

NO. 78514-7

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRELL EVERYBODYTALKSABOUT,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

DEBORAH A. DWYER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. SUMMARY OF ARGUMENT

After a jury found Darrell Everybodytalksabout guilty of Murder in the First Degree, the trial court ordered the Department of Corrections to prepare a presentence report. The defendant's attorney received a copy of this order. Community Corrections Officer Diane Navicky went to the King County Jail to interview the defendant. She told him that she was there to gather information to aid the court in sentencing him, and she assured him that, if he did not wish to answer certain questions, that was his privilege. When Navicky, as a standard part of the interview, invited the defendant to give his version of the events in question, he stated that he did not murder the victim, but only assisted in robbing him. The defendant then abruptly terminated the interview, and left the interview booth. Navicky made no attempt to keep him there, nor did she ever re-contact him. After the defendant's conviction was reversed on appeal, his statement was used at a retrial, and a jury again found him guilty of Murder in the First Degree. The Court of Appeals affirmed.

The State asks this Court to affirm the Court of Appeals. This Court should hold that the defendant was not in custody during the presentence interview, because he was not subject to any additional restraint beyond those that were "part and parcel" of his status as a person incarcerated in the King County Jail. This Court should further hold that,

under these circumstances, Navicky's invitation to the defendant to give his version of events was not reasonably likely to elicit an incriminating response, and thus did not amount to interrogation. Finally, this Court should hold that Navicky did not "deliberately elicit" an incriminating response in violation of the defendant's Sixth Amendment right to counsel.

B. RELEVANT FACTS

Defendant Darrell Everybodytalksabout and codefendant Phillip Lopez were charged jointly with Murder in the First Degree in the death of Rigel Jones on February 3, 1996. The State alleged that the pair stabbed and killed Jones in the course of robbing him. Both defendants were eventually convicted as charged.

Everybodytalksabout's conviction was reversed on appeal.¹ At the retrial, the State offered statements the defendant made to Community Corrections Officer (CCO) Diane Navicky during a presentence interview following the first conviction. CP 907, 914-17. Navicky had written in her presentence report: "[H]e simply stated that he was not the one who murdered Rigel Jones. He did admit that he assisted in the robbery but

¹ State v. Everybodytalksabout, 145 Wn.2d 456, 39 P.3d 294 (2002). Additional factual detail may be found in the unpublished opinion of the Court of Appeals in the first appeal, State v. Everybodytalksabout, No. 41409-7-I (Nov. 13, 2000), 2000 WL 1701322.

would not comment any further. He said that he had been drinking at the time of the offense.” Ex. 1 (pretrial) at 4; CP 922. The State requested a hearing under CrR 3.5. 9RP 153-54.

1. TESTIMONY OF CCO DIANE NAVICKY.

Diane Navicky testified at the CrR 3.5 hearing. 10RP 25-88. Navicky had worked in the DOC’s presentence unit for 17 years, writing about 200 presentence reports per year. 10RP 25-26. By the time of her involvement in this case, she had gained the status of a lead officer; this high-profile case was accordingly assigned to her. 10RP 27-29.

Navicky described her typical routine. Once a defendant had been found guilty of a felony, Navicky would conduct a presentence interview at the direction of the court. 10RP 26-27. She would tell the defendant who she was, whom she represented, and why she had been asked by the court to do a presentence investigation. 10RP 40. She would go over confidentiality forms and Miranda² rights. 10RP 40. She would ask the defendant for specified information, assuring him that if he did not wish to answer certain questions, that was his privilege. 10RP 40.

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

As part of her routine procedure, Navicky would gather criminal history, as well as medical, social and financial information. 10RP 27, 45-46. She would review the State's version of the offense and talk to victims; she would also ask the defendant for his version of the offense. She would gather all of this information in a report. 10RP 27. Navicky conducted these interviews "[b]asically the same every time." 10RP 37.

Navicky was clear about how she viewed her role. She believed that the purpose of the presentence report was to give the judge a fair evaluation of the information she could gather. 10RP 37. She tried to take into consideration both the client's³ view and the prosecutor's view, and present the information as accurately as she could. 10RP 83. She saw her role as being directly responsible to the court. 10RP 83. She never asked the prosecutor or law enforcement if they had questions they wanted her to ask; she made a "concerted effort" not to take sides. 10RP 37, 83.

