

IN THE SUPREME COURT OF FLORIDA

No. 20-1441

MICHAEL ANTHONY CONAGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Reply Argument.....	1
I. The plain and ordinary meaning of “purchase” does not require possession.	2
II. Section 893.135’s statutory context confirms that “purchase” has no possession requirement.	7
A. Mr. Conage’s reading fits within the overall statutory scheme.	10
B. The government’s reading creates surplusage.	13
C. The rule of lenity also supports Mr. Conage.	17
III. In light of the plain and ordinary meaning of “purchase,” the District Courts of Appeal have properly—and unanimously—held that “purchase” does not require “possession.”	18
Conclusion.....	21
Certificate of Compliance.....	23
Certificate of Service.....	23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Home Assur. Co. v. Plaza Materials Corp.</i> , 908 So. 2d 360 (Fla. 2005)	14
<i>Bailey v. United States</i> , 516 U.S. 137 (1995).....	10
<i>Boatwright v. State</i> , 566 So. 2d 75 (Fla. 1st DCA 1990)	3, 4
<i>Bosier v. State</i> , 419 So. 2d 1042 (Fla. 1982)	11, 14, 16, 17
<i>Burch v. State</i> , 558 So. 2d 1 (Fla. 1990).....	15, 16
<i>Deal v. United States</i> , 508 U.S. 129 (1993)	7
<i>Fla. Dep’t of Revenue v. De Maria</i> , 338 So. 2d 838 (Fla. 1976).....	3, 4
<i>Heart of Adoptions, Inc. v. J.A.</i> , 963 So. 2d 189 (Fla. 2007)	14
<i>Lopez v. Gonzales</i> , 549 U.S. 47 (2006)	2
<i>Milazzo v. State</i> , 377 So. 2d 1161 (Fla. 1979).....	10, 11
<i>Milhouse v. State</i> , 37 So. 3d 862 (Fla. 2d DCA 2010)	19
<i>Moskal v. United States</i> , 498 U.S. 103 (1990)	14
<i>Polite v. State</i> , 973 So. 2d 1107 (Fla. 2007).....	17
<i>Psihogios v. State</i> , 544 So. 2d 283 (Fla. 4th DCA 1989)	13, 19, 20
<i>Ras v. State</i> , 610 So. 2d 24 (Fla. 2d DCA 1992)	20
<i>Robinson v. Shell Oil Co.</i> , 519 U.S. 337 (1997)	9

Cases	Page(s)
<i>Sandifer v. U.S. Steel Corp.</i> , 571 U.S. 220 (2014)	8
<i>Smith v. United States</i> , 508 U.S. 223 (1993).....	3
<i>Sobrinio v. State</i> , 471 So. 2d 1333 (Fla. 3d DCA 1985).....	13, 16
<i>State v. Houghtailing</i> , 704 So. 2d 163 (Fla. 5th DCA 1997)	19, 20
<i>State v. Montoya</i> , 616 P.2d 417 (N.M. 1980)	15
<i>State v. Weeks</i> , 202 So. 3d 1 (Fla. 2016).....	17
<i>United States v. Granderson</i> , 511 U.S. 39 (1994)	18
<i>United States v. Ressam</i> , 553 U.S. 272 (2008)	2
<i>Watson v. United States</i> , 552 U.S. 74 (2007).....	2
 Statutes	
Fla. Stat. § 201.02.....	4
Fla. Stat. § 775.021(1)	18
Fla. Stat. § 825.101(5)	8
Fla. Stat. § 893.135.....	<i>passim</i>

Other Authorities	Page(s)
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i>	2
Merriam-Webster Online, https://www.merriam-webster.com	8

Reply Argument

The parties agree that to establish a completed “purchase” under Florida’s drug trafficking statute, § 893.135, Florida Statutes (2006), the State must show a defendant gave someone money or value for drugs. *Compare* Initial Br. at 7–11, *with* Gov. Br. at 11–13, 15 n.7. But in the government’s view, even if an individual turns over the money, a “purchase” has not occurred unless he also takes possession of the drugs. The government is wrong for at least three reasons.

