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IN THE SUPREME COURT OF FLORIDA

No. 20-1441

MICHAEL ANTHONY CONAGE,

Appellant,

v.

UNITED STATE OF AMERICA,

Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANT'S INITIAL BRIEF ON THE MERITS

James T. Skuthan
Acting Federal Defender

Rosemary Cakmis
Chief of Appeals

Conrad Benjamin Kahn
Counsel of Record
Fla. Bar No. 104456
Email: Conrad_Kahn@fd.org

Adeel Bashir
Katherine Howard
Federal Defender's Office
201 South Orange Ave., Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338

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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?

The most natural reading of § 893.135—which prohibits trafficking by six separate means, including "purchase" and "actual or constructive possession"—confirms that trafficking by purchasing requires proof of buying a threshold quantity of drugs, but it does not require proof of possession. This reading is compelled by canons of statutory construction, accords with existing case law, and effectuates the Florida Legislature's intent to capture a broad spectrum of conduct related to controlled substances.

Preliminary Statement

Appellant Michael Anthony Conage was the appellant in the Eleventh Circuit and the defendant in the United States District Court for the Middle District of Florida. The United States was the appellee in the Eleventh Circuit and the plaintiff in the district court.

Statement of the Case and Facts

A. Trial Court Proceedings.

In 2016, the United States charged Mr. Conage with possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (Count One), and possession of hydromorphone with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Count Two). Doc. 21. After a two-day trial, the jury found Mr. Conage guilty as charged. Doc. 47.

In anticipation of sentencing, the United State Probation Office prepared a Presentence Investigation Report ("PSR"), in which it recommended that the district court sentence Mr. Conage under the Armed Career Criminal Act ("ACCA") because he had three prior convictions for "serious drug offense[s]." PSR ¶ 25. Under the ACCA, a "serious drug offense" is an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). One prior conviction Probation identified was trafficking in cocaine, in violation of § 893.135(1)(b)(1), Florida Statutes (2006). PSR ¶ 25.

The ACCA enhancement raised Mr. Conage's maximum penalty from 10 years to life imprisonment, with a 15-year mandatory minimum. 18 U.S.C. § 924(e)(1). The ACCA enhancement also raised Mr. Conage's advisory Guidelines

range to 262-to-327 months' imprisonment. PSR ¶¶ 79, 80. Without the ACCA enhancement, Mr. Conage's Guidelines range on his drug count would have been 140-to-175 months' imprisonment, and the Guidelines range on his gun count would have been 120 months (the statutory maximum). Doc. 66 at 1; PSR ¶ 45.

Mr. Conage objected to Probation's recommendation that the district court treat his Florida conviction for trafficking in cocaine as a "serious drug offense" because a perpetrator could commit the offense by "purchasing" a controlled substance, which does not necessarily require a perpetrator to distribute or possess with the intent to distribute a controlled substance. Doc. 59 at 29–30; Doc. 63 at 9–17; Doc. 83 at 6–14. The district court overruled Mr. Conage's objection and imposed the ACCA's mandatory-minimum sentence of fifteen years' imprisonment, followed by five years' supervised release, on both counts to run concurrently. Doc. 83 at 18–19.

B. Appellate Court Proceedings.

On appeal, Mr. Conage maintained that the offense of drug trafficking by purchasing 28 grams of cocaine is not a "serious drug offense" because the offense does not categorically "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." *United States v. Conage*, 976 F.3d 1244, 1249 (11th Cir. 2020) (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). The

Eleventh Circuit noted that under federal law, "actual possession" occurs when a person knowingly has direct physical control over an item, and "constructive possession" occurs when a person "exercises ownership, dominion, or control" over an item or "has the power and intent to exercise dominion or control." *Id.* at 1255 (quoting *United States v. Beckles*, 565 F.3d 832, 841 (11th Cir. 2009)). And the court explained that under the "serious drug offense" definition, one could infer an "intent to distribute" from possession of a trafficking quantity of drugs. *Id.* at 1253. But the Eleventh Circuit could not determine whether drug trafficking by purchasing is a "serious drug offense" because it was unsure whether the elements of the Florida offense include "possession" of a trafficking quantity of drugs. *Id.* at 1247. Thus, the Eleventh Circuit certified the following question to this Court:

> 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?

Id. at 1263.