Navicky interviewed the defendant on August 21, 1997, in the King County Jail, most likely in an attorney/client interview booth. 10RP 31, 35-36, 61. The booths have a glass divider between the inmate and the visitor, and communication is via telephone. 10RP 66. A heavy glass door closes off each section of the booth from the rest of the jail;

³ It is telling that Navicky regularly referred to the defendants whom she interviewed as "clients." See, e.g., 10RP 27, 29, 35, 36, 45, 81, 83.

Navicky believed that the door behind the inmate locked. 10RP 66, 69. An inmate would walk up to the door and press a buzzer, the door would open, and the inmate would enter the booth; Navicky did not usually see officers accompanying the inmates at this point. 10RP 67. The inmate would leave the booth in the same way – press a buzzer and the door would open. 10RP 69-70.

While Navicky needed her report to refresh her memory on certain things like dates, she had an independent recollection of this case. 10RP 64. She recalled that the defendant was pleasant, polite and soft-spoken. 10RP 39. When she told him what she wanted to do, he said, “Okay.” 10RP 43. He was cooperative through most of the interview, which progressed uneventfully for about 30-45 minutes. 10RP 39, 51. When Navicky invited the defendant to give his version of what happened on the night Rigel Jones was killed, the defendant responded that he did not murder Jones, but only assisted in robbing him. 10RP 50. After saying this, the defendant abruptly got up to leave, saying, “I don’t want to talk about this anymore.” 10RP 50. Navicky took no steps to get him to stay, nor did she re-contact him to complete the interview. 10RP 58-59.

When asked whether she specifically recalled reading the defendant his Miranda rights, Navicky responded: “Specifically, no. The only response that I can say is, because this was a high profile case I am

absolutely sure I would not forget that.” 10RP 44. While the defendant’s DOC file contains Navicky’s presentence report, it does not include any of her notes or other related materials. 10RP 88-89. The file contains nothing to show that she read the defendant his Miranda rights. 14RP 2-6.

The defendant chose not to testify at the CrR 3.5 hearing, nor did he present any witnesses. 10RP 89-91.

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The trial court began its oral ruling on the admissibility of the defendant’s statements to Diane Navicky by noting that there were no disputed facts. 16RP 5-6. The court commented on the credibility of Navicky, who was the only witness to testify at the CrR 3.5 hearing:

This Court finds Ms. Novicky [sic] to be a credible witness, in fact, a highly credible witness. Her demeanor was thoughtful, she freely admitted what she recalled and what she doesn’t recall. **In fact, it’s difficult to imagine a witness who has more credibility.**

16RP 8 (emphasis added).

The court then made its findings of fact and conclusions of law pursuant to CrR 3.5, later including them in a written document (CP 851-57). The court found that the purpose of Navicky’s interview was to gather information to present to the sentencing judge pursuant to a court-ordered presentence report. CP 852. In allowing the defendant an

opportunity to state his version of events, she did not go beyond the scope of what was necessary to complete the report. 16RP 10; CP 852, 857.

The court found that Navicky did not operate as an advocate in doing her job – she did not “take sides.” 16RP 6-7; CP 852. If a defendant did not want to meet with her, she might “lightly encourage” him, but she would not continue with an interview against a defendant’s wishes. 16RP 10; CP 854. As an “ultimate professional,” Navicky was there to do “one thing and one thing alone, and that was to complete an accurate and thorough presentence information report for the Court.” 16RP 18. The court found that the defendant’s statements to Navicky were voluntarily made. 16RP 18; CP 856.

The court noted that the defendant’s DOC file did not contain a Miranda advisement or waiver, nor any other forms or documents completed in preparation for the presentence report. 16RP 12; CP 855. In the absence of direct evidence of advisement, the court assumed that no such advisement was given. 16RP 13; CP 856 (“The court will not make an inference of advisement”).

The court nevertheless found that Miranda warnings were not necessary because the defendant was not “in custody” for Miranda purposes, nor was he “interrogated” for Miranda purposes. CP 856. While the defendant resided in the King County Jail at the time of the

presentence interview, there were no further limitations placed on his already limited freedom of movement. CP 856. The buzzer system and locked door are “part and parcel” of the jail setting, and represent no greater restriction beyond what is inherent in such a setting. 16RP 16-17. “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. The evidence showed that the defendant was “cooperative, polite, and participated in the interview until he decided he no longer wanted to so participate.” 16RP 17. His contact with Navicky was not custodial. CP 856.

