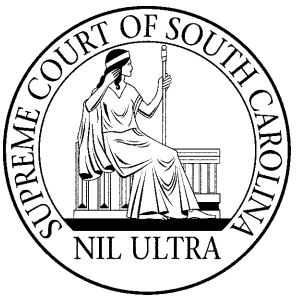

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
June 20, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

UNITED STATES SUPREME COURT—EXTENSION OF TIME

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2012-UP-372-Jeremy Lee Jones v. SCDC
(Lee, Judge George C. James, Jr.)

2012-UP-373-State v. Olbin Noel Banegas-Maldonado
(Lexington, Judge Clifton Newman)

2012-UP-374-Timothy Williams v. Force Protection Industries, Inc., et al
(Charleston, Judge R. Markley Dennis, Jr.)

2012-UP-375-Cornelius Barton v. SCDC
(Administrative Law Court Judge Shirley C. Robinson)

2012-UP-376-In the interest of Joseph A. C., a juvenile under the age of seventeen
(Lancaster, Judge Brian M. Gibbons)

2012-UP-377-Marie Assa'ad Faltas, M.D., M.P.H., v. Dinah Steele
(Richland, Judge Alison Renee Lee)

2012-UP-378-State v. Nelson H. Castro
(Horry, Judge Larry B. Hyman, Jr.)

2012-UP-379-SCDSS v. Jenny Elizabeth M. and Monroe H., III
(Aiken, Judge Vicki J. Snelgrove)

2012-UP-380-Kirk A. Thomson and Christine Thomson v. Charles Woods and Angie Woods
(Richland, Judge L. Casey Manning)

2012-UP-381-State v. Taurus Watts
(Richland, Judge J. Michelle Childs)

2012-UP-382-State v. Jeffery Wesley
(Darlington, Judge Michael G. Nettles)

2012-UP-383-Ronald Fitzjohn v. Gary Player a/k/a Gerald Player
(Horry, Judge Steven H. John)

2012-UP-384-James Garris Gantt(Deceased Employee). Frieda Gantt, Kegan P., Logan P., Kara Gantt Myers, Janine Felts, and Keane Allen v. Thomasson Management Corporation, Employer, and Travelers Indemnity Company, Carrier
(S. C. Workers' Compensation Commission Appellate Panel)

2012-UP-385-Suresh J. Nandwani et al. v. Queens Inn Motel, a South Carolina General Partnership d/b/a Coral Sea Villas Inc./Bon Villas Inc./Bon Villas et al.
(Horry, Special Referee Gene M. Connell, Jr.)

2012-UP-386-State v. Thomas Patrick Hilliard
(Edgefield, Judge Thomas A. Russo)

PETITIONS FOR REHEARING

4939-Cranford v. Hutchinson Const.	Pending	
4950-Flexon v. PHC	Pending	
4958-State v. D. Jenkins	Granted	06/20/12
4960-Lucey v. Meyer	Pending	
4961-Ex parte Lipscomb (Hollis v. Stone)	Pending	
4964-State v. A. Adams	Pending	
4970-Carolina Convenience Stores v. City of Spartanburg	Pending	
4973-Byrd v. Livingston	Pending	
4975-Greeneagle v. SCDHEC	Pending	
4978-Tillman v. Oakes	Pending	
2011-UP-558-State v. T. Williams	Pending	
2012-UP-078-Tahaei v. Smith	Pending	
2012-UP-134-Coen v. Crowley	Pending	
2012-UP-165-South v. South	Pending	
2012-UP-187-State v. J. Butler	Pending	
2012-UP-197-State v. L. Williams	Pending	
2012-UP-226-State v. C. Norris	Pending	

2012-UP-267-State v. J. White	Pending
2012-UP-270-National Grange v. Phoenix Contract	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge	Pending
2012-UP-278-State v. C. Hazard	Pending
2012-UP-285-State v. J. Breda	Pending
2012-UP-286-Rainwater v. Rainwater	Pending
2012-UP-290-State v. E. Simmons	Pending
2012-UP-292-Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht (3)	Pending
2012-UP-295-L. Hendricks v. SCDC	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-306-Watson Finance v. Fisher	Pending
2012-UP-312-State v. Edward Twyman	Pending
2012-UP-314-Grand Bees v. SCDHEC	Pending
2012-UP-316-Zetz v. Zetz	Pending
2012-UP-325-Abrams v. Nan Ya Plastics Corp., et al.	Pending
2012-UP-330-State v. D. Garrett	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4592-Weston v. Kim's Dollar Store	Pending
4637-Shirley's Iron Works v. City of Union	Granted 06/08/12
4670-SCDC v. B. Cartrette	Pending

4675-Middleton v. Eubank	Pending
4685-Wachovia Bank v. Coffey, A	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4742-State v. Theodore Wills	Pending
4750-Cullen v. McNeal	Pending
4753-Ware v. Ware	Pending
4760-State v. Geer	Denied 06/07/12
4764-Walterboro Hospital v. Meacher	Pending
4766-State v. T. Bryant	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending

4823-State v. L. Burgess	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending

4879-Wise v. Wise	Pending
4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4892-Sullivan v. Hawker Beechcraft	Dismissed 06/07/12
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4912-State v. Elwell	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree	Pending
4924-State v. B. Senter	Pending

4927-State v. J. Johnson	Pending
4932-Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4936-Mullarkey v. Mullarkey	Pending
4941-State v. B. Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Crossland v. Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4956-State v. Diamon D. Fripp	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-006-State v. Gallman	Denied 06/07/12
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending

2011-UP-091-State v. R. Watkins	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending

2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending
2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending

2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Johnson v. Hall	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-P. Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-475-State v. J. Austin	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-516-Smith v. SCDPPPS	Pending

2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. M. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-562-State v. T.Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. R. Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. D. Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-Ravenell v. Meyer	Pending
2012-UP-003-In the matter of the care and treatment of G. Gonzalez	Pending
2012-UP-008-SCDSS v. Michelle D.C.	Pending
2012-UP-010-State v. N. Mitchell	Pending
2012-UP-014-State v. A. Norris	Pending
2012-UP-018-State v. R. Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. A. Byron	Pending
2012-UP-060-Austin v. Stone	Pending
2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending

2012-UP-217-Forest Beach Owners' Assoc. v. Austin	Pending
2012-UP-218-State v. A. Eaglin	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of the Care and
Treatment of Bobbie Manigo, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
John M. Milling, Circuit Court Judge

Opinion No. 27134
Heard March 7, 2012 – Filed June 20, 2012

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' decision in this matter. In re Care & Treatment of Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010). Petitioner challenges

his civil commitment to the Department of Mental Health for long-term control, care, and treatment pursuant to the Sexually Violent Predator Act ("SVPA"). Specifically, Petitioner contends that, although he has been convicted of a sexually violent offense, he is exempt from the SVPA evaluation procedure simply because his most recent offense is not explicitly designated as sexually violent. The court of appeals affirmed Petitioner's commitment, finding the language of the SVPA unambiguous and applicable to Petitioner. We affirm.[1]

I.

In 1987, Petitioner was indicted for assault with intent to commit first-degree criminal sexual conduct ("CSC") after making sexual remarks to the victim and touching the victim on her breasts and vagina and pushing her to the ground in an attempt to have sex with her. Petitioner pled guilty to the reduced charge of assault and battery of a high and aggravated nature.

---

[1] Although the issue of appealability has not been raised by the court of appeals or the parties, the dissent would vacate the decision of the court of appeals because it erroneously addressed the merits of an unreviewable order. The dissent correctly points out that the denial of summary judgment cannot be reviewed by interlocutory appeal. Moreover, Petitioner indicates on certiorari to this Court that the "Court of Appeals erred in denying [his] pretrial summary judgment motion . . . ." We nevertheless elect to reach the merits of the certiorari petition, for the reality is that Petitioner appealed from final judgment, despite the erroneous reference to the denial of his summary judgment motion. The dissent notes that "[o]n direct appeal, petitioner raised a claim of error in the denial of his motion for summary judgment." What the dissent fails to mention is that on direct appeal Petitioner raised two additional evidentiary challenges from the trial. While those evidentiary challenges are now abandoned, they demonstrate that this appeal is from a final judgment. Because the legal issue before us was sufficiently preserved and Petitioner in fact appealed from final judgment, we address the legal question raised in the certiorari petition.

Petitioner was sentenced to ten years in prison, suspended upon service of two years in prison and five years of probation. Petitioner was also sentenced to alcohol, drug, and sex counseling.

While on probation following the 1987 conviction, Petitioner was again indicted for assault with intent to commit first-degree CSC. Petitioner knocked on the victim's door, forced his way into the house, grabbed the victim, and put his hand over her mouth. A struggle ensued, during which Petitioner pulled out a knife and pulled the victim into the yard. Once in the yard, Petitioner attempted to remove the victim's nightgown and panties, but the victim fought back and eventually escaped. In February 1990, Petitioner pled guilty to the reduced charge of assault with intent to commit second-degree CSC and was sentenced to twenty years in prison. During confinement, Petitioner committed eighty-three disciplinary infractions, of which three were assaultive and fifteen were for sexual misconduct, including willfully and repeatedly exposing his penis to and masturbating in front of female correctional officers.

