69849-4

69849-4

NO. 69849-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN W. FOLDS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

John Folds spent 30 productive years as a painter, construction worker, public servant and church member living in Missouri and Florida. He started a family and raised his two- and four-year-old daughters alone when his wife passed away from cancer. Fifteen years later, he remarried. In 2010, he was charged in a death that occurred in 1983, when he was just 18 years old. Mr. Folds had rehabilitated and demonstrated his ability to be a productive member of society in the 30 years between the crime and sentencing.

Contrary to the indeterminate sentencing regime in place in 1983 (the time of the offense), legislative policy, and the general rule that the law in effect at the time of the offense applies at sentencing, the sentencing court looked to the standard sentencing range at the time of sentencing and sentenced Mr. Folds to a minimum of 114 months incarceration. The sentencing court erred as a matter of law.

B. ASSIGNMENT OF ERROR

The sentencing court erred in applying the 2013 Sentencing Reform Act (SRA) sentencing range to determine Mr. Folds's minimum sentence for a pre-SRA offense.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Generally at sentencing, the court should apply the law in effect at the time of the crime. Since 1986, sentencing courts set the minimum sentence for an offender convicted of an offense committed before the SRA's effective date. Under the statutes, the court looks to the SRA for guidance in setting the minimum sentence. Where the SRA in turn directs courts to apply the law in effect at the time of the offense, where the Legislature intended for consistency among pre-SRA offenders and between pre-SRA and post-SRA offenders, where SRA offenders are sentenced according to the law in place at the time of the crime, and where classification of the underlying offense changed from the time of the offense to the time of sentencing, did the sentencing court err by applying the current SRA sentencing range to determine Mr. Folds's minimum sentence rather than the sentencing range in effect closest in time to the offense?

D. STATEMENT OF THE CASE

In February 1983, at age 18, John Folds travelled from his home in California to Darrington, Washington to visit family. CP 104, 108; 1/25/13 RP 59-60. On the flight from California he met 37-year-old Frank Kuony, who offered to give him a ride to Seattle from SeaTac

the next morning and a motel room to stay in overnight. CP 57, 104. Unbeknownst to Mr. Folds, Mr. Kuony was under investigation by the San Francisco Police Department for soliciting male prostitutes as young as 13 or 14 years old. CP 58 & n.1; CP 115-17. Mr. Kuony was also accused of having sexual intercourse with an underage male in King County on several occasions. CP 116-17. That night in 1983, Mr. Kuony checked into a motel near the airport, performed oral intercourse on Mr. Folds and then forcibly raped him. CP 37, 104, 115; 1/25/13 RP 60. Mr. Folds swung a knife at Mr. Kuony in self-defense, wounding him. CP 37, 104; 1/25/13 RP 60. Mr. Folds was hurt and frightened; he left the motel room. CP 104. Mr. Kuony died. CP 54, 57.

A year later, 19-year-old Mr. Folds moved with his family to Missouri. CP 106. He settled down, and married a woman he met at church. CP 109. They had two daughters together. Unfortunately, his wife died of ovarian cancer when their children were only two and four years old. CP 108-09. Mr. Folds was a widower and single parent at just 26 years old. CP 109. Family tragedy was not unknown to Mr. Folds: his father died at a young age and his brother died just three months before his wife. CP 106-07, 110.

After the untimely death of his wife, Mr. Folds focused on work and providing for his daughters, eventually moving to Florida to be closer to his mother. CP 109-10. He remained active in his church. CP 109-10, 111, 137. By way of employment, Mr. Folds had a painting and home repair business. CP 108, 110-11, 135. He also served for two years as Superintendent of Flinthill, Missouri, inspecting new-home construction and sewer and well pumps. CP 110.

In 2004, after his daughters were grown, Mr. Folds married his current wife. CP 110. He is now a grandfather. CP 130-32.

In 2010, DNA recovered in 1983 from the motel room was matched to Mr. Folds and he was arrested without resistance. CP 57, 105. The State disputed that Mr. Folds killed Mr. Kuony in self-defense, but the parties reached an agreement. *See* CP 54, 57-59. Mr. Folds pleaded guilty to manslaughter in the first degree and entered a plea under *North Carolina v. Alford*[1] for attempted theft in the first degree, the offenses set forth in the amended information. CP 34-48. In his own words, Mr. Folds stated,

> Count I: On February 15, 1983 in King Co. WA I was sexually attacked by Frank Kuony, I fought back and used an unlawful amount of force + did recklessly cause the death of Frank Kuony. Count II: I don't believe I'm

[1] 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

> guilty of attempted theft I. However, facts in a police report would substantially lead judge or jury to find me guilty. I don't agree with the report, but agree the court can review it and the probable cause certifications to find me guilty + for sentencing purposes.

