

NO. 95794-1

34852-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON M. CATLING, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 4

 A. THE COURT IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS..... 5

 B. *CITY OF RICHLAND v. WAKEFIELD* PROHIBITS COURTS FROM ORDERING A DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE DEFENDANT’S SOLE SOURCE OF INCOME IS FEDERAL SOCIAL SECURITY DISABILITY..... 6

 C. THE TRIAL COURT DID NOT ERR IN IMPOSING MANDATORY LEGAL FINANCIAL OBLIGATIONS, BUT RATHER, ERRED IN ORDERING THE DEFENDANT TO MAKE SCHEDULED MONTHLY PAYMENTS ON THOSE OBLIGATIONS FROM HIS SOCIAL SECURITY DISABILITY BENEFITS, AND IN THREATENING SANCTIONS IF THE DEFENDANT DID NOT..... 9

 D. THE DEFENDANT FAILED TO PRESERVE ANY ARGUMENT THAT THE TRIAL COURT ERRED IN NOT INQUIRING INTO THE DEFENDANT’S ABILITY TO PAY PURSUANT TO RCW 9.94A.777; IN ANY EVENT, THE RECORD IS INSUFFICIENT TO HAVE REQUIRED THE TRIAL COURT TO DO SO..... 15

V. CONCLUSION 19

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>City of Richland v. Wakefield</i> , 186 Wn.2d 596, 380 P.3d 459 (2016).....	2, 7, 8
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	10
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	17
<i>State v. Lundy</i> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	5
<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016).....	5
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	17, 18
<i>State v. Thompson</i> , 153 Wn. App. 325, 223 P.3d 1165 (2009).....	10
<i>State v. Williams</i> , 65 Wn. App. 456, 828 P.2d 1158, 840 P.2d 902 (1992).....	10

FEDERAL CASES

<i>Bennett v. Arkansas</i> , 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988).....	7
<i>Philpott v. Essex County Welfare Board</i> , 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973).....	7
<i>United States v. Pagan</i> , 785 F.2d 378 (2d Cir.), <i>cert. denied</i> , 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986).....	6
<i>Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler</i> , 537 U.S. 371, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003).....	7, 8

OTHER CASES

In Re Lampart, 306 Mich. App. 226, 856 N.W.2d 192 (2014)..... 7, 11, 12
State v. Eaton, 323 Mont. 287, 99 P.3d 661 (2004)..... 7, 12

STATUTES

42 U.S.C. § 407(a) passim
RCW 7.68.035 5, 12
RCW 9.94A.760..... 14
RCW 9.94A.777..... 16, 18, 19
RCW 10.01.160 5
RCW 36.18.020 5, 12
RCW 43.43.7541 5, 12

RULES

Fed. R. Crim. P. 51 17
Fed. R. Crim. P. 52 17
RAP 2.5..... 16, 17

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. As applied to social security recipients like Mr. Catling, RCW 7.68.035(1)(a), RCW 36.18.020(2)(h), and RCW 43.43.7541 conflict with 42 U.S.C. § 407(a) and are therefore in violation of the Supremacy Clause, U.S. Const. art. VI, pt. II.

2. The court order requiring Mr. Catling to pay \$25 a month in legal financial obligations is contrary to 42 U.S.C. § 407(a) and our Supreme Court's ruling in *City of Richland v. Wakefield*, 186 Wn.2d 596, 599, 380 P.3d 459 (2016).

3. The trial court erred when it failed to conduct the required inquiry into Mr. Catling's ability to pay under RCW 9.94A.777(1).

4. The trial court erred when it ordered Mr. Catling to pay \$800 in Legal Financial Obligations.

5. The trial court erred when it denied Mr. Catling's motion for reconsideration of the imposition of his LFOs.

II. ISSUES PRESENTED

1. May a trial court order a defendant to pay legal financial obligations, whether mandatory or discretionary, when the defendant's only source of income is federal social security disability benefits?