In support of its finding that Navicky did not interrogate the defendant, the court found that she did not confront him with evidence of his guilt, but asked him to complete a court-ordered, standardized presentence interview form. 16 RP 17; CP 856. As part of her procedure, she gave him an opportunity to give his version of events, an opportunity he was free to refuse. CP 856. The defendant’s statements were the product of a completely voluntary exchange with Navicky. 18RP 18; CP 856. The court ultimately concluded that the defendant’s statements to Navicky, that he felt badly about Jones’s death, that he had been drinking,

that he was innocent, and that he did not stab Jones but only assisted in the robbery, were admissible in the State's case-in-chief. CP 855.

The trial court also made findings concerning the defendant's Sixth Amendment right to counsel. 16RP 19. The court found that Navicky had neither "knowingly circumvented" the defendant's right to counsel, nor "deliberately elicited" incriminating statements from him. 16RP 19-20. 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." 16RP 21.

The court explicitly found that Navicky did not use "secret or evasive tactics." 16RP 23. Again, the court relied heavily on its assessment of Diane Navicky's credibility in reaching its conclusions:

And in this regard Ms. Novicky's [sic] credibility comes into play, and in fact it plays a critical role. As I've indicated earlier, it's difficult to imagine a witness with more credibility. There is no reason for the Court to believe she did anything other than what she testified she did, which was to go through the form of completing a standardized pre-sentence interview. . . . In short, Ms. Novicky did nothing to either take advantage of a situation or to create a situation in which she intended to interrogate Mr. Everybodytalksabout outside the presence of counsel.

16RP 23, 24. The court accordingly denied the defendant's motion to exclude his statements under the Sixth Amendment. 16RP 24.

C. ARGUMENT

1. THE DEFENDANT'S STATEMENTS TO CCO DIANE NAVICKY WERE OBTAINED WITHOUT VIOLATING HIS FIFTH AMENDMENT RIGHTS.

The Fifth Amendment protection against self-incrimination applies to the states through the Fourteenth Amendment. State v. Warner, 125 Wn.2d 876, 884, 889 P.2d 479 (1995) (citing Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). A person generally must invoke this protection in order for it to apply. Warner, 125 Wn.2d at 884. The Supreme Court has created an exception, however, in cases of custodial interrogation by a state agent. Id. (citing Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).⁴

This Court has held that a probation officer assigned by DOC to prepare a sentencing statement at the request of a superior court judge is acting as an "officer of the State" for purposes of the Miranda requirement. State v. Sargent, 111 Wn.2d 641, 652, 762 P.2d 1127 (1988). Miranda warnings were nevertheless not required here because the defendant was

⁴ Some federal courts have held that Miranda warnings are not required at a routine presentence interview conducted by a probation officer. These courts reason that such an interview simply does not implicate the concerns underlying Miranda. United States v. Rogers, 921 F.2d 975, 979-82 (10th Cir.), cert. denied, 498 U.S. 839 (1990); United States v. Jackson, 886 F.2d 838, 841-42, 841 n.4 (7th Cir. 1989); Baumann v. United States, 692 F.2d 565, 574-77 (9th Cir. 1982).

not in custody for Miranda purposes, and Navicky did not interrogate him. The defendant's statements were thus properly admitted at his trial.

a. The Defendant Was Not In Custody.

The trial court's determination of the defendant's custodial status for Miranda purposes is subject to *de novo* review. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). The standard is an objective one – whether a reasonable person in the defendant's situation would perceive that he was free to leave. State v. France, 121 Wn. App. 394, 399, 88 P.3d 1003 (2004). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

“Custody” for Miranda purposes is narrowly circumscribed; it requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest. State v. Post, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992). The traditional “custody” analysis is not appropriate when the interview takes place in a prison setting; not every person serving a prison sentence is automatically “in custody” for Miranda

purposes.⁵ Post, 118 Wn.2d at 606; United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985) (prisoner interrogation does not lend itself easily to analysis under the traditional formulations of the Miranda rule), cert. denied, 479 U.S. 830 (1986); United States v. Newton, 369 F.3d 659, 670 (2nd Cir.) ("Morales was a prison inmate at the time of the challenged questioning; thus, incarceration, not liberty, was his status quo. We have declined, however, to equate such incarceration with custody for purposes of Miranda."), cert. denied, 543 U.S. 947 (2004). While a convicted felon is "in custody" in the sense that his freedom of movement is undeniably restricted, "custodial" in the Miranda sense means more than just the normal restriction on freedom incident to incarceration – there must be "more than the usual restraint to depart." Post, 118 Wn.2d at 606-07; Warner, 125 Wn.2d at 885; United States v. Menzer, 29 F.3d 1223, 1232 (7th Cir.) ("While it is undisputed that the defendant was incarcerated for an unrelated crime, we conclude that Menzer was not 'in custody' for the purposes of Miranda because there was no 'added imposition on his