CP 36-37.

The court sentenced Mr. Folds to a minimum term of 114 months on the manslaughter count and 4.5 months on the attempted theft count, to be served concurrently. CP 73-78. On each count, the minimum term imposed was the top of the standard range under the SRA as it existed at the time of sentencing. 1/25/13 RP 68-70; CP 74, 79-80. The court imposed these minimum terms over Mr. Folds's objection. He argued that the court should look to the standard sentencing range for each offense as it existed at the time the SRA became effective because such a sentence was closest in time to the offense and in line with legislative policy. CP 113-15; 1/25/13 RP 36, 41-58.

E. ARGUMENT

The sentence should be remanded because the court used the current SRA sentencing range to determine the minimum indeterminate, pre-SRA sentence rather than the standards in effect at or close to the time of the offense.

At the time of the offense in 1983, manslaughter was a class B felony with a ten-year maximum sentence and no minimum sentence. When the SRA became effective just a year later, the standard sentencing range for manslaughter with an offender score of one was 36 to 48 months. The Legislature had set that range in 1981. But when the court sentenced Mr. Folds, it applied the 2013 class A felony standard sentencing range of 86 to 114 months to determine Mr. Folds's minimum sentence. The sentencing court committed a legal error when it applied the at-the-time-of-the-offense maximum but the at-time-of-sentencing minimum to the pre-SRA manslaughter offense for which Mr. Folds was sentenced on January 25, 2013.

This Court reviews de novo an improper calculation of the sentencing range. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

1. Framework of the sentencing laws.

Prior to 1981, criminal sentencing in this State focused on rehabilitation under an indeterminate scheme in which a minimum and maximum sentencing term was set. The minimum sentence was determined by the Board of Prison Terms and Paroles, redesignated the Indeterminate Sentence Review Board (collectively, the "Board"), under RCW 9.95.040. *See* RCW 9.95.001 & -.009. In 1981, the Legislature enacted the SRA, which did not become effective until July 1, 1984. 1981 c 137 § 28 (enacting RCW 9.94A.905). However, in 1981, the Legislature set the terms and ranges that would apply to sentencing for offenses from July 1, 1984 until further amendment. *Id.* In 1986, the Legislature transferred the responsibility for setting minimum sentences under pre-SRA sentences to the sentencing court. RCW 9.95.011; *State v. Landon*, 69 Wn. App. 83, 94-95, 848 P.2d 724 (1993).

Under the indeterminate sentencing act, certain crimes carry a mandatory minimum sentence. RCW 9.95.040(1)-(4); RCW 9.95.011 (court now subject to same limitations in setting minimum sentence). A five-year minimum applies to felonies committed while armed with a deadly weapon. RCW 9.95.040(1). However, the State did not allege

or prove Mr. Folds used a deadly weapon in the commission of manslaughter. CP 34-46 (guilty plea attaching amended information), 73-78 (judgment); *see* RCW 9.95.015 (if State alleges and produces evidence of deadly weapon, court shall make deadly weapon finding); *In re Per. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981) (information must include allegation of deadly weapon). Thus, had Mr. Folds been sentenced prior to enactment of the SRA, the Board would have been at liberty to set his minimum sentence. *See* RCW 9.95.040. Because Mr. Folds demonstrated substantial rehabilitation by the time he was sentenced, he likely would have received a fairly short minimum sentence. *In re Pers. Restraint of Stanphill*, 134 Wn.2d 165, 171-72, 949 P.2d 365 (1998) (rehabilitation is primary goal of indeterminate sentencing); 1/25/13 RP 68 (recognizing Folds rehabilitated).

Regardless of the minimum term, a pre-SRA offender is not released until the Board determines the inmate has been rehabilitated and is otherwise fit for release, or until the maximum sentence has been served. RCW 9.95.100 & -.110. If the Board determines the inmate is not fit to be released, it resets the minimum sentence. RCW 9.95.052. Thus the minimum sentence provides the first instance that the Board

will review the inmate's rehabilitation and sentence. RCW 9.95.052; *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 186 n.1, 189, 814 P.2d 635 (1991).

