

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DARRELL EVERYBODYTALKSABOUT,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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## A. INTRODUCTION

In State v. Sargent,<sup>1</sup> this Court held a defendant who is in custody in a correctional facility and interrogated by a government official must receive Miranda<sup>2</sup> warnings; otherwise, the State is barred from using his incriminating statements against him. A plurality of this Court also followed settled Sixth Amendment jurisprudence and held the use of the statements at a subsequent trial violated Sargent's right to counsel.

Nearly a decade later, a community corrections officer engaged in exactly the same prohibited conduct when she interrogated petitioner regarding the offense of conviction before he was sentenced, and without advising him of his constitutional rights. The State subsequently garnered a conviction at a retrial through the use of these unconstitutionally-obtained statements.

## B. ISSUES PRESENTED

1. The bright-line rule of Sargent follows United States Supreme Court Fifth Amendment decisional law, is easily applied, and imposes a minimal burden on law enforcement. Should this Court reaffirm Sargent and hold that when a community corrections officer (CCO) questioned Everybodytalksabout in the King County Jail about his "version of the

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<sup>1</sup> State v. Sargent, 111 Wn.2d 641, 762 P.2d 1127 (1988).

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

offense,” this was custodial interrogation necessitating the issuance of Miranda warnings?

2. Once the Sixth Amendment right to counsel has attached, the State is prohibited from using as evidence at trial statements deliberately elicited from the accused without the presence or waiver of counsel. The “deliberate elicitation” standard is well-settled under federal law and applies to circumstances where a government agent elicits information from an accused under circumstances not amounting to formal police interrogation. Should this Court hold a DOC official who questions the accused in the absence of counsel about his “version of the offense” has deliberately elicited any ensuing statements, in violation of the Sixth Amendment?

### C. STATEMENT OF THE CASE

Following his 1997 conviction as an accomplice to the first-degree felony murder of Rigel Jones but before he was sentenced, petitioner Darrell Everybodytalksabout was interviewed while in custody at the King County Jail by Diane Navicky, a lead officer of the Department of Corrections (DOC). Navicky had been assigned by DOC to prepare a presentence report. 10RP 29, 31.<sup>3</sup>

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<sup>3</sup> The verbatim report of proceedings consists of 29 volumes of transcripts. A table attached as Appendix A explains the citations.

Navicky arrived unannounced and without notifying Everybodytalksabout's attorney of her intent to interview his client. 10RP 70-71; CP 853 (FOF 1(g)).<sup>4</sup> The interview was conducted in the secure attorney-client meeting area in the jail. 10RP 66. Everybodytalksabout was seated in a booth, separated from Navicky by a heavy glass partition. Id. He was not free to move about on his own. He was escorted to the interview by a jail officer and in order to leave had to press a buzzer so an officer would take him back to his cell. 10RP 67-68.

Navicky testified that it was her general practice to issue Miranda warnings before conducting presentence interviews, but in this instance, was not certain whether she advised Everybodytalksabout of his Miranda rights. 10RP 44. Neither her report nor her file contained a record of either a Miranda rights advisement or confidentiality waiver. 10RP 72-73.

Prior to contacting Everybodytalksabout, Navicky derived the "official version" of the event from the police reports and certification for determination of probable cause. 10 RP 76-77; Pretr. Ex. 1 at 3. At the interview, she first elicited basic social history, then said to Everybodytalksabout,

This is the part where the Department of Corrections would ask you for your version of the offense, and you don't have

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<sup>4</sup> Navicky explained at the CrR 3.5 hearing, "It's [DOC] custom that we never do that." 10RP 71.

to give us the police or the prosecuting [sic] but what you say happened on that night.

10RP 50, 55-56; see also FOF 1(o) and (p) (CP 854).

In response, Everybodytalksabout stated adamantly that he was innocent and did not murder Jones, but only assisted in a robbery. 10RP 50, 56-57; Pretr. Ex. 1 at 4, 11. He also said he had been drinking that night and felt very badly about the situation. 10RP 52, 55. He then stated, "I don't want to talk about this anymore" and terminated the interview. 10RP 50; Pretr. Ex. 1 at 11. Everybodytalksabout's conviction was subsequently overturned by this Court, and the State sought to introduce the statement at his retrial. State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002).

