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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions  
Case No. 2019A2310100518  
Appellate Case No. 2025-002150

Letitia H. Verdin, Acting Circuit Court Judge

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State of South Carolina,

Respondent,

v.

Robert D. Foster,

Appellant.

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**REPLY BRIEF OF APPELLANT**

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## **REPLY ARGUMENT**

1. THE PLEA COURT ERRED IN SUA SPONTE PLACING THE APPELLANT ON THE SEX OFFENDER REGISTRY WHEN THE STATE PRODUCED NO EVIDENCE TO SUPPORT THE REGISTRY AND THE APPELLANT PRODUCED EVIDENCE THAT HE SHOULD NOT BE ON THE REGISTRY.

The State's argument is relatively simple: a plea court has virtually unlimited discretion, untethered from any evidentiary underpinnings, to place an offender on the Sex Offender Registry ("Registry"). Further, the State argues such placement can be based solely on classic sentencing factors, as opposed to actual evidence of risk of reoffending. This Court, and the Supreme Court, have repeatedly faced similar arguments and rejected them.

As it must. Ruling in favor of the State in this case would not just represent a sea change in the Registry's legal landscape. It would also call into question nearly every placement on the Registry in modern history. If placement on the Registry is part of sentencing, without concern for risk of reoffending, Due Process implications override the long-held belief that the Registry is a civil regulatory scheme geared towards protection of citizens. If it is punitive, it is different.

The State's argument fails on multiple fronts. By asking this Court to disregard the statutory requirement that good cause support placement on the Registry, the State is asking this Court to expand plea courts' discretion to such a degree that the Registry has no limitations. Worse, it is asking this Court to declare the Registry part of the sentence, as opposed to a collateral consequence of a sentence. But finally, it also asks this Court to abandon decades of jurisprudence and change the Registry from a collateral consequence to pure punishment.

**a. *State v. Fuller* has no role to play in this case.**

Throughout its brief, the State relies on *State v. Fuller* as support for its position. But the *Fuller* opinion is based on an entirely different scheme and offers no support for the State's position. *Fuller* involved a statutory scheme where a conviction for kidnapping a person 18 years or older resulted in automatic sex offender registry unless the court

made a finding that the offense did not involve a sex offense or attempted sex offense. *State v. Fuller*, 425 S.C. 468, 479 (Ct. App. 2019).

That law has now changed, but it involved an analysis of whether someone should be excepted from mandatory inclusion on the Registry. The facts of the case were important, because the statute required a factual inquiry to make the relevant determination. *Id.*

The opposite analysis applies here. The charge to which Foster pled guilty does not require the Registry. Instead, the Court must decide whether the State has presented “good cause.” That question would not have applied to *Fuller*. The statute at issue only required a finding the crime involved a sexual offense, not whether there was good cause to place someone on the Registry.

**b. The plea court’s placement of Foster on the Registry was an abuse of discretion.**

The State disregards the standard of “abuse of discretion” when it claims the plea court’s decision was supported by facts and accuses Foster of claiming error “...simply because [he] would have preferred a different outcome following his conviction for a sexual offense.” *Respondent’s Brief*, p.7. This argument mischaracterizes both the law and Foster’s argument.

Abuse of discretion occurs when a ruling is based on legal error or factual conclusions without evidentiary support. *State v. Mitchell*, 421 S.C. 365, 370 (2017). Both grounds are present here, and either one is sufficient to support reversal of the plea court’s decision.

The legal error is clear. Without repeating the arguments from the opening brief, the prosecution is required by statute to present good cause to place an offender on the Registry. *In re M.B.H.*, 387 S.C. 323, 327 (2010); S.C. Code Ann. § 23-3-430(D). Multiple cases reinforce what that means. This Court has recognized the solicitor must show the good cause, revealing a legislative intent to “...require more than a scintilla of evidence of risk.” *In the Interest of Christopher H.*, 432 S.C. 600, 606 (Ct. App. 2021). As a procedural

matter, the solicitor must do more than recite the facts of the case. The solicitor must present some evidence of the risk to reoffend to avoid violating the General Assembly's mandate.

Factually, the plea court compounded the error by failing to require any facts in support of the risk of reoffending. The State now argues the facts of the case are enough to support placement on the Registry. But this fails in multiple ways.

First, as this Court stated in *Christopher*, the good cause requirement has to mean something or the legislature's enactment of the Registry law would be futile. The statutory requirement of "good cause" reflects a legislative decision that more than a scintilla of evidence is required for placement on the Registry. *Id.* South Carolina courts have long held that, "... a scintilla of evidence is any material evidence, which, taken as true, would tend to establish the issue..." *Crosby v. Seaboard A. L. Ry.*, 81 S.C. 24, 31 (1908).

