

No. 49709-3-II
Clallam County No. 16-1-00065-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM EDWARD LUNDSTROM,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
CLALLAM COUNTY

The Honorable Judge Eric S. Rohrer
(pretrial release proceedings)
and
The Honorable Judge Brian P. Coughenour
(trial and sentencing)

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The improper five-point physical restraint of appellant William Lundstrom prior to trial without any proof or finding of individualized need, based on a general policy, violated appellant's state and federal due process rights.
2. The trial court erred in imposing legal financial obligations including a victim assessment, a criminal filing fee and a DNA collection fee, as well as onerous repayment terms, because appellant has a permanent disability, no present or future likely ability to pay and only receives income from federal benefits.
3. To the extent RCW 7.68.035, RCW 36.18.020 and RCW 43.43.754¹ require payment of fees by those convicted of a crime who do not have present or future likely ability to pay and further subject indigents to a greater sentence than those with ability to pay, those statutes violate due process and equal protection rights and are unconstitutional.
4. The sentencing court erred in imposing a payment of "[n]ot less than \$40.00 per month commencing 90 days upon release" upon an indigent defendant in a state criminal case when his sole source of income is federal benefits and the state's highest court has held that such conditions are improper, in City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016).

B. QUESTIONS PRESENTED

1. Every person accused of a crime is vested with the presumption of innocence. They have the right to have their guilt proven, beyond a reasonable doubt, before they are punished. They have greater due process rights than those who have been convicted. And it is longstanding in this state that a person accused is entitled to appear in court "unfettered," without physical restraints, unless and until the state shows some compelling, individualized reason why he should be subject to such physical indignities in a court of law.

Were Mr. Lundstrom's fundamental constitutional rights including the presumption of innocence, due process and to personally appear in court unfettered violated when the state subjected him to "five-point" harness restraints which are used only on the most

dangerous of prisoners but were used on Lundstrom as a matter of general policy that all persons be subjected to such restraint apparently for the convenience of or budget cuts to the agency providing transport and security?

2. Where the defendant is receiving Social Security Disability benefits based on his mental illnesses and has not ever held a job, does a trial court err and abuse its discretion in imposing legal financial obligations and onerous payment conditions despite the lack of evidence he will ever have any ability to pay?
3. To the extent that they can be read to require an impoverished person to surrender to the government monies the person does not have and will never be able to earn and subjects them to additional penalties and possible punishment for failure to pay, are “mandatory” fines and fees imposed under those statutes unconstitutional?

Further, to the extent that the statutory scheme requires an indigent person receiving federal benefits to use those benefits to pay state criminal fines and fees, does that violate equal protection and federal laws?

4. Did the court abuse its discretion in setting a payment schedule for repayment of state criminal fines and fees which subjects an indigent defendant to onerous terms and forces him to use federal disability benefits to pay state criminal court costs, despite Richland, supra?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant William E. Lundstrom was charged in Clallam County with unlawful possession of methamphetamine and unlawful possession of oxycodone. RCW 69.50.4013. CP 43. After proceedings before the Honorable Judge Christopher Melly, the Honorable Brian Coughenhour and the Honorable Erik S. Rohrer on April 8 (Melly), August 11 (Coughenhour), August 19 (Judge Melly),

October 6 (Coughenhour), November 9 and 18 and December 2 (Rohrer), on December 6, 2016, Judge Melly accepted Mr. Lundstrom's plea to an amended information filed the same date, charging two counts of possession of methamphetamine. CP 29.

Judge Melly imposed an agreed exceptional sentence above the standard range. CP 14-28. Mr. Lundstrom appealed and this pleading follows. CP 7.

2. Statement in plea

In the plea of guilty, Mr. Lundstrom declared that what made him guilty was, “[o]n August 8, 2016[,] and November 8, 2016[,] in Clallam County, Washington[,] I unlawfully possessed methamphetamine.” CP 36.

