

Using Its Sixth Sense: The Roberts Court Revamps the Rights of the Accused

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The Sixth Amendment loomed large during the Supreme Court's 2008 October Term.¹ Fittingly, the justices heard six oral arguments touching on nearly every aspect of that amendment.² This outsized fraction of cases indicates the recent tumult in criminal procedure law.³ In particular, the latter-stage Rehnquist Court decisions in

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¹ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

² The four argued Sixth Amendment cases from the term not discussed herein are *Vermont v. Brillion*, 556 U.S. ____, 129 S. Ct. 1283 (2009) (Ginsburg, J., 7-2 decision holding that delays created by defense counsel do not count against speedy trial deadlines); *Knowles v. Mirzayance*, 556 U.S. ____, 129 S. Ct. 1411 (2009) (Thomas, J., 9-0 decision holding that abandoning a not guilty by reason of insanity claim that was not likely to succeed does not rise to the level of ineffective assistance of counsel); *Kansas v. Ventris*, 556 U.S. ____, 129 S. Ct. 1841 (2009) (Scalia, J., 7-2 decision overturning a prophylactic rule that would prohibit the use of evidence obtained in violation of the right to counsel even for impeaching a defendant's perjurious testimony); and *Montejo v. Louisiana*, 556 U.S. ____, 129 S. Ct. 2079 (2009) (Scalia, J., 5-4 decision breaking on "traditional" lines that repealed *Michigan v. Jackson*, 475 U.S. 625 (1986), which forbade police from initiating any interrogation of a defendant in custody who has invoked the right to counsel).

³ The Court decided nine Sixth Amendment cases overall out of 83 cases this term, over 10 percent of the entire docket. The three cases decided without oral argument were *Moore v. United States*, 552 U.S. ____, 129 S. Ct. 4 (2008) (per curiam) (holding that district courts enjoy discretion on crack/powder sentencing disparity issue); *Spears v. United States*, 552 U.S. ____, 129 S. Ct. 840 (2008) (per curiam) (holding that judges may depart downward for policy reasons alone on crack/powder disparity sentencing issue); *Nelson v. United States*, 555 U.S. ____, 129 S. Ct. 890 (2009) (per curiam) (holding that the *Rita* presumption is for appellate courts to apply to district

Apprendi v. New Jersey and *Crawford v. Washington* raised numerous questions that the Court had not answered fully by the time Chief Justice John Roberts and Justice Samuel Alito replaced Chief Justice William Rehnquist and Justice Sandra Day O'Connor.⁴ Among the six argued cases, the Roberts Court heard two especially significant ones, which afforded it an early opportunity to clarify lingering issues in Sixth Amendment law and put its own stamp on constitutional criminal procedure jurisprudence. Considered separately, *Oregon v. Ice* and *Melendez-Diaz v. Massachusetts* are momentous cases, because each of them reshapes a major line of Rehnquist-era (albeit not Rehnquist-endorsed) precedent.⁵ Perhaps more importantly, however, these two cases taken together signify that the Roberts Court will continue the Rehnquist Court's renovation of the Sixth Amendment along originalist lines.

This pair of major cases explored the parameters of two separate Sixth Amendment protections afforded to criminal defendants: the right to a jury trial in the sentencing context, and the right to confront adverse witnesses. More specifically, *Oregon v. Ice* posed the question whether a post-*Apprendi* sentencing judge may find facts apart from the jury verdict to decide whether the defendant will serve consecutive or concurrent sentences. *Melendez-Diaz v. Massachusetts* asked if, given *Crawford*, it infringes a defendant's right to confront his accusers for the prosecution to enter lab test data into evidence via affidavit rather than via a lab technician's live testimony.

This article will first examine the Court's reasoning in *Ice* and *Melendez-Diaz*, and it will then address the implications of those decisions for the *Apprendi* and *Crawford* lines of precedent, respectively. In so doing, it will consider what questions remain open following this term's decisions, surmise where the jurisprudence regarding each of these major precedents may evolve, and discuss how Justice David Souter's retirement could affect that evolution.

court sentences within guidelines ranges, not a presumption for district courts to apply to guidelines sentences).

⁴ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ *Oregon v. Ice*, 555 U.S. ____, 129 S. Ct. 711 (2009); *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S. Ct. 2527 (2009).

The article will conclude by explaining how these cases exemplify the trend of originalist renovation.

I. Slipping on Ice: The *Apprendi* March Slows Down

A. *Apprendi* Jurisprudence before Ice

Justice Ruth Bader Ginsburg's opinion for a narrowly divided court in *Oregon v. Ice* must be understood against the backdrop of the previous decade's dramatic developments in the Court's Sixth Amendment sentencing law jurisprudence. Led by an unusual coalition of justices, the Rehnquist Court staged a radical renovation of the right to a jury trial in its later years. The odd alliance joined that Court's three most consistently liberal jurists—Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg—with its two most thoroughgoing conservatives, Justices Antonin Scalia and Clarence Thomas.

Beginning with the *Apprendi* decision in 2000, the Court broke from its prior approval of sentencing regimes that rely upon post-verdict judicial fact-finding.⁶ By a 5-4 margin, the Court held that the prosecution must both charge in the indictment and prove to the jury beyond a reasonable doubt every fact that contributes to the length of a defendant's sentence in order to uphold the accused's right to a trial by jury. As a result, judges may no longer enhance a defendant's sentence based on facts found by the judge during the sentencing phase, except for the fact of a prior conviction, which, after all, another jury already determined.⁷ Although *Apprendi* did not put an end to the controversial practice of judges basing sentencing decisions on acquitted conduct,⁸ it did curtail the previous prosecutorial practice of holding back facts or charges that might not be

⁶ Cf. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the federal sentencing guidelines).

⁷ See *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Members of the Court have noted that even that exception no longer enjoys support from the majority of the justices. See *Shepard v. United States*, 544 U.S. 13, 26 (2005) (Thomas, J.) (concurring in part and concurring in the judgment); see also *Jones v. United States*, 526 U.S. 227, 249 (1999) (noting that prior convictions had to have satisfied "fair notice, reasonable doubt, and jury trial guarantees").

⁸ Cf. *United States v. Watts*, 519 U.S. 148 (1997) (holding that acquittal of offense does not bar consideration of the acquitted conduct for sentencing enhancement purposes).

proved beyond a reasonable doubt to the jury in order to present them to the judge as factors meriting an enhanced sentence.⁹

The Court followed *Apprendi* two years later with *Ring v. Arizona*, deciding that a jury—not a judge—had to decide whether aggravating factors outweighed mitigating factors in rendering a death sentence.¹⁰ Although *Ring* was a 7-2 decision, the five-justice *Apprendi* majority added Justice Anthony Kennedy explicitly on *stare decisis* grounds and Justice Stephen Breyer on sui generis Eighth Amendment grounds.¹¹ The very same day, in *Harris v. United States*, the Court seemed to depart from *Apprendi*'s logic.¹² Even though a jury must decide facts that increase a defendant's maximum sentence, the *Harris* majority held that a judge could permissibly find the facts necessary for increasing a defendant's mandatory minimum sentence (based, in that case, on having brandished a weapon). Four of the five *Apprendi* justices hung together in dissent, but Justice Scalia crossed over to join the *Harris* majority without comment. *Harris* involved the same potential for prosecutors holding back facts not provable to the jury—brandishing is a crime with its own elements—in order to present them to the judge post-verdict and raise a defendant's minimum sentence. The Court reasoned, however, that no Sixth Amendment violation had occurred, because the higher mandatory minimum fell within the available sentence for the guilty verdict returned by the jury.

In the waning days of the 2003–04 term, *Apprendi* struck yet again. In *Blakely v. Washington*, the Court held that Washington state's sentencing guidelines regime was an unconstitutional violation of the jury trial right described in *Apprendi*, because it permitted the sentencing judge to find additional facts justifying an enhanced sentence.¹³ Because Washington's system closely resembled the federal sentencing guidelines, the *Blakely* decision generated immediate

⁹ Cf. *Jones*, 526 U.S. at 252 (construing the federal carjacking statute to contain offense elements rather than sentencing factors in order to avoid deciding whether a jury must find facts at issue rather than a judge). See also Stephen P. Halbrook, *Redefining a "Crime" as a Sentencing Factor to Circumvent the Right to Jury Trial: Harris v. United States, 2001–2002 Cato Sup. Ct. Rev. 187 (2002).*

¹⁰ *Ring v. Arizona*, 536 U.S. 584 (2002).

¹¹ *Id.* at 613 (Kennedy, J., concurring); *id.* at 614 (Breyer, J., concurring in the judgment).

¹² *Harris v. United States*, 536 U.S. 545 (2002).

¹³ *Blakely v. Washington*, 542 U.S. 296 (2004).

confusion and uncertainty in federal sentencing. To deal with the *Blakely* aftermath, the Court set two cases for oral argument on the first day of October Term 2004. Come January 2005, when *Booker v. United States* and *Fanfan v. United States* were decided, the *Apprendi* five held together once again, and the Court decided that the federal sentencing guidelines as constructed also violated the Sixth Amendment's jury trial guarantee.¹⁴

The victors, however, did not get the spoils. Justice Ginsburg deserted the *Apprendi* five to join in crafting a remedy favored by the *Booker/Fanfan* dissenters.¹⁵ Whereas the remainder of the *Apprendi* five would have required juries to find the necessary facts for enhanced sentences under the mandatory guidelines (following existing practice in states like Kansas),¹⁶ the *Booker* dissenters plus Justice Ginsburg excised just that portion of the statute making the federal sentencing guidelines mandatory.¹⁷ This way federal trial judges could still look to the guidelines as instructive or persuasive authority, but they were not impermissibly bound to find facts or issue enhanced sentences. The *Booker* remedy majority reasoned that such a result did less violence to the statute and came closer to preserving what Congress had intended.¹⁸

The *Apprendi* line of cases stood at this juncture when Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor. In a nearly unbroken chain of 5-4 decisions, generally pitting the three most liberal and two most conservative justices against the middle four, the Court had steadily reinforced its holding in *Apprendi* and extended the application of *Apprendi's* rule to strike down several sentencing regimes—including New Jersey's, Arizona's, and Washington's, as well as the federal sentencing guidelines.¹⁹

¹⁴ *United States v. Booker* and *United States v. Fanfan*, 543 U.S. 220 (2005).

¹⁵ *Id.* at 244 (Breyer, J.) (remedy decision).

¹⁶ *Id.* at 243-44 (Stevens, J.) (constitutional decision). See also *Blakely*, 542 U.S. 296, 309-10, 124 S. Ct. 2531, 2541-42 (2004) (citing Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws 1018-23 (codified at Kan. Stat. Ann. § 21-4716(b) (Cum. Supp.))).

¹⁷ *Id.* at 245 (Breyer, J.) (remedy decision).

¹⁸ *Id.* at 246-49.

¹⁹ Eight cases over an eight-year period beginning with the *Apprendi* precursor case of *Almendarez-Torres* and ending with *Shepard* were decided by 5-4 margins (or 5-3 in *Shepard*, because Chief Justice Rehnquist did not participate). That includes every *Apprendi* case during that time except for *Ring*. *Jones*, *Apprendi*, *Blakely*, *Booker*, and *Shepard* featured the same five-justice majority of Stevens, Scalia, Souter, Thomas, and Ginsburg. *Almendarez-Torres* featured the same line-up, except Justice Thomas

The pro-*Apprendi* trend showed no signs of abating in the newly reconstituted court's first full term together in 2006–07. For example, the constitutionality of California's sentencing guidelines regime came under review in *California v. Cunningham*.²⁰ The *Apprendi* five became six with the addition of Chief Justice Roberts, and the Court held that California's three-tiered sentencing system, where judge-found facts can move defendants into higher sentencing tiers, violated the right to trial by jury. Later in the term, in *Rita v. United States*, a nearly unanimous Court held that federal courts of appeals could apply a presumption of reasonableness to trial-court sentences falling within the guidelines range.²¹ Finally, in a pair of 7-2 decisions from December 2007—*Gall v. United States* and *Kimbrough v. United States*—the Court held that two lower courts had erred in overturning sentences below the guidelines range, because judges may depart downward from the now merely advisory federal sentencing guidelines.²² The reasonableness of sentencing decisions, said the Supreme Court, must be reviewed under an abuse of discretion standard.

