STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable William A. McKinnon, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

DUANE ARNESS HARRISON,

Appellant.

Appellate Case No. 2021-000226

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Harrison pled no contest to trafficking cocaine in violation of S.C. Code § 44-53-370 (e)(2)(b)(1) (trafficking 28-100 grams cocaine, first offense) before the Honorable Lee S. Alford on September 2, 2014. Appellant was sentenced to twelve and a half years' imprisonment. Six years later, on November 5, 2020, Appellant filed a "NOTICE OF MOTION AND MOTION TO VACATE DEFENDANT'S SENTENCE AND CONVICTION FOR LACK OF SUBJECT MATTER JURISDICTION." A hearing was held on the motion before the Honorable William A. McKinnon on February 16, 2021. The motion to vacate was denied by order dated February 18, 2021.

STATEMENT OF FACTS

Appellant pled no contest to trafficking cocaine on September 2, 2014, before the Honorable Lee S. Alford. Appellant advised Judge Alford he was forty years-old, owned a business, graduated high school, and attended a year of college. R. p. 16. Judge Alford advised Appellant the charge he was pleading to was conspiring to traffic cocaine in the amount between twenty-eight grams and a hundred grams. Judge Alford advised the offense carries a minimum seven years' imprisonment and up to a maximum twenty-five years' imprisonment. R. p. 17. Appellant confirmed, after hearing the charge and the sentencing range, he wished to enter a plea of no contest. R. p. 18. Appellant indicated he understood that as part of the plea agreement, the prosecution was reducing the amount of cocaine alleged so as to allow Appellant to receive a sentence of twelve and a half years' imprisonment. R. pp. 21-22.

The prosecution explained the facts of the case. Law enforcement was advised by UPS of a suspicious package. The drug dog alerted to the package and a search warrant was executed on the package, which allowed law enforcement to find close to a kilogram of cocaine inside the package. Law enforcement replaced the cocaine with imitation cocaine to execute a controlled delivery for the address on the package. At the plea proceeding, the prosecutor explained law enforcement believed the woman residing at the address was unaware of the conspiracy: Appellant's codefendant contacted her the day before to see if she would be home and then visited the residence with breakfast from Bojangles, entering uninvited through an unlocked door. The prosecution explained a drug unit officer observed Appellant driving his vehicle "up and down the street" in what was characterized in the narcotic officers' experience as "counter surveillance" by Appellant. Appellant followed the

delivery van into and out of the neighborhood. Appellant returned to the neighborhood afterwards and slowed down by the house. His codefendant then came outside and retrieved the package. When law enforcement moved in to make the arrests, Appellant fled from law enforcement in reverse at a high rate of speed and effected a 180 degree turn, fleeing through the neighborhood as law enforcement chased him. R. pp. 23-26.

Appellant jumped out on foot, dropped a couple of cell phones in the woods, then returned to the house and ran inside, and was apprehended by an agent. Phone extractions revealed a series of texts between Appellant and his codefendant concerning a packaged delivery. This included a text to Appellant providing the address for which the package of cocaine was addressed. The cocaine in the UPS package was tested and came to 965 grams of cocaine. R. pp. 26-27.

The trial court noted an outstanding motion concerning the admissibility of texts on the phones and explained those texts would be admissible to show the relationship between Appellant and his codefendant, and as evidence establishing a conspiracy. He noted the texts would be relevant to prove the codefendant believed he was in constructive possession of a kilogram of cocaine and to show an agreement between the codefendant and Appellant. R. pp. 29-37. Appellant's attorney related that Appellant indicated he understood the plea bargain and "everything up until this point." R. p. 37, lines 4-10.

Hearing on the motion to vacate, February 16, 2021

During the motion to vacate, Appellant asserted a lack of subject matter jurisdiction. In the procedural background he stated to Judge McKinnon, Appellant remonstrated the plea court stated it was a conspiracy to trafficking. However, Judge McKinnon interjected and Appellant humbly

agreed that the trafficking statute encompasses conspiracy. R. p. 49, line 14 – p. 50, line 3. Still, Appellant complained the evidence only showed he was a "lookout" and "there was no substantive drug possession." R. p. 50, lines 13-16.[1]

Appellant explained his view of the rule from State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), Appellant recognized the sufficiency of an indictment must be raised before a jury is sworn, then quipped "we're not raising that issue." He acknowledge that Gentry recognized a court's authority to try a class of cases as the situation that would fit a claim of subject matter jurisdiction. Appellant noted an indictment should be sufficient to provide notice to the defendant pursuant to the state constitution. R. p. 51. Appellant then asserted:

> We're not addressing the issue with regards to objecting before the trial. We're addressing the issue of the indictment itself giving notice to the Defendant; and, of course, the other issue with regards to subject matter jurisdiction.
>
> Now, in this particular case, if you look at the record, the bottom line of our argument is that the solicitor verbally amended the charge. And by verbally amending the charge, the solicitor divested the court of jurisdiction.

