

60474-1

60474-1
83244-7

NO. 60474-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES ERVIN,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUL 31 PM 4-37

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DANIEL KALISH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
1. ERVIN'S PREVIOUS CONVICTIONS DO NOT WASH BECAUSE HE DID NOT SPEND FIVE CONSECUTIVE YEARS IN THE COMMUNITY CRIME FREE	5
a. Summary Of The Law	7
b. RCW 9.94A.525(2)(c) Is Unambiguous; A Person Cannot Be "In The Community" While In Jail.....	8
c. Other Statutory Construction Rules Show That "In The Community" Does Not Mean In Confinement Pursuant To A Probation Violation	13
d. This Court Should Not Follow <u>In Re</u> <u>Nichols</u>	17
i. The full dictionary-definition of "community" makes the <u>Nichols</u> interpretation implausible	19
ii. The <u>Nichols</u> interpretation renders superfluous the phrase "in the community"	20
iv. The <u>Nichols</u> decision failed to consider several arguments raised here.....	23
D. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

<u>Am. Const'l Ins. Co. v. Steen</u> , 151 Wn.2d 512, 91 P.3d 684 (2004).....	7
<u>City of Seattle v. Quezada</u> , 142 Wn. App. 43, 174 P.3d 129 (2007).....	7
<u>Cowles Pub'g Co. v. State Patrol</u> , 109 Wn.2d 712, 748 P.2d 597 (1988).....	9
<u>Davis v. Dep't of Licensing</u> , 137 Wash.2d 957, 977 P.2d 554 (1999).....	14
<u>Dept. of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 2002)	8, 9
<hr/>	
<u>In re Detention of Kistenmacher</u> , 163 Wn.2d 166, 178 P.3d 949 (2008).....	7
<u>In re Martin</u> , 163 Wn.2d 501, 182 P.3d 951 (2008).....	7
<u>In re McKay</u> , 127 Wn. App. 165, 110 P.3d 856 (2005).....	12
<u>In re Nichols</u> , 120 Wn. App. 425, 85 P.3d 955 (2004).....	17, 19-24
<u>State v. Ammons</u> , 136 Wn.2d 453, 963 P.2d 812 (1998).....	12
<u>State v. Blair</u> , 57 Wn. App. 512, 789 P.2d 104 (1990).....	13, 14
<u>State v. Demos</u> , 94 Wn.2d 733, 619 P.2d 968 (1980).....	13

<u>State v. Fjermestad</u> , 114 Wn.2d 828, 791 P.2d 897 (1990).....	7, 8
<u>State v. Gartrell</u> , 138 Wn. App. 787, 158 P.3d 636 (2007).....	11
<u>State v. Linssen</u> , 131 Wn. App. 292, 126 P.3d 1287, <u>rev. denied</u> , 145 P.3d 1215 (2006).....	12
<u>State v. Posey</u> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	7
<u>State v. Smith</u> , 65 Wn. App. 887, 830 P.2d 379 (1992).....	22
<u>State v. Smith</u> , 137 Wn. App. 431, 153 P.3d 898 (2007).....	16, 23
<u>Timberline Air Serv. Inc. v. Bell Helicopter- Textron, Inc.</u> , 125 Wn.2d 305, 884 P.2d 920 (1994).....	9
<u>Tingey v. Haisch</u> , 159 Wn.2d 652, 152 P.3d 1020 (2007).....	7
<u>Udall v. T.D. Escrow Servs. Inc.</u> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	8
<u>Wright v. Engum</u> , 124 Wash.2d 343, 878 P.2d 1198 (1994).....	15

Statutes

Washington State:

RCW 4.24.550	11
RCW 9.41.110	11
RCW 9.94A.010.....	11
RCW 9.94A.030.....	10

RCW 9.94A.360.....	6, 17
RCW 9.94A.525.....	1, 4, 5, 7, 8, 13-15, 17
RCW 9.94A.634.....	11
RCW 9.94A.723.....	9, 10
RCW 9.94A.728.....	11
RCW 9.94A.820.....	11

