96176-0

Supreme Court No. __
(COA No. 76409-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Christopher Lewis Locken,

Appellant.

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

TREATED AS A PETITION FOR REVIEW

MOTION FOR DISCRETIONARY REVIEW

Sara S. Taboada
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treatises

Court Rules

Other Jurisdictions

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3), and RAP 13.4(b)(4), Christopher Lewis Locken, petitioner here and appellate below, asks this Court to accept review of a July 9, 2018, Court of Appeals decision. A copy of this decision is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Mr. Locken suffers from a mental illness that impairs his perception of reality. While a competency evaluation conducted shortly before Mr. Locken's trial deemed him competent to stand trial, this evaluation warned Mr. Locken's competency would likely deteriorate if he discontinued his psychiatric medication. During Mr. Locken's trial, his attorney asked the court to inquire on the record to assess whether Mr. Locken was knowingly, intelligently, and voluntarily waiving his right to testify.

When the trial court inquired, Mr. Locken responded he did not understand what the court was asking because his psychiatric medication was not working. In response, the court simply asked him the same question and told him the only two possible answers he could give were "yes" or "no." Mr. Locken responded, "yes."

> a. When a defendant's competency is contingent on his medication, and when a defendant informs the court his medication is not working, can a defendant knowingly, intelligently, and voluntarily waive his right to testify? RAP 13.4(b)(3); RAP 13.4(b)(4).
>
> b. Does a court improperly influence a defendant whose competency is contingent on functioning medication into waiving his right to testify when it learns the defendant's medication is not working and the person cannot understand the question, but the court merely recites the same question and tells the defendant his only available answers are "yes" or "no?' RAP 13.4(b)(3).

2. In *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016), a social security recipient with several disabilities challenged a court order requiring her to pay $15 a month in discretionary LFOs, arguing the court order violated 42 U.S.C. § 407(a). This Court agreed and held, "federal law prohibits courts from ordering defendants to pay LFOs if the person's only source of income is social security disability."

Mr. Locken receives social security income. Based on this Court's ruling in *Wakefield*, Mr. Locken challenged a court order requiring him to pay mandatory LFOs. Relying on Division Three's majority opinion in *State v. Catling*, 2 Wn. App. 2d 819, 413 P.3d 27 (2018), *review granted* Supreme Court No. 957941, Division One held the order was valid as long as the court amended it to specify that payments could not come from Mr. Locken's social security income. This Court granted review in *Catling* on August 8, 2018.

As this Court has already granted review on this issue, should this Court also grant review on this issue; alternatively, should this Court stay this issue pending the resolution of *Catling*? RAP 13.4(b)(1).

3. The Supremacy Clause invalidates all state laws that conflict or interfere with an act of congress. When a court rules a statute or statutory scheme is unconstitutional as applied, the statute no longer remains good law under similar circumstances.

Several statutes require courts to impose LFOs without any consideration of the defendant's economic circumstance. While these statutes do not explicitly require courts to impose LFOs on social security recipients, they leave courts with no choice but to impose mandatory LFOs on social security recipients.

Additionally, several statutes impose certain obligations and burdens upon an individual if he or she is convicted of a crime and remains indebted to the State due to non-payment of LFOs. Importantly, pursuant to RCW 9.94A.637(1)(a) and RCW 9.94A.640 an individual cannot vacate their record until he pays off his LFOs in their entirety.

a. As applied to a social security recipient like Mr. Locken, are RCW 7.68.035, RCW 36.18.020(2)(h), and RCW 43.43.7541 void under the Supremacy Clause because they force courts to impose LFOs on social security recipients? RAP 13.4(b)(3).

b. As applied to a social security recipient like Mr. Locken, is RCW 9.94A.760(7)(b) void under the Supremacy Clause because

it employs "other legal process" to summon a social security recipient to the clerk's office and leaves social security recipients vulnerable to warrants for failing to appear? RAP 13.4(b)(3).

c. As applied to a social security recipient like Mr. Locken, are RCW 9.94A.637(1)(a) and RCW 9.94A.640 void under the Supremacy Clause because they coerce social security recipients into using their social security income to pay off their LFOs so they can vacate their record? RAP 13.4(b)(3)?

