

No. 20-1441

---

---

In the  
**Supreme Court of Florida**

---

MICHAEL ANTHONY CONAGE,  
*Appellant,*

v.

UNITED STATES OF AMERICA,  
*Appellee.*

---

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT  
No. 17-13975

---

**BRIEF OF THE UNITED STATES**

---

KARIN HOPPMANN  
Acting United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

HOLLY L. GERSHOW  
Assistant United States Attorney  
Appellate Division  
Florida Bar No. 98960  
400 N. Tampa St., Ste. 3200  
Tampa, FL 33602  
(814) 274-6000

March 8, 2021

RECEIVED, 03/08/2021 03:23:27 PM, Clerk, Supreme Court

## Table of Contents

Table of Contents.....	i
Table of Citations .....	ii
Introduction .....	1
Statement of the Case and Facts.....	2
A. Conage’s Relevant Florida Drug Offenses .....	2
B. Conage’s General Offenses .....	3
C. Conage’s Eleventh Circuit Appeal .....	6
Summary of the Argument .....	8
Argument and Citations of Authority .....	10
This court should define “purchase” in § 893.135, Fla. Stat., to mean “to obtain or acquire drugs in exchange for something of value” and thus conclude that actual or constructive possession of drugs is inherently required for trafficking by purchase. ....	10
A. The plain and ordinary meaning of “purchase” is “to obtain or acquire in exchange for something of value,” and, consequently, one cannot purchase drugs without actually or constructively possessing them. ....	11
B. In any event, the principles of statutory construction dictate that “purchase” under section 893.135 requires possession. ....	22
Conclusion .....	32
Certificate of Compliance with Type-Volume Limitation	
Certificate of Service	

## Table of Citations

### Cases

<i>Advisory Opinion to Governor—1996 Amendment 5 (Everglades),</i> 706 So. 2d 278 nn.8 & 9 (Fla. 1997) .....	12
<i>Amaya v. State,</i> 782 So. 2d 984 (Fla. 3d DCA 2001) .....	19
<i>Boatwright v. State,</i> 566 So. 2d 75 (Fla. 1st DCA 1990) .....	14
<i>Carpet Installation &amp; Supplies of Glenco v. Alfa Mut. Ins. Co.,</i> 628 So. 2d 560 (Ala. 1993).....	19, 20
<i>Cintron v. U.S. Att’y Gen.,</i> 882 F.3d 1380 (11th Cir. 2018) .....	7
<i>Clines v. State,</i> 912 So. 2d 550 (Fla. 2005).....	30
<i>Cunningham v. State,</i> 647 So. 2d 164 (Fla. 1st DCA 1994) .....	14,15, 19
<i>Daudt v. State,</i> 368 So. 2d 52 (Fla. 2d DCA 1979) .....	17
<i>Davis v. State,</i> 581 So. 2d 893 (Fla. 1991).....	17, 18
<i>Doe v. Thompson,</i> 620 So. 2d 1004 (Fla. 1993).....	12
<i>English v. State,</i> 191 So. 3d 448 (Fla. 2016).....	21
<i>Fla. Dep’t of Revenue v. De Maria,</i> 338 So. 2d 838 (Fla. 1976).....	14
<i>Forsythe v. Longboat Key Beach Erosion Control Dist.,</i> 604 So. 2d 452 (Fla. 1992).....	21

<i>Kasischke v. State</i> , 991 So. 2d 803 (Fla. 2008).....	29
<i>L.J. v. State</i> , 578 So. 2d 360 (Fla. 3d DCA 1991) .....	18, 25
<i>Milazzo v. State</i> , 377 So. 2d 1161 (Fla. 1979).....	18, 23, 27
<i>Milhouse v. State</i> , 37 So. 3d 862 (Fla. 2d DCA 2010) .....	18
<i>Mitchell v. State</i> , 488 So. 2d 632 (Fla. 4th DCA 1986) .....	15
<i>Moskal v. United States</i> , 498 U.S. 103 (1990) .....	27
<i>Ohio Cas. Ins. Co. v. Dentek, Inc.</i> , 283 F. Supp. 2d 655 (D. Conn. 2003) .....	16
<i>Polite v. State</i> , 973 So. 2d 1107 (Fla. 2007).....	30
<i>Psihogios v. State</i> , 544 So. 2d 283 (Fla. 4th DCA 1989) .....	18
<i>Ras v. State</i> , 610 So. 2d 24 (Fla. 2d DCA 1992) .....	19
<i>Robinson v. State</i> , 205 So. 3d 584 (Fla. 2016).....	11
<i>Shular v. United States</i> , 140 S. Ct. 779 (2020) .....	5
<i>Sobrino v. State</i> , 471 So. 2d 1333 (Fla. 3d DCA 1985) .....	19, 28
<i>St. Clair v. State</i> , 575 So. 2d 243 (Fla. 1st DCA 1991) .....	18
<i>State v. Aluli</i> , 893 P.2d 168 (Haw. 1995).....	14, 16, 27

<i>State v. Daophin</i> , 533 So. 2d 761 (Fla. 1988).....	17, 18
<i>State v. Dent</i> , 322 So. 2d 543 (Fla. 1975).....	24
<i>State v. Hagan</i> , 387 So. 2d 943 (Fla. 1980).....	14
<i>State v. Houghtailing</i> , 704 So. 2d 163 (Fla. 1st DCA 1997) .....	18
<i>State v. Larzelere</i> , 979 So. 2d 195 (Fla. 2008).....	24
<i>State v. McCloud</i> , 577 So. 2d 939 (Fla. 1991).....	17, 18
<i>State v. Mena</i> , 471 So. 2d 1297 (Fla. 3d DCA 1985) .....	30
<i>State v. Montoya</i> , 616 P.2d 417 (N.M. 1980) .....	16
<i>State v. Peraza</i> , 259 So. 3d 728 (Fla. 2018).....	11, 28
<i>State v. Roby</i> , 246 So. 2d 566 (Fla. 1971).....	17
<i>State v. Stewart</i> , 374 So. 2d 1381 (Fla. 1979).....	11
<i>State v. Weeks</i> , 202 So. 3d 1 (Fla. 2016).....	22
<i>Thayer v. State</i> , 335 So. 2d 815 (Fla. 1976).....	21
<i>Tropical Coach Line, Inc. v. Carter</i> , 121 So. 2d 779 (Fla. 1960).....	28
<i>United States v. Conage</i> , 976 F.3d 1244 (11th Cir. 2020) .....	<i>passim</i>

