STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

APPELLATE CASE NO 2016-000844

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Rickey Santoine Henley was arrested for first degree burglary and larceny on February 23, 2012, the day after he was questioned by police about the incident. Supp. R.1. On July 27, 2012, the Abbeville County Grand Jury returned indictments against Henley for the same offenses. R. 695.

On April 8-9, 2015, Henley proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. Henley was represented by Patricia Bolen and Yasha Patel, and the state was represented by assistant solicitors Demetrios Andrews and Yates Brown. R. 1; R. 175. Following an *Allen*[1] charge, the jury returned a verdict of **not guilty on larceny.** However, the jury **hung on the count of first degree burglary**, such that Judge McIntosh declared a mistrial. R. 336 – 350.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Henley faced re-trial for the offense of first degree burglary before the Honorable Eugene C. Griffith, Jr. and a jury. R. 363, R. 384 – 402. The jury returned a verdict of guilty, and Judge Griffith sentenced Henley to twenty-four years incarceration. R. 664 – 674.

This appeal follows.

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[1] Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

I.

The trial court erred in denying Appellant's motion to quash the indictment based on Double Jeopardy where the trial court erred as a matter of law in failing to apply the proper test under *Yeager* and where Appellant's prior acquittal of larceny necessarily decided that Appellant was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Appellant's identity as the intruder or intent to steal.

Relevant Facts

Henley's First Trial

At Henley's first trial for first-degree burglary and larceny the solicitor averred in his opening statement that Moss' door was kicked down and "[s]he had personal property taken." 104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

> The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**
>
> As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

Ricky Culbreth testified that he was driving by the Moss' home at approximately 11:30 a.m. on February 15, 2012, when he noticed a silver car that he did not recognize backed into their carport with its backdoor open. He saw a black man wearing a do-rag ran from the front of the house to the side of the house. R. 117, l. 6 – 119, l. 4. Culbreth did a U-turn and pointed at

the man, who was standing in the doorway of the house. Culbreth said that it looked like the man threw something on the ground and then got into his car. The man pulled up next to Culbreth's white truck for a few seconds and asked if he needed any "yard help." R. 119, l. 12 – 120, l. 17; R. 130, ll. 22-24; R. 133, ll. 12-20. When Culbreth responded "no," the man turned left towards Anderson, but turned around and drove back past the house. R. 120, ll. 17-22. Culbreth walked to the house and called 911 at 11:39 a.m. He did not think that the call went through, but the dispatcher called him back at 11:43 a.m., at which time Culbreth reported the incident. R. 114, l. 16 – 116, l. 3; R. 120, l. 22 – 121, l. 1; R. 124, l. 16 – 125, l. 24.

Police arrived and found that side door to the Moss' home was open but there were no signs that anything had been tampered with inside of the home. The sole item missing was Ms. Moss' Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll. 17-19. Investigator Patrick Thompson photographed a boot print in the carpet inside of the home approximately one foot from where the laptop was taken. R. 196, l. 21 – 197, l. 6. He also photographed and allegedly collected a Newport cigarette butt from the ground just outside of the doorway to the Moss' home. R. 194, l. 15 – 195, l. 22; R. 197, l. 7 – 200, l. 8; Second Trial State's Exs. 11-12 (photos of cigarette butt). Ms. Moss said that neither she nor her husband were smokers. R. 138, ll. 16-17. Culbreth provided the police with a license plate number of HSN454 for the Pontiac Parisienne car that he saw the man driving, which he saw through his rearview mirror. R. 121, ll. 9-22; R. 207, l. 24 – 208, l. 2. When the police could not find a car with that description and plate number, they obtained a list of other possible license plate numbers and makes of cars. Appellant Henley was on that list because he owned a Pontiac

Bonneville with the license plate number HSM455. R. 200, l. 16 – 201, l. 9; R. 207, l. 1 – 208, l. 21.

On February 22, 2012, Thompson went to speak with Henley at his home. According to Thompson, Henley responded affirmatively that he had driven on Hwy 28 near Abbeville the week prior and spoken with a man in a white truck. He said that Henley explained that he had stopped to use the bathroom but denied going into any house. Thompson also claimed that Henley admitted to smoking Newport cigarettes and was wearing boots with a similar pattern as the print found in the Moss' home. R. 208, l. 12 – 209, l. 7; R. 212, l. 21 – 216, l. 19; R. 224, l. 21 – 230, l. 17. A photo array including Henley was shown to Culbreth, but he was only able to narrow it down to two people. R. 122, ll. 3-17; R. 209, l. 19 – 211, l. 15. The police lost the original photo array shown to Culbreth such that only a poor quality black and white copy was available at the first trial. R. 7, ll. 14-23; R. 222, l. 4 – 223, l. 4.