Alternatively, as this Court granted review in *Catling* on these issues, should this Court stay this issue pending the resolution in Mr. Catling's case?

C. STATEMENT OF THE CASE

Sergeant Darren Crownover arrested Christopher Locken, believing Mr. Locken attempted to elude a police vehicle. CP 52. When Sergeant Crownover read Mr. Locken his Miranda rights, Mr. Locken recited them back to Sergeant Crownover and told him he was under citizen's arrest. CP 52. Mr. Locken proceeded to tell Sergeant Crownover that he was a Navy Seal and a Federal Agent who could kill Sergeant Crownover with his mind. CP 52. Mr. Locken later threatened to burn Sergeant Crownover's home with a cruise missile. CP 52. Sergeant Crownover's police report from the date of this incident acknowledges that Mr. Locken "has issues with reality" and requests that Mr. Locken have his mental health evaluated. CP 53.

At a later arraignment hearing, Mr. Locken expressed his belief that he actually placed "an obviously intoxicated Officer Crownover" under citizen's arrest for undue harassment. 3RP 4. Additionally, Mr. Locken vacillated between requesting an attorney and representing himself, claiming he passed the bar and attended either Harvard or Yale. 3RP 8. Although Mr. Locken asserted a competency evaluation would be "completely irrelevant and unnecessary," the court ordered a competency evaluation. 3RP 10. The court's order was premised in part on a previous competency evaluation that found Mr. Locken incompetent. 3RP 10.

Mr. Locken's psychological evaluation (taken two months before his trial) notes he has been diagnosed with Bipolar I Disorder with manic and psychotic features and Attention Deficit Hyperactivity Disorder (ADHD). CP 60, 66. At the time of his competency evaluation, Mr. Locken was taking Abilify (antipsychotic) for his bipolar disorder and Dexedrine (amphetamine) to treat his ADHD. CP 60. Although the competency report concludes Mr. Locken is competent to stand trial, the report critically notes,

> The [opinion that Mr. Locken is competent] is offered at a time when Mr. Locken has been compliant with his prescribed antipsychotic medication and mood stabilizer. *Should he discontinue his current medication regime, his condition could*

> *deteriorate*, and he would likely require re-evaluation regarding his competency.

CP 70 (emphasis added).

Mr. Locken later agreed to a bench trial. Towards the end of the trial, the court asked Mr. Locken if he was freely and voluntarily waiving his right to testify. 7RP 75. In response, he stated he could not comprehend because his medication was not working. 7RP 75. To this, the judge replied, "Sir, I'll ask it again then. As to the – your right to invoke your silence, your right to remain silent at trial, is that your free and voluntary choice? That's a 'yes' or 'no.'" 7RP 75. Mr. Locken responded "yes." 7RP 75.

The court found Mr. Locken guilty of attempting to elude and sentenced him to four months in jail. CP 9; 7RP 98. At sentencing, Mr. Locken informed the court he receives social security disability income. 7RP 96. Although the court waived all of the discretionary legal financial obligations (LFOs), the court imposed $700 in mandatory LFOs. CP 13. The court ordered Mr. Locken to begin paying these LFOs within 30 days after his release from confinement. CP 14.

D. ARGUMENT

1. This Court should accept review because the Court of Appeal's opinion raises important constitutional questions regarding a mentally ill person's right to testify and what a trial court must undertake to ensure

it does not inappropriately influence a mentally ill person into waiving his right to testify.

This Court should accept review because the Court of Appeals' opinion raises important questions this Court should answer regarding (1) a mentally ill person's right to testify; and (2) what a trial court must undertake to ensure it does not inappropriately influence a mentally ill person into waiving his right to testify. RAP 13.4(b)(3); RAP 13.4(b)(4).

