FILED
SUPREME COURT
STATE OF WASHINGTON
3/9/2018 1:39 PM
BY SUSAN L. CARLSON
CLERK

93995-1
(COA No. 33911-4-III)

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER JOHN BLAIR, PETITIONER

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether *State v. Irish* and *State v. Ammons* control whether a sentencing court may engage in statutory interpretation or look beyond the face of the judgment to determine whether a prior conviction is facially and constitutionally invalid, or whether, as defendant has suggested, this Court's separate jurisprudence on personal restraint petitions extends to sentencing hearings?

2. Whether, under this Court's analysis in *State v. Barnes*, a snowmobile is a motor vehicle for purposes of RCW 9A.56.065, the statute criminalizing theft of a motor vehicle?

II. STATEMENT OF THE CASE

Christopher Blair was charged in Spokane County Superior Court with one count of theft of a motor vehicle, a Ford truck, occurring on or about October 28, 2011. CP 1, 4. He entered drug court, but was terminated from the program in 2015. CP 17-22, 36. Before sentencing, Blair filed a motion for an exceptional sentence downward. CP 37-57. He agreed he had earlier pleaded guilty to two counts of theft of a motor vehicle, snowmobiles,[1] on October 13, 2011, from an incident in July 2011, and that his offender score was a "9." CP 37-38, 42, 52, 63-64; RP 24-35. Blair argued the sentencing court should impose a sentence below the applicable standard range of 43 to 57 months because he claimed the prior convictions

[1] The only evidence that the motor vehicles stolen were snowmobiles was contained in the information. CP 42-57. One was a 2009 Ski Doo Summit Everest model 146. The other was a 2010 Ski Doo Summit Everest model 800X. It is unclear from the judgment and sentence whether the defendant actually pled guilty to theft of a motor vehicle based on the theft of these snowmobiles.

were "facially invalid plea[s] in that snowmobiles do not meet the definition of motor vehicle under statutes." RP 24-25.

> We're not asking the court to act as an appellate court from the prior Judgment and Sentence, Your Honor. We're just saying on its face the plea is invalid as to a motor vehicle. We're not saying that Chris is not guilty of stealing those motor vehicles. He entered a plea. We're just saying that the way they're counted is not correct and that they should be counted as one point instead of three; therefore, the correct range would be 22 to 29 months.

RP 28.

The sentencing court found the argument "may be … excellent … for a personal restraint petition or some other venue," but did not support an exceptional sentence. RP 31.

Blair appealed to Division Three of the Court of Appeals. In an unpublished opinion, the court noted the "extremely peculiar procedural posture" of Blair's case, as he "did not directly challenge the offender score calculation, but instead sought an exceptional sentence based on an alleged error in the offender score." *State v. Blair*, 2016 WL 7015858, *1-2, 196 Wn. App. 1076 (2016). Notwithstanding RAP 2.5, the court treated the defendant's argument at sentencing as one attempting to establish facial invalidity, determining he failed to make this showing. *Id*. It did not address whether a snowmobile is a motor vehicle. *Id*. at *2 n. 3. Blair then sought review in this Court.

III. ARGUMENT

A. THE DEFENDANT FAILED TO DEMONSTRATE, AND CANNOT DEMONSTRATE, THAT HIS PRIOR CONVICTIONS ARE CONSTITUTIONALLY INVALID ON THEIR FACE.

The Court of Appeals treated the defendant's statements[2] at his sentencing as a request for the sentencing court to determine that the prior theft of a motor vehicle convictions were "facially invalid." Based on *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719 (1986), *amended* 105 Wn.2d 175, 718 P.2d 796 (1986), the court rejected this contention. *Blair* at *2.

Under the Sentencing Reform Act, a court uses a defendant's prior convictions to determine his offender score and standard range sentence. RCW 9.94A.525; RCW 9.94A.530. The State has the burden of proving the existence of prior convictions, but is not tasked with establishing the "underlying constitutional validity of those convictions." RCW 9.94A.530(2); *State v. Irish*, 173 Wn.2d 787, 789-90, 272 P.3d 207 (2012) (per curiam); *Ammons*, 105 Wn.2d at 187.

