

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.

DARRELL EVERYBODYTALKSABOUT,

Appellant.

RECEIVED
MAY 11 2011

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

The Honorable Paris Kallas
The Honorable Donald Haley

OPENING 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. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE..... 9

 1. The Alleged Incident..... 9

 2. Procedural History 13

E. ARGUMENT 14

 1. THE TRIAL COURT ERRED IN ADMITTING
 EVERYBODYTALKSABOUT’S STATEMENTS OBTAINED IN
 VIOLATION OF HIS RIGHT TO COUNSEL AND PRIVILEGE
 AGAINST SELF-INCRIMINATION 14

 a. The Trial Court Erroneously Admitted Everybodytalksabout’s
 Statements to Diane Navicky 14

 b. The Admission of Everybodytalksabout’s Statement to Navicky
 Violated His Constitutional Right to Counsel 16

 i. The Sixth Amendment Bars the State From Introducing
 Statements That Have Been Deliberately Elicited From the
 Accused..... 18

 ii. Navicky “Deliberately Elicited” The Incriminating Statement
 from Everybodytalksabout..... 21

 iii. Navicky Knowingly Circumvented Everybodytalksabout’s
 Right to Counsel 24

 iv. The Provisions of RCW 9.95.200 Do Not Excuse the Sixth
 Amendment Violation..... 27

a) To the Extent the Statute is Unconstitutional, it May Not Be Applied.....	27
b) Rules of Statutory Construction Oppose the Court’s Interpretation.....	28
c) RCW 9.95.200 is Inapplicable.....	29
c. The Admission of Everybodytalksabout’s Statement to Navicky Violated Everybodytalksabout’s Constitutional Privilege Against Self-Incrimination.....	31
i. Navicky Interrogated Everybodytalksabout	32
ii. Under <i>Sargent</i> , Everybodytalksabout’s Interrogation in the Locked Jail Interview Room Was Custodial	33
iii. The Trial Court’s “Additional Restraint” Analysis Does Not Square With Settled Fifth Amendment Jurisprudence.....	35
a) The “Additional Restraint” Test Should Not Have Been Applied Because Everybodytalksabout Was Interrogated About the Crime For Which He Was Incarcerated.....	38
b) Assuming the “Additional Restraint” Standard Should Be Applied, Everybodytalksabout Was Under Additional Restraint When Navicky Interrogated Him	39
d. The Constitutional Error From the Fifth and Sixth Amendment Violations Prejudiced Everybodytalksabout.....	39
2. THE TRIAL COURT VIOLATED EVERYBODYTALKSABOUT’S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES BY LIMITING HIS ABILITY TO IMPEACH THE PROSECUTION INFORMANT	43
a. The Trial Court Limited Everybodytalksabout’s Ability to Adequately Confront Prosecution Informant Vincent Rain.....	43

b. Consistent With his Constitutional Rights to a Defense and to Confront Witnesses, Everybodytalksabout Was Entitled to Adequately Impeach the Prosecution Informant.....	47
i. Jailhouse Informants are Presumptively Unreliable	49
ii. The Trial Court Erred in Limiting Everybodytalksabout’s Impeachment of Rain.....	51
a) Rain’s Status as a Sex Offender.....	52
b. Rain’s Specific Infraction History	53
c) Rain’s Domestic Violence History With Melody Rain and Adjustment on Probation	55
d) Rain’s Threats to Get a Lawyer and Assert his Fifth Amendment Privilege	58
iii. The Impeachment Authorized by the Trial Court Was Not Sufficient.....	59
iv. The Limitations on Everybodytalksabout’s Impeachment of Rain Resulted in a Denial of Due Process	59
3. THE TRIAL COURT ERRED IN DENYING EVERYBODYTALKSABOUT’S MOTION FOR MISTRIAL	61
a. Ramirez Repeatedly Attempted to Influence Yolonda Lopez’s Testimony	61
b. Where Ramirez Attempted to Influence Witness Yolonda Lopez’s Testimony and Violated a Motion in Limine, the Trial Court Erred in Denying Everybodytalksabout’s Motion for Mistrial.....	63
c. The Sanction Imposed by the Trial Court Was Inadequate Given the Gravity of Ramirez’s Misconduct.....	67
4. THE PROSECUTION SHOULD HAVE BEEN DISMISSED FOR DUE PROCESS VIOLATIONS.....	68

a. Everybodytalksabout Moved to Dismiss for Discovery Violations and Destruction of Evidence.....	68
b. Dismissal Was Required for the State’s <i>Brady</i> Violation Under the Due Process Clauses and CrR 8.3(b).....	70
c. Due Process Required Ramirez to Preserve Evidence.....	75
d. Ramirez Destroyed the Audiotape and Other Suspect Evidence in Bad Faith.....	76
5. CUMULATIVE ERROR DENIED EVERYBODYTALKSABOUT A FAIR TRIAL.....	77
F. CONCLUSION.....	78

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Duke v. Boyd</u> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	29
<u>In re Benn</u> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	19
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	40
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	77
<u>State v. Coe</u> , 101 Wn.2d 772, 685 P.2d 668 (1984).....	77
<u>State v. Cory</u> , 62 Wn.2d 371, 382 P.2d 1019 (1962).....	63, 64, 66
<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	52
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	40, 43
<u>State v. Everybodytalksabout</u> , 145 Wn.2d 456, 39 P.3d 394 (2002). 13, 40, 66, 78	
<u>State v. Hobble</u> , 126 Wn.2d 283, 892 P.2d 85 (1995).....	58
<u>State v. Hudlow</u> , 99 Wn.2d 1, 59 P.2d 514 (1983).....	48
<u>State v. J.P.</u> , 149 Wn.2d 444, 904 P.2d 754 (1995).....	29
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	39
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	33, 35
<u>State v. Sargent</u> , 111 Wn.2d 651, 762 P.2d 1127 (1988)... 4, 20, 21, 24, 25, 27, 32-35, 39	
<u>State v. Shove</u> , 113 Wn.2d 83, 776 P.2d 132 (1989).....	30
<u>State v. Templeton</u> , 148 Wn.2d 193, 59 P.3d 632 (2002).....	32
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	28
<u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	75, 77
<u>Washington Water Jets Ass'n v. Yarborough</u> , 151 Wn.2d 470, 90 P.3d 42 (2004).....	28

Washington Court of Appeals Decisions

<u>State v. Bankes</u> , 114 Wn. App. 280, 57 P.3d 284 (2002).....	38
<u>State v. Cho</u> , 108 Wn. App. 315, 30 P.3d 496 (2001).....	65
<u>State v. Clark</u> , 48 Wn. App. 850, 743 P.2d 822 (1989).....	17, 62, 67
<u>State v. Diaz-Cardona</u> , 123 Wn. App. 477, 98 P.3d 136 (2004).....	38
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997).....	75
<u>State v. Granacki</u> , 90 Wn. App. 598, 90 P.2d 667 (1997).....	63-67
<u>State v. Krause</u> , 82 Wn. App. 688, 919 P.2d 123 (1996), <u>rev. denied</u> , 131 Wn.2d 1007 (1997).....	58
<u>State v. Martinez</u> , 121 Wn. App. 21, 86 P.3d 1210 (2004).....	72, 74
<u>State v. Willis</u> , 64 Wn. App. 634, 825 P.2d 837 (1992).....	35, 39

Washington Constitutional Provisions

Const. art. I, § 3..... 48
Const. art. I, § 9.....3, 16
Const. art. I, § 10..... 3
Const art. I, § 22.....47, 59, 68, 70

United States Supreme Court Decisions

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004)
..... 49, 51, 59, 71, 73, 74
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). 71,
73, 74
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)
..... 17
California v. Beheler, 466 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275
(1983)..... 33, 36
California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413
(1984)..... 71, 75
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297
(1973)..... 47
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)
..... 40, 60
Crane v. Kentucky, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)
..... 48
Davis v. Alaska, 415 U.S. 308, 948 S.Ct. 1105, 39 L.Ed.2d 347 (1974) 29,
48, 49, 59, 61
Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 2329-30, 147
L.Ed.2d 405 (2000)..... 32
Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)
..... 32, 38
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)
..... 17, 26
Illinois v. Perkins, 496 U.S. 262, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990)
..... 32
Kuhlman v. Wilson, 477 U.S. 436, 106 S.Ct. 1616, 91 L.Ed.2d 264 (1986)
..... 22
Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952)
..... 49, 51
Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)19,
20-24, 26

<u>Massiah v. United States</u> , 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).....	18, 19, 21
<u>Mathis v. United States</u> , 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d (1968) .	35, 37, 38
<u>McNeil v. Wisconsin</u> , 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).....	17
<u>Michigan v. Jackson</u> , 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).....	18
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	4-6, 15, 32-34, 37-39
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).....	20, 33
<u>U.S. v. Henry</u> , 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 215 (1980)....	18, 19, 22, 23, 26
<u>United States v. Bagley</u> , 473 U.S. 667, 105 S.Ct 3375 87 L.Ed.2d 481 (1985).....	49
<u>United States v. Fellers</u> , 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).....	19, 22, 24
<u>Zadvydas v. Davis</u> , 533 U.S. 678, 121 S.Ct 2491, 150 L.Ed.2d 653 (2001)	29

United States Court of Appeals Decisions

<u>Cahill v. Rushen</u> , 678 F.2d 791 (9 th Cir. 1982).....	17
<u>Cervantes v. Walker</u> , 589 F.2d 424 (9 th Cir. 1978)	37, 38
<u>Osborn v. Shillinger</u> , 861 F.2d 612 (10 th Cir. 1988).....	63
<u>United States ex rel Clark v. Fike</u> , 538 F.2d 750 (7 th Cir. 1976)	62, 67
<u>United States v. Bender</u> , 221 F.3d 221 (1 st Cir. 2000).....	26
<u>United States v. Bird</u> , 287 F.3d 709 (8 th Cir. 2002).....	23
<u>United States v. Conley</u> , 779 F.2d 970, 972 (4 th Cir. 1985)	37, 38
<u>United States v. Green</u> , 592 A.2d 985 (D.C. 1991), <u>cert. granted</u> 504 U.S. 908 (1992) <u>vacated and cert. dismissed</u> , 507 U.S. 545 (1993)	36
<u>United States v. Kimball</u> , 884 F.2d 1284 (9 th Cir. 1989).....	23

United States Constitutional Provisions

U.S. Const. amend. 5	1, 4-5, 31-39, 47, 58, 63
U.S. Const. amend. 6.....	1, 3-4, 16-24, 39, 42, 47
U.S. Const. amend. 14.....	47, 59, 68, 70

Statutes

Former RCW 9.94A.110, recodified as RCW 9.94A.500 by Laws 2001,
ch. 10, § 6..... 27, 30
Former RCW 9.94A.130, recodified as RCW 9.94A.575 by Laws 2001,
ch. 10, § 6..... 30
RCW 69.50.401 54
RCW 9.95.200 4, 24, 27, 28, 29, 30
RCW 9A.36.041..... 54
RCW 9A.36.031..... 54
RCW 9A.72.120..... 65

Rules

CrR 3.5 2, 3, 16
CrR 7.1 30
CrR 7.2 27
CrR 7.6(a) 64
CrR 8.3(b) 70, 71
ER 401 51
ER 402 52
ER 615 62, 67

Law Reviews, Journals and Treatises

American Bar Association Guidelines for the Appointment and
Performance of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913
(2003)..... 50
Constitution Project, Mandatory Justice: Eighteen Reforms to the Death
Penalty (2001)..... 50, 55
H. Patrick Furman, Wrongful Convictions and the Accuracy of the
Criminal Justice System, 32-Sep. Colo. Law 11 (2003)..... 50
R. Michael Cassidy, “Soft Words of Hope:” Giglio, Accomplice
Witnesses, and the Problem of Implied Inducements, 98 Nw. L. Rev.
1129 (2004)..... 60

Other Authorities

1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and
Instructions, (5th ed.2000) 51
Commonwealth v. Perez, 581 N.E.2d 1010 (Mass. 1991)..... 36
Dodd v. State, 998 P.2d 778 (Okla.Crim.App. 2000)..... 59

J. Dwyer et al., <u>Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted</u> (Doubleday, 2000).....	49
<u>People v. Cahan</u> , 44 Cal.2d 434, 282 P.2d 905 (1955)	64
Province of Manitoba, Manitoba Justice, <u>The Inquiry Regarding Thomas Sophonow, Manitoba Guidelines Respecting the Use of Jailhouse Informants</u> (2001)	50
<u>State v. Evans</u> , 144 Ohio.App.3d 539, 760 N.E.2d 909, <u>discretionary appeal not allowed</u> , 757 N.E.2d 771 (Ohio 2001)	39
<u>State v. Perkins</u> , 753 S.W.2d 567 (Mo. App. 1988)	39
<u>United States. v. Lugo</u> , 289 F.Supp.2d 790 (S.D. Tex. 2003)	36, 37
<u>Welch v. Commonwealth</u> , 149 S.W.3d 407 (Ky. 2004).....	38

A. SUMMARY OF ARGUMENT

Eyewitness Yolanda Lopez linked Philip Lopez to the 1996 stabbing death of Rigel Jones, a high-profile crime which had been unsolved for a year. Darrell Everybodytalksabout was also present during the crime's commission but the State could only speculate, based on weak and circumstantial evidence, that he was a participant in the crime.

The scant evidence did not deter the prosecution from seeking a conviction for first-degree murder. In Everybodytalksabout's first trial, the State presented perjured testimony, resulting in a mistrial. In his second trial, the State introduced inadmissible character evidence, resulting in reversal of Everybodytalksabout's conviction by the Washington Supreme Court. In Everybodytalksabout's third trial, the State introduced statements obtained in violation of Everybodytalksabout's Fifth and Sixth Amendment rights, blocked Everybodytalksabout's efforts to obtain impeachment evidence, colluded in the destruction of evidence, tampered with the testimony of eyewitness Lopez and bought the unreliable testimony of an unprincipled prison snitch.