First, the government’s dictionary-only approach to interpreting “purchase” in § 893.135 ignores that an ordinary English speaker uses “purchase” to mean providing money or value for something without necessarily taking “possession.” Second, statutory context confirms that § 893.135 uses “purchase” in its ordinary sense, without a “possession” requirement. Third, all three of the District Courts of Appeal (DCAs) to have addressed whether a “purchase” requires “possession” have held that it does not. Mr. Conage respectfully asks this Court to do the same.

I. The plain and ordinary meaning of “purchase” does not require possession.

The unspoken premise of the government’s textual argument is that the dictionary definition of “purchase” alone is enough to establish its plain and ordinary meaning. Gov. Br. at 12–21. To be sure, dictionary definitions speak to common usage. But the government’s dictionary-only approach rests on the false assumption that the fair meaning of statutory text is limited to the “hyperliteral meaning of each word in the text.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 356 (Thompson/West 2012). This approach reduces the textual inquiry into a formulaic and hyper-technical task that ignores how English speakers ordinarily use the term “purchase.”

Common usage, however, is a bedrock principle of sound statutory construction. See *United States v. Ressaam*, 553 U.S. 272, 274 (2008) (relying on the “most natural reading of the relevant statutory text”); *Watson v. United States*, 552 U.S. 74, 83 (2007) (applying the “ordinary meaning and the conventions of English”); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (looking to the “everyday”

or “regular usage” to maintain coherency with the “commonsense conception” of the term); *Smith v. United States*, 508 U.S. 223, 228 (1993) (referencing “ordinary or natural meaning” and “everyday meaning”). And as explained in Mr. Conage’s initial brief, common usage supports that the plain and ordinary definition of “purchase” does not require “possession.” Initial Br. at 8–12.

Even under the government’s formulaic approach, its argument is unpersuasive. Cherry-picking definitions that mention “obtain” or “acquire,” the government tries to limit the word “purchase” to situations in which the purchaser acquires possession of an item. Gov. Br. at 12–14. But even assuming the applicable dictionary definition includes the words “obtain” or “acquire,” that simply raises the question of “obtain” or “acquire” *for or by whom*. Indeed, an ordinary English speaker would not hesitate to refer to a transaction in which an individual never receives possession as a purchase—for example, purchasing an item for another person.¹

¹ The government’s reliance on *Boatwright v. State*, 566 So. 2d 75, 76 (Fla. 1st DCA 1990), and *Fla. Dep’t of Revenue v. De Maria*,

Take the government’s hypothetical about a middleman who purchases drugs for the leader of a drug-trafficking organization but never takes possession of the drugs. Gov. Br. at 24. The government does not argue the dictionary forbids saying the middleman “purchases” the drugs. Rather, it argues the middleman does not purchase the drugs “as a principle.” *Id.* But simply pointing to the kingpin as the “principle” purchaser does not change the fact that an ordinary English speaker would say the middleman purchased or bought the drugs for the kingpin. And that remains true even though the middleman never obtained or acquired possession of the drugs.

Several other scenarios in which an individual makes a purchase confirm that ordinary English usage undermines the

338 So. 2d 838, 840 (Fla. 1976), are flawed for the same reasons. Though both suggest that “purchase” is defined to include obtain or acquire, neither clarify *who* obtains or acquires the item. In any event, both cases are distinguishable because they do not consider whether a purchase requires possession, but rather what types of monetary equivalents may be used as consideration for a purchase. See *Boatwright*, 566 So. 2d at 76 (holding that exchanging marijuana for cocaine constituted “purchase”); *De Maria*, 338 So. 2d at 840 (holding that shift in economic benefit and burden sufficed to make taxpayer “purchaser” under § 201.02, Florida Statutes).

government's definition. Consider the government's response to Mr. Conage's examples of John purchasing a book. Initial Br. at 10. In the first example, John pays for Jenny's book. *Id.* The government argues that people would understand that John at least constructively possessed the book before giving it to Jenny. Gov. Br. at 20 n.10. But the government fails to show that ordinary people would understand that John necessarily possessed the book.