The maximum sentence, in cases such as this, is set by statute. RCW 9.95.010; RCW 9A.20.020; RCW 9A.32.060. In this case, the statutory maximum term for manslaughter in the first degree committed in 1983 is 10 years. RCW 9A.20.020; RCW 9A.32.060.

As mentioned, the SRA was adopted in 1981 but did not become effective until July 1, 1984; it applies only prospectively. The SRA was intended to rein in and structure the discretion of sentencing courts. *Parker*, 132 Wn.2d at 186.

An offender who commits a crime prior to the effective date of the SRA is sentenced under the indeterminate sentencing provisions of chapter 9.95 RCW. *Stanphill*, 134 Wn.2d at 170. However, in sentencing the defendant, the court is to take the SRA into consideration. RCW 9.95.011. As with sentences imposed under the SRA, these post-SRA indeterminate sentences are intended to be more consistent; the process is standardized. RCW 9.95.011; *Stanphill*, 134 Wn.2d at 172. Minimum sentences under the indeterminate scheme are to be set in a manner "reasonably consistent" with the SRA. RCW

9.95.011; *In re Pers. Restraint of Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *see State v. Whitaker*, 112 Wn.2d 341, 771 P.2d 332 (1989) (interpreting indeterminate sentencing scheme to apply to a pre-SRA offender in manner reasonably consistent with SRA). In relevant part, RCW 9.95.011 provides,

> The court shall attempt to set the minimum term reasonably consistent with the purposes, standards, and sentencing ranges under chapter 9.94A RCW of the sentencing reform act, but the court is subject to the same limitations as those placed on the board under RCW 9.92.090, 9.95.040(1) through (4), 9.95.115, 9A.32.040, 9A.44.045, and chapter 69.50 RCW.[2]

The goal is to ensure that post-SRA indeterminate sentences for the same offense are consistent with each other as well as similar offenses sentenced under the SRA. *E.g.*, *In re Pers. Restraint of George*, 52 Wn. App. 135, 145, 758 P.2d 13 (1988).

2. The statutes and policy both direct that courts should apply the law closest in time to the crime when determining a pre-SRA minimum sentence.

Several grounds compel that the law in effect closest in time to the offense—and not at the time of sentencing—applies to determine the minimum sentence for a pre-SRA offense.

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[2] The "limitations" discussed in the second clause are inapplicable in Mr. Folds's case.

First, RCW 9.95.011 directs that any post-SRA indeterminate sentence is to be "reasonably consistent with the purposes, standards, and sentencing ranges under chapter 9.94A RCW of the sentencing reform act." To be reasonably consistent with the SRA, the laws closest in time to the offense should be imposed. The SRA makes this clear, commanding that "Any sentence imposed under this chapter [the SRA] shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345; *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 797 n.3, 272 P.3d 209 (2012) ("Unless indicated otherwise, we refer to the law in effect at the time [the defendant] committed his current offenses. RCW 9.94A.345."); *State v. Pillatos*, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007) ("A defendant is subject to the penalty in place the day the crime was committed."). This is consistent with the Legislature's directive that absent explicit statutory language to the contrary, all offenses committed while a subsequently repealed or amended penal statute was in force shall be punished or enforced as if the former law remained in effect. RCW 10.01.040.

In 1981, the Legislature set the SRA range for manslaughter in the first degree with one offender score point at 36 to 48 months for all

crimes committed after June 30, 1984. David Boerner, Sentencing in Washington, App. III-49 (1985) (scoring sheet for manslaughter, first degree). That sentencing range accurately reflects the Legislature's intended standard range sentence for manslaughter in the first degree at the time of Mr. Folds's offense.

