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No. 61804-1-I  
King County Superior Court No. 07-1-04039-7 SEA

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

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STATE OF WASHINGTON,  
Plaintiff/Appellee,

v.

SIONE P. LUI,  
Defendant/Appellant.

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

The Honorable Michael J. Trickey, Judge

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APPELLANT'S SUPPLEMENTAL BRIEF REGARDING MELENDEZ  
DIAZ

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## I. INTRODUCTION

In his reply brief, Lui addressed the new U.S. Supreme Court decision in *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S. Ct. 2527, -- L. Ed. 2d -- (June 25, 2009). The State then filed a supplemental brief regarding *Melendez-Diaz*. Lui will now respond to certain points raised by the State.

## II. ARGUMENT

In his reply brief, Lui discussed *Ohio v. Crager*, 116 Ohio St.3d 369, 879 N.E.2d 745 (2007), a case with facts remarkably similar to those in this case. Lui noted that the Supreme Court granted certiorari, vacated and remanded for reconsideration in view of *Melendez-Diaz*. *Crager v. Ohio*, No. 07-10191, -- U.S. --, 2009 WL 1841607 (2009).

The State points out that the Supreme Court did *not* grant certiorari in *People v. Geier*, 41 Cal. 4<sup>th</sup> 555, 161 P.3d 104, 61 Cal. Rptr. 3d 580 (2007), although that case also involved similar facts. The State suggests that the differing treatment might turn on the precise evidence admitted in each case.

As Lui pointed out in his reply brief, however, the “denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”

*United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361 (1923) (Holmes, J.). *Accord, Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1, 93 S. Ct. 647, 650, n. 1, 34 L. Ed. 2d 577 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497, 73 S. Ct. 397, 437-441, 97 L. Ed. 469 (1953). “The variety of considerations that underlie denials of the writ, counsels against according denials of certiorari any precedential value.” *Teague v. Lane*, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (citations and internal quotations omitted).

On the other hand, the Court will not grant, vacate, and remand unless an intervening decision “reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996).

For these reasons, the Supreme Court’s ruling in *Crager* has some precedential value, whereas the ruling in *Geier* does not.

In any event, if one wished to speculate, it is not hard to find a reason why *Geier* did not meet the standard for reversal set out in *Lawrence v. Chater*. In *Geier*, the California Supreme Court upheld the

DNA testimony on two grounds. The first was that the testimony did not violate the Confrontation Clause. *Geier*, 41 Cal. 4<sup>th</sup> at 596-607. The second was that, assuming there was any error, it was harmless beyond a reasonable doubt in view of the overwhelming untainted evidence of guilt. *Id.* at 608. Therefore, reconsidering the analysis in view of *Melendez-Diaz* would not “determine the ultimate outcome of the litigation.” See *Lawrence v. Chater, supra*.

The State also suggests that, if Lui’s case were to go to the Supreme Court, it would not gather a majority in view of Justice Thomas’s concurrence. It is mere speculation, however, that this concurring opinion would hold sway.

Similar arguments have been made regarding the right to a jury finding of predicate convictions. In *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), a 5-4 majority of the Supreme Court held that prior convictions that increase the statutory maximum sentence need not be proved to a jury beyond a reasonable doubt. Then in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), the Court held that any other facts that increase the statutory maximum sentence must be proved to a jury beyond a reasonable doubt. Although Justice Thomas was in the majority in

*Almendarez-Torres*, he issued a concurring opinion in *Apprendi* explaining in detail why the former decision was wrongly decided. *See Apprendi*, 120 S.Ct. at 2379. In view of that, many defendants argued that *Almendarez-Torres* was no longer viable.

The Washington Supreme Court rejected such speculation. “Because the Court has not specifically held otherwise since [*Almendarez-Torres*], we hold that the federal constitution does not require that prior convictions be proved to a jury beyond a reasonable doubt.” *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied by Smith v. Washington*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004).

Similarly, this Court should not base its decision on speculation about what the U.S. Supreme Court might do in the future, but rather on decisions that have precedential value, including the Supreme Court’s decisions in *Melendez-Diaz* and *Crager*.

**III.  
CONCLUSION**

For the foregoing reasons, this Court should conclude that Lui's right to confrontation was violated and should remand for a new trial.

DATED this 25<sup>th</sup> day of August, 2009.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United

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