D. ARGUMENT

1. APPELLANT’S DUE PROCESS AND ARTICLE 1, SECTION 22, RIGHTS WERE VIOLATED WHEN HE WAS SUBJECTED TO FIVE-POINT PHYSICAL RESTRAINTS PRETRIAL WITHOUT ANY INDIVIDUALIZED DETERMINATION OF NEED AND THIS COURT SHOULD ADDRESS THE ISSUE

The federal and state constitutions protect against the state depriving any person of “life, liberty or property, without due process of law.” See Hardee v. Dep’t. of Soc. & Health Svcs., 172 Wn.2d 1, 256 P.3d 339 (2011); United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). These protections apply pretrial. Salerno, 481 U.S. at 744.

In addition, pretrial, as part of due process and “implicit in the concept of ordered liberty,” every person is presumed innocent

unless and until proven guilty, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970). As a result, being a pretrial detainee is different than being a convicted inmate. Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997). Due process provides greater protection for the former, cloaked with the presumption, than the latter, for whom the conviction means the presumption has been overcome. See id; see State v. Hartzog, 96 Wn.2d 383, 392-93, 635 P.2d 694 (1981).

The presumption of innocence and the state and federal rights to due process were violated in this case, as were Mr. Lundstrom's rights under Article 1, § 22, when Mr. Lundstrom was forced to appear in five-point physical restraints in the courtroom without any finding or proof of individualized need for such extreme restraint, as part of a general policy.

a. Relevant facts

Mr. Lundstrom was charged by information but, after service at his address was unsuccessful, a bench warrant was issued by Judge Christopher Melly on April 8, 2016, with bond fixed in the sum of \$2,500.00. RP 4. On August 11, 2016, Mr. Lundstrom was brought to court. RP 9. He had been arrested on the warrant. RP 9-10.

Judge Coughenhour explained Lundstrom's pretrial rights, asking if he had funds to hire counsel to represent him. RP 10. After Lundstrom shook his head, "no," the court appointed the public defendant's office. RP 10. The prosecutor and judge then discussed

Lundstrom's criminal history and Lundstrom tried to answer some questions but the judge then stopped him and introduced Lundstrom to the person next to him. RP 11. That person was a representative of the public defender and the judge told Lundstrom to talk to them. RP 10-11. After a little more discussion between the state and court, the judge then turned to the defendant and newly appointed counsel on the issue and ultimately Lundstrom was released. RP 11-14.

A few days later, on August 19, in front of Judge Melly, Lundstrom was arraigned. RP 21. At the next hearing, on October 6, 2016, Lundstrom had new counsel but was not himself there, so the court issued a bench warrant and struck the November trial date. RP 26.

Mr. Lundstrom was next before the court after his arrest on the bench warrant, appearing on November 9, 2016, before Judge Rohrer. RP 28-29. The judge told Lundstrom he had the right to counsel and Lundstrom said he wanted to go to "mental health court." RP 30-31. Judge Rohrer responded, "we're not going to do it today," suggesting Lundstrom talk to counsel. RP 30. The public defender present was asked to discuss the issues regarding conditions of release and said he did not have "much of" a response regarding the suggestions of the state. RP 31-32.

Counsel objected, however, to the conditions Mr. Lundstrom was being subjected to, declaring, "I do take exception to the gentleman being - - looks like five-point shackles" without an

independent inquiry or “determination of the appropriateness of that.” RP 32. The judge and prosecutor made no comment and did not respond in any way to that objection. RP 32-33.

Counsel also filed a written objection that the restraints used violated his due process rights and moving for their removal. CP 37. Citing both the federal and state constitutions, he argued that pretrial physical restraint under a “general policy” was unconstitutional and not based on a legitimate governmental need. CP 37-39. He submitted that it appeared that the Clallam County Sheriff’s Office was apparently applying a general policy that all defendants are physically restrained by 5 points with only 15 inches of slack connecting the chains between their arms and their stomach. CP 38-39.

Counsel noted that, in other cases, some minor shackling had been upheld after multiple hearings and evidence regarding the purpose but was “unaware” of any design flaws in the courtrooms in Clallam County requiring the extra restraint of the accused, “nor does there appear to have been a any judicial individual or generalized judicial input regarding the restraint practices utilized in the instant case” or others in Clallam County courthouse. CP 38. He argued that, absent an individual determination that this case involved specific need, shackling was improper and the court should grant the motion to be free of restraints immediately. CP 37-39.

