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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK

2019 MAR 14 AM 10:30

THE STATE,

vs.

Harold Gene White, III,

Defendant.

DAVID HAMILTON
C.D.C.P. & GS
YORK COUNTY) SC

Indictment No.: 2018-GS-46-07326

ORDER GRANTING MOTION TO DISMISS

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

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2019 MAR 14 AM 10:36

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...." 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.²

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.³ "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

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¹ Although the motion was originally made by the White as an objection to the indictment, the Assistant Solicitor requested, and the Court agreed, to dismiss the charge rather than quashing the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 (Ct. 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 has 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.

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)⁹, 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, peyote, 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).

Weighed 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

190 or 44-53-210 when the word "opiate" appears nowhere in S.C. Code Ann. 44-53-370(e)(3). And even if that hurdle were somehow met, the rule of lenity would be further violated by the statutory definition of "opiate," of definition so vague and broad that it provides inadequate notice of what drugs are covered.

The abuse of opiates and other narcotics is one of the pressing legal issues of our time, but this Court "may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." *Paschal v. State Election Comm'n*, 317 S.C. 434, 437, 454 S.E.2d 890, 892 (1995).

MOTION GRANTED. TRAFFICKING HYDROCODONE CHARGE DISMISSED.

AND IT IS SO ORDERED this 14 day of March, 2019.


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WILLIAM A. MCKINNON
Presiding Judge
Sixteenth Judicial Circuit

York, South Carolina