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Supreme Court No. 96397-5

Division III, No. 34356-1-III

IN THE  
SUPREME COURT  
OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOSE G. BARBOZA CORTES,

Petitioner

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SUPPLEMENTAL BRIEF OF PETITIONER

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## **A. ISSUES PRESENTED FOR REVIEW**

Issue 1: Both second degree unlawful possession of a firearm, RCW 9.41.040(2)(a), and identity theft, RCW 9.35.020(1), are alternative means offenses for purposes of jury unanimity requirements.

Issue 2: For both second degree unlawful possession of a firearm and second degree identity theft, the State did not elect to proceed on only one alternative. Both counts should be reversed and remanded for a new trial.

## **B. STATEMENT OF THE CASE**

In January 2015, Jose G. Barboza Cortes deposited a check into his checking account. (RP 168, 174-175, 190-192, 209-212, Pl.'s Exs. 1, 4). This check listed "Dava Construction Co" in the top left corner, and was made payable to "Francisco Villa" and signed by "Tom Collins." (RP 190-191, 209-212; Pl.'s Ex. 4). This check had a U.S. Bank logo across the top. (RP 210; Pl.'s Ex. 4).

Mr. Barboza, alone, was renting the basement of a house. (RP 201-203). During the execution of a search warrant for the premises, police officers found a firearm in the basement. (CP 84-89; RP 147-149, 241-243, 283-284, 287-288, 292-293, 298-299, 301-304, 306, 319, 342-348, 357-362; Pl.'s Ex. 3). Mr. Barboza answered the door when the search warrant was executed. (RP 266-268). He came up from the basement to answer the door. (RP 268). Mr. Barboza was the only person in the basement at that time. (RP 268).

The State charged Mr. Barboza with the nine counts, including one count of second degree unlawful possession of a firearm, for the firearm found in his residence pursuant to the search warrant; and a count of second degree identify theft, for the "Dava Construction Co" check. (CP 197-204). For second degree

unlawful possession of a firearm, the information alleged Mr. Barboza “did then and there unlawfully, feloniously, and knowingly own, possess, or control any firearm. . . .” (CP 198). For second degree identity theft, the information alleged Mr. Barboza “did then and there knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, to wit: Dava Construction Co. . . .” (CP 203).

The case proceeded to a jury trial. (RP 91-458; 515-633). Shelly Bedolla testified Dava Construction is a company ran by her and her husband. (RP 209-210). She testified they do not bank with U.S. Bank. (RP 210). Ms. Bedolla testified the company name and address listed in the top left corner of the check deposited by Mr. Barboza was their company and address. (RP 210; Pl.’s Ex. 4). She testified the check was not one of their business checks, and that she does not know an individual named Tom Collins or Francisco Villa. (RP 210-211).

A witness testified the firearm found in Mr. Barboza’s residence was located hidden “in between two mattress [sic], stacked together, in the bedroom . . . .” (RP 284, 287-288). There was no testimony presented that Mr. Barboza owned the firearm found in his residence. (RP 133-395).

Defense counsel proposed the following jury instruction for second degree unlawful possession of a firearm, that in order to convict Mr. Barboza of second degree unlawful possession of a firearm, it had to find the following elements, beyond a reasonable doubt:

- (1) That on or about the second day of February, 2015, the defendant knowingly had a firearm in his possession or control;
  - (2) That the defendant had previously been convicted of a felony;
- and

(3) That the possession or control of the firearm occurred in the State of Washington.

(CP 195-196).

Instead, as proposed by the State, the trial court instructed the jury that in order to convict Mr. Barboza of second degree unlawful possession of a firearm, it had to find the following elements, beyond a reasonable doubt:

- (1) That on or about the 5th day of February, 2015, the defendant knowingly owned, possessed or had in his control a firearm;
- (2) That prior to owning, possessing, or having the firearm under his control, the defendant had been convicted of a felony; and
- (3) That the acts occurred in the State of Washington.

(CP 207, 225; RP 603-604).

The trial court instructed the jury that in order to convict Mr. Barboza of second degree identity theft, it had to find the following elements, beyond a reasonable doubt:

- (1) That on or about the 27th day of January, 2015, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, whether that person is living or dead, to wit: Dava Construction Company;
- (2) That the defendant did so with the intent to commit, or to aid or abet any crime; and
- (3) That the acts occurred in the State of Washington.

