STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS ERIC MCDOWELL,

APPELLANT

APPELLATE CASE NO. 2024-000226

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by excluding evidence of third-party guilt where an ex-boyfriend told the investigating detective he had no memory of the night in question and admitted "the possibility existed that he was involved with the abduction" of the victim?

2. Did the trial court err in denying appellant's motion to dismiss based on the Due Process Clause of the Fourteenth Amendment because the over thirty-five-year delay between the alleged crime and his indictment prejudiced his defense?

3. Were McDowell's rights under the Due Process Clause in article I, section 3 of the South Carolina Constitution violated where the state delayed prosecution of this case for nearly four decades without justification?

STATEMENT OF THE CASE

On January 4, 2022—thirty-five years after the alleged crime—the state obtained an arrest warrant for Thomas McDowell, and he was arrested in North Carolina shortly thereafter on January 7, 2022. R. 527:15-24, 528:3-5, 728:16-20. He was indicted by the Lexington County grand jury on June 13, 2022 for murder, kidnapping, and first degree burglary. R. 732.

He went to trial on February 5-8, 2024 before Judge McCaslin and a jury. R. 1. He was represented by Sarah Mauldin and David Mauldin, and Kinli Abee and Heather Weiss represented the state. R. 1. The jury convicted him of all three charges. R. 714:1-8. Judge McCaslin gave him separate life sentences for the burglary and murder; the court did not sentence him for kidnapping due to the murder sentence. R. 730:9-12.

This appeal follows.

STATEMENT OF THE FACTS

After midnight on June 6, 1986, someone broke into a trailer home in Lexington County and kidnapped four-year-old Jessica Gutierrez. R. 299:5-20. She was sleeping in a bed with her sister Rebecca, who was six at the time. R. 276:7-16. The next morning Rebecca described to Detective Robert Bartlett of the Lexington County Sheriff's Department what happened. R. 818. Rebecca "stated that she had awoken during the night and seen a black man wearing a magic hat standing over the bed." R. 818. She saw the man "reach down and pick [Jessica] up" and then leave the room. R. 818. At trial, however, Rebecca testified the man that kidnapped Jessica was white and wore a generic hat.[1] R. 281:5-9. Rebecca did not identify McDowell at trial as the person that kidnapped Jessica.[2]

The state's theory was that the kidnapper broke into the home through a window on the front porch. R. 652:8-654:4. That window was previously broken, and Jessica's mother, Debra Gutierrez, propped it open with a stick for airflow.[3] R. 304:21-305:8; State's Ex. 24. The morning after Jessica disappeared, however, the stick was found pulled out, the screen was punched in, and the curtains were pulled down and broken. R. 319:23-320:13, 366:7-13. Debra testified she locked

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[1] The state's theory as to the hat was that McDowell wore cowboy hats around the time of the kidnapping. R. 662:13-20, 215:10-12, 465:22-466:7. No hat of any sort was recovered from the crime scene. There was no suggestion the "magic hat" was in fact a cowboy hat until her mother "talked to a psychic," and "the psychic told her that it was a man in a cowboy hat." R. 20:11-13, 88:23-89:1. Rebecca also saw a hypnotist to see if any more information could be recalled. R. 106:1-5. Rebecca testified she could not recall what was said at the hypnotist's. R. 106:4-11.

[2] Rebecca did identify McDowell in a 2007 photographic line-up. R. 101:12-14, 103:20-105:1. The trial court suppressed that identification after a *Biggers* hearing because of the excessive time that passed, the prior statement the perpetrator was black, Rebecca's testimony describing her opportunity to view the person, and some unclear and confusing statements Rebecca made when describing the line-up process. R. 127:3-128:25.

[3] The window was comprised of three panes, each of which opened outward. State's Exhibit 24 is a photograph of the window and is on file with this Court. R. 302:7-303:15.

the front door that night, but it was propped open the next morning. R. 313-21:314:1, 318:22-319:3.

Appellant McDowell had previously dated Debra for about two months at the end of 1985, six months before Jessica's disappearance. R. 868, 882. Prior to Jessica's disappearance, McDowell did some work at the Gutierrez home and installed the front porch awning and a shed. R. 326:10-19, 872. That awning covered the window through which the kidnapper entered. R. 327:12-15; State's Ex. 20. The evidence conflicted on when McDowell performed this work. Debra testified at trial that it was in 1983 or 1984. R. 326:20-327:8. In a statement to the sheriff's department on March 13, 2008, however, she wrote he installed the awning in August of 1985 and that he was last at the house that October. R. 872, 346:21-347:24. In his written statements to law enforcement officers, McDowell twice indicated he did that work in 1985. R. 868, 882.

On the day Jessica went missing Richard Freeman with the Lexington County Sheriff Department recovered a latent fingerprint from that front window.[4] R. 358:3-359:23, 368:13-17. At trial, James Hickman from the Lexington County Sheriff's Department testified the print belonged to McDowell. R. 394:4-14, 399:2-5, 880. Hickman also agreed there is "no scientific way to date a fingerprint" and could not independently determine when the fingerprint was left. R. 404:8-23. Separately, Michael Fowler testified that he was in jail in Polk County, North Carolina in the mid-1980s at the same time McDowell was there. R. 184:3-11, 188:12-23. Fowler testified McDowell confessed to him about kidnapping and killing a girl in South Carolina. R. 200:21-201:17.

[4] Debra testified at trial that she frequently cleaned the window where the fingerprint was found. R. 324:3-23.

STANDARD OF REVIEW

In general, "[t]he admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007) (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001)). Whether a criminal defendant's due process rights have been violated is often a mixed question of law and fact. *See State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (voluntariness of a confession); *cf. State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018) (waiver of right to counsel). In those cases, the appellate court will review the trial court's factual findings "for any evidentiary support"; however, "the ultimate legal conclusion . . . is a question of law subject to de novo review." *Miller*, 441 S.C. at 119, 893 S.E.2d at 313.

