PD-0038&0039-21

PD-0038&0039-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 1/15/2021 4:49 PM
Accepted 1/20/2021 2:16 PM
DEANA WILLIAMSON
CLERK

No. _____

FILED
COURT OF CRIMINAL APPEALS
1/20/2021
DEANA WILLIAMSON, CLERK

In the Court of Criminal Appeals of Texas

JOHNNY JOE AVALOS,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Petition for Discretionary Review from the
Fourth Court of Appeals, San Antonio, Texas
Nos. 04-19-00192-CR & 04-19-00193-CR

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Petitioner

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the Honorable **Lori Valenzuela**, Presiding Judge of the 437th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Johnny Joe Avalos** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Johnny Joe Avalos was represented by **Jorge Aristotelidis**, 310 S. Saint Mary's Street, Ste. 1910, San Antonio, Texas 78205.

2) The State of Texas was represented by **Joe D. Gonzales**, District Attorney, and **David Lunan**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys to the Fourth Court of Appeals were as follows:

1) Johnny Joe Avalos was represented by **Jorge Aristotelidis**, 310 S. Saint Mary's Street, Ste. 1910, San Antonio, Texas 78205.

2) The State of Texas was represented by **Joe D. Gonzales**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

The State of Texas is represented in this petition by **Joe D. Gonzales**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

TABLE OF CONTENTS

IDENTITIES OF PARTIES AND COUNSEL.....2

TABLE OF AUTHORITIES.....4

STATEMENT REGARDING ORAL ARGUMENT.....6

STATEMENT OF THE CASE.....6

STATEMENT OF PROCEDURAL HISTORY.....7

GROUNDS FOR REVIEW.....8

1. Are mandatory life-without-parole sentences cruel and unusual as applied to intellectually disabled offenders?

   A. The Supreme Court has held that mandatory life without parole is not cruel and unusual, and, since then, it has only exempted juveniles from that general holding. Appellant is an adult, not a juvenile. Thus, did the court of appeals err when it disregarded binding precedent?

   B. The Supreme Court's exemption of juveniles from mandatory life without parole was based on several material differences between juveniles and adults. Having an intellectual disability has no bearing on those differences. Thus, did the court of appeals erroneously analogize intellectually disabled adults to juveniles?

   C. Do other considerations—e.g., no evidence of a national consensus supporting appellant's position—also warrant reversal?

2. If the opinion below is affirmed, what are the available punishment options?

ARGUMENT.....9

PRAYER FOR RELIEF.....23

CERTIFICATE OF COMPLIANCE AND SERVICE.....24

APPENDIX.....25

TABLE OF AUTHORITIES

Tex. Penal Code Ann. § 12.31.....10, 20

Tex. R. App. P. 66.3.....9

Agostini v. Felton, 521 U.S. 203 (1997).....12

Atkins v. Virginia, 536 U.S. 304 (2002).....11, 19

Avalos v. State, ___ S.W.3d ___, Nos. 04-19-00192-CR & 04-19-00193-CR,
2020 WL 7775186 (Tex. App.—San Antonio Dec. 30, 2020).....12, *passim*

Baxter v. Mississippi, 177 So.3d 394 (Miss. 2015).....20

Baxter v. Mississippi, 177 So. 3d 423 (Miss. Ct. App. 2014).....20

Bourgeois v. Watson, 977 F.3d 620 (7th Cir. 2020).....17

Cantu v. State, 939 S.W.2d 627 (Tex. Crim. App. 1997).....10

Commonwealth v. Jones, 90 N.E.3d 1238 (Mass. 2018).....19

Ex parte Henderson, 144 So. 3d 1262 (Ala. 2013).....21

Ex parte Williams, 200 S.W.3d 819
(Tex. App.—Beaumont 2006, no pet.).....13

Harmelin v. Michigan, 501 U.S. 957 (1991).....11, *passim*

Knick v. Township of Scott, 139 S. Ct. 2162 (2019).....12

Lewis v. State, 428 S.W.3d 860 (Tex. Crim. App. 2014).....20

Miller v. Alabama, 567 U.S. 460 (2012).....12, *passim*

Modarresi v. State, 488 S.W.3d 455
(Tex. App.—Houston [14th Dist.] Houston 2016, no pet.).....10, 11, 15

Montgomery v. Louisiana, 136 S. Ct. 718 (2016).....17, 21

National Coalition for Men v. Selective Service System,
969 F.3d 546 (5th Cir. 2020).....13

Parsons v. State, No. 12-16-00330-CR, 2018 WL 3627527
(Tex. App.—Tyler July 31, 2018, pet. ref'd).....16, 17, 18

People v. Coty, __ N.E.3d __, 2020 WL 2963311 (Ill. June 4, 2020).....17, 19

People v. Coty, 110 N.E.3d 1105 (Ill. App. Ct. 2018).....19

Price v. City of Chicago, 915 F.3d 1107, 1111 (7th Cir. 2019).....13

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989).....12

Rodriguez v. State, 93 S.W.3d 60 (Tex. Crim. App. 2002).....11

Sellers v. State, 13-18-00572-CR, 2019 WL 2042040
(Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.).....13

Sheffield Development Co., Inc. v. City of Glenn Heights,
140 S.W.3d 660 (Tex. 2004).....13

State ex rel. *Lykos*, 330 S.W.3d 904 (Tex. Crim. App. 2011).....10

Thompson v. Marietta Education Association, 972 F.3d 809 (6th Cir. 2020).....13

United States v. Chavez, 894 F.3d 593 (4th Cir. 2018).....15

United States v. Dinh, 920 F.3d 307 (5th Cir. 2019).....13

Williams v. People, 64 V.I. 618, 626 (V.I. 2016).....21

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument because the primary issue presented—whether mandatory life-without-parole sentences are cruel and unusual as applied to intellectually disabled offenders—is one of first impression in this Court and requires an evaluation of various Supreme Court precedents. Therefore, oral argument will aid this Court in its resolution of the issues presented.

STATEMENT OF THE CASE

Appellant murdered five women, resulting in guilty pleas to two counts of capital murder. (192 CR 4; 193 CR 5; RR5 11-12.)[1] The trial court accepted his pleas and sentenced him to life without parole, which was mandatory under § 12.31(a)(2) of the Penal Code. (192 CR 25-26; 193 CR 285-86; RR5 12-14.) After a panel of the court of appeals heard oral arguments, it granted the parties' joint motion to abate for a finding of whether appellant was intellectually disabled, and the trial court subsequently found he was so. (192 CR Supp. 4-5; 193 CR Supp. 4-5.)

[1] The Reporter's Record of February 19, 2019, will be referenced as "RR5," followed by its respective page numbers. The Clerk's Records in appellate cause numbers 04-19-00192-CR & 04-19-00193-CR will be referenced as "192 CR" and "193 CR," respectively, and their supplements as "192 CR Supp." and "193 CR Supp.," respectively, followed by their page numbers.

STATEMENT OF PROCEDURAL HISTORY

On June 3, 2020, the court of appeals panel, over a dissent, affirmed the trial court's sentence. *Avalos v. State*, ___ S.W.3d ___, Nos. 04-19-00192-CR & 04-19-00193-CR, 2020 WL 2858867 (Tex. App.—San Antonio June 3, 2020). On August 10, 2020, appellant filed a motion for en banc reconsideration, which, on November 17, 2020, the en banc court granted over a dissent. On December 30, 2020, the en banc court, over a dissent, withdrew the panel opinion and judgment, reversed the trial court's sentence, and remanded for further proceedings. *Avalos v. State*, ___ S.W.3d ___, Nos. 04-19-00192-CR & 04-19-00193-CR, 2020 WL 7775186 (Tex. App.—San Antonio Dec. 30, 2020) (op. on en banc reconsideration).

GROUNDS FOR REVIEW

1. Are mandatory life-without-parole sentences cruel and unusual as applied to intellectually disabled offenders?

    A. The Supreme Court has held that mandatory life without parole is not cruel and unusual, and, since then, it has only exempted juveniles from that general holding. Appellant is an adult, not a juvenile. Thus, did the court of appeals err when it disregarded binding precedent?

    B. The Supreme Court's exemption of juveniles from mandatory life without parole was based on several material differences between juveniles and adults. Having an intellectual disability has no bearing on those differences. Thus, did the court of appeals erroneously analogize intellectually disabled adults to juveniles?

    C. Do other considerations—e.g., no evidence of a national consensus supporting appellant's position—also warrant reversal?

2. If the opinion below is affirmed, what are the available punishment options?

ARGUMENT

This Honorable Court should grant this petition because it presents nearly every reason for granting review, namely, 1) the lower court's decision conflicts with another court of appeals's decision on the same issue; 2) the lower court decided an important question of state and federal law that has not been, but should be, settled by this Court; 3) the lower court decided an important question of federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States; 4) the lower court declared a statute unconstitutional; and 5) the justices of the lower court disagreed on a material question of law necessary to the court's decision. Tex. R. App. P. 66.3(a)-(e).

