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These summaries were prepared by School of Government faculty and staff.

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Arrest, Search, and Investigation

Investigatory Stops

Given the commonsense inference that vehicles likely are being driven by their owners, an officer's

knowledge that the registered owner of a vehicle has a revoked driver's license provides reasonable suspicion for a traffic stop in the absence of information negating the inference that the owner is the driver.

***Kansas v. Glover*, 589 U.S.____, ____S. Ct. ___ (Apr. 6, 2020)**

In this Kansas driving with a revoked license case, the Court held that when a police officer knows that the registered owner of a vehicle has a revoked driver's license and lacks information negating an inference that the owner is the driver of the vehicle, a traffic stop is supported by reasonable suspicion and does not violate the Fourth Amendment. Recognizing that persons other than the registered owner sometimes may be lawfully driving, the Court said that knowledge of a registered owner's revoked license "provided more than reasonable suspicion to initiate [a] stop" based on the "commonsense inference" that, in the absence of negating information, vehicles likely are being driven by their registered owners. The Court emphasized the narrow scope of its holding, saying that the presence of additional facts may dispel reasonable suspicion and offering the example of a situation where an officer observes that a driver does not appear to be the registered owner.

Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion expressing the view that the stop in this case was reasonable given the particular nature of Kansas motor vehicle law, where a license revocation usually is the consequence of serious or repeated offenses, and in light of the fact that the "barebones [evidentiary] stipulation" before the court demonstrated a total absence of "additional facts" that might "dispel reasonable suspicion."

Justice Sotomayor dissented, criticizing the majority's approach for "absolving officers from any responsibility to investigate the identity of a driver" when feasible and arguing that inferences contributing to reasonable suspicion must be based on specialized law enforcement training and experience rather than layperson "common sense."

Middle finger gesture from passing car did not create reasonable suspicion of disorderly conduct

***State v. Ellis*, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020)**

In this Stanly County case, no reasonable suspicion existed when a trooper, already conducting a traffic stop, observed the defendant gesturing with his middle finger from the passenger side of a car driving past the stop. The Court of Appeals unanimously rejected the State's argument that the stop of the defendant was justified by the community caretaking exception to the Fourth Amendment, but a majority of the panel found that the stop was supported by reasonable suspicion of disorderly conduct. Judge Arrowood dissented and would have ruled that the act was protected speech under the First Amendment and that the trooper lacked reasonable suspicion.

On appeal to the Supreme Court, the State waived oral argument and conceded that the trooper lacked reasonable suspicion. The court agreed. The State's evidence at suppression showed that the trooper saw the defendant waving from the car, and then begin "flipping the bird," perhaps vigorously. The trooper did not know for whom the gesture was intended, and otherwise observed no traffic violations or other suspect activities. This failed to establish reasonable suspicion of a crime. In the court's words:

> The fact that [the trooper] was unsure of whether defendant's gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another

> driver. . .Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Slip op. at 6-7.

The court did not consider the defendant's First Amendment arguments in light of its ruling, and the matter was unanimously reversed and remanded.

A trooper unlawfully extended a traffic stop initiated for speeding by asking the defendant additional investigatory questions and for consent to search after the trooper had returned the defendant's paperwork, issued him a warning ticket, and stated that the stop had ended