ARGUMENT

I. The Trial Court Erred by Excluding Evidence of Third-Party Guilt.

Prior to trial the state sought to prevent McDowell from introducing evidence that Debra's ex-boyfriend, Henry Gordon, Jr. committed the alleged crimes. R. 11:6-8. Ultimately the trial court granted its motion reasoning the evidence against Gordon was "merely speculative." R. 160:1-161:21. That ruling prevented McDowell from presenting evidence that Gordon told Detective Bartlett he had no memory of the night in question and admitted "the possibility existed that he was involved with the abduction." R. 825.

The trial court erred by excluding the evidence because it misinterpreted and misapplied *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941). It also impermissibly weighed the strength of the state's evidence rather than the probative value of the proffered evidence as compared to its adverse effects, which violated *Holmes v. South Carolina*, 547 U.S. 319 (2006).

a. Relevant Facts

Debra and Gordon dated for roughly the year prior to Jessica's disappearance. R. 136:10-21. In that March 13, 2008, written statement to the Lexington County Sheriff's Department, Debra wrote that Gordon moved in with the family in late January or early February of 1986. R. 872, 344:2-345:20. She also wrote that she asked Gordon to move out on June 3, 1986, three days before Jessica disappeared. R. 872. According to Detective Bartlett's notes taken June 6, 1986, Debra ended the relationship on June 2, 1986. R. 815. At trial, Debra and Rebecca denied that Gordon ever lived in the home. R. 344:5-10, 287:5-11.

The most incriminating evidence against Gordon developed on August 27 when Bartlett interviewed Gordon at the sheriff's department after he failed a polygraph. R. 817, 131:9-14. They "discussed that [Gordon] did have a drinking (alcohol) and dope problem, and that it was apparent that when he was intoxicated of doped [sic] up that he developed another personality." R. 824-

825. When intoxicated, Gordon "became violent." R. 825. Gordon admitted "he could remember nothing of incident night" once his friends allegedly left his home after they "drank beer and watched skin flicks." R. 825. Gordon then "indicate[d] that the possibility existed that he was involved with the abduction." R. 825. Gordon "stated that if he had been involved in the incident involving Jessica, that he wanted to know . . . ."[5] R. 825.

In addition to this self-incriminating statement, Gordon's relationship with Jessica concerned Debra so much that over a month prior to her disappearance Debra took her worries to the police. R. 138:8-139:15. For another example, Debra testified he "started calling Jessica Little Debbie about a week and a half before Jesse was taken," on account of him viewing Jessica as so similar to her mother. R. 141:4-13. Debra saw Gordon whisper in Jessica's ear "frequently," which she described in that early statement to police.[6] R. 139:11-140:7. Apparently Gordon whispered to Jessica that "he wanted to take [her] for a ride on [Gordon's] truck," but told her that it was a secret she could not share. R. 140:12-20.

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[5] Bartlett's records also contain this note:

> [W]hen Det informed and asked why he had no longer a picture of vic he stated that he did, and was very direct and positive about it, whereas he was not direct or positive about the incident and his possible involvement. He stated that [sic] while he had a picture of vic, at his residence, whereas Det advised him that this picture was not observed on the 19th. Sus stated that he had a picture of vics family that he had hung on the wall, but had taken it down in order to forget vic, He could not give a reason why he wanted to forget vic.

R. 825.

[6] That written statement was not made a part of the record. However, it is described in the transcript and Debra recognized her handwriting. R. 139:3-15.

On June 6, 1986, Bartlett was on the scene interviewing the family after Jessica was found to be missing. R. 815. He then went to speak with Gordon because Debra thought he might have taken Jessica out of "spite." R. 815. In that conversation Gordon "appeared glassy eyed, and unconcerned about vic." R. 815. Gordon told Bartlett that he had two friends over and they "watched skin flicks and drank beer til [sic] about 2230-2300." R. 816. However, the next day one of those friends (a sixteen-year-old) told Bartlett he in fact did not see Gordon at all on June 5, and the friend's mother asserted he was home that day much earlier than Gordon indicated. R. 822.

Gordon voluntarily spoke with Bartlett and another officer at the Lexington County Sheriff's Department on June 7, 1986. R. 820. In the interview Gordon made extremely possessive statements about Debra, including that when they were dating "sometimes he would check [her] panties by smelling them to see if she had had sex when he was not there."[7] R. 820. He told them he was still "in love with" Debra and "she was all he needed." R. 820. Just days before Jessica's disappearance Gordon—after Debra ended their relationship—went back over to the house and asked Debra to sleep with him again. R. 816. The two argued because he wanted to have sex and she did not. R. 146:22-147:24. Gordon also could not recall the night following Jessica's disappearance when he went to the Guiterrez's home "very intoxicated." R. 825.

Prior to trial the state moved "to exclude any reference of Henry Gordon . . . as the perpetrator of this crime." R. 11:6-8. The court took the issue under advisement and then heard proffered testimony as part of *Denno* and *Biggers* motions. R. 21:8-11. The court ultimately granted the state's motion to exclude. R. 160:1. It found the evidence was "merely speculative"

[7] Thirty-five years later Debra testified this did not occur. R. 151:8-13.

and noted there was "no physical evidence tying Mr. Gordon to this scene." R. 160:1-9. It found: "there is no evidence inconsistent with . . . Mr. McDowell's guilt in this case." R. 161:15-17. The court concluded, "I believe what the State's relying on is a fingerprint on a window and I don't know what else, but I'm gonna find that I think it's conjecture and not allow it." R. 161:17-21.

b. The Trial Court Erred Under *State v. Gregory*

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), the Supreme Court adopted a general rule as stated in *Corpus Juris*:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

198 S.C. at 104, 16 S.E.2d at 534 (second alteration original) (quoting 16 Corpus Juris, *Criminal Law* § 1085, at 560 (1918)). As originally understood *Gregory* stands for the simple principle that immaterial evidence with little probative value can be excluded for good reasons. *See* Rule 403, SCRE. Had that rule been properly applied, evidence of Gordon's guilt would have been admitted because it is clearly probative, raises a reasonable inference of McDowell's innocence, and has no unfair or improper adverse effects.

