

No. 81225-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF
RICHARD D. HARTMAN

APPEAL FROM THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

NO. 35763-1-II

MASON COUNTY SUPERIOR COURT NO. 06-1-00246-6
The Honorable Toni A. Sheldon, Trial Court Judge

CLERK
2010 JUN 23 11 01
ST. MARY'S COUNTY
CLERK OF SUPERIOR COURT

SUPPLEMENTAL BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD D. HARTMAN,

Appellant

No.: 81225-0

STATE'S RESPONSE TO THE
COURT'S ORDER FOR
SUPPLEMENTAL BRIEFING

A. PROCEDURAL HISTORY

On June 8, 2010, the Court ordered supplemental briefing on three issues in Hartman's case: (1) whether voir dire was conducted in chambers; (2) whether the courtroom was too crowded with prospective jurors to allow spectators during jury selection; and (3) the application of State v. Bone-Club¹ and Presley v. Georgia.²

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

² Presley v. Georgia, ---U.S.---, 130 S.Ct. 721, ---L.Ed. 3d--- (2010)

B. RELIEF REQUESTED

The State respectfully requests the Court to find that Presley v. Georgia is factually not comparable to Hartman's case, for in Presley, the trial court ejected a spectator from the courtroom prior to voir dire over defense counsel's objection; something that did not occur here. Because Presley is factually dissimilar from Hartman, its holding is inapplicable.

After further research, it is clear that in-chambers voir dire did occur in Hartman's case, and that a total of ten prospective jurors were called in for questioning when voir dire was performed, on November 17 and 21, 2006. CP: 57, 62. The trial court did not conduct a Bone-Club analysis prior to taking these ten jurors into chambers. Hartman's decision to go into chambers to participate in voir dire with ten jurors represents, however, a valid tactical decision under the rationale of State v. Momah.³

Defense counsel actively participated in the in-chambers voir dire, and several jurors were excused for cause. CP 57, 62. The affidavits⁴ attached with this supplemental briefing show that the clerks from Mason County Superior Court do not remember anyone being excluded from the trial court due to overcrowding, which distinguishes this case from Presley.

³ State v. Momah, 167 Wash.2d 140, 217 P.3d 321 (2009).

⁴ State's Attachment A.

The State also respectfully requests the Court to view Hartman's case as a direct conflict between the state and federal caselaw of Momah, Strode⁵ and Presley, against the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996, because Jurors No. 35 and 51 were required to divulge confidential medical information. Accordingly, the State respectfully requests the Court to affirm.

C. EVIDENCE RELIED UPON

The Supplemental Report of Proceedings shall be referred to as "SUPP-RP⁶." The Clerk's Papers shall be referred to as "CP."

D. ARGUMENT

1. PRESLEY IS NOT FACTUALLY COMPARABLE TO HARTMAN'S CASE BECAUSE THERE THE TRIAL COURT EJECTED A SPECTATOR FROM THE COURTROOM PRIOR TO VOIR DIRE OVER DEFENSE COUNSEL'S OBJECTION.

In Presley, the trial court noticed a solitary observer in the courtroom prior to the start of voir dire. Presley, 130 S.Ct. at 722. The trial court judge explained to this individual, who happened to be the defendant's uncle, that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. Although defendant Presley's

⁵ State v. Strode, 167 Wash.2d 222, 217 P.3d 310 (2009).

attorney repeatedly objected to the exclusion of the public from the courtroom, the trial judge explained that there was no space for [spectators] to sit in the courtroom during voir dire, and that it would be inappropriate for them to intermingle with the venire. Following defendant Presley's conviction, he moved for a new trial based upon the exclusion of the public from the juror voir dire.

The U.S. Supreme Court ultimately accepted the case and ruled in a per curiam opinion that trial courts are required to consider alternatives to closure even when they are not offered by the parties, which includes the voir dire process. Presley, 130 S.Ct. at 724. The Court further reasoned that the public has a right to be present whether or not any party has asserted the right. Presley, 130 S.Ct. at 724-725. Addressing the trial court's concerns about spectators intermingling with the venire, the U.S. Supreme Court reasoned that:

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire. But in those cases, the particular interest, and threat to that interest, must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Presley, 130 S.Ct. at 725.