Summary of the Argument

To establish a completed "purchase" under Florida's drug trafficking statute, § 893.135, the State must show that a defendant bought a threshold quantity of drugs, but it does not need to prove that the defendant also possessed the drugs. Three

points compel this conclusion. First, the plain and ordinary meaning of "purchase" is to exchange money or buy something. Section 893.135's text and structure show that "purchases" carries its ordinary meaning and does not require the State to prove an individual possessed drugs in addition to buying them. Several canons of statutory construction and Florida's double jeopardy case law on drug offenses further support applying the plain meaning of "purchases" to § 893.135 and treating "purchases" and "actual and constructive possession" as distinct ways of committing drug trafficking.

Second, drug trafficking is the apex of a statutory scheme of drug offenses. As the severity of the offense increases, so too does the range of prohibited conduct that the statute aims to capture. For the offense of drug trafficking, the Florida Legislature prohibited six acts, including purchase and possession. Moreover, the Legislature amended § 893.135 to include "purchase" after it already included "actual and constructive possession." By adding "purchases" to the list of prohibited acts, the Legislature sought to capture a wide range of drug trafficking conduct, including individuals like middlemen who purchase—but do not possess—large quantities of drugs. This Court should, therefore, read the term "purchases" in § 893.135 to proscribe the distinct act of buying drugs and should not limit the offense to situations in which an individual also possesses the drugs.

Third, case law supports that "purchases" in the context of § 893.135 does not stray from its plain and ordinary meaning. Consistent with the Florida Legislature's intent to broadly capture conduct related to drug trafficking, the relevant cases show that the critical factor for a completed purchase is the exchange of money. As a result, the State does not need to prove a defendant possessed the drugs to secure a prosecution for drug trafficking by "purchase."

Argument

I. "Purchases" in § 893.135 Requires Proof of Buying, But Not Necessarily Possessing, a Threshold Quantity of Drugs.

Section 893.135(1) proscribes trafficking in various drugs, including cocaine. The trafficking in cocaine statute states:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine[.]"

§ 893.135(1)(b)(1), Fla. Stat. (2020). At issue here are two of the separate acts prohibited under the drug trafficking statute: a "person . . . who is knowingly in actual or constructive possession of[] 28 grams or more of cocaine" and a "person

who knowingly . . . purchases . . . 28 grams or more of cocaine." § 893.135(1)(b)(1), Fla. Stat.[1]

The text and structure of § 893.135 show that the offense of drug trafficking by "purchase" does not require possession of the drugs. Several tools of statutory construction confirm that the plain and ordinary meaning of "purchases" applies: "purchasing" drugs simply means to buy them, regardless of possession. And that understanding is further supported by Florida's application of double jeopardy principles, which establish that purchasing and possessing the same drugs involve distinct conduct and are thus treated as separate offenses.

A. Applying Fundamental Principles of Statutory Interpretation to the Text and Structure of § 893.135 Shows that "Purchase" Does Not Require "Possession."

Many of the common tools of statutory construction show that the Florida Legislature wanted the word "purchases" in § 893.135 to retain its ordinary meaning—that is, to buy a threshold quantity of drugs, but not necessarily possess

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[1] Florida law defines "actual possession" and "constructive possession" like federal law. "Actual possession" occurs when an individual has knowing physical possession of a controlled substance. *See Gartrell v. State*, 626 So. 2d 1364, 1366 (Fla. 1993). "Constructive possession" occurs when a defendant does not have actual physical possession of contraband but knows of its presence on or about his premises and can exercise dominion and control over it. *See Knight v. State*, 186 So. 3d 1005, 1012 (Fla. 2016).

them. These tools include the language's plain and ordinary meaning, the rule against surplusage, the grammar canon, and the rule of lenity.

i. Plain and Ordinary Meaning.

The Court's inquiry into the meaning of "purchases" in § 893.135 begins with the "actual language used in the statute." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006); *see also Maggio v. Fla. Dep't of Labor & Employment Sec.*, 899 So. 2d 1074, 1076–77 (Fla. 2005). Because § 893.135 does not define "purchases," its meaning derives from its "plain and ordinary sense." *Milazzo v. State*, 377 So. 2d 1161, 1162 (Fla. 1979); *see also Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) ("One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by the clear intent of the legislature.").

