Fourth Court of Appeals
San Antonio, Texas

OPINION

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

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

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

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

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

Delivered and Filed: June 3, 2020

AFFIRMED

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

PROCEDURAL BACKGROUND

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

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

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

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

A. Cruel & Unusual Punishments

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

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

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

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

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

B. Relevant Supreme Court Decisions

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

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

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

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

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

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

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

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

C. Other Relevant Authorities

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

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

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

D. Analysis

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

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

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

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

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

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

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

CONCLUSION

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

Luz Elena D. Chapa, Justice

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