In an attached certified statement, the director of the Clallam County Public Defender’s Office set forth the following under oath,

in relevant part, regarding the county sheriff's policy being applied, CCSO policy 15.106.1 "INMATE MOVEMENT TO COURT," noting that it requires "full restraints (waist chain, cuffs and leg irons" for all "[f]irst appearances," which involves "'5 point' restraints. . .handcuffs with a belly chain (believed to be approximately 15") and leg shackles." CP 39-40.

- b. This extreme violation of fundamental liberty and the presumption of innocence must be denounced

This Court should rule that the 5-point physical restraint used on Mr. Lundstrom without any proof or finding of an individualized need for such extreme restraint violated due process under the state and federal constitutions, as well as his rights under Article 1, § 22.

The presumption of innocence in favor of the accused is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 03, 39 L. Ed. 481 (1895). That presumption, however, is just one of the fundamental rights involved. This state also has long recognized the general right to appear in court "unfettered" by physical restraint. See State v. Williams, 18 Wash. 47, 49-50, 50 P. 580 (1897). Indeed, the right existed before our country was founded:

It was the ancient rule at common law that a prisoner brought into the presence of the court for trial upon a plea of not guilty to an indictment was entitled to appear free of all manner of shackles or bonds; and, prior to 1722, when a prisoner was arraigned or appeared at the bar of the court to plead, **he was presented without manacles or bonds, unless there was evidence danger of his escape.**

18 Wash. at 50 (emphasis added). In Williams, our Supreme Court described this as the “ancient right of one accused . . . to appear in court unfettered.” 18 Wash. at 50. Further, the Court noted, the right is “still preserved in all its original vigor in this state.” 18 Wash. at 50.

Article 1, § 22, of our state constitution is also involved. That provision guarantees the accused in a criminal prosecution “the right to appear and defend in person.” Article 1, § 22. The Williams Court also cited this provision as relevant to the use of physical restraint of the accused. 18 Wash. at 50. The Court held that the rights guaranteed under Article 1, § 22, include not only the right to be physically present but also the right to do so with mental and physical “faculties unfettered” unless the government proves some “impelling necessity” to demand restraint. Williams, 18 Wash. at 51.

Further, the Court held, the use of physical restraints is prejudicial even if a jury is not there. Williams, 18 Wash. at 51. Physical restraints have an impact on the accused and, the Court held, to “some extent, deprive[s] him of the free and calm use of all his faculties.” Williams, 18 Wash. at 50-51 (quotations omitted); see also, State v. Maryott, 6 Wn. App. 96, 100, 492 P.2d 239 (1971) (recognizing due process “right of a prisoner to be free of restraints which affect his reason”). Thus, the Supreme Court has “long recognized that a prisoner is entitled to be brought into the presence of the court free from restraints.” State v. Damon, 144 Wn.2d 686, 690, 25 P.3d 318 (2001).

Indeed, the right to be free from physical restraints in a courtroom in this state is so strong it applies to those incarcerated *post-trial*, after the presumption of innocence is no more. See Hartzog, 96 Wn.2d at 386. In Hartzog, the superior court issued a general “security” order for the courtroom, requiring that any inmate brought to court from the nearby maximum security prison would be subjected to body cavity searches and would remain physically restrained during trial. 96 Wn.2d at 386-87. The county had recently seen a violent stabbing of an inmate and the resulting trial had involved serious injuries occurring in the courthouse from a bomb believed to have been smuggled in by an inmate, in his rectum. 96 Wn.2d at 387. The superior court issued the security order to treat all prisoners as if they were violent, based on the court’s concerns that there was no reliable way to distinguish between those who were and those who were not. 96 Wn.2d at 387.

On review, the Supreme Court noted that, because the people to whom the rule applied had already been convicted of a crime and committed to a term in prison, they did not have the same rights as a pretrial detainee, or enjoy the presumption of innocence. 96 Wn.2d at 391. Further, the Court acknowledged, “[m]any rights and privileges are subject to limitation in penal institutions because of paramount institutional goals and policies.” Hartzog, 96 Wn.2d at 391, quoting, Bell, *supra*.

