Supreme Court No. 97375-0
(COA No. 77426-3-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID HAGGARD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

David Haggard, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision terminating review, dated June 5, 2019. A copy is attached hereto as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

1. In 2010, a court of limited jurisdiction entered judgment against petitioner for the misdemeanor crime of disorderly conduct. Pursuant to statute, said court deferred its sentence and subsequently allowed petitioner to withdraw his guilty plea before dismissing the charge later that year. At sentencing in the instant matter, the trial court included the dismissed charge in petitioner's criminal history – thereby precluding the washout of three felonies – because he had not also moved to withdraw his misdemeanor plea and dismiss the charge pursuant to a separate statute. Did the Court of Appeals err in its construction of the Sentencing Reform Act's "washout" statute thereby contravening this Court's analysis of the identical issue as it pertained to an analogous felony deferred

sentence statute in *In re Carrier*, 173 Wn.2d 791, 806-07, 272 P.3d 209 (2012)?

C. STATEMENT OF THE CASE

As a young man, David Haggard was convicted of three felonies in California: two counts of possession of methamphetamine and one count of possession of a stolen vehicle in 2002 and 2004, respectively. Following his release from prison in 2004, a rehabilitated Mr. Haggard remained crime free for over a decade save for an allegation of disorderly conduct in 2010 in Snohomish County, Washington. Therein, Mr. Haggard pled guilty to disorderly conduct in July 2011 and the court deferred its sentence. Mr. Haggard successfully complied with the conditions of the court's deferral and the case was dismissed ex parte on March 1, 2012. The case file was closed in April 2012 and destroyed in June 2015. RP 600-01; CP 126-153.

In 2015 and 2016, Mr. Haggard once again became involved in substance abuse and was ultimately convicted of burgling a construction site and arson for setting fire to a forklift to conceal evidence of said burglary. The trial court

simultaneously entered judgment against Mr. Haggard for the crimes of possession of methamphetamine and unlawful possession of a firearm stemming from a traffic stop in 2015.[1] CP 104-12.

At sentencing, Mr. Haggard objected to the trial court's inclusion of his dismissed disorderly conduct charge on the grounds that it was not a conviction within the meaning of the Sentencing Reform Act. As a result of the inclusion of this "conviction," the trial court concluded that Mr. Haggard's three felonies from over a decade earlier did not wash out of his offender score. RP 622-623.

Based on an offender score of six, the trial court sentenced Haggard to concurrent prison sentences of 39 months on the second degree arson and 29 months on the second degree burglary. The trial court ran the sentences concurrent to the sentences imposed under cause number 16-1-03423-0 SEA. The trial court also imposed 18 months of community custody. CP 104-12; RP 664-69.

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[1] The court's judgment in King County Superior Court cause number 16-1-03423-0 was subject to appeal in case number 77427-1-I. The Court of Appeals affirmed in an unpublished decision and Mr. Haggard also seeks

D. ARGUMENT

1. **As an issue of first impression, a misdemeanor conviction subsequently dismissed pursuant to a deferred sentence may not be included in an offender's criminal history as defined by the Sentencing Reform Act.**

a. The "washout interruption" provision of the Sentencing Reform Act is ambiguous as to whether it applies to a charged dismissed by deferred sentence and must therefore be construed in favor of defendants.

A court's primary duty in construing a statute is to determine the legislature's intent. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If, after this examination, the provision is still subject to more than one reasonable interpretation, it is ambiguous. *Conover*, 183 Wn.2d at 711-12 (citing *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005)). The rule of lenity requires an ambiguous statute to be

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review of that decision in a separate petition filed with this court.

interpreted in the defendant's favor absent legislative intent to the contrary. *Id.* at 712.

In the instant case, the sentencing court include three Class C felonies in Mr. Haggard's offender score because it found that they did not "wash out" due to the existence of a 2010 charge dismissed pursuant to a deferred sentence. The legislature has granted trial courts the authority to defer misdemeanor judgments and sentences through RCW 3.50.320, which lays out the procedure as follows:

> After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence or by deferring the sentence of the defendant and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof. [...] During the time of the deferral, the court may, for good cause shown, *permit a defendant to withdraw the plea of guilty, permit the defendant to enter a plea of not guilty, and dismiss the charges.*

RCW 3.50.320 (emphasis added).

RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in the offender score. The statute provides in relevant part:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time

> residential treatment) pursuant to a felony conviction, if any, or entry of judgement and sentence, the offender had spent five years in the community without *committing any crime that subsequently results in a conviction.*

RCW 9.94A.525(2)(c)(emphasis added). The ambiguity is apparent when considered in the context of convictions that are later set aside. Taken literally, the language of the washout statute could encompass a conviction reversed on direct appeal, since it did, at one point, result in a conviction.

i. The "separate results" analysis adopted below does not reasonably harmonize the three statutes in question by their plain language.