In addition to the lost photo array, the cigarette butt allegedly collected by law enforcement from the scene and accompanying chain of custody log were also lost and unavailable for Henley's trial. R. 219, l. 3 – 220, l. 5. Nonetheless, the judge admitted the state's DNA testing results, which found a match between the DNA on the cigarette provided to SLED and the known standard collected from Henley. R. 55 – 86; R. 160, l. 16 – 172, l. 6. Henley's ex-girlfriend, Jolene Gray, with whom he shared an apartment at the time of the incident, said that five police officers came to her house a second time when Henley was not there. They were walking around and picking something up off of the ground. R. 248, l. 14 – 249, l. 18; R. 259, ll. 5 – 260, l. 23; R. 261, ll. 14-25.

As far as his whereabouts on the date of the offense, Ms. Gray recalled that Henley left their apartment in Anderson, South Carolina between 8:00 a.m. and 9:00 a.m. to go to his

mother's house in Beech Island, South Carolina. She confirmed that Henley owned boots that she had gotten him for Valentine's Day and that he smoked Newport cigarettes. R. 249, l. 19 – 252, l. 23; R. 257, l. 7 – 259, l. 4; R. 260, l. 24 – 261, l. 7. Henley's mother, Ella Johnson, said that on February 15, 2015, Henley arrived at her home at approximately 10:00 a.m. with leftovers from his dinner with Ms. Gray. They went to Moe's Convenience Store at approximately 2:00 p.m., where Henley bought a beer. R. 262, l. 22 – 274, l. 9.

In his opening on the law at closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

> Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and entering that dwelling. In this case, he's charged with larceny.** Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – 288, l. 11 (emphasis added). In the latter portion of his closing, noted that a cigarette butt was found "on that side door, going in the side door, the same door that was kicked open and Mr. Henley went walking through **to go get that laptop**." R. 308, ll. 6-12. He argued that Henley made a stop on his way to see his mother Beech Island and "swung by Ms. Moss's house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**" R. 309, ll. 13-17 (emphasis added). The solicitor sarcastically said that the boot print was "[m]iraculously close to that pedestal where that laptop was taken from that day." R. 312, ll. 15-16. Ultimately, the jury acquitted Henley of larceny but hung on the count of first-degree burglary. R. 343, 17 – 349, l. 11.

Importantly, the defense made no challenge to whether a laptop was actually taken from the Moss' home or its value. Rather, the defense focused on alibi, mistaken identity and the unreliability of the DNA evidence. Counsel argued that the state's evidence regarding identity – namely the eyewitness testimony, DNA evidence, and alleged "confession" – were all flawed and failed to prove Henley's guilt beyond a reasonable doubt. R. 290, l. 3 – 306, l. 3. She argued: "[T]he person he [Culbreth] saw at Ann Moss' house was not Rickey Henley." R. 295, l. 15. Her argument regarding the state's failure to recover a laptop was not a suggestion that none was taken. Counsel pointed to that as another fact illustrating the police's shoddy investigation. R. 299, l. 10 – 300, l. 18.

Notably, the trial judge charged the jury both on alibi and identification. R. 325, l. 23 – 327, l. 2; R. 330, ll. 6-18. Regarding larceny, he charged:

> The State must prove beyond a reasonable doubt that the Defendant took and carried away the property of another against the will or without the consent of the other person. The slightest removal of the property or the complete possession of the property even if for an instance by the Defendant is enough to show a taking and carrying away of the property. The State must also prove beyond a reasonable doubt that the Defendant intended to permanently deprive the owner of the property.

R. 329, l. 21 – 330, l. 5.

Double Jeopardy Motion and Retrial

The defense filed a Motion to Quash the Indictment Based on Double Jeopardy pursuant to Ashe v. Swanson, 397 U.S. 436 (1970), and Yeager v. United States, 557 U.S. 110 (2009) R. 352; *see* R. 384, l. 22 – 400, l. 22. Counsel argued that the provision against double jeopardy precluded prosecution in Henley's case on the same conduct for which he was tried in 2015. R. 384, ll. 12-17. Counsel argued that in light of its holding that a hung count was a non-event not to be considered in determining the preclusive effect of the acquitted count, the Yeager Court

instructed lower courts to look at the acquitted count to determine what facts were decided by the jury. R. 384, l. 12 – 389, l. 8. In making such a determination the lower court must "examine the record of a prior proceeding . . . and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Yeager, 557 U.S. at 119-20; R. 399, ll. 6-17; R. 400, ll. 18-21.