i. Gregory *Exists to Keep Confusing and Extraneous Matters from the Jury*

The facts of *Gregory* are important for understanding the proper scope and application of the rule. There, the former treasurer of the Spartanburg Water Works was convicted of embezzlement. 198 S.C. at 102, 16 S.E.2d at 533. At trial the state presented evidence demonstrating a shortage in funds for "so–called 'miscellaneous items' . . . for material and services other than water." 198 S.C. at 104, 16 S.E.2d at 534. It did not seek to prove Gregory embezzled money from any other funds. *Id.* Gregory sought to introduce evidence "that there was also a

'covered up' shortage of several thousand dollars in the water account of the Spartanburg General Hospital and possibly another shortage in petty cash." *Id.* He intended to demonstrate that someone else stole the money from those second and third funds, but the trial court refused to allow that "unconnected" evidence to be presented. *Id.*

The Court affirmed exclusion finding it "peculiarly appropriate for the exercise of discretion as to admissibility of evidence and to guard against the confusion of the jury by the injection of collateral issues." *Id.* It affirmed the trial court's exclusion "because of the lack of connection above pointed out." *Id.* That makes perfect sense: Gregory sought to introduce evidence that someone else had stolen money from *different funds* than that which he was on trial for embezzling. The state accused him of robbing Fund A; he wanted to prove someone else had robbed Funds B and C. Of course, a trial court can exclude such evidence, especially in a complicated embezzlement case where it *is* likely to confuse the jury. *See Gregory*, 198 S.C. at 105 16 S.E.2d at 534 (explaining exclusion was proper because "[r]emote acts, disconnected *and outside the crime itself*, cannot be separately proved" to exculpate a defendant (quoting 20 Am.Jur. *Evidence* § 265, at 254 (1939) (emphasis added))); Rule 403, SCRE (providing relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues").

In contrast to the evidence proffered in *Gregory*, McDowell sought to introduce evidence that nearly amounted to a confession to the very crime for which he was being tried. Gordon told Bartlett that he had no memory of June 6 and *could have been involved with the abduction.* That is not the type of evidence of third-party guilt that *Gregory* allows trial courts to exclude. Because Rebecca testified she saw a single man abduct her sister, Gordon's guilt is clearly "inconsistent" with McDowell's guilt. The trial court thus erred in finding "there is no evidence inconsistent with

. . . McDowell's guilt." R. 161:15-17. Evidence that Gordon committed the crime is evidence inconsistent with McDowell's guilt, and thus the court's findings are not supported by the evidence and its decision to exclude this evidence was an abuse of discretion.

Additionally, the language in *Gregory* about evidence "inconsistent" with the defendant's guilt should not be read too broadly. As used in *Gregory*, the "inconsistent" point was that evidence someone else committed a *different* crime is plainly not inconsistent with the defendant's guilt for the crime charged. For evidence to be inconsistent as a preliminary question before admitting it for the jury to evaluate, no more is required than McDowell presented here.

When Gordon's admission is combined with the other evidence discussed above—a motive after Debra ended the relationship days before; the intoxication and "violent" personality—this is much more than "a bare suspicion" of Gordon's guilt and should have been admitted. It also is not evidence likely to have confused the jury or pointlessly distracted it, as was the case in *Gregory*. Rather, it is exactly the kind of evidence that might give a jury reasonable doubt about McDowell's guilt—evidence that "raise[s] a reasonable inference . . . as to his own innocence." *Gregory*, 198 S.C. at 104, 16 S.E.2d at 534 (quoting Corpus Juris, *supra*, § 1085, at 560).

In cases since *Gregory*, South Carolina courts have properly applied this sparing rule where a defendant offers up little more than the speculative idea that another party could have committed the crime. For example, in *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996), the bodies of a wife and son were found in a crashed vehicle that had been burnt with gasoline. 321 S.C. at 330, 468 S.E.2d at 628. The husband was charged with their murders. 321 S.C. at 330-31, 468 S.E.2d at 628. The defendant then sought to introduce evidence "that there were marijuana manufacturers in the area where the bodies were found who had subsequently threatened the lives of a confidential informant and a narcotics agent." 321 S.C. at 334, 468 S.E.2d at 630. The trial court properly

excluded this evidence because the defendant "failed to establish that the persons arrested for growing marijuana had *any* connection whatsoever to the homicides." 321 S.C. at 335, 468 S.E.2d at 631. While not evidence of an unrelated crime, like in *Gregory*, it was still proper to exclude that third-party guilt evidence because there was no reason whatsoever beyond wild speculation to believe the marijuana manufacturers had anything to do with the deaths. They just happened to be nearby at some later point in time and committing other crimes. That is the kind of immaterial, extraneous evidence that can be properly excluded under *Gregory*, and it is clearly less probative than the evidence offered by McDowell.

If the evidence presented here does not rise above a mere "conjectural inference," then it seems nothing short of hard, forensic evidence would be sufficient to introduce evidence of a third party's guilt. That is not what the rule was intended to mean. *See* Corpus Juris, *supra*, at 559 ("Accused may show that another committed the crime, and where the state relies on circumstantial evidence to connect the accused with the crime, he may, by the same character of testimony, prove that others committed it." (footnote omitted)). Yet the trial court appears to have believed such "physical evidence" connecting Gordon to the crime scene was necessary. That basis fundamentally misunderstands *Gregory* and extends it far beyond its more limited premise. Thus, it was error to exclude the proffered evidence.

ii. Gregory *is a Predecessor to Rule 403*

The trial court misapplied *Gregory* because the rule adopted there should really be understood as an application of what is now Rule 403, SCRE. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." That balancing is precisely

what *Gregory* approved—the trial court's exercise of discretion in excluding evidence with little probative value that was likely to confuse the jury. 198 S.C. at 16 S.E.2d at 534. The Note accompanying Rule 403 expressly cites *Gregory* as an example to demonstrate the Rule is "consistent with the law in South Carolina." Note, Rule 403, SCRE. Thus, *Gregory* stands for the simple proposition now embodied in Rule 403: where the probative value of evidence is substantially outweighed by its adverse effects, that evidence can be excluded in the discretion of the trial court.

Especially in a criminal case, the law should go no further than this traditional balancing test. Here, it simply cannot be said that the probative value of the evidence of Gordon's guilt is substantially outweighed by the dangers of its introduction. Unlike in *Gregory*, there is no apparent danger in its admission at all—no unfair prejudice to the state, no potential to confuse the issues or mislead the jury, and it is plainly not so disconnected that it can be considered a "waste of time" or "needless." Rule 403, SCRE.