One method of determining the plain meaning of statutory language is to consult a dictionary. *See States v. Weeks*, 202 So. 3d 1, 7 (Fla. 2016). Here, dictionary definitions support that in ordinary English, to "purchase" means to exchange money or buy something. *See, e.g.*, Webster's II New Riverside University Dictionary (1988) (defining purchase as "to obtain by paying money or its equivalent; buy"); The American Heritage Dictionary of the English Language

(2000) (same); Oxford English Dictionary (2d ed. 1989) (defining purchase as "to acquire by the payment of money or its equivalent; to buy.").

These dictionary definitions show that "purchase" and "buy" are synonymous. *See generally Burch v. State*, 558 So. 2d 1 (Fla. 1990) (using "purchasing" and "buying" interchangeably). Although these definitions also use the words "obtain" and "acquire," they do not state that "purchase" and "possession" are synonymous, undermining the notion that "purchase" necessarily connotes "possession." Thus, the dictionary, while not the sole tool at the Court's disposal, shows that to "purchase" means to exchange money or to buy something but not necessarily to possess it.

Beyond the dictionary, ordinary usage clarifies that "purchase" has no possession requirement. *See Yates v. United States*, 574 U.S. 528, 537 (2015) ("Whether a statutory term is unambiguous[] . . . does not turn solely on dictionary definitions of its component words."); *see also Lopez v. Gonzales*, 549 U.S. 47, 53–54 (2006) (reviewing how the word "trafficking" is regularly used to determine the meaning of the term "illicit trafficking").[2] For instance, ordinary English speakers

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[2] Aside from citing two dictionary definitions, the Eleventh Circuit engaged in no statutory construction. *See Conage*, 976 F.3d at 1255–56.

routinely use purchase to describe buying items for someone else or buying something without taking possession. Consider these two statements:

1) Jenny selected her favorite book, and John purchased it for her.

2) John purchased an advanced copy of the new book today, and he hopes it is available to pick up next month.

A normal English speaker would understand both sentences to mean that John bought a book but did not possess it. In the first example, one understands John to have purchased the book as a gift for Jenny, even though Jenny selected and possessed the book. And in the second example, the reader understands that although John may have bought the new book today, he may not take possession of the book for at least a month, or at all, depending on its availability. *See also* Art. I, § 8(b), Fla. Const. (imposing a mandatory waiting period between the purchase and delivery of a firearm and defining "purchase" as "the transfer of money or other valuable consideration to the retailer"); § 790.0655(1)(a), Fla. Stat. (2020) (same).

Another example is online shopping. In a typical purchase on Amazon, for instance, the moment the buyer finalizes a transaction, an ordinary English speaker would understand that the buyer has "purchased" the item. Yet one understands that possession will not occur until the buyer physically receives the item, which usually happens several days after the purchase. And like with the earlier examples about purchasing the book, one understands that the person making an Amazon purchase

may never intend to take possession, like when Amazon ships an item a third party. An ordinary English speaker, however, would still describe these instances as the buyer having made a "purchase."

Everyday English speakers also routinely use "purchases" or "purchaser" when talking about people who buy items that someone else will possess, such as purchasing agents, wholesale buyers, and stock brokers. The same is true when discussing drug trafficking. Large scale drug trafficking organizations often have a complex division of labor, designed to make it hard to trace the source of the drugs. By design, the middleman never possesses the drugs, and someone other than the middleman is managing the distribution of the drugs. Even under this framework, an ordinary English speaker would describe the middleman's conduct as "purchasing" drugs. And that makes sense. Although the middleman never actually or constructively possesses the drugs, Florida wants to punish him for drug trafficking because he facilitates the movement of a large quantity of drugs.

Thus, whether discussing purchasing generally or in the context of drug trafficking, ordinary English speakers use "purchase" to mean "buy" without necessarily "possessing." This Court should read "purchases" in § 893.135 the same way.

Although the dictionary and ordinary usage support that "purchase" means to exchange money or buy something, the inquiry does not end there. "Rather, the plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates*, 574 U.S. at 537 (alterations adopted) (internal quotation marks omitted). Thus, this Court should look to additional canons of statutory interpretation beyond dictionary definitions to determine the Legislature's intent. *See Weeks*, 202 So. 3d at 7–8.

ii. The Rule Against Surplusage.