B. *The Majority's Reasoning in Oregon v. Ice*

With this flood of decisions as a backdrop, *Oregon v. Ice* posed the question whether a judge may find post-verdict facts to justify ordering a defendant to serve consecutive rather than concurrent sentences, or whether, given *Apprendi*, a jury must make that decision. Unlike most states, Oregon's state legislature had established concurrent sentences as the default, specifying that consecutive sentences may be given only if the judge finds that the defendant's offenses were not part of the same "continuous and uninterrupted course of conduct," or that the offenses indicated a "willingness to commit more than one criminal offense," or that they caused or

switched sides (later confessing his error in his *Apprendi* concurrence). The *Booker* remedy was also nearly identical, with only Justice Ginsburg switching sides. Finally, *Harris* was also nearly identical to *Apprendi*, with only Justice Scalia switching sides (strangely without writing an opinion in the case). Justice O'Connor led the fight against the *Apprendi* five, authoring the lead dissent in *Apprendi*, *Ring*, *Blakely*, and *Shepard*—conceding in the last of these, "It is a battle I have lost." *Shepard v. United States*, 544 U.S. 13, 37 (2005) (O'Connor, J., dissenting).

²⁰ *Cunningham v. California*, 549 U.S. 270 (2007).

²¹ *Rita v. United States*, 551 U.S. 338 (2007).

²² *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).

risked causing the victim “greater or qualitatively different loss, injury or harm”²³

Apartment superintendent Thomas Ice twice entered the unit of his 11-year-old female victim and sexually assaulted her. The jury convicted him on two counts of first-degree burglary (entering with the intent to commit a crime), two counts of first-degree sexual assault for touching the victim’s vagina, and two additional counts of first-degree sexual assault for touching the victim’s breasts. The judge deemed the two burglaries separate incidents and imposed those sentences consecutively. The court further deemed that the sexual assaults both exhibited the requisite willingness to commit multiple offenses and caused qualitatively different harm. The court imposed the vaginal sexual assault sentences consecutive to the burglary sentences but exercised discretion to impose the breast sexual assault sentences concurrent to the rest (effectively earning no additional time for the latter). Based on the judge’s predicate findings, Ice received a total sentence of 28 years, 4 months (340 months), rather than the fully concurrent default sentence of 7 years, 6 months (90 months).²⁴

In approving the practice of basing consecutive sentences on judge-found facts, the Supreme Court relies primarily on prevailing historical practice under the common law and the sovereign authority of states over administration of their own criminal justice systems. The Court first asks whether the judge-found facts at issue in the case were the kind of facts that the framers of the Bill of Rights would have understood to be within the jury’s domain.²⁵ After a brief consideration of English and early American common-law tradition, the Court concludes that juries have not historically found facts pertaining to the decision to impose consecutive sentences. Because juries played no such role historically—and the decision itself was not a common-law jury function—the *Ice* Court reasons that Oregon’s scheme poses no threat to the traditional jury role as a bulwark between the accused and the state that the Sixth Amendment sought to protect.²⁶ Furthermore, since historical practice must

²³ Or. Rev. Stat. § 137.123(2); § 137.123(5)(a); § 137.123(5)(b).

²⁴ *Ice*, 129 S. Ct. at 715–16.

²⁵ *Id.* at 717.

²⁶ *Id.*

inform the scope of constitutional rights, the right to trial by jury will not automatically “attach[] to every contemporary state-law ‘entitlement’ to predicate findings” that constrains judicial sentencing discretion.²⁷

Turning then to the prerogatives of sovereign states, the Court notes that state legislatures have long determined the kind of regime states would employ in administering multiple sentences.²⁸ The Court refers to an amicus brief filed by several of Oregon’s sister states and voices concern that a contrary ruling could imperil a broad swath of sentencing practices.²⁹ For example, judge-found facts can govern decisions regarding supervised release, drug rehabilitation, community service, and the amount of fines or restitution imposed. To avoid prejudicing a jury during the guilt phase of trial, a bifurcated trial might be required with the facts forming the basis for a consecutive sentence being considered at a later stage of the proceedings. Before infringing state power by imposing such requirements, the Court indicates that it would need to see a “genuine affront to *Apprendi*’s instruction.”³⁰

Just such federalism concerns permeated many of Justice O’Connor’s dissents in the *Apprendi* line of cases, yet she never received a single vote from either Justice Ginsburg or Justice Stevens. For example, they did not evince concern with the effects of striking down the sentencing guidelines in *Blakely*. That fact raises some question whether the newfound concern for state prerogatives they voice in *Ice* is decidedly secondary. Perhaps they would argue that a real “affront to *Apprendi*’s instruction” existed in the prior cases.³¹ Alternatively, perhaps Justice Ginsburg inserted the federalism language to accommodate Justices Kennedy and Breyer—other justices in the majority who did join the earlier O’Connor dissents.³²

²⁷ *Id.* at 718.

²⁸ *Id.* at 718–19.

²⁹ *Id.* at 719.

³⁰ *Id.*

³¹ *Id.*

³² See *Apprendi*, 530 U.S. at 523 (2000) (O’Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ., dissenting); *Blakely v. Washington*, 542 U.S. at 314 (2004) (O’Connor, J., joined by Breyer, J., dissenting, and by Rehnquist, C.J., and Kennedy, J., dissenting in part); and *Shepard v. United States*, 544 U.S. at 29 (2005) (O’Connor, J., joined by Kennedy and Breyer, JJ., dissenting).

In the course of discussing the twin pillars of historical practice and state sovereignty that support its decision, the *Ice* Court repeatedly distinguishes the consecutive sentence context at issue in *Ice* from the enhanced sentencing context at issue in most other *Apprendi* cases. The opinion's opening paragraph notes, "[T]he Court has not extended the *Apprendi* and *Blakely* line of decisions beyond the offense-specific context."³³ Then, amid its discussion of prior applications of *Apprendi*, the Court once again observes: "All of these [prior] decisions involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times."³⁴ The *Ice* majority makes this point too often and too deliberately to disregard it, yet distinguishing *Ice* on the basis that it involved sentencing for more than one discrete crime hardly seems promising.

The dissent characterizes this discreteness distinction as a "strange exception," and it simply does not withstand much scrutiny.³⁵ For example, it does not seem like a consistent principle for *Apprendi*'s application to death penalty cases to turn on whether the capital defendant committed a discrete crime or multiple offenses. If this were the rule of *Ice*, then a death sentence for a discrete crime, such as the armed robbery/felony murder at issue in *Ring v. Arizona*, would require a jury to find aggravating factors even as a death sentence for a serial killer who committed multiple offenses over a lengthy period of time could have aggravating factors determined by a judge. A rule based on whether a defendant committed a discrete crime would not necessarily help even in the consecutive-versus-concurrent sentence context. Consider a judge needing to impose sentence upon a federal defendant who has been convicted and sentenced already on the same facts for a state-level offense (or

³³ *Ice*, 129 S. Ct. at 714. See also *id.* at 717 (putting the same point a bit confusingly: "These twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes."). Perhaps the use of the plural "crimes" here is meant to connote a difference from the status quo, but this is at best a very awkward phrasing—and it could be just a misstatement. The *Apprendi* rule already extends to sentencing for a discrete crime, so it would be clearer to say: "... counsel against extending *Apprendi*'s rule beyond the imposition of sentences for discrete crimes" or "... to the imposition of sentences for multiple crimes."

³⁴ *Id.* at 717.

³⁵ *Id.* at 720 (Scalia, J., dissenting).

vice versa). On the one hand, a judge might think *Apprendi* still requires a jury to determine facts relevant to a consecutive sentence because the defendant committed a discrete crime. On the other hand, a judge might well think that *Ice* empowers the judge to decide those facts because the circumstances implicate the unique consecutive-versus-concurrent sentence context—and because the judge could construe a second trial under a separate sovereign authority to be an offense “different in character” from the one for which the defendant already received the other sentence.

A rule turning on discreteness would not even safeguard judicial discretion over traditional sentencing decisions—another apparent motivating factor in *Ice*. The majority expresses concern that extending *Apprendi* to the facts of *Ice* would lead to jury intrusion into other decisions typically within a judge’s purview, such as the terms of supervised release or community service. Among other things, the majority worries that such intrusion could be unworkable and that it would infringe state sovereignty unnecessarily. But a discreteness rule would not prevent the extension of *Apprendi* to such decisions whenever a defendant has committed a discrete crime. So, while the *Ice* majority makes a valid and accurate distinction between the crime at issue in *Ice* and the discrete crimes committed in prior *Apprendi* cases, it is not a distinction that provides a workable rule or exception to *Apprendi* going forward.

Finally, the majority opinion also mentions the tempering nature of Oregon’s judicial fact-finding favorably. By making concurrent sentences the rule absent particular judicial findings, the Oregon state legislature flipped the common law’s presumption (or at least its prevailing practice) of rendering consecutive sentences.³⁶ The *Ice* majority argues that it “makes scant sense” to forbid making concurrent sentences the rule (and consecutive sentences the exception), when all agree that consecutive sentences could permissibly

³⁶ The dissent expresses concern that the judge’s deciding consecutive sentences in place of the jury changes the burden of proof from reasonable doubt to preponderance of the evidence. However, disallowing the Oregon regime would switch the burden of proof from the prosecution (arguing that certain facts favor the imposition of consecutive sentences despite the background presumption of concurrent sentences) to the defendant (arguing that certain facts favor the imposition of concurrent sentences despite the background presumption of consecutive sentences). Shifting the burden of proof to the defendant poses a greater problem than reducing the prosecution’s burden of proof from reasonable doubt to preponderance.

be the rule with judicial findings leading to concurrent sentences in exceptional cases.³⁷ Likewise, the Court said it “bears emphasis” that Oregon’s regime tempered judicial discretion to impose consecutive sentences, noting that limited judicial discretion promotes proportionate sentencing and reduces disparity in sentencing between similarly situated defendants.³⁸ The Court seems to imply that defendants fare better under a system like Oregon’s than they do in most other states. Even if that is true, it is not clear what constitutional significance the tempered nature of Oregon’s regime has. There is no rule of lenity in constitutional interpretation. Perhaps the Court means that the regime’s favoring defendants provides another factor suggesting that the jury function as a bulwark against the state is not compromised in this instance. Still, as Justice Scalia points out in his dissent, if Oregon’s regime truly favors defendants, then why did the National Association of Criminal Defense Lawyers file an amicus brief opposing that regime in this case?

C. *Why the Dissent’s Defense of Apprendi Falls Short*

Justice Scalia took issue with the departure of Justices Ginsburg and Stevens from the *Apprendi* fold and penned a forceful dissent rebuking the majority’s *Ice* capade. Joined by Chief Justice Roberts and Justices Souter and Thomas, Justice Scalia avers that the rule of *Apprendi* cannot properly be interpreted to support the majority’s position in *Oregon v. Ice*.³⁹ Furthermore, contrary to Justice Ginsburg’s reckoning, the dissent argues that the common law history of fact-finding about consecutive sentences is irrelevant, that the majority’s state sovereignty arguments were rejected in previous *Apprendi* cases, and that the discreteness point is a formalistic distinction without a difference.⁴⁰

Initially, the dissent contends that the decision in *Ice* does not follow from *Apprendi*, and that it is no different from subsequent cases like *Ring*, which held that post-verdict facts increasing punishment—specifically aggravating circumstances in a death penalty case—have to be found by the jury.⁴¹ It points out that consecutive

³⁷ *Ice*, 129 S. Ct. at 713.

³⁸ *Id.* at 719.

³⁹ *Id.* at 720 (Scalia, J., dissenting).

⁴⁰ *Id.* at 721.

⁴¹ *Id.* at 720.

sentences have long been understood as a greater punishment and that Oregon's regime permits judges to find facts that commit defendants to consecutive sentences longer than what the jury's verdict alone would permit.⁴² For the dissent then, *Ice* is an easy case because when the judge's separate factual findings are essential to the punishment imposed, the Sixth Amendment insists that the jury determine the facts instead: "If the doubling or tripling of a defendant's jail time through fact-dependent consecutive sentencing does not meet this description, nothing does."⁴³ As explicated above, however, the majority freely acknowledges that its ruling in *Ice* readjusts the rule of *Apprendi* somewhat. It does not refute the dissent's contention and in fact barely mentions the *Ring* case. For the dissent then to contend that the majority has redefined *Apprendi* merely states the obvious and does not address the altered rule's workability.

