APPENDIX A

Avalos v. State

Court of Appeals of Texas, Fourth District, San Antonio

June 3, 2020, Delivered; June 3, 2020, Filed

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

Reporter
616 S.W.3d 214 *; 2020 Tex. App. LEXIS 4118 **; 2020 WL 2858867

John Joe AVALOS, Appellant v. The STATE of Texas, Appellee

Subsequent History: Opinion withdrawn by, Substituted opinion at, On reconsideration by, En banc, Remanded by *Avalos v. State, 616 S.W.3d 207, 2020 Tex. App. LEXIS 10310, 2020 WL 7775186 (Tex. App. San Antonio, Dec. 30, 2020)*

Prior History: [1]** From the 437th Judicial District Court, Bexar County, Texas. Trial Court Nos. 2016-CR-10374, 2018-CR-7068. Honorable Lori I. Valenzuela, Judge Presiding.

Disposition: AFFIRMED.

Core Terms

parole, life sentence, disabled person, juveniles, sentence, cruel, death penalty, disabled, automatic, offenders, decisions, adults, individualized sentencing, unconstitutionally, juvenile offender, plurality, court of appeals, proportionality, mitigating, appeals, decency, objective evidence, unusual punishment, capital murder, culpability, quotations, evolving, argues, cases

Case Summary

Overview

HOLDINGS: [1]-The court held that the U.S. Supreme Court's decisions in Atkins, Roper, Graham, and Miller did not compel the conclusion that *Tex. Penal Code Ann. § 12.31(a)(2)* was unconstitutional as applied to intellectually disabled persons. Having been provided no objective evidence of evolving standards of decency required to analyze whether the punishment was unconstitutional, the court could not say defendant's sentences of an automatic life sentence without parole for a person were unconstitutionally cruel and unusual punishments.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > Capital Murder > Penalties

HN1[] **Capital Murder, Penalties**

Capital life is a reference to *Texas Penal Code Ann. § 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. *§ 12.31(a)(2)*.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN2[] **Sentencing, Cruel & Unusual Punishment**

The *Eighth Amendment to the U.S. Constitution* prohibits cruel and unusual punishments. *U.S. Const. amend. VIII*. *Tex. Const. art. I, § 13* also prohibits punishments that are cruel and unusual. 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, § 13.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN3[] **Sentencing, Cruel & Unusual Punishment**

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. Proportionality is informed by objective evidence of contemporary values. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. A court must also consider reasons for agreeing or disagreeing with their judgment in light of evolving standards of decency.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN4[] **Sentencing, Cruel & Unusual Punishment**

In Atkins v. Virginia, the U.S. Supreme Court held the imposition of the death penalty on an intellectually disabled person is unconstitutionally cruel and unusual.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN5[] **Sentencing, Cruel & Unusual Punishment**

The U.S. Supreme Court held that sentencing intellectually disabled persons to death did not substantially further two bases

for imposing the death penalty: retribution and deterrence. 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. 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. 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. The Supreme Court therefore held the death penalty is cruel and unusual when imposed on an intellectually disabled person.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN6[⬇] **Sentencing, Capital Punishment**

In Roper v. Simmons, the U.S. Supreme Court held the death penalty is unconstitutionally cruel and unusual when imposed on a juvenile.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

HN7[⬇] **Sentencing, Capital Punishment**

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. The U.S. 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. The Supreme Court explained the penological justifications for the death penalty apply to juveniles with lesser force than to adults. Quoting Atkins, the Supreme Court concluded that the same conclusions follow from the lesser culpability of the juvenile offender.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN8[⬇] **Sentencing, Age & Term Limits**

In Graham v. Florida, the U.S. Supreme Court extended Eighth Amendment protections for juveniles in the context of

automatic life sentences without parole for nonhomicide offenses.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

HN9 **Sentencing, Capital Punishment**

The U.S. Supreme Court has stated that life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The Supreme Court explained a life sentence without parole denies all hope of release and means good behavior and character improvement are immaterial. 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.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN10 **Sentencing, Age & Term Limits**

In Miller v. Alabama, the U.S. Supreme Court extended Graham to include life sentences without parole for homicide offenses, holding 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. The Supreme Court noted that Roper and Graham establish that children are constitutionally different from adults for purposes of sentencing and explained that deciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible—but incorrigibility is inconsistent with youth. 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.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN11 **Sentencing, Cruel & Unusual Punishment**

Not a single U.S. Supreme Court decision has held an automatic life sentence without parole is unconstitutionally cruel and unusual when imposed on an intellectually disabled person.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN12[] **Sentencing, Capital Punishment**

Although some of the reasoning behind the U.S. Supreme 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. The court knows of no reason to believe that these factors apply to intellectually disabled offenders.

Counsel: For APPELLANT: Jorge G. Aristotelidis, San Antonio, TX.

For APPELLEE: Andrew Warthen, Assistant Criminal District Attorney, San Antonio, TX.

Judges: 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.

Opinion by: Luz Elena D. Chapa

Opinion

[*214] 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 **[*215]** 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." ***HN1***[] "Capital life" is a reference to *Texas Penal Code section 12.31(a)(2)*'s requirement **[**2]** 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

HN2[⬆] 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 punishments that are cruel and unusual. *Tex. Const. art. I, § 13* **[**3]** . 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)*.

HN3[⬆] 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, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (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, **[*216]** 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 **[**4]** their persuasive value.

[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.

B. Relevant Supreme Court Decisions

HN4[↑] 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*. ***HN5***[↑] 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 **[**5]** 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. ***HN6***[↑] 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, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (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*. ***HN7***[↑] "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 **[**6]** 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 **[*217]** Supreme Court concluded, "The same conclusions follow from the lesser culpability of the juvenile offender." *Id.*

HN8[↑] 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, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (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*. ***HN9***[⬆] 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 **[**7]** 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*.

HN10[⬆] 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, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (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 **[**8]** 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, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (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, 2018 IL App (1st) 162383, 425 Ill. Dec. 47, 110 N.E.3d 1105 (Ill. App. Ct. 2018)*. In *Coty*, a jury convicted an intellectually disabled defendant as a repeat offender for sexual **[*218]** 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 **[**9]** 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 Tex. App. LEXIS 5898, 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 **[**10]** 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 **[**11]** 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*.

HN11[⬆] Conversely, not a single Supreme Court decision has held an automatic life sentence **[*219]** 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:

> ***HN12***[⬆] 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 **[**12]** 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 Tex. App. LEXIS 5898, 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 **[**13]** 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 **[**14]** Avalos's sole issue in these appeals and affirm the appealed judgments.

