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STATE OF WASHINGTON

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NO. 83244-7

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES L. ERVIN,

Petitioner.

STATE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
THE COURT OF APPEALS CORRECTLY HELD THAT CONFINEMENT INTERRUPTED THE WASH OUT PERIOD	4
1. RCW 9.94A.525(2)(c) Is Unambiguous; A Person Cannot Be "In The Community" While In Jail.....	
2. The Court Of Appeals' Holding Is Consistent With Case Law Interpreting A Prior Version Of The Statute	11
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

City of Seattle v. Quezada, 142 Wn. App. 43,
174 P.3d 129 (2007)..... 6

Cowles Pub'g Co. v. State Patrol,
109 Wn.2d 712, 748 P.2d 597 (1988)..... 7

Davis v. Dep't of Licensing, 137 Wn.2d 957,
977 P.2d 554 (1999)..... 15

Dept. of Ecology v. Campbell & Gwinn, L.L.C.,
146 Wn.2d 1, 43 P.3d 4 (2002)..... 6, 7

In re Detention of Kistenmacher, 163 Wn.2d 166,
178 P.3d 949 (2008)..... 6

In re Detention of Martin, 163 Wn.2d 501,
182 P.3d 951 (2008)..... 5

In re Personal Restraint of Dalluge,
162 Wn.2d 814, 177 P.3d 675 (2008)..... 6

In re Personal Restraint of Nichols,
120 Wn. App. 425, 85 P.3d 955 (2004)..... 12-15

In re Personal Restraint Petition of McKay,
127 Wn. App. 165, 110 P.3d 856 (2005)..... 10

State v. Ammons, 136 Wn.2d 453,
963 P.2d 812 (1998)..... 10

State v. Blair, 57 Wn. App. 512,
789 P.2d 104 (1990)..... 11, 12

State v. Bright, 129 Wn.2d 257,
916 P.2d 922 (1996)..... 5

<i>State v. Demos</i> , 94 Wn.2d 733, 619 P.2d 968 (1980).....	12
<i>State v. Ervin</i> , 149 Wn. App. 561, 205 P.3d 170 (2009).....	4, 6, 10-13
<i>State v. Fjermestad</i> , 114 Wn.2d 828, 791 P.2d 897 (1990).....	5
<i>State v. Gartrell</i> , 138 Wn. App. 787, 158 P.3d 636 (2007).....	9
<i>State v. Linssen</i> , 131 Wn. App. 292, 126 P.3d 1287, <i>rev. denied</i> , 145 P.3d 1215 (2006).....	10
<i>State v. Smith</i> , 65 Wn. App. 887, 830 P.2d 379 (1992).....	6
<i>State v. Smith</i> , 137 Wn. App. 431, 153 P.3d 898 (2007).....	16, 18
<i>State v. Williams</i> , 158 Wn.2d 904, 148 P.3d 993 (2006).....	5
<i>Timberline Air Serv. Inc. v. Bell Helicopter-Textron, Inc.</i> , 125 Wn.2d 305, 884 P.2d 920 (1994).....	7
<i>Wright v. Engum</i> , 124 Wn.2d 343, 878 P.2d 1198 (1994).....	16

Statutes

Washington State:

LAWS OF 1995, CH. 316, § 1.....	5
RCW 4.24.550	9
RCW 9.41.110	9

RCW 9.94A.010.....	9
RCW 9.94A.030.....	8
RCW 9.94A.360.....	4, 11, 13
RCW 9.94A.525.....	4-6, 11-13, 16
RCW 9.94A.634.....	9
RCW 9.94A.723.....	7, 8
RCW 9.94A.728.....	9
RCW 9.94A.820.....	9

Other Authorities

Sentencing Reform Act of 1981	1, 5-12
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1993)	6, 14

A. ISSUE

For purposes of the wash out provisions of the Sentencing Reform Act of 1981 (SRA), confinement for a community supervision violation interrupts the wash out period. In this case, the defendant violated probation and was confined during the consecutive five-year period in which he was crime free. Because the defendant's confinement for that violation removed him from the community and therefore interrupted the wash out period, should this Court affirm the Court of Appeals and hold that his prior felony convictions did not wash out?