In *Irish*, the defendant claimed his prior convictions violated double jeopardy. In addressing his claim, this Court reiterated the *Ammons* rule:

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[2] Defendant argued at sentencing that the use of a "facially invalid plea" as a prior conviction for purposes of determining the defendant's offender score constituted a "substantial and compelling reason justifying a downward departure." CP 40. He requested the court *treat* the prior theft of motor vehicle convictions as if they were not motor vehicle theft convictions. CP 40. Yet, he agreed that his offender score was a "9." CP 37-38, 63-64; RP 24. It is notable that, despite this argument, defendant failed to provide the court a copy of his statement on plea of guilty to the prior offenses. *See Blair* at *2.

> It is *well settled* that the State is not required to prove the constitutional validity of prior convictions used to calculate a defendant's offender score on a current conviction. *State v. Ammons*, 105 Wn.2d 175, 187–88, 713 P.2d 719, 718 P.2d 796 (1986). And a *criminal defendant generally has no right to contest the validity of a previous conviction in connection with a current sentencing. Ammons*, 105 Wn.2d at 188, 713 P.2d 719, 718 P.2d 796. Requiring the State to make such a showing, or allowing the defendant to assert such a challenge, would turn the current sentencing proceeding into an appellate review of all of the defendant's prior convictions. *Id.* Consequently, *a defendant seeking to challenge the validity of a prior conviction must exhaust established postconviction avenues of relief, such as a personal restraint petition. Id.* If Irish wishes to challenge the validity of his 1998 convictions, he should file a personal restraint petition attacking those convictions.
>
> Allowing Irish to assert such a challenge in connection with his current sentencing is plainly contrary to *Ammons*.

Irish, 173 Wn.2d at 789-90 (emphasis added).

In *State v. Thompson*, 143 Wn. App. 861, 866, 181 P.3d 858 (2008), the Court of Appeals echoed *Ammons*, holding:

> To allow an attack at [sentencing] would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction." *Ammons*, 105 Wn.2d at 188, 713 P.2d 719. For this reason, "[i]n [*Ammons*], ... the Supreme Court severely restricted a defendant's ability to mount a collateral attack on a prior conviction at a sentencing hearing." *State v. Bembry*, 46 Wn. App. 288, 289, 730 P.2d 115 (1986).

This rule follows from the courts' "overriding respect for settled judgments." *State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013) (J. Chambers, pro tem, concurring in dissent).

Exempted from this rule are prior convictions which are "constitutionally invalid on their face";[3] in other words, convictions "which *without further elaboration* evidence[] infirmities of a constitutional magnitude." *Ammons*, 105 Wn.2d at 187-88 (emphasis added). To make this determination, the sentencing court may review the judgment and sentence and any other document that qualifies as the "face of the conviction," which has been interpreted by lower courts to include those documents signed as a part of the plea agreement. *Thompson*, 143 Wn. App. at 867 (citing *State v. Gimarelli*, 105 Wn. App. 370, 377, 20 P.3d 430 (2001); *State v. Phillips*, 94 Wn. App. 313, 972 P.2d 932 (1999); *State v. Davis*, 47 Wn. App. 91, 94, 734 P.2d 500 (1987); and *State v. Bembry*, 46 Wn. App. 288, 291, 730 P.2d 115 (1986)). If the trial court must "go behind the verdict and sentence and judgment" to make a determination on constitutional invalidity, the conviction is not facially invalid. *Ammons*, 105 Wn.2d at 189. A conviction is facially invalid only if the constitutional invalidity is evident without further elaboration. *Id*. at 188.