Over-zealous application of *Gregory* creates a gross reversal of the criminal justice system. As applied by the circuit court, McDowell was effectively required to prove Gordon guilty before he could offer the jury probative evidence in his defense. But a criminal defendant is not responsible for proving another guilty; he has no burden of proof. Moreover, the important point is not whether Gordon could be proven guilty but whether the evidence sufficiently indicates his guilt so as to create a reasonable doubt in the mind of the jury about whether McDowell committed these crimes. Since there was no apparent or asserted adverse effect to the admission of this evidence, the trial court erred by granting the state's motion. Under Rule 403 the evidence is facially relevant and presumptively admissible, and its value is not substantially outweighed by any adverse effects because the state never even identified any such effects and none exist. Thus

the trial court erred by preventing the jury from even considering evidence Gordon committed the crime.

c. The Trial Court Erred Under *Holmes v. South Carolina*

The trial court also erred in excluding evidence of Gordon's guilt on the basis it believed the evidence against McDowell was more substantial. R. 161:15-21. It noted there was "no physical evidence" connecting Gordon to the crime scene while McDowell's fingerprint was on the window used to break in the house. R. 160:8-9, 161:17-19. This was even though McDowell contended the fingerprint was there innocently because he previously installed the awning over that window. R. 882. That was improper. First, that analysis is precisely the kind of weighing-of-the-evidence reserved for juries. Second, it violated McDowell's right to present a "complete defense" because it consisted of the exact kind of comparative analysis the United States Supreme Court invalidated in *Holmes v. South Carolina*, 547 U.S. 319, 329-30 (2006); *see State v. Burgess*, 391 S.C. 15, 22, 703 S.E.2d 512, 516 (Ct. App. 2010) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense." (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973))).

"In *State v. Gay* [343 S.C. 543, 541 S.E.2d 541 (2001),] and *State v. Holmes*, [361 S.C. 333, 605 S.E.2d 19 (2004),] the South Carolina Supreme Court altered the rule in *Gregory* by considering the strength of the prosecution's case in determining whether to admit evidence of third-party guilt." *State v. Swafford*, 375 S.C. 637, 641, 654 S.E.2d 297, 299 (Ct. App. 2007). Under *Holmes*, that is not valid because "weighing the strength of the prosecutions['] case is arbitrary and does not rationally serve the end that the *Gregory* rule was designed to promote." *Swafford*, 375 S.C. at 641, 654 S.E.2d at 299 (citing *Holmes*, 547 U.S. at 330). Instead, the *Gregory* rule as originally adopted—and as contemplated by Rule 403, SCRE—"requires the trial

judge to consider the probative value or the potential adverse effects of admitting proffered third-party guilt evidence." *Id.* (citing *Holmes*, 547 U.S. at 330).

By questioning the strength of the evidence against Gordon while relying on McDowell's fingerprint on the window, the trial court impermissibly weighed the evidence. But as the Supreme Court explained in *Holmes*, to consider the evidence against the defendant "depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." 547 U.S. at 330. "Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Id.* (emphasis original). Here, by pointing to the fingerprint, the trial court assumed McDowell's guilt and concluded that, therefore, evidence of Gordon's guilt had little value. It did so despite the innocent explanation for the fingerprint and by improperly crediting the state's evidence. This was incorrect, usurped the factfinding province of the jury, and violated McDowell's constitutional right to present a complete defense.

d. The Error was Prejudicial

McDowell was incorrectly precluded from presenting evidence of Gordon's behavior and admissions, evidence that could have reasonably and rationally created reasonable doubt of his guilt in the jury's mind. That error was not harmless. *See State v. McLeod*, 362 S.C. 73, 82, 606 S.E.2d 215, 220 (Ct. App. 2004) (exclusion of evidence is subject to harmless error analysis); *State v. Fossick*, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) (same). In a criminal case, an error is harmless only where the appellate court believes "beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012); *see also State v. Simmons*, 423 S.C. 552, 566, 816 S.E.2d 566, 574 (2018) ("If a review of the

entire record does not establish that the error was harmless beyond a reasonable doubt, then the conviction shall be reversed.").

i. *Impact of the Exclusion*

In its opening statement, the state argued that "indisputabl[y]" the kidnapping had occurred, so "[t]he one question for you ladies and gentlemen is who [committed the crime?]" R. 177:1-8. It continued: "when you weigh all of that evidence there's only gonna be one person who can answer that question of who and that person is Thomas McDowell . . . ." R. 177:17-19. With that introduction to the case, excluding evidence of third-party guilt is plainly prejudicial. McDowell was put in an impossible position before the jury heard any evidence. He knew evidence existed that tended to show someone else committed the crime, evidence strong enough to give the jury reasonable doubt before believing he was guilty. But he was not allowed to use it, and the state took full advantage.

Gordon himself *told a sheriff's detective* that he had absolutely no memory of the night of Jessica's abduction, that he was drunk and "watching skin flicks" that night, and "the possibility existed that he was involved with the abduction." He whispered questionable things to the child before her abduction, potentially attempting to normalize such behavior. Debra did not trust him alone with her and reported her suspicions to the police, and she ended their relationship just days before the kidnapping and ordered him out of the house. Gordon also had an unhealthy obsession with Debra's sex life. There is evidence he lied about his activities on the night of Jessica's disappearance. Taken together, there was more than enough evidence that, respectfully, this Court cannot say beyond a reasonable doubt its exclusion did not contribute to the verdict. A reasonable jury could have—and likely would have—heard that evidence and began to question whether the state had the right man. It easily could have given them a reasonable doubt as to McDowell's guilt.