For the purpose of this brief, Petitioner focuses on discretionary bases upon which trial courts can set aside convictions – as opposed to defects in procedure or proof requiring reversal. Specifically, the legislature has granted trial courts with two such bases: one the trial court can exercise at sentencing, RCW 3.50.320[2], recited above, and another it can exercise only a substantial period of time after sentencing provided a defendant meets certain criteria, RCW 9.96.060:

> If the court finds the applicant meets the tests prescribed in subsection (2) of this section, *the court may in its discretion vacate the record of conviction by:* (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) the court **dismissing** the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

RCW 9.96.060 (emphasis added).[3] With respect to this statute, the legislature left no question as to its interplay with the Sentencing Reform Act's offender score calculation in RCW 9.94A.525:

> Once the court vacates a record of conviction under this section, the person shall be released from all penalties and disabilities resulting from the offense and the fact that the person has been convicted of the offense shall not be included in the person's criminal history for purposes of determining a sentence in any subsequent conviction.

RCW 9.96.060(5)(a). Unfortunately, the legislature provided no such clarity with respect to RCW 3.50.320; said statute is silent with respect to the use of dismissed actions in future sentencing applications.

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[2] RCW 3.50.320 governs deferred sentences in district courts and its companion, RCW 3.66.067 governs deferred sentences in municipal courts. For the purposes of brevity, this petition treats both statutes as functionally indistinct.

[3]

The State argued below and the Court of Appeals held that none of the statutes at issue[4] – washout, deferral or vacation – were ambiguous. The State averred and the court below opined that RCW 3.50.320 and 9.96.060 were, by their plain language, independent procedures that achieved two separate results, rather than separate means to the same end. Thus, Mr. Haggard needed to take the additional step of moving to vacate his "conviction" even after it had been dismissed in order for it not to be included in his offender score:

> The language of the misdemeanor dismissal and vacation statutes is clear and unambiguous. **Although the misdemeanor dismissal statutes do not explicitly state the effect of dismissal on the defendant's record, the existence of a separate procedure for vacation implies that the legislature did not intend for a dismissal to automatically have the same effect as a vacation.** The vacation statute contains numerous limitations that are not present in the dismissal statutes, including restrictions on the offenses that are eligible for vacation and the number of convictions that a person may have vacated. A defendant must also apply to the court for vacation, while dismissal can be carried out ex parte, as it was in this instance.

State v. Haggard, Washington State Court of Appeals, Division One, 77426-3-I, Slip Opinion, at 8 (June 3, 2019).

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[4] RCW 3.50.320, RCW 9.94A.525(2)(c) and RCW 9.96.060 are referred to hereinafter as the deferral, washout and vacation statutes, respectively, for

Setting aside the Court of Appeals failure to properly direct its statutory construction analysis to the correct statute (petitioner argues the washout statute, not the deferral or vacation statutes, is subject to multiple, reasonable interpretations) its adoption of the State's "separate results" theory was problematic for the reason that it fundamentally misunderstands criminal procedure.

The Court of Appeals refers to RCW 9.96.060 and RCW 3.50.320 in its opinion as the "vacation" and "dismissal" statutes, respectively, when the plain language of both statutes contemplates the withdrawal of a plea or setting aside of verdict followed by dismissal of the complaint. This misplaced semantic dichotomy of "dismissal" versus "vacation" ignores fundamental tenets of criminal procedure; a court may only enter judgment upon a finding of guilt, i.e. a conviction. When a guilty plea is withdrawn or a verdict set aside, any judgment entered is 'vacated' as a practical matter. To hold otherwise would render the term "dismissal" entirely meaningless – what does dismissal

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the sake of clarity and brevity.

even mean if the judgment is not vacated, set aside, reversed, etc.?

The Court of Appeals analysis also glaringly conflicts with the plain language of the "vacation" statute:

> *[T]he court may in its discretion vacate the record of conviction by:* (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; [...] and (b) the court **dismissing** the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

RCW 9.96.060 (in relevant portion, emphasis added). Notably, the "vacation" statute makes no reference to or provision for "vacating" cases which have already been dismissed. Instead, it contemplates "vacating" existing convictions, i.e. those containing a finding of guilt. Yet, the court below suggests that Mr. Haggard should have moved under RCW 9.96.060 to withdraw his guilty plea and dismiss the complaint – when the court had *already* done those very things. Under the plain language of the "vacation" statute, there was nothing left for Mr. Haggard to ask the court to "vacate" following the dismissal of his case pursuant to his deferred sentence.

In sum, to harmonize the washout statute with the deferral and vacation statutes *on their plain language*, the State and the Court of Appeals would read into RCW 9.96.060 an alternative procedure for 'vacating' previously dismissed cases that is wholly absent from its plain language. This tortured reading of this statute fundamentally contradicts the assertion that the washout statute is unambiguous on its plain language.

ii. Reading the washout statute to exclude deferred sentences altogether frustrates the clear legislative intent to release defendants from the disabilities of dismissed charges.

