

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-212544

S.C. Supreme Court

THE STATE,

Petitioner,

vs.

DANIEL J. JENKINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

Did the Court of Appeals err in finding there was insufficient evidence in the record to establish by a preponderance of the evidence that Jenkins' D.N.A. would inevitably have been discovered where the officers in Jenkins' case unquestionably had probable cause to obtain a search warrant for Jenkins' D.N.A. and were actively taking steps to obtain such a warrant prior to the improper search undertaken in Jenkins' case and where Jenkins' D.N.A., which by its nature was unchanging and perpetually available, was already available through the South Carolina D.N.A. database based on the statutory requirements in effect at the time of one of Jenkins' earlier convictions?

II.

Did the Court of Appeals err in finding any error in the admission of the D.N.A. evidence was not harmless where the other evidence presented during trial, including Victim's unwavering testimony identifying Jenkins as the person who sexually assaulted her and forensic evidence conclusively showing Jenkins' fingerprints were discovered in Victim's home after the crime, overwhelmingly established Jenkins' guilt for the indicted offense?

STATEMENT OF THE CASE

Procedural History

In April of 2006, Respondent Daniel J. Jenkins was arrested following an investigation into a sexual assault. In September of 2006, the Charleston County grand jury indicted Jenkins for one count of first-degree criminal sexual conduct. On December 8, 2009, a jury trial was commenced in the Charleston County court of general sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, Jenkins was convicted as indicted. Based on Jenkins' prior convictions, the trial judge sentenced Jenkins to life imprisonment without the possibility parole pursuant to S.C. Code Ann. § 17-25-45. Jenkins then timely filed and perfected an appeal.

Thereafter, on March 28, 2012, the Court of Appeals reversed the trial judge's ruling on the validity of a search warrant and remanded the matter to the trial court for an evidentiary hearing on the applicability of the inevitable discovery doctrine. State v. Jenkins, Op. No. 4958 (S.C. Ct. App. filed Mar. 28, 2012) (Shearouse Adv. Sh. No. 11 at 48). The State then petitioned the Court of Appeals for rehearing. On June 20, 2012, the Court of Appeals granted the State's petition, withdrew its previous opinion, filed a substituted opinion containing an additional footnote while affirming its previous decision, and dispensed with further argument and briefing. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). The State then timely filed a petition for a writ of certiorari in the Supreme Court.

Factual History

On the morning of April 5, 2006, Heather Mayer ("Victim"), a thirty-one-year-old woman living alone in downtown Charleston, went to work at a local bakery. (R. pp. 1-2; p. 5). After work, Victim returned to her home and had several beers with a visiting

friend. (R. p. 5). After her friend left, Victim ordered a pizza and fell asleep on her couch around 8:00 p.m. while still wearing her work clothing. (R. p. 165). Subsequently, at around 10:00 p.m., she was awakened by the sound of someone knocking on her door. (R. p. 6).

Victim opened the door and recognized the person knocking as "Black," a man she regularly observed hanging around in front of a grocery store near her home when she was travelling to and from work. (R. pp. 3-4). The man was actually Respondent Daniel J. Jenkins, but Victim did not know him well, was unaware of his real name, and had only exchanged pleasantries or given him change in the past. (R. pp. 4-5; pp. 25-26). After knocking on the door, Jenkins asked Victim what was going on and asked if she wanted to go get a beer with him. (R. p. 7). However, Victim declined Jenkins' invitation. (R. p. 7). Jenkins then asked her for money so he could go get a beer, and Victim again declined. (R. p. 7). Jenkins then entered Victim's home "somewhat aggressively," which made Victim feel uncomfortable, and Victim responded by backing away into her living room and sitting down onto her couch. (R. pp. 8-9).

After entering Victim's home, Jenkins followed Victim to her couch, began making lewd sexual demands, and threatened to kill her if she did not comply with those demands. (R. p. 9; p. 33). Victim pleaded with Jenkins not to do anything, warned him of the potential consequences of his actions, and did everything she could to dissuade him from doing anything further. (R. p. 9). However, Jenkins was undeterred by Victim's pleas and began touching her. (R. p. 10).