⁵ The United States Supreme Court, in holding that an undercover law enforcement officer posing as a fellow inmate was not required to give Miranda warnings to an incarcerated suspect before asking questions that could elicit an incriminating response, stated in dicta that "[t]he bare fact of custody may not in every instance require a [Miranda] warning even when the suspect is aware that he is speaking to an official." Illinois v. Perkins, 496 U.S. 292, 299, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

freedom of movement' nor 'any measure of compulsion above and beyond [imprisonment]'."), cert. denied, 513 U.S. 1002 (1994).

Both Post and Warner relied on the analysis set forth in Conley, supra; Conley, in turn, relied on Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978).⁶ Defendant Cervantes was incarcerated in the county jail. While being moved from one cell to another due to his involvement in a fight, Cervantes was brought to the jail library to speak with the shift commander. A search of Cervantes' belongings, which he carried with him, revealed a green odorless substance in a matchbox. The shift commander confronted Cervantes in the small library room with the

⁶ The defendant argued in the Court of Appeals that there is a split in authority as to "whether interrogation of an incarcerated inmate presumptively violates the Fifth Amendment right to counsel," citing three cases as espousing a "bright-line rule" in opposition to Conley and Cervantes. Brf. of App. at 36 n.13. Two of the three cases, however, deal with the "bright-line" rule of Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), that once an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available; these cases specifically address whether a long gap in time between invocation of the right to counsel and a subsequent interrogation without counsel can take a case outside this "bright-line" rule. Commonwealth v. Perez, 581 N.E.2d 1010, 1016 (Mass. 1991); United States v. Green, 592 A.2d 985 (D.C. 1991), cert. granted, 504 U.S. 908 (1992), vacated and cert. dismissed, 507 U.S. 545 (1993). These cases do not address whether a custodial interrogation has occurred, but whether a lengthy break between custodial interrogations can vitiate the request for an attorney. In the third case, Border Patrol agents lined up inmates and questioned them about their citizenship. Any inmate who refused to answer would be returned to his cell to reconsider, and questioning would later be reinitiated. The court found that the inmates were not free to refuse to answer the questions, nor were they free to leave. United States v. Lugo, 289 F. Supp. 2d 790, 796 (S.D. Tex. 2003). None of these cases would require this Court to find custodial interrogation in this case.

opened matchbox and asked, “What’s this?” Cervantes replied, “That’s grass, man.” Cervantes, 589 F.2d at 426-27.

The issue for the Ninth Circuit was whether the questioning of Cervantes constituted custodial interrogation such that Miranda warnings were required. Rejecting the conclusion that all prison questioning is per se custodial, the court found that, in the prison situation, custody “necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.” Cervantes, 589 F.2d at 428; accord Garcia v. Singletary, 13 F.3d 1487, 1492 (11th Cir.), cert. denied, 513 U.S. 908 (1994).⁷

The Ninth Circuit put forth an objective, "reasonable person" standard for determining whether a prisoner being questioned would nevertheless feel “free to leave” within the context of the prison surroundings. The court relied on four factors in making this determination: 1) the language used to summon the prisoner; 2) the physical surroundings of the interrogation; 3) the extent to which the

⁷ The defendant argues that the “custody” analysis should be different when an inmate is questioned about the crime for which he is incarcerated. Nothing in the Miranda analysis supports this distinction. See Mathis v. United States, 391 U.S. 1, 4-5, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968) (Miranda does not recognize a distinction based on the reason that the person questioned is in custody).

prisoner is confronted with evidence of his guilt; and 4) the additional pressure exerted to detain him. Cervantes, 589 F.2d at 427-28.

