

53570-6

~~53570-6~~
53570-6

78514-7

NO. 53570-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARRYL EVERYBODYTALKSABOUT,

Appellant.

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

The Honorable Paris Kallas

REPLY BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. BECAUSE THE ADMISSION OF A CONFESSION IMPLICATES CONSTITUTIONAL RIGHTS, THE STANDARD OF REVIEW OF THE COURT’S LEGAL CONCLUSIONS IS *DE NOVO*..... 2

2. SIXTH AMENDMENT VIOLATION..... 3

 a. Whether Navicky “Knowingly Circumvented” Everybodytalksabout’s Right to Counsel or “Deliberately Elicited” the Incriminating Statements are Legal Conclusions, not Factual Determinations 3

 i. The State’s Application of the Deliberate-Elicitation Standard Incorrectly Focuses on Navicky’s Subjective Intent 4

 ii. Navicky Knowingly Circumvented Everybodytalksabout’s Right to Counsel 8

 b. The Cases Cited by the State for the Proposition that Everybodytalksabout was Not Entitled to the Assistance of Counsel During the Presentence Interview are not on Point 9

 c. Federal Authority Establishes the Admission of Everybodytalksabout’s Statement to Navicky at the Retrial Violated his Right to Counsel 10

3. EVERYBODYTALKSABOUT WAS SUBJECTED TO CUSTODIAL INTERROGATION UNDER SETTLED WASHINGTON FIFTH AMENDMENT JURISPRUDENCE..... 13

B. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997)	2
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 394 (2002).....	7
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)	2
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	2
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	14
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988)	4, 8, 9, 10, 11, 13, 14
<u>State v. Warner</u> , 125 Wn.2d 876, 889 P.2d 479 (1995).....	13, 14

Washington Court of Appeals Decisions

<u>State v. Tinkham</u> , 74 Wn. App. 102, 871 P.2d 1127 (1994).....	9
<u>State v. Willis</u> , 64 Wn. App. 634, 825 P.2d 837 (1992)	13, 14

United States Supreme Court Decisions

<u>Maine v. Moulton</u> , 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). 3, 5, 6	
<u>Massiah v. United States</u> , 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).....	4, 11
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	5, 14
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).....	5, 6
<u>United States v. Ash</u> , 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)	12
<u>United States v. Fellers</u> , 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).....	4, 6
<u>Watts v. Indiana</u> , 338 U.S. 49, 69 S.Ct. 1357, 93 L.Ed.2d 1801 (1949)...	13

United States Court of Appeals Decisions

<u>Baumann v. United States</u> , 692 F.2d 565 (9th Cir. 1982).....	10
<u>Brown v. Butler</u> , 811 F.2d 938 (5th Cir. 1987).....	10
<u>Cahill v. Rushen</u> , 678 F.2d 791 (9th Cir. 1982).....	10-12
<u>United States v. Jackson</u> , 886 F.2d 838 (7th Cir. 1989)	10
<u>United States v. Willard</u> , 919 F.2d 606 (9th Cir. 1990).....	10

United States Constitutional Provisions

U.S. Const. amend. 5 13
U.S. Const. amend. 6 3, 6, 9, 11, 13

Rules

CrR 3.5 1, 2

A. ARGUMENT IN REPLY

Darryl Everybodytalksabout appeals his conviction for first-degree murder with a deadly weapon, obtained following a retrial after his conviction was reversed by the Washington Supreme Court. Because the State's evidence against Everybodytalksabout was largely circumstantial, the State relied principally upon the testimony of two witnesses – Community Corrections Officer Diane Navicky, and prison informant Vincent Rain – to obtain the second conviction.

In his opening brief, Everybodytalksabout argued that Navicky's testimony was admitted in violation of Everybodytalksabout's state and federal right to counsel and privilege against self-incrimination, and that he was denied his right of confrontation by the trial court's unreasonable limitations on his cross-examination of Rain. Everybodytalksabout also argued that governmental misconduct deprived him of due process, requiring reversal of his conviction. Because Everybodytalksabout attempted to anticipate and respond to many of the State's claims in his opening brief, this reply does not repeat all of these arguments.