***State v. Reed*, ____ N.C. ____, 838 S.E.2d 414 (Feb. 28, 2020)**

In this drug trafficking case arising out of a traffic stop, the court affirmed the conclusion of the Court of Appeals that the law enforcement officer who arrested the defendant violated the Fourth amendment by prolonging the stop without the defendant's consent or a reasonable articulable suspicion of criminal activity. Highway Patrol Trooper Lamm, a member of the Patrol's Criminal Interdiction Unit who was assigned to aggressively enforce traffic laws while being on the lookout for other criminal activity including drug interdiction and drug activity, clocked the black male defendant's vehicle by radar being operated at a speed of 78 miles per hour in a 65 mile-per-hour zone. Lamm initiated a traffic stop and observed at its outset that there was a black female passenger and a female pit bull dog inside the vehicle. The defendant provided Lamm with his New York driver's license and the rental agreement for the vehicle, which indicated that the female passenger, Usha Peart who also was the defendant's fiancée, was the renter and that the defendant was an additional authorized driver. Trooper Lamm ordered the defendant out of the vehicle, which Lamm characterized as displaying "signs of . . . hard [continuous] driving," and into the front seat of Lamm's patrol car, where he further ordered the defendant to close the door of the patrol car, which the defendant did after expressing some reluctance. Trooper Lamm did not consider the defendant to be free to leave at this point and began to question the defendant about his travel and other activities. Upon confirming that things were sufficiently in order regarding the rental car, Lamm completed the traffic stop and returned all paperwork to the defendant, telling him that the stop was concluded. About 20 minutes had elapsed at this point. After telling the defendant that the stop had ended, Lamm said "I'm going to ask you a few more questions if it is okay with you," and construed the defendant's continued presence in his patrol car as voluntary. Lamm testified that despite informing the defendant that the stop had ended, defendant would still have been detained, even if he denied consent to search the vehicle and wanted to leave. Lamm asked the defendant for consent to search the vehicle, to which he replied "you could break the car down," but further explained that Lamm should seek consent from Peart since she had rented the car. Lamm told the defendant to "sit tight" in the patrol vehicle as Lamm went to confer with Peart. At this time, Trooper Ellerbe, also a member of the Criminal Interdiction Unit, arrived at the scene in response to Lamm's request for backup where he was informed by Lamm that Lamm was going to attempt to obtain consent to search from Peat. Ellerbe then stationed himself next to Lamm's passenger seat where the defendant remained seated with the door closed. Lamm proceeded to talk with Peart and obtained her signature on the State Highway Patrol form "Written Consent to Search," which he had completed himself. Lamm then discovered cocaine in the backseat area of the vehicle and

directed Ellerbe to place the defendant in handcuffs.

With this recitation of the factual circumstances surrounding the stop and search, the court proceeded to analyze, under the two-pronged analysis of *Terry v. Ohio*, 392 U.S. 1 (1968), (1) whether the stop was reasonable at its inception, and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Focusing on the second prong of the analysis because the defendant conceded that the stop was lawful at is inception, the court cited its previous decision in *State v. Bullock*, 370 N.C. 256 (2017) while explaining that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop," and that a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so." The critical question on this second prong in the traffic stop context is whether Trooper Lamm "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant" or whether Lamm unlawfully extended an otherwise-completed stop. Reviewing its own precedent and that of the U.S. Supreme Court, the court explained that all of Trooper Lamm's investigative activities until the point where Lamm returned the defendant's paperwork, issued the warning ticket, and told the defendant that the stop had ended were lawful. At that point, however, the mission of the stop was accomplished and Lamm unlawfully prolonged it by detaining the defendant in his patrol car and asking the defendant further questions without reasonable suspicion. As to whether reasonable suspicion existed to prolong the stop, the court found that inconsistencies in Lamm's testimony demonstrated that he was unable to articulate an objective basis for his purported reasonable suspicion and was unable to articulate the time at which he formulated such suspicion. The court disagreed with dissenting justices who took the view that the defendant's nervousness, his explanation of travel plans, the condition of the rental car, and the fact that it had been paid for in cash provided reasonable suspicion, saying that these circumstances were generally consistent with lawful travel and were unremarkable. The court concluded by agreeing with the Court of Appeals that the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of the defendant's unlawful detention.

Justice Newby dissented, explaining that in his view, and as the trial court had found, the defendant consented to the prolonging of the stop in order to allow Trooper Lamm to ask him a few more questions.

