No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

JOHNNY JOE AVALOS, PETITIONER

V.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE

TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED FOR REVIEW

Johnny Joe Avalos, an intellectually disabled adult, was sentenced to automatic life in prison, without the possibility of parole (ALWOP) for homicide offenses.

The question presented by Avalos is:

Whether an ALWOP sentence on an intellectually disabled adult convicted of capital murder as provided by Texas Penal Code Section 12.31(a)(2) - a statutory scheme that categorically precludes consideration of the offender's intellectual disability or any other mitigating circumstances - violates the Eighth Amendments' prohibition against cruel and unusual punishments?

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Johnny Joe Avalos asks that a writ of certiorari issue to review the opinion and judgment entered by the Texas Court of Criminal Appeals on December 15, 2021.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals, *Avalos v. State*, 635 S.W.3d 660 (Tex. Crim. App. 2021), which reversed the Fourth Court of Appeals' *en banc* ruling, and affirmed Avalos's ALWOP sentence, has been reported and is attached as Appendix A.

The *en banc* opinion (following rehearing) of the Texas Fourth Court of Appeals of San Antonio, Texas, *Avalos v. State*, 616 S.W.3d 207 (Tex. App. San Antonio - 2020) (en banc), *rev'd*, 635 S.W.3d 660 (Tex. Crim. App. App. 2021), which reversed the original opinion and declared that Texas Penal Code Section 12.31(a)(2)'s categorical requirement that an adult convicted of capital murder be sentenced to ALWOP violates the Eighth Amendment's prohibition against cruel and unusual punishment, has been reported and is attached as Appendix B.

The original panel opinion by the Texas Fourth Court of Appeals of San Antonio, Texas, *Avalos v. State*, 616 S.W.3d 214 (Tex. App. San Antonio - 2020), *rev'd*, 616 S.W.3d 207 (Tex. App. San Antonio - 2020) (en banc), which declined to hold that Texas Penal Code Section 12.31(a)(2)'s categorical requirement that an adult convicted of capital murder, in a case where the death penalty is not sought by the state, be sentenced to automatic life without the possibility of parole (ALWOP) violates the Eighth Amendment's prohibition against cruel and unusual punishment, has been reported and is attached as Appendix C.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on December 15, 2021. Following the Avalos' request, Justice Samuel Alito granted a filing extension to and including Saturday, May 14, 2022 - resulting in a filing deadline of Monday, May 16, 2022. This petition is therefore timely. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Texas Penal Code Section 12.31(a)(2) provides:

> (a) An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death. 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:
>
> ***
>
> (2) life without parole, if the individual committed the offense when 18 years of age or older.

STATEMENT

Petitioner Johnny Joe Avalos was charged with the murder of 2 and 3 women, in Cause Nos. 2018-CR-7068 and 2016-CR-10374, respectively. Mental health evaluations were conducted by experts for both the state (CR60;70) [1] and the defense (CR46;71), who agreed that Mr. Avalos is intellectually disabled, with IQ scores of 66 and 67. CR46-70.[2] Additionally, Avalos provided the trial court with reports from two court-appointed experts, Dr. Joan Mayfield and Dr. John Fabian, neuropsychologists who both interviewed and examined Avalos at different intervals.

Dr. Mayfield provided a report, finding, in relevant part that there were school records indicating that Avalos began attending special education classes in third grade and had an ARD (admission, review, and dismissal meeting). CR51. Records indicated that Mr. Avalos was never in a regular education class setting: he was educated in a resource room or a self-contained mild/moderate/severe special education setting. CR51. Through testing, Dr. Mayfield determined that Mr. Avalos suffered from intellectual disability, resulting in a "Full Scale IQ" of 66, described as "Extremely Low." CR51. Mr. Avalos's scores were "consistent with the presence of significant limitations in intellectual functioning." Additionally, Dr. Mayfield noted a number of scores with their age-equivalence as they relate to Mr. Avalos's "INTELLIGENCE," as computed through the Wechsler Adult

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[1] The clerk's record on appeal is hereby cited as CR, and the reporter's record as RR, followed by its respective page number.

