THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Opinion No.2017-UP-425 (S.C. Ct. App. filed November 15, 2017)
Appellate Case No. 2018-000272

State of South Carolina, ...Respondent,

v.

Esaiveus Frantrez Booker, ...Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

ATTORNEYS FOR RESPONDENT

Other Counsel of Record:

Laura Ruth Baer, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court admitting testimony from gang investigator Brown where: (1) it was relevant to explain the arc of the police investigation; (2) he never testified Booker was in a gang and therefore did not offer character evidence for purposes of Rule 404, SCRE; (3) to the extent his testimony may have suggested Booker was part of a gang it was nevertheless relevant as part of the res gestae of the crime and as proof of identity, intent, and motive; and (4) the probative value of the testimony outweighed any danger of unfair prejudice for purposes of Rule 403, SCRE.

2. Whether the of Appeals properly affirmed the trial court admitting several photographs of the codefendants flashing gang signs where: (1) Booker opened the door to their admission by cross-examining Investigator Brown on the alleged display of "gang signs" in a photo of the victims;(2) they were sufficiently authenticated by evidence presented at trial; (3) they were relevant as part of the res gestae of the crime and as proof of identity, intent, and motive; and (4) their probative value outweighed any danger of unfair prejudice.

3. Whether the Court of Appeals properly affirmed the trial court's warning to a co-defendant called as a witness by the State that his failure to testify as to the same facts he admitted in his earlier guilty plea would constitute a breach of his plea agreement and would result in the court vacating the plea and allowing the State to proceed with the original charges, where that warning was not coercive and did not infringe upon Booker's right to due process and a fair trial.

4. Whether the Court of Appeals properly affirmed the trial court denying Booker's motion for a mistrial due to juror misconduct where, in direct compliance with *Aldret*, the trial judge followed the precise procedure suggested by this Court as soon as he learned of the alleged juror misconduct and through *voir dire* determined Booker had suffered no prejudice.

STATEMENT OF THE CASE

Petitioner, **Esaiveus Frantrez Booker (Booker) (a/k/a "Trez"),**[1] was indicted at the May 2012 term of the grand jury for Greenville County for one (1) count of second-degree assault and battery by mob (2012-GS-23-3841A), one (1) count of possession of a weapon during the commission of a violent crime, one (1) count of conspiracy, and seven (7) counts of attempted murder (2012-GS-23-7941 to -7947).[2] He was represented by Randy Chambers, Esquire, of the Greenville County Bar. Respondent (the State) was represented by Assistant Solicitor Katrina Salisbury of the Thirteenth Circuit Solicitor's Office. On January 7-11, 2013, Booker and three of his eight codefendants, **Raymond L. Young (Young) (a/k/a "Lil Ray" & "Randy"), Michael A. Williams (Williams) (a/k/a "Mikey")**, and **Kinjta K. Sadler (Sadler) (a/k/a "Ken")**, proceeded to a joint trial by jury pursuant to which all four were found guilty of the seven counts of attempted murder and the single count of second-degree assault and battery by mob. Booker was found not guilty of conspiracy and possession of a weapon during the commission of a violent crime. As explained below, the other four codefendants entered pleas to various charges prior to trial. Booker was sentenced by the Honorable Edward W. Miller to twenty (20) years' concurrent imprisonment for each count of attempted murder (2011-GS-23-7941 to -7947) and twenty (20) years' concurrent imprisonment for second-degree assault and battery by a mob (2012-GS-23-3841A). (R.p.815-p.838). He timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the four issues raised by Booker on appeal. On November 15, 2017, the Court of Appeals issued an

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[1] Nearly all of the codefendants, victims, and other fact witnesses have nicknames that were used throughout the trial. To the extent possible, the State has noted those nicknames in parentheticals when each individual's name is first used in the Statement of Facts.

[2] Five codefendants, Raymond Lewis Young, Michael Antonio Williams, Kinjta Kadeem Sadler, Daquan Bruster, and Tavarus Holmes, were similarly indicted, and two codefendants, Shaquille Hogan and Larry Johnson, were indicted for only second-degree assault and battery by a mob and conspiracy.

unpublished opinion that affirmed Booker's convictions for seven counts of attempted murder and one count of second degree assault and battery by mob. *State v. Booker*, Op. No. 2017-UP-425 (S.C. Ct. App. filed November 15, 2017). (App.p.1-p.3). On November 29, 2017, Booker submitted a petition for rehearing and the State filed a return on December 14, 2017. (App.p.4-p.32). By order filed January 18, 2018, the petition was denied. (App.p.33). Booker timely served and filed a petition for a writ of certiorari to the Court of Appeals. This Return to Petition for a Writ of Certiorari, submitted on behalf of the State, now follows. Although a truncated statement of facts appears below, the full statement of facts and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

STATEMENT OF FACTS

As explained in the solicitor's opening statement, in the early morning hours of July 17, 2011, a group of friends were hanging out in the parking lot of the Lil' Cricket (LC) gas station on Whitehorse Road in Greenville County. They gathered at the LC after a trip to the hospital where they had visited a friend who was shot earlier that night during a fight at the nearby Red Planet (RP) nightclub. Unbeknownst to the friends, eight young men had devised a plan to retaliate for the fight at the RP. Booker, his three codefendants at trial, and four other codefendants, parked behind the LC, approached the gas station on foot, and opened fire. Seven people were hit as the victims ducked and ran for cover during the attack. (R.p.105-p.112).

