TO WHOM IT MAY CONCERN

My name is Jonathan Daniel Smith (Pro-Se), and my court appointed counsel has decided not to continue to help me. So please accept this motion, along with any errors. I am part autistic and a little dyslexic, so sorry about the few scribbles, I initialed it everytime though. Please do not re-assign me Ms. Glinski again if it goes back to the Court of Appeals. IF I need to show proof of indegency, please let me know, and send the proper forms to me, I am currently in IML with very limited access to the Law Library resources, and legal forms

Thank you for your time and patience.

Jonathan Daniel Smith (Pro-Se) 1/13/25

Jonathan Daniel Smith (Pro-Se) 1/13/25

Motion for discretionary review.

[Review of trial court decision]; Review of Court of Appeals interlocutory decision];

No. 58351-8-II
[Appellate court]

[SUPREME COURT or COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON]

[Title of trial court proceeding with parties designated as in rule 3.4]

STATE OF WASHINGTON,
Respondent,
v.
JONATHAN DANIEL SMITH (Pro-Se),
petitioner,
and
Same as above
Jonathan Daniel Smith (Pro-Se)
Defendant.

MOTION FOR DISCRETIONARY REVIEW

TREATED AS A PETITION FOR REVIEW

JONATHAN DANIEL SMITH (Pro-Se)
[Name of petitioner's attorney]

Signature of Attorney for [petitioner] (Pro-Se)

JONATHAN D. SMITH (Pro-Se) DOC#849151
[Name of Attorney for Appellant]

[Address] EE-09, Clallam Bay Corrections Center. 1830 Eagle Crest Way [City] Clallam Bay, [State] WA 98326 Zip Code]

[Telephone Number]

[Washington State Bar Association Membership No.]

A. IDENTITY OF PETITIONER JONATHAN DANIEL SMITH (Pro-Se)
[Petitioner's name]

asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

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2. The Court erred in admitting statements obtained in violation of petitioner's Fifth Amendment rights.

3. The courts erred in denying proposed jury instruction # 19 by defense (C.P. 445-447)

4. The court erred in not allowing evidence crucial to the defense to be published by the State of Washington (Clark County Sheriff's office evidence inventory report) referring to two knives and a methpipe found in Mr. Hudyma's jacket.

Issues pertaining to assignments of error

1. After Mr. Smith's arrest he invoked his right to have counsel present during interrogation. Nonetheless law enforcement continued to detain him in a recorded interrogation room for several hours, shirtless, injured, and bleeding, without access to counsel. Where these conditions were reasonably likely to elicit incriminating statements, should petitioner's resulting

statements have been suppressed? 2. Mr. Smith testified that he did not know if Ms. Herra was in the room, because his back was turned towards the front door at the time of his assailants attack, did the State prove beyond a reasonable that she wasn't or within earshot? 3. Why did the state choose to not publish the knives and meth pipe (evidence) found in Mr. Hudyma's camo jacket?

B. STATEMENT OF THE CASE

On January 27, 2023, Clark County deputies responded to a report of a disturbance at the Sunnyside Motel. RP 9. They approached the room where the disturbance was reported and knocked on the door. After about two minutes, Jonathan Smith opened the door, lying face down with his hands in front of him. RP 9-10. Deputies could see a man's body in the bathroom and blood on the floor and walls. RP 10. Smith was directed to crawl outside, and he complied, repeatedly saying that the man was trying to rape his girlfriend. RP 10. Smith looked at a woman standing with the deputies and said, "he was raping you." RP 11. Smith was arrested and placed in a patrol car.

RP 11. When a deputy asked how long he had been in the room with the other man, Smith said he would not make a statement without an attorney. RP 11. Smith was transported to the precint. RP 12. Smith was not given an opportunity to contact an attorney, but instead he was placed in an interview room, where a detective contacted him. RP 15, 19. There were signs notifying him that the room was audio and video recorded. RP 24-5. The detective began the interview by reading Smith the Miranda warnings and asked Smith if he understood his rights. RP 19. Smith said he wasn't an attorney and he didn't "all his rights." RP 19. When the detective asked if he was willing to talk without an attorney, Smith said he was not, and asked to use the phone to retain counsel. The detective ignored this request and left the "Room". RP 21-22.

Smith was shirtless, his hands were cuffed in front of him, and he had some injuries with blood dripping his Forehead. RP 19. He was left in the recorded interview room, without being given the opportunity to contact an attorney, for over five hours. RP 27. While Smith was being recorded, he made some statements, including "I had to do it, I had to do it." RP 25. After several

hours, Smith was transported to the jailed and booked. RP 22, 7-28. He was charged with second degree murder. CP 1-2. At a CrR 3.5 hearing, the defense argued that Smith had invoked his right to counsel at the scene, and the detective's attempt to interview him at the precint was unlawful and improper. RP 34. Moreover, Smith invoked his right to counsel again at the precint. Even after the detective left the room, however, Smith was still held in the recorded room for several more hours with the express purpose of gaining information. RP 35. Counsel argued that all the statements Smith made under those circumstances should be suppresed. RP 35.

