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STATE OF WASHINGTON

Supreme Court No. \_\_\_\_\_  
COA No. 60474-1-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES L. ERVIN,

Petitioner.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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PETITION FOR REVIEW

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**TABLE OF CONTENTS**

A. IDENTITY OF PETITIONER/DECISION BELOW..... 1

B. ISSUES PRESENTED FOR REVIEW ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 5

    1. THE COURT OF APPEALS PUBLISHED DECISION IS  
    CONTRARY TO THE LEGISLATURE'S INTENT THAT THE  
    FIVE-YEAR WASH-OUT PERIOD BE INTERRUPTED  
    ONLY IF THE OFFENDER COMMITS A CRIME ..... 5

    2. DIVISION ONE'S PUBLISHED DECISION CONFLICTS  
    WITH DIVISION THREE'S DECISION IN NICHOLS..... 10

E. CONCLUSION..... 13

**TABLE OF AUTHORITIES**

**Washington Supreme Court**

City of Seattle v. State, 136 Wn.2d 693, 965 P.2d 619 (1998) ..... 6

Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 173 P.3d 885  
(2007) ..... 9

In re Sietz, 124 Wn.2d 645, 880 P.2d 34 (1994) ..... 6, 10

State v. Bright, 129 Wn.2d 257, 916 P.2d 922 (1996) ..... 6

State v. Elgin, 118 Wn.2d 551, 825 P.2d 314 (1992) ..... 6

State v. J.P., 149 Wn.2d 444, 69 P.3d 318 (2003) ..... 9

State v. Wiley, 124 Wn.2d 679, 880 P.2d 983 (1994) ..... 7

**Washington Court of Appeals**

In re Parentage of J.H., 112 Wn. App. 486, 49 P.3d 154 (2002) ..... 6

State v. Blair, 57 Wn. App. 512, 789 P.2d 104 (1990) ..... 7, 12

State v. Hall, 45 Wn. App. 766, 728 P.2d 616 (1986) ..... 8

State v. Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004) ..... *passim*

State v. Smith, 65 Wn. App. 887, 830 P.2d 379 (1992) ..... 8

**Statutes**

Former RCW 9.94A.360(2) ..... 11, 13

Laws of 1995, ch. 316 § 1 ..... 11

RCW 26.50.110 ..... 2

RCW 9.94A.525(2)(c) ..... 1, 3, 4, 5, 7, 8, 9, 11, 12, 13

A. IDENTITY OF PETITIONER/DECISION BELOW

James L. Ervin requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Ervin, No. 60474-1-I, filed April 13, 2009. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Sentencing Reform Act (SRA) provides that an offender's prior class C felony convictions will "wash out" and not be included in the offender score, if the offender spends five consecutive years "in the community" following the offender's release from confinement pursuant to a felony conviction, without committing any crime. RCW 9.94A.525(2)(c). In its published opinion in this case, the Court of Appeals held the five-year wash-out period is interrupted by time an offender spends in jail pursuant to a misdemeanor probation violation, even if the offender spends five consecutive years without committing any crime. This Court has never interpreted the wash-out provision of the SRA. Does the Court of Appeals opinion conflict with the plain language of the statute, presenting an issue of substantial public interest that should be decided by this Court? RAP 13.4(b)(4).

2. In In re Personal Restraint of Nichols, 120 Wn. App. 425, 432-33, 85 P.3d 955 (2004), Division Three of the Court of Appeals interpreted a former version of the statute, which provided that the offender must spend five consecutive years "in the community" following the offender's release from confinement pursuant to a felony conviction, without being convicted of an additional felony. In all other respects, the present version of the statute is identical to the version interpreted in Nichols. Nichols held the wash-out period was not interrupted by time an offender spent in jail pursuant to a conviction for a misdemeanor, as long as the offender spent five consecutive years without being convicted of a felony. Does Division One's opinion in this case conflict with Nichols, requiring this Court grant review in order to resolve the conflict? RAP 13.4(b)(2).