R. p. 52, lines 3-14. Appellant then agreed with Judge McKinnon that for Appellant's motion to be successful, he would need to show the offense of trafficking 28 to 100 grams of cocaine is not a lesser included offense of the indictment for trafficking in excess of 400 grams of cocaine. R. p. 52, lines 16-21. Appellant advanced Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996), as the authority that supported his position. R. p. 53, lines 1-7. Appellant admitted Clair predated Gentry. R. p. 53, lines 12-19.

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[1] See State v. McCluney, 361 S.C. 607, 609, 606 S.E.2d 485, 486 (2004) ("Trafficking is not limited to the substantive offenses of purchasing, possessing, and selling large amounts of controlled

Judge McKinnon asked what notice Appellant did not receive, and Appellant answered:

> A new indictment should have been issued. We're not challenging the sufficiency or the deficiency of the indictment. In this particular case, when the solicitor verbally changed the charge, he divested the court of jurisdiction, and the court was required to tell the solicitor, "You've got to get a new indictment, and in addition to that, you have to present it to him and he has to have a waiver, a written waiver." And in this particular case, they failed to do so.

R. p. 55, line 20 – p. 56, line 3. Appellant claimed if an indictment is amended to allege a new amount, Clair required the prosecution to attain a new indictment. R. p. 56, lines 4-7. Appellant argued that Clair was good case law for the proposition he advanced because it was cited four or five times after Gentry. R. pp. 56-57.

Appellant asserted the following argument:

> [U]nder Clair v. State, our state supreme court ruled that a drug indictment which charges a specific sentencing parameter – and that's what we have here – by designating an amount within a particular sentencing level cannot be amended before trial, because it changes the nature of the offense. What I'm saying is that, in this particular case, the court was divested of subject matter jurisdiction when the solicitor verbally amended the charge. He's allowed to do so under the Granger range of cases if there's no specificity with regards to the sentencing parameter and there's no designation of an amount. And Granger says you have the freedom to do so.
>
> But under Gentry – Granger cases are applicable in that particular case. What happened was, it said 10 grams or more. In this particular case, he's indicted for 400 grams or better, and the amount changes. So under the circumstances, this is a Clair versus State case. And what it essentially says is that you can't verbally create an indictment without violating the state constitution by providing the defendant notice.

R. p. 59, line 12 – p. 60, line 16. Appellant claimed the problem was a lack of a written waiver for

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substances. Conspiring and attempting to do those acts also constitutes trafficking.").

the "new" offense. R. 62 p. 17, line 1-2. Appellant also complained about a lack of colloquy during the guilty plea to ensure Appellant understood what was happening and asserted it was wrong for the parties to assume the lesser amount of cocaine made it a lesser included offense of the indicted charge that alleged a greater weight. R. p. 62, lines 7-13.

The solicitor noted the sentencing sheet identified that Appellant pled to violating section 44-53-370(e)(2)(b)(1), and noted that the lower weight, 28 to less than 100 grams, was a lesser included offense. The solicitor explained, "We were primed for trial. We had had two days of pretrial in this case. And one of the key questions in this case in pretrial was the admissibility of a series of text messages between Mr. Harrison and his co-defendant, Mr. Underwood, establishing an ongoing scheme or conspiracy to traffic drugs." R. p. 67, lines 14-19. The solicitor noted the weight level needed to be decreased to allow Appellant to receive the lesser sentence because the original charge carried a mandatory minimum of twenty-five years imprisonment. The solicitor noted Appellant pled to a lesser-included offense and distinguished Clair by noting the amendment to the indictment in Clair **increased** the weight and punishment. R. pp. 67-68. In response, Appellant claimed Clair "doesn't address whether it increased the penalty or lessened the penalty." R. p. 70, lines 3-4.[2]

The solicitor responded, "I don't really know how to articulate this anymore plainly than this is a lesser included charge." R. p. 71, lines 22-23. The solicitor also explained, "I understand jurisdiction can be raised at any time. This is simply not a jurisdiction question." R. p. 72, lines 12-14. In response, Appellant complained his constitutional rights were violated and the court was divested of jurisdiction by changing the charge. R. p. 72, line 20 – p. 73, line 3.

