Texas Wesleyan Law Review

Volume 5 | Issue 1 Article 4

10-1-1998

Diminished Capacity as a Result of Intoxication and Addiction: The Capacity to Mitigate Punishment and the Need for Recognition in Texas Death Penalty Litigation

Katherine A. Drew

DIMINISHED CAPACITY AS A RESULT OF INTOXICATION AND ADDICTION: THE CAPACITY TO MITIGATE PUNISHMENT AND THE NEED FOR RECOGNITION IN TEXAS DEATH PENALTY LITIGATION

Katherine A. Drew†

INTRODUCTION

As a general rule, Texas does not recognize the doctrine of diminished capacity in criminal cases, much less in capital murder cases. Criminal defendants in Texas are left with three unattractive options: an insanity defense, involuntary intoxication, or voluntary intoxication rising to the level of temporary insanity. Often, the facts of the case will not squarely fit under any of these options, leaving a defendant with no defense to culpability. Moreover, in the case of a capital murder defendant there is no viable mechanism provided to guide the jury's discretion to mitigate punishment and impose a sentence of life rather than death.

Consider the following scenario.[1] A seventy-three year old woman was found murdered in her home. The murder occurred during the burglary of her residence, and she had been sexually assaulted. Actual cause of death was a crushing blunt injury to the chest that caused extensive damage to the heart and major blood vessels.

Fingerprints on the windowsill, the probable point of entry to the house, matched those of "Jasper," a seventeen year old seen in the neighborhood on the day of the crime. D.N.A. testing linked Jasper to the sexual assault. While in police custody, Jasper gave several confessions admitting the crime. His only criminal history was a burglary at age fourteen. The State elected to prosecute Jasper for capital murder and to seek the death penalty.

---

† B.A., Southern Methodist University, 1971; M.A. (with distinction), Southern Methodist University, 1974; J.D., Southern Methodist University School of Law, 1977. Ms. Drew is currently an Adjunct Professor of Law at Texas Wesleyan University School of Law, and a solo practitioner in Dallas, Texas. She served as a staff attorney to the Dallas County Criminal District Judges and as a Briefing Attorney to the Honorable C. Spencer Carver of the Fifth District Court of Appeals, Dallas, Texas. She is a former Assistant District Attorney for Dallas County, Texas where she served as Deputy Chief of the Appellate Division.

1. This scenario is based on a capital murder case currently pending on writ of habeas corpus in Texas. In the interest of academics, as well as to protect both the defendant and the victim's family, some facts have been embellished, while others have been abbreviated or eliminated.

DOI: https://doi.org/10.37419/TWLR.V5.I1.1

Evidence was adduced at his trial that Jasper first experienced controlled substances as early as five or six years of age. His mother, who was an alcoholic and a drug dealer, would give him beer and marijuana. This was her way of rewarding her children. Throughout his childhood, he smoked marijuana with his mother, who actually preferred that her children smoke it in front of her rather than behind her back. By the age of nine or ten, Jasper was using marijuana heavily. He also began "huffing" (inhaling spray paint), and, by age eleven, he was using either marijuana or spray paint two to three times a day. Jasper admitted to trying "speed" (amphetamine or methamphetamine) when he was thirteen or fourteen. In junior high school, he smoked marijuana every day. He then tried cocaine and immediately loved it. Jasper believed that drugs, as well as sex, were the way to be popular in school. He thought these activities were a sign of maturity, and he did not want to be a "nerd."

By age fifteen, Jasper had essentially lost control of his life. Using drugs every day, he was labeled a troubled kid in school. He smoked marijuana before school, between classes, and then after school with his mother.

By age sixteen, Jasper was basically living on his own. He lived on the street, in railroad boxcars, slept in cars, and behind houses. He had no permanency in his life, except drugs.

At his capital murder trial, a probation officer testified that Jasper was a long-time drug user who had been raised in an abusive environment and was living from one crisis to the next. The officer noted that Jasper was verbally and psychologically abused by an alcoholic mother and appeared to be a child with little or no self-esteem.

A psychologist who examined Jasper testified that he was suffering from a severe mental illness brought on by constant drug use. At an early age, Jasper had witnessed his father's suicide from a self-inflicted gunshot wound. The psychologist explained to the jury that Jasper came from a dysfunctional family where his mother and grandfather were controlled substance abusers. In the psychologist's opinion, Jasper had become addicted to controlled substances so young that he had been incapable of making a voluntary choice to engage in their use. In the psychologist's opinion, Jasper could not have formed the intent to kill because of either a paranoid hallucinatory state—a misperception of reality brought on by cocaine usage; a state of pathological drug intoxication—a dominant state of intoxication produced by a drug lifestyle; and an acute confusional state—a state characterized by a person having difficulty correctly sequencing events or correctly remembering facts.

Jasper entered a plea of not guilty by reason of insanity. His defense team also attempted to have the jury charged on the defense of involuntary intoxication due to long term drug usage, but the trial court denied their request. No attempt was made to have the jury

instructed on the law of voluntary intoxication. The jury did not accept the insanity defense and found Jasper guilty, sentencing him to death.

The better defense to culpability at trial in a scenario such as this, as well as to the imposition of the death penalty at the punishment phase, is clearly one of diminished capacity. Unfortunately, diminished capacity is not a recognized defense in Texas,[2] either to culpability or as a specific defense against imposition of the death penalty. This state of the law often leaves Texas defendants, particularly in capital murder cases, with unattractive, unworkable, and often incompatible choices that significantly reduce the efficacy of a defense. Moreover, the lack of a diminished capacity defense can result in evidence that would otherwise be considered mitigating not being considered by a jury in its proper context. Even worse, such evidence may be seen as aggravating by the jury.

This paper examines the substantial need for a defense to criminal culpability that has a lesser requirement than the traditional defenses of insanity and intoxication. The article details the traditional defenses of insanity, involuntary intoxication, and voluntary intoxication. Additionally, the myths surrounding diminished capacity are explored. In conclusion, an examination is made of the essence of mitigation in a capital murder context and the need to recognize a defense of diminished capacity to the death penalty.

I. THE ESSENCE OF DIMINISHED CAPACITY

Diminished capacity usually refers to mental conditions, less than insanity, that impact on a defendant's ability, or inability, to control his own behavior. Diminished capacity in a capital murder case can refer to intent to commit the crime or a reduction of personal moral blameworthiness that will justify a sentence less than death.[3] Legal scholars tend to distinguish between an intent, or mens rea, element of diminished capacity and a doctrine of diminished responsibility, usually recognizing that a defendant deserves conviction of a lesser included offense because of a mental disease or defect.[4]

Diminished capacity, which relates to intent,[5] is hardly a separate defense and should be clearly distinguished from affirmative de-

2. *See* De La Garza v. State, 650 S.W.2d 870, 876 (Tex. App.—San Antonio 1983, pet. ref'd); Thomas v. State, 886 S.W.2d 388, 390 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd) (holding that court does not recognize a hybrid defense to criminal responsibility).

3. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984).

4. *See* Frederic Ron Krausz, Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CAL. L. REV. 1197 (1983).

5. *See* Morse, *supra* note 3, at 1 (referring to this form of "diminished capacity" as the "mens rea variant").

fenses,[6] other defenses,[7] and multiple forms of justification.[8] Rather, it is a consideration in deciding whether the prosecution has proved a crucial element of the offense, for example, intent beyond a reasonable doubt.[9] If a trier of fact doubts that a defendant could form the requisite intent to commit the crime he is charged with, or possessed the requisite intent, an acquittal should ensue.[10] Mental conditions or other forms of impairment may prevent the formation of the requisite intent and entitle a defendant either to an acquittal or to a conviction on a charge that carries a lesser mens rea. Most of the state and federal courts recognize that evidence of diminished capacity is admissible to negate a mental state.[11]

In particular, capital murder is considered a *specific intent* crime.[12] Any form of mental disease, disorder, or other infirmity could be considered as impacting on a finding of intent. Trial counsel should be,

---

6. Affirmative defenses in Texas include insanity and duress. *See* TEX. PEN. CODE ANN. §§ 8.01, 8.05 (Vernon 1994).

7. Recognized defenses to a criminal charge in Texas include mistake of fact and entrapment. *See id.* §§ 8.02, 8.06.

8. Some forms of justification are public duty, necessity, self-defense, and defenses of persons and property under certain specified conditions. *See id.* §§ 9.21, 9.22, 9.31, 9.03, 9.04, 9.32, 9.33, 9.34, 9.41, 9.42, 9.43, 9.44.

9. *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970).

10. In this sense, diminished capacity is virtually a quasi-insanity defense.

11. The defense of diminished capacity has been recognized in thirty-one states and by the Model Penal Code. *See* MODEL PENAL CODE § 4.02 (1985).

The legislature of some states have enacted the diminished capacity doctrine: Alaska Stat. § 12.47.010 (1998); ARK. CODE ANN. § 5-2-303 (Michie 1993); COLO. REV. STAT. § 16-8-103(1) (1998); DEL. CODE ANN. tit. 11, § 401 (1995); HAW. REV. STAT. § 704-401 (1994); IDAHO CODE § 18-207 (Supp. 1987); MO. ANN. STAT. § 552.030 subd. 3 (1) (Vernon) (1981 Supp.); MO. ANN. STAT. § 552.030 (West 1998); MONT. CODE ANN. § 46-14-102 (1993); Bates v. State, 386 A.2d 1139, 1143 (Del. 1978) (Delaware legislature enacted statute providing for recognition of diminished capacity but repealed provision prior to code's effective date.).

For case law, see, e.g., United States v. Pohlot, 827 F.2d 889, 897 (3d Cir. 1987) (Under Insanity Defense Reform Act, evidence of mental disease or defect less than legal insanity is admissible to disprove mens rea.); United States v. Frisbee, 623 F. Supp. 1217 (N.D. Cal. 1985) (Under new federal statute and rules, expert testimony on mental disease or defect is admissible to negate specific intent.); State v. Burge, 487 A.2d 532, 539-40 (Conn. 1985) (Evidence of mental disease or defect is admissible to demonstrate absence of intent, general or specific.); Hendershott v. People, 653 P.2d 385, 390-93 (Colo. 1982) (noting that it violates due process to prohibit evidence of mental disease or defect to negate essential culpability element); State v. McKenzie, 608 P.2d 425, 452-53 (Mont. 1979) (recognizing viability of diminished capacity defense under former common law and under current statute); Waye v. Commonwealth, 251 S.E.2d 202 (Va. 1979).