Everybodytalksabout moved to exclude the statement as obtained in violation of his Fifth and Sixth Amendment rights. CP 544-52; 11RP 32-39, 45-48. Over Everybodytalksabout's objection, the court admitted the statement and permitted Navicky to testify. 16RP 6-24; 27RP 140-57; CP 851-57.

In closing argument, the prosecutor utilized the statement to prove Everybodytalksabout intended to rob Jones, one of the elements of the first-degree murder allegation. 28RP 60, 64, 66, 70, 85; RCW 9A.32.030(1)(c). The prosecutor argued, "that [Everybodytalksabout's]

statement to Diane Navicky is enough to convict him, especially in light of the circumstantial evidence.” 28RP 85. The prosecutor paraded Navicky before the jury as the State’s most credible witness:

A robbery did take place, the defendant confessed his involvement in it in a voluntary conversation with Diane Navicky specifically asking about this incident, Diane Navicky a person who’s on [sic] the end of her career, who had done, who had been supervisor for a long time, who’d written a lot of these reports, who’d taught other people how to write these reports, who realized at the time that she was talking to the defendant that maybe this was the last high profile case she was going to do, and she thought to herself that she wanted to go out with integrity, that she wanted to go out as a professional, and we know that report is accurate.

28RP 64. The prosecutor told the jury Navicky’s testimony was “important because it corroborates all the circumstantial evidence that says this was a robbery,” and reiterated in rebuttal that Navicky was “really the most credible person we had testify in this trial.” 28 RP 66, 154, 156.

On appeal, Everybodytalksabout contended the admission of his statement to Navicky violated his Fifth and Sixth Amendment rights and that given the State’s heavy reliance on the statement to obtain a conviction, the error required reversal.<sup>5</sup> The Court of Appeals affirmed, and this Court has accepted review.

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<sup>5</sup> Additional facts regarding the prejudicial effect of the error are contained in the Brief of Appellant at 39-43.

D. ARGUMENT

1. THIS COURT SHOULD REAFFIRM *SARGENT'S* BRIGHT-LINE RULE THAT A PERSON WHO IS IN CUSTODY IN A JAIL OR CORRECTIONAL FACILITY IS ENTITLED TO *MIRANDA* WARNINGS BEFORE HE IS INTERROGATED.

The constitutional privilege against self-incrimination prohibits the admission of statements given by a suspect during “custodial interrogation” without prior Miranda warnings. U.S. Const. amend. 5; Const. art. I, § 9; Miranda, 384 U.S. at 444; Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (interpreting privilege after right to counsel has attached); State v. Templeton, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002). The Court has defined “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444; accord Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). Everybodytalksabout was in custody and interrogated by Navicky under this well-grounded precedent.

- a. Sargent's application of the Fifth Amendment “custody” determination is consistent with the decisions of the United States Supreme Court and should not be disturbed. In Sargent, a case involving nearly identical facts to those present here, this Court found the defendant

had been subjected to “custodial interrogation” and thus the failure to issue Miranda warnings barred the use of the defendant’s inculpatory statement at a retrial. 111 Wn.2d at 647-48. Sargent correctly interpreted and applied United States Supreme Court Fifth Amendment doctrine and announced an easily-followed rule that imposes little burden on law enforcement. Because Sargent is controlling here, this Court should hold Everybodytalksabout’s statement to Navicky was improperly admitted and reverse his conviction.

i. Sargent’s analysis of what constitutes “custody” correctly interprets controlling United States Supreme Court decisional law. Sargent was held awaiting sentencing in the King County jail when he was contacted by probation officer Ronald Bloom, who was conducting a presentence interview. 111 Wn.2d at 642-43. Bloom asked Sargent if he was guilty and encouraged him to “come to the truth with himself.” Id. Bloom then terminated the interview, but told Sargent to call him “if there’s something else that he regard[ed] as significant.” Id. at 643. Sargent ultimately contacted Bloom two or three days later and provided a written confession, which was used against him at his retrial after his conviction was reversed on appeal. Id. This Court concluded Sargent was in custody for purposes of Miranda, and therefore his unwarned statement should not have been admitted at the retrial. 111 Wn.2d at 647-48.