Alternatively, the State may argue, or this Court may consider, the proposition that the washout statute is unambiguous because the legislature purposefully and intentionally excluded those who successfully complete deferred sentences from having the benefit conferred to "vacated" convictions, i.e. the prohibition against future use in criminal history. That is, the legislature intentionally excluded cases dismissed by deferred sentence from both "washout" and "vacation."

This argument fails for two reasons, first, as noted above, where a statute is ambiguous and there are multiple reasonable interpretations, the statute must be interpreted in favor of the defendant. Whether the legislature purposefully omitted language from the deferral statute is but one argument where the defendant has already proffered a reasonable alternative – namely that a charge dismissed pursuant to a deferred sentence is not within the meaning of the washout statute's 'any crime that results in conviction' language.

Second, such a reading of the statute yields an absurd result. A deferred sentence is granted within the discretion of the trial court at sentencing and can only be described as a measure of mercy, benefit, leniency, etc. in favor of the defendant. Logic dictates that a judge who defers a sentence deems the beneficiary more deserving of mercy, benefit, leniency, etc, than a defendant whose sentence is otherwise the same, save for being suspended rather than deferred. Therefore it is absurd to believe that the legislature would have intended to confer exemption from "washout" only to those individuals who were not deemed worthy of a deferred sentence at the time

of sentencing, but later successfully moved to vacate their conviction subsequently, while excluding those whose cases were successfully dismissed through deferral (because, as pointed out above, RCW 9.96.060 does not provide for the "vacation" of a case that has already been dismissed).

b. This Court has previously held favorably to Petitioner on the nearly identical issue of the effect of felony cases dismissed pursuant to deferred sentences.

Although no prior appellate court decision has addressed the issue of misdemeanor dismissals (save for the published opinion below in this ecase), this Court has previously analyzed this exact issue as it pertained to parallel statutes governing deferral of felony judgment and sentences in former RCW 9.95.240. See *State v. Breazeale*, 144 Wn.2d 829, 31 P.3d 1155 (2001).

Prior to the Washington legislature's enactment of the Sentencing Reform Act, trial courts had the power to defer felony sentences under former RCW 9.95.240 just as they currently do misdemeanor sentences under RCW 3.50.320. Trial courts also had – and presently retain – the power to vacate

felony convictions following the expiration of jurisdiction. See former RCW 9.95.230, recodified in 2001 as RCW 9.94A.640.

Prior to 2001, the interplay between RCW 9.94A.525, former RCW 9.95.240 and former RCW 9.95.230 was unsettled; specifically as to whether a "dismissal" under former RCW 9.95.240 had the same effect as a "vacation" under former RCW 9.95.230. See *In re Carrier*, 173 Wn.2d 791, 806-808, 272 P.3d 209, 217 (2012). In 2001, this Court addressed the interplay between "vacation" and "dismissal" as used in the aforementioned statutes. *Breazeale*, 144 Wn.2d at 830. Therein, the question was whether, under the authority of former RCW 9.95.240 the trial court had the authority to not only dismiss the indictment from a pre-SRA conviction, but to vacate the record of conviction such that the Washington State Patrol could not use the conviction data. *Id.* The *Breazeale* Court held that the trial courts powers pursuant to former RCW 9.95.240 and former RCW 9.95.230 were two sides of the same coin. See In re Carrier, 173 Wn.2d 791, 806-07, 272 P.3d 209, 217 (2012) ("We take this opportunity to clarify the holding in *Breazeale*.")

In response to Breazeale, the legislature amended former RCW 9.95240 such that it would no longer have the same effect as companion statute; specially "vacation" under RCW 9.94A.640 would be required before a conviction could be excluded from a defendant's offender score. Id. at 807. "In 2003, the legislature added a new subsection to the dismissal statute that states:

> After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640. The court may, in its discretion, clear the record of conviction if it finds the defendant has met the equivalent of the tests in RCW 9.94A.640(2) as those tests would be applied to a person convicted of a crime committed before July 1, 1984.

Id, quoting Laws of 2003, ch. 66, § I(2)(a).

In *Carrier*, the appellant made an argument precisely parallel to that made by Mr. Haggard – that his dismissed felony conviction should not be counted in his offender score because the trial court's dismissal of his sentence under the "deferred sentence" statute had the same legal effect as if the trial court had vacated the conviction under the companion statute allowing courts to vacate convictions. Although the

Carrier Court found that the legislative amendments in response to *Breazeale* successfully created a two-step process for removing convictions from criminal history, the court explicitly noted that absent the *Breazeale* fix, a deferred sentence is analogous to a vacated conviction:

> Were we deciding this case strictly under *Breazeale*, Carrier would succeed in his claim that the trial court wrongly included his dismissed conviction in his criminal history.[...] Under *Breazeale*, Carrier's dismissed indecent liberties conviction would be tantamount to a vacated conviction, and former RCW 9.95.240 would therefore exclude the conviction from Carrier's criminal history.

Id. at 806-07.