When reading the word "purchases" in the context of § 893.135, this Court should "endeavor to give effect to every word of [the] statute so that no word is construed as 'mere surplusage.'" *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 302 (Fla. 2017) (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198–99 (Fla. 2007)). Construing "purchase" to not include a possession requirement gives each term in the statute independent meaning. In contrast, construing the term "purchases" to include a possession requirement would render the phrase "actual or constructive possession" in § 893.135 "mere surplusage." *Id.*

Section 893.135's history strongly supports the Florida Legislature did not include "purchases" to replicate what was already in the statute. In 1987, the Florida

Legislature added "purchases" to the list of ways to violate § 893.135 because Florida was "facing a crisis of dramatic proportions due to a rapidly increasing crime rate" and needed "urgent and creative remedial action." *See Burch*, 558 So. 2d at 2. To that end, the Florida Legislature included "purchases" in §§ 893.13 and 893.135 to capture more conduct within the statute. When the Legislature added "purchases" to § 893.135, the statute already prohibited trafficking by "actual or constructive possession." § 893.135(1), Fla. Stat. (1987).

This history shows that the Florida Legislature intended not only for the word "purchases" to capture conduct that the statute did not already capture, but also that these terms carry different meanings. *See Psihogios v. State*, 544 So. 2d 283, 284 (Fla. 4th DCA 1989) ("[T]he apparent need to create a separate and distinct crime for a "purchase" may well reflect a legislative intent to punish buying as a felony in those cases where the buyer is not found in possession of the purchased drugs.").

Indeed, the Florida Legislature would have had no reason to add "purchases" to § 893.135 if it intended for this language to incorporate either actual or constructive possession. *See Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005) ("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." (quoting *State v. Goode*,

830 So. 2d 817, 824 (Fla. 2002))). Thus, the rule against surplusage favors reading "purchases" in § 893.135 to mean buying a threshold quantity of drugs but not necessarily possessing them.[3]

iii. The Grammar Canon.

Ordinary rules of grammar, syntax, and punctuation also support reading "purchase" and "actual or constructive possession" as distinct acts. *See State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004) (relying on the "grammatical structure" of a statute when construing a statute); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 140–43, 161–66 (discussing the "Grammar Cannon" and "Punctuation Canon"). Section 893.135 sets apart six ways to commit trafficking using either a comma or a combination of a comma and the word "or." It also used the word "knowingly" twice: the statute applies to "[a]ny person who knowingly sells, purchases, manufactures, delivers, or brings into the state," and to "[a]ny person…who is in knowingly in actual or constructive possession." § 893.135(1)(b), Fla. Stat.

[3] A corollary to the rule against surplusage is the presumption that different words in the same statute carry different meanings. *See Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006). Applying this presumption here also shows that the word "purchases" in § 893.135 carries its plain and ordinary meaning—to exchange money for or buy, but not necessarily possess, a certain quantity of drugs.

"As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime" in a single adverbial phrase. *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009). But here, the phrase "knowingly . . . purchases" is not part of the independent clause, "who is knowingly in actual or constructive possession." In other words, under the statute, "knowingly purchasing" and "knowingly possessing" differ from one another. *See, e.g.*, *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989). Thus, § 893.135's grammar, punctuation, and structure also support that the offense of "purchasing" under § 893.135 does not require possession.

iv. The Rule of Lenity.

Finally, to the extent that there is any remaining doubt about whether the term "purchases" includes a possession requirement, the rule of lenity compels a ruling in Mr. Conage's favor. *See Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008) ("[T]he rule of lenity is a canon of last resort."); *Paul v. State*, 129 So. 3d 1058, 1064 (Fla. 2013) (stating that the rule of lenity "applies if the statute remains ambiguous after consulting traditional canons of statutory construction"). "The rule of lenity is a 'fundamental tenant of Florida law regarding the construction of criminal statutes, which weighs in favor of the defendant.'" *Weeks*, 202 So. 3d at 8 (quoting *Polite v.*

State, 973 So. 2d 1107, 1112 (Fla. 2007)). Florida has codified its rule of lenity in § 775.021(1), Florida Statutes (2020), which provides that courts must "strictly construe[]" penal statutes. But when the statutory text "is susceptible to differing constructions," courts must construe the language "favorably to the accused." § 775.021(1), Fla. Stat.[4]

As the preceding analysis shows, the term "purchases" in § 893.135 does not include a possession requirement. There is thus no need to resort to the rule of lenity. But if any doubt remains, the rule of lenity favors Mr. Conage's reading that the offense of "purchase" has no possession requirement.

B. The *Blockburger* Test of Statutory Construction also Supports that "Purchases" in § 893.135 Does Not Require Possession.