Though counsel recognized that the state is not required that the intended crime was actually committed, she argued that the acquittal on larceny necessarily decided that he did not take the laptop. R. 391, l. 8 – 392, l. 21. She noted that the facts in support of probable cause on the burglary warrant included:

> That on February 15, 2012, in the county of Abbeville, one Rickey Santoine Henley did enter a dwelling located at . . . Hwy 28 N in Abbeville County, SC, without consent and with intent to commit a crime therein. Once inside the defendant did take, steal and carry away a Dell laptop computer from said residence. The defendant has prior Burglary convictions dated 12/07/2006 and 3/15/2002. Information from affiant and Sheriff's Dept. investigation, report 12-2-55.

Supp. R. 1. She further noted that "[t]he State's theory as presented in both of their opening and closing, as well as by their witness testimony, . . . was that Mr. Henley went into this home and took a Dell laptop computer. She submitted that there was no other evidence that any other crime was intended to have been committed inside the home other than theft of the laptop. R. 386, ll. 6-9; R. 390, l. 18 – 391, l. 8.

In response, the solicitor noted that the indictment on burglary made no reference to larceny. However, he admitted that the acquittal on larceny "puts us in a much tougher spot with regard to proving the burglary," understanding that the state could not mention the laptop at the retrial like they did in their arguments at the first trial. R. 392, l. 23 – 393, l. 23. He pointed the court to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), in support of the state's

position that it is merely required to prove that there was an intent to commit a crime in the dwelling, not that the underlying crime actually occurred. R. 394, ll. 4-21. He further referenced State ex rel. Taylor v. Janes, 693 S.E.2d 82 (W.Va. 2010), wherein the defendant was acquitted of conspiracy but the state was allowed to retry him on the hung count of murder. R. 394, l. 21 – 395, l. 7. The solicitor submitted that their proof of intent to commit a crime therein would be in the form of testimony that Henley's case was backed up under the Moss' garage with the back door open and was startled by the witness who saw him in the house – probably caught right at the beginning of his burglary and didn't have time to get into that much. R. 395, l. 23 – 396, l. 15.

In response, defense counsel distinguished the West Virginia case by noting that there was no overlapping fact necessary to prove murder and conspiracy to commit murder. However, she argued that in the present case Henley was found not guilty of the only crime that the state could possibly try to prove that he committed therein. R. 396, l. 16 – 399, l. 6. Though counsel averred that review of the transcripts of the first trial was necessary to the court's finding, the trial judge did not take a copy of the transcript. R. 399, l. 6 – 400, l. 21. He ruled that counsel's argument was a directed verdict type argument, which she could renew at that stage. He found that the state has the "burden of proving with the intent to commit a crime" but that the acquittal of the larceny did not preclude them from presenting facts from which the jury could infer intent to commit a crime therein. R. 399, l. 18 – 400, l. 10. The trial judge said that he found the Peterson "on point." R. 402, ll. 1-23.

The second trial proceeded and Henley was convicted of first-degree burglary. R. 664, l. 14 – 666, l. 22. The state presented much of the same evidence as it did at the first trial, but successfully excluded Jolene Gray's testimony that officers returned to the apartment that she

shared with Henley and picked something up off the ground. See discussion *infra*, Issue III. In his closing argument at the second trial, the solicitor contended:

> The carport, the car backed in, the back door open, the door kicked in. Folks, I'll submit to you **his intent was to go in there and clean them out.** Just so happened, Mr. Culbreth came by at the right time and turned around and came back before Mr. Henley could start loading it up.

R. 640, ll. 16-19 (emphasis added); and

> He [Henley] left Anderson to go down to Beech Island, but he made a stop on the way. He made a stop at the Moss' house **to see what they had good in there.** They said the windows, you could see right in and **see what they had** in there and he stopped. **He thought he'd get a little treasure trove** as he went on down to Aiken.

R. 646, l. 20 – 647, l. 1 (emphasis added).

Discussion

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, offers protection to citizens from being subjected to double jeopardy for the same offense. U.S. Const. amend. V ("No person shall be... subject for the same offense to be twice put in jeopardy of life or limb..."); U.S. Const. amend. XIV . The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). In Ashe v. Swenson, 397 U.S. 436, 443 (1970), the United States Supreme Court found the previously civil concept of collateral estopped applicable to criminal cases, writing:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See also State v. Hewins, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014).

