

IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY CONAGE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Case No. SC20-1441

**STATE OF FLORIDA'S MOTION FOR LEAVE
TO FILE AMICUS BRIEF IN SUPPORT OF APPELLANT**

Pursuant to Florida Rule of Appellate Procedure 9.370, the State of Florida moves for leave to file a brief as amicus curiae in support of Appellant.

1. On September 2, 2021, this Court heard oral argument in *Conage v. United States*, SC20-1441. The case presents the question whether “a completed purchase for purposes of conviction under [Florida Statutes] § 893.135(1) require[s] 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).

2. At oral argument, the Court took note of the fact that the State of Florida had not participated in the case, despite the State’s apparent interest in the correct resolution of this issue. The State

agrees that it has a significant interest in the question posed and believes that the Court may benefit from the State's participation. Section 893.135(1) describes the offense of drug trafficking—Florida's most serious drug crime. To give the State more tools to “combat Florida's substance abuse and crime problems,” see Ch. 87-243, Preamble, Laws of Fla. (1987), the Legislature distinguished purchase and possession in Section 893.135(1), dubbing either act sufficient to support a drug-trafficking conviction. As a result, the State pursues convictions for purchasing a trafficking quantity of drugs even when the defendant lacks possession. See, e.g., *Allen v. State*, 18 So. 3d 741, 741–42 (Fla. 2d DCA 2009). The State thus has an interest in Florida law continuing to recognize that one may be guilty of purchasing a substance without possessing it.

3. The State regrets that it did not file an amicus brief addressing these issues within the ordinary time limits prescribed in Florida Rule of Appellate Procedure 9.370(c). This Court “may grant leave for later service” when the circumstances call for it. Fla. R. App. P. 9.370(c). And given the substantial impact this case may have on the enforcement of the State's most severe drug offense, such leave is warranted here.

4. The State thus asks that the Court grant it leave to file an amicus brief in support of Appellant—a copy of which is appended to this motion, *see* Appendix, *infra*—and, as the Court deems appropriate, to afford the parties the opportunity to respond with supplemental briefing or re-argument.

5. The State has contacted the parties about this motion. They do not oppose the relief requested on the condition that they receive an opportunity to respond, if necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal, or by email, on September 3, 2021, to all counsel of record.

/s/ David M. Costello
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Appendix

In the Supreme Court of Florida

MICHAEL ANTHONY CONAGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON REVIEW OF A CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Case No. 17-13975

**AMICUS BRIEF OF THE STATE OF FLORIDA
IN SUPPORT OF APPELLANT**

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IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

The Attorney General submits this brief for the State of Florida as *amicus curiae* in support of Appellant. The Attorney General may appear in any suit in which the State has an interest. See § 16.01(4), Fla. Stat.

The United States Court of Appeals for the Eleventh Circuit has asked this Court to answer whether “a completed purchase for purposes of conviction under [Florida Statutes] § 893.135(1) require[s] 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 State has an interest in this question. The Florida Legislature distinguished “purchase” and “possession” in enacting Section 893.135(1), making either act sufficient to support a conviction for drug trafficking. It did so to give the State more tools to “combat Florida’s substance abuse and crime problems.” Ch. 87-243, Preamble, Laws of Fla. (1987). As a result, the State pursues convictions for purchasing a trafficking quantity of drugs even when the defendant did not possess them. See, e.g., *Allen v. State*, 18 So. 3d 741, 741–42 (Fla. 2d DCA 2009). The State thus has an interest

in Florida law continuing to recognize that one may be guilty of purchasing a controlled substance without possessing it.

SUMMARY OF THE ARGUMENT

This case turns on two terms: purchase and possession. Since its inception, Section 893.135(1), Florida Statutes, has criminalized “possessing” a trafficking quantity of a controlled substance. But in 1987, the Florida Legislature expanded the statute to also criminalize “purchasing” a trafficking quantity of a controlled substance. The Eleventh Circuit has asked this Court whether under Florida law purchasing a controlled substance requires that the defendant possess the controlled substance too. *See Conage*, 976 F.3d at 1263.

The answer is no. One need not have possession to commit a purchase under Section 893.135(1). Five points make this clear.