Luz Elena D. Chapa, Justice

Dissent by: Rebeca C. Martinez

Dissent

DISSENTING OPINION

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, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (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, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*; *Graham v. Florida, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (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 **[**15]** 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

[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, 2018 IL App (1st) 162383, 425 Ill. Dec. 47, 110 N.E.3d 1105, 1107 n.1 (Ill. App. Ct. 2018)*.

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, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (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 imposition of the death penalty excessive for individuals **[**16]** 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 **[**17]** 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

[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*.

circumstances before imposing the harshest possible penalty for juveniles."); *see also* *Woodson v. North Carolina, 428 U.S. 280, 304-05, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion) (holding 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 **[**18]** before imposing the maximum sentence of life imprisonment without parole.

Rebeca C. Martinez, Justice

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APPENDIX B

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

Reporter
616 S.W.3d 207 *; 2020 Tex. App. LEXIS 10310 **; 2020 WL 7775186

Johnny Joe AVALOS, Appellant v. The STATE of Texas, Appellee

Notice: PUBLISH.

Subsequent History: Petition for discretionary review granted by *In re Avalos, 2021 Tex. Crim. App. LEXIS 322 (Tex. Crim. App., Mar. 31, 2021)*

Petition for discretionary review granted by *In re Avalos, 2021 Tex. Crim. App. LEXIS 288 (Tex. Crim. App., Mar. 31, 2021)*

Reversed by *Avalos v. State, 635 S.W.3d 660, 2021 Tex. Crim. App. LEXIS 1202 (Tex. Crim. App., Dec. 15, 2021)*

Prior History: [1]** From the 437th Judicial District Court, Bexar County, Texas. Trial Court Nos. 2016-CR-10374, 2018-CR-7068. Honorable Lori I. Valenzuela, Judge Presiding.

Avalos v. State, 616 S.W.3d 214, 2020 Tex. App. LEXIS 4118, 2020 WL 2858867 (Tex. App. San Antonio, June 3, 2020)

Disposition: REVERSED AND REMANDED.

Core Terms

disabled, offenders, sentencing, parole, automatic, cases, disabled person, life sentence, juvenile, individualized sentencing, death penalty, adult, cruel, capital murder, harshest, culpability, en banc, diminished, life imprisonment, trial court, implications, mitigating, decisions, appeals

Case Summary

Overview

ISSUE: Whether *Tex. Penal Code § 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. HOLDINGS: [1]-In its Opinion on en banc reconsideration, the court agreed with defendant that *U.S. Const. amend. VIII* prohibits the automatic imposition of the punishment of life imprisonment without parole for an intellectually disabled person;

[2]-*Tex. Penal Code Ann. § 12.31(a)(2)* is unconstitutional as applied to intellectually disabled persons, and the trial court erred by denying defendant an opportunity to present mitigating evidence before imposing the sentences of life imprisonment without parole.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > Capital Murder > Elements

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > ... > Murder > Capital Murder > Penalties

***HN1*[] Capital Murder, Elements**

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. *Tex. Penal Code Ann. § 12.31(a)(2)*.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Postconviction Proceedings > Parole

***HN2*[] Capital Punishment, Intellectual Disabilities**

The harshest penalty allowed by law for an intellectually disabled person is life imprisonment without parole.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Resentencing

***HN3*[] Fundamental Rights, Cruel & Unusual Punishment**

The *U.S. Const. amend. VIII* 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN4[] **Fundamental Rights, Cruel & Unusual Punishment**

The *Eighth Amendment to the U.S. Constitution* prohibits cruel and unusual punishments. *U.S. Const. amend. VIII*. *Tex. Const. art. I, § 13* prohibits punishments that are cruel or 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 *Tex. Const. art. I, § 13*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN5[] **Fundamental Rights, Cruel & Unusual Punishment**

In Atkins, the U.S. Supreme Court barred the execution of intellectually disabled individuals because the sentence is cruel and unusual punishment within the meaning of the Eighth Amendment. 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. 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.

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN6[] **Capital Punishment, Cruel & Unusual Punishment**

Intellectually disabled defendants are categorically less culpable than the average criminal. 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. 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. 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.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN7[⬇] **Sentencing, Age & Term Limits**

Following Atkins, the U.S. 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. Members of each class of defendants have diminished culpability compared to other offenders. While differences exist, this fundamental similarity makes the imposition of the death penalty excessive for individuals in each group. Therefore, the harshest penalty that can be imposed on individuals in each group is life imprisonment without parole. As with a death sentence, imprisonment until an offender dies alters the remainder of the offender's life by a forfeiture that is irrevocable.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

HN8[⬇] **Sentencing, Age & Term Limits**

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. 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.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN9[⬇] **Imposition of Sentence, Factors**

The U.S. 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. 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.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN10[⬇] **Sentencing, Age & Term Limits**

As with juveniles—for whom Graham and Roper and the U.S. 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,—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. Because *Tex. Penal Code Ann. § 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.

Counsel: For APPELLANT: Jorge G. Aristotelidis, San Antonio, TX.

For APPELLEE: Andrew Warthen, Assistant Criminal District Attorney, San Antonio, TX.

Judges: 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.

Opinion by: Rebeca C. Martinez

Opinion

[*208] OPINION ON EN BANC RECONSIDERATION

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. *HN1*[] When the death penalty is not imposed on a person convicted of capital murder, Texas law **[**2]** 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.

HN2[] 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, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (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. *HN3*[] We agree with Avalos that the *Eighth Amendment* **[*209]** 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: **[**3]** "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 **[**4]** 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.

HN4[⬆] 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)*.

HN5[⬆] 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, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*; *see also Graham **[*210]** v. Florida, 560 U.S. 48, 60-61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*. Central to the Court's reasoning in these cases is "the

[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, 203 L. Ed. 2d 1 (2019)*; *Moore v. Texas, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017)*.

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). ***HN6***[⬆] Intellectually disabled defendants are "categorically less culpable than the average criminal." *Atkins, 536 U.S. at 316*. Intellectually disabled **[**5]** 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, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (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*.

HN7[⬆] 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 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 **[**6]** 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]

[*211] ***HN9***[⬆] 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

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[2] The State argues that we are bound by *Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (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*. 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] ***HN8***[⬆] 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*.

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, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion) (holding that a statute mandating a death sentence for first-degree murder violated the *Eighth Amendment*).

