

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
The State of South Carolina,)
)
)
vs.)
)
)
LILLIAN BATES,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
Indictment Number: 2021GS2301478A

MOTION TO VACATE GUILTY PLEA

RECEIVED

MAR 22 2023

SC Court of Appeals

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This matter comes before the Court on motion of Rachel Kepley, attorney for the above-captioned defendant who seeks to vacate the sentence received at her guilty plea to the above-referenced Indictment. In support of her motion defendant would show that:

1. Ms. Bates entered a plea to the above-referenced Indictment in on November 9th, 2022.
2. The sentencing sheet correctly reflects a plea to the offense of Trafficking in Fentanyl under § 44- 53-370(e)(3).
3. Ms. Bates was sentenced to 10 years incarceration for that offense alone.
4. Unknown to counsel and Ms. Bates, an Order was signed by the Honorable Donald Hocker of the Eighth Judicial Circuit the day prior on November 8th, 2022. In that Order, the court found that fentanyl is not a substance that can be lawfully included in any indictment under § 44- 53-370(e)(3). That Order is attached to this motion as an exhibit, along with Mr. Bates' indictment and sentencing sheet.
5. Had counsel or Ms. Bates been aware of this Order at the time the plea was entered, she likely would not have pled under that same statute. Accordingly, her plea was not made knowingly or intelligently.
6. In the alternate, Defendant moves this honorable court to vacate the conviction for lack of subject matter jurisdiction. Subject matter jurisdiction cannot be waived and can be raised at any point, including following a plea and sentence. *Florence v. Berry*, 61 S.C. 237, 239 (1901); *Browning v. State*, 320 S.C. 366, 465 S.E.2d 358 (1995). "A circuit court has subject matter jurisdiction over a criminal offense if: (1) there has been an indictment that sufficiently states the offense; (2) there has been a waiver of indictment; or (3) the charge is a lesser-included offense of the crime charged in the indictment." *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998); *State v. Dudley*, 354 S.C. 514, 522 (2003). The above indictment fails, as a matter of law, to state an offense

as fentanyl is not included in the cited statute. See attached order. Further, this failure to charge a lawful crime under that particular statute renders the indictment invalid and unlawful and failed to confer subject matter jurisdiction to the Court of General Sessions. The proper remedy for a lack of subject matter jurisdiction is to vacate the conviction.

NOW THEREFORE defendant moves to vacate the guilty plea and sentence or, in the alternative, withdraw the guilty plea as not being knowingly made. The defendant respectfully requests a hearing on the motion as soon as practicable.



Rachel Kepley
Greenville County Public Defender's Office
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
Attorney for Defendant

Greenville, South Carolina

This 17 day of November, 2022

WITNESSES

Jeremy E Jones
Greenville County Sheriffs Office
11/13/2020

DIRECT PRESENTMENT
DOB: W/F SSN:

**ACTION OF GRAND JURY
TRUE BILL**


FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2021-GS-23-^{EWM} 001478A

The State of South Carolina
County of Greenville

COURT OF GENERAL SESSIONS
May TERM 2021

THE STATE

vs.

LILLIAN MAE BATES

0149 Indictment for
TRAFFICKING IN ILLEGAL DRUGS
VIOLATION § 44-53-0370

ENTERED
ACCT. BM

WJA

Exhibit 1

RECEIVED
MAR 22 2023
SC Court of Appeals

e

STATE OF SOUTH CAROLINA
COUNTY OF Greenville

IN THE COURT OF GENERAL SESSIONS

STATE _____
VS.