In 2004, prior to his release from prison, Petitioner was evaluated by the Department of Corrections multidisciplinary team, which found probable cause that Petitioner was a sexually violent predator ("SVP"). Following a hearing, the circuit court also found probable cause that Petitioner was an SVP and ordered Dr. Pam Crawford to perform a psychiatric evaluation. Petitioner was diagnosed with alcohol dependence and borderline intellectual functioning; however, regarding whether Petitioner required inpatient sex-offender treatment, Dr. Crawford concluded insufficient clinical evidence existed to support a finding that, to a reasonable degree of medical certainty, Petitioner was suffering from a sexual disorder, personality disorder, or other mental abnormality that would make it likely he would re-offend.[2] In April

[2] Dr. Crawford was "very concerned" about Petitioner due to his pattern of sexually violent behaviors and history of alcohol abuse. However, given Petitioner's "sustained appropriate behavior" during the eighteen months preceding the evaluation, and that Petitioner received alcohol abuse treatment in prison, his family was "incredibly supportive," he had a job waiting for him, and he would receive mandatory outpatient sex-offender treatment while

2004, the SVP petition was dismissed and Petitioner was thereafter released from prison. Following his release, Petitioner's participation in sex-offender treatment was poor and he returned to using alcohol.

In October 2005, Petitioner was arrested on four counts of indecent exposure after exposing himself, urinating and masturbating in front of the victim. The victim was an employee of SCE&G who was conducting her route near Petitioner's home on the day of the incidents. Petitioner noticed the victim, turned around, and began walking towards her. Petitioner stood in the roadway and exposed himself to the victim. The victim continued to the next home along her route, and Petitioner walked towards the victim and urinated in front of her. The victim resumed her route, and Petitioner followed her and exposed himself a third time. Thereafter, Petitioner followed the victim onto a different street, exposed himself, and masturbated in front of her. At that point, the victim called 9-1-1 and reported the incidents. Petitioner pled guilty to one count of indecent exposure and was sentenced to three years in prison, suspended upon nine months in prison and two years of probation.

Prior to his release from prison, Petitioner was again referred for proceedings pursuant to the SVPA. The multidisciplinary team and the prosecutor's review committee found probable cause to believe Petitioner was an SVP. Following a hearing, the circuit court also found probable cause that Petitioner was an SVP and ordered Dr. Crawford to perform another psychiatric evaluation.

This time, Dr. Crawford opined, to a reasonable degree of medical certainty, that Petitioner was dangerous and would likely commit additional sexually violent acts against women. In addition to her previous findings of

---

on probation, Dr. Crawford could not conclude to a reasonable degree of medical certainty that Petitioner required inpatient treatment. Dr. Crawford stated, "When I did my first evaluation I did not say he did not meet the standard, but I said there was not enough clinical information at that point to convince me he had to be inpatient. I still at that time thought he could be outpatient . . . ."

alcohol dependence and borderline intellectual functioning, Dr. Crawford diagnosed Petitioner with two sexual disorders: paraphilia[3] and exhibitionism.[4]

At trial, Petitioner argued he was not subject to the SVPA evaluation process because he was not presently confined for a sexually violent offense. At the time, section 44-48-40 read:

> (A) When a person has been convicted of a sexually violent offense, the agency with jurisdiction must give written notice . . . one hundred eighty days before:
>
> > (1) the person's anticipated release from total confinement . . . .

Petitioner argued the legislature did not intend for the SVPA to encompass all offenses, and since Petitioner was serving time for an offense not classified as sexually violent, he was not subject to the SVPA evaluation process as a matter of law. The trial court disagreed and found section 44-48-

---

[3] Paraphilia is a sexual disorder in which one becomes sexually aroused by having sex with a non-consenting adult. According to current understanding, paraphilia is a lasting disorder that cannot be cured; however, it can be treated with medication and therapy.

[4] Exhibitionism is a sexual disorder in which one is sexually aroused by exposing their genitals for shock value. Dr. Crawford testified her diagnosis of exhibitionism was based on Petitioner's repeated disciplinary infractions in prison, the indecent exposure incident in which he followed and repeatedly exposed himself to the victim, and the circumstances of his 1990 conviction. Moreover, Petitioner's own expert also diagnosed him with exhibitionism and acknowledged that disorder, even unaccompanied by a paraphilia diagnosis, constituted a mental abnormality under the SVPA. See S.C. Code Ann. § 44-48-30(1) (Supp. 2011) (defining an SVP as a person who "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment").

40(A) does not require the most recent offense to be classified as sexually violent, and Petitioner was subject to the SVPA. The jury found the State proved beyond a reasonable doubt that Petitioner is an SVP. Thereafter, Petitioner was committed to the Department of Mental Health for long-term control, care, and treatment.

Petitioner appealed, arguing the SVP evaluation process is not triggered unless a person is currently confined for a sexually violent offense. Petitioner acknowledged his 1990 CSC conviction was a sexually violent offense but argues he was evaluated following his sentence in connection with that conviction and was determined not to be an SVP. Because the 2006 indecent exposure offense was not a sexually violent offense, Petitioner argues there was no conviction to trigger the SVP evaluation process a second time.

The court of appeals, like the trial court, rejected Petitioner's challenge and found the language of the SVPA was unambiguous and did not require the current offense and sentence to be a statutorily designated sexually violent offense. Rather, the SVPA only requires that a person "*has been* convicted of a sexually violent offense." The court of appeals relied on a Virginia case,[5] and distinguished the language of the Virginia SVPA from the language of the South Carolina SVPA.[6] The court of appeals further relied upon the legislative intent set forth in the SVPA which demonstrated a desire to identify and treat individuals suffering from a mental abnormality to prevent future acts of sexual violence:

> The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators

---

5 Townes v. Virginia, 609 S.E.2d 1 (Va. 2005).

6 The Virginia SVPA by its terms applies only to a person "*who is incarcerated for a sexually violent offense*." Id. at 3. In contrast, the South Carolina SVPA applies to any person who "*has been convicted* of a sexually violent offense." S.C. Code Ann. § 44-48-40 (emphasis added).

> will engage in repeated acts of sexual violence if not treated for their mental conditions is significant.

S.C. Code Ann. § 44-48-20 (Supp. 2011).

We granted a writ of certiorari to review the court of appeals' decision.

II.

Petitioner argues the court of appeals erred because he was not subject to the SVPA since he was not confined for a sexually violent offense. Petitioner argues that, although section 44-48-40 does not use present tense language in reference to confinement, it would lead to an absurd result if a person was subjected to the SVP evaluation process during incarceration for an offense that is not designated as sexually violent. Petitioner further argues the SVPA should be construed strictly against the State pursuant to the rule of lenity.[7] We disagree.

"Statutory interpretation is a question of law subject to de novo review." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). "The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute." Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "These words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose." Id. (internal quotations omitted). "[I]f the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used." Id. "But if applying the plain language would lead to an absurd result, we will interpret the words in such a way as to escape the absurdity." Id. "A

[7] The rule of lenity provides that typically, statutes that are penal in nature must be strictly construed in favor of a criminally accused and against the State. See Cooper v. S.C. Dep't of Prob., Pardon and Parole Serv., 377 S.C. 489, 496, 661 S.E.2d 106, 110 (2008) (construing parole statute strictly against the State because it was penal in nature).

merely conjectural absurdity is not enough; the result must be so patently absurd that it is clear that the General Assembly could not have intended such a result." Id. (internal quotations omitted).

The court of appeals correctly found the language of the SVPA is unambiguous and does not require a person to be presently confined for a sexually violent offense to be subject to the SVP evaluation process. The definition of an SVP refers to someone who "*has been* convicted of a sexually violent offense." S.C. Code Ann. § 44-48-30(1). Further, section 44-48-40 provides notice must be given "[w]hen a person *has been* convicted of a sexually violent offense." Thus, we must enforce the plain meaning of those sections which, by their terms, do not require a person to be confined for a sexually violent offense for the SVPA evaluation process to commence.

Further, we disagree that applying the plain language of section 44-48-40 would lead to an absurd result. "[A] person's dangerous propensities are the focus of the SVP[A]." In re Care & Treatment of Corley, 353 S.C. 202, 207, 577 S.E.2d 451, 453-54 (2003). Accordingly, we believe the application of the SVPA should not turn on whether a person's most recent conviction was specifically designated as sexually violent, particularly where, as here, the most recent conviction is sexually oriented and demonstrates a substantial risk of future offenses. Rather, the determination of whether a person is an SVP must include consideration of all relevant circumstances. See id. (affirming admission of indictments notwithstanding appellant's willingness to stipulate to the prior convictions because "the details of appellant's prior offenses . . . were relevant to the issue of whether appellant was likely to engage in acts of sexual violence again); White v. State, 375 S.C. 1, 9-10, 649 S.E.2d 172, 176 (Ct. App. 2008) (noting evidence of prior sexual history, regardless of whether it resulted in a criminal conviction, is directly relevant to determining whether a person is an SVP). We believe it would lead to an absurd result to interpret the SVPA to require the release of an inmate, who has been convicted of a sexually violent offense, presently suffers from a

mental abnormality, and is highly likely to re-offend, simply because he happens to be confined for an offense that is not enumerated in section 44-48-30(2). The legislature did not intend for that person to be required to commit another act of sexual violence before becoming subject to the SVPA.