(CP 251; RP 617-618).

The jury was also given an instruction defining possession, for purposes of the unlawful possession of a firearm charge. (CP 228; RP 601).

The trial court instructed the jury: “[t]he attorney’s remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement, or argument that is

not supported by the evidence, or the law, as stated by the Court.” (CP 211; RP 597-598).

Mr. Barboza did not object to the jury instructions, as given. (RP 398, 596-626).

In its closing argument, the State argued:

On the Dava Construction check, the bank - - Ms. Cochran, from Cashmere Valley Bank, indicated, well that check, actually, wasn't even legitimate, to begin with. You are not being asked if that check was a stolen check or not.

I'm presenting the argument that it was an entirely made-up check. You will be asked, on that one, whether a forgery and identity theft had taken place though.

So, now, Count 2 kind of stands by itself. Did Mr. Jose Barboza-Cortes unlawfully possess a firearm?

....

And that the defendant knowingly owned, possessed, or had under his control, a firearm.

....

So, did the defendant knowingly own or possess a firearm?

....

Prior to owning or possessing the firearm, he had been convicted of a felony.

....

Did he possess it? Did he knowingly possess it? And, had he been convicted of a felony? This happened in the State of Washington. That's Count 2.

....

Dava Construction. This is a real company. You heard from Shelly Bedolla. This is her address. This is not her bank. This check was determined to be false, or fraudulent, by the bank, and there was notice of charge back that was issued.

....

Now, identity theft may not be an obvious crime for many of you. You may -- may think you have an idea of what it is, but may not know about how broad it could be. For example, No. 38, knowingly, possessed, used, or transferred a means of identification or financial information, of another person. And they did -- did so, with intent to commit a crime. Again, State of Washington, right down the block. With the aid to intent to commit another crime.

....

The checks - - except for the Dava Construction check - - also have financial information on them. And, as, probably, many of you know, you have an account number and a routing number, on the bottom of those checks. That's financial information. You'll be able to see that, in the jury instructions.

(RP 402, 405-406, 409, 418, 421, 423-425).

The State also argued Mr. Barboza had constructive possession of the firearm found in his residence. (RP 406-409).

The jury found Mr. Barboza guilty of nine crimes, including second degree unlawful possession of a firearm and second degree identity theft. (CP 264-278; RP 626-632).

Mr. Barboza timely appealed. (CP 305-306). In the published portion of its opinion, the Court of Appeals affirmed his conviction for second degree unlawful possession of a firearm and reversed his conviction for second degree identity theft for the Dava Construction Company check.

### C. ARGUMENT

**Issue 1: Both second degree unlawful possession of a firearm, RCW 9.41.040(2)(a), and identity theft, RCW 9.35.020(1), are alternative means offenses for purposes of jury unanimity requirements.**

Mr. Barboza urges this Court to hold that both second degree unlawful possession of a firearm and identity theft are alternative means offenses. Doing so advances the two underlying purposes of the alternative means doctrine: first, “to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt” and second, “to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then

leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict.” *State v. Smith*, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

“Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways.” *Id.* at 784. “As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.” *Id.* Whether a crime is an alternative means crime “is left to judicial determination.” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). “[E]ach case must be determined on its own merits. . . .” *State v. Owens*, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). Determining whether a crime is an alternative means crime, and if so, what those alternative means are, is an issue of statutory interpretation. *Id.*

In *State v. Arndt*, this Court stated that “[w]hen a statute does not clearly answer this question upon its face, and there is a need for interpretation, several tests are available.” *State v. Arndt*, 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976). The Court stated that “there may be many factors that will aid the court,” and discussed and applied four non-exclusive factors to the statute in question. *Id.* at 379-84.