Other Authorities

NEW WEBSTER'S THIRD DICTIONARY 460 (1993).....	8, 19
Sentencing Reform Act.....	5, 8-14, 23, 24

A. ISSUES

A court should interpret a statute to give effect to the legislature's intent. Here, the defendant asks this Court to interpret "in the community" in RCW 9.94A.525(2)(c) in a way that is inconsistent with the plain meaning of the words, and the meaning of the phrase in other parts of the same statute and in other statutes. Further, the defendant's interpretation would render that very phrase meaningless, lead to absurd results, and contravene the statute's purpose. Should this Court reject the defendant's interpretation?

B. STATEMENT OF THE CASE

Between September 10 and 11, 2006, the defendant, James Ervin, contacted Kendall Stroman, violating a no-contact order. 1RP 93-101.¹ Because Ervin already had two prior convictions for violating no-contact orders, this contact constituted a Felony Violation of a No-Contact Order. CP 1. The jury convicted Ervin as charged. CP 12-13. With an offender

¹ The verbatim report of proceedings is cited as follows: 1RP (March 29, 2007); 2RP (July, 24, 2007).

score of 3, Ervin was sentenced to 15 months. CP 38. In his appeal, Ervin does not contest his conviction, but only his offender score.

Ervin had the following criminal history:

Crime	Date of Crime
Juvenile Felonies	
Possession of Stolen Property 2	01/27/91*
Burglary 2	01/25/89
Adult Felonies	
VUCSA - Possession of Methamphetamine	10/23/05
Rendering Criminal Assistance 1	03/31/94*
Adult Misdemeanors	
Criminal Trespass - DV	04/15/99
Assault in the Fourth Degree - DV	07/28/05
Violation of a No-Contact Order	09/09/05
Protection Order Violation	12/11/05
Protection Order Violation	01/19/06
Protection Order Violation	01/19/06
Protection Order Violation	01/19/06

CP 73. (* indicates scoring dispute).

At sentencing, the parties disputed whether two of Ervin's previous class C felonies – Rendering Criminal Assistance in the First Degree and Possession of Stolen Property in the Second Degree (PSP 2) – “washed out” or would not count in the calculation of Ervin's offender score.

Relevant to this inquiry was that Ervin committed Criminal Trespass in the First Degree (a misdemeanor) on April 15, 1999 and was later given a suspended sentence and put on probation. 2RP 9. On December 27, 2001,

the court found Ervin in violation of his probation on that case, partially revoked his suspended sentence, and ordered him to serve twenty-five days, which he served from January 25th to February 11, 2002 in the Pierce County Jail. 2RP 10. The next crime he committed occurred on July 28, 2005 when he committed an Assault in the Fourth Degree – Domestic Violence, another misdemeanor. CP 73.

At sentencing, the State argued that Ervin's offender score was 4, one point each for Rendering Criminal Assistance and VUCSA, 1/2 point each for the juvenile felonies of Burglary 2 and PSP 2, and 1 point because Ervin was on community custody when he committed the Felony Violation of a No-Contact Order. 2RP 9-10. Ervin claimed his offender score was 1. According to Ervin, both his Rendering Criminal Assistance and PSP 2 convictions washed out because he had spent five consecutive years crime-free between the date he committed Criminal Trespass – DV in 1999 and the date he committed Assault in the Fourth Degree – DV in 2005. CP 33-34; 2RP 2-10. The State argued that since Ervin spent time in jail on a misdemeanor probation violation in 2002, he did not spend the five consecutive years in the community crime free. 2RP 9-10.

The trial court agreed with the State and ruled that Ervin's previous class C felonies did not wash. 2RP 10-11. As to the community custody point, the State failed to prove that Ervin was on community

custody at the time of the offense. 2RP 12. The court thus calculated defendant's offender score as 3 and sentenced him to 15 months. CP 38. Ervin now appeals his offender score, claiming that his Rendering Criminal Assistance and PSP 2 convictions should have washed.