2. Whether *Wakefield*, 42 U.S.C. § 407(a), and other precedent insulate the defendant from the imposition of mandatory LFOs?

3. Whether the defendant has preserved the argument that the trial court failed to inquire into his ability to pay pursuant to RCW 9.94A.777, when the defendant failed to object on this basis in the lower court?

III. STATEMENT OF THE CASE

On February 1, 2016, the State charged Jason Catling with two counts of delivery of a controlled substance, heroin, in the Spokane County Superior Court. CP 1. The defendant pled guilty to one of those counts on August 18, 2016, in exchange for the State's agreement to dismiss the other charge and to recommend a Residential Drug Offender Sentencing Alternative. CP 4-14; (8/18/16) RP 3-10.

On September 23, 2016, the defendant came before the court for sentencing. (9/23/16) RP 3-11. Mr. Catling's attorney argued at sentencing that, because his client's sole source of income was Social Security Disability, the trial court should not impose any legal financial obligations on the defendant under *City of Richland v. Wakefield*, 186 Wn.2d 596, 599, 380 P.3d 459 (2016), a decision of our Supreme Court issued the day before sentencing. (9/23/16) RP 3-4.

The sentencing court acknowledged that it had not yet reviewed *Wakefield*, nor had the prosecutor, and opted to reserve ruling on the request to strike all legal financial obligations. CP 7-8; (9/23/16) RP 6-7, 11. In

deferring its decision to a later date, the trial court ascertained from the defendant that his source of income was “disability. It’s social security disability” “from the federal government” in the amount of \$753 per month. (9/23/16) RP 8. The defendant had been receiving that benefit for ten years because of chronic pain, surgeries and birth defects. (9/23/16) RP 8. The defendant’s mother, Ruth Bishop, confirmed those basic facts for the court, and offered medical documentation to the court, although the court indicated the documentation should be given to Catling’s community custody officer or treatment provider. (9/23/16) RP 9-10.

Three days later, on September 26, 2016, the court issued a written order amending the defendant’s report date for treatment, and imposing the earlier discussed and objected-to legal financial obligations. CP 34-35. Its basis for imposing the legal financial obligations was its finding that “the mandatory legal financial obligations can be ordered when a person is indigent and whose only source of income is social security disability.” CP 35. The order directed the defendant to pay \$25 dollars per month starting January 5, 2017, for a total amount of \$800 in legal financial obligations (\$500 State Crime Victim’s Compensation Fund, \$200 Filing Fee, and \$100 DNA Collection Fee). CP 35.

On October 5, 2016, the defendant moved the court to reconsider the imposition of legal financial obligations, again citing *Wakefield*, and

42 U.S.C. § 407(a). CP 36-38. By written order filed October 19, 2016, the trial court denied the defendant's motion for reconsideration, finding "good cause does not exist" to grant the motion. CP 61. The defendant timely filed a notice of appeal on October 26, 2016. CP 62.¹

IV. ARGUMENT

The defendant claims (1) that the court's order for Mr. Catling to pay \$25 per month constitutes "other legal process" under 42 U.S.C. § 407(a), and is therefore void under federal law; (2) the Washington statutes requiring trial courts to impose mandatory financial obligations on every felony conviction violate the Supremacy Clause where the defendant's sole source of income is Social Security Disability benefits; and (3) the trial court failed to inquire into the effect of defendant's mental illness on his ability to pay legal financial obligations.

The State agrees that, to the extent the court's order is "other legal process," it is void under federal law. However, the State disagrees with the defendant's arguments on the other two issues.

¹ Incidentally, after the defendant filed the current appeal, the court revoked his DOSA sentence for noncompliance on January 20, 2017. In doing so, the trial court re-imposed the legal financial obligations, but reset his payment schedule to order his first payment due on January 15, 2018. The defendant did not appeal from this subsequent LFO order. CP 89-93 (as designated by the State for review).