HN10[⬆] As with **[**7]** 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 **[**8]** 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

Dissent by: Luz Elena D. Chapa

Dissent

DISSENTING OPINION

[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.").

DISSENTING OPINION ON EN BANC RECONSIDERATION

Delivered and Filed: December 30, 2020

I respectfully dissent. For the reasons explained in the panel's original majority **[*212]** opinion,[1] the current state of the law compels us as an intermediary court to conclude that when an 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, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (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 **[**9]** 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, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (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 **[**10]** numerous capital murder cases for new punishment hearings. *See* Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016) (holding *Miller* is retroactive);

[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).

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 **[*213]** 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 Tex. App. LEXIS 5898, 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 **[**11]** 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, 884 N.W.2d 223, 2016 WL 1681524, at *8 (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.

[2] *See, e.g.*, *Ex parte Gutierrez, WR-70,152-03, 2020 Tex. Crim. App. Unpub. LEXIS 554, 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 Tex. Crim. App. Unpub. LEXIS 363, 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 Tex. Crim. App. Unpub. LEXIS 171, 2020 WL 1870477, at *1 (Tex. Crim. App. Apr. 15, 2020)* (per curiam) (not designated for publication) (same).

[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, 2012 IL App (1st) 091940, 967 N .E.2d 1004, 1022, 359 Ill. Dec. 974 (Ill. App. Ct. 2012)* (same); ***Commonwealth v. Yasipour, 2008 PA Super 214, 957 A.2d 734, 744 (Pa. Super. Ct. 2008)*** (same)); *see* *State v. Ward, 295 Ore. App. 636, 437 P.3d 298, 312 (Or. Ct. App. 2019)* (rejecting argument that *Miller* applies to intellectually disabled adults), *rev'd on other grounds*, *367 Ore. 188, 475 P.3d 420 (2020)*.

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, 2 L. Ed. 60 (1803)*, our position as an intermediate state **[**12]** 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. *People v. Coty, 2020 IL 123972, 2020 WL 2963311, at *11 (Il. 2020)* (reversing court of appeals and holding an automatic life sentence without parole was not unconstitutional as applied to intellectually **[*214]** 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 **[**13]** 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 Tex. App. LEXIS 5898, 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, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*.[4]

CONCLUSION

Because the significant differences between

[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*.

juvenile and intellectually disabled adult offenders reasonably explain why individualized sentencing is constitutionally mandatory for **[**14]** the former, but the not the latter, I respectfully dissent.

Luz Elena D. Chapa, Justice

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APPENDIX C

Avalos v. State

Court of Criminal Appeals of Texas

December 15, 2021, Delivered

NOS. PD-0038-21 & PD-0039-21

Reporter
635 S.W.3d 660 *; 2021 Tex. Crim. App. LEXIS 1202 **

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

Notice: PUBLISH

Prior History: [1]** ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY.

Core Terms

offenders, juvenile, parole, sentence, disabled, juvenile offender, death penalty, categorically, murderers, youth, automatic, culpable, adult, cases, individualized sentencing, penological, mandatory, objective indicia, adult offender, deterrence, mitigating, transient, homicide, ban, life sentence, circumstances, non-homicide, strand, court of appeals, rehabilitation

Case Summary

Overview
HOLDINGS: [1]-It would be inappropriate to extend ***Miller***'s ban on the automatic imposition of life without parole on juvenile offenders to cover adult offenders who were intellectually disabled; [2]-There was a distinction, identifiable in the Supreme Court's own precedents, that made a critical difference to the acceptability of a sentence of life without the possibility of parole, even when automatically imposed; [3]-The incapacitation justification rendered constitutionally acceptable the Legislature's policy choice to mandate a punishment of life without parole as an alternative to the death penalty for that category of capital murder offenders in ***Texas***, notwithstanding ***Miller***; [4]-Defendant's mandatory sentences of life without parole did not violate U.S. Const. amend. VIII.

Outcome
Judgment reversed.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile

Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN1[] **Fundamental Rights, Cruel & Unusual Punishment**

In ***Miller***, the United States Supreme Court decided that it violates the *Eighth Amendment to the United States Constitution*, *U.S. Const. amend. VIII*, for a state to automatically sentence a juvenile offender—even one who has committed murder—to a term of life in the penitentiary without the possibility of parole. While it did not categorically ban a life without parole sentence for such a juvenile offender, it held that the state must at least first afford the juvenile offender the opportunity to persuade the punishment fact finder that he should not be automatically, "irrevocably" sentenced to spend the rest of his life in prison.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

HN2[] **Fundamental Rights, Cruel & Unusual Punishment**

The United States Supreme Court held that the *Eighth Amendment*, *U.S. Const. amend. VIII*, does not require an individualized sentencing determination—as a prerequisite to assessing a sentence of life without parole—for an adult offender, and that the mandatory imposition of such a sentence is constitutionally acceptable.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Postconviction Proceedings > Parole

HN3[] **Sentencing, Age & Term Limits**

To be sure, ***Miller*** does not categorically eliminate life without parole from the ambit of permissible punishments for juvenile offenders. But ***Miller*** does mandate an individualized sentencing requirement as a prerequisite to assessing life without parole for a juvenile offender, even one who commits murder—the same kind of individualized sentencing required to impose the death penalty for adults. The Supreme Court explained that, although it does not foreclose a sentencer's ability to make that judgment that life without parole is appropriate for juvenile offenders in homicide cases, it requires it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN4[⬇] **Fundamental Rights, Cruel & Unusual Punishment**

The first strand identifies circumstances in which certain punishments (usually, but not exclusively, the death penalty) are simply prohibited—categorically. The second strand, deriving from requires particularized assessment of the appropriateness of assessing a punishment (only the death penalty, until). The Supreme Court explained in ***Miller*** that the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*, *U.S. Const. amend. VIII*.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN5[⬇] **Capital Punishment, Intellectual Disabilities**

The Supreme Court catalogued the characteristics of intellectual disability that render such offenders less culpable 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN6[⬇] **Sentencing, Confinement Practices**

The Supreme Court identified three general differences between juveniles under 18 and adults that it believed demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. They are: (1) lack of maturity and underdeveloped sense of responsibility; (2) greater susceptibility to negative influence and peer pressure; and (3) an undeveloped character, such that the personality traits of juveniles are more transitory, less fixed.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN7[⬇] **Sentencing, Confinement Practices**

The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN8[⬇] **Fundamental Rights, Cruel & Unusual Punishment**