A critical insight into the legislatures intent for felony deferral and felony vacation to constitute separate results is their amendment of the felony deferral statute to explicitly reference the felony vacation statute. By contrast, the current version of RCW 3.50.320 does not reference RCW 9.96.060. Nor does RCW 9.96.060 reference RCW 3.66.067 and RCW 3.50.320. Thus, these misdemeanor statutes are perfectly analogous to their felony counterparts *prior* to the legislature's response to *Breazeale* (which this Court has construed in favor of defendants).

c. The legislature has acquiesced to Breazeale as it pertains to misdemeanors by choosing not to amend the statutes governing deferral of misdemeanor sentences.

That the legislature chose *not* to amend the misdemeanor vacation and dismissal statutes following *Breazeal* or *Carrier* erases any remaining doubt as to the legislature's intent that misdemeanors dismissed by deferral of sentence have the same effect as those dismissed by vacation:

> Any lingering doubts about the correctness of Ervin's interpretation are allayed by the legislature's acquiescence in it. We presume the legislature is "familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.

State v. Ervin, 169 Wn.2d 815, 825, 239 P.3d 354, 359 (2010) (internal quotations and citations omitted). The legislature chose to amend only the felony "deferral" and "vacation" statutes in response to *Breazeale*. Thus, this court must presume that the legislature intentionally declined to amend the misdemeanor statutes in response to *Breazeale* or *Carrier*. Thus, because they have not been amended, this Court's above cited analysis is controlling: absent a *Breazeale* amendment, "deferral" and "vacation" have the same legal effect – dismissal – and a

misdemeanor conviction dismissed pursuant to RCW 3.66.067 or RCW 3.50.320 may not be included in the defendant's criminal history for purposes of calculating their offender score.

2. This Court should grant review pursuant to RAP 13.4(b)(4) because the mechanics of disentanglement from the restraints attendant to prior criminal convictions are a matter of substantial public interest.

The issues arising in the instant case are matters of substantial public interest for two reasons. First, the instant situation will almost certainly recur and other defendants will suffer prejudice in the form of unduly long sentences under the mechanistic Sentencing Reform Act as a result of the erroneous decision below.

Perhaps more importantly, the decision implicates a substantial number of Washingtonians in Mr. Haggard's position *prior* to his commission and prosecution for new felonies. It is not difficult to imagine hundreds, if not thousands, of cases in Washington involving defendants with prior felony convictions facing prosecution for minor crimes of poverty (such as driving with a suspended license or the disorderly conduct charge involved herein) even after substantially rehabilitating

themselves. In such situations, clarity for defendants, counsel and trial courts on the future implications of various criminal procedures is critical.

The tortured Court of Appeals interpretation of RCW 9.96.060 and RCW 3.50.320 provides no fair notice to defendants or trial courts that a defendant would need to take the additional step of "vacating" a conviction already set aside and dismissed by deferred sentence in order to be released from the attendant disabilities. Moreover, the decision below does not settle the issue of whether RCW 9.96.060 even allows one to vacate a conviction that has already been dismissed. Based on the plain language of the "vacation" statute, the *only* means by which a court can vacate a conviction is "by [...] [p]ermitting the applicant to withdraw the applicant's plea of guilty [...] **dismissing** the information." A reasonable trial judge could easily interpret such language as barring the "vacation" of a case that has been previously dismissed.

E. CONCLUSION

David Haggard respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 1st day of July 2019.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DAVID BRENT HAGGARD, Appellant.	No. 77426-3-I DIVISION ONE PUBLISHED OPINION FILED: June 3, 2019

HAZELRIGG-HERNANDEZ, J. — David B. Haggard seeks reversal of his convictions for arson and burglary, arguing that he was sentenced based on an improper offender score. Haggard contends that his score was miscalculated because a misdemeanor conviction dismissed after successful completion of a deferred sentence should not have interrupted the washout period for his prior class C felony convictions. Because the plain language of the statute is unambiguous and does not indicate that the legislature intended dismissal to be equivalent to vacation, we affirm.

FACTS

David Haggard was convicted of three felonies in California in 2002, 2004, and 2005. He was released from incarceration for the last of these offenses on May 22, 2008. Haggard was charged with assault in the fourth degree in Snohomish County District Court for events occurring in late 2010 and pleaded

guilty to the reduced charge of disorderly conduct. Haggard received a deferred sentence. On March 1, 2012, the Snohomish County District Court found Haggard to be in compliance with the conditions of his deferred sentence and dismissed the case ex parte.

In this case, Haggard was charged with arson in the second degree and burglary in the second degree for events that took place on June 5, 2016. The trial court engaged in a full colloquy with Haggard and found that he knowingly, voluntarily, and intelligently waived his right to a jury trial and stipulated to the facts. The court found sufficient facts beyond a reasonable doubt to convict Haggard of both arson in the second degree and burglary in the second degree.