INDICTMENT/CASE#: 2021 GS 23 001478 A

Lillian Mae Bates

AW#: Direct Presentment

AKA: _____

Date of Offense: 11/13/2020

Race: WHITE Sex: F Age: 33

S.C. Code § : 44-53-0370(E)(3)(

DOB: _____ SS#: _____

CDR Code #: 0149

Address: _____

RECEIVED SENTENCE SHEET

City, State, Zip: _____

MAR 22 2023

DL#: _____ SID#: _____

*CDL Yes No CMV Yes No Hazmat Yes No SC Court of Appeals

In disposition of the above indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Drugs / Trafficking In Illegal Drugs

in violation of § 44-53-0370(E)(3)(of the S.C. Code of Laws, bearing CDR Code # 2361

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS §17-25-45

(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. AMB (def.'s initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST:

[Signature] 100370 SC Bar# [Signature] Defendant [Signature] 101957 SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,

for a determinate term of 10 days/months/years/Time Served Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years/Time Served and or payment of \$ _____ ; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

The sentence shall run

CONCURRENT or CONSECUTIVE to sentence on: _____

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by SCDOC.

10 days/months

To include time spent on monitored house arrest prior to trial and sentencing.

The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

STATE VS Lillian Mae Bates INDICTMENT/CASE#: 2021 GS 23 001478

SPECIAL CONDITIONS: A/W#: Direct Presentment

PTUP after _____ months/years

And Other Terms Listed Below:

- Substance Abuse Counseling
- Completion of GED
- Random Drug/Alcohol testing
- Attend Voc. Rehab. or Job Corp
- No Contact with _____
- Domestic Violence Intervention Program
- Mental Health Counseling
- May serve W/E beginning: _____

Sex Offender Registry pursuant to S.C. Code § 23-3-430 Public Service Employment _____ days/hours

Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Other: _____

RESTITUTION: Deferred Def. Waives Hearing Ordered

Total: \$ _____ plus 20% fee: _____ \$ _____

Payment Term: _____ Set by SCDPPPS

Recipient: _____

*Fine:

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ Beginning _____

§14-1-206 (Assessments 107.5 %)		\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
§14-1-212 (Law Enforce: Funding)	\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$ 150.00
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	\$41	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	TBD	\$ 8.25
<input type="checkbox"/> Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.	\$500	\$ 500.00
<input type="checkbox"/> § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund	TBD	\$
TOTAL		\$ 283.25

Clerk of Court/ Deputy Clerk: Paul B. Wislenski Presiding Judge: [Signature]
 Court Reporter: Jenkins Judge Code: 2162
 Sentence Date: 11-09-22

Exhibit 2

STATE OF SOUTH CAROLINA)
COUNTY OF NEWBERRY)
The State)
v.)
Jonathan Conard Dawkins,)
Defendant.)

IN THE COURT OF GENERAL SESSIONS
EIGHTH JUDICIAL CIRCUIT

ORDER GRANTING MOTION TO QUASH
INDICTMENT

RECEIVED

MAR 22 2023

Indictment Number(s)
2022-GS-36-0095

SC Court of Appeals

This matter came before the court on August 24, 2022 on Jonathan Conard Dawkins's ("Defendant") pretrial Motion to Quash the above-referenced Indictment. In granting this motion the Court finds the following:

FACTUAL AND PROCEDURAL BACKGROUND

The State alleges that on October 30, 2021, Defendant was in possession of approximately 200 blue pills. Defendant was arrested and charged under warrant 2021A3629299331 for a violation of S.C. Code § 44-53-375(C)(1)(a).¹

It appears that the pills were sent to SLED and found to contain a mixture of fentanyl and Tramadol. The weight of the pills and packaging was found to be 19.18 grams.

In February of 2022, the case was presented to the Newberry County Grand Jury. The indictment which was presented to the Grand Jury listed the offense as "Trafficking Fentanyl." The Indictment lists the applicable statute as S.C. Code 44-53-370(e). The body of this indictment contains the following information:

The defendant, Jonathan Conrad Dawkins, did on or about October 30, 2021, in Newberry County, South Carolina, knowingly sell manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture,

¹ S.C. Code § 44-53-375(C)(1)(a) is the code section for the offense of Trafficking in Methamphetamine or Cocaine Base." However, Defendant's arrest warrant describes S.C. Code § 44-53-375(C)(1)(a) as "Trafficking a Schedule II Controlled Substance."

cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possession of **four (4) grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, namely fentanyl, as described in Section 44-53-190 or 44-53-210** (emphasis added) or four (4) grams or more of any mixture containing any of these, all in violation of 44-53-370(e), South Carolina Code of Laws (1976, as amended).