After he began touching Victim, Jenkins grabbed a glass candle holder from Victim's coffee table and began repeatedly striking Victim in her head, face, nose, forehead, ears, and mouth. (R. p. 9; p. 11). Victim tried to resist by pushing and kicking

Jenkins with her legs while tightly holding onto her pants. (R. p. 10). She also grabbed for her portable phone in an attempt to call for help, but Jenkins took the phone from her to prevent her from making any calls. (R. p. 11). Jenkins then forcibly ripped Victim's pants and underwear off. (R. p. 12). Victim repeatedly begged him to stop, warned Jenkins her boyfriend was on the way in an effort to frighten him into stopping, and attempted to scream. (R. p. 12; p. 36). Jenkins responded by telling her she was going to die and covering her mouth with his hand. (R. p. 13; p. 36). Jenkins then forced himself inside of Victim while continuing to make sexual remarks. (R. p. 13).

At some point, Jenkins eventually stopped and got off of Victim. (R. p. 13). Jenkins then threatened to kill her if she told anyone about the assault and left Victim's home. (R. p. 13). Injured, frightened, and in disbelief of what had occurred, Victim put on a sweatshirt to cover her blood-soaked clothes and unsuccessfully looked for her phone inside of her house. (R. p. 14). She then ran into the street looking for help, but several passing cars would not stop for her. (R. p. 14). After she failed to obtain any assistance from passing motorists, Victim ran towards the grocery store near her home, and a woman approached her to find out what had happened to her. (R. pp. 14-16). However, before Victim could respond, Jenkins approached them and inquired about what had occurred. (R. p. 16). Terrified, Victim began to cry and asked to use a phone. (R. p. 16). Jenkins grabbed her arm, led her across the street, and offered to let her use a phone if she would wash the blood off of her face. (R. p. 17). Jenkins then helped her wash her face with water from a nearby spigot before returning the phone from Victim's home to her. (R. pp. 17-18). Victim took the phone and immediately ran to her house. (R. p. 18). However, fearing that Jenkins would return, she ran back outside and hid

under a tarp on the side of her home before calling 911 to report the sexual assault. (R. p. 18).

Shortly thereafter, law enforcement officers arrived at Victim's house, began conducting an investigation into the incident, and questioned Victim about the attack. (R. p. 19; pp. 21-22). Officer Jake Grill of the Charleston Police Department met with Victim, noticed she looked "roughed up" and had blood on her face, and learned the assault was committed by a person Victim knew as "Black." (R. pp. 47-49). Familiar with "Black" and the areas he frequented, Officer Grill went to an abandoned building in the vicinity of the grocery store near Victim's house. (R. p. 51). Within thirty minutes of beginning the investigation, Officer Grill found Jenkins in the upstairs area of the building. (R. p. 22; pp. 51-52). Jenkins appeared to be sleeping and was completely naked. (R. pp. 51-52). Officer Grill woke Jenkins up, allowed him to get dressed, and then escorted him to the parking lot of the grocery store. (R. p. 50). Shortly thereafter, Detective Jennie Antonio of the Charleston Police Department brought Victim to the grocery store parking lot, and Victim positively identified Jenkins as her attacker. (R. pp. 22-23; p. 52; pp. 97-99). Jenkins was then arrested, and Victim was taken to see a nurse and have a sexual assault examination performed. (R. p. 24; p. 77; p. 109).

Thereafter, Nurse Faye Lebeof, an expert in sexual assaults, interviewed Victim and performed a sexual assault examination on her. (R. p. 106; pp. 108-109). Lebeof discovered Victim's face, eyes, and mouth were bruised and injured. (R. p. 110). Additionally, Lebeof discovered Victim suffered from abrasions and lacerations in her vagina and redness in her hymen. (R. p. 111). During the examination, Lebeof also recovered fluids from inside of Victim's vagina. (R. p. 112). Based on her examination, Lebeof concluded Victim's injuries were consistent with a sexual assault. (R. p. 112).

Meanwhile, officers processed the crime scene and collected evidence from Victim's home. (R: p. 55). Rene Charles, a crime scene technician with the Charleston Police Department, located blood stains on Victim's sofa and collected Victim's ripped underwear and a glass candle holder or ashtray from the floor. (R. pp. 57-59). Charles was able to collect several fingerprints from the candle holder or ashtray and submitted the prints for processing by a latent print examiner. (R. p. 61). The prints were subsequently compared to Jenkins' prints and were a positive match. (R. pp. 70-71).