In fact though, had the majority wanted to distinguish *Ice* from cases like *Ring* under the existing *Apprendi* rule, it could have made a decent case. While it is true that the sentencing judges mulled statutory factors in both *Ice* and *Ring*, the tenor of fact-finding differs tremendously. Whereas the judge in *Ring* considered aggravating and mitigating factors not at issue in the guilt phase, the judge in *Ice* sought to figure out whether the guilty verdicts themselves covered any overlapping conduct (where consecutive sentences might entail excess punishment) or whether they covered distinct crimes (meriting consecutive sentences). In considering the statutory factors, the Oregon judge's sentencing role is not so much to increase punishment as it is to regulate the imposition of consecutive sentences to filter out the effects of any charge-stacking, be it intentional or inadvertent. A judge who is a repeat player in the criminal justice system stands a far better chance of fulfilling that role effectively than a one-off jury.⁴⁴

⁴² *Id.* at 720–21.

⁴³ *Id.* at 723.

⁴⁴ The dissent suggests that it is always okay for the judge to decide these things as long as the judge is decreasing punishment, but the Court would surely balk (for Eighth Amendment reasons if nothing else) at a background rule that set the death penalty as the default sentence for some crime but let the judge reduce that to life imprisonment or something less based on certain factual findings. Flipping the background rule to make consecutive sentences the default, as the dissent would have Oregon do, subtly changes the judge's role and would not be acceptable in a case like *Ring*.

Ice also differs from the sentencing enhancement cases in that the *Ice* jury controls the maximum sentence that may be imposed. The judge has no power to impose a total sentence beyond the sum of the maximum sentence for each of the jury's guilty verdicts, and that upper bound remains the same whether the judge decides with full discretion based on unstated reasons or according to legislatively prescribed factors. Finally, some of the *Ice* judge's fact-finding resembles that approved in *Almendarez-Torres* more closely than it does that disapproved in *Apprendi*.⁴⁵ The judge's main finding, which sufficed to impose the two burglary sentences consecutively, determined that the two burglaries represented "separate incidents" that did not arise from a continuous course of conduct.⁴⁶ That inquiry is almost identical to the recidivism inquiry regarding prior convictions the Court approved in *Almendarez-Torres*, except that it calls for the judge to look at the instant verdict as opposed to the verdict in a previously adjudicated matter. Had the majority sought to avoid directly confronting *Apprendi* in this fashion, the dissent's arguing that *Ice* does not follow from *Apprendi* would then have made more sense.

The dissent next dispenses with the majority's historical analysis, deeming the common-law practice "entirely irrelevant," because it "had no bearing upon whether the jury must find the fact where a law conditions the higher sentence upon the fact. The jury's role is diminished when the length of a sentence is made to depend upon a fact removed from its determination."⁴⁷ The dismissive treatment of historical consecutive sentencing practices seems odd coming from an ardent originalist like Justice Scalia. More importantly, the equation of the historical argument here with that in *Apprendi* elides

⁴⁵ At a minimum, the *Almendarez-Torres* precedent should encompass the fact of a defendant's incarceration, bail, or probation status during the commission of another crime. The Oregon statute at issue here states that sentences must run consecutively when a defendant is sentenced for a crime committed while defendant was incarcerated. A similar Tennessee statute requires sentencing terms to run consecutively if a defendant commits a crime while released on bail, see Tenn. Code Ann. § 40-20-111(b) (2006), or while on probation, see Tenn. Code Ann. § 40-35-115(b)(6) (2006). These statutes permit the judge to determine the fact of whether or not a defendant was incarcerated, released on bail, or on probation, but the dissent's rule in *Ice* would forbid even that.

⁴⁶ *Ice*, 129 S. Ct. at 715.

⁴⁷ *Id.* at 721 (Scalia, J., dissenting) (citing *Apprendi*, 530 U.S. at 482–83).

an important distinction. In the enhanced sentencing context, it is true that judicial fact-finding removes facts from the jury and diminishes its role. However, when legislatures condition consecutive sentences on certain judge-found facts, they are not diminishing the jury's role. Because juries apparently never had a role in deciding consecutive sentences, legislatures are not removing those facts from the jury's consideration. At most, legislatures are refusing to enhance the role of the jury beyond historical norms.

Because judge-determined consecutive sentences do not circumvent any traditional jury function, it is hard to see how they can possibly implicate the Sixth Amendment's right to a jury trial (at least on an original understanding of what that entailed). Although judicial fact-finding for consecutive sentences may well violate the *Apprendi* rule, it does so only because the bright-line rule that case established would forbid as unconstitutional a variety of judicial fact-finding that is not in fact defective—and hence the *Ice* case is really an artifact of the *Apprendi* rule's being stated too broadly. Besides which, the *Apprendi* rule does not protect the jury's role. Although the *Apprendi* five (and the *Ice* dissenters) voice concern for lost jury prerogatives, *Apprendi* invites discretionary judicial sentencing as its solution. Under a return to that regime, the jury would have no more of a role than it did pre-*Apprendi* (or has under *Ice*).⁴⁸

The dissent likewise rejects the majority's state sovereignty analysis primarily because prior dissents made similar arguments unsuccessfully. For example, Justice Scalia notes that the fear of bifurcated trials did not preclude the outcomes in *Apprendi* and *Blakely*.⁴⁹ He neglects to note, however, that just such a concern may well have influenced the *Booker* remedy that Justice Ginsburg joined. Of course the failure of state sovereignty arguments to carry the day earlier does not mean those arguments necessarily lacked any merit; other considerations supervened. Where a Sixth Amendment interpretation based on history dictates a different outcome in the consecutive sentencing context, the majority properly touts the virtue of respecting state sovereignty.

⁴⁸ See Ron Allen and Ethan Hastert, From *Winship* to *Apprendi* to *Booker*: Constitutional Command or Constitutional Blunder?, 58 Stan. L. Rev. 195, 200 (2005).

⁴⁹ *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting).

Finally, the dissent derides the majority's discreteness distinction as unduly formalistic (and as a "distinction without a difference"), because it applies *Apprendi* to the length of the sentence for each of a defendant's individual crimes but not to the total length of a defendant's jail term.⁵⁰ While the *Ice* decision does produce that formalistic result, the line *Apprendi* draws generates formalistic results too. For example, Justice Scalia and the dissenters would accept judicial fact-finding whenever it reduces a sentence found by the jury. So, in *Ice*, they would be perfectly fine with a background rule that mandates consecutive sentences unless the judge finds facts justifying a concurrent sentence. But in terms of results, that regime does not differ from Oregon's facially opposite rule (that mandates concurrent sentences unless the judge finds facts justifying a consecutive sentence). By insisting on one of these background rules over the other, the dissenters uphold no less formalistic a distinction than the *Ice* majority.

Moreover, all sides agree that a judge acting alone may impose a consecutive sentence without any additional overt fact-finding, but the dissenters would prohibit the legislature from specifying facts to consider explicitly before imposing such a sentence.⁵¹ That kind of forced concealment of judicial reasoning seems not only formalistic, but also antagonistic to the rule of law ideal of transparency. Put to a choice between two formalistic rules, the *Ice* majority's brand of formalism leaves traditional jury calls to the jury, leaves traditional judicial calls to the judges, and leaves state legislatures free to set the rules. Under the dissenters' brand of formalism, by contrast, "[n]o constitutional values are served . . . while its constitutional costs in statutes struck down . . . are real."⁵²

D. Harris Redux or New Line Drawing? Will Ice Matter?

Oregon v. Ice is the first case since *Harris v. United States* where the Supreme Court has declined an invitation to apply *Apprendi*.⁵³ At first blush, *Ice* might strike some observers as *Harris* redux—a failure of the Court to apply *Apprendi* in circumstances calling for

⁵⁰ *Id.* at 721 (Scalia, J., dissenting).

⁵¹ *Id.*

⁵² *Jones v. United States*, 526 U.S. 227, 267 (1999) (Kennedy, J., dissenting).

⁵³ *Harris v. United States*, 536 U.S. 545 (2002).

it due to the inexplicable defection of one or two of the *Apprendi* five.⁵⁴ Certainly the *Ice* dissenters regard it that way, much as the dissenting justices in *Harris* viewed that case as an aberration. Nothing indicates that Justices Ginsburg and Stevens have had a change of heart about *Apprendi*, however, and the defection of two justices—including the author of *Apprendi* himself—suggests that something more than idiosyncrasy is at work.⁵⁵ Ginsburg and Stevens have voted identically in every *Apprendi* case save the *Booker* remedy, and until this case they had voted in favor of applying *Apprendi* every single time.⁵⁶ If they do merely regard the consecutive-versus-concurrent sentence context as exceptional in some unique respect, then *Ice* could turn out to be inconsequential. Like *Harris*, it could then be followed by a succession of cases further extending *Apprendi*. If they instead believe that applying *Apprendi* to cover *Ice* would extend the rule to an entire category of cases they cannot accept, then *Ice* may well mark a new line that reconfigures the ambit of the *Apprendi* precedent going forward. Given the tenor of the arguments put forth in Justice Ginsburg's opinion, the latter result seems more likely.

Apart from the unconvincing effort to distinguish *Ice* from the other *Apprendi* cases on discreteness grounds, the majority does not appear to view the case as an outlier. Nor does the majority attempt to argue that *Apprendi* does not apply on its own terms to the facts of *Ice*. It does not, for example, suggest that a consecutive sentence represents no increase in punishment over a concurrent sentence. Nor does the *Ice* majority contain a vote merely concurring in the judgment—like Justice Breyer's in *Harris*—which rendered that opinion a plurality and called into question the logic it used to distinguish *Harris* from *Apprendi*. Nor does it make the “decent case” outlined above for distinguishing *Ice* from *Ring*.

Instead, precisely because a straightforward reading of the rule would seem to apply, the *Ice* majority evinces a wider concern with pushing the rule's logic too far. The Court declares that inserting the *Apprendi* rule into decisions about supervised release and the

⁵⁴ See Halbrook, *supra* note 10.

⁵⁵ *Cunningham*'s 6-3 vote to extend *Apprendi* became a 5-4 vote against extending *Apprendi* in *Ice* as a result of two switched votes.

⁵⁶ For example, Justices Ginsburg and Stevens voted together in the following 12 cases: *Almendarez-Torres*, *Jones*, *Apprendi*, *Ring*, *Harris*, *Blakely*, *Booker*, *Shepard*, *Cunningham*, *Rita*, *Gall*, and *Kimbrough*.

like “surely would cut the rule loose from its moorings.”⁵⁷ It then echoes Justice Kennedy’s prior criticism of a “wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.”⁵⁸ The Court concludes self-consciously that it is seeking a “principled rationale” that would confine the rule’s application to those “cases ‘within the central sphere of [the *Apprendi* cases]’ concern.”⁵⁹ Hence, apparently once Justices Ginsburg and Stevens discovered that a contrary result in *Ice* would extend *Apprendi*’s reach beyond their comfort, they reasoned back from that realization to find a more defensible specification of the rule. If so, then the *Ice* majority has drawn a line that marks a stopping point for the *Apprendi* precedent in a way that *Harris* did not. In thus retreating from applying the *Apprendi* rule to a novel context, Ginsburg and Stevens crossed over to form a new majority that now speaks the language of reining in—though not necessarily turning back—*Apprendi*. In other words, they have put *Apprendi* on ice.

Justices Ginsburg and Stevens encountered a line-drawing problem in applying the *Apprendi* rule to the facts of *Ice* because the circumstances of that case revealed that the originally specified rule could infringe upon well-established judicial fact-finding responsibilities. In the ongoing tug-of-war over what belongs in the jury’s province and what belongs in the judge’s, the *Apprendi* five generally have construed the right to a jury trial to require reserving more decisions to jurors. The *Apprendi* dissenters, on the other hand, have shown themselves willing to leave a great deal of decisionmaking to the judge and legislature. As *Apprendi*’s domain widens, it threatens to encroach on sentencing choices that typically have been left to judicial discretion and ones that are far removed from the original problem that motivated *Apprendi* itself. That issue finally came to a head in *Ice*.