C. ARGUMENT

To have a class C felony conviction wash, a defendant must remain crime free in the community (i.e., not in confinement, out in the public) for five consecutive years. RCW 9.94A.525(2)(c). Here, Ervin went five consecutive years (1999 to 2005) crime-free. But he did not spend five consecutive years "in the community" because he was jailed for a misdemeanor probation violation in 2002. Ervin, however, argues that he was still "in the community" when he was incarcerated for his probation violation. He asks this Court to interpret "in the community" to mean the people who are either (1) out of confinement or (2) in confinement solely pursuant to a misdemeanor. Br. of App. at 9-11. This interpretation should be rejected.

Neither "community" nor "in the community" are defined by the legislature. But in the criminal context, "in the community" unambiguously means in the general public and not incarcerated in jail or prison. This interpretation is consistent with common sense and logic, the

plain meaning of the words, and the meaning of this phrase in other parts of the Sentencing Reform Act (“SRA”) and other Washington statutes. To the contrary, Ervin’s interpretation of “in the community” defeats the goals of the SRA, writes that phrase out of the statute, and leads to absurd results.

1. ERVIN’S PREVIOUS CONVICTIONS DO NOT WASH BECAUSE HE DID NOT SPEND FIVE CONSECUTIVE YEARS IN THE COMMUNITY CRIME FREE.

Prior felony convictions count in a defendant’s offender score.

RCW 9.94A.525. As part of the Sentencing Reform Act, RCW 9.94A.525(2)(c) delineates the conditions under which a prior Class C felony will not count in an offender score:

[C]lass C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction . . . the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c). This statute illustrates that courts need to focus on three things when deciding whether to exclude a prior Class C felony conviction from the calculation of a defendant’s offender score: (1) the starting date, sometimes referred to as the trigger date (which is the date a person is released from confinement pursuant to a felony conviction);

(2) the requisite time the defendant has spent in the community; and
(3) whether the defendant has any relevant convictions. In other words, a court needs to first determine the starting/trigger date, and then needs to see whether the defendant has spent five consecutive years *both* (1) in the community and (2) crime-free. If the defendant satisfies all three conditions, then his previous Class C felonies will wash.²

Here, the trigger date for wash out purposes was October 1994, since this was the last date Ervin was in confinement pursuant to a felony conviction. 2RP 9. Since that trigger date, Ervin had spent five consecutive years crime-free, from 1999 to 2005. CP 71. But Ervin failed to spend five consecutive years “in the community” because he was jailed in 2002 on a misdemeanor probation violation. 2RP 9-10. Accordingly, his previous class C convictions do not wash, and the trial court correctly calculated his offender score at 3.

² The reason the trigger date starts from release of confinement pursuant to a *felony* conviction is understandable since, when the statute was first written, that was the only thing that could be washed out. The original statute, former RCW 9.94A.360(2), did not provide a mechanism for “washing out” misdemeanor convictions since they did not (at least initially) factor in the offender score calculation. In essence, misdemeanors were not relevant to the trigger clause because only felonies were subject to wash out.

a. Summary Of The Law.

This Court reviews the trial court's interpretation of RCW 9.94A.525(2)(c) de novo. State v. Posey, 161 Wn.2d 638, 643, 167 P.3d 560 (2007). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. Am. Const'l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 684 (2004). "If the plain language is only subject to one interpretation, our inquiry is at an end." In re Martin, 163 Wn.2d 501, 509, 182 P.3d 951, 954 (2008). The plain meaning is discerned by considering "the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." Tingey v. Haisch, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). "A nontechnical statutory term may be given its dictionary meaning." State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990).

An ambiguous statute is one fairly susceptible to different, reasonable interpretations. In re Detention of Kistenmacher, 163 Wn.2d 166, 178, 178 P.3d 949 (2008). A statute is not ambiguous, however, simply because different interpretations are conceivable. City of Seattle v. Quezada, 142 Wn. App. 43, 48, 174 P.3d 129 (2007). When deciding whether a statute is ambiguous, a court will consider not only the statute at issue but also "related statutes or other provisions of the same act in which

the provision is found.” Dept. of Ecology v. Campbell & Gwinn, L.L.C.,
146 Wn.2d 1, 10, 43 P.3d 4 (2002).