The Supreme Court determined that retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. For these reasons it concluded that, when a juvenile offender commits a heinous crime, the State

can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. Accordingly, the Supreme Court held that the Eighth and *Fourteenth Amendments* forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed, *U.S. Const. amends. VIII*, XIV.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN9 **Imposition of Sentence, Factors**

The judicial exercise of independent judgment requires consideration of the (1) culpability of the offenders at issue (2) in light of their crimes and characteristics, along with (3) the severity of the punishment in question. In this inquiry the Court also considers (4) whether the challenged sentencing practice serves legitimate penological goals.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN10 **Postconviction Proceedings, Imprisonment**

With respect to the first of these two additional objectives—incapacitation—the Supreme Court recognized that removing an incorrigible criminal from the rest of society has been deemed to be a legitimate penological justification in some contexts.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN11 **Sentencing, Age & Term Limits**

Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted with a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including in a plea agreement) or his incapacity to assists his

own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN12[] **Imposition of Sentence, Factors**

The Supreme Court mandates only that a sentencer follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN13[] **Imposition of Sentence, Factors**

Relying on the confluence of the categorical-challenge strand of cases and the individualized sentencing strand of cases, the Supreme Court concluded that it need not scrutinize legislative enactments for objective indicia of a consensus against the practice before exercising its own independent judgment.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Confinement Practices

HN14[] **Sentencing, Confinement Practices**

The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

HN15[] **Capital Punishment, Intellectual Disabilities**

In contrast to the juvenile offender, the intellectually disabled offender's condition is not transient precisely because of his condition, and thus he represents a greater long-term continuing threat to society. His diminished capacity to control impulses, to communicate, to abstract from his mistakes and learn from his experience is a fixed attribute that makes him a greater, not a lesser, danger to society.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

Criminal Law & Procedure > Sentencing > Capital Punishment > Intellectual Disabilities

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Life Imprisonment in Capital Cases

Criminal Law & Procedure > Postconviction Proceedings > Parole

Criminal Law & Procedure > Sentencing > Mental Incapacity

HN16[] **Sentencing, Age & Term Limits**

Juvenile offenders may—by the simple process of aging—mature out of their dangerous proclivities, but the intellectually disabled offender will not. It simply cannot be said, as ***Miller*** did about juvenile murderers, that the penological goal of incapacitation does not justify the State's decision to mandate a sentence of life without parole for the intellectually disabled killer.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN17[] **Imposition of Sentence, Factors**

The Supreme Court's traditional deference to legislative policy choices finds a corollary in the principle that the Constitution does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN18[] **Sentencing, Capital Punishment**

An intellectually disabled capital murderer may be, as the United States Supreme Court has concluded, categorically less culpable for his offense than the ordinary adult capital murderer, and therefore insulated from the death penalty; but he is no less dangerous for it—and there is no evidence that he will simply grow out of those aspects of his condition that may have contributed to his commission of his offense in the same way that a juvenile offender will eventually become an adult.

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

HN19[] **Capital Punishment, Cruel & Unusual Punishment**

The incapacitation justification renders constitutionally acceptable the Legislature's policy choice to mandate a punishment of life without parole as an alternative to the death penalty for that category of capital

murder offenders in ***Texas***—notwithstanding.

Judges: YEARY, J., delivered the opinion of the Court in which KELLER, P.J., and KEEL, SLAUGHTER, and MCCLURE, JJ., joined. HERVEY, RICHARDSON, and NEWELL, JJ., concurred in the result. WALKER, J., dissented.

Opinion

[*661] In two separate indictments, Appellant was charged with capital murder for the serial killing of five women over the course of several years. The State waived the death penalty, and Appellant pled guilty to two capital murders, judicially confessing in the process to murdering all five of the alleged victims. In pre-trial proceedings, he preserved his argument that the only remaining punishment—mandatory life without the possibility of parole—was unconstitutional as applied to him because he is intellectually disabled. The trial court accepted Appellant's plea but rejected his claim that to automatically assess life without parole against him, without allowing the consideration of mitigating evidence, violated the *Eighth Amendment*. Accordingly, the trial court sentenced Appellant to two life sentences without the possibility of parole, as required by statute when the State waives the death penalty in ***Texas***.[1]

HN1[↑] In **[**2]** ***Miller*** *v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)*, the United States Supreme Court decided that it violates the *Eighth Amendment to the United States Constitution* for a state to automatically sentence a *juvenile* offender—even one who has committed murder—to a term of life in the penitentiary without the possibility of parole. While it did not categorically ban a life without parole sentence for such a juvenile offender, it held that the state must at least first afford the juvenile offender the opportunity to persuade the punishment fact finder that he should not be automatically, "irrevocably" sentenced to spend the rest of his life in prison. *Id. at 480*.[2]

In the instant case, the Fourth Court of Appeals, sitting *en banc*, extended ***Miller***'s *Eighth Amendment* ban on automatic life-without-parole sentences to cover murder **[*662]** defendants who are intellectually disabled.[3] ***Avalos*** *v. State, 616 S.W.3d 207,*

[1] *See* ***Tex.*** *Penal Code § 12.31(a)(2)* ("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."). Appellant challenged the constitutionality of this provision in several pre-trial motions. In his prayers, Appellant requested that (1) the trial court conduct a sentencing hearing to allow him to present mitigating evidence, and that (2) at the conclusion of the hearing, the trial court assess a "proportionate" punishment less than life without parole. The trial court denied these motions and later certified Appellant's right to challenge its pre-trial rulings on appeal, notwithstanding his guilty pleas.

[2] *See Lewis v. State, 428 S.W.3d 860, 863 (****Tex.*** *Crim. App. 2014)* (recognizing that ***Miller*** does not categorically ban life without parole as an available punishment for juvenile offenders, but instead requires an individualized sentencing process as a prerequisite to its imposition).

[3] The State does not take issue with the trial court's conclusion that Appellant in fact suffers from intellectual disability. *See* ***Avalos*** *v. State, 616 S.W.3d 207, at 209 n.1 (****Tex.*** *App.—San Antonio 2020)*; State's Reply Brief on the Merits at 10, 15 ("This case is not about whether appellant is intellectually disabled. The State agrees that he is."). Having no need to inquire further about that issue, we therefore accept that proposition for the purposes of this opinion.