I. The court of appeals erred when it declared mandatory life without parole unconstitutional as applied to intellectually disabled offenders.

Below, appellant argued that § 12.31(a)(2) of the Penal Code is unconstitutional as applied to him, an intellectually disabled person, under both the federal and state constitutions because it mandates life without parole. In a published opinion and over a vigorous dissent, the en banc court of appeals agreed, reversed his sentence, and remanded for an individualized sentencing hearing.[2]

a. Applicable law and standard of review

When the State does not seek the death penalty, an individual adjudged guilty of a capital felony shall be imprisoned for life without parole if he committed the offense when 18 years of age or older. Tex. Penal Code Ann. § 12.31(a)(2).

"A defendant raising only an 'as applied' challenge concedes the general constitutionality of the statute but asserts it is unconstitutional as applied to her particular facts and circumstances." *Modarresi v. State*, 488 S.W.3d 455, 465 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.) (citing *State* ex rel. *Lykos*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011)). "A defendant challenging the constitutionality of a statute bears the burden to establish its

[2] Appellant originally suggested that the state constitution should be read more expansively than the federal. However, the court of appeals rejected that argument and considered both issues in tandem because there is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution." *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997). Thus, this petition also addresses the issues together.

unconstitutionality." *Id*. (citing *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002)). The constitutionality of a criminal statute is a question of law, which is reviewed *de novo*. *Id*.

b. This case is controlled by <u>*Harmelin v. Michigan*</u>

Appellant has never argued that intellectually disabled defendants cannot receive life without parole. In other words, he did not make an *Atkins*-like claim, attacking life-without-parole sentences for intellectually disabled defendants in all instances. *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically baring the death penalty for intellectually disabled offenders). Rather, his argument was that *mandatory* life-without-parole sentences are cruel and unusual if the offender is intellectually disabled. As a result, this case is controlled by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Supreme Court declared a general rule that the mandatory imposition of life without parole is not cruel and unusual. As explained more below, it has only deviated from that rule for juvenile defendants. For all other offenders, *Harmelin*'s general holding controls.[3]

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[3] In *Harmelin*, the defendant first claimed his life-without-parole sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed. *Harmelin*, 501 U.S. at 961. While the Court rejected his proportionality argument, its reasoning was fractured. *Compare id*. at 962-94 (opinion of Scalia, J.) *with id*. at 996-1005 (opinion of Kennedy, J.).

But Harmelin also made a separate procedural argument, claiming—as appellant does—that the imposition of life without parole absent an individualized sentencing hearing was cruel and unusual. *Id*. at 961-62, 994. Unlike his proportionality argument, rejection of his procedural argument garnered a majority of the Court. *Id*. at 961, 994-96 (Scalia, J., "delivered the opinion of the Court with respect to Part IV"); *id*. at 996 (Kennedy, J., concurring with Part IV). Thus, Part IV of *Harmelin* constitutes binding authority.

The court of appeals rejected the State's reliance on *Harmelin*. Paraphrasing *Miller v. Alabama*, 567 U.S. 460, 481 (2012), it stated, "*Harmelin* does not control because it 'had nothing to do with [intellectually disabled persons].'" *Avalos v. State*, ___ S.W.3d ___, Nos. 04-19-00192-CR & 04-19-00193-CR, 2020 WL 7775186, at *2 n.2 (Tex. App.—San Antonio Dec. 30, 2020) (op. on en banc reconsideration). But that assertion ignores the Supreme Court's unique role in abrogating its prior rulings. Until the Supreme Court itself specifically speaks on this issue as it relates to intellectually disabled offenders, all courts below it are bound to apply *Harmelin*'s general holding.

The Supreme Court has repeatedly instructed lower courts to follow its precedents even if those precedents seem to have been implicitly abrogated or overruled by later doctrinal or factual developments. Specifically, it has stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *see also Knick v. Township of Scott*, 139 S. Ct. 2162, 2177-78 (2019) ("[O]nly this Court or a constitutional amendment can alter our holdings."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (reaffirming that lower courts should not "conclude our more recent cases have, by implication,

overruled an earlier precedent"). Thus, even when a case's doctrinal foundations have been completely undermined by later Supreme Court opinions, lower courts are still bound by the Supreme Court's on-point holdings.[4]

Here, the Supreme Court rule at issue is *Harmelin*'s holding that mandatory life-without-parole sentences are not cruel and unusual. The Supreme Court has only deviated from that holding in cases involving offenders who committed homicides while juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012). On the other hand, the Supreme Court has never deviated from or abrogated *Harmelin*'s holding in the context of intellectually disabled offenders. It might do so in the future. But until it does, all lower courts—including this Court and the court of appeals—must adhere to *Harmelin*'s general rule even in the face of subsequent doctrinal developments that theoretically undermined it.

What, then, to make of *Miller*'s declaration that "*Harmelin* had nothing to do with children," *Miller*, 567 U.S. at 481, on which the court of appeals relied? In other words, why would *Miller* turn on the age distinction between Harmelin and Miller? The *Miller* Court itself answered that by stating, "[I]f (as *Harmelin*

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[4] *E.g.*, *Thompson v. Marietta Education Association*, 972 F.3d 809, 813-15 (6th Cir. 2020); *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 547-50 (5th Cir. 2020) (per curiam); *United States v. Dinh*, 920 F.3d 307, 312 (5th Cir. 2019); *Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004); *Sellers v. State*, 13-18-00572-CR, 2019 WL 2042040, at *3 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.) (mem. op., not designated for publication); *see also Ex parte Williams*, 200 S.W.3d 819, 820-823 (Tex. App.—Beaumont 2006, no pet.) (questioning the continued validity of a general holding of this Court, but applying that holding anyway).

recognized) 'death is different,' children are different too." *Id*. As will be discussed more below, *Miller*'s entire reasoning rested on the fundamental differences between children and adults. Thus, in *Miller*, the Supreme Court decided that *Harmelin* did not apply because of what it considered to be a fundamental distinction between defendants Harmelin and Miller.

But it cannot be assumed that the Supreme Court will see offenders with intellectual disabilities as fundamentally different from other adults in the context of mandatory life-without-parole sentences. Accordingly, the court of appeals acted outside its prerogative when it decided that *Harmelin* did not apply because of what *it* considered to be a fundamental distinction between Harmelin and appellant.

An analogy helps illustrate the point. Some neuroscience research has suggested that humans, especially males, may not reach full maturity until around the age of 25. If a 19-year-old offender argued that, in light of such science, *Miller* entitled him to a discretionary hearing before being subject to life without parole, lower courts would be forced to reject that claim and apply *Harmelin*'s holding. That is so because, despite many similarities between young adults and juveniles, lower courts would still be bound by *Harmelin*'s general holding. In other words, a lower court could not skirt around *Harmelin* by saying, "*Harmelin* does not control because it 'had nothing to do with [young adults].'" That is not how

precedent works. *See United States v. Chavez*, 894 F.3d 593, 608-09 (4th Cir. 2018) (citing *Harmelin* and rejecting attempts to extend *Miller* to young adults facing mandatory life sentences).

The same would be true of a host of different types of defendants who may share characteristics with juveniles, notably offenders with certain physical, mental, or emotional disabilities. *See Modarresi v. State*, 488 S.W.3d 455 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.) (applying *Harmelin* even though defendant suffered from post-partum depression associated with Bipolar Disorder). Simply, despite the seeming appropriateness of deviating from a holding in a particular case, abrogation of general Supreme Court holdings, including *Harmelin*'s, rests with the Supreme Court, not the lower courts.

If *Harmelin* had never been decided, then this situation would be different. Absent an underlying rule regarding the mandatory imposition of life without parole, lower courts could potentially extend *Miller* and related holdings to new circumstances that the Supreme Court had not yet addressed. But *Harmelin* does exist, and, as a result, only the Supreme Court may depart from it. That is to say, no lower court may extrapolate what the Supreme Court may do with *Harmelin*'s general rule in the context of intellectually disabled offenders. Therefore, the court of appeals erred by not following binding Supreme Court precedent, and, accordingly, this Court should grant this petition to correct that error.

c. Intellectually disabled offenders are not sufficiently analogous to juveniles to warrant individualized sentencing hearings

The court of appeals based its decision on an analogy between juveniles and intellectually disabled offenders, noting that "[m]embers of each class of defendants have diminished culpability compared to other offenders." *Avalos*, 2020 WL 7775186, at *2. While acknowledging that "differences exist" between those classes of offenders, *id*., as the dissent noted, the majority did "not identify those differences or explain why most of these differences are immaterial." *Id*. at *4 (Chapa, J., dissenting). But, as explained by the Tyler Court of Appeals, which has addressed this same issue, *Miller* outlined several material distinctions between juveniles and adults. *Parsons v. State*, No. 12-16-00330-CR, 2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication).[5]

The obvious difference between juveniles and adults, including intellectually disabled adults, is that juveniles are less mentally and emotionally developed because they are still maturing. Thus, "juvenile offenders have greater prospects for reform than adult offenders," "the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders," and "recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in

[5] In *Parsons*, the defendant was 25 years old, but had the "mind of a 12 year old." *Parsons*, 2018 WL 3627527, at *4. Despite that, the *Parsons* Court upheld her mandatory life-without-parole sentence. *Id*. at *5.

adults[.]" *Parsons*, 2018 WL 3627527, at *5 (citing *Miller*, 567 U.S. at 471-75). In other words, a defining characteristic of childhood is change, which is not true of adulthood. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (stating that *Miller*'s "central intuition" was that "children who commit even heinous crimes are capable of change"). Therefore, a legislature, when making generally applicable laws, may assume that adults as a class will never change and, thus, must be sentenced to life without parole.