C. STATEMENT OF THE CASE

A jury convicted James Ervin of one count of felony violation of a no-contact order stemming from an incident in June 2006. CP 1, 35; RCW 26.50.110(1), (5). Mr. Ervin had two prior class C felony convictions: second degree possession of stolen property, committed on January 27, 1991, and first degree rendering criminal assistance, committed on March 31, 1994. CP 41, 65-75;

7/24/07RP 1-2, 9-10. At sentencing for the current offense, defense counsel argued Mr. Ervin's two prior felonies "washed out," because he had spent five consecutive years following his release from confinement for those offenses without committing any crimes. 7/24/07RP 3-6, 11-12; see RCW 9.94A.525(2)(c). The trial court disagreed, concluding the several days Mr. Ervin spent in jail in 2002 for a misdemeanor probation violation interrupted the wash-out period, even though Mr. Ervin had spent five consecutive years without committing any crime. 7/24/07RP 10-11.

Mr. Ervin appealed the trial court's calculation of his offender score, relying on In re Personal Restraint of Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004). In Nichols, Division Three of the Court of Appeals interpreted a former version of the statute, which provided that the offender must spend five consecutive years "in the community" following his release from confinement pursuant to a felony conviction, without being convicted of an additional felony. Nichols held the wash-out period was not interrupted by time an offender spent in jail pursuant to a conviction for a misdemeanor. Nichols concluded the Legislature intended the wash-out period be interrupted only if the offender was convicted of a felony, and not

simply because the offender spent time in jail. 120 Wn. App. at 432-33.

Mr. Ervin acknowledged that Nichols interpreted a former version of the statute, which has since been amended. The statute now provides that the offender must spend five consecutive years "in the community" following his release from confinement pursuant to a felony conviction, without committing *any* crime, whether felony or misdemeanor. RCW 9.94A.525(2)(c). But Mr. Ervin argued the statutory amendment does not reflect a material change in legislative intent. Under the reasoning of Nichols, the wash-out period is now interrupted if the offender commits any crime, but is *not* interrupted simply because the offender spent time in jail.

Division One disagreed with Division Three's interpretation of the statute, however. Division One held the wash-out period is interrupted by time an offender spends in jail for a misdemeanor probation violation, even if the offender spends five consecutive years without committing any crime. Slip Op. at 2-3. Mr. Ervin now seeks review by this Court.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS PUBLISHED DECISION IS CONTRARY TO THE LEGISLATURE'S INTENT THAT THE FIVE-YEAR WASH-OUT PERIOD BE INTERRUPTED ONLY IF THE OFFENDER COMMITS A CRIME

The SRA provides that prior class C felonies "wash out" and shall not be included in the offender score "if, since the last date of release from confinement . . . pursuant to a felony conviction," the offender "spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c).<sup>1</sup> This Court has never interpreted the present or former version of that provision. The question is whether the wash-out period is interrupted by a period of time an offender spends in jail on a misdemeanor probation violation, even if the offender spends five consecutive years without committing any crime.

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<sup>1</sup> The statute provides in full:

Except as provided in (e) of this subsection<sup>[1]</sup>, class 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 judgment and sentence, 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 Court reviews a lower court's interpretation of the SRA de novo. Nichols, 120 Wn. App. at 431 (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)). The Court's paramount duty in interpreting the statute is to give effect to the Legislature's intent. Nichols, 120 Wn. App. at 431 (citing State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992)). Statutory terms are given their plain and ordinary meaning. Nichols, 120 Wn. App. at 431 (citing Bright, 129 Wn.2d at 265). The Court is to give effect to every word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual. Nichols, 120 Wn. App. at 431 (citing City of Seattle v. State, 136 Wn.2d 693, 698, 965 P.2d 619 (1998)).

When the statute is plain and unambiguous, the Court derives its meaning and the Legislature's intent from the statutory language. Nichols, 120 Wn. App. at 431 (citing In re Parentage of J.H., 112 Wn. App. 486, 498, 49 P.3d 154 (2002)). If the statute is ambiguous, the Court applies the rule of lenity and construes it strictly in favor of a criminal defendant. In re Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994).