On the day after the sexual assault occurred, Detective Antonio prepared a search warrant affidavit for the recovery of Jenkins' D.N.A. based on information contained in Victim's statement to law enforcement following the assault. (R. pp. 76-77; p. 81; p. 84; p. 146). The probable cause section of the warrant affidavit stated:

On 4-5-06 at approximately 2230 hrs 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 demand 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 suspect by a trained medical personnel in a medical facility. The collection of these sample will be conducted in a noninvasive manner.

(R. pp. 78-79; p. 145). After preparing the warrant affidavit, Detective Antonio presented the affidavit to a magistrate judge, and the magistrate judge issued a search warrant without taking any supporting oral testimony. (R. pp. 79-80; p. 100). Subsequently, pursuant to the search warrant, a nurse collected a D.N.A. sample from Jenkins. (R. p. 114). Thereafter, Jenkins' D.N.A. sample was compared to the semen located in the rectal and vaginal swabs collected from Victim after the sexual assault. (R. pp. 129-130).

Jenkins' D.N.A. was conclusively matched to the D.N.A. collected from the swabs taken during Victim's sexual assault examination. (R. p. 130).

Jenkins was subsequently indicted for first-degree criminal sexual conduct, and he proceeded to trial. (R. pp. 141-142). During trial, Victim recounted the details of the sexual assault and identified Jenkins in the courtroom as her attacker. (R. pp. 9-19; p. 23). Additionally, the officers and other personnel who were involved in investigating the sexual assault testified about the results of their investigations. (R. pp. 48-49; p. 55; pp. 70-71; pp. 76-77; p. 98; pp. 109-110; p. 129).

Prior to the introduction of the evidence establishing Jenkins' D.N.A. matched the D.N.A. collected from Victim after the assault, defense counsel moved to suppress the D.N.A. evidence, and the trial judge conducted a hearing on the matter. (R. p. 85). In support of his motion, defense counsel argued the search warrant affidavit did not sufficiently establish probable cause because the statements contained in the affidavit were simply conclusions without any explanation as to how the witnesses obtained the reported information. (R. pp. 88-89). Defense counsel further argued there was no indication relevant information would have been found as a result of the search warrant. (R. p. 91). After considering the arguments of counsel, the trial judge denied the suppression motion after finding the search warrant affidavit was sufficient to establish probable cause. (R. p. 92-95). Thereafter, Adrienne Riley, a forensic D.N.A. analyst and expert in forensic D.N.A. analysis, testified Jenkins' D.N.A. matched the D.N.A. taken from Victim's body. (R. p. 125; p. 127; pp. 129-130). Riley further explained the odds of randomly finding an individual with a matching D.N.A. profile were one in 8,600,000,000,000,000,000,000. (R. p. 130). Defense counsel then renewed his objection to the search warrant, and the objection was overruled. (R. pp. 130-131).

Subsequently, at the conclusion of trial, Jenkins was convicted as indicted. (R. p. 135). Based on Jenkins' prior "most serious" convictions for first-degree criminal sexual conduct and carjacking, the trial judge sentenced Jenkins to life imprisonment without the possibility of parole. (R. pp. 138-140). Jenkins then timely appealed his conviction.

On appeal, the Court of Appeals reversed the trial judge's ruling on the propriety of the search warrant and remanded Jenkins' case for an evidentiary hearing on the inevitability of the discovery of Jenkins' D.N.A. State v. Jenkins, 398 S.C. 215, 230-231, 727 S.E.2d 761, 769 (Ct. App. 2012). In reaching that decision, the Court of Appeals determined the search warrant affidavit was deficient because it did not demonstrate that the police had probable cause to believe Jenkins raped Victim or that Jenkins' D.N.A. was relevant to the investigation. Id. at 222, 727 S.E.2d at 764. Additionally, the Court of Appeals determined any error in the admission of the D.N.A. evidence was not harmless, stating:

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, and that the sex was not consensual. 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.

Id. at 226, 727 S.E.2d at 767 (citations and footnotes omitted). Finally, the Court of Appeals concluded there was insufficient evidence in the "blank" appellate record to establish that Jenkins' D.N.A. would inevitably have been discovered and remanded the matter for an evidentiary hearing on the issue. Id. at 230, 727 S.E.2d at 769.

ARGUMENT

I.