Justice Davis, joined by Justices Newby and Ervin, also dissented, expressing the view that even is the defendant's consent to search was not voluntary, Trooper Lamm possessed reasonable suspicion to extend the stop. In finding that reasonable suspicion existed, Justice Davis noted the defendant and his passenger's inconsistent statements regarding their travel plans, certain features of the rental car agreement, the fact that the car had been paid for in cash, and the condition of the interior of the car, including that dog food was strewn about and that air fresheners were present.

Reasonable suspicion to stop defendant's vehicle was based on an objectively reasonable mistake of fact; extension of the stop was permissible based on reasonable suspicion of other criminal activity.

***State v. Wiles* , ___ N.C. App. ____, ____ S.E.2d _____ (Mar. 17, 2020)**

While parked on the side of the road, a trooper saw a truck pass by and believed that the passenger was not wearing a seat belt. After the trooper stopped the truck and approached the passenger side, he realized that passenger was wearing his seat belt, but the gray belt had not been visible against the

passenger's gray shirt. The passenger stated that he was wearing his seat belt the whole time, and the trooper did not cite him for a seat belt infraction.

However, upon approaching the window, the trooper had also immediately noticed an odor of alcohol coming from the vehicle. The trooper asked the passenger and the driver (the defendant) if they had been drinking, and both men said yes. The trooper asked the men to step out of the truck, and saw that the defendant's eyes were red, glassy, and bloodshot. After further investigation, the trooper determined the defendant was impaired and charged him with DWI. The defendant filed a motion to suppress, arguing there was no reasonable suspicion to support the initial or extended vehicle stop. The trial court denied the motion, finding that the trooper had a mistaken but lawful basis for the initial stop, and he developed reasonable suspicion of other criminal activity that warranted an extension of the stop. The defendant proceeded to trial, was convicted of DWI, and appealed.

The appellate court affirmed the findings and rulings denying the suppression motion. First, the trial court's findings of fact were adequately supported by the trooper's testimony. Second, even though the trooper's initial belief that the passenger was not wearing a seat belt turned out to be mistaken, it was nevertheless objectively reasonable ("failing to see a gray seat belt atop a gray shirt is one a reasonable officer could make") and the extension of the stop was permissible based on the trooper "instantaneously" smelling an odor of alcohol coming from the vehicle, raising a reasonable suspicion of DWI. Defendant's related constitutional arguments concerning the extension of the stop and probable cause to arrest were not properly raised at the trial level, so they were dismissed on appeal. As to defendant's remaining arguments regarding his trial (denial of motion to dismiss at close of evidence, allowing a "positive" PBT reading into evidence, and qualifying the trooper as an expert in HGN), the appellate court likewise found no error.

En banc court affirms grant of motion to suppress, reversing prior decision; exigent circumstances based on the sound of gunshots in the area did not justify stop and frisk

***U.S. v. Curry*, 965 F.3d 313 (4th Cir. July 15; amended July 16,2020)**

Four Richmond, Virginia police officers were patrolling Creighton Court, a heavily populated neighborhood, as a part of a "focus mission team" in response to recent shooting and homicides. The officers heard gunshots nearby and responded to the area where they believed the shots originated in less than a minute, an open area between apartment buildings. Five to eight people were walking away from the area in various directions in a field between buildings and other people were standing closer to the buildings. Two dispatch calls relayed reports of gunshots in the area but did not provide any further information. The officers spread out and began approaching different people in the field, asking them to show their hands and waistbands and using a flashlight to check for weapons. The defendant and another man were separately walking in the field when an officer stopped them and asked them to raise their hands. The defendant complied and pointed the officer in the direction the shots had come from. When asked to raise his shirt, the defendant complied in a "lackadaisical manner" according to the officer, and eventually two officers patted him down, finding a gun. The defendant was charged with felon in possession of firearm and moved to suppress. The district court granted the motion, finding that officers lacked reasonable suspicion for the stop and that exigent circumstances did not apply. The government appealed, and a panel of the Fourth Circuit reversed. On rehearing en banc, the divided full court reversed the three-judge panel decision and affirmed the trial court 9-6.