But Hartzog Court disagreed with the state’s claim that the issue of what restraints are used in a courtroom is a decision for the

security officers working there or the prison from which the witness or defendant is transferred. 96 Wn.2d at 396. Instead, the Hartzog Court found it “fundamental” that trial courts, not security officers or police, must have the “discretion to provide for courtroom security, in order to ensure the safety of court officers, parties and the public.” Hartzog, 96 Wn.2d at 396. This is because of the important constitutional rights involved. 96 Wn.2d at 397-98.

The Court next noted, however, that physical restraints are considered “an extreme measure to be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.” Hartzog, 96 Wn.2d at 398. And it rejected the state’s theory that the “exigent circumstances in the penitentiary in general” and tension in the local community justified the broad order justifying the physical restraints in all cases:

None of the circumstances alleged. . . are shown directly attributable to petitioner, and the State cites no case where a court has ordered shackling of an inmate defendant because of general conditions at his place of incarceration. Rather, in the cases that have permitted shackling, the specific facts relating to the individual have been found to justify the practice.

96 Wn.2d at 399.

The Hartzog Court also dismissed the idea relied on by the lower court judge - that seeing the defendant and his witnesses in shackles would not affect or prejudice the defense, because the jurors would already know, under the unique facts of the case, that they were in prison. 96 Wn.2d at 400. Put simply, the Supreme Court declared, it “could not agree:”

A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. **That discretion must be founded upon a factual basis set forth in the record.** A broad policy of imposing physical restraints upon prison inmates charged with new offenses because they may be “potentially dangerous” is a failure to exercise discretion. The activities of other persons, either unrelated or not imputable to an accused, may not be used as a basis for shackling a criminal defendant.

Hartzog, 96 Wn.2d at 400 (emphasis added).

Next, the Court cited with approval several factors the court of appeals had listed for examining the propriety of the use of physical restraints on an inmate defendant or witness. Id. The factors include 1) the seriousness of the present charge, 2) the defendant’s temperament and character, 3) his age and physical condition, 4) whether he has threatened harm or attempted escape, 5) prior disturbances caused by him, 6) the nature and physical security of the courtroom and 7) the adequacy and availability of alternative remedies. 96 Wn. 2d at 400-401.

In sum, the Hartzog Court recognized that, “in appropriate circumstances,” a court has the inherent power and discretion to take additional security measures including physical restraints. Hartzog, 96 Wn.2d at 401. It cautioned, however, that the necessity for any such restraints must be established “on a case-by-case basis after a hearing with a record evidencing the reason for the action taken.” Id. And it concluded that, even though the prisoners there were *post-conviction* detainees and thus had far less rights than those detained *pretrial*, a blanket policy of restraint used without

consideration of the relevant individual facts and circumstances of the prisoner's particular situation does not pass constitutional muster. Id.

More recently, in State v. Finch, 137 Wn.2d 792, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999), the trial court ordered leg shackles through trial and sentencing, over defense objection. In reversing, the Supreme Court held that the accused is entitled to "physical indicia of innocence" when cloaked with the presumption of innocence. Finch, 137 Wn.2d at 844. This encompasses the right "to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." Finch, 137 Wn.2d at 844.

The Finch Court went further, noting that shackling or even just handcuffing is discouraged by many courts in part because it "offends the dignity of the judicial process." Id. The Supreme Court also pointed out that virtually every court which allows restraints in court limits their use to only when necessary, for preventing escape, disorderly conduct or injury to those in the courtroom. Id. It agreed that the use of shackles and physical restraints should be limited and should be only as a matter of last resort. 137 Wn.2d at 850-51.

Like the Hartzog Court, the Finch Court concluded that the trial court was required to base any decision on the need to physically restrain a defendant on *actual* evidence regarding the specific defendant's unusual risks - of escape, intent to injure someone in the courtroom - or proof the defendant cannot behave. Finch, 137 Wn.2d at 850-51.

Indeed, in Finch, the Supreme Court declared that basing the decision on anything less than such individualized findings would be an abuse of the trial court's discretion. Id. It has since reaffirmed this holding that "the trial court should allow the use of restraints only after conducting a hearing and entering findings into the record that are sufficient to justify the use of [such] restraints." Damon, 144 Wn.2d 691-92. As has the Court of Appeals, State v. Flieger, 91 Wn. App. 236, 241, 955 P.2d 872 (1998), review denied, 137 Wn.2d 1003 (1999).