Such challenges in federal sentencing hearings are limited to those situations where a defendant's prior conviction was obtained in violation of

[3] Along with those situations in which the "prior conviction … has previously been determined to have been unconstitutionally obtained." *Ammons*, 105 Wn.2d at 187-88. Blair challenged the validity of his earlier theft of a motor vehicle convictions for the first time at sentencing on this case.

his or her right to counsel. *See Daniels v. United States*, 532 U.S. 374, 121 S.Ct. 1578, 1583-84, 149 L.Ed.2d 590 (2001); *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Burgett v. Texas*, 389 U.S. 109, 88, S.Ct. 258, 19 L.Ed.2d 319 (1967).[4] In *Daniels*, the Supreme Court stated:

> Thus we have held that if, by the time of sentencing … a prior conviction has not been set aside on direct or collateral review, that conviction is presumptively valid… *See Custis* [*v. United States*], 511 U.S.[485,] 497, 114 S.Ct. 1732, [128 L.Ed.2d 517 (1994)]. This rule is subject to only one exception: If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings. *Id*., at 496, 114 S.Ct. 1732. *No other constitutional challenge to a prior conviction may be raised in the sentencing forum*. *Id*., at 497, 114 S.Ct. 1732.

532 U.S. at 382-83 (emphasis added).

In *Custis v. United States*, the Supreme Court concluded that due process does not mandate the opportunity to challenge prior convictions during sentencing for most constitutional claims, except for the failure to appoint counsel where there is no valid waiver, as a defendant may challenge the prior proceedings by collateral attack and then "apply for

[4] *Ammons* cited both *Tucker* and *Burgett* for its holding that the State has no affirmative burden to prove the constitutional validity of a prior conviction at sentencing, but that a prior conviction which is constitutionally invalid on its face may not be used. 105 Wn.2d at 187-88. Both *Tucker* and *Burgett* were cases in which the defendants' convictions were invalid due to lack of counsel or a valid waiver of counsel at the time of their guilty pleas.

reopening of any federal sentence enhanced by the state sentences." 511 U.S. 485, 496, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

Defendant has cited law governing *personal restraint petitions* in support of review, claiming *Blair* conflicts with those cases. Pet. for Rev. at 2-4. However, it is *Ammons* and *Irish* that control the inquiry before this Court, not this Court's jurisprudence involving personal restraint petitions. The principle of stare decisis would counsel that this Court should not abandon its jurisprudence in *Ammons* and *Irish* without a showing that the holdings of those cases are both incorrect and harmful. *State v. Otton*, 185 Wn.2d 673, 374 P.3d 1108 (2016). No showing has been made.

Ammons clearly requires immediately apparent, facial "*constitutional* invalidity" to challenge a prior conviction at a subsequent sentencing. Conversely, in personal restraint petitions, for a petitioner to circumvent the one-year time-bar of RCW 10.73.090, the statute and this Court merely require the judgment to be "facially invalid," not *both* constitutionally *and* facially invalid. RCW 10.73.090; *In Re Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002). Thus, the relevant invalidity for personal restraint petitions may be constitutional, statutory, or perhaps some other form of invalidity.

Furthermore, in personal restraint petitions, it is an *appellate court* which engages in review of a defendant's conviction; in the sentencing

context, it is the *trial/sentencing court* that is tasked with review of prior convictions. A sentencing court may not have all of the information necessary to make a sound determination of the validity of a prior conviction – which is manifested in this case, by the defendant's failure to include his prior guilty plea statement to the sentencing court in support of his request to not include the prior convictions in his offender score. To task a sentencing court with determining the validity of the defendant's prior convictions would unduly burden Washington's sentencing courts, turning sentencing hearings into mini-trials regarding a defendant's criminal history. This is precisely what *Ammons* and *Irish* sought to avoid, especially where a defendant has not exhausted other avenues for relief.

In examining whether a defendant is exempted from the one-year time-bar applicable to *personal restraint petitions*, this Court has stated that a facial invalidity inquiry allows the court to look beyond the face of the judgment and sentence, including to other documents, such as the information. *See In Re Coats*, 173 Wn.2d 123, 139, 267 P.3d 324 (2011) (listing multiple personal restraint cases in which the court has looked beyond the face of the judgment to the information to determine whether a judgment is facially invalid for purposes of avoiding the one-year time-bar

of RCW 10.73.090).[5] Notably, *Coats* was decided one year before the per curiam decision of this Court in *Irish*. Thus, any disagreement from this Court as to what may or may not be considered in determining whether a personal restraint petition is exempted from the one-year time-bar clearly does not affect the bright line rule of *Ammons*, reiterated in *Irish*, requiring a facially obvious constitutionally invalid judgment.