The Double Jeopardy Clause embodies two vitally important interests. Yeager v. United States, 557 U.S. 110, 117 (2009). The first is the "deeply ingrained" principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Id. at 117-18 (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). The second interest is the preservation of "the finality of judgments." Id. at 118 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).

In Ashe v. Swenson, 397 U.S. 436, 437 (1970), the defendant was accused of participating along with two or three man in the robbery of six men who were engaged in a poker game in the basement of one of the victims. The men fled in one of the victim's cars, which was discovered in a field. 397 U.S. at 437. Later that morning, three men were arrested by a state trooper while they were walking on a highway not far from where the abandoned car had been found. Id. Ashe was arrested by another officer some distance away. Id. Though charged with seven separate offenses for the armed robbery of each of the six poker players and the theft of the car, the state began its prosecution of Ashe by calling him to trial on the charge of robbing one of the victims, Donald Knight. Id. at 438. The Ashe Court described the evidence that an armed robbery occurred and that personal property was taken from Knight as "unassailable." Id. However, the state's evidence that Ashe was one of the robbers was weak, with varying accounts of whether there were three or four robbers and the only positive identification of Ashe limited to his "size, height, and his actions." Id. The defense did not question whether the holdup itself occurred or the victims' claims regarding their losses, instead focusing on the identification of Ashe. Id. The jury found Ashe "not guilty due to insufficient evidence." Id. at 439.

Six weeks later, the state called Ashe to trial again for the robbery of another participant in the poker game. 397 U.S. at 439. The trial court denied the petitioner's motion to dismiss based on his prior acquittal. Id. at 439. The state's evidence at the second trial was generally the same, except that they presented substantially stronger evidence on Ashe's identity. Id. at 439-40. Witnesses who were unable to identify Ashe at the first trial were much more specific in their descriptions and recollections. Id. "The State further refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." Id. The case went to the jury on instructions virtually identical to those given at the first trial. Id. This time the jury found the petitioner guilty, and he was sentenced to a 35-year term in the state penitentiary. Id.

In reversing Ashe's conviction under double jeopardy, the Court found that the question before them was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." 397 U.S. at 446. In finding that it could not, the Court noted that the following the acquittal for the robbery of Knight, the state could certainly not have brought him to trial again upon that charge because the jury determined that there was at least a reasonable doubt that the petitioner was one of the robbers. Id. The Court held: "The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." Id. Further, the state conceded that following Ashe's acquittal, "it treated the first trial as no more than a dry run for the second prosecution." Id. at 447. The Court found that the prosecutors "refine[ment] [of] his presentation in light of the turn of events at the first trial" was "precisely what the constitutional guarantee forbids." Id.

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the "fraud counts" and the "insider trader counts" – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557 U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that "the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution." Id. The Court of Appeals affirmed, though it concluded from the record that the jury must have found when it acquitted petitioner that he did not have any insider information that contradicted what was presented to the public. Id. at 116. While the intermediate appellate court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering, it was persuaded "that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts." Id. (emphasis in original). Considering "the hung counts along with the acquittals," the Court of

Appeals court found it "impossible to decide with any certainty what the jury necessarily determined." Id.

The Yeager Court noted a conflict between jurisdictions regarding whether a jury's failure to reach a verdict on some count should play any role in determining the preclusive affect of an acquittal. 557 U.S. at 116-17. In holding that the failure to return a verdict has no affect on such analysis, the Court noted the Double Jeopardy Clauses' interest in preserving the finalty of the jury's judgment. Id. at 117-18. The Court looked to the reasoning of Ashe that "the Double Jeopardy Clause precludes the Government from religitating any issue that was necessarily decided by a jury's acquittal in a prior trial." Id. at 119; but see State v. Easler, 327 S.C. 121, 134, 489 S.E.2d 617, 624–25 (1997) ("As to the double jeopardy issue, we affirm the Court of Appeals' holding that *Blockburger* is the only remaining test to determine a double jeopardy violation."). The Yeager Court wrote:

> **To decipher what a jury has necessarily decided, we held that courts should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."**

Id. at 119-20 (quoting Ashe, 397 U.S. at 444) (emphasis added).

