

FILED  
COURT OF APPEALS

NO. 34111-5-II

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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS,  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

DAVID D. TARABOCHIA,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF IS COUNTY

Before  
The Honorable Joel M. Penoyar, Judge

REPLY BRIEF OF APPELLANT

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**A. STATEMENT OF THE CASE**

The facts of this case are fully set forth in the Appellant's Brief.

**B. STATEMENT OF THE FACTS**

Appellant will rely upon the Statement of the Facts as presented in his Opening Brief.

**C. ARGUMENT**

David Tarabochia was sentenced on December 4, 2000 to 126 months of imprisonment for Counts I and II, 78 months for Count III, and 53 months for Count IV, to be served consecutively. The maximum sentence that can be imposed within the standard range is 144 months. The court imposed 36 months of community placement for Counts I, II and III. Mr. Tarabochia argues that community placement should be counted as part of the total period of imprisonment, and that the total sentence imposed is 162 months, therefore exceeding the top of the range and violating *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Counts I and II were committed in 1993. CP at 169-181. The State in its Response Brief points out that under the version of RCW 9.94A.120(9)(b) in effect at the time of the offense, the amount of community placement that can be imposed is two years or the period of earned early release, whichever is longer. Brief of Respondent at 2-3.

The State also argues that *Blakely* should not apply and that the “36-month period of community custody is part and parcel of the sentence for Child Molestation in the Second Degree . . . .” Brief of Respondent at 5. The State also argues that the period of community custody does not constitute a sentence enhancement. Brief of Respondent at 5. The State also relies on *State v. Ball*, 127 Wn.App. 956, 113 P.3d 520 (2005), arguing that this Court held that *Blakely* does not apply to Persistent Offender Accountability Act. Brief of Respondent at 6. The State argues that the period of community placement is not an enhancement, but that it “is just the sentence prescribed by the law.” Brief of Respondent at 6.

The State’s argument does not address the contention propounded by Tarabochia, based on *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996), that community placement constitutes imprisonment, and that the total period of commitment imposed is 162 months, and therefore within the purview of *Blakely*.

Recently, in *Samson v. California*, 126 S. Ct. 2193; 165 L. Ed. 2d 25; 2006 U.S. LEXIS 4885; 74 U.S.L.W. 4349; 19 Fla. L. Weekly Fed. S 306 (June 19, 2006), the United States Supreme Court addressed this issue in the context of searches of federal parolees. The Supreme Court stated:

“As we noted in *Knights*, [*United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001)] parolees are on the “continuum” of state-imposed punishments. *Id.*, at 119, 122 S. Ct. 587, 151 L. Ed. 2d 497

(internal quotation marks omitted). On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment. As this Court has pointed out, "parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence." *Morrissey, supra*, at 477, 92 S. Ct. 2593, 33 L. Ed. 2d 484. [*Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)] "In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements." *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365, 118 S. Ct. 2014, 141 L. Ed. 2d 344 (1998).

*Samson*, 2006 U.S. LEXIS 4885, at 14.

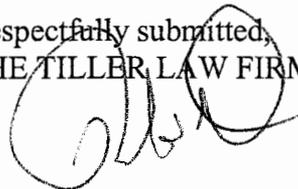
Tarabochia submits that the same reasoning should be applied in the present case, and that the terms and conditions imposed during community placement be recognized as imprisonment for purposes of *Blakely*.

### C. CONCLUSION

For the above-stated reasons, and those set forth in David Tarabochia's Opening Brief, this Court should grant the relief requested in the opening brief.

DATED: November 9, 2006.

Respectfully submitted,  
THE TILLER LAW FIRM



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**CERTIFICATE**

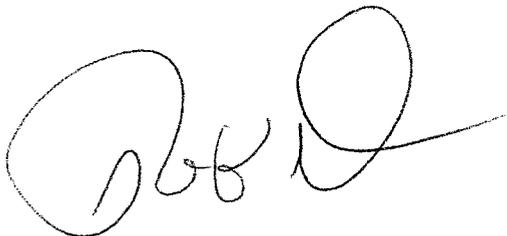
I certify that I mailed a copy of the foregoing Reply Brief of Appellant, postage pre-paid on November 9, 2006, at the Centralia, Washington post office addressed as follows:

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