The court agreed that Smith invoked his right to counsel when he was placed in restraints and put into the back of the patrol car, therefore the detective should not have initiated an interview with him at the precint. RP 37-38. It ruled, howevever, that the statements Smith made in the recorded interview room, other than again invoking his right to counsel, were not the product of interrogation or the functional equivalent of

interrogation. RP 38-39. It concluded that the statements Smith made "inside a recorded interview room were not the result of custodial interrogation and were voluntarily made. Those statements are admissible at trial." CP 6 (Conclusion of Law 4).

The portion of the recording containing Smith's statement was played for the jury at trial, but because of the poor quality, it was difficult to hear. RP 208-09. Nonetheless, the detective testified that he listened to the recording using headphones, and he heard Smith say "I had to do it, I had to do it." RP 210. The State also presented testimony about Smith's statements when he came out of the motel room. RP 171. And the detective testified that as he was taking Smith to the jail to be booked, he had an interaction right outside the booking area door with Smith, telling Smith he was just doing his job. Smith responded, "So was I. I got orders from some-one, it was kill or be killed." RP 211.

There was evidence that once Smith was taken into custody, deputies entered the motel room and found Roger Hudyma on the floor of the bathroom. RP 71, 128. He had significant facial injuries and was covered

in blood. Deputies started CPR, but when emergency medical responders arrived, they did not continue with CPR and determined Mr. Hudyma was dead. RP 71-72, 84, 221. Deputies found a broken piece of tile in Hudyma's hand as well as a gold chain and the handle of a kitchen knife on the floor near his body. RP 110-11, 243.

The medical examiner who performed Hudyma's autopsy testified that toxicology report showed blood pressure medication, nicotine, amphetamine, and methamphetamine in Hudyma's blood. RP 322. She noted that Hudyma had had multiple bypass surgeries, and his heart was very unhealthy. He would have been easily overwhelmed by physical exertion, emotional stress, drugs, or toxins. RP 326-327. She described the injuries to Hudyma's head, face, and eyes, noting a combination of sharp force injuries, abrasions and bruising. RP 335-46. The medical examiner testified that "none" of these injuries would have been fatal, alone or in a combination thereof, in a healthy person. But where but for of Hudyma's heart condition and severe methamphetamine

use, he did not survive the trauma. RP 348-49.

Smith testified that he was living at the Sunyside Motel. RP 402. Hudyma had given him and his girlfriend a ride back to the motel room that evening. RP 407. Hudyma had been using methamphetamine, and Smith was getting really bad vibes from him. RP 406. Nonetheless, he did not object when his girlfriend invited Hudyma into the room. RP 408. Hudyma decided to take a shower, and he headed into the bathroom, while Smith and his girlfriend (Ashley Herrera) went to the manager's office to get clean linen RP 410-11.

Smith returned to the motel room while his girlfriend stayed at the office talking to the manager. RP 411. As Smith was taking off the old linen, and getting the bed ready, he heard the bathroom door, which his back was to, open. He turned around and saw Hudyma with a knife in one hand and a piece of tile in the other. RP 413. Hudyma threatened Smith, that he was going to "gut him like a fish and rape his bitch." RP 414 Smith truly believed Hudyma was going to do what he said he would. Smith tried to get out of Hudyma's way, but then

he felt something hit his stomach and a hand come down on his forehead. Wanting to disarm Hudyma, Smith grabbed his wrist with the knife in it, and drove him back into the bathroom wall. RP 414. Smith hit Hudyma two or three times, and they both slipped and fell. He landed on top of Hudyma. Smith tried to prevent Hudyma from stabbing him with the knife, at some point, he broke the handle off the knife. RP 416-17. Hudyma struck Smith a couple more times with the tile, and then Smith him until he was no longer a threat. RP 417.

When Smith's girlfriend returned to the room, he told her Hudyma needed medical attention. RP 418. Smith waited in the room until he heard sirens and then police knocking on the door. RP 419-20. When he came out of the door/room, he told police that Hudyma had said he was going to rape his girlfriend. RP 422. Smith had injuries to his forehead, some scratches and cuts on the inside of his hands, and a slice mark on his stomach. RP 424-25.

Defense counsel argued that the State had no plausible explanation for what happened. RP 491. But Smith had shown he reasonably believed he was in

imminent danger. He used as much force as necessary to neutralize the threat, but not excessive force, and the State had not proven beyond a reasonable doubt that it was not self defense. RP 501-02.

The jury returned a guilty verdict. CP 115. The court imposed a mid-standard range sentence of 240 months. CP 221-22. Smith filed a direct appeal, and the Court of Appeals Division II, which issued its unpublished opinion on 12/24/24, the upheld the trial courts conviction. See attached "Appendix A".

