

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Kershaw County  
Honorable James R. Barber, III, Circuit Court Judge  
Appellate Case No. 2014-000165

**RECEIVED**

FEB 29 2016

SC Court of Appeals

THE STATE,

Respondent,

vs.

ERNEST MAURICE ALLEN,

Appellant.

**RETURN TO APPELLANT'S MOTION TO SUPPLEMENT  
FINAL BRIEF OF APPELLANT BASED ON  
RECENTLY DECIDED CASE LAW**

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

**Procedural History**

In December of 2012, Appellant Ernest Maurice Allen was eventually apprehended and arrested after he fled from and fired multiple gunshots at law enforcement officers attempting to lawfully arrest him on outstanding bench warrants. In July of 2013, the Kershaw County Grand Jury indicted Appellant for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. On January 13, 2014, a jury trial was commenced in the Kershaw County Court of General Sessions with the Honorable James R. Barber, III, circuit court judge, presiding. During trial, the trial judge granted a directed verdict as to one of the attempted murder charges.

Thereafter, at the conclusion of trial, the jury convicted Appellant of two counts of attempted murder, one count of the lesser-included offense of assault and battery of a high and aggravated nature, one count of resisting arrest with a deadly weapon, and one count of possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty years for each of the attempted murder convictions, twenty years for the assault and battery of a high and aggravated nature conviction, and two years for the resisting arrest with a deadly weapon conviction. Likewise, the trial judge sentenced Appellant to a consecutive four-year term of imprisonment for the possession of a weapon during the commission of a violent crime conviction. Appellant then timely filed a notice of appeal.

Subsequently, on January 6, 2015, Appellant filed an Initial Brief of Appellant and Designation of Matter with this Court. In his initial brief, Appellant raised two distinct issues – one challenging the trial judge’s ruling in regard to his motion for a directed verdict on the resisting arrest with a deadly weapon charge and another challenging the trial judge’s admission of evidence related to his prior criminal acts. Significantly, Appellant did **not** raise any issues challenging the trial judge’s instructions to the jury on any grounds. Following the filing of the Initial Brief of Appellant, the State – on April 22, 2015 – filed an Initial Brief of Respondent addressing the issues raised in Appellant’s initial brief along with its own Designation of Matter. Thereafter, on June 22, 2015, Appellant filed the Record on Appeal containing the matter the parties believed was relevant to the issues Appellant had raised on appeal, and the parties filed their final briefs shortly after in July of 2015. Following the filing of the final briefs, this Court scheduled Appellant’s appeal for oral argument, and an oral argument was conducted on

February 2, 2016. Then, twenty-two days later, Appellant filed his Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law.

**Response to Appellant's Motion Seeking to File a Supplemental Brief Addressing a Previously-Unraised Appellate Issue**

In his Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law, Appellant asks this Court to permit him to file an amended or supplemental final brief of appellant raising an entirely distinct issue that he previously elected not to pursue in his appellate brief. Specifically, Appellant seeks to raise an issue in regard to whether the trial judge committed reversible error through his jury instructions on the intent element of the offense of attempted murder. In support of that request, Appellant notes the issue he now seeks to pursue was addressed in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), which was decided on April 22, 2015 – a date three months and seventeen days after Appellant submitted his initial brief and ten months and three days before Appellant filed his motion seeking to raise the new issue. Because King was decided after Appellant filed his initial brief, Appellant maintains it “presents a new legal issue which was not available at the time” he filed his brief.<sup>1</sup> As a result, Appellant asserts this Court should grant his motion and permit him to submit a new appellate brief raising a previously-unraised issue in an appeal in which the briefs and records have long been completed and submitted to this Court, an oral argument has been conducted before this Court, and a decision is presently pending from this Court.

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<sup>1</sup> It is unclear why Appellant contends the decision in King presented a new legal issue that was not available at the time he filed his initial brief. Significantly, if Appellant's contention was correct and an appellant could not have raised an appellate challenge to a trial judge's jury instruction on attempted murder until after an appellate court decision had been issued on that subject, the decision in King itself could not exist because the issue would have been “unavailable” for King to raise. Thus, it would be more accurate to state Appellant could have pursued an appellate challenge to the trial judge's attempted murder jury instruction in light of fact defense counsel objected to it during trial and simply elected not to do so in favor of raising other appellate issues until he reconsidered his earlier decision and filed his motion seeking to file a supplemental or amended brief nearly a year after King was decided.