In Damon, the Court reaffirmed that "it is an abuse of discretion for the trial court to base its decision to use restraints solely upon concerns expressed by a correctional officer." 144 Wn.2d at 692. Damon was on trial for second-degree assault, attempted first-degree rape, first-degree robbery and unlawful imprisonment, and had tried to kill himself several times during pretrial proceedings. 144 Wn.2d at 689. The allegations included him remaining in a home with a knife holding his landlady hostage after taking huge quantities of alcohol and drug. The trial court also had to hold several competency hearings out of concern for Damon's mental condition. Id. When he was initially brought into the court in shackles and leg irons, counsel asked for the shackles to be removed. A security guard then "advised the court that Damon would need to be placed in a restraint chair" if the shackles were not on. Id. Counsel objected but the trial court "simply deferred to the security concerns raised by the officer." Id. The defendant later

claimed diminished capacity at trial, but was convicted of all counts and sentenced to life in prison. 144 Wn.2d. at 689-90.

After first noting the “broad discretion” a trial court has in matters of security, like the Hartzog Court before it, the Damon Court reaffirmed that

shackles or other restraining devices should ‘be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape’. . . [and] the trial court should allow the use of restraints only after conducting a hearing and entering findings into the record that are sufficient to justify the use of restraints.

Damon, 144 Wn.2d at 691, quoting, Hartzog, 96 Wn.2d at 691.

The Court then held that the trial court’s “discretion’ in allowing use of restraints does not extend to delegating the decision to a security officer. Damon, 144 Wn.2d at 692. The Court declared, “we have. . . explained that it is an abuse of discretion for the trial court to base its decision to use restraints solely upon concerns expressed by a correctional officer.” Id. Because the trial court had just relied on the officer’s concerns and “failed to conduct a hearing,” the Court found an abuse of discretion. Id. It also questioned whether there would have been sufficient evidence to support the restraint ordered, noting the record did not support it. 144 Wn.2d at 692 n. 2.

Mr. Lundstrom was charged with two minor drug possession offenses. There was no evidence whatsoever that he was particularly dangerous, to himself or others in the courtroom. No evidence was presented to show he was or would be so disruptive that physically

restraining him to the extent in a courtroom was required *pretrial*.

Yet he was brought into court in “full restraints (waist chain, cuffs and leg irons)” known as “‘5 point’ restraints. . .handcuffs with a belly chain (believed to be approximately 15”) and leg shackles.” CP 39-40.

The trial court abused its discretion sorely in this case. The court did not even discuss counsel’s objection, let alone hold a hearing at which any individualized concern about Mr. Lundstrom could have been shown. This use of extreme physical restraint pretrial apparently as a matter of policy for all first appearances must be soundly denounced as unconstitutional and wholly improper by this Court.

The 9th Circuit Court of Appeals majority recently agreed in a case with facts remarkably similar to those in the case at bar. See United States v. Sanchez-Gomez, 859 F.3d 649 (9th Cir. 2017). In Sanchez-Gomez, the Court addressed a blanket policy, requested by the federal Marshals Service, which allowed marshals to bring in-custody defendants into court in full restraints “for most non-jury proceedings.” 859 F.3d at 653-54.

In striking down the policy, the Court first noted that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” 859 F.3d at 659-60, quoting, Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The Court also pointed out that it is well-settled that the

constitution prohibits the use of visible restraints during trial or the penalty phase unless there is an essential state interest specific to the defendant on trial justifying such restraint. Sanchez-Gomez, 859 F.3d at 660.

The 9th Circuit then traced the history of the right to remain physically unrestrained pretrial, relying upon many of the same authorities as our state's highest court. Sanchez-Gomez, 859 F. 3d at 660; see Williams, 18 Wash. at 449-51. The Sanchez-Gomez Court held there were at least three constitutional principles involved; the due process rights to a fair trial or an impartial jury; the rights of the defendant to due process and the presumption of innocence; and the "dignity and decorum" of the courts and system itself. Sanchez-Gomez, 859 F.2d at 660-61. The Court noted that the dignity and decorum element includes "the respectful treatment of defendants."

