

FILED  
Court of Appeals  
Division II  
State of Washington  
9/28/2018 4:32 PM

No. 51049-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN GREYSTOKE,

Appellant.

---

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

---

BRIEF OF APPELLANT

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A. INTRODUCTION

John Greystoke suffers from severe mental illness but lived alone safely in his own apartment for more than a decade. However, a man moved into Mr. Greystoke's apartment, put Mr. Greystoke at risk of eviction, and refused to leave. Mr. Greystoke reacted by stabbing the man when the man attempted to reenter Mr. Greystoke's apartment against Mr. Greystoke's explicit directive to leave.

Mr. Greystoke's resulting trial on a first degree assault charge was patently unfair. Mr. Greystoke elected to represent himself after his attorney declined to pursue a mental health defense. The court granted his request but then prevented Mr. Greystoke from raising the mental health defense at trial. Stripped of his only defense to the charge against him, Mr. Greystoke simply asked the jurors for leniency, but the trial court failed to consider whether, under these circumstances, Mr. Greystoke's self-representation prevented him from having a fair trial.

During the trial, the court commented on the evidence and denied Mr. Greystoke's request for a jury instruction on second degree assault based upon incorrect facts. At sentencing, the court imposed an additional 24 months of incarceration for a deadly weapon enhancement not alleged in the information.

This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The court denied Mr. Greystoke's right to present a defense under the Sixth and Fourteenth Amendments and article I, sections 3 and 22, when it refused to allow him to present evidence of his mental state at trial.

2. Mr. Greystoke was denied his right to meaningfully represent himself when the court ruled he "waived" his mental health defense, contrary to the Sixth and Fourteenth Amendments and article I, sections 3 and 22.

3. The trial court unconstitutionally commented on the evidence in violation of article IV, section 16.

4. Mr. Greystoke's right to a fair trial under the Sixth and Fourteenth Amendments and article I, sections 3 and 22, was violated when the court permitted Mr. Greystoke to represent himself after preventing him from raising his only defense at trial.

5. In violation of RCW 10.77.020, the trial court failed to review Mr. Greystoke's possible defenses at trial with him before granting his motion to represent himself.

6. The trial court erred when it denied Mr. Greystoke's motion for a second degree assault instruction.

7. Mr. Greystoke's right to due process under the Fourteenth Amendment and article I, section 3, was violated when the deadly weapon enhancement was not alleged in the information but the jury returned a special verdict on this enhancement and the trial court imposed an additional 24 months for the enhancement.

8. The trial court erred when it imposed legal financial obligations against Mr. Greystoke at sentencing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Greystoke was entitled to represent himself at his trial. Where the court permitted Mr. Greystoke to represent himself, but then found Mr. Greystoke "waived" the only defense he unequivocally and repeatedly stated he wished to raise, did the court unconstitutionally deny Mr. Greystoke his right to self-representation?

2. Mr. Greystoke was also constitutionally entitled to present and control his own defense. Where the trial court prevented Mr. Greystoke from raising his mental health defense, which was Mr. Greystoke's only defense to the charge of first degree assault, did the court violate Mr. Greystoke's constitutional right to present a defense?

3. A judge is constitutionally prohibited from commenting on facts during trial. Where the court indicated Mr. Greystoke was outmatched by the State at trial, that it was appropriate to characterize his actions as

“attempted murder,” and interrupted Mr. Greystoke during questioning to prevent him from introducing impeachment evidence, did the court unconstitutionally comment on the evidence?

4. An individual may not be permitted to represent himself where doing so would undercut his fundamental right to a fair trial. Where the court prevented Mr. Greystoke from raising his only defense at trial, causing Mr. Greystoke to ask the jurors for leniency rather than defend against the charge, did the trial court’s determination Mr. Greystoke could represent himself violate his right to a fair trial?

5. Mr. Greystoke was entitled to the inferior degree instruction of second degree assault where the evidence showed he committed only this inferior offense. Where the trial court denied Mr. Greystoke’s request for this instruction based on incorrect facts, and the evidence presented at trial demonstrated a reasonable juror could find Mr. Greystoke committed only second degree assault, did the trial court err when it denied his request for an instruction on second degree assault?

6. Due process requires the State to allege any sentencing enhancements in the information. Where the State failed to allege the deadly weapon sentencing enhancement in the original information, and Mr. Greystoke was not arraigned on the State’s proposed amended information, must this Court reverse and remand for resentencing because

Mr. Greystoke was erroneously sentenced on the deadly weapon enhancement?

7. The trial court imposed \$800 in legal financial obligations (LFOs) even though Mr. Greystoke's sole source of income was social security disability benefits. Where federal law prohibits an individual from being ordered to pay LFOs using these benefits, should this Court strike these LFOs in their entirety?

8. If the court does not strike the LFOs in their entirety, must this Court strike the DNA fee and criminal filing fee because Mr. Greystoke suffers from a mental health condition, and in any event, the law has changed to prevent the imposition of these fees where the individual is indigent (criminal filing fee) or has already provided a DNA sample (DNA fee)?

D. STATEMENT OF THE CASE

**1. Mr. Greystoke suffers from serious mental illness and was charged with assaulting a man who moved into his home and refused to leave, causing Mr. Greystoke to be evicted.**

John Greystoke has suffered from mental illness since he was 21 years old. RP 7. According to his mother, Mr. Greystoke had a psychotic break six weeks after entering Cornish College of the Arts, where he had received a full scholarship. Supp. CP \_\_\_\_ (Sub No. 120, June 7, 2016

Letter). Three years later, the social security administration found Mr. Greystoke permanently disabled. Supp. CP \_\_\_\_ (Sub No. 120, June 7, 2016 Letter).

Mr. Greystoke has been diagnosed with schizoaffective disorder and a psychotic disorder. CP 54. These illnesses have caused him to suffer from auditory hallucinations and impulsive behavior. CP 54-55. However, at age 41, Mr. Greystoke had lived in the same apartment, without incident, for 10 to 15 years. RP 25; CP 18.

This changed after Mr. Greystoke agreed to allow Adam Gross to stay in his apartment temporarily. Mr. Gross and his girlfriend, Michelle Kiehl, were in the process of getting evicted from their own apartment and Mr. Greystoke permitted Mr. Gross to stay with him because Ms. Kiehl knew Mr. Greystoke's neighbor, who lived just a few doors down from Mr. Greystoke in the same building. RP 560, 600. Shortly after Mr. Gross moved in with Mr. Greystoke, Ms. Kiehl also moved in. RP 600.