If, after this inquiry, the statute can reasonably be interpreted in more than one way, then it is ambiguous and this Court would resort to principles of statutory construction to assist in interpreting the statute. Udall v. T.D. Escrow Servs. Inc., 159 Wn.2d 903, 909, 154 P.3d 882 (2007). Under these rules, statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. Fjermestad, 114 Wn.2d at 835.

b. RCW 9.94A.525(2)(c) Is Unambiguous; A Person Cannot Be "In The Community" While In Jail.

The plain ordinary meaning of the phrase “in the community” is that a person is out of confinement, in the general public. Although the SRA does not define “community,” the dictionary defines it as “society at large: public” such as “the interests of the community.” NEW WEBSTER’S THIRD DICTIONARY 460 (1993). People confined in jail are not – by design – in the society at large or in the public. Thus, they necessarily are not “in the community.” The plain language of the statute defeats Ervin’s claim.

Although this dictionary definition, by itself, is sufficient to show that “in the community” is unambiguous, this Court can look to other provisions of the SRA to decide whether the phrase is susceptible of different interpretations. Dep’t. of Ecology, 146 Wn.2d at 10 (when deciding whether a provision in a statute is ambiguous, courts will consider “related statutes or other provisions of the same act in which the provision is found”); Timberline Air Serv. Inc. v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (“When the same words are used in different parts of the same statute, it is presumed that the Legislature intended the same meaning.”); Cowles Pub’g Co. v. State Patrol, 109 Wn.2d 712, 722, 748 P.2d 597 (1988) (“[W]hen similar words are used in different parts of a statute, the meaning is presumed to be the same throughout.”).

Indeed, the SRA uses “in the community” frequently and, not surprisingly, in every circumstance it means out in the public, not in confinement. For example, in RCW 9.94A.723, the legislature illustrated the distinction between “in confinement” and “in the community”:

An offender’s failure to inform the department of court-ordered treatment upon request by the department is a violation of the conditions of supervision if the offender is *in the community* and an infraction if the offender is *in confinement*, and the violation or infraction is subject to sanctions.

RCW 9.94A.723 (emphasis added). This statute provides different penalties depending on whether individuals are in “in confinement” or “in the community.” According to Ervin’s interpretation, however, if a person was in jail for a misdemeanor probation violation he would be both “in the community” and “in confinement” (i.e., in jail). But this statute shows clearly what we already know – that “in the community” and “in confinement” do not mean the same thing, they describe opposite conditions.³

Other parts of the SRA further suggest that if one is in custody, he is not “in the community.” The SRA defines “*community custody*” as the “portion of an offender’s sentence . . . served *in the community* . . . subject to controls placed on the offender’s movements and activities by the department.” RCW 9.94A.030 (emphasis added). And when discussing the mechanisms for earned release, the legislature said “no more than the final six months of the offender’s term of confinement may be served in partial confinement designed to aid the offender in finding work and

³ “Confinement” is defined as “total or partial confinement.” RCW 9.94A.030(11). “Total confinement” means confinement inside the physical boundaries of a state facility for 24 hour a day. RCW 9.94A.030(47). “Partial confinement” means confinement for 12 months or less in a state facility for a substantial portion each day, or, if home detention or work crew has been ordered, confinement in an approved residence for a substantial portion of each day. RCW 9.94A.030(32).