Pre-trial Guilty Pleas

Before the commencement of the trial, four of the eight original codefendants entered guilty pleas to charges associated with the shooting. **Shaquille Hogan (Hogan) (a/k/a "Lipz")** pled guilty to second-degree assault and battery by mob and conspiracy. He agreed with the solicitor's recitation of the facts and said the previous statement he had given to police, wherein

he described how the attack was planned and carried out, was true. Hogan named the other codefendants who participated in the attack including Booker and Sadler, and specifically identified Williams as one of the shooters. (R.p.5-p.11). **Daquan Bruster (Bruster) (a/k/a "Buddha")** pled guilty to seven (7) counts of attempted murder, one (1) count of possession of a weapon during the commission of a violent crime, and one (1) count of conspiracy. He agreed that the facts recited by the solicitor were true, including the fact that he carried a handgun to the scene and opened fire along with five other codefendants. The solicitor noted the State had agreed to withdraw notice of intent to seek life without parole as part of Bruster's plea. (R.p.11-p.18). **Larry Johnson (Johnson)** pled guilty to second-degree assault and battery by mob and conspiracy. He also agreed to the facts recited by the solicitor. Johnson testified he drove to the LC with a gun but did not get out of the car and only shot several rounds into the air during the attack. He specifically testified that Bruster, Booker, Williams, Hogan, Young, Holmes, and Sadler were with him during the attack and that they all had guns. (R.p.18-p.25). **Tavarus Holmes (Holmes) (a/k/a "Varus")** pled guilty to conspiracy and one count of attempted murder. He agreed that the facts recited by the solicitor were true, including the fact that he was one of the six shooters at the LC and that he carried a .380 handgun and travelled to and from the scene with Young and Williams in a red Honda. The solicitor noted the State had agreed to dismiss six counts of attempted murder, a weapons charge, and assault and battery by mob as a part of Holmes' plea. (R.p.25-p.30). Finally, **Kiara Kerns (Kearns)** pled guilty to obstruction of justice for her role in subsequently hiding some of the firearms used in the assault. (R.p.30-p.34). The State asked for deferred sentencing on the four codefendants who pled guilty until after the trial of the four remaining codefendants.

Pretrial motion *in limine* regarding "gangs"

After accepting the pleas, the trial began and during a discussion of possible introduction of documentary evidence, the solicitor noted she planned to submit "documents related to the defendants' gang affiliation" if they became relevant during trial. Young's counsel, John Abdalla, Esquire, advised: "The defendants have a motion *in limine* to prevent the State from any mention of gangs or use of the word gang because we believe the prejudicial effect outweighs any probative value." He argued that if the jurors started hearing about gangs it would make it very difficult for them to give the defendants a fair trial. The trial judge asked if Young had any foundation for his motion and Young asked if the motion could be argued more fully the following morning. (R.p.70-p.71).

When the proceedings resumed the following morning, Williams' counsel, Scott Robinson, Esquire, argued the codefendants' joint motion *in limine* to prohibit the State's witnesses from characterizing or employing the terms "gang," "gang related," or "criminal gang" in the case. First, Williams argued that since none of the codefendants had been charged pursuant to the Criminal Gang Prevention Act, Section 16-8-230 of the Code, any testimony suggesting they were in a gang should be prohibited. Second, Williams made a "[Rule] 403 objection in terms of being unduly prejudicial and inflammatory." He contended the connotation of the word would arouse the passion of the jury to the point of causing prejudice. The trial judge reminded Williams that he needed some foundation for the argument because he could not rule "in a vacuum." Responding to this comment, Booker argued the discovery material showed the police had pursued their entire investigation as though the eight codefendants were in the Folk Nation gang or the "G's." He said the State intended to call Officer [Brandon] Brown as a witness, and Brown's sole job is to investigate gangs in Greenville County. The judge declined

ruling on the joint motion prior to the State presenting evidence, finding he could not rule on the propriety of testimony about gangs without knowing the context in which it was being offered. (R.p.93-p.98).

