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No. 96397-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 34356-1-III

Chelan County Superior Court
Cause No. 15-1-00085-4

State of Washington, Respondent

v.

Jose G. Barboza-Cortes, Petitioner

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. Statement of the Issues

1. Under RCW 9.35.021(1), did the legislature intend the terms “means of identification” and “financial information” to create two alternative means of committing the crime of Identity Theft Second Degree?
2. Under RCW 9.41.040(1)(a), did the legislature intend the terms “owns,” “has in his or her possession, and “has in his or her control” to create two or more alternative means of committing the crime of Unlawful Possession of a Firearm?

II. Statement of the Case

On February 25, 2016, a jury found Mr. Barboza-Cortes guilty of four counts of Identity Theft Second Degree, one count of Unlawful Possession of Methamphetamine, one count of Unlawful Possession of a Firearm Second Degree, and three counts of Possession of Stolen Property Third Degree; on April 1, 2016, the trial court sentenced Mr. Barboza-Cortes to 43 months in prison for these crimes.

Mr. Barboza-Cortes appealed his convictions. In its plurality decision filed August 30, 2018, the Court of Appeals dismissed (with prejudice) two counts of Possession of Stolen Property Third Degree because they violated the Double Jeopardy clause of the U.S. Constitution and dismissed (without prejudice) one count of Identity Theft Second

Degree; the court affirmed the remaining convictions. *State v. Barboza-Cortes*, 5 Wn. App. 86, 92, 425 P.3d 856 (2018).

The court addressed the issue of whether the unlawful possession of a firearm statute created alternative means by using the three verbs “own,” “possess,” and “control”; however, the court rejected this argument by Mr. Barboza, reasoning that the verbs “own” and “control” inhered in the act of possession and thus merely served to elaborate upon and clarify the manners in which possession can occur. *Id.* at 92-93.

As to the one count of identity theft that it dismissed, the Court of Appeals held that (1) the crime’s statutory language in RCW 9.35.021(1) specifying “means of identification or financial information” created an alternative means by which the crime could be committed, and that (2) because the crime had an alternative means of being committed, the conviction must be reversed because (i) the jury was not instructed that it must be unanimous as to which of the means was committed and (ii) there was insufficient evidence to support both means. *Barboza-Cortes* at 93-97. More specifically, the court supported its alternative means conclusion by reasoning that the two terms do not overlap and do not inhere in each other, and the court fleshed out this reasoning further by describing scenarios where one of the acts could occur without the other one occurring. *Id.* at 95-96.

In addition to the lead opinion, two of Court of Appeals judges wrote dissenting opinions (while also concurring with parts of the lead opinion). In his dissent, Judge Fearing concluded that “the act of ownership is significantly different from possession or control,” and thus creates an alternative means for committing the crime of unlawful possession of a firearm. *Id.* at 111-114. Judge Fearing, applying similar reasoning used in the lead opinion, bolstered his alternative-means conclusion by conceiving of multiple scenarios where a person could own property without possessing it. *Id.* at 112-113.

Judge Korsmo, while concurring with the lead opinion with respect to its conclusion that the unlawful firearm statute did not create alternative means, wrote a dissent concluding that the two terms in the identity theft statute did not create alternative means. *Id.* at 98-104. Specifically, Judge Korsmo reasoned that “the essence of this offense is wrongly exploiting the personal information of another, whether it be financial information or personal identity information,” and that “it is the *misuse* of that information that is actionable.” *Id.* at 101. Judge Korsmo also expressed concern that the majority opinion had deviated from established alternative means analysis by shifting the focus from variations in conduct to variations in objects. *Id.* at 101.

III. Argument

This supplemental brief will cover the following topics: it will cover the historical development of alternative means analysis as well as the current state of the law; applying this law, it will discuss why the identity theft statute and unlawful possession of firearm statute do not create alternative means; it will discuss the State's election at trial to only proceed under the "means of identification" prong; finally, it will discuss why this Court should reject the recently employed test the Court of Appeals used in its lead opinion and in Judge Fearing's dissent.