<i>United States v. James</i> , 430 F.3d 1150 (11th Cir. 2005) .....	5, 6
<i>United States v. Leonard</i> , 138 F.3d 906 (11th Cir. 1998) .....	10
<i>United States v. Shannon</i> , 631 F.3d 1187 (11th Cir. 2011) .....	5, 6, 8
<i>Yates v. United States</i> , 574 U.S. 528 (2015) .....	23

## **Statutes**

18 U.S.C. § 922(g) .....	3
18 U.S.C. § 922(g)(1) .....	3
18 U.S.C. § 922(g)(2) .....	3
18 U.S.C. § 924(e)(1) .....	3
18 U.S.C. § 924(e)(2) .....	1
18 U.S.C. § 924(e)(2)(A)(ii) .....	4
21 U.S.C. § 841(a)(1) .....	3
Ala. Code. § 13A-12-231 .....	8
Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) .....	<i>passim</i>
Fla. Stat. § 775.021(1) .....	29
Fla. Stat. § 775.021(4)(a) .....	19
Fla. Stat. § 777.011 .....	17
Fla. Stat. § 893.13 .....	<i>passim</i>
Fla. Stat. § 893.135(1) .....	1, 10
Fla. Stat. § 893.135 .....	<i>passim</i>

Ga. Code § 16-13-31 .....	8
<b>Rules</b>	
Fla. R. App. P. 9.030(a)(2)(C) .....	1
Fla. R. App. P. 9.150 .....	1
<b>Other Authorities</b>	
<i>Amazon Opens for Business</i> , <a href="https://www.history.com/this-day-in-history/amazon-opens-for-business">https://www.history.com/this-day-in-history/amazon-opens-for-business</a> (Nov. 4, 2015).....	20
<i>American Heritage Dictionary</i> 1005 (2d College Ed. 1985) .....	12, 13
Fla. Const. Art. V, § (3) .....	1
Fla. Const. Art. V, § (6) .....	1
Fla. Const. Art. I, § (8).....	25
Meriam-Webster Online, <a href="https://www.merriam-webster.com">https://www.merriam-webster.com</a> .....	12, 20
<i>Reading Law: The Interpretation of Legal Texts</i> , Antonin Scalia & Bryan A. Garner (Thompson/West 2012).....	27–29
<i>Webster's II New Riverside University Dictionary</i> (1988) .....	12
<i>Webster's New Twentieth Century Dictionary</i> (2d unab. ed. 1971) .....	14

## Introduction

This case comes before this Court on the following question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit:

How does Florida law define the term “purchase” for purposes of Florida Statutes § 893.135(1)? More specifically, does a completed purchase for purposes of conviction under § 893.135(1) require some form of possession—either actual or constructive—of the drug being purchased?

*United States v. Conage*, 976 F.3d 1244, 1263 (11th Cir. 2020). The Court noted that this “statement of the certified questions is merely suggestive and is not meant to limit the inquiry of the Florida Supreme Court.”<sup>1</sup> *Id.*

The overarching issue for the Eleventh Circuit is whether trafficking drugs, in violation of § 893.135, Fla. Stat.—the top tier of Florida’s three-tiered drug-offense scheme—qualifies as a “serious drug offense” under the federal Armed Career Criminal Act, 18 U.S.C. § 924(e). That act provides for an enhanced sentence for a felon who is convicted of possessing a firearm and who has three previous convictions for a “violent felony” or a “serious drug offense,” as defined by section 924(e)(2). The appellant, Michael Conage, was sentenced in federal court as an armed

---

<sup>1</sup>This Court has discretionary jurisdiction to decide the certified question. See Fla. R. App. P. 9.030(a)(2)(C), 9.150; Art. V, § (3)(6), Fla. Const.

career criminal based in part on his previous Florida conviction for violating section 893.135.

The more specific question for this Court is whether “purchasing” illegal drugs under section 893.135 requires possession of those drugs. “Purchase” is a commonly used and nearly universally understood term, defined as “to obtain or acquire in exchange for something of value.” As explained below, that definition requires either actual or constructive possession of the drugs. Consequently, this Court need look no further than the plain language of the statute to answer the Eleventh Circuit’s certified question.

## **Statement of the Case and Facts**

### **A. Conage’s Relevant Florida Drug Offenses**

In October 2004, Michael Conage fled from police in a stolen vehicle. Doc. 59 ¶ 39. When he was caught, police officers recovered a bag containing crack cocaine and six bags containing powder cocaine. *Id.* Conage pled nolo contendere to several offenses, including possession of cocaine with the intent to sell it, in violation of § 893.13, Fla. Stat. Doc. 59 ¶ 39. In December 2005, he was arrested again, after he sold crack cocaine to a cooperating source, and he pleaded guilty to sale of cocaine and possession of cocaine with the intent to sell, in violation of § 893.13,

Fla. Stat. Doc. 59 ¶ 40. In April 2006, officers found Conage in possession of 36 grams of cocaine, and he pleaded nolo contendere to trafficking in 28 to 200 grams of cocaine, in violation of § 893.135, Fla. Stat. Doc. 59 ¶ 42. This third Florida conviction is the one at issue here.