In so holding, this Court relied on Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), which considered whether a defendant in work release commanded to appear for an interview by a probation officer was in “custody” under Miranda. Although Murphy answered this question in the negative, it reaffirmed that for Miranda purposes, “custody” requires “‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” Murphy, 465 U.S. at 430 (citing California v. Beheler, 466 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 297 (1983) (per curiam)). The Court in Murphy emphasized that

Murphy was not under arrest and. . . he was free to leave at the end of the meeting. *A different question would be presented if he had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting.*

Murphy, 465 U.S. at 430 n. 5 (emphasis added).

Applying Murphy, this Court held: “Sargent was unquestionably in custody when this interview took place. He was in jail, locked in the interview booth. These restraints on his freedom of movement constitute custody for Miranda purposes.” Sargent, 111 Wn.2d at 648. Importantly, this Court deemed extrinsic or subjective considerations irrelevant:

[F]reedom of movement, not the atmosphere or the psychological state of the defendant, is the determining factor in deciding whether an interview is “custodial.”

Since Sargent's freedom of movement was unquestionably limited, the interview with Bloom was "custodial" for Miranda purposes.

Id. (citation omitted).

This objective standard has remained the touchstone of the United States Supreme Court analysis. See e.g. Stansbury v. California, 511 U.S. 318, 323-35, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam) ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.") (and citations therein).

ii. The "additional restraint" inquiry utilized by some federal courts has not been adopted by the United States Supreme Court and would not apply where the inmate is questioned about the offense that led to his incarceration. While conceding Everybodytalksabout was interviewed by Navicky in the same setting as Sargent, both the trial court and the Court of Appeals called Sargent's holding into question, citing State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992), and State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995), and so refused to follow Sargent. Slip Op. at 5. This result evinces a misunderstanding of these decisions.

Similar to Murphy, in Post this Court found that a defendant on work release, who was interrogated by a psychologist about past criminal conduct to determine future dangerousness, was not in custody for Miranda purposes. Post, 118 Wn.2d at 606-07. Post reached this conclusion in part because the record failed to disclose the location of the interview. Id. at 607;<sup>6</sup> accord State v. Willis, 64 Wn. App. 634, 637 n. 2, 825 P.2d 837 (1992) (construing Post).

In Warner, this Court held a juvenile in a treatment setting at the Maple Lane School who was questioned by a treatment coordinator was not in custody under the Fifth Amendment. 125 Wn.2d at 885. The juvenile had already been sentenced and although participation in the treatment program was mandatory, this Court found this incentive to make disclosures was not the type of “compulsion” contemplated in Miranda. Id. at 884-85. In so finding, Warner reaffirmed Sargent. Id. (“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”).

Post and Warner cited federal decisions finding an inmate who is questioned must prove an “additional restraint” in addition to the

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<sup>6</sup> Post also noted, “The key difference between Sargent and this case is that Post had no criminal prosecution or appeal pending [when he was interviewed].” Post, 118 Wn.2d at 608; see also id. at 610 (same).

restrictions on freedom of movement normally attendant to custody in order to be entitled to warnings prior to an interrogation. See Warner, 125 Wn.2d at 885 and Post, 118 Wn.2d at 607 (citing United States v. Conley, 779 F.3d 970, 973 (4th Cir. 1985), cert. denied, 479 U.S. 830 (1986) and Cervantes v. Walker, 589 F.2d 424, 427-29 (9th Cir. 1978)). By their plain terms, however, the federal cases are limited to “on-the-scene questioning” about a recent crime, itself permitted by Miranda, 384 U.S. at 477-78, or questioning regarding an unrelated offense. See e.g. Garcia v. Singletary, 13 F.3d 1487 (11th Cir. 1994) (on-the-scene questioning), cert. denied, 513 U.S. 908 (1994); Conley, 779 F.2d 970 (offense arose during incarceration); Cervantes, (on-the-scene questioning).

The seminal decision from the United States Supreme Court holding an inmate of a correctional facility or prison is in custody for purposes of Miranda and entitled to warnings before interrogation, Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), has never been overruled. See Berkemer v. McCarty, 468 U.S. 420, 439 n. 28, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (citing Mathis with approval); New York v. Quarles, 467 U.S. 649, 654 n. 4, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (noting Court has declined to dilute Miranda’s requirements, often despite “strong dissent”; citing Mathis); Illinois v. Perkins, 496 U.S. 292, 299, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (distinguishing Mathis

on basis that suspect did not know he was interrogated by government agent); see also Bradley v. Ohio, 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) (Marshall, J., dissenting from denial of certiorari).