C. ARGUMENT

1. STATEMENTS OBTAINED IN VIOLATION OF SMITH'S FIFTH AMENDMENT RIGHTS SHOULD HAVE BEEN SUPPRESSED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall... be compelled in any criminal case to be a witness against himself." U.S. Const., Amend V. The Washington Constitution states "[n]o person shall be compelled in any criminal case to give evidence against himself." WA. Const. Article I, sect. 9. The provision for the U.S. Const. Amend V. intends "to prohibit

the compelling of self-incriminating testimony from a party or witness." State v. Russell, 125 Wn. 2d 24, 59, 882 P. 2d 747 (1994) (citing State v. Moore, 79 Wn. 2d 51, 56, 483 P. 2d 630 (1971)), cert. denied, 514 U.S. 1129 (1995). "Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence." State v. Pinson, 183 Wn. App. 411, 417, 333, P. 3d 528 (2014) The state bears the burden of overcoming this presumption. North Carolina v. Butler, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1978); State v. Sargent, 111 Wn. 2d 641, 648, 762 P. 2d 1127 (1988). (Once an individual is in police custody, any incriminating statements obtained from that person are presumed "involuntary").

To protect a person accused of a crime from the pressures of in-custody interrogation, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully

honored." Miranda v. Arizona, 384 U.S. 436, 467, 16 L. Ed. 2d. 694, 86 S. Ct. 1602 (1966). A person who has been advised of his rights may waive them, provided the waiver is made knowingly and intelligently. Miranda, 384 U.S. at 473. A trial court's determination of voluntariness should be reversed on appeal where it is not supported by substantial evidence in the record. State v. Broadway, 133 Wn. 2d 118, 131, 942 P. 2d 363 (1997).

Significant to this case, is what the Supreme Court has addressed as the proper procedure when a suspect invokes his right to have an attorney present during questioning:

> If the individual states that he wants an attorney the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning... If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 473-75. Moreover, an accused who asserts his right to counsel during custodial interrogation cannot be interrogated further until counsel is made available, "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The functional equivalent of express questioning was defined by the Court 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." Id. at 301. The focus of the inquiry is on the perceptions of the suspect, rather than on the intent of the police. State v. Wilson, 144 Wn. App. 166, 184, 181 P. 3d 887 (2008).

In Wilson, the defendant agreed to waive her rights and speak to police. When she made reference

to an attorney during interrogation, the interview was terminated. Later, a deputy reentered the interview room to tell her that the man she was accused of stabbing had died. She collapsed and said she didn't mean to kill him and didn't mean to stab him. Wilson, 144 Wn. App. 183-83. The trial court ruled these statements admissable because the officer delivering the death notification about the man he believed was Wilson's husband did not intend to elicit an incriminating response. The Court of Appeals reversed. It held that the officer should have known that telling the defendant about the death was reasonbly likely to elicit an incriminating response, given that she was in jail for stabbing the man. Because the officer's action elicited the defendant's statement after she had invoked her right to counsel, the statement should have been suppresed. Wilson, 144 Wn. App. at 184-85. The admission of her statement was constitutional error. Id. at 185

Here, as in Wilson there was no express questioning after Smith invoked his right to an attorney at the precint. The issue is whether the detective's actions were the functional equivalentcy of questioning. Because the conditions Smith endured at the precint were reasonbly likely to elicit incriminating statements, his recorded statement should have been suppressed. Also Smith testified at trial "I became kind of agitated and said I'm going to piss in the corner and I remember saying I'm going to do it, I'm going to do it. I was referring to taking a piss in their holding cell." CP 424. Smith's full interview room recording should have been played for the jury, otherwise the statement made is taken out of context and inadmissable. The State bears a heavy burden of establishing it refrained from interrogation or its functional equivalentcy after Smith invoked his right to counsel. See Miranda, 384 U.S. at 475; Innis, 446 U.S. at 301. It cannot meet this burden. First, the detective attempted express interrogation in

the ~~[illegible]~~ interview room after Smith had invoked his rights at the scene. There is no question this was improper, as the trial court found. RP 38; See Edwards, 451 U.S. at 485.

Second, even after Smith again invoked his rights at the precinct, law enforcement did not cease their efforts to gain information from him. By asking for an attorney, Smith had "expressed his own view that he is not competent to deal with the authorities without legal advice present". See Michigan v. Mosley, 423 U.S. 96, 110 n. 2, 96 S. Ct. 321, 329 n. 2, 46 L. Ed. 2d 313 (1975) (White, J., concurring). Law enforcement exploited his incompetence by holding him for hours in a recorded interview room, still without access to counsel. He was shirtless, cold, bleeding from multiple wounds to his forehead, with his hands cuffed in front of him. RP 19, 202. There was no evidence that holding him in this condition, for this length of time, while being recorded, was "normally attendant

to arrest and custody." See Innis, 446 U.S. at 301. The only reason for doing so was to obtain information from Smith at a time he was without the advice of counsel. The deputies had reason to believe Smith was likely to cave to the pressure of this psychological and physical compulsion and make incriminating statements. This is exactly what the constitution, and the rules enforcing it, were designed to protect against.