Moreover, we reject Petitioner's invitation to apply the rule of lenity in this context because the terms of section 44-48-40(A) are clear and unambiguous on their face and there is no need to resort to the rules of statutory construction. See Edwards v. State Law Enforcement Div., 395 S.C. 571, 575, 720 S.E.2d 462, 465 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). Further, the rule of lenity is wholly inapposite because the SVPA is a civil, non-punitive scheme. See In re Treatment & Care of Luckabaugh, 351 S.C. 122, 135-37, 568 S.E.2d 338, 344-45 (2002); In re Care & Treatment of Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 318 (2001) ("Our [SVPA] specifies the purpose of the Act is *civil* commitment."); In re Care & Treatment of Canupp, 380 S.C. 611, 617-18, 671 S.E.2d 614, 617 (Ct. App. 2009) ("While the [SVPA] bestows some of the rights normally associated with criminal prosecutions, it is not intended to be punitive in nature; rather, it sets forth a civil process for the commitment and treatment of sexually violent predators."). Lastly, assuming any ambiguity, it was resolved by the legislature's 2010 amendment of section 44-48-40(A) substituting "If" for "When," which forecloses the interpretation Petitioner advances. See Stuckey v. State Budget & Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent.").

III.

We find the broad language of section 44-48-40 demonstrates the legislature's intent for the SVPA to include any person who has been convicted of a sexually violent offense and presently suffers from a mental

abnormality or personality disorder that makes the person likely to reoffend. Accordingly, we find Petitioner's civil commitment was proper pursuant to the procedure set forth in the SVPA.

AFFIRMED.

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, we must vacate the decision of the Court of Appeals because petitioner failed to properly preserve any statutory construction issue for appellate court review. On direct appeal, petitioner raised a claim of error in the denial of his motion for summary judgment.[8] An order denying summary judgment does not finally decide any issue on its merits. E.g. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). Moreover, the denial of summary judgment cannot be reviewed by an interlocutory appeal nor can such an order be appealed after final judgment. Olson v. Faculty House of Carolina, Inc., 354 S.C.161, 580 S.E.2d 440 (2003).

Since the Court of Appeals erroneously addressed the merits of an unreviewable order, I would vacate that decision. E.g., South Carolina Dep't of Transp. v. McDonald's Corp., 375 S.C. 90, 650 S.E.2d 473 (2007).

[8] Petitioner's statement of the issue on appeal was "Did the trial court err in denying appellant's pretrial summary judgment motion when appellant was found not to be a sexually violent predator in 2004 just prior to his release from DOC and had committed no sexually violent offenses according to the Sexually Violent Predator Act since his release?" His sole issue on certiorari is "Whether the Court of Appeals erred by denying petitioner's pretrial summary judgment motion when petitioner was found not to be a sexually violent predator in 2004 just prior to his release from DOC and had committed no sexually violent offenses according to the Sexually Violent Predator Act since his release?" I note that petitioner's appellate counsel was only able to raise the issue by reference to summary judgment as trial counsel presented the issue to the trial judge through this motion.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kathy Salley, Appellant.

Appeal from Aiken County
Doyet A. Early III, Circuit Court Judge

Opinion No. 27135
Heard February 22, 2012 – Filed June 20, 2012

AFFIRMED

Allen Mattison Bogan, of Nelson Mullins Riley & Scarborough, and Chief Appellate Defender Robert M. Dudek, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General Harold M. Coombs Jr., all of Columbia, and Solicitor James Strom Thurmond Jr., of Aiken, for Respondent.

CHIEF JUSTICE TOAL: Kathy Salley (Appellant) was found guilty of homicide by child abuse under section 16-3-85 of the South Carolina Code, S.C. Code Ann. § 16-3-85 (2003), and sentenced to twenty years' imprisonment, suspendable upon the service of eight years. Appellant claims the circuit judge committed reversible error by allowing into evidence a photograph of the child taken while she was alive and well, and two pieces of wood found at the home of the child. Although we believe that the admission of the pieces of wood was an abuse of discretion, we nevertheless find the error to be harmless. Accordingly, we affirm Appellant's conviction.

FACTS/ PROCEDURAL BACKGROUND

On Thursday, June 23, 2005, Appellant arrived at the Aiken Regional Medical Center's emergency room at approximately 3:00 p.m. carrying a lifeless Chaquise Gregory (child) in her arms. Although the emergency room personnel attempted to revive her, it was apparent the child had been dead for some time. The child's body temperature was too low to register on a thermometer, rigor had set in at her jaw and right arm, and decomposition had begun in the lower right quadrant of her abdomen. The child had surface level abrasions on both buttocks, a bruise on her right forearm, and an injury to her lip. Several witnesses who were present at the hospital testified that one of the abrasions was scabbed over and looked to be more advanced than the other.[1] The child was six years old at the time of death.

Officers with the Aiken Department of Public Safety arrived at the hospital and obtained consent to search Appellant's home. At Appellant's home, on the floor next to the only bed in the house, officers confiscated a pair of children's jeans, underwear, a shirt, and socks. The back of the jeans and the underwear, which appeared to

[1] The pathologist who conducted the autopsy, Dr. Joel Sexton, testified that one wound appeared to be older than the other simply because the abrasions on one side were deeper than the other.

have been taken off as a unit, had blood stains on the right and left sides, consistent with the abrasions observed on the child's buttocks at the hospital.[2] The stains were visible on both the interior and exterior of the jeans. These items had a strong odor of urine. In a laundry basket, officers confiscated a pair of children's underwear, a child-sized undershirt, and a green towel, each appearing to have blood on them. Officers additionally confiscated a toilet seat that appeared to have blood on it. Finally, officers took two pieces of wood with staples protruding from them that appeared to have come off a piece of furniture in the house and were lying atop a rollaway trashcan outside of Appellant's residence. The shorts the child wore to the hospital also had blood stains on the inside rear area (not bleeding through) consistent with the abrasions on the child's buttocks. An investigating officer testified that the shorts were considerably less stained than the jeans found on the side of the bed. DNA testing performed on samples from each of these items confirmed that the blood belonged to the child. Additionally, officers searched the home of Appellant's ex-boyfriend whom she referred to as her father, Joseph Oliphant, where the child occasionally stayed, and confiscated a pair of children's sized underwear with a trace amount of blood in them. The amount of blood in this underwear was insufficient to recover a DNA profile.

The pathologist who performed the autopsy on the child, Dr. Joel Sexton, testified that in addition to the surface level abrasions visible on the child's buttocks, he found underneath that skin a large hematoma, where a cup to a cup and a half of blood had pooled. This internal bleeding was not apparent to the naked eye. Dr. Sexton stated repeatedly that, under ordinary circumstances, the blood loss caused by this hematoma would not have been fatal. However, the child had an undiagnosed sickle cell trait, and the blood loss triggered a "sickle cell crisis," which led to her death.[3] Specifically, Dr. Sexton testified, "The

---

[2] The shirt and socks found on the side of the bed did not have blood on them.

[3] When a person has a sickle cell trait, the loss of oxygen to the blood can trigger a sickle cell crisis. Loss of oxygen to the blood can occur

beating caused hemorrhage in the tissue which decreased the fluid volume of the blood throughout the body which led to the sickle-cell crisis." Dr. Sexton made clear that "the amount of blood that was lost by [the child] was caused by the beating, not by the sickle-cell trait."

Dr. Sexton testified that the hematoma resulted from the child being hit with an object of sufficient weight to cause the internal hemorrhage and with a rough surface to cause the skin abrasions. Based on the varied planes of linear abrasions found on the child, Dr. Sexton estimated the child was struck with a rough object between three and four times. While he was inclined to believe the blows were made to the bare skin, he stated that with enough force, skin can become abraded even with clothing on. Finally, Dr. Sexton testified to a reasonable degree of medical certainty that the cause of the child's death was homicide, or death "at the hands of another." Aside from the conglutination, "she had clear lungs and all of her organ tissues looked normal."

---

from blood loss, over-exertion and dehydration, or vomiting. The loss of oxygen causes otherwise normally shaped red blood cells to become larger and crescent shaped. The shape and size of these cells causes "log-jamming" in the capillaries, technically referred to as conglutination, and the tissue downstream in the capillaries is deprived of the oxygen carried within these cells. This causes a domino effect where the red blood cells in the oxygen-deprived tissue then become similarly crescent shaped. If not treated, the process continues until the organs shut down. Most people with sickle cell trait are unaware they have it unless they experience a loss of oxygen to the blood which induces a sickle cell crisis. Dr. Sexton testified that children are not routinely tested for sickle cell trait. The symptoms of a sickle cell crisis are vomiting, abdominal pain, and general feelings of discomfort. He stated that a person presenting at the emergency room with these symptoms would not necessarily be tested for the presence of the sickle cell gene. Dr. Sexton has performed over 8,000 autopsies and has seen only 15 to 20 cases of death by sickle cell crisis.

Based on the extent to which the child's food was digested, the decomposition that had begun in her abdomen, and the absence of urine in the bladder, Dr. Sexton estimated the child died at least 12 hours before presenting at the hospital at 3:00 p.m. Specifically, he stated the child would have died no sooner than 8:00 p.m. the evening before, and no later than 1:00 or 2:00 a.m. on the morning of June 23rd. Based on the phase of the child's inflammatory reaction to her injuries, Dr. Sexton estimated the child received those injuries approximately 12 hours before her death—anywhere from 8 a.m. to 2:00 p.m. on Wednesday, June 22nd.

On cross-examination, Dr. Sexton stated that it is possible "the child could have been struck with a hand some time after this injury and that might have triggered excessive bleeding since the trauma would have already occurred to the vessels from the strike." However, he stated, "I wouldn't—I normally wouldn't expect a hand—I have never in my career seen a person spanked with their hand and caused this kind of injury."