The State filed a memorandum detailing the timing of Haggard's prior convictions, which affected his offender score. The State argued that the critical distinction between dismissal and vacation was that a prior vacated offense would not impact a future offender score. Because Haggard's 2010 conviction had been dismissed but not vacated, the State contended that he was not entitled to exclude his prior California felony convictions from the offender score calculation. Haggard argued in response that the supreme court's analysis of the analogous felony dismissal and vacation statutes compelled the conclusion that a misdemeanor dismissed after a deferred sentence may not be included when calculating an offender score.

The court also heard oral argument on Haggard's offender score. The State argued that the governing statute specifically states that vacated convictions will not be used to calculate a future offender score but does not provide the same

benefit to charges dismissed after a deferred sentence. Haggard responded that the distinction between "vacation" and "dismissal" was artificial and the two terms were interchangeable for misdemeanor convictions. He argued that the two statutes recognized a procedural distinction and applied in different stages: dismissal when the trial judge still had jurisdiction over a defendant and vacation when the trial court no longer had jurisdiction because the defendant's probation had expired.

Haggard argued that the statute was ambiguous because it was unclear whether vacation under RCW 9.96.060 had a different legal effect than a dismissal under RCW 3.66.067, and the court should apply the rule of lenity in his favor. The State responded that RCW 9.96.060 was not ambiguous because it was a general, stand-alone statute that applied to all courts in which a defendant seeks vacation of a misdemeanor. The trial court found that the statute was not ambiguous and that it was clear from the language of the statute that the defendant had to petition the court and give notice to the prosecutor to have the conviction vacated. Only then would the court exclude the prior conviction when calculating an offender score. Therefore, the court found that Haggard's dismissed misdemeanor conviction interrupted the washout period for his prior felonies because the misdemeanor was not vacated.

Because Haggard's prior felonies did not wash out, the court determined that he had an offender score of six. Haggard was sentenced to 39 months imprisonment on the arson charge and 29 months on the burglary charge. The sentencing hearings for this matter and another case in which Haggard was

convicted of unlawful possession of a firearm and violation of the Uniform Controlled Substances Act occurred simultaneously. All four sentences were ordered to run concurrently. Haggard timely appealed. Haggard also appealed this same issue with a separate Statement of Additional Grounds for Review in State of Washington v. David B. Haggard, No. 77427-1-I.

DISCUSSION

I. Offender Score

Haggard contends that his dismissed 2010 conviction should not have been included in his criminal history when calculating his offender score because dismissal of a misdemeanor conviction is equivalent to vacation of that conviction.

We review both offender score calculations and questions of statutory construction de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011); State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). Our objective when interpreting a statute is to determine the legislature's intent. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). We will give effect to the plain meaning of a statute if it is evident from the text of the statute itself and context within the statutory scheme. Id. If the statute is susceptible to more than one reasonable interpretation, it is ambiguous. Id.

A defendant's offender score is calculated according to RCW 9.94A.525. Generally, prior felony convictions each count as one point toward the offender score, except in certain specific circumstances set out in the statute. RCW 9.94A.525. However, some prior class C felonies can "wash out" (that is, be excluded from the calculation) if the offender spent five consecutive years in the

community without committing any crime that results in a conviction since the last date of confinement. RCW 9.94A.525(2)(c). The issue before the trial court was whether Haggard's dismissed 2010 conviction interrupted the washout period for his prior class C felony offenses.

Courts of limited jurisdiction may dismiss misdemeanor offenses under RCW 3.50.320 and RCW 3.66.067.[1] On a showing of good cause during a deferred sentence, the court may allow the defendant to withdraw a guilty plea, enter a plea of not guilty, and dismiss the charges. RCW 3.50.320; RCW 3.66.067. The dismissal statutes do not limit the number of deferred sentences a person may receive or the number of cases that may be dismissed. RCW 3.50.320; RCW 3.66.067. Although the statutes do not explicitly state the effect that dismissal has on a defendant's criminal history, Division Three of this court has remarked that "[n]othing in RCW 3.66.067 implies that a conviction is automatically deleted or expunged from the criminal record after dismissal." State v. Gallaher, 103 Wn. App. 842, 844, 14 P.3d 875 (2000).

A person convicted of a misdemeanor offense who has satisfied the terms of the sentence may apply to the sentencing court for vacation of the conviction. RCW 9.96.060(1). The court may in its discretion vacate the record of conviction if the applicant qualifies under the relevant statute. RCW 9.96.060(1)–(2). Certain offenses, including violent offenses, driving under the influence offenses, and sex offenses, are not eligible for vacation. RCW 9.96.060(2)(b)–(c). If the court

[1] Although RCW 3.50.320 applies to municipal courts and RCW 3.66.067 applies to district courts, the provisions of the two statutes are functionally identical.

vacates the record of conviction, the applicant "shall be released from all penalties and disabilities resulting from the offense and the fact that the person has been convicted of the offense shall not be included in the person's criminal history for purposes of determining a sentence in any subsequent conviction." RCW 9.96.060(5)(a). A person may not have a misdemeanor conviction vacated if "[t]he applicant has ever had the record of another conviction vacated." RCW 9.96.060(2)(h).