That is true for intellectually disabled offenders as well. Unfortunately, unlike juveniles, appellant and those like him will never change; they will always be intellectually disabled. *See Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020) ("Intellectual disability is a permanent condition . . . ."). Thus, "[t]he factors identified in *Atkins* logically impair rehabilitative potential, and, unlike a juvenile, whose mental development and maturation will eventually increase that potential, the same cannot generally be said of the intellectually disabled over time." *People v. Coty*, __ N.E.3d __, 2020 WL 2963311, at *9 ¶ 37 (Ill. June 4, 2020); *see also id*. at *10 ¶ 39 ("[T]he *Miller* Court's decision is founded, principally, upon the *transient* characteristics of youth, characteristics not shared by adults who are intellectually disabled.").

As the dissent below noted, "If juveniles are entitled to individualized sentencing because the developmental features of youth are transient, . . . then it is

unclear how the majority's holding flows straightforwardly from *Miller* when impaired cognitive functioning is an 'intellectual disability' only if the condition is permanent." *Avalos*, 2020 WL 7775186, at *4 (Chapa, J., dissenting). The legislature, thus, acted within its purview when it decided that dangerous offenders—such as appellant—with fixed traits should be forever isolated from the rest of society.

Furthermore, another material difference between juveniles and adults is the simple fact that juveniles are younger. Thus, "a sentence of life without parole is harsher for juveniles than adults because of their age," and "a sentence of life without parole for juveniles is akin to a death sentence because of their age." *Parsons*, 2018 WL 3627527, at *5 (citing *Miller*, 567 U.S. at 471-75). Neither of those reasons apply to adults, intellectually disabled or otherwise.

Accordingly, the court of appeals erred when it ignored material differences between juveniles and the intellectually disabled, thus eroding the very foundation upon which *Miller* stood.

d. Other considerations favor reversal

The Supreme Court has said that the Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. *Id*. at 312. However, appellant never outlined which states, if any, have prohibited mandatory life-without-parole sentences for intellectually disabled offenders. Since he bore the burden of establishing the statute's unconstitutionality, his failure to do so appears fatal to his claim.

Moreover, no case law indicates a changing national consensus towards prohibiting mandatory life-without-parole sentences for the intellectually disabled. Notably, the only case appellant relied upon below for his contention that the combined reasoning of *Atkins* and *Miller* proscribe such sentences was reversed by the Supreme Court of Illinois. *People v. Coty*, 110 N.E.3d 1105 (Ill. App. Ct. 2018), *rev'd*, 2020 WL 2963311, at *11 ¶ 45.

The court of appeals likewise failed to cite to any case that comports with its holding. In fact, as the dissent noted, the court of appeals's holding brings "Texas out of step with the growing consensus of other jurisdictions . . . ." *Avalos*, 2020 WL 7775186, at *4 & n.3 (Chapa, J., dissenting) (citing cases); *see also Commonwealth v. Jones*, 90 N.E.3d 1238, 1249-52 (Mass. 2018) (declining to

extend *Miller*'s holding to defendants with "developmental disabilities"); *Baxter v. Mississippi*, 177 So. 3d 423, 447 ¶ 83 (Miss. Ct. App. 2014) (stating that the defendant's "intellectual disability only precluded the death penalty, not life imprisonment without parole"), *aff'd*, 177 So.3d 394 (Miss. 2015). This Court should correct that misstep.

Finally, the dissent also outlined many other negative implications that could potentially flow from the court of appeal's holding—most notably "unearthing numerous capital murder cases for new punishment hearings" following retroactive relief—all of which further support review by this Court. *Avalos*, 2020 WL 7775186, at *4 (Chapa, J., dissenting).[6]

[6] Also of note, alternative reprieves are possible because "there remain the possibilities of retroactive legislative reduction and executive clemency." *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991); *see also id*. at 1008 (Kennedy, J., concurring) (further noting that prosecutors may, in their discretion, bring lesser charges to avert unjust sentences). For instance, the legislature has prohibited life-without-parole sentences for all juveniles, including capital offenders. Tex. Penal Code Ann. § 12.31(a)(1). So, while the Legislature has seen fit to extend greater protections to juveniles than the Constitution requires, *see Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014), it has not done so for the intellectually disabled. It may in the future, but it is not required to do so.

II. If the court of appeals is affirmed, the only available sentencing options should be life or life without parole.

If this Court is inclined to affirm, it should take this opportunity to answer a question not addressed by the holding below, namely, following an individualized sentencing hearing, what is the allowable range of punishment? Rather than waiting until after appellant is resentenced, answering that question now will serve the interests of judicial economy by providing the trial court with guidance and preventing the need for further litigation by the parties.

If, as the court of appeals held, this case's holding flows from *Miller*, then it is notable that the United States Supreme Court has endorsed a narrow construction of *Miller*, stating,

> Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. . . . Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences.

Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016); *see also Williams v. People*, 64 V.I. 618, 626 (V.I. 2016) (discussing *Montgomery* and citing additional cases); *Ex parte Henderson*, 144 So. 3d 1262, 1281-83 (Ala. 2013) (severing mandatory language from capital-murder statute in cases involving juveniles and stating that

life without parole is a sentencing ceiling, while life with parole eligibility is a floor).

Accordingly, if the court of appeals is affirmed, then this Court should declare that the only punishment options are life or life without parole.

PRAYER

The State prays that this Honorable Court grant this petition, reverse the judgment of the court of appeals, and affirm the judgment of the trial court.

Respectfully submitted,

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Attorneys for the State

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this petition is 3,280. I also certify that a true and correct copy of this petition for discretionary review was emailed to respondent Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, and Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 15th day of January, 2021.

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney

Attorney for the State

APPENDIX

Petitioner, the State of Texas, submits the following documents in support of its Petition:

1) Opinion of the En Banc Court of Appeals
2) Dissenting Opinion of the En Banc Court of Appeals
3) Opinion of the Court of Appeals on Original Submission
4) Dissenting Opinion of the Court of Appeals on Original Submission

Tab 1

Fourth Court of Appeals
San Antonio, Texas

OPINION

Nos. 04-19-00192-CR & 04-19-00193-CR

Johnny Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-10374, 2018-CR-7068
Honorable Lori I. Valenzuela, Judge Presiding

OPINION ON EN BANC RECONSIDERATION

Opinion by: Rebeca C. Martinez, Justice
Dissenting Opinion by: Luz Elena D. Chapa, Justice (joined by Sandee Bryan Marion, Chief Justice and Patricia O. Alvarez, Justice)

Sitting en banc: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 30, 2020

REVERSED AND REMANDED

This court previously ordered en banc reconsideration. We now withdraw our prior opinions and judgment and substitute today's opinions and judgment in their stead.

INTRODUCTION

Johnny Joe Avalos, an adult, intellectually disabled person, pled guilty and was convicted of two counts of capital murder. The State did not seek the death penalty. When the death penalty is not imposed on a person convicted of capital murder, Texas law requires the automatic imposition of a life sentence without parole. *See* TEX. PENAL CODE ANN. § 12.31(a)(2). Avalos was sentenced in accordance with this statute, and, consequently, the trial court did not consider mitigating factors related to Avalos's intellectual disability during the punishment phase of trial.

The harshest penalty allowed by law for an intellectually disabled person is life imprisonment without parole. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that an intellectually disabled person may not be sentenced to death). On appeal, Avalos argues that the automatic imposition of life sentences without parole amounted to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, section 13, of the Texas Constitution because he was denied an individualized assessment prior to the imposition of these harshest penalties. We agree with Avalos that the Eighth Amendment prohibits the automatic imposition of the punishment of life imprisonment without parole for an intellectually disabled person, and, consequently, we reverse the trial court's judgments and remand for resentencing.