For states rejecting diminished capacity, see Neelley v. State, 494 So. 2d 669 (Ala. Crim. App. 1985); State v. Schantz, 403 P.2d 521 (Ariz. 1965); Bethea v. U.S., 365 A.2d 64 (D.C. 1976); Kansas v. Dargatz, 614 P.2d 430, 437 (Kan. 1980); State v. Bouwman, 328 N.W.2d 703 (Minn. 1982); Commonwealth v. Garcia, 479 A.2d 473 (Pa. 1984); Thomas v. State, 886 S.W.2d 388 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

12. *See* Garcia v. State, 887 S.W.2d 862 (Tex. Crim. App. 1994); Dillard v. State, 931 S.W.2d 689 (Tex. App.—Dallas 1996, pet. ref'd).

and usually is, free to fully develop whatever facts could negate intent at trial. Nothing further should be required in the nature of a statute or jury instruction so long as trial counsel is free to develop fully the defendant's diminished capacity at trial and argue the impact of that evidence before the jury at the appropriate time. Any abnormality severe enough to prevent the formation of the requisite intent should justify an acquittal, or a reduction of the offense charged to a lesser included offense, which will usually carry with it a lesser penalty.

An obvious problem is presented when the disorder, or abnormality, that affects intent is also the probable catalyst that spurred, or at least failed to curb, the criminal conduct at issue. For example, some medical experts believe that there may be a correlation between bipolar disorder/manic depression and violent behavior.[13] A defendant with this disorder, particularly an unmedicated defendant, may be more prone to violence *because* of his affliction. Without clear guidance to the contrary, the average juror will find such a defendant guilty if he appears violent or there is testimony of a pre-disposition for violence.

Even greater difficulty arises in the area of diminished capacity, that is, in effect, diminished responsibility. In these situations, a defendant is essentially claiming that he is less culpable and should be convicted of a lesser crime or punished less severely.[14] A classic example of diminished responsibility, in a lesser included offense category, is in a prosecution for burglary of a habitation. In order to convict, the prosecution must demonstrate that an accused entered the home without the consent of the owner *and* with the *intent* to commit theft or any felony.[15] Intent to commit the underlying felony is an element of the offense the prosecution must prove beyond a reasonable doubt.[16] Thus, entry without consent, and without larcenous or felonious intent, could reduce a charge of burglary to criminal trespass.[17] An accused would face punishment for a misdemeanor as opposed to a first degree felony.[18] Consequently, a defendant who cannot form a clear intent to kill, due to diminished mental functioning, should be entitled to consideration of lesser charges.

In the context of mitigation of punishment in a capital murder case, diminished capacity becomes an even thornier problem. The United

13. Jerome Yesavage, *Bipolar Illness: Correlates of Dangerous Inpatient Behavior*, 143 PSYCHIATRY 554-57 (1983).

14. *See* Morse, *supra* note 3, at 20.

15. *See* TEX. PEN. CODE ANN. § 30.02(a)(1) (Vernon 1994). The elements of burglary of a habitation are: (1) a person, (2) without effective consent, (3) enters a habitation, (4) with the intent to commit theft or any other felony. *See id.*

16. *See* LaPoint v. State, 750 S.W.2d 180, 182 (Tex. Crim. App. 1986).

17. *See* TEX. PEN. CODE ANN. § 30.05 (Vernon 1994).

18. A first degree felony carries a possible term of imprisonment of 5-99 years or life, while a misdemeanor is punishable by no more than one year in jail. *See id.* §§ 12.32, 2.21, 12.22.

States Supreme Court has held, in a variety of contexts, that any evidence that might be mitigating to imposition of the death penalty must be admitted into evidence.[19] Even the Federal Sentencing Guidelines, draconian as they are, recognize that diminished capacity may impact sentencing in a mitigating manner.[20] The difficulties, however, are two-fold. First, mitigating evidence that constitutes diminished capacity is often of such a nature that an ordinary jury might also consider it to be aggravating.[21] Second, there is always the question of how to guide the jury's discretion to ensure that mitigating evidence is given mitigating effect. One approach is for the sentencing jury to be given a "laundry list" of statutorily mandated aggravating and mitigating circumstances. They are asked to weigh those factors in deciding the fate of the defendant.[22] Texas is not a "weighing" capital murder state.

19. *See generally* Penry v. Lynaugh, 492 U.S. 302 (1989); Franklin v. Lynaugh, 487 U.S. 164 (1988); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

20. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (1998). *See also* United States v. Leandre, 132 F.3d 796 (D.C. Cir. 1998), *cert. denied*, 118 S. Ct. 1823 (1998); United States v. McBroom, 124 F.3d 533 (3d Cir. 1997); United States v. Soliman, 954 F.2d 1012 (5th Cir. 1992); Deborah E. Dezelan, *Departures from the Federal Sentencing Guidelines after* Koon v. United States*: More Discretion, Less Direction*, 72 NOTRE DAME L. REV. 1679, 1688 (1997) (recognizing diminished capacity as a mitigating factor to punishment).

21. *See* Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 393 (1997).

22. In "weighing states," the fact-finding body is required to weigh the aggravating factors against any mitigating evidence and determine in which direction, based on the evidence, the scales are tipped. *See* People v. Howard, 824 P.2d 1315 (Cal. 1992); State v. Bey, 548 A.2d 887 (N.J. 1988). Of the thirty-six states that have a death penalty, twenty-one qualify as weighing states. *See* Christian D. Marr, Note, *Criminal Law: An Evolutionary Analysis of the Role of Statutory Aggravating Factors in Contemporary Death Penalty Jurisprudence from* Furman *to* Blystone, 32 Washburn L.J. 77, 103 n.127 (1992). Marr cites to the following statutes that have been updated to reflect their most recent codification: Alabama, ALA. CODE §§ 13A-5-39 to 59 (1994); weighing provision, ALA. CODE § 13A-5-48 (1994); aggravating circumstances provision, ALA. CODE § 13A-5-49 (1994). Arkansas, ARK. CODE ANN. §§ 5-4-601 to -17 (Michie 1997); weighing provision, ARK. CODE ANN. § 5-4-603(a)(2) (Michie 1997); aggravating circumstances provision, ARK. CODE ANN. § 5-4-604 (Michie 1997). California, CAL. PENAL CODE §§ 190.1 - .9 (West 1988 & Supp. 1998); weighing provision, CAL. PENAL CODE § 190.3 (West 1988); "special" circumstances provision, CAL. PENAL CODE § 190.2 (West Supp. 1988). Colorado, COLO. REV. STAT. § 16-11-103 (Supp. 1996); weighing provision, COLO. REV. STAT. § 16-11-103(2) (a) (III) (Supp. 1996); aggravating circumstances provision, COLO. REV. STAT. § 16-11-103(6) (Supp. 1996). Connecticut, CONN. GEN. STAT. §§ 53a-46a - 46b (Supp. 1998); weighing provision, CONN. GEN. STAT. § 53a-46a (Supp. 1998); aggravating circumstances provision, CONN. GEN. STAT. § 53a-46a(i) (Supp. 1998). Delaware, DEL. CODE ANN. tit. 11, § 4209 (1998); weighing provision, DEL. CODE ANN. tit. 11, § 4209(d)(1)(b) (1998); aggravating circumstances provision, DEL. CODE ANN. tit. 11, § 4209(e) (1998). Florida, FLA. STAT. ANN. § 921.141 (West Supp. 1998); jury (advisory) weighing provision, FLA. STAT. ANN. § 921.141(2)(b) (West Supp. 1998); bench weighing provision, FLA. STAT. ANN. § 921.141(3)(b) (West Supp. 1998); aggravating circumstances provision, FLA. STAT. ANN. § 921.141(5) (West Supp. 1998). Idaho, IDAHO CODE § 19-2515 (1997); weighing provision, IDAHO CODE § 19-2515(c) (1997); aggravating circumstances provision, IDAHO CODE § 19-2515(h) (1997). Indiana, IND.

A. *Diminished Capacity in Texas*

The doctrine of diminished capacity is not, *per se*, recognized as a defense, though it may be utilized to negate a mental state.[23] A number of attempts have been made in Texas to further the cause of diminished capacity, and none have been particularly successful, nor had any lasting impact on Texas law.

For example, in 1974 the Court of Criminal Appeals decided *Cowles v. State*.[24] In *Cowles*,[25] the defendant claimed the trial court erred in excluding psychiatric testimony on a charge of rape at the guilt stage. The defendant claimed that, although he knew the difference between right and wrong, he was nevertheless extremely disturbed and mentally ill, with poor judgment and reasoning that impaired his ability to control himself. The court said that the great weight of authority held that such evidence, falling short of insanity, was not admissible. The court recognized "[a]n exception to this rule, where specific intent is an element of the offense at issue, as in the different degrees of mur-

---

CODE ANN. §§ 35-38-6-1, 35-50-2-9 (West 1998); weighing provision, IND. CODE ANN. § 35-50-2-9(d) (West 1998); aggravating circumstances provision, IND. CODE ANN. § 35-50-2-9(b) (West 1998). Maryland, MD. ANN. CODE art. 27, § 413 (1996); weighing provision, MD. ANN. CODE art. 27, § 413(h) (1996); aggravating circumstances provision, MD. ANN. CODE art. 27, § 413(d) (1996). Mississippi, MISS. CODE ANN. §§ 99-19-101 - 103 (1994); MISS. CODE ANN. § 99-19-103 (1994); aggravating circumstances provision, MISS. CODE ANN. § 99-19-101(5) (1994). Missouri, MO. ANN. STAT. §§ 565.030 to -.040 (West Supp. 1998); weighing provision, MO. ANN. STAT. § 565.030(4) (West Supp. 1998); aggravating circumstances provision, MO. ANN. STAT. § 565.032(2) (West Supp. 1998). Nebraska, NEB. REV. STAT. §§ 29-2521 - 34 (1991 & Supp. 1996); weighing provision, NEB. REV. STAT. § 29-2522 (1995); aggravating circumstance provision, NEB. REV. STAT. § 29-2523(1) (1995). Nevada, NEV. REV. STAT. §§ 200.030 to -.035 (1997); weighing provision, NEV. REV. STAT. § 200.030(4)(a) (1997); aggravating factors provision, NEV. REV. STAT. § 200.033 (1997). New Hampshire, N.H. REV. STAT. ANN. § 630:5 (1996); weighing provision, N.H. REV. STAT. ANN. § 630:5(IV) (1996); aggravating circumstances provision, N.H. REV. STAT. ANN. § 630:5(VII) (1996). New Jersey, N.J. STAT. ANN. § 2C:11-3c(3) (West Supp. 1998); weighing provision, N.J. STAT. ANN. § 2C:11-3c (West Supp. 1998); aggravating circumstances provision, N.J. STAT. ANN. § 2C:11-3c(2)(f) (West Supp. 1998). North Carolina, N.C. GEN. STAT. § 15A-2000 (1997); weighing provision, N.C. GEN. STAT. § 15A-2000(b)(2) (1997); aggravating circumstances provision, N.C. GEN. STAT. § 15A-2000(e) (1997). Ohio, OHIO REV. CODE ANN. §§ 2929.03 to -.05 (Anderson 1989); weighing provision, OHIO REV. CODE ANN. § 2929.03 (D)(2) (Anderson 1989); OHIO REV. CODE ANN. § 2929.03(A) (Anderson 1989). Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 701.10 to -.15 (West 1992); weighing provision, OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1999); aggravating circumstances provision, OKLA. STAT. ANN. tit. 21, § 701.12 (West 1992). Pennsylvania, 42 PA. CONS. STAT. ANN. § 9711 (1982 & Supp. 1998); weighing provision, 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (1982); 42 PA. CONS. STAT. ANN. § 9711(d) (Supp. 1998). Tennessee, TENN. CODE ANN. § 39-13-204 (Supp. 1998); weighing provision, TENN CODE ANN. § 39-13-204(g)(1)(B) (Supp. 1998); aggravating circumstances provision, TENN. CODE ANN. § 39-13-204(i) (Supp. 1998).