The Grand Jury true billed the indictment on February 18, 2022.

The Indictment charges under S.C. Code § 44-53-370(e). However, that section contains all of the following offenses: (1) Trafficking in marijuana; (2) Trafficking in cocaine; (3) Trafficking in illegal drugs; (4) Trafficking in methaqualone; (5) Trafficking in LSD; (6) Trafficking in flunitrazepam; (7) Trafficking in gamma hydroxybutyric acid; and (8) Trafficking in MDMA or ecstasy;

Prior to the August 24, 2022 General Sessions non-jury term in Newberry, the parties informed the Court that Defendant would like to be heard concerning motions by Defendant. On August 22, 2022, Defense Counsel emailed the Court and indicated that he planned on raising the following motions:

- 1) Motion to Quash Indictment
- 2) Pursuant to the doctrine of collateral estoppel and res judicata, motion to estop the State from arguing that Fentanyl and/or Tramadol is a "morphine, opium, salt, isomer, or salt of an isomer thereof"
- 3) Motion in limine to prevent the state from arguing that "morphine, opium, salt, isomer, or salt of an isomer thereof" based on *Napue*² and *Riddle*.³
- 4) Motion to compel any writing in the possession of the State which would show that fentanyl does not qualify under the current version of the statute.

² *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

³ *Riddle v. Ozmint*, 631 S.E.2d 70, 369 S.C. 39 (S.C. 2006).



The State objected to conducting the pre-trial hearing on this matter. The State argued that Defendant's motions were in reality pretrial motions to dismiss. Citing *Massey*,⁴ the State argued that pretrial motions to dismiss were not proper. The State argued that Defendant's motions should be denied without prejudice. The State submitted such motions would not be ripe until the State had rested its case, and at that point Defendant could raise the motion on directed verdict.

The Court found that it would be prudent to allow Defendant to submit evidence and make his motions prior to deciding whether such motions were ripe.

At the hearing on August 24, 2022, Defendant called Dr. Wendy Bell. Dr. Bell has a PhD in Chemistry. Dr. Bell holds the rank of Captain with SLED and is director of forensic services at SLED. Additionally, Dr. Bell was appointed as a SLED representative to the Governor's Opioid Emergency Task Force. During the hearing, the Defense moved for her to be qualified as an expert and the State did not object to her being so qualified.

Dr. Bell testified that Fentanyl and Tramadol were fully synthetic opioids. Dr. Bell testified that morphine and heroin were natural opiates that are produced from synthesizing the opium poppy. Dr. Bell testified that substances such as hydrocodone were considered semisynthetic opioids. Dr. Bell testified that fully synthetic opioids can not be produced by synthesizing the opium poppy.

Dr. Bell testified that for several years, SLED has been advising law enforcement agencies and Solicitors that it is problematic to charge someone under S.C. Code § 44-53-370(e)(3) when the drug was a fully synthetic opioid. Dr. Bell testified that neither Fentanyl nor Tramadol are a "morphine, opium, salt, isomer, or salt of an isomer thereof."⁵ Although Dr. Bell admitted that

⁴ *State v. Massey*, 430 S.C. 349, 844 S.E.2d 667 (2020).

⁵ See S.C. § Code 44-53-370 (e)(3).

Fentanyl was a Schedule II drug, Dr. Bell testified that it would be difficult to say that fentanyl was included in the language S.C. Code § 44-53-370(e)(3).

Dr. Bell also testified that there has been proposed legislation that would define an offense for trafficking in fentanyl. Defendant submitted the proposed Acts for the Court's review. Dr. Bell testified that she helped write the proposed legislation.