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[2] Specifically, the Court found, "The amendment in his case changed the penalty involved since it increased the applicable fine from $50,000 to $100,000." Clair, 324 S.C. at 146-47, 478 S.E.2d at 55-56.

ARGUMENT

I.

The trial court lacked authority to hear Appellant's motion to vacate a guilty plea conviction based on an allegedly insufficient indictment.

Because the term of court ended six years ago, Judge McKinnon lacked authority to entertain Appellant's motion to vacate based on an allegedly insufficient indictment. A circuit court judge generally lacks authority to consider a criminal matter once the term of court in which the judgment occurred expires. State v. Warren, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App. 2011) (finding post-trial motion to reconsider the sentence, filed three years after the sentence was not timely); accord State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) ("It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires."). The two exceptions to this rule are when a timely post-trial motion is filed or a motion for new trial based on after-discovered evidence is filed. State v. Campbell, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008). Everything argued in 2021 was known by the parties in 2014, so the motion is not based on after-discovered evidence. Further, the post-trial motion to set aside the guilty plea is also not timely. Rule 29(a), SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal.") see also Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice"). "A judgement by a court without jurisdiction of both the parties and the subject matter is a nullity and

must be so treated by the courts whenever and for whatever purpose it is presented and relied on." Blanton v. Stathos, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002); Tant v. South Carolina Dep't of Corr., 408 S.C. 334, 342-43, 759 S.E.2d 398, 402 (2014) (finding the circuit court judge no longer had any jurisdiction over the case and was without jurisdiction to make any further pronouncement concerning the defendant's sentence). The hearing held in 2021 for a motion filed six or so years after the term of court ended is not timely, and therefore, the Court of General Sessions lacked jurisdiction to hear the six-years-too-late motion and the hearing should be a nullity. Campbell, 376 S.C. at 216, 656 S.E.2d at 373 ("When we used the "lack of jurisdiction' language, we meant that the trial court simply no longer has the power to act in a particular manner because the term of court has ended.").

As explained in the next issue, Appellant never explains why there was a lack of subject matter jurisdiction in this case in light of Gentry – Appellant just says it, primarily relying on overruled cases.

II.

The trial court has subject matter jurisdiction to accept a guilty plea to trafficking between twenty-eight and a hundred grams of cocaine, and trafficking twenty-eight to a hundred grams of cocaine is a lesser included offense of trafficking over four hundred grams of cocaine.

Appellant claims the trial court lacked subject matter jurisdiction because he was indicted for trafficking in excess of four hundred grams of cocaine, but pled to trafficking in cocaine in the amount of twenty-eight to a hundred grams of cocaine. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." State v. Means, 367 S.C. 374, 381, 626 S.E.2d 348, 352 (2006) (citation and internal quotation marks omitted); State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Appellant contends although the sentencing sheet Appellant and his plea attorney signed indicates Appellant was pleading guilty to a lesser included offense, it is actually not a lesser included offense, and therefore the plea court lacks subject matter jurisdiction. Lower weight levels of trafficking are lesser included offenses of greater weight levels found in an indictment. State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct. App. 2000). Further, an indictment is a notice document. Means, 367 S.C. at 382, 535 S.E.2d at 353. Indeed, "[a] defendant may waive a potential challenge to an indictment, just as he may waive any of his constitutional rights, **by failing to raise the issue** . . . ." Id. at 385, 535 S.E.2d at 355 (emphasis added).

Gentry ends conflating the notice purpose of an indictment with an issue of subject matter jurisdiction.