reestablishing himself or herself *in the community*.” RCW 9.94A.728(6) (emphasis added). Indeed, the SRA’s underlying purpose is to “reduce the risk of reoffending by offenders *in the community*.” RCW 9.94A.010(7) (emphasis added). But when the legislature talks about serving a portion of a sentence *in the community*, reestablishing oneself *in the community*, and reducing the risk of reoffending *in the community*, it is *not* referring to “in jail pursuant to a misdemeanor,” as Ervin, by his interpretation of “in the community,” would have this Court believe. See State v. Gartrell, 138 Wn. App. 787, 790, 158 P.3d 636 (2007) (“Community custody is plainly not confinement.”). Instead, the legislature is simply referring to the public at large, out of jail or prison. See also RCW 9.94A.820 (provision entitled “Sex offender treatment in the community” and dealing with treatment for a sex offender after he is released from confinement); RCW 9.94A.634(3)(a)(i) (providing that DOC may impose “other sanctions available in the community”).

Countless other non-SRA examples exist where the legislature uses “in the community” to simply mean not incarcerated. See e.g., RCW 4.24.550(6) (“The juvenile court shall provide local law enforcement officials with all relevant information on offenders allowed to remain *in the community* in a timely manner.”); RCW 9.41.110(6)(b) (“A dealer may conduct business temporarily at a location other than the building

designated in the license, if the . . . [location] is a gun show sponsored by . . . [an] organization, devoted to . . . other sporting use of firearms *in the community.*”). Indeed, to the State’s knowledge, the legislature has never once used “in the community” to include people incarcerated pursuant to a misdemeanor conviction or probation violation, and there is no reason for this Court to believe the legislature meant to do so here.⁴

The plain meaning of “in the community” and the meaning of that phrase in other parts of the SRA and other statutes show that the phrase has one reasonable interpretation: not in custody or confinement. Ervin fails to even *attempt* to show how his interpretation conforms to the plain meaning of the phrase. Thus, he fails to take the first and most important step in discerning the meaning of the statute. Accordingly, this Court should conclude that “in the community” unambiguously does not include one who is incarcerated due to a misdemeanor probation violation.

⁴ Indeed, the longstanding meaning of “in the community” in the criminal law context means out of confinement. See, e.g., State v. Linssen, 131 Wn. App. 292, 297, 126 P.3d 1287, rev. denied, 145 P.3d 1215 (2006) (“A juvenile sex offender . . . avoids incarceration by promising to complete a program in the community”); State v. Ammons, 136 Wn.2d 453, 465, 963 P.2d 812 (1998) (“These offenders are out in the community, not behind locked bars.”); In re McKay, 127 Wn. App. 165, 167, 110 P.3d 856 (2005) (noting how DOSA requires “half [the time] to be served in prison and half in the community”).

- c. Other Statutory Construction Rules Show That "In The Community" Does Not Mean In Confinement Pursuant To A Probation Violation.

Even if this Court concludes that "in the community" is ambiguous, other rules of statutory construction illustrate that the legislature never intended that jailed probationers be considered "in the community" for wash-out purposes.

First, the State's interpretation is consistent with the purpose of the wash-out provisions. In choosing between alternative statutory interpretations, the court should adopt that interpretation which best fosters the presumed purpose. State v. Demos, 94 Wn.2d 733, 739, 619 P.2d 968 (1980). In State v. Blair, 57 Wn. App. 512, 789 P.2d 104 (1990), the court explained the purpose behind the SRA wash-out provisions. The issue there was whether, in the former version of RCW 9.94A.525(2)(c), time in confinement on a felony probation violation reset the trigger date.⁵ The court concluded that it did, and went to explain that this interpretation was consistent with the purposes of the SRA. The court noted that "disregarding confinement due to probation violations" when considering

⁵ The court did not address whether time in confinement on a felony probation violation means the defendant was "in the community."

the wash-out statutes, “would not promote respect for the law and provide just punishment as the SRA intended.” Id. at 516. Rather, the court concluded, “treating those who violate probation conditions differently from those who observe such conditions furthers the goals of the SRA.” Id.

This reasoning applies with equal force here. For purposes of the wash-out provision in RCW 9.94A.525(2)(c), Ervin treats those who violate probation pursuant to a misdemeanor identically to those who do not, failing to “promote respect for the law and provide just punishment as the SRA intended.” Blair, 57 Wn. App. at 516.