Because the trial errors deprived Everybodytalksabout of his due process right to a fair trial, he seeks reversal of his conviction.

B. ASSIGNMENTS OF ERROR

1. In violation of appellant's federal and state right to counsel and privilege against self-incrimination, the trial court erred in admitting appellant's statements to Diane Navicky.

2. In violation of appellant's federal and state constitutional rights to confront witnesses and present a defense, the trial court erred in limiting appellant's impeachment of prosecution witness Vincent Rain.

3. In violation of appellant's federal and state constitutional rights to due process of law and to a fair trial, the trial court erred in denying appellant's motions for mistrial.

4. In violation of appellant's federal and state constitutional right to due process of law, the trial court erred in denying appellant's motion to dismiss for destruction of evidence and prosecutorial misconduct.

5. In violation of appellant's federal and state constitutional rights to confront witnesses and present a defense, the trial court erred in granting the State's motion to prohibit the defense from presenting argument regarding Detective Ramirez's failure to tape Vincent Rain's initial statement.

6. The trial court erred in entering written conclusion of law on CrR 3.5 motion to suppress the defendant's statement(s) 4(b). CP 856.

7. The trial court erred in entering written conclusion of law on CrR 3.5 motion to suppress the defendant's statement(s) 4(c). CP 856.

8. The trial court erred in entering written conclusion of law on CrR 3.5 motion to suppress the defendant's statement(s) 4(d). CP 856.

9. The trial court erred in entering written conclusion of law on CrR 3.5 motion to suppress the defendant's statement(s) 4(e). CP 857.

10. Cumulative error deprived appellant of a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to counsel attaches at the initiation of adversarial judicial proceedings and protects an accused person through the duration of criminal proceedings. . A violation of the right to counsel occurs where, under circumstances that are the functional equivalent of interrogation, the government "deliberately elicits" incriminating statements from the accused. After appellant's 1997 conviction, a lead Department of Corrections (DOC) official, Diane Navicky, contacted him without counsel for the purpose of preparing a presentence report and solicited his "version of the offense." In response to this question, appellant incriminated himself. Did the State "deliberately elicit" the ensuing statement, requiring suppression? (Assignments of Error 1, 6-9)

2. 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. Did the State knowingly circumvent appellant's right to counsel, requiring suppression of the incriminating statement? (Assignments of Error 1, 6-9)

3. RCW 9.95.200 authorizes the court, prior to sentencing, to refer a case to DOC "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." By its plain terms, the statute does not authorize DOC to seek this information from the defendant directly, nor does it contemplate that the information be obtained in violation of the defendant's right to counsel. Did the trial court err in finding appellant's right to counsel was not violated because the DOC officer "was simply completing a standardized pre-sentence information form authorized by RCW 9.95.200"? (Assignments of Error 1, 6-9)

4. The constitutional privilege against self-incrimination prohibits the admission of statements made during "custodial interrogation" without Miranda¹ warnings. In State v. Sargent,² the Washington Supreme Court decided a convicted defendant held in the King County Jail was in custody

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

² State v. Sargent, 111 Wn.2d 651, 649-50, 762 P.2d 1127 (1988).

for Miranda purposes, and ordered suppression of his unwarned statements to a probation officer. Appellant was in custody in the King County Jail awaiting sentencing when he was interrogated by a DOC official without Miranda warnings. Should the trial court have suppressed appellant's statements, pursuant to Sargent? (Assignments of Error 1, 6-9)

5. For purposes of the Fifth Amendment, interrogation is defined 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." A DOC officer completing a presentence report asked appellant for his "version of the offense" for which he had been incarcerated. Did this inquiry constitute interrogation, requiring Miranda warnings? (Assignments of Error 1, 6-9)

6. Consistent with the Fifth Amendment, Washington courts require Miranda warnings be issued whenever a defendant in "custody" is subject to interrogation. Washington courts utilize the bright-line definition of custody established by the United States Supreme Court: "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Some jurisdictions find an incarcerated defendant must establish an "additional restraint" in order to gain Miranda's protections. This standard conflicts with United States Supreme Court and

Washington precedent. Should this Court reverse the trial court's application of the "additional restraint" standard to appellant's motion to suppress his unwarned statement? (Assignments of Error 1, 6-9)

7. The constitutional privilege against self-incrimination applies to a convicted defendant awaiting sentencing. To the extent courts from other jurisdictions have concluded that an incarcerated defendant must prove an "additional restraint" to obtain Miranda's protections, they have considered only the question of a defendant interrogated about a crime unrelated to the crime of incarceration. Navicky interrogated appellant while he was imprisoned in the King County Jail about the crime for which he was placed in custody. Was appellant entitled to Miranda warnings before the government solicited incriminating information from him? (Assignments of Error 1, 6-9)

8. Constitutional error is presumed to be prejudicial. A constitutional error requires reversal unless the State can prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Only circumstantial evidence linked appellant to a felony murder predicated on a robbery. The State therefore relied heavily on appellant's statement to Navicky that he assisted in the robbery to (1) prove guilt and (2) corroborate the testimony of other, unreliable witnesses. Does the constitutional error from the admission of the

statement require reversal of appellant's conviction? (Assignments of Error 1, 6-9)

9. An accused person has the constitutional right to confront the witnesses against him. This right includes the right to effective cross-examination and impeachment of prosecution witnesses. The trial court limited appellant's impeachment of a prosecution informant, even though the subject matter of the proposed cross-examination was relevant and necessary to both inform the jury of the value of the benefit conferred by the prosecution and allow the jury to meaningfully assess the informant's credibility. Did the trial court deny appellant his right to confrontation, requiring reversal of the conviction? (Assignment of Error 2)

10. An accused person has the constitutional right to present a defense. The defense theorized that the prosecution informant was a "liar for hire," but was barred from presenting evidence relevant and necessary to prove the extent of the informant's credibility problems and the value of the inducement offered by the prosecution for favorable testimony. Was appellant denied his constitutional right to present a defense, requiring reversal of the conviction? (Assignment of Error 2)

11. Courts have recognized that the testimony of jailhouse informants is presumptively unreliable. Consistent with due process, informant testimony should be viewed by jurors with great care and

defendants should be entitled to expose an informant's bias and motive for offering favorable testimony to the prosecution. Where the trial court limited appellant's impeachment of the prosecution informant, was appellant denied due process, requiring reversal of the conviction?

(Assignment of Error 2)

12. Consistent with the due process right to a fair trial, a mistrial is properly granted for egregious government misconduct, even absent a showing of prejudice. Yolonda Lopez was the sole eyewitness to the crime. In the second trial, Yolonda recanted her earlier testimony. Eugene Ramirez, the lead detective on the case, who was also permitted to remain in the courtroom as the State's "managing witness," drove Yolonda Lopez home after her first day of testimony and told her he was "displeased" with her testimony because it was inconsistent with her testimony in appellant's previous trial. Following this discussion, Yolonda was more compliant with the prosecution. Did the trial court err in denying appellant's motion for mistrial? (Assignment of Error 3)

13. Due process is violated where, irrespective of the prosecution's good or bad faith, the prosecution fails to give to the defense materially exculpatory evidence. Despite repeated defense requests for discovery of the prosecution informant's DOC file, the State not only failed to turn over the evidence but actively impeded appellant's efforts to

directly obtain the evidence. Where the DOC file contained materially relevant impeachment evidence, did the State's failure to produce the file violate due process, requiring dismissal? (Assignment of Error 4)

14. The State's failure to preserve potentially useful evidence violates due process where the evidence is destroyed in bad faith. Bad faith can be shown not only by intentional destruction of evidence but by failure to comply with established procedures. Where the case detective failed to preserve a tape "required for evidence," contrary to Seattle Police Department policy, did the detective act in bad faith, in violation of due process? (Assignment of Error 4)

15. Even where no error standing alone merits reversal, reversal may nonetheless be required where the errors if cumulated deprived an accused a fair trial. Must appellant's conviction be reversed under the cumulative error doctrine? (Assignment of Error 10)

D. STATEMENT OF THE CASE

1. The Alleged Incident. In the early morning hours of February 4, 1996, Carl Olsen and Samuel Franciscovich discovered the body of Rigel Jones lying face-up near a red pickup truck under the Alaskan Way Viaduct in Pioneer Square. 20RP 216-19.³ Jones had apparently been

³ The verbatim report of proceedings consists of 29 volumes of transcripts. These shall be referenced herein as follows:

stabbed. 20RP 234; 21RP 32-43. The truck's door was open and its engine was running but the truck's contents appeared to be undisturbed. 20RP 216-19, 25RP 169.

The previous evening, Jones had been out drinking with friends and an out-of-town date, Jessica Green, but after his friends went home,

5/30/03 RP	-	1RP
7/30/03 RP	-	2RP
7/11/03RP	-	3RP
8/22/03RP	-	4RP
9/5/03RP	-	5RP
9/17/03RP	-	6RP
9/29/03RP	-	7RP
10/1/03RP	-	8RP
10/15/03RP	-	9RP
10/16/03RP	-	10RP
10/27/03RP	-	11RP
10/28/03RP	-	12RP
10/29/03RP	-	13RP
10/30/03RP	-	14RP
11/5/03RP	-	15RP
11/6/03RP	-	16RP
11/10/03RP	-	17RP
11/12/03RP	-	18RP
11/13/03RP	-	19RP
11/17/03RP	-	20RP
11/18/03RP (Vol. 1)	-	21RP
11/18/03RP (Vol. 2)	-	22RP
11/19/03RP	-	23RP
11/24/03RP	-	24RP
11/25/03RP	-	25RP
12/1/03RP	-	26RP
12/2/03RP	-	27RP
12/3/03RP	-	28RP
12/19/03RP	-	29RP

Jones somehow got separated from Green. 20RP 36, 38, 102-03, 197-98. When Jones' body was found, he had neither a jacket, identification, nor a pager. 20RP 221; 22RP 15, 25RP 170. Witnesses could not say for sure whether Jones had been wearing a jacket or carrying his wallet and pager earlier in the evening, although they were fairly certain he had brought a new jacket with him. 20RP 17, 27-28, 55, 61-62, 68, 72, 100, 107, 147, 151, 162, 165.

The crime remained unsolved for approximately a year.

Ultimately, police located an eyewitness to the crime, Yolonda Lopez.⁴ 24RP 160, 168-69, 184; 26RP 59, 131-36. In 1996, Yolonda was dating Philip Lara Lopez. 24RP 68. One afternoon in early February 1996, Yolonda and Lopez were drinking with Darrell Everybodytalksabout. 24RP 71-73. Later that evening, they encountered a tall young man near the Alaskan Way viaduct who smiled when he saw them. 24RP 77, 82-84. Everybodytalksabout was several steps ahead and approached the young man, saying, "what's up, homes?" 24RP 96. Lopez left Yolonda's side and went to Everybodytalksabout and the young man. 24 RP 94-95.

Yolonda could hear that the three men were talking but could not hear what they were saying. 24RP 97. She crossed the street and turned

⁴ To distinguish witness Yolonda Lopez from Everybodytalksabout's co-defendant Philip Lara Lopez, Yolonda Lopez shall be referred to herein as "Yolonda" and Philip Lopez as "Lopez."

to see if Lopez was coming, and saw the three men “messaging around” and “wrestling.” 24RP 100-02, 105. Lopez was holding the young man’s arm but Yolonda could not tell what he was doing and kept walking. 24RP 107.

Some minutes later, at First Avenue and Yesler Way, Everybodytalksabout and Lopez caught up with Yolonda. Lopez had blood on his hands and shirt and his hair was messy. 24RP 110, 130-31, 187. He took off the bloody shirt and threw it away. They waited for a bus for a while, then Everybodytalksabout said, “let’s get out of here.” 24RP 110, 112. The following afternoon, Lopez confided to Yolonda that he got into a fight with a “white boy” and had “done” him “pretty bad” and did not know if he had killed him. 24RP 149.

On February 7, 1997, police interrogated Everybodytalksabout. 27RP 36, 39, 42-44, 45-46, 49, 50, 53, 92, 99-100; Supp. CP __ (St. Ex. 68). After initially denying knowledge of the incident, Everybodytalksabout explained to police that he recognized Jones as someone he had sold marijuana to previously. He denied seeing Lopez fight Jones and said he knew nothing about a knife. 27 RP 44-46, 99-100; Supp. CP __ (St. Ex. 68). He said he ran into Lopez on the street sometime after the incident and Lopez had a new jacket, which Lopez

later traded to a “Mexican” for heroin. 27RP 50, 53; Supp. CP ___ (St. Ex. 68).

2. Procedural History. On February 12, 1997, the King County Prosecuting Attorney charged Everybodytalksabout and Lopez with first-degree murder in connection with the alleged robbery and stabbing death of Rigel Jones. CP 1-2. At Everybodytalksabout’s first trial, after the State rested, it was discovered that Richard Prevost, a jailhouse informant who claimed to have been with Everybodytalksabout and Lopez when they committed the crime, was actually in custody in Skagit County at the time of the murder. State v. Everybodytalksabout, 145 Wn.2d 456, 460, 462, 39 P.3d 394 (2002).

The Honorable Larry Jordan granted Everybodytalksabout’s motion for mistrial and a second trial proceeded against Everybodytalksabout alone. Supp. CP ___, Sub No. 30A (Trial minutes). At this trial, the State called Detective Jeffrey Martin who, over Everybodytalksabout’s objection, was permitted to testify to Everybodytalksabout’s character traits for leadership and assertiveness as proof that Everybodytalksabout encouraged Lopez to rob and kill Jones. State v. Everybodytalksabout, 156 Wn.2d at 463-65. The Washington Supreme Court reversed Everybodytalksabout’s conviction, holding that given the weak and circumstantial evidence tending to show

Everybodytalksabout was an accomplice to the crime, error from admission of Martin's testimony was not harmless. Id. at 471.