The wash-out provision is divided into two clauses: a "trigger" clause and a "continuity/interruption" clause. RCW

9.94A.525(2)(c); Nichols, 120 Wn. App. at 432. The statutory phrase "Class 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" triggers the start of the five-year wash-out period. Id. Misdemeanors are not relevant to the "trigger" clause because it is only felony convictions that are subject to wash out. Nichols, 120 Wn. App. at 432. Only felony convictions are subject to wash out because, with one exception<sup>2</sup>, only felony convictions are included in the offender score. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). Therefore, a new five-year wash-out period is not triggered unless the offender spends time incarcerated "pursuant to a felony conviction." RCW 9.94A.525(2)(c).

Confinement "pursuant to a felony conviction" includes confinement due to a felony probation violation. State v. Blair, 57 Wn. App. 512, 516, 789 P.2d 104 (1990). It also includes time spent in confinement pursuant to any felony, not only for the specific felony at issue. State v. Hall, 45 Wn. App. 766, 769, 728

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<sup>2</sup> Where the current conviction is for a felony traffic offense, the SRA authorizes the court to include serious misdemeanor traffic offenses in the offender score. See RCW 9.94A.525(11).

P.2d 616 (1986). But time spent incarcerated for any other reason does not trigger a new wash-out period.

The second clause of the statute, the "continuity/interruption" clause, determines when the five-year wash-out period is interrupted. Nichols, 120 Wn. App. at 432. The wash-out period is interrupted if the offender "commit[s] any crime." RCW 9.94A.525(2)(c). It is not interrupted if the offender spends time in jail, unless the time spent in jail is "pursuant to a felony conviction," in which case a new five-year wash-out period is triggered. Nichols, 120 Wn. App. at 429, 432. The phrase "in the community" is not rendered superfluous, however, because it "refers to the defendant's status because of the trigger event. In other words, an offender is not 'in the community' if not released from felony confinement." Id. at 432. Further, the "in the community" language reflects the Legislature's intent that the wash-out period be interrupted by confinement pursuant to *any* felony, not just the specific felony in question. Id.; State v. Smith, 65 Wn. App. 887, 892-93, 830 P.2d 379 (1992).

The Court of Appeals' interpretation of the statute conflicts with legislative intent as discussed above. The Court of Appeals concluded that the wash-out period is interrupted when an offender

spends time in jail for a misdemeanor probation violation, even though the confinement is not "pursuant to a felony conviction." Slip Op. at 5. The Court of Appeals opinion ignores the Legislature's intent that the wash-out period be interrupted only if the offender commits a crime. RCW 9.94A.525(2)(c).

Moreover, the Court of Appeals interpretation would lead to absurd results. It is well-settled that "[i]n undertaking a plain language analysis, . . . [a]bsurd results should be avoided because 'it will not be presumed that the legislature intended absurd results.'" Densley v. Dep't of Ret. Sys., 162 Wn.2d 210, 233, 173 P.3d 885 (2007) (quoting State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). The Court of Appeals interpreted the phrase "in the community" to mean any time spent not in custody. Slip Op. at 4. But taking this interpretation to its logical extreme, an offender "would be 'out of the community' and the wash-out period interrupted for any arrest and detention." Nichols, 120 Wn. App. at 433; see also Smith, 65 Wn. App. at 893 ("Under the clear language of the statute the washout period is interrupted not for any reason, but only for time spent in confinement pursuant to a felony conviction."). The Legislature could not have intended that result.

Finally, to the extent the statute is ambiguous, the rule of lenity requires it be construed strictly in favor of Mr. Ervin. Sietz, 124 Wn.2d at 652.

In sum, the Court of Appeals interpretation of the statute conflicts with legislative intent. Because Mr. Ervin spent five consecutive years after his release from confinement pursuant to a felony conviction, without committing any crime, his two prior felony convictions washed out and should not have been included in his offender score.

2. DIVISION ONE'S PUBLISHED DECISION  
CONFLICTS WITH DIVISION THREE'S DECISION  
IN NICHOLS

In Nichols, Division Three interpreted the former version of the statute and concluded the wash-out period is "triggered" on the last date of release from confinement pursuant to a felony conviction, and is interrupted only if the offender is convicted of another felony. See Nichols, 120 Wn. App. at 432-33. By contrast, Division One concluded time spent in jail for violating misdemeanor probation interrupts the wash-out period, even though the current version of the statute provides the wash-out period is interrupted only if the offender commits a crime. Although Division One interpreted a different version of the statute, its interpretation

cannot be reconciled with the interpretation adopted by Nichols. Therefore, review by this Court is warranted. RAP 13.4(b)(2).