Indeed even Cervantes, the first case to experiment with an “additional restraint” test, was careful to distinguish Mathis:

The questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring Miranda warnings. . . . At the same time, Mathis, so interpreted, does not bar all instances of the on-the-scene questioning so carefully excluded from the Miranda requirements.

Cervantes, 589 F.2d at 428; see also Conley, 779 F.2d at 973-74 (prisoner was interrogated by prison staff; Court holds requiring Miranda warnings as a matter of course before such questioning would interfere with prison administration).<sup>7</sup>

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<sup>7</sup> Both Conley and Cervantes contended that requiring Miranda warnings prior to “many of the myriad informal conversations between inmates and prison guards” would “torture [Miranda] to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart.” Conley, 779 F.2d at 973; Cervantes, 589 F.2d at 427. This argument rests on a faulty paradigm. First, the “myriad informal conversations between inmates and prison guards” would not qualify as interrogation. Second, it is not possible to truly compare the prisoner to his nonimprisoned counterpart. The paradigm presumes the custodial setting itself irrelevant and the prisoner and his nonimprisoned counterpart on a level playing field. Even assuming such a comparison possible, in light of the inherent compulsion attendant to the custodial setting, minimal additional restraint is needed to establish a prisoner is in “custody.” See Argument 1(a)iii, infra.

The “additional restraint” inquiry also has not been applied to the circumstance where a prisoner is interrogated about the crime for which he is in custody and awaiting sentencing. In addition to the obvious Sixth Amendment problem with permitting such a practice, discussed in more detail in Argument 2, infra, there is a presumptive violation of the Fifth Amendment privilege against self-incrimination at sentencing. Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981); see also Mathis, 391 U.S. at 4.

In Estelle v. Smith, the defendant in a capital case was ordered to submit to a psychological evaluation after the jury’s guilt finding but prior to the penalty phase of the proceeding which was used to support the State’s claim of future dangerousness. 451 U.S. at 458-60. In holding that Smith was entitled to be warned of his privilege against self-incrimination, the Court emphatically rejected the contention that the Fifth Amendment privilege terminates upon a guilty verdict: “The essence of [the privilege against self-incrimination] is ‘the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.’” Id. at 462 (quoting Culombe v. Connecticut, 367 U.S. 568, 581-82, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (emphasis in Estelle v. Smith)); see also id. at 464 (finding Fifth

Amendment privilege “directly involved” because psychiatrist solicited Smith’s account of the charged offense); accord Mitchell v. United States, 526 U.S. 314, 326-28, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (extending rule to non-capital cases). The Washington courts have followed Estelle v. Smith and Mitchell. State v. Diaz-Cardona, 123 Wn. App. 477, 482, 98 P.3d 136 (2004); State v. Bankes, 114 Wn. App. 280, 288, 57 P.3d 284 (2002); State v. Tinkham, 74 Wn. App. 102, 106-07, 871 P.2d 1127 (1994).

iii. Even assuming the “additional restraint” inquiry applicable, Everybodytalksabout was under additional restraint when Navicky interrogated him. Even if the “additional restraint” test applied, Everybodytalksabout was under additional restraint when Navicky interrogated him. Everybodytalksabout was in custody in the King County Jail. Estelle v. Smith, 451 U.S. at 467. His interrogator was a government agent, not a member of the jail staff. Mathis, 391 US. at 2-3; Cervantes, 589 F.2d at 428. Everybodytalksabout was summoned to the interview by Navicky and interrogated in a locked booth. Warner, 125 Wn.2d at 885; Post, 118 Wn.2d at 608. Thus, even applying an “additional restraint” standard, Everybodytalksabout was “in custody” and entitled to Miranda warnings.

b. Everybodytalksabout was under “interrogation.” The United States Supreme Court has defined interrogation as “any words or actions on the part of the police (other than those normally attendant to arrest and custody) 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 the context of a presentence interview by a DOC employee, this Court has found “interrogation” when “the probation officer should have known that his questioning would have provoked an incriminating response.” Sargent, 111 Wn.2d at 650. Although voluntary statements are admissible, Innis, 446 U.S. at 300, the United States Supreme Court has been loath to construe Miranda’s definition of “interrogation” narrowly, and instead has found police practices to qualify as interrogation even where they did not involve express questioning. Innis, 446 U.S. at 299.<sup>8</sup> Under Miranda and