Both the federal and state constitution guarantee a defendant's right to testify at his own trial. This right is implicitly rooted in the Fifth, Sixth, and Fourteenth Amendments to the federal constitution and explicitly protected under article I, section 22 of the Washington constitution. U.S. Const. amends. V, VI, XIV; Const. art. I, § 22; *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). A criminal defendant's right to testify is essential to due process of law in a fair adversarial proceeding; indeed, "the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 51-52. A criminal defendant's right to testify is fundamental. *Id.* at 52.

"The waiver of a fundamental constitutional right must be 'an intelligent relinquishment or abandonment of a known right or privilege'" *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996) (quoting

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Although this waiver need not be on the record, the waiver must be knowing, intelligent, and voluntary. *Thomas*, 128 Wn.2d at 558-59.

The exchange between Mr. Locken and the trial court demonstrates he did not knowingly, intelligently, and voluntarily waive his right to testify, and the trial court likely influenced Mr. Locken into agreeing to waive this right. The exchange was as follows:

> THE COURT: Mr. Montoya,[1] any witnesses?
>
> MR. MONTOYA: Your Honor, Mr. Locken does not wish to testify. He did have a statement he wanted to give to the Court, but-- I'm sorry. He does not want to give that to the Court.
>
> So if the Court wants to inquire to make sure Mr. Locken understands his right to testify.
>
> THE COURT: Mr. Locken, I believe it was sometime this week -- probably yesterday -- that I advised you that you had the right to testify if you wanted to do so. You have the right to remain silent and to refuse to testify, as well. And is it your free and voluntary choice not to testify?
>
> THE DEFENDANT: Yes, Your Honor. Four days ago. Yes.

[1] Mr. Montoya was Mr. Locken's trial attorney.

THE COURT: Okay. Thank you.

THE DEFENDANT: Thank you. Thank you, your eminence.

THE COURT: You said four days ago, yes. So that makes me think you answered how long it's been since we had the hearing. But as far as invoking your right to remain silent, you are doing that freely and voluntarily?

THE DEFENDANT: I apologize. Hmm. *I'm unable to properly comprehend because my medication is not working.*

THE COURT: Sir, I'll ask it again then. As to the - your right to invoke your silence, your right to remain silent at trial, is that your free and voluntary choice? *That's a "yes" or "no."*

THE DEFENDANT: Yes. Thank you, Your Honor.

THE COURT: All right. Thank you.

7RP 75 (emphasis added).

Mr. Locken's lack of functioning medication casts considerable doubt on whether he knowingly, intelligently, and voluntarily waived his right to testify. Mr. Locken indicated he could not understand the court's question because his medication was not working. 7RP 75. Without functioning psychiatric medication, it is unlikely Mr. Locken could appreciate the nature of the right he was relinquishing. Mr. Locken's confusion was consistent with the competency evaluation conducted

before his trial that indication his condition would deteriorate without medication; it also stated he would require a new competency evaluation if he discontinued his medication. CP 70. Additionally, if Mr. Locken understood the court's question, it is doubtful he would have waived his right to testify, as he insisted on speaking at other court appearances. 1RP 4, 3RP 2. In fact, Mr. Locken originally prepared a statement to give to the court before his trial. 7RP 75.

Moreover, after hearing Mr. Locken could not understand her query concerning the waiver of the right to testify, the court merely reiterated, "as to the - your right to invoke your silence, your right to remain silent at trial, is that your free and voluntary choice? *That's a 'yes' or 'no.'*" RP 75 (emphasis added). Mr. Locken likely did not know what he was saying "yes" or "no" to. But the court's choices—"yes" or "no"—left Mr. Locken without the ability to inquire about the nature of the right he was relinquishing. The court neither gave Mr. Locken the opportunity to further inquire with counsel or the court regarding the right he was relinquishing nor did the court acknowledge that Mr. Locken's competency may be compromised due to his lack of functioning medication.

