NO. 00000000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	226TH JUDICIAL DISTRICT
JO SMITH	)	BEXAR COUNTY, TEXAS

MOTION TO DECLARE UNCONSTITUTIONAL
§ 12.31(a) OF THE TEXAS PENAL CODE

TO THE HONORABLE JUDGE OF THIS COURT

Jo Smith moves, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3, 10, 13, 19, and 29 of the Texas Constitution, that this Court declare § 12.31(a) of the Texas Penal Code unconstitutional because it categorically prevents the Judge or the jury from considering the circumstances of the offense or any mitigating evidence when sentencing persons found guilty of capital murder committed when they were under the age of 18.

I.

Capital murder is the most serious offense in Texas. Punishment for one under the age of 18 at the time of this offense is mandatory: life imprisonment. TEX. PENAL CODE § 12.31(a). And one so sentenced "is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years." TEX. GOV'T CODE § 508.145(b).

II.

There is no evidence in this case at all that Ms. Smith herself shot the complainant.

Indeed, the case against the person that *everyone* identifies as the shooter has been dismissed. Yet, if Ms. Smith is convicted of capital murder, her sentencer will have no opportunity whatsoever to consider this undeniably mitigating fact. Nor will the sentencer be able to consider at all any other mitigating evidence, including that she was 17 years old at the time of the offense alleged, that she had a difficult childhood, that she has never before been convicted of any crime as an adult, that she has behaved peaceably both in and out of jail since her arrest on March 21, 2021, that she is gainfully employed, that she is the mother of a infant, and that she is a daughter, a sister, and a granddaughter, loved and valued by her family and friends.

III.

The Eighth Amendment to the United States Constitution bars the infliction of "cruel and unusual punishments." This amendment applies to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Puga v. State*, 916 S.W. 2d 547, 548 (Tex. App.–San Antonio 1996, no pet.). The Eighth Amendment "encompasses a narrow proportionality principle." *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)(Kennedy, J., concurring). This principle is only rarely applied, and "its precise contours are unclear. *Id*. at 998. It forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 1001. Although the State of Texas is entitled to punish those it convicts, disproportionate punishments violate a person's right to be free

from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. It would be constitutionally disproportionate to sentence Ms. Smith to the mandatory and extreme sentence of life imprisonment after depriving her of the opportunity to present mitigating evidence of any sort to any sentencer, simply because she was convicted of capital murder.

IV.

It is settled that the Texas Constitution may provide greater protection than its federal counterpart. *Heitman v. State*, 815 S.W. 2d 681 (Tex. Crim. App. 1991). A comparison of the different texts of the Texas and United States Constitutions concerning cruel and unusual punishment reveals that the Texas Constitution is in fact more protective.

The Eighth Amendment on its face prohibits cruel *and* unusual punishment. The use of the conjunctive "and" is significant. In *Harmelin v. Michigan*, petitioner claimed that it was cruel and unusual to impose a mandatory life sentence for possession of more than 650 grams of cocaine. A majority of the Court rejected this argument. Justice Scalia, writing for the Court, conceded that while "[s]evere, mandatory penalties" may be cruel, they are not constitutionally unusual. 501 U.S. 957, 994-995 (1991). This language permits only one conclusion: a law must be *both* cruel *and* unusual to violate the Eighth Amendment, and that means necessarily that "cruel" is different than "unusual."

Article I, § 13 of the Texas Constitution expressly prohibits cruel *or* unusual punishment. In Texas, then, a punishment is unconstitutional if it is either cruel or unusual. In this motion, Ms. Smith says that sentencing her to life imprisonment without allowing her the opportunity to present any mitigating evidence is constitutionally disproportionate and violates the Eighth Amendment. She also submits that this total prohibition on mitigating evidence is both cruel and unusual. But even if it is not unusual, it is every bit as "cruel" as Justice Scalia seemed to concede that the life sentence was in *Harmelin*. The difference, of course, is that a sentence is federally unconstitutional only if it is *both* cruel *and* unusual, while a sentence that is "only" cruel is unconstitutional in Texas.

V.

In *Miller v. Alabama*, the Supreme Court held "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).

> [O]ur 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. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory-sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.

Id. at 489.