A. THE COURT IMPOSED MANDATORY LEGAL FINANCIAL OBLIGATIONS.

The sentencing court imposed a \$500.00 victim assessment fee, a \$200.00 criminal filing fee, and a \$100.00 DNA collection fee. Each of these is mandated by statute. *See* RCW 7.68.035, 36.18.020(2)(h), and 43.43.7541. As such, they must be *imposed* regardless of the defendant's ability to pay. *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016).

There is a statutory, non-constitutional requirement that the court shall determine the defendant's ability to pay *discretionary* financial obligations before ordering them at sentencing. *See* RCW 10.01.160(3). However, as articulated in *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013), this statute does not apply to *mandatory* legal financial obligations:

As a preliminary matter, we note that Lundy does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for *mandatory* legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. **For victim restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, 175 Wn. App. 420, 424-25, 306 P.3d 1022 (2013).** And our courts have held that these mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing

scheme to prevent *imprisonment* of indigent defendants.”
State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)
(emphasis added).

(Footnote omitted.)

This is so because Washington, like so many other jurisdictions, has adopted the Second Circuit Court of Appeals reasoning in *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986), concerning whether imposing mandatory fees implicates a defendant’s constitutional rights:

Constitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments “at a time when [the defendant is] unable, through no fault of his own, to comply.”

Id. (internal quotation marks omitted) (quoting *U.S. v. Hutchings*, 757 F.2d 11, 14-15 (2d Cir.), *cert. denied*, 472 U.S. 1031, 105 S.Ct. 3511, 87 L.Ed.2d 640 (1985)).

B. CITY OF RICHLAND v. WAKEFIELD PROHIBITS COURTS FROM ORDERING A DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE DEFENDANT’S SOLE SOURCE OF INCOME IS FEDERAL SOCIAL SECURITY DISABILITY.

Under the Social Security Act:

The right of any person to any future payment under this subchapter shall not be transferable for 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).

In *Wakefield*, our Supreme Court held that a district court, which denied a motion for remission and ordered a defendant to pay \$15 per month toward her discretionary legal financial obligations, violated this anti-attachment provision of the Social Security Act. 186 Wn.2d at 602, 608-609. In doing so, the Supreme Court looked to both the United States Supreme Court and other state courts for guidance.

The *Wakefield* Court reviewed *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), in which the United States Supreme Court found that funds from social security disability payments retain their protected quality even after being deposited, and that such funds are protected from “the use of any legal process,” to include claims from state governments.² Our high court also reviewed *In Re Lampart*, 306 Mich. App. 226, 856 N.W.2d 192 (2014), *State v. Eaton*, 323 Mont. 287, 293, 99 P.3d 661 (2004), and *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). In doing so, our high court determined that the district court’s order requiring Ms. Wakefield to pay

² When a state court order attaches to Social Security benefits in contravention of 42 U.S.C. § 407(a), the attachment amounts to a conflict with federal law and such a conflict is one “that the State cannot win.” *Bennett v. Arkansas*, 485 U.S. 395, 397, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988).

\$15 per month from her social security disability payments “meets the Supreme Court’s definition of ‘other legal process.’ Accordingly, we hold that federal law prohibits courts from *ordering defendants to pay* LFOs if the person’s only source of income is social security disability.” *Wakefield*, 186 Wn.2d at 609 (emphasis added).³

Based on our Supreme Court’s holding in *Wakefield*, the State concedes that the defendant’s argument is, in part, meritorious; the trial court erred in ordering the defendant to pay legal financial obligations at a rate of \$25 per month beginning January 5, 2017.⁴ CP 35. The State agrees

³ “Other legal process” has been defined by the United States Supreme Court as:

Much like the process of execution, levy, attachment, and garnishment, and at a minimum would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessary 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.

Keffeler, 537 U.S. at 385.

It is “the means by which a court (or agency or official) compels compliance with its demand; generally it is a court order.”

Id. citing POMS GN 02410.001(2002) (“POMS” is the Social Security Administration’s Program Operations Manual System.)