The Supreme Court mandate was issued on March 18, 2002. CP 45. Everybodytalksabout was tried a third time before the Honorable Paris Kallas. On December 2, 2003, a jury convicted him of first-degree murder and, by special verdict, found he or an accomplice was armed with a deadly weapon during the commission of the crime. CP 834-35. Based on Everybodytalksabout's offender score of 2, the court imposed a sentence of 347 months confinement plus 24 months for the deadly weapon enhancement, for a total of 371 months. 29RP 36-37; CP 38, 41.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING EVERYBODYTALKSABOUT'S STATEMENTS OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION.

a. The Trial Court Erroneously Admitted

Everybodytalksabout's Statements to Diane Navicky. Following his conviction in 1997 but before sentencing, Everybodytalksabout was interviewed while in custody at the King County Jail by Diane Navicky, a lead DOC officer. Navicky had been assigned to prepare a presentence report. 10RP 29, 31.

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. Rather, he was escorted to the interview by a jail officer and, in order to leave, he 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 prior to conducting presentence interviews. 10RP 44. In this instance, however, she was unable to say whether she advised Everybodytalksabout of his Miranda rights prior to interviewing him, and neither her report nor her file contained a record of either a Miranda rights advisement or confidentiality waiver. 10RP 72-73.

In her presentence report, Navicky noted the “official version” of the event, which she derived from the police reports and certification for determination of probable cause. 10 RP 76-77; Supp. CP __ (St. Pretr. Ex. 1 at 3). After obtaining a basic social history, she then asked Everybodytalksabout for his “version of the offense.”⁵ 10RP 50, 55-56. Everybodytalksabout stated adamantly that he was innocent and did not

⁵ Navicky testified she asked him, “This is the part where the Department of Corrections would ask you for your version of the offense, and you don’t have to give us the police or the prosecuting [sic] but what you say happened on that night.” 10RP 50; see also FOF 1(o) and (p) (CP 854).

murder Jones, but only assisted in a robbery. 10RP 50, 56-57; Supp. CP ___ (St. 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; Supp. CP ___ (St. Pretr. Ex. 1 at 11).

Prior to the interview, Navicky did not contact Everybodytalksabout’s counsel to either request his permission to speak with Everybodytalksabout or notify him that she planned to interview Everybodytalksabout. 10RP 70-71. In fact, she testified, “it’s our custom that we never do that.” 10RP 71.

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 at trial. 16RP 6-24; 27RP 140-57; CP 851-57.⁶

b. The Admission of Everybodytalksabout’s Statement to Navicky Violated His Constitutional Right to Counsel. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S.

⁶ The court’s written findings of fact and conclusions of law pursuant to CrR 3.5 are attached as Appendix A.

Const. amend. 6; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (Sixth Amendment right to counsel in criminal proceedings applies to states through Fourteenth Amendment). Likewise, Article I, § 22 provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” The right to counsel under the Washington state constitution is coextensive with the right as provided under the Sixth Amendment. State v. Clark, 48 Wn. App. 850, 861, 743 P.2d 822 (1989).

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); Cahill v. Rushen, 678 F.2d 791, 795 (9th Cir. 1982) (holding right to counsel prevents state from using illegally-obtained statements at retrial after reversal of conviction).

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 (arraigned defendant’s incriminating statements inadmissible at trial when

made in response to “Christian burial speech” by police officer during four-hour car ride without the presence of counsel because the officer’s speech was tantamount to interrogation); 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).

i. The Sixth Amendment Bars the State From Introducing Statements That Have Been Deliberately Elicited From the Accused. In Massiah v. United States, the Supreme Court held the defendant’s Sixth Amendment right to counsel was violated when a co-defendant cooperating with government authorities deliberately elicited incriminating statements. Massiah v. United States, 377 U.S. 201, 205, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

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, 377 U.S. at 206; see also, U.S. 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); ⁷ 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); In re Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998) (“Once a defendant’s Sixth Amendment right attaches with the formal filing of charges, an undisclosed government agent may not deliberately elicit incriminating statements from the defendant.”).

Recently, the Supreme Court reaffirmed the Massiah and Henry holdings, suppressing statements made in response to “implici[t] questions” by federal agents who contacted the defendant at his home to discuss his use and distribution of methamphetamine. United States v. Fellers, 540 U.S. 519, 124 S.Ct. 1019, 1022-24, 157 L.Ed.2d 1016 (2004). The Court observed, “The definitions of “interrogation” under the Fifth and Sixth Amendments, if indeed the term ‘interrogation’ is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite

⁷ In Henry, the Court set forth a three-factor test to assess whether statements were deliberately elicited by informant in violation of Sixth Amendment protections. The three factors considered by the Henry Court were: “First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation with Nichols.” 447 U.S. at 270.

distinct.” Id. (citing Rhode Island v. Innis, 446 U.S. 291, 300 n. 4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).⁸ The Fellers Court thus held the absence of formal “interrogation” to be irrelevant to the Sixth Amendment analysis, finding there was “no question” the officers had “deliberately elicited” information from the defendant. 124 S.Ct. at 1023. Rather, the question whether the right has been violated depends on the nature of the contact itself. See Maine v. Moulton, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985) (Sixth Amendment violation found where incriminating conversation was recorded by paid jailhouse informant, although defendant initiated conversation).

Applying Moulton, the Washington Supreme Court found a violation of the Sixth Amendment right to counsel where, after conviction, a probation officer contacted the defendant in the absence of counsel and obtained a written confession which was then admitted at the defendant’s second trial. State v. Sargent, 111 Wn.2d 641, 645-46, 762 P.2d 1127 (1988). The 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 opportunity to confront the accused

⁸ In Innis, the Court 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.” 446 U.S. at 292.

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 court below speculated that because the Sixth Amendment portion of the Sargent opinion was signed by only three justices, the Court's "knowingly circumvent" standard might lack precedential value. 16RP 19. Under either the "knowingly circumvent" or the "deliberately elicit" standard, Navicky violated Everybodytalksabout's Sixth Amendment right to counsel.

ii. Navicky "Deliberately Elicited" The Incriminating Statement from Everybodytalksabout. When she interviewed Everybodytalksabout, Navicky was undisputably a government agent and her status was known to Everybodytalksabout. 10RP 46. Moreover, she expressly questioned him about the charged offense, explaining he need not tell her the prosecution's account and soliciting his "version" of what happened. 10RP 50, 55-56.

In conducting her analysis, the trial judge observed, "Looking at the deliberately-elicited-standard, the primary concern of Massiah and its

progeny is a secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.” 16RP 22 (emphasis added). But the court found the lack of “secret or evasive tactics” by Navicky dispelled a potential Sixth Amendment violation. 16RP 22.

The Fellers opinion makes clear that the government’s “tactics” in obtaining an incriminating statement have no relevance to the application of the “deliberately elicit” standard. 124 S.Ct. 1022-23. Rather, the “deliberately elicit” standard examines whether the government has engaged in the “functional equivalent” of interrogation. Moulton, 474 U.S. at 477. For this reason, mere passive listening by an informant will not always amount to a Sixth Amendment violation. Henry, 447 U.S. at 271 n. 9; Kuhlman v. Wilson, 477 U.S. 436, 460-61, 106 S.Ct. 1616, 91 L.Ed.2d 264 (1986) (no Sixth Amendment violation when: (1) the government merely placed the defendant in the cell with the informant; (2) the conversation was entirely spontaneous; (3) the informant asked no questions; and (4) the police told the informant only to listen for the identities of accomplices).

A comparison to the informant cases demonstrates the flaw in the court’s reasoning. Had a paid informant explicitly asked Everybodytalksabout to disclose his “version of the offense,” there would be no doubt that the question violated the right to counsel. Fellers, 124

S.Ct. at 1022-23 (2004) (“implicit questions” and “discussion” about defendant’s methamphetamine use constituted a Sixth Amendment violation); Henry, 447 U.S. at 273-74 (refusing to adopt less rigorous standard for violation by government informant); Moulton, 474 U.S. at 177 n. 14 (right to counsel violated “as soon as the State’s agent engaged Moulton in conversation about the charges pending against him.”).⁹

Furthermore, Navicky was familiar with the “official version” of the offense, and therefore knew Everybodytalksabout had confessed to being present when Lopez contacted Jones. 10 RP 76-77. Believing Everybodytalksabout’s statements to police were incriminating, the State introduced them at both of Everybodytalksabout’s trials. 26RP 106-07, 129. Given the substance of these statements, it is reasonably likely that Navicky would have known a further inquiry into Everybodytalksabout’s “version of the offense” would be likely to elicit an incriminating response.

⁹ See also United States v. Bird, 287 F.3d 709, 714 (8th Cir. 2002) (affirming suppression of defendant’s statements where federal investigator worked in tandem with the tribal criminal investigator pursuing identical tribal allegations to deliberately elicit information from defendant); United States v. Kimball, 884 F.2d 1284, 1277-78 (9th Cir. 1989) (applying “deliberately elicit” standard to conclude contacts by undercover DEA agents with defendant in prison violated Sixth Amendment).

Navicky deliberately elicited the incriminating statement from Everybodytalksabout, in violation of his right to counsel. Fellers, 124 S.Ct. at 1022-24; Moulton, 474 U.S. at 176; Sargent, 111 Wn.2d at 645-46;. The statement should have been suppressed.

iii. Navicky Knowingly Circumvented

Everybodytalksabout's Right to Counsel. According to the Sargent Court, the standard for assessing whether the government has knowingly circumvented the right to counsel is objective: whether the State "knew or should have known that the contact in the absence of counsel would prejudice the defendant." 111 Wn.2d at 645.

The trial court nonetheless found,

CCO Navicky neither knew or had reason to believe that Mr. Everybodytalksabout would make incriminating statements. She had not encouraged him to do so, and she had no reason to believe he was on the verge of doing so. To the contrary, she was simply completing a standardized pre-sentence information form authorized by RCW 9.95.200. The statute directs the CCO to investigate and report to the court, "Upon the circumstances surrounding the crime and concerning the defendant, his prior record and his family surroundings and environment." Asking a defendant to give his version of the circumstances of the crime as required by the statute is a far cry from asking a defendant to confess, as the CCO did in Sargent.

16RP 21-22. The court also distinguished Sargent because

Everybodytalksabout did not tell Navicky he intended to appeal his conviction. 16RP 24.

The trial court's conclusion that Navicky did not knowingly circumvent Everybodytalksabout's right to counsel is neither sound nor reasonable. 16RP 21-22. It strains common sense to imagine that a state agent—particularly an experienced DOC official—would expressly ask a convicted defendant for his “version of the offense” without having a reason to believe that the question would be likely to elicit an incriminating response. That Navicky did so politely and without ill intent, unlike the probation officer in Sargent, does not eliminate the Sixth Amendment problem. 111 Wn.2d at 645.

Whether Everybodytalksabout advised Navicky of his intent to appeal should have been irrelevant to the court's analysis. An unsophisticated defendant may not appreciate that his confession at a presentence interview could be used against him at a subsequent trial, in the event his conviction is reversed. Furthermore, depending on the timing of the presentence interview, a defendant may not have had an opportunity to consult with counsel regarding the decision whether or not to appeal. Finally, when a presentence interview is conducted, a defendant is still awaiting sentencing. His disclosures may affect the court's sentencing decision. It is therefore fundamentally unfair to allow the determination whether Sixth Amendment protections apply to turn on

whether or not the state agent conducting the presentence interview was actually informed the defendant intended to appeal.

In any event, Navicky certainly must have known an appeal was possible, especially given the seriousness of the conviction. To require a convicted defendant who is ignorant of the law to inform a state agent that he intends to appeal his conviction in order to preserve his Sixth Amendment right critically undermines that right. “[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, 372 U.S. at 344-45). This is particular true here, where in order to appreciate the reasons for a possible appeal, Everybodytalksabout would have had to understand two complicated areas of criminal law: felony murder and accomplice liability.

Federal authority supports Everybodytalksabout’s position. United States v. Bender, 221 F.3d 221, 268-69 (1st Cir. 2000) (Sixth Amendment violation found where government agent investigating unrelated crimes “must have known” that its agent was likely to obtain incriminating information about charged offense); Henry, 447 U.S. at 274-75 (finding Sixth Amendment violation where paid jailhouse informant was placed in defendant’s cell for the purpose of obtaining statements).

According to the trial court's reasoning, any straightforward interrogation of a defendant by a government agent during a critical stage, if conducted in a friendly and professional manner, would not violate the Sixth Amendment. As observed by the Sargent Court, the presence or absence of subterfuge is irrelevant. 111 Wn.2d at 645. By questioning Everybodytalksabout about the offense without the presence of counsel, Navicky violated his right to counsel. The statement should have been suppressed.

iv. The Provisions of RCW 9.95.200 Do Not Excuse the Sixth Amendment Violation. The trial court found Navicky did not violate Everybodytalksabout's right to counsel because she "was simply completing a standardized pre-sentence information form authorized by RCW 9.95.200." 16RP 21-22. The trial court was incorrect for three reasons. First, to the extent that the statute conflicts with a constitutional protection, the statute may not be applied. Second, rules of statutory construction do not support the trial court's reading of RCW 9.95.200. Third, the preparation of presentence reports following felony convictions is governed instead by former RCW 9.94A.110 and CrR 7.2.

a) To the Extent the Statute is Unconstitutional, it May Not Be Applied. Courts will not construe an unconstitutional statute. See, e.g., State v. Williams, 144 Wn.2d 197, 208,

211, 26 P.3d 890 (2001) (striking misdemeanor harassment statute criminalizing protected speech); cf., Washington Water Jets Ass'n v. Yarborough, 151 Wn.2d 470, 502, 90 P.3d 42 (2004) (deference to legislative intent improper where statute is unconstitutional). To the extent the trial court correctly construed RCW 9.95.200 as encouraging violation of an accused person's right to counsel, the statute was not constitutional and should not have been applied.

b) Rules of Statutory Construction Oppose the Court's Interpretation. In relevant part, 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.