Since *Arndt*, this Court has decided several alternative means cases, and refined the applicable test. *See Smith*, 159 Wn.2d at 778; *Peterson*, 168 Wn.2d at 763; *Owens*, 180 Wn.2d at 90; *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015). “[T]he statutory analysis focuses on whether each alleged alternative describes ‘distinct acts that amount to the same crime.’” *Sandholm*, 184 Wn.2d at

734 (quoting *Peterson*, 168 Wn.2d at 770). “The more varied the criminal conduct, the more likely the statute describes alternative means.” *Id.* “[W]hen the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *Id.* In addition, “it has [not] been found that structuring the statute into subsections is dispositive or that definitional statutes create alternative means.” *Id.*

In *Peterson*, this Court held that failure to register as a sex offender is not an alternative means crime. *Peterson*, 168 Wn.2d at 769-71. The statute requires a person convicted of a sex offense to register his whereabouts in a county with the county’s sheriff. *Id.* at 768. When an offender leaves his residence, the statute sets forth time limits for re-registration, which depend upon the offender’s residential status. *Id.*

The defendant argued “the various deadlines and entities with which an offender must register represent alternative means of committing the crime.” *Id.* at 769. Specifically, the defendant argued the crime is an alternative means crime because it can be accomplished in three ways: “(1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another.” *Id.* at 769-70.

This Court rejected the argument and held that failure to register is not an alternative means crime. *Id.* at 770-71. The Court reasoned that unlike the crime of theft, where the alternative means “describe *distinct acts* that amount to the same crime . . . the failure to register statute contemplates *a single act* that

amounts to failure to register: the offender moves without alerting the appropriate authority.” *Id.* at 770. The Court further reasoned “[t]he fact that different deadlines may apply, depending on the offender’s residential status, does not change the nature of the criminal act: moving without registering.” *Id.* The Court noted the legislature’s purpose for the registration requirement, “to aid law enforcement by providing notice of the whereabouts of convicted sex offenders within the law enforcement agency’s jurisdiction.” *Id.* at 768 (citing Law of 1990, ch. 3, § 401).

In *Owens*, this Court held the first degree trafficking in stolen property statute describes two alternative means of trafficking in stolen property, rather than eight alternative means identified by the Court of Appeals. *Owens*, 180 Wn.2d at 95-99. The statute provides that “[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.” *Id.* at 96 (quoting RCW 9A.82.050(1)).

The Court noted “[t]he analysis our cases have applied focuses on the different underlying acts that could constitute the same crime.” *Id.* at 96-97. The Court held the statute describes only two alternative means of trafficking in stolen property, (1) “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others,” and (2) “knowingly traffics in stolen property[.]” *Id.* at 97-99. The Court agreed with the analysis of a Court of Appeals case that had reached the same holding. *Id.* at 97-98; *see also State v. Lindsey*, 177 Wn. App. 233, 241-42, 311 P.3d 61 (2013). That case reasoned: (1)

“[t]he placement and repetition of the word ‘knowingly’ suggests the legislature intended two means[,]” and (2) “the first group of seven terms relate to different aspects of a single category of criminal conduct – facilitating or participating in the theft of property so it can be sold.” *Id.* (quoting *Lindsey*, 177 Wn. App. at 241-42).

The Court also reasoned “[o]ur conclusion that RCW 9A.82.050(1) describes only two alternative means is consistent with *Peterson*.” *Id.* at 99; *see also Peterson*, 168 Wn.2d at 763. The Court stated “an individual’s conduct under RCW 9A.82.050(1) does not vary significantly between the seven terms listed in the first clause, but does vary significantly between the two clauses.” *Id.* The Court noted the seven terms listed in the first clause “are merely different ways of committing one act, specifically stealing.” *Id.*

**a. Second degree unlawful possession of a firearm, RCW 9.41.040(2)(a), is an alternative means offense for purposes of jury unanimity requirements.**

Mr. Barboza urges this Court to hold that second degree unlawful possession of a firearm is an alternative means offense. Second degree unlawful possession of a firearm contains two alternative means: (1) owning any firearm, while having the requisite criminal history; or (2) having in his or her possession or control any firearm, while having the requisite criminal history.

Second degree unlawful possession of a firearm is defined as follows:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person *owns, has in his or her possession, or has in his or her control any firearm . . . [a]fter having previously been convicted or*

found not guilty by reason of insanity in this state or elsewhere [of specified crimes].

RCW 9.41.040(2)(a) (emphasis added).