⁴ The defendant has not appealed from the order resetting these payments to commence on January 15, 2018. CP 89-93. However, as

that, in cases involving the Federal Social Security anti-attachment statute, it is irrelevant whether the legal financial obligation is mandatory or discretionary. The court cannot enforce the *collection* of legal financial obligations from a defendant's social security disability benefits, simply by relying on the legislative dictate that those obligations are mandatory. However, this concession then raises the true issue in this case: what is a trial court's recourse when faced with a legislative mandate to impose mandatory legal financial obligations upon a defendant who receives social security disability benefits, and has no other source of income?

C. THE TRIAL COURT DID NOT ERR IN IMPOSING MANDATORY LEGAL FINANCIAL OBLIGATIONS, BUT RATHER, ERRED IN ORDERING THE DEFENDANT TO MAKE SCHEDULED MONTHLY PAYMENTS ON THOSE OBLIGATIONS FROM HIS SOCIAL SECURITY DISABILITY BENEFITS, AND IN THREATENING SANCTIONS IF THE DEFENDANT DID NOT.

It should be noted that monetary assessments may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because constitutional principles will be implicated only if the government seeks to enforce collection of the assessments at a time when the defendant is unable, through no fault of his own, to comply.

discussed below, to the extent that the trial court has no information that the defendant's financial circumstances have changed, this order would also be in error.

State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997). Generally, it is at the point of enforced collection, where an indigent is faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency. *Blank*, 131 Wn.2d at 241 (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)); and see *State v. Thompson*, 153 Wn. App. 325, 336-38, 223 P.3d 1165 (2009) (DNA fee); *State v. Williams*, 65 Wn. App. 456, 460-61, 828 P.2d 1158, 840 P.2d 902 (1992) (victim penalty assessment). This issue is well-settled. There are no constitutional roadblocks to the *assessment* of monetary penalties and costs.⁵

However, in the context of defendants who receive *only* social security disability benefits, and have no other present source of income, even the *threat* of contempt procedures, or jailing for failure to pay, is “other legal process” which violates the anti-attachment provisions of the Social

⁵ See *State v. Blank*:

This court concluded in *Curry* that sufficient safeguards existed to prevent imprisonment because of inability to pay the mandatory victim penalty assessment because a show cause hearing was required which allowed defendant to show why he or she should not be incarcerated for a violation of his or her sentence, the court could treat a nonwillful violation more leniently, and only intentional violations were subject to contempt proceedings for violations of a sentence.

Blank, 131 Wn.2d at 241.

Security Act. *Lampart*, 306 Mich. App. at 242.⁶ “An implied or express threat of formal legal sanction constitutes a ‘legal process’ within the meaning of section 407(a).” *Id.* (internal citation omitted).

Here, the defendant’s judgment and sentence includes language that failure to comply with the LFO order, to include the failure to make payments as ordered, “will result in a warrant for your arrest.” CP 26. The State concedes that, to the extent that the court’s order also threatens legal process for noncompliance with the order, i.e., the issuance of a warrant, the trial court erred. Thus, the State agrees with defendant that the portions of the judgment and sentence and subsequent LFO orders requiring the defendant to commence payment on a date certain, and in a particular amount, upon threat of the issuance of an arrest warrant, are invalid under *Wakefield* and the anti-attachment provisions of the Social Security Act.

However, the imposition or the assessment of the mandatory costs was not in error, as claimed by the defendant. In *Lampert*, the court

⁶ In those circumstances, the contempt order would be the functional equivalent of an order directly reaching the funds, such that labeling the order as one of “contempt” rather than “garnishment” would exalt form over substance and ignore the reality of the circumstances.