[2] Both the Fourth Court of Appeals and the Texas Court of Criminal Appeals accepted the stipulation by the state and the defense that Avalos was intellectually disabled.

Intelligence Scale-Fourth Edition (WAIS-IV) test, with all scores resulting in an equivalence under age 16 (<16:00). CR54. Her scoring for "ACHIEVEMENT" through the Wide Range Achievement Test - Fourth Edition (WRAT4), on subjects such as "Word Reading," "Sentence Comprehension," "Spelling," and "Math Computation" resulted in equivalents for grade-schools 10.8, 3.6, 6.3 and 3.7, respectively. CR54. In a second evaluation from November 6-7, 2018, Dr. Mayfield found the following scores with their respective age equivalence, boldfaced (**years:months)**:

INTELLIGENCE

General Reasoning Index **< 3:6**

ATTENTION/EXECUTIVE FUNCTIONING

Delis-Kaplan Executive Function System

Verbal Fluency

Letter Fluency	**16:0 – 19:0**
Category	**15:0**
Category Switching Responses	**< 8:0**
Category Switching Accuracy	**9:0**

Free Sorting

Confirmed Correct Sorts	**< 8:0**
Free Sorting Description Score	**< 8:0**
Tower	**30:0 – 39:00**

Comprehensive Trail-Marking Test (CTMT)

Trail 1	**9:0**
Trail 2	**11:00**
Trail 3	**< 8:0**
Trail 4	**< 8:0**
Trail 5	**< 8:0**

Quotient Score 66 (1 percentile)

Reynolds Interference Task (RIT)

Object Interference	**11:00**
Color Interference	**11:00**

MEMORY

Test of Memory and Learning-Second Edition (TOMAL-2)

Memory for Stories	**5:00**
Word Selective Reminding	**< 5:0**
Object Recall	**8:0**
Paired Recall	**5:6**
Facial Memory	**9:0**
Abstract Visual Memory	**9:0**
Visual Sequential Memory	**11:0**
Memory for Location	**8:0**
Digits Forward	**10:6**
Letters Forward	**8:0**

Digits Backward	**11:0**
Letters Backward	**11:0**
Manual Imitation	**14:0**
Visual Selective Reminding	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**< 5:0**
Memory for Stories (Delayed)	**5:6**
Word Selective Reminding (Delayed)	**5:0**

LANGUAGE

Boston Naming Test – Significantly Impaired

Comprehensive Receptive and Expressive Vocabulary Test – Third Edition – CREVT – 3

Receptive Vocabulary	**10:0**

Academic Achievement Battery (AAB)

Listening Comprehension

Listening Comprehension	
Words/Sentences	**5:2**
Listening Comprehension	
Passages	**4:6**

MOTOR AND VISUAL PERCEPTUAL

Developmental Test of Visual Perception – Adolescent and Adult

Motor-Reduced Visual Perception

Figure-Ground	**11:0-11:11**
Visual Closure	**11:0-11:11**
Form Consistency	**11:0-11:11**

Visual -Motor Integration

Copy	**23:0 – 29:0**
Visual-Motor Search	**11:00-11:11**
Visual-Motor Speed	**11:0-11:11**

CR55-59.

Dr. John Fabian also evaluated Mr. Avalos. Among materials he reviewed was Dr. Mayfield's first report. CR80-81. He concurred with all of her findings on intellectual disability, and its levels, and also, at the defense's urging, conducted his own testing addressing, specifically, "Attention" and "Executive" functioning, and "Psychopathology." CR80-81. A "DSM-5 Diagnostic Formulation" rendered the following results:

Intellectual Disability

Schizoaffective Disorder, Mixed Type by History

Probable Autism Spectrum Disorder by History

Post-traumatic Stress Disorder with Complex Trauma

Alcohol Use Disorder

Opioid Use Disorder

Cannabis Use Disorder

CR84. Dr. Fabian also conducted a mitigation assessment report. *Id*. Regarding a connection between Mr. Avalos's intellectual disability, his history of limited mental abilities and his mental illness, when compared to individuals of a juvenile age, Dr. Fabian expressed:

> The U.S. Supreme Court in *Miller v. Alabama* 567 U.S. 460 (2012) held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders.
>
> Obviously, Mr. Avalos is not a juvenile offender but committed these offenses as an adult. However, in my opinion, he is functioning more like an 8-year old due to his intellectual disability and his lawyer, Mr. Aristotelidis, wants to consider a legal argument that applies the holding in *Miller* to an adult that is intellectually disabled and brain damaged and functions more like a child. Mr. Avalos essentially thinks, acts, and behaves in many ways as a child or adolescent because of his significant brain dysfunction, intellectual disability, and mental illness.
>
> Mr. Avalos presents as a tri-diagnosed individual with the following three areas of diagnoses and dysfunction:
>
> 1. Brain dysfunction through intellectual disability
> 2. Mental illness related to posttraumatic stress disorder/complex trauma and schizophrenia
> 3. Co-occurring chemical dependency problems to alcohol, cannabis, and opioids.
>
> There is compelling evidence of impairments as to Mr. Avalos' brain function. Despite him being an adult, he again has a damaged and dysfunctional brain that would be pertinent to impairments in a number of areas, especially related to overall intelligence, language and executive functioning. The holding in *Miller* certainly includes the [United States Supreme Court] recognizing developmental characteristics of adolescents and recent neuroscience research showing that adolescent brains are not fully developed in regions related to higher order executive functions such as

> impulse control, planning ahead, and risk evaluation. That neuroanatomical deficiency is consonant with juveniles demonstrating psychosocial, social, and emotional immaturity. Along these lines, Mr. Avalos has brain damage and dysfunction related again to his history of intellectual disability coupled with neuropsychiatric disorders of schizophrenia and complex trauma/posttraumatic stress disorder. These conditions cumulatively place him with significant emotional, cognitive, and behavioral impairments that leave him functioning in a childlike fashion. Consequently, these detrimental conditions affecting his brain functioning should be considered as to his overall moral culpability and ultimately as to his sentencing.

CR88-89. The state did not respond to Dr. Mayfield's or Dr. Fabian's findings.

Mr. Avalos then filed motions to declare Tex. Pen. Code Section 12.31(a)(2) unconstitutional under the Eighth Amendment to the United States Constitution, because it required the imposition of an automatic, mandatory life sentence, without the possibility of parole. CR269;281.[3] Mr. Avalos pled guilty to both indictments. RR5-6; CR90-267. Prior to imposing a sentence, and after the district court asked whether there was any legal reason why the Court could not impose a sentence, Mr. Avalos reiterated his constitutional challenge to Texas Penal Code section 12.31 (a)(2), requested that he be allowed to present mitigation evidence on behalf of Mr. Avalos, and that Mr. Avalos be eligible to receive a sentence within the statutory range applicable to a murder conviction, or 5-99 years, or life, with the possibility for release on parole. The Court noted the objection, denied the request, and sentenced Mr. Avalos to two concurrent life terms, without the possibility of a parole release. RR13-14; CR25-26. Mr. Avalos filed a timely notice of appeal. CR411.

Both causes were consolidated into a single appeal, under Cause Nos. 04-19-00192-

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[3] The exhibits (A-D) to the amended motion are found in CR307-350.

CR and 04-19-00193-CR.