23. *See* Penry v. State, 903 S.W.2d 715, 767-69 (Tex. Crim. App. 1995) (Maloney, J., concurring).

24. 510 S.W.2d 608 (Tex. Crim. App. 1974).

25. *See id.* at 609.

der and the 'with intent' crimes."[26] The court held that such evidence was properly rejected in *Cowles*, because specific intent was not an element of the crime at issue.[27] A plain reading of *Cowles* would seem to indicate that, in specific intent crimes–including all forms of homicide, such evidence is admissible. The problem remains in how this evidence could be given effect by the jury.

Ten years later, *Wagner v. State*[28] held that if the defendant's evidence showed sudden passion, "the doctrine of diminished responsibility would mandate that the evidence be admitted."[29] The intent indicated in diminished responsibility differs significantly from the intent related to diminished capacity. Rather, *Wagner*'s diminished responsibility specifically refers to situations where a person should be regarded not as less culpable, but as worthy of a lesser punishment due to mental capacity. The Court of Criminal Appeals sidestepped the issue by finding that the evidence presented in the case did not significantly develop the issue. There was evidence that a head injury possibly affected the defendant's impulse control and that the defendant lacked emotional contact with his surroundings. The court found that the only inference that could be drawn from this evidence was that defendant may be more susceptible than the average person to act with sudden passion. It did not establish that the defendant, at the time of the crime, acted under the influence of sudden passion.[30] The court found that the introduction of such evidence would only confuse the jury in seeking to apply the charge for voluntary manslaughter that was given by the trial court. The court noted that the trial court had charged the jury as follows: "'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection."[31] Finally, the Court of Criminal Appeals was troubled by lack of legislative sanction for diminished capacity.[32]

---

26. *Id.* at 610.

27. *See id.*

28. 687 S.W.2d 303 (Tex. Crim. App. 1984).

29. *Id.* at 311.

30. *See id.*

31. *See id.* "[E]vidence pertaining to . . . [defendant's] head injury is that he is *not* a person of ordinary temper. The . . . definition of voluntary manslaughter does not contemplate what would constitute adequate cause from the perspective of an individual whose impulse control is impaired." *Id.* at 311-12.

32. As the Court said, "Lack of normal impulse control is simply not a circumstance recognized by the Legislature to diminish the criminal responsibility of an accused or reduce his crime to a lesser included offense." *Id.* at 312. In this same vein, Texas has never recognized the doctrine of "irresistible impulse." *See* Freeman v. State, 166 Tex. Crim. 626, 317 S.W.2d 726 (1958); Simpson v. State, 291 S.W.2d 341 (1956); McCann v. Texas, 83 S.W.2d 967 (1935). *See also* Saenz v. State, 879 S.W.2d 301 (Tex. App.—Corpus Christi 1994, no pet.).

The Court of Criminal Appeals gave the greatest consideration of this issue in the capital murder case of *Penry v. State*.[33] There, diminished capacity was argued as a justification for a jury charge on the lesser included offense of voluntary manslaughter.[34] The defendant in that case had specifically argued that the lesser-included offense of voluntary manslaughter was raised because the jury may have disbelieved his two confessions, may have believed the victim was not raped, and his diminished capacity for reasoning rendered him incapable of cool reflection.[35] The majority of the court found that defendant did not meet the requisite test in Texas[36] for a charge on a lesser included offense to be given since the evidence failed to show that the defendant acted from sudden passion arising from an adequate cause.[37] In a well-reasoned concurrence, Justice Maloney agreed that

33. 903 S.W.2d 715, 767-69. This was a retrial of the famous *Penry v. Lynaugh*, 492 U.S. 302 (1989), a case that mandated the "mitigation" charge in a capital murder penalty phase.

34. Since this case, voluntary manslaughter in Texas is no longer a separate offense. Voluntary manslaughter is considered only in mitigation of punishment at a murder trial; however, it is *not* allowed as an enumerated mitigating circumstance at a capital murder trial. *See* TEX. PEN. CODE ANN. § 19.02(d) (Vernon 1994). If a defendant can prove that he committed the murder under the immediate influence of sudden passion arising from an adequate cause, then the homicide is reduced from a first degree felony to a second degree felony, which carries a lesser range of punishment.

35. *See Penry*, 903 S.W.2d at 755.

36. Texas uses a two-pronged test to determine if a charge on a lesser included offense is required. *See, e.g., id.* (citing Rousseau v. State, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). *See also* Marras v. State, 41 S.W.2d 395, 405 (Tex. Crim. App. 1987), *overruled on other grounds by* Garret v. State, 851 S.W.2d 853, 860 (Tex. Crim. App. 1993). First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *See Penry*, 903 S.W.2d at 755 (citing Rousseau, 855 S.W.2d at 672-73). Second, there must be some evidence in the record that if the defendant is guilty, he is guilty *only* of the lesser-included offense. *See id.* The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should be given. *See id.*

37. *See Penry*, 903 S.W.2d at 755 (citing Rousseau, 855 S.W.2d at 672-73). The following evidence was adduced at trial:

> Appellant's confessions state that he became acquainted with the victim when he was assisting another man with a delivery of some appliances to her home about three weeks prior to October 25, 1979. On the morning of October 25th, he decided he would go to the victim's house and rape her. Appellant knew that if he went over to the victim's home and raped her, he would have to kill her because she would tell the police. After arriving at the victim's home, he forced his way in and threatened her with a pocket knife. After a struggle during which appellant hit the victim, knocked her to the floor, and shoved her into the stove, the victim managed to grab a pair of scissors and stab appellant in the back.
>
> Appellant knocked the scissors out of the victim's hand and dragged her into the bedroom. The victim refused to get undressed so appellant kicked her with his boots and "stomped" her once. The victim eventually complied and pulled her underpants down by her knees. Appellant unzipped his pants and attempted to get on top of her, but the victim got up. Appellant pushed her back down to the floor, hit her two or three times in the chest, and

an instruction should not have been given since, in Penry's case, it would have amounted to a comment on the weight of the evidence.[38] Nevertheless, he clearly approved of the theory of diminished capacity in the "intent" mode, without addressing the question of mitigation of punishment.[39]

None of these cases really address the heart of the matter, i.e., that a criminal defendant, due to his diminished capacity, may be worthy of special considerations by the jury.

B. *Insanity*

The defense of insanity has been recognized for centuries in Anglo-American jurisprudence. The common law is best exemplified by Blackstone's Commentaries:

> [I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.[40]

A defendant who was insane was excused from criminal liability due to a deficiency in will and a perceived lack of volition for his acts.

The most widely recognized and accepted notion of insanity in the United States, and the standard used for the majority of insanity cases in this country, is the M'Naghten Rule.[41] Under M'Naghten, the

---

threatened to kill her if she would not "make love" to him. Appellant then had intercourse with the victim for about thirty minutes.

After sexually assaulting the victim, appellant got up and retrieved the scissors. He then came back and sat on the victim's stomach. Appellant told her that he hated to kill her but he thought that she would squeal on him. He then plunged the scissors into her chest.

The defense and the State both presented evidence concerning appellant's mental status. Appellant had I.Q. scores ranging from the forties to the seventies. No evidence was presented concerning how appellant's mental status would affect his knowledge of right from wrong or how he would react to a victim's retaliation.

See id.

38. *See id.* at 767.

39. *See id.* at 767-69 (Maloney, J., concurring).

40. 4 WILLIAM BLACKSTONE, COMMENTARIES 24-25 (1769) (footnotes omitted).