The solicitor then summarized the State's theory of the case. She explained several witnesses were likely to indicate the codefendants wore all black during the attack, were part of the "G's," and that Young was known to be a leader in the Folk Nation in Greenville. The solicitor argued this information was critical to the State's case because the codefendants retaliated as a unit in response to the fight at the RP. She explained the gang evidence would be probative of identity, motive, and intent. Williams responded that they also had an objection based on Rule 404(a), SCRE, because the evidence of gang affiliation would improperly interject character into the case. The trial judge agreed the evidence would interject character into the matter but explained it sounded like it would be appropriate evidence under the State's theory of the case. He said he would "see how it plays out" based on the other evidence presented and again declined to make a pretrial ruling restricting the State's ability to reference gangs. Young made one last argument, returning to his original contention that the word "gang" is simply so prejudicial that it would outweigh any probative value and prevent a fair trial. The trial judge disagreed and again denied the request for a pretrial limitation. He then questioned the solicitor as to how the State's witnesses would describe their own group. The solicitor said her witnesses would testify they were in a rap group at which point the judge cautioned all the parties to be careful with how they proceeded since they were concerned about anyone using the term "gang." (R.p.98-104).

Trial

The State and each co-defendant then made an opening statement, none of which mentioned gangs. (R.p.102-p.121). The State proceeded to elicit testimony from several victims who were hanging out at the LC prior to the attack including: Vincent Fant (Fant) (a/k/a "Buddha"),[3] Raheem Adams (Adams) (a/k/a "Dex" & "Ra Ra"), Russell Moore Patterson (Patterson), Thomas Walker (Walker) (a/k/a "TJ"), and Javon Henry (Henry). (R.p.120-p.189).

Juror Misconduct

After Henry left the stand, the jury was sent out so the trial court could address an issue that arose during trial. The judge explained he received a note from a juror in an unrelated case stating: "I overheard jurors from Courtroom 8 [this courtroom] discussing what sounded like details of their case. Need to decode language, 'I was chillin, he's going down.'" He noted the parties had participated in a bench conference about the note resulting in the defendants moving for a mistrial. The trial judge referenced the 1999 case of *State v. Aldret*[4] which sets forth both the burden of proof when there has been an allegation of premature jury deliberations, as well as the proper procedure for the court to follow when assessing such an allegation. He noted it was necessary for him to determine whether or not misconduct occurred and whether it was prejudicial, and to make these determinations he would discuss the issue with the jurors one by one. The trial judge cleared the courtroom for the purpose of the hearing and invited the defendants to put their position on the record. (R.p.192, line 2-p.194, line 13).

Counsel for Sadler explained for the record that the specific motion was for removal of the two jurors alleged to have been involved in the premature deliberations. Because this would result in being left with only eleven jurors, he argued the court would be required to declare a

[3] Coincidentally, both Fant and codefendant Daquan Bruster go by the nickname "Buddha."

[4] *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999).

mistrial. Sadler further argued there was no need for the court to question individual jurors because the comment "he's going down" could only have meant a juror had already decided the defendants were guilty, which is prejudicial. He objected to the procedure outlined in *Aldret* and asked the court to simply declare a mistrial without further inquiry. Booker, Young, and Williams all joined in the objection. The trial judge noted that this Court had recently referenced *Aldret* with approval when analyzing a trial court's handling of a juror misconduct issue in State v. *Carmack*,[5] and denied the defendants' request not to question individual jurors. (R.p.194, line 14-p.198, line 6).

The trial court proceeded to separately call each of the twelve sitting jurors and the single alternate juror into the courtroom to answer questions about the alleged misconduct. Although several jurors indicated there had been brief conversations about the behavior and enunciation of the witnesses, as well as comments about trying to keep their names straight, there had been no discussion about the content of the testimony and no conclusions drawn about the ultimate outcome of the case. In fact, each juror assured the court that nothing that was said would impair his or her ability to be fair and impartial to the State and the defendants. They all stated they could follow their oath to judge the case solely on the evidence and the law. (R.p.198-p.214). After the inquiry, the trial judge held as follows:

> Okay. Based on what I've just done I'm going to deny the motion for mistrial at this time. I don't find any prejudice to any defendant. I will give more cautionary instructions about discussion of the case and we're get [sic] ready to go forward.

(R.p.214, lines 11-17). Sadler again objected to the procedure and noted *Aldret* only suggested voir dire of the jurors when requested by the moving party. He argued the trial court should not have done so on its own. Sadler also objected to how the procedure was handled, arguing the

[5] *State v. Carmack*, 388 S.C. 190, 694 S.E.2d 224 (Ct. App. 2010).

parties should have been allowed to ask questions to establish an appellate record on which prejudice could be reviewed on appeal, and arguing the original accuser should have been questioned about what he heard in the restroom. Young added to the objection that he believed the questions asked by the court were framed in such a way that the jurors were not able to freely express themselves. Booker joined in the objection; however, Williams did not, stating: "I don't disagree with the Court. I believe it was conducted properly." (R.p.216, lines 4-5). Although the solicitor expressed her own concerns about the testimony of a particular juror, the State did not indicate any agreement with the defendants' request for a mistrial. Ultimately, the trial court overruled all objections to the procedure and maintained its denial of the motion for a mistrial. (R.p.214, line 18-p.217, line 7).