Lampart, 306 Mich. App.at 242.

addressed the issue of the imposition of mandatory restitution under Michigan law:

The restitution order itself remains valid. Indeed, Alexandroni's receipt of SSDI benefits does not immunize her from the restitution order; rather it merely prohibits the trial court from using legal process to compel satisfaction of the restitution order from those benefits. Because it is possible that Alexandroni may have assets or may receive income from other sources in the future, we affirm the trial court's refusal to cancel or modify Alexandroni's restitution obligation.

The trial court's contempt powers similarly remain a valid tool in enforcing the restitution order, and our decision today should not be read otherwise. Again, a contempt hearing can be an appropriate vehicle for determining income and assets from which the restitution order may properly be enforced... However, the trial court may not compel Alexandroni to satisfy her restitution obligation out of her SSDI benefits, by a contempt finding or other legal process, because Alexandroni is entitled to the protections of 42 U.S.C. § 407(a).

Lampart, 306 Mich. App. at 246 (emphasis added) (internal citations omitted).⁷

The same is true under Washington law. Our legislature has determined that certain financial obligations are mandatory. RCW 7.68.035; RCW 36.18.020(2)(h); RCW 43.43.7541. These financial

⁷ In *Eaton*, the Supreme Court of Montana affirmed the imposition of restitution under Montana law, on other grounds, but determined that the consideration of the defendant's social security disability benefits in determining how much the defendant should pay per month was an improper attempt to subject the defendant's social security benefits to "other legal process." *Eaton*, 323 Mont. at 293-294.

obligations include restitution, the crime victims' compensation fund assessment, the imposition of court costs, and the DNA fee. The trial court did not err in declining to follow the defendant's request to *strike* all legal financial obligations pursuant to *Wakefield*. As in *Lampert*, the defendant's status as a social security disability recipient does not immunize him from the imposition of mandatory LFOs. However, it *does* immunize him from paying those LFOs from his social security disability benefits and from the threat of legal process by the court to collect the debt.

Defendant claims that RCW 7.68.035; RCW 36.18.020(2)(h); RCW 43.43.7541 violate the Supremacy Clause, U.S. Const. art. VI, pt. II, because they "conflict or interfere with an act of Congress." Br. at 8-9. This is not accurate. The statutes mandating the imposition of certain legal financial obligations upon a felony conviction do not, in and of themselves, mandate the procedure by which a court should collect those obligations, or in any way dictate that a court is to collect those funds from a defendant's federal social security benefits. The LFO statutes do not conflict with federal law; rather, it is the manner in which the trial court has ordered enforcement of the defendant's mandatory LFO obligations that violates federal law.

In this case, the trial court faced a conundrum - how to craft an order that imposes mandatory legal financial obligations pursuant to Washington

law, but that did not also run afoul of the Social Security anti-attachment provisions of 42 U.S.C. § 407(a). The solution to this quandary may be found in RCW 9.94A.760(7)(b). This statute provides a mechanism by which the court may ascertain whether the defendant's financial situation has changed. It provides:

Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the county clerk sets the monthly payment amount, or if the department set the monthly payment amount and the department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court. *During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.*

RCW 9.94A.760(7)(b) (emphasis added).

Thus, the statute provides that the clerk of the court is authorized to require the defendant to report to the clerk's office to provide periodic updates regarding his income and ability to pay, and in this context, that authorization would include allowing the clerk to determine whether the defendant has any assets or income other than his social security disability

benefits. Rather than imposing a date certain by which the defendant must commence payment, the trial court should have assessed the mandatory legal financial obligations, but left it to the clerk's office to determine at a designated future point (or points) in time, whether the defendant's circumstances have changed, and whether the defendant later has any source of income other than his social security disability benefits.

Thus, this Court should affirm the trial court to the extent that it properly denied the defendant's request to waive all legal financial obligations under *Wakefield*. The defendant is not, and should not be insulated from the imposition of mandatory legal financial obligations associated with his felony criminal conviction. The State concedes, however, that the trial court erred, and should be reversed, in its decision to order the defendant to pay those obligations from his social security disability benefits without first determining that he has a means, other than those protected benefits, by which to pay the monetary judgment.