Holding Smith under these conditions was a continuation of the interrogation which was suppose to cease when Smith invoked his right to have counsel present. Statements Smith made in response to this prolonged interrogation should have been suppressed, and admission of his statements was constitutional error. See Wilson, 144 Wn. App. at 185.

The erroneous admission of statements obtained in violation of constitutional rights require "reversal" unless it is harmless beyond a reasonable doubt. Wilson, 144 Wn. App. at 185 (citing Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The

State cannot show that error here was harmless.

Smith testified at trial that he acted in self defense following Hudyma's threats RP 413-14. Brown v. United States, 256 U.S. 335 argued (1920, 1921). The State offered no other explanation for what happened, relying in part on statements Smith made throughout the evening to suggest some other motivation. Without the improperly admitted statement, (exhibit 93) CP 517-18. or RP 88 (being played during jury deliberations) Smith made in response to interrogation without access to counsel, the jury more likely than not, would have been convinced beyond a reasonable doubt that Smith did not act in self defense. The court's error in admitting the statement was not harmless beyond a reasonable doubt, and reversal is required. Smith is entitled to a new trial with these statements suppresed.

2. DEFENSE OF OTHERS PROPOSED JURY INSTRUCTION #19 AT RP 446, DUTY TO RETREAT #24

Defendant's are guaranteed a Fair trial

under the Sixth Amendment, which requires jury instructions that accurately inform the relevant law. To ensure a jury is informed of the relevant law, the Washington Supreme Court "permits a trial court to provide the jury with supplemental written instructions on any point of law after deliberations begin." Wash. S. Ct. Crim. R. 6.15 (f) (1).

In the two cases the State refused to give self-defense jury instructions, and was later found by the appellate court to be an prejudicial erroneous error. State v. Tullar, State v. Bradley, 141 Wn. 3d 731, 10 p. 3d. 358 (2000), State v. Felton, 582 (2024). Also RCW. 9A. 16.020(3).

The State did not prove beyond a reasonable doubt that Mr. Smith did not believe his or Ashley Herrera's life was in imminent danger, or that a felonious attempt thereof was going to take place. There is no record during Smith's testimony, besides him stating Ms. Herrera did not follow him

back immediately to the room. R.P 411. Smith did testify that Herrera was no farther than the laundry room area. RP 401-38. The State could not prove if Ms. Herrera was within earshot at the time Hudyma attacked Smith with the knife. The State therefore, should judge on the side of caution that it was possible, more likely than not, that Herrera was in the room when Hudyma stated "when I get done gutting you like a fish I am going to rape your bitch." RP 414. Herrera even made this statement to police at the time, then the police pressured her into recanting it without counsel present. Arresting OFFICER'S DECLARATION OF PROBABLE CAUSE p. 2 of 3 (see attach. Appendix A.). "A person attacked by another with a knife does not, as a matter of law, exceed the of lawful self-defense if he stands his ground and kills his assailant, where he has sufficient reason to believe that he is in imminent danger of death, or grievous bodily harm from his assailant." Brown v. United States, 256 U.S. 335 (1920, 1921). See more

Cases at, see Homicide, III. b, in Digest Supreme Ct. (1908). Mr Smith is entitled to a new trial based on the trial courts error at. RP 446 (proposed jury instruction #19).

D. Conclusion

Statements obtained in violation of Smith's Fifth Amendment rights should have been suppressed. The trial court erred in not allowing Defense of others jury instruction (see Attached pages in Appendix A.), and informing the jury of the relevant law. Smith's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,

Jonathan Daniel Smith (Pro-Se) 1/13/25

(Pro-Se) 1/13/25

Appendix A.

Filed
Washington State
Court of Appeals
Division Two

December 24, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JONATHAN DANIEL SMITH Appellant.	No. 58351-8-II UNPUBLISHED OPINION

MAXA, J. – Jonathan Smith appeals his second degree murder conviction. The conviction arose from a fight between Smith and Roger Hudyma that resulted in Hudyma's death.

We hold that (1) the trial court did not err when it ruled that a statement Smith made to himself while being held in a recorded interview room was admissible because it was not a product of custodial interrogation and was voluntarily made; (2) Smith's assertions in a statement of additional grounds (SAG) lack merit or rely on matters outside the record; and (3) as the State concedes, the crime victim penalty assessment (VPA) must be stricken from the judgment and sentence. Accordingly, we affirm Smith's conviction, but we remand for the trial court to strike the VPA from his judgment and sentence.