The Sanchez-Gomez Court concluded that there was a right to be free from physical restraint in a courtroom unless the state proves such restraint is required based on the specific facts in the particular case. 859 F.2d at 660-61. And the Court found the right applied, regardless whether jurors were around:

whether the proceeding is pretrial, trial, or sentencing, with a jury or without. Before a presumptively innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom.

Id.

Further, the Court rejected the same claims as those used in

our state - that the appellate or trial courts must defer to courthouse security agencies on “this constitutional question.” Id.

The Court then held that courts cannot “institute routine shackling policies reflecting a presumption that shackles are necessary in every case.” Id. The Court went on:

[t]his right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty. The principle isn’t limited to juries or trial proceedings. It includes the perception of any person who may walk into a public courtroom. . . . A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.

Sanchez-Gomez, 859 Wn.2d at 661.

Mr. Lundstrom was accused of minor drug possession crimes. CP 43. There was nothing in the record about his case or about him which supported the extreme safety measure of handcuffing him, shackling his legs together and forcing him subjected to a “belly chain” for appearance in court. RP 32; CP 37. The prosecutor made no claim it was needed. No one said anything to explain it, or even really discuss it despite counsel’s objection below. RP 32; CP 37-40.

There is no question that the state has a legitimate interest in preventing danger to the community or preventing crime. See Salerno, 481 U.S. at 747. But this general interest must be balanced against the individual’s strong constitutional rights. See id. In case after case, our courts have held that physical restrictions must be imposed only in the most serious of cases and only after individualized findings - even when the presumption of innocence

does *not* exist. Here, it did.

In response, the prosecution may argue that the Court should not address the issue despite counsel's objection below, because Mr. Lundstrom has now entered a plea to methamphetamine possession. This Court should reject any such effort and should address the issue. The decision to impose physical restraints pretrial is an issue of substantial public importance likely to arise again but evade review. See, e.g., Federated Publ'ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). As the Sanchez-Gomez Court noted, unconstitutional pretrial physical restraint "is inherently ephemeral," involving an "ever-refilling but short-lived" class of people - people arrested and appearing for the first time pretrial - subjected to the improper, unconstitutional conditions. 859 F.3d at 559. Notably the Court addressed the issue even though, in that case, the relevant district policy had been changed, because it could be "reinstated at any time." Id.

This Court should address the issue. It should hold that pretrial five-point physical shackling and restraint of people accused of but not convicted of a crime must be based on individualized findings regarding the specific defendant that such extreme measures are required. It should find the practices used here violated state and federal due process. And it should clearly inform the lower courts to comply with the constitutional rights of pretrial defendants in all cases in the future.

2. IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS AND ONEROUS REPAYMENT TERMS AS “MANDATORY” DESPITE THE DEFENDANT’S INDIGENCE AND LACK OF PRESENT OR LIKELY FUTURE ABILITY TO PAY IS UNCONSTITUTIONAL

The imposition - and collection - of legal financial obligations (LFOs) has constitutional limits. See State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976); Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S.Ct. 2116, 40 L. Ed. 2d 642 (1974). In addition, where the defendant is indigent and disabled, both federal laws and controlling Washington cases apply. The sentencing court here violated those constitutional, statutory and caselaw holdings in imposing “mandatory” legal financial obligations and onerous financial terms in this case.

a. Relevant facts

On December 6, 2016, Judge Melly accepted Lundstrom’s pleas to the amended information, charging two counts of unlawful possession of methamphetamine. RP 50-62. The prosecutor asked for 12 months of community custody with certain conditions, including legal financial obligations. RP 55-56. She told the court she was requesting “the mandatory \$500 victim assessment fee; the \$200 court cost; and, the \$100 DNA fee.” RP 56. She suggested that, if the judge found Lundstrom had “current and/or future ability to pay,” the court also should impose \$500 for reimbursement for court appointed counsel and a \$2,000 “VUCSA fine.” RP 56. The prosecutor told the court it should place Lundstrom “on a payment plan starting at \$40 a month commencing 90 days upon release from custody in this case.” RP 56.