## **B. Conage's Federal Offenses**

In August 2016, police officers received tips about suspicious activity involving vehicles registered to Conage. Doc. 59 ¶¶ 7–8. Officers began to watch Conage and discovered that he was selling drugs. *Id.* ¶ 9. The officers then searched, pursuant to a warrant, an apartment where Conage was. *Id.* ¶ 10. During the search, the officers found two pistols, one of which—a semiautomatic pistol—had been stolen. *Id.* The officers also found marijuana, crack cocaine, and an assortment of prescription narcotics and amphetamines. *Id.*

A federal jury convicted Conage of possessing hydromorphone with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1), and of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) and (2), a crime subject to the Armed Career Criminal Act. Docs. 21, 47. That act mandates a 15-year minimum sentence for a defendant convicted of violating 18 U.S.C. § 922(g) who has three prior convictions for a “violent felony” or a “serious drug offense.” 18

U.S.C. § 924(e)(1). It defines a “serious drug offense” to include “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii).

In the presentence investigation report, the United States Probation Office recommended that the district court sentence Conage as an armed career criminal because he has two Florida convictions for possession of cocaine with the intent to sell or deliver it, in violation of § 893.13, Fla. Stat., and a Florida conviction for trafficking in cocaine, in violation of § 893.135, Fla. Stat. Doc. 59 ¶ 25; see *also id.* ¶¶ 39–40, 42. Section 893.135 punishes a person who “knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of” a specified quantity of certain drugs.

Conage objected to his armed-career-criminal designation, arguing that his Florida drug-trafficking conviction does not qualify as a “serious drug offense.” Doc. 59 at 35; Doc. 63 at 9–17. At sentencing, Conage repeated his objections, arguing that, because it was unclear how he had committed his trafficking offense, the district court had to assume that he had been convicted of purchasing cocaine, which he argued was the

statute's least culpable conduct.<sup>2</sup> Doc. 83 at 6–14. Conage argued that purchasing could not be used to enhance his sentence because it is not listed in the Armed Career Criminal Act's definition of a "serious drug offense." Doc. 83 at 6–14 (relying on *United States v. Shannon*, 631 F.3d 1187 (11th Cir. 2011)).

The United States argued that the Eleventh Circuit had already decided in *United States v. James*, 430 F.3d 1150 (11th Cir. 2005), that a conviction under Florida's drug-trafficking statute qualifies as a conviction for a "serious drug offense." Doc. 83 at 14–16. The United States explained that *Shannon*, on which Conage relied, is a career-offender case, not an armed-career-criminal case like Conage's, and that different definitions govern a "serious drug offense" under the Armed Career Criminal Act and a

---

<sup>2</sup>Conage did not contest the fact that he had committed the trafficking offense by possessing 36 grams of cocaine, as set forth in his presentence investigation report. See Doc. 59 ¶ 42, Addendum at 6–7. But, to determine whether an offender's prior conviction qualifies as a "serious drug offense," federal courts use the categorical approach, under which they look only to the statutory definitions of the prior offenses, and they do not consider the particular facts underlying the prior convictions. *Shular v. United States*, 140 S. Ct. 779, 783 (2020). To determine if an offense categorically qualifies as a "serious drug offense" requires the district court to determine if the offense involves the manufacture, distribution, or possession with the intent to manufacture or distribute a controlled substance. See *id.* at 784–85.

“controlled substance offense” under the career-offender sentencing guideline. *Id.*

The district court concluded that Conage is an armed career criminal and sentenced him to serve 15 years’ imprisonment. Doc. 83 at 18–19; see *also* Doc. 66 at 1.

### **C. Conage’s Eleventh Circuit Appeal**

Conage appealed his sentence to the Eleventh Circuit, which resulted in a published opinion and the question certified to this Court. See *United States v. Conage*, 976 F.3d 1244 (11th Cir. 2020). He argued to the Eleventh Circuit that his Florida conviction for drug trafficking does not qualify as a “serious drug offense” because a defendant can be deemed a trafficker by purchasing a distribution quantity of drugs even if he purchases the drugs for personal use.

The United States argued that purchasing a distribution quantity of drugs qualifies as a “serious drug offense” because that offense *involves* distribution or possession with the intent to distribute. The United States relied on *James*, which held that a person who possesses a distribution quantity of drugs had committed a “serious drug offense.” See *James*, 430 F.3d at 1155. And, relying on *Shannon*, in which the Eleventh Circuit had stated that a defendant could violate section 893.135 by purchasing without

possessing drugs, the United States argued that it is axiomatic that a person who purchases drugs but never possesses them cannot have purchased them for personal use, and must, therefore, intend to distribute them.

The United States also pointed out that, in *Cintron v. U.S. Att’y Gen.*, 882 F.3d 1380, 1387 (11th Cir. 2018), the Eleventh Circuit had held that section 893.135 is not divisible because the statutory alternatives “sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of” are not statutory elements but rather various means of accomplishing “trafficking.” Because section 893.135 is indivisible, for the statute to qualify as a “serious drug offense,” every way of violating the statute must meet the definition of a “serious drug offense.” So, if trafficking by purchase does not qualify as a “serious drug offense,” then no conviction under section 893.135, no matter the type of underlying conduct, could qualify as a conviction for a “serious drug offense.” The United States argued that this would create an anomaly where violations of § 893.13, Fla. Stat.—the middle tier of Florida’s drug-offense scheme—would qualify as “serious drug offenses,” but the more serious drug-trafficking offense would not.<sup>3</sup>

---

<sup>3</sup>The United States also argued that holding that a Florida drug-

In its opinion, the Eleventh Circuit stated that whether section 893.135 qualifies as a “serious drug offense” under the Armed Career Criminal Act depends on the definition of “purchase,” specifically whether one can traffic by purchasing drugs without also possessing those drugs.<sup>4</sup> *Conage*, 976 F.3d at 1247–48. The Court explained that the answer to its certified question is of “enormous” significance because it resolves whether “the most serious of all drug offenses under Florida law” qualifies as a predicate offense for the Armed Career Criminal Act. *Conage*, 976 F.3d at 1248.

### **Summary of the Argument**

This Court should answer the certified question by defining “purchase” in Florida’s drug-trafficking statute as “to obtain or acquire drugs in exchange for something of value” and conclude that possession of drugs

---

trafficking conviction can never qualify as a conviction for a “serious drug offense” would create an even more anomalous result because a conviction for trafficking the same amount of drugs in Alabama and Georgia still would qualify as a conviction for a “serious drug offense” because those states’ drug-trafficking statutes do not include “purchase” as a means of committing the offense. See Ala. Code. § 13A-12-231; Ga. Code § 16-13-31.