Mr. Greystoke had always occupied the apartment alone and had always paid his rent on time. RP 726. However, after Mr. Gross and Ms. Kiehl moved in, Mr. Greystoke's landlord served Mr. Greystoke with a notice of eviction. RP 723.

As Mr. Gross explained in an email to Mr. Greystoke's mother, Mr. Gross was engaged in a "hostile situation" with his own landlord,

which had resulted in two lawsuits. Supp. CP \_\_\_\_ (Sub No. 236, April 23, 2016 Email). Mr. Gross alleged he had been subjected to “constant landlord harassment and other abuses of the law.” Supp. CP \_\_\_\_ (Sub No. 236, April 23, 2016 Email). He argued the eviction notice served by Mr. Greystoke’s landlord also constituted harassment and was “an attempt to... bully John into rescinding his offer of help to me and sanctuary for Michelle.” Supp. CP \_\_\_\_ (Sub No. 236, April 23, 2016 Email). He said he had overheard the landlord telling Mr. Greystoke the eviction notice had been served because the apartment had been rented only to Mr. Greystoke, but now two additional people were staying there. Supp. CP \_\_\_\_ (Sub No. 236, April 23, 2016 Email).

The morning after Mr. Gross sent this email to Mr. Greystoke’s mother, Mr. Gross left the apartment to go to the nearby convenience store. RP 564. As he attempted to reenter Mr. Greystoke’s apartment, Mr. Greystoke stabbed Mr. Gross in the abdomen. RP 565. Mr. Greystoke left the apartment and immediately told a stranger what he had done. CP 221. He cooperated with the police and showed them where he had thrown the knife. RP 223, 227, 229. He also explained to the police that Mr. Gross had stayed in Mr. Greystoke’s home longer than initially agreed, refused to leave even as Mr. Greystoke faced eviction, and had become verbally abusive toward Mr. Greystoke. RP 665.

Mr. Gross was seriously injured but recovered. RP 589, 689. Mr. Greystoke was charged with first degree assault with a deadly weapon. CP 256.

**2. Mr. Greystoke exercised his right to represent himself at trial after his attorney declined to pursue a mental health defense.**

Mr. Greystoke was appointed counsel, who expressed a plan to pursue a mental health defense. RP 5, 10, 16. However, almost six months later, defense counsel had not collected the records needed to obtain an evaluation and Mr. Greystoke asked to represent himself. RP 14-15.

In response to Mr. Greystoke's request, the court ordered a competency evaluation. RP 19. Mr. Greystoke was found competent. RP 27. After Mr. Greystoke again explained he wanted to represent himself because his attorney was slow in preparing the case for trial, a different attorney stepped in and took over Mr. Greystoke's case. RP 29, 49. This attorney arranged for an evaluation to be conducted and, over a year after the incident, represented to the court Mr. Greystoke would not be pursuing a mental health defense. RP 68, 72, 82.

A few days after defense counsel abandoned Mr. Greystoke's mental health defense Mr. Greystoke moved to discharge his new counsel, explaining he was able to communicate with the first attorney but could not communicate with the substitute counsel. RP 75-76. Mr. Greystoke's

first attorney, who was present in the courtroom, agreed they communicated well but expressed a reluctance to be reappointed, explaining he was now focused on the cases to which he was currently assigned. RP 78-79.

Mr. Greystoke's counsel moved to have another competency evaluation performed. RP 85. Once again, Mr. Greystoke was found competent. RP 91.

Mr. Greystoke renewed his request to represent himself and the court granted Mr. Greystoke's motion. RP 91-95. Mr. Greystoke later agreed to have his attorney act as standby counsel. RP 151.

**3. The trial court excluded all evidence of Mr. Greystoke's mental state despite the fact this was Mr. Greystoke's only defense at trial.**

Throughout the course of the trial, the court limited Mr. Greystoke to a "general denial" defense and prevented Mr. Greystoke from presenting evidence of his mental state at the time he assaulted Mr. Gross.

In motions in limine, the State moved to exclude both lay and expert witnesses from testifying about Mr. Greystoke's mental state at the time of the incident and moved to exclude any defense by Mr. Greystoke "beyond general denial." CP 168 (motions 5-7). The trial court granted these motions, but stated the rulings could be modified during trial and that it would grant "some flexibility in this." RP 287, 293-94.

However, the trial court later strictly prohibited Mr. Greystoke from presenting any evidence of his mental state at the time of the incident. Mr. Greystoke subpoenaed several expert witnesses to testify about his mental state and the State moved to strike their testimony. RP 333; Supp. CP \_\_ (Sub No. 189, List of Defense Witnesses). Mr. Greystoke objected, explaining this was his only defense to the charge against him. RP 334. The court informed Mr. Greystoke he had “waived” this defense months earlier, in July, and was not permitted to “resurrect” the defense the day of trial. RP 334. Mr. Greystoke represented himself in July and the record shows he remained focused on pursuing a mental health defense. *See, e.g.* RP 127. Only at the end of that month was he given the funds needed to hire an investigator to assist in preparing his defense for trial. RP 142.

**4. Members of the jury panel were highly concerned about Mr. Greystoke’s mental health and inability to defend himself against the power of the State.**

After Mr. Greystoke addressed the jury panel during voir dire, multiple members of the jury panel began expressing concerns about Mr. Greystoke’s demeanor. Several members of the panel expressed they would be biased against Mr. Greystoke. RP 507-511. Prospective jurors explained Mr. Greystoke’s mental health issues made it difficult, if not impossible, to accept what he said. RP 510-11.

Members of the jury panel asked sua sponte why Mr. Greystoke was allowed to represent himself. Prospective jurors expressed concern they were witnessing a “travesty” of the justice system, that Mr. Greystoke might not be competent to represent himself, and wondered whether the court would fill the missing role of defense counsel because, if not, it seemed apparent there was no one in the room to challenge the State’s case. RP 511-12, 515, 519.

In response, the court suggested Mr. Greystoke’s limitations were no different than those of an inexperienced attorney, and the circumstances were similar to a college football team facing off against a professional football team. RP 512-13, 518. But prospective jurors pointed out mental illness was different than mere inexperience, and the consequences at a criminal trial were far more serious than those in a football game. RP 517-18.