Second, Ervin’s interpretation renders “in the community” meaningless. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. Davis v. Dep’t of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999). Ervin interprets the statute to mean that to have a previous class C felony wash, a person merely needs to spend five consecutive years (1) not in confinement pursuant to a felony (as this would reset the trigger date) and (2) crime-free. But if that interpretation were correct, “in

the community” adds nothing to its meaning.⁶ This Court should reject Ervin’s attempt to omit these terms from the statute.

Third, Ervin’s interpretation creates absurd results. As a rule of statutory interpretation, courts construe statutes to avoid absurd or strained consequences.” Wright v. Engum, 124 Wash.2d 343, 351-52, 878 P.2d 1198 (1994). Ervin’s theory would allow someone to wash out all his class C felony convictions even though that person spent the entire five years incarcerated on a series of consecutive misdemeanors (e.g., six consecutive one-year sentences on six misdemeanor convictions). This Court should assume the legislature did not write the statute to allow this result.

This point further shows how Ervin’s interpretation contravenes the legislative purpose behind the RCW 9.94A.525(2)(c). The main point of the wash-out provisions is to ensure that an individual could live five consecutive years in the *general public* – not five consecutive years in jail – before receiving the reward of a wash-out.

⁶ Without “in the community,” RCW 9.94A.525(2)(c) would read as follows:
[C]lass C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, the offender had spent five consecutive years without committing any crime that subsequently results in a conviction.

The recent decision of State v. Smith, 137 Wn. App. 431, 153 P.3d 898 (2007), further supports the State's interpretation. There, the defendant, on a previous case in 1995, had been erroneously sentenced to several years in prison under an incorrect offender score. Id. at 435-36. Even though he was not released from prison on that case until 2002, the appellate court held that he should have been released from confinement in February 2000. Id. at 436. Smith then committed two felonies in 2005, which was *more than* five years after when he should have been released, but *less than* five years since his actual release. At sentencing on those felonies, Smith argued that since he spent five years crime-free from the date when he *should have been* released from confinement pursuant to a felony, his prior class C felonies should have washed. Id. at 439-41.

The trial court disagreed, and the appellate court affirmed for two reasons. First, the appellate court noted that the five-year clock did not start until he was actually released in 2002 and, thus, he was still held pursuant to a felony until this date. Id. at 439-40. But the court also suggested that even if he were not being held under a felony conviction after February 2000, he still failed to spend five years *in the community* crime-free. Although Smith spent five years from the date when he should have been released to that of his next crime, "the legislature intended to reward only those defendants who spend five consecutive years *in the*

community without committing a crime.” Id. at 440 (emphasis added).

Since the court had no way of knowing whether Smith would have spent five consecutive years crime free *while out of jail*, the court concluded that his felonies did not wash. Id.

This Court should follow the same reasoning here. Like defendant Smith, even though Ervin spent five years crime-free, he failed to spend those five years crime-free in the community, a necessary requirement.

d. This Court Should Not Follow In Re Nichols.

Ervin relies entirely on In re Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004) to support his argument. That reliance is misplaced. Nichols was poorly reasoned, and that court failed to consider several of the arguments made here.

Nichols construed RCW 9.94A.360(2), the previous version of RCW 9.94A.525(2)(c).⁷ The defendant, Nichols, had spent five years

⁷ Unlike the current version, however, which requires one not commit any crime (felony or misdemeanor) during the five-year wash-out period, the previous version merely required one spend five years in the community without committing any *felony*. The previous version of RCW 9.94A.525(2)(c), RCW 9.94A.360(2), stated:

[C]lass C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, the offender had spent five consecutive years without being convicted of any felonies.

crime-free from the time of his release from confinement pursuant to a felony (the trigger date) to the date of his next felony. Id. at 427-28. But during those five years, he had committed and served time in jail on several misdemeanors. Id. Nichols argued that his previous felonies washed, but the trial court disagreed.

