IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

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

JOHNNY JOE AVALOS, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

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.

O P I N I O N

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]

In *Miller v. Alabama*, 567 U.S. 460 (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

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[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).

Eighth Amendment ban on automatic life-without-parole sentences to cover murder defendants who are intellectually disabled.[3] *Avalos v. State*, 616 S.W.3d 207, 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 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

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 (1991). 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

[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.

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 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 may militate against sentencing him to death. 455 U.S. 104, 112 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)). That Court's 1976 plurality

opinion in *Woodson* had already concluded that a state may 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*, "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. 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 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. 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*. 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 (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 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 and deterrence. *Id*. at 318–20. 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." *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 (2005), the Supreme Court revisited the question whether the Eighth Amendment categorically banned execution of juvenile capital murder offenders,[4] applying the same 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. 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, 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

[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 (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.

(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 heinous offense, than an adult offender:

> 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.

Id. at 570 (internal citations, quotation marks, and brackets omitted). The Supreme Court determined that "[r]etribution 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." *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 mental culpability for the actual killing).[5] In *Graham v. Florida*, 560 U.S. 48 (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 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

[5] *See Coker v. Georgia*, 433 U.S. 584, 598 (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 (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 (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 (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.").

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 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:

> 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.

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 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.

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 (2003) (plurality opinion)).[6] But it rejected that justification for assessing life without parole for a juvenile offender because the transience of youth makes "questionable" any assumption 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*

[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 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).").

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 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. As the Supreme Court summarized:

> 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.

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, 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:

> 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*. 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 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 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Moore v. Texas*, 139 S. Ct. 666 (2019). The 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.[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. 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.

[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.

But we need not definitively resolve either of these arguments. Ultimately, we 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*. 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). 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 murderers have noted that youth is mitigating precisely because it is transient. *See Turner v. Coleman*, No. 13-1787, 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 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]

The Illinois Supreme Court has recently offered a cogent explanation for why that difference matters. In *People v. Coty*, ___ N.E.3d ___, No. 123972, 2020 WL 2963311 (Ill. June 4, 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.

[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*, 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*, 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).

Id. 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. 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. *Id* at *9.

We agree with the Illinois Supreme Court. 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]

A plurality of the Supreme Court observed in *Ewing v. California*, 538 U.S. 11 (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

[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.

> 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]

Id. at 25 (internal citation omitted). We therefore agree with the State that *Harmelin* should control. *See* 501 U.S. at 1006–07 (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."). 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 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. 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.

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

IV. CONCLUSION

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

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