The record does not disclose the language used to summon the defendant to the interview room at the jail where he spoke with Navicky.⁸ However, Navicky, who had conducted countless such interviews over her 17-year career in the presentence unit, testified that she did not usually see jail guards escort defendants to the interview room. 10RP 25-26, 67. Navicky emphasized that, while she might encourage a reluctant defendant, she never made any effort to compel or coerce a defendant to participate in the presentence interview. 10RP 41-42, 59-60. When she explained the interview process to the defendant in this case, he readily agreed. 10RP 43. The trial court found no evidence of compulsion:

There is no evidence he was compelled to attend the interview; there is no evidence that he was handcuffed. While it may have been an unannounced appointment, there is no evidence that Mr. Everybodytalksabout was commanded to enter in the room or remain in the room. Most telling of all, when Mr. Everybodytalksabout wanted to leave he did so.

⁸ The defendant could have provided information to the court on the manner in which he was summoned for the presentence interview, and how it was conducted. Because he chose not to testify at the CrR 3.5 hearing, the trial court properly relied on Navicky's testimony, which the court found credible. 16RP 8, 23; CP 851, 857.

16RP 16. The first Cervantes factor thus supports the trial court's conclusion that the defendant was not in custody during the presentence interview. See CP 856.

Nor do the physical surroundings of the interview point to a custodial situation. Navicky testified that the attorney booths in the jail, in which the presentence interviews typically took place, had a glass divider separating the inmate and his visitor; the two communicated via a telephone. 10RP 36, 66. Access to each side was through a heavy glass door. 10RP 66. When the inmate wished to leave, he would buzz and the door would open. 10RP 70. This system of locked doors and buzzers was "part and parcel of the jail setting," and thus not more restrictive than any other part of the jail. 16RP 16-17. Thus, the second Cervantes factor supports the conclusion that the interview was not custodial.

Turning to the third factor, there is no evidence that the defendant was confronted with evidence of his guilt at the presentence interview.⁹ 16RP 17. Rather, as part of her standard protocol, Navicky would invite the defendant to give his version of the offense. 10RP 26-27. She would typically phrase the invitation as follows: "This is the part where the Department of Corrections would ask you for your version of the offense,

⁹ There is simply no reason to confront a defendant with evidence of guilt at the presentence stage. He has already been found guilty beyond a reasonable doubt.

and you don't have [to] give us the police or the prosecuting [version] but what you say happened on that night." 10RP 50. Navicky never inquired of the prosecutor or law enforcement whether they had questions that they wanted her to ask the defendant; she made a concerted effort not to take sides. 10RP 36-37. Recalling this case specifically, Navicky remembered feeling that "Mr. Everybodytalksabout deserved every opportunity to present his side." 10RP 84. Thus, the third Cervantes factor supports the conclusion that the interview was not custodial.

Finally, no pressure was exerted to detain the defendant in the interview room. Navicky recalled that he was polite and cooperative for most of the interview. 10RP 39. When Navicky told him what she wanted to do, he said, "Okay." 10RP 43. When the defendant abruptly terminated the interview and got up to leave, Navicky did not ask jail personnel to force him to remain. 10RP 58. She explained that "he was upset and I was going to respect him." 10RP 50. She did not push the defendant for any further information at the time, nor did she ever try to re-contact him to complete the interview. 10RP 50, 58-59. Significantly, Navicky never told defendants that her recommendation depended on compliance with the presentence process; she believed that such a practice

would be unethical.¹⁰ 10RP 40-41. The last Cervantes factor also supports a finding that the defendant was not in custody.

Based primarily on the testimony of Diane Navicky, whom the trial court found to be a “highly credible witness,” the trial court properly concluded that the presentence interview was not custodial for Miranda purposes. 16RP 8, 17-18; CP 856.

b. The Defendant Was Not Interrogated.

Whether the defendant was interrogated is a factual issue, subject to a clearly erroneous standard of review. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

"Interrogation" occurs when the questioner "should have known" that the question would provoke an incriminating response. Post, 118 Wn.2d at 596. The trial court's credibility determinations are not subject to review on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The United States Supreme Court in Miranda intended to protect “persons suspected or accused of crime” from “inherently compelling pressures which work to undermine the individual’s will to resist and to

¹⁰ This stands in sharp contrast to the probation officer in Sargent, who told the defendant that if he was to benefit from mental health counseling, he would "have to come to the truth with himself," by which he meant admit to the crime. 111 Wn.2d at 643.

compel him to speak where he would not otherwise do so freely.”
Miranda, 384 U.S. at 467. “‘Interrogation,’ as conceptualized in the
Miranda opinion, must reflect a measure of compulsion above and beyond
that inherent in custody itself.” Rhode Island v. Innis, 446 U.S. 291, 300,
100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

A presentence interview like the one that took place in this case
does not fall within the purview of Miranda. A defendant in the
presentence stage of his case is not a person “suspected or accused of a
crime.” Rather, he has already been found guilty beyond a reasonable
doubt of the crime with which the State has charged him. The State has no
need for further evidence at this point in the proceedings. Moreover, the
wholly voluntary presentence interview can hardly be said to create
“compelling pressures” that “undermine the individual’s will to resist.”