On appeal, the State argued that since Nichols had spent time in jail on his misdemeanor convictions, he had failed to spend five consecutive years “in the community,” as required by the statute. Id. at 432-33. The appellate court disagreed, holding that time spent incarcerated pursuant to a misdemeanor was, in fact, time spent “in the community” and, thus, did not interrupt the wash-out period. Id. The court provided three reasons for its interpretation of “in the community”:

- (1) that the dictionary-definition of “community” did not exclude the possibility that the word meant those in confinement on misdemeanors;
- (2) that its interpretation did not read “in the community” out of the statute; and (3) that the State’s interpretation would create an absurd result. Id. None of these reasons can withstand careful scrutiny.

- i. The full dictionary-definition of "community" makes the Nichols interpretation implausible.

The Nichols court first focused on a partial definition of "community." The court stated that community is defined as "a neighborhood, vicinity, or locality" or a "body of individuals . . . with . . . some unifying trait" and a "people living in a particular place or region and usu. linked by common interests." In re Nichols, 120 Wn. App. at 432 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 460 (1993)). The court concluded that "freedom from local jail is not a requisite to being 'in the community.'"⁸

Three problems exist with this analysis. First, the Webster's Third International Dictionary provides four different definitions for "community" — not just one — and the Nichols court simply chose the wrong definition. That case quoted the first definition provided, which refers to community in the sense of "a climax community," "the Chinese community," "the artists community downtown," and the "Jewish community in London." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1993). The court should have focused on the second

⁸ The court held that "freedom from local jail pursuant to a felony is not a requisite to being 'in the community.'" In re Nichols, 120 Wn. App. at 432. Another way to say this same statement is that being in jail pursuant to a non-felony does not necessarily preclude one from being "in the community."

definition, which defines “community” as “society at large: public” and is “used with the definite article” such as “the interests of the community.”

Id. This proper, more appropriate definition shows that being out of jail is indeed a requisite for being in the community.

Second, even the definition cited in Nichols suggests that being out of jail is a requisite for being “in the community.” This is because the group of individuals (1) not incarcerated and (2) incarcerated only on misdemeanors (Nichols’ interpretation of “community”) does not constitute a “neighborhood,” a “locale,” a “body of individuals with some unifying trait,” or “people living in a particular place or region” linked by common interests. In re Nichols, 120 Wn. App. at 432.

Finally, the Nichols decision misses the point. Statutory interpretation does not focus on what a phrase *could* mean, but what it *likely* means, considering the plain language and context and how the word is used in other parts of the statute. The Nichols opinion never did this analysis and, thus, its reasoning is unpersuasive.

- ii. The Nichols interpretation renders superfluous the phrase “in the community.”

The Nichols court said that its interpretation of “in the community” does not render that phrase superfluous because it “refers to the

defendant's status" as not in confinement pursuant to a felony. In re Nichols, 120 Wn. App. at 432. "[I]n other words, an offender is not in the community if not released from felony confinement." Id. But Nichols does not cite any grammatical rule – nor could it – to suggest that “in the community” refers to the status as not being released from felony confinement.

And further, if “in the community” merely meant “not in confinement pursuant to a felony,” there would still be no reason to include “in the community” in the statute. This is because, without “in the community,” the statute would still have required that one remain “not in confinement pursuant to a felony” for five consecutive years (or else the starting date would reset). Despite any statement to the contrary, Nichols writes “in the community” out of the statute.

- iii. The Nichols interpretation does not avoid absurd results.

Third, the Nichols court mentions how the State's interpretation of “in the community” would create an absurd result because, according to Nichols, the State's interpretation, “taken to its logical extreme,” would mean that anyone arrested but not charged or later acquitted would interrupt the wash-out period. In re Nichols, 120 Wn. App. at 433.