⁶ State's Attachment B.

Given this rationale, there is no indication from the affidavits of the Mason County Superior Court Clerks who were in the courtroom for voir dire that Hartman's friends and/or family were excluded from the courtroom.⁷ Because Presley is factually dissimilar from Hartman's case, its holding is inapplicable here.

2. HARTMAN MADE A TACTICAL DECISION UNDER MOMAH BY GOING INTO CHAMBERS FOR VOIR DIRE OF TEN PROSPECTIVE JURORS.

The Court enunciated a clear rule in Momah in that because that defendant affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it, his attempts to then assign error to his actions on appeal were not valid. Momah, 167 Wash.2d 155-156. In Hartman's case, there is no record that he objected to the in-chambers voir dire, or that he did not want to participate in and/or benefit from it by selecting a jury that he felt was impartial.

Under the rationale of Momah, Hartman made a tactical decision and should not be allowed to assign error to it on appeal. Likewise, while the trial court did not conduct a Bone-Club test, the courtroom was not closed; Hartman made a tactical decision to receive what he felt was a fair trial.

⁷ Please see: State's Attachment A.

3. MOMAH, STRODE AND PRESLEY ARE IN DIRECT CONFLICT WITH FEDERAL LAW BECAUSE FORCING JURORS TO DISCLOSE PERSONAL AND CONFIDENTIAL MEDICAL INFORMATION VIOLATES HIPAA.

Under the rationale of Presley, Momah and/or Strode, a juror does not have a right to keep his/her medical information private, and forcing any juror to disclose that information in either open court or in chambers violates HIPAA. Hypothetically, even if the court had conducted a Bone-Club test and closed the courtroom in Hartman's case, Jurors No. 35 and 51, if they were to be candid, still would have had to disclose confidential medical information to the judge, both counsel, the defendant and the clerk at the very least. SUPP-RP: 1-3. None of the leading Washington State cases, namely Momah, Strode and/or Bone-Club, or the U.S. Supreme Court decision in Presley, either resolve or avoid this direct conflict with HIPAA in the context of voir dire.

If a covered entity such as health care provider must make reasonable efforts to protect confidential, personal medical information, then a trial court should likewise protect the same information of prospective jurors during the voir dire process. In Hartman's case, the trial court tried to protect Jurors No. 35 and 51 by not forcing them to

disclose confidential medical information in open court, but rather brought them in-chambers to discuss such issues. SUPP-RP: 1-3.

The medical information and general situation of Jurors No. 35 and 51 are addressed under 45 CFR § 160.103-General Administrative Requirements-Definitions-Individual, Individually identifiable health information, and Protected health information. Under 45 CFR § 160.103, an “individual” is defined as “the person who is the subject of protected health information,” here the two jurors. Likewise, “Individually identifiable health information” refers to “that subset of health information, including demographic information collected from an individual.” 45 CFR § 160.103.

Applying 45 CFR § 160.103 to Hartman’s case, this would be Juror No. 35’s diagnosis of diabetes and ensuing medical issues, such as problems with “urination,” and Juror No. 51’s multiple issues involving his/her: (a) son’s medical treatment for alcoholism; (b) a mother’s doctor appointment; and (c) a father’s surgery. SUPP-RP 1: 9-15; 2: 20-25; 3: 6-12. This is also addressed in “Protected health information,” which means “individually identifiable health information” that can be either transmitted or maintained in various forms. 45 CFR § 160.103.

Under 45 CFR 164.502(a) the following standard applies:

A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

(a) Permitted uses and disclosures. A covered entity is permitted to use or disclose protected health information as follows:

(i) To the individual;

(ii) For treatment, payment, or health care operations⁸, as permitted by and in compliance with § 164.506...⁹

The next section, 45 CFR 164.502(b), also applies:

When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request.¹⁰ (emphasis added)

Applying these sections of HIPAA to Juror No. 35's situation, his confidential, medical information regarding diabetes and the course of treatment was protected health information that, in most other circumstances, could not be disclosed unless (a) certain procedures were followed, or (b) he consented. This same rationale is applicable to Juror No. 51's medical information as well. There is nothing in the record

⁸ Emphasis added.

