

No. 44646-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sandy Fehr,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01066-5

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Fehr's conviction violated her Fourteenth Amendment right to due process.
2. The evidence was insufficient to prove the elements of possession with intent to deliver beyond a reasonable doubt.
3. The prosecution failed to prove that Ms. Fehr intended to deliver a controlled substance.
4. The prosecution failed to present evidence of intent to deliver beyond the quantity of drugs and the officer's opinion.
5. The trial court failed to properly determine Ms. Fehr's criminal history and offender score.
6. The sentencing judge erred by sentencing Ms. Fehr with an offender score of fourteen.
7. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence).
8. The evidence was insufficient to establish that Ms. Fehr has the criminal history listed in Finding No. 2.3.
9. The sentencing procedure violated Ms. Fehr's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
10. The sentencing procedure violated Ms. Fehr's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for possession with intent to deliver may not rest solely on the quantity of drugs and the officer's opinion that the accused person intended to deliver. Here, the only additional evidence presented by the prosecution was that Ms. Fehr had a small quantity of drugs in one pocket and a larger

quantity in another pocket. Did the conviction violate Ms. Fehr's Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of the offense?

2. At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to present any evidence regarding Ms. Fehr's criminal history. Did the trial court violate Ms. Fehr's Fourteenth Amendment right to due process by finding that she had fourteen prior felony convictions and sentencing her with an offender score of 14?
3. Any fact that increases the penalty for an offense must be proved to a jury beyond a reasonable doubt. The U.S. Supreme Court's *Alleyne* decision eliminates the basis for the *Almendarez-Torres* exception to this rule, which allows the sentencing judge to determine the existence of a prior conviction by a mere preponderance. Did the imposition of an enhanced sentence based on judicial factfinding by a preponderance of the evidence violate Ms. Fehr's state and federal constitutional right to have a jury determine her prior convictions by proof beyond a reasonable doubt?
4. An accused person has a state and federal constitutional right to procedural due process at sentencing. When balanced against the state's interest, an accused person's interest in avoiding erroneous incarceration weighs in favor of requiring a jury determination beyond a reasonable doubt of the existence of prior convictions. Did the sentencing procedure here violate Ms. Fehr's right to procedural due process under Wash. Const. art. I, § 3 and the Fourteenth Amendment?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sandra Fehr was at a garage sale. Police had a warrant for her arrest, went to the garage sale and asked for her. When she came out, she was taken into custody. RP 51-53.

Law enforcement searched her. In a pocket in her hooded sweatshirt, they found a pouch with three pills, a pipe, and a small amount of methamphetamine. RP 83, 86-88. In her pants pocket, they found about 5 grams of methamphetamine. RP 90.

The state charged Ms. Fehr with Possession of Methamphetamine with Intent to Deliver. CP 1-2.

At trial, the defense argued that the evidence did not meet the state's burden of proof with respect to the intent to deliver element. RP 99-114, 143-156. The state's theory was that the drugs in her pouch were for her personal use, and her pocket held the drugs she intended to sell. RP 8-15, 110-113, 139-142, 157-165.

The prosecutor presented the testimony of the two officers who arrested Ms. Fehr. Detective Libbey said that a buyer can get a quantity discount if buying more than a gram of methamphetamine at a time. He stated that \$20 can buy about .2 grams. RP 44, 49. Detective Hartley said that a "teener" is about 7 grams, and that 5 grams could be worth as much

as \$500. RP 80-81, 90. He opined that the pouch looked like a “user’s kit”. RP 88-89. He also testified that users don’t generally have as much methamphetamine on their person as was found in this case. RP 91.

The court denied the defense motion to dismiss for insufficient evidence. RP 99, 106-119. During argument on the motion, the state acknowledged that the only evidence of intent to deliver was the opinion testimony of the officers and the placement of the 5 grams of methamphetamine separate from the pouch. RP 110-111.

The prosecutor made the same argument to the jury. RP 139-142, 157-165. The jury convicted Ms. Fehr as charged. RP 170-172.