Apart from the limited reference in State v. Gallaher, 103 Wn. App 842, 14 P.3d 875 (2000), Washington courts do not seem to have addressed the relationship between the misdemeanor dismissal and vacation statutes. However, the Ninth Circuit Court of Appeals has considered whether a federal defendant's prior Washington state misdemeanor conviction, which had been dismissed under RCW 3.66.067, could be used in calculating his offender score. United States v. Vassar, 40 Fed. Appx. 463, 465 (9th Cir. 2002) (unpublished). The court found nothing in the misdemeanor statute evidencing the legislature's intent that the dismissed conviction be set aside or expunged from the record. Id. at 466. The Ninth Circuit relied on this court's statement about the misdemeanor statute in Gallaher for support of that proposition. Id. Ultimately, the court concluded that the district court had properly included the defendant's dismissed misdemeanor conviction as part of his criminal history when calculating his offender score. Id. at 466.

The Washington Supreme Court considered a similar issue concerning analogous felony statutes in In re Carrier, 173 Wn.2d 791, 272 P.3d 209 (2012).

In Carrier, the petitioner argued that the trial court improperly counted a dismissed felony conviction as a strike in his criminal history. Id. at 796. He argued "that dismissing a conviction pursuant to former RCW 9.95.240 is equivalent to vacating a conviction under former RCW 9.94A.640" and "that the two statutes have the same legal effect in removing convictions from a defendant's criminal history." Id. at 804.

The Carrier court discussed its prior decision regarding the relationship between the felony dismissal and vacation statutes in Breazeale. The court clarified that its holding in Breazeale was "that a court's dismissal of a pre–SRA conviction pursuant to former RCW 9.95.240 has the same legal effect as vacating the conviction under the SRA." Carrier, 173 Wn.2d at 806. The court acknowledged that Carrier would prevail under the rationale in Breazeale, but went on to note that the legislature had amended RCW 9.95.240 in response to Breazeale to require a two-step process to vacate pre-SRA convictions. Id. at 806–07. However, the court concluded that Carrier was entitled to relief because the amendment did not apply to him retroactively. Id. at 818–19.

In his written argument to the trial court, Haggard drew the court's attention to the Supreme Court's comment in Carrier that Breazeale would compel the conclusion that Carrier's dismissed conviction should not have been included in the calculation of his offender score if not for the subsequent amendment to the statute. He contended that, because the misdemeanor statute was not similarly amended, Breazeale controls the result in this case. However, the court in Breazeale relied on the language of the felony dismissal statute mandating that,

after dismissal, the defendant "'shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.'" Breazeale, 144 Wn.2d at 835 (quoting former RCW 9.95.240). This language was common to both the dismissal and vacation statutes. Id. at 837. The court had previously interpreted that statement "to mean that a person who has been granted dismissal under RCW 9.95.240 is entitled to assert that he or she has never been convicted." Id. (citing In re Discipline of Stroh, 108 Wn.2d 410, 417–18, 739 P.2d 690 (1987)). This language does not appear in the misdemeanor dismissal statutes. RCW 3.50.320; RCW 3.66.067.

The language of the misdemeanor dismissal and vacation statutes is clear and unambiguous. Although the misdemeanor dismissal statutes do not explicitly state the effect of dismissal on the defendant's record, the existence of a separate procedure for vacation implies that the legislature did not intend for a dismissal to automatically have the same effect as a vacation. The vacation statute contains numerous limitations that are not present in the dismissal statutes, including restrictions on the offenses that are eligible for vacation and the number of convictions that a person may have vacated. A defendant must also apply to the court for vacation, while dismissal can be carried out ex parte, as it was in this instance. Therefore, we find that the two procedures are not equivalent and dismissal does not automatically have the same effect as vacation. The trial court correctly found that Haggard's dismissed 2010 conviction interrupted the washout period for his prior felonies, and did not err in sentencing him based on an offender score of six.

II. Statement of Additional Grounds

In a Statement of Additional Grounds, Haggard contends that the trial court erred in denying his motions to compel production of evidence and his motion to suppress evidence stemming from an allegedly defective search warrant. Haggard primarily relies on the briefing filed below and adopts the arguments raised by trial counsel.

In July 2016, Detective Christina Bartlett applied for a warrant to search the property where Haggard and his sister, Jamie,[2] had been living before Jamie's disappearance. During the execution of that warrant on July 15, 2016, officers discovered evidence of the crimes with which Haggard was later charged in this case. Haggard subpoenaed a copy of the affidavit supporting the search warrant and King County Sheriff's Office provided him with a redacted copy.

A. Motions to Compel

Haggard contends that the trial court erred in denying two motions to compel production of evidence. The first motion sought to compel an unredacted copy of Det. Bartlett's affidavit in support of the search warrant, but the State objected on the grounds that disclosure would compromise the ongoing investigation into Jamie's disappearance. The trial court reviewed the unredacted warrant affidavit in camera and denied the motion to compel. The second motion sought production of investigative records pertaining to Jamie's disappearance.