There is a clear distinction between (1) owning a firearm and (2) possessing or controlling a firearm. These two means do not “describe[ ] minor nuances inhering in the same act. . . .” *Sandholm*, 184 Wn.2d at 734. Instead, owning a firearm, and possessing or controlling a firearm, describe two distinct acts that amount to the same crime. *See Peterson*, 168 Wn.2d at 770; *Owens*, 180 Wn.2d at 99. Importantly, as Judge Fearing explained in his dissent to the Court of Appeals’ opinion, it is possible to own personal property, but not possess or control the property. *See Slip Opinion, J. Fearing, concur in part/dissent in part*, pg. 11. While an owner of personal property can possess or control the property, it does not follow that a person possessing or controlling personal property is necessarily the owner. Possessing or controlling a firearm does not require owning the firearm. *See CP 228* (jury instruction defining possession for purposes of unlawful possession of a firearm); *see also* 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 133.52 (4th Ed. 2016) (defining possession for purposes of a weapons offense). Possession and ownership are two legally distinct concepts.

The two alternative means in the second degree unlawful possession of a firearm statute (possession/control and ownership) describe distinct acts amounting to the same crime. *See Sandholm*, 184 Wn.2d at 734; *Peterson*, 168 Wn.2d at 770. An individual’s conduct varies significantly between possessing or controlling a firearm and owning a firearm. *See Owen*, 180 Wn.2d at 99. Second

degree unlawful possession of a firearm is an alternative means offense for purposes of jury unanimity requirements.

**b. Identity theft, RCW 9.35.020(1), is an alternative means offense for purposes of jury unanimity requirements.**

Mr. Barboza urges this Court to hold that identity theft is an alternative means offense. Identity theft contains two alternative means: (1) knowingly obtaining, possessing, using, or transferring a means of identification; and (2) knowingly obtaining, possessing, using, or transferring financial information.

Identity theft is defined as follows:

No person may knowingly obtain, possess, use, or transfer a *means of identification* or *financial information* of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1) (emphasis added).

Both alternative means are defined by statute:

“Financial information” means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

- (a) Account numbers and balances;
- (b) Transactional information concerning an account; and
- (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicaid numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

.....

“Means of identification” means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be

used to identify the person, including unique biometric data.

RCW 9.35.005(1), (3).

Although the alternative means are defined in a separate statute, the terms are listed as part of the substantive offense. *See* RCW 9.35.020(1); *see also Smith*, 159 Wn.2d at 785 (in holding the common law assault definitions do not create additional alternative means for the crime of assault, stating “[t]hat holding is consistent with a line of decisions, from our court and the Court of Appeals, holding that the reach of the alternative means doctrine has not been extended to encompass a mere definitional instruction.”). The legislature directly provided for the statutory alternatives of means of identification and financial information in the substantive offense. *See* RCW 9.35.020(1)

The two means, means of identification and financial information, do not “describe[ ] minor nuances inhering in the same act. . . .” *Sandholm*, 184 Wn.2d at 734. Instead, (1) knowingly obtaining, possessing, using, or transferring a means of identification, and (2) knowingly obtaining, possessing, using, or transferring financial information, describe two distinct acts that amount to the same crime. *See Peterson*, 168 Wn.2d at 770; *Owens*, 180 Wn.2d at 99.

“Financial information” is information “identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit. . . .” RCW 9.35.005(1). “Means of identification” is information or an item “that is not describing finances or credit but is personal to or identifiable with an individual or other person. . . .” RCW 9.35.005(3). Identity theft is a singular crime that can occur in one of two ways, by either obtaining, possessing, using, or

transferring financial information, or by obtaining, possessing, using, or transferring means of identification.

When the identity theft statute was first enacted in 1999, it only prohibited knowingly obtaining, possessing, using, or transferring a means of identification. Laws of 1999, ch. 368, § 3. “Financial information” was added to the identity theft statute in 2001. Laws of 2001, ch. 217, § 9. This demonstrates the terms are not closely related, but distinct.

The legislative intent of the identity crimes chapter is as follows:

The legislature finds that means of identification and financial information are personal and sensitive information such that if unlawfully obtained, possessed, used, or transferred by others may result in significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain, possess, use, and transfer another person's means of identification or financial information. The legislature intends to penalize for each unlawful act of improperly obtaining, possessing, using, or transferring means of identification or financial information of an individual person. The unit of prosecution for identity theft by use of a means of identification or financial information is each individual unlawful use of any one person's means of identification or financial information. Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

RCW 9.35.001.