The Supreme Court in Gentry overruled a number of prior cases that found the trial court

lacked subject matter jurisdiction based on an insufficient indictment. The South Carolina Supreme Court explained it was persuaded by the United States Supreme Court decision in United States v. Cotton, 535 U.S. 625 (2002) which overruled Ex parte Bain, 121 U.S. 1 (1887) and held an allegedly defective indictment does not affect the jurisdiction of a trial court. Our Supreme Court examined our own case law and found like the federal court did in Ex parte Bain, our Supreme Court broadened its meaning of jurisdiction in State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987). "Prior to Munn, the rule was that any objection to the sufficiency of the indictment, i.e. that the indictment was defective, had to be made before the jury was sworn." Gentry, 363 S.C. at 100, 610 S.E.2d at 498 (citing State v. Young, 243 S.C. 187, 133 S.E.2d 210 (1963) (finding a challenge to the sufficiency of the indictment must be raised by a motion to quash before the jury was sworn)). The Supreme Court observed, "While our broadened definition of subject matter jurisdiction occurred more recently than during the time of Bain, we find the Supreme Court's comments in Cotton instructive. As noted by the Supreme Court in Cotton . . . subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." Id. at 101, 610 S.E.2d at 499. The Supreme Court held that a challenge to an allegedly defective indictment must be made before the jury is sworn. Id.

Following Gentry, the Supreme Court explained, "A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him." Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005). However, Appellant did not assert this constitutional right until six years after his plea.

Appellant's argument is a bit to unravel. Appellant admits, "Undisputedly, the trial court

initially had subject matter jurisdiction in the case on the morning that Harrison walked into the Court – because the Amend[ed] Indictment was sufficient." Br. of App. p. 11. Appellant also admits, "Post-Gentry, an indictment is no longer needed in our state to give the Court subject matter jurisdiction in a criminal matter. Gentry, infra. 'However, an indictment is needed to give *notice* to the defendant of the charges against him.' Gentry, 363 S.C. at 102 n.6, 610 S.E.2d at 499 n.6. (emphasis added)." Br. of App. p. 13. Appellant advises an indictment remains important "because due process requires that a criminal defendant be properly served with a valid indictment." Br. of App. p. 14. Yet Appellant is not arguing a lack of notice (six years later) or lack of due process; instead, in the face of the authority he cites, Appellant claims a lack of subject matter jurisdiction because the indictment is insufficient. Missing is an explanation of how the lack of a sufficient indictment, considered to be an issue of notice and due process, becomes an issue of subject matter jurisdiction, even though by Appellant's own admission, post-Gentry, an indictment is not necessary for a trial court to have subject matter jurisdiction over the charge. Appellant's recitation of authority does not match his argument.

Whether an amendment to an indictment is proper is not an issue of subject matter jurisdiction.

Elsewhere in the brief, Appellant claims "post-Gentry, an amendment to an indictment that changes the nature of the offense charged or charges a different offense divests the trial court of subject matter jurisdiction." Br. of App. p. 7. Appellant's cited authority in support of this proposition of law includes citation to the 1995 edition of the American Jurisprudence hornbook, and cases dating from 1910 to as recent as 2001, which is still four years before Gentry was even

decided. So Appellant relies on pre-Gentry authorities to establish his view of post-Gentry law.

The 1910 case he cites, seventy-years prior to Munn, is State v. Sowell, 85 S.C. 278, 67 S.E. 316 (1910), and the case was not decided as an issue of subject matter jurisdiction. Instead, the indictment alleged Sowell broke into a dwelling in the daytime, he moved for directed verdict because the proof was the breaking occurred in the nighttime. The trial court denied the directed verdict motion and allowed the indictment to be amended to "conform to the evidence." Jurisdiction was never discussed, but the Supreme Court reversed because Sowell's right to have the charge presented to a grand jury was violated. Id. at 318.

The rare post-Gentry case Appellant relies on is State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006). In that case, the Court of Appeals reversed Means' conviction, prior to Gentry, on the ground the trial court lacked subject matter jurisdiction. The Supreme Court reversed the Court of Appeals based on its opinion issued in the interim in Gentry. The Supreme Court explained, "In Gentry, we abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment by either a county or state grand jury." Id. at 381, 626 S.E.2d at 352. Fatal to Appellant's argument is the Supreme Court's holding: "An indictment which allegedly is improperly amended no longer raises a question of subject matter jurisdiction; it instead raises a question of whether a defendant properly received notice he would be tried for a particular crime." Id. at 382-83, 626 S.E.2d at 353.