1. A brief historical background of alternative means analysis.

In *Arndt*, the Washington Supreme Court provided a general framework for an alternative means analysis. *State v. Arndt*, 87 Wn.2d 374, 377-80, 553 P.2d 1328 (1976). At its heart, an alternative means analysis is a question of legislative intent: does the statute describe a "single offense of [the crime] committable in more than one way . . . or several separate and distinct offenses, each constituting [the crime]." *Id.* (citing *State v. Kosanke*, 23 Wn.2d 211, 213, 160 P.2d 541 (1945)). In the absence of express legislative intent, courts consider four factors: (1) the title of the act, (2) whether there is a connection between the various acts set out, (3) whether the acts are consistent with and not repugnant to each other, and (4) whether the acts inhere in the same transaction. *Id.* The

emphasis established in *Arndt* of focusing on legislative intent when analyzing alternative means continued in subsequent cases. *In re Det. of Halgren*, 156 Wn.2d 795, 809, 132 P.3d 714 (2006); *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

Although *Arndt* and its progeny provided a framework for distinguishing between (i) separate crimes and (ii) a single crime that may be committed by alternative means, the cases did not address distinguishing between a single crime with no alternative means and a single crime with alternative means.

2. Alternative means analysis focuses on variation in conduct.

In contrast to *Arndt* and its related cases that attempted to distinguish between a statute creating separate crimes and a single crime that may be committed by alternative means, more recent cases have attempted to determine whether a statute specifying a single crime creates alternative means. And when answering this newer issue, courts have focused on whether the statute prohibits more than one disparate types of conduct, with the focus being on how different the types of conduct are. *State v. Peterson*, 168 Wn.2d 763, 230 P.3d 588 (2010); *State v. Butler*, 194 Wn. App. 525, 374 P.3d 1232 (2016); *State v. Sandholm*, 184 Wn.2d

726, 364 P.3d 87 (2015); *State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014).

In *Peterson*, this Court held that, under the Failure to Register statute, the three ways of failing to register did not constitute alternative means because the three ways nevertheless all came down to a single act (not registering). *Id.* at 770; RCW 9A.44.130. Whether the person fails to register after becoming homeless, fails to register after moving between fixed residences within a county, or fails to register after moving from one county to another, the singular act in every case is failing to register. *Peterson* at 770. Because the three ways (or events that trigger the registration) all proscribe the same conduct, they are not alternative means. *Id.*

In *Sandholm*, this Court continued emphasizing deviation or variation in conduct as being of prime importance in alternative means analysis: “the distinctiveness of the conduct is more dispositive than the use of the disjunctive ‘or’ and the structuring of the statute into subsections.” *Sandholm* at 735. Specifically, this Court held that the two “affected by” prongs of former RCW 46.61.502 did not describe multiple distinct acts and were thus not alternative means. *Id.* This Court continued with its reasoning and pointed out that where the statutory

language simply adds more facets to the same conduct, these additional facets do not constitute alternative means. *Id.*

In *Owens*, this Court held that the eight terms in the trafficking in stolen property statute only created two alternative means. *Owens* at 97-99; RCW 9A.82.050(1). This holding was based on two lines of reasoning: (1) the word “knowingly” was used twice in the statute and identified two separate types of conduct, and (2) the seven terms following the first “knowingly” are so closely related that they “are merely different ways of committing one act.” *Owens* at 97-99.

Finally, and following the holdings in *Peterson*, *Owens*, and *Sandholm*, the Court of Appeals held that the crime of identity theft does not create alternative means. *Butler* at 525-30. At issue specifically in *Butler* was whether the four verbs in the statute, “obtain, possess, use, or transfer,” created alternative means of committing the crime. *Id.* at 529; RCW 9.35.020(1). The court reiterated that an alternative means analysis,

“focuses on whether each alleged alternative describes ‘distinct acts that amount to the same crime’” . . . the more varied the criminal conduct, the more likely it is the statute describes alternative means . . . the various underlying acts must vary significantly to constitute distinct alternative means . . . but when the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.

Butler at 528 (quoting *Peterson*, 168 Wn.2d at 770; quoting *Sandholm*, 184 Wn.2d at 734; citing *Owens*, 180 Wn.2d at 96).

In holding that the four verbs in the identity theft statute did not create alternative means, the court in *Butler* relied on the reasoning in *Owens* that the verbs did not vary significantly. *Butler* at 529-30. Rather the four identity theft verbs are like the seven verbs in trafficking in stolen property: “the verbs here are not distinct means by which to commit identity theft, but rather are multiple facets of a single means.” *Id.* “[I]t would be hard to imagine the crime of identity theft being committed by a single act of ‘using’ a check that did not also involve ‘obtaining’ and ‘possessing’ the check. Likewise, one could not ‘transfer’ financial information without also ‘obtaining’ and ‘possessing’ that information.” *Id.*

The focus on variation in conduct described in *Peterson* synthesizes with the holdings in other cases. For example, theft is an alternative means crime because it may be committed by two distinct types of conduct: (1) wrongfully obtaining or exerting control over another’s property, or (2) using color or aid of deception to obtain control over another’s property. *State v. Linehan*, 147 Wn.2d 638, 644, 56 P.3d 542 (2002).