However, in the State's response to Everybodytalksabout's arguments regarding Navicky's testimony, the State does commit three important errors. First, the State misstates the standard of review for the admission of evidence pursuant to CrR 3.5. Second, the State mistakes the

trial court's legal conclusions to be credibility determinations. Third, the State misapplies on-point, controlling decisional law. As set forth below, this Court should reject the State's claims.

1. BECAUSE THE ADMISSION OF A CONFESSION IMPLICATES CONSTITUTIONAL RIGHTS, THE STANDARD OF REVIEW OF THE COURT'S LEGAL CONCLUSIONS IS *DE NOVO*.

The State initially claims this Court should review the trial court's CrR 3.5 ruling for an abuse of discretion, relying on cases setting forth the standard of review for a trial court's evidentiary ruling. Br. Resp. at 23-24 (and citations therein). The State is incorrect.

A CrR 3.5 hearing concerns the admissibility of a confession and, specifically, whether law enforcement conduct in obtaining the confession violated a constitutional right of the defendant. For this reason, the appellate court will only uphold the trial court's factual findings if they are supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 129-31, 133, 942 P.2d 363 (1997); State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). The court's legal conclusions are subject to *de novo* review. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). Here, while Everybodytalksabout did not assign error to the trial court's factual findings pursuant to CrR 3.5, he challenged the court's legal conclusions. Br. App. at 2-3. Because these legal conclusions

implicate important constitutional rights, they are subject to *de novo* review by this Court. Lorenz, 152 Wn.2d at 30.

2. SIXTH AMENDMENT VIOLATION.

a. Whether Navicky “Knowingly Circumvented”

Everybodytalksabout’s Right to Counsel or “Deliberately Elicited” the Incriminating Statements are Legal Conclusions, not Factual

Determinations. The State casts the issue whether Navicky knowingly circumvented Everybodytalksabout’s right to counsel or deliberately elicited incriminating statements from him as factual questions that were resolved by the trial court. Br. Resp. at 37-41. On this basis, the State urges this Court not to disturb the trial court’s ruling. The State is incorrect: whether Navicky knowingly circumvented Everybodytalksabout’s right to counsel or deliberately elicited incriminating statements are legal, not factual questions.

To assess whether Navicky “deliberately elicited” the statements from Everybodytalksabout, the appellate court considers whether the circumstances of Navicky’s contact with Everybodytalksabout were the “functional equivalent” of interrogation. Maine v. Moulton, 474 U.S. 159, 177, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). United States Supreme Court Sixth Amendment jurisprudence establishes this as a legal question or, at best, a mixed question of fact and law. United States v. Henry, 447 U.S.

264, 273, 277, 100 S.Ct. 2183, 65 L.Ed.2d 215 (1980) (noting question is whether under the facts of the case, a government agent deliberately elicited incriminating statements within the meaning of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)); accord United States v. Fellers, 540 U.S. 519, 524-25, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004). In fact, Fellers makes plain that the deliberate-elicitation standard is a legal inquiry in which the appellate court engages based on the facts presented at the suppression hearing. Id. at 524 (“We have consistently applied the deliberate-elicitation standard in...Sixth Amendment cases [after Massiah]....”).

Likewise, whether Navicky knowingly circumvented Everybodytalksabout’s right to counsel is also ultimately a legal determination to be made by the appellate court applying a *de novo* standard of review. And in fact, the Washington Supreme Court has clarified that this is an objective standard: whether the government agent “knew or should have known that the contact in the absence of counsel would prejudice the defendant.” State v. Sargent, 111 Wn.2d 641, 645, 762 P.2d 1127 (1988) (emphasis added).

i. The State’s Application of the Deliberate-Elicitation Standard Incorrectly Focuses on Navicky’s Subjective Intent.
As noted, to decide whether a government agent deliberately elicited

statements from a defendant, the court considers whether the agent's actions were the "functional equivalent" of interrogation. Moulton, 474 U.S. at 177 (citing Henry, 447 U.S. at 277 (Powell, J., concurring)). Interrogation is defined as "any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). In Innis, the Court clarified the latter portion of the definition focuses primarily on the perceptions of the suspect, not the government agent:

This focus reflects the fact that the [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Id.