Did the Court of Appeals err in finding there was insufficient evidence in the record to establish by a preponderance of the evidence that Jenkins' D.N.A. would inevitably have been discovered where the officers in Jenkins' case unquestionably had probable cause to obtain a search warrant for Jenkins' D.N.A. and were actively taking steps to obtain such a warrant prior to the improper search undertaken in Jenkins' case and where Jenkins' D.N.A., which by its nature was unchanging and perpetually available, was already available through the South Carolina D.N.A. database based on the statutory requirements in effect at the time of one of Jenkins' earlier convictions?

The Court of Appeals remanded Jenkins' case for an evidentiary hearing on the applicability of the inevitable discovery doctrine. In doing so, the Court of Appeals determined the existing record was insufficient to establish Jenkins' D.N.A. would inevitably have been discovered. To the contrary, the evidence and testimony presented during trial established by a preponderance of the evidence that the law enforcement officers in Jenkins' case inevitably would have obtained a sample of his D.N.A. regardless of any improper search because the officers had probable cause to obtain a search warrant for that evidence and were actively seeking such a warrant prior to the improper search that was conducted. Furthermore, based on the unchanging and perpetual nature of D.N.A. evidence along with the fact Jenkins' D.N.A. was already available to the investigating officers through the South Carolina D.N.A. database, the officers inevitably would have and will obtain a sample of Jenkins' D.N.A. regardless of the improper search. For those reasons, the Court of Appeals erred in concluding the record was insufficient to establish Jenkins' D.N.A. would inevitably have been discovered. Accordingly, the petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Jenkins' conviction should be affirmed.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. Any evidence seized as the result of an unreasonable search and seizure typically must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). However, the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule. Nix v. Williams, 467 U.S. 431, 444 (1984). Pursuant to that doctrine, if the prosecution can establish by a preponderance of the evidence that information or evidence would inevitably have been discovered by lawful means, then the discovered evidence, even if obtained by unlawful means, should not be excluded during trial. Id. “Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” Id. at 446. Thus, while the exclusionary rule is designed to ensure the prosecution will not be placed in a better position than it would have been without an illegal search or some police misconduct, the inevitable discovery doctrine ensures the prosecution is not placed in a worse position simply because of some earlier police error or misconduct. Id. at 443.

In the case sub judice, the evidence and testimony presented during trial established by a preponderance of the evidence that Jenkins’ D.N.A. would inevitably have been discovered even if the defective search warrant had not been issued due to the fact the investigating officers had probable cause to obtain a search warrant **and** were actively seeking such a warrant prior to the improper search undertaken in Jenkins’ case. Furthermore, Jenkins’ D.N.A. inevitably would have been discovered based on the nature of D.N.A. evidence and based on the fact the evidence was already available to the officers due to statutory requirements in effect at the time of one of Jenkins’ earlier convictions requiring Jenkins’ D.N.A. to be collected and stored in the South Carolina

D.N.A. database before Jenkins could be released from incarceration. Therefore, the Court of Appeals erred in finding a remand for an evidentiary hearing was necessary to establish Jenkins' D.N.A. would inevitably have been discovered.

Unquestionably, in Jenkins' case, the law enforcement officers that investigated the sexual assault had probable cause to procure a search warrant to obtain a sample of Jenkins' D.N.A. after Victim positively identified Jenkins as the person who sexually assaulted her and bodily fluids were recovered from Victim's body during a sexual assault examination. See, e.g., Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992) ("Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise."); In re Care and Treatment of Brown v. State, 372 S.C. 611, 619-620, 643 S.E.2d 118, 122 (Ct. App. 2007) (instructing probable cause only requires that the facts available to an officer would warrant a man of reasonable caution in the belief that an offense has been committed and that the accused committed it). Additionally, after the officers developed a probable cause basis to obtain a sample of Jenkins' D.N.A., an officer actively attempted to procure a search warrant for Jenkins' D.N.A. and was able to obtain one even though it later turned out to be defective based on the officer's failure to include all known and available information in the warrant affidavit.