Of secondary importance to analyzing the distinctiveness of conduct described in a statute, the statute's structure is also considered in determining whether it creates alternative means. *Sandholm*, 184 Wn.2d at 734. For example, this Court has disapproved of recognizing alternative means simply by the use of the disjunctive "or." *Owens*, 180 Wn.2d at 96. Nor has it been found that structuring the statute into subsections is dispositive or that definitional statutes create alternative means. *Sandholm*, 184 Wn.2d at 734.

3. The identity theft statute does not create alternative means.

The identity theft statute states that "[n]o 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. In this case, the Court of Appeals held that the phrase "means of identification or financial information" created two alternative means. The term "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(3). The term “financial information” is defined as

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 identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1).

- i. The terms “means of identification” and “financial information” do not create different types of conduct.

Based on the multiple recent holdings from this Court that emphasize analyzing variations in conduct, the terms “means of identification” and “financial information” do not create alternative means because they do not create two or more disparate types of conduct. Analogizing this case to *Peterson*, the proscribed conduct is the same regardless of what personal information is obtained: the misuse of another’s identity with the intent to commit any crime. In *Peterson*, the person singularly failed to register regardless of what triggered the registration requirement (becoming homeless, moving between fixed residences within county, moving from one county to another); likewise, a

person (if with the intent to commit any crime) singularly misuses someone's identity (1) whether they have that person's account number or biometric data, (2) whether they have that person's social security number or change in address, (3) whether they have the person's passwords or driver's license. The conduct proscribed is the same regardless of what exact information a defendant controls.

ii. The structure of the identity theft statute suggests the legislature did not intend to create alternative means.

As mentioned previously, although variation in conduct is the primary focus of an alternative means analysis, the structure of the statute is also considered. The exact structure of the identity theft statute supports the conclusion that the legislature did not intend to create alternative means. The terms "means of identification" and "financial information" are not separated into subsections; nor are they separated into separate sentences or clauses. And while each term has its own definition, this structure makes sense because each term represents a different facet of a person's identity.

iii. The terms "means of identification" and "financial information" are multiple facets of a person's identity that are vulnerable to misappropriation.

Instead of describing distinct types of conduct, the terms "means of identification" and "financial information" are merely multiple, closely-

related facets of a person's identity. Rather than narrowly construing a person's identity, the legislature used a broad brush by employing numerous closely-related terms to cover the exploitable portion of a person's identity that an unscrupulous person could capitalize upon.

A more detailed look at the definitions for the two terms reveals how closely related they are. At the outset, it appears that the legislature attempted to minimize the overlap of the two terms by specifying that "means of identification" includes information/items not describing finances or credit. From a legislative drafting perspective, this attempt to minimize overlap makes sense; any overlap in the two terms would be superfluous. More precisely, the legislature took a relatively colloquial definition of financial information (account numbers and other information that may be used to access accounts) and then extended this protected portion of a person's identity to include certain types of non-financial information (that may be vulnerable to misuse).

The "means of identification" facet of identity is just as exploitable as the "financial information" facet. For example, a bank may ask a potential customer for a driver's license in order to confirm the person's identity before giving them a loan. Similarly, that same bank may ask the potential customer about historical changes to their address or historical changes to their phone number to further verify his/her identity. These

potential scenarios for financial abuse are easily imagined for the other types of information described in the “means of identification” definition: (1) a person could misuse biometric data to access someone’s smartphone; (2) a person could misuse a social security number to fraudulently acquire a job; or (3) a person could misuse an email address to reset and change a password to a bank account. In summary, the legislature ensured that even a person’s means of identification could not be used to facilitate the commission of crimes by including this facet of identity in the statute.

