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Division II
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No. 50731-5-II

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

State of Washington,

Respondent,

v.

Gina Bush-Ford,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Gina Bush-Ford has several physical disabilities that render her unable to work. Due to her conditions, she receives social security disability income, which is the only source of income for her and her family.

Federal law prohibits the State from compelling an individual to satisfy a debt through social security income. Nevertheless, the sentencing court ordered Ms. Bush-Ford to pay \$800 in mandatory legal financial obligations. Because Ms. Bush-Ford can only pay this debt with her social security income, the court's order is void under federal law. Additionally, as applied to a social security recipient like Ms. Bush-Ford, Washington's mandatory legal financial obligation statutes are at odds with the Supremacy Clause.

Ms. Bush-Ford asks this Court to strike the court's order requiring her to pay \$800 in mandatory legal financial obligations.

B. ASSIGNMENTS OF ERROR

1. The court order requiring Ms. Bush-Ford to pay \$800 in mandatory legal financial obligations is contrary to 42 U.S.C. § 407(a) and our Supreme Court's ruling in *City of Richland v. Wakefield*, 186 Wn.2d 596, 599, 380 P.3d 459 (2016).

2. As applied to a social security recipient like Ms. Bush-Ford, RCW 7.68.035(1)(a), RCW 36.18.020(2)(h), and RCW 43.43.7541 conflict with 42 U.S.C. § 407 (a) and therefore violate the Supremacy Clause. U.S. Const. art. VI, pt. II.

C. ISSUES

1. The Social Security Act forbids the State from forcing a social security recipient to use social security funds to pay off a debt. Ms. Bush-Ford has several disabilities that leave her unable to work, and her sole source of income derives from social security disability payments. Nevertheless, the sentencing court ordered her to pay \$800 a month in mandatory legal financial obligations, which can only be satisfied through her social security income. Is the court's order requiring Ms. Bush-Ford to pay mandatory legal financial obligations unlawful under federal law?

2. The Supremacy Clause invalidates all state laws that conflict or interfere with an act of congress. RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 require courts to impose mandatory legal financial obligations, but the Social Security Act forbids the State from forcing a social security recipient to use social security funds to pay off legal financial obligations. As applied to a social security recipient like Ms. Bush-Ford, are RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 void under the Supremacy Clause?

3. Citing policy reasons, our Supreme Court has previously exercised its discretion to reach the merits of an unpreserved LFO challenge. The court reached the merits of the unpreserved claim largely because the nonpayment of legal financial obligations decreases an offender's ability to reintegrate into society because a person cannot vacate their record until LFOs are paid in their entirety. A person with a disability who receives social security disability income as their sole source of income can never pay off their LFOs. Therefore, they will never possess the ability to vacate their record. Should this Court exercise its RAP 2.5 discretion and reach the merits of Ms. Bush-Ford's unpreserved challenge to the court's imposition of mandatory LFOs?

D. STATEMENT OF THE CASE

Gina Bush-Ford suffers from a disabling hearing impairment. 3RP 3.¹ She also has other disabilities that required her to undergo numerous surgeries in 2017. 1RP 7; 2RP 5. Her disabilities are so severe that she is not employable. 3RP 11-12. Due to her conditions, she receives social security disability income (SSDI). 3RP 11-12. SSDI provides income for her and her family. 3RP 8, 11-12.

¹ Three VRPs exist. The first, dated 2/2/17, will be referred to as 1RP. The second, dated 2/14/17, will be referred to as 2RP. The third, dated 5/12/17, will be referred to as 3RP.

Ms. Bush-Ford pleaded guilty to one count of unlawful possession of methamphetamine with intent to deliver. CP 23; 2RP 10. At her sentencing hearing, the court sentenced her to the lowest end of her standard range, which was 20 months. CP 24; 3RP 11. While the sentencing court rejected the State's request for discretionary legal financial obligations (LFOs), the court ordered Ms. Bush-Ford to pay \$800 in mandatory LFOs. 3RP 12; CP 28.

Ms. Bush-Ford appeals.