Although the isolated fact that the law enforcement officers had a probable cause basis to obtain a search warrant was not alone sufficient to establish Jenkins' D.N.A. would inevitably have been discovered, the officers in Jenkins' case were also actively seeking a search warrant prior to the improper search in which Jenkins' D.N.A. was obtained. See United States v. Souza, 223 F.3d 1197, 1203 (10th Cir. 2000) ("While the

inevitable discovery exception does not apply in situations where the government's only argument is that it had probable cause for the search, the doctrine may apply where, in addition to the existence of probable cause, the police had taken steps in an attempt to obtain a search warrant.” (footnotes omitted)). Critically, had the magistrate judge found the search warrant affidavit to be insufficient because it did not identify the source or basis of the information contained within it, Detective Antonio logically and inevitably would have provided that information to the magistrate judge as she was fully aware of the facts supporting probable cause at the time the warrant was issued since she investigated the case, spoke with Victim, and was present when Victim positively identified Jenkins as her attacker. Cf. Nix, 467 U.S. at 449-450 (concluding the search party would inevitably have resumed the search and discovered the victim’s body if Williams had not earlier led police to the location of the victim’s body). Thus, the fact that law enforcement officers had probable cause to obtain a warrant **and** were actively seeking a warrant affirmatively established by a preponderance of the evidence that the officers would inevitably have obtained a search warrant had the defective warrant not been issued and absent the improper search that followed. See United States v. Allen, 159 F.3d 832, 841 (4th Cir. 1998) (“The [inevitable discovery] doctrine may even apply where the subsequent search that inevitably would have uncovered the disputed evidence required a warrant and the police had probable cause to obtain this warrant prior to the unlawful search but failed to do so, *if* the government produces evidence that the police would have obtained the necessary warrant absent the illegal search. Such evidence might include proof that, based on independent evidence available at the time of the illegal search, the police obtained and executed a valid warrant subsequent to that

unlawful search, **or took steps to obtain a warrant prior to the unlawful search.**” (italics in original, emphasis added, and citations omitted)).

Notably, in United States v. Allen, a case relied upon by the Court of Appeals in its analysis, the Fourth Circuit Court of Appeals rejected the application of the inevitable discovery doctrine because the record affirmatively showed the officers in that case **were not seeking and would not have obtained** a warrant absent the illegal search. See Id. at 843 (“Thus, not only does the government’s case lack concrete evidence that the officers would have obtained a warrant, the testimony of the record affirmatively supports the conclusion that they would *not* have done so.” (italics in original)). However, the situation in Jenkins’ case is far different from the circumstance of Allen’s case. Significantly, unlike the officers in Allen, an officer involved in Jenkins’ case unquestionably did seek a warrant **before** the improper search, which clearly demonstrated the officer’s intent to obtain a warrant for Jenkins’ D.N.A. sample. Therefore, absent the issuance of the defective warrant and the ensuing improper search, the officer’s actions demonstrated law enforcement personnel were already taking steps to obtain a warrant for and would inevitably have obtained a warrant for a sample of Jenkins’ D.N.A. had the defective warrant not been issued and the improper search not occurred.

Furthermore, supporting the fact that the officers had the means to obtain a warrant and were taking the steps to do so prior to the issuance of the defective search warrant, the nature of the evidence sought and obtained in Jenkins’ case distinguishes it from other cases where evidence is illegally obtained through the execution of a defective warrant. In Jenkins’ case, the evidence obtained was genetic evidence that could not and cannot be changed, concealed, or altered no matter how much time elapses. Instead,

unlike something such as an individual's blood alcohol concentration, an individual's D.N.A. remains static and perpetually available. Therefore, based on the unique characteristics of genetic evidence, the officers could still have obtained Jenkins' D.N.A. at any time after the search was undertaken pursuant to the defective warrant regardless of any defects with that warrant. See, e.g., State v. Simmons, 384 S.C. 145, 175, 682 S.E.2d 19, 35 (Ct. App. 2009) (finding the trial judge properly required Simmons to provide a second palm print during a pre-trial hearing where the first palm print was ruled inadmissible but probable cause existed to justify the issuance of an order requiring Simmons to allow another palm print to be taken).