Rather than address these points, the Court of Appeals' opinion notes that in regards to the court's questioning, "the trial court simply

made a minimal inquiry in response to defense counsel's request, " and merely casts Mr. Locken's argument as a competency challenge. Opinion at 4-5. This ignores the trial court's restrictive questioning. But importantly, the opinion fails to answer the question of what a court must do when a mentally ill defendant, whose competency is contingent on functioning medication, informs the court that his medication is not working and that he is confused with the court's questions.

This Court should accept review. RAP 13.4(b)(3), RAP 13.4(b)(4).

2. This Court should accept review because the opinion conflicts with this Court's decision in *Wakefield*.

This Court should accept review because the opinion, which relies on Division Three's majority opinion in *Catling*, conflicts with this Court's ruling in *Wakefield*. RAP 13.4(b)(1).

a. <u>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.</u>

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. 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).

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). 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.

b. In *City of Richland v. Wakefield*, this 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."

In *Wakefield*, a court ordered the petitioner to pay $15 per month toward her outstanding LFOs. 186 Wn.2d at 599. 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, as she possessed no other resources to pay off this debt. *Id.* at 607-08.

This Court vacated the order requiring the petitioner to pay LFOs for a number of reasons; importantly, this Court concluded the court's order met the United State Supreme Court's definition of "other legal process." *Id.* at 609. Noting the United States Supreme Court "has already rejected prior state attempts to recoup money from social security recipients," this Court turned to Montana[2] and Michigan[3] 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 this conclusion, this 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

[2] *State v. Eaton*, 323 Mont. 287, 99 P.3d 661 (2004).
[3] *In re Lampart*, 306 Mich. App. 226, 856 N.W.2d 192 (2014).

reach those protected funds." *Id.* at 609. This Court agreed, noting this conclusion comported with *Keffeler's* definition of "other legal process," which involves "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 609 (quoting *Keffeler*, 537 U.S. at 385).

Thus, this 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).

Relying on Division Three's majority opinion *Catling*, here, the court simply instructed the sentencing court to amend the judgment and sentence to state the government cannot reach Mr. Locken's social securing income to satisfy this debt. Opinion at 9; *Catling*, 2 Wn. App. 2d at 823. But this was not the remedy employed in *Wakefield.* Instead, this Court struck the order in its entirety, holding that social security recipients were insulated from such orders.

This Court should grant review under RAP 13.4(b)(1); alternatively, as this Court accepted review in *Catling*, this Court should stay this case pending the resolution in *Catling*.

2. This Court should accept review because the opinion presents important questions arising under the federal constitution.

This Court should accept review because, as applied to a social security recipient like Mr. Locken, Washington's LFO statutory scheme is at odds with the anti-attachment provision of the social security act; thus, the scheme presents numerous questions regarding its compatibility with the Supremacy Clause. U.S. Const. art. VI, pt. II; RAP 13.4(b)(3).

"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).

a. As applied to a social security recipient like Mr. Locken, the Washington statutes requiring courts to impose mandatory LFOs conflict with 42 U.S.C. § 407(a) and violate the Supremacy Clause.

As applied to a social security recipient like Mr. Locken, Washington's mandatory LFOs conflict with 42 U.S.C. § 407(a) and therefore 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 upon an incarcerated person's social security benefits. *Bennett v. Arkansas*, 485 U.S. 395, 396, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988). 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 Washington's mandatory LFOs do not explicitly allow courts to impose mandatory LFOs on defendants whose sole source of income derives from social security, the statutes nevertheless run counter to the Supremacy Clause because they require courts to impose LFOs on every convicted person, including impoverished social security recipients. None of these statutes contain provisions that grant sentencing courts the discretion to forego "attempt[ing]" to attach social security benefits.