*211 (**Tex.** App.—San Antonio 2020)* (opinion on en banc reconsideration). A panel of another court of appeals has held that such an extension is *not* appropriate, albeit in an unpublished opinion. *Parsons v. State, No. 12-16-00330-CR, 2018 **Tex.** App. LEXIS 5898, 2018 WL 3627527, at *5 (**Tex.** App.—Tyler July 31, 2020)* (mem. op., not designated for publication). We granted the State's petition for discretionary review to examine whether the Supreme Court's decision in ***Miller*** should be so extended. We conclude that it should not, and we now reverse the Fourth Court of Appeals' judgment.

I. THE COMPETING ARGUMENTS [**3]

The State maintains that because Appellant is an adult offender, not a juvenile, this case is controlled by *Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)*. ***HN2***[⬆] There, the United States Supreme Court held that the *Eighth Amendment* does not require an individualized sentencing determination—as a prerequisite to assessing a sentence of life without parole—for an adult offender, and that the mandatory imposition of such a sentence is constitutionally acceptable. *Id. at 994-96*. The court of appeals disagreed that *Harmelin* controls, however, deciding that what was true of the juvenile homicide offender under ***Miller*** is equally true of the adult intellectually disabled homicide offender. ***Avalos**, 616 S.W.3d at 211*. Just as the Supreme Court in ***Miller*** found it appropriate to extend the individualized sentencing requirement to juveniles facing the possibility of life-without-parole because of the recognized mitigating qualities of youth, the court of appeals in this case also considered it appropriate to extend the individualized sentencing requirement to the mentally disabled offenders sentenced to life without parole because of the recognized mitigating qualities of *that* debilitating condition. *Id.*

In order to evaluate the legitimacy of this reasoning, it is necessary for us to take a deeper dive into the Supreme **[**4]** Court cases. In Part II of this opinion, we will examine the opinions of the Supreme Court that laid the foundation for its opinion in ***Miller***, with a view to explaining exactly what it is about juvenile offenders that led the Court to conclude that mandatory life without parole was an unacceptable sentence. In Part III, we will explain that, because offenders who are intellectually disabled do not share all of the same qualities as juvenile offenders—specifically, that their mitigating qualities are not inherently "transient" as are those of a juvenile offender—mandatory life without parole is a constitutionally acceptable punishment for them.

II. THE SUPREME COURT CASES

A. *Woodson* and *Eddings*: Individualized Sentencing

In 1982, in *Eddings v. Oklahoma*, the United States Supreme Court decided that, before a state may impose the death penalty in a capital murder case, it must permit the

sentencer to consider "the character and record of the individual offender and the circumstances of the particular offense" insofar as those considerations **[*663]** may militate against sentencing him to death. *455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)* (quoting *Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)* (plurality opinion)). That Court's 1976 plurality opinion in *Woodson* had already concluded that a state may **[**5]** not *automatically* impose the death penalty upon *any* offender, including murderers. "This conclusion" the Court explained, "rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment,"—"however long." *Woodson, 428 U.S. at 305* (plurality opinion).

B. *Harmelin*: No Individualized Assessment Required Before Mandatory Life Without Parole

Indeed, the Supreme Court explained in 1991 that its "cases creating and clarifying the 'individualized capital sentencing doctrine' [of *Woodson*/*Eddings*] have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." *Harmelin, 501 U.S. at 995* (citing, *inter alia*, *Eddings, 455 U.S. at 110-12*, and *Woodson, 428 U.S. at 303-05*). In *Harmelin*, for example, a majority of the Supreme Court concluded (in Part IV of what was otherwise a plurality opinion) that the individualized-sentencing requirement in death-penalty cases does not apply to a lesser sentence, and that it does not offend the *Eighth Amendment* for a state to impose an automatic sentence of life without parole—even for a non-homicide offense. *Id.* "We have drawn the line of required individualized sentencing at capital cases," the Supreme Court majority declared in *Harmelin* **[**6]**, "and see no basis for extending it further." *Id. at 996*.

C. *Miller*: Individualized Assessment Required Before Imposition of Mandatory Life Without Parole for Juveniles

Of course, the offender in *Harmelin* was an adult. In ***Miller***, however, which was decided in 2012, the offender was a juvenile. For the first time, in ***Miller***, the Supreme Court *did* extend the individualized sentencing requirement beyond the context of the death penalty, so that it now embraces what *Harmelin* characterized as "the second most severe [sentence] known to the law": life without parole. ***Miller**, 567 U.S. at 479*; *Harmelin, 501 U.S. at 996*. ***HN3***[⬆] To be sure, ***Miller*** does not *categorically* eliminate life without parole from the ambit of permissible punishments for juvenile offenders. *567 U.S. at 479-80*. But ***Miller*** does mandate an individualized sentencing requirement as a prerequisite to assessing life without parole for a juvenile offender, even one who commits murder—the same kind of individualized sentencing required to impose the death penalty for adults. *Id.* The Supreme Court explained that, "[a]lthough we do not foreclose a sentencer's ability to

make that judgment [that life without parole is appropriate for juvenile offenders] in homicide cases, we require it to take into account how children are different, and how those differences **[**7]** counsel against irrevocably sentencing them to a lifetime in prison." *Id. at 480*.

The decision in ***Miller*** represented a "confluence" of two "strands" of the Supreme Court's *Eighth Amendment* cases. *567 U.S. at 470*. ***HN4***[⬆] The first strand identifies circumstances in which certain punishments (usually, but not exclusively, the death penalty) are simply prohibited—categorically. *Id.* The second strand, deriving from *Woodson*, requires **[*664]** particularized assessment of the appropriateness of assessing a punishment (only the death penalty, until ***Miller***). *Id.* The Supreme Court explained in ***Miller*** that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the *Eighth Amendment*." *Id.* The question before us now is whether that confluence also ineluctably leads to the conclusion that mandatory life-without-parole sentences similarly violate the *Eighth Amendment* when assessed against an adult offender who is intellectually disabled.

1. Categorical Prohibitions Against Particular Punishments

(a) *Atkins*: Prohibiting the Death Penalty for Intellectually Disabled Offenders

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), is an example of the first "strand" that ***Miller*** identified—the categorical-challenge strand. In *Atkins*, the Supreme Court conducted what it called a "[p]roportionality **[**8]** review" to determine whether a particular *category* of punishment is constitutionally "excessive" for a particular *class of offender* under the *Eighth Amendment*. *Id. at 311-13*. It looked to "objective factors," including the prevalent legislative judgments, with respect to the nation's acceptance of that category of punishment, and then tempered that with its "own judgment" as to "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Id.* In *Atkins* itself, the Supreme Court found an emerging legislative trend against imposing the death penalty against capital offenders who are intellectually disabled, finding such offenders to be "categorically less culpable than the average criminal." *See id. at 315-16* ("It is not so much the number of these States that is significant, but the consistency in the direction of change."). From there, it turned to its own assessment of whether there is a reason to disagree with that perceived legislative judgment.