Counsel objected to imposition of any legal financial obligations. RP 57. He noted that Lundstrom's only income was from social security disability and food stamps, which totaled about \$800 to \$900 per month. RP 57. Lundstrom was permanently and totally disabled and having no ability to work. RP 57.

Counsel also noted that Lundstrom's disability payments are cut off while he is in custody and would not be reinstated until after his release, with no specific date promised. RP 57. He argued that there was "no prospect" for Lundstrom to get any "gainful employment" in the future because of his disabilities, saying that, as a result, "no legal financial obligations" should be imposed. RP 58.

Counsel also objected to any conditions requiring Mr. Lundstrom to pay costs of supervision, or testing, or a substance abuse evaluation or any treatment. RP 58-59. He said if an evaluation and treatment were required they would have to be paid for at public expense. RP 59.

The sentencing court ordered Mr. Lundstrom to serve 12 months of community custody for each offense. CP 19-20. One of the preprinted conditions imposed was that Lundstrom must "pay supervision fees as determined by DOC[.]" CP 21. Also included on the judgment and sentence were the following legal financial obligations, \$500.00 "Victim Assessment" under RCW 7.68.035, a \$200 "Criminal Filing Fee," and a \$100.00 DNA collection fee under RCW 43.43.7541. CP 20-21.

The judgment and sentence also provided that Mr. Lundstrom

was required to pay “[N]ot less than \$40.00 per month commencing 90 days upon release .” CP 22. Also preprinted on the judgment and sentence was a clause which required the financial obligations to start bearing interest from the date of sentencing “until payment in full,” at a 12 percent rate of interest. CP 22.

Pending this appeal, the court granted Lundstrom’s request to stay the collection of the fines, fees and costs. CP 13.

b. The sentencing court erred, abused its discretion and violated state and federal law

The sentencing court erred in multiple ways in ordering these conditions below. The court violated federal law and the Supreme Court’s decision in Wakefield in 1) imposing the legal fines and fees despite the evidence that Lundstrom has no income and survives solely on federal benefits, and 2) ordering the payments to be made at \$40 per month despite Lundstrom’s potential income of at most \$900 including food stamps.

In Wakefield, supra, the Supreme Court addressed whether it is proper for federal disability and subsistence benefits to be used to pay legal financial obligations. 186 Wn.2d at 608. Ms. Wakefield was on SSI but the superior court found that she presented “no evidence” that she had “a permanent disability that prevents her from working.” 186 Wn.2d at 607. The Supreme Court found these two findings in conflict, noting that the only evidence below was that Wakefield had qualified for SSI because she had a permanent disability preventing her from working. The Court noted that the

determination of actual disability made by the Social Security Administration had to be given “evidentiary weight” by courts “regarding an individual’s disability and whether it prevents them from working.” 186 Wn.2d at 607-608.

The Wakefield Court also reiterated its concern about “the particularly punitive consequences of LFOs for indigent individuals,” and that payment plans such as the one imposed on Wakefield were wholly improper. 186 Wn.2d at 607. The Court noted that, on average, a person who pays \$25 per month on LFOs will still owe more, given the 12 % interest and collection and annual fee terms imposed, in 10 years than the day the LFOs were imposed. 186 Wn.2d at 607, citing, State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). For people like Wakefield, the Court said, “with no prospects of any change in their ability to pay, it is unjustly punitive to impose payments that will only cause the amount to increase.” Wakefield, 186 Wn. 2d at 607.

Here, as noted below, Mr. Lundstrom is subsisting wholly on SSI disability and food stamps. There is no evidence of any possibility of anything more - instead, the evidence below was that this status was permanent. RP 45-48. It is unjustly punitive to impose \$40 per month on someone whose entire monthly income, including food stamps, is about \$900.

Wakefield also controls on the issue of whether the obligations should have been ordered at all. In that case, like here, the only income was SSI, yet she was being ordered to pay state legal

financial obligations. 186 Wn.2d at 607-608. The Supreme Court held that it was a violation of the federal Social Security Act to impose criminal fines and fees which must be paid in such situations, because it legally requires payment from social security disability benefits. 186 Wn.2d at 608. This ruling relied on 42 U.S.C. §407(a), which provides, “none of the moneys paid” as part of social security benefits “shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” Id.