<sup>4</sup>The Eleventh Circuit decided that *Shannon* (the career-offender case) does not control whether one can traffic by purchasing without possessing the drugs because it addressed a different context. *Conage*, 976 F.3d at 1254 n.10.

(either actual or constructive), as defined by federal law, is an inherent requirement for trafficking by purchase. This definition not only accords with the dictionary definition of “purchase,” which is the best source of the plain and ordinary meaning of a term of common usage, but also is supported by case law. Because the plain and ordinary meaning of “purchase” is clear, there is no reason for this Court to look beyond that to determine legislative intent.

But if this Court does look past the definition of “purchase,” applying the canons of statutory construction as Conage proposes would not help him. That’s because the canons leave meaningful doubt as to whether “purchasing” under section 893.135 requires only giving consideration for illegal drugs, as Conage contends, or whether it also requires that the purchaser possess the drugs, as we contend. So, if this Court were to look beyond the ordinary meaning of “purchase,” the rule of lenity would require the Court to construe the statute as requiring both payment *and possession*. This is the construction most favorable to one accused of violating section 893.135 by purchasing a distribution quantity of drugs. (Conage’s invocation of the rule of lenity to—perversely—*broaden* the reach of section 893.135, is misguided.)

## Argument and Citations of Authority

**This Court should define “purchase” in § 893.135, Fla. Stat., to mean “to obtain or acquire drugs in exchange for something of value” and thus conclude that actual or constructive possession of drugs is inherently required for trafficking by purchase.**

The question certified asks this Court how Florida law defines “purchase” for the purpose of § 893.135, Fla. Stat., and specifically whether the term requires possession, as defined by federal law. *See United States v. Conage*, 976 F.3d 1244, 1263 (11th Cir. 2020); *see also id.* at 1255 (“The initial question for us to decide then is whether ‘purchase’ under Florida Statute § 893.135(1) involves ‘possession’ as federal law under the [federal statute] defines that term.”). Under federal law, possession can be actual or constructive; “actual possession of a thing occurs if a person knowingly has direct physical control of it,” while “[c]onstructive possession exists when the defendant exercises ownership, dominion, or control over the item or has the power and intent to exercise dominion or control.” *Id.* (internal quotation marks omitted); *see also United States v. Leonard*, 138 F.3d 906, 909 (11th Cir. 1998) (“Constructive possession exists when a defendant has ownership, dominion, or control over an object.”).

As set forth below, this Court should answer the certified question by

defining “purchase” under section 893.135 as “to obtain or to acquire drugs in exchange for something of value” and thus hold that actual or constructive possession of the drugs is required to traffic by purchase.

**A. The plain and ordinary meaning of “purchase” is “to obtain or acquire in exchange for something of value,” and, consequently, one cannot purchase drugs without actually or constructively possessing them.**

Where this Court is tasked with construing a statute, its “first (and often only) step ... is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used.” *State v. Peraza*, 259 So. 3d 728, 733 (Fla. 2018) (internal quotation marks omitted); *see also Robinson v. State*, 205 So. 3d 584, 590 (Fla. 2016) (“[W]here the Legislature has not defined words in a statute, the words should be given their plain and ordinary meaning.”).

The “plain and ordinary meaning,” of a word in a statute may be “ascertained by reference to a dictionary definition.” *Robinson*, 205 So. 3d at 590; *see also Peraza*, 259 So. 3d at 731 (using dictionary definition to determine the common understanding of the undefined term “person” in the Stand Your Ground statute); *State v. Stewart*, 374 So. 2d 1381, 1383 (Fla. 1979) (noting that undefined word “sell” in § 893.13, Fla. Stat., is word of common usage and stating that this Court has “consistently held that it is appropriate to look to the ordinary dictionary definition of common words

used in legislation”).

The dictionary definition of “purchase” establishes that one cannot purchase something without possessing it, either actually or constructively. When the legislature added “purchase” to section 893.135 in 1987, dictionaries uniformly defined “purchase” to mean to obtain or acquire in exchange for something of value. For example, *Webster’s II New Riverside University Dictionary* 955 (1988) defined “purchase” as “to obtain by paying money or its equivalent,” and *American Heritage Dictionary* 1005 (2d College Ed. 1985) defined “purchase” as “to obtain in exchange for money or its equivalent.”<sup>5</sup> The terms “obtain” and “acquire,” in turn, were defined as “to gain possession of something.” See *American Heritage Dictionary* at 75, 859 (defining “to acquire” as “to gain possession of,” and “[t]o obtain” as “to succeed in gaining possession of as the result of planning or endeavor; procure or acquire”). These definitions persist today.<sup>6</sup>

Conage has not provided any dictionary definition that supports his

---

<sup>5</sup>This Court has used the *American Heritage Dictionary* before to define terms in statutes. See, e.g., *Advisory Opinion to Governor—1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 283 nn.8 & 9 (Fla. 1997); *Doe v. Thompson*, 620 So. 2d 1004, 1005–06 (Fla. 1993).

<sup>6</sup>See, e.g., Meriam-Webster Online, <https://www.merriam-webster.com/dictionary/purchase>; <https://www.merriam-webster.com/dictionary/acquire>; <https://www.merriam-webster.com/dictionary/obtain> (last visited March 4, 2021).

argument that “purchasing” drugs means simply paying or giving consideration for the drugs without actually obtaining them. In fact, the definitions he advances support the conclusion that purchase requires possession. First, he argues that “purchase” means “to buy,” see Conage’s brief at 8–9, but that definition (synonym, really) does not support his argument. To the contrary, “buy”—like “purchase”—is defined as “to acquire in exchange for money or its equivalent.” *American Heritage Dictionary* at 222. Thus, to buy something also requires its acquisition, that is, its possession.