That is, *Apprendi* redressed a problem that had grown up around sentencing guideline regimes, namely that legislatures and prosecutors were redefining elements of a crime—properly tried by juries—

⁵⁷ *Ice*, 129 S. Ct. at 719 (quoting *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting)).

⁵⁸ *Id.* (quoting *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting) (internal quotation marks omitted)).

⁵⁹ *Id.*

as sentencing factors for judges to consider. Removing such basic fact-finding from juries violated the accused's Sixth Amendment right to a jury trial. But that same problem does not manifest itself in *Ice*.⁶⁰ Unlike those cases where an element of the crime gets framed as a factor for the judge to consider in enhancing a defendant's sentence, requiring predicate judicial findings to order consecutive sentences does not enable the prosecution to circumvent the jury in any way. A guilty verdict on each separate offense already authorizes the full sentence imposed for each crime, and consecutive sentences probably accord with a lay jury's expectations in any event. Extending *Apprendi* to cover the facts of *Ice*, however, threatened to create an unprecedented right to jury sentencing—something from which Justice Ginsburg had already retreated in joining the *Booker* remedy.⁶¹ To solve the line-drawing dilemma in the end, Ginsburg's majority opinion had to rewrite the *Apprendi* rule to restrict its domain from entering traditional judicial fact-finding territory.

E. What's in Store for Apprendi in the Ice Age?

At the close of his dissent in *Ice*, Justice Scalia asserts, "Today's opinion muddies the waters, and gives cause to doubt whether the Court is willing to stand by *Apprendi*'s interpretation of the Sixth Amendment's jury-trial guarantee."⁶² If *Ice* indeed marks a redrawing of the *Apprendi* boundary, the question still remains just how broadly limiting on *Apprendi* the *Ice* precedent will prove. That question itself has three parts. First, is *Apprendi* itself now in jeopardy of being overruled? Second, are any other previous cases in the *Apprendi* line now in such jeopardy? Third and finally, are any future extensions of *Apprendi* now less likely? *Cunningham* showed Chief Justice Roberts to be an *Apprendi* acolyte whereas Chief Justice Rehnquist was a critic. Therefore—notwithstanding Justice Souter's retirement—there are still five votes for *Apprendi* among the current

⁶⁰ *Oregon v. Ice*, 170 P.3d 1049 (2007) (holding that no jury trial violation exists under the state constitutional guarantee, because the facts informing the concurrent/consecutive decision do not require adjudging the elements of any crime).

⁶¹ A jury trial has never meant that a jury decides every issue in the case. Judges, for example, have always made evidentiary rulings during the trial and charged the jury with its instructions for deliberation. Once the jury has found a defendant guilty as charged, judges also traditionally have enjoyed some measure of discretion in determining the appropriate sentence.

⁶² *Ice*, 129 S. Ct. at 723 (Scalia, J., dissenting).

justices and *Apprendi* itself should remain secure. Furthermore, Justices Ginsburg and Stevens give no indication of rethinking their core commitment to *Apprendi* itself. Instead, they expressed qualms about extending *Apprendi* further. So, despite Justice Scalia's concern for muddied waters, the rule in *Apprendi* does not appear to be in further jeopardy.

The same cannot be said for other cases in the *Apprendi* line. However, the two cases most likely to be overruled—*Harris* and *Almendarez-Torres*—would each represent extensions, not limitations, of *Apprendi*. *Harris*, the 2002 mandatory minimum case, is the single precedent that seems most at risk of being revisited. Justice Breyer concurred in the judgment only, so *Harris* was a plurality decision to begin with. The problem with *Harris* has become even more acute in a post-*Booker* world of restored judicial discretion because any prisoner sentenced at the bottom of the mandatory minimum (like *Harris* himself, who was raised from a five to a seven-year minimum) can argue more convincingly than ever that he would have received a lower sentence but for the mandatory minimum. Moreover, a judge's post-verdict factual findings can now raise the defendant's mandatory minimum to greater than before due to intervening statutory changes. The fact that a judge's findings are the sole determinant of a defendant's sentence being increased starkly from, say, 10 to 30 years, may ultimately persuade the Court to reconsider exempting mandatory minimum sentences from the *Apprendi* rule.⁶³

The fact that only two justices—Kennedy and Breyer—supported the outcome in both *Harris* and *Ice* further suggests the *Harris* precedent's vulnerability. Although Justice Alito could represent a third *Harris* supporter, at most one-third of the sitting Court supports both decisions. Nothing suggests the *Ice* majority is fragile, so any instability between the two decisions most likely will be resolved against maintaining *Harris*. Justices Stevens, Thomas, and Ginsburg (along with the departed Souter) dissented in *Harris*, so two more justices would suffice to overturn *Harris* and apply the *Apprendi* rule

⁶³ See, e.g., 18 U.S.C. § 924(c)(1)(B)(ii) (creating a mandatory minimum sentence of 30 years for possessing a firearm "equipped with a firearm silencer or firearm muffler" in furtherance of a federal crime of violence or drug trafficking crime).

to mandatory minimums.⁶⁴ Chief Justice Roberts's pro-*Apprendi* vote in *Cunningham* already promised that his might be the fifth vote to vindicate the *Harris* dissenters (assuming that his vote in *Harris* would have mirrored his position on *Apprendi*, as did every justice's save Scalia).⁶⁵ By virtue of his joining the *Ice* dissent, the Chief Justice's support for an extension of *Apprendi* to the mandatory minimum context seems even more likely.

The overturning of the 1998 *Almendarez-Torres* case is possible as well, though it seems somewhat less likely than it did before this term. Several commentators, including Cato's own Tim Lynch in a previous volume of this publication, have noted that a majority of the Court no longer supports the *Almendarez-Torres* exception to *Apprendi*, which permits a judge to find the fact of a prior conviction.⁶⁶ Justice Thomas has expressed regret in joining the *Almendarez-Torres* majority, so the assumption had been that his vote combined with the four dissenters in that case—Justices Stevens, Scalia, Souter, and Ginsburg—would flip the result.⁶⁷ Indeed, those five justices comprised the majority in *Shepard*, which limited the materials upon which a judge may rely in determining the fact of a prior conviction. The outcome in *Ice* and the departure of Justice Souter could mean that *Almendarez-Torres* is somewhat less imperiled now. At least it is not immediately apparent why the rule of *Apprendi* would forbid judges from finding the fact of a prior conviction now that *Ice* permits them to find facts to justify consecutive sentences. The Oregon statute, for example, requires judicial fact-finding that bears a striking resemblance to the fact-finding in which judges would engage to find a prior conviction—whether actions were part of the same course of conduct and whether the offense indicated a willingness to commit more than one crime.

⁶⁴ Overturning *Harris* would probably also result in overturning *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), upon which *Harris* largely relied.

⁶⁵ Justice Scalia's earlier vote in *Harris* is all the more inexplicable in light of his dissent in *Ice*, in which he criticizes Justices Ginsburg and Stevens for inconsistency. Oddly, his vote in *Harris* also came after he had joined Justice Thomas's *Apprendi* concurrence, which presaged the application of the *Apprendi* rule to mandatory minimum sentences.

⁶⁶ See Timothy Lynch, *One Cheer for United States v. Booker*, 2004–2005 Cato Sup. Ct. Rev. 232 n.97 (2005) (citing *Shepard v. United States*, 544 U.S. 13, 26–28 (2005) (Thomas, J., concurring in part and concurring in the judgment)).

⁶⁷ *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring).

Justice Souter's retirement could matter for both of these cases. Justice Sonia Sotomayor's district court experience could push her to guard the discretion of sentencing judges.⁶⁸ Conversely, as she has been notably hostile to mandatory minimums, she may support applying the *Apprendi* rule in that context and force the factors leading to the enhanced sentence to be tried to the jury—a possibility strengthened by the Second Circuit's robust extension of *Apprendi* in drug cases. Even if Justice Sotomayor would not support application of *Apprendi* across the board, which remains to be seen, her documented antipathy to mandatory minimums could mean that she would join an effort to reverse *Harris*.⁶⁹ Regarding Sotomayor's potential attitude toward *Almendarez-Torres*, she has interpreted its exception to *Apprendi* broadly⁷⁰ and has upheld its continuing validity against challenge—which could indicate less of a proclivity on her part to overrule *Almendarez-Torres* than Justice Souter had.⁷¹

In terms of future extensions of the *Apprendi* rule, a closer look at the logic underlying the four possible vote pairings in *Harris* and *Ice* reveals the implicit rule endorsed by each pairing and may suggest where the Court would come out on extending *Apprendi*. First, Justices Kennedy and Breyer (and perhaps Alito would have) extended *Apprendi* to neither *Harris* nor *Ice*, which suggests that they believe judges should enjoy discretion in determining punishment and would presumably oppose further *Apprendi* extensions generally. Justices Souter and Thomas (and possibly Chief Justice Roberts would have) extended *Apprendi* to both *Harris* and *Ice* because they appear to believe that both mandatory minimums and concurrent

⁶⁸ Justice Sotomayor is the first Supreme Court justice to have served as a federal district court judge in almost half a century, since Justice Charles Whittaker took senior status in 1962.

⁶⁹ See *United States v. Estrada*, 428 F.3d 387, 390 (2d Cir. 2005) (Sotomayor, J.) (noting that *Harris* “deprives the judge of sentencing discretion”).

⁷⁰ See *United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (Sotomayor, J.) (“In short, we read *Apprendi* as leaving to the judge, consistent with due process, the task of finding not only the mere fact of previous convictions but other related issues as well. Judges frequently must make factual determinations for sentencing, so it is hardly anomalous to require that they also determine the ‘who, what, when, and where’ of a prior conviction.”).

⁷¹ See *Estrada*, 428 F.3d at 391 (noting that we are “bound by the Supreme Court’s rulings in *Almendarez-Torres* and *Harris*”).

sentences represent increases in punishment, and that any such increase has to be a jury decision.

Justices Ginsburg and Stevens extended *Apprendi* to *Harris* but not to *Ice*. They appear to believe that the facts to be decided in the mandatory minimum context resemble facts that have traditionally been a jury function to decide—because they are effectively elements of a greater crime that must be charged subject to the constitutional requirements of indictment, jury trial, and proof beyond a reasonable doubt—but that juries have not traditionally considered facts that would determine imposition of a concurrent or consecutive sentence. They may tend to favor further extensions of *Apprendi* that neither bestow unprecedented fact-finding duties on jurors nor remove traditional fact-finding duties from judges. Finally, Justice Scalia extended *Apprendi* to *Ice* but not to *Harris* because he appears to believe that imposing a consecutive sentence represents an increase in punishment, whereas increasing a defendant's mandatory minimum sentence does not (at least where the new minimum was always within the available sentence). He may support extending *Apprendi* wherever he perceives an increase in the statutory *maximum* punishment faced by a defendant.⁷²

Putting together the implicit rules above, the circumstances under which the new *Apprendi* five (with the Chief Justice in place of Justice Souter) would coalesce become clear. Future extensions of *Apprendi* will most likely occur if the particular fact-finding at issue implicates an increase in the defendant's maximum punishment *and* extending *Apprendi* will not remove traditional judicial fact-finding responsibilities. While dicta in *Ice* call into doubt the permissibility of judge-found facts in the discrete crime context, the distinction offered between defendants who have committed discrete crimes and those who have committed multiple offenses seems unlikely to make a difference. In contrast, the majority's statement in *Ice* that "[t]rial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release" seems destined for further dispute.⁷³ The *Ice* dissenters

⁷² Justice Scalia was the silent swing vote in *Harris*, as he did not author an opinion, making it a bit difficult to discern exactly what separates *Harris* from *Ice* in his view.

⁷³ *Ice*, 129 S. Ct. at 719. To the extent that Justices Ginsburg and Stevens embraced an originalist jurisprudence in *Ice* out of any-port-in-a-storm expedience, the new rule ultimately may not suffice to protect some judicial determinations that they would wish to preserve for sheer policy reasons.

are likely to argue that the Sixth Amendment permits trial judges to find facts only when they are reducing a defendant's punishment, whereas the *Ice* majority may uphold as constitutional the prerogative of judges to make some factual findings that lengthen sentences, if the type of fact-finding has a sufficiently strong historical pedigree.