Appellant made three separate statements to the police and additionally testified at trial. For the most part, her testimony contained only minor inconsistencies. Appellant was not the natural mother of the child, but had cared for the child for two and a half years after the child's mother, Appellant's niece, could no longer take care of the child. At the time of the child's death, Kenneth Buckmon, a friend of Appellant's, was living with them. On the day before Appellant presented at the hospital with the child, the child was never outside the supervision of Appellant. In fact, the child had not been alone with anyone other than Appellant since approximately 9:00 a.m. on Tuesday, June 21st. On that Wednesday, Buckmon left the house at approximately 11:00 a.m. to go visit his children and did not return until approximately 5:30 p.m. Appellant worked the night shift at the Hot Spot gas station and had a meeting at 2:00 that afternoon. Appellant woke up sometime after Buckmon left that morning. Appellant's ex-boyfriend, Oliphant[4], was to pick Appellant and child up

[4] Oliphant was deceased at the time of trial.

at approximately 1:00 p.m. to take Appellant and child to the meeting since Appellant did not have a car.[5] Appellant was running late in getting ready for the meeting and her boss had threatened to fire anyone that missed the meeting. Appellant stated that before Oliphant arrived to pick them up, around 1:00 p.m., she popped the child with her hand once on her fully clothed rear end because the child was moving slowly. They proceeded to the meeting, and all three attended. While at the meeting, Oliphant asked the child if she was feeling okay, and commented that she was walking funny. An employee who heard Oliphant make that statement testified that she did not notice anything wrong with the child and did not notice blood on the back of her jeans. After the meeting, Oliphant, Appellant, and the child ran an errand, and then Appellant dropped Oliphant at his house, and returned to her own home with the child in Oliphant's car.[6]

Buckmon returned to the home around 5:30 p.m. and noticed drops of blood on the toilet seat. When Buckmon asked Appellant if it was hers, she stated it was not, but did not look at the toilet seat or investigate further to see if the child was okay. Appellant cooked dinner and gave it to the child at approximately 7:00 p.m. After eating some pasta, the child began to vomit on the floor. Appellant told her to go to the bathroom to clean herself up and then told her to clean up the vomit. Appellant then went to the bedroom that she shared with the child and laid out clothing for the child to change in to. The child took her clothing off and dropped it on the side of the bed, and changed into the clothing Appellant laid out for her. The child went to bed at approximately 7:30 p.m. Appellant was scheduled to work the night shift at the Hot Spot that evening, so after Appellant cleaned up for the evening, she crawled into bed with the child and napped until

---

[5] It took approximately 45 minutes to get to the Hot Spot from Appellant's house.

[6] Oliphant had recently had a toe amputated and Appellant spent much of that week driving to and from Oliphant's house to change his dressings and to bring him food.

approximately 10:45 p.m., when Buckmon woke her up so she could get ready for work. Appellant stated that the child was snoring when she leaned in to kiss her before she left for work at approximately 11:00 p.m. Appellant told Buckmon to fix the child a peanut butter and jelly sandwich if she woke up since she had thrown up her dinner. Buckmon testified that he was not sure whether the child got out of the bed after Appellant left for work, but he stated that he thought he heard her turn the television on in her room and that he called in to her at approximately midnight, telling her to turn the television off, and she did. Buckmon never went into the bedroom to check on the child.

When Appellant returned to the house from work at approximately 10:00 a.m. on Thursday morning, she asked Buckmon if the child had awoken, and he answered in the negative. Appellant then got into the bed with the child and went to sleep. She testified that she checked the bed to make sure the child had not wet the bed since she was prone to doing so. In one of the taped confessions, Appellant stated she thought the child was alive when she got into the bed because she thought she saw movement, but upon further questioning, Appellant stated that the child could have been dead at this point because she did not check to see if she was breathing or moving. At approximately noon, Buckmon's ex-wife called, waking Appellant, and Buckmon went into the room to speak with her, but did not notice the condition of the child. At that time, Appellant asked Buckmon to wake her up at 2:30 p.m. so that she could take Oliphant to the foot doctor. Buckmon woke Appellant at 2:34 p.m. and Appellant went to the bathroom to fix her hair. The child was still in the bed (and had been in the bed for approximately 19 hours). When Appellant called out to the child to wake her up and did not receive a response, she said, "you know you're faking," but then noticed vomit in her mouth and nose and all over the pillowcase and sheet.[7] After Buckmon's unsuccessful attempt to revive her, she placed the child in the backseat of Oliphant's

[7] Investigators did not find any vomit on the sheets and pillowcases as Appellant represents, and no witness from the hospital testified that the child had vomit on her.

car and drove her to the emergency room, believing she could get care quicker than by calling an ambulance.

Appellant denies causing the abrasions to the buttocks of the child and denies that she hit her with the force to cause the hematoma. Appellant claims that the injury to the child's lip happened while they were playfully wrestling on the Tuesday before the child died when Appellant's hand accidentally hit her lip. Appellant was not aware how the child received the bruise on her forearm, but claimed she may have accidentally grabbed her too hard. Several witnesses that knew Appellant well and had lived with her testified that she was not a violent person. Buckmon stated that in the month that he lived with her, he never witnessed Appellant spanking the child, and her main mechanism of punishment was to restrict the child from watching cartoons.

ISSUES

I. Whether the circuit judge properly admitted into evidence State's Exhibit 31, a photograph of the child while she was alive and well.

II. Whether the circuit judge properly admitted the pieces of wood found at the home of the child for the purpose of showing the type of instrument that could have caused the injuries to the child.

STANDARD OF REVIEW

The admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion. *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2009).

ANALYSIS

I. Photograph

Appellant contends that the admission of State's Exhibit 31, a professional photograph of the child taken when she was alive and well, was irrelevant to proving Appellant's guilt and should have been excluded pursuant to *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999). We disagree.

"Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." *Id.* at 647, 515 S.E.2d at 101 (citing Rule 401, SCRE). "A photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts." *Id.* (citation omitted). However, "there is no abuse of discretion if the offered photograph serves to corroborate testimony." *State v. Johnson*, 338 S.C. 114, 122, 525 S.E.2d 519, 523 (2009) (citation omitted).

In *Langley*, this Court found the admission of a photograph of the victim, taken in his high school band uniform, was reversible error because it was not relevant in proving the guilt of the appellant in that case. *Id.* at 648, 515 S.E.2d at 100. In so finding, the Court discounted the State's argument that the photograph was admitted to establish the identity of the victim because the identity of the victim was not an issue in that case. *Id.* at 648 n.3, 515 S.E.2d at 100 n.3. The Court concluded that "the only possible purpose of . . . [the] introduction of the photograph was to distance the victim from the drug dealing . . . and to neutralize testimony by the State's witnesses regarding his drug use." *Id.*

Appellant objected to the admission of State's Exhibit 31 at trial, arguing the picture was highly prejudicial, especially because the shorts the child was wearing in the photograph were the same shorts in which she died and that were submitted into evidence with blood on them.

Appellant argued that it was not necessary to admit the photograph to show the age and size of the child since Dr. Sexton could testify as to the size of the child and the jury could infer her size from the testimony of the child's age. In overruling Appellant's objection, the circuit judge found the picture was not inflammatory: "[i]t's just a simple picture of the little child prior to death, and it gives the jury an opportunity to see what she looked like."

Reviewing the admission of this evidence through an abuse of discretion lens, we find that the picture of the child was relevant because it substantiated Dr. Sexton's testimony that the child's sickle cell trait was not outwardly apparent and that the she was an otherwise healthy and vibrant child. Without seeing the child when she was alive, Dr. Sexton's testimony could have elicited an impression of a sickly and fragile child, which may have affected the establishment of guilt. Therefore, we believe this picture had a purpose independent of arousing sympathy, and was properly admitted.

II. Wooden Sticks

The State sought to introduce into evidence two pieces of wood retrieved from the trashcan outside of Appellant's house (Exhibit 28), and the circuit judge overruled Appellant's objection to their admission. On appeal, Appellant argues the wooden sticks were more prejudicial than probative, under Rule 403, SCRE, and that their admission was reversible error. We find that the prejudicial value of the wooden sticks clearly outweighed their probative value, and therefore it was an abuse of discretion to allow them into evidence. However, after due consideration, we find that error to be harmless.

While searching Appellant's house on the day the child presented at the hospital, officers confiscated two pieces of wood with staples protruding from them that were lying atop a rollaway trashcan outside of Appellant's residence. On each of these pieces, there is a black faux alligator skin material that has a rough surface on one side and the other side appears smooth. The side with the rough surface has staples protruding from it approximately every eight inches. The State argued

that the probative value of these sticks was to demonstrate the type of object that could have caused the child's injuries, and the question of whether or not these sticks were actually used on the child went to the weight and not the admissibility of the evidence.

Dr. Sexton testified repeatedly that he could not say the particular object caused the injuries, but that the sticks were of consistent weight and had a rough surface consistent with the object that caused the child's injuries. Dr. Sexton testified that the child was likely hit with an object that weighed at least as much as these sticks. However, at one point Dr. Sexton stated that these sticks may not have been heavy enough to have produced the impact necessary to cause the hematoma: "so it could be an object that narrow but heavier than something of this sort." Dr. Sexton testified that the black surface on the sticks could certainly have caused the abrasions to the child's buttocks, but stated repeatedly that the child could not have been hit with the part of the stick that contained staples because the child did not have any puncture wounds.[8] Dr. Sexton stated that it was possible that the opposite side of the sticks (without the staples) caused the injury because although "it looks planed . . . if you rub your finger across it, it's rough." However, later in his testimony, he refers to that side as the "smooth side."