Conage repeatedly states, similarly, that “purchase” is the “exchange of money.” See, e.g., Conage’s brief at 5 (asserting that “the plain and ordinary meaning of ‘purchase’ is to exchange money or buy something”); *id.* at 6 (asserting that “the critical factor for a completed purchase is the exchange of money”); *id.* at 8 (stating that “dictionary definitions support that in ordinary English, to ‘purchase’ means to exchange money or buy something”). But, again, that does not help him. For one thing, an “exchange of money” is an incomplete concept because the money must be exchanged *for something*: the term “exchange” itself requires a completed transaction—the giving of something in return for something else. See *American Heritage Dictionary* at 473. “[A] person who exchanges

something both gives the thing and accepts an equivalent in return.” *State v. Aluli*, 893 P.2d 168, 171 (Haw. 1995). Here, that something else is the drugs. So, in a drug transaction, one cannot be said to have “exchanged money” unless he or she received the drugs in return.

Not only do dictionary definitions require possession, but so does case law, which courts also can resort to for definitions of the same term. See *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980). And, consistent with the ordinary meaning of “purchase” discussed above, this Court has interpreted the undefined term “purchaser” in a statute by “turn[ing] to the plain and ordinary meaning of the term” and concluding that a “purchaser” is “one who obtains or acquires property by paying an equivalent in money or other exchange in value.” *Fla. Dep’t of Revenue v. De Maria*, 338 So. 2d 838, 840 (Fla. 1976) (quoting *Webster’s New Twentieth Century Dictionary* (2d unab. ed. 1971)). And, in *Boatwright v. State*, 566 So. 2d 75, 76 (Fla. 1st DCA 1990), the Court determined that the undefined term “purchase” in § 893.13, Fla. Stat., means “to obtain in exchange for money or its equivalent’ or to ‘buy,’” and that “buy” “meant ‘to acquire by sacrifice, exchange, or trade.’” *Id.* (citing various dictionaries).

Further, in *Cunningham v. State*, 647 So. 2d 164, 166 (Fla. 1st DCA 1994), the Court reversed the defendant’s conviction for purchasing

marijuana, in violation of section 893.13, because he was arrested before the transaction had been completed—no money had been handed to the seller *and* the marijuana had not been handed to the defendant. As the Eleventh Circuit noted in *Conage, Cunningham* “arguably suggests that a purchase conviction requires that the transaction be completed, and a completed transaction would require the purchaser to obtain possession of the purchased drug.”<sup>7</sup> 976 F.3d at 1258. Thus, Florida case law supports the conclusion that the purchase of drugs necessarily requires a completed transaction: the exchange of money for the possession—actual or constructive—of drugs.

Out-of-jurisdiction case law supports this conclusion, too. For example, the New Mexico Supreme Court applied the dictionary definition of “purchase”—“to get into one’s possession: gain, acquire; to obtain by

---

<sup>7</sup>*Conage* argues that *Cunningham*’s citation to *Mitchell v. State*, 488 So. 2d 632, 633–34 (Fla. 4th DCA 1986), which held that payment for the drugs was an essential element of the sale of drugs, shows that *Cunningham* means simply that “the exchange of money is crucial to the offense of ‘purchasing’ a controlled substance.” See *Conage*’s brief at 23. But it does not follow that the requirement of payment excludes the requirement of possession. We do not dispute that a purchase requires payment, but a purchase also requires the other side of the transaction: possession. And, as noted above, *Conage*’s use of “exchange of money” without acknowledging that the money must be exchanged *for something* is misguided. Finally, as discussed below, no case from this Court holds that one can traffic drugs by purchasing without possessing the drugs.

paying money or its equivalent”— and held that “the ‘purchase’ of heroin necessarily includes the actual or constructive ‘possession’ of that heroin.” *State v. Montoya*, 616 P.2d 417, 419 (N.M. 1980). In doing so, the Court reasoned that the term “purchase” is not a term of art or a legal term and therefore should be given its “usual and customary” meaning. *Id.*; *see also Ohio Cas. Ins. Co. v. Dentek, Inc.*, 283 F. Supp. 2d 655, 661 (D. Conn. 2003) (stating that “there is no legal ‘ambiguity’ in the term ‘purchase,’ which is a commonly used and nearly universally understood non-technical term”). And the Hawaii Supreme Court recognized, with respect to purchase’s synonym, that “one who buys a thing acquires or obtains ownership of it from another.” *Aluli*, 893 P.2d at 171. These cases support the conclusion that one cannot purchase drugs under section 893.135 without also possessing those drugs.

In contrast, the cases cited by Conage do not support his claim that “purchasing” means only paying for the illegal drugs and therefore does not require possession. He cites no controlling authority holding that one can purchase drugs without possessing them or whose reasoning supports this Court’s reaching that conclusion. Moreover, the intermediate appellate court cases that he cites either support our position or are inapposite or unpersuasive.

First, this Court’s double-jeopardy and lesser-included-offense cases that Conage cites on page 17 of his brief, which hold that a defendant can be convicted of both trafficking drugs by sale or delivery and simple possession—*State v. Daophin*, 533 So. 2d 761 (Fla. 1988); *State v. McCloud*, 577 So. 2d 939 (Fla. 1991); and *Davis v. State*, 581 So. 2d 893 (Fla. 1991)—are inapposite. Those cases rely on the principle that one who aids and abets is liable as a principal. See § 777.011, Fla. Stat.; *State v. Roby*, 246 So. 2d 566, 571 (Fla. 1971). In *Daophin*, 533 So. 2d at 762, this Court held that simple possession is not a lesser-included offense of trafficking by delivery because, “through the law of principals, it is quite possible for an accused to aid, abet, counsel, hire, or otherwise procure the delivery of contraband without having actual or constructive possession of the contraband.” And, in *McCloud*, 577 So. 2d at 940, this Court relied on *Daophin*, and, in *Davis*, 581 So. 2d at 894, this Court followed *McCloud*.<sup>8</sup> As *Daophin* makes clear, the reason that someone can aid and abet the sale or delivery of drugs without possessing them, either principally or as an aider-and-abettor, is that the seller/deliverer already possesses the

---

<sup>8</sup>*McCloud* also relies on *Daudt v. State*, 368 So. 2d 52, 54 (Fla. 2d DCA 1979), which similarly held that the defendant had aided and abetted the principal in selling the marijuana but not in possessing it. See *McCloud*, 577 So. 2d at 940.

drugs and someone who aids and abets the sale or delivery is aiding and abetting the principal in *divesting* himself of the drugs he possesses. See *id.*, 33 So. 2d at 762; see also *St. Clair v. State*, 575 So. 2d 243, 244 (Fla. 1st DCA 1991); *L.J. v. State*, 578 So. 2d 360, 362 (Fla. 3d DCA 1991).