In his opening brief, Everybodytalksabout explained at length why Navicky's conduct in interviewing Everybodytalksabout without the presence or knowledge of counsel and expressly soliciting his "version of the offense" was the functional equivalent of interrogation, and cited cases that supported his argument. Br. App. at 21-24. In lieu of discussing these cases, and without citation to authority, the State contends this Court

should consider whether Navicky herself intended to elicit an incriminating response when she questioned Everybodytalksabout. Br. Resp. at 37-39. As Innis, Moulton and Henry make clear, because this Court must determine if Navicky engaged in the functional equivalent of interrogation, whether Navicky herself intentionally sought to induce Everybodytalksabout to incriminate himself is not the focal point of the inquiry. Moulton, 474 U.S. at 177 n. 14 (right to counsel violated by State agent's "conversation about the charges"); see also Fellers, 540 U.S. at 524-25 ("implicit questions" and "discussion" violated Sixth Amendment).

In any event, however, Navicky should have known that her questions were reasonably likely to elicit an incriminating response. See Br. Resp. at 38 (asserting that Navicky herself may not have understood the inculpatory nature of Everybodytalksabout's statements and did not intend to elicit an incriminating response). Navicky was a lead Department of Corrections officer who, at the time she conducted her interview with Everybodytalksabout, had been working in the criminal justice system for 17 years. 10RP 25-29. During this time she prepared approximately 200 presentence reports per year. 10 RP 25-26. Navicky was assigned this high-profile case because of her status and experience. 10RP 27-29.

When Navicky met with Everybodytalksabout, he had gone to trial twice and had been convicted by a jury of first-degree murder. Prior to contacting defendants, Navicky customarily familiarized herself with the prosecution's version of what had occurred and sometimes talked to victims. 10RP 27, 37. Therefore Navicky was likely aware that the State theorized Everybodytalksabout had encouraged Philip Lopez to rob and kill Rigel Jones and, moreover, that the State had supported this theory at trial with the testimony of Detective Jeffrey Martin. State v. Everybodytalksabout, 145 Wn.2d 456, 463-65, 39 P.3d 394 (2002). Certainly, Navicky would have been aware that the State had proceeded under a theory of accomplice liability, in which case whether Everybodytalksabout himself stabbed Jones was irrelevant to the question of guilt or innocence. Thus, although Everybodytalksabout was adamant in his interview with Navicky that he "did not stab Mr. Jones," Navicky surely would have known that an admission of involvement in the robbery constituted an admission of guilt.

As the foregoing discussion demonstrates, a lengthy inquiry into what Navicky intended when she solicited a statement from Everybodytalksabout about his "version of the offense" does not answer the question whether she deliberately elicited his incriminating statement. This Court should hold Navicky's targeted inquiry into

Everybodytalksabout’s “version of the offense” was the “functional equivalent” of interrogation, reverse the conviction and remand with direction Navicky’s testimony be suppressed.

ii. Navicky Knowingly Circumvented

Everybodytalksabout’s Right to Counsel. In claiming Navicky did not knowingly circumvent Everybodytalksabout’s right to counsel, the State again urges this Court to view the trial court’s legal conclusions as factual findings rooted in the court’s credibility assessment of Navicky. Br. Resp. at 39-41.

The State obscures the relevant standard. While this Court may properly adopt the court’s factual finding that Navicky did not subjectively know contact in the absence of counsel would prejudice Everybodytalksabout, the question whether she should have known it would do so is subject to *de novo* review by this Court. Cf., Sargent, 111 Wn.2d at 646-47 (conducting *de novo* review of facts).

Certainly, after Everybodytalksabout was convicted of first-degree murder as an accomplice in the robbery and stabbing of Rigel Jones, it was objectively reasonable for Navicky to conclude that direct questions about Everybodytalksabout’s “version of the offense” would result in Everybodytalksabout incriminating himself. This is particularly true given that (1) Everybodytalksabout may not have necessarily understood his

admission was incriminating and (2) Everybodytalksabout may not have been aware he was at risk in his conversations with Navicky.¹ Cf., Sargent, 111 Wn.2d at 647. Moreover, it is troubling that during her long career with DOC, Navicky routinely violated criminal defendants' right to counsel by asking for their "version of the offense" as a matter of course, but never notified their counsel of the interview. 10RP 50, 70-71.