When questioned about the lack of forensic evidence on the sticks, Dr. Sexton verified that if the child's pants were down while being beaten, he "would expect there to be some DNA transfer to that object because the skin was torn, usually tiny fragment of skin or some of the fluid [sic]." He testified that although it was possible the child could have received the abrasions with clothing on, abrasions result more commonly by an object's direct contact with the skin. When asked if he would expect to find fibers of clothing in the rough surfaces of the stick if the child were beaten with clothing on, he stated "perhaps you would." After this line of questioning, Dr. Sexton appeared to

[8] The staples protrude from the black surface of these sticks every eight inches and therefore it would require deliberate effort to repeatedly strike another using this side of the stick without inflicting puncture wounds.

concede that he did not believe the sticks were the actual weapon, stating, "So maybe—like I said, maybe it's not this object. It's just this object is consistent size-wise and weight wise."

The State did not produce any evidence that these sticks were used in the commission of the crime against the child, other than the fact they were found lying atop a trashcan outside Appellant's house. If the only probative value of these sticks was to show the jury the *type* of object that could have been used to harm the child, it would have been far less prejudicial to have shown an object with a rough surface and of sufficient weight that was not tied to the crime scene, as were these sticks. Although Dr. Sexton made clear that the child was not hit with an object that would cause puncture wounds, the visual created by these sticks with large protruding staples was highly prejudicial. Therefore, we find the prejudicial value of this evidence clearly outweighed its probative value and it was an abuse of discretion to allow the sticks into evidence.

Still, we believe that the error in admitting this highly prejudicial piece of evidence could not have contributed to the guilty verdict, and was therefore harmless. Whether an error is harmless depends on the particular circumstances of the case, and therefore a reviewing court must look to the entire record to determine the effect the error had on the verdict. *State v. Clark*, 315 S.C. 478, 484, 445 S.E.2d 633, 636 (1994) (J. Toal, dissenting). "In order for a constitutional error to be harmless, the error must have been harmless beyond a reasonable doubt." *Id.* This means the reviewing court can conclude, beyond a reasonable doubt, the error did not contribute to the verdict. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002).

The testimony of Dr. Sexton as to the time of death, and the time he believed the child sustained the injuries, combined with the blood evidence found in the house, and Appellant's own statements about the events of that Wednesday support the jury's finding that the only person who could have inflicted these injuries on the child was Appellant. Dr. Sexton testified that the child could have died anywhere from 8:00 p.m. on Wednesday, June 22nd to 2:00 a.m. the next Thursday morning

based on a host of variables uncovered during the autopsy. Appellant testified that the child was snoring when she kissed her good-bye shortly before 11:00 p.m. Buckmon stated that he heard the television on the child's room and asked her to turn it off at around midnight, and to his knowledge, she complied.[9] Therefore, the child most likely perished between 11:00 p.m., at the earliest, and 2:00 a.m. on Thursday, June 23rd. Dr. Sexton testified that based on the early phase of the inflammatory reaction to her injuries, the child most likely sustained the injuries to her buttocks approximately 12 to 15 hours before her death.[10] This would mean the child was likely beaten between 9:00 a.m., at the earliest, and 2:00 p.m. on Wednesday, June 22nd—the period of time when Appellant was with the child before leaving for the meeting at the Hot Spot. Appellant verified that the last time the child was with someone else, outside of her presence, was at 9:00 a.m. on Tuesday when Appellant picked the child up from Oliphant's house after a night of work.[11] Appellant was with the child all day on Tuesday and Wednesday morning and testified she did not notice anything wrong. Blood resulting from the injury was found on the clothing that the child wore on Wednesday, and Buckmon noticed

---

[9] There is no testimony addressing whether the television was on when Appellant returned home from work on Thursday and crawled in the bed with the child.

[10] Although Dr. Sexton testified that a hand slap could have possibly exacerbated an earlier injury to the child, causing a hematoma, we do not believe he intended to infer that the hematoma injury occurred any earlier than 12 to 15 hours before death, because this calculation was based on the extent of inflammatory response found at the site of the hematoma.

[11] On cross-examination, Appellant stated, "The only time [the child] was alone with anybody was that Monday." The timeline appears to get somewhat confused because of Appellant's overnight work, but after carefully reading the testimony, we believe it is accurate to conclude Appellant left the child with Oliphant on Monday evening and returned to pick her up on Tuesday morning.

the blood on the toilet seat on Wednesday, as well. The State offered Buckmon's testimony that he was not at the house from 11:00 a.m. until 5:30 p.m. that day. Buckmon's ex-wife and Appellant, herself, corroborated this testimony.

The circumstantial evidence in this case points conclusively to the guilt of Appellant to the exclusion of every other reasonable hypothesis. Appellant was the only person who could have inflicted the wounds to the child during the time frame supported by the evidence. During its deliberations the jury appeared to be concerned with the timeline of events during the days leading up to the child's death. The jury foreperson sent a return and asked to hear Appellant's testimony of the day Appellant took a shower with the child. The jury specifically asked to hear Dr. Sexton's testimony about the injury occurring 12 to 15 hours before death, and his testimony that a hand slap could have possibly triggered the sickling of the cells. Therefore, the paramount concern of the jury appeared to be the question of whether or not another person could have caused the child's injuries based on timeline of events, not the object with which the child was beaten. Accordingly, we believe beyond a reasonable doubt that the admission of these wooden sticks into evidence did not contribute to the jury's guilty verdict.

CONCLUSION

For the foregoing reasons, we affirm Appellant's conviction.

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent because, as explained below, I find the erroneous admission of the wooden sticks constituted reversible error. I would also find the trial court erred in allowing the State to introduce the victim's photograph as it was irrelevant under *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999), but that any error was harmless in light of appellant's introduction of several pictures of the child.

I agree with the majority that the circuit court committed error in admitting the "highly prejudicial" wooden sticks. Although I would not characterize this error as one of constitutional magnitude, were I to apply the "harmless beyond a reasonable doubt" standard, I would find reversible error here. In my opinion, the standard for reviewing ordinary evidentiary errors such as the one here is whether there is a reasonable probability that the wrongly admitted evidence influenced the jury's verdict. *E.g.*, *State v. Green*, ____ S.C. ____, 724 S.E.2d 664 (2012). Whether there is such a probability here is a close question.

The majority finds the error harmless by focusing on the evidence that appellant was the perpetrator. As I view the record, I believe the jury was concerned not so much with the question whether appellant beat the child, but rather whether her actions constituted "child abuse and neglect" that "harmed" the victim within the meaning of the homicide by child abuse statute.[12] Under the statute, child abuse and neglect is

---

[12] S.C. Code Ann. § 16-3-85(A) and (B) provides:

> (A) A person is guilty of **homicide** by **child abuse** if the person:
>
> > (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or
> >
> > (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse

defined as "an act or omission by any person which causes harm to the child's physical health or welfare." § 16-3-85(B)(1). Harm is defined in relevant part as "inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment." § 16-3-85(B)(2)(a). As explained below, I believe the critical issue in this case was whether the corporal punishment inflicted on this child was excessive and therefore met the statutory definition of harm.

The jury began deliberating at 1:15 pm. Around 4:00 pm the jury asked to be recharged on the definitions found in the statute, to rehear appellant's testimony of when she took a shower with the victim, and "Dr. Sexton's testimony from A. to Z." The jury later asked for two

---

> or neglect results in the death of a child under the age of eleven.
>
> (B) For purposes of this section, the following definitions apply:
>
> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" to a child's health or welfare occurs when a person:
>
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
>
> (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

parts of Dr. Sexton's testimony to be replayed and to be recharged on the statutory definitions. The jury was sent home for the evening at 6:44 pm. They deliberated the next day for more than two hours before returning the guilty verdict. In light of the length of the deliberations, the jury's apparent focus on "abuse," "harm," and the expert testimony as to time of injury and manner and cause of death, including the medical testimony that the corporal punishment inflicted on this child led to her death only because of her undiagnosed sickle cell trait**,** and considering the "highly prejudicial" nature of the sticks, I am compelled to conclude that there is a reasonable probability that this improperly admitted evidence influenced the jury's verdict. *State v. Green*, *supra*. I would therefore reverse.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Wayne Argabright, Respondent,

v.

Lisa Argabright, Appellant.

Appeal from Sumter County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 27136
Heard February 8, 2012 – Filed June 20, 2012

AFFIRMED

Richard T. Jones, Jones Seth Shuler & Jones, of Sumter, for Appellant.

John S. Nichols and Blake A. Hewitt, both of Bluestein, Nichols, Thompson & Delgado, of Columbia, and T.H. Davis, III, of Atkinson & Davis, of Sumter, for Respondent.

James Alexander Stoddard, of Sumter, Guardian *Ad Litem*.

JUSTICE KITTREDGE: Appellant Lisa Argabright and Respondent Wayne Argabright were formerly married, are now divorced and share joint custody of their minor daughter. Appellant appeals the family

court's issuance of a restraining order enjoining her from permitting any contact between her boyfriend, a convicted sex offender, and the parties' minor daughter. The family court further required Appellant to pay Respondent's attorney's fees and the guardian *ad litem* fees. We affirm.