41. Several states have adopted the M'Naghten Rule by legislation: ARIZ. REV. STAT. § 13-502 (West Supp. 1997); CAL. PENAL CODE § 25 (West 1988); COLO. REV. STAT. ANN. § 16-8-101 (West 1998); GA. CODE ANN. § 16-3-2 (1996); IOWA CODE

question is whether the defendant had the ability to distinguish between right and wrong and whether he had the capacity to refrain from committing the unlawful act.[42] The M'Naghten Rule derives from English common law developed in the mid 1800's. In 1843, Daniel M'Naghten shot and killed Edward Drummond,[43] private secretary to Sir Robert Peel.[44] M'Naghten claimed to have killed Mr. Drummond because M'Naghten believed that Peel was leading a conspiracy to have him killed.[45] Although M'Naghten had intended to take Peel's life, he killed Drummond because he mistakenly believed Drummond was Peel during an insane delusion.[46] At trial, M'Naghten claimed he was insane and stated that he could not be held liable for the murder because his insane delusions compelled him to commit the crime.[47] M'Naghten was acquitted on the ground of insanity.[48] The majority of English justices developed a test from the M'Naghten case that involved two prongs: in order to establish a defense on the ground of insanity, it must be clearly proven that, at the time of committing the act, the party accused was laboring under such a defect of reason or from disease of the mind that: (1) he did not know the nature and quality of the act, or, (2) if he did know it, he did not know that what he was doing was wrong.[49]

Since then, efforts have been made to formulate a more realistic standard. In the landmark decision of *Durham v. United States*,[50] the District of Columbia Circuit Court adopted the "product rule" that exculpated people from criminal culpability whose acts were the product of a mental disease or defect. This case marked the beginning of realization, within both the legal community and the judiciary, of the

---

ANN. § 701.4 (West 1993); LA. REV. STAT. ANN. § 14:14 (West 1997); MINN. STAT. ANN. § 611.026 (West 1987); N.J. STAT. ANN. § 2C:4-1 (West 1995); N.Y. PENAL LAW § 40.15 (McKinney 1997); OKLA. STAT. tit. 21 § 152 (1983); PA. CONS. STAT. ANN. § 314 (West 1998); WASH. REV. CODE ANN. § 9A.12.010 (West 1988). Other states have adopted M'Naghten by judicial decision: Gurganus v. State, 451 So. 2d 817 (Fla. 1984); State v. Allen, 609 P.2d 219 (Kan. 1980); Laney v. State, 421 So. 2d 1216 (Miss. 1982); State v. Simants, 250 N.W.2d 881 (Neb. 1977), *disapproved on other grounds*, State v. Reeves, 453 N.W.2d 359, 377 (Neb. 1990); Clark v. State, 588 P.2d 1027 (Nev. 1979); State v. Hartley, 565 P.2d 658 (N.M. 1978); State v. Jackson, 273 S.E.2d 666 (N.C. 1981); State v. Brown, 449 N.E.2d 449 (Ohio 1983); State v. Law, 244 S.E.2d 302 (S.C. 1978); Davis v. Commonwealth, 204 S.E.2d 272 (Va. 1974).

42. *See* M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

43. *See id.* at 719.

44. *See* Michael Clay Smith, *The Insanity Plea In Mississippi: A Primer and a Proposal*, 10 MISS. C. L. REV. 147, 155 (1990).

45. *See* Richard Lowell Nygaard, ON RESPONSIBILITY: OR THE INSANITY OF MENTAL DEFENSES AND PUNISHMENT, 41 VILL. L. REV. 951, 962 n.31 (1996).

46. *See* Smith, *supra* note 44, at 155.

47. *See M'Naghten*, 8 Eng. Rep. at 719.

48. *See* Smith, *supra* note 44, at 155 (The public uproar in England over the M'Naghten verdict led the House of Lords to inquire of the fifteen judges sitting on the Queen's Bench to find the proper test to be applied in cases of this nature.).

49. *See id.* at 155-56.

50. 214 F.2d 862 (D.C. Cir. 1954).

astounding problems in trying to define legal responsibility when a mental disease is involved.[51] *Durham*, however, was never widely followed and was not followed in Texas at any time.[52] Indeed, the District of Columbia Circuit abandoned the *Durham* formula in 1972 in favor of the American Law Institute Standard.[53]

The American Law Institute (ALI) formulated a definition of insanity in 1962. This has been referred to as the "substantial capacity" test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[54]

The ALI test was billed as combining the "cognitive" M'Naghten test with the theory of irresistible impulse, then qualifying both with a "substantial capacity" test.[55] This test, however, fell into disfavor following John Hinckley's attempted assassination of President Ronald Reagan. Hinckley was acquitted on grounds of insanity and, to this day, is in a mental institution.

The federal response to the Hinckley decision was the Insanity Defense Reform Act of 1984 (IDRA), the first federal insanity act.[56] The purpose of this act was, in fact, to narrow the scope of the insanity defense.[57] This act provides that it is an affirmative defense to a crime if, at the time of the offense, the defendant "as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."[58] This language mirrors the language found in *M'Naghten*[59] and seems to bring the matter "full circle."

As previously noted, Texas never followed any standard other than M'Naghten prior to 1974, when the Texas Penal Code was adopted.[60] Texas law provides that "insanity"[61] is an affirmative defense to a crime, which, in effect, excuses a defendant from criminal responsibility. The test for "insanity" in Texas, set forth in section 8.01 of the Texas Penal Code, is as follows:

---

51. *See* United States v. Brawner, 471 F.2d 969, 976 (D.C. Cir. 1972) (commenting that *Durham* sparked interest in the problems defining legal responsibility when mental illness was involved).

52. *See id.* at 979 (noting that the American Law Institute's insanity defense rule has been adopted in all but one circuit).

53. *See id.* at 981-83.

54. MODEL PENAL CODE § 4.01(1) (1985).

55. 2 MODEL PENAL CODE AND COMMENTARIES 167-68 (1985).

56. 18 U.S.C § 17(a) (Supp. 1998).

57. 937 F.2d 604 n.2 (1991); United States v. Pohlot, 827 F.2d 889, 896 (3rd Cir. 1987).

58. 18 U.S.C. § 17(a) (Supp. 1998).

59. *See* 1843-60 All E.R. at 730.

60. *See Ex parte* Hagans, 558 S.W.2d 457, 461 n.5 (Tex. Crim. App. 1977) (stating that M'Naghten is no longer the rule in Texas).

61. *See* TEX. PEN. CODE ANN. § 8.01 (Vernon 1994).

> (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
> (b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[62]

Texas law embodies a presumption of sanity; all persons are presumed sane until proven otherwise by a preponderance of the evidence.[63] A defendant has the burden of proof on an insanity issue.[64] Insanity is clearly a mens rea variant of diminished capacity since an insane defendant is not culpable *at all* and criminal conduct is usually excused.

It is important to note that "insanity" is a legal, as opposed to a medical, term.[65] Indeed, there is no such mental defect or disease known strictly as "insanity" in the medical profession. It is not listed under either the Axis I or Axis II disorders in the DSM IV.[66] The

---

62. *Id.* Prior to 1983 it was a defense to a crime if a defendant knew his conduct was "wrong," but nevertheless he was incapable of conforming his conduct to the requirements of the law. *See* Act of June 14, 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 896, *amended by* Act of June 19, 1983, 68th Leg., R.S., ch. 454, § 1, 1983 Tex. Gen. Laws 2640, *amended by* Act of June 19, 1993, 73d Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3595. This defense was eliminated in August of 1983. Texas essentially followed the M'Naghten rule until January 1, 1974, when section 8.01 of the Texas Penal Code went into effect. *See* Sloan v. Estelle, 710 F.2d 229, 231-32 (5th Cir. 1983).

The Court of Criminal Appeals, in the cases of *Ex parte Long,* 564 S.W.2d 760, 765 n.2 (Tex.Crim. App. 1978) (en banc), and *Ex parte* Hagans, 558 S.W. 2d 457, 461 (Tex. Crim. App. 1977), stated that "[t]he M'Naghten rule is no longer the standard for determining criminal responsibility in Texas." *See also* Jenelle White Nolan, *Texas Rejects M'Naghten,* 11 HOUS. L. REV. 946 (1974); Ray Farabee & James L. Spearly, *The New Insanity Law in Texas: Reliable Testimony and Judicial Review of Release,* 24 S. TEX. L. REV. 671 (1983).

Yet section 8.01 of the Texas Penal Code does not appear to be much of an improvement. The statute still requires a defendant to be able to discriminate between right and wrong before being eligible for a jury to declare him "insane." Texas may reject M'Naghten explicitly but appears implicitly still to adhere to its main component.

63. *See* Bigby v. State, 892 S.W.2d 864, 870 (Tex. Crim. App. 1994); Cross v. State, 446 S.W.2d 314, 315-16 (Tex. Crim. App. 1969); Cover v. State, 913 S.W.2d 611, 619 (Tex. App.—Tyler 1995, pet. ref'd).

64. *See* Medina v. California, 505 U.S. 442 (1992); Penry v. State, 903 S.W.2d 715, 729 (Tex. Crim. App. 1995) (placing the burden of proof on the defendant in a competency hearing does not violate either the due process guarantees of neither the Texas or federal constitution in light of adequate procedures protecting these rights).

65. *See* McGee v. State, 155 Tex. Crim. 639, 238 S.W.2d 707, 709 (1950) (holding a person may be medically "insane" by reason of mental disease or mania, but to be legally "insane" a person must be unable to distinguish right from wrong and or unable to know the nature and consequences of actions); Bigby v. State, 892 S.W.2d 864, 877 (Tex. Crim. App. 1994) (noting that the issue of insanity is not strictly medical; it also invokes both legal and ethical considerations); Cover v. State, 913 S.W.2d 611, 619 (Tex. App.—Tyler 1995, pet. ref'd), Graham v. State, 566 S.W.2d 941, 948-49 (Tex. Crim. App. 1978) (en banc).

66. *See* discussion *infra* note 104.

closest medical terminology to what is generally thought of as insanity might well be "psychosis," and that term covers a wide variety of mental diseases, impairments, and abnormalities. Nor should insanity be confused with competency to stand trial, or vice versa, as the two concepts are distinct.[67]

There are many medical conditions in Texas that have been held *not* to constitute insanity. Some of these are as follows: (1) a state of psychosis proved by cerebral trauma;[68] (2) drinking;[69] (3) emotional problems;[70] and (4) irresistible impulse doctrine.[71] All of these conditions, however, would clearly qualify as diminished capacity, which is *not* a defense.

By the same token, one of the quirks of Texas law is that a mental disease or defect that may constitute a form of psychosis *known and recognized by medical science* may not be sufficient to establish a section 8.01 defense.[72] Thus, a person can be *medically* insane, either mentally ill or psychotic, but not *legally* insane.[73] This is particularly true since, regardless of expert testimony that may be adduced at trial,[74] it is up to the trier of fact, either judge or jury, to decide if a defendant is insane.[75] Trials involving insanity defenses often become "battles of the experts,"[76] with contradictory[77] evidence introduced for both the defense and the prosecution. This can be confusing to juries and irritating to judges.

It seems only too clear that a person may become medically insane through the prolonged use of narcotics and/or addiction to narcotics that is so severe that the person can no longer function, even during

67. *See* Rodriguez v. State, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995).

68. *See* Morales v. State, 458 S.W.2d 56, 58 (Tex. Crim. App. 1970), *vacated as to the death penalty imposed*, 408 U.S. 938 (1971).

69. *See* Garcia v. State, 429 S.W.2d 468, 471 (Tex. Crim. App. 1968).

70. *See id.*

71. *See* Freeman v. State, 166 Tex. Crim. 626, 317 S.W.2d 726, 730 (1958). *See also* Saenz v. State, 879 S.W.2d 301, 308 (Tex. App.—Corpus Christi 1994, no pet.).