Trial Continued

After denying the motion for a mistrial, the jury returned to the courtroom and the trial resumed. The State then called additional shooting victims and witnesses from the attack, including: Roshonques Perry (Perry) (a/k/a "Choc"), Jamel Williams (Jamel) (a/k/a "Mel"), Anthony Callahan (Callahan) (a/k/a "Ant" & "Antro"), Dontavious Sullivan (Sullivan) (a/k/a "Tate"), Carroll Jackson (Jackson) (a/k/a "Warren"), Trevis Thompson (a/k/a Trap), and Patricia Smith. (R.p.227-p.273). Next, the State called a series of investigators from the Greenville County Sheriff's Office to describe their roles in the investigation of the shooting including: Chris McCalmont, Christopher Hill, James Brown, Matthew Owens, DPS Crime Scene Investigator Iona Ooten, and forensic investigators Jonathan Derby and Jonathan Hamilton. (R.p.274-p.353).

The State then called lead investigator Wayne Taylor Campbell to the stand. He gave detailed testimony about managing the investigation, from the collection and processing of

physical evidence to finding and interviewing possible suspects, including Johnson and Hogan. Campbell testified that Travis Wear was ultimately arrested for shooting Fant, and that a person named Desmond Roberts was charged with shooting Brandon Edwards (Edwards) (a/k/a "Black") and Brandon Davis (Davis) (a/k/a "Bram-Bram"). (R.p.354-p.421). Next, the State called additional investigating officers including: Shawn A. Peoples, Michael Moore, and Dustin Woodall. (R.p.422-p.453). The State also called Joseline Mack (Mack), to the stand. (R.p.454-p.471).

Gang Investigator Brandon Brown

Before the State called its next witness, Booker raised an objection as to how that witness would be identified to the jury. He explained that GCSO Investigator Brandon Brown is in the gang investigation unit and objected to Brown being identified this way. Booker complained that to do so would imply Brown was called in because police were investigating a gang, and that the State had not laid any foundation from any witness that the defendants were actually in a gang. The trial judge noted the objection for the record and the fact that all codefendants had joined in the objection; however, the objection was overruled. (R.p.472, line 7-p.473, line 23).

Investigator Brown then took the stand. He testified he was a "gang investigator" and that his responsibilities include maintaining all gang intelligence throughout Greenville County and knowing the players and entities involved as they pertain to gangs and violent crime. Brown explained he is often called to assist if an incident might involve a gang. He responded to the attack at the LC and began gathering information to see if any of his gang knowledge would help the investigation. Brown learned about the prior incident at another location involving what people were calling the "Folk Boys" who all showed up together wearing black. Several witnesses mentioned the name "Mikey" but the name did not stand out as someone he associated

with a gang. Meanwhile, another investigator learned an individual named Brandon Edwards had been shot at the previous location. Brown testified that Edwards' name definitely had significance because he knew Edwards to be associated with several notable individuals in Greenville, particularly Young. He described Edwards and Young as possibly "family." (R.p.475-p.479). Young objected to the testimony "involving this whole gang thing" and testimony about himself and Edwards. He argued it was prejudicial without a foundation. The objection was overruled and Brown continued explaining the investigation. (R.p.479, lines 14-23).

Brown next looked at Young's Facebook page, particularly a public conversation he had been having with Williams and a photo he posted that was titled "The Family." The photo came in without objection from Booker, Williams, or Young, and over the objection of Sadler. Brown testified they used the photo to start determining exactly which individuals associated together. After many hours and days of trying to identify and track down people in the photo, Brown was able to interview Johnson, who he said was very forthcoming with the legal names and nicknames of people in the photo. This led them to Mack, who was involved with Young either romantically or as a friend. Mack shared more useful information about names and vehicles, and she told Brown she saw several guns in the residence where she and Young were staying. Mack also revealed that her roommate, Kerns, was involved with Booker, which was a new name that led Brown to more people from the photo. Mack told Brown the guns had been brought into the residence by Booker in a black duffle bag. Based on all the new information, Brown obtained an arrest warrant for Williams and subsequently got a search warrant for the residence. When executing the search warrant, the police found paperwork belonging to Young as well as two

canvas gun holsters. Although Kerns was originally uncooperative, she eventually helped the police locate the guns Mack had seen in the residence. (R.p.480-p.494).