Importantly, "[a] defendant may waive a potential challenge to an indictment, just as he may waive any of his constitutional rights, **by failing to raise the issue** . . . ." Id. at 385, 535 S.E.2d at 355 (emphasis added). Appellant failed to raise the issue of the alleged defective indictment or an

improperly amended indictment at his plea proceeding, and did not raise the issue in his post-conviction relief application either. If there ever existed a legitimate challenge to be made to the indictment, Appellant waived it.

Appellant's analysis of Means is problematic. Means makes clear, post-Gentry, that the amendment of an indictment does not implicate subject matter jurisdiction, but an improperly amended indictment could violate a defendant's statutory and constitutional rights to grand jury presentment that nonetheless is waived **without an objection**. Yet Appellant draws the following conclusion, "In essence, if indicted under circumstances that change the name of the offense charged, without waiver of presentment, the Court is divested of subject matter jurisdiction. State v. Lynch, 344 S.C. 635, 640-41, 545 S.E.2d 511, 514 (2001)." Br. of App. p. 9.

In Lynch, the prosecutor, prior to trial, amended an indictment for burglary in the first degree by changing the aggravating circumstance from a burglary occurring in the nighttime to a burglary that resulted in physical injury. The Supreme Court, pre-Gentry, found a lack of subject matter jurisdiction. Here's the rub. Lynch was expressly overruled by Gentry in its appendix – it is the sixteenth case cited in the appendix of cases overruled by Gentry. Gentry, 363 S.C. at 105, 610 S.E. at 501. The holding in Means directly contradicts the proposition Appellant asserts, Means is clear that a problem with the indictment will not rise to a lack of subject matter jurisdiction.

This is not the only case expressly overruled by Gentry that Appellant relies on to claim his indictment argument should be categorized as an issue of subject matter jurisdiction. Appellant cites Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) for the proposition that "an amendment may deprive the Circuit Court of jurisdiction even if it does not change the penalty." Br. of App. p.

12. Appellant claims his proposition of law remains good because Means cites Weinhauer with approval. Br. of App. p. 12, Br. of App. p. 13, n.6. In Weinhauer, the prosecutor amended the indictment to allege the burglary occurred in the nighttime, which served to change the charge from a non-violent second degree burglary to a violent second degree burglary – both offenses carry a maximum fifteen year sentence. The Supreme Court held the circuit court lacked subject matter jurisdiction. However, the proposition Means cites Weinhauer for is not the question of subject matter jurisdiction, but the requirement a trial judge determine whether the proposed amendment changes the nature of the offense in order to ensure the defendant's rights to grand jury presentment are protected. Means, 367 S.C. at 355, 626 S.E.2d at 386-87. Means did not cite with approval the rule that Appellant asserts in his brief because, as Means recognizes, Gentry declared "that the subject matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts." Id. at 352, 626 S.E.2d at 381. Weinhauer was the twenty-first case expressly overruled by Gentry in Gentry's appendix. Gentry, 363 S.C. at 105, 610 S.E. at 501.

Appellant's reliance on pre-Gentry cases attempts to conflate the same two rules Gentry decided to separate; however, post-Gentry, a defendant is required to object to the amendment of an indictment for the issue to be reviewed. Gentry, Means. Appellant's arguments demonstrate the wisdom expressed in Gentry – Gentry eliminated the confusion inherent in combining the concepts of sufficiency of an indictment for notice purposes, and the unrelated issue of subject matter jurisdiction, which is what occurred during the Munn era.

Because Appellant and his attorney signed the sentencing sheet, Appellant waived any challenge to the alleged lack of a properly presented indictment.

The Supreme Court also made this point in State v. Smalls, 364 S.C. 343, 346, 613 S.E.2d 754, 756 (2005), explaining that in Gentry and Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005): "[W]e abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment. The court of general sessions has subject matter jurisdiction to try criminal cases." Noting that the primary purpose of an indictment was to provide notice to the defendant, the Supreme Court advised that "challenges to the sufficiency of an indictment must be raised before a jury is sworn." Id.

The Supreme Court further announced:

> We hold that signing a sentencing sheet for a charge to which a defendant has pled guilty constitutes a written waiver of presentment. Moreover, a signed document that informs a defendant of the charges against him, such as a sentencing sheet, gives rise to a presumed regularity in the proceedings and signifies that the defendant has been notified of the charges to which he has pled guilty.

Id. at 347, 613 S.E.2d 756.