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<sup>8</sup> The Court of Appeals found Navicky’s interview was not “interrogation” within the meaning of the Fifth Amendment based on the erroneous view that “interrogation involves some degree of compulsion.” Slip Op. at 6 (citing Warner). This view misunderstands Miranda and Innis. The analysis of whether a suspect is “in custody” properly is separate from the question of whether he is under “interrogation.” Miranda, 384 U.S. at 478; Innis, 446 U.S. at 300. Although voluntary statements produced in a custodial setting will not trigger Miranda’s protections, a person who is in custody need not prove a government official’s method was coercive in order for the “words or actions” to qualify as interrogation. Such a rule would render Miranda nugatory. See Miranda, 384 U.S. at 448-58; Innis, 446 U.S. at 298-99.

Innis, Navicky's invitation to Everybodytalksabout to tell her his "version of the offense" clearly was interrogation.

c. The Fifth Amendment violation requires suppression of Everybodytalksabout's statement and reversal of his conviction. Sargent's holding is entirely consistent with the decisions of the United States Supreme Court and controlling here. Moreover, Sargent imposes a modest burden on the government: merely to advise jail or prison inmates of their Fifth Amendment rights before conducting a pre-sentence interview.

Under principles of *stare decisis*, established case doctrine is binding unless it is shown to be both incorrect and harmful. State v. Robbins, 138 Wn.2d 486, 494, 980 P.2d 725 (1999). The State can show neither. Based on the clear violation of his Fifth Amendment rights, Everybodytalksabout is entitled to suppression of his statement and reversal of his conviction. Dickerson v. United States, 530 U.S. 428, 443-44, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

2. THIS COURT SHOULD HOLD NAVICKY, ACTING AS A GOVERNMENT AGENT, DELIBERATELY ELICITED THE STATEMENT FROM EVERYBODYTALKSABOUT IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

Everybodytalksabout also asks this Court to hold the statements inadmissible under the Sixth Amendment.

The Sixth Amendment right to counsel attaches at or after the

initiation of adversarial judicial proceedings and does not require a request by the accused. Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The right is offense-specific and protects an accused throughout the duration of a criminal prosecution and following conviction. McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). Thus, after the right to counsel has attached, the State may not use as evidence at trial statements “deliberately elicited” from the accused and without the presence or waiver of counsel. Brewer, 430 U.S. at 399.

The “deliberately elicit” standard evolved to address the situation where a government informant or agent elicits information from a defendant under circumstances not amounting to formal police interrogation. Massiah v. United States, 377 U.S. 201, 206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (holding a co-defendant cooperating with government officials deliberately elicited incriminating statements from the accused); see also, United States v. Henry, 447 U.S. 264, 273, 100 S.Ct. 2183, 65 L.Ed.2d 215 (1980) (where informant had “stimulated” conversations with defendant in order to “elicit” incriminating information, those facts amounted to “indirect and surreptitious interrogation” of defendant); Michigan v. Jackson, 475 U.S. 625, 630-31, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) (following attachment of Sixth

Amendment protections, “government efforts to elicit information from the accused, including interrogation, represent ‘critical stages’ at which the Sixth Amendment applies”) (internal citations omitted); Maine v. Moulton, 474 U.S. 159, 177, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) (informant’s actions were “the functional equivalent” of interrogation).

The Court has continued to strictly adhere to the Massiah standard. See United States v. Fellers, 540 U.S. 519, 525, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004) (holding the absence of formal “interrogation” irrelevant to the Sixth Amendment analysis, and finding there was “no question” that officers’ “implicit questions” “deliberately elicited” information from the defendant).

Applying these principles, a plurality of this Court found that Bloom’s contact with Sargent at the presentence interview and introduction of Sargent’s statements at his retrial violated his right to counsel. 111 Wn.2d at 645-46.<sup>9</sup> This Court reasoned:

The Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. However, *knowing exploitation by the State of an*

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<sup>9</sup> 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 656. Justice Durham authored a dissent in which Justice Callow joined. 111 Wn.2d at 656-67. Justice Smith did not participate in the disposition of the case. 111 Wn.2d at 641.

*opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.* Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Sargent, 111 Wn.2d at 645-46 (quoting Moulton, 474 U.S. at 176)

(emphasis in Sargent).