Though the Yeager Court noted that Ashe involved an acquittal after trial on a single offense, it found that its reasoning was still controlling "because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." 557 U.S. at 120. The Court explained that a hung count is not a relevant part of the record of the prior proceeding because there is no way to determine what the hung count represents or why the jury hung. Id. at 121-22. Conversely, "[a] jury's verdict of acquittal represents the community's

collective judgment regarding all the evidence and arguments presented to it." Id. at 122. Thus, "[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable." Id. (internal quotations and citations omitted). In applying these principles to Yeager, the Court ruled that "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123. The Court remanded the case for further proceedings consistent with its opinion. Id. at 126.

Here, the trial judge erred in failing to apply the test set forth in Yeager to determine whether the State was collaterally estopped from reprosecuting Henley for first-degree burglary following his acquittal for larceny related to the same incident. He improperly likened defense counsel's argument to that of a motion for directed verdict. See R. 399, l. 18 – 400, l. 10. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of "manifest necessity" due a jury's inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather, the trial court must determine whether the interest in preserving the finality of the jury's judgment on the decided count(s) bars a retrial on the undecided count(s) because "the

jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts." Id.

As pointed out by defense counsel, in making this determination, the trial court's focus should have been on the evidence and arguments presented at the first trial. R. 399, ll. 6-17. Specifically, Yeager provides that the court should "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 557 U.S. at 119-20 (quoting Ashe, 397 U.S. at 444). The trial court's failure to conduct the requisite analysis is further illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

At retrial, the state was required to prove both the intruder's identity and his intent to commit a crime therein. S.C. CODE ANN. § 16-11-311(A)(2) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling*, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." (emphasis added)); see Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (finding no prejudice from failure to request alibi charge "[g]iven the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt"); see also Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (stating that an alibi charge places "emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime."). Much like Ashe, there was no dispute

at Henley's first trial that the Moss' home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from relitating Henley's identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley's "intent to commit a crime therein." Relatedly, the prior jury's finding that Henlery did not steal precluded the state's continuing theory that the criminal intent was to steal. As such, Henley's retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from religitating the issues that were necessarily decided by the jury's prior acquittal on larceny.

II.

The trial court erred in denying the defense's motion to admit evidence of Appellant's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.

Relevant Facts

At the close of the defense's case, defense counsel moved to admit the self-authenticating record of the indictment for larceny that reflected Henley's prior acquittal. R. 612, ll. 1-9; R. 691. The solicitor argued against its admission, stating that it would bring to the jury's attention that the case was tried before and that their role was decide to guilt or innocence on the burglary charge. He said that the jury would be invited to speculate on what happened at the prior hearing. R. 612, ll. 13-20.

Defense counsel responded that she was not seeking to admit anything other than the document and that any inference that there was a prior trial from its contents would not be prejudicial, as there are often separate trials for lower court charges and General Sessions charges. R. 612, l. 21 – 613, l. 2. She further argued that the acquittal was exculpatory and a permissible part of the constitutional right to present a defense to the state's attempt to prove that there was "an intent to commit a crime therein." R. 613, ll. 2-11. She noted that there was no reference on the document to the prior trial on the burglary charge. R. 613, ll. 11-18.

The solicitor argued that admission of the document would open the door "to talking about the missing evidence," presumably referring to evidence that a laptop was located on a bench through the window, that the boot print in the carpet was located within a foot of the bench, and that the laptop was missing from the house when the Mosses returned. He said: "Again, if they want to put that in, I mean, we'd agree that he's been acquitted of it. But the element of burglary is the intent to commit the crime." R. 613, ll. 19-23.

Ms. Bolen agreed that the state could call rebuttal witnesses, but reiterated that admission of the prior acquittal was a strategic decision on the part of the defense. R. 613, l. 24 – 614, l. 3. The solicitor said that he thought they had all agreed that "because of the prior acquittal that no one was going to say anything about the stolen property," but that their burden would be easier if they would now be able to talk about the missing property. R. 614, ll. 4-11. The trial judge responded:

> I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. To some extent it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge. And I'll tell you, it's a novel issue for me. I've never had this presented, so I commend y'all for coming up with this. But I've never thought about that. But I think my ruling would be under, I'm not sure which rule.

R. 614, ll. 12-22. The judge agreed with defense counsel that the document itself was self-authenticating, but noted that authentication is not the hurtle to admissibility. R. 614, l. 23 – 615, l. 5.