The *Blockburger*[5] test (also known as the "same-elements" test) underscores that § 893.135 uses "purchases" in its plain and ordinary sense, meaning simply to buy a certain quantity of drugs. Under the *Blockburger* test, courts ask whether each offense requires proof of an element the other does not. If not, the offenses are the

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[4] Notably, the rule of lenity also applies to sentencing provisions. *Clines v. State*, 912 So. 2d 550, 560 (Fla. 2005) ("We have explained that the rule 'is applicable to sentencing provisions' if they 'create ambiguity or generate differing reasonable constructions.'" (quoting *Nettles v. State*, 850 So. 2d 487, 494 (Fla. 2003))).

[5] *Blockburger v. United States*, 284 U.S. 299 (1932).

same and double jeopardy bars later prosecution or punishment. *See M.P. v. State*, 682 So. 2d 79, 81 (Fla. 1996); § 775.021(4), Fla. Stat. (2020) (codifying the *Blockburger* test).

Several Florida courts have examined whether dual prosecutions for both the purchase of a controlled substance and the possession of that substance violate double jeopardy principles. And uniformly these courts have held there is no double jeopardy problem because "[p]ossession is not required to purchase, and purchase is not required to possess contraband." *Psihogios*, 544 So. 2d at 284; *see Milhouse v. State*, 37 So. 3d 862 (Fla. 2d DCA 2010); *State v. Houghtailing*, 704 So. 2d 163, 164 (Fla. 5th DCA 1997).

Likewise, this Court has held that a trial court may convict a defendant of possessing a controlled substance and one of the other acts in the trafficking statute, such as selling or delivering the controlled substance, without violating double jeopardy. *See State v. McCloud*, 577 So. 2d 939, 940–41 (Fla. 1991) (holding that the State may convict a defendant of possessing and selling the same cocaine); *Davis v. State*, 581 So. 2d 893, 894 (Fla. 1991) (holding that the State may convict a defendant of possessing and delivering the same controlled substance); *State v. Daophin*, 533 So. 2d 761, 762 (Fla. 1988) ("Simple possession is not a necessarily lesser included offense of trafficking by delivery."); *see also Anderson v. State*, 447

So. 2d 236, 239–40 (Fla. 1st DCA 1983) ("[T]he crime of 'manufacture' does not require proof of possession.").

Additionally, the jury instruction for drug trafficking by purchase does not include possession as a lesser-included offense. Fla. Std. Jury. Instr. (Crim.) 25.7(a). The only time possession is a lesser-included offense is when the State charges drug trafficking by possession. *Id.* Thus, the *Blockburger* test also supports that "purchases" in § 893.135 does not have a possession requirement.

II. The Statutory Scheme Supports that the Legislature Intended to Punish a Wide Range of Drug Trafficking Conduct, Including Purchasing a Threshold Quantity of Drugs, Regardless of Possession.

The "broader context of the statute as a whole" also informs the reading of the word "purchases" in § 893.135. *See Yates*, 574 U.S. at 529 (internal quotation marks omitted). Drug trafficking is part of a three-tiered statutory scheme for drug offenses of increasing severity. As the severity of the offense increases, so too does the conduct covered under the statutes, demonstrating that the Legislature wanted "purchases" in § 893.135 to have an expansive definition.

The lowest tier is a third-degree felony and prohibits the "actual or constructive possession" of any amount of a controlled substance. *See* § 893.13(6)(a), Fla. Stat. Florida's middle tier offense makes it unlawful to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a

controlled substance." *See* § 893.13(1)(a), Fla. Stat. Florida separately makes it unlawful to "purchase, or possess with intent to purchase, a controlled substance." *Id.* § 893.13(2)(a).[6] Depending on the type of controlled substance involved, a violation of §§ 893.13(1)(a) or 893.13(2)(a) may be a second- or third-degree felony (or, in the case of a Schedule V controlled substance, a first-degree misdemeanor). § 893.13(1)(a)(1)–(3), Fla. Stat.; *id.* § 893.13(2)(a)(1)–(3).

The highest tier offense is drug trafficking. *Id.* § 893.135(1). The statute prohibits trafficking by six separate acts with regard to a specific quantity of drugs (for trafficking in cocaine, 28 grams or more). Specifically, 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 drugs]," commits a first-degree felony. *Id.* As noted in Part I.A.ii, *supra*, the Florida Legislature added "purchases" in 1987, when the statute already prohibited "actual or constructive possession."