Instead, because only the state was permitted to introduce evidence pointing to an accused, the jury had only one person to suspect.

ii. *The State's Evidence Against McDowell*

When first investigating the scene, deputies found a Vantage branded cigarette butt and package outside the Gutierrez home. R. 368:23-369:21, 879. McDowell's cousin testified that in the eighties, McDowell smoked that brand of cigarettes. R. 497:9-15, 499:10-19. Vantage cigarette butts with his DNA on them were also found in his mother's car. R. 254:15-256:22, 257:24-259:2, 476:18-25, 881. However, DNA was not identified on the Vantage butt found at the house, so it could not be linked to McDowell.[8] R. 549:12-15. Further, there was no testimony about how old that butt was. In fact, Adrienne Hefney, a SLED DNA analyst, testified that typically she has "good success" with "freshly discarded" cigarette butts, so her inability to get DNA off the crime scene butts indicates they were likely there a long time. R. 548:15-22.

The state, of course, relied on Rebecca's trial testimony that she saw a white man with a beard, mustache, and hat kidnap Jessica. But that was the extent of her testimony—she did not identify McDowell as that man. Further, that testimony was unreliable because her original statement to Bartlett was that a black man in a magic hat kidnapped Jessica. Only on the stand decades later did she claim the man was white.

The state's strongest evidence was Fowler's testimony that McDowell confessed to him. But that evidence is not so strong that the Court can say this exclusion was harmless beyond a

[8] For clarity in reviewing the record, State's Exhibit 36 is the Vantage cigarette butt found below the front window at the house. R. 879, 368:23-369:17. State's Exhibit 35 is the Vantage packaging found outside the house. R. 879, 371:19-372:4. State's Exhibit 15 is the Vantage package found in the console of McDowell's mother's car. R. 258:9-23. State's Exhibit 16 is the cigarette butts also taken from the console. R. 254:15-255:16.

reasonable doubt, particularly because it came from a jailhouse snitch *decades* after the fact. A jury could very reasonably discount it. Further, the Lexington County Sheriff's Department knew of Fowler's alleged story in 1987, and it apparently recognized that even with his testimony the case was too weak to take to trial. R. 797. The evidence is not so overwhelming as to render this exclusion harmless.

II. The Thirty-Five-Year Pre-Indictment Delay Was Prejudicial, Unjustified, and Violates the Due Process Clause of the Fourteenth Amendment.

Excessive investigative delay prior to indicting a defendant violates the Due Process Clause of the Fourteenth Amendment if "the delay caused substantial actual prejudice" to the defendant and the state's reasons for the delay do not justify it. *State v. Lee*, 375 S.C. 394, 397, 653 S.E.2d 259, 260 (2007) (citing *State v. Brazell*, 325 S.C. 65, 72, 480 S.E.2d 64, 68 (1997)). Here, the trial court erred in finding McDowell did not demonstrate prejudice because the decades-long delay eliminated his alibi defense and caused the loss of the crime scene and chief investigator.

This Court should review that legal determination de novo but defer to the trial court's factual findings. *Cf. See State v. Miller*, 441 S.C. 106, 119, 893 S.E.2d 306, 313 (2023) (voluntariness of a confession is a mixed question of law and fact).

a. Relevant Facts

Jessica disappeared on June 6, 1986. Detective Bartlett interviewed McDowell on September 3, 1986, and confirmed he knew Debra, had been to the house, and knew Jessica had been kidnapped.[9] R. 747. Bartlett also obtained a set of McDowell's fingerprints at this time. R. 747. By October, Bartlett had used those prints to identify the fingerprint found on the window as belonging to McDowell. R. 42:24-43:3, 747. Bartlett and SLED Agent Virginia Jacobs

[9] The trial court correctly suppressed this evidence because it was obtained in violation of the Fifth Amendment after McDowell requested his attorney be present for the interview. R. 39:12-40:4.

interviewed McDowell again on December 10, 1986. R. 795. Bartlett interviewed Michael Fowler on July 10, 1987, and learned of McDowell's alleged confession. R. 44:1-2, 606:14-20, 767, 797. Lexington County officers twice searched McDowell's mother's truck that he drove, once on November 3, 1986 and again on July 21, 1987. R. 755. They found the Vantage cigarette packages and butts at the house and in his mother's car. R. 258:9-16, 368:23-369:21, 879. By the end of 1987 Lexington County Sheriff's Department and SLED had almost all of the evidence it would eventually use against him at trial.

Having gathered that evidence, Bartlett and Agent Jacobs met with Solicitor McMahon "concerning obtaining arrest warrant for Thomas McDowell." R. 799. Finally, in November of 1988 Solicitor Meyers determined McDowell "could not be charged at this time." R. 805. At that point, Jacobs "consider[ed] this case closed" "[u]until additional information or evidence is found." R. 807. Nothing in the record explains why the investigation stalled for the next two decades until David Pritchard with the Lexington County Sheriff's Department looked at the case again in 2008.[10] R. 72:10-14. The case stalled again until it was transferred to SLED in 2014, and again until the FBI became involved in 2021.

Before the trial court the assistant attorney general pointed to two new pieces of evidence it discovered after the FBI started working the case again: (1) expert testimony approximating the size of the window along with an animation allegedly demonstrating a man could have entered through it, and (2) DNA results matching McDowell to the cigarette butts found in his mother's car but not the butts found at the scene. R. 62:9-63:19. The state offered no other justification for the delay.

[10] Apparently in 2006 Debra made a seven-page, single-spaced written statement for Pritchard, but the record does not contain that statement nor is it clear that date is accurate. R. 343:6-20.

Prior to trial McDowell filed a motion to dismiss based on the pre-indictment delay. R. 792. After argument the trial court denied the motion finding McDowell did not demonstrate prejudice. R. 66:7-67:8, 69:21-70:22.

b. Prejudice

A defendant proves an "oppressive pre-indictment delay" violated his federal due process rights where he suffers "substantial actual prejudice" and the "the prosecution's reasons for the delay" do not outweigh the prejudice. *Brazell*, 325 S.C. at 72, 480 S.E.2d at 68. To demonstrate actual prejudice the defendant "must identify the evidence and expected content of the evidence with specificity, as well as show that he made serious efforts to obtain the evidence and that it was not available from [an]other source." *Lee*, 375 S.C. at 398, 653 S.E.2d at 261 (citing *Brazell*, 325 S.C. at 73, 480 S.E.2d at 69). Here, McDowell did more than show that "his defense might have been somewhat prejudiced by the lapse of time." *United States v. Lovasco*, 431 U.S. 783, 796. He pointed to specific facts he was unable to further develop and which prejudiced his defense, namely the death of a potential alibi witness, loss of the crime scene, and death of Lexington County's lead investigator.