Additionally, once a sentencing court imposes mandatory LFOs (which it is required to do by statute), a chain of events follows. As discussed below, this chain of events continuously submit a social security recipient to "other legal process" for an unlimited period of time.

b. As applied to a social security recipient like Mr. Locken, RCW 9.94A.760(7)(b) is void under the Supremacy Clause because it employs "other legal process" to summon a social security recipient to the clerk's office and leaves social security recipients vulnerable to warrants if they fail to appear.

Once a court imposes mandatory LFOs, the clerk may repeatedly summon the defendant to his or her office to review his finances, thereby continuously subjecting the defendant to "other legal process."

RCW 9.94A.760(7)(b) grants a clerk with the ability to 1) require the LFO debtor to appear before him or her; 2) command the LFO debtor to respond to questions "under oath;" and 3) demand that the LFO debtor bring documentation of his financial assets. This statute employs a "quasi-judicial mechanism" used to "secure discharge of an allegedly existing or anticipated liability" under *Keffeller*. 537 U.S. at 385. As the dissent in *Catling* notes, "the State still arrays the legal process in an attempt to gain payment despite knowing federal law protects the offender's only income fund. Because of the offender's inability to pay, he remains stuck in an ongoing, burdensome court process." 2 Wn. App. 2d at 845 (J. Fearing, dissenting).

Additionally, this statute could potentially result in warrants for arrest if the social security recipient does not show up to the clerk's office to give the clerk an update on his finances. *See State v. Nason*, 168 Wn.2d

936, 233 P.3d 848 (2010) (describing a clerk's decision to issue a violation report due to the defendant's nonpayment, leading to a hearing where the defendant failed to appear and the court's issuance of a warrant for the defendant's arrest).

c. As applied to a social security recipient like Mr. Locken, RCW 9.94A.637(1)(a) and RCW 9.94A.640 are void under the Supremacy Clause because they coerce social security recipients into using their social security income to pay off their LFOs so they can vacate their record.

Washington's LFO statutory scheme employs "other legal process" because it "coerce[s] an offender to invade his social security disability benefits." 2 Wn. App. 2d at 845 (J. Fearing, dissenting). This is because "the State will continuously hold a lien on [a person like Mr. Locken's] civil rights and encumber his social security benefits until he pays off all of his legal financial obligations from this sheltered score." *Id.*

Washington's LFO statutory scheme dangerously leaves ex-offenders with disabilities without the ability to vacate their criminal records. 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 source of meeting basic needs for people with disabilities so serious that they may result in, or persist until, death. 42 U.S.C. § 1382.

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 his criminal conviction after all of his 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); Dissent at 10-14. Thus, if a social security recipient wishes to vacate his record and restore his civil rights, he is left with no choice but to use his social security funds to pay off his mandatory LFOs.

Washington's LFO statutory scheme continuously employs a "legal process" upon social security recipients with disabilities. It leaves

people with lifelong disabilities and no future source of income other than social security income without the ability to vacate their criminal conviction(s). Such individuals will be forced to go to the clerk's office, reaffirm that they are not receiving money from another source, and leave the clerk's office without ever having the ability to vacate their record. The cycle is unending.

This Court should accept review under RAP 13.4(b)(3); alternative, this Court should stay this case pending the resolution in *Catling*.

E. CONCLUSION

Based on the foregoing, Mr. Locken respectfully requests that this Court accept review.

DATED this 8th day of August, 2018.

Respectfully submitted,

/s Sara S. Taboada
Sara S. Taboada – WSBA #51225
Washington Appellate Project
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER LEWIS LOCKEN, Appellant.	)	No. 76409-8-I DIVISION ONE UNPUBLISHED OPINION FILED: July 9, 2018

BECKER, J. — In light of appellant's extensive history of mental illness and his receipt of Social Security disability income, we remand for reconsideration of the legal financial obligations that were imposed when he was convicted.

Appellant Christopher Locken was arrested and charged with attempting to elude police pursuit in October 2016.