Contrary to Appellant's contentions, Appellant's motion should be denied because no authority in South Carolina permits an appellant to raise new issues after that appellant files an initial brief with the appellate court. Instead, pursuant to South Carolina law, an appellant's argument on appeal is ordinarily limited to the issues raised in the initial brief, and issues **not** raised in that brief are deemed to be abandoned. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); see also Jones v. Leagan, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) ("An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal."); Gold Kist, Inc. v. Citizens & S. Nat'l Bank of South Carolina, 286 S.C. 272, 276, 333 S.E.2d 67, 70 (Ct. App. 1985) (instructing issues not raised in an appellate brief are deemed to be abandoned).

Furthermore, after an appellant selects the issues he wishes to pursue on appeal and files an initial brief, that appellant is precluded from using a reply brief, a final brief, an oral argument, a petition for rehearing, or a petition for a writ of certiorari to raise new, previously-unraised issues. See Rule 211(b), SCACR (instructing final briefs must be identical to initial briefs in every respect except with respect to references to the record and the correction of typographical errors); see also Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011) ("[A] party may not raise an issue for the first time in a petition for rehearing."); State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) ("It is axiomatic that oral argument may not be used as a vehicle to argue issues not argued in the appellate brief."); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief."); JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 77 (2nd ed. 2002) ("There are two prerequisites to preserving an issue for consideration by the Supreme Court on a

writ of certiorari: (1) the issue must have been raised in the **initial arguments to the Court of Appeals**, and (2) the issue must have been raised in the petition for rehearing before the Court of Appeals.” (emphasis added)). For the same reasons our rules and case law consider an issue not raised in an initial brief to be waived and prohibit an appellant from raising a new issue in a reply brief, a final brief, during oral argument, or in any pleadings filed after an appellate court reaches a decision in a case, Appellant is not permitted to amend his final brief to raise a new, previously-unraised issue, and his motion seeking to do just that after all the briefs have been filed, the record has been filed, and oral argument has been conducted must be denied. See Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State.”); cf. Sloan Constr. Co., Inc. v. South Carolina Bd. of Health and Env’tl. Control, 285 S.C. 523, 526, 331 S.E.2d 345, 347 (1985) (“The second brief[, which was a revised brief of appellant,] was improper. Our rules do not allow such a revision. The prejudice created by such a brief is obvious, and it will not be considered.”).

**WHEREFORE**, Respondent prays that this Court will deny Appellant’s Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law; and grant such other and further relief as the Court may deem just and proper.<sup>2</sup>

Respectfully submitted,

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Assistant Attorney General

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<sup>2</sup> Although the State believes such relief would be improper, the State would ask for an opportunity to file its own amended brief and be heard on the issue in the event this Court were to grant Appellant’s motion.

By:

A large, stylized handwritten signature in black ink, appearing to read 'Mark R. Farthing', written over a horizontal line.

Mark R. Farthing

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

February 29, 2016

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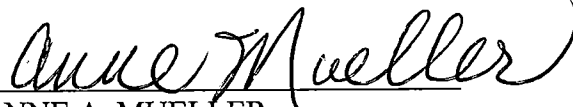
**PROOF OF SERVICE**

I, Anne A. Mueller, certify that I have served the within Return to Appellant's Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

T. Jarrett Bouchette, Esquire  
Johnny Gardner Law Group, P.A.  
212 Main Street  
Conway, SC 29526

Robert M. Dudek, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 29th day of February, 2016.

  
ANNE A. MUELLER  
Legal Assistant  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211



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SC Court of Appeals

ALAN WILSON  
ATTORNEY GENERAL

February 29, 2016

The Honorable Jenny A. Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, S.C. 29211

RE: State v. Ernest Maurice Allen – Appellate Case No. 2014-000165

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Return to Appellant's Motion to Supplement Final Brief of Appellant Based on Recently Decided Case Law, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing  
Assistant Attorney General  
Bar No. 76901

MRF/  
Enclosures

cc: T. Jarrett Bouchette, Esquire  
Robert M. Dudek, Esquire  
Victim Services