I.

Appellant and Respondent were married in 1986 and their daughter (Child) was born in 1996. The parties divorced in 2000 and share joint custody of Child, with Appellant having primary physical custody.

In 2003, when Child was seven years old, Appellant began dating John Doe,[1] a convicted sex offender. Four years earlier, Doe pled guilty to lewd act upon a minor. Doe performed oral sex on his two daughters, ages six and eight at the time. Part of Doe's sentence required him to register as a sex offender.

Although Appellant learned of Doe's conviction several months after they began the relationship, Appellant did not inform Respondent. Appellant admitted Doe's past concerned her about the safety of Child. Nonetheless, Child frequently spent the night at Doe's house with Appellant and occasionally slept in the bedroom with them.

In 2009, Appellant informed Child about Doe's past. Appellant requested that Child not share the information with Respondent, but promised to do so herself. However, Appellant did not tell Respondent, who ultimately learned of Doe's status as a child molester via the sex offender registry. Believing Appellant was not aware of Doe's pedophilia, Respondent immediately notified Appellant. Appellant admitted she was already aware of Doe's history of sexually abusing young girls.

---

[1] We refer to Appellant's boyfriend using the pseudonym John Doe because both this case and Doe's criminal conviction deal with the sexual abuse of children, which is a sensitive and personal subject matter. See Doe v. Howe, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2005).

Upon Appellant's refusal to prohibit further contact between Doe and Child, Respondent filed the underlying action in family court seeking to restrain Appellant from exposing Child to Doe. In its final order, the family court enjoined Appellant from permitting contact between Child and Doe until Child reaches eighteen years of age.[2] Appellant was further ordered to pay Respondent's attorney's fees and the guardian *ad litem* fees.

II.

This Court's standard of review in an appeal from the family court is *de novo*. Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). As such, "the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. However, this broad scope of review does not require this Court to disregard the findings of the family court." Id. at 384, 709 S.E.2d at 651 (quoting Eason v. Eason, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009)).

III.

We have reviewed the record and concur in the judgment of the family court. Under the facts presented, it was appropriate to enjoin Appellant from permitting any contact between her boyfriend and Child until Child reaches eighteen years of age. Doe, as Appellant's boyfriend, has no rights with respect to Child. We reject Appellant's reliance on case law which, under the facts, allowed contact between *parents* who were convicted sex offenders and their children. See Payne v. Payne, 382 S.C. 62, 674 S.E.2d 515 (Ct. App. 2009); In re M., 312 S.C. 248, 439 S.E.2d 857 (Ct. App. 1994). Permitting parents who are convicted sex offenders to have custody and visitation rights, under proper circumstances, is so far removed from the nonexistent right of a child sex offender to have legally sanctioned contact with an unrelated child that no discussion is warranted.[3]

---

[2] Child is now sixteen years old.

[3] Appellant's brief indicates she and Doe have since married. We are, of course, bound by the record established at trial. See Rule 210(c), SCACR

The family court correctly focused on the best interest of the child, not the romantic interests of Appellant. Courts must ensure that "in all matters concerning a child, the best interest of the child is the paramount consideration." Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992) (noting that "South Carolina, as *parens patriae*, protects and safeguards the welfare of its children"); see also Michael P. v. Greenville County Dep't of Social Servs., 385 S.C. 407, 417, 684 S.E.2d 211, 216 (Ct. App. 2009) ("[T]he best interest of a child is the polar star by which decisions must be made which affect children.") (quoting In re Michael Ray T., 206 W.Va.434, 442, 525 S.E.2d 315, 323 (1999)).

We reject Appellant's argument that the family court failed to consider the expert's testimony that Doe had successfully completed treatment and posed a low risk of re-offending. The family court considered such evidence, but rejected it, as we do, as a basis for allowing contact between Doe and Child. The family court also considered the same expert's cautionary admonition that if Doe were permitted contact with Child, such contact should be supervised. The guardian *ad litem* concurred. Based on the record before us, Appellant is the only person available to supervise contact between Child and Doe. Given Appellant's pattern of deception and pursuit of her own interests over those of Child, an order entrusting Appellant to ensure no future unsupervised contact between Child and Doe would be suspect.

IV.

We affirm the remaining issues, including the award of attorney's fees and guardian *ad litem* fees, pursuant to Rule 220(b)(1), SCACR.

AFFIRMED.

("The Record shall not . . . include matter which was not presented to the lower court or tribunal.").

TOAL, C.J., BEATTY and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion

JUSTICE PLEICONES: I respectfully dissent. As noted by the majority, our review of family court rulings is de novo. In my view, the evidence in the record fails to support the imposition of such a restrictive order on Appellant. All of the evidence in the record is that Appellant's child and Doe enjoy a close relationship and that he poses no danger to her. As the family court recognized and all parties agreed, Appellant allowed her daughter to be alone with Doe on only one occasion in seven years and only for a very brief period of time. The family court concluded that this behavior supported an inference that while Appellant recognized great danger to her child she nonetheless exhibited a lack of concern for the child's safety. The majority further infers that Appellant cannot be trusted to supervise her child's interaction with Doe given this history.

To the contrary, in my view, this history provides a strong basis for concluding that Appellant can be trusted to safeguard her child and has a consistent track record of having done so. Moreover, I disagree with the majority that Appellant has demonstrated a "pattern of deception and pursuit of her own interests over those of" her daughter. The record indicates that Doe has fully accepted responsibility for his actions and unstintingly pursued rehabilitation. All of the expert testimony in the record is that he has been highly successful in doing so. I would not deem Appellant guilty of deception when she sought to avoid disclosing information that was available in the public record and which she had no affirmative obligation to disclose.

To hold now, when the child is a young adult, that Appellant must prevent *any* contact, including supervised contact, between Doe and her daughter, appears to me unwarranted. I would thus modify the family court's order insofar as it prohibits even supervised contact between Doe and the child. I therefore respectfully dissent.

The Supreme Court of South Carolina

In the Matter of Fredrick Scott Pfeiffer, Respondent

Appellate Case No. 2012-212229

ORDER

On or about June 14, 2012, the State Grand Jury of South Carolina indicted respondent on nine (9) counts of securities fraud and two (2) counts of criminal conspiracy. The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). Respondent requests a period of time in which to file a return. Respondent's request is denied.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from access to any trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

June 15, 2012

The Supreme Court of South Carolina

In the Matter of Jack L. Schoer, Petitioner.

Appellate Case No. 2011-200646

ORDER

This matter is before the Court on petitioner's Petition for Reinstatement. The petition is granted subject to the condition that, if he enters private practice, petitioner shall be required to enter into a mentoring agreement with an active member of the South Carolina Bar for two (2) years during which petitioner and the mentor shall meet on a monthly basis to discuss issues and concerns related to petitioner's law practice and the mentor shall submit quarterly reports concerning petitioner's compliance with his mentoring obligation to the Commission on Lawyer Conduct.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

June 14, 2012

The Supreme Court of South Carolina

In the Matter of Howard Hammer, Petitioner.

Appellate Case No. 2012-212098

ORDER

On November 28, 2011, Respondent was suspended from the practice of law for a period of six (6) months. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

FOR THE COURT

s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina

June 1, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Daniel J. Jenkins, Appellant.

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4958
Heard December 6, 2011 – Filed March 28, 2012
Withdrawn, Substituted, and Refiled June 20, 2012

REMANDED

Appellate Defender Kathrine H. Hudgins, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Mark R. Farthing, all of Columbia;

and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

FEW, C.J.: Daniel Jenkins appeals his conviction for criminal sexual conduct in the first degree. Jenkins argues the trial court erred in denying his motion to suppress DNA test results because the affidavit offered in support of the search warrant for samples of his DNA did not meet the constitutional and statutory requirements for issuance of the warrant. We agree. We remand the case to the trial court for a factual determination of whether the inevitable discovery doctrine precludes application of the exclusionary rule in this case.

I. Facts and Procedural History

The victim testified that on the evening of April 5, 2006, she came home from work, drank several beers, ordered a pizza, and fell asleep on her couch. She awoke approximately two hours later to a knock at the door. The victim recognized the man at her door as "Black," a man she sometimes saw at a neighborhood grocery store called Jabbers. Black frequently hung around outside Jabbers, and she occasionally said hello to him.

According to the victim, she answered the door, and Black asked if she wanted to get a beer with him. After the victim declined, Black asked her to put away her two dogs. She put away the dogs, and Black entered her house. The two of them sat on the victim's couch while Black smoked a cigarette, using a glass candle holder as an ashtray. Black then demanded she show him her genitals or else he would kill her. A struggle ensued in which Black hit the victim in the head and face multiple times with the candle holder, removed her pants and underwear, and raped her. Black told the victim "don't tell anyone or I will kill you," and left.

The victim explained that because she could not find her cordless phone, she ran down the street looking for help. Near Jabbers, the victim encountered a woman who asked her what happened. At that moment, Black approached the victim, took her by the arm, and guided her to a hose so she

could wash blood off of her face. Black then handed the victim her cordless phone. She ran home and called 911.

When the police arrived at the victim's house, she described the incident and gave them the name "Black." Within thirty minutes, police located Jenkins in an abandoned building across the street from Jabbers. The police brought the victim to the store parking lot, where she identified Jenkins as the man who raped her. After the victim identified Jenkins, she underwent a rape examination. The nurse who performed the examination observed a large amount of fluid in the victim's vagina, and she took evidence swabs of the victim's vagina and other parts of her body.