**5. The trial court denied Mr. Greystoke’s request for an instruction on second degree assault.**

After the evidence was presented at trial, Mr. Greystoke requested the jury be instructed on the inferior degree offense of assault in the second degree. RP 802; CP 127. The trial judge denied Mr. Greystoke’s request based on the judge’s memory that Mr. Gross’s wound was so large as to indicate Mr. Greystoke intentionally enlarged the wound during the

stabbing. RP 807. In fact, the State's presentation of evidence showed the injury caused by the stabbing was approximately one inch long, but a larger wound was made during surgery in order to ensure Mr. Gross's recovery. RP 679, 683.

During deliberations, the jury requested an instruction on second degree assault, but the trial court again refused to provide it. CP 125; RP 833.

The jury convicted Mr. Greystoke of first degree assault and returned a special verdict finding he used a deadly weapon in the commission of the crime. CP 123-24. However, the State had not alleged the deadly weapon enhancement in the information. CP 246.

Mr. Greystoke was sentenced to 117 months in prison, including 24 months for the deadly weapon enhancement. CP 22. The trial court believed Mr. Greystoke should serve his time at Western State Hospital and indicated this belief in the judgment and sentence. CP 29, RP 902.

E. ARGUMENT

**1. Reversal is required because the court refused to permit Mr. Greystoke to present testimony about his mental state, denying Mr. Greystoke his constitutional right to represent himself and present his defense.**

- a. Mr. Greystoke had the fundamental right to represent himself and to control and present his defense.

Under article I, section 22 and the Sixth Amendment Mr. Greystoke was entitled to represent himself without the interference of counsel. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (discussing explicit right in article I, section 22). “The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The right to self-representation is fundamental. *Madsen*, 168 Wn.2d at 503 (citing *Faretta*, 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002)). A review of centuries of history reveals no state or colony has ever forced counsel upon a defendant or even suggested such a practice would be tolerable. *Faretta*, 422 U.S. at 832. The right to self-representation exists “to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.” *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S. Ct. 944, 79 L.Ed.2d 122 (1984).

Mr. Greystoke's right to represent himself "embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979)) (other citations omitted). When Mr. Greystoke exercised his right to self-representation against the State's accusations, he was exercising his right to control his own defense. *Jones*, 99 Wn.2d at 741.

Mr. Greystoke also had the fundamental right to present his defense to the jury. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. At its core, this was Mr. Greystoke's "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (2010); *State v. Jones*, 168 Wn. 2d 713, 719, 230 P. 3d 576 (2010).

This right to an opportunity to be heard in his defense, "is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. In order for the jury to decide "where the truth lies," Mr. Greystoke must have been given the opportunity to present his version of the facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The Sixth Amendment right at stake is the defendant's right to control his

presentation of the defense. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013); *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013).

- b. When the trial court prevented Mr. Greystoke from presenting his sole defense at trial, it violated his right to represent himself and his right to present a defense.

Mr. Greystoke repeatedly asserted his only defense to the charge against him was that he had not formed the requisite intent at the time of the incident as a result of his mental illness. *See* RP 11, 37, 59, 293, 334, 756, 864; CP 237. He subpoenaed several witnesses, including both psychologists who evaluated him for competency (Christopher Cadle, Ph.D. and Richard Yokum Ph.D.) and the physician who had evaluated him for diminished capacity (Mark McClung, M.D.). RP 334, 336, 357.

When the State moved to strike these expert witnesses, Mr.

Greystoke told the court:

I'm going to have to object, sir, because I'm going to repeat myself again. My defense is an acquittal on the grounds of mental incompatibility. I don't know why you don't understand that. Do I have to write it down?

....

I'm going to use that defense. If you don't want to accept it, that's your choice, but that's my defense.

RP 334.

The court granted the State's motion to strike Mr. Greystoke's witnesses over his objection after finding Mr. Greystoke had "waived this

defense” a few months earlier. RP 334. The court said it appeared “that in July, there was a waiver of any claim with regard to mental health claims and defenses. I’ve seen nothing in the file since, that would resurrect them.” RP 334. The court did not explain exactly when or how Mr. Greystoke had made this waiver.

In response, Mr. Greystoke asked how he could resurrect his defense, but the trial court told him, simply, “it’s a little too late. Today is the day of trial.” RP 334. Mr. Greystoke explained his mental illness was his only defense to the charge and if the court would not permit him to raise it, he had no choice but “endure the trial” and appeal the verdict. RP 335.

The trial court was wrong to find Mr. Greystoke had waived his mental health defense. Throughout the pretrial hearings this defense was Mr. Greystoke’s primary focus and July was no exception. At the July pretrial hearings, Mr. Greystoke requested copies of his records from Peninsula Behavioral Health. RP 127; Supp. CP \_\_ (Sub No. 111, July 5, 2017 Motion). He explained he had several witnesses he wished to subpoena, and his witness list was later revealed to include the experts who evaluated him for competency and diminished capacity. RP 125; Supp. CP \_\_ (Sub No. 189, List of Defense Witnesses). He also asked to be committed pursuant to RCW 71.05. RP 135.

To the extent the trial court concluded Mr. Greystoke had waived a mental health defense in July because Mr. Greystoke also moved to “quash” the report drafted by Dr. McClung, it erred. RP 128; Supp. CP \_\_\_ (Sub No. 111, July 5, 2017 Motion). Moving to quash one evaluator’s report was not a waiver of Mr. Greystoke’s entire defense. In addition, the context within which Mr. Greystoke made this request demonstrates Mr. Greystoke’s goal was to pursue his mental health defense in earnest, not waive it.

In fact, Mr. Greystoke moved to “quash” the report because he was concerned about the *judge’s interpretation* of the evaluation rather than the evaluation itself. RP 129. Mr. Greystoke explained:

THE DEFENDANT: And, the only thing that’s missing is the stuff from PBH and Doctor McClung’s report was opposite that I read the letter, that I read his report, of what Coughenour<sup>[1]</sup> said.

THE COURT: Judge Coughenour.

THE DEFENDANT: Right. He stated, it said it didn’t support the fact of my mental health case, but I read the letter and in nowhere in it does it say that he either supports it or denies it.

[THE STATE]: I don’t believe Judge Coughenour actually read it, Your Honor.