Even if this Court considers the information which charged the defendant with theft of motor vehicles, snowmobiles, the defendant's judgment and sentence is not *facially* invalid. As the court of appeals noted, "whether the [taking motor vehicle] statute applies to snowmobiles would require more than a simple look at the judgment and sentence and associated documents." *Blair* at *2.

Furthermore, any alleged deficiency in the defendant's prior criminal conviction is not one of constitutional magnitude. It is one involving statutory construction. The simple question posed to the sentencing court was whether there was a *factual basis* for his prior

[5] *But see, Coats*, 173 Wn.2d at 147 (J. Madsen concurring) ("[T]he invalidity must appear on the face of the judgment and sentence, i.e., it must be discernable from the face of the document itself"; "we have ignored this holding and considered various other documents to determine whether the judgment and sentence is invalid… Instead of a rule of 'no further elaboration,' we have employed a rule of 'with further elaboration'"; "As we accurately stated in a recent case, if a petition 'must resort to external documents in the hope of rendering his judgment and sentence invalid, then the judgment and sentence cannot be invalid on its face,'" *citing In Re Clark*, 168 Wn.2d 581, 588, 230 P.3d 156 (2010)).

convictions. To make such a determination, the trial court would be required to "go behind the verdict and sentence and judgment" to determine whether a snowmobile was the type of motor vehicle the legislature intended to cover in enacting RCW 9A.56.065.[6] Thus, the judgment and sentence was not "constitutionally invalid on its face." In other words, the required analysis would constitute "further elaboration" prohibited by *Ammons*, 105 Wn.2d at 188, and criticized by Justice Madsen in the personal restraint petition context in *Coats*, 173 Wn2d at 147.

Again, the defendant has cited to several *personal restraint* cases to claim that a trial court may engage in statutory interpretation in determining facial invalidity. However, the comparison of what may be reviewed for personal restraint petitions, on the one hand, and during sentencing hearings, on the other, to determine facial invalidity in those two distinct contexts, is inapt. Also, the defendant's reliance on *In Re Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015), is unhelpful to his claim that a sentencing court may construe a statute to determine facial invalidity because the *Wheeler* court only reiterated the rule from *State v. Taylor*,

[6] As discussed in depth below, in *State v. Barnes*, this Court could not agree whether RCW 9A.56.065 is unambiguous, and whether, under that statute, a riding lawnmower was a motor vehicle. The varied opinions of this Court in *Barnes*, demonstrate that one must look beyond the information to determine whether a snowmobile is a motor vehicle under RCW 9A.56.065.

162 Wn. App. 791, 259 P.3d 289 (2011),[7] and did not engage in independent statutory interpretation.

This Court should reaffirm, as it did in *Ammons* and *Irish*, that Blair may not circumvent this Court's requirement that, in general, challenges to established judgments be made through the "usual channels," such as personal restraint petitions. To allow defendants to collaterally attack a prior conviction during a sentencing hearing on an unrelated conviction would turn sentencing courts into appellate courts and unduly burden those courts with mini-trials regarding criminal history, would undercut the finality of long-settled judgments, would impede the consistency in how all future sentencing courts would treat prior convictions,[8] and would fly in the face of this Court's well-settled jurisprudence.

B. SNOWMOBILES ARE MOTOR VEHICLES WITHIN THE MEANING OF RCW 9A.56.065.

In *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017), this Court determined that the term "motor vehicle" as used in RCW 9A.56.065 does not include a riding lawnmower. RCW 9A.56.065, criminalizing motor

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[7] Both *Taylor* and *Wheeler* have been rejected by this Court's ruling in *Matter of Arnold*, __ Wn.2d __, 410 P.3d 1133 (2018).