PROCEDURAL BACKGROUND

Avalos pled guilty to two counts of capital murder. In his plea agreements, he and the State mutually agreed and recommended that punishment be assessed at "capital life." "Capital life" refers to section 12.31(a)(2) of the Texas Penal Code, which provides: "An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for . . . life without parole, if the individual committed the offense when 18 years of age or older." TEX. PEN. CODE ANN. § 12.31(a)(2). Avalos filed motions in the trial court challenging the constitutionality of his

automatic sentences. He argued the Supreme Court's decisions under the Eighth Amendment prohibit the automatic imposition of a life sentence without parole for an intellectually disabled person. The trial court denied Avalos's motions, accepted his guilty pleas, found him guilty of both capital murder offenses, and pronounced his life sentences in open court. Avalos timely appealed.[1]

THE CONSTITUTIONALITY OF SECTION 12.31(a)(2) AS APPLIED TO INTELLECTUALLY DISABLED PERSONS

Avalos's sole issue on appeal is whether section 12.31(a)(2)'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel and unusual as applied to intellectually disabled persons. Although neither the United States Supreme Court nor the Texas Court of Criminal Appeals have addressed this issue directly, we agree with Avalos that the prohibition on the automatic imposition of the punishment follows from the Supreme Court's holdings in *Atkins* and the Court's individualized sentencing cases.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments. *See* U.S. CONST. amend. VIII. Article I, section 13, of the Texas Constitution prohibits punishments that are cruel or unusual. TEX. CONST. art. I, § 13. Because there is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution," we address Avalos's issue in light of Supreme Court decisions. *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997).

[1] After oral argument, we granted the parties' joint motion to abate these appeals for the trial court to make an express finding as to whether Avalos is intellectually disabled. Without objection by the State, the trial court found that Avalos is intellectually disabled under the standards announced by the Supreme Court. *See Moore v. Texas*, 139 S. Ct. 666 (2019); *Moore v. Texas*, 137 S. Ct. 1039 (2017).

In *Atkins*, the Supreme Court barred the execution of intellectually disabled individuals because the sentence is cruel and unusual punishment within the meaning of the Eighth Amendment. *Atkins*, 536 U.S. at 321. The Court later explained that the decision falls within a line of cases striking down "sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *see also Graham v. Florida*, 560 U.S. 48, 60–61 (2010). Central to the Court's reasoning in these cases is "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469 (quotations omitted). Intellectually disabled defendants are "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316. Intellectually disabled individuals "frequently know the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. These impairments "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (citing *Atkins*, 536 U.S. at 319–20). Additionally, by nature of their diminished faculties, intellectually disabled defendants face an enhanced possibility of false confessions and a lessened ability to give meaningful assistance to their counsel. *Atkins*, 536 U.S. at 320–21.

Following *Atkins*, the Supreme Court decided that juvenile offenders, like intellectually disabled offenders, are in a class of defendants that is "constitutionally different" from other defendants for sentencing purposes. *Miller*, 567 U.S. at 471.[2] Members of each class of

[2] The State argues that we are bound by *Harmelin v. Michigan*, 501 U.S. 957 (1991), which held that the automatic imposition of a life sentence without parole for an adult was not cruel and unusual punishment. *See id.* at 961, 996.

defendants have diminished culpability compared to other offenders. *See Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 318–20. While differences exist, this fundamental similarity makes the imposition of the death penalty excessive for individuals in each group. *See Roper*, 543 U.S. at 572–73; *Atkins*, 536 U.S. at 321. Therefore, the harshest penalty that can be imposed on individuals in each group is life imprisonment without parole. *See Miller*, 567 U.S. at 470, 476–78; *cf. Graham*, 560 U.S. at 69 ("[L]ife without parole is the second most severe penalty permitted by law." (quotations omitted)). As with a death sentence, imprisonment until an offender dies "alters the remainder of [the offender's] life by a forfeiture that is irrevocable." *See Miller*, 567 U.S. at 474–75 (quotations omitted).[3]

The Supreme Court held in *Miller* that a mandatory imposition of a life sentence without parole on a juvenile "runs afoul of . . . [the] requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 567 U.S. at 465. A defendant facing the most serious penalties must have an opportunity to advance mitigating factors and have those factors assessed by a judge or jury. *See id.* at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (holding that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment).

However, *Harmelin* does not control because it "had nothing to do with [intellectually disabled persons]." *Cf. Miller*, 567 U.S. at 481 (declining to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children").

[3] To be sure, a life sentence without parole may be "an especially harsh punishment for a juvenile[, who] will on average serve more years and a greater percentage of his life in prison than an adult offender," but the difference in severity of the sentence when applied to a juvenile compared to an adult is one of degree. *See Graham*, 560 U.S. at 70. In other respects, the disproportionality of the punishment can be similar if mitigating factors are not considered. Diminished culpability for juvenile offenders and intellectually disabled offenders lessens the penological justifications for a sentence of life imprisonment without parole, which can render the sentence disproportionate. *See id.* at 71–74; *Atkins*, 536 U.S. at 318–20.

As with juveniles—for whom "*Graham* and *Roper* and [the Supreme Court's] individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult," *Miller*, 567 U.S. at 477—so too with the intellectually disabled; for them, the Supreme Court's decisions in *Atkins* and its individualized sentencing cases teach that a sentencer misses too much in imposing a State's harshest penalties if he treats every intellectually disabled person as alike with other adults. *See Atkins*, 536 U.S. at 316 (explaining that society views intellectually disabled defendants as "categorically less culpable than the average criminal"). Because Texas Penal Code section 12.31(a)(2) automatically imposes life imprisonment without parole, which is the harshest sentence an intellectually disabled person faces, the statute is unconstitutional as applied to intellectually disabled persons based on the combined reasoning of *Atkins* and the Court's individualized sentencing cases, which entitle defendants to present mitigating evidence before a trial court may impose the harshest possible penalty. *See id.*; *Miller*, 567 U.S. at 475–76.[4]

CONCLUSION

We hold that section 12.31(a)(2) of the Texas Penal Code is unconstitutional as applied to intellectually disabled persons, and that the trial court erred by denying Avalos an opportunity to present mitigating evidence before imposing the sentences of life imprisonment without parole. We remand these cases for further proceedings consistent with this opinion.

Rebeca C. Martinez, Justice

PUBLISH

[4] Because our ruling follows from precedent and does not categorically bar any penalty, there is no need to review legislative enactments to discern "objective indicia of societal standards." *See Miller*, 567 U.S. at 482–83 (explaining that because the Court's holding did not categorically bar a penalty for a class of offenders or type of crime and the decision followed from precedent, the Court was not required to scrutinize legislative enactments before holding a practice unconstitutional under the Eighth Amendment); *cf. Graham*, 560 U.S. at 61 (explaining that in cases adopting categorical rules, "[t]he Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the sentencing practice at issue.").

Tab 2

Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

Nos. 04-19-00192-CR & 04-19-00193-CR

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-10374, 2018-CR-7068
Honorable Lori I. Valenzuela, Judge Presiding

DISSENTING OPINION ON EN BANC RECONSIDERATION

Opinion by: Rebeca C. Martinez, Justice
Dissenting Opinion by: Luz Elena D. Chapa, Justice (joined by Sandee Bryan Marion, Chief Justice and Patricia O. Alvarez, Justice)

Sitting en banc: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: December 30, 2020

I respectfully dissent. For the reasons explained in the panel's original majority opinion,[1] the current state of the law compels us as an intermediary court to conclude that when an

[1] I have attached the opinion as an appendix to this dissent. *See, e.g.*, *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 703 (Tex. 2007) (O'Neil, J., dissenting) (attaching original opinion to new dissenting opinion).

intellectually disabled adult commits capital murder, imposing an automatic life sentence without parole—without an individualized sentencing determination as is required for juveniles under *Miller v. Alabama*—is not unconstitutionally cruel and unusual. *See* 567 U.S. 460 (2012); TEX. PENAL CODE § 12.31(a)(2). I write separately to: (1) briefly respond to the en banc majority opinion; (2) note the broad implications of the majority's holding; and (3) recommend that the Texas Legislature amend Penal Code section 12.31(a)(2) to account for intellectually disabled offenders' diminished culpability.

RESPONSE TO THE EN BANC MAJORITY

The panel majority identified five differences between juvenile and intellectually disabled adult offenders. The en banc majority notes "differences exist," but does not identify those differences or explain why most of these differences are immaterial. In a footnote, the majority addresses the difference in actual time served by a juvenile with a life sentence and by an intellectually disabled adult with the same sentence. *See Miller*, 567 U.S. at 470. But the majority does not address the most salient difference between the two classes of offenders. Juveniles are generally expected to develop intellectually, *id.* at 472–73, but "[i]ntellectual disability is a permanent condition." *Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020) (citing *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)). If juveniles are entitled to individualized sentencing because the developmental features of youth are transient, and a juvenile's likelihood of future intellectual development should be considered at a punishment hearing, then it is unclear how the majority's holding flows straightforwardly from *Miller* when impaired cognitive functioning is an "intellectual disability" only if the condition is permanent. *See* 567 U.S. at 470.

THE BROAD IMPLICATIONS OF THE MAJORITY'S HOLDING

Although the majority refers to the "combined reasoning" of *Miller v. Alabama* and *Atkins v. Virginia*, the majority extends *Miller* to adult offenders, and extends *Atkins* to non-death penalty

cases. Because both Supreme Court decisions are retroactive in habeas proceedings, the majority's holding could require unearthing numerous capital murder cases for new punishment hearings. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding *Miller* is retroactive); *Ex parte Maxwell*, 424 S.W.3d 66, 72 n.25 (Tex. Crim. App. 2014) (stating *Atkins* is retroactive).[2] The implications for the families of capital murder victims—families who once had some closure through prior legal proceedings—are considerable. The majority's holding could also extend to automatic life sentences without parole for repeat violent sexual offenders who are intellectually disabled. *See* TEX. PENAL CODE § 12.42(c)(4). And, "when the issue [of the defendant's intellectual disability] is presented at trial," and a jury is considering the death penalty, the majority's holding could have implications for jury instructions and other procedures in death penalty cases, over which the Court of Criminal Appeals has exclusive jurisdiction. *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).