Nowhere does the statute require—or even authorize—that the “circumstances surrounding the crime” be obtained directly from the defendant. In fact, the statute does not require 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 the like.

An interpretation of RCW 9.95.200 which does not require DOC officials to solicit information about “the circumstances surrounding the

crime” directly from the defendant is consistent with settled principles of statutory construction. In construing a statute, a reviewing court’s primary duty is to discern and implement the intent of the Legislature. State v. J.P., 149 Wn.2d 444, 450, 904 P.2d 754 (1995). When statutory language is clear and unequivocal, the Court must “assume that the Legislature meant exactly what it said and apply the statute as written.” Duke v. Boyd, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). Moreover, a statute must be construed to avoid absurd results. J.P., 149 Wn.2d at 450. “[I]t will not be presumed that the legislature intended absurd results.” Id.

An interpretation of RCW 9.95.200 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. Zadvydas v. Davis, 533 U.S. 678, 689, 121 S.Ct 2491, 150 L.Ed.2d 653 (2001). The trial court’s determination that Navicky’s contact was authorized by RCW 9.95.200 was erroneous.

c) RCW 9.95.200 is Inapplicable. As RCW 9.95.200 pertains specifically to probation, it is doubtful whether this statute even applies to the question before the court. Former RCW 9.94A.130 (eliminating a trial court’s discretion to suspend a sentence

imposed for a felony conviction) recodified as RCW 9.94A.575 by Laws 2001, ch. 10, § 6; State v. Shove, 113 Wn.2d 83, 90, 776 P.2d 132 (1989).

Former RCW 9.94A.110, however, provides for the preparation of presentence reports following felony convictions. Former RCW 9.94A.110, recodified as RCW 9.94A.500 by Laws 2001, ch. 10, § 6.

Under the statute's terms, the trial court has discretion to order a presentence report, giving priority to felony sex offenders. Id. The statute does not specify the anticipated contents of the presentence report.

CrR 7.1, governing "Procedures Before Sentencing", provides more direction. 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).

CrR 7.1 is more general than RCW 9.95.200. Like RCW 9.95.200, however, the court rule steers clear of ordering DOC to speak directly to a

convicted defendant and supports Everybodytalksabout's argument that Navicky's inquiry was improper.

Further, it is plain that an inquiry into the circumstances surrounding the commission of the crime may or may not be warranted, depending on the procedural posture of the case. A defendant who has pleaded guilty, for example, may be more willing to offer the court some insight into the circumstances affecting his behavior than a defendant who has asserted his innocence throughout the proceedings and been convicted. There is no basis to conclude, therefore, that a DOC official conducting a presentence interview should always question a defendant about the offense of conviction, or that such questions should occur outside of the presence of counsel.

Navicky obtained statements from Everybodytalksabout in violation of his right to counsel. The statements should not have been introduced at his subsequent trial.

c. The Admission of Everybodytalksabout's Statement to Navicky Violated Everybodytalksabout's Constitutional Privilege Against Self-Incrimination. It is axiomatic that the privilege against self-incrimination prohibits admitting statements given by a suspect during

“custodial interrogation” without a prior warning. U.S. Const. amend. 5;¹⁰ 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); Const. art. I, § 9;¹¹ State v. Templeton, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (Article I, § 9 is equivalent to Fifth Amendment and should receive “the same definition and interpretation as that which has been given to” the Fifth Amendment by the Supreme Court) (internal citations omitted). Miranda is not just a prophylactic rule but rather a constitutionally-based rule of law. Dickerson v. United States, 530 U.S. 428, 431, 120 S.Ct. 2326, 2329-30, 147 L.Ed.2d 405 (2000).

Custodial interrogation means “questioning initiated by law enforcement officers after a person has been taken into custody....” Miranda, 384 U.S. at 444.; Illinois v. Perkins, 496 U.S. 262, 296, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). When a suspect is in custody, the presumption that statements made in response to interrogation are voluntary disappears. State v. Sargent, 111 Wn.2d at 648.

i. Navicky Interrogated Everybodytalksabout.

Interrogation is defined as “any words or actions on the part of the police

¹⁰ The self-incrimination clause of the Fifth Amendment provides: “No person... shall be compelled in any criminal case to be a witness against himself...”

¹¹ In relevant part, Article I, § 9 provides, “No person shall be compelled in any criminal case to give evidence against himself...”

(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.” Innis, 446 U.S. at 292; Sargent, 111 Wn.2d at 650. Under this standard, Navicky’s inquiry into Everybodytalksabout’s “version” of the offense constituted interrogation. Id. at 651 (noting that standard is “what the officer knows or ought to know will be the result of his words and acts.”) (emphasis in original).

ii. Under Sargent, Everybodytalksabout’s Interrogation in the Locked Jail Interview Room Was Custodial. The critical inquiry in determining whether an individual in a prison or jail setting is in custody for Miranda purposes depends on the extent to which his freedom of movement was restricted. Sargent, 111 Wn.2d at 649-50; State v. Post, 118 Wn.2d 596, 606, 826 P.2d 172 (1992). The dispositive question is whether there was a “formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” California v. Beheler, 466 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)).

Applying this analysis, it is plain that Everybodytalksabout was in custody. Sargent, 111 Wn.2d at 649. Thus, Everybodytalksabout’s statements were presumptively involuntary and should have been excluded.

In Sargent, a probation officer preparing a presentence report met with Sargent in the visiting area of the King County Jail, in a booth separated by a glass wall. 111 Wn.2d at 642. Sargent was locked into the booth. Id. The 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.” 111 Wn.2d at 649.

Navicky’s interview of Everybodytalksabout took place under nearly identical circumstances, possibly in the very same visiting area described in Sargent. 10RP 66-68. While noting that the passage of time had to some degree eroded Navicky’s memory of the interview, the trial court found Navicky believed the interview room was locked and that there was a buzzer system to get in and out of the interview room. 16RP 16-17; CP 853 (Finding of Fact 1(j)). Moreover, the court expressly declined to find Navicky advised Everybodytalksabout of his Miranda rights. CP 856 (Conclusion of law (a)).¹² Under Sargent, the court should have excluded the unwarned statements. 111 Wn.2d at 649-50; Mathis v.

¹² Although it is listed in the section entitled, “Conclusions of Law as to the Admissibility of the Defendant’s Statement(s)”, the determination that Navicky did not advise Everybodytalksabout of his Miranda rights is clearly a factual finding.

United States, 391 U.S. 1, 4-5, 88 S.Ct. 1503, 20 L.Ed.2d (1968)

(questioning of inmate on unrelated charge violated Miranda)

The court nonetheless unreasonably failed to apply controlling Washington Supreme Court precedent and instead relied on the Court's Post opinion. CP 856 (Conclusion of Law (b)). In Post, the Court found admissible the defendant's statements to a DOC psychologist regarding future dangerousness made while the defendant was on work release. 118 Wn.2d at 606-07. Post must be distinguished, however, as Post was not incarcerated when the interview with the psychologist took place and the record failed to indicate the location of the interview. 118 Wn.2d at 606. While finding Post was technically in DOC custody, the Court concluded that the restrictions on his movement did not equate to those associated with formal arrest. Id.

Subsequently analyzing Post and Sargent, Division Three of this Court found Post's absence of a record dispositive. State v. Willis, 64 Wn. App. 634, 637 n. 2, 825 P.2d 837 (1992) (applying Sargent and holding that defendant who was locked in his jail cell during a police interview was "unquestionably in custody").

iii. The Trial Court's "Additional Restraint"

Analysis Does Not Square With Settled Fifth Amendment Jurisprudence.

When Navicky contacted and interrogated Everybodytalksabout, he was

under the following restraints in addition to being held in custody at the jail: (1) he was interviewed in a secure area in a locked glass booth; (2) he was not free to move about on his own and (3) in order to leave, he had to press a buzzer and await an officer to escort him to his cell. 10RP 66-68.

Notwithstanding these additional restraints, the trial court concluded

Navicky's contact with Everybodytalksabout was not custodial because,

no further limitations were placed on the defendant's already limited freedom of movement as a result of Ms. Navicky's [sic] interview. The defendant was not commanded to attend the interview, he was not handcuffed during the interview, he was not compelled to remain in the room during the interview, he was free to leave the room at a time of his own choosing, and indeed did so.

CP 856.

Courts in other jurisdictions addressing the question whether interrogation of an incarcerated inmate presumptively violates the Fifth Amendment right to counsel are divided.¹³ The courts that have decided to apply a "additional restraint" test have, however, done so by avoiding the Beheler standard, which requires suppression of a statement if

¹³ Compare United States v. Green, 592 A.2d 985 (D.C. 1991) (bright-line rule) cert. granted 504 U.S. 908 (1992) vacated and cert. dismissed, 507 U.S. 545 (1993); Commonwealth v. Perez, 581 N.E.2d 1010, 1016 (Mass. 1991) (bright-line rule); and United States v. Lugo, 289 F.Supp.2d 790 (S.D. Tex. 2003) (bright-line rule) with Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978) (applying "additional restraint" test) and United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985) ("additional restraint" test).

interrogation occurred under circumstances equating to formal arrest. 466 U.S. at 1125.

In United States v. Conley, for example, the Court decided there was no “additional restraint” even though the defendant was (1) wounded; (2) handcuffed and (3) in full restraints when he was questioned. 779 F.2d 970, 972 (4th Cir. 1985). Likewise, in Cervantes v. Walker, the Court claimed the defendant “was residing” in jail when the questioning occurred and lamented that adoption of a bright-line custody rule would provide “greater protection to a prisoner than his non-imprisoned counterpart.” 589 F.2d 424, 427 (9th Cir. 1978).

This result-driven analysis does not square with the Fifth Amendment. Mathis, 391 U.S. at 4-5 (finding “nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.”).

As stated by the federal district court in United States v. Lugo,

The obvious difficulty with asserting that the Defendant was not “in custody” is that, by definition, he was. Nambo was in jail for a state offense, and according to established doctrine a suspect under formal arrest is typically thought to be “in custody” for Miranda purposes.

289 F.Supp.2d 790, 795 (S.D. Tex. 2003).

a) The “Additional Restraint” Test Should Not Have Been Applied Because Everybodytalksabout Was Interrogated About the Crime For Which He Was Incarcerated. Assuming *arguendo* the “additional restraint” test may be applied, it should not be used to evaluate questioning of the defendant on the crime of incarceration. In Cervantes and Conley, government officials interrogated the defendants about criminal activity unrelated to the crime for which the defendant had been incarcerated. Cervantes, 589 F.2d at 427; Conley, 779 F.2d at 971. Where, as here, the government questions an incarcerated defendant about the crime for which he has been placed in custody, the interrogation violates the Fifth and Sixth Amendments. Edwards, 451 U.S. at 484-85; Mathis, 391 U.S. at 4.

Washington Courts have recognized that a defendant “has a Fifth Amendment privilege against self-incrimination at the punishment phase of his trial, and therefore, the mere finding of guilt does not terminate the privilege against self-incrimination.” State v. Diaz-Cardona, 123 Wn. App. 477, 98 P.3d 136, 137 (2004); State v. Bankes, 114 Wn. App. 280, 288, 57 P.3d 284 (2002). Other state courts have reached similar results. See, e.g., Welch v. Commonwealth, 149 S.W.3d 407, 410 (Ky. 2004) (juvenile committed to sex offender treatment program at juvenile facility in custody for Miranda purposes); State v. Evans, 144 Ohio.App.3d 539,

760 N.E.2d 909 (suppressing juvenile's statements made to counselors while in involuntary treatment) discretionary appeal not allowed, 757 N.E.2d 771 (Ohio 2001); State v. Perkins, 753 S.W.2d 567, 570 (Mo. App. 1988) (suspect incarcerated on burglary charges in custody for Miranda purposes).

b) Assuming the "Additional Restraint" Standard Should Be Applied, Everybodytalksabout Was Under Additional Restraint When Navicky Interrogated Him. As noted, the Sargent Court determined that where the defendant was "in jail, locked in the interview booth," those "restraints on his freedom of movement constitute[d] custody for Miranda purposes." 111 Wn.2d at 649; Willis, 634 Wn. App. at 637 n. 2. Everybodytalksabout was subject to identical restraints as Sargent and Willis. The trial court erred in reaching a contrary conclusion.

Everybodytalksabout was in custody when Navicky interrogated him about the offense. The statements should have been suppressed.

d. The Constitutional Error From the Fifth and Sixth Amendment Violations Prejudiced Everybodytalksabout. A constitutional error is presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). On appeal, the State bears the burden of proving beyond a reasonable doubt that the jury would have reached the same result absent

the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State must point to sufficient untainted evidence in the record as to inevitably lead to a finding of guilt. Id. In this case, the prosecution cannot prove that error from the trial court's violation of Everybodytalksabout's constitutional right to counsel and privilege against self-incrimination was harmless beyond a reasonable doubt.

Applying the far more liberal standard of review for evidentiary error, the Washington Supreme Court concluded Everybodytalksabout's right to a fair trial had been violated by the admission of evidence tending to prove he participated with Lopez in killing Jones. 145 Wn.2d at 468-73.¹⁴ The Court conducted a detailed analysis of the remaining evidence and decided that there "was not sufficient evidence to convict [Everybodytalksabout] without [Detective Martin's testimony]." 145 Wn.2d at 471.