THE DEFENDANT: So, whatever that letter said is incorrect, basically, cuz I hadn’t read the report. It

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<sup>1</sup> Mr. Greystoke was referring to Judge Brian Coughenour. He was addressing Judge Christopher Melly.

was only based on the information Mr. Coughenour gave me.

RP 129.

Mr. Greystoke's attorney hired Dr. McClung to evaluate Mr. Greystoke's mental state as it related to the incident. CP 54. According to Dr. McClung, Mr. Greystoke "was chronically focused on self-protection" and, due to his mental disorder, "was more likely to react impulsively, dramatically, and aggressively in a highly stressful situation such as he was experiencing at the time of this incident." CP 55.

At the July hearing in which the issue of "quashing" Dr. McClung's report was raised, Mr. Greystoke explained Dr. McClung's report did not support or deny a mental health defense. RP 129. But Mr. Greystoke was concerned Judge Coughenour believed Dr. McClung's report refuted his mental health defense, so he moved to "quash" it. Thus, Mr. Greystoke brought the motion to quash in order to pursue his mental health defense, rather than to waive this defense.

The only waiver of Mr. Greystoke's mental health defense was made by Mr. Greystoke's attorney. In May, defense counsel notified the State Mr. Greystoke would not pursue a diminished capacity defense. RP 82. In response, Mr. Greystoke moved to discharge his attorney and asked to represent himself. RP 93.

To the extent the trial court relied on defense counsel's prior waiver of Mr. Greystoke's mental health defense, or believed Mr. Greystoke's defense was contingent on the expert selected by defense counsel, the court violated Mr. Greystoke's right to represent himself. *McKaskle*, 465 U.S. at 177 ("In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way.").

Mr. Greystoke was not bound by his attorney's waiver or his attorney's choice of expert. He was constitutionally entitled to pursue a defense his attorney had waived and select the expert of his choosing. *See McWilliams v. Dunn*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1790, 1799, 198 L. Ed. 2d 341 (2017) ("a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense'") (internal citations omitted).

Even if the court gave no consideration to defense counsel's waiver or selection of Dr. McClung, it violated Mr. Greystoke's right to present a defense when it found Mr. Greystoke waived his mental health defense in July, struck his expert witnesses, and refused to allow him to present testimony as to his mental state at the time of the incident. Mr.

Greystoke was clear throughout the pretrial proceedings that a mental health defense was his *only* defense. *See* RP 11, 37, 59, 293, 334, 756, 864; CP 237. He did not waive this defense at any time, including in the month of July.

Indeed, Mr. Greystoke did not even not obtain the funds to hire an investigator until the very end of July, making it impossible for him to make strategic decisions about his defense until sometime later. RP 142. The trial court’s refusal to allow Mr. Greystoke to pursue a mental health defense and call the experts critical to that defense deprived him the fair opportunity to defend against the State’s accusations and violated his right to present his defense. *See Chambers*, 410 U.S. at 294; *State v. Lyons*, 199 Wn. App. 235, 237, 399 P.3d 557, 559 (2017) (defendant denied due process at an involuntary medication hearing where he was denied “the ability to obtain and present expert testimony”).

c. The error was not harmless.

The right to self-representation is a right that is “either respected or denied; its deprivation cannot be harmless.” *Vermillion*, 112 Wn. App. at 851 (citing *McKaskle*, 465 U.S. at 177 n. 8); *see also Madsen*, 168 Wn.2d at 503. Reversal is required because the Court violated Mr. Greystoke’s right to self-representation when it determined his right to the defense of his choosing had somehow been “waived.” Mr. Greystoke’s attorney was

the only one who had waived this defense, and that waiver prompted Mr. Greystoke to discharge his counsel and represent himself. Mr. Greystoke was entitled to pursue his mental health defense using Dr. McClung or another expert witness of his choosing.

The denial of an individual's right to present a defense is subject to a constitutional harmless error analysis. *Jones*, 168 Wn.2d at 724; *see also Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under a constitutional analysis, the error is harmless only if the State proves, beyond a reasonable doubt, that "any reasonable jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724 (citations omitted).

The State cannot make that showing here. As Mr. Greystoke repeatedly informed the court, his diminished mental state at the time of the incident was his *only* defense at trial. Given the evidence against Mr. Greystoke, including his own admissions to police, this analysis was accurate. When Mr. Greystoke was prohibited from raising this defense, he had no choice but to "endure" the trial and seek relief on appeal. Under these circumstances, the trial court's error cannot be found harmless. This Court should reverse.

**2. The trial court unconstitutionally interfered with Mr. Greystoke's defense by commenting on the evidence.**

- a. Courts are strictly prohibited from commenting on the evidence in a case in any way.

A judge is constitutionally prohibited from commenting on the evidence under article 4, section 16. A judge's job is to "declare the law" and this constitutional provision prohibits a judge from deviating from this role and commenting on "matters of fact." Const. art. IV, § 16. The purpose of this prohibition is to prevent the judge's opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986)).

"A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *Id.* The judge's comment may be express or implied. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The prohibition on judicial comments on the evidence is clear, and "[i]ts application is strict." *City of Seattle v. Arensmeyer*, 6 Wn. App. 116, 120, 491 P.3d 1305 (1971). This Court reviews whether a judge's comments constitutes a comment on the evidence de novo. *State v. Butler*, 165 Wn. App. 820, 835, 269 P.3d 315 (2012).

- b. The trial court's comments suggested Mr. Greystoke's defense had no merit.

Throughout Mr. Greystoke's trial, the court made statements that permitted the jury to infer the court believed Mr. Greystoke's defense was meritless and the State had the stronger case. First, during voir dire, the court analogized Mr. Greystoke to a college football team and the State to a more highly skilled, professional national football league team. RP 518. The inference from the court's comment was that Mr. Greystoke was likely to lose because he was far outmatched by the State.

Second, during direct testimony one of the officers described working to "deescalate" the situation by placing his hand on Mr. Greystoke's shoulder, because Mr. Greystoke had just committed "an attempted murder a few minutes before." RP 640. Mr. Greystoke immediately objected and stated, "It wasn't me that was suspect of an attempted murder." RP 642. Even though Mr. Greystoke was absolutely correct, and the witness's characterization of the charge was both wrong and highly prejudicial, the Court overruled Mr. Greystoke's objection. RP 641. By overruling the objection, the court signaled to the jury that "attempted murder" was an accurate way to describe Mr. Greystoke's actions.