However, the Courts have also held that "more than a scintilla" is a heightened standard of proof. *Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 331 n.2 (2009) (collecting cases discussing heightened standard of review). Had the legislature intended for the Registry to apply based on the facts of a case, it would have either placed assault and battery in the mandatory placement list or it would have declined to place a condition in the statute requiring the prosecution to meet a burden of proof. Either would have accomplished what the State argues in its brief: complete, unfettered discretion by the court or no real responsibility on the solicitor's part to provide good cause for placement on the Registry.

Additionally, the statute would read differently if the facts of the conviction were enough to require the Registry. There would be no role for the solicitor to play under such a scheme. The plea court's discretion was not unlimited. It was the opposite. That discretion was limited to circumstances where the solicitor had made a showing of good cause. Without that showing, the court's discretion never enters the picture. The solicitor's failure to provide any proof the Registry was appropriate should end the Court's inquiry.

The legislature has spoken and the burden of proof is clear. It was not met here, and the Court should reverse the plea court's placement of Foster on the Registry.

**c. This Court owes no deference to the plea court's ruling.**

Finally, the State seems to argue this Court should afford some deference to the plea court's ruling, which is incorrect. It first cites *Fuller*, which was discussed earlier. As argued previously, *Fuller* involved a case in which the plea court was required to review the facts of a case and make a determination. This is a different situation. In the instant case, unlike the old kidnapping statute, the requirement is good cause shown by the solicitor. After such a showing is made, the plea court then determines whether the Registry is appropriate. The specific failing here is that the showing was never made, so there is no discretion involved.

The State also incorrectly relies on *In re Kennedy* for the proposition there is a limited scope of review in this case. *In re Kennedy*, 353 S.C. 394 (Ct. App. 2003). But *Kennedy* involves a different statutory scheme and a different burden of proof. More importantly, there was clearly evidence presented by both sides and a decision to be made by the plea court.

There was extensive evidence presented in *Kennedy* in support of a risk of reoffending. *Id.* at 397-98. Combined with a different statutory scheme, procedural posture, and burden of proof, that evidence was enough for inclusion on the Registry. This case is far different. There was no evidence offered in support of the placement on the Registry and that decision should be reversed.

**d. Sound policy reasons exist for reversing the plea court.**

The State's argument essentially rests on the facts of the case and the effect the case had on the victim. Neither has been linked to any future risk, either in the plea court or this Court. While that lack of evidence is fatal to the State's argument from a legal and factual standpoint, it also runs against the underlying policies of the Registry.

Sex offender registration in South Carolina has historically been subject to lesser due process review because it is non-punitive. *Powell v. Keel*, 433 S.C. 457, 464 (2021).

Courts have repeatedly upheld registration under the “rational relationship” test because the law was meeting the General Assembly’s stated purpose: the goal of the law is to protect the public from sex offenders, who the legislature labels as “...pos[ing] a high risk of re-offending.” *Id.* at 465-66.

The statutory scheme involves two types of cases that will result in placement on the Registry. Certain crimes are subject to mandatory placement on the Registry. Other crimes fall under the “good cause” statute at issue here, which requires the prosecution to make such a showing before the plea court can place an offender on the Registry. Under the State’s theory, the facts of the case are always enough, even in the face of scientific evidence presented by Foster at his plea that showed he was not likely to reoffend. The change in Registry law after *Powell* was directly related to the arbitrariness of a process not rationally related to the legislative goal of protecting the public from offenders with a high risk of reoffending. *Id.* at 472.

Registration is not intended as a punishment, so it is considered as regulatory and imposed to further public safety. *Williams v. State*, 378 S.C. 511, 515-16 (Ct. App. 2008). Every decision involving the Registry rests on this theory. The State’s position would create a significant difference in this law and the process by which it is imposed. As an initial matter, there is such little evidence cited in support of the Registry in this case that the Court would essentially be adopting an “any evidence” standard which is directly contrary to the legislature’s mandate regarding the solicitor’s requirement to show good cause for placement on the Registry.

More importantly, the Court would significantly change the amount of process due a defendant if it rules that the facts of a case and an untested statement from a victim are enough to place an offender on the Registry, especially when contrasted with an expert report showing the offender is not appropriate for placement on the Registry. Changing the Registry from a collateral consequence to a direct consequence of a guilty plea will significantly change the process by which it is imposed. More importantly for this appeal,

such a decision would directly reject the legislative scheme surrounding placement on the Registry and that requires the Court to reject the State's arguments.

### **CONCLUSION**

The South Carolina Sex Offender Registry was carefully crafted by the General Assembly to serve a specific purpose. When allowing certain crimes to trigger registration in a non-mandatory manner, the legislature placed a burden of proof on the State. That burden was not met here. The Appellant presented evidence he should not be required to register. In contrast, the State presented no evidence related to the Registry.

This failure of proof requires the Court to reverse the plea court and remove Appellant Foster from the Registry.<sup>1</sup>

Respectfully submitted,

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<sup>1</sup> Foster does not challenge his conviction and the opinion in this case could not affect that underlying conviction.

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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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