Because it covers such a broad array of conduct, the hallmark of drug trafficking is the quantity of drugs. *See, e.g.*, *Driver v. State*, 288 So. 3d 716, 719

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[6] The offenses of purchasing a controlled substance and possessing with the intent to purchase a controlled substance were part of § 893.13(1)(a) from 1987 to 1993. *See* § 893.13(1)(a), Fla. Stat. (1987). In 1993, the Florida Legislature moved those two offenses to § 893.13(2)(a). *See* § 893.13(2)(a), Fla. Stat. (1993).

(Fla. 4th DCA 2020) ("[L]ogic compels the conclusion that the legislature intended that trafficking possession, which requires the possession of more than twenty-eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty-eight grams of any illegal drug." (quoting *Gibbs v. State*, 698 So. 2d 1206, 1209 (Fla. 1997), *receded from on other grounds by Roughton v. State*, 185 So. 3d 1207 (Fla. 2016))).

The Florida Legislature's emphasis on quantity is also reflected in its decision to increase the mandatory-minimum punishment for drug trafficking commensurate with the quantity of the drugs. *See* § 893.135(1)(b)(1)(a)–(c), Fla. Stat.; *id.* § 893.135(1)(b)(2). This statutory scheme shows that the Florida Legislature did not intend to limit trafficking by purchase to situations in which the offender also possessed the drugs. Instead, the Legislature intended to capture all the players in the drug trade, including middlemen who purchase large quantities of drugs but may never possess the drugs.

III. Applying the Ordinary Meaning of "Purchase" Accords with Florida Case Law.

No Florida case has expressly set forth the elements of "purchasing." Several cases, however, support Mr. Conage's position, and none imply a possession requirement. Thus, consistent with the plain meaning of "purchase," Florida case law shows an individual may purchase a controlled substance without possessing it.

A. Several DCA Opinions Confirm that "Purchase" Does Not Require Possession.

i. *Sobrino v. State*, 471 So. 2d 1333 (Fla. 3d DCA 1985).

First, in *Sobrino*, the Third DCA suggested that a perpetrator may commit a purchasing offense even if the perpetrator never possesses a controlled substance. The defendants in *Sobrino* were buying marijuana, and law enforcement arrested them *before* they took possession of the marijuana, as one of the defendants was counting the money. 471 So. 2d at 1334. The Third DCA stated that the defendants had merely purchased cannabis, which was, at that time, not a crime under the trafficking statute. *Id.* ("The problem is that the facts alleged, *the purchase of cannabis,* do not constitute violations of the statutory provisions alleged in the information.").[7] The Third DCA also stated the defendants did not actually or constructively possess the marijuana. 471 So. 2d at 1335 n.1. Thus, if "purchase" applies the way the *Sobrino* court envisioned, a defendant can clearly purchase a controlled substance without possessing it.

ii. *Cunningham v. State*, 647 So. 2d 164 (Fla. 1st DCA 1994).

Second, *Cunningham* shows the pivotal inquiry for purchase is not about the possession of drugs—it is about the exchange of money. In *Cunningham*, two

[7] The Third DCA decided *Sobrino* in 1985, and the Florida Legislature did not criminalize "purchasing" until 1987. *See supra* section I.A.ii.

undercover officers offered to sell the defendant a pound of marijuana. 647 So. 2d at 165. The defendant "took the bag containing the marijuana, opened it, and examined the marijuana." *Id.* at 166. After some more negotiations, the defendant said he would be willing to buy a half pound for $500.00. *Id.* After the officer segregated a sufficient amount of marijuana on a tray, the defendant said, "Okay, I'll go with this." *Id.* One of the officers then said that he "wanted to see some money." *Id.* The defendant pulled a roll of money from his pocket. *Id.* "At that point '*before any money was ever handed to the officer and before any marijuana was handed to appellant*' the back-up officers entered and arrested appellant." *Id.* (emphasis added, alterations adopted).

The trial court convicted the defendant of purchasing marijuana or possessing marijuana with the intent to purchase it, in violation of § 893.13(1)(a) (Count One),[8] and attempted possession of more than 20 grams of marijuana (Count Two). 647 So. 2d at 166.[9] The First DCA held the State's evidence could not support a

[8] *See* n.6, *supra* (explaining that the Florida Legislature moved "purchases" from § 893.13(1)(a) to § 893.13(2)(a) in 1993).

[9] The State charged the defendant in Count Two with possession of 20 grams of marijuana, but the jury returned a verdict on the lesser included offense of attempted possession. *Id.* at 165.

conviction for purchasing a controlled substance "because appellant was arrested before the transaction could be completed." *Id.* at 166.