This Court has addressed the meaning of “interrogation” where a
defendant was interviewed by a DOC employee. Questioning in this
context is deemed to be “interrogation” for Miranda purposes when “the
probation officer should have known that his questioning would have
provoked an incriminating response.” Post, 118 Wn.2d at 606; Sargent,
111 Wn.2d at 650 (citing Innis, 446 U.S. at 301). In addition, any
questioning not necessary to prepare the presentence report constitutes
interrogation. Post, 118 Wn.2d at 606; Sargent, 111 Wn.2d at 651-52.

There was no reason for Navicky to expect that her invitation to the defendant to articulate his version of events for the sentencing judge would provoke an incriminating response. She told him that this was his chance to give **his** version, as opposed to the official, law-enforcement version. 10RP 50. In his statement to police, the defendant had denied any knowledge of the stabbing. Ex. 68, 69.

Nor did Navicky's interview exceed what was necessary to prepare the presentence report. The Superior Court Criminal Rules provide that the DOC should conduct a presentence investigation and prepare a report if directed to do so by the trial court. CrR 7.1(a). The report "shall contain," among other things, "the circumstances affecting the defendant's behavior" as well as "such other information as may be required by the court." CrR 7.1(b). Navicky testified that asking a defendant for his or her version of the offense was a consistent part of the presentence investigation. 10RP 26-27, 37. Given the broad language of the mandate, the trial court reasonably found that Navicky did not go beyond the scope of what was necessary to complete the report.¹¹ 16RP 10; CP 857.

¹¹ While the trial court may technically have erred when it relied on RCW 9.95.200 ("Probation by court – Investigation by secretary of corrections") as the authority for this presentence interview, that statute's mandate to investigate and report on "the circumstances surrounding the crime" sheds light on the type of information that courts find useful in deciding on a disposition after conviction.

Navicky had no reason to know that her invitation to the defendant to give his version of the offense, which was a standard piece of information that she gathered for the court in a presentence report, would provoke an incriminating response. Based upon Navicky's "highly credible" testimony, the trial court properly found that the defendant was not interrogated for purposes of Miranda when he gave the statements he now challenges on appeal. CP 856-57.

2. THE DEFENDANT'S STATEMENTS TO CCO NAVICKY WERE OBTAINED WITHOUT VIOLATING HIS SIXTH AMENDMENT RIGHTS.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel at every critical stage of the proceedings. State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994) (citing United States v. Wade, 388 U.S. 218, 224-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). The sentencing hearing is such a critical stage. Tinkham, 74 Wn. App. at 109-10 (citing Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). Some federal courts have held that the Sixth Amendment right to counsel does not extend to a routine presentence interview conducted by a probation officer. These cases emphasize the role of the probation officer as a

neutral gatherer of information for the court. Jackson, 886 F.2d 838, 843-45 (7th Cir. 1989); Brown v. Butler, 811 F.2d 938, 940-41 (5th Cir. 1987).

In any event, the Sixth Amendment is not violated every time the State obtains an incriminating statement from a defendant after the right to counsel has attached. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Courts have at various times applied two different standards in testing whether a defendant's Sixth Amendment right to an attorney was violated in such situations: 1) whether the State "knowingly circumvented" the defendant's right to counsel, and 2) whether the State "deliberately elicited" the incriminating statement. Compare Moulton, 474 U.S. at 176 (knowingly circumvent) and Sargent, 111 Wn.2d at 645 (knowingly circumvent)¹² with Fellers v. United States, 540 U.S. 519, 523-24, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004) (deliberately elicit); Kuhlmann v. Wilson, 477 U.S. 436, 457-59, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986) (deliberately elicit); and In re Personal Restraint of Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998) (deliberately elicit). While more recent authority supports the

¹² Eight justices participated in the Sargent decision; the three who signed the lead opinion applied the "knowingly circumvent" test, three who concurred would not have reached the Sixth Amendment issue, and two in dissent argued that "deliberately elicit" was the proper standard. Sargent, 111 Wn.2d at 645-46, 656, 664-66.