The Supreme Court concluded that, because of the qualities of intellectual disability, the execution of an offender who suffers from it categorically fails to contribute to either of the justifications it identified for the death penalty: retribution **[**9]** and deterrence. *Id. at 318-20*. ***HN5***[⬆] First, the Supreme Court catalogued the characteristics of intellectual disability that render such offenders less culpable "by definition":

> [T]hey 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id. at 318. Because retribution is a function of culpability, and the intellectually disabled are, "by definition" less culpable than "the average murderer[,]" the Supreme Court concluded that this justification fell short. *Id. at 319*.

Next, addressing deterrence, the *Atkins* Court determined that "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on the information." **[**10]** **[*665]** *Id. at 320*. Therefore, the Supreme Court concluded, the deterrence justification is also not well served by executing the intellectually disabled murderer. *Id.*

Finally, the Supreme Court observed that offenders who are intellectually disabled "in the aggregate face a special risk of wrongful execution." This happens, the Court observed, because of the danger that they may be induced to confess falsely, and because of a diminished capacity to assist in their own defense and to show the sentencer an appropriate level of contrition. *Id. at 320-21*.

These considerations persuaded the Supreme Court that the national legislative consensus it perceived to be emerging against executing intellectually disabled offenders was supportable. *Id. at 321*. It therefore concluded that the death penalty categorically constitutes an "excessive" punishment for such offenders under the *Eighth Amendment*. *Id.* And similar reasoning would soon lead the Supreme Court to conclude that the *Eighth Amendment* also categorically bans the execution of capital juvenile offenders.

(b) *Roper*: Prohibiting the Death Penalty for Juvenile Offenders

In *Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*, the Supreme Court revisited the question whether the *Eighth Amendment* categorically banned execution of juvenile capital murder offenders,[4] applying the same **[**11]** analysis as it had in *Atkins*. It asked first whether there were "objective indicia of consensus, as expressed in particular enactments of legislatures that have addressed the question." *Id. at 564*.

[4] Just sixteen years before deciding *Roper*, the Supreme Court had concluded that the *Eighth Amendment* does not prohibit the execution of offenders who are sixteen years of age or older when they commit their offense. *Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989)*. The Court at that time could "discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment" on such offenders. *Id. at 380*.

Next, it asked, "in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." *Id.* The Supreme Court found both that there were sufficient objective indicia of a societal aversion to executing juvenile offenders, *id., at 567*, and that executing juvenile offenders did not serve the penological objectives of retribution and deterrence. *Id. at 571-72*.

In arriving at the latter determination, ***HN6***[⬆] the Supreme Court identified "[t]hree general differences between juveniles under 18 and adults" that it believed "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id. at 569*. They are:

> (1) lack of maturity and underdeveloped sense of responsibility;
> (2) greater susceptibility to negative influence and peer pressure; and
> (3) an undeveloped character, such that "[t]he personality traits of juveniles are more transitory, less fixed."

Id. at 569-70. The Court went on to describe how these differences render a juvenile offender less culpable, even for the most **[**12]** heinous offense, than an adult offender:

> ***HN7***[⬆] The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate **[*666]** surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Id. at 570 (internal citations, quotation marks, and brackets omitted). ***HN8***[⬆] The Supreme Court determined that "[r]etribution is not proportional if the law's most **[**13]** severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id. at 571*. "As for deterrence," the Court observed, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles[.]" *Id.* For these reasons it concluded that, "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id. at 573-74*. Accordingly, the Supreme Court held that "[t]he *Eighth* and *Fourteenth Amendments* forbid imposition

of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Id. at 578*.

As of 2005, when *Roper* was decided, the Supreme Court's *Eighth Amendment* bar on certain punishments as disproportionate, and therefore "excessive," was somewhat limited. It was, up until that time, largely confined to the *death penalty*, either for a certain class of categorically-less-culpable offenders (juveniles and the intellectually disabled), or for categorically-less-heinous crimes (*e.g.*, rape, or vicarious responsibility for a murder for which the offender lacked **[**14]** mental culpability for the actual killing).[5] In *Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)*, however, the Supreme Court would break new ground, for the first time categorically prohibiting a punishment of *less than death* (life without parole) for a certain *class of offender* (juveniles) for a certain *kind of crime* (less than homicide).

(c) *Graham*: Prohibiting Life Without Parole for Juvenile Offenders Who Commit Non-Homicide Offenses

In *Graham*, the juvenile defendant was assessed a sentence of life without parole **[*667]** for a non-homicide offense. *Graham* differs from ***Miller*** (which it preceded by two years) in that the sentence was not imposed automatically, and Graham argued that, even so, it was categorically unconstitutional when imposed for a non-homicide offense. At the outset, the Supreme Court recognized the novelty of the issue before it: "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence." *Id. at 61*. Because it was a categorical challenge, the Supreme Court proceeded under the mode of analysis it had employed in *Atkins* and *Roper*, namely: (1) looking for objective indicia of society's attitude about life without parole within its legislative enactments; and then (2) overlaying **[**15]** its "own independent judgment" about the efficacy of that punishment to satisfy the relevant penological goals, to decide whether the legislative consensus was supportable.

After examining the objective indicia, the Supreme Court concluded that "[t]he sentencing practice now under consideration is exceedingly rare[,]" such that "'it is fair to say that a national consensus has developed against it.'" *Id. at 67* (quoting *Atkins, 536 U.S. at 316*). Turning to the exercise of its own independent judgment, the Court observed:

> ***HN9***[⬆] The judicial exercise of

[5] *See* *Coker v. Georgia, 433 U.S. 584, 598, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977)* (plurality opinion) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."); *Enmund v. Florida, 458 U.S. 782, 801, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)* ("Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."); *see also* *Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008)* (deciding that the death penalty is a categorically disproportionate sentence for the offense of rape of a child); *Graham v. Florida, 560 U.S. 48, 60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)* (observing that the Court has broken down its classification of cases that focus on categorical bans on the death penalty into "two subsets, one considering the nature of the offense, the other considering the characteristics of the offender.").

> independent judgment requires consideration of the [1] culpability of the offenders at issue [2] in light of their crimes and characteristics, along with [3] the severity of the punishment in question. In this inquiry the Court also considers [4] whether the challenged sentencing practice serves legitimate penological goals.