Moreover, pre-SRA offenders should be sentenced consistently according to the offense committed. This Court has previously held the Legislature clearly intended to instill consistency among pre-SRA offenders. *Landon*, 69 Wn. App. at 96-97 & n.11; *see Stanphill*; 134 Wn.2d at 170. Only if a court considers the sentencing range in effect at the time closest to the offense will sentences among pre-SRA offenders, as well as across pre- and post-SRA offenders, be harmonized, in accordance with legislative intent. Under this regime, all offenders who committed manslaughter in the first degree in 1983 but were sentenced post-SRA would have the sentencing court consider a similar standard range when setting the minimum sentence, regardless of the relatively arbitrary date of sentencing. Moreover, post-SRA offenders who committed manslaughter in the first degree close in time to the 1983 offenders, such as in 1985, would receive similar post-SRA sentences to those pre-SRA offenders. On the other hand, an offender

who committed manslaughter in 2013 would be sentenced under the law in effect at the time of his or her offense.

The precept that the law in effect at the time of the offense governs sentencing is also consistent with the sentencing court's imposition of the maximum sentence from the time of Mr. Folds's offense, rather than the maximum at the time of sentencing. RCW 9A.20.020; RCW 9A.32.060; CP 74.

In fact, it is entirely contradictory for the sentencing court to have applied the 1983 statutory maximum but to use the 2013 standard sentencing range to determine the minimum sentence. *Cf. Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155 (2013) (treating mandatory minimum sentences the same as maximum sentences for purposes of the Sixth and Fourteenth Amendment rights to proof to a jury beyond a reasonable doubt). In 1983, at the time of the offense, manslaughter in the first degree was a class B felony. *Compare* 1975 1st ex. s. c 260 § 9A.32.060 (manslaughter in first degree is class B felony) *with* 1997 c 365 § 5 (amending RCW 9A.32.060 to make manslaughter in first degree a class A felony). The statutory maximum for a class B felony committed prior to July 1, 1984 is 10 years. RCW 9A.20.020. A class A felony committed prior to July 1, 1984 carries a

20-year statutory maximum. RCW 9A.20.020. The sentencing court plainly applied the statutory maximum from 1983. CP 74; *see* CP 35 (guilty plea notes 10-year statutory maximum). Yet, the court applied 2013 law to set Mr. Folds's minimum sentence. CP 79-80; 1/25/13 RP 61-70. Neither the court nor the prosecutor provided any justification for this blatant contradiction.

This illustrates an additional basis for applying the time-of-offense sentencing range to determine the minimum sentence. Manslaughter in the first degree was a class B felony in 1983, when Mr. Folds committed the offense. 1975 1st ex. s. c 260 § 9A.32.060. But as stated, in 1997, the Legislature amended the law to classify manslaughter in the first degree as a class A felony. 1997 c 365 § 5. It remains a class A felony today. RCW 9A.32.060. Thus, by applying the 2013 standard range as a guide in setting Mr. Folds's minimum sentence, the court applied a class A sentencing range to a class B offense. Imposing a penalty for a higher-classified crime is fundamentally unfair and without justification. *See Pillatos*, 159 Wn.2d at 475 ("A defendant is subject to the penalty in place the day the crime was committed.").

For all of these reasons, the sentencing court erred when it applied a 2013, class A felony sentencing range to determine Mr. Folds's minimum sentence for a 1983 class B manslaughter conviction.

3. The *Stanphill* opinion does not compel a different result.

At sentencing the State argued that *Stanphill* forecloses any argument that a pre-time-of-sentencing standard range should be considered. CP 56. The sentencing court agreed that it was not error to consider the current SRA sentencing range. 1/25/13 RP 65.

The State's argument is overbroad—it does not reflect the actual reach of *Stanphill*. In *Stanphill*, the Board set a minimum term in 1995 for a 1975 rape. 134 Wn.2d at 168. In doing so, the Board used the 1993 SRA sentencing range. *Id.* In a personal restraint petition, Mr. Stanphill argued using the 1993 range violated ex post facto laws and the Equal Protection Clause. *Id.* at 168-69. Our Supreme Court held that application of a current-at-the-time-of-sentencing standard range does not violate the ex post facto laws because a pre-SRA offender had no expectation of a particular minimum sentence, let alone one lower than that of the time-of-sentencing standard SRA range. *Id.* at 171. Under the indeterminate sentencing scheme, the Board could have set a minimum sentence at up to the maximum for the offense. *Id.*

Moreover, even after a minimum term is served, release still hangs in the balance of the Board's consideration of the offender's rehabilitation and other factors. *Id.* at 171-72. Because Mr. Stanphill had no vested right in any particular release date, the Court held he could not show he had been disadvantaged by the Board's use of the SRA range. *Id.* at 173.