On cross-examination by Booker, Brown admitted he was familiar with the Hardliners. He testified he had seen the photograph of them flashing hand signs and admitted that is something that can be common among gang members. Brown also admitted the police found weapons inside some of the victims' vehicles. (R.p.494-p.499). Under redirect examination from the solicitor, Brown identified three photographs of groups of people who were making hand signs he recognized as being associated with gangs. The photos were admitted over objection and Brown identified Williams, Booker, and Hogan in those photos. (R.p.499-p.504). The trial judge then excused the jury to allow the defendants to argue their specific objections to the photos on the record. Counsel for Young renewed his objection to the prejudicial nature of gang information and the objection was overruled. The trial judge noted the photographs came from Young's cell phone. (R.p.499-p.507).

After Investigator Brown left the stand, the State called more investigators from the Greenville County Sheriff's Office including: Assistant Gang Investigator William Whitlock, Devon Hooper, David Weiner, James Perry, and forensic crime lab chemist and firearms examiner James Williams Armstrong. (R.p.507-p.512; 517-p.548). The State also elicited testimony from Amanda Bell. (R.p.512-p.517).

Testimony of Codefendants

To conclude its case, the State began calling each codefendant who had previously entered a guilty plea to the stand. First, the State called Larry Johnson. Johnson acknowledged his earlier plea to attempted murder and second-degree assault and battery by mob and then described the events of July 16-17, 2011. (R.p.560-p.575). Under cross-examination, Johnson

acknowledged photos from his cell phone where he was displaying guns and money but denied an allegation that he was in the Bloods. He was questioned about a recantation in which he claimed he had been coerced to give a statement to the police; however, he testified this was not correct and that he was actually coerced to issue the recantation. (R.p.575-p.594). On redirect Johnson testified he recanted because of threats from people in the gang. He said Young wanted the recantation for trial or Johnson would get "x-ed." Johnson testified he understood this to mean murdered and explained he feared for his safety. (R.p.594-p.596).

Next, the State called Shaquille Hogan. He made in-court identifications of Booker, Williams, Young, and Sadler, all of whom he testified were at the RP on the night of July 16, 2011, along with Johnson and Holmes. He acknowledged the confrontation that happened inside the RP and posing for the photograph. (R.p.597-p.614). Under cross-examination, Hogan admitted that he also wrote a recantation. (R.p.614-p.630). On redirect Hogan testified he got the idea to recant from another inmate at the jail. (R.p.626-p.629).

After briefly recalling Investigator Wayne Campbell in regard to details about the various guns that were described in Hogan's statement, (R.p.631-p.633), the State called Bruster to the stand. Bruster acknowledged pleading guilty to seven counts of attempted murder and possession of a weapon during the commission of a violent crime; however, he claimed he did not remember the events surrounding the shooting and attempted to "take the 5th." The solicitor asked to treat Bruster as a hostile witness and proceeded to question him about agreeing to the facts of the offenses when they were described at his plea. He admitted he did not want to testify and claimed he simply pled to whatever charges he was given. Under cross-examination Bruster testified he only pled guilty because the State had threatened him with life without parole and because his mother pled with him to do what the State wanted. He testified he did not know he

would have to testify as a result of his guilty plea. The trial court then excused the jury and asked the solicitor to have Bruster's counsel come to the courtroom the following morning. The trial judge commented he would give Bruster a chance to withdraw his plea since he was now claiming he did not remember what happened, which would make the plea invalid. (R.p.633-p.639).

The following morning, the State called codefendant Tavarus Holmes to the stand. Holmes made an in-court identification of Booker but then refused to answer any more questions without his attorney, Brian Beasley, present. The jury was sent out. After hearing from the solicitor about the terms of Holmes' plea deal, the trial judge vacated his plea, over Young's objection. Williams, Booker, and Sadler did not object. (R.p.642-p.646).

Next, Bruster's counsel advised the court that he had spoken with Bruster, and that to the extent of his knowledge, Bruster realized he was indeed guilty of the charges and would cooperate as to what he knows. Booker raised an objection. On behalf of all four defendants, he argued: "Our position is that once someone has entered a plea, that they can not be forced to withdraw that plea, that the plea cannot be vacated, that he came in here to testify after pleading guilty and just because he didn't say what they wanted him to say doesn't mean that he can now be brought back out here and essentially be forced to testify." The trial judge disagreed, noting that if this was true, it would allow someone to "game the system." The judge then called Bruster to the stand and explained he was going to give him another opportunity to testify truthfully, but that if Bruster continued to insist he could not remember what happened during the incident, the court would vacate his plea. Bruster said he would testify. (R.p.648-p.651).