The standard to be applied is objective: “whether the State knew or should have known that the contact in the absence of counsel would prejudice the defendant.” Sargent, 111 Wn.2d at 645 (citing Moulton, 474 U.S. at 176.

a. Navicky “deliberately elicited” an incriminating response from Everybodytalksabout at a critical stage of the proceeding, in violation of the Sixth Amendment.

i. The interview was a critical stage of the proceeding. It is settled that sentencing is a critical stage of a criminal proceeding at which the right to counsel applies. Mitchell, 526 U.S. at 326-28; Estelle v. Smith, 451 U.S. at 470. Even the Court of Appeals conceded in this case that, “[c]onsidering the gravity of what was at stake,” the presentence interview constituted a critical stage of the proceeding. Slip Op. at 9.

The Ninth Circuit, the only other court to consider whether an incriminating statement made to a government official after conviction and used at a retrial violates the Sixth Amendment, has also found the interview to be a critical stage. Cahill v. Rushen, 678 F.2d 791, 793 (9th Cir. 1982). The Court noted, “[i]t is by now well settled that the sixth and fourteenth amendments bar the use at a subsequent trial of incriminating statements which the government has deliberately elicited from the defendant after indictment and in the absence of counsel.” Cahill, 678 F.2d at 793 (citing Henry, 447 U.S. at 274; Innis, 446 U.S. at 300 n. 4; Brewer, 430 U.S. at 401; and Massiah, 377 U.S. at 307).<sup>10</sup> The Court found the case “falls squarely within that rule,” emphasizing, “we must focus on the need to preserve the protections of the sixth amendment in any trial in which conviction might result.” Cahill, 678 F.2d at 793.

ii. Navicky “deliberately elicited” the statement.

Under any reasonable application of the standard, Navicky deliberately elicited an incriminating response from Everybodytalksabout. As noted, the “deliberate elicitation” standard examines whether a government agent

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<sup>10</sup> Below, the State claimed “a routine post-conviction presentence interview conducted by a probation officer” is not a critical stage. Br. Resp. at 35-36. The cases cited by the State, however, precede Mitchell, and in any event address only the use of the interview at sentencing. This rule cannot apply where unwarned statements are used against the defendant at a subsequent trial. See United States v. Willard, 919 F.2d 606, 609 (9th Cir. 1990) (explaining, “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.”).

has engaged in tactics that are the “functional equivalent” of interrogation. Moulton, 474 U.S. at 477. “Notably, ‘stimulation’ of conversation falls far short of ‘interrogation.’” Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004) (citing Fellers, 540 U.S. at 524). Again, the inquiry is objective: “it is not the government’s intent or overt acts that are important; rather, it is the ‘likely...result’ of the government’s acts.” Randolph, 380 F.3d at 1144 (citing Henry, 447 U.S. at 271).

Navicky expressly invited Everybodytalksabout to tell her his “version of the offense,” not “the police or the prosecuting [sic] but what you say happened on that night.” 10RP 50; 55-56. Navicky was a senior CCO who had conducted hundreds of presentence interviews. She knew Everybodytalksabout was a high-profile case and she prepared for the interview by first familiarizing herself with the “official version” of the offense, which she garnered from police reports and the like. She certainly knew Everybodytalksabout was charged as an accomplice to felony murder predicated on robbery and that he had confessed to being present when his co-defendant contacted Jones to rob him. 10 RP 76-77. Any reasonable person in her position would have understood that criminal complicity in this context is far-reaching and an admission of any involvement could be incriminating. Navicky certainly knew that a jury had convicted Everybodytalksabout as charged. In short, Navicky “knew

or should have known” a further inquiry into Everybodytalksabout’s “version of the offense” would be likely to elicit an incriminating response.

iii. The questioning violated Everybodytalksabout’s Sixth Amendment right to counsel. Navicky’s targeted inquiry into Everybodytalksabout’s “version of the offense,” done at a critical stage of the proceeding and without the benefit of counsel, and producing a statement which the State used to Everybodytalksabout’s peril at a retrial, unquestionably violated his Sixth Amendment right to counsel. As the Court in Cahill 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.