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

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

Ervin had the following criminal history:

Crime	Date of Crime
Juvenile Felonies	
Burglary 2	01/25/89
Possession of Stolen Property 2	01/27/91*
Adult Felonies	
Rendering Criminal Assistance 1	03/31/94*
VUCSA - Possession of Methamphetamine	10/23/05
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 – the 1994 Rendering Criminal Assistance in the First Degree and the 1991 Possession of Stolen Property in the Second Degree (PSP 2) – had "washed out," and thus, would not count in the calculation of Ervin's offender score. Relevant to this inquiry was the fact that Ervin committed Criminal Trespass in the First Degree, a misdemeanor, on April 15, 1999 and was 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 25 to February 11, 2002 in the Pierce County Jail. 2RP 10. The next crime that he committed occurred on July 28, 2005 (Assault in the Fourth Degree – Domestic Violence), another misdemeanor. CP 73.

At sentencing, the State argued that Ervin's offender score was 3, one point each for Rendering Criminal Assistance and VUCSA, and 1/2 point each for the juvenile felonies of Burglary 2 and PSP 2.² 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. The court thus calculated defendant's offender score as 3 and sentenced him to

² Initially, the State sought an additional point because Ervin was on community custody when he committed the instant offense. However, the State conceded that it had failed to prove the community custody point and adjusted its recommendation accordingly. *See* 2RP 11-12.

15 months. CP 38. In a published opinion, Division I of the Court of Appeals affirmed the trial court. *State v. Ervin*, 149 Wn. App. 561, 205 P.3d 170 (2009). On November 4, 2009, this Court granted review.

C. **ARGUMENT**

THE COURT OF APPEALS CORRECTLY HELD THAT CONFINEMENT INTERRUPTED THE WASH OUT PERIOD.

Ervin contends that two of his prior felony convictions should wash out because he was crime-free for five consecutive years (1999 - 2005). However, 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). Although Ervin did not commit a crime between 1999 and 2005, his confinement for the 2002 probation violation interrupted his time "in the community." Consequently, this Court should affirm the Court of Appeals and hold that, for purposes of the wash out period, a defendant must be *both* in the community for five consecutive years *and* crime-free.

Prior felony convictions count in a defendant's offender score. RCW 9.94A.525. Before 1995, prior convictions washed out for sentencing purposes if the defendant spent a specified period in the community without being convicted of any felonies. Former RCW 9.94A.360(2). In 1995, the legislature amended that provision, requiring

the defendant to spend the period in the community without committing "any crime" that subsequently results in a conviction. LAWS OF 1995, CH. 316, § 1. The SRA currently provides:

[C]lass C prior felony convictions . . . 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 . . . 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) (emphasis added). At issue in this appeal is what "in the community" — a term undefined by statute — means.

This Court reviews a lower court's interpretation of the SRA *de novo*. *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). The primary goal of statutory construction is to ascertain and give effect to the legislature's intent and purpose. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006). Statutory terms are given their plain and ordinary meaning. *Bright*, 129 Wn.2d at 265. "A nontechnical statutory term may be given its dictionary meaning." *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). "If the plain language is only subject to one interpretation, our inquiry is at an end." *In re Detention of Martin*, 163 Wn.2d 501, 509, 182 P.3d 951, 954 (2008).

Otherwise, to fulfill the legislature's intent this Court must construe the statute as a whole, giving effect to all of its language, considering the

provisions in relation to each other, and harmonizing them whenever possible. *State v. Ervin*, 149 Wn. App. at 564 (citing *In re Personal 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)). 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).

1. 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." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1993). People confined in jail are not in the society at large or in the public. They are not "in the

community." The plain language of the statute therefore 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").

The SRA uses "in the community" frequently and 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, a person in jail for a misdemeanor probation violation is both "in the community" and "in confinement" (i.e., in jail). RCW 9.94A.723 evidences that for purposes of the SRA "in the community" and "in confinement" are mutually exclusive.³

Other sections 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

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).

work and 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 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 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 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 only one reasonable interpretation: not in custody or confinement. Ervin fails 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, as did the Court of Appeals, that "in the community" unambiguously does not include one who is incarcerated as a result of a misdemeanor probation violation. *Ervin*, 149 Wn. App. at 562.