⁹ 45 CFR Subpart E—Privacy of Individually Identifiable Health Information § 164.502 Uses and disclosures of protected health information: general rules-standard.

¹⁰ 45 CFR Subpart E—Privacy of Individually Identifiable Health Information § 164.502 Uses and disclosures of protected health information: general rules-minimum necessary.

which shows that either juror was given an option except to simply divulge their confidential, medical information, and in the process, their rights under HIPAA were violated. A conflict therefore exists between federal law/HIPAA, and Washington State law through the Supreme Court's recent decisions, Momah and Strode, if the interpretation of these cases is that jurors now have no choice but to disclose their confidential medical information during voir dire.

The developing practice in Washington State of clearing the courtroom of the venire and then questioning a juror who may need to be excused for confidential, medical reasons does not remedy the problem, for the courtroom may still contain spectators, the press, family and/or friends present. While the Court in Strode would reason that the remedy is a Bone-Club analysis, a strong possibility remains that the juror may not want to divulge his/her medical information in court to anyone under any circumstances. In trying to fulfill their civic duty, a prospective juror should not also face the prospect of having to divulge confidential and potentially embarrassing medical information in a courtroom that is either open or closed.

E. CONCLUSION

The State respectfully requests the Court to find the following: (1) that the holding of Presley does not apply to Hartman's case because the two cases are factually dissimilar; (2) because of Hartman's tactical decisions under Momah, error did not occur; and (3) under HIPAA, a prospective juror should not be forced to disclose his/her confidential and personal medical information in court, even if a Bone-Club test has been conducted. The State respectfully requests the Court to affirm.

Dated this 25TH day of June, 2010.

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burlison, Prosecuting Attorney
Mason County, WA

State's Attachment A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON	NO. 81225-0
In Re Personal Restraint of RICHARD D. HARTMAN	DECLARATION OF CATHY GALLAGHER SUPERIOR COURT CLERK

COMES NOW, CATHY GALLAGHER, and declares as follows:

I was a clerk in the case of State v. Richard D. Hartman, Mason County Cause Number 06-1-00246-6, on Friday, November 17 and Tuesday, November 21, 2006, when voir dire occurred. I do not remember anyone being excluded from the trial court due to a lack of space during voir dire.

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

DATED this 22nd day of June, 2010 at Shelton, Washington.



Cathy Gallagher

IN THE SUPREME COURT OF THE STATE OF WASHINGTON	NO. 81225-0 DECLARATION OF MARIE CHURCHILL SUPERIOR COURT CLERK
In Re Personal Restraint of RICHARD D. HARTMAN	

COMES NOW, MARIE CHURCHILL, and declares as follows:

I was a clerk in the case of State v. Richard D. Hartman, Mason County Cause Number 06-1-00246-6, on Friday, November 17 and Tuesday, November 21, 2006, when voir dire occurred. I do not remember anyone being excluded from the trial court due to a lack of space during voir dire.

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

DATED this 22 day of June, 2010 at Shelton, Washington.

Marie Churchill
Marie Churchill

State's Attachment B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

)	
STATE OF WASHINGTON,)	Court of Appeals
Plaintiff,)	No. 81225-0-II
)	
vs.)	
)	
)	Mason County Cause
RICHARD D. HARTMAN,)	No. 06-1-00246-6
Defendant.)	
)	

VOIR DIRE - SUPPLEMENTAL PARTIAL REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 17th day of November, 2006,
the above matter came on for voir dire before the HONORABLE TONI
A. SHELDON, JUDGE of the Mason County Superior Court, sitting at
the Mason County Courthouse, City of Shelton, County of Mason,
State of Washington; and the parties being present as follows:

REINHOLD SCHUETZ, Attorney for THE STATE OF WASHINGTON,
Plaintiff; and

ERIC VALLEY, Attorney for RICHARD D. HARTMAN, Defendant.