Sadler objected to the State being allowed to recall Bruster as a witness, arguing the State had already had a full and fair opportunity to examine him. He again referenced what he called

the "coercive nature" of the court's ability to compel withdrawal of the plea resulting in Bruster facing additional charges and additional time. The trial judge noted the objection for the record and noted that all defendants presumably joined in the motion before denying it and advising the defendants they were free to cross-examine Bruster about all of this. The jury reentered the courtroom and the State resumed examining Bruster. (R.p.651-p.652).

Bruster testified that although he did not remember everything that happened, he remembered some things from the RP and the LC. He was at the RP the night of July 16, 2011, and he left to go to the hospital when he heard Davis got shot in the back. He left the hospital and went to the McDonalds near Club 864 where he got in a Cutlass with Johnson and rode with him to the LC. Bruster said he put a black shirt over his face and was carrying a .380. He testified he got out of the car at the LC with ten or eleven others, all of whom had their faces covered so he could not identify them. Bruster acknowledged that at his plea he admitted conspiring with Williams, Booker, Sadler, Young, Holmes, Hogan, and Johnson to attack the people at the LC; however, he testified he actually has no idea who was with him because their faces were covered. Bruster testified that he and Johnson got back in his car and went to the WH2. (R.p.652-p.660).

Conclusion of Trial

After the State rested, the defendants moved for directed verdicts and those motions were denied. Each defendant then advised the trial court that he did not want to testify. Following a brief charge conference, closing arguments, and a thorough jury charge, Booker was found guilty of the seven counts of attempted murder and the single count of second-degree assault and battery by mob. (R.p.661-p.796; p.831-p.838).

CERTIORARI

Booker argues this Court should grant certiorari both because the Court of Appeals misapprehended certain issues in reaching its decision on appeal and because it "reached vastly different decisions" in the respective cases of the four codefendants who were tried. However, the Court of Appeals employed the proper standard of review in concluding Booker's claims of error did not warrant reversal. The decision is consistent with precedent in South Carolina. Pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, the Court of Appeals decision was a straightforward exercise of reviewing the trial court's application of the law to the particular facts and circumstances of Booker's case. Booker's petition for a writ of certiorari should be denied and dismissed.

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court admitting testimony from gang investigator Brown where: (1) it was relevant to explain the arc of the police investigation; (2) he never testified Booker was in a gang and therefore did not offer character evidence for purposes of Rule 404, SCRE; (3) to the extent his testimony may have suggested Booker was part of a gang it was nevertheless relevant as part of the res gestae of the crime and as proof of identity, intent, and motive; and (4) the probative value of the testimony outweighed any danger of unfair prejudice for purposes of Rule 403, SCRE.

In his appeal to the Court of Appeals, Booker argued the trial court erred in allowing testimony by State's witnesses using the term "gang" in reference to the investigation of his case because: (1) the solicitor failed to lay the proper foundation that he was a gang member; (2) the reference was inflammatory and unduly prejudicial under Rule 403, SCRE; and (3) the reference constituted improper character evidence under Rule 404, SCRE. He complained that contrary to

the solicitor's claim during the pretrial motion *in limine*, none of the victims gave testimony identifying the codefendants as being involved in a gang, much less any particular gang, and that as a result the solicitor should not have been allowed to call Investigators Brown and Whitlock to testify they consulted in the investigation due to suspected gang involvement. Booker further complained that Brown was allowed to testify regarding gang signs shown in photographs of some of the codefendants. He argued all of this testimony should have been excluded by the trial judge for a lack of foundation and under Rules 403 and 404, SCRE. (Brief of Appellant, p.20-p.21).

The Court of Appeals found no error, relying on the principle discussed in *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978), that the admission of improper evidence is harmless when it is merely cumulative to other evidence admitted during trial. The Court of Appeals accurately noted that evidence referencing gangs was admitted numerous times without objection from Booker, and therefore testimony from Investigator Brown referencing the term "gang," even if error, was merely cumulative and therefore harmless. The State continues to maintain the positions argued in its Final Brief that the trial court properly admitted the testimony from Brown. In regard to laying a proper foundation, the State merely elicited testimony from Investigator Brown regarding suspected gang activity which helped move the investigation forward from one suspect to the next. The only foundation required was Brown's own testimony that he was able to make these investigative connections due to his extensive knowledge about gangs in Greenville County. In regard to Rule 403, Booker did not challenge relevance in his argument, instead claiming the testimony should have been excluded as inflammatory and unduly prejudicial. However, the probative value of the testimony clearly outweighed any danger of unfair prejudice; therefore, it was properly admitted. In regard to Rule

404, the State did not offer any testimonial evidence that Booker was in a gang; therefore, no character evidence was offered and there was no basis for exclusion under the Rule. (Final Brief of Respondent, p.25-p.32). Additionally, the State submits the Court of Appeals properly affirmed on the alternative basis that the testimony from Brown was cumulative and therefore harmless.

