

RECEIVED

Oct 16 2025

SC Court of Appeals

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

MOTION TO TRANSFER

Counsel for Appellant Thomas McDowell respectfully requests his case be transferred from the Court of Appeals to the Supreme Court pursuant to Rule 204(b), SCACR.

As Justice Hill observed in dissent in *State v. Johnson*, 444 S.C. 442, 456, 908 S.E.2d 102, 109 (2024), "a curious asymmetry now exists in our law." The state can obtain a jury instruction on accomplice liability "if there is even a 'bare suspicion' or 'conjectural inference'" that someone else was present with the defendant at the time of the commission of the alleged crime. *Id.* However, "the third-party guilt doctrine would bar a defendant from admitting the same type of evidence to suggest another person committed the crime." *Id.* That asymmetry is a mistake, one this Court can clarify and eliminate with this case.

Appellant Thomas McDowell was convicted of crimes arising out of the disappearance of four-year-old Jessica Gutierrez from her home in Lexington County. Henry Gordon, Jr. had been dating Jessica's mother, Debra Gutierrez, around the time of Jessica's disappearance, and McDowell sought to introduce evidence tending to show Gordon committed these crimes. In summary, McDowell offered (1) a statement Gordon made to a Lexington County Sheriff's Office detective almost amounting to a confession—that "the possibility existed that he was involved with the abduction," R. 825; (2) 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 to the disappearance, R. 815-816; and (3) the fact Debra went to law enforcement officials a month prior with concerns about statements Gordon made to the victim, R. 138:8-139:15. In addition, Gordon admitted—again, to a Lexington County Sheriff's Office detective—that he could not recall anything of the night in question because he had been drunk, that he has a "violent" personality when drunk, and that he had "watched skin flicks" with friends that night. R. 815, 825. Further, one of the "friends" he supposedly watched "skin flicks" with denied doing so, and that denial was corroborated by another person. R. 823. Thus, apparently, Gordon lied about his activities on the night and attempted to create a fake alibi. This evidence was more than sufficient to raise a factual question for the jury to decide and to create a reasonable doubt of McDowell's guilt. The trial court erred by excluding the evidence and in reasoning the evidence was a "merely speculative" demonstration of Gordon's guilt. R. 160:1-161:21.

In *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941), this 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 explained more fully in his briefs filed with the Court of Appeals, App. Br. at 9-12, the *Gregory* rule has been incorrectly extended and applied to require some greater showing of the third-party's guilt, which has come to be known as the "third-party guilt doctrine." *Johnson*, 444 S.C. at 456, 908 S.E.2d at 109 (Hill, J., dissenting). That is incorrect because the *Gregory* rule should be understood as an application of what is now Rule 403, SCRE, as McDowell more fully explained in the brief. App. Br. 12-13; *see, e.g.*, Note, Rule 403, SCRE (relying on *Gregory* to demonstrate Rule 403 is "consistent with the law in South Carolina"). The trial court erred by excluding this facially relevant evidence when there was no danger of unfair prejudice, confusing the issues, or patently wasting time. Rule 403, SCRE. The state has never offered a legitimate reason for exclusion under Rule 403.

The Court should certify this case for direct review to resolve the "curious asymmetry" noted in *Johnson*, confine *Gregory* to the standard it intended to apply, and reign in solicitors and trial courts who refuse to allow defendants to present evidence tending to establish a reasonable doubt of their guilt. The Court can and should clarify the question is not whether the defendant has proven a third-party guilty—a gross reversal of the criminal justice system—but whether the evidence is relevant to a determination of the defendant's guilt and if its probative value is substantially outweighed by the factors identified in Rule 403.

The second and third issues on appeal concern the excessive pre-indictment delay in this case. Jessica disappeared in June of 1986; McDowell was not arrested and indicted until 2022. Issues two and three challenge that excessive delay under the Due Process Clauses of the federal and state constitutions because the state should not be permitted to delay prosecution for *decades*

without legitimate reason, particularly here where McDowell was directly prejudiced by the delay. In this case, the fact of the matter is that Lexington County Solicitor Donnie Meyers simply decided not to prosecute McDowell, as indicated by contemporary records. R. 805. Decades later, with no significant change in the evidence in the state's possession, a different solicitor should not be permitted to decide differently without explanation.