As a preliminary matter, this Court need not address this point because here Ervin was incarcerated pursuant to a valid misdemeanor probation violation on judicial order; an order that presumably was never overturned. 2RP 9-10. Further, the same apparent absurdity exists even under Nichols' interpretation. Nichols concedes that incarceration pursuant to a *felony* means one is not "in the community." Id. at 432. But taking this interpretation on its face and "to its logical extreme," would mean that anyone arrested pursuant to a felony and later acquitted or not charged would not be "in the community" for the time the person was in jail pursuant to that felony. Further, spending time in jail pursuant to a felony, even if later acquitted, would, taken to its logical extreme, also reset the trigger date because the person would be in "in confinement pursuant to a felony." Nichols' interpretation fails to resolve the apparent absurdity that so troubled the court.⁹

⁹ The Nichols decision also cites for support State v. Smith, 65 Wn. App. 887, 830 P.2d 379 (1992), a case where the court held that a person in confinement for any felony (not just the specific felony a person wants to wash) restarts the trigger date. Nichols relies on the statement in Smith that a person arrested for a misdemeanor, but later acquitted, would not interrupt the wash-out period because "the wash-out period is interrupted not for any reason, but for time spent in confinement pursuant to a felony conviction." Id. at 892.

But Smith is inapposite, for two principal reasons. First, that statement was dicta. In re Nichols, 120 Wn. App. at 432-33 (conceding it was "additional dicta"). But possibly more important, the issue in that case focused on the meaning of "in confinement pursuant to a felony" not "in the community" and, like Nichols, Smith never addressed the many arguments raised in this appeal.

- iv. The Nichols decision failed to consider several arguments raised here.

Finally, the Nichols decision never addressed — much less even discussed — several key arguments raised in this brief, including:

- that the State’s interpretation is consistent with the definition of “community” that defines it as “society at large: public”;
- that the State’s interpretation of “in the community” is the most logical, common-sense interpretation of the phrase;
- that the State’s interpretation is consistent with what “in the community” means in other parts of the SRA;
- that the State’s interpretation is consistent with what “in the community” means in other Washington statutes;
- that the State’s interpretation is consistent with the longstanding meaning of “in the community” in the criminal law context;
- that the State’s interpretation is consistent with the purpose of the SRA to treat those who violate conditions of probation *differently* than those who abide by their conditions;
- that the State’s interpretation is consistent with the reasoning in State v. Smith, 137 Wn. App. 431, 153 P.3d 898 (2007); and
- that the theory that “in the community” means out of confinement pursuant to a felony creates absurd results.

Because the Nichols court never considered these arguments, it is less surprising that it reached the holding that it did. But after focusing both

on these new arguments and reexamining Nichols' reasoning, it becomes clear that this Court should not follow the interpretation of "in the community" adopted in that case. To the contrary, this Court should give "in the community" its normal meaning, which is out of confinement, not in incarceration, and out in the general free public.

D. CONCLUSION

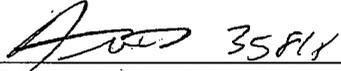
Ervin asks this Court to adopt an interpretation of "in the community" that is inconsistent with purpose of the SRA, its plain and logical meaning, the meaning of the phrase in other parts of the SRA and other Washington statutes, and that renders the phrase superfluous and leads to absurd results. And Ervin does this by putting all of his eggs in the Nichols decision, and hoping that this Court will reflexively follow the reasoning in that case. (Indeed, Ervin does not provide a *single* argument other than the Nichols decision.) This Court must not do that. As this brief explained, the Nichols decision employed incorrect reasoning, and did not focus on the many arguments presented in this appeal. For these reasons, this Court should give "in the community" its natural, common-sense, plain meaning, and conclude that Ervin's convictions do not wash because he failed to spend five consecutive years in the community.

For these foregoing reasons, this Court should affirm the trial court.

DATED this 31st day of July, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  35811
DANIEL KALISH, WSBA #35815
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 1511 Third Ave., Suite 701, Seattle, WA 98101, containing a copy of the Brief of Respondent, in State v. James Ervin, Cause No. 60474-1-I, in the Court of Appeals, Division I. of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/31/08
Date

FILED
S. DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2008 JUL 31 PM 4:37