The sentencing sheet indicates that Appellant is pleading no contest to "Drugs/Conspiracy to traffick in cocaine, 28g or more, but less than 100 grams, 1st offense" in violation of [section] 44-53-0370(e)(2)(b)1. A checked box indicates the offense is a lesser included offense. Another checked box indicates the plea is for a negotiated sentence. A signature appears for the defendant and for the defendant's attorney on the sentencing sheet. R. p. 45.

Trafficking 28 to 100 grams of cocaine requires a lesser weight than trafficking 400 grams or more cocaine and carries a lesser penalty, and is a lesser included offense of trafficking 400 grams or more cocaine.

The tipping point for this determination, in Appellant's view, is whether or not the offense he

pled no contest to is a lesser included offense of the trafficking charge for which he was indicted. "The test for determining when an offense is a lesser included offense of another offense is whether the greater of the two offenses includes all the elements of the lesser offense." McKnight v. State, 378 S.C. 33, 51, 661 S.E.2d 354, 363 (2008) (citation omitted); see Rutledge v. United States, 517 U.S. 292, 298 (1996) ("If the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In subsequent applications of the [Blockburger] test, we have often concluded that two different statutes define the same offense, typically because one is a lesser included offense of the other") (internal quotation marks and citations omitted).

Indisputably, the trafficking statute covers a lot of conduct towards a narcotic. The provision provides as follows:

> (e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or **otherwise aids, abets, attempts, or conspires** to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession **or who knowingly attempts to become in actual or constructive possession** of:
>
> (2) ten or more grams of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> (b) twenty-eight grams or more, but less than one hundred grams:
>
> 1. for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years, . . .
>
> (e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a

> mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, . . .

S.C. Code § 44-53-370 (emphasis added).

It is apodictic that all the same elements contained in the offense of trafficking cocaine between 28 and 100 grams are also contained in the offense of trafficking cocaine in excess of 400 grams. The only elements that are different are the gradations of weight. For obvious reasons, the greater the weight class of narcotics, the greater the punishment. The maximum sentence for trafficking cocaine between 28-100 grams is twenty five years' imprisonment and the statute allows for a minimum punishment of seven years if merely a first offense, while above four hundred grams, the punishment is a mandatory minimum of twenty five years' imprisonment and maximum sentence of thirty years' imprisonment. The weight requirement for the offense with the greater punishment is greater, while the weight requirement for the offense with a lesser penalty requires a lesser weight. Therefore, it seems reasonably clear that an offense with the lesser weight requirement and lesser penalty is a lesser offense of the offense presenting a greater penalty and requiring a greater weight. Given the structure of the statute, it is hard to envision a stronger example of legislative intent for the offense upon which Appellant pled no contest was a lesser offense of the offense upon which Appellant was indicted. In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) *overruled on other grounds by* Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532

S.E.2d 876 (2000).

All this analysis leads to the conclusion that this Court has already determined in State v. Gosnell, 341 S.C. 627, 535 S.E.2d 453 (Ct. App. 2000). Gosnell was indicted in a State Grand Jury prosecution for conspiracy to traffic 400 or more grams of cocaine. The trial judge instructed the jury on trafficking between 200 and 400 grams of cocaine as a lesser included offense, and Gosnell was convicted for this weight range. Gosnell argued he was entitled to a directed verdict and he was sentenced without subject matter jurisdiction. This Court determined an indictment charging conspiracy to trafficking four hundred grams of cocaine or more "can include conspiracy to traffic in lesser amounts." Id. at 635, 535 S.E.2d at 458. This Court then reviewed the evidence and determined the trial judge erred in providing a jury instruction for the lesser amount because it was not supported by evidence. While Gosnell personally handled 252 grams of cocaine, the evidence firmly established the amount of cocaine involved in the charged conspiracy was greater than 400 grams. Id.

Appellant cites Gosnell and does not attempt to distinguish the case, but instead categorizes it, artificially, in the "first line of cases" which Appellant announces he will refer to as the "Granger" or "Gosnell" line of cases. Appellant then claims that his case belongs in "the second line of cases" represented by Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996). Br. of App. p. 15.

This is the rule Appellant claims Clair created: "A trafficking indictment under this scenario will allege that a defendant committed trafficking in cocaine in a fixed, certain amount. . . . The quantity of drugs represented under the Clair line of cases charges a specific parameter by designating a quantity of drugs within a sentencing level." Br. of App. p. 15. According to

Appellant, the weight alleged in the indictment may never be amended, upwards or downwards, because it would change the nature of the offense "by increasing or decreasing the penalty involved." Br. of App. p. 15.