Additionally, by declaring a sentencing statute unconstitutional as applied to a class of offenders, the majority creates a conflict with our sister court, which rejected this very same challenge with detailed reasoning. *Parsons v. State*, No. 12-16-00330-CR, 2018 WL 3627527, at *4–5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication). Consequently, the sentencing of intellectually disabled capital offenders will differ depending upon where in Texas the offense occurred. And throughout the country, "courts faced with *Atkins*-based challenges by intellectually-disabled offenders have found *Atkins* only applies to those offenders with death penalty sentences." *State v. Tuecke*, No. 15-0617, 2016 WL 1681524, at *8

[2] *See, e.g.*, *Ex parte Gutierrez*, WR-70,152-03, 2020 WL 6930823, at *1 (Tex. Crim. App. Nov. 25, 2020) (per curiam) (not designated for publication) (reforming a death penalty sentence for an intellectually disabled offender to an automatic life sentence); *Ex parte Lizcano*, WR-68,348-03, 2020 WL 5540165, at *1 (Tex. Crim. App. Sept. 16, 2020) (per curiam) (not designated for publication) (same); *Ex parte Henderson*, WR-37,658-03, 2020 WL 1870477, at *1 (Tex. Crim. App. Apr. 15, 2020) (per curiam) (not designated for publication) (same).

(Iowa Ct. App. Apr. 27, 2016). The majority's holding therefore brings Texas out of step with the growing consensus of other jurisdictions, including Iowa, Illinois, Pennsylvania, Oregon, and the 7th and 11th Circuits.[3]

THIS LEGISLATURE SHOULD CONSIDER REVISING SECTION 12.31(a)(2)

This issue is challenging because we must set aside our personal beliefs about the fairness of Texas's sentencing practices. From a public policy perspective, Texas's sentencing laws could and should be fairer in considering intellectually disabled offenders' diminished culpability. But expressing the will of the people of Texas, duly elected members of our legislature balanced various public policy considerations and came to a different conclusion through a democratic process. TEX. PENAL CODE § 12.31(a)(2). While "[i]t is emphatically the province and duty of the judicial department" to strike down laws that violate constitutional rights, *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803), our position as an intermediate state court of appeals requires faithful adherence to the Supreme Court's constitutional jurisprudence, just as statutory construction requires faithful adherence to a statute's plain language. *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

A growing national consensus of courts—indeed, in a diverse set of jurisdictions—has concluded the Eighth Amendment does not require the consideration of intellectual disability for non-death penalty cases involving adults. *See supra* note 3. Notably, the sole case from another jurisdiction relied upon by Avalos on original submission—*People v. Coty*—was reversed by the Supreme Court of Illinois the day after the panel issued its opinion and judgment in these appeals.

[3] *See id.* (citing *United States v. Gibbs*, 237 F. App'x 550, 568 (11th Cir. 2007) (finding *Atkins* was inapplicable in the context of a sentence that did not involve the death penalty); *Harris v. McAdory*, 334 F.3d 665, 668 n.1 (7th Cir. 2003) (same); *People v. Brown*, 967 N .E.2d 1004, 1022 (Ill. App. Ct. 2012) (same); *Commonwealth v. Yasipour*, 957 A.2d 734, 744 (Pa. Super. Ct. 2008) (same)); *see State v. Ward*, 437 P.3d 298, 312 (Or. Ct. App. 2019) (rejecting argument that *Miller* applies to intellectually disabled adults), *rev'd on other grounds*, 475 P.3d 420 (2020).

People v. Coty, 2020 WL 2963311, at *11 (Il. June 4, 2020) (reversing court of appeals and holding an automatic life sentence without parole was not unconstitutional as applied to intellectually disabled sex offender). Today, the majority deviates from the growing national consensus of courts considering this issue. The majority's reasoning shows how one day, the Supreme Court might conclude an automatic life sentence without parole for intellectually disabled offenders is unconstitutionally cruel and unusual. But given the growing consensus of other courts throughout the country, it simply does not appear that day has come.

When a "decision [does not] flow[] straightforwardly from [the Supreme Court's] precedents," judicial declarations that legislatively enacted sentencing statutes are unconstitutional have broad implications. *Miller*, 567 U.S. at 483. Under *Parsons*—and the overwhelming weight of authority from other jurisdictions—the prerogative to change constitutional, legislatively enacted statutes belongs to the legislature. 2018 WL 3627527, at *4–5. The Texas Legislature should therefore consider revising Penal Code section 12.31(a) to account for the diminished culpability of intellectually disabled capital offenders as a matter of public policy. Such a legislative change would provide fairness and justice for intellectually disabled offenders in future cases without the retroactive ramifications of premature constitutional declarations by the judiciary. Such legislation would also be a step in the right direction for evolving standards of decency that might, one day, be constitutionally relevant for intellectually disabled offenders. *See Graham v. Florida*, 560 U.S. 48, 61 (2010).[4]

[4] In a footnote, the majority states it need not consider objective indicia of evolving standards of human decency because *Miller* and *Atkins* compel its holding. However, such objective indicia can be a relevant factor to consider. *See, e.g.*, *Miller*, 567 U.S. at 482–83.

CONCLUSION

Because the significant differences between juvenile and intellectually disabled adult offenders reasonably explain why individualized sentencing is constitutionally mandatory for the former, but the not the latter, I respectfully dissent.

Luz Elena D. Chapa, Justice

Appendix
Original Panel Majority Opinion

Fourth Court of Appeals
San Antonio, Texas

OPINION

Nos. 04-19-00192-CR & 04-19-00193-CR

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-10374, 2018-CR-7068
Honorable Lori I. Valenzuela, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 3, 2020

AFFIRMED

In these two appeals, we are presented with a single issue of first impression: When an intellectually disabled person is convicted of capital murder, and the State does not seek the death penalty, is an automatic life sentence without parole unconstitutionally cruel and unusual? Based on the record and arguments before us, we cannot say the imposition of such a punishment is unconstitutional as applied to all intellectually disabled persons in every case. We therefore affirm the trial court's judgments.

PROCEDURAL BACKGROUND

Under a plea agreement, Johnny Joe Avalos, an adult, pled guilty to two charges of capital murder. The State did not seek the death penalty. In the plea agreements, Avalos and the State mutually agreed and recommended that punishment be assessed at "capital life." "Capital life" is a reference to Texas Penal Code section 12.31(a)(2)'s requirement of an automatic life sentence without parole for a person convicted of capital murder, when the death penalty is not imposed. *See* TEX. PENAL CODE § 12.31(a)(2).

Avalos filed motions challenging the constitutionality of his automatic life sentences without parole. He argued the Supreme Court of the United States' decisions under the Eighth Amendment prohibit the imposition of such a sentence on intellectually disabled persons. The trial court denied Avalos's motions, accepted his guilty pleas, found him guilty of both capital murder offenses, and pronounced his life sentences in open court. Avalos timely perfected appeal.[1]

THE CONSTITUTIONALITY OF SECTION 12.31(a)(2) AS APPLIED TO INTELLECTUALLY DISABLED PERSONS

Avalos's sole issue is whether section 12.31(a)(2)'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel and unusual as applied to intellectually disabled persons. Avalos argues the decisions of the Supreme Court of the United States under the Eighth Amendment compel the conclusion that section 12.31(a)(2) is unconstitutional as applied to intellectually disabled persons.

A. Cruel & Unusual Punishments

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments. U.S. CONST. amend. VIII. Article I, section 13, of the Texas Constitution also prohibits

[1] After oral argument, we granted the parties' joint motion to abate these appeals for the trial court to make an express finding as to whether Avalos is intellectually disabled. The trial court made findings in both cases that Avalos is intellectually disabled.

punishments that are cruel and unusual. TEX. CONST. art. I, § 13. There is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution." *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997).

The "cruel and unusual" standard is based on "a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). Proportionality is informed by objective evidence of contemporary values. *Id.* at 312. "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* A court must also "consider reason[s] for agreeing or disagreeing with their judgment" in light of "evolving standards of decency." *Id.* at 313, 321.

The Supreme Court of the United States, the Texas Court of Criminal Appeals, and this court have not yet addressed whether an automatic life sentence without parole, imposed upon an intellectually disabled person, is unconstitutionally cruel and usual. Avalos argues such a conclusion logically follows from the Supreme Court's Eighth Amendment decisions. Because there is no significant difference between the Texas Constitution and U.S. Constitution on this issue, we address Avalos's issue in light of the Supreme Court's decisions. *See Cantu*, 939 S.W.2d at 645. We also consider the decisions of other courts applying these Eighth Amendment decisions for their persuasive value.