At sentencing, the prosecutor alleged 14 prior convictions. RP 183. Ms. Fehr did not acknowledge any prior convictions. RP 183-189. Despite this, the court found that she had fourteen prior felony convictions, and sentenced her with an offender score of 14. CP 6.

Ms. Fehr timely appealed. CP 17.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MS. FEHR OF POSSESSION WITH INTENT TO DELIVER METHAMPHETAMINE.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found the charge proven beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. The state failed to prove Ms. Fehr intended to deliver a controlled substance.

Proof of intent to deliver cannot rest on the quantity of drugs found on an accused person. *State v. Huynh*, 107 Wn. App. 68, 77, 26 P.3d 290 (2001).¹ Nor can the state obtain a conviction by combining evidence of quantity with an officer's opinion that the accused person intended to deliver the drugs. *Id.*

Here the state relied on the quantity of methamphetamine and the officers' opinion that she must have intended delivery. RP 8-15, 110-113,

¹ See also *State v. Wade*, 98 Wn. App. 328, 339, 989 P.2d 576 (1999); *State v. Davis*, 79 Wn. App. 591, 595-96, 904 P.2d 306 (1995) (Davis I); *State v. Hutchins*, 73 Wn. App. 211, 218, 868 P.2d 196 (1994).

139-142, 157-165. The only other fact put forward to support an inference of intent was that Ms. Fehr had a small quantity of the drug in one pocket and a larger quantity in another. She did not possess cash, packaging supplies, a scale, a ledger, a firearm, or any of the other paraphernalia associated with drug dealing. In fact, the only other item indicative of her intent was a methamphetamine pipe, which showed her intent to use the drug rather than distribute it. RP 8-15, 110-113, 139-142, 157-165.

Under these circumstances, the state presented insufficient evidence to convict of possession with intent to deliver. *Huynh*, 107 Wn. App. at 77. Her conviction must be reversed and the charge dismissed with prejudice. *Id.*

II. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MS. FEHR'S CRIMINAL HISTORY AND OFFENDER SCORE.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

The requirement of proof by a preponderance of the evidence is constitutionally mandated under the Fourteenth Amendment's due process clause. *State v. Hunley*, 175 Wn.2d 901, 910-917, 287 P.3d 584 (2012). An offender's silence at sentencing cannot provide the basis for a criminal history finding. *Id.*, at 911.

In this case, Ms. Fehr did not acknowledge any prior felony convictions. RP 183-193. The prosecutor alleged fourteen prior convictions, but did not present any evidence of criminal history at sentencing. Under these circumstances, Ms. Fehr should have been sentenced with an offender score of zero. Instead, however, the Judgment and Sentence reflects 14 prior felony convictions, and the court sentenced Ms. Fehr with an offender score of '14.' CP 6.

In the absence of any proof that she had prior convictions, the sentence violated Ms. Fehr's Fourteenth Amendment right to due process. *Hunley*, 175 Wn.2d at 910-917. Accordingly, the sentence must be vacated and the case remanded for another sentencing hearing. *Id.*

III. MS. FEHR’S SENTENCE VIOLATED HER RIGHT TO A JURY DETERMINATION OF HER PRIOR CONVICTIONS BY PROOF BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, --- Wn.2d ---, ___, 291 P.3d 876 (2012).

B. Under *Alleyne*’s reasoning, Ms. Fehr’s prior convictions were elements of the offense for which she was sentenced.

Any fact that “increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.” *Alleyne v. United States*, -- U.S. --, ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The “historic link between crime and punishment” compels this conclusion. *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 491-492 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

In the *Apprendi/Blakely*² context, “the essential Sixth Amendment inquiry is whether a fact is an element of the crime.” *Alleyne*, --- U.S. at ___. By definition, a fact is an element “if it increases the punishment above what is otherwise legally prescribed.”³ *Alleyne*, --- U.S. at ___. Although the *Alleyne* court was not asked to

² *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

³ This is so whether the fact increases the statutory maximum (as in *Apprendi*), the standard range (as in *Blakely*), or a mandatory minimum (as in *Alleyne*).

determine the continuing validity of the *Almendarez-Torres*⁴ exception for the fact of a prior conviction,⁵ *Alleyne*'s reasoning necessarily eliminates the exception.⁶ Each piece of the *Alleyne* court's analysis applies to any fact that increases the penalty—including the fact of a prior conviction.