These predictions presume that the Court will hear additional cases with *Apprendi* implications. In dissenting from the summary reversal in *Spears v. United States* this term, however, Chief Justice Roberts, joined by Justice Alito, signaled reluctance to consider further cases in this line in the near future:

Apprendi, Booker, Rita, Gall, and Kimbrough have given the lower courts a good deal to digest over a relatively short period. We should give them some time to address the nuances of these precedents before adding new ones. As has been said, a plant cannot grow if you constantly yank it out of the ground to see if the roots are healthy.⁷⁴

If this sentiment means that Roberts and Alito will not provide certiorari votes for *Apprendi* cases, then this line of precedent may be frozen in place for the time being.

F. A Liberal Originalist Result

Aside from the ruling itself, several other aspects of *Ice* merit brief attention. As has been true all along with *Apprendi* cases, the justices' votes did not break along predictable ideological lines, but here their votes also lined up oddly given past breakdowns in these cases. Even though the *Apprendi* coalition ruptured—along with its formalist/pragmatist split—the Court still produced a clean, non-ideological division (with no concurrences) that fractured both the conservative and liberal wings. Justices Kennedy and Alito joined Justices Ginsburg, Stevens, and Breyer in a predominantly liberal majority, just as Justice Souter joined Chief Justice Roberts, Justice Scalia, and Justice Thomas in a predominantly conservative dissent.

Thus Chief Justice Roberts and Justice Alito found themselves on opposite sides of an *Apprendi* case once again. While the Chief Justice has replaced his predecessor's staunch anti-*Apprendi* presence with a supporting voice, Justice Alito has replicated Justice O'Connor's

⁷⁴ *Spears v. United States*, 129 S. Ct. 840, 846 (2008) (Roberts, C.J., dissenting).

longstanding skepticism towards this line of precedent. *Ice* is also the fourth *Apprendi* case in a row (following *Rita*, *Gall*, and *Kimbrough*) where Justices Ginsburg and Stevens have joined Justices Kennedy and Breyer in the majority. That may just be an odd coincidence rather than a trend, however, because the previous three lopsided cases also found Justice Scalia in the majority.

Ironically, given who dissented, the reasoning and result in *Oregon v. Ice* continue to renovate Sixth Amendment jurisprudence along originalist lines. Although faithful application of the *Apprendi* rule probably would have led to a different result in *Ice*, the historical lack of jury involvement in consecutive sentencing suggests that the Sixth Amendment Framers would not have envisioned the right to a jury trial to include jury input on this matter. Justice Scalia's dissent deems the common-law practice irrelevant to modern statutes that condition higher sentences upon judicial fact-finding. But since the jury traditionally did not have a role in determining the appropriateness of concurrent or consecutive sentences, the jury's role is not diminished under Oregon's scheme; nothing is taken away from the jury that belonged to it at the time of the Framing. That seems like logic that originalists ought to accept readily, but Justice Scalia and his fellow dissenters will have none of it. Even so, the future evolution of *Apprendi* jurisprudence, now more than ever, appears bound up tightly with the kinds of post-verdict judicial fact-finding that have the strongest traditional foundation.

II. *Crawford* with a Vengeance: Expanding the Right to Confront Witnesses

A. *From Crawford v. Washington to Melendez-Diaz v. Massachusetts*

Like *Apprendi*, the 2004 *Crawford v. Washington* case portended a sea change in Sixth Amendment jurisprudence that also left many unsettled questions.⁷⁵ With *Crawford*, the Rehnquist Court discarded a longstanding (and seemingly settled) interpretive approach to the Confrontation Clause, first articulated in *Ohio v. Roberts*,⁷⁶ which balanced the right to confront witnesses against the reliability of the proffered evidence. The Court eschewed applying the *Roberts*

⁷⁵ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁷⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

precedent because that case's approach ignored the Confrontation Clause's original meaning as a "procedural, rather than a substantive, guarantee" of the reliability of evidence.⁷⁷ The less stringent prior approach allowed hearsay evidence to be admitted if it either fell within a "firmly rooted hearsay exception" or else bore "particularized guarantees of trustworthiness."⁷⁸ The *Crawford* Court instead held that the Confrontation Clause operates as a "categorical constitutional guarante[e]" that always precludes judges from admitting testimonial evidence by unavailable witnesses unless a previous opportunity for cross-examination existed.⁷⁹ The *Crawford* majority canvassed the long history of English and American common law and provided a Cook's tour of the origin of the right to confront one's accusers, as well as its status at the time of the Sixth Amendment's ratification. The Court gleaned two constitutional principles from its historical review. First, it deemed that the Confrontation Clause is chiefly "concerned with testimonial hearsay."⁸⁰ Second, it determined that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."⁸¹ Based on these principles, the Court held, "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."⁸²

The *Crawford* Court did not offer a comprehensive definition of "testimonial statements," and subsequent cases have not shed much, if any, further light on the meaning of the term. In *Davis v. Washington*, the Court unanimously held that admitting the transcript of a 911 call involving a domestic disturbance did not violate the Confrontation Clause because the statements made to the dispatcher were not testimonial.⁸³ In the companion case of *Hammon v. Indiana*, however, the Court ruled 8-1 that admitting a victim's statement to

⁷⁷ *Crawford*, 541 U.S. at 61.

⁷⁸ *Roberts*, 448 U.S. at 66.

⁷⁹ *Crawford*, 541 U.S. at 67.

⁸⁰ *Id.* at 53.

⁸¹ *Id.* at 54.

⁸² *Id.* at 68–69.

⁸³ *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813 (2006).

police in the immediate aftermath of an otherwise similar domestic disturbance did violate the Confrontation Clause.⁸⁴ Like the formal statement given to police by the victim in *Crawford*, the Court reasoned that the victim in *Hammon* provided her statement to police under circumstances suggesting that the information would be used in a court case. Hence, by the time the Court agreed to hear *Melendez-Diaz v. Massachusetts*, it had already passed on a few opportunities in lopsided rulings to clarify the meaning of the term “testimonial statement.” *Melendez-Diaz* raised the precise issue of whether a particular kind of statement—a sworn affidavit by a crime lab technician—constitutes a testimonial statement, so it seemingly afforded the Court the perfect occasion to define the term in the context of a closer question.⁸⁵ The Court’s decision did not live up to those expectations, instead offering the rationale that the statement at issue fell squarely within the class of testimonial statements described in *Crawford*.⁸⁶ But by holding that *Crawford*’s rule applies even to lab tests done on drug evidence, the *Melendez-Diaz* decision confirmed *Crawford*’s revolutionary import as another complete originalist renovation of a Sixth Amendment right. Indeed, one defense attorney characterized the ruling as “the biggest case for the defense since *Miranda*.”⁸⁷

B. *The Melendez-Diaz Majority’s Reasoning*

Police officers arrested Luis Melendez-Diaz following a surveillance operation in a Kmart parking lot that began in response to an informant’s tip regarding a store employee’s suspicious behavior. Officers observed the employee leave the store during his shift, get into a car with Melendez-Diaz and another man, drive away briefly, and then get dropped off back at the store. An officer who detained and searched the employee discovered four clear plastic bags on the employee’s person containing a white substance that appeared to be cocaine. Officers then arrested the employee and the two occupants of the car and drove all three men back to the police station together. A search of the police cruiser following the trip turned up

⁸⁴ *Id.*

⁸⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. ____, 129 S. Ct. 2527 (2009).

⁸⁶ *Id.* at 2532.

⁸⁷ Tom Jackman, Lab Analyst Decision Complicates Prosecutions, *Washington Post*, July 15, 2009, at A1.

a hidden plastic bag containing smaller plastic bags also filled with a white powdery substance. Police sent all of the bags to a state laboratory for chemical analysis. When prosecutors sought to introduce certificates of analysis from the laboratory reporting the weight and identity of the substance in the plastic bags at Melendez-Diaz's trial for cocaine distribution and trafficking, he objected on the ground that *Crawford's* interpretation of the Confrontation Clause required in-court testimony by the lab analysts. The trial court overruled that objection and admitted the certificates. The jury found Melendez-Diaz guilty, and he appealed. The intermediate appellate court in Massachusetts denied the claim, and the highest court there declined review.

The question framed for the U.S. Supreme Court asked whether the trial court should have construed the certificates of analysis as "testimonial" affidavits under *Crawford*, and, if so, whether admitting the certificates into evidence violated Melendez-Diaz's Sixth Amendment right to confront the witnesses against him.⁸⁸ The majority not only answers yes to both of these questions, but it treats the answers as manifestly obvious rather than borderline calls, downplaying the significance of the case and calling the decision a "rather straightforward application of our holding in *Crawford*."⁸⁹ True to its word, the majority reaches its conclusion in a mere five paragraphs—the same amount of space it devotes to laying out the facts in the case. The remainder of the opinion refutes arguments advanced by the dissent and respondent. For the longest-held case of the term⁹⁰—it was argued on November 10, 2008, and not decided until June 25, 2009—the brevity of the majority's affirmative argument is surprising, particularly in a 5-4 decision where the fifth justice based his vote on a different and narrower rationale, discussed in further detail in the next section.

⁸⁸ Melendez-Diaz, 129 S. Ct. at 2530.

⁸⁹ *Id.* at 2533. The Court also said the decision "involves little more than the application of our holding in *Crawford*." *Id.* at 2542.

⁹⁰ The *Citizens United* campaign finance case, which was initially argued on March 24 and set for re-argument on September 9, 2009, could surpass it. *Citizens United v. Federal Election Commission*, 2008 U.S. Dist. WL 2788753 (D.D.C. July 18, 2008), appellate jurisdiction noted, 129 S. Ct. 594 (2008), reargument scheduled, 2009 WL 1841614 (U.S. June 29, 2009) (No. 08-205).

The Court provides a rationale as simple as it is brief: (1) *Crawford* held affidavits to be testimonial statements; (2) the certificates of analysis at issue are the functional equivalent of affidavits; and hence (3) the analysts who swore the affidavits are witnesses whom Melendez-Diaz has the right to confront under the Confrontation Clause (absent a showing of unavailability and a prior opportunity for cross-examination). Following *Crawford*'s originalist methodology, the Court initially relies on Noah Webster's 1828 definition of a witness as one who "bear[s] testimony" to read the term "witnesses" in the Confrontation Clause to cover all testimonial statements.⁹¹ The Court then asserts that *Crawford*'s description of the class of testimonial statements "mention[ed] affidavits twice."⁹² The Court deems the analysts' certificates to be affidavits because they meet the definition of sworn declarations in proof of some fact. They are also testimonial because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."⁹³ Finally, the face of the certificates themselves specified their evidentiary purpose, so the analysts must have been aware that their certificates would be used in criminal trials.⁹⁴

Although Justice Scalia's majority opinion thus rests heavily on the assumption that *Crawford* already settled the question of whether affidavits are testimonial statements, *Crawford* did no such thing. In mentioning affidavits twice, the *Crawford* Court merely collected—without endorsing—various possible formulations of the class of testimonial statements. It quoted one definition proposed in *Crawford*'s own brief, another proposed in the amicus brief filed by the National Association of Criminal Defense Lawyers, and some language put forth by Justice Thomas in his concurrence in *White v. Illinois*.⁹⁵ At the conclusion of the opinion, the *Crawford* Court explicitly left open the question of the meaning of testimonial, leaving "for another day

⁹¹ Melendez-Diaz, 129 S. Ct. at 2531 (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

⁹² *Id.* at 2532.

⁹³ *Id.* at 2531 (quoting *Crawford*, 541 U.S. at 51–52).

⁹⁴ *Id.* at 2532.

⁹⁵ *Crawford*, 541 U.S. at 51–52 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

any effort to spell out a comprehensive definition."⁹⁶ It offered only the limited holding that the term "testimonial" applies at least "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."⁹⁷ That reduced list notably excluded affidavits. So to now characterize *Crawford* as having determined that affidavits are testimonial is not accurate. None of which means that affidavits are *not* testimonial, but the majority's failure to grapple fully with the question renders a key justification for its holding in *Melendez-Diaz* incomplete.

C. Hammon's *Renewed Relevance: Why Justice Thomas's Concurrence Matters*

Justice Thomas provides the *Melendez-Diaz* majority its fifth vote, but he also writes a separate concurrence reiterating his own distinct perspective on the Confrontation Clause, which he has espoused consistently since his first term on the Court.⁹⁸ In his view, the clause does not extend to all testimonial statements, as the rest of the majority would have it. Instead, the clause extends only to formal testimonial statements "such as affidavits, depositions, prior testimony, or confessions"⁹⁹ (as well as any other testimonial statements contrived to avoid the demands of confrontation), because those were the kinds of statements that the Framers had in mind when instantiating the common-law right of confrontation. Because certificates of analysis meet the more stringent test of formal testimonial statements (because they are effectively sworn affidavits), Thomas shares the majority's view that admitting them violated *Melendez-Diaz*'s right to confront the witnesses against him.