Unlike physical evidence recovered from the scene of a crime, which cannot simply be put back into its place and then rediscovered in another search if the initial search warrant used to uncover it is later declared to be defective, D.N.A. evidence remains the same before, during, and after an illegal search. Accordingly, in Jenkins' case, Jenkins' D.N.A. remained available after the improper search took place and currently remains available should the State need to obtain another sample prior to a new trial if one were to become necessary. See Nix, 467 U.S. at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense."). Therefore, application of the exclusionary rule to Jenkins' case does not further the rule's deterrent rationale and serves no practical effect based on the specific circumstances of his case coupled with the fact that the D.N.A. evidence used in his case would inevitably have been discovered and, if necessary, **will** inevitably be discovered regardless of the outcome of his appeal or any further

proceedings on remand. See, e.g., Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005) (“In this case, the police had initiated an investigation of Fitzpatrick prior to requesting a blood sample. The record reveals that the police considered Fitzpatrick a suspect prior to requesting a blood sample from him based on evidence that Fitzpatrick was the last person to be seen with Romines alive leaving Howard’s house at approximately midnight – three hours before she was found. Based on this evidence, requesting a blood sample from Fitzpatrick or obtaining it through a warrant would have been a normal investigative measure that would have occurred regardless of any police impropriety. Therefore, even if Fitzpatrick’s consent to the taking of his blood was involuntary, the error is harmless because the police had probable cause for a warrant requiring a blood sample, and the blood sample would have been inevitably obtained.”); In re Welfare of J.W.K., 583 N.W.2d 752, 757 (Minn. 1998) (applying the inevitable discovery doctrine to preclude the suppression of evidence under the exclusionary rule after determining the defendant’s blood sample would inevitably have been obtained for comparison purposes regardless of any illegal police conduct because “the DNA profile present in one’s blood stays the same from day to day”).

Furthermore, not only would Jenkins’ D.N.A. sample inevitably have been discovered under the circumstances based on the nature of D.N.A. evidence and the steps already undertaken by the law enforcement officers in Jenkins’ case, Jenkins’ D.N.A. sample was already available to those officers through other means independent of a search warrant or court order. Significantly, prior to sexually assaulting Victim, Jenkins was previously convicted of assault and battery of a high and aggravated nature in 2001, and he received a ten-year sentence for that conviction. (R. p. 139). At the time of Jenkins’ 2001 conviction, Jenkins was required to provide a D.N.A. sample for inclusion

in the State D.N.A. database upon his intake to prison. See S.C. Code Ann. § 23-3-620(A)(1)(b) (Supp. 2000) (requiring defendants convicted of assault and battery of a high and aggravated nature on or after July 1, 2000, to provide “a sample from which DNA may be obtained for inclusion in the State DNA Database”); S.C. Code Ann. § 23-3-620(G) (Supp. 2000) (“A person required to provide a sample pursuant to this section may be required to provide another sample if the original sample is lost, damaged, contaminated, or unusable for examination.”); see also S.C. Code Ann. § 23-3-700 (Supp. 2000) (requiring law enforcement to begin collecting the required samples for the D.N.A. database no later than July 30, 2000). Accordingly, pursuant to the statutory requirements in place at the time of Jenkins’ 2001 conviction, Jenkins’ D.N.A. sample was already included in and available through the South Carolina D.N.A. database prior to his arrest for sexually assaulting Victim in this case. Because Jenkins’ D.N.A. sample was already a part of the D.N.A. database prior to his arrest for sexually assaulting Victim, the law enforcement officers investigating Jenkins’ case would logically and inevitably have discovered that Jenkins’ D.N.A. sample matched the sample collected from Victim’s body even if the officers had not discovered the match through the sample obtained pursuant to the defective warrant. See, e.g., Haynes v. State, 354 Ark. 514, 527, 127 S.W.3d 456, 463-464 (Ark. 2003) (“Here, the State met its burden to show Haynes’s DNA evidence would inevitably have been discovered. The State was required, by statute, to obtain a DNA sample from Haynes before he was released from prison following his conviction and sentence for residential burglary, and there was testimony by Kermit Channell that, even in 1997, blood samples had been taken from *all* prisoners. The evidence of Haynes’s DNA match would have been discovered upon Haynes’s release from prison following his residential burglary conviction; therefore, the Crime

Lab would have obtained its ‘hit’ on Haynes's DNA at that time, which was well before Haynes was brought to trial on the rape charge on May 9, 2003. Once again, the State eventually would have come legally into possession of his DNA sample, and Haynes, who has not rebutted the presumption discussed above, has not demonstrated how he was prejudiced by the trial court's denial of his suppression motion.” (italics in original)); State v. Notti, 316 Mont. 345, 352, 71 P.3d 1233, 1239 (Mont. 2003) (“Section 44-6-102(2), MCA, provides that: ‘[t]he DNA identification index must include: (a) DNA records for an individual convicted of a felony offense’ Thus, Notti’s DNA profile would have been placed on the State’s DNA Identification Index and submitted to CODIS, which would have inevitably led to the discovery of a match by either a CODIS computer check or when another Crime Lab employee compared profiles in the ‘forensic unknown’ database the State’s DNA Identification Index.”).

