Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

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

John Joe **AVALOS**,
Appellant

v.

The **STATE** of Texas,
Appellee

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

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

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

Delivered and Filed: June 3, 2020

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

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

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

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

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

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

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

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

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

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

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

Rebeca C. Martinez, Justice

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