This stated legislative intent also demonstrates that means of identification and financial information are distinct acts.

The two alternative means in the identity theft statute describe distinct acts amounting to the same crime. *See Sandholm*, 184 Wn.2d at 734; *Peterson*, 168

Wn.2d at 770. An individual's conduct varies significantly between knowingly obtaining, possessing, using, or transferring a means of identification, and knowingly obtaining, possessing, using, or transferring financial information. *See Owens*, 180 Wn.2d at 99. Identify theft is an alternative means offense for purposes of jury unanimity requirements.

**Issue 2: For both second degree unlawful possession of a firearm and second degree identity theft, the State did not elect to proceed on only one alternative. Both counts should be reversed and remanded for a new trial.**

Because the jury was instructed on more than one statutory alternative for both second degree unlawful possession of a firearm and second degree identity theft, the State did not elect to proceed on only one alternative. Where sufficient evidence does not support each alternative means, both counts should be reversed and remanded for a new trial.

“Criminal defendants have a right to a unanimous jury verdict in Washington.” *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017) (citing Wash. Const. art. I, § 21). “But in alternative means cases, where substantial evidence supports both alternative means submitted to the jury, unanimity as to the means is not required.” *Id.*

For both second degree unlawful possession of a firearm and second degree identity theft, the State did not elect to proceed on only one alternative. (CP 207, 225, 251; RP 603-604, 617, 618). For each offense, the jury was instructed on both alternative means: for second degree unlawful possession of a firearm, possess or control, and own; and for second degree identity theft, means

of identification or financial information. (CP 207, 225, 251; RP 603-604, 617, 618).

When a crime with alternative means is charged, an election to proceed on only one alternative can be made, but it can only be done by instructing the jury on a single statutory means. Where a jury is only instructed on one statutory means of committing an alternative means crime, the case is not tried as an alternative means case. See *Peterson*, 168 Wn.2d at 771 n.6 (noting the defendant did not show the case was tried as an alternative means case, where the jury was only instructed as to one deadline for registering as a sex offender); *Smith*, 159 Wn.2d at 792 (where the jury was only instructed on one statutory means of committing second degree assault, “this is not an alternative means case.”).

In multiple acts cases<sup>1</sup>, as opposed to alternative means cases, “[t]o ensure jury unanimity . . . we require that either the state elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985)), *abrogated on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

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<sup>1</sup> “In multiple acts cases . . . several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime.” *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *abrogated on other grounds by In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

Alternative means cases differ from multiple acts cases. *See, e.g., Kitchen*, 110 Wn.2d at 410-411 (explaining the difference between the two types of cases); *see also State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (stating “[t]he *Petrich* rule only applies to multiple act cases.”). In alternative means cases, the alternative means are a legal element of the crime the State must prove. Therefore, if the State is going to elect to proceed on only one statutory alternative of an alternative means crime, this needs to be done by jury instruction. The State cannot alter the jury instructions by its closing arguments. As was the case here, the jury is instructed to disregard any argument that is not supported by the law stated by the Court. (CP 211; RP 597-598).

Furthermore, this Court has indicated that in multiple acts cases, a clear election by the State of the particular act criminal act it will rely upon for a conviction cannot be done solely in closing argument, where the evidence and jury instructions do not support the election. *See State v. Kier*, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008) (in addressing a double jeopardy issue, discussing the clear election the State must make in a multiple acts case, when the jury is not instructed on the unanimity requirement, and declining to consider the closing statement in isolation).

In addition, requiring an election to proceed on a single alternative in an alternative means case to only be done by instructing the jury on one statutory means comports with this Court’s decision in *State v. Woodlyn*. *See State v. Woodlyn*, 188 Wn.2d 157, 392 P.3d 1062 (2017).