Nichols interpreted the prior version of the statute, which was amended in 1995. See Former RCW 9.94A.360(2); Laws of 1995, ch. 316 § 1 (effective July 23, 1995). Prior to the revision, the statute required that in order for a class C felony conviction to wash out, the offender must have spent five consecutive years in the community, following his release from confinement pursuant to a felony conviction, "without being convicted of any felonies." Former RCW 9.94A.360(2) (1990). The current version of the statute requires the offender spend five consecutive years in the community, following his release from confinement pursuant to a felony conviction, "without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). This is the only material change in the statute.<sup>3</sup>

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<sup>3</sup> Prior to the 1995 amendments, the provision stated in full:

Class 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 judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies.

Former RCW 9.94A.360(2) (1990).

The issue in Nichols was whether the time Nichols spent in jail pursuant to two misdemeanor convictions interrupted the wash-out period. Id. at 429. Division Three concluded that because Nichols was not convicted of any new *felonies* within five years of his release from confinement pursuant to a felony conviction, the wash-out period was not interrupted. Id. at 432-33.

In this case, Division One attempted to distinguish Nichols on the basis that Nichols was decided under the former statute that was subsequently amended. Slip Op. at 2-3. But the reasoning and outcome of Nichols apply equally to the current version of the statute at issue in Mr. Ervin's case. The "trigger" clause of the current statute is identical to the prior version addressed in Nichols. Thus, the five-year wash-out period is triggered on the last date the offender is released from confinement pursuant to a felony conviction, which includes confinement for a felony probation violation. Nichols, 120 Wn. App. at 432; Blair, 57 Wn. App. at 515-16; RCW 9.94A.525(2)(c). But confinement for a *misdemeanor* probation violation does not trigger a new wash-out period. As under the former version of the statute, only felonies are relevant to the "trigger" clause because only felonies are included in the offender score. Nichols, 120 Wn. App. at 432; RCW 9.94A.525.

The "continuity/interruption" clause of the current statute is different from the prior version addressed in Nichols, but not in any way material to Mr. Ervin's case. The prior version of the statute provided the wash-out period would be interrupted if, after being released from confinement pursuant to a felony offense, the offender were "convicted of any [subsequent] felonies." Former RCW 9.94A.360(2) (1990). The current version provides the wash-out period is interrupted if the offender "commit[s] any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). Thus, following the reasoning of Nichols, under the current statute, the wash-out period will be interrupted only if the offender commits a crime. Confinement pursuant to a misdemeanor probation violation does not interrupt the wash-out period. See Nichols, 120 Wn. App. at 432-33.

Because Division One's interpretation of the statute conflicts with Division Three's interpretation in Nichols, this Court should grant review.

E. CONCLUSION

The Court of Appeals opinion conflicts with legislative intent and therefore presents an issue of substantial public interest that should be addressed by this Court. In addition, the court's opinion

conflicts with Nichols and review is warranted in order to resolve  
the conflict between the two divisions of the Court of Appeals.

Respectfully submitted this 13th day of May 2009.

A handwritten signature in black ink that reads "Maureen M. Cyr". The signature is written in a cursive style with a horizontal line underneath the name.

MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Appellant

## **APPENDIX**



he violated his probation and was sentenced to 25 days' incarceration. Three years later, on July 28, 2005, he committed fourth degree assault, a misdemeanor. In sentencing on the current 2006 felony conviction, the trial court calculated Ervin's offender score as a 3, a figure arrived at by counting the two prior felony convictions. Ervin appeals contesting only his offender score.

#### ANALYSIS

Ervin challenges the inclusion of the two prior felony convictions in his criminal history arguing that the prior convictions washed out because he spent five years in the community, from 1999 to 2005, without committing a crime. The State argues that although Ervin did not commit a crime within five years, his confinement for the probation violation in 2002 interrupted his time "in the community." RCW 9.94A.525(2)(c) provides:

Except as provided in (e) of this subsection, class 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 judgment and sentence, the offender *had spent five consecutive years in the community* without committing any crime that subsequently results in a conviction.<sup>[1]</sup>

Ervin argues that confinement for a misdemeanor probation violation does not remove him from the community. He relies on In re Personal Restraint of Nichols, which held that time spent in the community did not include time spent incarcerated for misdemeanors.<sup>2</sup> But this decision was rendered under a prior

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<sup>1</sup> (Emphasis added.)