That reasoning does not apply to the purchase of drugs, which is an act of acquisition. See *Conage*, 976 F.3d at 1262 (distinguishing cases that “dealt with a defendant who had been convicted of possession based on the assistance he provided in *selling* illegal drugs,” and therefore “helping the seller dispose of the drug,” from circumstances in which a defendant “helps a cohort come into possession of the drugs”) (emphasis in original). A would-be purchaser does not yet possess the drugs, and the purchase is not complete until he does, just as a sale is not complete without delivery. See *Milazzo v. State*, 377 So. 2d 1161, 1163 (Fla. 1979) (holding that “delivery is one of the essential elements of a sale”). Thus, one cannot aid and abet the purchase of drugs without also aiding and abetting the purchaser’s possession of those drugs. *Daophon*, *McCloud*, and *Davis*, are inapposite.<sup>9</sup>

---

<sup>9</sup>The cases cited by *Conage* that allowed a defendant to be found guilty of both purchasing and possessing the same drugs—*Psihogios v. State*, 544 So. 2d 283 (Fla. 4th DCA 1989); *State v. Houghtailing*, 704 So. 2d 163 (Fla. 1st DCA 1997); and *Milhouse v. State*, 37 So. 3d 862 (Fla. 2d DCA 2010) (unpublished)—were wrongly decided for the reasons

Second, the cases that Conage cites on pages 21–27 of his brief do not hold that one can traffic by purchasing without also possessing the drugs. The Eleventh Circuit explained in *Conage* why these cases do not directly address the issue and why, in some cases, they support the conclusion that possession is an inherent requirement of purchasing. See 976 F.3d at 1257–62 (discussing *Sobrino v. State*, 471 So. 2d 1333 (Fla. 3d DCA 1985); *Cunningham*, 647 So. 2d 164; *Amaya v. State*, 782 So. 2d 984 (Fla. 3d DCA 2001); and *Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA 1992)). Because we cannot do better than the Eleventh Circuit, we refer this Court to that Court’s explanation rather than repeating it here.

Conage argues that this Court should look beyond the dictionary definition of “purchase” to determine that word’s ordinary meaning. See Conage’s brief at 9–11. But this Court should not disregard dictionary definitions based on Conage’s assertion of how a “normal English speaker” uses the word. See *Carpet Installation & Supplies of Glenco v. Alfa Mut.*

---

explained throughout this brief, and this Court should not find them persuasive. Although purchase requires an extra element—the giving of consideration—trafficking by possession does not require proof of any element beyond what is required for trafficking by purchase. See § 775.021(4)(a), Fla. Stat. (“[O]ffenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.”).

*Ins. Co.*, 628 So. 2d 560, 562 (Ala. 1993) (“What is a dictionary definition if not an assertion of that very meaning that an ordinary person would give a particular word? It is exactly the result of an examination into the interpretation that ordinary people would give the word.”). In any event, his examples misconstrue how ordinary speakers use the term or fail to show that purchasing does not require the exchange of money for the item.<sup>10</sup>

---

<sup>10</sup>Take Conage’s first example, John’s purchasing of a book for Jenny. See Conage’s brief at 10. Although Jenny ultimately ended up possessing the book, one understands that, before John gave the book to Jenny, he possessed the book, at least constructively, which is why he had the ability to give it, or direct that it be given, to Jenny. Conage’s second example—John’s purchasing of a book to be received later, *see id.*—fares no better. An ordinary English speaker would not use the word “purchase” in the manner Conage suggests; rather, one might say that John ordered or pre-ordered the book. See Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/preorder> (last visited March 4, 2021) (defining “preorder” as “to order (something) in advance: to request to purchase (something) before it is available for sale). Conage also points to online shopping, but, of course, online shopping did not exist until 1991 and did not become common until after that—Amazon, for instance, was not even founded until 1994. Editors, *Amazon Opens for Business*, History.com (Nov. 4, 2015), <https://www.history.com/this-day-in-history/amazon-opens-for-business>. Thus, the use of the term “purchase” as it relates to online shopping could not have informed what the term “purchase” meant when the legislature added it to the statute in 1987. In any event, an ordinary English speaker would say that he “ordered” an item on Amazon. See Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/order> (last visited March 4, 2021) (giving as an example, “I ordered the books from the company’s website.”). In all these examples, a normal English speaker would understand, as the dictionary confirms, that an order does not become a purchase until money is exchanged and the item is obtained or acquired.

In short, Conage offers no compelling reason for this Court to depart from the dictionary definition of “purchase” to establish the plain meaning of the term. And cases from this Court and others support using the dictionary definition, which establishes that “purchase” requires a completed transaction: the exchange of something of value for, and the receipt of, the item.

Because “purchase” unambiguously requires possession, there is no need for this Court to inquire further. “When the statutory language is clear or unambiguous, this Court need not look behind the statute’s plain language or employ principles of statutory construction to determine legislative intent.” *English v. State*, 191 So. 3d 448, 450 (Fla. 2016). “The reason for this rule is that the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.” *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976). Indeed, this Court cannot depart from the plain and ordinary meaning of “purchase,” even if it is “convinced that the Legislature really meant and intended something not expressed in the phraseology of the act.” See *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (internal quotation marks omitted). Consequently, this Court should look no further to hold that trafficking by purchasing under

section 893.135 requires actual or constructive possession of the drugs.