72. *See* Taylor v. State, 856 S.W.2d 459, 468 (Tex. App.—Houston [1st Dist.] 1993), *aff'd*, 885 S.W.2d 154 (Tex. Crim. App. 1994).

73. *See id. See also* Graham v. State, 566 S.W.2d 941, 948 (Tex. Crim. App. 1978); McGee v. State, 238 S.W.2d 707, 710 (Tex. Crim. App. 1950) *rev'd on other grounds.*

74. *See* Love v. State, 909 S.W.2d 930, 943 (Tex. App.—El Paso 1995, pet. ref'd) ("Expert witnesses, although capable of giving testimony that may aid a jury in determining the issue, do not dictate the result.").

75. *See also* Bigby v. State, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994) (noting only the jury is allowed to join the non-medical components in considering the ultimate issue; otherwise, "the issue of sanity would be decided in the hospitals and not the courtroom.") (quoting *Graham*, 566 S.W.2d at 948-49); Cover v. State, 913 S.W.2d 611, 619 (Tex. App.—Tyler 1995, pet. ref'd) ("Only a jury can decide the ultimate issue of criminal responsibility."); *Love*, 909 S.W.2d at 943.

76. *See* Mines v. State, 852 S.W.2d 941, 952 (Tex. Crim. App. 1992), *vacated*, 510 U.S. 802 (1993). *See also Love*, 909 S.W.2d at 943.

77. Indeed, lack of contradictory evidence from the State may support a reversal on appeal. *See* Olivier v. State, 850 S.W.2d 742, 749 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd).

periods of abstinence. While the use of narcotics may produce mental disease or defect, unless a defendant can meet the stringent test of section 8.01, he may have no defense to culpability.

Another, more recent, difficulty with the insanity defense in Texas is the Court of Criminal Appeals' interpretation that a defendant is not necessarily entitled to his own expert under *Ake v. Oklahoma*.[78] In *Ake*, the court held that the most a defendant may be entitled to is appointment of a *court* expert who will be selected by the trial judge.[79] This holding undercuts an indigent defendant's right to present a defense. Moreover, the Court of Criminal Appeals has held that, by raising an insanity defense at the guilt and innocence phase of the trial, and offering psychiatric evidence in support thereof, the defendant waives his Fifth Amendment rights as to the State's use of psychiatric evidence in rebuttal on that issue.[80] When the defendant presents psychiatric evidence in his defense at punishment, he essentially "opens the door" to the State's rebuttal use of psychiatric evidence at punishment.[81] Thus, an insanity defense may not only be virtually impossible to prove, but it may even be ill-advised as a defense. The use of rebuttal testimony can undercut the credibility of defense expert testimony, as well as relegate issues more properly considered in mitigation of punishment to merely disputed facts.

C. *Involuntary Intoxication*

Involuntary intoxication is considered a defense to a crime in Texas.[82] A defendant is entitled to have the jury charged on the issue of involuntary intoxication, as a defense at the guilt/innocence phase of the trial, if it is raised by the evidence at trial. To be entitled to a charge on involuntary intoxication, the evidence must meet the following test:

> Involuntary intoxication is a defense to criminal culpability when it is shown that:
> 1) the accused has exercised no independent judgment or volition in taking the intoxicant, and

78. *See* Ake v. Oklahoma, 470 U.S. 68, 76-85 (1985) ("When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution [due process] requires that a state provide access to a psychiatrist's assistance on this issue, if a defendant cannot otherwise afford one."). *See also* Soria v. State, 933 S.W.2d 46, 57 (Tex. Crim. App. 1996); Wilkens v. State, 847 S.W.2d 547, 551 (Tex. Crim. App. 1992).

79. *See Ake*, 470 U.S. at 83.

80. *See Soria*, 933 S.W.2d at 57; *Wilkens*, 847 S.W.2d at 551. *See also* Buchanan v. Kentucky, 483 U.S. 402, 421-24 (1987) (raising an extreme emotional distress defense).

81. *See* Hernandez v. State, 805 S.W.2d 409, 412 (Tex. Crim. App. 1990).

82. Involuntary intoxication is not provided for by statute in this jurisdiction. The development of this defense has been almost solely by case law. *See* Torres v. State, 585 S.W.2d 746, 748 (Tex. Crim. App. 1979).

> 2) as a result of his intoxication the accused did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law.[83]

If a criminal defendant raises involuntary intoxication, then he must prove it only by a preponderance of the evidence and not beyond a reasonable doubt.[84]

In this regard, the defense of involuntary intoxication is closely related to the defense of insanity. Involuntary intoxication can be used to negate a mens rea finding.[85] In that sense it is a "mens rea variant." Involuntary intoxication, however, can also be of the diminished responsibility variant, depending on the facts of the individual case.

The difficulty with an involuntary intoxication defense is the paucity of case law that recognizes that the evidence was sufficient to raise the defense in the first place. Moreover, there is a strong undercurrent in the law that there must be *no* volition on the part of the defendant in ingesting the intoxicant in order to be entitled to have the jury even *consider* the defense.[86] Essentially, a defendant must prove that he was "slipped a Mickey" without his knowledge[87] or that intoxication was, in some other way, not self-induced in order for the evidence to be considered sufficient to justify a jury instruction.

At first blush it may appear that Jasper is not entitled to a jury instruction on involuntary intoxication. These were illegal narcotics and hardly prescription drugs. He knew their nature. He took the drugs of his own volition in the sense that no one held a gun to his head or "slipped him a Mickey" into his food or drink. Yet all of these considerations beg the question, can it be an act of volition or independent judgment when a defendant has, essentially, been ingesting drugs for most of his life? At what point does extreme drug usage, beginning in early childhood, become voluntary or involuntary? Under the scenarios presented herein, involuntary intoxication is a risky choice for a complete defense and by no means assured of success. Additionally, there are no provisions in the law for involuntary intoxication being considered separately in mitigation of punishment.

---

83. *See Torres*, 585 S.W.2d at 749. *See also* Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976); Shurbet v. State, 652 S.W.2d 425, 427 (Tex. App.—Austin 1982, no pet.).

84. *See* Hardie v. State, 588 S.W.2d 936, 939 (Tex. Crim. App. 1979).

85. *See Torres*, 585 S.W.2d at 749; Juhasz v. State, 827 S.W.2d 397, 406 (Tex. App.—Corpus Christi 1992, pet. ref'd).

86. *See* Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976) ("There must be an absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant.").

87. *See* Shurbet v. State, 652 S.W.2d 425, 428 (Tex. App.—Austin, 1982, no pet.) (holding that the defense of involuntary intoxication is limited to situations in which the defendant is (1) unaware of what the intoxicating substance is, (2) subject to force or duress, or (3) taking medication according to prescription). *See also* Spriggs v. State, 878 S.W.2d 646, 649 (Tex. App.—Corpus Christi 1994, no pet.).

D. *Voluntary Intoxication*

Voluntary intoxication has long been disfavored[88] as a defense, both at common law and in Texas. So strong is the sentiment that a person should not seek to avoid criminal responsibility because of his voluntary act in rendering himself of unsound mind,[89] that voluntary intoxication is not a defense to criminal responsibility in Texas.[90] Unlike mental disease or defect, intoxication cannot be used to negate intent.[91] Rather, voluntary intoxication may be considered in mitigation of punishment *if* the intoxication rises to the level of temporary insanity under section 8.04 of the Texas Penal Code.[92] While section 8.04 specifically provides that voluntary intoxication is not a defense to the commission of a crime, mitigation of punishment is possible, but only where the level of intoxication produces temporary insanity in the defendant.[93] As a general rule, a defendant must be able to show his intoxication produced temporary insanity in order to be entitled to a charge that such insanity may mitigate his punishment. Once such a showing has been made, a section 8.04 charge to the jury at punishment is mandatory. Voluntary intoxication is the diminished responsibility variant of diminished capacity.

The Eighth Amendment[94] of the U.S. Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment,[95] requires a jury instruction that the appellant's temporary insanity, if caused by voluntary intoxication, may be considered in

88. *See* Heard v. State, 887 S.W.2d 94, 98 (Tex. App.—Texarkana 1994, pet. ref'd).

89. *Id. See also Spriggs*, 878 S.W.2d at 646; Rassner v. State, 705 S.W.2d 798 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd).

90. TEX. PEN. CODE ANN. § 8.01(a) (Vernon 1994).

91. *See* East v. Scott, 55 F.3d 996 (5th Cir. 1995) (holding that under Texas law, voluntary intoxication does not negate specific intent); Hawkins v. State, 605 S.W.2d 586 (Tex. Crim. App. 1980); Ramos v. State, 547 S.W.2d 33 (Tex. Crim. App. 1977).

92. The Texas Penal Code provides as follows:

> (a) Voluntary intoxication does not constitute a defense to the commission of crime.
>
> (b) *Evidence of temporary insanity caused by intoxication* may be introduced by the actor *in mitigation of the penalty attached* to the offense for which he is being tried.
>
> (c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.
>
> (d) For purposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

TEX. PEN. CODE ANN. § 8.04 (Vernon 1994) (emphasis added).

93. *See* Tucker v. State, 771 S.W.2d 523, 533 (Tex. Crim. App. 1988) (The Court of Criminal Appeals did not address the issue in that case due to a lack of preservation of issues.); Cordova v. State, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987); Sawyers v. State, 724 S.W.2d 24 (Tex. Crim. App. 1986). *See also* G. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 216 (1987).

94. *See* U.S. CONST. amend. VIII.

95. *See* U.S. CONST. amend. XIV.

mitigation of punishment. In *Lockett v. Ohio*,[96] the Supreme Court held the penalty of death to be qualitatively different from any other sentence. In that case, the United States Supreme Court said, "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[97]

> [A] statute that prevents the sentencer . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is . . . incompatible with the commands of the Eighth and Fourteenth Amendments.[98]

Although the appellant was not prevented from introducing mitigating evidence, the above instruction required the jury to find at the time of the killings that her intoxication rendered her temporarily insane before they could consider her drug use in mitigation of her punishment. The charge, on its face, instructed the jury to consider the mitigating evidence only in this light, thereby implying that it may not have been considered for any other purpose. The appellant maintained that she is entitled to whatever mitigating significance the jury might choose to give the fact of her intoxication.[99] A specific charge on mitigation of punishment due to voluntary intoxication is thus essential whenever it is raised by the evidence.