Locken suffers from bipolar disorder with manic and psychotic features. He has been committed involuntarily on at least eight occasions. Locken was evaluated again after this arrest. The court found him competent to stand trial. After a one day bench trial, Locken was convicted. He was sentenced to four months' confinement and $700 in mandatory legal financial obligations.

WAIVER OF RIGHT TO TESTIFY

Locken first contends that he did not make a valid waiver of his right to testify.

A party's assignment of error should include a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4). Assignments of error must be included in the appellant's brief so that the reviewing court can pinpoint the time and place in the record at which the trial court allegedly committed error, either by ruling or by failing to rule.

Locken's assignment of error raises waiver of the right to testify in the abstract, without identifying an error made by the trial court:

> In violation of the Fifth, Sixth, and Fourteenth Amendments to the United States constitution and article 1, section 22 of the Washington constitution, Mr. Locken did not knowingly, intelligently, and voluntarily waive his right to testify.

As a result of his failure to make a proper assignment of error, Locken's discussion of waiver is unfocused and the standard of review unclear.

Locken's claim of error appears to be rooted in an exchange with the trial court that took place after the State rested its case. At the request of Locken's attorney, the court asked Locken if it was his free and voluntary choice not to testify. Locken responded in part that he was "unable to properly comprehend" because his medication was "not working."

> [DEFENSE COUNSEL]: Your Honor, Mr. Locken does not wish to testify. He did have a statement he wanted to give to the Court, but—I'm sorry. He does not want to give that to the Court.

So if the Court wants to inquire to make sure Mr. Locken understands his right to testify.

THE COURT: Mr. Locken, I believe it was sometime this week—probably yesterday—that I advised you that you had the right to testify if you wanted to do so.

You have the right to remain silent and to refuse to testify, as well.

And is it your free and voluntary choice not to testify?

THE DEFENDANT: Yes, Your Honor. Four days ago. Yes.

THE COURT: Okay. Thank you.

THE DEFENDANT: Thank you. Thank you, your eminence.

THE COURT: You said four days ago, yes. So that makes me think you answered how long it's been since we had the hearing.

But as far as invoking your right to remain silent, you are doing that freely and voluntarily?

THE DEFENDANT: I apologize.

Hmm. I'm unable to properly comprehend because my medication is not working.

THE COURT: Sir, I'll ask it again then.

As to the—your right to invoke your silence, your right to remain silent at trial, is that your free and voluntary choice?

That's a "yes" or "no."

THE DEFENDANT: Yes. Thank you, Your Honor.

THE COURT: All right. Thank you.

According to Locken, his statement that he was unable to comprehend meant that he did not knowingly, intelligently, and voluntarily waive his right to testify.

A defendant has the constitutional right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44, 49, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Any waiver of a constitutional right must be made knowingly, intelligently, and voluntarily. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

A trial court does not need to obtain an on-the-record waiver of the right to testify in order to assure that the waiver is valid:

> We believe that the right to testify belongs in the category of rights for which no on-the-record waiver is required. . . . The right to remain silent is waived by the act of taking the stand; the trial court has no duty to inquire as to whether the defendant knowingly and intelligently waived the right. Likewise, a court is not obligated to obtain an on-the-record waiver of the right to self-representation when a defendant appears with counsel. As with the right to self-representation, the right not to testify, and the right to confront witnesses, the judge may assume a knowing waiver of the right from the defendant's conduct. The conduct of not taking the stand may be interpreted as a valid waiver of the right to testify.

State v. Thomas, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (citations omitted). Under Thomas, the trial court did not have to inquire if Locken was voluntarily waiving his right to testify. The court did so only at the request of defense counsel.

While Locken attempts to assert a violation of a constitutional right, his argument would seem to be more properly characterized as a challenge to the trial court's previous competency ruling, or alternatively, as an assignment of error to the trial court's failure to revisit Locken's competency sua sponte.