This Court should hold that even if Navicky subjectively did not know her questions to Everybodytalksabout would prejudice him, objectively, Navicky should have known he might incriminate himself. Navicky therefore knowingly circumvented Everybodytalksabout's right to counsel.

b. The Cases Cited by the State for the Proposition that Everybodytalksabout was Not Entitled to the Assistance of Counsel During the Presentence Interview are not on Point. The State alternatively suggests the presentence interview was not a critical stage at which Everybodytalksabout was entitled to the assistance of counsel.² The State preliminarily notes that "some federal courts have held that the Sixth Amendment right to counsel does not extend to a routine post-conviction

¹ These arguments are elaborated in Everybodytalksabout's opening brief at 24-27.

² At the same time, the State acknowledges that this Court has held a sentencing hearing is a critical stage of the proceedings. Br. Resp. at 35 (citing State v. Tinkham, 74 Wn. App. 102, 871 P.2d 1127 (1994)).

presentence interview conducted by a probation officer.” Br. Resp. at 35-36. However, even assuming for the sake of argument that the federal rule referenced by the State were consistent with Washington decisional law, the cases cited by the State are not on point, as they deal solely with the question whether statements obtained in this context may be considered at a sentencing hearing. United States v. Jackson, 886 F.2d 838 (7th Cir. 1989); Brown v. Butler, 811 F.2d 938 (5th Cir. 1987).

c. Federal Authority Establishes the Admission of Everybodytalksabout’s Statement to Navicky at the Retrial Violated his Right to Counsel. Notably, the State omits discussion of Cahill v. Rushen,³ cited by Everybodytalksabout in his opening brief,⁴ which is squarely on point and disposes of the question whether the admission of Navicky’s testimony at Everybodytalksabout’s retrial violated his right to counsel. Cahill v. Rushen, 678 F.2d at 794.⁵ In Sargent, a plurality of the

³ Cahill v. Rushen, 678 F.2d 791 (9th Cir. 1982).

⁴ Br. App. at 17.

⁵ In fact, while the Ninth Circuit Court of Appeals concurs with the Seventh and Fifth Circuits regarding whether information obtained in a presentence interview may be used at sentencing, the Ninth Circuit has expressly distinguished this situation from the circumstance where the government seeks to use the confession at a retrial. Compare Baumann v. United States, 692 F.2d 565 (9th Cir. 1982) (statement used during sentencing) and United States v. Willard, 919 F.2d 606 (9th Cir. 1990) (noting, “Cahill held that a confession by a defendant after his conviction could not be used in a second trial, because he had not been informed of his right to counsel”).

Washington Supreme Court relied, *inter alia*, on Cahill to hold that the admission of statements that had been obtained during a presentence interview at a retrial violated the defendant's Sixth Amendment right to counsel. State v. Sargent, 111 Wn.2d at 645-46.⁶ In reaching this conclusion, the Sargent Court found it was "a virtual certainty that Sargent did not understand that he was at risk in his conversations with Bloom. He was ignorant of the fact that, if his conviction was overturned on appeal, the confession would render his new trial a formality." Id. at 647. The court noted that "In a case with virtually identical facts, the Ninth Circuit held that it is this precise risk that the right to counsel is meant to guard against." Id. (citing Cahill, 678 F.2d at 794).

The Cahill Court, in turn, announced a broad rule that is controlling here. The Court identified "the only question remaining for resolution" to be "whether the analysis or the conclusion compelled by Massiah is in any way affected by the fact that when the interview took place, Cahill had been convicted and sentenced for the first time and the confession therefore was admitted not at the first trial but upon retrial."

⁶ Justices Dore, Utter and Dolliver found the statements were obtained in violation of Sargent's Sixth Amendment right to counsel. 111 Wn.2d at 641. Justices Andersen, Pearson and Brachtenbach, who signed onto the majority opinion finding Sargent's Fifth Amendment privilege had been violated, did not reach the Sixth Amendment issue. 111 Wn.2d at 657.

Cahill, 678 F.2d at 793. In holding the admission of the statement did violate Cahill's right to counsel, the Court reasoned:

The State and the dissent treat this case as though the question presented were whether the right to counsel "extends beyond" the first trial. We believe such an approach is fundamentally flawed. While the interview occurred after the first trial and before the first appeal, Cahill does not complain of anything that happened at that trial, nor is he asserting any right to counsel in connection with an appeal. He complains of the admission of his confession at the second trial. The question before us, then, is whether the interview with Captain Carter violated Cahill's right to counsel with respect to the second trial. We therefore do not view the case in terms of an "extension" of the right to counsel after a first trial. Rather, we must focus on the need to preserve the protections of the sixth amendment in any trial in which conviction might result.