In support of his motion to estop the state from arguing that fentanyl and/or tramadol are "morphine, opium, salt, isomer, or salt of an isomer thereof", defense counsel submitted several documents concerning Judge McKinnon's opinion in *State v. Harold Gene White, III* (2018-GS-46-7326). Defense Counsel argued to the Court that the State should be estopped from asserting that S.C. Code 44-53-370(e)(3) includes substances that are not derived from opium. Defense Counsel argued that by voluntarily abandoning its appeal of Judge McKinnon's opinion in *White*, the State is precluded from re-litigating whether S.C. Code § 44-53-370(e)(3) prohibits synthetic opioids.

In addition to the estoppel issue, Defendant further argued that it would be inappropriate to allow the State to argue that fentanyl and/or tramadol are "morphine, opium, salt, isomer, or salt of an isomer thereof" under S.C. Code § 44-53-370(e)(3) because there is no factual support for this argument. To support their argument Defendant cites to *Napue*⁶ and *Riddle*⁷ which both deal with prosecutors presenting knowingly false information to a jury. Defendant contended that allowing the state to make the argument that fentanyl is "morphine, opium, salt, isomer, or salt of an isomer thereof" is false because the state has no evidence to support such a position.

⁶ *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

⁷ *Riddle v. Ozmint*, 631 S.E.2d 70, 369 S.C. 39 (S.C. 2006).

During the hearing the State took the position, by its cross-examination of Dr. Bell, that fentanyl was covered by S.C. Code § 44-53-370(e)(3). After the hearing, there were multiple email exchanges between the State and the Defense restating their respective positions which the Court will not discuss in this Order.

FINDINGS OF THE COURT

“Trafficking In Fentanyl” and S.C. Code § 44-53-370(e)

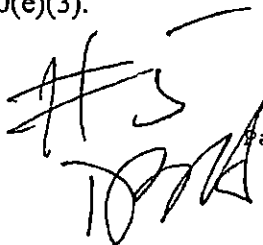
Before the Court states its rulings on Defendant’s motions, it is important that the Court address whether there currently is an offense of trafficking in fentanyl in South Carolina, or whether fentanyl is included in the substances prohibited by S.C. Code § 44-53-370(e)(3).

According to the face of the indictment in this case, Defendant is charged with “Trafficking in Fentanyl.” This Court finds that “Trafficking in Fentanyl” is not currently an offense under South Carolina Law. Although there are statutes that criminalize the unlawful possession of fentanyl, it is not currently contained in South Carolina’s drug trafficking statutes. During the hearing, there was testimony that the legislature had proposed legislation creating the offense of trafficking in fentanyl. While there are certainly strong public policy reasons for the adoption of such a statute, currently the offense of Trafficking in Fentanyl does not exist in this state.

During the hearing, the State alleged that the possession of over 4 grams of a substance containing fentanyl should be considered a violation of S.C. Code § 44-53-370(e)(3). S.C. Code § 44-53-370(e)(3) states in part the following:

Four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210, or four grams or more of any mixture containing any of these substances, is guilty of a felony which is known as “trafficking in illegal drugs”...

S.C. Code § 44-53-370(e)(3).


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Based on the testimony of Dr. Bell, this Court finds that fentanyl is not by definition a "morphine, opium, salt, isomer, or salt of an isomer thereof." The plain language of the statute does not include fully synthetic opioids such as fentanyl. Therefore, this Court finds that fentanyl is not included under S.C. Code § 44-53-370(e)(3). It is worth noting that S.C. Code § 44-53-370(e)(3) cross-references two other statutes; S.C. Code § 44-53-190 and S.C. Code § 44-53-210. S.C. Code § 44-53-210 comprises a list of controlled substances labeled Schedule II. Included in this list is the opioid fentanyl. At first glance, it would appear that this cross-reference would pull fentanyl into the substances covered by S.C. Code § 44-53-370(e)(3). However, S.C. Code § 44-53-210 also lists Amphetamine, Methamphetamine, and multiple other Schedule II substances which are clearly not a "morphine, opium, salt, isomer, or salt of an isomer thereof" as expressly contemplated in § 44-53-370(e)(3). Thus, This Court finds that a mere cross-reference to S.C. Code § 44-53-210 is not sufficient to pull fentanyl into the substances covered by S.C. Code § 44-53-370(e)(3). This Court further notes that even if S.C. Code § 44-53-370(e)(3) was found to be ambiguous, the rule of lenity demands that the statute be strictly construed against the State.