At Everybodytalksabout's trial following remand, Yolonda testified she did not observe or overhear Everybodytalksabout interact with Jones after his initial greeting to Jones, and that her prior inconsistent

¹⁴ "An evidentiary error which is not of constitutional magnitude... requires reversal only if the error, within reasonable probability, materially affected the outcome." State v. Everybodytalksabout, 145 Wn.2d at 468-69 (quoting State v. Stenson, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997)).

testimony had been coerced, to a large extent, by threats from Detective Ramirez.¹⁵ 25RP 65-66, 94, 97, 99, 108. The State sought to bolster its weak case in two ways: by the introduction of Everybodytalksabout's admission to Navicky and through the testimony of a prison informant who claimed Everybodytalksabout described the crime to him. See Argument 2, infra. But the State's principal evidence of guilt was Everybodytalksabout's statement to Navicky. Much as the State relied on Detective Martin's testimony to prove accomplice liability in the prior proceeding, following remand, the State depended on the Navicky testimony to prove Everybodytalksabout's participation in the robbery. 145 Wn.2d at 471-73. The statement to Navicky was the linchpin of the State's case.

In closing argument, the prosecutor referenced Everybodytalksabout's statement to Navicky eight times. 28RP 56, 57, 60, 64, 66, 70, 80, 85. The prosecutor relied on 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 contended, "let me say right here that [Everybodytalksabout's] statement to Diane Navicky is enough to convict

¹⁵ The issue of Ramirez's efforts to influence Yolonda's testimony is discussed in greater detail in argument section 3, infra.

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.” 28 RP 66.

In rebuttal closing argument, the prosecutor reiterated this theme. 28RP 154, 155-56. The prosecutor characterized Navicky as “really the most credible person we had testify in this trial,” again emphasized Navicky’s investment in ensuring her report was accurate and told the jury her testimony corroborated that of the unreliable prosecution snitch. 28RP 154, 156.

In short, by the prosecutor’s own admission, Navicky’s testimony was crucial to the State winning its case. The State cannot, therefore, meet its heavy burden of overcoming the presumption of prejudice from the

erroneous admission of this evidence. Reversal of the conviction and remand for a new trial is required. Easter, 130 Wn.2d at 243.

2. THE TRIAL COURT VIOLATED
EVERYBODYTALKSABOUT'S CONSTITUTIONAL
RIGHT TO CONFRONT WITNESSES BY LIMITING HIS
ABILITY TO IMPEACH THE PROSECUTION
INFORMANT.

a. The Trial Court Limited Everybodytalksabout's Ability to Adequately Confront Prosecution Informant Vincent Rain. In addition to relying on Navicky's testimony, the prosecution bought the cooperation of Vincent Rain, a prison snitch. Rain was housed with Everybodytalksabout in 1997-99 in the "native cell" at the Washington State Penitentiary in Walla Walla and claimed Everybodytalksabout and Lopez related the details of the crime to him. 15RP 15, 24-25; 22RP 65-69; 23RP 7-12, 58, 61, 69, 143-45, 162; 24RP 18-27. At the time, Rain, a repeat offender, was incarcerated on a conviction for third-degree assault of a child with sexual motivation. CP 725, 23RP 15-18, 71.

Rain did not hesitate to relate the alleged disclosures to his DOC counselor, who reportedly advised him to contact the lead detective on the case, Eugene Ramirez, to tell him what he had heard. 15RP 13, 60-61. Rain's first contact with Ramirez occurred on February 22, 1999. 15RP 13. After receiving Rain's report, Ramirez allegedly thanked him for the information and told him that because Everybodytalksabout had already

been convicted, Ramirez did not need Rain's assistance. 15RP 16-17, 61. Nonetheless, Ramirez accepted between 10 and 20 collect telephone calls from Rain which he then transferred to Rain's wife, Melody, who was also the victim of a domestic violence assault charge which Rain committed following his release from custody on the sex offense. 15RP 34-35, 62-63, 71.

When Everybodytalksabout's conviction was reversed by the Washington Supreme Court in 2002, Ramirez contacted Rain's counselor in an effort to locate Rain. 15RP 18. Rain was in the Spokane County Jail on a new third-degree assault charge involving his wife, and consented to testify against Everybodytalksabout in exchange for certain favors from the prosecution. 15RP 21.

At trial, Rain claimed Everybodytalksabout told him that he and Lopez pretended they would sell drugs to Jones in order to rob him. 22RP 67-68; 23RP 7-8. According to Rain, the men argued and started to fight. 22RP 68; 23 RP 61. Allegedly, Everybodytalksabout called for Lopez to help him and Lopez stabbed Jones as Everybodytalksabout held him. 22RP 68-69, 23RP 143. Everybodytalksabout did not know Lopez was armed when they planned the robbery. 23RP 69.

According to Rain, Everybodytalksabout and Lopez stole Jones's jacket, which they gave to Lopez's girlfriend, "Yolee." 23RP 9, 63. Rain

claimed that in the prison yard, Everybodytalksabout and Lopez joked about the incident. Everybodytalksabout said to Lopez, “You did it,” or “you killed him” and pretended to stab Lopez. 23RP 12, 144. Rain claimed he had taken notes of his conversations with Everybodytalksabout but “mice got ahold” of his notes. 23RP 63.

In exchange for Rain’s cooperation,

- (1) Ramirez facilitated numerous telephone calls between Rain and his wife, the victim of his crime of incarceration and a subsequent assault in the prison visiting room. 15RP 34-35. Most of these were collect telephone calls from the prison, which Ramirez transferred at no charge to Rain. *Id.*
- (2) Ramirez assisted Rain in his transfer from Walla Walla to a minimum security facility at Monroe, and acted as a go-between for Rain with the prosecution regarding the transfer. 15RP 37, 41-42, 47.
- (3) The prosecution arranged for Rain’s transfer and release to Colorado, even though his proposed residence was that of the victim in his case, the Colorado DOC found parole to the victim’s residence “would equate a reckless disregard for the safety of the victim” and Rain did not meet the criteria for acceptance in Colorado under the interstate compact. CP 707, 709, 712, 714-15; 14RP 47-49, 23RP 17-22.
- (4) The prosecution paid for Rain to stay in a motel for one week in Grand Junction, Colorado and paid his travel expenses. CP 707, 710, 715; 14RP 47-49; 23RP 84-85.
- (5) The trial prosecutors gave Rain a ride from Spokane to Seattle, purchased him a bus ticket from Seattle to Spokane, gave him cash and bought him a meal. 14RP 49, 23RP 112; CP 702.

Everybodytalksabout sought to confront Rain by exposing his bias, untrustworthiness and motive to lie. CP 691-702; 14RP 30-104. In

addition to introducing evidence of Rain's specific bargain with the prosecution, Everybodytalksabout requested to introduce evidence that Rain's status as a sex offender factored into his claimed concern for his safety, as other inmates were aware of that status and had threatened him. 14RP 93-94, 22RP 53-55; CP 700, 735.

Everybodytalksabout also sought to introduce Rain's specific infraction history, which included kicking his wife during a prison visit, narcotics trafficking, possession of stolen property, and inciting other inmates to violence, for which Rain was placed in administrative segregation and suffered losses of good time and visiting privileges while in prison. 14RP 31-32, 51-52, 54; CP 698-702, CP 733-34, CP 743-75. According to Rain's DOC file, Rain repeatedly denied even witnessed infractions, claiming, for example, the visiting room guards were "liars"; that his wife was "being jealous"; and that he did not know drug dealers were "coming to visit me." CP 734, 743, 773.

Everybodytalksabout also moved to admit Rain's history of misconduct with his wife, including probation violations and his efforts to solicit assistance with those violations from the prosecution, as relevant to his bias and motive for seeking transfer to Colorado. 14RP 31-32, 49, 58-59, 63, 68-69. At trial, Everybodytalksabout also sought to impeach Rain by showing that when he was frustrated by the prosecution's decision not

to assist him with his probation matters, Rain refused to answer many of the defense investigator's questions, asserted his Fifth Amendment privilege, and threatened to get a lawyer. 19RP 3-4, 23RP 123.

The court barred Everybodytalksabout from introducing evidence about Rain's status as a sex offender. 17RP 4-5, 22RP 53-55. Except for the possession of stolen property infraction, the trial court excluded evidence of Rain's specific prison infractions. 14RP 55-57. The court denied Everybodytalksabout's motion to introduce evidence of Rain's specific probation violations, limiting cross-examination to Rain's general performance while on probation. 14RP 68, 72-74, CP 701. The court also excluded evidence of Rain's threats to get a lawyer or assert his Fifth Amendment privilege. 23RP 132-33.

b. Consistent With his Constitutional Rights to a Defense and to Confront Witnesses, Everybodytalksabout Was Entitled to Adequately Impeach the Prosecution Informant. An accused is assured the right to fairly defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to present a complete defense is protected by the Sixth¹⁶ and

¹⁶ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him. . . ."

Fourteenth¹⁷ Amendments of the United States Constitution. U.S. Const. amends. 6, 14; Const. art I, §§ 3,¹⁸ 22;¹⁹ Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

An accused person also has the right to confront the witnesses against him. U.S. Const. amend. 6; Const. art. I, § 22. Under the confrontation clauses, effective confrontation means not only the right to cross-examine adversarial witnesses, but the right to impeach witnesses by “revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” Davis v. Alaska, 415 U.S. 308, 316, 948 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (reversing conviction where defense was prevented from exposing jury to facts from which inferences could be drawn as to a witness’s credibility); State v. Hudlow, 99 Wn.2d 1, 15, 59 P.2d 514 (1983) (holding limitation on cross-examination must be justified by “compelling state interest”).

¹⁷ The Fourteenth Amendment includes the guarantee that no state shall “deprive any citizen of life, liberty, or property, without due process of law. . . .”

¹⁸ Article I, § 3 of the Washington Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.”

¹⁹ Article I, § 22 of the Washington Constitution provides in pertinent part: “In criminal prosecutions, the accused shall have the right... to meet the witnesses against him face to face...”

The Davis Court’s holding prohibits “direct restriction on the scope of cross-examination of a crucial prosecution witness.” United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct 3375 87 L.Ed.2d 481 (1985). “Whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question.” As such, the right must be “zealously guarded.”

i. Jailhouse Informants are Presumptively

Unreliable. The testimony of a prison informant, who has been compensated by the government to deliver favorable testimony in a criminal prosecution, is inherently untrustworthy. Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 1278, 157 L.Ed.2d 1166 (2004);²⁰ Lee v. United States, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed.2d 1270 (1952).

Commentators have observed the correlation between the use of informant testimony and wrongful conviction. See e.g., J. Dwyer et al., Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted 263 (Doubleday, 2000) (after conducting a study of 67 wrongful conviction cases in the United States, the Innocence Project determined that 15 resulted from the use of jailhouse informants); American Bar Association Guidelines for the Appointment and

²⁰ At the time of this writing, citations to the United States Reporter were not available on Westlaw.

Performance of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 934 n. 50, 1017 n. 198 (2003); H. Patrick Furman, Wrongful Convictions and the Accuracy of the Criminal Justice System, 32-Sep. Colo. Law 11, 12 (2003).

Georgetown University's bipartisan Constitution Project has observed,

[a] category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony.

Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 52 (2001) (hereafter "Mandatory Justice").²¹

The unreliability of government informants and the contribution of informant testimony to the incidence of wrongful conviction prompted the Manitoba province to bar informant testimony except in the most limited circumstances, subject to rigorous safeguards. Province of Manitoba, Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Manitoba Guidelines Respecting the Use of Jailhouse Informants (2001).²²

²¹ Available at:

<http://www.constitutionproject.org/dpi/MandatoryJustice.pdf>

²² Available at:

<http://www.gov.mb.ca/justice/sophonow/recommendations/>

ii. The Trial Court Erred in Limiting

Everybodytalksabout's Impeachment of Rain. In federal courts, the use of informant testimony is usually accompanied by an instruction requiring the jury to view the testimony with "caution" or "great care." Banks, supra, 124 S.Ct. at 1278 (citing 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on informant instruction)). In the instant case, the trial court did not similarly instruct the jury to use caution in assessing Rain's credibility.²³ Thus, it was of integral importance that Everybodytalksabout be able to effectively impeach Rain's credibility in order to present his defense and properly confront Rain's otherwise devastating testimony.

Moreover, the evidence excluded by the trial court was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. . . ." (emphasis added). ER 401. "The

english.html#jailhouse

²³ The court warned the jury that "the testimony of an accomplice, given on behalf of the state, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution..." CP 795 (emphasis added). The instruction related to Lopez's reliability, not Rain's. 24RP 149; 28RP 101-02.

threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.” State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). “All relevant evidence is admissible” unless it violates the constitution or is barred by other evidentiary rules or regulations. ER 402.

a) Rain’s Status as a Sex Offender. The trial court prevented Everybodytalksabout from informing the jury of Rain’s sex offender status, finding the defense did not establish a nexus between Rain’s sex offense and his fears for his safety. 22RP 53-55. This testimony, by the court’s own admission, would have been relevant to prove Rain’s strong incentive to cooperate with the prosecution as well as the value of the benefit of being transferred to Monroe, where his prior history would have been unknown to other inmates. Id.; CP 740.²⁴ The evidence also would have been relevant to rebut the inference that Rain desired transfer because he felt threatened by Everybodytalksabout. 17RP 6-8.

The court mistakenly sought proof of the nexus in Rain’s own self-serving pretrial interview, in which he predictably insinuated Everybodytalksabout was responsible for any threat to his safety. 17RP 5; Supp. CP __ (St. Pretr. Ex. 13 at 26). It is not clear why the court

²⁴ A “suitability review” dated June 20, 2002, indicated that because Rain was a Level 3 Sex Offender, he should not have been placed at Monroe. CP 740.

disregarded Rain's April 9, 2002 request to be segregated for personal safety, in which he indicated four individuals threatened him because he was a sex offender.²⁵ CP 735. Likewise, the court disdained a defense offer of proof that his wife confirmed that when Rain was in Walla Walla, he was concerned for his safety because other inmates had found out about his prior sex offense. 22RP 55.

Further, given his refusal to concede that he was a snitch, and the likelihood that the jury would believe Rain had requested transfer because he feared retaliation from Everybodytalksabout, the evidence should have been admitted.

b. Rain's Specific Infraction History.