The next day, the police sought a search warrant for samples of Jenkins' blood and hair. A detective who responded to the victim's 911 call prepared the affidavit in support of the warrant. In the affidavit, the detective wrote only the following:

> On 4-5-06 at approx. 2230hrs while at [victim's address], the subject Daniel Jerome Jenkins (BM, dob 6-17-60) did enter the victim's residence and threatened to kill her if she did not comply with his demands to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder. The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair, and pubic hair will be retrieved from the subject by a trained medical personnel in a medical facility. This collection of these sample [sic] will be conducted in a noninvasive manner.

The detective did not supplement the affidavit with oral testimony. The magistrate read the affidavit and signed the warrant. The police executed the warrant, obtaining blood and hair samples from Jenkins.

SLED analyzed Jenkins' samples and the swabs taken from the victim. A SLED forensic DNA analyst found semen on several swabs, including the vaginal swab. The analyst developed a DNA profile from the vaginal swab and compared it to a DNA profile developed from Jenkins' samples. The profiles matched, with a one-in-8.6 quintillion[1] chance the semen came from an unrelated person.

At trial, the victim testified in the detail set out above that Jenkins raped her. Later in the trial, the State called the DNA analyst to testify to the results of the DNA comparison. After the trial court found the warrant was valid and denied Jenkins' motion to suppress, the witness testified to the results of the comparison and its degree of certainty.

The jury found Jenkins guilty. Because he had prior convictions for criminal sexual conduct in the first degree and carjacking, both "most serious offense[s]" under section 17-25-45(C)(1) of the South Carolina Code (Supp. 2011), the trial court imposed a mandatory sentence of life in prison with no possibility of parole. See S.C. Code Ann. § 17-25-45(A)(1)(a) (Supp. 2011).

II. The Validity of the Search Warrant

A search warrant allowing the government to obtain evidence from a suspect's body is a search and seizure under the Fourth Amendment and, therefore, must comply with constitutional and statutory requirements. State v. Baccus, 367 S.C. 41, 53, 625 S.E.2d 216, 222 (2006). To secure a warrant for the acquisition of such evidence, the State must establish the following elements: (1) probable cause to believe the suspect committed the crime; (2) a clear indication that relevant evidence will be found; and (3) the method used to secure it is safe and reliable. 367 S.C. at 53-54, 625 S.E.2d at 223 (quoting In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992) (per curiam)); see also S.C. Code Ann. § 17-13-140 (2003). The magistrate must

[1] The number representing one quintillion is a one followed by eighteen zeros. Webster's New World College Dictionary 1178 (4th ed. 2008).

also consider the seriousness of the crime and the importance of the evidence to the investigation, weighing "'the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures.'" Baccus, 367 S.C. at 54, 625 S.E.2d at 223 (quoting Snyder, 308 S.C. at 195, 417 S.E.2d at 574).

We find the affidavit, which was the only information presented to the magistrate in support of the warrant application, does not meet the requirements of Baccus. See State v. Arnold, 319 S.C. 256, 259, 460 S.E.2d 403, 405 (Ct. App. 1995) (per curiam) (stating a court reviewing the validity of a warrant may consider only information presented to the magistrate who issued the warrant). In particular, we find the affidavit does not demonstrate that the police had probable cause to believe that Jenkins raped the victim or that Jenkins' DNA was relevant to the investigation. Therefore, we hold the trial court erred in finding the warrant was valid.

A. Probable Cause that Jenkins Committed the Crime

A probable cause determination requires a magistrate to "'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before her, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place.'" State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). On review, our duty is to ensure that the magistrate had a substantial basis for concluding probable cause existed. 387 S.C. at 212, 692 S.E.2d at 495; see also State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) (stating a reviewing court should give great deference to a magistrate's determination of probable cause). Considering the totality of the circumstances, we find the affidavit in this case did not provide the magistrate a substantial basis for concluding there was probable cause that Jenkins committed the crime.

First, the affidavit must set forth facts as to why the police believe the suspect whose DNA is sought is the person who committed the crime. See State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (finding an affidavit defective because it "sets forth no facts as to why police believed Smith" committed the robbery). Applying that requirement in Baccus, our supreme court found the affidavit defective and therefore found there was an insufficient basis for a finding of probable cause. 367 S.C. at 52, 625 S.E.2d at 222. The court stated: "This affidavit fails to set forth any facts as to why police believed Appellant committed the crime. The language in the affidavit lacks [specificity] and contains conclusory statements. Given the totality of the circumstances, we conclude the issuing magistrate did not have a substantial basis to find probable cause." Id. Similarly, the affidavit in this case lacks specificity and contains nothing more than conclusory statements. "The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165 (1978)). The affidavit in this case fails to meet the requirement of showing why the police believed Jenkins committed the crime.

Second, the affidavit does not set forth the source of the facts alleged in it. In Smith, the defendant sought to suppress a knife seized from his hotel room that was allegedly used in a robbery. 301 S.C. at 372, 392 S.E.2d at 183. The affidavit supporting the search warrant stated that the defendant committed the robbery, he had been staying in the hotel room, "and there is every reason to believe the weapon and clothes used in the robbery will be located in the room." Id. The affidavit also stated "[t]his information was confirmed in person by Sgt. Sherman . . . ." Id. Our supreme court found the affidavit "defective on its face," in part because "[a]lthough the record reveals that police relied upon information from an informant, there is no indication that this fact was made known to the magistrate . . . ." 301 S.C. at 373, 392 S.E.2d at 183. Similarly, the affidavit in this case is defective because it contains no indication as to where the detective obtained the information.

Nevertheless, the State argues that because this case involves a sex crime, the magistrate could reasonably have inferred the victim was the source of the information. We disagree. The law does not allow the State to justify a bodily intrusion on the possibility that a magistrate made a correct inference as to the source of the information in the affidavit. Rather, "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." Smith, 301 S.C. at 373, 392 S.E.2d at 183. Moreover, the complete absence of a source for any of the information makes a variety of scenarios possible. For example, the detective could have pieced together the information from other officers, the victim's neighbors, or even an anonymous tip. This is precisely what the law forbids a magistrate from doing. The magistrate's "'action cannot be a mere ratification of the bare conclusions of others.'" Id. (quoting Gates, 462 U.S. at 239).

Third, the affidavit does not contain even a conclusory assertion that the information or its source is reliable. See Gates, 462 U.S. at 238 (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based). "Without any information concerning the reliability of the informant, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime . . . ." State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167, 169 (1990) (citation and quotation marks omitted).

Viewing these deficiencies together and considering the totality of the circumstances, we find the police did not provide the magistrate a substantial basis on which to find probable cause to believe Jenkins committed this crime.

B. Clear Indication that Jenkins' Samples Are Relevant

The information presented to a magistrate to obtain a warrant for bodily intrusion must contain "a clear indication that relevant evidence will be

found." Baccus, 367 S.C. at 53-54, 625 S.E.2d at 223. The trial court stated: "Clearly DNA or genetic material is . . . evidence relevant to the question of the suspect's guilt on the crime of criminal sexual conduct in the first degree." However, this statement is true only if the police have DNA from the victim or the crime scene to which they can compare the suspect's DNA. Accordingly, to show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly indicate the relevance of the DNA sought.

The affidavit in this case does not contain any indication as to whether the police had other DNA evidence to which Jenkins' DNA profile could be compared.[2] Cf. State v. Chisholm, 395 S.C. 259, 266-68, 717 S.E.2d 614, 617-18 (Ct. App. 2011) (affirming an order requiring defendant to provide a DNA sample where the State presented evidence to the magistrate that the victim's clothing contained the DNA of an unidentified male); State v. Sanders, 388 S.C. 292, 298, 696 S.E.2d 592, 595 (Ct. App. 2009) (finding the second Baccus element met because the State showed it could compare defendant's blood sample to blood found on a victim's shirt); State v. Simmons, 384 S.C. 145, 176, 682 S.E.2d 19, 35-36 (Ct. App. 2009) (affirming an order requiring defendant to provide a palm print because it could be compared to a palm print lifted from the car he was accused of stealing). Thus, the affidavit failed to clearly indicate the relevance of Jenkins' DNA.

III. Whether the Trial Court's Error Was Harmless

The State argues any error in admitting the DNA comparison results was harmless in light of other evidence of Jenkins' guilt. "To deem an error harmless, this court must determine 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'" State v. Fonseca, 383 S.C. 640, 650, 681 S.E.2d 1, 6 (Ct. App. 2009) (quoting Taylor v. State,

[2] The detective who prepared the affidavit admitted that when she prepared it, she did not know the results of the victim's rape examination.

312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993)), aff'd, 393 S.C. 229, 711 S.E.2d 906 (2011); see also Baccus, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result."). In Baccus, the supreme court found the trial court's error in admitting the DNA to be harmless. 367 S.C. at 56, 625 S.E.2d at 224. As the court indicated, however, the other evidence in the case conclusively proved the defendant guilty.

> The State presented the testimony of [the victim's friend] who overheard Appellant tell the victim he was going to kill her and who overheard a pop and clicking sound. Additionally, the State presented evidence that Appellant's fingerprints matched fingerprints on the window sill of the broken window in the victim's bedroom. Also, [a DNA analyst] testified the blood sample collected from Appellant on the night of his arrest matched the blood found on the swabs and cuttings from the door, blind, and sheet in the victim's house. Therefore, the blood evidence drawn pursuant to the court order which should have been excluded was cumulative.