B. Relevant Supreme Court Decisions

In *Atkins v. Virginia*, the Supreme Court held the imposition of the death penalty on an intellectually disabled person is unconstitutionally cruel and unusual. 536 U.S. at 321. The Supreme Court first considered the acts of several state legislatures to exclude intellectually disabled persons from eligibility for the death penalty. *Id.* at 313–17. The Supreme Court also held

that sentencing intellectually disabled persons to death did not substantially further two bases for imposing the death penalty: retribution and deterrence. *Id.* at 318–19. With respect to retribution, the Supreme Court explained that because "only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate." *Id.* at 319. With respect to deterrence, the Supreme Court explained the availability of the death penalty for intellectually disabled persons, who often act impulsively, would likely not deter them from "murderous conduct," and excluding intellectually disabled persons from eligibility for the death penalty would not undermine the deterrent effect the death penalty has on others. *Id.* at 319–20. The Supreme Court also considered that intellectually disabled persons generally "face a special risk of wrongful execution" due to an increased risk of false confessions, they generally have lesser abilities to communicate with counsel and to make a persuasive showing of mitigation to the jury, and "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320–21. The Supreme Court therefore held the death penalty is cruel and unusual when imposed on an intellectually disabled person. *Id.* at 321.

Although the Supreme Court has not considered the imposition of an automatic life sentence without parole as applied to intellectually disabled persons, Avalos argues the Supreme Court's decisions regarding juveniles guides our resolution of these appeals. In *Roper v. Simmons*, the Supreme Court held the death penalty is unconstitutionally cruel and unusual when imposed on a juvenile. 543 U.S. 551, 578 (2005). As in *Atkins*, the Supreme Court began by considering "[t]he evidence of national consensus against the death penalty for juveniles." *Id.* at 564. "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. The Supreme Court noted juveniles: (1) lack maturity and have an underdeveloped sense of responsibility; (2) "are more vulnerable or susceptible to negative influences and outside pressures, including peer

pressure"; and (3) have a relatively unformed character. *See id.* at 569–70. The Supreme Court explained "the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id.* at 571. Quoting *Atkins*, the Supreme Court concluded, "The same conclusions follow from the lesser culpability of the juvenile offender." *Id.*

In *Graham v. Florida*, the Supreme Court extended Eighth Amendment protections for juveniles in the context of automatic life sentences without parole for nonhomicide offenses. 560 U.S. 48, 74 (2010). In *Graham*, the Supreme Court relied on *Roper* to explain the diminished culpability of juveniles in light of the penological interests served by a life sentence without parole. *See id.* at 67–69, 71–75. The Supreme Court stated that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69. The Supreme Court explained a life sentence without parole denies all hope of release and "means . . . good behavior and character improvement are immaterial." *Id.* at 71. The Supreme Court also explained such a punishment is "especially harsh" for juveniles who "will on average serve more years and a greater percentage of . . . life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70.

In *Miller v. Alabama*, the Supreme Court extended *Graham* to include life sentences without parole for homicide offenses, "hold[ing] that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. 460, 465 (2012). The Supreme Court noted, "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing" and explained that "[d]eciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth." *Id.* at 471–73 (internal quotation marks omitted). The Supreme Court concluded juveniles are entitled to an individualized sentencing determination in which "a judge

or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. Avalos argues intellectually disabled persons are entitled to the same type of individualized sentencing determination.

The State argues we are bound by the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, the majority of the Supreme Court concluded the imposition of an automatic life sentence without parole for the offense of possession of 650 grams of cocaine was not cruel and unusual. *Id.* at 961, 996. The *Harmelin* plurality did not consider a proportionality review and considered the originally intended meaning of "cruel and unusual" in the Eighth Amendment. *See id.* at 994–95. The plurality's approach differed from the approach taken in Justice Kennedy's concurrence, in which he reached the same conclusion as the plurality, except by emphasizing the proportionality of the sentence as opposed to the Framers' original intent. *Id.* at 996–1001 (Kennedy, J., concurring).

C. Other Relevant Authorities

The parties also rely on decisions from other courts. Avalos principally relies on *People v. Coty*, 110 N.E.3d 1105 (Ill. App. Ct. 2018). In *Coty*, a jury convicted an intellectually disabled defendant as a repeat offender for sexual assault of a minor. *Id.* at 1107–08. An automatic life sentence without parole was assessed and, on appeal, the court of appeals reversed the sentence. *Id.* at 1108. The court held an automatic life sentence without parole was not facially unconstitutional under the Eighth Amendment, but was unconstitutional under Illinois's state constitution as applied to the defendant due to his intellectual disability. *See id.* On remand, the defendant was resentenced to 50 years in prison. *See id.* In the defendant's second appeal, the court of appeals noted the evolution in standards of decency required that the trial court consider evidence of the defendant's intellectual disability in sentencing. *Id.* at 1121–22. The court of appeals in *Coty* saw no reason why "the prohibition against the imposition of discretionary *de facto*

life sentences without the procedural safeguards of *Miller* and its progeny should not be extended to intellectually disabled persons." *Id.* at 1122.

The State relies on *Parsons v. State*, in which the Tyler court of appeals considered and rejected the very same position Avalos takes in these appeals. *See* No. 12-16-00330-CR, 2018 WL 3627527, at *4–5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication). The Tyler court reasoned that although there are some similarities between juveniles and intellectually disabled persons, the differences are too significant to extend the Supreme Court's precedents regarding juveniles, specifically *Miller*'s categorical bar to an automatic life sentence without parole, to intellectually disabled persons. *Id.* The State also relies on *Modarresi v. State*, in which the Houston court of appeals relied on *Harmelin* to reject a contention that section 12.31(a)(2) was unconstitutional as applied to someone suffering from "mental illness, particularly post-partum depression associated with Bipolar Disorder." 488 S.W.3d 455, 466 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The court in *Modarresi* noted the Supreme Court in *Harmelin* held an automatic life sentence without parole is constitutional without exception. *See id.*

D. Analysis

Not a single Supreme Court decision directly controls the resolution of these appeals. Although the court of appeals in *Modarresi* treated *Harmelin* as controlling in all contexts, there is no indication that the appellant in *Harmelin* was intellectually disabled. In other words, *Harmelin* is not controlling because it "had nothing to do with [intellectually disabled persons]." *Cf. Miller*, 567 U.S. at 481 (declining to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children"). Furthermore, the Supreme Court in *Harmelin* was able to reach a majority in its ultimate holding, but the plurality and concurrence disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins*. As one example, the *Harmelin*

plurality rejected proportionality as a consideration and construed the Eighth Amendment's phrase "cruel and unusual" considering the original intent of the language as used in the 1700s. *See* 501 U.S. at 965 ("[T]he Eighth Amendment contains no proportionality guarantee."). In *Atkins*, the Supreme Court considered proportionality and construed the phrase "cruel and unusual" in "evolving standards of decency" and "contemporary values." *See* 536 U.S. at 311–12.

Conversely, not a single Supreme Court decision has held an automatic life sentence without parole is unconstitutionally cruel and unusual when imposed on an intellectually disabled person. Avalos's position therefore turns on the strength of the analogy between intellectually disabled persons and juveniles under the Eighth Amendment. As to this analogy, the Tyler court's analysis in *Parsons* is persuasive:

> Although some of the reasoning behind the Court's decision in *Miller* might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not. These reasons include that (1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. We know of no reason to believe that these factors apply to intellectually disabled offenders.

2018 WL 3627527, at *5. This analysis accounts for the Supreme Court's specific considerations in *Miller* and *Graham*, such as the difference in time actually served by a 16-year-old and a 75-year-old for identical "life" sentences, and the inconsistency of incorrigibility with youth. *See Graham*, 560 U.S. at 70; *Miller*, 567 U.S. at 472–73. Avalos's reasoning and the Illinois case he cites, *Coty*, do not adequately account for the significant differences between juvenile offenders and adults identified by the Supreme Court in *Miller* and *Graham*.

We also note an additional point of distinction. In *Graham* and *Miller*, as well as *Atkins* and other Eighth Amendment cases, the Supreme Court considered the laws enacted by states'

legislatures. Avalos did not provide the trial court, and has not provided us, with any citations, discussion, or analysis of objective evidence of evolving standards of decency, such as the sentencing laws or practices of other states. *See* TEX. R. APP. P. 38.1(i); *Atkins*, 536 U.S. at 311–12 (considering such objective evidence of evolving standards of decency). We disagree with Avalos's specific contention on appeal, namely that the Supreme Court's decisions compel the conclusion that an automatic life sentence without parole is unconstitutional as applied to intellectually disabled persons. Without the objective evidence necessary to resolve Avalos's Eighth Amendment issue, we cannot say, in the first instance, that such a punishment is unconstitutionally cruel and unusual under either the U.S. Constitution or the Texas Constitution.