First, McDowell was prejudiced because his mother could have been an alibi witness but she died in 1997. R. 55:5-21, 531:4-8. Around the time Jessica disappeared McDowell lived with his mother in Lexington County. He would often pick her up after her shift at a nearby grocery store. R. 55:5-21, 490:16-22. If this case had been called within any reasonable time after the alleged crime occurred, she could have testified he was picking her up from a late shift that night and could not have committed the crime. But these events were so long ago, not only has she died, McDowell's own memory has faded after the decades.

This is precisely the type of prejudice against which the Due Process Clause of the Fourteenth Amendment is supposed to protect. *See United States v. Marion*, 404 U.S. 307, 321

(1971) ("Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, *deprive the defendant of witnesses*, and otherwise interfere with his ability to defend himself." (emphasis added)). Had this case been called in 1987 after Lexington County and SLED collected all their evidence, McDowell's mother would still have been alive. She could have unequivocally testified that at the time of the alleged crime McDowell had picked her up from work. But McDowell could not put her on the stand. He could not even obtain records showing whether she worked that night because her employer closed years ago. R. 55:16-21. That is substantial prejudice that the trial court did not even consider. Nowhere in its ruling did the court discuss the prejudice from McDowell losing a potential alibi witness, one which would have been particularly powerful because no evidence affirmatively placed him at the scene of the crime on that night.

Second, the actual crime scene, the mobile home, either cannot be located or has been destroyed.[11] R. 51:4-9. The state's theory of the case was that the kidnapper entered the house through the broken window on the front porch. R. 659:17-20. If the charge had been brought promptly, McDowell could have investigated the home and measured that window. He could have taken the actual dimensions and determined if and how a person might climb through it. That is the type of exculpatory evidence he should have been able to uncover and present, but because of the unjustified delay he could not do so. Instead, the state used an FBI analyst to estimate the size of the window based on a couple of photographs. R. 428:14-429:22. Another analyst then produced animations allegedly demonstrating that someone could fit in the windows. R. 451:15-

[11] McDowell made deliberate and extensive efforts to find the house and window, but he was not successful. R. 51:8-12. An investigator located what *might* be the house, but that structure was significantly modified and has different windows. R. 51:12-16, 811-812. The FBI was also unable to locate the house or a replica. R. 594:19-595:7.

452:13; State's Ex. 39. That is a bridge too far and not an adequate substitute for the evidence he lost.

Third, the lead investigating detective—Robert Bartlett—died in 2019. R. 813. The defense was therefore unable to interview him and uncover his impressions and memories from those first days and months investigating the case. He would have been valuable in contradicting Rebecca's and Debra's testimony about the scene of the crime. For example, McDowell could not ask him about how he questioned Rebecca when she told him a black man kidnapped Jessica.

Taken together, McDowell demonstrated substantial actual prejudice to his defense. The trial court erred in denying the motion because its ruling was, in essence, that law enforcement officers made some efforts and "there's no time limit on crime."[12] R. 66:7-20. It made no factual findings at all, except to say "that the scene is gone" and reason that is "a prejudice to them, too." R. 66:22-25. That was error because prejudice to the *state* is absolutely no part of this analysis. The state was capable of bringing these charges earlier and chose not to. If that decision prejudiced its case that is its own doing and has no bearing on whether McDowell's due process rights were violated. This alone was error because it shows the trial court's finding was based on a flawed legal premise: that the question involves evaluating his prejudice as compared to the state's. That is incorrect—the question is only whether *McDowell's* right to a fair trial was infringed. *See Brazell*, 325 S.C. at 72, 480 S.E.2d at 68; *Lee*, 375 S.C. at 397, 653 S.E.2d at 260.

[12] After the jury's verdict and prior to sentencing, the trial court further commented on this issue. While addressing Debra the court acknowledged the decades of delay and then stated: "[B]ut I don't think it was on anyone's fault. It was just new evidence kept coming up . . . ." R. 729:12-22. This is simply not true. There is absolutely no evidence in the record to support the court's understanding because new evidence did not "keep coming up." This statement reflects the court's reasoning and demonstrates the insufficient basis for denying McDowell's motion.

The trial court also did not engage with the fact that Bartlett and McDowell's mother died and could not be called to testify. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) ("If witnesses die or disappear during a delay, the prejudice is obvious."). The court entirely failed to consider the potential alibi from McDowell's mother and the resulting prejudice from her death. It also did not analyze the value of impeaching the questionable witnesses critical to the state's circumstantial case against McDowell. It therefore erred and its ruling must be reversed because the record establishes the substantial prejudice McDowell suffered.

c. State's Justification

If the Court agrees McDowell has established sufficient prejudice, it must next "consider the prosecution's reasons for the delay and balance the justification for delay with any prejudice to the defendant." *Brazell*, 325 S.C. at 72, 480 S.E.2d at 68-69. The delay here has no legitimate justification. The state's asserted justification to the trial court was that it only recently obtained new evidence: McDowell's DNA sample and the expert testimony from the FBI analysts. R. 62:9-63:19. That argument is without merit and misses the point. The state offered *no* explanation for why it could not have obtained McDowell's DNA earlier. At any point in time it could have obtained a warrant for a buccal swab for comparison. They knew he was incarcerated in North Carolina into the mid-1990s, where he lived in 2008, and found him easily after obtaining an arrest warrant. If they wanted it would have been easy to obtain his DNA at any point in time. Therefore, this is absolutely no justification for the over *thirty* years of inactivity prior to getting the sample.[13] The state similarly offers no explanation for why it could not have obtained similar expert testimony earlier or actually measured the window and McDowell thirty years ago. Critically, that

[13] Additionally, the DNA has very little probative value because there was no DNA recovered from the scene for comparison. The sample merely matched the cigarette butts found *in the car he drove*.

evidence was necessary solely due to the delay and loss of the home. It therefore absolutely cannot support the delay in the first place.