As his lone dissenting vote in *Hammon v. Indiana* indicates, however, Justice Thomas's view will not always generate the same outcome as Justice Scalia's for the *Melendez-Diaz* majority.¹⁰⁰ Given the

⁹⁶ *Crawford*, 541 U.S. at 68.

⁹⁷ *Id.*

⁹⁸ See *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment).

⁹⁹ *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (quoting his own concurrence in *White*, 502 U.S. at 365).

¹⁰⁰ Given all the criticism Justice Thomas receives when a lone vote of his comes against, say, an abused prisoner, it should be noted that this lone vote came in defense of a victim of domestic violence. Whereas the other eight justices would exclude Amy Hammon's informal statements to police investigating a domestic disturbance report—statements that helped convict her attacker—Justice Thomas's more limited rule would have admitted her statements into evidence. The Court noted the possibil-

narrowness of that 5-4 majority, what may have appeared to be an idiosyncratic view holding little future practical import in *Hammon*, now becomes crucial for determining the course of Confrontation Clause jurisprudence. Nor is *Hammon* the only case where Justice Thomas's perspective makes a difference. For example, *White v. Illinois*, which dealt with a child victim whose statements to an investigating police officer were admitted as spontaneous declarations, would be affected. Although the Court in that case did not consider whether the statements had to be excluded even if the witness was unavailable, the *Crawford* rule would clearly exclude the statements as testimonial. *White* thus belies Justice Scalia's assertion that the *Crawford* test "is an empirically accurate explanation of the results our cases have reached."¹⁰¹ Justice Thomas's narrower rule, however, would not find a Sixth Amendment problem with admitting the child's informal statements to police because, like the statements in *Hammon*, they did not rise to the necessary level of formality.

To fully understand Thomas's position, his overlooked opinion concurring in the judgment in *Davis v. Washington*, but dissenting from the outcome in *Hammon*, merits renewed attention. In that partial dissent, Justice Thomas asserted that the *Hammon* Court should not have interpreted *Crawford* to treat informal statements made to police as testimonial statements, because such statements did not rise to the level of formality required for being deemed testimonial.¹⁰² Because the *Crawford* Court construed the term "witnesses" to include those who "bear testimony" based on Noah Webster's definition, Thomas reasoned that the Court must further accept Webster's definition of testimony as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."¹⁰³

ity of equitable forfeiture of the confrontation right on remand if the state could prove that Mr. Hammon secured Mrs. Hammon's absence from the courtroom. *Davis v. Washington*, 547 U.S. 813, 833 (2006). But the Court later circumscribed the forfeiture doctrine. *Giles v. California*, 554 U.S. ____, 128 S. Ct. 2678 (2008) (holding that forfeiture exception applies only if the defendant acts with the specific intention to make the witness unavailable to testify).

¹⁰¹ *Crawford*, 541 U.S. at 59 n.9.

¹⁰² Because the *Davis* and *Hammon* cases were heard together, the case cites here are to *Davis*. However, I will refer to *Hammon* in the text of the article for reasons of clarity.

¹⁰³ *Davis*, 547 U.S. at 836 (Thomas, J., concurring in judgment in part and dissenting in part) (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828) (internal quotation marks omitted)).

Doing so limits the class of testimonial statements to those made with a certain degree of solemnity, which Thomas argued was lacking with regard to the victim's original statement to the police. In addition to Webster's definition, Thomas based his interpretation of the original meaning of the Confrontation Clause on his belief that the Framers of the Sixth Amendment meant to protect criminal defendants from the abuses of the Marian bail and committal statutes, not from all testimonial hearsay:

The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."¹⁰⁴

On this view, admitting informal statements when there's no evidence of prosecutorial efforts to evade confrontation would not violate the Sixth Amendment. The *Crawford* Court expressed concern that prosecutors could evade the strictures of the Confrontation Clause if its scope were limited to formalized testimonial statements, but Justice Thomas argued in his *Hammon* dissent that courts could admit "evidence offered by the prosecution in good faith" and legitimately invoke the Confrontation Clause to prohibit any prosecutorial attempts to "circumvent[] the literal right of confrontation."¹⁰⁵

The *Hammon* majority held that admitting a victim's statements given when the police responded to a domestic disturbance report violated the Confrontation Clause. Justice Thomas accepted—as did the parties—that Amy Hammon's affidavit could not be admitted into evidence unless she were unavailable to testify at trial and the defendant had a prior opportunity to cross-examine her. Applying his solemnity criteria, however, Thomas argued that Mrs. Hammon's informal police statement, given when they initially responded to the domestic violence incident, could be admitted because it did not rise to the formal testimonial level. The police questioning was not a "formalized dialogue," and bore no marks of a Marian examination

¹⁰⁴ *Id.* at 835 (quoting *Crawford*, 541 U.S. at 43, 50).

¹⁰⁵ *Davis*, 547 U.S. at 838 (Thomas, J.) (concurring in judgment in part and dissenting in part).

because “the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality.”¹⁰⁶ By excluding the statement as evidence against Mr. Hammon, Thomas argued that the Court “extend[ed] the Confrontation Clause far beyond the abuses it was intended to prevent.”¹⁰⁷ All of this matters not for *Melendez-Diaz* itself, which majority Justice Thomas joined, but it could alter the outcome in future cases because it indicates that only four justices adhere to a construction of *Crawford* as broad as that offered in Justice Scalia’s *Melendez-Diaz* majority opinion. Future litigants would thus be well advised to take Justice Thomas’s position into consideration.

D. Justice Kennedy’s Dissent and Three Versions of Originalism

Justice Kennedy, who voted with the *Crawford* majority, sharply dissented in *Melendez-Diaz*, joined by the Chief Justice and Justices Breyer and Alito. Although pragmatist in its tenor, Kennedy’s lengthy and detailed dissent follows an originalist methodology in attempting to debunk the majority’s reasoning. About half of his critiques comprise pragmatic concerns with the effects the Court’s decision will produce, but the other half of his points attack the majority’s argument on originalist grounds. Kennedy himself admits that the numerous practical considerations he mentions “would be of no moment if the Constitution did, in fact, require the Court to rule as it does.”¹⁰⁸ Contrary to Justice Scalia’s reckoning, the dissent argues that the Sixth Amendment does not focus on “testimonial” evidence, that the rule of *Melendez-Diaz* ignores the purpose of the Confrontation Clause, and that the historical record is too meager (and conflicted) to support the majority’s speculation that the Sixth Amendment would exclude lab analysts’ affidavits absent their in-person testimony or the defendant’s waiver of his right “to be confronted with the witnesses against him.”¹⁰⁹ Despite the originalist objections lodged and pragmatic concerns detailed in Justice Kennedy’s forceful dissent, the *Melendez-Diaz* majority’s *result* may be right, even though its *rule* may be overly broad.

¹⁰⁶ *Id.* at 840.

¹⁰⁷ *Id.*

¹⁰⁸ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2550 (2009) (Kennedy, J., dissenting).

¹⁰⁹ U.S. Const. amend. VI.

Justice Kennedy chiefly argues along originalist lines that the word “testimonial” does not appear in the Sixth Amendment. Whereas Justices Scalia and Thomas extrapolate from a near contemporaneous definition of “witness” to find a right to confront certain kinds of testimony, Justice Kennedy contends that “[t]he Clause does not refer to kinds of statements The text, instead, refers to kinds of persons, namely, to ‘witnesses against’ the defendant.”¹¹⁰ Hence, he would confine the Confrontation Clause to witnesses with personal knowledge of the defendant’s guilt or innocence. The statements at issue in the *Crawford* and *Davis* cases came from just this kind of conventional witness. Kennedy argues that *Melendez-Diaz* significantly expands the *Crawford* holding and upbraids the majority for “assum[ing], with little analysis, that *Crawford* and *Davis* extended the Clause to any person who makes a ‘testimonial’ statement.”¹¹¹ In fact, earlier cases did not hold and could not have held that every testimonial statement that lacks corresponding in-person testimony must be excluded, because the issue was not presented in them.

Justice Kennedy provides three reasons to treat conventional witnesses differently from the kind of witness represented by the lab analysts. First, he notes that conventional witnesses have to recall events they may have seen but once and may have misperceived. Lab analysts, in contrast, simply record the result of a test and do not have to rely on their memory.¹¹² Second, he argues that a lab analyst is not a witness “against” the defendant, because an analyst does not “observe[] . . . the crime, . . . know the defendant’s identity, . . . [or] have personal knowledge of an aspect of the defendant’s guilt.”¹¹³ Finally, Justice Kennedy points out that conventional witnesses give answers in response to official interrogation, whereas lab tests follow “scientific protocols . . . [that] are not dependent upon or controlled by interrogation of any sort.”¹¹⁴ The majority objects that the analyst certificates were prepared some time after the tests themselves, that witnesses testify either for or against a defendant and so cannot be neutral, that some lab analysts falsify

¹¹⁰ *Melendez-Diaz*, 129 S. Ct. at 2550 (Kennedy, J., dissenting).

¹¹¹ *Id.* at 2552.

¹¹² *Id.* at 2551–52.

¹¹³ *Id.* at 2552.

¹¹⁴ *Id.*

tests, and that officials sometimes try to influence lab results.¹¹⁵ But whether or not each of the differences Kennedy posits withstands scrutiny, he identifies a difference in kind between eyewitnesses and other kinds of witnesses (e.g., character witnesses, expert witnesses).¹¹⁶

Perhaps the best way to see Justice Kennedy's point is to consider the Constitution's Treason Clause: "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."¹¹⁷ A few things jump out from reading this clause in the context of Sixth Amendment analysis. First, the Framers could use the word "Testimony" when they meant testimony—no extrapolation required. Second, the term "Witnesses" is used here to refer to personal knowledge gleaned through direct observation of a particular act by the accused, consistent with the way that Kennedy defines the term. Third, a lab analyst's testimony would not suffice as one of the two witnesses referred to in this clause because an analyst does not witness human action. Finally, the Framers could insist on certain kinds of testimony taking place "in open Court" when they explicitly meant that. Whether that phrase applies just to the (traitor's own) confession or also to the testimony of the two witnesses, no similar requirement exists in the Sixth Amendment. These points call into question the *Melendez-Diaz* rule's broad formulation that anyone who makes a testimonial statement is a witness—unless the word "witnesses" has different meanings in Article III and the Sixth Amendment. But because the Sixth Amendment was ratified soon after the main articles, it seems proper to assume that its words have the same meaning as those used in the main document. If so, then the Treason Clause lends credence to Justice Kennedy's definition of "witnesses."

¹¹⁵ *Id.* at 2536 (majority opinion).

¹¹⁶ The use of the term "witnesses" in the Compulsory Process Clause raises questions similar to those discussed below regarding the Treason Clause. It would not be reasonable to limit a defendant's right to compulsory process to just those witnesses who have given testimonial statements to the police. This fact calls into question a definition of "witnesses" extrapolated to mean testimonial statements and further reinforces Justice Kennedy's point that the term refers to kinds of people, not kinds of statements.

¹¹⁷ U.S. Const. art. III, § 3.

To further buttress his interpretation, Justice Kennedy argues that the majority's rule ignores the Confrontation Clause's purpose. In his view, confrontation impresses the gravity of the testimony on the witness and prevents one-sided or high-pressure questioning—and it provides an opportunity for recantation. Because a lab analyst does not have personal knowledge and may not even remember conducting a particular test, Kennedy asserts that analysts will be unlikely to retract. Worse yet, he argues, where “the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing.”¹¹⁸ The majority persuasively counters that lab analysts may be less likely to fudge results if they have to testify about them, but that may be more a fortuitous result of the majority's interpretation than part of the Confrontation Clause's original purpose. And it is an open question whether the gain in test reliability would be offset by guilty defendants going free due to innocent problems with the availability of analysts to testify.