"Reviewing courts in Washington customarily defer to the trial court's judgment of a defendant's mental competency." State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702 (2014), cert. denied, 135 S. Ct. 1444 (2015). Competency rulings are reviewed for an abuse of discretion. Coley, 180 Wn.2d at 551. The record does not support an argument that the trial court abused its discretion in judging Locken to be competent.

A discussion between the trial court and defendant regarding the right to testify "might have the undesirable effect of influencing the defendant's decision not to testify." Thomas, 128 Wn.2d at 560. Locken asserts the court inappropriately influenced him into agreeing to waive his right to testify. We disagree. The trial court avoided getting into a discussion that might influence Locken. The court simply made a minimal inquiry in response to defense counsel's request. Nothing the court said can be construed as explaining the benefits or drawbacks of testifying.

We conclude Locken's first assignment of error lacks merit.

LEGAL FINANCIAL OBLIGATIONS

Next, Locken contends the court erred in imposing legal financial obligations without first determining whether he had the means to pay them despite his mental illness.

At sentencing, the court inquired into Locken's finances. Locken said he was unemployed and received Social Security disability income. He provided no information about other sources of income or past employment. Whether he has some other source of income or is capable of gainful employment is unclear. Locken told his mental competency evaluator that he had been employed in the past, most recently working as a clown.

The court imposed $500 as a victim penalty assessment and $200 for court costs. These are obligations mandated by state statutes. The judgment and sentence ordered a notice of payroll deduction. Locken was ordered to

report to the clerk of the court and the collections deputy to determine the payment terms for the obligations.

RCW 9.94A.777

Before imposing legal financial obligations, a trial court must determine whether a defendant who suffers from a mental health condition has the ability to pay:

> (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
>
> (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777. Locken contends the court erred in imposing the obligation to pay $200 in court costs because he suffers from a mental health condition and lacks the means to pay.

Although Locken did not raise this objection below, we exercise our discretion under RAP 2.5 to hear the issue, following State v. Tedder, 194 Wn. App. 753, 757, 378 P.3d 246 (2016). In Tedder, the defendant had a history of mental illness, but the parties failed to raise RCW 9.94A.777 at sentencing. Tedder, 194 Wn. App. at 756. As a result, the trial court did not inquire or develop the record as to the defendant's ability to participate in gainful employment. Tedder, 194 Wn. App. at 757. The court remanded for reconsideration in light of RCW 9.94A.777(1).

Here, the State contends the record is inadequate to establish that Locken cannot participate in gainful employment. But inadequacy of the record is the very reason why the issue is meritorious. Under the statute, the judge "must first determine" that a defendant who has a qualifying mental health condition "has the means to pay such additional sums." RCW 9.94A.777(1). We conclude remand is necessary to develop the record and consider whether Locken should be excused from the obligation to pay court costs.

Social Security Disability Income

Locken contends the court also erred in imposing the obligation to pay a victim penalty assessment of $500. The victim penalty assessment is specifically called out in RCW 9.94A.777 as an obligation to which the statute does not apply, so that it remains mandatory under state statutes even for a defendant with a mental health condition. But Locken contends a federal statute, the antiattachment provision of the Social Security Act, relieves him from the obligation to pay even the victim penalty assessment so long as he receives Social Security disability income. This argument too is raised for the first time on appeal. If it were the only issue pertaining to Locken's legal financial obligations, we would decline to review it. But having decided to remand for determination of the applicability of RCW 9.94A.777 to the court cost obligation, we exercise our discretion to address the Social Security disability question as well.

Social Security disability income is protected from attachment and "other legal process":

> 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). The statutory term "other legal process" means a process "much like the processes of execution, levy, attachment, and garnishment, and at a 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." Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 372, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003).

