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 REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. McDowell proffered evidence with a clear connection to Henry Gordon's guilt and thus McDowell's innocence, and the trial court erred by excluding it.

The state in its brief has apparently overlooked the factual basis for Gordon's potential guilt that McDowell was foreclosed from presenting to the jury. McDowell was prepared with facts that "are inconsistent with his own guilt" and did more than raise "a conjectural inference as to the commission of the crime by another." *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) (quoting 16 Corpus Juris, *Criminal Law* § 1085, at 560 (1918)). McDowell offered a statement Gordon made *to a sheriff's office detective* almost amounting to a confession; a motive as immediately identified by Debra—to spite her because she broke up with him and kicked him out of the house just three days prior; and the fact Debra went to law enforcement officials with her concerns about statements Gordon made to Jessica. R. 815-816. In addition, Gordon admitted—again, to a Lexington County Sheriff's Office detective—he was drunk, had "watched skin flicks" with friends, had no memory of the night, and has a "violent" personality when drunk. R. 815, 825. Further, one of the "friends" he supposedly watched "skin flicks" with denied that happened—so, apparently, Gordon lied about his activities and attempted to create a fake alibi. R. 823. The state fundamentally misunderstands *Gregory* if it believes these facts are in any way similar to an attempt to use evidence someone else committed a different theft to demonstrate the defendant's innocence of embezzlement.

Moreover, in its brief the state failed to even suggest any "danger of *unfair* prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE (emphasis added). In *Gregory*, there was a clear need—as the Court recognized—"to guard against the confusion of the jury by the injection of collateral issues" in a complicated embezzlement case. 198 S.C. 98, 16 S.E.2d at 534. There was no similar need here in any way, and there was no danger of unfair prejudice. The

only "prejudice" to the state is that fairly supported by the evidence. If the jury could reasonably believe this evidence supports a reasonable inference of McDowell's guilt, then the evidence *fairly* prejudices the state and should have been admitted. *See State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014) (Few, C.J.) ("Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case. '"Unfair prejudice does not mean the damage to a [party]'s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis."' (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998))).

Substantial unfair prejudice or other improper factor is a precondition for exclusion under Rule 403. This evidence is facially relevant under Rule 401. Absent a showing of substantial unfair prejudice, it cannot be excluded under Rule 403, and *Gregory* should be understood to go no further.[1] Because there was no unfair prejudice or improper danger from the admission of the evidence, the trial court committed an error of law by excluding this obviously relevant and probative evidence. *See* 16 Corpus Juris, *supra*, § 1085, at 559 ("Accused may show that another committed the crime, and where the state relies on circumstantial evidence to connect the accused

[1] If the *Gregory* rule does bar admission of this evidence, then it should be overruled. By imposing a heightened standard over-and-above that required by Rules 401 and 403, SCRE, the *Gregory* rule—if it means more—is in conflict with the Rules of Evidence and should be discarded. *See Whitfield v. Schimpf*, 444 S.C. 633, 656, 911 S.E.2d 310, 322 (2025) ("This Court has recently emphasized that trial courts should apply the language of the Rules."). In addition, the heightened scrutiny with which *Gregory* is often applied creates a "curious asymmetry" between what is necessary for a jury charge on accomplice liability for the state and the admission of evidence of third-party guilt by the defendant. *State v. Johnson*, 444 S.C. 442, 456, 908 S.E.2d 102, 109 (2024) (Hill, J., dissenting). If the rule means any more than the ordinary Rule 403, SCRE, principle, then it is bad law and should be removed from this state as it defeats foundational principles protecting criminal defendants and allowing them to present a complete defense.

with the crime, he may, by the same character of testimony, prove that others committed it." (footnote omitted)).

As to the "factual clarifications" the state addresses in its brief, Resp. Br. 12-13, McDowell strongly disagrees. First, it is ludicrous for the state to suggest Henry Gordon's statement to Detective Bartlett that "the possibility existed that he was involved with the abduction," R. 825, was merely a "metaphysical could" or "existential possibility" that he might have been involved. Resp. Br. 12, 15. When a suspect makes such a statement to an officer after a months-long investigation, no one should seriously suggest Gordon meant only that, in the abstract, it is theoretically possible he could have kidnapped this child. That is absolutely unreasonable and facially disingenuous. Regardless, what Gordon meant is plainly a question of fact for the jury to decide—yet it was not given that chance. *See Nettles v. MacMillan Petroleum Corp.*, 210 S.C. 200, 206, 42 S.E.2d 57, 59 (1947) (meaning of "ambiguous" statement is "a question for the jury"). Second, it is similarly unimportant that the jury obliquely heard about Gordon in a few small, passing references. That is clearly different from allowing McDowell to present for the jury actual evidence and complete argument; it is not an adequate substitute. As to the *Holmes* argument, McDowell will rest on his initial brief.