Next, Justice Kennedy makes an historical argument, analogizing the lab analyst with the role of the Framing-Era functionary known as a copyist. Copyists made copies for use at trial of records that could not be removed from state archives, and they frequently swore affidavits attesting to the accuracy of the item copied. When early American courts allowed copyists' affidavits in criminal trials, which they did regularly, they admitted out-of-court statements, prepared for prosecutorial purposes, for the truth of the matter asserted—precisely what the Court rules illegitimate in *Melendez-Diaz*. To the extent any history supports one reading of the Confrontation Clause over another when it comes to lab analysts, Kennedy suggests that the example of copyists supports his account.¹¹⁹ The majority dismisses the copyist as a person with “narrowly circumscribed”¹²⁰ authority, but that hardly explains how the role of modern lab analysts' affidavits differs from that of copyists' affidavits in criminal trials for Sixth Amendment purposes—particularly as regards those analysts whose results require little interpretation.

Justices Scalia, Thomas, and Kennedy strive to determine the original meaning of the Confrontation Clause, more specifically the word

¹¹⁸ *Melendez-Diaz*, 129 S. Ct. at 2549 (Kennedy, J., dissenting).

¹¹⁹ *Id.* at 2553 (Kennedy, J., dissenting).

¹²⁰ *Id.* at 2539 (majority opinion).

“witnesses,” but arrive at differing conclusions. Scalia’s version of originalism in *Melendez-Diaz* is bolder than the others. In his determination to get it right and avoid confusion, however, he downplays contrary historical evidence, serious practical concerns, and the amount of existing authority his rule will overrun. Thomas’s variety of originalism sticks closer to the historical record. While he does not hesitate to overturn erroneous precedent where he feels that fidelity to original meaning requires it, he substantially limits the potential scope of such overrulings. He seeks the most established historical ground and extrapolates less readily while still setting forth a clear definition. Kennedy’s brand of originalism is humbler. Where *stare decisis* and strong practical considerations weigh against departing too far from existing practice, he looks to vindicate original meaning more tentatively. Without a compelling basis for concluding that original meaning runs contrary to existing precedent, he will not abandon potentially flawed case law where doing so risks creating practical difficulties. Kennedy does not want to throw originalism overboard, but he does not want to go overboard with originalism either.

Although the majority no doubt intends to be pursuing the original meaning of the Confrontation Clause, it devises a hard and fast rule that may not actually comport with the Framers’ meaning. The dissent overstates matters slightly in saying that “[t]he only authority on which the Court can rely is its own speculation on the meaning of the word ‘testimonial,’” but the question remains whether the Confrontation Clause uses the term “witnesses” in a sense closer to Justice Scalia’s, Justice Thomas’s, or Justice Kennedy’s.¹²¹ The *Melendez-Diaz* Court’s rule may well exceed the reasonable limit of what constitutional principle can be inferred from the text and supported by the limited historical record available here to determine original meaning.

E. What Impact Will Justice Souter’s Departure and Briscoe v. Virginia Have?

The *Crawford* Court abandoned the *Roberts* precedent because it found that test to be “inherently, and therefore permanently, unpredictable.”¹²² Justice Thomas worried, in his *Hammon* dissent, that the

¹²¹ *Id.* at 2555 (Kennedy, J., dissenting).

¹²² *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004).

Court had adopted “an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations.”¹²³ Now, in *Melendez-Diaz*, the dissent expresses concern that “a wooden application of the *Crawford* and *Davis* definition of ‘testimonial,’” provides “no way to predict the future applications of today’s holding. . . . There is nothing predictable here . . . other than the uncertainty and disruption that now must ensue.”¹²⁴ The collective concern of a majority of the Court over the unpredictability of the *Crawford/Davis/Melendez-Diaz* line of precedent—and the unwillingness or inability of the Court thus far to articulate a comprehensive definition of testimonial statements—raises the question whether the Court has replaced *Roberts’* rule of order with *Crawford’s* ukase of chaos.

In addition to the mounting skepticism from a majority of justices, two other factors suggest that *Melendez-Diaz* may have a short shelf life. First, the Court granted certiorari in *Briscoe v. Virginia* less than a week after handing down *Melendez-Diaz*.¹²⁵ Second, Justice Souter stepped down from the Court, and he had voted with the majority in every case in the *Crawford* line. *Briscoe* presents the following question: “If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?”¹²⁶ The Court noted in *Melendez-Diaz* that it had “no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the simplest form [of] notice-and-demand statutes, is constitutional.”¹²⁷ The simplest such statute, unlike Virginia’s, merely (1) requires the state to notify the defendant of any plans to

¹²³ *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in judgment in part and dissenting in part).

¹²⁴ *Melendez-Diaz*, 129 S. Ct. at 2547 (Kennedy, J., dissenting).

¹²⁵ *Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008), cert. granted sub nom., *Briscoe v. Virginia*, 2009 WL 1841615 (U.S. June 29, 2009) (No. 07-11191).

¹²⁶ Petition for a Writ of Certiorari at i, *Briscoe v. Virginia*, 07-11191 (U.S. May 29, 2008), 2008 WL 6485425, at *i.

¹²⁷ *Melendez-Diaz*, 129 S. Ct. at 2541 n.12 (internal quotation marks and citation omitted).

introduce an analyst's report into evidence and (2) provides the defendant time in which he must object to the report's admission sans analyst or else forfeit the right. If the Court approves Virginia's notice-and-demand regime, under which defendants have a confrontation right to call the analyst as a defense witness but cannot force the prosecution to introduce the analyst's live testimony as part of the prosecution's case-in-chief, then the apparent breadth of *Melendez-Diaz* will be reduced and practical concerns muted. More than one commentator has observed that it is somewhat unusual for the Court to reconsider a decision the very next term, but "there is little else to suggest" why the Court took on *Briscoe* so soon after deciding *Melendez-Diaz*.¹²⁸

If the *Briscoe* Court reads the *Melendez-Diaz* decision as straightforwardly as the *Melendez-Diaz* Court reads the *Crawford* decision, however, then it will not uphold Virginia's statute. The *Melendez-Diaz* majority explicitly rejects Massachusetts's argument that the defendant's ability to subpoena lab analysts precluded any Confrontation Clause violation. "[T]hat power . . . is no substitute for the right of confrontation," because it "shifts the consequences of adverse-witness no-shows from the State to the accused."¹²⁹ Moreover, the Court reads the Confrontation Clause to "impose[] a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."¹³⁰ It bases this interpretation on a contrast in wording between the Confrontation Clause and the Compulsory Process Clause.¹³¹ An accused enjoys a right under the latter "to have compulsory process for obtaining witnesses in his favor," but an accused has a right under the former "to be confronted with the witnesses against him."¹³²

While not mandatory, it is reasonable for the Court to read the juxtaposed clauses to require no action on the part of a defendant to secure his confrontation right other than raising an objection. If *Briscoe* confirms that result, it would resurrect all of the practical

¹²⁸ Lyle Denniston, Analysis: Is Melendez-Diaz already endangered?, SCOTUSblog, June 29, 2009, <http://www.scotusblog.com/wp/new-lab-report-case-granted/>.

¹²⁹ *Melendez-Diaz*, 129 S. Ct. at 2540.

¹³⁰ *Id.*

¹³¹ *Id.* at 2533–34.

¹³² U.S. Const. amend. VI.

concerns voiced in Justice Kennedy's *Melendez-Diaz* dissent (e.g., enormous financial and logistical costs, guilty defendants going free due to analyst no-shows, defense counsel extracting large concessions in exchange for surrendering the confrontation right). Of course whether Kennedy's menagerie of misfortunes will actually befall a post-*Melendez-Diaz* criminal justice system remains to be seen. If the dire consequences predicted do not materialize during the ensuing months, their lack could even embolden the *Briscoe* Court to preserve the full scope of *Melendez-Diaz*.

Justice Sotomayor's vote probably represents the largest single variable in determining what the Court will decide in *Briscoe*. She did not reveal any definite views about the proper scope of the Confrontation Clause during her confirmation hearing when Senator Amy Klobuchar asked about *Melendez-Diaz*.¹³³ However, in a post-*Crawford* opinion Judge Sotomayor authored in the Second Circuit, *United States v. Saget*, she interpreted *Crawford* as "at least suggest[ing] that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."¹³⁴ The *Saget* case, as Sotomayor recognized, did not require any exposition of *Crawford*'s efforts to define testimonial statements because its fact pattern fell squarely within an example of non-testimonial evidence cited approvingly by the *Crawford* Court.¹³⁵ Nevertheless, Judge Sotomayor predicted, "[T]he [Supreme] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony."¹³⁶ Such a broad and open-ended gloss on *Crawford*'s definition of testimonial statements—in dicta—suggests that

¹³³ Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court before the S. Comm. on the Judiciary, 111th Cong. (2009), available at 2009 WL 2039064.

¹³⁴ *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004); see also *United States v. Vallee*, 304 Fed. Appx. 916 (2d Cir. 2008) (summary order) (holding that the confrontation clause does not bar admission of testimony from an agent to whom defendant admitted killing an individual based on the forfeiture-by-wrongdoing doctrine).

¹³⁵ *Saget*, 377 F.3d at 229 (citing *Bourjaily v. United States*, 483 U.S. 171, 173–74 (1987)) (both *Bourjaily* and *Saget* dealt with statements made to confidential informants whose true allegiance was not known to the declarant).

¹³⁶ *Id.*

Justice Sotomayor would fully support *Melendez-Diaz*, despite commentators who argue that she has shown less deference to criminal defendants than did Justice Souter. Lab analysts obviously expect that their reports may be used at trial; therefore, a test for testimonial statements grounded in the declarant's expectation would not reduce the scope of *Melendez-Diaz* one iota.

Because the Court has not yet held what the definition of testimonial statements precisely entails, and because a majority of the Court did not endorse the rule of *Melendez-Diaz*, a newly ensconced Justice Sotomayor might not feel bound to honor the interpretation of *Crawford* outlined in *Melendez-Diaz* and *Saget*. Ironically, if she does instead hew to a more pragmatic and methodologically liberal jurisprudence, that would work to the detriment of criminal defendants—because the formalist alliance that has recently expanded criminal defendants' rights on originalist grounds would lose sway.

F. Does the *Melendez-Diaz* Decision Aid *Daubert* or Endanger It?

A lesser appreciated, but nonetheless noteworthy consequence of the Court's *Melendez-Diaz* decision comes in its dual impact on expert testimony. On the one hand, the ruling removes a major impediment to state legislatures' and state court rulemaking authorities' accepting the Court's *Daubert* decision.¹³⁷ On the other hand, language in the decision undermines the very basis on which the Court adopted the *Daubert* standard in the first place. First, on the pro-*Daubert* side, *Melendez-Diaz* helpfully requires lab analysts to testify more often. One major source of resistance to the expansion of *Daubert* in state courts—second only to plaintiffs' attorneys—has been prosecutors who fear its effects. Many district attorneys and state attorneys general with limited federal court exposure worry that *Daubert* will either divert scarce crime lab resources by requiring analysts to take time and money away from the lab to testify, or that standard forensic tests will not withstand *Daubert*-level scrutiny. In fact, *Daubert* has governed federal practice for 16 years with no apparent ill effects on criminal trials. Because lab analysts will now have to testify under

¹³⁷ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (holding that federal rules of evidence superseded the common law even with regard to expert testimony and requiring judges to ensure that expert testimony actually comes from scientific knowledge).

certain circumstances regardless, state legislatures may face less opposition from prosecutors in adopting the *Daubert* standard.

In addition, *Daubert* hearings may resolve some of the logistical problems posed by *Melendez-Diaz*. If a defendant wishes to challenge the basis for an analyst's findings or the reliability of an analyst's methods, a *Daubert* hearing would work nicely. The ability to schedule an analyst's appearance would be eased and the possibility of a no-show minimized. If a defendant waives a *Daubert* hearing, then the Confrontation Clause objection disappears. Further, a *Daubert* hearing would constitute a previous opportunity for cross-examination in the event that the analyst is not available for trial—if unavailability remains a criterion for expert witnesses. *Melendez-Diaz* may thus ultimately promote the universal adoption of the *Daubert* standard. That eventuality would, in turn, greatly enhance the quality and reliability of expert evidence.