First, Section 893.135(1) textually distinguishes “purchase” and “possession,” and reading one to require the other would be contrary to the plain meaning of the terms and violate the surplusage canon. *Second*, the Florida Legislature added the purchase predicate to expand the reach of a statute that already criminalized possession. Reading “purchase” to require possession, however, would make the statute no broader than it was before, robbing the Legislature’s amendment of its intended effect. *Third*, other Florida statutes also use the terms “purchase” and “possession,” and their usage shows

that a purchase does not necessarily involve possession. *Fourth*, Florida and federal cases construing these terms agree that, under Florida law, one can purchase a substance without possessing it. *Finally*, the purchase predicate's purpose—giving the State more tools to combat drug crime—confirms that “purchase” is not constrained by “possession.”

ARGUMENT

TRAFFICKING BY “PURCHASE” UNDER SECTION 893.135(1) DOES NOT REQUIRE “POSSESSION.”

Florida uses a three-tiered scheme to punish drug offenses, ascending from least serious to most serious. *United States v. James*, 430 F.3d 1150, 1154 (11th Cir. 2005). At the top of that scheme sits the Florida statute that criminalizes drug trafficking. § 893.135(1), Fla. Stat. A drug-trafficking conviction is a first-degree felony. *Id.* Depending on the trafficked substance, quantity, and circumstances, it is punishable by life imprisonment. *See, e.g., id.* § 893.135(1)(b)3.

To commit drug trafficking under Florida law, one must “knowingly sell[], purchase[], manufacture[], deliver[], or bring[] into this state, or [be] knowingly in actual or constructive possession of”

a trafficking quantity¹ of a controlled substance. *E.g., id.* § 893.135(1)(b)1. The statute is intentionally broad. It reflects the Legislature’s desire to arm the State with substantial tools “to combat Florida’s substance abuse and crime problems.” Ch. 87-243, Preamble, Laws of Fla. (1987). It thus proscribes six predicate trafficking acts, each meant to cover a distinct part of the drug-trafficking cycle. *Cf. Conage*, 976 F.3d at 1253 (noting that one who commits a drug-trafficking act “plans on distributing and thereby trafficking those drugs”).

The question here is whether one predicate—purchase—necessarily requires another predicate—possession. It does not.

There are two kinds of possession: actual and constructive. See *In re Standard Jury Instructions in Crim. Cases—Rep. No. 2015-03*, 191 So. 3d 291, 310 (Fla. 2016). To actually possess contraband, a person must be “aware of the presence of the substance” and must be holding it or have it within his “control” and “ready reach.” *Id.* To constructively possess contraband, (a) one must be “aware of the

¹ This amount varies depending on the substance. Compare § 893.135(1)(b)1, Fla. Stat. (28 grams or more for cocaine), with *id.* § 893.135(1)(c)1 (four grams or more of morphine).

presence of the substance,” (b) one must have “the ability to control the substance,” and (c) the substance must be “in a place over which the person has control.” *Id.*

Neither type of possession is essential to a purchase. The trafficking statute’s text, history, surrounding context, interpretative case law, and purpose make this clear.

A. The Text. Section 893.135(1) does not define “purchase.” This Court thus construes the term in its “plain and ordinary sense.” *State v. Stewart*, 374 So. 2d 1381, 1383 (Fla. 1979). To do so, it typically turns to the term’s “ordinary dictionary definition.” *Id.*

When the Legislature added “purchase” to the trafficking statute in 1987, see Ch. 87-243, § 5, Laws of Fla., dictionaries primarily defined it as “to obtain in exchange for money or its equivalent.” *Purchase*, THE AMERICAN HERITAGE DICTIONARY 1005 (2d ed. 1985). They also equated “purchase” with the word “buy,” *id.*, defining “buy” to mean “to acquire by sacrifice, exchange, or trade,” *id.* at 222. Florida courts have since adopted these definitions when construing “purchase” in the drug-crime context. See *Boatwright v. State*, 566 So. 2d 75, 76 (Fla. 1st DCA 1990) (adopting this definition of “purchase” and equating it with the word “buy” when construing

“purchase” in Section 893.13); *Sobrino v. State*, 471 So. 2d 1333, 1334 (Fla. 3d DCA 1985) (“To receive or obtain something in exchange for compensation is to purchase.”).

A common thread runs through these definitions: To purchase, one must acquire or obtain something through an exchange.² What is “acquired” or “obtained,” however, is not necessarily “possession.” One could simply acquire the *right* to compel an action or take possession of a good. For example, when a person purchases a service, she does not “acquire” or “obtain” possession of an item, but the *right* to particular assistance. Similarly, one can “acquire” or “obtain” the *right* to control a good before assuming such control, like when one orders a good from an online retailer and awaits its arrival.