Id. (citations omitted; bracketed numbers added). After (1) reiterating *Roper*'s conclusion that juveniles are categorically less culpable than adult offenders, and then observing that (2) no other offense can compare to murder in seriousness and irrevocability, and that (3) life without parole is surpassed in its severity only by the death penalty and may be "an **[**16]** especially harsh punishment for a juvenile," *id. at 68-70*, the Court went on (4) to analyze whether life without parole for juvenile non-homicide offenders could be justified by any penological goal.

In analyzing the efficacy of life without parole to serve the penological goals when it comes to juvenile offenders, the *Graham* Court expanded upon those penological goals it had found wanting in *Atkins* and *Roper*. As in *Atkins* and *Roper*, the Court found that life without parole for a juvenile non-homicide offender was not justified by the familiar twin goals of retribution or deterrence. *Id. at 71-72*. But beyond that, the Court also asked whether life without parole for juveniles might also be justified by either of two additional penological objectives not mentioned in *Atkins* or *Roper*: incapacitation and rehabilitation. *Id. at 72*.

HN10[⬆] With respect to the first of these two additional objectives—incapacitation—the Supreme Court recognized that removing an incorrigible criminal from the rest of society has been deemed to be a "legitimate" penological justification in some contexts. *Id. at 71* (citing *Ewing v. California, 538 U.S. 11, 25, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)* (plurality opinion)).[6] But it rejected that justification **[*668]** for assessing life without parole for a juvenile offender because the transience of youth makes "questionable" any assumption **[**17]** that a juvenile will prove incorrigible." *Id. at 72-73*. To exile such an offender to a lifetime in the penitentiary without even the possibility of parole, it explained, "improperly denies [him] a chance to demonstrate growth and maturity." *Id. at 73*.

As for the goal of rehabilitation, the Supreme Court rejected this justification for life without parole out of hand. In doing so, it observed that life without parole, by its nature, "forswears altogether the rehabilitative ideal." *Id. at 74*. "In sum," the *Graham* Court concluded, "penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders." *Id.*

(2) Prohibition Against Life Without Parole for Juvenile Homicide Offenders

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[6] *See also* *Atkins, 536 U.S. at 350* (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future,' *Gregg v. Georgia, 428 U.S. 153, 183 n.28, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)* (joint opinion of Stewart, Powell, and Stevens, JJ.).").

Absent Individualized Sentencing

What distinguishes ***Miller*** from *Atkins*, *Roper*, and *Graham* is that, in ***Miller***, the Supreme Court did *not* address a claim that a certain punishment was *categorically* banned. ***Miller***, *567 U.S. at 479*. Instead, it held that a state is permitted to impose a sentence of life without parole upon a juvenile homicide offender only when the sentencer is first given an opportunity to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id. at 476*. ***HN11***[⬆] As the Supreme Court summarized:

> Mandatory **[**18]** life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted with a lesser offense if not for the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including in a plea agreement) or his incapacity to assists his own attorneys. * * * And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477-78. So, while it did not categorically ban life without parole for juvenile homicide offenders, the Court concluded that such a punishment could not be assessed without requiring the sentencer "to take into account how children are different, **[**19]** and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id. at 480*.

Notably, the ***Miller*** Court did *not* inquire about the legislative consensus, or any other "objective indicia" of society's attitude, before announcing its decision. Because it was not imposing a categorical ban, the Supreme Court said, it did not need to undertake the first part of the *Eighth Amendment* analysis of cases such as *Atkins*, *Roper*, and *Graham* (*i.e.*, the part that looks for "objective indicia" of societal consensus in, *e.g.*, legislative enactments), but could proceed basically upon its own judgment, as it had done in cases such as *Woodson* and *Eddings*. *Id. at 483*. As the Court explained:

> **[*669]** Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. ***HN12***[⬆] Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant circumstances—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases [such as *Woodson* and

> *Eddings*] that youth matters for purposes of meting out the law's most serious **[**20]** punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. We see no difference here.

Id. (citations omitted). The Supreme Court then went on to observe that, in any event, the relevant legislative enactments regarding automatic life without parole for juvenile murderers were too amorphous to "preclude" its own ultimate judgment that such a penalty was constitutionally unacceptable. *Id. at 483-87, 489*.

III. ANALYSIS

The State principally argues that, because Appellant was an adult offender, the court of appeals' decision must be reversed consistent with *Harmelin*. The State of Alabama made a similar argument in ***Miller***, that *Harmelin* controlled the question whether juveniles are susceptible to automatic life without parole. The Supreme Court rejected that argument as "myopic[,]" observing that "*Harmelin* had nothing to do with children and did not purport to apply its decision to the sentencing of juvenile offenders." *567 U.S. at 481*.

It is not inconceivable to us that the Supreme Court might again ultimately say something similar with respect to intellectual disability. *Harmelin* was decided before *Atkins*, not to mention *Hall v. Florida, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)*, *Moore v. **Texas**, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017)*, and *Moore v. **Texas**, 139 S. Ct. 666, 203 L. Ed. 2d 1 (2019)*. The Supreme Court might well conclude that the **[**21]** question remains open because *Harmelin* "did not purport to apply its holding to the sentencing of" intellectually disabled offenders.[7]

The State also argues that the court of appeals erred because Appellant failed to identify any objective indicia of a national consensus—not even a trend—against assessing life without parole for intellectually disabled murderers. That is true. But in ***Miller***, the Supreme Court did not require the demonstration of such a consensus before deciding that the automatic assessment of life without parole was a constitutionally unacceptable sentence for juvenile offenders. ***HN13***[⬆] Relying on the "confluence" of the categorical-challenge "strand" of cases and the individualized sentencing "strand" of cases, the Supreme Court concluded that it need not scrutinize legislative enactments for objective indicia of a consensus against the practice before exercising its own independent judgment. ***Miller**, 567 U.S. at 483*. This failure of proof, therefore, consistent with ***Miller***, is not necessarily fatal to Appellant's case.

[*670] But we need not definitively resolve either of these arguments.

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[7] The State also argues that only the United States Supreme Court has the authority to extend ***Miller*** to the detriment of its decision in *Harmelin*. State's Brief at 17-20. The State made no such argument in its brief to the court of appeals. In any event, in light of our ultimate conclusion that *Harmelin*, not ***Miller***, does control, we need not address this contention.