Finally, the court interrupted Mr. Greystoke when he attempted to elicit testimony from the building maintenance worker showing Mr. Greystoke would not have been evicted if not for Mr. Gross's behavior. RP 726-27. The court directed Mr. Greystoke to terminate his line of questioning and focus on the criminal charge. RP 727.

Even if the court believed this evidence was irrelevant because it had precluded Mr. Greystoke from presenting evidence of his mental state, the State had not objected to Mr. Greystoke's questions. In addition, the evidence was relevant for impeachment purposes, as Mr. Gross had denied his conduct was the reason Mr. Greystoke was facing eviction. *See* RP 563 (testimony by Mr. Gross suggesting Mr. Greystoke's landlord was upset about various issues, not simply that Mr. Gross and Ms. Kiehl were staying in the apartment). When the trial court cut off Mr. Greystoke's questioning sua sponte, it signaled to the jury that Mr. Greystoke's defense was so irrelevant the court was forced to intervene on its own initiative.

c. The judge's comments on the evidence were not harmless.

"Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213, 218 (2015) (quoting *Levy*, 156 Wn.2d at 723). The State cannot meet this burden here.

Mr. Greystoke was placed at an extraordinary disadvantage at trial after the court prevented him from raising his only defense. His only remaining chance at prevailing at trial was to cast doubt on Mr. Gross's recitation of the events. But the court's intervention in the trial, by suggesting to the jury Mr. Greystoke was outmatched by the State, that it was accurate to characterize his actions as attempted murder, and that his attempted impeachment of Mr. Gross was irrelevant, severely prejudiced Mr. Greystoke's ability to defend against the State's evidence. This Court should reverse.

**3. Mr. Greystoke was denied a fair trial when the court allowed him to represent himself after preventing Mr. Greystoke from raising his only defense.**

- a. Mr. Greystoke's right to self-representation was not absolute where it undermined his right to a fair trial.

While the state constitution explicitly grants individuals the right to self-representation in criminal proceedings, this right is not absolute in all circumstances. *State v. Kolocotronis*, 73 Wn.2d 92, 98, 436 P.2d 774 (1968). The right to self-representation does not "affirm the dignity" of an individual "who lacks the capacity to conduct his defense without the assistance of counsel." *Indiana v. Edwards*, 554 U.S. 164, 176, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) (citing *McKaskle*, 465 U.S. at 176-77).

Different standards exist for determining whether an individual is competent to stand trial and must be permitted to represent himself. *Id.* at 175. Simply because an individual is capable of assisting counsel does not mean his mental state permits him “to carry out the basic tasks needed to present his own defense without the help of counsel.” *Id.* at 175-76.

Where Mr. Greystoke did not have the required mental competency to act as his own counsel, permitting him to represent himself came at the expense of other important constitutional rights, including Mr. Greystoke’s “right to a fair trial and his constitutional right to due process of law.” *Kolocotronis*, 73 Wn.2d at 99; U.S. Const. VI; Const. art. I, § 22. The trial court was obligated to ensure Mr. Greystoke’s right to self-representation did not undercut the fundamental constitutional objective of a fair trial. *Edwards*, 554 U.S. at 176-77; *see also In re Pers. Restr. of Rhome*, 172 Wn.2d 654, 669, 260 P.3d 874 (2011). The court failed to satisfy this obligation here.

- b. The trial court failed to consider Mr. Greystoke’s right to a fair trial when it permitted Mr. Greystoke to represent himself.

A trial court’s decision to allow a defendant to represent himself is reviewed for an abuse of discretion, but a court necessarily abuses its discretion when it misapprehends the law. *Rhome*, 172 Wn.2d at 667; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

Here the court failed to correctly apply the law when it permitted Mr. Greystoke to represent himself. RP 93.

The court explained Mr. Greystoke faced life in prison, questioned Mr. Greystoke about his familiarity with the rules of evidence, and informed Mr. Greystoke he believed Mr. Greystoke would be at a significant disadvantage by waiving his right to counsel. RP 93-97. However, “a searching inquiry into a defendant’s mental health status is different from an inquiry into a defendant’s skill and judgment to act as his own lawyer.” *Rhome*, 172 Wn.2d at 669. “Skill is not the same as capacity.” *Id.*

Mental illness varies in degree and over time, and may interfere with an individual’s ability to function in different ways at different points in the trial. *Edwards*, 554 U.S. at 175. Although Mr. Greystoke represented he understood the punishment he faced and simply needed the “texts” to get up to speed on the rules of evidence, he was also singularly focused on raising a mental health defense the court later found he had “waived.” RP 94, 334.

Once his only defense was deemed “waived,” Mr. Greystoke was left with no defense at trial and did not even attempt to convince the jury otherwise. In his opening statement, he informed the jury whether he committed “an assault or not, in any degree, is not a question here” and

that all he wanted was to “face leniency in sentencing at time in the state hospital and probate and drug treatment.” RP 544. Based on Mr. Greystoke’s opening statement, the court questioned whether Mr. Greystoke understood he could plead guilty and gave him the opportunity to consult with standby counsel. RP 578. But at no point did the court consider whether, given that Mr. Greystoke had asked to represent himself solely to present the mental health defense the court later prohibited him from raising, Mr. Greystoke remained competent to represent himself at the trial.

The court’s failure to comply with RCW 10.77.020(1)(d) during the initial colloquy contributed to the error. This statutory provision directs the court to determine whether Mr. Greystoke understood the “[p]ossible defenses to the charges and circumstances in mitigation thereof” at the time he waived counsel. The court failed to evaluate this factor as part of the colloquy, and doing so would have further illuminated Mr. Greystoke’s anticipated defense and helped the court evaluate whether Mr. Greystoke was competent to represent himself, separate from whether he was competent to assist an attorney at trial.

The jury panel’s alarm at Mr. Greystoke’s mental state demonstrates how apparent it was Mr. Greystoke suffered from significant mental illness. Criminal proceedings “must not only be fair, they must

‘appear fair to all who observe them.’” *Edwards*, 554 U.S. at 177. (citing *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). “No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court.” *Massey v. Moore*, 348 U.S. 105, 108, 75 S. Ct. 145, 99 L. Ed. 135 (1954).