[2] To avoid confusion, Jamie Haggard will be referred to by her first name. We intend no disrespect.

The trial court also denied this motion. The record on appeal is insufficient to allow for our review of these rulings.

B. Motion to Suppress

Finally, Haggard contends that the trial court erred in denying his motion to suppress evidence obtained from the execution of a search warrant at his residence. He argues that the warrant was neither supported by probable cause nor constrained by adequate particularity, and that Det. Bartlett recklessly omitted material information from her affidavit. He also claims that the search exceeded the scope of the warrant and that witness statements obtained during the execution of the warrant should have been excluded.

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). We review challenged findings of fact for substantial evidence. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Unchallenged findings of fact are viewed as verities on appeal. Gaines, 154 Wn.2d at 716.

Haggard moved to suppress the evidence collected during the searches of his residence on July 15, 2016 and September 1, 2016, as well as the "search of his private affairs" on August 18, 2016, arguing that they violated his constitutional rights. In his motion to suppress, Haggard raised various arguments challenging all three searches. In his Statement of Additional Grounds, Haggard assigns error only to the denial of the motion to suppress evidence obtained from the search warrant executed on July 15, 2016.

1. Issuance of Warrant

a. Probable Cause

First, Haggard argues that the affidavit in support of the search warrant did not establish probable cause to believe that evidence of specific criminal activity would be found in his residence. Haggard contends that there was no probable cause to believe that Jamie was murdered or that there would be evidence of criminal activity in the place to be searched or items to be seized. The trial court found that there was sufficient probable cause detailed in the affidavit to allow a search of the premises.

A magistrate may only issue a search warrant after a showing of probable cause. State v. Clark, 143 Wn.2d 731, 747, 24 P.3d 1006 (2001) (citing U.S. CONST. amend. IV). Probable cause requires only a probability of criminal activity, not a prima facie showing. Id. at 748. If the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that a person is probably involved in criminal activity and the evidence of the crime could be found in the place to be searched, probable cause exists. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generally, appellate courts review the issuance of a search warrant only for abuse of discretion, giving great deference to the issuing judge or magistrate. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, when the trial court has reviewed the affidavit supporting the warrant after a motion to suppress, the trial court's finding of probable cause is a legal conclusion that we review de novo. Id.

In the affidavit, Det. Bartlett states that Jamie; her half-brother, Haggard; his girlfriend, Carlee Chew; and Jason Nolte lived together in the Kenmore house. Jamie disappeared without notice to anyone, including the person with whom she had plans the day after her disappearance. She had been involved in a physical altercation with Haggard the day before she disappeared. Haggard filled in a hole at the property soon after her disappearance and impersonated Jamie in a text message to their sister. Additionally, Haggard's accounts of the events leading up to Jamie's disappearance changed multiple times over the course of his contacts with police. Because the affidavit sets forth these facts, which are sufficient for a reasonable person to conclude that Haggard was involved in criminal activity and evidence of that activity could be found in the residence, probable cause existed to issue the warrant.

b. Particularity

Haggard also argues that the warrant was overbroad because it lacked sufficient particularity as to the items to be seized. Specifically, Haggard contends that the warrant allowed property belonging to other residents of the house to be seized because it did not provide objective standards for distinguishing between Jamie's belongings and the belongings of the other residents.

Det. Bartlett's affidavit said that she believed that evidence of Jamie's murder could be found at the Kenmore house, in Haggard's truck, in Nolte's car, and in the phone records of the relevant parties. The affidavit listed a specific date range for the cell phone data and position information to be searched. The affidavit also listed examples of items in the house that would help to establish whether

Jamie was missing voluntarily, including "clothes, phones, belongings, medications, prescriptions (given her abuse of narcotic pain pills), purses, suitcases, documents, diaries, etc." Haggard had stated to officers that Jamie had driven Nolte's car the night before she disappeared and he believed she had been in his truck since her disappearance. The trial court did not see any problems with the particularity of the warrant because the items listed were related to the suspected homicide.

"A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search." State v. Keodara, 191 Wn. App. 305, 312, 364 P.3d 777 (2015) (citing State v. Maddox, 116 Wn. App 796, 805, 67 P.3d 1135 (2003)). A warrant is not necessarily impermissibly broad solely because it lists generic classifications. Id. at 313 (citing State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997)). Washington courts have upheld such general descriptions as "specific items plus any other evidence of the homicide . . . any and all evidence of assault and rape included but not limited to . . . specified items," and "trace evidence from the victim in the van." Clark, 143 Wn.2d at 754–55 (internal quotation marks omitted) (quoting State v. Reid, 38 Wn. App. 203, 211–12, 687 P.2d 861 (1984); State v. Lingo, 32 Wn. App. 638, 640–42, 649 P.2d 130 (1982)). However, "blanket inferences and generalities cannot substitute for the required showing of 'reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.'" Keodara, 191 Wn. App. at 313 (quoting Thein, 138 Wn.2d at 133).