It has been held that section 8.04 (c) does not *preclude* the giving of an intoxication instruction if circumstances different from those outlined in subsection (c) otherwise raise the issue under either section 8.04 (a) or (b).[100] Thus, a voluntary intoxication charge is *not* necessarily limited to cases where temporary insanity is relied on as a defense. It seems only self-evident that such a charge is appropriate in mitigation of punishment in cases wherein the intoxication may not have risen to the level of temporary insanity or where the jury may have bona fide doubts on the insanity issue. A charge on voluntary intoxication is particularly appropriate at the punishment stage, as it is in the nature of mitigation.[101]

In Jasper's case, a charge on voluntary intoxication would certainly have been appropriate since he had voluntarily ingested narcotics on the day of the murder. Yet, again, a holding that a defendant ingested drugs voluntarily may beg the question, what is voluntary about the continuation of drug usage that began *before* an individual could be said to make a "reasoned choice"? In short, the mitigating effect may

96. 438 U.S. 586, 604 (1978).
97. *Id.*
98. *Id.* at 605.
99. *See id.* at 602.
100. *See* Taylor v. State, 885 S.W.2d 154, 156 (Tex. Crim. App. 1994).
101. *See id.*

well be diluted by the voluntary nature of the conduct in taking the drugs. Again, the defendant is left with an unsatisfactory defense, and the jury may well view his conduct as aggravating as opposed to mitigating.

E. *Addiction*

The term "addiction" is currently not found in scientific literature or in the DSM[102] IV but is considered by mental health professionals to be a "lay" term. As used in this paper, addiction refers to habitual or compulsive use of a drug or other intoxicant accompanied by physiological or psychological dependence. Dependence[103] refers to either the development of physiological signs of dependence, such as tolerance and withdrawal *or* to the compulsive use of a substance that the person is powerless to discontinue. Addiction, as utilized in this paper, covers both substance use and substance induced disorders.

Addiction has long been troubling for the courts of this country. In *Robinson v. California*,[104] the United States Supreme Court found that a statute making addiction to narcotics a crime was unconstitutional. Under the facts of that case, it was concluded that imprisoning an individual because that person was essentially ill was excessive punishment under the Eighth Amendment. While addiction cannot be criminalized, however, it often does not excuse a crime if the addiction can be separated from the crime.[105]

There is *no* case law the author is aware of that has held that proof of long term addiction alone constitutes a defense to a crime.[106] This is odd, since addiction is an old and evil problem of society.[107] This is not to say, however, that the issue has not been considered in other contexts. For example, the United States Court of Appeals for the

102. The Diagnostic and Statistical Manual of Mental Disorders is the "bible" of psychological and mental conditions and illness in the United States.

103. In order to have diagnosable "dependence," for purposes of the DSM IV, a person must exhibit at least 3 of the following 7 "symptoms": (1) tolerance; (2) withdrawal symptoms; (3) need for larger amounts of substance; (4) persistent desire to cut down; (5) spending a good deal of time in or at activities aimed at obtaining the substance; (6) change in social, occupational, or recreational activities; and (7) continued use of substance despite physical or psychological problems. Most people become physiologically dependent on the substance, but one does not need to be to meet criteria for a positive diagnosis.

104. 370 U.S. 660 (1962). *Robinson* was the first case where the United States Supreme Court definitively held that the Eighth Amendment was applicable to punishments imposed by state courts through the due process clause of the Fourteenth Amendment. *See* 24 AM. CRIM. L. REV. 1 n.34.

105. *See* Powell v. Texas, 392 U.S. 514, 532-36 (1968) (Defendant was not being imprisoned for being a chronic alcoholic, but for being drunk in public; the facts of the case did not establish "irresistible compulsion" to drink. Addiction as a defense was not, however, considered.).

106. *See* Annotation 73 A.L.R. 3d 16 n.17.

107. *See* United States v. Moore, 486 F.2d 1139, 1212-29 (D.C. Cir.) (Wright, J., dissenting).

Fifth Circuit has found that the great weight of legal authority clearly supports the view that evidence of mere narcotics addiction, standing alone and without other physiological or psychological involvement, raises no issue of such a mental defect or disease as can serve as a basis for the insanity defense.[108] Other courts have held that use of narcotics does not per se render a defendant incompetent to stand trial.[109] Plenary consideration was given to the defense of addiction and rejected by the District of Columbia Circuit Court in *United States v. Moore*[110] for drug related offenses only. Cases that reject addiction as a defense, or as a component element thereof, appear to do so on the theory that there is an element of reasoned choice when an addict knowingly acquires and uses drugs.[111] That is precisely the problem with our considered scenario: there can be no element of "reasoned choice" when addiction has begun before the age of reason and continued virtually uninterrupted throughout the addict's life.

The closest Texas cases to this issue involve alcoholism. In *Shurbet v. State*, the Austin Court of Appeals, citing to out-of-state authority, held that alcoholism may not be the basis for a defense of involuntary intoxication.[112] Similarly, in *Heard v. State*, the Texarkana Court of Appeals held that expert testimony that an alcoholic does not voluntarily consume alcohol was not evidence of involuntary intoxication.[113] Again, the prevailing theory seems to be one of volition; if any degree or judgment is involved, an impaired defendant has no defense to a crime. Moreover, the voluntary nature allows a jury to view addiction as aggravating and not consider the psychological or physiological impairment of a defendant in mitigation of punishment.

II. Abortive Attempts at Diminished Capacity in the Intoxication Realm

A. *Montana v. Egelhoff*

One of the clearest examples of the difficulty posed by a diminished capacity defense in recent years is the case of *Montana v. Egelhoff*,[114] which considerably muddies these waters. Defendant Egelhoff was convicted by a Montana jury of two counts of deliberate homicide.

108. *See* United States v. Lyons, 731 F.2d 243, 245 (5th Cir. 1984).

109. *See* Lewis v. United States, 542 F.2d 50, 51 (8th Cir. 1976); United States v. Williams, 468 F.2d 819, 820 (5th Cir. 1972); Grennett v. United States, 403 F.2d 928, 931 (D.C. Cir. 1968).

110. 486 F.2d 1139, 1181 (D.C. Cir.) (en banc).

111. *See id.* at 1183 (Leventhal, J., concurring).

112. 652 S.W.2d 425, 428 (Tex. App.—Austin 1982, no pet.) (citing People v. Morrow, 74 Cal. Rptr. 551 (Cal. Ct. App. 1969); Ford v. State, 298 S.E.2d 327 (Ga. Ct. App. 1982); State v. Lilley, 647 P.2d 1323 (Kan. 1982); State v. Palacio, 559 P.2d 804 (Kan. 1977); State v. Johnson, 327 N.W.2d 580 (Minn. 1982); State v. Crayton, 354 S.W.2d 834 (Mo. 1962)).

113. 887 S.W.2d 94, 98 (Tex. App.—Texarkana 1994, pet. ref'd).

114. 518 U.S. 37 (1996). *See also* State v. Egelhoff, 900 P.2d 260 (Mont. 1995).

The evidence in *Egelhoff* showed that the defendant had been drinking heavily on the day prior to the homicides; indeed, at the time of his arrest, Egelhoff was still intoxicated.[115] There was testimony that Egelhoff could not remember much of what happened on the evening of the murders. It was contended by Egelhoff, and supported by medical testimony, that he suffered from an alcohol-induced amnesia (blackout) that prevented him from recalling the events of the night in question.[116]

At Egelhoff's trial, the following instruction, over objection, was given to the jury:

> A person who is in an intoxicated condition is criminally responsible for his conduct and *an intoxicated condition is not a defense to any offense* and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the Defendant proves that he did not know that it was an intoxicating substance when he consumed the substance causing the condition.[117]

Egelhoff objected to this instruction on grounds that it was "unconstitutional because it had the effect of negating the requirement that the State prove a mental state when proving deliberate homicide where the defendant is voluntarily intoxicated."[118] He further argued that the applicable statute, section 45-2-203 of the Montana Code,[119] was "unconstitutional because it shifts the burden of proof on the element of mental state from the prosecution to the defendant."[120] These arguments were rejected by the trial court.[121] On appeal, defendant Egelhoff contended that the jury instruction removed evi-

115. *See Egelhoff*, 518 U.S. at 40.
116. *See Egelhoff*, 900 P.2d at 262-63.
117. *Id.* at 263 (emphasis added).
118. *Id.*
119. Section 45-2-203 of the Montana code, as amended in 1987, provided:

> 45-2-203. Responsibility—intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

MONT. CODE ANN. § 45-2-203 (1987). The 1985 version of section 45-2-203 of the Montana code provided:

> 45-2-203. Responsibility—intoxicated or drugged condition. A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

MONT. CODE ANN. § 45-2-203 (1985).
120. *Egelhoff*, 900 P.2d at 263.
121. *See id.*

dence of alcohol intoxication from the jury's consideration in determining that he acted "knowingly" or "purposely" and relieved the prosecution of its burden to prove the required mental state for deliberate homicide.[122] Egelhoff asserted that this was constitutionally impermissible.[123]

The Montana Supreme Court agreed, holding that Egelhoff was denied *federal* due process when the jury was instructed that voluntary intoxication may not be taken into consideration in determining the existence of a mental state which is an element of the offense.[124] The court concluded that a Montana defendant has a due process right to present, and have considered by the jury, all relevant evidence to rebut the State's evidence on all elements of the offense charged.[125] The court held that the following portion of Montana Code Ann. section 45-2-203 (1993), is a violation of due process and is, therefore, unconstitutional: "[an intoxicated condition]. . . may not be taken into consideration in determining the existence of a mental state which is an element of the offense."[126] This was clearly a quantum leap forward for the diminished capacity defense due to intoxication.