Notably, in support of its holding, the First DCA cited *Mitchell v. State*, 488 So. 2d 632 (Fla. 4th DCA 1986), for the proposition that no "sale" occurs when a defendant delivers alleged drugs to an undercover officer but has not yet received payment. 647 So. 2d at 166. Through this citation, the First DCA made clear the exchange of money is crucial to the offense of "purchasing" a controlled substance.

To be sure, the officers arrested the defendant before he was handed the marijuana. But the defendant in *Cunningham* undoubtedly possessed the marijuana when he examined and smoked it. The First DCA stated that "there was evidence from which the jury could have found that appellant possessed the marijuana with intent to purchase it." *Cunningham*, 647 So. 2d at 166. Nevertheless, the First DCA vacated the conviction on Count One because it was inconsistent with the jury's finding on Count Two that the defendant did not possess the same marijuana and could be convicted of only the lesser included offense of attempted possession. *Id.* If the offense of purchasing a controlled substance had a possession requirement, the First DCA could have simply used the inconsistent finding on Count Two to vacate the purchasing conviction the same way it used the finding to vacate the conviction for possession with intent to purchase.

In sum, *Cunningham* emphasized—both in its recitation of the facts and the case law it relied on—that the critical aspect of the offense was whether the defendant exchanged money with the officers. *Cunningham* thus supports Mr. Conage. Whether an individual has committed the offense of "purchasing" a controlled substance depends on whether the defendant has exchanged money (or something of value) for a controlled substance, not on whether the defendant possessed the substance.

iii. *Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA 1992).

Third, in *Ras*, the Second DCA explained that a perpetrator may commit the offense of aiding and abetting the purchase of a controlled substance without aiding and abetting the possession of that substance. In *Ras*, the defendant accompanied a suspected drug dealer to a lounge so the defendant could meet, and buy cocaine from, undercover detectives. 610 So. 2d at 25. The defendant, dealer, and detectives went to the detectives' motel room, where they agreed on a price for three ounces of cocaine. *Id.* The officers told the defendant to meet back at the room later. *Id.* The defendant later returned to the room with another man named Griswold. *Id.* "[The defendant]'s only involvement at this time was to lend Griswold a pocket knife to open the bag of cocaine. Griswold then gave the detective the money and picked up

the package of cocaine." *Id.* The detectives arrested the defendant and Griswold. *Id.*

The State charged the defendant with trafficking in cocaine, but it did not charge trafficking by purchase. *Id.* at 26 ("The state, for some unknown reason, did not charge purchase of the cocaine in a trafficking amount . . . . Equally puzzling is why the state did not charge conspiracy to traffic in cocaine . . . ."). At trial, the judge found the evidence showed only trafficking by possession, and submitted the case to the jury on only that charge and its lesser included offenses. *Id.* The jury found the defendant guilty of trafficking by possession. *Id.* at 25.

On appeal, the Second DCA reversed the conviction because the evidence did not support a finding that the defendant actually or constructively possessed the cocaine. *Id.* The Second DCA also concluded that although the evidence could have supported a conviction for aiding and abetting the purchase of cocaine, the State did not charge the defendant with purchase. The court explained that "an aider and abettor of a purchase does not necessarily aid and abet the possession." *Id.* at 25–26.[10] The court cited three cases to support this explanation; each held that aiding

[10] An aider and abettor is a principal in the first degree. *See* § 777.011, Fla. Stat. (2020). "In order to be guilty as a principal for a crime physically committed by another," the aider and abettor "must intend that the crime be committed and do some act to assist the other person in actually committing the crime." *Staten v. State*, 519 So. 2d 622, 624 (Fla. 1988).

and abetting the sale of a controlled substance does not require a perpetrator to aid and abet the possession of the substance. 610 So. 2d at 26 (citing *Stephenson v. State*, 371 So. 2d 554 (Fla. 2d DCA 1979), *Daudt v. State*, 368 So. 2d 52 (Fla. 2d DCA 1979), and *Kickasola v. State*, 400 So. 2d 200 (Fla. 3d DCA 1981)). The Second DCA "recognize[d] the difference between aiding a seller" in divesting himself of a drug and "aiding a purchaser" in acquiring a drug, but "conclude[d] that neither situation encompasses aiding in the possession of the drug." *Id.* at 26 n.1. Thus, because the State did not pursue a purchasing theory, the Second DCA was compelled to reverse the defendant's trafficking conviction. *Id.* at 26.

iv. *Amaya v. State*, 782 So. 2d 984 (Fla. 3d DCA 2001).