Here, although the warrant contains generic classifications of the items to be searched and seized, it gives sufficient guidance to officers to prevent them from "mak[ing] the search a 'general, exploratory rummaging in a person's belongings.'" Clark, 143 Wn.2d at 755 (quoting Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). The listed items were all related to the disappearance and suspected homicide of Jamie Haggard. The warrant was not impermissibly broad.

c. Reckless Omission

Haggard argues that Det. Bartlett recklessly omitted from her affidavit the fact that Nolte was in jail at the time of Jamie's disappearance, knowing "that the court would draw unfair inferences as to the likelihood of [Nolte's] involvement in criminal activity." The trial court concluded that Det. Bartlett did not recklessly omit any relevant information from her affidavit.

In order to invalidate the warrant on this basis, the defendant must show evidence of a deliberate, material omission or statements made in reckless disregard of the truth, rather than simply negligence or innocent mistake. Clark, 143 Wn.2d at 751. "A trial court's finding on whether an affiant deliberately excluded material facts is a factual determination, upheld unless clearly erroneous." Id. at 752 (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). Therefore, although the court listed its finding that Det. Bartlett did not recklessly omit any relevant information from her affidavit as a conclusion of law, we review it as a factual determination.

Haggard contends that the affidavit "gives rise to a clear inference that her disappearance may be linked to the jealous, assaultive boyfriend [Nolte]." However, although Nolte is mentioned throughout the affidavit, the main focus of the affidavit seems to be Haggard's statements and actions leading up to and following Jamie's disappearance. Det. Bartlett's affidavit does not explicitly state that Nolte was in jail when Jamie disappeared, but it does state that he was arrested for domestic violence assault on June 8, 2016 and that Haggard filled in the pond "while Nolte was incarcerated." These references indicate that the lack of an explicit statement that Nolte was in jail when Jamie disappeared was more likely negligence or an innocent mistake rather than a deliberate or reckless omission. Haggard has not shown that Det. Bartlett deliberately excluded material facts from her affidavit, and therefore the court's finding is not clearly erroneous.

2. Scope of Warrant

Next, Haggard argues that the law enforcement officers who executed the warrant exceeded its scope by searching and seizing property unrelated to the target of the search warrant. Haggard contends that moving a welder to locate its serial number constituted a warrantless search and seizure because the warrant did not authorize them to move the welder. The trial court found it "very clear" that the serial number was in plain view because it was on the front of the welder and exposed. Therefore, the court found that there was no warrantless search or seizure of the welder when the serial number was in plain sight on the front of the equipment. In its written findings, the court concluded that the welder was in plain view in a common area of the house, and taking a picture of an object in plain view

at a scene violates neither Article I, Section 4 of the Washington State Constitution nor the Fourth Amendment to the United States Constitution. We review this conclusion of law de novo. Gaines, 154 Wn.2d at 716.

Detective Kathleen Decker testified at the CrR 3.6 hearing that she participated in the search of the Kenmore house on July 15, 2016. She oversaw the search-and-rescue personnel and took photographs of the scene. During the search, she noticed a large metal arc welder located in the breezeway between the residence and the garage. She was asked to photograph the welder and she did so. She testified that, although the welder was moved slightly while being photographed, she was able to see the front of the welder without moving it and that the serial number was printed on the front of the welder. Det. Bartlett had told her that the welder was suspected stolen property, and Det. Decker knew that the purpose of photographing the welder was to document the serial number to research whether it was stolen.

Recording serial numbers that are in plain view does not constitute a search or seizure. Arizona v. Hicks, 480 U.S. 321, 324–25, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). In Hicks, a police officer searching an apartment for evidence of a shooting noticed expensive stereo equipment that seemed out of place in the "squalid and otherwise ill-appointed four-room apartment." Id. at 323. He recorded the serial numbers to check if the equipment was stolen, but had to move components of the equipment to find the numbers. Id. The Court found that moving suspected stolen property in order to locate the serial number constituted a search that must be supported by authority of law. Id. at 324–25.

Unlike the serial numbers on the equipment in Hicks, the serial number on the welder was clearly visible before it was moved. Because the serial number was in plain view, photographing that number did not constitute a separate search or seizure. The trial court did not err in finding that recording this information did not violate Haggard's constitutional rights.

3. Statements of Carlee Chew and Jason Nolte

Finally, Haggard argues that Carlee Chew and Jason Nolte's statements to law enforcement officers when the warrants were executed should be excluded as fruits of the poisonous tree. Because we have concluded that the warrant was valid, Haggard has identified no basis to exclude these statements.

Affirmed.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent,* v. DAVID HAGGARD, *Petitioner.*	)	Supreme Court No. _____ (COA No. 77426-3-I) DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Amanda Kim, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct:

That I am an American citizen over 18 years of age; that on July 1, 2019, I personally served the attorney for the Respondent with one copy of Petition for Review in the above-captioned cause the same via email to the King County Prosecuting Attorney's Office at PAOAppellateUnitMail@kingcounty.gov.

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