The government conceded on appeal that no reasonable suspicion supported the stop but maintained that the exigencies of the situation justified the stop and frisk. The majority disagreed. Exigent

circumstances are an exception to the warrant requirement arising when an emergency justifies immediate action by the police. *See Mincey v. Arizona*, 437 U.S. 385 (1987). The "narrow" exception has traditionally been applied to situations involving pursuit of a fleeing suspect, prevention of "imminent harm," and prevention of destruction of evidence. The government argued that the recent nearby gunshots constituted a threat of imminent harm. The court disagreed.

Though the 'emergency-as-exigency approach,' may sound broad in name, it is subject to important limitations and thus is quite narrow in application. For example, the requirement that the circumstances present a true "emergency" is strictly construed—that is, an emergency must be "enveloped by a sufficient level of urgency. Curry Slip op. at 16 (citation omitted).

Further, the exigent circumstances exception is typically applied to the search of private property, not to pedestrian stops, and the court declined to apply the doctrine to these facts. "[T]he few cases that have extended the exigent circumstances exception to such seizures all involve specific and clear limiting principles that were absent in Curry's stop." *Id.* at 18. The officers here did not have any specific information about the crime or the suspect. According to the court:

[T]he officers approached Curry in an open field, at one of several possible escape routes, in an area that they only suspected to be near the scene of an unknown crime. Likewise, the officers lacked a description of the suspect's appearance or, more importantly, any indication that the suspect was in the vicinity. . . Id. at 21 (emphasis in original) (citations omitted).

The officers also stopped only the men walking in the area and not other people standing around. This illustrated the "relatively unrestricted nature of the search." *Id.* While the exigent circumstances exception may allow this type of search with a known crime or suspect or more controlled geographic area, here it did not. The trial court's ruling was therefore affirmed.

Judge Wilkinson dissented. He argued that the majority decision would lead to underpolicing of disadvantaged communities. His opinion emphasizes that police were in the area due to so-called "predictive policing" strategies (aimed at crime prevention) and warns that the majority opinion's "gut-punch" to those strategies will harm high-crime communities.

Judge Richardson also dissented separately, joined by Judges Wilkinson, Neimeyer, Agee, Quattelbaum, and Rushing. They would have found no Fourth Amendment violation based on the exigent circumstances exception and criticized the majority's limitations on that doctrine.

Chief Judge Gregory wrote separately to concur with the majority and to address Judge Wilkinson's dissent. His opinion emphasizes the problem of overpolicing in minority communities (while acknowledging the problem of under-policing emphasized by Judge Wilkinson) and responds to the dissent's criticism that the majority opinion undermines effective policing practices.

Judge Wynn wrote separately to concur, noting that Judge Wilkinson's dissent relied on statistical data and that the U.S. Supreme Court had recently expressed skepticism of the use of such data in deciding constitutional issues. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018). He also addressed Judge Richardson's dissent, arguing that the approach there would allow police to stop frisk anyone in a high-crime area or near the scene of recent gunshots. "[A] consideration of the high crime area alone is anathema under our jurisprudence. Individuals who happen to live in high crime areas are not second-class citizens." *Curry* Slip

op. at 47 (Wynn, J., concurring).

Judge Diaz wrote separately to concur, joined by Judge Harris. His opinion argues that exigent circumstances may be justified as a special need under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and finding that case persuasive in this context. [A majority of the panel who initially decided the case in favor of the government relied on a variation of this argument.]

Judge Thacker also wrote separately in concurrence, joined by Judge Keenan. Her opinion also took issue with Judge Wilkinson's dissent and condemned predictive policing strategies as "little more than racial profiling writ large." *Curry* Slip op. at 58 (Thacker, J., concurring).

