STATE OF SOUTH CAROLINA) **COUNTY OF GREENVILLE)** **The State of South Carolina,)** **)** **)** **vs.)** **)** **)** **Tony Sweet,)** **Defendant.)**	**IN THE COURT OF GENERAL SESSIONS** **Indictment Number: 2020A2330210074** **MOTION TO VACATE GUILTY PLEA**

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

1. Mr. Sweet entered a plea to the above-referenced Indictment in Febuary of 2022.

2. The sentencing sheet correctly reflects a plea to the offense of Trafficking in Fentanyl under § 44- 53-370(e)(3).

3. Sentencing for Mr. Sweet was deferred at that time.

4. Since that plea date, an Order was signed by the Honorable Donald Hocker of the Eighth Judicial Circuit 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. Sweet's indictment.

5. Had counsel or Mr. Sweet been aware of this Order at the time the plea was entered, he likely would not have pled under that same statute. Accordingly, his 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 16th day of October, 2023

WITNESSES

Jamie L Fowler

Greenville County Sheriffs Office

10/12/2020

AJG

ARREST WARRANT NUMBER
2020A2330210074

ACTION OF GRAND JURY
TRUE BILL

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2021-GS-23-GHB 001746

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

April TERM 2021

THE STATE

vs.

TONY TUJUAN SWEET

Indictment for

2361

TRAFFICKING IN ILLEGAL DRUGS

VIOLATION § 44-53-0370

Exhibit 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
TRAFFICKING IN ILLEGAL DRUGS

APR 0 6 2021

At a Court of General Sessions, convened on the Grand Jurors of Greenville County present upon their oath:

That TONY TUJUAN SWEET did in Greenville County, on or about the 12th day of October, 2020, knowingly sell, manufacture, deliver, purchase, or bring into the State of South Carolina, or did knowingly provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into the State or was knowingly in actual or constructive possession of 4 grams or more but less 14 grams of Fentanyl; a morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin, as described in §44-53-0190 or §44-53-0210. This is in violation of §44-53-370 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR BAR # 103602

Exhibit #2

STATE OF SOUTH CAROLINA COUNTY OF NEWBERRY	IN THE COURT OF GENERAL SESSIONS EIGHTH JUDICIAL CIRCUIT
The State	ORDER GRANTING MOTION TO QUASH INDICTMENT
v.	
Jonathan Conard Dawkins, Defendant.	Indictment Number(s) 2022-GS-36-0095

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."

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> 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.

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[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

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[4] *State v. Massey*, 430 S.C. 349, 844 S.E.2d 667 (2020).
[5] *See* S.C. § Code 44-53-370 (e)(3).

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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.

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[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).

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

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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.

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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