Jury panel members expressed concern Mr. Greystoke was helpless to defend himself against the State, was not competent to represent himself, and that allowing him to do so was a “travesty” of justice. RP 511-12. Some prospective jurors were excused because they did not believe they could weigh the evidence fairly given their assessment of Mr. Greystoke’s mental state. RP 522-23. This was all *before* Mr. Greystoke stood up during his opening argument and said his guilt was not at issue at trial.

Most importantly, Mr. Greystoke chose to represent himself for one reason: to pursue the mental health defense his attorney waived. But the trial court granted Mr. Greystoke’s motion to represent himself and then prevented Mr. Greystoke from raising this defense. Despite acknowledging Mr. Greystoke was at a significant disadvantage, outmatched by the State, and had abandoned any attempt to defend himself in the wake of the court’s rulings, the court failed to evaluate

whether Mr. Greystoke's self-representation undermined his right to a fair trial. Under the facts presented here, the court failed to correctly apply the law.

c. The trial court's error violated Mr. Greystoke's right to a fair trial.

An individual's fundamental right to a fair trial is violated where his "mental capacity will have serious and negative effects on the ability to conduct a defense." *Rhome*, 172 Wn.2d at 669. Here, Mr. Greystoke specifically sought to represent himself for a very particular purpose – to raise his mental health defense – and then abandoned any attempt to defend himself after the court found his defense had been "waived." In his opening statement, Mr. Greystoke told the jury he was not challenging his guilt, but in response the court merely suggested he plead guilty. RP 578. It did not consider whether Mr. Greystoke's mental health issues prevented him from representing himself under the circumstances presented in this case.

This constitutional violation constitutes structural error. A structural error is one that creates a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113

(2012). A structural error renders a trial fundamentally unfair because it infects the entire process. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (citations omitted).

Mr. Greystoke had no hope for a fair trial once the trial court precluded him from raising his only defense and allowed him to continue to represent himself after he made it clear he had no ability to raise an alternative defense. This Court should reverse.

**4. The trial court erred when it denied Mr. Greystoke's request for a second degree assault instruction.**

- a. An individual is entitled to an instruction on an inferior degree offense where evidence exists to show he committed only the inferior offense.

The State alleged Mr. Greystoke committed first degree assault. CP 246. After the presentation of evidence at trial, Mr. Greystoke requested the court instruct the jury that, if it did not believe Mr. Greystoke was guilty of first degree assault, it could find Mr. Greystoke guilty of second degree assault instead. RP 802; CP 127.

The trial refused to instruct the jury on second degree assault. RP 807. Mr. Greystoke renewed his request twice: once when the jurors requested the second degree instruction during deliberations and once as part of a post-trial motion for mistrial. CP 125; RP 833, 862. The court denied Mr. Greystoke's request each time. CP 125; RP 833, 863.

Second degree assault is an inferior degree offense to first degree assault. *State v. Fernandez-Medina*, 141 Wn.2d 448, 450, 6 P.3d 1150 (2000). It is proper to instruct the jury on an inferior degree offense when: “(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.” *Id.* at 454 (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381(1997)) (other citations omitted); *see also State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (applying same factual test for lesser included offenses). Because both the legal and factual prongs of the test were satisfied, Mr. Greystoke was entitled to the instruction.

b. In denying Mr. Greystoke’s request for an instruction, the trial court misremembered the facts presented at trial.

In response to Mr. Greystoke’s request for the second degree assault instruction, the State argued the factual component of the *Workman* test had not been satisfied. RP 803-04. While first degree assault requires the individual intended both to assault the victim and, in doing so, intended to inflict great bodily harm, second degree assault requires only that the individual intended the assault. RCW 9A.36.011; RCW

9A.36.021. The State claimed Mr. Greystoke’s “only intent” when stabbing Mr. Gross in the abdomen must have been to inflict great bodily harm. RP 804.

However, the court found the *size* of the wound more compelling than the State’s argument. In rejecting Mr. Greystoke’s proposed instruction, the court held:

I will just note one additional thing, that I think is significant, independent of what Mr. Johnson’s presentation was and that is that the testimony was the wound went from below Mr. Gross’s belly button up the central part of his chest and in the course of that strike with a knife, he was essentially eviscerated and I think that the fact that a knife was just not simply allegedly plunged in but apparently a second step, pulled such that the abdominal cavity was opened up sufficiently.

RP 807.

But the court misremembered the facts and rested its decision on a basic factual error. The general surgeon who treated Mr. Gross testified the stab wound measured approximately one inch to one and a half inches. RP 679. The surgeon further testified she was required to perform an exploratory laparotomy to treat Mr. Gross, which she explained is “just a fancy word for we make an incision in the middle of the abdomen, which gives us access to all those nicks [sic] and crannies to look for other injuries...” RP 683. Mr. Gross’s girlfriend, Ms. Kiehl, described the

wound *after surgery* as running from Mr. Gross's chest to past his belly button. RP 607.

The State's evidence showed Mr. Gross's abdominal cavity was opened during surgery, not during the course of the stabbing. But the State said nothing when the court misremembered the testimony presented at trial and relied on erroneous facts to rule in the State's favor. RP 807; *see also* RP 823 (State acknowledging in closing argument how "a significant portion of [Mr. Gross's] scar is because of the surgical procedure").

- c. Viewed in the light most favorable to Mr. Greystoke, the evidence permitted the jury to find Mr. Greystoke committed only second degree assault.

This Court views the evidence in the light most favorable to Mr. Greystoke when evaluating whether a second degree assault conviction should have been given to the jury. *Fernandez-Medina*, 141 Wn.2d at 455-56; *see also State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). In *Fernandez-Medina*, the defendant fired a gun into an apartment, severing one person's spinal cord, and then briefly held the gun to another person's head before running away. *Id.* at 451. There was conflicting evidence as to whether Mr. Fernandez-Medina pulled the trigger when he placed it next to the victim's head, but the gun did not fire. *Id.* The court instructed the jury on attempted first degree murder and, alternatively, first degree assault, but refused to instruct the jury on second degree assault. *Id.*

The supreme court reversed, finding a reasonable juror could have found Mr. Fernandez-Medina had not pulled the trigger and therefore had not intended to inflict great bodily harm. *Id.* at 456. It rejected the State's claim that the denial of the instruction was proper because Mr. Fernandez-Medina had denied being in the apartment at all, holding the trial court was wrong "to take such a limited view of the evidence" and it "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Id.* at 456 (citing *State v. Bright*, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)).