Criminal Procedure

Verdict

The Sixth Amendment establishes a right to a unanimous jury verdict that applies to the state courts

***Ramos v. Louisiana*, 590 U.S. ___, ___ S. Ct. ___ (Apr. 20, 2020)**
The Supreme Court reversed a Louisiana state court and held that the Sixth Amendment gives defendants a right to a unanimous jury verdict that applies to the states. The defendant was convicted of murder in 2016 based on a 10–2 jury verdict, which was a sufficient basis for conviction under then-existing Louisiana state law. (Oregon is the only other state that allows convictions based on nonunanimous verdicts.) Justice Gorsuch wrote a majority opinion joined in full by Justices Ginsburg and Breyer and in part by Justices Sotomayor and Kavanaugh, concluding based on the historical context in which the Sixth Amendment was adopted that the entitlement to an impartial jury included the right, applicable in both the federal courts and the state courts, to a unanimous jury to be convicted. The Court disclaimed the precedential value of *Apodaca v. Oregon*, 406 U.S. 404 (1972), a case in which a four-Justice plurality plus a lone Justice resolving the case on other grounds upheld an Oregon conviction that was based on a nonunanimous verdict. Justice Sotomayor wrote a concurring opinion saying that *Apodaca* must be overruled, not only because of its dubious reasoning, but also because of the racially discriminatory origins of the Louisiana and Oregon laws the case upheld. Justice Kavanaugh likewise wrote separately to concur and to share more extended thoughts on the application of stare decisis in this case. Justice Thomas concurred in the judgment, noting his agreement that the requirement for a unanimous jury verdict applies to the states, but under his own view that it applies through the Fourteenth Amendment Privileges or Immunities Clause, not the Due Process Clause. Justice Alito wrote a dissent, joined by Chief Justice Roberts and joined in part by Justice Kagan, arguing that the lower court should have been affirmed under *Apodaca*.

Defenses

Insanity

Kansas' repeal of insanity defense and adoption of mens rea defense does not violate due process

***Kahler v. Kansas*, 589 U.S. ___, ___ S. Ct. ___ (Mar. 23, 2020)**

The defendant was convicted of and sentenced to death for killing his wife, who had filed for divorce, his two teenage daughters, and his wife's grandmother, with whom the victims were staying. Before trial, the defendant filed a motion arguing that Kansas' law on insanity violated the Due Process Clause of the Fourteenth Amendment. Before statutory changes enacted in 1995, Kansas followed the M'Naghten test for insanity. Under that test, a defendant is not guilty by reason of insanity if either (1) he did not know the nature and quality of the act he was doing or (2) if he did know, he did not know his act was wrong. In 1995, Kansas legislatively abolished the M'Naghten insanity defense and adopted a mens rea defense. The pertinent statute provides that it is a defense to prosecution that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged. The statute provides further that a mental disease or defect is not otherwise a defense. The Kansas courts rejected the defendant's due process challenge. The U.S. Supreme Court affirmed.

The six-member majority began by observing that the M'Naghten insanity formulation consists of two tests: a cognitive incapacity test (the defendant did not know the nature and quality of his act); and a moral incapacity test (the defendant did not know his act was wrong). The Kansas' mens rea defense, according to the Court, retains the cognitive incapacity test for insanity and jettisons the moral incapacity test. For a state rule on criminal liability to violate the Due Process Clause, it must offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Slip Op. at 14. The Court held that the moral capacity test is not such a principle and that the Due Process Clause does not compel states to adopt an insanity defense that turns on a defendant's ability to know his act was wrong. The Court also noted that Kansas law allows a defendant to present mental health evidence at sentencing and that a judge may replace a defendant's prison term with commitment to a mental health facility.

The three dissenting justices argued that Kansas had eliminated the core of the insanity defense by disallowing the defense for a defendant, who by reason of mental illness, "lacked the mental capacity necessary for his conduct to be considered morally blameworthy." Dissenting Op. at 1. The dissent gave two examples to illustrate its view.

In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecution Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. Id. at 1–2.