Applying rational basis review, the *Stanphill* Court also determined it did not violate equal protection to apply different SRA sentencing ranges to pre-SRA offenders depending upon the year the offender appeared before the Board. *Stanphill*, 134 Wn.2d at 174-76. The Court found the application rationally related to the legitimate state objective "to set consistent sentences and to create certainty within the indeterminate sentencing scheme." *Id.* at 175.

The Court's holdings do not reach the extent the State claimed at sentencing. *Stanphill* only addresses two constitutional provisions—the ex post facto laws and equal protection. It does not resolve the additional arguments set forth above, including legislative policy, the edicts of RCW 9.94A.345 to apply the law in effect at the time of the offense, the contradictory application of the mandatory maximum from

one period and a minimum sentence from another, and the change in classification of this offense.

In light of *Stanphill*'s actual reach, the sentencing court's statement that it was not error to consider the current SRA sentencing range is only partially correct. As noted, *Stanphill* holds only that application of the current sentencing range does violate the Equal Protection Clause or ex post facto laws. The question of which sentencing range could otherwise be considered was not before the *Stanphill* Court. The Court's analysis appropriately focuses on application of SRA sentencing ranges generally, and not of the range from any particular time period. *E.g.*, 134 Wn.2d at 172. Likewise, it does not distinguish among potential sentencing range periods. The *Stanphill* court did not consider any of the arguments set forth above. In fact, RCW 9.94A.345 was not even in effect at the time of the Court's decision. *See* 2000 c 26 § 2 (adopting RCW 9.94A.345).

In short, the limited reach of *Stanphill* does not extend to the issue presented here.

4. The sentence should be vacated and remanded.

Unless the record clearly indicates that the sentencing court would have imposed the same sentence if it had applied the proper

framework, vacation of the sentence and remand is required. *Parker*, 132 Wn.2d at 189. Here, the trial court's minimum sentence on the first-degree manslaughter count was defined by the current SRA standard sentencing range.[3] The court explicitly rejected Mr. Folds's argument for a lower sentencing range based on the 1984 SRA. 1/25/13 RP 68-69. Under the initial SRA, the standard sentencing range for first degree manslaughter with a single point for other current offenses was 36 to 48 months. Boerner, Sentencing in Washington at App. III-49 (scoring sheet for manslaughter, first degree); *see* CP 74 (listing offender score of one). After rejecting Mr. Folds's argument the court also rejected the State's request that the statutory maximum serve as Mr. Folds's minimum sentence. 1/25/13 RP 69. The court did not accept that proposal because it exceeded the current standard range sentence of 86 to 114 months. *Id.*; CP 74. Instead, the court imposed the high end of the current sentencing range, 114 months, as Mr. Folds's minimum sentence. 1/25/13 RP 68-70.

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[3] The same legal argument set forth herein applies to the sentence for attempted theft in the first degree. However, the 1985 SRA standard sentencing range for this offense is the same as the current range, 75 percent of two to six months. *Compare* Boerner, Sentencing in Washington at App. III-82; 1975 1st ex. s. c 260 § 9A.56.030 *with* RCW 9A.28.020; RCW 9A.20.021; RCW 9A.56.030. Attempted theft in the first degree remains a Class C felony. *Compare* RCW 9A.56.030 *with* 1975 1st ex. s. c 260 § 9A.56.030. Thus, even if the court had considered the 1985 standard range, it likely would have imposed the same sentence for the attempt count.

The court's sentencing was clearly constrained by its belief that the current standard range sentence informed the analysis. Moreover, the current sentencing range of 86 to 114 months differs greatly from the 1984 SRA range of 36 to 48 months. Accordingly, it cannot be said that the record clearly indicates the minimum sentence imposed would have been the same if the court had not looked to the current SRA sentencing range. *See Parker*, 132 Wn.2d at 192 (not expressly clear court would have imposed same sentence where exceptional sentence appears to have been based directly on incorrect ranges). This was error; the remedy is to vacate the sentence and remand.

F. CONCLUSION

The sentencing court erred when it applied a later-in-time sentencing range, which reflected an increased classification, to Mr. Folds's 1983 offense. The application was contrary to legislative intent and policy. The sentence should be vacated and remanded.

DATED this 19th day of August, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. JOHN FOLDS, Appellant.	)))))))))	NO. 69849-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF AUGUST, 2013.

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