E. ARGUMENT

- 1. The sentencing court erred when it ordered Ms. Bush-Ford to pay \$800 in mandatory LFOs because the court's order is contrary to our Supreme Court's holding in *Wakefield* and the anti-attachment provision of the social security act.**
 - a. The anti-attachment provision of the Social Security Act prohibits the State from using a legal process to reach an individual's social security funds.**

The anti-attachment provision of the Social Security Act prohibits individuals and other entities from using a legal process to reach a social security recipient's social security funds. Under 42 U.S.C. § 407(a) of the Social Security Act,

The right of any person to any future payment under this subchapter *shall not* be transferable or assignable, at law or in equity, and *none* of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy,

attachment, garnishment, or *other legal process*, or to the operation of any bankruptcy or insolvency law.

(emphasis added).

This provision of the Social Security Act also applies to states seeking to recoup money from an individual's social security funds. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973) (prohibiting New Jersey from suing a social security recipient); *see also Bennett v. Arkansas*, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988) (invalidating a statute that allowed Arkansas to seize an incarcerated person's social security funds to defray the cost of imprisonment).

The United States Supreme Court defined the term "other legal process" as it appears in the anti-attachment provision of the social security act in *Washington State Dep't of Social and Health Services v. Guardianship Estate of Keffeler*. 537 U.S. 371, 385, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003). In *Keffeler*, foster children brought suit against Washington's Department of Social and Health services, claiming the Department unlawfully used "other legal process" to reach their social security benefits. *Id.* at 379. Acting as the children's representative payee, the Department regularly reimbursed itself for expenditures paid on the foster children's behalf with the children's social security benefits. *Id.* at

376-78. The children claimed the Department’s practice was unlawful because it was contrary to the anti-attachment provision of the social security act. *Id.* at 379.

To discern whether Washington’s practice was contrary to the anti-attachment provision of the social security act, the court interpreted the term “other legal process.” Rather than defining the term broadly to encompass *any* form of legal process, the court turned to the words surrounding the term to discern the term’s meaning. *Id.* at 383-84. Specifically, the court used the established canon of *edjusem generis* to construe the term’s meaning (“where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words”). *Id.* at 384 (*citing Circuit City Stores Inc., v. Adams*, 532 U.S. 105, 114-15, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)). In doing so, the court observed that the Black’s Law Dictionary definition of the terms surrounding “other legal process”—“execution,” “levy,” “attachment,” and “garnishment”—“refer to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involves some form of judicial authorization.” *Id.* at 383. Thus, the court defined “other legal process” as

[a] process much like the processes of execution, levy, attachment, and garnishment, and at minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.

Id. at 385.

The Social Security Administration's Program Operations Manual System (POMS), a publicly available manual for processing social security claims, fortified the court's interpretation of the term "other legal process." POMS defined "legal process" as "the means by which a court compels compliance with its demand; generally, it is a court order." *Id.* at 385. In other portions of the POMS, the manual defined "legal process" as

any writ, order, summons, or other similar process in the nature of garnishment. It may include, but is not limited to, an attachment, writ of execution, income execution order or wage assignment that is issued by...a court of competent jurisdiction...or an authorized official pursuant to an order of a court of competent jurisdiction or pursuant to State or local law...and is directed to a government entity.

Id. at 385.

Applying its definition of "other legal process," the court rejected the foster children's claim that the Department's practice of reimbursing itself with social security income amounted to "other legal process." *Id.* at 386. This was because the Department was acting as a representative payee and possessed no enforceable claim against its foster children;

therefore, the Department was not “securing discharge” of any enforceable obligation through its reimbursement practices. *Id.*

Here, unlike in *Keffeler*, the State actually possesses an enforceable claim against Ms. Bush-Ford that can only be satisfied with her social security income. 3RP 8, 11-12; CP 28. This claim is “other legal process” and is contrary to the anti-attachment provision of the social security act.

- b. In *City of Richland v. Wakefield*, our Supreme Court vacated a court order requiring the petitioner, a social security recipient, to pay legal financial obligations because the court order constituted “other legal process.”**

The court’s imposition of \$800 in mandatory legal financial obligations is contrary to 42 U.S.C. § 407(a) and our Supreme Court’s ruling in *City of Richland v. Wakefield*, 186 Wn.2d 596, 599, 380 P.3d 459 (2016). CP 15.

In *Wakefield*, a court ordered the petitioner to pay \$15 per month toward her outstanding LFOs. 186 Wn.2d at 599. However, the petitioner’s sole source of income for the preceding ten years of her life derived from social security disability. *Id.* at 599-600. The petitioner argued the court’s order violated 42 U.S.C. § 407(a) because it required her to make payments from her social security disability benefits. *Id.* at 607-08.