Now Clair supports half of this conclusion, but the half it supports is not the half applicable in this case. In Clair, the defendant was indicted for trafficking more than 100 grams, but less than 200 grams of cocaine. The prosecutor moved to amend the indictment to allege trafficking between 200 and 400 grams. This case was pre-Gentry and decided as an issue of subject matter jurisdiction, so the fact that the defendant consented to the amendment became irrelevant. The Supreme Court held "[A]n amendment that **increases** the penalty changes the nature of the offense and . . . deprives the court of subject matter jurisdiction. The amendment in this case changed the penalty involved since it **increased** the applicable fine from $50,000 to $100,000." Clair, 324 S.C. at 145-47, 478 S.E.2d at 55-56 (emphasis added).

The weight in the instant case went in the opposite direction – it went down. Clair did not say decreasing the weight, and therefore, decreasing the penalty, changed the nature of the offense. The trial court in the instant case observed, "Clair v. State, relied upon by the movant, applies only to increases in possible punishment, not decreases, and has no application here." Order (dated Feb. 18, 2021) p. 2. Appellant does not offer any authority to support his argument that Clair applies so broadly to apply to the decrease in penalty and fails to demonstrate why the trial court's analysis was wrong.

As discussed previously, the evidence as proffered by the prosecution demonstrated Appellant and his codefendant conspired and attempted to gain possession of nearly a kilogram of

cocaine. Pursuant to the plea bargain, Appellant was allowed to plead to a lesser amount. In Anderson v. State, 342 S.C. 54, 56-57, 535 S.E.2d 649, 650 (2000), Anderson was tried for murder. He contended that he was playing around with a gun that went off accidently, and the jury was provided involuntary manslaughter as a possible verdict. During jury deliberations, Anderson pled guilty to voluntary manslaughter. Anderson alleged in his post-conviction relief proceeding that the guilty plea conviction was involuntary because no evidence existed to show heat of passion or legal provocation.

The Supreme Court held that the prosecution may offer a defendant charged with a greater offense the opportunity to plead guilty to a lesser offense, even if the factual basis for the plea "does not comport with the lesser offense." Id. at 57-58, 535 S.E.2d at 651. The Supreme Court concluded, "We find, so long as there was a sufficient factual basis to support the crime for which the defendant was indicted, a plea to any lesser included offense is sufficient." Id. at 58, 535 S.E.2d at 651. The evidence supported the greater offense of trafficking over 400 grams; therefore, the prosecution properly allowed Appellant the opportunity to plead to the lesser included offense of trafficking between 28 and 100 grams of cocaine.

Because it is a lesser included offense of trafficking 400 grams or more cocaine, Appellant was on notice of the charge of trafficking between 28 to 100 grams of cocaine.

Further, Appellant was on notice of the offense to which he pled. In State v. Green, 406 S.C. 589, 753 S.E.2d 259 (Ct. App. 2014), Green was charged with first degree burglary. At the conclusion of the State's case, the judge determined the evidence failed to show an entry, and granted a directed verdict for burglary, but at the prosecution's request, submitted the case to the jury

on the lesser included offense of attempted burglary, without the original indictment being amended. Green argued that by submitting attempt to the jury, the judge improperly enlarged the original indictment. This Court rejected that argument, finding Green was on notice of the burglary charge and the same theory was used by the prosecution to prove the attempted burglary. This Court found, "Green was on notice of the charge and its lesser included offenses." Id. at 595, 753 S.E.2d at 262. Likewise, in the instant case, under Green, Appellant would be on notice of the offense he pled to as a lesser included offense of trafficking in excess of 400 grams of cocaine.

Undoubtedly, trafficking between 28 and 100 grams of cocaine is a lesser included offense of trafficking in excess of 400 grams, and Appellant was undoubtedly motivated to take the negotiated sentence to avoid the risk of the mandatory twenty-five year sentence he would receive if a jury found him guilty. He is not able to gain a windfall by having his plea conviction and sentence set aside based on an argument he waited six years to raise. Gentry stopped these windfalls. The conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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December 14, 2021

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable William A. McKinnon, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

vs.

DUANE A. HARRISON,

Appellant.

Appellate Case No. 2021-000226

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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