Defense's Motion to Quash the Indictment

"Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code § 17-19-90. "A motion to quash an indictment tests only the facial validity of the indictment." *See State v. Massey*, 430 S.C. 349, 358, 844 S.E.2d 667, 671 (2020). "An indictment which does not charge a valid offense is clearly insufficient." *State v. Blackmon*, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991).

Defendant submits that the indictment in this case is not facially valid. At the hearing Defendant argued that the indictment was not facially valid because of the following:

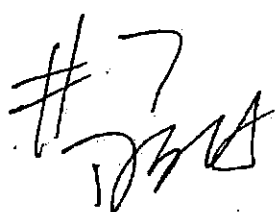


- (1) the State titles the offense "Trafficking in Fentanyl"; and
- (2) the State interjected the term "namely fentanyl" into the language taken from 44-53-370(e).

As to the first objection this Court finds that titling the charged offense as Trafficking in Fentanyl renders the indictment invalid. This Court finds that there is not currently an offense in South Carolina for Trafficking in Fentanyl. The purpose of the indictment is to give Defendant notice of the charges against him. *See State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 499 (2005) ("an indictment is needed to give notice to the defendant of the charge(s) against him." (footnote 6)). This notice is required by Article I, Section 11 of the South Carolina Constitution. Since the charged offense does not currently exist, this court finds that the indictment does not give sufficient notice to the Defendant.

The problem of insufficient notice is compounded by the State's decision to cite to all of S.C. Code § 44-53-370(e). S.C. Code § 44-53-370(e) contains 8 different trafficking offenses. Although the language of the indictment is largely based on S.C. Code § 44-53-370(e)(3), the fact that the State titled the indictment, in two places, "Trafficking in Fentanyl," does not create a valid criminal offense. *See Blackmon*, 304 S.C. at 274, 403 S.E.2d at 662. Defendant also asserts that the body of the indictment is facially invalid because the State interjected the term "namely fentanyl" into the language taken from 44-53-370(e). The term fentanyl does not appear in S.C. Code § 44-53-370(e). Insertion of the word "fentanyl" into the body of the indictment does not create a valid criminal offense, and the Court will not create a criminal offense in this case.

While it may seem inconsistent that heroin is included under § 44-53-370(e)(3) but a similarly dangerous opioid such as fentanyl is not, it is not within the Court's "province to amend the law to resolve this inconsistency." *See id*, 304 S.C. at 274, 403 S.E.2d at 662 (1991). Moreover, to allow amendment of the law through the State's act of crafting an indictment or the Judicial act

A handwritten signature, possibly "DWA", with a large number "7" written above it.

of reading new terms into a statute would violate the doctrine of separation of powers and Defendant's right to due process.

State's Argument Concerning *Massey*


In order for full consideration of the State's arguments, the Court finds it necessary to address the State's main argument concerning *Massey*. The State has alleged that *Massey* prohibits Defendant from making a pre-trial motion to quash on these grounds. The State contends that Defendant's argument would be more appropriately raised by a motion for directed verdict at trial after the State has rested its case-in-chief.

In *Massey*, the defendant moved to quash an indictment for burglary in the first degree. *Massey* argued that the outbuilding in the indictment was not a dwelling under South Carolina law. The trial court agreed and quashed the indictment. The Court of Appeals affirmed the trial court, and the State sought certiorari. In their Petition for Writ of Certiorari the State:

- (1) Challenged the circuit court's authority to quash a facially valid indictment, and
- (2) Asked whether the court of appeals erred in affirming the circuit court on fact-based grounds where the pretrial evidence showed the first-degree burglary charge was both "legally and factually appropriate."

State v. Massey, 430 S.C. 349, 356, 844 S.E.2d 667, 670 (2020). The Supreme Court only granted certiorari as to the second issue.

