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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Lexington County
The Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

Respondent,

v.

TIMOTHY RAY JONES, JR.,

Appellant.

Appellate Case No. 2019-001008

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# RETURN TO APPELLANT'S MOTION TO ARGUE AGAINST PRECEDENT

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This Court has scheduled oral argument in the captioned appeal for November 9, 2021. On October 19, 2021, Appellant submitted a motion to argue against precedent. This Court has called for a response to the motion, which Respondent now makes. Respondent initially acknowledges that whether the motion will be granted is in the discretion of this Court. Respondent submits, however, that Appellant has failed to offer any meritorious reason for the Court to grant his request. In particular, Appellant has failed to argue against precedent in his brief and such an argument is not properly before the Court. In support of this position, Respondent submits the following points and argument for consideration:

1. Appellant's motion is limited to three cases, specifically *State v. Poindexter*, 314 S.C. 490, 431 S.E.2d 254 (1993); *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978); and *State v. Stanko*, 376 S.C. 571 658 S.E.2d 94 (2008). (Motion, p. 1). These cases are referenced in Issue Three in the appeal. Appellant submits that though the State has relied upon these cases as

controlling and dispositive, he has "distinguished" the cases. (Motion, p. 1). Yet, Appellant's position in his brief is that two of the cases *support* his argument, *Poindexter* and *Huiett*, and the other, *Stanko*, is inapposite. (*See* FBOA, pp. 34-35 and 46, asserting reliance on *Poindexter* and *Huiett*; FBOA, p. 36-37, distinguishing *Stanko*; *see also* Reply Brief, p. 11, asserting the State "attempt[ed] to spin" *Poindexter* when the case, in Appellant's opinion, supports his interpretation). There is not a hint of the need to argue against precedent. According to Appellant's own argument, the motion to argue against precedent is unnecessary.

2. Appellant further submits in his motion that if "this Court accepts the state's contention that these three cases are controlling precedent," *i.e.,* if this Court disagrees with Appellant's assessment of the cited precedent, then he wishes to have the opportunity to argue against precedent. (Motion, pp. 1-2). However, as noted, no such argument has been developed, explained and presented in the brief. *See* Rule 217, SCACR ("Permission of the appellate court shall not be required to argue against precedent in the brief."). Appellant has not requested to amend or supplement his brief. Consequently, Appellant "has offered no legitimate legal or policy reason to depart from" the cited precedent. *See Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016). To the contrary, he has made no assertion at all that such overruling is necessary– a preliminary and required step for appellate review. *See, e.g, Paradis v. Charleston Cty. Sch. Dist.,* 433 S.C. 562, 861 S.E.2d 774 (2021) (request to overrule precedent was squarely presented as the issue on appeal); *Brownlee v. S.C. Dep't of Health & Env't Control*, 382 S.C. 129, 144, 676 S.E.2d 116, 124 (2009) (Pleicones, J., concurring in part, dissenting in part) ("As Chief Judge Sanders famously wrote, '[A]ppellate courts in this state .... do not answer questions they are not asked.' ") (alteration in original) (citing *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct.App. 1984) (subsequent history omitted)).

3. Notably, Appellant does not even concede error in his interpretation of precedent at this time, rather, he premises his motion to argue against precedent on this Court's *future* consideration of the issue as presented. (Motion, pp. 1-2). Appellant should not be allowed to proffer in oral argument a *potential* amendment because he may lose on the position he presented in briefing. It is well-settled that a party is not allowed to "use oral argument as a vehicle to argue new matters" not included in his brief. 16 S.C. Jur. *Appeal and Error* § 106 (September 2021 Update) (citing *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993); *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); *In the Interest of Bruce O.,* 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993)). Our rules provide that oral argument is not even required in appellate review. *See* Rule 215, SCACR ("appellate court may decide any case without oral argument"). It would be odd indeed to allow an appellant the opportunity to potentially shift his position as presented in his brief during subsequent oral argument in hopes of avoiding denial of relief on the issue he has actually presented. *Accord State v. Crain,* 288 S.W.3d 804, 805 (Mo. Ct. App. 2009) ("Our appellate rules require briefs, but not oral argument, because argument supports briefing and not vice versa.").

WHEREFORE, for all the foregoing reasons, Respondent submits Appellant has failed to show any meritorious reason for this Court to grant his pending motion to argue against precedent. The motion should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

*[signature block continued on next page]*

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