In *Woodlyn*, the defendant was charged with one count of second degree theft. *Woodlyn*, 188 Wn.2d at 161. At trial, the jury was instructed on two alternative means of committing the crime. *Id.* The jury was instructed they had to unanimously agree as to the defendant's guilt or innocence, but they could find him guilty without agreeing on the means. *Id.* The jury returned a general verdict of guilty. *Id.*

On appeal, the defendant argued his right to a unanimous verdict was violated, because sufficient evidence did not support one of the alternative means of theft. *Id.* The Court of Appeals affirmed, applying a harmless error approach: because the evidence only supported one of the alternative means, then the jury must have unanimously relied on the other alternative means. *Id.*

This Court granted review, and rejected the Court of Appeals' harmless error approach. *Id.* at 162. The Court stated "[w]hen one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means." *Id.* The Court further stated "[a] general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence." *Id.* at 165. The Court held that "[a]bsent some form of colloquy or explicit instruction, we cannot assume that every member of the jury relied solely on the supported alternative." *Id.* at 166. The Court "decline[d] to adopt a rule that relies on a complete evidentiary failure as proof of harmless error." *Id.* at 167.

The Court nonetheless affirmed the defendant's theft conviction, because sufficient evidence was presented at trial to support both alternative means. *Id.* at 167-70.

Pursuant to *Woodlyn*, even if the State argues in closing that only one alternative means is supported by the evidence, absent some form of colloquy with the jury or an explicit instruction requiring unanimity as to the means by which the crime was committed, it cannot be assumed that every member of the jury relied solely on the supported alternative means. *See Woodlyn*, 188 Wn.2d at 162-67.

Mr. Barboza urges this Court to hold that when a crime with alternative means is charged, an election to proceed on only one alternative can be made, but it can only be done by instructing the jury on a single statutory means.

Should this Court disagree, the State's closing argument does not show a clear election of the alternative means it relied upon for Mr. Barboza's convictions. For second degree unlawful possession of a firearm, although the State argued Mr. Barboza had constructive possession of the firearm, the State mentioned ownership as an element of the crime three times. (RP 406-409). The State did not explicitly ask the jury to only find Mr. Barboza guilty based upon the possession or control alternative means. (RP 400-426, 454-458).

For second degree identity theft, the State did discuss in closing argument that the check was not legitimate, and that the check did not have financial information on it. (RP 402, 421, 424-425). However, the State did not discuss the difference between financial information and means of identification. (RP

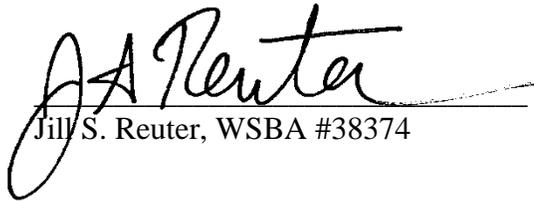
400-426, 454-458). The State did not explicitly ask the jury to only find Mr. Barboza guilty based upon the means of identification alternative means. (RP 400-426, 454-458).

The State did not elect to proceed on only one alternative means for second degree unlawful possession of a firearm and second degree identity theft. *Woodlyn* requires that both counts should be reversed and remanded for a new trial.

#### **D. CONCLUSION**

This Court should reverse Mr. Barboza's conviction for second degree unlawful possession of a firearm, and uphold the Court of Appeals' reversal of his conviction for second degree identity theft.

Respectfully submitted this 8th day of March, 2019.

  
Jill S. Reuter, WSBA #38374

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

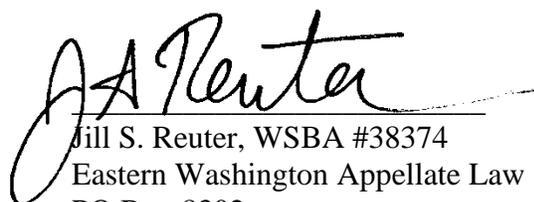
STATE OF WASHINGTON	)	
Respondent	)	Supreme Court No. 96397-5
vs.	)	COA No. 34356-1-III
	)	
JOSE G. BARBOZA CORTES	)	PROOF OF SERVICE
	)	
Petitioner	)	
_____	)	

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 8, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Supplemental Brief of Petitioner to:

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The Dalles, Oregon 97058

Having obtained prior permission from the Chelan County Prosecutor's Office, I also served the Respondent State of Washington at [prosecuting.attorney@co.chelan.wa.us](mailto:prosecuting.attorney@co.chelan.wa.us) using the Washington State Appellate Courts' Portal.

Dated this 8th day of March, 2019.

  
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**Superior Court Case Number:** 15-1-00085-4

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