FACTS

Background

In January 2023, sheriff's deputies responded to a disturbance at a motel in Clark County. The officers knocked on the door of the room where the disturbance had been reported. A few minutes later, Smith opened the door with blood on his hands and face. Hudyma's body was in the back of the hotel room, and he later was declared dead. Ashley Herrera, Smith's girlfriend, was present at the scene.

The officers detained Smith. While still at the motel, an officer asked Smith a question. Smith said he would not speak to the officer without an attorney present. Officers did not ask Smith any other questions.

The officers transported Smith to the local precinct and detained him in an interview room. Smith was shirtless and bleeding from a wound on his forehead, and his hands were cuffed in front of him. A detective informed Smith that the interview room was audio and video recorded. The detective also advised Smith of his constitutional rights under *Miranda*. Smith said that he did not understand his rights and that he was not willing to speak to the detective without an attorney. The detective did not ask Smith any questions.

After the detective left, Smith remained in the interview room by himself for approximately 90 minutes. While he was alone in the interview room, Smith said to himself, "I had to do it. I had to do it." Clerk's Papers at 5. The statement was picked up by the recording equipment.

The State charged Smith with second degree murder. The trial court held a CrR 3.5 hearing to determine the admissibility of the Smith's recorded statement, "I had to do it," made

while in the interview room. The trial court ruled that the statement was not the result of custodial interrogation and was voluntarily made, and therefore was admissible at trial.

Jury Trial

At trial, the State played for the jury a portion of the recording from the interview room that contained Smith's statements. However, because of the poor quality of the recording, a detective testified that he had listened to the recording with headphones and had been able to hear what Smith said. The detective testified that he heard Smith say on the recording, "I had to do it, I had to do it." Rep. of Proc. at 210.

Smith testified that he and Hudyma were in the motel room together when Hudyma, who was holding a knife, threatened to kill Smith and rape Smith's girlfriend. Smith stated that Hudyma hit Smith with the knife, and Smith fought back. Smith struck Hudyma many times until he went limp. Based on this testimony, Smith claimed self-defense.

The State did not reference Smith's recorded statement from the interview room in its closing argument or in its rebuttal argument.

The jury found Smith guilty of second degree murder. In the judgment and sentence, the trial court imposed a mandatory VPA. The trial court found that Smith was indigent under RCW 10.101.010(3).

Smith appeals his conviction and the assessment of the VPA.

ANALYSIS

A. ADMISSIBILITY OF RECORDED STATEMENTS

Smith argues that he was subjected to custodial interrogation when he was held in the interrogation room by himself, and his recorded statement, "I had to do it," should have been ruled inadmissible because he had invoked his right to an attorney. We disagree.

1. Legal Principles

The purpose of a CrR 3.5 hearing is to prevent "the admission of *involuntary, incriminating* statements." *State v. Williams*, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). Under CrR 3.5, the trial court must conduct a hearing before admitting a defendant's statement into evidence.

The Fifth Amendment to the United States Constitution states that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution states "[n]o person shall be compelled in any criminal case to give evidence against himself." "Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence." *State v. Pinson*, 183 Wn. App. 411, 417, 333 P.3d 528 (2014).

A person who is in custody must be given *Miranda* warnings – the right to remain silent and the right to an attorney – before being subjected to interrogation. *State v. Gardner*, 32 Wn. App. 2d 320, 338, 556 P.3d 186 (2024). If the accused invokes the right to an attorney, all questioning must stop. *Id.*

Interrogation by law enforcement includes "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The functional equivalent of express questioning is "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response." *Id* at 301. However, incriminating statements that are not responsive to an officer's questioning are not products of interrogation. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 685, 327 P.3d 660 (2014).

We review challenged findings of fact entered after a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court's conclusions of law are supported by its findings of fact. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013).

2. Analysis

There is no question that Smith was in custody when he was being held in the interview room. And it is undisputed that he was informed of his *Miranda* rights, he invoked the right to an attorney, and he was asked no questions after that point.

However, it also is undisputed that Smith did not make the challenged statement in response to an officer's express questioning. He was alone in the interview room when he spontaneously made the statements. Incriminating statements that are not responsive to an officer's questioning are not products of interrogation. *Cross*, 180 Wn.2d at 685.

Smith argues that holding him alone in the interview room for a long period without the attorney he had requested was the functional equivalent of an interrogation. He claims that law enforcement exploited his situation – he was shirtless, bleeding, and handcuffed – and had reason to believe that the psychological and physical pressure would cause Smith to cave and make incriminating statements that could be recorded. Smith contends that holding him under these conditions was a continuation of his interrogation.

Courts in other jurisdictions have rejected similar arguments. In *United States v. Hernandez-Mendoza*, a law enforcement officer detained two people in his patrol vehicle and left them alone. 600 F.3d 971, 974 (8th Cir. 2010). A video recorder in the vehicle recorded an incriminating conversation between the two people. *Id.* The court rejected the argument that activating the recording device was the functional equivalent of a custodial interrogation. *Id.* at 976-77. The court stated,

> [The officer's] act of leaving the appellants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning. [The officer] may have expected that the two men would talk to each other if left alone, but an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. "Officers do not interrogate a suspect simply by hoping that he will incriminate himself."