Ultimately, we agree with the State that it would be inappropriate to extend ***Miller***'s ban on the automatic imposition of life without parole **[**22]** on juvenile offenders to cover adult offenders who are intellectually disabled—even under the same "confluence-of-strands" analysis that the Supreme Court applied in ***Miller***. It is true that those two categories of offenders (juveniles and adults who are intellectually disabled) may share many of the same mitigating characteristics, such as diminished impulse control and greater susceptibility to peer pressure. Nevertheless, there is a distinction, identifiable in the Supreme Court's own precedents, that makes a critical difference to the acceptability of a sentence of life without the possibility of parole, even when automatically imposed.

A number of courts have recognized the distinction (without necessarily describing exactly why it makes a difference to the *Eighth Amendment* analysis). ***HN14***[⬆] As the Supreme Court itself explained in *Roper*, "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *543 U.S. at 570*. Accordingly, the few lower and intermediate courts that have directly addressed the question of whether ***Miller*** should be extended to cover intellectually disabled **[**23]** murderers have noted that youth is mitigating precisely because it is transient. *See Turner v. Coleman, No. 13-1787, 2016 U.S. Dist. LEXIS 97099, 2016 WL 3999837, at *8 (W.D. Pa. July 26, 2016)* (mem. op., not designated for publication) (addressing a claim that the *Equal Protection Clause* required application of ***Miller*** to intellectually disabled defendant convicted of murder in state court, and deciding that "Petitioner fails to show that he is similarly situated to juveniles in the critical aspect that mentally retarded individuals share as a class with the class of juvenile convicts, i.e., greater prospects for reform") (internal quotation marks omitted); *State v. Little, 200 So.3d 400, 403-04 (La. Ct. App. 3rd 2016)* (rejecting an argument that "mentally retarded defendants should be afforded the same protections given to juvenile defendants" in ***Miller***, while observing that "there is a greater possibility of reform over time as the juvenile matures into adulthood"); *Parsons, 2018* ***Tex.*** *App. LEXIS 5898, 2018 WL 3627527, at *5* (noting the characteristics of juveniles that do not apply to the intellectually disabled, including 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 . . . [and] (3) recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults").[8]

[8] Other post-***Miller*** courts have also refused to expand it, but with less explanation of how intellectual disability is sufficiently different from the juvenile condition to justify a different treatment. *See Baxter v. State, 177 So.3d 423, 447 (Miss. Ct. App. 2014)* (rejecting a claim that life without parole "is disproportionate" considering the defendant's intellectual disability, observing simply (even after ***Miller***) that, "under our law, Baxter's intellectual disability only precluded the death penalty, not life imprisonment without parole"); *Commonwealth v. Jones, 479 Mass. 1, 90 N.E.3d 1238, 1252 (Mass. 2018)* (refusing to extend ***Miller*** to "eliminate" mandatory life without parole sentences for defendants with "developmental

The Illinois Supreme Court has recently offered a cogent explanation for why that difference matters. In *People v. Coty, N.E.3d , 2020 IL 123972, **[*671]** 2020 WL 2963311 (Ill. 2020)*, the court observed:

> While the Supreme Court's decision in ***Miller*** is based in part upon the lesser culpability of youth—a characteristic the *Atkins* Court pronounced shared by the intellectually disabled—the ***Miller*** Court's decision is founded, principally, upon the *transient* characteristics of youth, characteristics not shared by adults who are intellectually disabled.

*2020 IL 123972, [WL] at *10*. That the juvenile offender's deficiencies are transient made all the difference to the Illinois Court, as it elaborated:

> The enhanced prospect that, as the years go by and neurological development occurs, deficiencies will be reformed—is not a prospect that applies to this intellectually disabled defendant, who was 46 years old when he committed this, his second sexual offense against a child. The rehabilitative prospects of youth do not figure into the sentencing calculus for him.

Id. ***HN15***[⬆] In contrast to the juvenile offender, the intellectually disabled offender's condition is not transient precisely *because* of his condition, and thus he represents a greater long-term *continuing* threat to society. His diminished capacity to control impulses, **[**25]** to communicate, to abstract from his mistakes and learn from his experience is a fixed attribute that makes him a greater, not a lesser, danger to society. *2020 IL 123972, [WL] at *9*.

We agree with the Illinois Supreme Court.***HN16***[⬆] Juvenile offenders may—by the simple process of aging—mature out of their dangerous proclivities, but the intellectually disabled offender will not. It simply cannot be said, as ***Miller*** did about juvenile murderers, that the penological goal of incapacitation does not justify the State's decision to mandate a sentence of life without parole for the intellectually disabled killer.[9]

HN17[⬆] A plurality of the Supreme Court observed in *Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003)*:

> Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.[10]

disabilities"); *c.f.*, *State v. Ward, 295 Ore. App. 636, 437 P.3d 298, 313 (Ore. Ct. App. 2019)* (refusing to expand ***Miller*** even *further* to impose a *categorical* **[**24]** ban on life without parole sentences for intellectually disabled defendants).

[9] Appellant in these cases has judicially confessed to killing five women over the course of several years. He was almost 26 years old when he committed the first murder, in 2012.

[10] *See also* *Harmelin, 501 U.S. at 999* (Kennedy, J., concurring) ("[T]he *Eighth Amendment* does not mandate adoption of any one

Id. at 25 (internal citation omitted). We therefore agree with the State that *Harmelin* should control. *See 501 U.S. at 1006-07* **[**26]** (Kennedy, J., concurring) ("We have never invalidated a penalty mandated by a legislature based only on the length of sentence, and, especially with a crime as severe as this one, we should do so only in the most extreme circumstances."). ***HN18***[ ] An intellectually disabled capital murderer may be, as the United States Supreme Court has concluded, categorically less *culpable* for his offense than the ordinary adult capital murderer, and therefore insulated from the death penalty; but he is no less dangerous for it—and we are aware of no evidence that he will simply grow out of those aspects of his condition that may have contributed **[*672]** to his commission of his offense in the same way that a juvenile offender will eventually become an adult.

Society has a substantial need to protect itself from intellectually disabled murderers. ***HN19***[ ] We therefore conclude that the incapacitation justification renders constitutionally acceptable the Legislature's policy choice to mandate a punishment of life without parole as an alternative to the death penalty for that category of capital murder offenders in ***Texas***—notwithstanding ***Miller***. Appellant's mandatory sentences of life without parole do not violate the *Eighth Amendment*.

IV. [**27] CONCLUSION

Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

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penological theory.").