⁴ 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 Personal Restraint Petition of 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").

2. The Court Of Appeals' Holding Is Consistent With Case Law Interpreting A Prior Version Of The Statute.

The current statute requires that one not commit any crime – felony or misdemeanor – during the five-year wash out period. RCW 9.94A.525(2). The prior version, however, required spending five years in the community without committing any felony. *See* Former RCW 9.94A.360(2) (providing that "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."). Case law interpreting that statute recognized that if a defendant was incarcerated pursuant to a probation violation of a felony, the person had been removed from the community. *Ervin*, 149 Wn. App. at 563-64 (citing *State v. Blair*, 57 Wn. App. 512, 789 P.2d 104 (1990)).

In *Blair*, 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 on to explain that this interpretation was consistent with the purposes of the SRA. The

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

court noted that "disregarding confinement due to probation violations" when considering the wash out statutes, "would not promote respect for the law and provide just punishment as the SRA intended." *Blair*, 57 Wn. App. at 516. The court reasoned that the probation was intertwined with the original conviction; thus there was "no reason to disassociate the probation confinement from its underlying cause." *Ervin*, 149 Wn. App. at 564 (quoting *Blair*, 57 Wn. App. at 515-16). Consequently the court in *Blair* held that incarceration pursuant to a probation violation of a felony interrupted the five-year wash out period for a class C felony. *Blair*, at 517.

This reasoning applies here. The Court of Appeals' interpretation in this case is consistent with the purpose of the wash out provisions. *See State v. Demos*, 94 Wn.2d 733, 739, 619 P.2d 968 (1980) (in choosing between alternative statutory interpretations, the court should adopt that interpretation which best fosters the presumed purpose). Yet, 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.

Ervin relies on *In re Personal Restraint of Nichols*, which held that time spent incarcerated for misdemeanors did not interrupt the five-year

felony wash out period for Class C felonies. 120 Wn. App. 425, 427 & 433, 85 P.3d 955 (2004). However, as the Court of Appeals noted, *Nichols* construed RCW 9.94A.360(2), the previous version of RCW 9.94A.525(2)(c). *Ervin*, 149 Wn. App. at 563. The defendant, Nichols, had spent five years crime-free from the time of his release from confinement pursuant to a felony (the trigger date) to the date of his next felony. *Nichols*, 120 Wn. App. 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.

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 usually linked by common interests." *In re Nichols*, 120 Wn. App. at 432 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 460 (1993)). The court concluded that freedom from local jail is not a requisite to being "in the community."

However, 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. *Nichols*, 120 Wn. App. at 432.

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.

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. *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. Yet, 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 Wn.2d 957, 963, 977 P.2d 554 (1999).

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 Wn.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 because he violated probation on several misdemeanors (e.g., a defendant received one-year suspended sentences on six misdemeanor convictions and he subsequently violated probation on each cause, resulting in a judge revoking probation and imposing all of the previously suspended time –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.

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 the defendant in *Smith*, even though Ervin spent five years crime-free, he failed to spend those five years crime-free in the community, a necessary requirement.

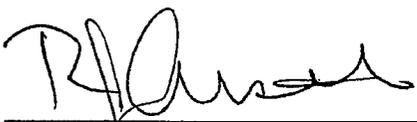
D. CONCLUSION

A necessary condition precedent to one being crime-free for five years in the community is that one spend five consecutive years in the community. Because Ervin's period of incarceration following probation violations interrupted his wash out period, his prior felony convictions did not wash. Accordingly, this Court should affirm Division One's decision and hold that time spent incarcerated pursuant to probation violations re-sets the wash out period.

DATED this 15 day of January, 2010.

Respectfully submitted,

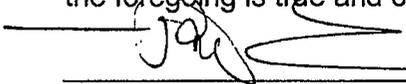
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Maureen Cyr @ Washington Appellate Project, containing a copy of the State's Supplemental Brief, in STATE V. ERVIN, Cause No. 83244-7-1, in the Supreme Court, for 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.



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