Id. at 977 (quoting *Arizona v. Mauro*, 481 U.S. 520, 529, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987)).

In *United States v. Swift*, officers placed two suspects alone in an interrogation room together. 623 F.3d 618, 620 (8th Cir. 2010). Officers monitored their conversations, and they heard incriminating statements. *Id.* The court affirmed the denial of a suppression motion, finding the reasoning of *Hernandez-Mendoza* controlling. *Id.* at 623. The court stated, "Even though officers may have hoped that Swift or Harlan would make incriminating statements when left alone, that action was not express questioning. Nor does that action rise to the 'functional equivalent' of a police interrogation." *Id.*

Other cases have refused to suppress statements made by people left alone in a recorded law enforcement vehicle. *United States v. Colon*, 59 F. Supp. 3d 462, 468 (D. Conn. 2014) (ruling that placing suspects in a police car "in hopes that they might make incriminating statements" did not amount to interrogation); *State v. Younger*, 556 P.3d 838, 855 (Kan. 2024) (stating that the defendant "was not constitutionally protected from incriminating herself by making spontaneous statements").

Conversely, Smith cites no authority for the proposition that leaving a defendant in an interview room constitutes interrogation. Instead, Smith argues that his case is similar to *State v. Wilson*, 144 Wn. App. 166, 181 P.3d 887 (2008). In *Wilson*, the defendant was charged with felony murder after stabbing her ex-boyfriend. *Id.* at 170. While in police custody, the defendant referenced an attorney during the interrogation and the police terminated the

interrogation. *Id.* Later, believing that the defendant had been married to the victim, a deputy entered the interview room and told her that her husband had died from his injuries. *Id.* at 182-83. The defendant collapsed and said that she did not mean to kill him. *Id.* at 183.

The court held that the officer should have known that telling the defendant about the death was reasonably likely to elicit an incriminating response. *Id.* at 184-85. The court reasoned that, because the officer elicited the defendant's statement after she had invoked her right to counsel, admission of the statement during trial was a constitutional error. *Id.* at 185.

But this case is different from *Wilson*. Officers did not make any statements to Smith that were likely to elicit an incriminating response. Indeed, no one said anything at all to Smith before he made the statement that "he had to do it" while alone in the interview room.

As stated above, police interrogation includes "express questioning," or "words or actions . . . that the police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301. Law enforcement did not engage in any express questioning or actions reasonably likely to elicit an incriminating response from Smith in the recorded interview room.

We conclude that Smith's recorded statement that "he had to do it" made in the interrogation room was not a product of custodial interrogation and was made voluntarily. Therefore, we hold that the statement was not obtained in violation of Smith's constitutional rights.[1]

[1] Any error also was harmless. Rather than being incriminating, Smith's statement actually was consistent with his self-defense theory. Probably for that reason, the State did not mention the statement in closing.

B. SAG CLAIMS

1. Defense of Others Instruction

Smith asserts that the trial court erred when it failed to give a defense of others jury instruction, claiming that Herrera could have been in the room with him at the time of the fight. He argues that the State did not prove that Herrera was not in the room, and therefore that a defense of others instruction should have been given. We disagree.

Smith testified that he was in the hotel room alone when the fight with Hudyma began. At one point, Smith called for help. Herrera returned to the room to help him get band-aids and call for help. Smith did *not* testify that Herrera was in the room with him for the duration of the fight with Hudyma. And the trial court excluded Smith's testimony that referenced defending Herrera because there was no evidence that she was in imminent danger. Smith does not challenge that ruling. Accordingly, we reject this argument.

2. Suppression of Evidence

Smith asserts that in the photos of the hotel room, there was a jacket belonging to Hudyma that contained knives and a methamphetamine pipe. He claims that the State illegally suppressed the contents of the jacket while Smith was not present in the court. Smith argues that the contents of the jacket showed intent to cause Smith harm and would have impacted the jury's decision.

This assertion relies on matters outside the record. As a result, we cannot consider it on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008). This assertion is more properly raised in a personal restraint petition. *Id.* Therefore, we decline to consider this claim.

C. CRIME VICTIM PENALTY ASSESSMENT

Smith argues, and the State concedes, that the $500 VPA should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet the criteria in RCW 10.101.010(3)(a)-(c). Although this amendment took place after Smith's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

The trial court determined that Smith was indigent under RCW 10.101.010(3)(a)-(c). Therefore, we remand for the trial court to strike the $500 VPA from the judgment and sentence.

CONCLUSION

We affirm Smith's conviction, but we remand for the trial court to strike the VPA from his judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

VELJACIC, A.C.J.

LEE, J.