Plain text confirms these commonsense principles. For instance, consider purchase’s direct synonym, “buy.” See *Boatwright*, 566 So. 2d at 76. When the Legislature passed Section 893.135(1),

² This is all that *Cunningham v. State*—a case that the Eleventh Circuit cited when certifying this question—stands for. See 647 So. 2d 164, 166 (Fla. 1st DCA 1994). No doubt, both the majority and the dissent in *Cunningham* presumed that a purchase requires a completed exchange. See *id.* at 166; *id.* at 167 (Booth, J., concurring in part and dissenting in part). But neither specified exactly *what* must be exchanged.

Black's Law Dictionary recognized that one bought something when he "acquire[d] the ownership of property by giving an accepted price or consideration therefor; or by agreeing to do so." *Buy*, Black's Law Dictionary 181 (5th ed. 1981). Ownership, in turn, meant the "[c]ollection of rights to use and enjoy property." *Ownership*, Black's Law Dictionary 997 (5th ed. 1981). Added together, one bought (i.e., purchased) an item or service when one acquired the *right* to that item or service by giving or agreeing to give an accepted price or consideration. *Cf. State v. Snyder*, 635 So. 2d 1057, 1058 (Fla. 2d DCA 1994) (recognizing that a defendant has "paid" for a substance when the defendant acquires "a contractual right" to it).

Other aspects of the statute's text solidify that a purchase can occur without possessing an item. Most obviously, Section 893.135(1) distinguishes "purchase" and "possession." A person commits drug trafficking when he "purchases . . . or is knowingly in actual or constructive possession of" a trafficking quantity of a given controlled substance. § 893.135(1)(a), Fla. Stat. (emphasis added). The term "or" is "generally construed in the disjunctive" and "normally indicates that alternatives were intended." *Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986). So the statute's

grammatical structure shows that “possession” criminalizes alternative conduct that is not encompassed by the term “purchase.”

And indeed, reading “purchase” to require “possession” would violate Florida’s canon against surplusage. Under that canon, this Court construes statutes “to give effect to every word, phrase, sentence, and part of the statute” so that no words are “mere surplusage.” *Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017) (quotation mark omitted). Yet construing “purchase” to require possession would do just that. If possessing a drug were inherent to purchasing it, the purchase predicate would not criminalize distinct conduct: It could cover no more than the possession predicate, making the purchase predicate redundant.

Reading “purchase” as distinct from “possession” also tracks how these terms are used in their “plain and ordinary sense.” *Stewart*, 374 So. 2d at 1383. Consider, for example, a customer of a mail-order catalogue in 1987, the year that the Legislature added “purchase” to Section 893.135(1). As commonly understood, the purchase of an item from the catalogue would be complete when the customer placed the order and paid for the item. It would not occur days or weeks later when the item was received by the customer; after

exchanging money for the item, the customer would simply be waiting to acquire possession.

Nor would the mail-order purchaser have acquired either actual or constructive possession upon submitting her order. The item is obviously not in her actual possession, as it is not within her “ready reach” and “control.” *In re Standard Jury Instructions in Crim. Cases*, 191 So. 3d at 310. And it is not in her constructive possession either. For one thing, the buyer does not have “control” over the “place” where her item is located, *see id.*—while in transit, the item may travel through many physical locations, all outside the buyer’s control. And for another, the buyer might not always know “the presence of the substance” while it is en route, *see id.*: The item’s location will naturally change many times throughout the delivery process, usually without the buyer’s knowledge.

This analysis extends to the drug context. Imagine, for instance, a controlled drug buy in which the buyer pays for drugs but is arrested before the undercover agent hands them over. Florida courts have held that a buyer does not possess the drugs in that instance. *See, e.g., Roberts v. State*, 505 So. 2d 547, 549–50 (Fla. 3d DCA 1987) (per curiam). Or take a case in which the buyer pays for the drugs

online but authorities intercept the drugs in the mail. Or one in which the buyer pays for the drugs so someone else can possess them. In each example, the defendant purchased the drugs, even though he never acquired actual or constructive possession under Florida law.

B. Statutory History. The statute’s history also shows that “purchase,” as used in Section 893.135(1), does not require possession. From its enactment, Section 893.135(1) has listed possession as a predicate act (along with other acts irrelevant here). Ch. 79-1, § 1, Laws of Fla. (1979). But in 1987, the Legislature amended the statute to add “purchase” as a predicate act. Ch. 87-243, § 5, Laws of Fla.