D. THE DEFENDANT FAILED TO PRESERVE ANY ARGUMENT THAT THE TRIAL COURT ERRED IN NOT INQUIRING INTO THE DEFENDANT'S ABILITY TO PAY PURSUANT TO RCW 9.94A.777; IN ANY EVENT, THE RECORD IS INSUFFICIENT TO HAVE REQUIRED THE TRIAL COURT TO DO SO.

The defendant claims that the trial court failed to make the proper inquiry into the defendant's ability to pay his legal financial obligations

under RCW 9.94A.777, an inquiry specific to defendants who have mental health conditions. The statute provides:

(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.

The defendant failed to object to the imposition of his LFOs on the basis that he had a mental health condition which would allow the trial court to waive any obligation other than restitution or the victim penalty assessment under RCW 9.94A.777, should he be found unable to pay; he only raised the *Wakefield* issue below. Therefore, he failed preserve the matter for appeal. RAP 2.5.

In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that an LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the

prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 do not favor allowing review of this statutory, non-constitutional LFO issue.

In any event, the record of the defendant’s mental health condition was insufficient to trigger the sentencing court to engage in an inquiry under RCW 9.94A.777. In fact, neither the defendant, nor his attorney, claimed *any* mental health condition affecting his ability to pay; that fact was raised only in passing by the defendant’s mother, without any evidentiary support, and not in the context of the defendant’s ability to pay legal financial obligations. (9/23/16) RP 9.

The only LFO issue preserved in this case was the issue raised and argued by defendant to the trial court – that *Wakefield* precluded the imposition of any legal financial obligations, regardless of their mandatory nature. This Court should decline to address other additional, non-constitutional and unpreserved issues.

V. CONCLUSION

While the trial court can and must assess mandatory legal financial obligations against a defendant upon conviction for a felony offense, *Wakefield* makes it clear that the sentencing court may not order a defendant whose sole source of income is social security disability to *pay* those legal financial obligations from the federal benefits he or she receives. It is irrelevant whether the legal financial obligation is mandatory or discretionary. What is relevant is whether the court's order is "legal process" by which a defendant is *compelled* to use social security disability benefits to pay those obligations.

To this extent, the State concedes that the trial court erred in ordering the defendant to pay the legal financial obligations from his social security disability moneys, his only present source of income. The matter should be remanded to the sentencing court with an order to strike the requirement of that the defendant is to commence making payments on a date certain in a specific amount, unless the court or the clerk of the court first determines that the defendant has another source of income not protected by 42 U.S.C. § 407(a).

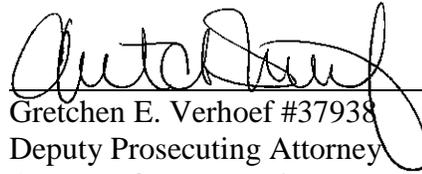
The defendant's claim that the trial court failed to inquire, pursuant to RCW 9.94A.777, into the defendant's ability to pay was unpreserved and

may not be raised for the first time on appeal. This Court should decline to consider that issue.

The State respectfully requests that this Court affirm the decision below in part, and reverse the decision in part.

Dated this 19 day of July, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JASON M. CATLING,

Appellant.

NO. 34852-1-III

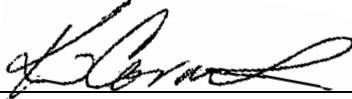
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 19, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Sara S. Taboada
Wapaofficemail.@washapp.org

7/19/2017
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

July 19, 2017 - 9:24 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34852-1
Appellate Court Case Title: State of Washington v. Jason Michael Catling
Superior Court Case Number: 16-1-00352-5

The following documents have been uploaded:

- 348521_Briefs_20170719092302D3005576_4389.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Catling Jason - 348521 - Resp Br - GEV.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- sara@washapp.org
- tom@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Gretchen Eileen Verhoef - Email: gverhoef@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170719092302D3005576