Id.

The Court then explained,

We must look to the function of counsel and the role to be played at the event in question. As the Supreme Court has stated, the sixth amendment requires that counsel "be provided to prevent the defendant himself from falling into traps" [United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)]. Cahill fell into a trap. Even a brief consultation with his attorney would have corrected Cahill's erroneous impression that a confession at that point could have no adverse consequences.

Id. at 794.

Similarly, here, had Everybodytalksabout been afforded an opportunity to consult with counsel before offering up an admission to involvement in the robbery, his lawyer undoubtedly would have advised

him not to discuss his version of the offense with Navicky. “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1357, 93 L.Ed.2d 1801 (1949). In sum, the admission of Everybodytalksabout’s unwarned statement, obtained during a critical stage of the proceedings and without the benefit of counsel, violated Everybodytalksabout’s Sixth Amendment right. This Court should hold Navicky’s testimony was improperly admitted and reverse the conviction.

3. EVERYBODYTALKSABOUT WAS SUBJECTED TO
CUSTODIAL INTERROGATION UNDER SETTLED
WASHINGTON FIFTH AMENDMENT
JURISPRUDENCE.

Everybodytalksabout alternately argued the admission of Navicky’s testimony violated his Fifth Amendment privilege against self-incrimination. Br. App. at 31-39. In response, the State urges this Court to apply the rule endorsed by some federal courts which requires an inmate interrogated while in secure custody to prove an “additional restraint” in order to obtain suppression of an unwarned confession. However, this rule is contrary to Washington Supreme Court and Court of Appeals precedent. Sargent, supra, 111 Wn.2d at 648-50; State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); State v. Willis, 64 Wn. App. 634, 637 n. 2, 825 P.2d 837 (1992). According to these cases, the

circumstances of Navicky's contact with Everybodytalksabout amounted to custodial interrogation.

And in fact, Warner explained the difference between the situation addressed by State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992), where a defendant seeks the protection of Miranda although he is not formally in custody, and the circumstances present in Sargent, where the defendant was interrogated while in custody at the King County Jail. Warner, 125 Wn.2d at 885. The Court stated,

In [Sargent], there was a custodial interrogation where the questioning by the probation officer took place in a booth in the King County Jail's visiting area and the defendant was locked in his side of the booth. In Post, on the other hand, this court rejected the argument that an interview by a Department of Corrections psychologist was custodial where the interviewee was on work release, even though "Post was 'required' to submit to his evaluation in the sense that it was widely known that if individuals did not cooperate during the interview process, it was a factor considered against them." Post, 118 Wn.2d at 603. We held that psychological compulsion is not enough to establish "custody" for Miranda purposes.

Warner, 125 Wn.2d at 885.

As argued in Everybodytalksabout's opening brief, this case is like Sargent. When Navicky contacted Everybodytalksabout, he was in the custody of the King County Jail, as he had been since his arrest. He was in a locked booth. In such a circumstance, he was "unquestionably in custody." Willis, 64 Wn. App. at 637 n. 2. This Court should hold the

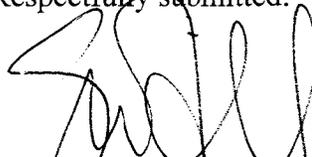
unwarned custodial interrogation violated Everybodytalksabout's privilege against self-incrimination, order the statement be suppressed, and reverse Everybodytalksabout's conviction.

B. CONCLUSION

For the reasons stated herein and in the opening brief of appellant, this Court should reverse Darryl Everybodytalksabout's conviction and remand for a new trial.

DATED this 8th day of September, 2005.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	COA NO. 53570-6-1
)	
DARRY EVERYBODYTALKSABOUT,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 8TH DAY OF SEPTEMBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE DIVISION
KING COUNTY COURTHOUSE, W-554
516 THIRD AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF SEPTEMBER, 2005.

x _____
Jme

SEP 13 2005
10:16 AM
[Signature]