When a defendant's only source of income is Social Security disability, a court order *enforcing* legal financial obligations falls within the Keffeler definition of "other legal process." City of Richland v. Wakefield, 186 Wn.2d 596, 609, 380 P.3d 459 (2016) (ordering the defendant to pay $15 a month when her only income was from Social Security disability violated 42 U.S.C. § 407). But so far, the court order only imposes obligations on Locken; it does not enforce them.

Currently, a sentencing judge must make an individualized inquiry into a defendant's current and future ability to pay before imposing *discretionary* legal financial obligations. State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Locken contends that even when legal financial obligations are *mandatory*, courts may not impose them on a defendant who receives Social Security disability income without first determining that the defendant possesses

an independent source of income from which payment can be drawn. Division Three recently issued a divided opinion rejecting this argument in State v. Catling, 2 Wn. App. 2d 819, 413 P.3d 27 (2018).

The majority opinion in Catling interprets Wakefield as limiting the enforced *collection* of obligations, not the act of *imposing* the obligations.

> The Constitution does not limit the ability of the states to impose financial obligations on convicted offenders; it only prohibits the enforced collection of financial obligations from those who cannot pay them. Thus, ability to pay is not considered when imposing mandatory costs and need only be considered at the time of collection.

Catling, 2 Wn. App. 2d at 823 (citations omitted). The court affirmed the *imposition* of the obligations but remanded with an instruction to amend the judgment to explicitly prohibit the use of Social Security disability benefits in *enforcement* proceedings:

> Consistent with Wakefield, we agree that the order that Mr. Catling pay $25 per month cannot be enforced against his disability income per § 407(a). . . . The antiattachment provision prevents levying against Social Security disability proceeds, but it does not address the debt itself. . . . .
>
> We remand the case to superior court to amend its judgment and sentence to indicate that the [legal financial obligations] may not be satisfied out of any funds subject to 42 U.S.C. § 407(a).

Catling, 2 Wn. App. 2d at 826.

Following Catling, we hold that the federal statute does not prevent the trial court from including a legal financial obligation in the judgment and sentence of a defendant who receives Social Security disability benefits. Nor is there any necessity for the court to inquire at the time of sentencing whether the defendant has other sources of income from which the obligation might be paid.

Ability to pay "is not considered when imposing mandatory costs and need only be considered at the time of collection." Catling, 2 Wn. App. 2d at 823. But we also agree with Catling that when sentencing a defendant who receives Social Security disability benefits, the best practice is to state explicitly in the judgment and sentence that legal financial obligations may not be satisfied out of any funds subject to 42 U.S.C. § 407(a).

When this matter returns to the court to address Locken's claim under RCW 9.94A.777, the superior court should take the opportunity to amend the judgment and sentence to indicate that Locken's legal financial obligations may not be satisfied out of any funds subject to 42 U.S.C. § 407(a).

In a statement of additional grounds for review under RAP 10.10, Locken alleges that the officer who arrested him was drunk and that he, Locken, placed the officer under citizen's arrest. Because the nature of the alleged error is unidentified, review is not warranted.

The conviction is affirmed. The matter is remanded for further proceedings with respect to the legal financial obligations as provided by this opinion.

Becker, J.

WE CONCUR:

Spearman, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Motion for Discretionary Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76409-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Ian Michels-Slettvet
[i.michelsslettvet@co.island.wa.us]
[ICPAO_webmaster@co.island.wa.us]
Island County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 8, 2018

WASHINGTON APPELLATE PROJECT

August 08, 2018 - 4:03 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent vs. Christopher Lewis Locken, Appellant (764098)

The following documents have been uploaded:

- DCA_Motion_Discretionary_Rvw_of_COA_20180808160218SC696750_1046.pdf
  This File Contains:
  Motion for Discretionary Review of Court of Appeals
  The Original File Name was washapp.080818-08.pdf

A copy of the uploaded files will be sent to:

- ICPAO_webmaster@co.island.wa.us
- i.michelsslettvet@co.island.wa.us
- kate@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Sara Sofia Taboada - Email: sara@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180808160218SC696750