**B. In any event, the principles of statutory construction dictate that “purchase” under section 893.135 requires possession.**

But, if this Court were to apply the canons of statutory construction that Conage proposes, the outcome would be no different—purchase would still require possession. Under Conage’s best case, those canons would show that the term “purchase” is subject to competing, reasonable meanings—its ordinary meaning, which requires possession, and the meaning proposed by Conage, which does not. Therefore, under that scenario, the rule of lenity would require that section 893.135 be construed in favor of defendants charged under it to require possession. *See State v. Weeks*, 202 So. 3d 1, 9 (Fla. 2016) (applying the rule of lenity because the term “replica” in the felon-in-possession statute reasonably could have two meanings and construing the statute in favor of the defendant charged with violating it).

First, Conage is wrong that the statutory scheme supports that the legislature intended to make the payment of money without the receipt of drugs a violation of Florida’s most serious drug-offense statute. *See* Conage’s brief at 18–20. To the contrary, construing “purchase” as Conage suggests would be inconsistent with the statutory scheme. As discussed above, this Court has held that “delivery is one of the essential elements of

a sale.” See *Milazzo*, 377 So. 2d at 1163. Yet Conage has not explained why the legislature would punish under section 893.135 the payment for drugs without the receipt of those drugs but not punish under the same statute the receipt of money for the same drugs without delivery. Rather, the payment of money without the receipt of drugs constitutes the attempted purchase of the drugs, just like the acceptance of money without the delivery of drugs constitutes an attempted sale. See *Milazzo*, 377 So. 2d at 1162 (recognizing “that the ordinary definition of sale does not include attempted sale and that, in common usage, the terms ‘sale’ and ‘attempted sale’ are not synonymous”).

Moreover, using the ordinary meaning of “purchase” would not result in “middlemen who purchase large quantities of drugs” being exempt from liability under the drug-trafficking statute, as Conage contends.<sup>11</sup> See Conage’s brief at 11, 20. As discussed above, under Florida law a person can be convicted as a principal for a crime physically committed by another, if the defendant intended that the crime be committed and performed some act to assist the other person in actually committing the

---

<sup>11</sup>Even if it did, that is no reason to depart from the ordinary meaning of “purchase.” See *Yates v. United States*, 574 U.S. 528, 570 (2015) (Scalia, J., dissenting) (“Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.”).

crime. See *State v. Larzelere*, 979 So. 2d 195, 215 (Fla. 2008).

Consequently, a middleman would be liable for drug trafficking under an aiding-and-abetting theory, even if he did not purchase the drugs as a principal.

Consider the following scenario. The leader of a drug-trafficking ring arranges to purchase over 28 grams of cocaine from a supplier. He gives a middleman the money to pay the supplier but sends a courier to collect the drugs and transport them to a stash house. The middleman gives the money to the supplier, and the supplier gives the drugs to the courier. At this point, the leader—not the middleman—is the principal purchaser of the drugs. He caused his money to be exchanged for the drugs, and he exercised dominion and control over the drugs that he now owned by directing that they be given to the courier to deliver to the stash house.

But that does not mean that the middleman escapes liability. He aided and abetted the leader's purchase and therefore is liable as if he had purchased the drugs himself. *Cf. State v. Dent*, 322 So. 2d 543, 544 (Fla. 1975) (defendant, who took an active part in arranging the sale of drugs, was liable for the sale of the drugs under an aiding-and-abetting theory, even though he did not personally sell the drugs). The middleman in our example aided and abetted the leader's possession of the drugs, too, so he

also could be convicted of trafficking by possession. See *L.J.*, 578 So. at 361 (explaining that a person may be found guilty of possession of a contraband substance, “although not in physical possession of same,” if he aids or abets another party in acquiring possession of the drugs). In other words, the middleman is guilty of—and could be convicted of—either trafficking by purchasing or trafficking by possessing.

For these reasons, this Court need not—and as discussed above, cannot—cast aside the ordinary meaning of “purchase” in order to capture the conduct that Conage contends that the legislature intended to capture. Although possession is inherent in purchasing, a person still can be held liable for purchasing under an aiding-and-abetting theory even if that person did not personally possess the drugs.

Conage’s reliance on the Florida Constitution, see Conage’s brief at 10, is equally misplaced. The Florida Constitution requires a three-day waiting period between the “purchase” and “delivery” of a handgun, and it defines “purchase” as “the transfer of money or other valuable consideration to the retailer.” Art. I, § 8, Fla. Const. That the drafters chose to define “purchase,” a term of ordinary meaning, indicates that they intended the term to mean something other than its ordinary meaning. And beyond that, the drafters’ decision to define “purchase” in that

unconventional way makes perfect sense in that context; indeed it was inevitable, given that the provision is designed to address the (waiting) period before the purchaser can take possession. In any event, had the legislature intended the meaning of the term “purchase” in Florida’s drug-trafficking statute to differ from its ordinary meaning, it could have defined it so as to accomplish that, just as the Constitution’s drafters did.

Nor does the rule against surplusage require that “purchase” be given a different meaning than its ordinary one. Conage argues that construing “purchase” to require possession would render superfluous the phrase “actual or constructive possession” in section 893.135. Conage’s brief at 12. Not so. If “purchase” requires both consideration and possession, as we contend, that term does not criminalize all actual and constructive possession of drugs.<sup>12</sup> A defendant could traffic by possessing the requisite quantity of drugs even if he did not give any consideration for them.

Of course, as Conage points out, this begs the question why the legislature would add “purchase” to the statute when that term covers less conduct than the already-included term “actual and constructive

---

<sup>12</sup>For the same reason, Conage’s grammar argument on pages 14–15 of his brief fails. Actual and constructive possession is distinct from purchase because it does not require consideration. But that does not mean that purchase does not require possession.

possession.” But the statute criminalizes both the sale and the delivery of drugs, and we know that a sale requires the delivery of the drugs. See *Milazzo*, 377 So. 2d at 1163. So the legislature already has included overlapping terms in the statute, and, where “iteration is obviously afoot” in the relevant statute, this Court should not give an unnatural meaning to the term “purchase” “simply in order to avoid iteration.” See *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting). Indeed, “drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176–77 (Thompson/West 2012) (cautioning that “[d]oublets and triplets abound in legalese” and that “a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage”) (emphases in original).