“deliberately elicit” test, the defendant’s statements to CCO Diane Navicky are admissible under either test.¹³

a. Navicky Did Not "Deliberately Elicit" Incriminating Statements From The Defendant.

A “deliberate” action is “premeditated” and “intentional.”¹⁴ Diane Navicky emphasized repeatedly that she employed a consistent approach in conducting presentence interviews. 10RP 33, 37, 40-42, 81-82. She never asked questions on behalf of law enforcement or the prosecutor’s office. 10RP 36-37. She saw her role as a neutral one: “The purpose of the pre-sentence [interview] was to give the judges, as much as we could, a fair evaluation of what we could gather for pre-sentence information and make a concerted effort not to take sides.” 10 RP 37. Navicky believed that her responsibility was to the court -- she was putting together a presentence report because a judge had asked for one. 10RP 83.

Navicky's view of her role finds support in the law. In gathering information for a presentence report, the CCO acts on behalf of the court, and thus has an independent duty of investigation; the CCO is not a part of

¹³ The Court of Appeals below endorsed the "deliberately elicit" test. State v. Everybodytalksabout, 131 Wn. App. 227, 238 n.37, 126 P.3d 87, review granted in part, 158 Wn.2d 1019 (2006).

¹⁴ The American Heritage Dictionary of the English Language 349 (1973).

the "prosecution team." State v. Sanchez, 146 Wn.2d 339, 354, 46 P.3d 774 (2002); see also Rogers, 921 F.2d at 979-80 (federal probation officer conducting a routine presentence interview is not performing a prosecutorial function, but rather acts as an agent of the court in the exercise of its sentencing responsibility). The CCO performing this function on behalf of the court thus acts as a quasi-judicial officer.

Navicky described the manner in which she would have introduced the question asking for the defendant's version of the offense: "And what I would have asked him is, I would have said, '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 [version] but what you say happened on that night.'" 10RP 50. Given that the defendant had pled not guilty, and given his previous statements to police in which he had claimed no knowledge of the stabbing (Ex. 68, 69), Navicky's invitation to give his version of the offense was not a deliberate attempt to elicit an incriminating statement.

Distinguishing cases where the courts found that the State had "deliberately elicited" incriminating responses,¹⁵ the trial court concluded:

We have no such secret or evasive tactics being used in this case. Instead, this was a straightforward pre-sentence

¹⁵ Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980).

information interview. And in this regard Ms. Novicky's [sic] credibility comes into play, and in fact it plays a critical role. As I've indicated earlier, it's difficult to imagine a witness with more credibility. There is no reason for the Court to believe she did anything other than what she testified she did, which was to go through the form of completing a standardized pre-sentence interview.

16RP 23. Based on the testimony, and on the trial court's unique ability to evaluate the credibility of a witness, the trial court properly found that Navicky did not "deliberately elicit" the incriminating statement.

The defendant relied in the Court of Appeals on Cahill v. Rushen, 678 F.2d 791 (9th Cir. 1982), arguing that that case is "squarely on point." Reply Brief of Appellant at 10. It is not. In Cahill, the defendant promised a police captain during a pretrial interrogation that, after trial, he would tell the captain all that had transpired at the scene of the crime. Id. at 792. The day after Cahill was convicted, the captain had him brought over from jail with no notice to counsel; Cahill confessed to the crime, expressing his belief that there could be no adverse consequences at that point. Id. at 793. The confession was admitted at a subsequent trial, and Cahill was again convicted. Id.

Under these circumstances, it is no surprise that the Ninth Circuit found the captain had "deliberately elicited" the incriminating statements:

We emphasize the narrowness of our holding. When as here defendant's right to counsel has attached, any incriminating statements **deliberately elicited** by the State

without at least affording defendant the opportunity to consult with counsel, must be excluded at any subsequent trial on the charges for which defendant is then under indictment.

Id. at 795. In Cahill, the captain had every reason to believe that the defendant would incriminate himself, yet he had the defendant brought over from jail to speak with police without his attorney present. By contrast, Navicky had no reason to believe that the defendant would incriminate himself.

Indeed, there are many ways that defendants would typically use this part of the presentence interview to their own advantage. It can be used as an opportunity for a convicted defendant to reassert his innocence, or elaborate on a failed defense (such as duress). It can be used as an opportunity to persuade the sentencing judge that mitigating circumstances, such as alcoholism or drug addiction, peer pressure, or minimal participation merit a sentence at the low end of the range. While a defendant will have the opportunity for allocution at sentencing, such opportunity occurs only moments before sentence is imposed, at a point where the judge's view of the case is largely, if not irreversibly, fixed. The ability to provide mitigating information to the judge at an earlier stage in the decision-making process can be invaluable to a defendant.