The state's reliance on this new evidence misses the point: the question is not "why is the state bringing this case now?" but "why did the state not bring this case before?" The state offered absolutely no explanation for why the case was not brought in 1987 after it collected McDowell's fingerprint and learned of the alleged confession to Fowler. Instead, the document records demonstrate that Solicitor Meyers decided not to indict McDowell, so the case was considered closed. R. 805. In fact, when the National Center for Missing and Exploited Children inquired into the case in 1994, it was told Solicitor Meyers "refused to indict" McDowell and noted "[n]o explanation has been given." R. 808. The decades of delay following that decision is what the state needed to justify, something it plainly did not and cannot do.

III. The Extreme Pre-Indictment Delay Violates the Due Process Clause in the South Carolina Constitution Because the State Offered No Adequate Justification

The state should not have limitless discretion in choosing when to prosecute. The Lexington County Sheriff's Department and SLED have suspected Thomas McDowell of committing the alleged crimes for over thirty years but chose not to prosecute him. Since 1987 they have developed no material new evidence. But that did not stop law enforcement officers from coming calling every few years, knocking on McDowell's door and raising the specter of arresting him. Regardless of the prejudice to McDowell's defense, his right to due process of the law guaranteed in article I, section 3 of the South Carolina Constitution was violated by the unjustified delay in the prosecution of this case. R. 792.

It is fundamentally unfair for the state to delay prosecution for decades with no legitimate justification. There must be some protection against "[t]he evils of prosecutions instituted long after offences committed." *State v. Howard*, 49 S.C.L. (15 Rich.) 274, 281 (1868); *see State ex*

rel. Condon v. City of Columbia, 339 S.C. 8, 20, 528 S.E.2d 408, 414 (2000) (citation omitted) ("Long delays by the government in instituting suit, of course, cause harm to the defendant and are in the interest of no one."). Lexington County and the state have held their allegations over McDowell's head for over half his life. *See Barker v. Wingo*, 407 U.S. 514, 533 (1972) ("[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged . . . by living under a cloud of anxiety, suspicion, and often hostility.").[14] Only *decades* after officers began questioning and suspecting McDowell did the state finally charge him, yet in 2021 it had essentially the same evidence it did in 1987: a potentially innocuous fingerprint, a cigarette butt and wrapper, and an alleged jailhouse confession. It did not finally discover new damning evidence or clear some other person of suspicion. Nothing material to the case has changed in decades—except that witnesses have died, memories have failed, and evidence has been lost. Any acceptable concept of justice must forbid the government from sitting on a case against someone for so long without reason, or else we all must live in fear of "the danger of official punishment because of acts in the far-distant past." *United States v. Marion*, 404 U.S. 307, 323 (1971) (quoting *Toussie v. United States*, 397 U.S. 112, 114 (1970)).

[14] During the 2008 interview with Pritchard, R. 867, McDowell demonstrated his understandable frustration and anxiety from having to relive this investigation over and over again, then twenty years later. After he explained his lack of information and the officers began their interrogation, "McDowell appeared to be getting nervous again and said that Detectives were going to try to 'pin' this on him." R. 869. Of course he was nervous. Of course he thought they were going to try to pin this on him, just like officers had been trying to do for over twenty years, and like they kept trying to do for fifteen more. At that interview Sled Agent Bill Graham then told him "that if he was innocent of any involvement in the case he needed to do what he could to prove it." R. 871. That is nearly a threat, as if to say, "if you can't prove your innocence, we will keep coming back." Graham continued and asked McDowell to take a polygraph stating that even though they are not admissible as evidence, "if he passed it, Detectives would not bother him any more." R. 871. This is precisely the type of anxiety and pressure against which the Due Process Clause protects.

McDowell recognizes that some discretion must be given to law enforcement officials and solicitors in deciding when and whether to initiate criminal proceedings. *See State v. Langford*, 400 S.C. 421, 435 n.6, 735 S.E.2d 471, 479 n.6 (2012). However, that "does not mean that the solicitor's authority is unrestrained by judicial oversight." *Langford*, 400 S.C. at 436, 735 S.E.2d at 479 (citation omitted). In fact, because it "is the prerogative of the court" to set the docket, unfettered and limitless discretion in charging and arresting suspects usurps the judicial power taken back from solicitors in *Langford*. 400 S.C. at 435, 735 S.E.2d at 478.

Such discretion is not justified under South Carolina law. When the United States Supreme Court decided *Marion* and *Lovasco* and first addressed excessive pre-indictment delay, it did so with the backdrop of federal statutes of limitation. *Marion*, 404 U.S. at 322 ("[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." (alteration original) (quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966))). That is why federal due process steps in prior to the statute of limitations only where the defendant can establish prejudice.[15] *Lovasco*, 431 U.S. at 789 (citing *Marion*, 404 U.S. at 324). But South Carolina has made no "legislative assessment[] of relative interests of the State and the defendant in administering and receiving justice." *Marion*, 404 U.S. at 322. Thus, the rationale limiting federal due process protection does not support a similarly narrow interpretation of the rights of South Carolinians under the state constitution. Rather, the lack of a statute of limitations "heightens the need for constitutional vigilance" precisely because there is no other safeguard. *People v. Regan*, 212 N.E.3d 282, 289 (N.Y. 2023) (holding pre-indictment delay required dismissal even after state legislature abolished the statute of limitations).

[15] Further, it is important to note that in *Lovasco* the Court considered an eighteen-*month* delay. 431 U.S. at 784. Thirty-five years is simply a different matter altogether.

It is broadly recognized that "State courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." *State v. Easler*, 327 S.C. 121, 131 n.13, 489 S.E.2d 617, 622 n.13 (citations omitted); *see State v. Rowell*, 444 S.C. 109, 116, 906 S.E.2d 554, 557 (2024) (holding a defendant's "right to an impartial jury" is broader under the South Carolina constitution than federal because "We have the right to interpret the South Carolina Constitution in a more expansive manner").[16] For example, in New York there is a "constitutional right to prompt prosecution," which is "embodied in the due process clause of [the] state constitution." *Regan*, 212 N.E.3d at 285; *see also People v. Singer*, 44 N.Y.2d 241, 253, 376 N.E.2d 179 (1978) ("[T]he State due process requirement of a prompt prosecution is broader than . . . the Sixth Amendment . . . ."). That right places the burden on the prosecution to establish good cause for a "protracted delay," which is "certainly [one] over a period of years." *Singer*, 44 N.Y.2d at 254, 376 N.E.2d 179 (three years delay required justification); *Regan*, 212 N.E.3d at 289. In *Regan*, the Court reversed the defendant's conviction and dismissed his indictment because of a four-year delay in prosecuting a rape case where the victim immediately reported the crime and accused the defendant. 212 N.E.3d at 295. The Court reversed because the prosecution could not "satisfactorily account for 31 months of their four-year delay" where the prosecutor and police did nothing for months and years without justification. *Regan*, 212 N.E.3d at 289-91. It did so even though the "defendant did not show special prejudice" because that "is not required." *Regan*, 212 N.E.3d at 292.