Our Supreme Court vacated the order requiring the petitioner to pay LFOs for a number of reasons; importantly, the Supreme Court concluded the court's order met the United State Supreme Court's definition of "other legal process." *Id.* at 609. Noting that the United States Supreme Court "has already rejected prior state attempts to recoup money from social security recipients," our Supreme Court turned to Montana² and Michigan³ caselaw to determine whether the state possessed the ability to reach social security funds to pay off legal financial obligations. *Id.* at 608-09. It concluded the State lacked such authority.

In drawing its conclusion, our Supreme Court observed that both the Montana and Michigan courts rejected the view that 42 U.S.C. § 407(a) prohibited only direct attachment and garnishment and have both instead held that "a court ordering LFO payments from a person who receives social security disability payments is an 'other legal process' by which to reach those protected funds." *Id.* at 609. Our court agreed, noting that this conclusion comported with *Keffeler's* definition of "other legal process," which involves "some judicial or quasi-judicial mechanism,

² *State v. Eaton*, 323 Mont. 287, 99 P.3d 661 (2004) (eliminating a judgment that ordered a social security recipient to pay restitution to his victims because the order constituted "an improper attempt to subject [the defendant's] social security benefits to 'other legal process'" under 42 U.S.C. § 407 (a)).

³ *In re Lampart*, 306 Mich. App. 226, 856 N.W.2d 192 (2014) (holding "when a state court order attaches to social security benefits in contravention of 42 U.S.C. § 407 (a), the attachment amounts to a conflict with federal law, and such a conflict is one 'that the State cannot win'").

though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.” *Id.* at 609 (quoting *Keffeler*, 537 U.S. at 385).

Our court held, “federal law prohibits courts from *ordering* defendants to pay LFOs if the person’s only source of income is social security disability.” *Id.* (emphasis added).⁴

c. The sentence and order in Ms. Bush-Ford’s judgment and sentence requiring her to pay \$800 in mandatory LFOs is unlawful under *Wakefield* and the anti-attachment provision of the social security.

Here, Ms. Bush-Ford’s judgment and sentence explicitly order her to pay \$800 in mandatory legal financial obligations. CP 26, 28. The order creates an enforceable claim against Ms. Bush-Ford, and is therefore clearly a “legal process” to “secure discharge...of an allegedly existing or anticipated liability.” *Keffeler*, 537 U.S. at 385; *Wakefield*, 186 Wn.2d at 609.

But like the petitioner in *Wakefield*, Ms. Bush-Ford’s sole source of income derives from her social security disability benefits. 3RP 11-12.

⁴ See also *In re Michael S.*, 206 W. Va. 291, 524 S.E.2d 443 (1999) (invalidating a court order requiring a juvenile defendant’s father to pay restitution because the father’s sole source of income derived from social security).

And like the petitioner in *Wakefield*, the only way Ms. Bush-Ford can satisfy the court's order is through her social security income.

Because the court's order requiring Ms. Bush-Ford to pay \$800 in mandatory legal financial obligations constitutes "other legal process" per *Keffeler* and *Wakefield*, this court should vacate the orders.

2. As applied to a social security recipient like Ms. Bush-Ford, the Washington statutes that require a social security recipient to use social security funds to pay off legal financial obligations conflict with 42 U.S.C. § 407(a) and violate the Supremacy Clause.

Additionally, "there can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an act of congress." *Rose v. Arkansas State Police*, 479 U.S. 1, 3, 107 S. Ct. 334, 93 L. Ed. 2d 183 (1986); U.S. Const. art. VI, pt. II. When a court finds that a statute is unconstitutional as applied, the statute no longer remains good law under similar circumstances. *State v. Jorgenson*, 179 Wn.2d 145, 151, 312 P.3d 960 (2013). This court reviews constitutional issues *de novo*. *Id.* at 150.

As applied to a social security recipient like Ms. Bush-Ford, RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 conflict with 42 U.S.C. § 407 (a) and violate the Supremacy Clause. U.S. Const. art. VI, pt. II. For example, in *Bennett v. Arkansas*, the petitioners challenged a statute that authorized the State to seize an incarcerated person's social security benefits. 485 U.S. at 396. The petitioners argued the statute

violated the Supremacy Clause of the federal constitution because it explicitly allowed the State to expropriate funds the United States legislature specifically exempted from legal process per 42 U.S.C. § 407 (a). *Id.* The Supreme Court agreed and found that the Arkansas statute conflicted with the Supremacy Clause because “Section 407 (a) unambiguously rules out *any attempt* to attach Social Security Benefits.” *Id.* at 397 (emphasis added).