Likewise, the evidence of the nature of Rain's specific prison infractions was relevant and necessary to impeach his credibility. The evidence supported the defense contention that the various benefits Rain received, such as numerous free telephone calls from to his wife,²⁶ transfer to a

²⁵ In the administrative segregation referral, the other inmates reportedly told Rain when he was returning from the gym, "You need to go away, we heard about your last beef and you won't be safe here. If it's not us, it will be someone else." CP 735.

²⁶ According to data gathered by the Center for Constitutional Rights, telephone companies charge as much as 60% above market rate for collect telephone calls from prisoners to civilians. See <http://www.ccr-ny.org/v2/education/program.asp?ObjID=jSu5LiaCRd&Content=111>

minimum security facility and release to Colorado, were particularly valuable.

Rain was a recidivist offender with multiple serious convictions and a poor adjustment history in prison. CP 698-702, CP 733-34, CP 743-75. Each of the specific infractions would have been a crime if prosecuted. See RCW 69.50.401 et seq. (defining narcotics offenses); RCW 9A.36.031; .041 (defining third- and fourth-degree assault). An offender with his infraction history would have been hard-pressed to get the benefits Rain acquired through cooperation with the prosecution.

The sanctions imposed for the infractions were extremely serious. For example, after Rain kicked his wife in the visiting room, Rain (1) was indefinitely banned from visiting with her; (2) lost 120 days of good time; (3) was placed in administrative segregation for 20 days; and (4) was demoted to medium custody. CP 733. The defense should have been entitled to explain the gravity of the infractions to the jury so the value of Rain's benefit could be fully developed. Similarly, the defense should have been entitled to cross-examine Rain about his repeated denials of the narcotics trafficking and assault to delve into his untruthfulness. CP 734. Evidence of the specific infractions and the sanctions imposed for these infractions would have given the jurors a context with which to assess the benefits to Rain from cooperation with the prosecution, which were

substantial given his status as a repeat offender who did not comply with DOC rules.

Without this context, Rain's motivations appeared mysterious, or even altruistic. In fact, the trial court did not fully understand this testimony's significance, as was shown by the court's comments at sentencing: "I do find [Vincent Rain] is [a] credible witness, perhaps even surprisingly so. He had nothing much to gain by his testimony, and frankly his motives for coming forward will probably remain a mystery for ever...". 29RP 38. As was noted by the Constitution Project, prison informants' "confinement... motivates them to lie in order to improve the conditions of their confinement..." Mandatory Justice at 52 (emphasis added). Had Everybodytalksabout been able to present Rain's specific infraction history to the jury, the jury would have learned Rain had "much to gain by his testimony." 29RP 38. The evidence should have been admitted.

c) Rain's Domestic Violence History With Melody Rain and Adjustment on Probation. Rain's history as Melody Rain's abuser and related probation violations were similarly relevant to explain the value of the consideration offered by the State, as well as Rain's bias and incentive to offer favorable testimony to the prosecution. 14RP 50. Rain wanted to go to Colorado because Melody Rain lived

there. 9RP 54-66. In the course of the prosecution's negotiations with Colorado regarding Rain's desired release there, his abuse of Melody Rain was Colorado's sticking point. CP 707, 709, 713. The transfer was ultimately arranged and, in fact, was formalized in the prosecution's letter to Rain memorializing the State's agreement with him. Supp. CP __ (St. Ex. 37, 38).

When Rain was alleged to have violated his probation by having contact with Melody Rain, he immediately contacted the trial prosecutors and attempted to have them change his conditions for release. 9RP 61, 65-66; 23RP 106; CP 705. Rain's efforts to manipulate favors from the prosecution continued until the actual commencement of trial. *Id.*

Further, Rain's cooperation was of critical importance to the prosecution case. In an urgent email to Colorado DOC, the Washington DOC interstate program manager stressed,

King County PA's office needs this WA inmate's testimony at a high profile homicide trial. The case has twice resulted in a hung jury. They believe with this inmate's testimony that they could turn the table in their favor. In exchange for testimony, the inmate would like to be transferred to Colorado where he has family...if King County can resolve their case and is willing to pay any travel expenses, I would like to try and get this done...

CP 715 (emphasis added).

The defense theory was that Rain was a "liar for hire." 28RP 133-43. The extent of Rain's bias, his importance to the prosecution case, and

the value of the consideration offered him for his testimony were all necessary and relevant to develop this theory. Absent the context of Rain's history with Melody Rain, however, the benefit offered to Rain seemed of relatively little significance. This inference was fortified by the prosecution's letter to Rain, which ambiguously stated, "We will not offer you any legal benefit for your testimony." Supp. CP __ (St. Ex. 38). A benefit that entitles a prisoner to avoid the requirements of the interstate compact and relocate to the home state of his abuse victim is surely a legal benefit. Everybodytalksabout should have been entitled to expose the import of the State's bargain with Rain to the jury.

Contrary to the trial court's ruling, therefore, the interplay between the transfer request and Rain's history as Melody Rain's abuser was of extreme significance. 14RP 65-68. In order to present his defense, Everybodytalksabout should have been entitled to inform the jury that Rain's offense history otherwise would have prohibited Rain's relocation at state expense to Colorado.

The court below expressed a concern that evidence of Rain's prior domestic violence history would have been overly prejudicial. 14RP 72-74. Any prejudice would have been mitigated, however, by the issuance of an instruction limiting the purpose for which the jury could consider the evidence. As this Court has observed, the jury is presumed to follow the

court's instructions. State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997). Because a limiting instruction would have minimized unfair prejudice from the evidence, the court should not have excluded the evidence.

d) Rain's Threats to Get a Lawyer and Assert his Fifth Amendment Privilege. Rain experienced a period of disaffection with the prosecutor's office when the trial prosecutors declined to assist him with pending probation violations. 23RP 123, 126; CP 705. Prior to trial, he repeatedly contacted the defense investigator and defense counsel and indicated he wanted a lawyer and planned to assert his Fifth Amendment privilege. 13RP 4; 23RP 123. The trial court erroneously excluded this evidence as well, finding it was not relevant to prove Rain's bias.

A witness who has been given transactional immunity regarding incriminating testimony has no right to claim the privilege against self-incrimination. State v. Hobble, 126 Wn.2d 283, 291, 892 P.2d 85 (1995). Thus, as argued by the defense, this evidence was (1) admissible and (2) relevant to show the extent to which Rain perceived he could manipulate the system in order to get what he wanted from the State. Id.; 23RP 126. The evidence should have been admitted.

iii. The Impeachment Authorized by the Trial Court Was Not Sufficient. In response, the State may try to claim that Everybodytalksabout's impeachment of Rain was adequate to protect his right to confront witnesses and present his defense. In Banks, supra, the United States Supreme Court disapproved similar arguments, finding that although the prosecution informant was "heavily impeached," evidence of his informant status was not "merely cumulative." 124 S.Ct. at 1278-79.

The State may alternately contend that because Rain was not working for the government when he allegedly obtained the disclosures at issue, the reliability problems voiced in section 2(b)(i), supra, are not a cause for concern. As this Court should, the Oklahoma Court of Appeals rejected this precise argument in Dodd v. State, 998 P.2d 778, 783-84 (Okla.Crim.App. 2000) (noting that the distinction "matters little" in terms of an informant's trustworthiness, and observing, "most informants relay incriminating statements to the state in expectation of benefit in exchange").

iv. The Limitations on Everybodytalksabout's Impeachment of Rain Resulted in a Denial of Due Process. The Supreme Court has stated the denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis, 415 U.S. at 318 (internal citations

omitted). This statement suggests the denial of the Sixth Amendment rights at stake here may never be deemed harmless. But even if a constitutional harmless error standard were applied, reversal of Everybodytalksabout's conviction is warranted.

In a criminal case, "an error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." Chapman, 386 U.S. at 24; Maupin, 128 Wn.2d at 928-29. The State cannot prove the error from the denial of confrontation was harmless. Like the trial court, the jury may have been confused by the limited impeachment and Rain's self-serving responses into believing he received no real inducement for his testimony. See R. Michael Cassidy, "Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 Nw. L. Rev. 1129, 1148-50 (2004) (arguing that implied inducements to informants make it difficult for defendants to expose the informants' bias). Everybodytalksabout should have been entitled to cross-examine about Rain's sex offense, specific prison infractions and probation violations, and history as Melody Rain's abuser to explain the value of the prosecution's "soft inducement". The limitations on the impeachment evidence denied Everybodytalksabout his

due process right to a fair trial. Davis, 415 U.S. at 318. Reversal of the conviction is required.

3. THE TRIAL COURT ERRED IN DENYING
EVERYBODYTALKSABOUT'S MOTION FOR MISTRIAL.

a. Ramirez Repeatedly Attempted to Influence Yolonda

Lopez's Testimony. On May 23, 1997, after Everybodytalksabout was convicted, Yolonda submitted a letter indicating she wished to retract her testimony, alleging it had been coerced by the police and was partially untrue. Supp. CP __ (St. Ex. 50). Prior to Everybodytalksabout's trial following remand, she contacted defense counsel to request a lawyer. 1RP 2. In response, the trial prosecutor contacted the Office of Public Defense (OPD) to object to the appointment of counsel and sent the case detective, Ramirez, to Yolonda's home to discourage her from invoking any privilege. 1RP 7-8. Allegedly, Ramirez threatened Yolonda with prosecution for perjury if her testimony varied from the prior proceeding. 1RP 7.

At trial, Yolonda testified consistently with her recantation. 24RP 68-112; 130-195. She indicated that due to her level of intoxication at the time of the event and when speaking with detectives about the case, she was unsure whether they were discussing the same incident. 24RP 184. She stated that to the extent her prior testimony differed, the disparities

were due to threats by Ramirez to influence a pending child custody action and to charge her as an accomplice to the crime. 25RP 64-66, 94, 97.

Although the court had granted a motion to exclude witnesses pretrial, Ramirez was permitted to remain in the courtroom, pursuant to ER 615. 11RP 92; 27RP 13. Consistent with ER 615, Ramirez received a cautionary instruction from the prosecution to not discuss his testimony with other witnesses. 27RP 13.

Yolonda's testimony spanned over two days of trial. After her first day of testimony, and in violation of the *in limine* order, Ramirez drove Yolonda home and told her he was "displeased" with her testimony because it was inconsistent with her testimony from the prior trial. 26RP 171-73.

Everybodytalksabout moved for a mistrial, contending Ramirez had deliberately violated the court's *in limine* ruling excluding witnesses. 27RP 6-7, 9-11. The trial court agreed Ramirez had violated the pretrial ruling, but ruled Everybodytalksabout's right to a fair trial had not been impacted. 27RP 14-15. Instead, relying on United States ex rel Clark v. Fike,²⁷ the court ordered that an adequate remedy was for

²⁷ United States ex rel Clark v. Fike, 538 F.2d 750, 757 (7th Cir. 1976).

Everybodytalksabout to cross-examine Ramirez about the conversation with Yolonda. 27RP 15-16.

Ramirez subsequently characterized his discussions with Yolonda as consistently “friendly” exchanges and denied attempting to influence her testimony. 27RP 66-69, 88-89.²⁸

b. Where Ramirez Attempted to Influence Witness Yolonda Lopez’s Testimony and Violated a Motion in Limine, the Trial Court Erred in Denying Everybodytalksabout’s Motion for Mistrial. Due process guarantees accused persons a fair trial. U.S. Const. amends. 5, 14; Const. art I, § 3. Consistent with due process, a new trial is properly granted for egregious government misconduct, even absent a showing of prejudice. State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1962) (reversing where sheriff eavesdropped on conversations between defendant and his counsel); State v. Granacki, 90 Wn. App. 598, 604, 90 P.2d 667 (1997).

A presumption of prejudice arises when the adversarial process loses its integrity because of affirmative state interference. Osborn v. Shillinger, 861 F.2d 612, 626 (10th Cir. 1988). “It is morally incongruous for the state to flout constitutional rights and at the same time

²⁸ Relevant portions of cross- and redirect examination of Ramirez are attached as Appendix B.

demand that its citizens observe the law. . .” Cory, 62 Wn.2d at 378 (quoting People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905 (1955)).

In Granacki, the prosecutor designated a police officer as a “lead detective” who was permitted to remain in the courtroom to assist counsel during trial. 90 Wn. App. at 600. The detective was present when the Court admonished the parties to have no contact with the jurors. Id. During a recess, the detective covertly read defense counsel’s notes containing confidential communications with her client and her trial strategy and tactics. He was also witnessed during the lunch hour engaged in “earnest” conversation with a juror. Id.

This Court found the detective had abused the trust placed in him by the trial court in permitting him to remain to assist the prosecutor. Id. at 603. On appeal, the state conceded a mistrial was proper but objected to dismissal of the prosecution. Id. at 601-02. In affirming both the mistrial and dismissal with prejudice, this Court noted a presumption of prejudice was proper in the case of egregious misconduct. Id. at 604.

A trial court’s decision to grant or deny a new trial is reviewed for an abuse of discretion.²⁹ A trial court abuses its discretion when its

²⁹ CrR 7.6(a) provides in relevant part: “[t]he court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: ... (2) Misconduct of the prosecution....(5) Irregularity

decision is manifestly unreasonable or its decision is based on untenable grounds or reasons. State v. Cho, 108 Wn. App. 315, 321, 30 P.3d 496 (2001) (reversing trial court's order denying motion for new trial based on juror misconduct). The trial court here abused its discretion in denying Everybodytalksabout's motion for mistrial.

As in Granacki, the trial court had demonstrated its confidence in Ramirez's integrity and ability to abide by the court's pretrial rulings by permitting him to remain in the courtroom. Granacki, 90 Wn. App. at 603. Furthermore, Ramirez was aware of the motion to exclude witnesses and, by virtue of his 20 years of experience in law enforcement, certainly understood its import. 27 RP 68-69. At a minimum, Ramirez should have been aware that his comments to Yolonda could have been reasonably construed as witness tampering. See, RCW 9A.72.120.³⁰ Thus, it was beyond the pale for Ramirez to engage in the "dirty business" of trying to

in the proceedings of the court, jury, or prosecution...by which the defendant was prevented from having a fair trial..."