First, the *Alleyne* court examined the English common law, which it found consistent with early American legal practices. At common law, criminal offenses tended to be sanction-specific, meaning that conviction of a particular crime necessarily led to imposition of a specific sentence. *Id.*, at _____. A crime was defined as those facts that must be proved in order to impose the punishment associated with that crime. *Id.*, at _____. The conclusions *Alleyne* draws from its examination of English common law and early American legal practices apply to prior convictions.

Second, the *Alleyne* court outlined *Apprendi*'s conclusion: "that *any* 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id.*, at _____ (emphasis added) (quoting

⁴ *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

⁵ *Alleyne*, __ at __, n. 1. "In [*Almendarez-Torres*], we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today."

⁶ Thus confirming the *Apprendi* majority's observation regarding the possibility "that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Apprendi*, 530 U.S. at 489 (footnote omitted).

Apprendi, 530 U.S. at 490). The court described this holding as “[c]onsistent with [the] common-law and early American practice” just described. *Alleyne*, --- U.S. at _____. This reasoning applies to the fact of a prior conviction.

Third, the *Alleyne* court noted that treating sentencing factors as “part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the [charging document].” *Id.*, at _____. For this reason, any fact relevant to punishment should be treated as an element. Doing so “preserves the historic role of the jury as an intermediary between the State and criminal defendants.” *Id.*, at _____. The *Alleyne* court made no exception for prior convictions. Nor does its reasoning allow for such an exception.

Finally, the court repeatedly stressed that “the core crime and the fact triggering the [aggravated] sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Id.*, at _____. Throughout *Alleyne*, the majority, the concurrences, and the dissent refer to “facts” generally, without making an exception for prior convictions. This is in stark contrast to the court’s earlier decisions, in which it carefully distinguished prior convictions from other facts used to enhance penalties. *See, e.g., Jones v. United States*, 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Jones I) (“[A]ny fact (*other than prior conviction*) that increases the maximum penalty for a crime...”) (emphasis added); *Apprendi*, 530 U.S. at 490 (“*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime...”) (emphasis added).

The Supreme Court's reasoning in *Alleyne* leaves no room for the *Almendarez-Torres* exception. Its analysis applies with equal force to any aggravating fact, including the fact of a prior conviction. Under *Alleyne*, there is no basis for treating prior convictions that enhance a penalty differently from other facts that enhance a penalty.

Accordingly, Ms. Fehr's persistent offender sentence must be vacated, and the case remanded for a new sentencing hearing. *Alleyne*, --- U.S. at ____.

IV. THE IMPOSITION OF A 60-MONTH SENTENCE VIOLATED MS. FEHR'S RIGHT TO PROCEDURAL DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt*, --- Wn.2d at ____.

B. The traditional *Mathews* balancing test applies to procedural due process claims in state court criminal proceedings.

The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. Amend XIV; art. I, § 3. A procedural due process claim requires the court to balance three factors. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These include (1) the private interest at stake, (2) the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

Federal courts do not apply this test to state criminal proceedings.⁷ *Medina v. California*, 505 U.S. 437, 444, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)). This is because federal courts are loathe to “construe the Constitution so as to intrude upon the administration of justice by the individual States.” *Patterson*, 432 U.S. at 201; *see also Medina*, 505 U.S. at 445 (quoting *Patterson*).

Washington courts are not constrained by such concerns. Thus, the rationale for abandoning *Mathews* in federal court does not apply in state court. The *Medina* decision restricts *federal* court review of state court proceedings. *Patterson*, 432 U.S. at 201; *Medina*, 505 U.S. at 445. State courts need not adopt *Patterson* when interpreting the Fourteenth Amendment’s due process clause.⁸ Because *Medina* and *Patterson* deviate from *Mathews* solely because of federalism, this court must apply *Mathews* balancing to Ms. Fehr’s procedural due process claim. The *Mathews* test applies under both the Fourteenth Amendment and under art. I, § 3.⁹

⁷ Instead, federal courts apply the *Patterson* test when evaluating the process due in state criminal proceedings. *Medina*, 505 U.S. at 444-445 (citing *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). Under *Patterson*, a federal court will not invalidate a state criminal procedure on due process grounds “unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Patterson*. 432 U.S. at 201-202.