II. The state fails to appreciate these events were decades ago and to recognize the state offered no legitimate reason for not prosecuting the case earlier.

The state's complaint that "Appellant did not specifically show that his mother would have provided an alibi for him," Resp. Br. 17, is simply unreasonable and unfair. How could he? These events were decades ago and his mother *died* over fifteen years ago. Yet he explained he regularly picked his mother up from work after her night shift at a local store and was likely doing the same on the night in question. A stringent demand for further particularity upends the criminal justice system and—like SLED Agent Bill Graham told McDowell in 2008, App. Br. 27 n.14—would

apparently require a defendant to prove himself innocent, *even before being charged.* Moreover, his mother's passing is particularly important because the trial court failed to consider that prejudice at all since it made no mention of her or his potential alibi when giving its ruling.

To allow these charges to stand without any legitimate justification from the state would allow it to get convictions simply by waiting any citizen out. If enough time passes, he or she will be unable to muster evidence in defense, but the state's archives of records will always be waiting. And all of that is not to mention the other danger against which these rights are designed to protect: that despite the lack of a formal indictment, an accused "is still disadvantaged . . . by living under a cloud of anxiety, suspicion, and often hostility." *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

As mentioned in McDowell's initial brief, the federal precedent on this issue was established on a fundamentally different factual basis. *United States v. Lovasco*, 431 U.S. 783 (1977), concerned an *eighteen-month* pre-indictment delay. 431 U.S. at 784. Over *thirty years* is another matter altogether, and it is fundamentally unfair to require McDowell to demonstrate prejudice with such specificity in this situation. On a plausible showing, as here, prejudice should be presumed after a delay this lengthy—even if McDowell's demonstrated prejudice is insufficient, which he does not concede. Because the state offered no legitimate reason for the delay at trial below or in its brief now, McDowell's convictions should be vacated and his indictments dismissed.

III. McDowell proposes a clear test under the South Carolina Constitution: regardless of prejudice to the defendant, the state must offer *some* legitimate justification for extensive pre-indictment delays.

McDowell was accused by the Lexington County Sheriff's Office of this crime in 1986, and allegedly he confessed to a jailhouse snitch in 1987. Yet he was not tried until June of 2022. The state still has not justified the delay in prosecuting this case; at most it explained why it decided to bring the case now, pointing to only insubstantial supposed justifications about unimportant

DNA and an expert witness.[2] But the question is and must be the reason for the delay. McDowell does not suggest this rule out of thin air. At least one other jurisdiction has followed exactly the path proposed: New York. *See People v. Singer*, 376 N.E.2d 179 (N.Y. 1978) ("[T]he State due process requirement of a prompt prosecution is broader than . . . the Sixth Amendment . . . ."); *see People v. Regan*, 212 N.E.3d 282, 288 (N.Y. 2023) ("[I]f commencement of the action has been delayed for a lengthy period, without good cause, the defendant may be entitled to a dismissal although there may be no showing of special prejudice" (quoting *Singer*, 376 N.E.2d at 187) (alteration original)).

The state's argument that a specific line must be drawn or risk that "the rule becomes a subjective rumination on how long a delay can last before it has lasted too long" is myopic. Resp. Br. 19. First, no hard-and-fast rule is necessary. The Court can and should decide only the case before it by holding that *over three decades* is long enough. Leave to future cases questions about delays that are not long enough to require just some justification. Second, if the state insists, McDowell will suggest a starting line of ten years. After ten years of pre-indictment delay, it should be the state's burden to explain that delay with some legitimate justification. Ten years is presumptively long enough for adequate investigation and the state should be required to explain why it did not proceed sooner. Certainly, in many cases, the state will be able to do so and explain that, for one reason or another, it reasonably decided not to prosecute the cases before that point.

[2] As explained in McDowell's initial brief, that DNA did not—and the state knew it never could—connect McDowell to anything found at the scene of the crime. Also, McDowell's DNA could have been obtained for comparison at any point, so finally obtaining it decades later is no legitimate justification or explanation. As to the FBI expert, this witness was necessary only *because of* the state's delay and subsequent loss of the crime scene. Such self-imposed necessity is no justification. A delay cannot be justified by what came after it. Further, the state gave no reason measurements could not have been taken initially to avoid the need for the expert at all.

See Regan, 212 N.E.3d at 288 ("[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 . . . ." (quoting *Singer*, 376 N.E.2d at 187) (emphasis added))). But courts must require that justification at some point, or people will always be in "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)).

As to the state's issue preservation argument, McDowell will rest on his argument in footnote 18 of his initial brief and on this Court's review of the record. Again, for clarity, however, McDowell did expressly invoke the South Carolina Constitution in his motion to dismiss filed four days before trial began. R. 792.

CONCLUSION

McDowell respectfully requests this Court dismiss his indictments and vacate his convictions for the reasons stated above and in his initial brief to this Court.

Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of July, 2025.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have 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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