The evidence and testimony presented during trial regarding the officers’ actions and the type of evidence sought in Jenkins’ case coupled with the fact Jenkins’ D.N.A. was available through the South Carolina D.N.A. database established by a preponderance of the evidence that Jenkins’ D.N.A. would inevitably have been discovered regardless of whether any improper search had occurred. Under those circumstances, there is no rational reason for Jenkins’ evidence to be excluded from trial, and no additional evidence is necessary to establish the inevitability of the discovery of Jenkins’ D.N.A. See Nix, 467 U.S. at 444 (“If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. **Anything less would reject logic, experience, and common sense.**” (emphasis added)). For the foregoing reasons, the Court of Appeals

erred in concluding a remand for further findings on the applicability of the inevitable discovery doctrine was necessary or required in Jenkins' case. Accordingly, the petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Jenkins' conviction should be affirmed.

II.

Did the Court of Appeals err in finding any error in the admission of the D.N.A. evidence was not harmless where the other evidence presented during trial, including Victim's unwavering testimony identifying Jenkins as the person who sexually assaulted her and forensic evidence conclusively showing Jenkins' fingerprints were discovered in Victim's home after the crime, overwhelmingly established Jenkins' guilt for the indicted offense?

The Court of Appeals concluded the improper admission of the D.N.A. evidence was not harmless. To the contrary, the evidence and testimony presented during Jenkins' trial other than the D.N.A. evidence overwhelmingly established Jenkins' guilt for the indicted offense and rendered any error in the admission of that evidence harmless. Most significantly, the evidence and testimony presented during trial included Victim's consistent and unwavering identification of Jenkins as the person who sexually assaulted her, and that testimony was corroborated through photographs and testimony confirming Victim's numerous injuries, testimony regarding the discovery of semen in a forensic sexual assault examination performed on Victim shortly after the crime, and evidence and testimony regarding the discovery of bloodstains, ripped underwear, and Jenkins' fingerprints in Victim's home. In light of the other overwhelming evidence of guilt and the fact the challenged D.N.A. evidence did not impact the key issue in dispute in Jenkins' case, which was Victim's credibility, any error in the admission of the D.N.A. evidence was entirely harmless, and the Court of Appeals erred in concluding otherwise. Therefore, the petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Jenkins' conviction should be affirmed.

After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis.

Next we must determine whether the error was harmless.”). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In the case at bar, the testimony and evidence presented during trial other than the D.N.A. evidence overwhelmingly established Jenkins’ guilt for the indicted offense and rendered any error in the admission of the D.N.A. evidence entirely harmless. Initially and most significantly, Victim unconditionally identified Jenkins as the person who sexually assaulted her to law enforcement before Jenkins was apprehended, during a show-up identification procedure shortly after the crime occurred, and during trial without any hesitation whatsoever. Thus, the testimony and evidence presented to the jury established Victim consistently and unwaveringly identified Jenkins as the person who sexually assaulted her from the moment the crime occurred and continuing through trial. Corroborating Victim’s testimony, photographs documenting Victim’s injuries to her head and body were presented to the jury, and the investigating officers who spoke

with Victim after the sexual assault testified Victim was “roughed up,” hysterical, shaking, crying, and bleeding after the crime. Consistent with the officers’ testimony and the photographic evidence, the nurse who examined Victim after the crime testified that Victim’s mouth was cut and Victim’s face and body were swollen, bloody, and bruised. The nurse further confirmed semen was discovered in Victim’s body and Victim’s injuries were consistent with a sexual assault. Additionally, the testimony presented during trial established Victim’s ripped underwear was discovered on the floor of her home shortly after the crime and bloodstains were discovered on her sofa. Furthermore, Jenkins was further linked to the crime through the discovery of his fingerprints inside of Victim’s home. Collectively, this evidence overwhelmingly established Jenkins’ guilt for the sexual assault even without consideration of the D.N.A. evidence obtained as a result of the improper search. Cf. State v. Allen, 269 S.C. 233, 242, 237 S.E.2d 64, 68 (1977) (“In any event, however, the overwhelming proof of guilt rendered harmless the admission of the evidence in question. The positive identification of Allen by the victims, the possession of the stolen gun by appellants, the wig obtained pursuant to the search warrant and admitted without objection, and the walkie-talkie admitted without objection rendered any verdict other than guilty most unlikely.”).