In the opinion, the Court noted that a "motion to quash an indictment tests only the facial validity of the indictment." *Id.*, 430 S.C. at 358, 844 S.E.2d at 671. In reversing the trial court, the Supreme Court found that "the only question that should have been addressed at the pretrial hearing was whether the first-degree burglary indictment set forth the necessary elements of the offense." *Id.*, 430 S.C. at 358-59, 844 S.E.2d at 672.

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In its motion to quash the indictment, Defendant here has argued that the indictment is not facially valid. While the State frames this as a "pretrial directed verdict motion," at the hearing, Defendant based his argument on the language that appeared on the face of the indictment. As stated above, the court agrees that the indictment is not facially valid as it does not charge a valid criminal offense under South Carolina law. *See Blackmon*, 304 S.C. at 274, 403 S.E.2d at 662 ("An indictment which does not charge a valid offense is clearly insufficient."). The State's position relies heavily on *Massey*. Although the *Massey* Court did not rule on whether or not the trial court had the authority to quash a facially valid indictment, it provided guidance on the issue. What this Court takes from the *Massey* decision is this: if the defense is offering a sufficiency of the evidence (question of fact) analysis in challenging the indictment, then the defense is precluded from moving to quash the indictment pretrial. On the other hand, if the defense is offering an analysis of whether the indictment sufficiently charges a crime (question of law), then a pretrial motion to quash is appropriate. Though the Court in *Massey* did not make this specific ruling, it is gleaned from the body of the opinion.

Due to the fact that this Court finds that Trafficking Fentanyl is not covered under § 44-53-370(e)(3), we are faced with a question of law in that this indictment does not sufficiently charge a crime. In light of the Court's ruling, the Defense's other motions will not be addressed.

IT IS HEREBY ORDERED that the indictment 22-GS-36-00095 is Quashed.



Donald Hocker
Presiding Circuit Court Judge
Eighth Judicial Circuit

Date: 11-8-22

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Exhibit 3

RECEIVED

MAR 22 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF GENERAL SESSIONS

MAR 14 AM 10:30

THE STATE,

vs.

Harold Gene White, III,

Defendant.

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Indictment No.: 2018-GS-46-07326

ORDER GRANTING MOTION TO DISMISS

CERTIFIED TRUE COPY
2019 MAR 14 AM 10:36
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Defendant Harold Gene White, III ("White") has moved to dismiss the charge of Trafficking Hydrocodone, Indictment No. 2018-GS-46-07326.¹ For the reasons set forth below, the motion is GRANTED.

During a search of White's residence on April 17, 2017, 88 hydrocodone pills were found. The State then indicted White for trafficking pursuant to S.C. Code Ann. 44-53-370(e)(3), which makes it unlawful to traffic: "four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210..."² The question before the Court is whether hydrocodone is included in this statute. As far as the Court can determine, this is an issue of first impression in South Carolina.³

The State conceded in this matter that hydrocodone is not chemically "any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin," but that Court will analyze that issue out of thoroughness since it appears an appeal is likely.

It is first necessary to define the terms in the statute. "Opium" is a natural product of the *papaver somniferum* poppy plant, and contains numerous chemical compounds including: morphine, narcotine, codeine, thebaine, papaverine and narceine.⁴ "Morphine" is a specific chemical substance: C₁₇H₁₉NO₃ and one of the component drugs found in opium.⁴ "Heroin" is chemically modified morphine, and is a different chemical compound: C₂₁H₂₃NO₅.⁵ Hydrocodone, the substance at issue in this indictment, is a

¹ Although the motion was originally made by the White as an objection to the indictment, the Assistant Solicitor requested, and the Court agreed, to dismiss the charge rather than quashing the indictment to allow for an appeal. The ruling was made prior to the start of the bench trial, and therefore double jeopardy had not attached.