To the contrary, an ordinary English speaker would describe John as "purchasing" the book for Jenny even if all John does is give the cashier the money for the book while Jenny selects the book and retains possession of it during the transaction. The same is true when describing someone who buys a drink for someone at a bar or pays for a friend's meal at a restaurant. Although the person exchanging the money never takes possession of the item, an ordinary English speaker would still say that person purchased the book, drink, or meal. Likewise, in § 895.135, an ordinary English speaker would say that someone who buys drugs for someone else is purchasing the drugs, even if the individual never obtains or acquires

possession of the drugs.

The government's response to the second book-buying example is similarly disconnected from the way ordinary English speakers use "purchase." For example, the government suggests that when John buys an advanced copy of a book for Jenny, an ordinary English speaker would say John "preordered" the book, not that he "purchased" it. Gov. Br. at 20 n.10. But the English language is not so restrictive that it limits the use of "purchase" or "order" in the way the government suggests. There is more than one correct word to describe a common scenario like purchasing an advanced copy of a book for someone else.

The government also argues that looking at how ordinary English speakers use the term "purchase" in common scenarios like online shopping is unhelpful because online shopping did not exist in 1987—the year the legislature added "purchase" to § 893.135. Gov. Br. at 20 n.10. To be sure, companies like Amazon may not have been around in the 1980s, but newspapers, magazines, catalogues, and television home shopping programs were. And these

outlets allowed people to purchase items for others without obtaining or acquiring possession of the items, just as Amazon does today.

In the end, the government has no answer to the fact that normal English speakers commonly use “purchase” to describe situations in which an individual buys something but never obtains or acquires possession of it. Rather, the government denies the realities of English convention and applies its own dictionary definition erroneously. This Court should reject the government’s efforts to disregard common speech. Instead, the Court should conclude, consistent with both the dictionary and ordinary English, that “purchase” means to give money or value for an item, regardless of possession.

II. Section 893.135’s statutory context confirms that “purchase” has no possession requirement.

On top of flouting ordinary speech, the government’s dictionary-only approach violates the “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” *Deal v. United States*, 508 U.S. 129, 132

(1993); see *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227–28 (2014).

The government acknowledges that statutory context matters when interpreting the word “purchase” in the Florida Constitution. See Gov. Br. at 25–26 (arguing that for purposes of the three-day waiting period to obtain possession of a gun, the legislature defined “purchase” not to require possession because the legislature’s intent was for a buyer to wait a certain period after buying the gun to take possession of it).² Mr. Conage agrees; context is critical. And the context here shows that the legislature intended the term “purchase” in § 893.135 to carry its plain and ordinary meaning—exchanging or

² Although the government agrees that the definition of “purchase” under the Florida Constitution has no possession requirement, it argues that when the legislature provides a definition for a word, the legislature is intentionally deviating from that word’s plain and ordinary meaning. Gov. Br. at 25–26. The government, of course, cites no support for this novel proposition. Nor could it. Under the government’s argument, every time the legislature defines a word, the definition necessarily deviates from the plain and ordinary meaning. But the legislature often defines a word using its plain and ordinary meaning. Compare § 825.101(5), Fla. Stat. (2021) (defining “endeavor” as “attempt or try”), with Merriam-Webster, *Endeavor*, <https://www.merriam-webster.com/dictionary/endeavor> (last accessed May 20, 2021) (defining “endeavor” as “to attempt . . . by exertion of effort”).

providing money or value for something but not necessarily possessing it.

Yet the government avoids statutory context when advocating for its definition of “purchase” in § 895.135, instead asserting that “purchase” “unambiguously requires possession.” Gov. Br. at 21. The government likewise dismisses the application of contextual canons as an exercise in futility, claiming the process would devolve into two “competing, reasonable meanings” of “purchase.” *Id.* 22. But these arguments are just efforts to avoid engaging in statutory construction altogether. The government fails to appreciate, however, that “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but also by] the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). And as Mr. Conage explained in his initial brief, the statutory context and canons of statutory construction show that “purchase” has no possession requirement.

A. Mr. Conage’s reading fits within the overall statutory scheme.

To begin with, a contextual analysis here requires reading “purchase” with a view to the word’s placement in the overall statutory scheme. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (“We consider not only the bare meaning” of the critical word or phrase “but also its placement and purpose in the statutory scheme.”). Section 893.135 is part of a three-tiered scheme to combat drug offenses. The legislature designed the offense of drug trafficking, which is at the apex of the scheme, to capture the broadest swath of conduct. *See Initial Br.* at 18–20.