<sup>2</sup> 120 Wn. App. 425, 85 P.3d 955 (2004).

statute which has subsequently been amended.<sup>3</sup> The current statute requires that one not commit any crime (felony or misdemeanor) during the five-year wash out period.<sup>4</sup> The prior version required spending five years in the community without committing any felony.<sup>5</sup> Case law interpreting that prior statute recognized that probation violation for felonies removed the person from the community.<sup>6</sup> This court in State v. Blair held that incarceration pursuant to a probation violation of a felony interrupted the five-year wash out period for a class C felony.<sup>7</sup> There the court reasoned that the probation was intertwined with the original conviction and thus there was "no reason to disassociate the probation confinement from its underlying cause."<sup>8</sup> Since the statute as amended prevents a wash out of a class C felony for a misdemeanor, it follows that incarceration for a probation violation of that misdemeanor interrupts the wash out period as well.

The term "community" is not defined in the statute. Our paramount duty is to give effect to legislative intent when construing statutes. To fulfill the legislature's intent we must construe the statute as a whole, giving effect to all of its language, considering the provisions in relation to each other, and

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<sup>3</sup> Former RCW 9.94A.360(2) (1990) (amended by LAWS OF 1990, ch. 3, § 706) (recodified as RCW 9.94A.525(2) by LAWS OF 2001, ch. 10, § 6).

<sup>4</sup> RCW 9.94A.525(2).

<sup>5</sup> Former RCW 9.94A.360(2) provided:

Class 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.

<sup>6</sup> State v. Blair, 57 Wn. App. 512, 789 P.2d 104 (1990).

<sup>7</sup> 57 Wn. App. 512, 517, 789 P.2d 104 (1990).

<sup>8</sup> Blair, 57 Wn. App. at 515-16.

harmonizing them whenever possible.<sup>9</sup> Thus, we look at the SRA's sentencing scheme as a whole and examine the other sections where the term "community" is found. When we do so, it becomes clear that the legislature intended that incarcerations for misdemeanor probation violation count in assessing whether a defendant's prior felony convictions are washed out. For example, 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.<sup>[10]</sup>

Likewise other sections of the SRA suggest that if one is in custody, one is not "in the community."<sup>11</sup> And further, the underlying purpose of the SRA is to "[r]educ[e] the risk of reoffending by offenders in the community."<sup>12</sup> It is clear throughout the SRA that persons who are restrained in confinement pursuant to a conviction are not "in the community." Indeed, Washington courts have recognized a distinction between those offenders who are "out in the community, not behind locked bars."<sup>13</sup> "Community placement occurs in addition to the period of confinement, while probation and parole occur in lieu of confinement."<sup>14</sup>

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<sup>9</sup> In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 818, 177 P.3d 675 (2008); State v. Smith, 65 Wn. App. 887, 892, 830 P.2d 379 (1992).

<sup>10</sup> RCW 9.94A.723 (emphasis added).

<sup>11</sup> RCW 9.94A.030(5); State v. Riles, 135 Wn.2d 326, 334, 957 P.2d 655 (1998).

<sup>12</sup> RCW 9.94A.010(7).

<sup>13</sup> State v. Ammons, 136 Wn.2d 453, 465, 963 P.2d 812 (1998).

<sup>14</sup> State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996).

We find that when one reads the statute naturally, the conclusion is inescapable that the legislature necessarily intended to exclude those who are incarcerated pursuant to a probation violation from being considered "in the community" under this statute. Thus, an offender, such as Ervin in misdemeanor confinement, does not fall within the wash out parameters set forth by the legislature.

We affirm the judgment and sentence.

Grosse, J

WE CONCUR:

Schindler, CT

Appelwick, J

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**DECLARATION OF FILING & MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 60474-1-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for  **respondent: Daniel Kalish - King County Prosecuting Attorney-Appellate Unit**,  **appellant** and/or  **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: May 13, 2009