[8] For example, if the issue were determined by the appellate court, a copy of the court's order invalidating the conviction would be placed in that case's court file, readily available to both the prosecution and the defense in future cases. However, the order of a sentencing court in a subsequent prosecution, determining that a prior conviction is invalid, would be filed in the subsequent case's court file, and would not be readily apparent to the prosecutor (especially in a different county) or to defense counsel.

vehicle theft, does not define "motor vehicle." After the Court of Appeals decided *Blair*, in which it did not decide if a snowmobile is a motor vehicle, disposing of the defendant's claim on other grounds, this Court decided *Barnes*. In *Barnes*, six Justices of this Court, in two opinions, determined that a riding lawnmower was not a motor vehicle for purposes of RCW 9A.56.065. However, three Justices dissented, and would have held that the plain language of RCW 9A.56.065, 9A.04.110 and Title 46 include a riding lawnmower as a motor vehicle.[9] Under any analysis presented in *Barnes*, a snowmobile is a motor vehicle.

Justice Owens' opinion rejected the notion that the answer to the inquiry before the Court could be found by using the definition of "vehicle" found in RCW 9A.04.110, RCW 46.20.320, and RCW 46.20.670. Because the legislature did not define the term "motor vehicle" in this context, Justice Owens turned to the dictionary definition, which states, a motor vehicle is "an automotive vehicle not operated on rails, esp[ecially] one with rubber tires for use on highways." *Barnes,* 189 Wn.2d at 496. Thus, Justice Owens stated, "in the context of [RCW 9A.56.065] these definitions contemplate cars and other automobiles designed for transport of people or

[9] The State's briefing to the Court of Appeals in *Blair* also argued that the plain language of these statutes supported a determination that a snowmobile was a motor vehicle for purposes of RCW 9A.56.065.

cargo, but not machines designed for other purposes yet capable of transporting people or cargo." *Id*. at 496-97. The legislative history of the act noted that "the family car is a priority of most individuals and families" and "auto-theft … is linked more and more to offenders engaged in other crimes … such as robbery, burglary and assault." *Id*. at 497 (citing Laws of 2007, ch. 199, § 1 (1)(c)). Justice Owens determined that the legislative intent was clear: "auto theft, not lawnmower theft, was the primary concern when the bill was drafted," and the plain meaning of "motor vehicle" focused on "cars and other automobiles." *Id*.

In contrast, Justice Wiggins concluded that the meaning of "motor vehicle" as used in RCW 9A.56.065 and RCW 46.04.320 is ambiguous. *Id*. at 500-07. Because the statutes are ambiguous, Justice Wiggins turned to the legislative history of the act to ascertain the legislature's intent. In reviewing the statute's history, Justice Wiggins stated that "the legislature intended to punish and deter theft of automobiles according to the acknowledged impact of this crime on the lives of Washingtonians." *Id*. at 508. Thus, it was not the intent of the legislature to punish theft of riding lawnmowers under RCW 9A.56.065. *Id*.

Justice González disagreed with both Justice Owens and Justice Wiggins, finding RCW 9A.04.110 and RCW 46.04.320 to unambiguously encompass "all self-propelled vehicles," with certain legislatively created

exceptions, such as for golf carts and wheelchairs. *Id*. at 509-11. Under Justice González's analysis, a riding lawnmower is a motor vehicle. *Id*. at 514-15.

In order to analyze the current issue within the framework of the opinions set forth in *Barnes*, one must understand the capabilities of snowmobiles.

1. Snowmobiles are used for recreation and wintertime transport, are capable of extreme speeds, and the industry impacts Washington's economy in excess of 90 million dollars annually.

Snowmobiles were originally designed as power driven sleds, especially for use in transporting ill individuals to emergency care in areas afflicted by heavy snowfall. Snowmobiling Fact Book at 3, available at http://www.snowmobile.org/docs/snowmobiling-fact-book-2013-2014.pdf (last accessed 3/2/18). Original models were also used by doctors, veterinarians and taxi drivers. *Id*. at 4. Today's models provide a major source of winter recreation, with 95% of snowmobilers considering it to be a family activity. *Id*. at 4. When snowmobiling as a recreational activity, riders typically travel 30 to 75 miles per day on daytrips and 100 to 150 miles per day for overnight trips. *Id*. at 4-5.[10]

[10] The average U.S. snowmobiler rides 1,200 miles per year. American Council of Snowmobile Associations, *Facts and Myths About Snowmobiling and Winter Trails* at 6, available at http://www.snowmobilers.org/docs/ ACSA_Facts_and_Myths_book.pdf (last accessed 3/2/18).