Florida law “assume[s] that the Legislature by [this] amendment intended it to serve a useful purpose.” *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968) (citing *Sharer v. Hotel Corp. of Am.*, 144 So. 2d 813, 817 (Fla. 1962)). And more generally, when a legislature “amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); see also *Arnold*, 217 So. 2d at 119 (“Likewise, when a statute is

amended, it is presumed that the Legislature intended it to have a meaning different from that accorded to it before the amendment.”).

Reading “purchase” to require “possession,” however, would bleed both purpose and meaning from this amendment. The purchase predicate—constrained by possession—would criminalize no more conduct than the statute did before the amendment. The statute’s meaning would thus remain frozen, despite a “significant change in language,” Scalia & Garner, *supra*, at 256, stripping the amendment of any “useful purpose.” *Arnold*, 217 So. 2d at 119.

C. Statutory Context. Other Florida drug statutes underscore that “purchase” does not necessarily encompass “possession.” For instance, Section 893.13—the companion provision to Section 893.135(1) that criminalizes possession with intent and simple possession of lesser amounts of contraband—also distinguishes the acts: It criminalizes purchase, and it criminalizes possession with intent to sell, manufacture, deliver, or purchase. *Compare* § 893.13(1)(a), Fla. Stat., *with id.* § 893.13(2)(a). As it did with Section 893.135(1), the Legislature added “purchase” to Section 893.13 even though it already criminalized possession. Ch. 87-243, § 4, Laws of Fla. And it did so for the same reason, “to combat Florida’s substance

abuse and crime problems.” *Id.*, at Preamble. So the Legislature’s decision to include both “purchase” and “possession” as predicates in Section 893.135(1) was no accident: It was part of an effort to expand the State’s drug-enforcement scheme.

Other drug statutes also reflect this distinction. For example, Florida criminalizes the “purchase” *or* “possess[ion]” of certain items related to drug distribution. § 893.147(7), Fla. Stat. It also makes it a crime to “purchase[]” *or* “possess[]” certain quantities of nitrous oxide. *Id.* § 877.111(4). And its juvenile-delinquency code recognizes that a child can be “charged with a felony of the second or third degree for purchase *or* possession of a controlled substance.” *Id.* § 985.345(1)(a) (emphasis added).³ In all these statutes “purchase” criminalizes something distinct from “possession.”

D. Case Law. Florida courts largely agree that “[p]ossession is not required to purchase, and purchase is not required to possess contraband.” *Psihogios v. State*, 544 So. 2d 283, 284 (Fla. 4th DCA 1989); *see also State v. Winter*, 549 So. 2d 1170, 1171 (Fla. 4th DCA

³ Florida law separates “purchase” and “possession” in other contexts too. *See, e.g.*, § 849.231(1), Fla. Stat. (gambling devices); *id.* § 790.401(3)(g)(7) (risk-protection orders restricting firearms); *id.* § 828.055(1) (pharmaceuticals regulation).

1989) (same); *State v. Houghtailing*, 704 So. 2d 163, 164 (Fla. 5th DCA 1997) (holding that purchasing a drug is distinct from possessing that drug). These cases apply the rule of *Blockburger v. United States*, under which a crime is a lesser-included offense of another if the greater crime contains all the elements of the lesser crime. 284 U.S. 299, 304 (1932). Or put another way, a crime is a lesser-included offense of another if the greater crime *requires* all the elements of the lesser crime. *See id.* These cases hold that possession is not a lesser-included offense of purchase. They therefore confirm that possession is not required to prove a purchase.⁴

Florida courts have reached this conclusion outside the *Blockburger* context too. *See Ras v. State*, 610 So. 2d 24 (Fla. 2d DCA 1992). In *Ras*, the court explained that although the defendant likely “aided and abetted the purchase” of drugs, he “did not aid and abet” his friend’s possession. *Id.* at 25–26. The court also said that a jury

⁴ Some Florida courts, relying on *Carawan v. State*, 515 So. 2d 161 (Fla. 1987) and the now-defunct “same evil” test, once maintained that possession was a lesser-included offense of purchase. *See, e.g., State v. Glenn*, 545 So. 2d 903, 903 (Fla. 4th DCA March 29, 1989). But *Carawan* and the “same evil” test were overridden by statute, *see State v. Smith*, 547 So. 2d 613, 614 (Fla. June 22, 1989), so these holdings are no longer good law. *See Houghtailing*, 704 So. 2d at 164.

likely could have convicted the defendant for purchase, even though there was not enough evidence to convict him for possession. *See id.* at 26 (“The state, for some unknown reason, did not charge purchase of the cocaine in a trafficking amount, which could have been charged, and which is supported by the evidence.”). No doubt, these statements were dicta. *See Conage*, 976 F.3d at 1260–61. But they show that the *Ras* court, too, thought that a purchase can occur without possession.