While the statutes at issue here do not explicitly require courts to impose LFOs on social security recipients, they leave courts with no choice but to *attempt* to attach a social security recipient’s social security funds, and this is contrary to 42 U.S.C. § 407 (a). The word “attempt” means, “to make an effort to do, accomplish, solve, or effect.” *Attempt*, Merriam Webster.⁵ See RCW 7.68.035(1)(a) (1)(a) (“when any person is found guilty in any superior court of having committed a crime... there *shall be imposed by the court* upon such convicted person a penalty assessment”); RCW 36.18.020(2)(h) (“upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case *shall* be liable for a fee

⁵ <https://www.merriam-webster.com/dictionary/attempt> (last visited Jan. 4, 2018).

of two hundred dollars”); RCW 43.43.7541 (“every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars”). (emphases added).

These statutes contain no provisions that grant sentencing courts the discretion to forego “attempt[ing]” to attach social security benefits (e.g., “shall not conflict or interfere with an act of Congress,” or “shall not conflict or interfere with federal law”). Therefore, these statutes conflict with the anti-attachment provision of the social security act.

Moreover, the anti-attachment provision of the social security act prohibits the practice of *imposing* fines on social security recipients to discharge a debt; however, Washington’s LFO statutes require courts to impose such fines on social security recipients. *See, e.g., State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016) (holding that courts must impose mandatory legal financial obligations). As previously stated, the anti-attachment provision of the social security act contains the following language:

The right of any person to any future payment under this subchapter *shall not* be transferable or assignable, at law or in equity, and *none* of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, *levy*, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407 (a) (emphasis added).

In *Keffeler*, the United States Supreme Court relied on the Black's Law Dictionary to discern the meaning of "other legal process" and the other terms in the anti-attachment provision of the social security act. 537 U.S. at 381. Black's Law Dictionary defines "levy" as follows: "to impose or assess (a fine or tax) by legal authority." Black's Law Dictionary, (10th Ed. 2013). RCW 7.68.035(1)(a)(1)(a) explicitly requires courts to "impose" a victim penalty assessment, and RCW 36.18.020(2)(h) and RCW 43.43.7541 use similar language that requires courts to impose legal financial obligations, regardless of the source of the defendant's income. Accordingly, Washington's mandatory legal financial obligation statutes are contrary to 42 U.S.C. § 407(a).

Because the sentencing court relied on these statutes when it imposed the order requiring Ms. Bush-Ford to pay \$800 in mandatory LFOs, the Supremacy Clause forms another basis for reversing the order. This court should hold that, as applied to social security recipients like Ms. Bush-Ford, RCW 7.68.035, RCW 36.18.020(2)(h), RCW 43.43.7541 are void under the Supremacy Clause.

3. The same policy reasons surrounding our Supreme Court’s decision to reach the merits of an unpreserved LFO challenge in *Blazina* apply with greater force to Ms. Bush-Ford’s claims; therefore, this Court should reach the merits of her claims.

The same policy reasons surrounding our Supreme Court’s decision to reach the merits of an unpreserved LFO challenge in *Blazina* apply with even greater force to Ms. Bush-Ford’s claims, and therefore, this Court should reach the merits of her claims even though Ms. Bush-Ford did not raise the issues raised in this brief at sentencing. In *State v. Blazina*, 182 Wn.2d 827, 830, 344 p.3d 680 (2015), two defendants challenged the sentencing court’s imposition of discretionary LFOs. Although the defendants did not preserve this challenge below, our Supreme Court exercised its RAP 2.5 discretion to reach the merits of the claim due to policy reasons. *Id.* at 834-35.

First, the court noted that defendants cannot vacate their records without paying off their LFOs. *Id.* at 836-37; RCW 9.94A.760(4). However, “LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time.” *Id.* at 836; RCW 10.82.090(1). Because indigent offenders can only afford to make minimal payments per month (if at all), LFOs increase a defendant’s inability to reenter society because the inability to pay off LFOs means the

court retains jurisdiction over the defendant indefinitely. *Id.* at 836-37. For these indigent defendants,

legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to secure housing. This is because the active record results in serious negative consequences in employment, housing, and finances. All of these difficulties increase the chances of recidivism.