The government’s sole attempt to grapple with the statutory context is to posit that “sale” requires “delivery” and to speculate that it is illogical that the legislature would punish “the payment for drugs without the receipt of those drugs but not . . . the receipt of money for the same drugs without delivery.” *Gov. Brief* at 23. The government’s speculation is unfounded.

As an initial matter, the government relies on *Milazzo v. State*, 377 So. 2d 1161, 1163 (Fla. 1979), to support its position that this

Court has held that “delivery” is an element of “sale.” Gov. Brief at 22–23. But it appears the government may have misplaced its reliance on *Milazzo*. Three years after *Milazzo*, this Court decided *Bosier v. State*, 419 So. 2d 1042, 1043–44 (Fla. 1982), holding that “[s]ale and delivery are separate offenses with separate definitions.” (internal quotation marks omitted). Among other things, the *Bosier* Court rejected the argument that “delivery for consideration” is the same as “sale,” clarified that *Milazzo* simply held that the definition of “delivery” includes attempted delivery but that the definition of “sale” does not include attempted sale, and refused to reach the merits of the government’s argument that “delivery is a necessary element of every sale.” *Id.* Thus, contrary to the government’s argument, this Court has expressly declined to hold that every “sale” requires a “delivery.”

But even if this Court accepts the government’s assertion that every “sale” requires a “delivery,” it does not follow that the legislature intended to create more surplusage when it added “purchases” to the statute in 1987. See Part II.B, *infra*. Moreover, the legislature had

plenty of reasons to punish purchasers who do not possess drugs. To use the government's own example on page 24 of its brief, a middleman may provide money for—or “purchase”—drugs but not be near the drugs or have any control over them. Instead, a third-party courier—hired not by the middleman but by another individual—would pick up the drugs at a separate location. At no point in that scenario would the middleman have actual or constructive possession of the drugs.

The government dismisses the middleman example, claiming that the State could prosecute a middleman under an aiding and abetting theory. Even if true, there is no indication the legislature intended to limit the State's prosecutorial power in such a way. Moreover, there are other examples of purchasers who do not possess in the drug trafficking context. Take, for example, a reverse sting operation. The purchaser buys drugs from an undercover law enforcement officer. Once he hands over the money, the officer arrests him. But he never possessed a trafficking quantity of drugs. Under the government's theory, the State could not prosecute that

individual except under an attempt theory. *See, e.g., Sobrino v. State*, 471 So. 2d 1333, 1334, 1335 n.1 (Fla. 3d DCA 1985) (noting, pre-amendment, that the State could not charge a purchaser with trafficking by possession when law enforcement caught the individual during a reverse sting operation before he took possession of the drugs); *Psihogios v. State*, 544 So. 2d 283, 284 (Fla. 4th DCA 1989) (explaining, in the context of a reverse sting operation, that before the legislature added “purchase” in a related drug statute, the State could charge a purchaser not in possession of drugs with only an attempt to commit a felony). Thus, Mr. Conage’s reading harmoniously aligns with the legislature’s intent to punish these individuals who purchase drugs without possessing them.

B. The government’s reading creates surplusage.

In addition to ignoring the overall statutory context, the government’s reading fails to give meaning to each word surrounding “purchase.” Rather, the government suggests that § 895.135’s definition of “sale” and “delivery” overlap, and it relies on that alleged overlap to advocate for an interpretation of “purchase” that overlaps

with “possession.” Gov. Brief at 26–27. It again appears the government relies on the mistake assumption that “sale” and “delivery” overlap. See Part II.A, *supra*. Even if they do, there are at least three problems with the government’s argument.