The solicitor interjected that he believed the applicable rule was Rule 401, SCRE, regarding relevance. He argued that the prior acquittal "does not help resolve an issue we're here for on the burglary" and would cause confusion and speculation. R. 615, ll. 6-12. Defense counsel responded that the evidence was probative, arguing:

> He was found not guilty of the crime that the State had previously alleged was committed inside the home . . . . We'd be seeking to admit it to try to defend against the element of burglary that requires the State to prove intent to commit a crime therein. We'd be using it to show no crime was committed inside the home and that they can't prove any intent to commit a crime inside the home.

R. 615, l. 13 – 616, l. 12. Nevertheless, the trial judge denied the request for admission of the documentation of the prior acquittal. R. 616, ll. 13-15.

Discussion

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. Rule 403, SCRE, provides: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added).

Though far from a recent case, South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston's handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant's prior "acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence**." Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result of a defect in the original indictment or the absence of witnesses. Id. The Court wrote: "It does not follow, that because a man is acquitted, he is innocent: the legal

consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter." *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly here, the trial judge's denial of the motion to quash the indictment under Double Jeopardy did not render the prior acquittal on larceny irrelevant to the current proceedings. Rather, the defense properly sought its admission to attack the state's theory that Henley had any intent to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying "I'll submit to you his intent was to go in there and clean them out;" that Henley stopped "to see what they had good in there;" and that "[h]e thought he'd get a little treasure trove." R. 640, ll. 16-19; R. 646, l. 20 – 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor's argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As this Court has noted, "[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

III.

The trial court erred in limiting the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had opportunity to obtain a cigarette smoked by Appellant from outside of his home.

Relevant Facts

At Henley's first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Henley. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll. 14-25. In the closing argument at the first trial, defense counsel argued:

> Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Counsel represented that Gray was Henley's girlfriend at the time of the incident but that their investigator had been unable to locate her in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – 462, l. 9. In response to the trial judge's question regarding how

much of the testimony they wanted to present, defense counsel said: "All of it. There's not much testimony." R. 462, ll. 10-13.

The solicitor suggested that they would have someone come in to read the witness' portion of the testimony and the attorneys would read their respective portions of the examinations. R. 462, ll. 15-18. The trial judge agreed and said that he would instruct the jury that the person was "going to read some prior testimony which was taken under oath; that witness is not available." R. 462, ll. 19-25.

Defense counsel said that she was having a similar unavailability problem with Officer Belcher, who was under subpoena but traveling out of state the next day. R. 463, ll. 2-5. Again, the solicitor said that he had no problem with the admission of the testimony from the prior trial. R. 463, ll. 6-7. The trial judge said that they would proceed in the same fashion and with the same instruction with respect to Belcher's testimony. R. 463, ll. 8-18.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, following its presentation of testimony from the DNA analyst and the defense's motion for directed verdict, the solicitor again represented that he no objection to the reading of Officer Belcher's testimony from the prior trial. R. 593, l. 25 – 594, l. 20. However, with respect to Jolene Gray, he said:

> Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – 595, l. 8. (emphasis added). The Judge asked defense counsel to explain why the redirect testimony was necessary. R. 595, ll. 11-20. The following exchange occurred:

> DEFENSE COUNSEL PATEL: Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in. And, Your Honor, we, our office being multiple--
>
> THE COURT: Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating.
>
> DEFENSE COUNSEL BOLEN: She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.
>
> MR. BROWN: And, Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to Mr. Henley, and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.
>
> THE COURT: All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you Or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those Lines in your closing argument and you can summarize it
> had they gone and found something in that search, certainly it would be here. It's not here.
>
> MS. PATEL: Yes, Your Honor.

THE COURT: By me, the recross or redirect from you does not prohibit you from arguing what you choose.

MS. PATEL: Yes, Your Honor.

THE COURT: All right. So let's, we'll limit it to tell your witness, well, once you stop, she'll quit reading.

MR. BROWN: Yes, sir. I'll stop reading.

R. 595, l. 21 – 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – 600, l. 1. 13; R. 676.

Discussion

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding . . ., if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(b)(1), SCRE. One of the situations in which a declarant is deemed "unavailable" for purposes of the Rule is when the declarant "is absent from the hearing ***and the proponent of a statement has been unable to procure the declarant's attendance*** . . . by process or other reasonable means." Rule 804(a)(5), SCRE (emphasis added).