The evidence presented at Mr. Greystoke's trial, when viewed in the light most favorable to him, would have allowed a reasonable juror to find Mr. Greystoke intended to assault Mr. Gross but did *not* intend to inflict great bodily harm. Mr. Gross testified Mr. Greystoke "left the apartment and assaulted me." RP 565. Mr. Gross did not recall Mr. Greystoke saying anything and at first Mr. Gross believed he had been punched. RP 565. When Mr. Gross asked Mr. Greystoke why he had stabbed him, Mr. Greystoke's expression changed from hostile to panicked. RP 566. Mr. Greystoke immediately ran from the apartment but quickly admitted he stabbed Mr. Gross and helped police find the knife. RP 566, 665.

An officer testified Mr. Greystoke explained he had stabbed Mr. Gross because Mr. Gross refused to leave Mr. Greystoke's apartment. RP 665. Mr. Greystoke agreed Mr. Gross could stay with him for only a few days but the days turned into weeks and then Ms. Kiehl moved in too. RP 665. Mr. Gross kept promising to leave, but did not, and became verbally abusive toward Mr. Greystoke, "calling him chicken legs, different names, [and] accusing him of having sex with his landlord." RP 665. Mr. Greystoke had told Mr. Gross "in very strong language" to leave the night before the incident, and Mr. Gross had refused. RP 665.

Based on this evidence, a reasonable juror could have determined Mr. Greystoke intended to scare or injure Mr. Gross, but did not intend to inflict "great bodily injury," or "injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 141 (jury instruction defining "great bodily injury"). Viewed in the light most favorable to Mr. Greystoke, the fact that Mr. Greystoke merely wanted Mr. Gross to leave the apartment, and felt panicked after he stabbed Mr. Gross, suggests he did not wish Mr. Gross serious physical harm.

Indeed, the jury's question during deliberations suggested it was grappling with this very issue. The jurors inquired of the court: "MAY

WE SEE THE DEFINITION OF SECOND DEGREE ASSAULT?” and in response Mr. Greystoke renewed his motion for the inferior offense instruction. CP 125, RP 833. The court denied Mr. Greystoke’s motion based on its finding that it “complicates things” to introduce a new instruction during deliberations. RP 833. Instead, the court informed the jury “All of the law has been provided to the jury.” RP 125.

The trial court abused its discretion when it denied Mr. Greystoke’s request for an instruction based first on its incorrect recollection of the facts presented at trial and later based on a concern about complicating the issue for the jury. *See State v. Hunter*, 152 Wn. App. 30, 48, 216 P.3d 421 (2009) (factual component of *Workman* test reviewed for abuse of discretion). A trial court abuses its discretion when it relies on unsupported facts or applies the wrong legal standard. *Salas*, 168 Wn.2d at 668-69. Here, the court committed both errors.

Viewed in Mr. Greystoke’s favor, the evidence supported a charge of second degree assault to the exclusion of first degree assault, and the court erred when denied Mr. Greystoke’s motion for a second degree instruction, in part, because it wrongly believed the testimony showed Mr. Greystoke opened Mr. Gross’s abdominal cavity during the course of the stabbing. The trial court further erred when it refused to provide the jury with the second degree assault instruction when the jury requested it based

on the wrong legal standard: that it would complicate things to provide a new instruction during deliberations. It had an opportunity to remedy this error when Mr. Greystoke moved for a mistrial, but did not.

Because a theory of second degree assault was supported by the evidence presented at trial, Mr. Greystoke was entitled to have the jury instructed on second degree assault. *Fernandez-Medina*, 141 Wn.2d at 462. This Court should reverse.

**5. Reversal of the sentencing enhancement is required because it was not alleged in the information.**

a. A sentencing enhancement must be alleged in the information.

A sentencing enhancement that may increase a sentence beyond the maximum authorized statutory sentence is an “element” of a greater offense and must be alleged by the State in the information. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); *see also Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (“when the term ‘sentence enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict”). Thus, “[s]entencing enhancements, such as a deadly weapon allegation, must be included in the information.”

*Id.* (citing *In re Pers. Restraint of Bush*, 95 Wn.2d 552, 554, 627 P.2d 953 (1981)).

When the information fails to contain the specific allegation that “enhanced consequences will flow with a conviction,” the individual’s right to due process is violated and the case must be remanded for resentencing. *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980); U.S. Const. amends. V, XIV; Const. art. I, § 3.

- b. Reversal of the deadly weapon enhancement is required because the deadly weapon was not alleged in the original information and Mr. Greystoke was not arraigned on the amended information.

The original information, and the only information on which Mr. Greystoke was arraigned, did not provide notice of a deadly weapon enhancement. CP 246. After Mr. Greystoke refused to plead guilty, the State filed a motion to file an amended information in August 2017. CP 171-72 (explaining motion was being filed because Mr. Greystoke had rejected plea offer). On the day the State filed the motion, the court indicated the motion would be considered at a hearing in October. RP 200, 242. At a September hearing, Mr. Greystoke stated he objected to the State’s motion to amend the information but the court again told Mr. Greystoke this would be addressed in October. RP 263-64.

The amended information was not addressed in October. Mr. Greystoke was not arraigned on the amended information and the amended information was not filed aside from as an attachment to the State's August motion.

Criminal rule 4.1 requires an individual be arraigned no later than 14 days after the information is filed, because arraignment serves to provide the individual with official notice of the charges against him. *See State v. King*, 101 Wn. App. 318, 322, 2 P.3d 1012 (2000) (State's delay in arraigning Mr. King deprived him "of timely notice of the charges"). This did not occur here. Mr. Greystoke objected to the State's motion to file the amended information and the record does not show this issue was ever resolved.

Instead, the State proceeded at trial against Mr. Greystoke on the deadly weapon enhancement despite the fact this enhancement was not included in the only information on which Mr. Greystoke was arraigned. The jury was instructed on the enhancement and returned a special verdict finding the State had satisfied its burden on the enhancement. CP 123, 145. Mr. Greystoke was sentenced to an addition 24 months as a result. CP 18, 20.

In *Theroff*, the State filed a notice to seek enhanced penalties with the original information, but failed to file this notice with the amended

information. 95 Wn.2d at 387, 392. The jury returned a special verdict finding the enhancement, but the supreme court reversed, finding that because the prosecutor failed to provide the required notice, remand for resentencing was required. *Id.* at 393. Similarly, here, Mr. Greystoke cannot be sentenced on an enhancement not alleged in the information. Reversal of the deadly weapon enhancement is required.