² The Court is aware of *State v. Miles*, 421 S.C. 154, 805 S.E.2d 204 (Cr. App. 2017), in which the Court of Appeals affirmed a conviction under S.C. Code Ann. 44-53-370(e)(3) for trafficking oxycodone. However, *Miles* presented the issue of whether the defendant must know the specific drug he was possessing, rather than the issue of what drugs are covered by the statute.

³ United Nations Office of Drugs and Crime, "The Opium Alkaloids," https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1953-01-01_3_page005.html, visited 3/12/19.

⁴ Pubmed Chemistry Database, "Morphine," <https://pubchem.ncbi.nlm.nih.gov/compound/5288826>, visited 3/12/19.

⁵ Pubmed Chemistry Database, "Heroin," <https://pubchem.ncbi.nlm.nih.gov/compound/Diacetylmorphine#section=Top>, visited 3/12/19.

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synthetic derivative of codeine or thebaine with the structure $C_{18}H_{21}NO_3$.⁶ It is chemically distinct from both heroin and morphine, and not one of the chemicals found in opium.

While hydrocodone is not a component part of opium, and is chemically different than heroin and morphine, S.C. Code Ann. § 44-53-370(e)(3) also includes a "salt, isomer, or salt of an isomer thereof." An isomer is a chemical compound with an identical number and type of atoms as another compound, but with a different three dimensional structure (i.e., the atoms are arranged and connected differently). Hydrocodone is not an isomer of either morphine or heroin (it has a different chemical formula), and opium cannot have an isomer because it is a mixture of numerous different chemical compounds.

A "salt" in this sense is a compound formed by mixing an acid with the base compound.⁷ Drugs are often mixed with hydrochloric acid (HCl) or other acids to create a salt that is dissolvable in water (for use in IVs, injections, etc).⁸ Although there are salt forms of hydrocodone (e.g., hydrocodone bitartrate), hydrocodone itself is not a salt, much less a "salt" of morphine, heroin, or opium.

S.C. Code Ann. § 44-53-370(e)(3) also uses the phrase "any morphine," which is difficult to interpret because morphine is a specific chemical compound. It is possible "any" refers to the "salts" and "isomers" language (i.e., it means "any salt or isomer of morphine"). Even if the "any morphine" phrase is construed as broadly as possible, and "any morphine" is read to mean any chemical derivative of morphine, hydrocodone is not included. Hydrocodone is a chemical derivative of thebaine and codeine, not morphine.¹⁰

The only remaining avenue to sweep hydrocodone into S.C. Code Ann. § 44-53-370(e)(3) is the "as described in Section 44-53-190 or 44-53-210" clause, and this is what the State argues. S.C. Code Ann. § 44-53-190 and § 44-53-210 are the two statutory lists of drugs in Schedule I and Schedule II, respectively. It is difficult to determine what the legislature intended here, as none of the important terms from S.C. Code Ann. § 44-53-370(e)(3) are "described" or defined in sections 44-53-190 or 44-53-210. Further, those statutes include large numbers of drugs that are chemically unrelated to morphine, opium, and heroin (e.g., marijuana, psycote, psilocybin, and amphetamines).

Perhaps recognizing this difficulty, the State does not argue for wholesale importation of every drug in either S.C. Code Ann. § 44-53-190 or S.C. Code Ann. § 44-53-210 into the S.C. Code Ann. § 44-53-370(e)(3) trafficking statute. Instead, the State argues the term "opiate" should be imported from S.C. Code Ann. § 44-53-190 and § 44-53-210 into the S.C. Code Ann. 44-53-370(e)(3). The State essentially argues the phrase "as described in Section 44-53-190 or 44-53-210" should be interpreted to mean

⁶ Pubmed Chemistry Database, "Hydrocodone",

<https://pubchem.ncbi.nlm.nih.gov/compound/hydrocodone#section=Top>, visited 3/12/19; and NIH Liver Toxicity, "Hydrocodone," <https://livertox.nih.gov/hydrocodone.htm>, visited 3/13/19.