Under all of these circumstances, the trial court properly found that Diane Navicky did not "deliberately elicit" incriminating statements in violation of the defendant's Sixth Amendment right to counsel.

b. Navicky Did Not "Knowingly Circumvent" The Defendant's Right To An Attorney.

"[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." Moulton, 474 U.S. at 176. In applying the "knowingly circumvent" test, the standard of knowledge is objective: "whether the State knew or should have known that the contact in the absence of counsel would prejudice the defendant." Sargent, 111 Wn.2d at 645.

Diane Navicky testified that it was not her practice to notify a defendant's attorney before contacting the defendant for the presentence interview:

Q: Did you call Mr. McGary prior to August 21st of 1997 and ask whether you could have permission to go and interview his client?

A: No.

Q: You're aware that Mr. McGary was the attorney at the time for Mr. Everybodytalksabout; correct?

A: Yes. And it's our custom that we never do that, we were just told that – we were asked by the court to do a

pre-sentence report and we went to do the interview. Rarely did we ever – I can't even think of ever contacting an attorney to do that.

10RP 71.¹⁶

Navicky's subjective intent is clear from her testimony. She visited the defendant pursuant to a court order to prepare a presentence report, and she followed her standard procedure in doing this, including a standard script that invited the defendant to give his version of events for presentation to the court. She clearly did not intend to circumvent the defendant's attorney to the defendant's detriment. Nor did Navicky have any objective reason to think that the defendant would be prejudiced by the invitation to give his version. Where the defendant has maintained his innocence throughout a trial, and has already given police a version of events in which he had nothing to do with the murder, there is no reason to expect that an invitation to give his version of events in a presentence report for the court will cause the defendant to incriminate himself.

In ruling on this issue, the trial court found that 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." 16RP 21.

¹⁶ The trial court's "Order for Presentence Investigation Report" indicates that a copy of the order was provided to defense counsel. CP 946.

Distinguishing this case from the facts in Sargent, the trial court reasoned: “Asking a defendant to give his version of the circumstances surrounding the crime as required by the statute is a far cry from asking a defendant to confess, as the C.C.O. did in Sargent.” 16RP 22. The court concluded: “[T]here is no evidence before this court that Ms. Novicky [sic] took advantage of an opportunity to bypass counsel, or that she in any way knowingly circumvented Mr. Everybodytalksabout’s right to counsel.” 16RP 22. Based on the evidence and the trial court’s finding that Navicky was credible, this conclusion is well supported.

D. CONCLUSION

As to the Fifth Amendment claim, this Court should find that, even though the defendant was in jail when the presentence interview took place, he was not in custody for Miranda purposes because there was no additional restraint placed on his freedom of movement. This Court should further find that the presentence interview did not amount to interrogation, because Navicky had no reason to know that her questions would provoke an incriminating response.

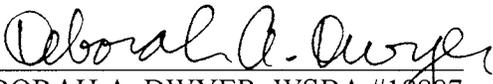
As to the Sixth Amendment claim, this Court should adopt the "deliberately elicit" test, and find that the standard was not violated in this case.

For all of the foregoing reasons, the State respectfully asks this
Court to affirm the Court of Appeals.

DATED this 2nd day of February, 2007.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: 
DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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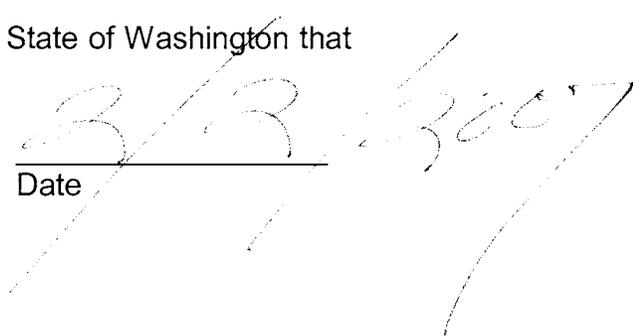
Supplemental Brief of Respondent, in **STATE V. DARRELL**

EVERYBODYTALKSABOUT, Cause No. **78514-7**, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

Date

Handwritten signature and date in black ink. The signature is written over the date line and extends upwards and to the right.