367 S.C. at 55, 625 S.E.2d at 223-24.

In Baccus, the DNA match to the defendant would have been in evidence regardless of the trial court's ruling on the motion to suppress. The admissible DNA evidence, combined with the friend's testimony she heard a gunshot immediately after she heard the defendant tell the victim he was going to kill her, "conclusively" proved the defendant guilty and left no rational conclusion but that he was guilty of murder. 367 S.C. at 55-56, 625 S.E.2d at 224. Without the DNA in this case, on the other hand, the State would have been forced to rely heavily on the credibility of the victim. Jenkins' fingerprint in the victim's home proved he was there, the presence of

fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that Jenkins was the person who had sex with her,[3] and that the sex was not consensual. See State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011) (stating "[b]ecause the [victim]'s credibility was the most critical determination of this case, we find the admission of the written reports was not harmless"), reh'g denied, (Oct. 19, 2011); 394 S.C. at 482, 716 S.E.2d at 96 (Kittredge, J., concurring) (stating "it may be a rare occurrence for the State to prove harmless error . . . in these circumstances").[4] We cannot find beyond a reasonable doubt that the DNA comparison results in this case, which the DNA analyst testified had a one-in-8.6 quintillion likelihood of error, did not contribute to or affect the verdict.[5]

---

[3] The State suggests that Jenkins argued the sex was consensual and thus conceded he had sex with the victim. We disagree. Jenkins' counsel cross-examined witnesses to elicit evidence that many of the victim's injuries were consistent with consensual sex, argued this evidence to the jury, argued that "all [the DNA] can do is tell you they had sex," and further argued several points supporting an inference the sex was consensual. We do not believe this rises to a concession. Rather, counsel is entitled to argue to the jury that the State has failed to prove an essential element of the crime—the sex was not consensual—without conceding the occurrence of sex.

[4] Our finding that the error was not harmless is based on our analysis of the facts of this individual case, not based on any categorical rule. See Jennings, 394 S.C. at 482, 716 S.E.2d at 95-96 (Kittredge, J., concurring), and 394 S.C. at 483, 716 S.E.2d at 96 (Toal, C.J., dissenting) (collectively overruling Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), to the extent Jolly imposes a categorical or per se rule regarding harmless error).

[5] We acknowledge the DNA evidence does not bear directly on the question of whether the sex was consensual. However, the DNA corroborated the victim's testimony that it was Jenkins who had sex with her. Because the DNA bolstered her credibility on this important point, we cannot say the

IV. Inevitable Discovery of Jenkins' DNA

As an additional sustaining ground, the State argues that even if the search was illegal because of the defective affidavit, the DNA evidence was admissible under the inevitable discovery doctrine. The inevitable discovery doctrine is an exception to the exclusionary rule which requires the State to establish by a preponderance of the evidence that the same evidence seized unlawfully would have been discovered inevitably by lawful means. See State v. Brown, 389 S.C. 473, 483, 698 S.E.2d 811, 816 (Ct. App. 2010), cert. granted, (Dec. 15, 2011); see also Nix v. Williams, 467 U.S. 431, 447 (1984) (holding evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police"). When the doctrine applies, the evidence will not be suppressed despite the fact it was obtained pursuant to an illegal search. Brown, 389 S.C. at 483, 698 S.E.2d at 816.

The State first argues that because probable cause did in fact exist, the inevitable discovery doctrine applies. We disagree. While the police could have presented evidence to the magistrate sufficient to establish probable cause, that does not satisfy the requirement that the State prove it would inevitably have discovered Jenkins' DNA. As the Fourth Circuit has stated: "The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. Any other rule would emasculate the Fourth Amendment." United States v. Allen, 159 F.3d 832, 842 (4th Cir. 1998).[6]

DNA did not contribute to her credibility as to whether the sex was consensual.

[6] Allen involved a situation where the police never sought a warrant in the first place. See 159 F.3d at 834-37. The difference between that situation and this case, where the police obtained a defective warrant, is immaterial as to the inevitable discovery doctrine. In both situations, allowing the doctrine to excuse the requirement of a valid warrant simply because the State can

The State also argues that discovery of Jenkins' DNA was inevitable because the State DNA Identification Record Database Act required that Jenkins' DNA be tested for inclusion in the State DNA database. See S.C. Code Ann. § 23-3-610 (2007) (establishing State DNA database); § 23-3-620(A) (Supp. 2011) (providing a person arrested for a felony must provide a DNA sample); § 23-3-620(B) (Supp. 2011) (providing a prisoner may not be released until he provides a DNA sample); § 23-3-640 (2007) (requiring all DNA samples taken pursuant to the Act be submitted to SLED for testing and secure storage); § 23-3-650(A) (Supp. 2011) (permitting SLED to make samples available to local law enforcement and solicitor's offices "in furtherance of an official investigation of a criminal offense"). The State contends on appeal that Jenkins was tested pursuant to the Act because of his prior conviction and imprisonment for criminal sexual conduct, and his DNA profile is included in the State DNA database. However, because the trial court ruled the search was legal, the State never had an opportunity to present evidence to prove its contention.[7]

---

later establish that probable cause existed would render the Fourth Amendment meaningless.

[7] The State's petition for rehearing includes an uncertified copy of a printout from SLED indicating the State DNA database contains Jenkins' DNA profile. The printout has not been authenticated under Rule 901(a), SCRE, is not part of the record on appeal, and contains no indication a DNA expert could actually use the profile. The State's contention that the printout proves its inevitable discovery claim misses the point of the inevitable discovery doctrine. The issue as to inevitable discovery is not whether a state agency separate from the prosecutor has Jenkins' profile in its database. Rather, the doctrine places on the State the burden of proving that the law enforcement agencies investigating or the solicitor's office prosecuting Jenkins inevitably would have obtained Jenkins' genetic profile from this database and that the lawfully-obtained profile could be compared to the profile developed from the semen found in the victim. Standing alone, the printout establishes only that the solicitor's office or investigating agency might have obtained the profile from the State DNA database. The inevitable discovery doctrine

The purpose of the exclusionary rule "'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" State v. Sachs, 264 S.C. 541, 560-61, 216 S.E.2d 501, 511 (1975) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). However, the exclusionary rule was not designed to apply to every violation of the Fourth Amendment. See Weston, 329 S.C. at 293, 494 S.E.2d at 804 ("Suppression is appropriate in only a few situations . . ."); State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued." (citing Sachs, 264 S.C. at 556, 216 S.E.2d at 509)). In Sachs, our supreme court observed "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where deterrence is clearly subserved." 264 S.C. at 566, 216 S.E.2d at 514. When the State has met its burden of proving it inevitably would have discovered the evidence, the "deterrence" purpose of the exclusionary rule is not "clearly subserved," id., and "'there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.'" State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (quoting Nix, 467 U.S. at 447). Therefore, the inevitable discovery doctrine represents an important policy determination that the "harsh medicine" of excluding probative evidence should be avoided when doing so does not advance the objectives of the exclusionary rule by deterring violation of constitutional rights. See James v. Illinois, 493 U.S. 307, 312 (1990) (noting the basis of exceptions to the exclusionary rule includes "the likelihood that admissibility of such evidence would encourage police misconduct").

In this particular case, we find it appropriate to remand to the trial court for an evidentiary hearing as to whether the inevitable discovery doctrine applies. The issue is presented to us on appeal from the trial court's denial of Jenkins' suppression motion on the basis that the search was legal. Therefore, the State did not need to present evidence in support of the inevitable discovery doctrine to proceed with the trial. While it would have been

---

requires the State to establish it inevitably would have obtained it and could have used it.

possible for the State to make a record on this issue, doing so would have been impractical. As our supreme court has explained: "It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments . . . . It also could violate the principle that a court usually should refrain from deciding unnecessary questions." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Given the important policy considerations behind the exclusionary rule and the inevitable discovery doctrine, we believe the determination of whether the illegally seized evidence of Jenkins' DNA must be suppressed should not be made by this court on a blank record. Rather, the determination should be made first by the trial court after an evidentiary hearing.[8] If the trial court determines on remand that the inevitable discovery doctrine applies, the conviction must be affirmed. If the trial court determines the doctrine does not apply, the illegally seized evidence must be suppressed, and Jenkins must receive a new trial.

V. Conclusion

We find the trial court erred in finding the search warrant for samples of Jenkins' DNA was valid. The case is **REMANDED** for an evidentiary hearing on the applicability of the inevitable discovery doctrine and a determination of whether the illegally seized evidence should have been suppressed.

---

[8] The appellate courts of South Carolina have addressed the inevitable discovery doctrine in only three published decisions. In two of the cases, the factual record before the appellate court was sufficient to enable the court to determine whether the State met its burden of proof. Compare Spears, 393 S.C. at 481, 713 S.E.2d at 332 (reviewing the trial court's ruling that the State met its burden of proving inevitable discovery), and State v. McCord, 349 S.C. 477, 485 n.2, 562 S.E.2d 689, 693 n.2 (Ct. App. 2002) (noting the police would have inevitably discovered defendant's blood because they had a search warrant for a sample of it), with Brown, 389 S.C. at 483-84, 698 S.E.2d at 817 (noting standard procedures would allow for inventory search and thus discovery of the drugs, but finding the State did not present evidence it would have followed such a procedure).

THOMAS and KONDUROS, JJ., concur.