The victory was short lived. The United States Supreme Court overruled the Montana Supreme Court in a 5/4 decision.[127] The Supreme Court held that federal due process does not bar states from enacting laws that have the effect of making it *easier* for the prosecution to obtain convictions.[128] The majority concluded that the Montana Supreme Court had misconstrued federal authority as no burden had been shifted from the State to the defense.[129] That Court also heavily relied on the English common law that voluntary intoxication was no defense to criminal activity.[130]

In a well reasoned dissent, Justice O'Connor noted that the Court's ruling would "impede the defendant's ability to throw doubt on the State's case"[131] by removing from the jury's consideration a "category of evidence"[132] relevant to mental state, which must be proven beyond a reasonable doubt.[133]

---

122. *See id.*
123. *See id.*
124. *See id.* at 265.
125. *See id.*
126. *Id.* at 266 (quoting MONT. CODE ANN. § 45-2-203 (1993)).
127. *See* Montana v. Egelhoff, 518 U.S. 37 (1996).
128. *See id.* at 57.
129. *See id.*
130. *See id.* at 39-42.
131. *Id.* at 50.
132. *Id.*
133. *See id.*

B. *Diminished Capacity and the Texas Constitution*

The Court of Criminal Appeals lost no time in holding that *Montana v. Egelhoff* rendered moot federal due process claims with respect to the constitutionality of section 8.04.[134] This is disturbing, since Texas defendants are entitled to greater protection under the due course of law provisions of the Texas Constitution and applicable statutes.[135] The due course of law clause of the Texas Constitution, article I, section 19, creates greater protection for Texans charged with a crime since it is not limited to restricting government activity and it expands protection to include any manner in which a citizen may be disenfranchised.[136] Disenfranchisement can include not only the right to vote, but also deprivation of other rights, privileges and immunities. The lack of a viable defense at trial can be a form of disenfranchisement. It seems only too clear that the inability to formulate a defense and/or to present evidence in clear mitigation of a death sentence, which the jury must then consider in its proper context, is a deprivation of due course of law.

The United States Supreme Court has itself recognized that the Texas Constitution may offer greater protection to its citizens than that afforded by the federal constitution. In *City of Mesquite v. Aladdin's Castle, Inc.*, the United States Supreme Court said:

> It is first noteworthy that the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.[137]

While the track record for Texas appellate courts is not promising, a Texas court could, within the meaning of the Texas Constitution, rule that the due course of law provisions of the Texas Constitution demand protection for a criminal defendant in Egelhoff's situation. Certainly this is an area worthy of continued litigation, despite daunting setbacks.

---

134. *See* Mata v. State, 939 S.W.2d 719, 726 (Tex. Crim. App. 1997); Williams v. State, 937 S.W.2d 479, 488 (Tex. Crim. App. 1996).

135. *See* Heitmen v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991). *See also* Bauder v. State, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996); Autran v. State, 887 S.W.2d 31, 34 (Tex. Crim. App. 1994).

136. *See* JAMES C. HARRINGTON, TEXAS BILL OF RIGHTS LITIGATION MANUAL, § 5.21 (2d ed. 1994).

137. 455 U.S. 283, 293 (1982).

III. ALTERNATIVES TO THE DIMINISHED CAPACITY DEFENSE

A. *Guilty, but Mentally Ill*

An interesting alternative to the diminished capacity "defense," as used in the mitigation context, is a plea and verdict adopted several years ago by Michigan. In that state, a criminal defendant has the option of entering a plea of "guilty, but mentally ill."[138] Under this provision, a jury may find that a criminal defendant is "guilty, but mentally ill" ("GBMI") if they find that the defendant is mentally ill but that the mental illness did not cause the defendant to commit the crime. A GBMI verdict allows for an imprisoned defendant to be given treatment for his condition. This is used in Michigan as a supplement, rather than a replacement, for the insanity defense. Indeed, a defendant who asserts an insanity defense may be found "guilty, but mentally ill."[139] This statute has passed constitutional muster in Michigan as not being violative of due process,[140] equal protection,[141] or leading to the jury's unfair compromise on the issue of the defendant's insanity.[142] This unique verdict seems to allow both for the punishment of the crime and for the humane treatment of defendants with serious mental health issues.

How a defense of this nature would be adapted in the addiction context is unknown. Yet, clearly there is potential for a "happy medium." No one wants to see a person who is truly mentally ill go without treatment. Yet, all too often, that is what happens when a mentally ill defendant is incarcerated. A substance abusing defendant

---

138. MICH. COMP. LAWS ANN. § 768.36(2) (1982).

139. Chapter 768, section 36, of the Michigan Code of Criminal Procedure reads, in pertinent part, as follows:

> Sec. 36. (1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:
> (a) That the defendant is guilty of an offense.
> (b) That the defendant was mentally ill at the time of the commission of that offense.
> (c) That the defendant was not legally insane at the time of the commission of that offense.
> (2) If the defendant asserts a defense of insanity in compliance with section 20a and the defendant waives his right to trial, by jury or by judge, the trial judge, with the approval of the prosecuting attorney, may accept a plea of guilty but mentally ill in lieu of a plea of guilty or a plea of nolo contendere. The judge may not accept a plea of guilty but mentally ill until, with the defendant's consent, he has examined the report or reports prepared pursuant to section 20a, has held a hearing on the issue of the defendant's mental illness at which either party may present evidence, and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered. The reports shall be made a part of the record of the case.

MICH. COMP. LAWS ANN. § 768.36(1) (1982) (footnote omitted).

140. *See* People v. McLeod, 288 N.W.2d 909, 917-18 (Mich. 1980).

141. *See id.* at 918-19.

142. *See* People v. Mitchell, 345 N.W.2d 611, 614 (Mich. Ct. App. 1983).

with substance use and/or induced disorders is even less likely to adjust to incarceration without treatment. Indeed, Texas statutes currently forbid the transfer of a mentally ill defendant incarcerated on death row to a mental health facility.[143] A verdict of "guilty, but mentally ill" allows for a conviction, as well as treatment, for the criminal and would remedy the problem of untreated death row inmates. This is certainly a matter worthy of investigation and possibly legislative consideration in Texas.

B. *Mitigation of Punishment*

1. Special Issues

In Texas, a jury has the option of punishing a convicted capital murder defendant by either life imprisonment or death by lethal injection. The jury makes this decision not by a "thumbs up, thumbs down" vote, but by answering "special issues" set forth in statute. While the jury's verdict is subject to review by the Court of Criminal Appeals,[144] reversal for error in answering the special issues in the affirmative is extremely rare. The Court of Criminal Appeals is also inclined to give the jury's verdict great deference and has held that certain avenues of review available to non-capital defendants are not fully available to capital defendants.[145]

The nature of the special issues has changed over time since Texas reinstituted the death penalty in the wake of *Furman v. Georgia*.[146] Initially, the special issues provided for by the Legislature, and approved by the United States Supreme Court in *Jurek v. Texas*,[147]

143. *See* TEX. CODE CRIM. PROC. ANN. art. 46.01 § 2(a) (Vernon 1979); *Ex parte* Jordan, 758 S.W.2d 250, 254 (Tex. Crim. App. 1988).

144. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(h), 37.0711 § 3(j) (Vernon Supp. 1998).

145. *See* McGinn v. State, 961 S.W.2d 161, 166-67 (Tex. Crim. App. 1998), *cert. denied*, 1998 WL 467510. Essentially, the Court of Criminal Appeals held that it will conduct neither a legal sufficiency review, under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), nor a factual sufficiency review under the standard of *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996) on the mitigation special issue. *See also* Green v. State, 934 S.W.2d 92, 106 (Tex. Crim. App. 1996). The Court of Criminal Appeals' rationale appears to be that no juror is required to accord any particular meaning or significance to any evidence offered in mitigation of punishment.

This reasoning seems at odds with the insistence of the United States Supreme Court that convicted death penalty defendants be afforded "meaningful appellate review." *See* Parker v. Dugger, 498 U.S. 308, 321 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990). The United States Supreme Court does not approve of "automatic affirmance," considering it at odds with the dictates of *Lockett v. Ohio* and *Eddings v. Oklahoma*. If *no* sufficiency review can be conducted of the mitigation special issue, then it seems only logical that automatic affirmance will ensue every time. This clearly cannot withstand federal constitutional scrutiny.

Moreover, the reasoning of *McGinn* is also at odds with cases wherein the Court of Criminal Appeals has conducted a sufficiency review of the "future dangerousness" special issue. *See* Hughes v. State, 987 S.W.2d 285, 293 (Tex. Crim. App. 1994).

146. 408 U.S. 238 (1972).

147. 428 U.S. 262 (1976).

called for a jury to find affirmative answers to the following special issues before the death penalty could be imposed:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[148]

These special issues did not specifically provide for consideration of mitigating evidence that might account for matters outside the purview of those issues. This omission eventually put the Texas death penalty scheme at odds with concepts of federal due process, as interpreted by the United States Supreme Court in death penalty cases from other jurisdictions within the context of mitigation of punishment.

In *Lockett v. Ohio*, the United States Supreme Court emphasized that the sentencer in a death penalty case must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[149] In *Eddings v. Oklahoma*,[150] the Supreme Court reversed a death sentence due to the fact that the sentencing judge concluded, as a matter of law, that he was unable to consider the proffered evidence of the youthful defendant's troubled childhood and emotional turmoil even though Oklahoma's death penalty statute provided for the introduction of mitigating evidence. Relying on *Lockett v. Ohio*, the Court held that "just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."[151] Phrased more simplistically, a death jury must be allowed to show mercy to a defendant they deem, for whatever reason, not to be "deathworthy."

---

148. Act of June 14, 1973, 63d Leg., R.S., ch. 426, art. 3, § 1, 1973 Tex. Gen. Laws 1122, 1125, *amended by* Act of June 16, 1981, 67th Leg., R.S., ch. 725, § 1, 1981 Tex. Gen. Laws 2673, *amended by* Act of April 23, 1985, 69th Leg., R.S., ch. 44, § 2, 1985 Tex. Gen. Laws 434, *amended by* Act of June 16, 1991, 72d Leg., R.S., ch. 652, § 9, 1991 Tex. Gen. Laws 2394, *amended by* Act of June 16, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, *amended by* Act of June 17, 1993, 73d Leg., R.S., ch. 781, § 1, 1993 Tex. Gen. Laws 3057.

149. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

150. 455 U.S. 104 (1982).

151. *Id.* at 113-14.