Ras is not alone. According to the Third District, “one can envision a scenario in which a defendant might purchase a controlled substance without ever actually or constructively possessing it.” *Potter v. State*, 304 So. 3d 1270, 1275 (Fla. 3d DCA 2020). Then-Judge Anstead also noted that it is only “[o]rdinarily” that a “purchaser takes ‘possession’ of the drugs he pays for,” *Lamanto v. State*, 547 So. 2d 1248, 1250 (Fla. 4th DCA 1989) (Anstead, J., concurring), meaning that there must be some cases in which the purchaser does not take “‘possession’ of the drugs he pays for.” And the Second District has suggested, in discussing a jury finding, that one can purchase drugs yet not possess them. *See Aubuchon v. State*, 110 So. 3d 55, 58 (Fla. 2d DCA 2013) (“And while our result might

have been different had the jury made a specific finding that Aubuchon *purchased* 400 pills but only *possessed* 40, no such specific jury finding was made in this case.”).

Federal courts have interpreted Florida law the same way. In *United States v. Shannon*, the Eleventh Circuit, citing *Ras*, held that “Florida case law confirms that purchasing a distributable quantity of drugs does not necessarily give rise to actual or constructive possession.” 631 F.3d 1187, 1189–90 (11th Cir. 2011). The Florida trafficking statute, the court explained, “facially distinguishes purchase from actual or constructive possession,” listing them as separate offenses. *Id.* at 1190. Any attempt to disregard “the statute’s use of the disjunctive . . . runs afoul of Florida’s elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.” *Id.* (internal quotation mark omitted). And Judge Marcus, in a concurrence, reached the same conclusion. *See id.* at 1193 (Marcus, concurring) (citing *Ras* for the premise that “under Florida law, it is possible to purchase 28 grams or more of cocaine, as we must assume Roye did, without necessarily possessing the cocaine

purchased”); *see also* Gov’t’s Br., *United States v. Conage*, 976 F.3d 1244 (11th Cir. 2020) (No. 17-13975), 2018 WL 2063431, at *22 (citing *Shannon* for the proposition that “purchasing a distributable quantity of drugs does not necessarily give rise to actual or constructive possession”).

E. Purpose. Finally, “statutory construction envisions that courts will also review the purpose behind the enactment.” *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 192 (Fla. 2013). And the Legislature made the purchase predicate’s purpose clear. When it added “purchase” to Section 893.135(1), Florida was facing a drug-crime “crisis of dramatic proportions.” Ch. 87-243, Preamble, Laws of Fla. To fight “this most insidious enemy,” the Legislature sought to broaden the State’s ability “to combat Florida’s substance abuse and crime problems.” *Id.* So it added “purchase” as a predicate in Florida’s drug scheme, expecting that its addition would broaden the range of drug-related criminal liability. *Cf.* Staff of Fla. H.R. Comm. on Crim. J. HB 1467 (1987) Staff Analysis 2 (final June 22, 1987) (noting, when adding “purchase” to the closely related Section 893.13, that the statutory amendment would “likely [] add a number of new offenders to the state prison system”).

Construing “purchase” to require possession would defeat this purpose. The statute already criminalized possession, so criminalizing purchase-contingent-on-possession would not have outlawed more conduct or given the State more ways “to combat Florida’s substance abuse and crime problems.” *Contra* Ch. 87-243, Preamble, Laws of Fla. This Court should not interpret this statute to nullify the Legislature’s principal reason for adding the purchase predicate.

CONCLUSION

For these reasons, the Court should answer “no” to the certified question: “Purchase” does not require “possession” under Section 893.135(1).

Dated: September 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal, or by email, on September 3, 2021 to all counsel of record.

/s/ David M. Costello
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CERTIFICATE OF COMPLIANCE

I certify, under Florida Rule of Appellate Procedure 9.045(e), that this brief complies with the applicable font and word-count requirements. It was prepared in Bookman Old Style 14-point font, and it contains 3,386 words.

/s/ David M. Costello
Assistant Solicitor General