In the present case, defense counsel represented that their investigator had been able to locate Jolene Gray in order to serve a subpoena, but that if the solicitor could find her and procure her attendance, she was fine with that. R. 461, l. 12 – 102, l. 6. Though the solicitor was able to contact Gray, the relevant inquiry is whether the proponent of the evidence has been able to procure the declarant's attendance by process of other reasonable means. The solicitor confirmed that Gray had not been served a subpoena. R. 594, l. 20 – 595, l. 1; Rule 804(a)(5),

SCRE. While the solicitor again represented that he did not oppose the reading of the testimony, he then sought to qualify that by arguing that he should be permitted to read only a portion of his redirect examination, consequently excluding the redirect testimony. R. 595, ll. 1-8. Notably, the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial. See R. 261, ll. 14-25.

To the extent that the solicitor was dissatisfied in his cross-examination of Gray at the first trial, it is important to note that "[t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." State v. Nance, 393 S.C. 289, 294, 712 S.E.2d 446, 449 (2011) (internal citations and quotations omitted) (emphasis in original). However, the real reason for the state's request is apparent from the record – he wanted to exclude the defense's evidence regarding law enforcement's opportunity to obtain a cigarette butt with Henley's DNA from his yard. This testimony was essentially to the defense's attack on the reliability of the DNA analysis on the cigarette butt, which as discussed more fully in Issue IV, was lost along with the Sheriff's Department's chain of custody log. Additionally, Gray's testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – 596, l. 10.

The solicitor's attempt to exclude the evidence that he rightly perceived as detrimental to the state's case at the first trial raises double jeopardy concerns, as the United States Supreme Court ruled that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found

guilty." Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). It is reminiscent of Ashe v. Swenson, 397 U.S. 436, 440 (1970), where the state "refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." There, the Court noted the state's concession in its brief that "[n]o doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." 397 U.S. at 447. The Court held that "this is precisely what the constitutional guarantee [against double jeopardy] forbids." Id.

In summary, there being no dispute that the Gray was unavailable to the defense and subject to cross-examination by the same solicitors during the prior trial, the trial court had no basis to exclude a portion of Gray's former testimony. In doing so, he abused his discretion.

IV.

The trial court erred in denying the defense's motion to exclude evidence regarding DNA testing conducted on the cigarette butt purportedly found at the scene where the state's negligence in the destruction of the evidence constituted bad faith and where the state could not present a complete a chain of custody for the cigarette butt such that the cigarette butt was not available for comparison to the crime scene photograph at trial.

Relevant Facts

Defense counsel made a pre-trial motion to exclude the DNA testing done on the cigarette butt purportedly found at the scene due to the state's inability to produce the cigarette butt and corresponding property log. The trial judge ruled preliminarily that the evidence would be admissible. R. 440, l. 22 – 455, l. 25. Defense counsel renewed her objection when the photographs of the cigarette butt were admitted into evidence, following its motion for directed verdict; and at the conclusion of the defense's case. R. 520, ll. 11-17; R. 599, ll. 8-12; R. 618, ll. 22-25.

Despite the solicitor's attempts to improve the strength of its DNA evidence at Henley's retrial, the loss or destruction of the cigarette butt analyzed by SLED along with the chain of custody log prevented the state from proving that the cigarette butt photographed at the scene was the same one analyzed for DNA. Even the SLED analyst was careful to limit her testimony, saying that the cigarette in the photograph was merely consistent with the cigarette in the photograph. R. 576, ll. 6-14. On cross-examination, she clarified that she cannot say that the cigarette butt in the photograph. She noted that there can be distinguishing markings on a cigarette butt, such being run over, having lipstick on it, or how far down it was smoked. R. 585, ll. 5-22.

The jury was obviously concerned about the chain of custody, sending out a note that asked whether the cigarette butt was turned into the evidence locker "on the 15th." The written

response to the jury was: "There was testimony presented about those facts. If you want testimony replayed, please send another note." R. 693. In fact, while Office Thompson claimed that he collected the cigarette butt from the incident location on February 15, 2012, there was no testimony regarding the date on which the cigarette butt was logged in at the evidence locker. See R. 524, l. 16 – 527, l. 6; R. 538, l. 14 – 539, l. 4; R. 550, l. 16 – 551, l. 20. The first documented evidence of a cigarette butts existence was March 29, 2012, when Ryan Abenathy transported one to SLED for testing. However, sometime after the evidence custodian's retirement in May 2013 and Hneley's first trial, the cigarette butt tested was lost or destroyed. R. 551, l. 21 – 560, l. 1. That is why Jolene Gray's testimony that officers returned to Henley's apartment complex and picked something up off the ground near Henley's car was so important. It provided the factual basis for the defense's argument that a member of law enforcement picked up a cigarette butt that they knew had Henley's DNA, perhaps even looking for one that closely matched the photograph, and sent it to SLED for testing rather than the cigarette butt that was found at the scene. See discussion *supra*, Issue II. Without the Sheriff's Department's chain of custody log, or even testimony regarding the specific date of submission to the evidence custodian, the evidence regarding chain of custody was incomplete.