4. Jury unanimity was assured by the State’s election.

If the identity theft statute did create alternative means, the threshold test on review is whether sufficient evidence exists to support each of the alternative means presented to the jury; “an alternative means crime will not be analyzed as such if a single means was elected at trial.” *State v. Peterson*, 168 Wn.2d at 771 n.6 (citing *Smith*, 159 Wn.2d at 790). To be an effective election, “either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act”; this election can be made during closing argument. *State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (quoting *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). Although *Carson* and *Kitchen* deal with multiple acts cases (rather than alternative means cases), the issue of constitutional unanimity is the same.

In the present case, the State elected to only proceed on the “means of identification” prong. The Court of Appeals held there was insufficient evidence of “financial information” with regards to the Dava Construction check. *Barboza-Cortes*, 5 Wn. App. at 94-96. Yet in the State’s closing argument, the prosecutor stated that “The checks—except for the Dava Construction check—also have financial information on them.” RP (2.25.16) at 424. This statement makes it clear that, as to the Dava identity theft count, the State was not proceeding under the “financial information” prong but only the “means of identification” prong.

5. The unlawful possession of firearms statute does not create alternative means.

Under RCW 9.41.040(1)(a)-(2)(a), persons previously convicted of certain offenses are guilty of unlawful possession of a firearm “if the person owns, has in his or her possession, or has in his or her control any firearm.” Specifically, the three proscribed verbs are owning, possessing, or controlling (the firearm). Prior to Division III of the Court of Appeals holding that the unlawful possession of a firearm does not create alternative means in the present case, Division II, bereft of any reasoning or analysis, simply concluded that the statute created three alternative means. *State v. Holt*, 119 Wn. App. 712, 718, 82 P.3d 688 (2004).

- i. The verbs “own,” “possess,” and “control” do not create distinct types of conduct.

Simply put, the three verbs in the unlawful possession of a firearm statute, (“own,” “possess,” and “control”) overlap significantly in their definitions and all prohibit exerting control over a firearm. More specifically, the three verbs are facets of exerting control; apart from the act of “controlling,” the two additional acts of “owning” and “possessing” merely expand and clarify what constitutes control.

Owning a firearm and possessing a firearm are, at their core, means of exerting control over that firearm; or put another way, they are both a means of wielding or utilizing the firearm, directly and/or indirectly. First, in comparing the act of possessing a firearm to the act of controlling it, possession is a very specific facet of control. This definition of possession is supported in the law. Although not binding authority, WPIC 133.52 defines possession as

[H]aving a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and **control** over the item . . . In deciding whether the defendant had dominion and **control** over an item, you are to consider all the relevant circumstances in the case. Factors you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item,

and whether the defendant had dominion and **control** over the premises where the item was located.

(Emphasis added; brackets and some bracketed words removed.)

Equating possession with control, as stated in WPIC 133.52, is supported by case law. *See State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *State v. Summers*, 107 Wn. App. 373, 383-84, 28 P.3d 780 (2001). In summary, a person cannot have possession of a firearm without also having control over it.

Similarly to how a person cannot possess a firearm without exerting control over it, a person cannot own a firearm without having control over it. Merriam-Webster Dictionary defines the verb “own” as (a) “to have or hold as property: possess” or to (b) “to have power or mastery over,” and Merriam-Webster Thesaurus describes “own” as “to keep, **control**, or experience as one’s own” and gives the following synonyms: “command, enjoy, have, hold, **possess**, retain.” *Definition of Own*, Merriam-Webster Dictionary, <https://merriam-webster.com/dictionary/own> (emphasis added); *Own Synonyms, Own Antonyms*, Merriam-Webster Thesaurus, <https://merriam-webster.com/thesaurus/own> (emphasis added). Merriam-Webster Dictionary defines “control” as, inter alia, (a) “to exercise restraining or directing influence over: regulate” and

(b) “to have power over: rule.” *Definition of Control*, Merriam-Webster Dictionary, <https://merriam-webster.com/dictionary/control>.

Keeping these definitions in mind, a person who owns a firearm has control over it. He can decide who possesses the firearm, who can operate the firearm, whether to sell or give away the firearm, etc. All of these decisions ultimately vest with the owner of the firearm. Even if the owner temporarily gives up possession over the firearm, he still ultimately controls it.

In summary, the terms “own,” “possess,” and “control” are all facets of the same conduct, controlling a firearm, and therefore do not create alternative means of committing the crime of unlawful possession of it.

6. Determining whether a statute creates alternative means by asking whether one of the acts could occur in the absence of the other act(s) is nonsensical and conflicts with well-founded principles of statutory interpretation.