ARRESTING OFFICER'S DECLARATION OF PROBABLE CAUSE

The undersigned law enforcement officer states that the person whose name appears on this Pre-book/Probable Cause sheet was arrested without a warrant on the date and time shown thereon for the crimes committed in Clark County, Washington based on the following circumstances. The Pre-Book for this sheet is hereby incorporated by evidence.

CCSO Case # 23000790
Probable Cause: RCW 9A.32.050, Murder in the Second Degree

My information is derived from:

BOOKED: Jonathan D. Smith, DOB 09/10/1983
VICTIM: Roger J. Hudyma, DOB 07/03/1964
WITNESS: Ashley D. Herrera, DOB 11/07/1988

Investigation Summary:

On January 27th, 2023, at approximately 2106 hours, Clark County Sheriff's Office Deputies responded to the report of a heard only physical disturbance in room #31 at the Sunnyside Motel located at 12200 NE Highway 99, Vancouver, Clark County, WA. Deputy Messman provided me with the following information:

"On the evening of 01/27/2023 I self-dispatched to cover Sgt. Agar on a disturbance at the Sunnyside Motel located at 12200 NE Hwy 99 room #31. The caller, Jack Jones, had called 911 to report that his neighbors were fighting in room #31. He said he believed it to be Male vs Female and that someone was screaming to call the police.

I arrived on scene with Sgt. Agar and Dep. Ogdee. There were two people standing outside room #30 screaming that we needed to hurry up and that someone was going to die. We approached the door to #31 and heard no noise or disturbance coming from inside the room. We knocked several times and were joined by Dep. Winegar as we were waiting for someone to answer the door.

After approximately two minutes I heard someone opening the door. When the door opened, I immediately noted one male laying on the ground crawling out the front door. I also noted there a nude lifeless male in the back of the room laying on the bathroom floor. There was blood on the bathroom floor and walls that I could see from the doorway. As the male on the floor was crawling outside, I noticed he had blood on his face and hands. As he was crawling out of the apartment, he repeatedly said he was trying to rape my girlfriend. He looked up at a female who was with the 911 caller and said, "He was trying to rape you, he was raping you." Dep. Agar placed him in handcuffs, and he was moved to my patrol vehicle where he was secured.

I asked him how long he was in the apartment with the other male, and he said he didn't want to make a statement without an attorney. He was identified as Jonathan Smith from a Washington State ID card which was in his wallet. Jonathan was seen by AMR medical for the superficial wounds on his head and was cleared. I later transported him to west precinct, I took two swabs from each hand and placed those swabs in secure evidence bags. I later turned them over to Det. Henschel to be processed.

I interviewed the caller, Jack Jones, who was in room #30. Jack said he heard loud screaming and banging coming from the apartment and thought Jon was beating up his girlfriend Ashley.

He said after about fifteen minutes he still heard the noise and went to knock on the door. He said he knocked, and the noise stopped for a second, but nobody came to the door. He said a short time later Ashley walked up and went into the room (31) He said she quickly came out of the room and told him to call the ambulance, so he called 911.

Along with Dep. Arvizo I spoke with Ashley. Ashley was all over the place and could not speak in linear thought patterns. From what she said her version of the events lined up with what Jack had said. Ashley said he left the room to go get band aids and Jon and "Donny" were in the room. Ashley said when she came back to the room, she saw them fighting. She said Jon had something in his hands that had a black handle, but she couldn't tell what it was.

I asked if she was being raped. Ashely made odd comments that I could not track. She said, "He was trying to rape me." I asked, "who" and she said, "he was" When I was able to clarify she said nobody was trying to rape her, but Jon had "thrown that our there." She eventually said that she was not being raped and nobody was trying to rape her. She was secured in Dep. Wald's vehicle."

An AMR ambulance medic unit that had responded to the scene pronounced a then unidentified male found in the hotel room as deceased at approximately 2125 hours.

At approximately 2333 hours that same day, I attempted to interview Jonathan Smith who was in Deputy Messman's custody and secured in an interview at the CCSO West Precinct at 505 NW 179th Street, Ridgefield, WA. When I contacted Jonathan I noticed he had blood on his face, head and hands. I advised Jonathan of his Constitutional Rights and he refused to answer if he understood his rights. After some time passed in silence and then asking if he would like me to read his rights to him again with no response, I ended my interview attempt without asking him any questions. As I left the room Jonathan began talking and said he's not an attorney and didn't understand his rights. I asked him if he was willing to speak to me without an attorney present and he stated he was not. I asked him no questions in regards to this investigation.

Simultaneous to my attempted interview of Smith, Detective Silveria interviewed Smith's girlfriend Ashley Herrera. She provided me with the following information:

"On 01/27/2023 at approximately 2200 hours, I responded to a homicide at 12200 NE Highway 99. At the scene I spoke with a witness, Ashley Herrera. Ashley was sitting inside a patrol car waiting to be interviewed.