On direct appeal, the San Antonio Fourth Court of Appeals began its analysis by conceding that "[n]ot a single Supreme Court decision directly controls the resolution of [Avalos'] appeals." *Avalos v. State*, 616 S.W.3d 214, 218 (Tex. App. 2020), *rev'd*, 616 S.W.3d 207 (Tex. App. San Antonio - 2020) (en banc). Citing *Parsons v. State*, No. 12-16-00330-CR (Tex. App. Tyler - 2018, no pet.), an unpublished Texas opinion that found *Miller's* holding insufficiently analogous to be applied to intellectually disabled adult offenders like Avalos, [4] it rejected Avalos' argument that a failure to extend Miller's holding, which requires individualized sentencing *in lieu* of an automatic life without parole sentence, violated the Eighth Amendment's prohibition against cruel and unusual punishment, and affirmed Avalos's conviction, *via* 2-1 majority, with a dissent from Chief Justice Rebecca Martinez.

Notably however, the panel declined the state's invitation to follow this Court's opinion in *Harmelin v. Michigan*, which held that the automatic imposition of a life sentence without parole for an adult was not cruel and unusual punishment, as dispositive of Avalos's issue. *Id*. at 210, n.2 (citing *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991)). It rejected *Hamelin* on the basis that it had nothing to do with children, and because it did not address intellectual disability. *Avalos v. State*, 616 S.W.3d 214, 218 (Tex. App. 2020) *rev'd*, 616 S.W.3d 207 (Tex. App. San Antonio - 2020) (en banc) (citing *Miller*, at 481

[4] *Parsons* "reasoned that although there are some similarities between juveniles and intellectually disabled persons, the differences are too significant to extend the Supreme Court's precedents regarding juveniles, specifically *Miller's* categorical bar to an automatic life sentence without parole, to intellectually disabled persons." *Avalos*, 616 S.W.3d at 218.

(declining to extend *Harmelin* to juveniles because "*Harmelin* had nothing to do with children")).

But the Court went further, also noting that despite reaching a majority in its ultimate holding, "the plurality and the concurrence [in *Harmelin*] disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]." *Avalos*, 616 S.W.3d at 218. It elaborated that "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 (citing *Harmelin* at 965 ("[T]he Eighth Amendment contains no proportionality guarantee.")," which is at odds with the Supreme Court's later analysis in *Atkins*, which "considered proportionality and construed the phrase 'cruel and unusual' in 'evolving standards of decency' and 'contemporary values.'" *Id*. (citing *Atkins* at 536 U.S. at 311–12).

Avalos filed motions for panel and *en banc* rehearing. The appellate court granted *en banc* rehearing, and issued an opinion authored by Chief Justice Rebecca Martinez, who authored the opinion with a 5-4 majority.

The *en banc* Court reversed the panel opinion, and determined that the combined precedent by this Court, beginning with *Atkins*, followed by *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48, 60-61 (2010), and culminating with this Court's decision in *Miller*, required a different conclusion. A faithful narration of the *en*

banc court's decision is helpful in order to best grasp its reasoning.

The *en banc* Court began with this Court's holding that the harshest penalty allowed by the United States Supreme Court for an intellectually disabled person is life imprisonment without parole. *Avalos v. State*, 616 S.W.3d 207, 208 (Tex. App. 2020) (en banc), *rev'd* 635 S.W.3d 660 (Tex. Crim. App. 2021) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)) (holding that an intellectually disabled person may not be sentenced to death). 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. *Avalos*, 616 S.W.3d at 209 (citing *Atkins*, 536 U.S. at 321). The Court elaborated 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." *Id*. (citing *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *see also Graham v. Florida*, 560 U.S. 48, 60–61 (2010)). "Central to the Court's reasoning in these cases," it explained, is "the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense." *Id*. at 210 (citing *Miller*, 567 U.S. at 469 (quotations omitted)). Intellectually disabled defendants are "categorically less culpable than the average criminal." *Id*. (citing *Atkins*, 536 U.S. at 316. Additionally, "Intellectually disabled individuals "frequently know the difference between right and wrong and are competent to stand trial," but "by definition[,] they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses,

and to understand the reactions of others." *Id*. (citing *Atkins* at 318.) These impairments, it elaborated, "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." *Id*. (citing *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (citing Atkins, 536 U.S. at 319–20). "Additionally," added the Court, "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." *Id* (citing *Atkins*, 536 U.S. at 320–21).