⁷ Chemistry Explained, "Salt," <http://www.chemistryexplained.com/Ru-Sp/Salt.html>, visited 3/13/19

⁸ Patel, et al., "Pharmaceutical salts: a formulation trick or a clinical conundrum?", *Br J Cardiol* 2009;16:281-6, <https://bjcardio.co.uk/2009/11/pharmaceutical-salts-a-formulation-trick-or-a-clinical-conundrum/>, visited 3/13/19

⁹ Pubmed Chemistry Database, "Hycon," <https://pubchem.ncbi.nlm.nih.gov/compound/5463977#section=Top>, visited 3/13/19.

¹⁰ NIH Liver Toxicity, "Hydrocodone," <https://livertox.nih.gov/Hydrocodone.htm>, visited 3/13/19.

"Including opiates as listed in Section 44-53-190 or 44-53-210" even though the word "opiate" does not appear in S.C. Code Ann. 44-53-370(e)(3).

An "opiate" is generally considered to be a drug made from opium. For example, the National Cancer Institute at the National Institute of Health defines an opiate as "A substance used to treat pain or cause sleep. Opiates are made from opium or have opium in them. Opiates bind to opioid receptors in the central nervous system. Examples of opiates are codeine, heroin, and morphine. An opiate is a type of analgesic agent."¹¹ The Merriam-Webster Dictionary agrees that an opiate is: "a drug (such as morphine or codeine) containing or derived from opium and tending to induce sleep and alleviate pain."¹²

However, "opiate" is defined in the South Carolina Code in a very unusual way:

'Opiate' means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under this article, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include racemic and levorotatory forms.

S.C. Code Ann. § 44-53-110(31).

South Carolina's unusual definition of opiate includes not just drugs derived from opium, but *any* drug "having an addiction-forming or addiction-sustaining liability similar to morphine" or even being capable of "conversion" into such a drug. This language is staggeringly vague and broad. How does someone determine if a drug has "addiction forming liability similar to morphine"? How many steps of chemical "conversions" are allowed in determining if a benign chemical can be converted into a substance with "addiction forming liability similar to morphine"? Given the widespread acknowledgement of the addictiveness of nicotine, surely the Legislature did not intend to include trafficking in cigarettes in S.C. Code Ann. § 44-53-370(e)(3), but that is a possible result if "opiates" are included and defined in this way.

What settles this matter definitively is the rule of lenity. "[I]n construing a criminal statute, we are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the accused." *Berry v. State*, 381 S.C. 630, 633, 675 S.E.2d 425, 426 (2009). An important part of the rule of lenity is the concept of fair notice — that a criminal statute should make it plain what is prohibited. "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Welghed against the rule of lenity, it is plain the motion must be granted. Hydrocodone is not mentioned in S.C. Code Ann. 44-53-370(e)(3) by name, and neither is it morphine or opium or heroin or a salt or isomer of one of those. There is no possible way the phrase "four grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in Section 44-53-190 or 44-53-210...." can be fairly said to unambiguously pull in the definition of "opiate" from 44-53-

¹¹ NIH National Cancer Institute, "Opiate", <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/opiate>, visited 3/13/19

¹² Merriam-Webster's Dictionary, "Opiate," <https://www.merriam-webster.com/dictionary/opiate>, visited 3/13/19

THE STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
THE STATE)
v.)
LILLIAN MAE BATES,)
DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT
Warrant/Indictment Nos.:
2021-85-23-01478A
AFFIDAVIT OF SERVICE
(Hand Delivery)

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PERSONALLY APPEARED before me the below signed Investigator for the Greenville County Public Defender Office who states, after first being duly sworn, that they have served the below listed pleading(s) upon all parties by hand delivering a copy to the address(es) listed below on this 17 day of NOV, 2022.

Pleading(s) Served: Motion to Vacate Guilty Plea

Parties Served: The Honorable W. Walt Wilkins, Solicitor
13th Circuit Solicitor Office
305 East North Street, Suite 325
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GREENVILLE COUNTY PUBLIC DEFENDER

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SWORN TO and subscribed before me
this 17 day of November, 2022

Jules Pack
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 10-29-30