"Although primarily a recreational activity, snowmobiling also provides many other useful functions" including, in remote areas of the United States, serving as citizens' primary source of transportation in the winter. *Id*. at 5. They are used by law enforcement agencies, by search and rescue organizations, by ranchers, surveyors, public utility employees, and scientists. *Id*.

Washington State has approximately 3,500 miles of signed and maintained snowmobile trails, *id*. at 15, and a 2001 study from Washington State University indicated that the economic impact of snowmobiling in Washington State was $92.7 million dollars annually.[11] *Id*. at 8; American Council of Snowmobile Associations, *Facts and Myths About Snowmobiling and Winter Trails* at 7, available at http://www.snowmobilers.org/docs/ACSA_Facts_and_Myths_book.pdf (last accessed 3/2/18).

Snowmobiles are capable of extreme speeds. Even in 1967, the record speed for a snowmobile was 73.9 miles per hour. Hal Armstrong, *The Chase for a Snowmobile World Speed Record: A Short History*, SNOWTECH MAGAZINE, Jan. 17, 2017, available at

[11] "[Snowmobiling's] economic impact is … important in many rural communities where snowmobiling-related tourism … helps many businesses keep their doors open and people employed year-round." *Facts and Myths* at 6.

https://www.snowtechmagazine.com/the-chase-for-a-snowmobile-world-speed-record-a-short-history/ (last accessed 3/2/18).[12] Given the speed and agility with which a snowmobile can operate, snowmobiles have been used to attempt to flee from police. *See, e.g.*, *Brown v. State*, 830 N.E.2d 956 (Ind. 2005) (After abandoning motor vehicle, defendant stole a snowmobile, continued to flee from police, struck officer with snowmobile and knocked him down, dragged another officer with the snowmobile, and then led police on a chase over roads, through fields, cemeteries and along tree lines).

2. Snowmobiles are self-propelled vehicles, subject to many of the same rules of the road as other automobiles, and may, at times, operate on Washington's roadways.

A "snowmobile" is defined in RCW 46.04.546 as:

> a *self-propelled vehicle* that is capable of traveling over snow or ice that (1) utilizes as its means of propulsion an endless belt tread or cleats, or any combination of these or other similar means of contact with the surface upon which it is operated, (2) is steered wholly or in part by skis or sled type runners, and (3) is not otherwise registered as, or subject to, the motor vehicle excise tax in the state of Washington.

(Emphasis added). Importantly, the dictionary defines "snowmobile" as "any of various *automotive vehicles* for travel on snow; specif: an open vehicle for usu. one or two persons with steerable skis on the front and an

[12] Today's models can attain even greater speeds. *See, e.g.*, AMERICAN SNOWMOBILER, *Real World 2015 Snowmobile Reviews*, March 6, 2015, available at http://www.amsnow.com/reviews/snowmobile-reviews/2015/03/real-world-2015-snowmobile-reviews (last accessed 3/7/18) (reporting Polaris' Switchback 800 H.O. snowmobile achieved a top speed of 96.63 miles per hour).

endless belt at the rear." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1181 (2003) (emphasis added); cf. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1476 (2002) ("Motor Vehicle: an *automotive vehicle* not operated on rails" (emphasis added)).

Subject to certain limitations, a person may not operate a snowmobile in Washington unless the snowmobile has been registered. RCW 46.10.310; RCW 46.10.400; RCW 46.10.410. Like automobile operators, snowmobile operators must submit collision reports upon an accident resulting in injury or death, or in property damage over a certain monetary threshold. RCW 46.10.310. RCW 46.52.010 - .130, which outline the duties associated with reporting collisions, apply to snowmobile operators. RCW 46.10.310. Crossing public roadways on a snowmobile is permitted by RCW 46.10.460. The legislature has also provided that it is lawful to operate a snowmobile on a public roadway when the roadway is covered with snow or ice and has been closed to motor vehicle traffic, when the responsible governing body has given notice that such roadway is open to snowmobile use, or in times of emergency where the snow and ice on a roadway make the roadway impassible to travel by other automobile. RCW 46.61.470. The legislature has imposed age restrictions on snowmobile operation. RCW 46.10.480. Excessive speed or unsafe

operation may subject the operator to legal penalties, including traffic infractions or criminal charges. RCW 46.10.490, .495.