**6. Mr. Greystoke’s judgment and sentence must be amended to strike the legal financial obligations.**

- a. All of the legal financial obligations should be stricken from Mr. Greystoke’s judgment and sentence because his only source of income is social security disability.

At sentencing, the court imposed a total of \$800 in legal financial obligations (LFOs) against Mr. Greystoke, including a \$500 victim penalty assessment, \$200 in court costs, and a \$100 DNA fee. CP 24. The court imposed these LFOs upon Mr. Greystoke even though his only source of income was social security disability benefits. RP 891. According to Mr. Greystoke’s mother, he was found permanently disabled in his twenties, after he suffered a psychotic break. Supp. CP \_\_\_\_ (Sub No. 120, June 7, 2016 Letter).

Pursuant to the anti-attachment provision of the Social Security Act, “none of the moneys paid” to Mr. Greystoke in federal disability benefits “shall be subject to execution, levy, attachment, garnishment, or

other legal process, or the operation of any bankruptcy or insolvency law.” 42 U.S.C. § 407(a). As the supreme court held in *City of Richland v. Wakefield*, the term “other legal process” prohibits a court from ordering an individual to pay legal financial obligations (LFOs) if the person’s only source of income is social security disability. 186 Wn.2d 596, 609, 380 P.3d 459 (2016). Thus, the trial court is precluded from collecting LFO payments from Mr. Greystoke because his sole source of income is social security disability. *State v. Catling*, 2 Wn. App. 2d 819, 826, 413 P.3d 27 (2018), review granted 422 P.3d 915 (2018).

In *Catling*, this Court applied *Wakefield* to amend Mr. Catling’s judgment and sentence to specify that repayment of his LFOs cannot be made from the proceeds of his Social Security disability payments. *Catling*, 2 Wn. App. 2d at 826. The court had imposed LFOs in the amount of \$800 and required Mr. Catling to make payments of \$25 per month. *Id.* at 822. On appeal, this Court held “[c]onsistent with *Wakefield*, we agree that the order that Mr. Catling pay \$25 per month cannot be enforced against his disability income per § 407(a).” *Id.* at 826. It remanded the case to amend the judgment and sentence to reflect this directive and urged courts to amend the uniform language in standard judgment and sentence forms. *Id.*

However, Chief Judge Fearing dissented, explaining he would hold the LFOs must be stricken from the judgment and sentence because merely amending the judgment and sentence to maintain the LFO order but preclude collection “thwarts the federal anti-attachment statute protecting social security recipients.” *Catling*, 2 Wn. App. 2d at 828 (Fearing, C.J. dissenting). The imposition of LFOs, regardless of whether the State seeks to collect them, constitutes “legal process” within the meaning of 42 U.S.C § 407(a). *Catling*, 2 Wn. App. 2d at 844 (Fearing, C.J. dissenting) (noting the supreme court “impliedly agreed in *Wakefield* that the court order in itself constitutes ‘legal process’”). The supreme court has accepted review. *State v. Catling*, 422 P.3d 915 (2018).

The trial court retains jurisdiction over Mr. Greystoke until he is able to completely satisfy his financial obligations, irrespective of the statutory maximum for a conviction first degree assault. RCW 9.94A.760(4); *Catling*, 2 Wn. App. 2d at 834 (Fearing, C.J. dissenting). Because Mr. Greystoke suffers from severe mental illness and has received social security disability benefits most of his adult life, he will never be able to pay of this debt.

The State cannot articulate a legitimate purpose for maintaining a judgment for LFOs that Mr. Greystoke will never be able to pay, and is in fact protected from paying under federal law. Under these circumstances,

the judgment only serves to harass. *Catling*, 2 Wn. App. 2d at 846 (Fearing, C.J. dissenting). For the reasons, this Court should strike the LFOs entered against Mr. Greystoke. In the alternative, the court must amend the judgment and sentence to reflect these LFOs may not be collected. *Id.* at 826.

- b. If this Court declines to strike the legal financial obligations in their entirety, it must strike the DNA fee and the criminal filing fee.

RCW 9.94A.777 prohibits a court from imposing any LFOs, other than the victim penalty assessment or restitution, on an individual who “suffers from a mental health condition” unless the court determines he “has the means to pay such additional sums.” The court did not consider this statute before imposing the DNA fee or criminal filing fee on Mr. Greystoke. Given that Mr. Greystoke’s mental illness is well documented and he receives social security disability as a result of his mental illness, both fees should be struck from the judgment and sentence.

In addition, after the trial court sentenced Mr. Greystoke, the legislature enacted House Bill 1783, which amended several statutes related to legal financial obligations, including the statutes directing the imposition of the DNA fee and the criminal filing fee. Laws of 2018, ch. 269 §§ 17, 18. These amendments apply to Mr. Greystoke because his case is not yet final on appeal. *State v. Ramirez*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_,

2018 WL 4499761 at \*6 (September 20, 2018) (“We hold that House Bill 1783 applies prospectively to Ramirez because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez’s case was pending on direct review and thus not final when the amendments were enacted.”).

Pursuant to the amendments, the criminal filing fee may not be imposed against individual who is “indigent,” which is defined, in part, as someone who receives disability benefits. RCW 36.18.020(2)(h); RCW 10.101.010(3)(a). In addition, the DNA fee may only be imposed if the individual has not previously provided his sample. RCW 43.43.7541. Because Mr. Greystoke qualified as indigent and because the court did not inquire as to whether Mr. Greystoke’s DNA sample was already provided, this Court must strike these LFOs from the judgment and sentence.

F. CONCLUSION

John Greystoke was denied his constitutional rights to present his defense, represent himself, and ultimately, to have a fair trial. The trial court also erroneously denied his request for a second degree assault instruction, unconstitutionally commented on the evidence, and sentenced Mr. Greystoke on an enhancement not alleged in the information. For all of these reasons, this Court should reverse.

DATED this 28<sup>th</sup> day of September, 2018.

Respectfully submitted,



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Kathleen A. Shea – WSBA 42634  
Washington Appellate Project  
Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 51049-9-II
	)	
JOHN GREYSTOKE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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# WASHINGTON APPELLATE PROJECT

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**Appellate Court Case Title:** State of Washington, Respondent v John Greystoke, Appellant  
**Superior Court Case Number:** 16-1-00183-1

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