In his petition for certiorari, Booker contends that: "In addition to erring in finding the gang evidence admissible, the Court of Appeals further erred in finding that the admission of the gang evidence was harmless because the evidence was 'merely cumulative to other evidence.'" He argues "counsel was not required to object to every mention of the term 'gang' in order to prevent a finding that the evidence tying the codefendant to a gang was 'merely cumulative.'" Booker contends further objection in certain circumstances would have been futile because the trial judge made clear his intention to allow the gang evidence, and further contends objection in other circumstances was not necessary because: "The mention of the term 'gang' by other members of law enforcement was in reference to their general duty assignments and never tied to this specific investigation."

None of these arguments were made to the trial court as a basis for Booker not raising further objections to the evidence referencing gangs that was admitted throughout the trial. Indeed, Booker never asked the trial court if he would somehow be excused from making further objections to the term "gang" as the trial proceeded. Officer Michael Moore testified he served as a "cover officer" due to the violence the day of the shooting, noting he was assigned to the "gang task force." (R.p.437). While Brown was still on the stand, Booker independently raised the issue of gangs during his cross-examination by suggesting the victims of the shooting were themselves part of a gang called the Hardliners. (R.p.452-p.457). Similarly, under cross-

examination from codefendant Young, codefendant Larry Johnson repeatedly used the term gang, including a reference to Brown as a "gang investigator." (R.p.545-p.549). Investigator William Whitlock also testified he assisted in "gang investigations" when describing his role in Booker's case. (R.p.466, lines 16-18). No objections were raised to this specific "gang" related testimony. Thus, the Court of Appeals properly concluded Brown's use of the term "gang" could not have been prejudicial because it was cumulative. Certiorari should be denied.

II.

The Court of Appeals properly affirmed the trial court admitting several photographs of the codefendants flashing gang signs where: (1) Booker opened the door to their admission by cross-examining Investigator Brown on the alleged display of "gang signs" in a photo of the victims;(2) they were sufficiently authenticated by evidence presented at trial; (3) they were relevant as part of the res gestae of the crime and as proof of identity, intent, and motive; and (4) their probative value outweighed any danger of unfair prejudice.

In his appeal to the Court of Appeals, Booker argued the trial court erred in admitting two photographs of him and his codefendants making "gang signs" because the solicitor failed to lay the proper foundation for their admission, they were not relevant to the facts at issue in the case, and they were unduly prejudicial. This Court found no error, relying on the principle set forth in *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991), that when an appellant opens the door to evidence at trial, he may not complain of prejudice from its admission. The State agrees and continues to maintain the positions argued in its Final Brief that: (1) Booker cannot complain of prejudice because he opened the door to admission of the photographs through his own cross-examination of Investigator Brown; and (2) the photographs were appropriately admitted because they were properly authenticated pursuant to Rule 901, they were relevant to facts in issue in the case, and their probative value outweighed any danger of unfair prejudice. (Final Brief of Respondent, p.33-p.38).

In his petition for certiorari, Booker argues it is "most important to note that the trial judge had already admitted gang related evidence, over objection, during Brown's direct examination," when Booker then cross-examined Brown about whether the victims were "flashing gang signs" in a photograph from the club where the original altercation took place. Yet none of the "gang related evidence" previously admitted related specifically to gang signs or testimony that anyone in photographs might be displaying gang signs. Booker's cross-examination did, and effectively opened the door to the photographs of the codefendants and testimony about their gang signs. The Court of Appeals properly found no error and properly affirmed pursuant to *Robinson*. Certiorari should be denied.

III.

The Court of Appeals properly affirmed the trial court's warning to a co-defendant called as a witness by the State that his failure to testify as to the same facts he admitted in his earlier guilty plea would constitute a breach of his plea agreement and would result in the court vacating the plea and allowing the State to proceed with the original charges, because that warning was not coercive and did not infringe upon Booker's right to due process and a fair trial.

In his appeal to the Court of Appeals, Booker argued the trial court erred by effectively coercing codefendant Bruster to testify against him with a threat to vacate Bruster's guilty plea after finding Bruster's initial testimony violated his plea agreement, which left Bruster facing a sentence of life without parole. He complained that the trial court's actions amounted to enforcement of a portion of the plea negotiations that never existed. The Court of Appeals found no error, relying on the principle discussed in *State v. Stanley*, 365 S.C. 24, 30-32, 615 S.E.2d 455, 458-59 (Ct. App. 2005) and *State v. McKay*, 89 S.C. 234, 236, 71 S.E. 858, 859 (1911), that the actions were appropriate under the trial court's duty to supervise and control witnesses. The State continues to maintain the position argued in its Final Brief that the trial judge acted well

within his discretion in advising Bruster of the very real consequences of his actions under contract principles, as well as in doing so in the performance of his duty to supervise and control witnesses. (Final Brief of Respondent, p.38-p.40).