"Following *Atkins*," continued the Court, "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.'" *Id*. (citing *Miller*, 567 U.S. at 471.

At this juncture in its opinion, the *en banc* court, like the original panel, also rejected outright the state's submission of this Court's decision in *Harmelin.* Relying on *Miller*, which rejected *Harmelin's* application as "myopic" because it "had nothing to do with children," (citing *Miller* at 481), it likewise reasoned that *Harmelin* did not control because it "had nothing to do with intellectually disabled persons." *Id*. at n.2. (brackets omitted).

Members of each class of defendants have diminished culpability compared to other offenders. *Id*. (citing *Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 318–20. "While differences exist, this fundamental similarity makes the imposition of the death penalty excessive for individuals in each group." *Id*. *Citing 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." *Id*. (citing *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," added the Court, "imprisonment until an offender dies 'alters the remainder of [the offender's] life by a forfeiture that is irrevocable.'" *Id*. (citing *Miller*, 567 U.S. at 474–75 (quotations omitted)).

In *Miller*, this Court held 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." *Avalos* at 211 (citing *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." *Id*. (citing *Miller* at 489) ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."); *see also Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion) (holding that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment)).

"As with juveniles—for whom "*Graham* and *Roper* and [the Supreme Court's] individualized sentencing cases alike teach that in imposing a State's harshest penalties," continued the Court, "'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." *Id.* (citing *Atkins*, 536 U.S. at 316 (explaining that society views intellectually disabled defendants as "categorically less culpable than the average criminal")).

With this reasoning, the *en banc* Court determined that, because Texas Penal Code section 12.31(a)(2) automatically requires imposition of a LWOP sentence - 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. *Id*. (citing *Atkins* at 316; *Miller*, 567 U.S. at 475–76.).

The state appealed the *en banc* court's decision, *via* petition for discretionary review to the Texas Court of Criminal Appeals (TCCA) – Texas' criminal court of last resort - which accepted the petition. The TCCA reversed the *en banc* court's decision, with 5 votes comprising the majority opinion, joined by three concurrences (no opinion), and one dissent (also no opinion). *See Avalos v. State*, 635 S.W.3d 660 (Tex. Crim. App. 2021).

Like the *en banc* court, the TCCA gave its own summary of the precedential travels of this Court's opinions, beginning with *Atkins*, and culminating with *Miller*. "The TCCA explained that [t]he decision in *Miller* represented a 'confluence' of two 'strands' of the Supreme Court's Eighth Amendment cases." *Avalos*, 635 S.W.3d at 663 (citing 567 U.S. at 470. "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 particularized assessment of the appropriateness of assessing a punishment (only the death penalty, until *Miller*)." *Id*. at 663-664. The TCCA added that "[t]he 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 Court identified the question before it as "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." *Id*.

Ultimately, the TCCA'S analysis honed in on the difference in traits between juvenile and adult intellectually disabled offenders, giving particular attention to the transient characteristics of youth, and the ability of juveniles to outgrow their criminal behavior, characteristics that it determined were not possessed by adults who are intellectually disabled. *Id*. at 670 (citing *Roper*, 543 U.S. at 570) ("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.'") This process developed the premise behind the TCCA's holding, that juvenile offenders, by virtue of their age development, have the capacity to rehabilitate, while intellectually disabled adults, whose intellectual disability is relatively permanent, do not. It then backed up and relied on *Harmelin's* holding to ultimately agree with the State that 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 are intellectually disabled—even under the same "confluence-of-strands" analysis that the Supreme Court applied in *Miller*. *Id*. at 670.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A MANDATORY, AUTOMATIC SENTENCE OF LIFE IN PRISON WITHOUT PAROLE ON AN INTELLECTUALLY DISABLED ADULT CONVICTED OF HOMICIDE OFFENSES VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The State of Texas has decided an important question of federal law that has not been, but should be, settled by this Court, and it has decided that question in a way that conflicts with relevant decisions of this Court. Mr. Avalos's issue, whether the Eighth Amendment is violated when an intellectually disabled adult who is convicted of a non-death capital, homicide offense is sentenced to automatic life without parole, is one of first impression before this Court. The Court should grant certiorari, and resolve this open issue.