[16] *See Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

New York courts have gone to lengths to explain that this right to "prompt prosecution" is not merely for the benefit of criminal defendants: "it also vindicates the interests of victims and the rest of society by ensuring prompt adjudications and reinforcing society's expectation that crime will be taken seriously." *Regan*, 39 N.Y.3d at 472, 212 N.E.3d at 293. The rule "spurs prosecutors to . . . give all parties the prompt closure they need to move on with their lives." *Regan*, 39 N.Y.3d at 474, 212 N.E.3d at 294-95.

McDowell does not assert an expansive right.[17] He suggests only that after decades of suspicion the state is required to show some legitimate justification for the delay. After the state affirmatively decided not to prosecute him—as Solicitor Meyers told Agent Jacobs in 1989, R. 805—it should not be allowed to come back nearly *four decades later* and simply change its mind.[18] That is not in good faith nor a sufficient reason for this extreme delay because the state

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[17] McDowell does not suggest "a requirement of immediate prosecution" because courts should not dismiss charges "simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *Lovasco*, 431 U.S. at 790-92. As in New York, "a determination made in good faith to defer commencement of the prosecution for further investigation or for other sufficient reasons, will not deprive the defendant of due process of law . . . ." *Regan*, 39 N.Y.3d at 465, 212 N.E.3d at 288 (quoting *Singer*, 44 N.Y.2d at 254, 376 N.E.2d 179).

[18] In addition to the argument under the federal standard, this was the through-line of trial McDowell's argument under the South Carolina Constitution: that there has been absolutely no legitimate justification for these extreme delays after law enforcement officers obtained essentially all of the evidence against McDowell by the end of 1987. R. 42:18-45:11. McDowell argued that Solicitor Myers decided not to prosecute him, which "was a conscious decision not to bring the case to trial." R. 45:12-47:4. He emphasized Agent Jacobs's notes that she was "considering this case closed." R. 48:11-19. He repeated several times that this was a decision not to prosecute—and that decision leading to *decades* of delay is not a valid justification. R. 46:24-47:2, 47:8-22, 49:1-8, 50:5-16. Importantly, McDowell made all these points *before* addressing prejudice. R. 51:1-2. But under the federal analysis as articulated and applied in *Brazell*, prejudice is a strict prerequisite before considering the state's justifications. *State v. Brazell*, 325 S.C. 65, 72, 480 S.E.2d 64, 68 (1997). Thus, the only reason to address the unjustified delay first was because McDowell also argued actual prejudice is not strictly necessary in this case. This is demonstrated by McDowell's express statement in his motion to dismiss that the motion is made "pursuant to Article I, section 3 of the South Carolina Constitution." R. 792. The only reason to invoke the

gave absolutely no explanation for why it could not—or even should not—have brought this case in 1987, 1996, 2008, or 2014. There must be some point beyond which the state has waited too long. This case crosses that line, and the burden was on the state to provide a legitimate good faith justification for its delay. It did not and cannot do so, and therefore it violated McDowell's right to prompt prosecution that is part of due process under article I, section 3 of the South Carolina Constitution.

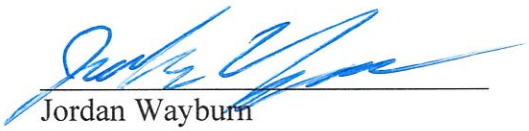
South Carolina Constitution is to argue that a different analysis and result applies—one where the delay is facially impermissible because "the case seems like something out of Kafka." R. 63:21.

That argument is sufficient to preserve the issue for review. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). Issue preservation requirements are not "a game of 'gotcha,' where form is elevated over substance." *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021). Rather, the rules foster two purposes: to ensure the trial court—and the parties—has a fair opportunity to address the objection, and to create "a platform for meaningful appellate review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)); *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023). Here, McDowell filed his written motion to dismiss invoking the South Carolina Constitution prior to trial. He then extensively argued the delay in this case is entirely unjustified before addressing (and implicitly regardless of) prejudice. The state was aware of that basis and could make arguments to the trial court on it. The state then did so and asserted justifications for the delay, thus creating a platform sufficient for this Court's review.

The trial court also implicitly ruled on the issue in denying the motion on the basis that McDowell did not prove prejudice. That ruling clearly means the trial court believed prejudice is a necessary element to make out a due process violation, something that the Due Process Clause of the South Carolina Constitution should not and does not require. That more specific language was not used should not preclude this Court from reviewing the legitimacy and constitutionality of McDowell's conviction. *See State v. Kimbrough*, 212 S.C. 348, 353, 46 S.E.2d 273, 275 (1948) ("[T]here exists in every court an inherent power to see that a man's fundamental rights are protected in every case.").

CONCLUSION

McDowell requests this Court vacate his convictions due to the excessive delay prior to his indictment because it was unjustified, unjustifiable, and caused substantial actual prejudice to his defense. Alternatively, he asks the Court to vacate the convictions and remand for a new trial in which he will be able to introduce probative evidence of Henry Gordon's guilt so the jury has the information it needs to determine whether the state has proven McDowell's guilt beyond a reasonable doubt.



Jordan Wayburn
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ATTORNEY FOR APPELLANT

This 11th day of July, 2025.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final brief of appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 11th day of July, 2025.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS ERIC MCDOWELL,

APPELLANT

APPELLATE CASE NO. 2024-000226

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon R. Brandon Larrabee, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 11th day of July, 2025.

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