First, and critically, the government’s argument violates the basic canon of statutory construction that this Court must “give effect to ‘every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage.’” *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (quoting *Am. Home Assur. Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005)). Contrary to the government’s argument, “iteration is [not] obviously afoot” in § 893.135. Gov. Brief at 27 (quoting *Moskal v. United States*, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting)). Obvious iteration includes phrases like “right, title, and interest” or “aver and affirm”—lists of words that “mean the same thing.” *Moskal*, 498 U.S. at 120 (Scalia, J. dissenting). The distinct conduct prohibited in § 893.135—including “sale” and “delivery,” which have “separate definitions,” *Bosier*, 419

So. 2d at 1044—is unlike such iterative phrases, which are simply “a collection of near synonyms.” *Id.* at 121 (Scalia, J., dissenting).³

Second, the government ignores that—unlike “sale” and “delivery,” which the legislature simultaneously listed in § 893.135—the legislature added the word “purchase” to the statute in 1987, when it already prohibited “actual or constructive possession.” Initial Brief at 13. As this Court has explained, the legislature added “purchase” to combat the rising crime rate by taking “urgent and remedial action.” *Burch v. State*, 558 So. 2d 1, 2 (Fla. 1990). Thus, contrary to the government’s contention that the word purchase “add[ed] nothing of substance,” Gov. Brief at 27 (internal quotation marks omitted), the legislature intended for the word “purchase” to capture more conduct related to drug trafficking. Interpreting “purchase” to require possession would thus both create

³ The surplusage created by the government’s interpretation also shows why the government misplaces its reliance on out-of-jurisdiction cases interpreting statutes that lack both “purchase” and “possession.” See Gov. Br. 15–16 (relying on *State v. Montoya*, 616 P.2d 417, 419 (N.M. 1980)).

unnecessary surplusage and contradict legislative intent.⁴

Third, by the time the legislature added the word “purchase” to the statute, this Court in *Bosier* had commented on the “weaknesses” created by the inclusion of both “sale” and “delivery” in § 893.135:

It takes more of an evidentiary showing to prove sale than delivery, because the element of consideration must be established. But the two offenses are assigned equal culpability. Therefore, the legislature has provided no incentive for prosecutors to charge and prove the crime of sale, because the equally culpable crime of delivery can be more easily proved and carries identical penalties.

⁴ The government speculates about why the legislature might have wanted a surplusage-creating definition of “purchase.” For example, the government hypothesizes that the legislature may have added “purchase” as a prophylactic measure in case a court thought § 893.135’s mention of “sale” excluded “purchase.” Gov. Br. at 27–28. The government, however, points no case in which that had happened. The government also suggests the legislature added “purchase” in response to the Third DCA’s decision in *Sobriano*, 471 So. 2d at 1333—a case the government suggests contains erroneous dicta. Gov. Br. at 28. But there is no evidence *Sobriano* wrongly held that the defendants purchased but did not possess drugs or that the pre-1987 statute did not cover “purchase.” 471 So. 2d at 1334, 1335 n.1. Rather, as explained, given the rapidly increasing crime rate at the time, the legislature amended § 893.135 to increase the scope of drug-trafficking conduct it covered to include “purchase” and to capture those individuals—like the *Sobriano* defendants—who purchase drugs without possessing them. *Burch*, 558 So. 2d at 2.

419 So. 2d at 1044. If the government’s definition of “purchase” is correct, it would create the same perverse incentive for prosecutors to always charge possession rather than purchase because possession would always be easier to prove, despite carrying the same penalty. Surely, given this Court’s concerns in *Bosier*, the legislature did not later add the word “purchase” to be mere surplusage and to further “weak[en] . . . the statutory scheme.” *Id.*

C. The rule of lenity also supports Mr. Conage.

This Court can rule in Mr. Conage’s favor based on the plain and ordinary meaning of “purchase” in § 893.135. But if any doubt remains after applying all tools of statutory interpretation, the Court should use the rule of lenity to resolve this dispute in Mr. Conage’s favor.

The rule of lenity favors the defendant over the government. *See State v. Weeks*, 202 So. 3d 1, 8 (Fla. 2016) (“The rule of lenity is a ‘fundamental tenet of Florida law regarding the construction of criminal statutes, which weighs in favor of the defendant.’” (quoting *Polite v. State*, 973 So. 2d 1107, 1112 (Fla. 2007))). The government,

however, puts forth a novel argument that the Court should use the rule of lenity in its favor, failing to cite a single case in which a court has ever applied the rule of lenity for the government. Gov. Br. at 29–31. That is not how the rule of lenity works.