To be sure, the sentencing statute in our case – § 12.31(a) – is not identical to those

at issue in *Miller*, since the mandatory life sentence that Ms. Smith faces permits parole after 40 calendar years. Constitutionally, though, that the minimum time a 17 year old in Texas will have to serve is *only* 40 years, and not *necessarily* life imprisonment, is a distinction without a difference. The fatal constitutional flaw with § 12.31(a) is in fact identical to those statutes in *Miller*: they all categorically disallow consideration of every sort of mitigating evidence for every person under 18 years old at the time of their alleged crimes. Just like the statutes struck down in Alabama and Arkansas, Texas's statute is a mandatory sentencing scheme that severely punishes immature youths "regardless of their age and age-related characteristics and the nature of their crimes," and each violate the violate the "principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller v. Alabama*, 567 U.S. at 489. *Contra Lewis v. State*, 428 S.W. 3d 860, 863 (Tex. Crim. App. 2014)(holding that "*Miller* does not forbid mandatory sentencing schemes."); *but see Brooks v. State*, 590 S.W.3d 35, 57 (Tex. App.–Houston [1st Dist.] 2019, pet. ref'd)(Goddard, J., concurring(arguing that "*Lewis* was wrongly decided", and following it only "under protest").

VI.

Additionally, unfair, or disproportionate, or arbitrary and capricious punishments, violate a person's rights to Due Process of Law, guaranteed by the 14th Amendment to the United States Constitution. In *Rochin v. California*, 342 U.S. 165, 166 (1952), the police had information that petitioner was selling narcotics, so they forced their way into

his home and struggled with him to extract two capsules they saw him put in his mouth. When they were unable to disgorge the capsules they handcuffed Rochin and took him to the hospital where his stomach was pumped against his will. The two capsules thus retrieved constituted the evidence against Rochin at his trial for possession of morphine. The Supreme Court reversed, finding that the Due Process Clause is violated when a conviction is "brought about by methods that offend 'a sense of justice.'" *Id*. at 173.

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime to energetically. *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172(emphasis supplied). Rochin prevailed because the police broke into his home, choked him, and had his stomach pumped to retrieve two morphine capsules that were later used to obtain a 60 day jail sentence. Ms. Smith's position is simple: If Rochin was entitled to constitutional relief for what happened to him, then due process of law also prohibits sentencing a young woman of her background to life imprisonment without the opportunity to present mitigating evidence.

VII.

Due Course of Law, under Article I, §§ 13 and 19 of the Texas Constitution is also

offended by Texas statutes that prevent a person facing a mandatory sentence of life, with no opportunity to present available mitigating evidence to her sentencing jury.

VIII.

All persons in Texas are entitled to Equal Protection Of Law under the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Most legislation classifies, and, if it does not impair a fundamental right or target a suspect class, a legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996).

> Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminating state action and violates both the state and federal Constitutions.

Milligan v. State, 554 S.W. 2d 192, 194 (Tex. Crim. App. 1997)(finding there is a rational basis for distinguishing violent felons from all other felons); *see also Ex parte Montgomery,* 894 S.W. 2d 324, 329 (Tex. Crim. App. 1995)(legislation must bear "some fair relationship to a legitimate public purpose"); *John v. State*, 577 S.W. 2d 483, 485 (Tex. Crim. App. 1979)(legislature may classify to serve "legitimate aims if the limits of the class are not unreasonable or arbitrary"). Persons convicted of murder are entitled to present mitigating evidence in an effort to persuade their jurors to sentence them to less than life imprisonment. And persons convicted of capital murder against whom the State

seeks a death sentence are constitutionally and statutorily entitled to present mitigating evidence in a effort to convince the jury to impose less than the maximum sentence. It is irrational and a violation of Equal Protection of the Law to disallow someone situated as is Jo Smith from presenting mitigating evidence. But this is just what Texas law does.

IX.

Article I, § 3 of the Texas Constitution – our equal protection guarantee – will likewise be violated if Ms. Smith is convicted of capital murder and thereby statutorily prohibited from presenting mitigating evidence.

X.

For the reasons given, this Court should hear this motion and declare § 12.31(a) of the Texas Penal Code unconstitutional.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I certify that a copy of this motion been electronically delivered to the Bexar County District Attorney on March 13, 2023.

/s/ Mark Stevens
MARK STEVENS

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ORDER

On this the ____ day of ________________, 2023, came to be considered Defendant's Motion To Declare § 12.31(a) of the Texas Penal Code Unconstitutional and said motion is hereby

(GRANTED) (DENIED)

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JUDGE PRESIDING