⁸ State courts may apply a more protective test, despite the U.S. Supreme Court’s adoption of the *Patterson* standard in federal court. The Supreme Court has not purported to impose a particular rubric on a state’s evaluation of a federal due process claim, so long as the challenged procedure does not violate *Patterson*.

⁹ In *Heddrick*, the Supreme Court declined to apply *Mathews*. *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009). The court did not analyze art. I, § 3, and it

In some contexts, art. I, § 3 provides greater protection than does the Fourteenth Amendment's due process clause.¹⁰ *See, e.g., State v. Bartholomew*, 101 Wn.2d 631, 639-640, 683 P.2d 1079 (1984); *State v. Davis*, 38 Wn. App. 600, 605, 686 P.2d 1143 (1984) (Davis II). Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive *Gunwall* criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Gunwall* may not apply in this case, because Ms. Fehr asks the court to do no more than apply the traditional federal standard for evaluating procedural due process claims. Nonetheless, Ms. Fehr provides a brief *Gunwall* analysis.

The language of the state provision. Art. I, § 3 provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” The strong, simple, and direct language establishes a concern for individual rights. The acknowledgment that the state may deprive a person of rights suggests the need to balance such rights against government interests. The *Mathews* balancing test meets this need.

does not appear that the appellant provided a *Gunwall* analysis. Nor did the court make any mention of the federalism concerns that prompted the Supreme Court's application of a different standard in *Medina* and *Patterson*. *Id.* The court made note of *Heddrick* in *State v. Brousseau*, 172 Wn.2d 331, 346-49 n. 8, 259 P.3d 209 (2011). The *Brousseau* court declined to reach the applicability of *Mathews* in the criminal context, finding in favor of the state under either the *Mathews* standard or the standard set forth in *Medina*. *Brousseau*, 172 Wn.2d at 346-49, n. 8, n. 9.

¹⁰ Because of this, the Washington Supreme Court is free to adopt a test even more protective than that articulated in *Mathews*.

Differences between the state and federal provisions. Identity of language does not end the inquiry under this factor. Instead, the state constitution may depart from federal law where justified by policies underlying the constitutional guarantee. *Davis*, 38 Wn. App. at 605 n. 4. The federalism concerns discussed by the U.S. Supreme Court do not apply to art. I, § 3. *See Medina*, 505 U.S. at 445. Independent application of the state constitution is appropriate.

State constitutional and common law history. No legislative history from the constitutional convention suggests that the state due process clause differs from federal provision;¹¹ however, this does not mean that they are coextensive. Nor does the common law preclude application of the balancing test outlined in *Mathews*. Indeed, the Supreme Court has noted that *Mathews* provides the minimum standard (at least in civil cases); thus, the state constitution “would not provide less due process protection” than that required under *Mathews*. *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *reconsideration denied* (May 9, 2012), *as corrected* (May 8, 2012).

Pre-existing state law. Washington has a long tradition of balancing competing interests in criminal cases. For example, the Supreme Court long ago balanced the competing interests attached to the presumption of innocence and the

¹¹ *See State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

presumption of chastity in rape cases.¹² *State v. Jones*, 80 Wash. 588, 596, 142 P. 35 (1914) (Jones II). Thus pre-existing state law suggests that a balancing test should apply under art. I, § 3.

Structural differences between the two constitutions. This factor always supports an independent constitutional analysis. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Matters of local concern. State criminal procedure is a matter of local concern. *Medina*, 505 U.S. at 445.

Five of the six *Gunwall* factors support an independent application of art. I, § 3. The remaining factor does not prohibit application of the *Mathews* balancing test. Accordingly, art. I, § 3 requires analysis of criminal procedures using the balancing test set forth in *Mathews*.