WHEREUPON, the following portions were had and done,
to wit:

1
2 VOIR DIRE OF JUROR NO. 35 IN JUDGE'S CHAMBERS

3 THE COURT: Hello.

4 JUROR NO. 35: Hello.

5 THE COURT: We have a chair for you there, Sir, and
6 once you're settled, I'll hand you a microphone. Here you go.
7 You indicated that you may have a physical problem or limitation
8 that would make it difficult to serve as a juror. Can you tell
9 us what that is?

10 JUROR NO. 35: I'm a diabetic.

11 THE COURT: All right. And is it something that you
12 not only have to monitor what you eat but also your blood sugar?

13 JUROR NO. 35: Oh, yeah.

14 THE COURT: And --

15 JUROR NO. 35: And urination problems.

16 THE COURT: Okay.

17 JUROR NO. 35: And that - I mean . . . I really don't
18 think it's . . .

19 THE COURT: Would you be more comfortable not serving
20 on the jury, not having to deal with the issue of --

21 JUROR NO. 35: Well, it's true.

22 THE COURT: All right. You will be excused at this
23 point and you do not need to call back to the recording number.

24 MR. SCHUETZ: Before he's gone - just out of personal
25 curiosity - he also raised his card as to having either heard of
the case or having some information about the case, and I'm

1 curious about the basis in case that raises any other
2 questions outside.

3 JUROR NO. 35: Well, that was - I saw it, the deal in
4 the paper on it. And then one of my neighbors works for the
5 school district.

6 MR. SCHUETZ: Okay.

7 JUROR NO. 35: Nobody ever really gave me any opinions
8 on it.

9 MR. SCHUETZ: Gotcha.

10 THE COURT: Thank you very much. Watch your step.
11 And Juror No. 35 is excused. I think we'll see 46 next.

12 Portion of voir dire not requested.

13 VOIR DIRE OF JUROR NO. 51 IN JUDGE'S CHAMBERS

14 THE COURT: Hello. Juror No. 51, if you will have a
15 seat, I will hand you this microphone. You indicated that you
16 may have time conflict that would make it difficult for you to
17 be with us in that timeframe I gave you.

18 JUROR NO. 51: Right.

19 THE COURT: Can you tell us what that is?

20 JUROR NO. 51: My son's in - [inaudible] be an
21 alcoholic and I need to be home to baby sit, or my mom and dad
22 do, and they've got doctor's appointments Monday and Tuesday in
23 Seattle. So, that pretty much - that's where he's at now. So,
24 he's 14, he just did diversion or he's doing diversion - excuse
25 me, I'm not feeling good either - so, he's kind of under

1 supervision right now, total.

2 THE COURT: Is he on house arrest?

3 JUROR NO. 51: Only on my account.

4 THE COURT: All right.

5 JUROR NO. 51: Just from me and my parents.

6 THE COURT: And you don't have enough coverage with
7 your parents to be able to --

8 JUROR NO. 51: My mom's got --

9 THE COURT: -- work it out to be here?

10 JUROR NO. 51: Right. My mom has a doctor's
11 appointment in Seattle on Monday; my dad's surgery's on Tuesday
12 in Seattle.

13 THE COURT: So, you have a lot going on.

14 JUROR NO. 51: Yeah.

15 THE COURT: The Court will excuse you at this time.

16 JUROR NO. 51: Oh, thank you.

17 THE COURT: Was today your last day to be calling in?

18 JUROR NO. 51: No.

19 THE COURT: You do not need to call back to the
20 recording number.

21 JUROR NO. 51: Oh, thank you.

22 THE COURT: Thank you very much.

23 JUROR NO. 51: All right.

24 End of requested transcript.

25 *****

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 81225-0
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
RICHARD D. HARTMAN,)	
)	
Appellant,)	
_____)	

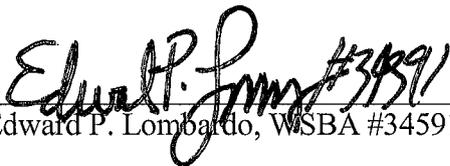
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, JUNE 25, 2010, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (SUPPLEMENTAL BRIEF OF RESPONDENT), to:

Richard D. Hartman
Stafford Creek Corrections Center
#299896
191 Constantine Way
Aberdeen, WA 98520

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 25TH day of JUNE, 2010, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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