In reaching a conclusion to the contrary, the Court of Appeals concluded: “[R]emoving 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, and that the sex was not consensual.” Jenkins, 398 S.C. at 226, 727 S.E.2d at 767 (footnotes omitted). Based on Victim’s injuries and the discovery of semen inside of her body, it was indisputable she was involved in a violent sexual episode with another person. Victim’s testimony and the discovery of Jenkins’ fingerprints in Victim’s home linked

Jenkins to the crime. Thus, the key dispute in Jenkins' case involved the credibility of Victim's testimony on the non-consensual nature of the sexual intercourse. However, contrary to the Court of Appeals' conclusions, the D.N.A. evidence had no bearing whatsoever on whether Victim's testimony regarding the non-consensual nature of the sex was or was not credible. Instead, the D.N.A. evidence merely served as further, cumulative evidence that Jenkins was involved in the crime, which had previously been established through Victim's testimony and the physical evidence recovered from Victim's home conclusively linking Jenkins to the crime.¹ See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Accordingly, since the case hinged on Victim's credibility and the D.N.A. evidence did not impact that credibility in any way, any error in the admission of the D.N.A. evidence was entirely harmless in light of the other overwhelming evidence of Jenkins' guilt.

In light of the other overwhelming evidence of guilt and the fact the challenged D.N.A. evidence did not impact the key issue in dispute in Jenkins' case, any error in the

¹ In finding the error in the admission of the D.N.A. not to be harmless, the Court of Appeals relied heavily upon this Court's decision in State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011). Jenkins, 398 S.C. at 226-227, 727 S.E.2d at 767. However, the Court of Appeals overlooked the key and substantial differences between Jenkins' case and Jennings' case. In Jennings, hearsay evidence was admitted that improperly bolstered the juvenile victims' claims of sexual abuse. Id., 394 S.C. at 479, 716 S.E.2d at 93. After determining the evidence was improperly admitted, this Court found the evidence could not be harmless because **no** physical evidence of any kind was presented during trial and because the only evidence of Jennings' guilt was the victims' testimony coupled with the improperly-admitted bolstering evidence. Id. at 480, 716 S.E.2d at 94-95. Significantly, unlike Jennings' case, physical evidence **was** presented in Jenkins' case conclusively establishing Victim was sexually assaulted. The officers and medical personnel who interacted with the victim after the crime observed numerous visible injuries to Victim's face and body, and semen was discovered inside of Victim's body during a sexual assault examination after the crime. Furthermore, Jenkins was linked to the crime through Victim's testimony and, critically, through the discovery of his fingerprints in Victim's home. Therefore, unlike Jennings, Jenkins' case did not involve a situation where the improperly-admitted evidence bolstered the only otherwise-unsupported testimony establishing guilt. Instead, Victim's testimony in Jenkins' case was corroborated by significant physical evidence linking Jenkins to the crime and verifying the details of Victim's testimony. Based on that key distinction from the circumstances of Jennings, the admission of the D.N.A. evidence in Jenkins' case was entirely harmless.

admission of the D.N.A. evidence was entirely harmless. See State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) (“Given the abundant evidence of Tench’s guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt.”). Therefore, the Court of Appeals erred in reaching a conflicting conclusion. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant’s guilt). Accordingly, the petition for a writ of certiorari should be granted, the decision of the Court of Appeals should be reversed, and Jenkins’ conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted. In requesting this relief, counsel for Petitioner certifies a petition for rehearing was made and finally ruled upon by the Court of Appeals.

Respectfully submitted,


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ATTORNEYS FOR PETITIONER

September 7, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-212544

THE STATE,

Petitioner,

vs.

DANIEL J. JENKINS,


Respondent.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 7th day of September, 2012.



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September 7, 2012

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SEP 07 2012

S.C. Supreme Court

State v. Daniel J. Jenkins – Appellate Case No. 2012-212544

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Petition for Writ of Certiorari and Appendix, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/erd
Enclosures

cc: ~~(Honorable Daniel E. Shearouse (original and six copies enclosed))~~
Honorable Jenny A. Kitchings
Victim Services