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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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No. 36346-1-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RENE P. PAUMIER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge  
Cause No. 07-1-00060-7

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SUPPLEMENTAL BRIEF OF RESPONDENT

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

STATE OF WASHINGTON,

Plaintiff,

vs.

RENE PEDRO PAUMIER,

Defendant

No.: 36346-1-II

STATE'S RESPONSE TO THE  
COURT'S ORDER LIFTING  
STAY AND CALL FOR  
ADDITIONAL BRIEFING

A. PROCEDURAL HISTORY

The case of State v. Paumier, No. 36346-1-II, was stayed by the Court on May 1, 2008, pending the Supreme Court's decisions in State v. Momah, 217 P.3d 321 (2009) and State v. Strode, 217 P.3d 310 (2009). These cases were decided on October 8, 2009, and this Court issued an order on Tuesday, November 3, 2009, calling for additional briefing on Paumier in light of Momah and Strode.

## B. RELIEF REQUESTED

The State respectfully requests the Court to view Paumier's case as a direct conflict between the state law of State v. Momah<sup>1</sup> and State v. Strode<sup>2</sup> against the federal law of the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

Had the trial court forced Juror No. 7, who specifically asked to go into chambers, to disclose his/her confidential medical information in open court, then 45 CFR 164.502-Uses an disclosures of protected health information: general rules-would have been violated.

## C. EVIDENCE RELIED UPON

The Supplemental Report of Proceedings will be referred to as "SUPP RP."

## D. ARGUMENT

### 1. THE RULES OF MOMAH AND STRODE AS APPLIED TO PAUMIER'S CASE WOULD VIOLATE JUROR NO. 7'S HIPAA RIGHTS

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

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<sup>1</sup> State v. Momah, 217 P.3d 321 (2009).

<sup>2</sup> State v. Strode, 217 P.3d 310 (2009).

prospective jurors during voir dire. In Paumier's case, the trial court protected Juror No. 7 by not forcing him/her to disclose in open court that he/she had "just been diagnosed with diabetes" taken a "first shot of insulin" and had a medical "appointment" the next day. SUPP RP 12: 1-7.

Juror No. 7's medical information and general situation 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 Juror No. 7. Likewise, "Individually identifiable health information" refers to "that subset of health information, including demographic information collected from an individual," namely, Juror No. 7's diagnosis of diabetes and course of treatment. This is also addressed in "Protected health information," which means "individually identifiable health information" that can be either transmitted or maintained in various forms.

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 operations<sup>3</sup>, as permitted by and in compliance with § 164.506...<sup>4</sup>

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.<sup>5</sup> (emphasis added)

Applying these sections of HIPAA to Juror No. 7's situation, his/her 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/she consented.

In Paumier's case, Juror No. 7 did not consent to make his/her medical condition known in open court, and forcing this juror to do so would have violated HIPAA. 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

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<sup>3</sup> Emphasis added.

<sup>4</sup> 45 CFR Subpart E—Privacy of Individually Identifiable Health Information § 164.502 Uses and disclosures of protected health information: general rules-standard.

<sup>5</sup> 45 CFR Subpart E—Privacy of Individually Identifiable Health Information § 164.502 Uses and disclosures of protected health information: general rules-minimum necessary.

that jurors now have no choice but to disclose their confidential information in open court.

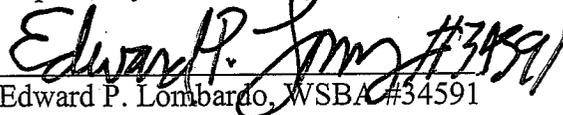
The developing practice of clearing the courtroom of the venire except for a juror who has confidential, medical information, does not remedy the problem, for the courtroom may well contain spectators, the press, family and/or friends present. While the Court in Strode would reason that the remedy is a Bone-Club<sup>6</sup> analysis, a strong possibility remains that the juror may not want to divulge his/her medical information in court under any circumstances.

#### E. CONCLUSION

The State respectfully submits to this Court that the privacy of each juror should be respected, and that HIPAA provides them with that protection.

Dated this 25<sup>TH</sup> day of November, 2009

Respectfully submitted by

Edward P. Lombardo, WSBA #34591

Deputy Prosecuting Attorney for Respondent  
Gary P. Burleson, Prosecuting Attorney  
Mason County, WA

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<sup>6</sup> State v. Bone-Club, 128 Wash.2d 254, 906 P.2d 325 (1995).

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

STATE OF WASHINGTON,	)	
	)	No. 36346-1-II
Respondent,	)	
	)	DECLARATION OF
vs.	)	FILING/MAILING
	)	PROOF OF SERVICE
RENE P. PAUMIER,	)	
	)	
Appellant,	)	
_____	)	

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

On WEDNESDAY, NOVEMBER 25, 2009, 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:

Andrew P. Zinner  
Nielsen, Broman & Koch  
1908 East Madison  
Seattle, WA 98122

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COURT OF APPEALS  
DIVISION II  
09 NOV 30 AM 9:54  
STATE OF WASHINGTON  
BY DEPUTY

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 25<sup>th</sup> day of November, 2009, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591