³⁰ RCW 9A.72.120 provides in relevant part: "(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding to

...
(a) Testify falsely or, without right or privilege to do so, to withhold any testimony. . ."

influence Yolonda's testimony in the pending proceeding.³¹ Cory, 62 Wn.2d at 678.

In response, the State may attempt to argue that Cory and Granacki concerned violations of the rights to counsel and to the effective assistance of counsel and should be distinguished from the instant case. Any difference between the scenarios, however, is a difference in form, not kind, given the seriousness of Ramirez's misconduct. Yolonda was the only eyewitness to testify and in large part, the prosecution relied on her testimony in the prior proceeding to provide the context and predicate facts for the crime. State v. Everybodytalksabout, 145 Wn.2d at 469. As Ramirez was the lead detective on the case and was responsible for trial preparation following reversal of Everybodytalksabout's conviction, Ramirez was aware of the importance of Yolonda's testimony.

Moreover, the sanction of a mistrial would have served not only as a remedy for the defendant, but as a deterrent to the government.

Granacki, 90 Wn. App. at 603. It should be noted that Everybodytalksabout sought a lesser remedy than was imposed in Granacki, where the State conceded a mistrial was proper. Id. at 601-02. The court erred in denying Everybodytalksabout's motion.

³¹ Everybodytalksabout pointed out that the day after Ramirez conveyed his displeasure with Yolonda's testimony to her, her demeanor "could be interpreted as being more compliant with the State." 27RP 9.

c. The Sanction Imposed by the Trial Court Was

Inadequate Given the Gravity of Ramirez's Misconduct. In Granacki, this Court acknowledged that while dismissal was proper, a lesser sanction would also have been appropriate. 90 Wn. App. at 604. In describing a suitable lesser sanction, this Court stated, "Had the court chosen to ban Detective Kelly from the courtroom, exclude his testimony and prohibit him from discussing the case with anyone, we would not find an abuse of its discretion." 90 Wn. App. at 604.

Here, the court permitted Everybodytalksabout the lesser remedy of cross-examination about the misconduct. In finding this remedy sufficed, the court's reliance on Clark v. Fike was misplaced. In Clark v. Fike, the prosecution violated a sequestration order by discussing the case with several witnesses. 538 F.2d at 757-58. Here, Ramirez not only violated ER 615, but attempted to influence a crucial witness's testimony. This violation was particularly egregious given Yolonda's claims that her previous testimony was influenced by Ramirez's threats to manipulate the outcome of her child custody dispute and charge her as an accomplice to murder. 25RP 64-66, 94, 97.

On cross-examination, Ramirez's testimony was predictably self-serving. Ramirez first tried to claim Yolonda had completed her testimony when he spoke with her. 27RP 67-68. He then claimed he did

not “feel” he violated the court’s motion in limine by telling her that he was “unhappy with the way she was testifying.” 27RP 68. He then told the jury Yolonda’s testimony was “inconsistent with her previous testimony, it was inconsistent with what she told me just a few days prior.” Thus, rather than exposing the gravity of Ramirez’s misconduct, the court’s “sanction” permitted Ramirez to comment on Yolonda’s recantation and bolster the credibility of her previous testimony. Further, the court rendered its sanction toothless by permitting Ramirez to remain in the courtroom—conveying to the jury that the violation was not particularly serious.

In sum, Ramirez’s “discussion” with Yolonda constituted serious misconduct for which a mistrial should have been granted. This Court should reverse the conviction.

4. THE PROSECUTION SHOULD HAVE BEEN DISMISSED FOR DUE PROCESS VIOLATIONS.

a. Everybodytalksabout Moved to Dismiss for Discovery Violations and Destruction of Evidence. Commencing in January, 2003, the defense moved to compel discovery from the State pertaining to informant Vincent Rain. 6RP 10; 8RP 3-4; 9RP 51-71; CP 355-71; Supp. CP __ (Sub No. 135, 136, 255). The defense repeatedly requested the State turn over Rain’s DOC file. Id. Due to the State’s recalcitrance in

producing the file, the defense interview of Rain was delayed for several months. 9RP 95. Ultimately, after protracted efforts, the defense obtained Rain's file from DOC without prosecution assistance. The prosecution immediately moved to compel production of the file from the defense, complaining that the defense had committed discovery violations. 11RP 67. The court denied the State's motion. 11RP 86.

In addition to numerous documents pertaining to Rain's adjustment in prison and probation violations, within the DOC file were many documents relating to Rain's request for transfer to Colorado, including multiple emails between the prosecution and DOC. CP 707-775. Information from many of these documents was used to impeach Rain at trial. 23RP 26-34, 81-85, 99-101, 103, 106.

The defense moved for dismissal of the charge, contending the State's failure to comply with its discovery obligations constituted misconduct, and arguing Everybodytalksabout had been prejudiced by the State's obstructionism. 9RP 51-71, 76, 79, 91-92, 95; CP 355-71, 647-53.

The defense also moved to dismiss because, contrary to Seattle Police Department protocol, Ramirez had destroyed the tape recording of his interview with Rain. 12RP 141, 149, CP 647-53, 683.³² The defense

³² According to the Seattle Police Department's Investigations Bureau's Policies and Procedures, "Tapes which are not required for

noted that while Everybodytalksabout's first prosecution was pending, the police had investigated another suspect, Ron Hay, who allegedly was believed to be involved in another stabbing homicide. 12RP 114-16, 127-28, 135; 13RP 12-15. Hay's clothing was believed to be bloodstained. 12RP 114-16. According to Ramirez's follow-up report, Ramirez obtained Hay's clothing but did not request an analysis, and subsequently the clothing was destroyed. 12RP 116.

The court denied the defense motions, finding that Everybodytalksabout did not demonstrate prejudice from the State's discovery violations, and that a continuance had remedied the problem. 16RP 40-44. With respect to the State's failure to preserve evidence, the court ruled that although the "better practice" would have been to keep the audiotape, Everybodytalksabout had not shown Ramirez knew of the tape's apparent exculpatory value when the tape was destroyed. 16RP 45-49. The court ruled that the State had no duty to preserve Hay's clothing, as Everybodytalksabout's conviction was "reason enough to believe that other suspects had been virtually eliminated." 16RP 50-53.

b. Dismissal Was Required for the State's *Brady* Violation

Under the Due Process Clauses and CrR 8.3(b). The due process clauses

evidence should be recycled as soon as possible." CP 683 (emphasis added). Everybodytalksabout contended Ramirez's taped interview was "required for evidence." 12RP 117-27.

of the State and Federal Constitutions guarantee an accused the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amends. 5, 14; Const. art I, § 3; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). Due process requires the government disclose to an accused material evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). “The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id.

In Banks, supra, the prosecution did not disclose that a witness was an informant who had received benefit for his testimony from the prosecution. 124 S.Ct. at 1266. Reversing, the Supreme Court observed, “If it was reasonable for Banks to rely on the prosecution’s full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction.” 124 S.Ct. at 1274.

Likewise, Division Three of this Court recently upheld an order dismissing a prosecution under CrR 8.3(b)³³ where the State failed to

³³ CrR 8.3(b) provides in relevant part: “[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal

disclose exculpatory evidence to the defense until trial had commenced. State v. Martinez, 121 Wn. App. 21, 86 P.3d 1210, 1216 (2004).³⁴ The Court found “ludicrous” the State’s claims that it did not know the significance of the exculpatory report until mid-trial. Id. The Court noted that in certain circumstances, “Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution.” Id. at 1217.

In the instant matter, the prosecution disclosed Rain’s status as an informant to the defense (as it had to, given the context of Everybodytalksabout’s alleged disclosures). In response to Everybodytalksabout’s numerous, detailed discovery requests, however, the prosecution only turned over to the defense the one-page letter to Rain memorializing the informant agreement, which suggested no “legal benefit” was given Rain for his testimony. 6RP 10; 8RP 3-4; 9RP 51-71; CP 355-71; Supp. CP __ (St. Ex. 38; Sub Nos. 135, 136, 255). The State deliberately withheld a substantial amount of evidence highly relevant to the inducement offered Rain and Rain’s bad character, evidently gambling

prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.”

³⁴ At the time of this writing, Washington Reporter pin citations were not available on Westlaw.

that the defense would not ultimately succeed in obtaining the evidence.

9RP 72-89;³⁵ CP 194-95.³⁶

But for defense counsel's diligence, it is likely

Everybodytalksabout would never have obtained the DOC file, and therefore would never have learned of (1) Rain's infractions for possession of stolen property and inciting other inmates to violence, (2) Rain's efforts to have the prosecution change his conditions of release, (3) Rain's free airfare from Washington to Colorado, and (4) Rain's ride with the prosecutors from Spokane to Seattle. 23RP 26-34, 41, 81-82, 84-85, 99-101, 106, 112. All of this evidence was introduced at trial. Id. There can be no doubt that if the evidence had been discovered after the commencement after the trial, the State's failure to turn over the DOC file would have been deemed a Brady violation and reversible error. Banks, 124 S.Ct. at 1274-75.

³⁵ The prosecution admitted it did not turn over the many emails exchanged between the trial prosecutors and DOC, nor did it give the defense discovery concerning its agreement with DOC regarding the costs of Rain's transfer and how these costs would be paid, claiming the evidence was not material under Brady. 9RP 72, 77, 79, 89.

³⁶ In a motion for continuance, defense counsel explained that the State told the defense on January 9, 2003, "we have obtained Mr. Everybodytalksabout's [DOC] file." CP 194. Yet the State refused to (1) turn over the file to the defense; (2) contact DOC to facilitate the defense obtaining the file; or (3) agree to a subpoena duces tecum that would have enabled the defense to obtain the entire file. CP 195.

Where the State has deliberately and in bad faith withheld Brady evidence, the question whether a prosecution will be dismissed should not turn on whether the accused was fortuitous enough to have obtained the sought-after evidence. This rule penalizes the accused for having diligent counsel and deprives him a remedy without regard to the significance of the violation or the materiality of the evidence. As the Supreme Court stated,

A rule. . . declaring “prosecutor may hide, defendant must seek,” is not tenable in a system constitutionally bound to accord defendants due process. “Ordinarily we presume that public officials have properly discharged their official duties.” . . . Courts, litigants, and juries properly anticipate that “obligations [to refrain from improper methods to secure a conviction]. . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed. . . Prosecutors’ dishonest conduct or unwarranted concealment should attract no judicial approbation.

Banks, 124 S.Ct. at 1275.

The Martinez Court agreed that “The State prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial is. . . so repugnant to principles of fundamental fairness that it constitutes a violation of due process.” 86 P.3d at 1217. The Court also recognized the deterrent value of a dismissal remedy, noting, “if the State knows that the most severe consequence that can follow from withholding exculpatory evidence until late in the trial is that it may have to try the

case twice, it will hardly be seriously deterred from such conduct in the future.” Id.

Because the evidence of guilt was largely circumstantial, this Court should view any improper tactics used by the prosecution to unfairly influence the verdict with particular disfavor. As this Court has observed, “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). This Court should reverse the conviction and dismiss the prosecution.

c. Due Process Required Ramirez to Preserve Evidence.

Due process also requires the government preserve exculpatory evidence. Trombetta, 467 U.S. at 485-87. If the State destroys “materially exculpatory” evidence, the criminal charges against a defendant must be dismissed. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Dismissal is also required even where the evidence does not meet the standard of “materially exculpatory” but was potentially useful and was destroyed in bad faith by the State. Wittenbarger, 124 Wn.2d at 477. Bad faith can be shown by the lack of compliance with established

procedures or the intentional destruction and/or concealment of evidence.

Wittenbarger, 124 Wn.2d at 477.

d. Ramirez Destroyed the Audiotape and Other Suspect Evidence in Bad Faith. As set forth in the SPD policies and procedures manual, it was recommended that police officers tape record interviews and preserve those tape recordings. CP 682. Established procedures permitted recycling only of tapes “not required for evidence.” CP 683. Nonetheless, and without notifying either the defense or the prosecution, Ramirez elected to destroy the tape recording of his Rain interview. 12RP 126-27.

Similarly, Ramirez destroyed Ron Hay’s clothing without ever submitting it for analysis. Nor did Ramirez pursue the Hay lead after identifying Everybodytalksabout and Lopez as suspects. 13RP 13-15.

Although the court correctly found that both pieces of evidence were potentially useful, rather than materially exculpatory, the court erred in finding bad faith turned on Ramirez’s knowledge of the evidence’s “apparent exculpatory value” when the evidence was destroyed. Further, the court incorrectly determined the SPD policy was not “sufficiently explicit to provide guidance.” 13RP 48. Under the court’s forgiving construction of the SPD policy, any destruction of a tape recording would not constitute bad faith.

Wittenbarger makes clear that the defense only need show failure to comply with established procedures. 124 Wn.2d at 481. The court should have granted Everybodytalksabout's motion to dismiss.

5. CUMULATIVE ERROR DENIED
EVERYBODYTALKSABOUT A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although Everybodytalksabout contends that each of the errors set forth above, viewed on its own, engendered sufficient prejudice to merit reversal, he alternatively argues the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

The admission of Navicky's testimony gave the prosecution a confession to the predicate crime for the felony murder charge where previously it had none. Navicky's testimony also corroborated the testimony of other, unreliable witnesses, adding "significant weight to an

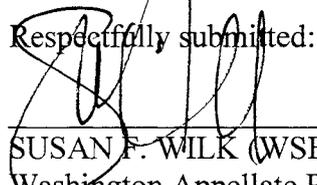
otherwise weak case.” State v. Everybodytalksabout, 145 Wn.2d at 469. The unreasonable limitations on Everybodytalksabout’s cross-examination of Rain deprived the jury of needed context to assess his bias and motivations, and the value of the benefit he received from the prosecution. The trial court’s failure to give Everybodytalksabout an adequate remedy for Ramirez’s violation of the motion to exclude witnesses enabled Ramirez to highlight the discrepancies in Yolonda’s testimony in the two proceedings to the prosecution’s benefit. The trial court’s failure to dismiss for due process violations signaled to the prosecution that it could seek a conviction by fair means or foul. Viewed together, these errors deprived Everybodytalksabout of a fair trial, meriting reversal of his conviction.