Discussion

Defense counsel's objection to admissibility of the DNA analysis related to the cigarette butt was twofold. First, she argued that its destruction, as speculated to by the solicitor, constituted negligence sufficient to establish bad faith. Second, she argued that the state could not establish that the cigarette butt tested was the same cigarette butt photographed at the scene due to the incomplete chain of custody.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant's fundamental right to a fair trial. U.S. Const. amend. XIV. Where a defendant's right to a fair trial due to missing or destroyed evidence is at issue, the applicable standard is derived from the United States Supreme Court's opinion in Arizona v. Youngblood, 488 U.S. 51 (1988). State v. Reaves, 414 S.C. 118, 125, 777 S.E.2d 213, 216 (2015), cert. denied, 136 S. Ct. 855 (2016). Youngblood held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Reaves, 414 S.C. at 126, 777 S.E.2d at 217.

In Reaves, the Court ruled that even if accepted the appellant's premise that recklessness can equate to bad faith, he disagreed that the police were reckless in not preserving evidence in this case. 414 S.C. at 128, 777 S.E.2d at 218. There the police had lost three gold chains that a state's witness alleged were "snatched off Reaves' neck by Applewhite moments before the shooting," the vicimt's clothing, and five witness statements purportedly taken by police officers at the scene that night. Id. at 123–24, 777 S.E.2d at 216. The Court ruled that "[a]lthough the record is replete with indications the police investigation was deeply flawed, the record also contains no indication these flaws were the product of more than mere negligence." Here, the missing evidence is of far greater importance, as it relates directly to admissibility of the state's DNA evidence and there was evidence at the first trial that the police went to Henley's residence and picked something up off the ground.

The present case is also distinguishable from State v. Cheeseboro, 346 S.C. 526, 539, 552 S.E.2d 300, 307 (2001), where the Court found the appellant failed to demonstrate bad faith because there the officer's testified that they followed normal procedures for destroying the gun and that there was no indication on the gun connecting it to the barbershop murders at the time of

its destruction. Here, there was no testimony regarding how or why the cigarette butt was lost. Though the solicitor speculated that it was inadvertently destroyed with other drug evidence, he provided no documentation or testimony to support that claim.

Regarding the insufficiency of the chain of custody, State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011), provides:

> This Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.

(internal quotations and citations omitted). Even so, case law does not go so far as to require testimony from every person who handled it or negate all possibility of tampering. 392 S.C. at 91-92, 708 S.E.2d at 753. "Courts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." Id. at 94, 708 S.E.2d at 754. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." Id. at 94-95, 708 S.E.2d at 754-55 (internal quotations omitted).

At issue here is whether the state could present a sufficient chain of custody to support the admission of the DNA analysis conducted on the cigarette butt. Though the solicitor emphasized the SLED analyst's testimony that she did not observe any testimony of tampering in his closing argument, no such tampering would be expected if the substituted cigarette butt was submitted to the Sheriff's Department's evidence custodian in the first place. The more important portion of the analyst's testimony was that she could not say that the cigarette butt that she analyzed was the same one in the photograph. Were the cigarette butt and its accompanying

documentation available for admission at the trial, then her response may have been different. Her uncertainty reflects the state's failure to establish a complete chain of custody regarding the cigarette butt, which necessitated exclusion of the DNA analysts' testimony.

CONCLUSION

Based on the foregoing, Appellate Rickey Henley Santoine respectfully requests that this Court vacate his conviction (Issue I) or reverse his conviction and remand his case for a new trial (Issues II, III, and IV).

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 18, 2017

Laura R. Baer
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon V. Henry Gunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of August, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of August, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027

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August 18, 2017

V. Henry Gunter, Esquire
Assistant Deputy Attorney General
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Columbia, SC 29201

Re: The State v. Rickey Henley,

Dear Mr. Gunter:

Enclosed are two copies of the Final Brief of Appellant in the above entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Laura R. Baer
Appellate Defender

LRB/meb

Enclosure