An unsophisticated defendant is afforded the right to counsel at critical stages to guard against precisely the kind of encounter with the government that occurred here. “[The layman] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every stage of the

proceedings against him.” Moulton, 174 U.S. at 170 (citing Gideon v. Wainwright, 372 U.S. 335, 344-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)). This Court should reaffirm the plurality decision in Sargent and, consistent with the decisions of the United States Supreme Court and Ninth Circuit, hold the violation of Everybodytalksabout’s Sixth Amendment right to counsel barred the State’s use of his statement at the retrial.

b. This Court should refuse to hold the questioning by a DOC official in the absence of counsel was statutorily authorized. Both the Court of Appeals and the trial court approved the admission of the statement based on “the system by which a DOC official interviews a defendant for purposes of preparing a presentence report for the court.” Slip Op. at 10. This justification was unavailing; this Court should reject any claim that the Legislature intended to promote or condone routine violations of a defendant’s Sixth Amendment right to counsel by enacting legislation prescribing the preparation of presentence reports.

Former RCW 9.94A.110<sup>11</sup> provides the trial court with discretion

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<sup>11</sup> The trial court referenced RCW 9.95.200 as the pertinent statute. RCW 9.95.200 provides:

The court may, in its discretion, prior to the hearing on the granting of probation, refer the matter to the secretary of corrections or such officers as the secretary may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his prior record, and his family surroundings and environment.

to order a presentence report, giving priority to felony sex offenders.

Former RCW 9.94A.110, recodified as RCW 9.94A.500 by Laws 2001, ch. 10, § 6. The statute does not specify the anticipated contents of the presentence report. This is supplied by court rule.

CrR 7.1(a) states, “At the time of, or within 3 days after, a plea, finding, or verdict of guilt of a felony, the court may order that a presentence investigation and report be prepared by the Department of Corrections.” CrR 7.1(a). CrR 7.1(b) instructs:

The report of the presentence investigation shall contain the defendant’s criminal history, as defined by RCW 9.94A.030, such information about the defendant’s characteristics, financial condition, and the circumstances affecting the defendant’s behavior as may be relevant in imposing sentence or in correctional treatment of the defendant, information about the victim, and such other information as may be required by the court.

CrR 7.1 (b).

Neither the statute nor the court rule requires DOC to ever contact the defendant directly. Rather, consistent with the statute’s plain language, all information can easily be obtained by resort to social and court files, police reports, and similar sources. This is consistent with settled rules of statutory construction, which presume the Legislature did

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As RCW 9.95.200 pertains specifically to probation, it is likely that it does not bear upon this Court’s analysis of the constitutional question presented. Like former RCW 9.94A.110, however, the statute does not specify direct contact between the DOC presentence interviewer and the defendant.

not intend an absurd result. State v. J.P., 149 Wn.2d 444, 450, 904 P.2d 754 (1995). An interpretation that suggests the Legislature intended to undermine an accused person's constitutional right to counsel is an absurd construction of the statute. The Legislature cannot be assumed to have intended an unconstitutional result. This Court should reject any claim that the Sixth Amendment violation was authorized or intended by the Legislature.

c. The interests of public policy weigh against condoning a result that permits CCOs to routinely violate the Sixth Amendment rights of criminal defendants awaiting sentencing. The current Court of Appeals opinion expands the scope of government power to obtain and use incriminating information from accused persons beyond what was previously authorized under this state's Fifth and Sixth Amendment jurisprudence. If upheld, this result is likely to embolden DOC officials to take advantage of their contacts with defendants in the absence of counsel and encourage the State to mine presentence interviews for usable confessions in the event of retrials. Because of these incentives, defense attorneys will routinely be compelled to advise their clients not to participate in presentence interviews. "[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

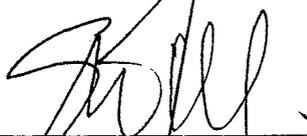
L.Ed.2d 1801 (1949). The interests of public policy, too, weigh against diluting the Sixth Amendment standard.

E. CONCLUSION

This Court should hold Navicky's interrogation of Everybodytalksabout violated his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. By the State's own admission, the statement procured by unconstitutional means was the key to the State winning its case. Everybodytalksabout respectfully requests this Court to hold the Fifth and Sixth Amendment violations require reversal of his conviction and remand for a new trial.

DATED this 5<sup>th</sup> day of February, 2007.

Respectfully submitted:



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Supreme Court Case No. 78514-7  
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