CONCLUSION

We hold the Supreme Court's decisions in *Atkins*, *Roper*, *Graham*, and *Miller* do not compel the conclusion that Texas Penal Code section 12.31(a)(2) is unconstitutional as applied to intellectually disabled persons. Having been provided no objective evidence of evolving standards of decency required to analyze whether the punishment here is unconstitutional, we cannot say Avalos's sentences are unconstitutionally cruel and unusual punishments. We therefore overrule Avalos's sole issue in these appeals and affirm the appealed judgments.

Luz Elena D. Chapa, Justice

PUBLISH

Tab 3

Fourth Court of Appeals
San Antonio, Texas

OPINION

Nos. 04-19-00192-CR & 04-19-00193-CR

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-10374, 2018-CR-7068
Honorable Lori I. Valenzuela, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 3, 2020

AFFIRMED

In these two appeals, we are presented with a single issue of first impression: When an intellectually disabled person is convicted of capital murder, and the State does not seek the death penalty, is an automatic life sentence without parole unconstitutionally cruel and unusual? Based on the record and arguments before us, we cannot say the imposition of such a punishment is unconstitutional as applied to all intellectually disabled persons in every case. We therefore affirm the trial court's judgments.

PROCEDURAL BACKGROUND

Under a plea agreement, Johnny Joe Avalos, an adult, pled guilty to two charges of capital murder. The State did not seek the death penalty. In the plea agreements, Avalos and the State mutually agreed and recommended that punishment be assessed at "capital life." "Capital life" is a reference to Texas Penal Code section 12.31(a)(2)'s requirement of an automatic life sentence without parole for a person convicted of capital murder, when the death penalty is not imposed. *See* TEX. PENAL CODE § 12.31(a)(2).

Avalos filed motions challenging the constitutionality of his automatic life sentences without parole. He argued the Supreme Court of the United States' decisions under the Eighth Amendment prohibit the imposition of such a sentence on intellectually disabled persons. The trial court denied Avalos's motions, accepted his guilty pleas, found him guilty of both capital murder offenses, and pronounced his life sentences in open court. Avalos timely perfected appeal.[1]

THE CONSTITUTIONALITY OF SECTION 12.31(a)(2) AS APPLIED TO INTELLECTUALLY DISABLED PERSONS

Avalos's sole issue is whether section 12.31(a)(2)'s requirement of an automatic life sentence without parole for capital murder, when the death penalty is not imposed, is unconstitutionally cruel and unusual as applied to intellectually disabled persons. Avalos argues the decisions of the Supreme Court of the United States under the Eighth Amendment compel the conclusion that section 12.31(a)(2) is unconstitutional as applied to intellectually disabled persons.

A. Cruel & Unusual Punishments

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishments. U.S. CONST. amend. VIII. Article I, section 13, of the Texas Constitution also prohibits

[1] After oral argument, we granted the parties' joint motion to abate these appeals for the trial court to make an express finding as to whether Avalos is intellectually disabled. The trial court made findings in both cases that Avalos is intellectually disabled.

punishments that are cruel and unusual. TEX. CONST. art. I, § 13. There is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution." *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997).

The "cruel and unusual" standard is based on "a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (internal quotation marks omitted). Proportionality is informed by objective evidence of contemporary values. *Id.* at 312. "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* A court must also "consider reason[s] for agreeing or disagreeing with their judgment" in light of "evolving standards of decency." *Id.* at 313, 321.

The Supreme Court of the United States, the Texas Court of Criminal Appeals, and this court have not yet addressed whether an automatic life sentence without parole, imposed upon an intellectually disabled person, is unconstitutionally cruel and usual. Avalos argues such a conclusion logically follows from the Supreme Court's Eighth Amendment decisions. Because there is no significant difference between the Texas Constitution and U.S. Constitution on this issue, we address Avalos's issue in light of the Supreme Court's decisions. *See Cantu*, 939 S.W.2d at 645. We also consider the decisions of other courts applying these Eighth Amendment decisions for their persuasive value.

B. Relevant Supreme Court Decisions

In *Atkins v. Virginia*, the Supreme Court held the imposition of the death penalty on an intellectually disabled person is unconstitutionally cruel and unusual. 536 U.S. at 321. The Supreme Court first considered the acts of several state legislatures to exclude intellectually disabled persons from eligibility for the death penalty. *Id.* at 313–17. The Supreme Court also held

that sentencing intellectually disabled persons to death did not substantially further two bases for imposing the death penalty: retribution and deterrence. *Id.* at 318–19. With respect to retribution, the Supreme Court explained that because "only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate." *Id.* at 319. With respect to deterrence, the Supreme Court explained the availability of the death penalty for intellectually disabled persons, who often act impulsively, would likely not deter them from "murderous conduct," and excluding intellectually disabled persons from eligibility for the death penalty would not undermine the deterrent effect the death penalty has on others. *Id.* at 319–20. The Supreme Court also considered that intellectually disabled persons generally "face a special risk of wrongful execution" due to an increased risk of false confessions, they generally have lesser abilities to communicate with counsel and to make a persuasive showing of mitigation to the jury, and "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320–21. The Supreme Court therefore held the death penalty is cruel and unusual when imposed on an intellectually disabled person. *Id.* at 321.

Although the Supreme Court has not considered the imposition of an automatic life sentence without parole as applied to intellectually disabled persons, Avalos argues the Supreme Court's decisions regarding juveniles guides our resolution of these appeals. In *Roper v. Simmons*, the Supreme Court held the death penalty is unconstitutionally cruel and unusual when imposed on a juvenile. 543 U.S. 551, 578 (2005). As in *Atkins*, the Supreme Court began by considering "[t]he evidence of national consensus against the death penalty for juveniles." *Id.* at 564. "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. The Supreme Court noted juveniles: (1) lack maturity and have an underdeveloped sense of responsibility; (2) "are more vulnerable or susceptible to negative influences and outside pressures, including peer

pressure"; and (3) have a relatively unformed character. *See id.* at 569–70. The Supreme Court explained "the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults." *Id.* at 571. Quoting *Atkins*, the Supreme Court concluded, "The same conclusions follow from the lesser culpability of the juvenile offender." *Id.*

In *Graham v. Florida*, the Supreme Court extended Eighth Amendment protections for juveniles in the context of automatic life sentences without parole for nonhomicide offenses. 560 U.S. 48, 74 (2010). In *Graham*, the Supreme Court relied on *Roper* to explain the diminished culpability of juveniles in light of the penological interests served by a life sentence without parole. *See id.* at 67–69, 71–75. The Supreme Court stated that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69. The Supreme Court explained a life sentence without parole denies all hope of release and "means . . . good behavior and character improvement are immaterial." *Id.* at 71. The Supreme Court also explained such a punishment is "especially harsh" for juveniles who "will on average serve more years and a greater percentage of . . . life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* at 70.

In *Miller v. Alabama*, the Supreme Court extended *Graham* to include life sentences without parole for homicide offenses, "hold[ing] that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. 460, 465 (2012). The Supreme Court noted, "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing" and explained that "[d]eciding that a juvenile offender forever will be a danger to society would require mak[ing] a judgment that [he] is incorrigible—but incorrigibility is inconsistent with youth." *Id.* at 471–73 (internal quotation marks omitted). The Supreme Court concluded juveniles are entitled to an individualized sentencing determination in which "a judge

or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489. Avalos argues intellectually disabled persons are entitled to the same type of individualized sentencing determination.

The State argues we are bound by the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, the majority of the Supreme Court concluded the imposition of an automatic life sentence without parole for the offense of possession of 650 grams of cocaine was not cruel and unusual. *Id.* at 961, 996. The *Harmelin* plurality did not consider a proportionality review and considered the originally intended meaning of "cruel and unusual" in the Eighth Amendment. *See id.* at 994–95. The plurality's approach differed from the approach taken in Justice Kennedy's concurrence, in which he reached the same conclusion as the plurality, except by emphasizing the proportionality of the sentence as opposed to the Framers' original intent. *Id.* at 996–1001 (Kennedy, J., concurring).

C. Other Relevant Authorities

The parties also rely on decisions from other courts. Avalos principally relies on *People v. Coty*, 110 N.E.3d 1105 (Ill. App. Ct. 2018). In *Coty*, a jury convicted an intellectually disabled defendant as a repeat offender for sexual assault of a minor. *Id.* at 1107–08. An automatic life sentence without parole was assessed and, on appeal, the court of appeals reversed the sentence. *Id.* at 1108. The court held an automatic life sentence without parole was not facially unconstitutional under the Eighth Amendment, but was unconstitutional under Illinois's state constitution as applied to the defendant due to his intellectual disability. *See id.* On remand, the defendant was resentenced to 50 years in prison. *See id.* In the defendant's second appeal, the court of appeals noted the evolution in standards of decency required that the trial court consider evidence of the defendant's intellectual disability in sentencing. *Id.* at 1121–22. The court of appeals in *Coty* saw no reason why "the prohibition against the imposition of discretionary *de facto*

life sentences without the procedural safeguards of *Miller* and its progeny should not be extended to intellectually disabled persons." *Id.* at 1122.