On issue two, the trial court erred by denying McDowell's motion to dismiss because he demonstrated substantial actual prejudice from the state's decades-long delay. *See 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)) (explaining the federal Due Process Clause prohibits excessive pre-indictment delay if there is "substantial actual prejudice" to the defendant and the state's reasons for the delay do not outweigh the prejudice). McDowell showed prejudice in three forms: (1) a likely alibi witness, his mother, died years after the crime but decades before prosecution; (2) the crime scene itself was lost, so evidence could not be obtained demonstrating his physical inability to have committed the crime; and (3) the lead investigator who spoke with all of the witnesses contemporaneously—to whom Gordon confessed—and could have explained some discrepancies, died in 2019. App. Br. at 20-23. The trial court incorrectly found there was no prejudice due to the three-decade delay, and in doing so it failed to even consider the prejudice resulting from the death of McDowell's likely alibi witness. R. 65:8-67:8.

Issue three presents the same problem under the state constitution, and McDowell firmly believes that three decades is long enough to be presumptively prejudicial regardless of a showing of actual prejudice. The state should have been required to present some legitimate reason for the delay, and the trial court erred by not requiring it to do so. It is *wrong* for the state to wait, and wait, and wait to prosecute a case. It is unfair to defendants, it is unfair to victims, and it hurts the

general public. No material evidence was later obtained that finally allowed the state to identify or prosecute McDowell. *Contra Freiburger v. State*, 413 S.C. 243, 252, 775 S.E.2d 391, 396 (Ct. App. 2015) (explaining forty-year delay in prosecution where "the State brought charges only after it obtained ballistics evidence directly tying Freiburger's gun to the murder"). Practically, there has been no substantial new evidence since the 1980s. The state even had an alleged confession to a jailhouse snitch in 1987. But Donnie Meyers chose not to prosecute. The state should not be permitted infinite time in which to change its mind as evidence in a defendant's favor fades and disappears while he suffers "by living under a cloud of anxiety, suspicion, and often hostility." *Barker v. Wingo*, 407 U.S. 514, 533 (1972). In effect, McDowell challenges the constitutionality of the lack of any statutes of limitations in this state. App. Br. at 26. That constitutional issue is one best decided by this Court, and thus certification is warranted.

Finally, McDowell presents a humble request for the timely administration of justice. He is 64 years old. As explained in his brief, he has been hounded and haunted by those suspicious of him for decades now. App. Br. at 25 & n.14. If he has to wait years more for the Court of Appeals to decide the issues, and months or years after for certiorari review in this Court, he may never see the justice he deserves, be it a new trial or dismissal of these untimely charges. The questions raised in the appeal are of sufficient importance to give him that chance sooner rather than later.

Respectfully submitted,



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

RECEIVED

Oct 16 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Debra R. McCaslin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

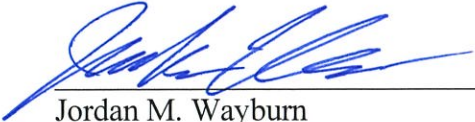
THOMAS ERIC MCDOWELL,

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 Motion to Transfer in the above-referenced case have been served upon Brandon Larrabee at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of October, 2025.



Jordan M. Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

From: [Stock, Chris](#)
To: [Brandon Larrabee](#); [Donna D'Alessio](#)
Cc: [Wayburn, Jordan](#)
Subject: 2024-000226 - Thomas E. McDowell - Motion to transfer 101425
Date: Thursday, October 16, 2025 2:47:00 PM
Attachments: [2024-000226 - Thomas E. McDowell - Motion to transfer 101425.pdf](#)

Mr. Larrabee,

Please find attached for service the Motion to Transfer for Thomas Eric McDowell's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris Stock
Administrative Coordinator
Commission on Indigent Defense
Appellate Division
(803) 734-1330