Section 775.021(1), Florida Statutes (2016), provides that “when the language is susceptible of differing constructions, it shall be construed most favorably to *the accused*.” (emphasis added). The statute is clear that the rule of lenity applies to only one person—“*the accused*,” here, Mr. Conage—on a case-by-case basis. *See United States v. Granderson*, 511 U.S. 39, 56–57, 57 n.15 (1994) (noting that the application of the rule of lenity is a case-specific determination).

III. In light of the plain and ordinary meaning of “purchase,” the District Courts of Appeal have properly—and unanimously—held that “purchase” does not require “possession.”

In a footnote, the government acknowledges that three DCAs have held that possession and purchase are separate crimes for double jeopardy purposes because purchase does not require possession. Gov. Brief at 18 n.9. The government dismisses those cases as “wrongly decided.” *Id.* But the government’s naked

assertion does not trump the analysis of the DCAs, which have uniformly held that “purchase” does not subsume “possession.” See *Psihogios*, 544 So. 2d at 285 (“Possession is not required to purchase, and purchase is not required to possess contraband.”); *Milhouse v. State*, 37 So. 3d 862 (Fla. 2d DCA 2010) (adopting *Psihogios*); *State v. Houghtailing*, 704 So. 2d 163, 164 (Fla. 5th DCA 1997) (remanding to reinstate a possession conviction for a defendant also convicted of purchase).

Not only have these DCAs correctly (and unanimously) applied double jeopardy principles to determine that purchase does not require possession, but at least one of those decisions provides insight into legislative intent regarding the meaning of “purchase.” *Psihogios* explained that the legislature may have added “purchase” to the drug statutes in 1987 “to punish buying as a felony in those cases where the buyer is not found in possession of the purchased drugs.” 544 So. 2d at 284. Before the amendments, “in the absence of proof of actual or constructive possession, such a purchaser would only have been charged with [an attempt] to commit a . . . felony.” *Id.*

Rather than address uniform DCA precedent, the government tries to explain why these cases were wrong under its aiding and abetting theory. According to the government, “delivery” and “sale” focus on the *divestment* of drugs, so one can aid and abet “delivery” or “sale” without aiding or abetting “possession.” But the same does not follow, the government asserts, for “purchase,” which focuses on *acquiring* drugs. See Gov. Brief at 17–18.

There are at least three problems with the government’s argument. First, the DCA cases did not involve aiding and abetting. They were one-on-one reverse sting operations. See *Psihogios*, 544 So. 2d at 283 (“The appellant bought and received a single cocaine rock from an undercover deputy.”); *Houghtailing*, 704 So. 2d at 163 (“Houghtailing purchases a \$10.00 piece of cocaine from Officer Diaz, an undercover working a reverse sting operation.”). And as explained in Part II.A, *supra*, an individual can purchase drugs during a reverse sting operation without possessing the drugs or helping someone else possess the drugs. Second, one DCA has already rejected the government’s theory. See *Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA

1992) (“An aider and abettor of a purchase does not necessarily aid and abet the possession.”). And third, the government’s argument is circular because it depends on its own definition of “purchase” requiring possession, which, as explained, is mistaken. The government, therefore, has provided no sound reason to reject this uniform DCA precedent.

Conclusion

When the legislature added the word “purchase” to § 893.135, it did so to combat the rising crime rate and capture a broader swath of drug trafficking conduct. The plain and ordinary meaning of “purchase,” as used by the ordinary English speaker—as well as the statutory context and other canons of statutory construction—confirms the legislature accomplished its goal. Consistent with the uniform DCA precedent, Mr. Conage respectfully asks this Court to answer the Eleventh Circuit’s certified question by holding that under § 893.135, an individual can purchase drugs without necessarily possessing them.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that I prepared this brief using Bookman Old Style font and that it contains 3,999 countable words.

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CERTIFICATE OF SERVICE

I certify that on May 20, 2021, I emailed this brief to Assistant United States Attorney Holly L. Gershow (Holly.Gershow@usdoj.gov).

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