The State relies on *Parsons v. State*, in which the Tyler court of appeals considered and rejected the very same position Avalos takes in these appeals. *See* No. 12-16-00330-CR, 2018 WL 3627527, at *4–5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication). The Tyler court reasoned that although there are some similarities between juveniles and intellectually disabled persons, the differences are too significant to extend the Supreme Court's precedents regarding juveniles, specifically *Miller*'s categorical bar to an automatic life sentence without parole, to intellectually disabled persons. *Id.* The State also relies on *Modarresi v. State*, in which the Houston court of appeals relied on *Harmelin* to reject a contention that section 12.31(a)(2) was unconstitutional as applied to someone suffering from "mental illness, particularly post-partum depression associated with Bipolar Disorder." 488 S.W.3d 455, 466 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The court in *Modarresi* noted the Supreme Court in *Harmelin* held an automatic life sentence without parole is constitutional without exception. *See id.*

D. Analysis

Not a single Supreme Court decision directly controls the resolution of these appeals. Although the court of appeals in *Modarresi* treated *Harmelin* as controlling in all contexts, there is no indication that the appellant in *Harmelin* was intellectually disabled. In other words, *Harmelin* is not controlling because it "had nothing to do with [intellectually disabled persons]." *Cf. Miller*, 567 U.S. at 481 (declining to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children"). Furthermore, the Supreme Court in *Harmelin* was able to reach a majority in its ultimate holding, but the plurality and concurrence disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins*. As one example, the *Harmelin*

plurality rejected proportionality as a consideration and construed the Eighth Amendment's phrase "cruel and unusual" considering the original intent of the language as used in the 1700s. *See* 501 U.S. at 965 ("[T]he Eighth Amendment contains no proportionality guarantee."). In *Atkins*, the Supreme Court considered proportionality and construed the phrase "cruel and unusual" in "evolving standards of decency" and "contemporary values." *See* 536 U.S. at 311–12.

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> Although some of the reasoning behind the Court's decision in *Miller* might apply to intellectually disabled defendants as well as it does to juveniles, significant portions of the reasoning do not. These reasons include that (1) juvenile offenders have greater prospects for reform than adult offenders, (2) the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders, (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults, (4) a sentence of life without parole is harsher for juveniles than adults because of their age, and (5) a sentence of life without parole for juveniles is akin to a death sentence because of their age. We know of no reason to believe that these factors apply to intellectually disabled offenders.

2018 WL 3627527, at *5. This analysis accounts for the Supreme Court's specific considerations in *Miller* and *Graham*, such as the difference in time actually served by a 16-year-old and a 75-year-old for identical "life" sentences, and the inconsistency of incorrigibility with youth. *See Graham*, 560 U.S. at 70; *Miller*, 567 U.S. at 472–73. Avalos's reasoning and the Illinois case he cites, *Coty*, do not adequately account for the significant differences between juvenile offenders and adults identified by the Supreme Court in *Miller* and *Graham*.

We also note an additional point of distinction. In *Graham* and *Miller*, as well as *Atkins* and other Eighth Amendment cases, the Supreme Court considered the laws enacted by states'

legislatures. Avalos did not provide the trial court, and has not provided us, with any citations, discussion, or analysis of objective evidence of evolving standards of decency, such as the sentencing laws or practices of other states. *See* TEX. R. APP. P. 38.1(i); *Atkins*, 536 U.S. at 311–12 (considering such objective evidence of evolving standards of decency). We disagree with Avalos's specific contention on appeal, namely that the Supreme Court's decisions compel the conclusion that an automatic life sentence without parole is unconstitutional as applied to intellectually disabled persons. Without the objective evidence necessary to resolve Avalos's Eighth Amendment issue, we cannot say, in the first instance, that such a punishment is unconstitutionally cruel and unusual under either the U.S. Constitution or the Texas Constitution.

CONCLUSION

We hold the Supreme Court's decisions in *Atkins*, *Roper*, *Graham*, and *Miller* do not compel the conclusion that Texas Penal Code section 12.31(a)(2) is unconstitutional as applied to intellectually disabled persons. Having been provided no objective evidence of evolving standards of decency required to analyze whether the punishment here is unconstitutional, we cannot say Avalos's sentences are unconstitutionally cruel and unusual punishments. We therefore overrule Avalos's sole issue in these appeals and affirm the appealed judgments.

Luz Elena D. Chapa, Justice

PUBLISH

Tab 4

Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

Nos. 04-19-00192-CR & 04-19-00193-CR

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court Nos. 2016-CR-10374, 2018-CR-7068
Honorable Lori I. Valenzuela, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 3, 2020

I dissent because the Constitution requires individualized sentencing for intellectually disabled defendants who face the most serious penalty the State can impose on them—a life sentence without parole. Although this is a case of first impression, our result should follow straightforwardly from *Atkins v. Virginia*, 536 U.S. 304 (2002), and the Supreme Court's individualized sentencing cases.

In *Atkins*, the Supreme Court barred the execution of intellectually disabled individuals because the sentence is cruel and unusual punishment within the meaning of the Eighth Amendment. *Atkins*, 536 U.S. at 321. This decision falls within a line of cases striking down

"sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Graham v. Florida*, 560 U.S. 48, 60–61 (2010). Central to the Court's reasoning in these cases is "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Miller*, 567 U.S. at 469 (quotations omitted). Intellectually disabled defendants are "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316.[1] Intellectually disabled individuals "frequently know the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. These impairments "make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect." *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (citing *Atkins*, 536 U.S. at 319–20). Additionally, by nature of their diminished faculties, intellectually disabled defendants face an enhanced possibility of false confessions and a lessened ability to give meaningful assistance to their counsel. *Atkins*, 536 U.S. at 320–21.

Following *Atkins*, the Supreme Court decided that juvenile offenders, like intellectually disabled offenders, are in a class of defendants that is "constitutionally different" from other defendants for sentencing purposes. *Miller*, 567 U.S. at 471. Members of each class of defendants have diminished culpability compared to other offenders. *See Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 318–20. While differences certainly exist, this fundamental similarity makes the

[1] It is undisputed that Avalos is intellectually disabled or "mentally retarded," which is the term used in *Atkins*, which has since fallen out of favor. *See Atkins*, 536 U.S. at 306; *People v. Coty*, 110 N.E.3d 1105, 1107 n.1 (Ill. App. Ct. 2018).

imposition of the death penalty excessive for individuals in each group. *See Roper*, 543 U.S. at 572–73; *Atkins*, 536 U.S. at 321.

Acknowledging this fundamental similarity, I would follow the course adopted by *Miller*. The Supreme Court held in *Miller*, with respect to juvenile defendants, that a mandatory imposition of a life sentence without parole "runs afoul of . . . [the] requirement of individualized sentencing for defendants facing the most serious penalties." *Miller*, 567 U.S. at 465. For juveniles and the intellectually disabled, the most serious penalty is life imprisonment without parole; therefore, a life sentence without parole for these offenders is analogous to the death penalty. *See id.* at 470, 476–478; *see also Graham*, 560 U.S. at 69 ("[L]ife without parole is the second most severe penalty permitted by law." (quotations omitted)). As with a death sentence, imprisonment until an offender dies "alters the remainder of [the offender's] life by a forfeiture that is irrevocable." *See Miller*, 567 U.S. at 474–75 (quotations omitted).[2] Applying the analogy "makes relevant . . . a second line of [Supreme Court] precedents, demanding individualized sentencing when imposing the death penalty." *See id.* at 475.

Applying death-penalty precedent on sentencing leads directly to the requirement that a defendant facing the most serious penalty must have an opportunity to advance mitigating factors and have those factors assessed by a judge or jury. *See id.* at 489 ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (holding

[2] To be sure, a life sentence without parole may be "an especially harsh punishment for a juvenile[, who] will on average serve more years and a greater percentage of his life in prison than an adult offender," but the difference in severity of the sentence when applied to a juvenile compared to an adult is one of degree. *See Graham*, 560 U.S. at 70. In other respects, the disproportionality of the punishment can be similar if mitigating factors are not considered. Diminished culpability for juvenile offenders and intellectually disabled offenders lessens the penological justifications for a sentence of life imprisonment without parole, which can render the sentence disproportionate. *See id.* at 71–74; *Atkins*, 536 U.S. at 318–20.

that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment). Extending the reasoning, here, requires that an intellectually disabled individual be allowed an opportunity to present mitigating evidence related to his intellectual disability before the sentencer may impose the most severe sentence of life imprisonment without parole. By linking precedent in this manner, I would impose a requirement of individualized sentencing without the need to review legislative enactments. *See Miller*, 567 U.S. at 482–83 (explaining that because the Court's holding did not categorically bar a penalty for a class of offenders or type of crime and the decision followed from precedent, the Court was not required to scrutinize legislative enactments).

In short, I dissent because precedent controls. I would hold the trial court erred by denying Avalos an opportunity to present mitigating evidence before imposing the maximum sentence of life imprisonment without parole.

Rebeca C. Martinez, Justice

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