Id. at 837 [internal citations omitted].

Similarly, this Court has also exercised its discretion and reached the merits of several unpreserved LFO challenges. *State v. Malone*, 193 Wn. App. 762, 376 P.3d 443 (2016) (exercising RAP 2.5(a) discretion to reach the merits of unpreserved discretionary LFO challenge based on the policy issues outlined in *Blazina*); *State v. Tedder*, 194 Wn. App. 753, 378 P.3d 246 (2016) (reaching the merits of unpreserved RCW 9.94A.777(1)⁶) LFO claim); *State v. Pendell*, No. 34887-3-III (Wash. Ct. App. Jan. 4, 2018)⁷(reaching the merits of unpreserved constitutional substantive due process challenge to the sentencing court’s imposition of mandatory LFOs).

⁶ This statute creates several exceptions to the court’s imposition of LFOs if the defendant has a mental illness.

⁷ This case is unpublished and is cited to pursuant to GR 14.1(a). Unpublished opinions of the Court of Appeals “may be accorded such persuasive value as the court deems appropriate.” *Id.*

The same policy reasons that concerned our Supreme Court in *Blazina* apply with even greater force to social security recipients. Social Security “provides benefits to a person with a disability so severe that she is ‘unable to do her previous work’ and ‘cannot...engage in any other kind of substantial gainful work which exists in the national economy.’” *Cleveland v. Policy Management Systems Corp.*, 565 U.S. 795, 797, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (referencing 42 U.S.C. § 423(d)(2)(a)). Indeed, social security provides a means of living for people with disabilities so serious that they may result in, or persist until, death. 42 U.S.C. § 1382.

As described in *Blazina*, prior to July 2000, the State only possessed a ten year time frame to collect LFOs; however, our Legislature “extend[ed] the court’s jurisdiction for the lifetime of the offender or until all LFOs are satisfied” for crimes committed after July of 2000. *State v. Gossage*, 165 Wn.2d 1, 8, 195 P.3d 525 (2008). Now, an ex-offender can only receive a certificate of discharge and vacate her criminal conviction after *all* of her legal financial obligations are paid off. RCW 9.94A.637(1)(a); RCW 9.94A.640. This order restores many of the ex-offender’s civil rights and enhances an ex-offender’s chances of accessing housing because once the conviction is vacated, the previous conviction is less likely to show up in background checks. RCW 9.94A.637(5); Dash

DeJarnatt, *Changing the Way Adult Convictions are Vacated in Washington State*, 12 Seattle J. for Soc. Just. 1045, 1054 (2014).

Thus, Ms. Bush-Ford's challenge is particularly important for people with lifelong disabilities and no future source of income other than social security disability. Such individuals will remain under the court's jurisdiction for their entire lives if sentencing courts continue to impose mandatory LFOs on SSDI recipients. RCW 9.94A.637(1)(a); RCW 9.94A.640. The twelve percent interest rate will continue to accrue every year because they cannot satisfy this debt with their social security income. RCW 10.82.090; 42 U.S.C. § 407(a).

Additionally, bankruptcy will not relieve individuals like Ms. Bush-Ford of this debt. *See State v. Cunningham*, 116 Wn. App. 946, 69 P.3d 358 (2003) (holding that LFOs are not dischargeable in bankruptcy); *Kelly v. Robinson*, 479 U.S. 36 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) (ruling that restitution obligations, as a criminal sanction, are not subject to discharge in a bankruptcy proceeding); *see also* Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, 11 Seattle J. for Soc. Just. 963, 965 (2013). The unpaid debt will hurt people like Ms. Bush-Ford's credit ratings. *Blazina*, 182 Wn.2d at 837.

F. CONCLUSION

The sentencing court's imposition of mandatory LFOs is void under federal law, and the statutes that force courts to impose mandatory LFOs on social security recipients are also unlawful under the Supremacy Clause.

For these reasons, Ms. Bush-Ford asks this court to strike the court's order requiring her to pay \$800 in mandatory LFOs.

DATED this 30th day of January, 2018.

Respectfully submitted,

/s Sara S. Taboada

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50731-5-II
)	
GINA BUSH-FORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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