At 2252 hours, I initiated a recorded interview with Ashley, and she told me the following: Jonathan Smith is my boyfriend and we have been dating for approximately 2 weeks. Today Jon and I were hanging out at my friend's trailer located at 10804 NE highway 99. I do not remember the trailer number, but my friend's name is Donny.

My other friend Don, whom I have known from a long time. Came to the trailer to pick me and Jon up. Don drove a small red car and dropped us off at our hotel, Sunnyside, room 31.

Jon and I have been staying there for two weeks. Don followed us in the room to hang out for a little bit. Nobody was arguing before getting to the room. I then saw Jon picking up some clothes in the room and Don going into the shower. I noticed there was a hole in the bedroom sheets and decided to go to the hotel's office and get a sewing kit.

While I was at the office, I heard screaming coming from outside the office. I assumed it was an argument between a girlfriend and boyfriend because I know guys would not fight like that. I never heard a female voice. I went inside my hotel room and saw Don laying on his back in the bathroom floor and Jon was on top of him. I do not know what Jon was doing.

I believe that Don was having seizures and that he fell on the floor. I thought that Jon was helping him, but I could not see his hands because he was facing the wall. I looked over at Don and notice there was something wrong with his eye because it looked swollen. I told Jon "Oh my god, we need an ambulance." Jon stood up and started pacing back and forth in the hotel room. I started feeling anxious and left the room. I started knocking on the other hotel doors to ask for a cellphone, but no one would call 911 for me. I am not sure what happened, but I think Jon thought that Don raped me. Don never raped me. We have never had sex or even dated in the past."

Detective Telecsan authored a search warrant for hotel room #31 at 12200 NE Highway 99 which was granted by Clark County Superior Court Judge Lewis. Upon serving that search warrant at 0039 hours on January 28th, 2023, I observed the body of a naked deceased male laying on his back on the floor of the hotel room. The male's head was covered in blood and swollen. There was additional bloody wounds and abrasions visible in other areas of his body. Additionally, there was a significant amount of apparent blood on the floor and walls of the bathroom attached to the hotel room. The deceased male had a distinctive angel or winged man tattoo on his left forearm. Additionally there was a Washington State photo ID card on the floor of the hotel in the name of Roger John Hudyma, DOB 07/03/1964. The photo on the Roger Hudyma ID generally matched the deceased male but due apparent swelling and injuries on his face I was not 100% positive on who the deceased male was. I did research in local law enforcement reports and found that Roger Hudyma had been booked in the Clark County Jail previously and was listed as having an "angel" tattoo on his left forearm. I contacted Clark County Records and they were able to provide me with a photo of that tattoo from booking photos of Roger Hudyma taken at the Clark County Jail in 2020. I believe the deceased male is Roger Hudyma.

Based on the above information I believe there is probable cause to arrest Jonathan D. Smith with one count of RCW 9A.32.050 Murder 2 for the death of Roger Hudyma.

The undersigned declares and certifies under penalty of perjury under the laws of the State of Washington that the preceding statement is true and correct to the best of his knowledge.

Signed this 28TH **Day of** JANUARY, **2023 in Vancouver, Clark County, Washington.**

(DETECTIVE J. STEVENS)

Signature 4485 **PSN**

The undersigned Judge/Magistrate/Commissioner hereby certifies that I have read or had read to me the above statement of probable cause to arrest and that I find probable cause to arrest is
✓ established ____ not established (release defendant).

Signed this 29 **day of** January **; 20** 23 **in Vancouver, Clark County, Washington**

Judge Derek J. Vanderwood **Time:** 9:40am **am/~~pm~~**

The above named Judge found probable cause via email at the listed date and time.
/s/Chad C. Marquez, DPA, WSBA #54168

Instruction No. _____

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:

(1) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 16.02 Justifiable Homicide—Defense of Self and Others

Instruction No. _____

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger.

Actual danger is not necessary for a homicide to be justifiable.

WPIC 16.07

Instruction No. _____

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 16.08 No Duty to Retreat

INMATE

January 14, 2025 - 8:00 AM

Transmittal Information

Filed With Court:	Court of Appeals Division II
Appellate Court Case Number:	583518
Appellate Court Case Title:	State of Washington, Respondent v. Jonathan Daniel Smith, Appellant
Trial Court Case Number:	23-1-00288-1

DOC filing of Smith Inmate DOC Number 849151

The following documents have been uploaded:
DOC1pCBY1118@doc1.wa.gov_20250113_195618.pdf

The DOC Facility Name is Clallam Bay Corrections Center
The Inmate/Filer's Last Name is Smith
The Inmate DOC Number is 849151
The Case Number is 583518
The entire original email subject is 04,Smith,849151,583518,1of1

The following email addresses also received a copy of this email and filed document(s):
aaron.bartlett@clark.wa.gov,cntypa.generaldelivery@clark.wa.gov,glinskilaw@wavecable.com