3. Under RCW 9A.56.065, snowmobiles are "automobiles" or "motor vehicles."

In *Barnes*, six Justices of this Court relied heavily on the legislative history of RCW 9A.56.065 to determine that riding lawnmowers are not a motor vehicle for purposes of the auto theft statute. However, as discussed above, snowmobiles *are* motor vehicles. They *are* automobiles. They are simply a type of automobile that is designed for travel on snow and ice. Their purpose is clear – to carry *people* (or people and cargo) from one place to another, whether for recreation or for some other purpose.

In enacting the theft of a motor vehicle statute, the legislature was concerned with the impact of motor vehicle theft on the daily lives of Washingtonians. The theft of a snowmobile owned by a rural Washingtonian who relies upon it for winter transportation, farm maintenance, or some other purpose, could be devastating. So, too, could be the effect of the theft of snowmobiles belonging to a family on a winter holiday, staying in a motel, and lacking any other means of returning home. The theft of a search and rescue snowmobile could mean that aid workers are unable to locate a missing person in a timely manner. These concerns

are simply not present where a riding lawnmower is stolen, as the only effect on its owner would be an inability to mow his or her lawn.

In enacting the motor vehicle theft statute, the legislature was also concerned with the use of stolen motor vehicles to commit other crimes. The extreme speed and agility with which a snowmobile can maneuver and its ability to travel both on and off roadways, could enable a thief to easily elude police. Pedestrians and passengers of snowmobiles could be put at risk of death or injury by the reckless or intoxicated use of snowmobiles. *See e.g.,* Minnesota Department of Natural Resources/Minnesota Certified Snowmobile Safety Report, 2017-2018 Fatal Snowmobile Accidents, February 12, 2018, available at http://files.dnr.state.mn.us/enforcement/incident_reports/snowmobileaccidents18.pdf (last accessed 3/5/2018) (reporting 8-year-old pedestrian killed by DUI snowmobiler). Treating snowmobiles like cars and trucks for purposes of RCW 9A.56.065 furthers the legislature's intent to prevent stolen snowmobiles from being used to commit other crimes and the potential injuries to others from such use.

IV. CONCLUSION

The proper mechanism by which the defendant should have challenged his prior convictions was to file a personal restraint petition. The judgment and sentence from those convictions manifests no facial or constitutional invalidity. Where a sentencing court must construe a statute

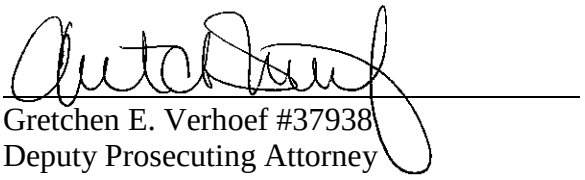
for the first time to determine whether a defendant has been convicted of a non-existent crime for purposes of determining an offender score, the prior conviction is not facially invalid.

Moreover, a snowmobile is a "motor vehicle" under RCW 9A.56.065. Snowmobiles, unlike riding lawnmowers, are *designed* to transport people from one place to another, whether it be for recreation, commerce, or some other purpose. The theft of a snowmobile can have a significant impact on the victim of the theft. Snowmobiles can be used to perpetrate other crimes. The legislature intended that snowmobiles, like other motor vehicles, should be covered by the provisions of RCW 9A.56.065.

For these reasons, the State respectfully requests this Court affirm the lower courts and the judgment and sentence.

Dated this 9 day of March, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER J. BLAIR, Petitioner	NO. 93995-1 COA 33911-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on March 9, 2018, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andra Brukhart
andrea@2arrows.net

3/9/2018	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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