In his petition for certiorari, Booker claims the *Stanley* case is not analogous to his case. He argues that in his case, there was no perjury by Bruster and repeats the claim from his Final Brief that the trial judge enforced a non-existent term of the plea agreement. However, a witness does not have to offer perjured testimony to be in violation of a plea agreement to testify truthfully at trial. Whether it is actual perjury or a refusal to testify truthfully due to a sudden and convenient loss of memory, the trial court still has a duty to supervise and control witnesses at trial by ensuring they know the consequences of failing to comply with the terms of their agreements. Here, the trial court's actions in this regard were entirely appropriate. As for Booker's nonsensical and speculative contention that there was no plea negotiation or requirement that Bruster testify for the State, such a circumstance would have left Bruster *entirely free from coercion* by the trial judge rather than under a threat. Bruster could have simply refused to testify, secure in his knowledge that no plea negotiations requiring his testimony were in existence. He and his attorney could then protect his rights if and when the trial court attempted to vacate his plea and proceed to trial. Instead, Bruster, upon advice of counsel, elected to retake the stand and testify truthfully about the attack. The Court of Appeals properly found no error in the trial court's actions and properly affirmed pursuant to *Stanley*. Booker's petition for certiorari should be denied.

IV.

The Court of Appeals properly affirmed the trial court denying Booker's motion for a mistrial due to juror misconduct where, in direct compliance with *Aldret*, the trial judge followed the precise procedure suggested by this Court as soon as he learned of the alleged juror misconduct and through *voir dire* determined Booker had suffered no prejudice.

In his appeal to the Court of Appeals, Booker argued the trial court erred in refusing to excuse two jurors and in denying his motion for a mistrial based on juror misconduct in the form of premature jury deliberations. He contended that where a juror allegedly made the comment that "he's going down," it implies that the juror intended to find at least one of the defendants guilty and therefore had been engaged in deliberations. Booker went on to claim: "Their deliberations did affect fundamental fairness, as they not only indicate a premature discussion in the case but a premature decision in the case against the defendants." Focusing on the dictionary definition of "deliberate," Booker complained that the trial court's attempt to follow the procedure set forth in *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), was insufficient to make the requisite findings. Nevertheless, he argued the testimony the trial court did elicit from the questioned jurors indicated they were discussing the case, which met the definition of "deliberate." He argued he was denied a fair trial because it was clear the jurors were discussing the case in spite of the judge's instructions and because "it was apparent from the discussion that was overheard that at least some of the jurors had made a decision regarding guilt or innocence [] well before the conclusion of the case." (Brief of Appellant, p.34-p.37).

The Court of Appeals found no error, relying on this Court's opinion in *Aldret*, 333 S.C. at 312-16, 509 S.E.2d at 813-15, and the procedure established therein to address an allegation of juror misconduct that arises during trial. The State continues to maintain the position argued in its Final Brief that the trial court followed the proper procedure as set forth in *Aldret* to explore

the allegation of juror misconduct and that as a result, the trial judge committed no error and Booker suffered no prejudice. (Final Brief of Respondent, p.34-p.38).

In his petition for certiorari, Booker argues that under the circumstances of the case, the trial court's efforts to follow the procedure in *Aldret* were insufficient to make the requisite findings. The State disagrees and submits the *Aldret* procedure was followed in its entirety. Upon following this procedure, the trial court concluded Booker was not entitled to a mistrial. He failed to establish the jury engaged in premature deliberations in his case and failed to establish he suffered any prejudice as a result of the brief conversations described by the jurors during *voir dire*. The Court of Appeals properly found no error in the procedure or the denial of Booker's motion for a mistrial, and properly affirmed. Certiorari should be denied.

CONCLUSION

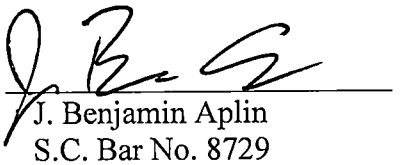
Based on the foregoing reasons, the State submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals. If the Court grants the petition for a writ of certiorari, the State would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
March 20, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 20 2018
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Edward W. Miller, Circuit Court Judge

Opinion No.2017-UP-425 (S.C. Ct. App. filed November 15, 2017)
Appellate Case No. 2018-000272

State of South Carolina, ...Respondent,

v.

Esaiveus Frantrez Booker, ...Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated March 20, 2018, on Petitioner by depositing two copies of the Petition and one copy of the Appendix in the United States mail, postage prepaid, addressed to his attorney of record:

Laura Ruth Baer, Appellate Defender
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 20th day of March, 2018.

Angela Bennett
Administrative Coordinator

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727