F. CONCLUSION

For the foregoing reasons, Darrell Everybodytalksabout requests reversal of his conviction. For the reasons set forth in argument 4, Everybodytalksabout requests dismissal of the prosecution.

DATED this 7th day of January, 2005.

Respectfully submitted:



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

State v. Everybodytalksabout, No. 53570-6

Appendix A

~~State's proposed~~

FILED
KING COUNTY, WASHINGTON

JAN 05 2004

SUPERIOR COURT CLERK
BY JANIE SMOTER
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 97-1-01122-8 SEA
)	
vs.)	
)	WRITTEN FINDINGS OF FACT AND
DARRELL EVERYBODYTALKSABOUT,)	CONCLUSIONS OF LAW ON CrR 3.5
)	MOTION TO SUPPRESS THE
)	DEFENDANT'S STATEMENT(S)
)	
)	
)	

A hearing on the admissibility of the defendant's statement(s) was held before the Honorable Judge Paris Kallas.

The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

314
857

1 After considering the evidence submitted by the parties and hearing argument, to wit:
2 testimony of Diane Navicky, presentence report of Diane Navicky for the above entitled case,
3 and the defendant's Department of Corrections master file the court enters the following findings
4 of fact and conclusions of law as required by CrR 3.5.

5 1. THE UNDISPUTED FACTS:

6 a) On August 21st, 1997, Diane Navicky, a Community Corrections Officer (C.C.O), met with
7 the defendant, Darrell Everybodytalksabout, to conduct a presentence interview for purposes of
8 preparing a court ordered presentence investigation report.

9 b) Ms. Navicky was a C.C.O. with the Washington State Department of Corrections (D.O.C.) for
10 17 years. In her position she was both a supervisor and senior author of presentence
11 investigations and reports. In her capacity she also taught others how to conduct presentence
12 investigations and write presentence reports. She has since retired.

13 c) The interview of the defendant took place in the King County jail, where Mr.
14 Everybodytalksabout was in confinement pending sentencing.

15 d) The purpose of Ms. Navicky's interview of the defendant was to gather information to present
16 to the sentencing judge pursuant to a court ordered presentence report. That information

17 ~~included the defendant's criminal history, medical, social, drug and alcohol history, and other~~
18 ~~background information.~~ Further, such an interview involves contact with the victim's family,
19 and allows the defendant an opportunity to state his version of events.

20 e) Ms. Navicky's role was not to draw conclusions but to gather information, to be as accurate as
21 possible. Ms Navicky did not view her role as an advocate; instead believing it would be
22 unethical to take sides.

23
WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 f) Ms. Navicky had a common protocol that she used each and every time she conducted an
2 interview in her career. She would introduce herself, explain that she was there to complete the
3 form (presentence interview), they would then go over and complete the release of information
4 forms, go over the Miranda advisement and waiver forms, and then begin completing the forms
5 for the interview. Further, it was also Ms. Navicky's routine practice to provide the blank forms
6 to defendants before the presentence interview. Often times defendants would bring those with
7 them partially completed.

8 g) Ms. Navicky did not contact defense counsel Tim McGarry to ask permission to interview the
9 defendant. This was not her practice at the time. Ms. Navicky was simply completing a court-
10 ordered presentence interview report.

*There was no evidence that Mr. Everybodytalksabout
was aware Ms. Navicky was coming to
interview him.*

11 h) Ms. Navicky remembered that Mr. Everybodytalksabout's case was high profile case and that
12 it had been specifically assigned to her in her role as a lead officer. *a* **PKK**

13 i) The case was memorable to Ms. Navicky for several reasons. It was a high profile case, she
14 recalled the defendant as being pleasant and cooperative. She wanted to prepare the best
15 possible report, not wanting to get sloppy at the end of her career as other CCOs had done.

16 *To the extent she recalls the case,*
j) Ms. Navicky recalled that officers did not escort the defendant to the interview room, she
17 believes but was not sure that the interview rooms were locked. She also believes there was a
18 buzzer system to get in and out of the interview room.

19 k) There were things, however, that Ms. Navicky does not remember about the interview. She
20 does not recall which floor of the jail the interview took place on; she does not remember which
21 room it occurred in; she does not remember how many other, if any, presentence interviews took
22 place that day.

1 l) Ms. Navicky stated that during the interview with Mr. Everybodytalksabout he was polite, soft
2 spoken, cooperative, at least until the end. The interview lasted approximately 30 to 45 minutes.

3 m) Ms. Navicky cannot specifically recall advising Mr. Everybodytalksabout of his Miranda
4 warnings and his Miranda rights. However, she was certain she would not forget to do so. It
5 was her practice to do so in each and every presentence investigation she had conducted over 17
6 years, she was committed to finishing her career with integrity, and this was a high profile case.

7 n) Ms. Navicky cannot specifically recall if Mr. Everybodytalksabout initially declined to speak
8 with her at the beginning of the interview, but she doubts it, otherwise they would not have
9 completed so much of the form. Ms. Navicky stated that if someone initially did not want to
10 meet with her she may lightly encourage it. But if they indicated they did not she would not
11 continue with the interview.

12 o) In the portion of the presentence form that called for the defendant's version of events, Ms.
13 Navicky reviewed this portion and would explain that it allowed a defendant to give his or her
14 version, not the prosecutor's version, not the police version, but the defendant's version. ^{PICK} ~~She did~~
15 ~~not confront defendants with evidence from their case.~~

16 p) When Ms. Navicky came to ^{the} section of the form for the ^{PKK} defendant's version of events with Mr.
17 Everybodytalksabout ~~Ms. Navicky followed her usual practice.~~ The defendant indicated that he
18 felt badly about Mr. Jones' death; that he had been drinking that night; he was emphatic that he
19 was innocent; he said he did not stab the victim but he only assisted in the robbery.

20 q) During the defendant's version of events Ms. Navicky noted that he had a noticeable change
21 in demeanor. He stood up, he was upset, he indicated that he wanted to leave and he did leave.

22 r) From Ms. Novicky's point of view nothing explained the drastic change in his demeanor. She
23 did not ask additional questions; she did not ask officers to bring Mr. Everybodytalksabout back

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 4

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

1 into the room, she did not make any attempt to keep him in the interview room; she did not
2 conduct any further presentence investigation, either then or at any other time. Mr.
3 Everybodytalksabout walked away from the interview and Ms. Navicky made no efforts to stop
4 him.

5 s) Following completion of a presentence interview it was Ms. Navicky's practice to place her
6 notes and any letters she had received into a defendant's file. The file would then follow the
7 defendant to the Washington State Department of Corrections. As a result, she no longer
8 possessed any of the forms that she completed regarding her interview with Mr.
9 Everybodytalksabout.

10 t) The Washington State Department of Corrections master file for Mr. Everybodytalksabout
11 does not contain any Miranda advisement or waiver forms completed during the presentence
12 interview. Nor does it contain any other forms or documents completed in preparation for the
13 presentence report.

14 2. THE DISPUTED FACTS;

15 There were no disputed facts at the hearing.

16 3. CONCLUSIONS AS TO THE DISPUTED FACTS:

17 There were no disputed facts at the hearing.

18 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
19 STATEMENT(S):

20 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

21 The following statement(s) of the defendant is/are admissible in the State's case-
22 in-chief: The defendant told Ms. Navicky that he felt badly about Mr. Jones'
23 death; that he had been drinking that night; he was emphatic that he was innocent;
he said he did not stab the victim but he only assisted in the robbery.

1 This/These statement(s) is/are admissible because Miranda was not applicable for
2 the following reasons:

3 a) Ms. Novicky was acting as a State agent when she interviewed the defendant, and that she
4 does not recall whether she advised the defendant of his Miranda rights or whether they
5 completed the written advisement and waiver form. Although it was Ms. Navicky's practice
6 to do so there is no direct evidence of an advisement. *The court will not* **(PKK)**
make an inference of advisement.

7 b) Although the defendant was residing in the King County Jail at the time of Ms. Navicky's
8 interview with him, he was not in "custody" in the sense meant by Miranda pursuant to the
9 Washington Supreme Court's decision in State v. Post, 118 Wn. 2d 596 (1992). Specifically,
10 no further limitations were placed on the defendant's already limited freedom of movement
11 as a result of Ms. Navicky's interview. The defendant was not commanded to attend the
12 interview, he was not handcuffed during the interview, he was not compelled to remain in the
13 room during the interview, he was free to leave the room at a time of his own choosing, and
14 indeed did so. Because he was not physically restrained from leaving the interview area and
15 was not restrained during the interview, Ms. Navicky's contact with the defendant was not
16 custodial.

17 c) The defendant was not interrogated for purposes of Miranda in this case. He was asked to
18 complete a court ordered and standardized presentence interview form, he was not
19 confronted with or asked about the evidence of his guilt, but rather was given the opportunity
20 to give his version of events, an opportunity that he was free to refuse.

21 d) The statements were the byproduct of a completely voluntary exchange between the
22 defendant and Diane Navicky, and thus were voluntary.

1 e) Diane Navicky is a highly credible witness. Her demeanor was thoughtful, she freely
2 admitted what she recalled and what she doesn't recall. Ms. Navicky did not go beyond the
3 scope of what was necessary to complete the presentence report.

4 In addition to the above written findings and conclusions, the court incorporates by
5 reference its oral findings and conclusions.

6 Signed this 4 day of ~~December, 2003~~ January, 2004

7
8 
9 PARIS K. KALLAS
JUDGE

10 Presented by:

11 
12 Deputy Prosecuting Attorney *ccw*

13 161
14 Deputy Prosecuting Attorney

15 *Defense objects to findings of fact & conclusions of law
as it is not supported by the testimony. Objections noted also
on record. Signed as acknowledgment
of form.*
16 Attorney for Defendant #21651

State v. Everybodytalksabout, No. 53570-6

Appendix B

1 A. I do.

2 Q. Detective, during the course of
3 your investigation -- and I refer you to your
4 entry on 2/29/96 in follow-up report. Do you
5 have that before you?

6 A. I will in a minute. There are
7 several entries on 2/29. Would you be more
8 specific?

9 Q. Sure. How about at 9:50 hours?

10 A. Yes.

11 Q. Going towards the end of that
12 particular entry, during the course of your
13 investigation you found out that some people
14 who get food stamps at the beginning of the
15 month will sell the food stamps in order to get
16 money to buy alcohol; is that correct?

17 A. It's something that is known by
18 just about everyone in the department and many
19 other people.

20 Q. And you confirmed that by talking
21 to someone who does that; is that correct?

22 A. I spoke to an individual who told
23 me that, yes.

24 Q. Detective, yesterday you talked
25 about the fact that you had given Yolonda Lopez

1 a ride home after one of the days in which she
2 testified. Do you remember that?

3 A. I did.

4 Q. And you admitted that when you
5 gave her a ride home you expressed
6 dissatisfaction about the way she was
7 testifying; is that right?

8 A. You can say that, yes.

9 Q. Detective Ramirez, you're aware of
10 what's called a motion in limine or the court's
11 order that witnesses are not supposed to talk
12 to other witnesses about their testimony;
13 correct?

14 A. We did not discuss her testimony.
15 We discussed her previous statements that she
16 had given to me and others.

17 Q. You told her that you were
18 dissatisfied with the way she was testifying;
19 correct?

20 A. I believe I've already testified
21 to that, yes.

22 Q. And she came and testified again
23 the following day after you gave her a ride
home; is that correct?

A. She did. She had not completed

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. Now, you were told that she violated the court order when you talked to her and said you were unsatisfied with the way she was testifying, correct?

A. I am aware now when I violated a court order, yes.

Q. Detective, are you trying to tell us that the prosecutors didn't make you aware of that motion in limine?

A. I didn't feel that I was violation to tell her that I was unhappy with the way she was testifying, it was inconsistent with her previous testimony, it was inconsistent with what she told me just a few days prior. I didn't discuss the details of what she needed to say.

Q. Detective, you've testified many times over your 20 plus years of experience; correct?

A. I have.

Q. You're aware that courts frequently order that witnesses are not supposed to talk to other witnesses; correct?

A. About their testimony. As a

1 detective I have contact with many of the
2 witnesses over the past many years, so if it's
3 a violation I have done it many times, and I
4 apologize.

5 Q. And you know that the court found
6 that you violated that order; correct?

7 A. Yes.

8 MS. WALSH: Thank you. I don't
9 have anything further.

10 THE COURT: Is this an appropriate
11 time for the morning break?

12 MR. CALVO: It is, Your Honor.

13 THE COURT: Leave your notebooks on
14 your chairs, step back into the jury room, and
15 we'll be with you in about 15 minutes.
16 Thank you.

17 (The following proceedings
18 were held outside the
19 presence of the jury.)

20 THE COURT: Let's put our two
21 side-bars on the record.

22 One was Mr. Martin requested a
23 side-bar. Ms. Walsh was asking the detective
24 about Mr. Everybodytalksabout's statement and
25 whether it was taped and whether all the
statements from him had been taped.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

DECLARATION OF SERVICE

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

ON THE 7TH DAY OF JANUARY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING 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
- [X] DARRELL EVERYBODYTALKSABOUT
DOC# 256197
CLALLAM BAY CC
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

2005 JAN -7 11:50 AM
COURT OF APPEALS

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2005.

x _____ *gmls*