C. Under traditional *Mathews* balancing, the state must prove prior convictions to a jury beyond a reasonable doubt whenever it seeks a persistent offender sentence.

Offenders have a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest

¹² The court rejected the idea that the balance should be struck in favor of the presumption of innocence: "If the presumption of chastity, which is only a recognition of the prevailing purity of the women of this state... is to give way in this state to the no more reasonable and no more sacred presumption of the innocence of the accused, it ought to be only upon the strongest reasons of public policy. Such reasons do not exist... The advantage of the cynical, not to say barbarous, assumption of a lack of chastity, which would cast the burden of proof in the first instance upon the state, is too slight and chimerical to weigh in the balance against the decency of the contrary assumption." *Id.*

at stake is that “most elemental of liberty interests,” freedom. This interest has been described as “almost uniquely compelling.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

The U.S. Supreme Court requires significant procedural safeguards when a person’s freedom is at issue. For example, a court may not impose confinement for failure to pay in a civil contempt case absent (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) an opportunity to respond to questions about financial status; and (4) an express judicial finding regarding that the defendant has the ability to pay. *Turner v. Rogers*, --- U.S. ---, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011). Similarly, a person may not be subject to involuntary civil commitment absent proof by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The private interest in avoiding a lengthy prison term is greater than in most situations involving loss of freedom. Thus, the punishment at issue here weighs heavily in favor of additional procedural safeguards. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

Unfortunately, the current procedure—judicial factfinding by a preponderance of the evidence—creates a significant risk of error. By focusing on the quantity (rather than the quality) of the evidence, the current standard of proof

“may misdirect the factfinder in the marginal case.” *Santosky v. Kramer*, 455 U.S. 745, 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Courts require a standard greater than the preponderance standard when significant interests are at stake. *Id.*; *see also e.g., United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the “significant liberty interests” implicated by an involuntary medication order); *Addington* 441 U.S. at 433.

Furthermore, “it is presumed, that juries are the best judges of facts.” *State of Georgia v. Brailsford*, 3 U.S. 1, 4, 3 Dall. 1, 1 L.Ed. 483 (1794). As in this case, the state’s proof might come in the form of documentary evidence, witness testimony, and expert opinion. RP (5/24/10) 2-51. Juries are well-equipped to evaluate such evidence. The possibility of even occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury whenever a sentence of this type turns on proof of historical facts.

These additional procedures also benefit the government. The state has two significant reasons to ensure the accuracy of persistent offender sentencing proceedings. First, prosecutors have a duty to act in the interest of justice,¹³ and thus cannot seek the wrongful imposition of a lengthy prison sentence. Second, the state’s scarce resources should not be wasted incarcerating people based on

¹³ *See, e.g., State v. Warren* 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

errors in the criminal history and offender score. The state's countervailing interests are minor. Additional administrative costs can be recouped.¹⁴ In marginal cases, some offenders might erroneously receive lighter sentences than they would otherwise; however, this error is no different than the problem of guilty people going free when the state can't present sufficient evidence for conviction. On balance, the government would receive a net benefit from added procedural protections.

Mathews requires that prior convictions be proved to a jury beyond a reasonable doubt. *Mathews*, 424 U.S. at 333. The significant private interest, the likely benefits of additional procedural protections, and the net benefit flowing to the government from a change in procedure all weigh in favor of requiring proof to a jury beyond a reasonable doubt. *Mathews*, 424 U.S. at 333.

The current procedure, under which Ms. Fehr was sentenced, violates art. I, § 3. Ms. Fehr's sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

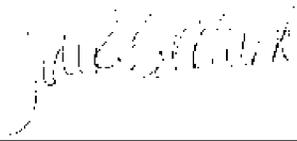
Insufficient evidence supports Ms. Fehr's conviction. The conviction must be reversed and the charge dismissed with prejudice. In

¹⁴ See RCW 10.01.160.

the alternative her sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on September 10, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Sandy Fehr, DOC #843426
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

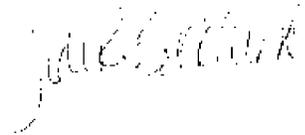
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
bours@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 10, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

September 10, 2013 - 6:55 AM

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