Under Kansas' law, the defendant in Prosecution One could defend against the charge by showing that his mental illness prevented him from forming the mens rea for murder (intentional killing of a human being). The defendant in Prosecution Two has no defense under Kansas law because he acted with the necessary level of intent. The dissent observed that mental illness typically does not deprive individuals of the ability to form intent; rather, it affects their motivations for acting. As a result, Kansas' approach requires conviction of a broad swath of defendants who would be adjudged not guilty under any traditional formulation of the insanity defense. In the dissent's view, this result "offends deeply entrenched and widely recognized moral principles underpinning our criminal laws." *Id.* at 21. The dissent rejected the idea that consideration of mental capacity at sentencing satisfies due process, finding that an insane defendant should not be found guilty in the first place.

Sentencing

Capital Sentencing

Appellate reweighing of aggravating and mitigating factors was permissible; death sentence affirmed by divided Supreme Court

***McKinney v. Arizona*, 589 U.S. ___, ___ S. Ct. ___ (Feb. 25, 2020)**

In this habeas appeal, the petitioner was convicted of two murders in 1992 in Arizona state court. At that time, no requirement existed that the jury determine facts supporting an aggravating factor. At least one aggravating factor must be found to support a sentence of death under the Court's precedents. In the petitioner's case, the trial court found factors in aggravation for both murders and imposed death. In federal habeas proceedings 20 years later, the Ninth Circuit found that the trial court improperly ignored mitigation evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversible error for trial court to ignore relevant mitigation evidence at capital sentencing). The case returned to the Arizona Supreme Court, where the petitioner argued for a new sentencing hearing before a jury. The Arizona Supreme Court rejected this argument, pointing to *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Clemons* allows a state appellate court to reweigh aggravating and mitigating factors in a death case following reversal for use of an improper aggravating factor (instead of a jury weighing those factors). The Arizona Supreme Court reweighed the sentencing factors in the case and again imposed death. The petitioner appealed to the U.S. Supreme Court, arguing that a jury should have made that determination. A majority of the court disagreed and affirmed the death sentence.

The court first rejected the argument that *Clemons* did not apply because that case involved an improper aggravating factor, whereas the petitioner's case involved a failure to consider a mitigation factor.

> [T]he Court's decision in *Clemons* ruled that appellate tribunals may perform a 'reweighing of the aggravating and mitigating evidence.' In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error.

The court also rejected the argument that *Clemons* was overruled by *Ring v. Arizona*, 536 U. S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), which require a jury to determine facts supporting an aggravating factor. The petitioner argued that an appellate court could no longer reweigh aggravating factors under those cases and that a jury determination was required. This too was rejected. A jury need only find the *facts* in support of the aggravated factor; states are free to allow the trial court to make the ultimate decision on whether to impose a death sentence, so long as any facts necessary to support the aggravating factor were found by a jury. The court noted:

> . . .[I]n a capital proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. . . In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating

circumstances.

The petitioner also pointed to the fact that no jury determined the facts of the factors in aggravation supporting his death sentence as *Ring* and *Hurst* require. This claim was foreclosed by the fact that *Ring* and *Hurst* were decided after the petitioner's direct appeal became final. Those cases therefore do not apply retroactively to cases (like the petitioner's) on collateral review under *Schriro v. Summerlin*, 542 U.S. 348. The court rejected the argument that the Arizona Supreme Court's reweighing of aggravating and mitigating factors re-opened direct review. The Arizona Supreme Court categorized its decision as collateral review, and the U.S. Supreme Court declined to disturb that interpretation of state law. "As a matter of *state* law, the reweighing proceeding in McKinney's case occurred on collateral review." *Id*. at 8 (emphasis in original). The Arizona Supreme Court's judgment was consequently affirmed by a 5-4 majority. Chief Justice Roberts, and Justices Alito, Gorsuch, and Thomas joined the majority opinion.

Justice Ginsberg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenting justices disagreed with the majority that the Arizona Supreme Court's action in reweighing sentencing factors was a collateral proceeding. In their view, that proceeding was a re-opening of direct appeal proceedings, and *Ring* applied. The dissenting justices would have found the death sentence unconstitutional and reversed the judgment of the Arizona Supreme Court.