The Court also noted that the U.S. Supreme Court had previously rejected state attempts to take money from social security disability recipients for repayment of fines, fees or costs. Id.; see Philpott v. Essex County Welfare Board, 409 U.S. 413, 417, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

Social security disability payments are “protected benefits,” free from the reach of “the use of any legal process,” even a claim from a state court. Philpott, 409 U.S. at 417. Thus, the state may not attach social security benefits of prisoners in order to pay for the cost of their imprisonment, without violating the Supremacy Clause. Bennet v. Arkansas, 485 U.S. 395, 397, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988). Under the federal statutes and Wakefield, ordering legal financial obligations to be paid by a person whose sole source of income is social security disability is prohibited, because it conflicts

with federal law. 186 Wn.2d at 608.¹

Finally, the court erred in ordering payment of costs of community custody, for much the same reason. RCW 9.94A.703 provides both mandatory and “waiveable” conditions. Costs of community custody are allowed - but not required - and may be waived by the Court. RCW 9.94A.703(2)(d) provides, “[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department[.]” Just as it is improper to order payment of fines which can never be paid, ordering a person on permanent disability to somehow pay for costs of community custody is a fruitless gesture. It is a gesture with real consequences for Mr. Lundstrom, however, who can be subjected to sanctions for failing to pay the costs he has no ability to ever pay.

Further, it is a violation of the constitution. The U.S. Supreme Court has held that, where a state chooses to impose legal financial obligations as a condition of a criminal conviction, the system must meet certain requirements. Fuller, 417 U.S. at 45. First, repayment must not be mandatory. 417 U.S. at 45. Second, the court is required to “take into account the defendant’s financial resources and the burden that payment would impose.” Third, if “there was no

¹This is distinct from the situation in Kays v. State, 963 N.E. 2d 507 (Ind. 2012), for example, where the court found it proper to consider SSI as potential income in setting restitution, because “a debt-free defendant” getting free room and board from a family member “may very well have the ability to pay” even if her only income is from social security. 963 N.E. 2d at 510-11. As the Kays Court noted, that is different than ordering a “levy against that income,” which is not permitted.

likelihood the defendant's indigency would end," no repayment obligation may be required. 417 U.S. at 46. Fourth, no convicted person can be jailed or held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

In Blazina, supra, our state's highest Court found "ample and increasing evidence that unpayable legal fines and fees, just like the "supervision" fee here, were imposing "significant burdens on offenders and our community." State v. Duncan, 185 Wn.2d 430, 374 P.3d 83 (2016). In Duncan, the Supreme Court reaffirmed that a sentencing court must make "an individualized inquiry" into the financial situation of each specific defendant before imposing LFOs. 185 Wn.2d at 437. And in Duncan, the Court ordered such consideration *despite* recognizing that a number of the LFO's imposed had been described in authorizing statutes as "mandatory." 185 Wn.2d at 436-37.

Notably, the Court found it "difficult to see how being unable to care for one's own basic needs - food, shelter, basic medical expenses - would not meet" the standard of indigence which would show inability to pay. Id.

Mr. Lundstrom was found indigent not just for trial but for appeal, as well, due to his poverty. The only evidence below was that he was permanently disabled and unable to work. This Court should strike the financial conditions in this case.

E. CONCLUSION

The state violated Mr. Lundstrom's fundamental constitutional rights in subjecting him to five-point physical restraints pretrial, in a courtroom, with no personalized finding whatsoever that the restraints were required. The court also erred in imposing improper conditions, and this Court should so hold.

Respectfully submitted,

DATED this 12th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that I served the attached document as follows: by this Court's portal upload I filed this document with (1) the Court of Appeals Division II; (2) Clallam County Prosecutor's office and to appellant by depositing in first-class mail, postage prepaid, at his current address is DOC, William Lundstrom, DOC 986223, WCC, P.O. Box 900, Shelton, WA. 98584.

DATED this 12th day of September, 2017.

/s/ Kathryn A. Russell Selk
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