A. ***Harmelin* Does Not Control Avalos' Question**

The TCCA is aware that its reliance on *Harmelin* is precedentially unsound. It conceded that "[it is not inconceivable…that the Supreme Court might again ultimately hold" that *Harmelin's* holding is inapplicable to Avalos' issue, given that "*Harmelin* was decided before *Atkins*, not to mention *Hall v. Florida,* 572 U.S. 701 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Moore v. Texas* (on second submission), 139 S. Ct. 666 (2019)." *Avalos*, 635 S.W.3d at 669. It surmised that "[t]he Supreme Court might well

conclude that the question remains open because *Harmelin* 'did not purport to apply its holding to the sentencing of 'intellectually disabled offenders.'" *Id*. Despite this acknowledgment, it decided to ultimately rely on *Harmelin* to deny extending *Miller's* holding to Avalos' automatic sentencing scheme.

Additionally, and as noted by the Fourth Court of Appeals on original submission, despite reaching a majority in its ultimate holding, the plurality and the concurrence in *Harmelin* disagreed as to the appropriate legal principles and modes of constitutional interpretation, adding that the Supreme Court later rejected the plurality's approach in subsequent cases that included *Atkins*. *See Avalos*, 616 S.W.3d 214, at 218, *supra*. The *Harmelin* plurality rejected proportionality as a consideration and construed the Eighth Amendment's phrase 'cruel and unusual' by considering the original intent of the language as used in the 1700s (citing *Harmelin* at 965 ("[T]he Eighth Amendment contains no proportionality guarantee.")," which the panel found to be at odds with the Supreme Court's subsequent analysis in *Atkins*, which "considered proportionality and construed the phrase 'cruel and unusual' in 'evolving standards of decency' and 'contemporary values.'" *Id*., *supra* (citing *Atkins* at 536 U.S. at 311–12). As noted, both the original panel and *en banc* decisions outright rejected *Harmelin's* application to Avalos's case, based on the reasoning in *Miller* that *Harmelin* did not involve intellectually disabled adults. *Harmelin* has been effectively overruled as viable precedent, and is no longer relevant to determine the merits of *Avalos*' request for an individualized sentencing process.

B. The Texas Court of Criminal Appeals Misapplied the Transient, "Signature Qualities of Youth" Factor to Avalos' Analysis

Focusing on language in *Miller* that youthful immaturity is transient, while intellectual disability is not, the TCCA mischaracterized the significance of this factor in *Miller*, and misapplied in in Avalos' analysis.

First, youthful immaturity was not the predominant factor that drove *Miller's* holding. As *Miller* explained, "'just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of a youthful defendant be duly considered*,' in assessing his culpability." *Miller*, at 476 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (emphasis added).

Second, *Miller* recognized that juvenile offenders can be "incorrigible" (*Miller* at 479-80) (referencing "…the rare juvenile offender whose crime reflects irreparable corruption.") (citations omitted), a position reaffirmed more recently by this Court in *Montgomery v. Louisiana*, where this Court held that *Miller* did not foreclose a life without parole sentence on a juvenile, "a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption.'" *See Montgomery v. Louisiana*, 577 U.S. 190, 479-80 (2016) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)). Neither the state, nor the TCCA offer any evidence that intellectually disabled adults are more prone to commit serious, or any other type of criminal activity, than juvenile offenders.