With respect to both the crimes of unlawful possession of a firearm as well as identity theft, a factual scenario could be conjured where one of the acts is met and the other act(s) not met. But it would be absurd to employ this test in an alternative means analysis. If it was impossible to conceive of a factual scenario where one act was met but not the other, the only logical conclusion would be that the legislature’s inclusion of the

second act or term was entirely superfluous. This interpretation is inconsistent with the court's duty "to give meaning to every word the legislature includes in a statute, and [the court] must avoid rendering any language superfluous." *Berrocal v. Fernandez*, 155 Wn.2d 585, 599, 121 P.3d 82 (2005).

Applying this test to the acts in the unlawful possession of a firearm statute, it is not difficult to conceive a situation where someone possesses a firearm but does not own it (and vice versa). For example a person could borrow his friend's firearm for the day: he possesses the gun but doesn't own it. Similarly, a person could loan a firearm (he owns) to a friend for the day; during that day the owner loses possession of the firearm (assuming the owner did not go with his friend). However as discussed above, ownership and possession are merely two facets of control. In both of the scenarios described above, the persons respectively acquire and retain control over the firearms.

Finally, applying this test to other criminal statutes would create results that conflict with prior cases. For example, in the Failure to Register statute, the three events that trigger the registration requirement or basically mutually exclusive with each other. RCW 9A.44.130; *see Peterson*, 168 Wn.2d 763. Under the reasoning used by the Court of Appeals in this case, this lack of overlap implies the events do not inhere

in each other and therefore the three trigger events creates three alternative means. As another example, the first seven verbs in the Trafficking in Stolen Property statute can each occur without the other six necessarily occurring; e.g., a person could finance the theft of property for sale to others without being involved in the management or supervision of the operation. RCW 9A.82.050(1); *see Owens*, 180 Wn.2d 90.

IV. Conclusion

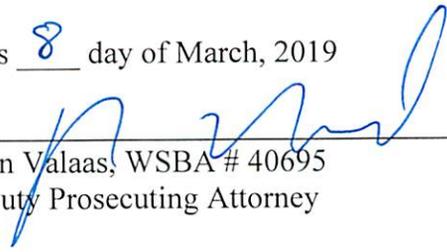
To summarize, this Court should continue emphasizing variations in conduct when performing an alternative means analysis. Additionally, the Court should examine the nature and character of the terms as they relate to the conduct being prohibited rather than how much the terms overlap: are the terms facets of a singular concept or disparate concepts entirely?

In the case of unlawful possession of a firearm, the three terms of own, possess, and control all represent facets of control; using these related terms to broadly define this control, the legislature intended to entirely remove a person's ability to exert control over a firearm, directly or indirectly. And because all three of these terms broaden the concept of control rather than create disparate types of conduct, the statute does not create alternative means of committing the crime.

In the case of identity theft, the two terms “financial information” and “means of identification” do not create any variations in conduct. The types of information in both terms merely describe a broad array of tools: those exploitable facets of a person’s identity that can be used equally to commit crimes. While financial information describes a more direct means of exploiting a person, means of identification expands the protection to include information that may be a precursor (or more indirect route) to that same financial information and same criminal exploitation. These two terms are similar in nature and character: they protect the vulnerable portion of a person’s identity from misuse. More importantly, they do not create disparate types of conduct.

No alternative means are created in either the identity theft statute or the unlawful possession of a firearm statute. Based on the foregoing arguments, this Court should affirm the Court of Appeals decision by holding that the unlawful possession of a firearm statute does not create alternative means, and this Court should reverse the Court of Appeals decision by holding that the identity theft statute also does not create alternative means.

Respectfully submitted this 8 day of March, 2019



Ryan Valaas, WSBA # 40695
Deputy Prosecuting Attorney

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IN THE SUPREME COURT OF THE
THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 96397-5
Plaintiff/Respondent,)	Court of Appeals No. 34356-1-III
)	
vs.)	DECLARATION OF SERVICE
)	
JOSE G. BARBOZA CORTES,)	
)	
Defendant/Petitioner.)	

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 8th day of March, 2019, I caused the original SUPPLEMENTAL BRIEF OF RESPONDENT to be filed via electronic transmission with The Supreme Court, and a true and correct copy of the same to be served on the following in the manner indicated below:

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Signed at Wenatchee, Washington, this 8th day of March, 2019.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTING ATTORNEY

March 08, 2019 - 11:54 AM

Transmittal Information

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