Moreover, because “sale” was already included in the statute, the legislature could have added “purchase” to section 893.135 to avoid the possible application of the doctrine of *expressio unius est exclusio alterius*—the mention of one thing implies the exclusion of another. *Cf. Aluli*, 893 P.2d at 171 (inclusion of “to sell” in the definition of distribution but not its converse “to buy” indicates that the legislature did not intend for

the statute to cover buying drugs). Or the legislature could have added “purchase” to clarify that the statute does, in fact, cover the purchase of drugs, in reaction to cases such as *Sobrino*, which wrongly state in dicta that the pre-1987 version of section 893.135 does not prohibit the purchase of drugs.<sup>13</sup> See *id.*, 471 So. 2d at 1335.

But all this conjecture gets Conage nowhere. Legislative purpose “must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desire.” Scalia & Garner, *supra*, at 56; see also *Tropical Coach Line, Inc. v. Carter*, 121 So. 2d 779, 782 (Fla. 1960) (“If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.”). Here, nothing in the text tells us why the legislature added “purchase,” so Conage can only speculate at legislative intent. That is insufficient to cast aside the ordinary meaning of the term. See *Peraza*, 259 So. 3d at 733 (“Because even a clearly discernible

---

<sup>13</sup>In *Sobrino*, the Court stated that, in the context of a drug transaction, “[t]o receive or obtain something in exchange for compensation is to purchase.” 471 So. 2d at 1334. As explained above, that definition requires possession.

Legislative intent cannot change the meaning of a plainly worded statute, it would only confuse matters to focus on what the Legislature might have intended rather than what the statute actually says.”).

The above discussion demonstrates that, if this Court were to go beyond the ordinary meaning of “purchase,” applying additional canons of statutory construction would not support that the legislature meant for the term “purchase” to require only the giving of consideration, as Conage contends. And doing so certainly does not resolve clearly which of the proposed interpretations of “purchase” the legislature intended. Therefore, if there were sufficient doubt, the rule of lenity would require any doubt to be resolved in favor of defendants charged with violating section 893.135. See *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) (“The rule of lenity requires that any ambiguity or situations in which statutory language is susceptible to differing constructions *must* be resolved in favor of the person charged with an offense.”) (internal quotation marks and brackets omitted; emphasis in original); see *also* Scalia & Garner, *supra*, at 299. “In Florida, the rule is not just an interpretive tool, but a statutory directive.” *Kasischke*, 991 So. 2d at 814 (citing § 775.021(1), Fla. Stat.)).

Contrary to Conage’s argument on pages 15–16 of his brief, the rule of lenity does not require this Court to construe section 893.135 *broadly*—

and capture more criminal conduct—so that a federal defendant like Conage may avoid a sentencing enhancement premised on his previous violation of that statute. Although the rule of lenity requires that an ambiguous sentencing-enhancement statute be construed in favor of the defendant, *Clines v. State*, 912 So. 2d 550, 560 (Fla. 2005), here this Court is not construing the meaning of the Armed Career Criminal Act. Instead, the Eleventh Circuit asked this Court to construe Florida’s drug-trafficking statute, so that is the statute to which this Court must apply the rule of lenity, if it applies that rule at all. See *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007) (when criminal statutes are subject to more than one reasonable interpretation, they must be strictly construed in favor of the accused).

And the interpretation of section 893.135 that most favors a defendant accused of violating it by purchasing is the interpretation we propose, that “purchase” encompasses both payment for and possession of the drugs. Cf. *State v. Mena*, 471 So. 2d 1297, 1299 (Fla. 3d DCA 1985) (“It takes more of an evidentiary showing to prove a sale than a delivery because the element of consideration must be established in a sale.”); *Conage*, 976 F.3d at 1258 (“It is Conage’s position that proof of trafficking by purchase does not require the State to prove that the defendant ever

possessed the drugs at issue, which, if true, would mean that it would be easier for the State to prove a purchase than to prove possession.”).

Therefore, the rule of lenity, if applied, would require this Court to construe the term “purchase” to require both the exchange of consideration and the possession of the drugs.

## Conclusion

For the foregoing reasons, to traffic by purchasing a distribution quantity of drugs requires both the giving of consideration and the actual or constructive possession of the drugs under the plain meaning of the word “purchase” and, if resorted to, by application of the canons of statutory interpretation. This Court, therefore, should hold that “purchase,” as used in section 893.135, means “to obtain or acquire drugs in exchange for something of value” and that violating section 893.135 by purchasing a distribution quantity of drugs inherently requires the actual or constructive possession of those drugs.

Respectfully submitted,

KARIN HOPPMANN  
Acting United States Attorney

DAVID P. RHODES  
Assistant United States Attorney  
Chief, Appellate Division

By: s/ Holly L. Gershow  
HOLLY L. GERSHOW  
Assistant United States Attorney  
Appellate Division  
Florida Bar No. 98960  
400 N. Tampa St., Ste. 3200  
Tampa, FL 33602  
(813) 274-6000  
holly.gershow@usdoj.gov

## **Certificate of Compliance**

I HEREBY CERTIFY that I prepared this brief using Arial 14-point font and that it contains 7,203 countable words.

*s/ Holly L. Gershow*  
\_\_\_\_\_  
HOLLY L. GERSHOW  
Assistant United States Attorney

## **Certificate of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court's E-Filing Portal on all counsel in the Service List below on this 8<sup>th</sup> day of March 2021.

*s/ Holly L. Gershow*  
\_\_\_\_\_  
HOLLY L. GERSHOW  
Assistant United States Attorney

### **SERVICE LIST**

*Counsel for Michael Conage:*

**CONRAD BENJAMIN KAHN**  
Assistant Federal Public Defender  
Florida Bar No. 104456  
201 S. Orange Avenue, Ste. 300  
Orlando, FL 32801  
(407) 648-6338  
Conrad\_Kahn@fd.org