Third, despite the relatively static nature of an adult's intellectual disability diagnosis, it is without cavil that adults with intelligence deficits possess the capacity to cope - and *do* cope - with their environment, are capable of correcting their behavior, and

live productive lives. No language from *Atkins* to *Miller*, in *Montgomery*, or any other authority since undermines this reality. Moreover, since *Miller*, there has been no holding, from any court that has denied *Miller's* extension to intellectually disabled adults like Avalos, that relies on *studies or other reliable data* showing that intellectually disabled adults, as a class are more incorrigible than juveniles. As this Court wrote in *Atkins*, an adult offender's "[intellectual] disability deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." Nothing by the State, or the TCCA has been fronted to prove that intellectually disabled adults cannot also rehabilitate. Rather, the TCCA simply posited a conclusory position that intellectually disabled adult offenders are incapable of it, promulgating the bald assertion that they can never, *as a class*, measure up to juveniles.

Moreover, TCCA candidly admits that post-*Miller* courts that have refused to expand *Miller's* application to intellectualy disabled adult offenders did so with little explanation of how intellectual disability is sufficiently different from the juvenile condition to justify a different treatment. *See Avalos* at 670 n.8. [5] As an exception to this trend, the TCCA cited the Illinois Supreme Court's decision in *People v. Coty*, 2020 IL

[5] The TCCA cited *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 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* ban on life without parole sentences for intellectually disabled defendants).

123972, at *10 ¶ 39. But *Coty*, which reversed the Illinois intermediate court's ruling that extended *Miller's* reasoning in a case involving a *de facto*-life-without-parole sentence of 50 years for an intellectually disabled adult, provides little more of the same anecdotal and conclusory logic. To highlight the significance of *Coty's* ruling, the TCCA focused on language in *Coty* that attempted to differentiate juvenile offenders' ability to grow out of criminal behavior as superior to that of intellectually disabled adults. Far from providing "a cogent explanation," (*Avalos*, at 670-71) *Coty* concluded, without elaboration or supporting authority, that "unlike a juvenile, whose mental development and maturation will eventually increase [rehabilitative] potential, the same cannot generally be said of the intellectually disabled over time." *Avalos* at 671. The TCCA seized on this language and mixed apples and oranges. It associated an intellectually disabled adult's relatively static condition, with an inability to abandon criminal behavior, leading the TCCA to "agree with the Illinois Supreme Court [that j]uvenile offenders may—by the simple process of aging—mature out of their dangerous proclivities, but the intellectually disabled offender will not." *Avalos*, 635 S.W.3d 660, at 671. Restated, the TCCA determined that, because juvenile offenders grow into adulthood, they therefore can outgrow their criminal behavior; intellectually disabled adults, who remain so for the entirety of their lives, cannot. Armed with this logic, the Court of Criminal Appeals recriminates, "we are aware of no evidence that [Avalos] 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." *Avalos*, at 671-672. The reasoning on which the TCCA denies Avalos an extension of *Miller's* holding is clearly based on a false, bald premise, and

ignores the applicable, functional tenet first announced in *Atkins*, that Intellectually disabled defendants are categorically less culpable than the average criminal. *See Atkins* at 316, *supra*. Moreover, the missing "evidence" that the TCCA clamors for is precisely what the parties should be allowed to present in an individualized sentencing process, so that the appropriate punishment is meted out after a full and exhaustive analysis. This is precisely what Avalos requests.

C. *The Court Should Extend Miller's Holding to Intellectually Disabled Adults.*

Mr. Avalos does not request that this Court outlaw his sentence of LWOP as *per se* violative of the Eighth Amendment's prohibition against cruel and unusual punishment. His request is narrow. As it did with juvenile offenders in *Miller*, Avalos asks this Court to also recognize an individualized sentencing process that allows a consideration of all relevant evidence from all parties before crafting a proper sentence, to include even the possibility of a LWOP sentence. A determination of his sentence should mirror the process in *Miller*, where the varied and individualized mitigating evidence, and the respective expert opinions behind the causes of the individual intellectually disabled adult criminal's behavior - such as those presented by Avalos' experts - are best determined by a sentencing process that considers all relevant data from the parties, ensuring proportionality.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted.

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DATED: May 16, 2022.