On the negative side, Justice Scalia's *Crawford* and *Melendez-Diaz* opinions set up a false dichotomy between reliability secured through judicial determinations and reliability obtained via cross-examination. Just as a general reliability standard does not suffice for Confrontation Clause purposes, so too cross-examination does not necessarily suffice to establish reliability—even though criminal trials require it. The Supreme Court itself recognized this fact in the context of scientific evidence when the *Daubert* Court instructed federal trial judges to act as gatekeepers for expert testimony using several factors (e.g., error rate, peer review, use of reliable methodology).

The *Frye* test relies much more heavily on cross-examination to determine the truth and treats even serious defects in testimony as matters going to the weight of the evidence rather than its admissibility.¹³⁸ By abandoning the *Frye* test, the Court rejected the capacity for cross-examination alone to prevent juries from getting persuaded by junk science. By instead requiring trial judges to ascertain the reliability of expert testimony before it goes to the jury, the *Daubert* standard has performed admirably in keeping pseudoscience and

¹³⁸ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (holding that expert testimony based on a scientific technique is admissible only if the technique is generally accepted in the relevant scientific community).

“quackspertise” out of the courtroom.¹³⁹ Regrettably, in many state courts where *Frye* governs, any charlatan with a sheepskin (or well-intentioned doctor unwilling to recognize the limits of his training) can still peddle unsubstantiated theories or otherwise unreliable “expert” testimony to an impressionable jury and facilitate unjust results.

Section III.C. of *Melendez-Diaz* goes to great lengths to spell out some deficiencies of forensic evidence used in criminal trials and to highlight concerns with the “honesty, proficiency, and methodology” of lab analysts.¹⁴⁰ It stands out as a rather remarkable detour given that not even a hint of forensic malfeasance is suggested in the underlying case. Likewise, *Crawford* casts aspersions on reliability—the touchstone of *Daubert*—as “an amorphous, if not entirely subjective, concept.”¹⁴¹ It criticizes reliability as a “vague” and “manipulable”¹⁴² standard with “countless factors. . . . Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”¹⁴³ It even derides the *Roberts* test for “leav[ing] too much discretion in judicial hands”¹⁴⁴ and “allow[ing] a jury to hear evidence, untested by the adversary process, [and] based on a mere judicial determination of reliability,” which, of course, is the kind of determination *Daubert* calls for.¹⁴⁵ Although the *Daubert* standard does not supplant the adversary process, it does de-emphasize the crucible of cross-examination in favor of excluding unreliable testimony via judicial determination.

Finally, *Crawford* nearly implied that *Daubert* could not apply to criminal cases: “The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”¹⁴⁶ Hence, while the *Crawford* and *Melendez-Diaz*

¹³⁹ See David E. Bernstein, Quackspertise, *The Wall Street Journal*, Sept. 30, 2006, at A9.

¹⁴⁰ *Melendez-Diaz*, 129 S. Ct. at 2538.

¹⁴¹ *Crawford*, 541 U.S. at 63.

¹⁴² *Id.* at 68.

¹⁴³ *Id.* at 63.

¹⁴⁴ *Id.* at 67.

¹⁴⁵ *Id.* at 62 (emphasis added).

¹⁴⁶ *Id.* at 67.

Courts came down opposed to a reliability standard per se, as well as to judicial determinations of reliability, the *Daubert* Court came down foursquare in favor of reliability and judicial determinations. It seems odd that a judge-directed inquiry into the reliability of hearsay evidence would be less predictable and trustworthy than one into the reliability of a causation study or other scientific claim—often well outside the judge’s areas of specialized training—via the assorted scientific means required by *Daubert*.

All of the *Melendez-Diaz* Court’s discussion of forensic evidence is dicta, and the Court freely admits it “would reach the same conclusion if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa.”¹⁴⁷ The Court indicates that this portion of the opinion intends merely to refute the dissent’s claim that analysts’ evidence is relatively more reliable and relatively less amenable to productive cross-examination. However, the Court’s extensive critique of criminal forensic lab standards and practices inadvertently delivers an early Christmas present to criminal defense attorneys and plaintiffs’ trial lawyers. They will now mine the dicta for critical verbiage to use against *Daubert*—which is a shame because none of the attacks on the *Roberts* test (and on reliability) were necessary to reject the *Roberts* test as invalid in the Confrontation Clause context. Yet if the Court truly harbors as much concern over the quality and reliability of forensic evidence as the *Melendez-Diaz* discussion suggests, the solution lies in more strictly enforcing *Daubert*’s application to criminal cases—not in impugning the judicial determination of testimony’s reliability inherent in *Daubert*.

This misunderstanding regarding reliability may arise from confusion in the majority opinion regarding people and testimony identified by Justice Kennedy in his dissent. In the *Roberts* context reliability refers chiefly to credibility, but in the *Daubert* context it refers mainly to scientific soundness. The *Crawford* Court criticizes lower courts’ determining reliability by attaching the same significance to opposite facts when applying factors from the *Roberts* test, but that phenomenon occurs more frequently when courts make credibility determinations than when they assess scientific validity. In other

¹⁴⁷ *Melendez-Diaz*, 129 S. Ct. at 2537 n.6.

words, when employing multifactor tests to determine *witness* reliability under *Roberts*, courts tend to produce inconsistent outcomes. But when using *Daubert's* multi-factor test to determine *testimony* reliability, courts tend to produce consistent results.

This conflation of reliable witnesses and reliable testimony suggests that Justice Kennedy's distinction between conventional and unconventional (analyst-type) witnesses has merit. Lab analysts really are a different kind of witness in some important respect, and admitting their testimony generally requires a different kind of reliability assessment. But perhaps Justices Scalia and Kennedy are both right. Scalia is right that the accused has the right to be confronted with lab analysts, but Kennedy is right that unconventional witnesses are different in a way that justifies not allowing criminal defendants to confront them in the exact same manner as other witnesses. The Court should attend to the double-edged effect of the *Crawford* line of precedent and ensure that its next ruling in this area more clearly respects and preserves the Court's carefully wrought regime for ensuring the reliability of expert testimony, perhaps by holding that a *Daubert* hearing for criminal trials satisfies the Confrontation Clause.

G. Another Originalist Result

By discarding *Roberts* in favor of *Crawford*, the Rehnquist Court sparked the recognition of a much broader confrontation right. Because *Crawford* involved the formal testimony of a conventional witness (the victim) with firsthand knowledge of the defendant's guilt, the possibility remained that the Court would later confine *Crawford's* absolute bar on admissibility to similar testimonial statements (i.e., formal statements of conventional witnesses with personal knowledge). Instead, the Roberts Court's originalist *Melendez-Diaz* decision dramatically expands the scope of a defendant's right to be confronted with adverse witnesses by construing the confrontation right to extend to crime lab analysts and their affidavits. Although the reasoning behind the broad *Melendez-Diaz* rule may prove a bridge too far, even a less ambitious originalism would have generated the same result in this case. The Court's grant of certiorari in *Briscoe* leaves the door slightly ajar, but at a minimum *Melendez-Diaz* confirms *Crawford's* thorough renovation of the Confrontation Clause along originalist lines. How far *Melendez-Diaz* ultimately takes that renovation now awaits the decision in *Briscoe*.

The future development of *Crawford* jurisprudence thus depends on which version of originalism Justice Sotomayor endorses. If she sides with the *Melendez-Diaz* majority—as seems likely from her *Saget* opinion—then *Crawford*'s revolutionary impact on confrontation rights will endure. If instead she shares the *Melendez-Diaz* dissenters' caution regarding extrapolation from limited originalist foundations in this instance—as her generally pragmatic reputation might portend—then the Court may develop a more restrained and nuanced view of the proper limits of the confrontation right.

If the empirical results of the Court's new rule wreak havoc, a new majority—perhaps formed by Justice Sotomayor—might retreat to *Crawford* as interpreted by the *Melendez-Diaz* dissenters. Without returning to the repudiated *Roberts* approach, the Court could say that *Crawford* applies only to conventional witnesses (and that the Confrontation Clause does not extend to other kinds of witnesses). More realistically, if a future majority rejects the *Melendez-Diaz* rule in a case testing its outer limits, the narrower justification inherent in the Thomas viewpoint provides a fallback. Similarly, because Thomas largely avoids the need to define “testimonial statement,” a new majority may resort to his position rather than hash out a comprehensive definition. Ever since *Crawford* left open the definition question, each case in this line has raised it. Now four cases later the Court has still not supplied an answer, and it is not clear why the Court has been so loath to provide one. The question remains whether “unconventional” witnesses must always be treated exactly the same as “conventional” ones.

III. Liberal Originalism in *Ice* and *Melendez-Diaz*

Considering *Ice* and *Melendez-Diaz* together, some interesting voting patterns emerge. Justices Scalia and Thomas find themselves back in good standing with an originalist majority once again in *Melendez-Diaz*. As in *Ice*, however, a majority of the Court's five most conservative members fell on the opposite side of an originalist opinion. Hence, the Court's more liberal members perpetuated the originalist trend in Sixth Amendment jurisprudence this term, especially Justice Ginsburg. *Ice* and *Melendez-Diaz* also represent two examples from a large handful this term where one or two conservative justices (Alito in *Ice*, Scalia and Thomas in *Melendez-Diaz*) have crossed over to form a majority with three or four of the liberal

justices, suggesting independent streaks in some of the court's more conservative justices.

Melendez-Diaz also marks perhaps the most prominent and momentous decision to date in which Justices Scalia and Thomas have cast their votes on the opposite side of Chief Justice Roberts and Justice Alito, so it will be interesting to watch their votes in *Briscoe* and other future Confrontation Clause cases. In sharp contrast, according to one prominent commentator, this term did not contain a single example of a liberal justice crossing over to form a majority with the more conservative justices.¹⁴⁸ Moreover, Chief Justice Roberts is the only member of his Court to dissent in both *Ice* and *Melendez-Diaz*, casting him in the same role his mentor Chief Justice Rehnquist played in *Apprendi* and *Crawford* (although, as noted in the earlier discussion of *Ice*, Roberts joined the *Cunningham* majority and a dissent in *Ice* may actually reflect support for *Apprendi*).

While *Ice* did not reproduce the formalist/pragmatist split that has drawn so much attention in other recent Jury Trial Clause cases, the five-justice *Apprendi* coalition that fractured in *Ice* re-formed in *Melendez-Diaz*. This development may mean that the split first revealed in Jury Trial Clause cases will carry over to Confrontation Clause cases as well. In fact, it lurked beneath the surface all along. The larger margins of decision in the previous three Confrontation Clause cases obscured the existence of a formalist/pragmatist undercurrent in them. However, in retrospect, the *Apprendi* five held together in *Crawford*, *Davis*, and *Giles*, with the small exceptions of Justice Thomas's partial dissent in *Davis* and Justice Stevens's negative vote in *Giles*.

Ice and *Melendez-Diaz* promised to determine whether the Roberts Court would validate the dramatic shifts in Sixth Amendment jurisprudence made during the latter years of the Rehnquist Court—and they did. By permitting sentencing judges to make explicit findings to justify consecutive sentences, *Ice* enables states with default rules preferring concurrent sentences to keep them. By

¹⁴⁸ Tom Goldstein, Thoughts on this Term and the Next, SCOTUSblog, June 29, 2009, <http://www.scotusblog.com/wp/thoughts-on-this-term-and-the-next/> (“There is no counter-example in which a member of the left joined the Court’s four most conservative Justices to provide a majority.”).

declaring that sworn lab results are testimonial statements, *Melendez-Diaz* forces prosecutors to prove forensic results with in-person lab analyst testimony any time that a defendant demands it. Standing alone *Melendez-Diaz* represents the most significant Sixth Amendment development for criminal defendants in many terms, and the other cases decided this term come nowhere close to offsetting its effects. If the Court promotes the right to confront state-retained forensics experts without denigrating the trial judge's role as a gatekeeper of reliable scientific evidence, then *Melendez-Diaz* will surely improve the quality of forensic evidence used in criminal trials.

Indeed, each of the outcomes in this term's Sixth Amendment cases accords with a sensible approach to criminal procedure that respects the rights of the accused without handcuffing prosecutors and judges. Together these decisions simultaneously make it less likely that a guilty criminal defendant will go free for procedural reasons *and* less likely that a criminal defendant will be wrongly convicted based on erroneous forensic evidence. Neither constitutional originalists nor civil libertarians—nor criminal defendants, for that matter—can gainsay that result.