Amaya is another case involving a reverse sting operation, but it concerned whether the evidence was sufficient to prove possession—not purchase. In *Amaya*, an undercover officer negotiated to sell cocaine to the defendant and her companion. 782 So. 2d at 985. The defendant's companion was holding the cocaine and then put it down so he could retrieve money from his pocket. *Id.* He paid the officers, and law enforcement arrested both soon after. *Id.* The trial court convicted the defendant of trafficking in cocaine and conspiring to traffic in cocaine, in violation of §§ 893.135(1)(b) and 893.135(5). *Id.* On appeal, the defendant challenged whether the evidence was sufficient to establish possession. *Id.* The Third DCA

held that the defendant and her companion clearly "had the right to possession and control of the cocaine and had physically exercised that right." *Id.* It is unclear whether the State charged the defendant with purchasing or even pursued a purchasing theory. *Id.* Thus, *Amaya* does not imply that "purchase" requires possession. But the State clearly could have charged the defendant with purchasing given that he paid the officers. *See, e.g.*, *Sobrino*, 471 at 1334; *Cunningham*, 647 So. 2d at 166.

B. The Offense of Attempting to Purchase a Controlled Substance Shows that "Purchase" Does Not Require "Possession."

Under Florida law, an individual commits the offense of criminal attempt if the person "attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof." § 777.04(1), Fla. Stat. (2020). To prove a defendant attempted to commit a crime, the State must show: (1) the defendant did some act toward committing the crime beyond just thinking or talking about it, and (2) the defendant would have committed the crime except the defendant failed or someone prevented him from doing so. *See In re Standard Jury Instructions in Criminal Cases-Report 2016-01*, 213 So. 3d 680, 685 (Fla. 2017).

Florida cases addressing convictions for the attempted purchase of a controlled substance do not discuss the elements of the offense or facts underlying

the convictions. *See, e.g.*, *Foster v. State*, 160 So. 3d 948, 950 (Fla. 5th DCA 2015); *Cardi v. State*, 685 So. 2d 842, 843 (Fla. 2d DCA 1995). The case law discussing completed purchases, however, shows that the difference between an attempted purchase and a completed purchase turns on whether the defendant successfully made payment. If the defendant successfully exchanged money, he has committed the offense of purchasing a controlled substance. *See Cunningham*, 647 So. 2d at 165–66; *Sobrino*, 471 So. 2d at 1334. If the defendant does some act toward making payment but fails to make payment or is preventing from doing so, he has committed the offense of attempting to purchase a controlled substance. *See* § 777.04(1), Fla. Stat. Thus, Florida case law supports that neither "attempted purchasing" nor "purchasing" have a possession requirement.

* * *

As established by the plain statutory language and additional canons of statutory construction—and as affirmed by the broader statutory scheme and relevant case law such as *Psihogios*, *Sobrino*, *Cunningham*, and *Ras*—"purchase" does not require actual or constructive possession. Instead, consistent with the Legislature's intent to capture and punish a broader swath of conduct, a defendant may purchase a trafficking quantity of drugs without possessing them.

Conclusion

The offense of drug trafficking by "purchase" under § 893.135 requires that a defendant buy drugs, but it does not require proof that a defendant actually or constructively possess the drugs. Mr. Conage asks this Court to answer the Eleventh Circuit's certified question accordingly.

Respectfully submitted,

James T. Skuthan
Acting Federal Defender

Rosemary Cakmis
Chief of Appeals

/s/ Conrad Benjamin Kahn
Conrad Benjamin Kahn
Counsel of Record
Florida Bar No. 104456
Email: Conrad_Kahn@fd.org

Adeel Bashir
Katherine Howard
Federal Defender's Office
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338

CERTIFICATE OF COMPLIANCE

I certify that I prepared this brief using Times New Roman 14-point font.

/s/ Conrad Benjamin Kahn
Conrad Benjamin Kahn
Counsel for Mr. Conage

CERTIFICATE OF SERVICE

I certify that on December 8, 2020, I emailed this brief to Assistant United States Attorney Holly L. Gershow (Holly.Gershow@usdoj.gov).

/s/ Conrad Benjamin Kahn
Conrad Benjamin Kahn
Counsel for Mr. Conage