The *Lockett* rationale was first applied to the Texas death penalty scheme in *Franklin v. Lynaugh*.[152] A plurality of the Supreme Court determined that Franklin was not sentenced to death in violation of the Eighth Amendment because the jury was free to give effect to his mitigating evidence of good behavior in prison by answering "no" to the second special issue—whether Franklin posed a "future danger" to society.[153] One year later, in *Penry v. Lynaugh*, the Supreme Court held that the Texas death penalty scheme failed to provide a method for the sentencer to give effect to mitigating evidence of mental retardation and severe childhood abuse.[154] The Court focused on how, under the facts of Penry's case, the undefined first special issue concerning deliberateness failed to guarantee a mechanism for a "reasoned moral response" to the mitigating evidence of severe mental retardation.[155] Noting that the Eighth Amendment demands that a capital sentence verdict reflect a "reasoned moral response" to the defendant's mitigating evidence, the Court held that the Texas "special issues,"[156] as applied to Penry's evidence, precluded such consideration. In the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background, the court concluded that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.[157]

With respect to the first special issue, which asked the sentencing jury to determine whether the defendant acted deliberately, the Court noted that "[p]ersonal culpability is not solely a function of [one's] capacity to act 'deliberately.'"[158] Thus, Penry's childhood abuse and mental retardation could not be fully considered under the first special issue because such evidence had relevance to moral culpability *beyond* the scope of "deliberateness." As the Court explained:

> [A] juror who believed that Penry's retardation and background *diminished his moral culpability* and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime "deliberately."[159]

With respect to the second special issue, which asked the jury to determine whether the defendant would probably commit future criminal acts, the Court observed that Penry's evidence of mental retardation and abusive childhood was "relevant only as an *aggravating*

152. 487 U.S. 164 (1988) (discussing *Lockett*, 438 U.S. 586 (1978)).
153. *See id.* at 179.
154. *See* 492 U.S. 302, 328 (1989).
155. *See id.* at 323.
156. Act of June 14, 1973, 63d Leg., R.S., ch. 426, art. 3, § 1, 1973 Tex. Gen. Laws 1122, 1125 (amended 1981, 1985, 1991, 1993).
157. *See Penry*, 492 U.S. at 323.
158. *Id.* at 322.
159. *Id.* at 323 (emphasis added).

factor,"[160] because it suggested "a 'yes' answer to the question of future dangerousness."[161] As the Court put it:

> Penry's mental retardation and history of abuse is thus a two-edged sword: it may *diminish his blameworthiness for his crime even* as it indicates that there is a probability that he will be dangerous in the future. . . . The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence . . . .[162]

Defendant Penry's conviction was reversed on grounds that the Texas capital sentencing scheme was unconstitutional as applied to him, since the jury had no vehicle with which to consider mitigating evidence.

The obvious impact of the *Penry* decision is that, under the Eighth and Fourteenth Amendments, a capital sentencing jury "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character, or the circumstances of the crime."[163] The charge must allow the jury to: (1) consider "any aspect of the defendant's character or any circumstances of his offense as an independently mitigating factor,"[164] and (2) give mitigating effect to such evidence "by declining to impose the death penalty."[165]

In response to *Penry,* the Texas death penalty scheme was amended, effective September 1, 1991, to provide that the jury be charged as follows:

> (e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.
>
> (f) The court shall charge the jury that in answering the special issue submitted under Subsection (e) of this article, the jury: (1) shall answer the issue "yes" or "no" . . . and (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.[166]

---

160. *Id.*

161. *Id.* (emphasis added).

162. *Id.* at 324 (emphasis added). *See also* Zant v. Stephens, 462 U.S. 862, 885 (1983) (stating capital sentencing procedure is constitutionally invalid if it attaches the "'aggravating' label to factors that actually should militate in favor of a lesser penalty," such as mental illness).

163. Blystone v. Pennsylvania, 494 U.S. 299, 304-05 (1990) (quoting *Penry*, 492 U.S. at 327).

164. *See id.* at 305.

165. *Id.* (quoting *Lockett*, 438 U.S. at 607).

166. TEX. CRIM. PROC. CODE ANN. § 37.071(e), (f) (Vernon Supp. 1991).

Even later, in 1993, the statute was further changed to provide:

> This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.[167]

The changes in the statute do not, however, fully address the problem as emphasized in the considered scenario that provides the focus for this paper. While the vehicle may be in place, there still remains the problem of how to properly guide the jury's discretion to ensure that full consideration is given to a defendant's impairment.

2. Diminished Capacity in a Capital Murder Context

In capital murder cases, considerations of diminished capacity constitute a form of mitigation of punishment, explaining why a convicted defendant should be given a sentence of life as opposed to death. The difficulty is that, all too often, the jury will have had no vehicle other than intent and/or the catch-all mitigation issue by which to apply this evidence. An addicted and/or mentally impaired defendant is clearly less culpable than an individual not afflicted with long term addiction, organic brain damage, or other mental difficulties arising from these disabilities. If the jury could only consider this evidence in the context of intent, an area that does not fully allow for consideration of the ramifications of a particular mental issue, the jury may well miss the entire mitigation aspect of the case or, even worse, consider that evidence as mitigating. This is particularly true in cases that were tried pre-*Penry*, or those that were tried after *Penry*, but prior to the implementation of the amendments to Article 37.071 that added the mitigation charge.[168] Clearly, evidence of diminished capacity is virtually worthless unless the jury, in its discretion to consider the evidence in mitigation of punishment, is given appropriate guidance.

---

167. TEX. CRIM. PROC. CODE ANN. § 37.071(i) (Vernon Supp. 1993).

168. During this interim, many trial courts utilized a "jury nullification" charge, that would, essentially, read as follows:

> In answering the issues submitted, you are to consider whether there is any mitigating evidence before you which diminishes the Defendant's moral culpability so as to make the imposition of the death penalty unwarranted; and if you believe or if you have a reasonable doubt as to whether the death penalty should be imposed, you may give effect to that conclusion by answering "no" to one or more of the issues submitted.

These jury nullification charges were approved by the Court of Criminal Appeals. *See* Coleman v. State, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); San Miguel v. State, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993). The flaw in this form of a jury instruction, however, is that the charge makes no mention of lessening a defendant's personal moral blameworthiness due to either character or background. It hardly seems a suitable vehicle for consideration of any form of mitigating circumstances, much less the evidence presented by Jasper's unique situation.

The clearest example of this injustice is the opinion of the Court of Criminal Appeals in *Penry v. State*,[169] the case following remand and retrial of John Paul Penry, the prevailing litigant in *Penry v. Lynaugh*. In *Penry v. State*, defendant Penry had requested that the trial court instruct the jury to consider his mental condition in making its determination of whether he had the specific intent to kill.[170] He argued that the statutory definition of "intentional" given to the jury presupposes that the accused is able to connect his acts with their results.[171] Therefore, he asserted, "the jury was afforded no opportunity to give effect to the evidence of his poor reasoning ability and may have shifted the burden of proof to the defense on the issue of intent."[172] He also complained "that the charge failed to emphasize to the jury that they should take all evidence, especially any abnormal physical or mental conditions, into account when deciding the issue of intent."[173] The trial court denied this instruction and generally instructed the jury on intent.[174] The Court of Criminal Appeals upheld the action of the trial court, stating:

---

169. 903 S.W.2d 715 (Tex. Crim. App. 1995).

170. Defendant Penry's requested instruction was as follows:

> If you find from the evidence that at the time the alleged offense was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental retardation, or other mental defect, or other cause, you must consider what effect, if any, this diminished mental capacity had on the defendant's ability to form the "intentional" mental state which is an element of the crime of capital murder.
>
> Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did intentionally commit the acts constituting capital murder, even if you find beyond a reasonable doubt that he performed the acts, you are to find the defendant not guilty of capital murder, and consider whether or not he is guilty of a lesser offense.
>
> You are instructed that when a person is charged with an offense which requires that he act intentionally . . . you must take all of the evidence into consideration, and determine therefrom, if, at the time when the offense was allegedly committed, the person accused was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the intent essential to constitute the offense with which he is charged.
>
> If from all the evidence you have a reasonable doubt whether the defendant was capable of forming the intent necessary to constitute the offense of capital murder, you must give the defendant the benefit of the doubt, and find that he did not have such intent. In such event you are to say by your verdict that the defendant is not guilty of capital murder . . . .

Penry, 903 S.W.2d at 753

171. *See id.* (citing TEX. PEN. CODE § 6.03(a)).

172. *Id.*

173. *Id.*

174. The charge given to the jury was as follows:

> A person commits capital murder when such person intentionally causes the death of another while such person is in the course of committing or attempting to commit the offense of aggravated rape. . . .

> The trial court also properly submitted the statutory definition of "intentional." Appellant presented extensive evidence on his mental handicap at trial and emphasized it during jury argument. We see no reason to conclude that the jury did not consider this evidence in making its findings. A specific instruction calling attention to the evidence on appellant's impaired mental abilities was unnecessary, and might have inappropriately vested this evidence with a disproportionate legal significance in the eyes of the jury.[175]

The Court of Criminal Appeals essentially held that to instruct the jury on the law of diminished capacity would have amounted to a comment on the weight of the evidence, a practice not allowed in Texas.[176]

In a separate concurring opinion, Justice Maloney agreed with the majority of the Court of Criminal Appeals that the requested instruction on the defense of diminished capacity would have amounted to a comment on the weight of the evidence and was properly denied.[177] He recognized, however, that the theory of diminished capacity is a viable one for the presentation of defensive evidence and argument.[178] He focused on the mens rea variant, and did not consider the issue of diminished responsibility in his opinion.[179] Judge Maloney stated:

> These courts reason that evidence tending to negate or raise a reasonable doubt as to an element of the State's case is relevant and generally admissible. One court views barring such evidence as contrary to our adversary system and as a violation of due process: "A reasonable doubt as to guilt may arise not only from the prosecu-

---

> A person acts "intentionally," or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. . . .
>
> Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Pamela Carpenter when he stabbed her, if he did stab her, you cannot convict him of the offense of capital murder.
>
> The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.
>
> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

Id. at 753-54.

175. *Id.* (citing Bell v. State, 582 S.W.2d 800, 812 (Tex. Crim. App. 1979)).

176. *See id.*

177. *See id.* (Maloney, J., concurring).

178. *See id.*

179. Judge Maloney noted in his opinion that a distinction should be made between diminished capacity as an "affirmative defense" and diminished capacity as evidence rebutting the element of mens rea. *See id.* at 767. He relied on the opinion of the Third Circuit, in *United States v. Pohlot*, 827 F.2d 889, 897 (3rd Cir. 1987), a case that interpreted the Insanity Defense Reform Act. He also relied heavily on Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984). Judge Maloney wrote in terms of the theory of diminished capacity meaning evidence of mental disease or defect, not necessarily insanity, offered to negate mental state. *See Penry*, 903 S.W.2d at 767 (Maloney, J., concurring).

> tion's case, but also from defense evidence casting doubt upon what previously may have appeared certain. Denying the defendant any opportunity to controvert the prosecution's case by reliable and relevant evidence of mental impairment, in addition to cutting against our traditional concept of the adversary system, downgrades the prosecution's burden to something less than that mandated by due process of law."[180]

Judge Maloney concluded his opinion by noting that a defendant should have the full ability to offer evidence and argument in support of a theory of diminished capacity.[181]

It seems only too clear that due process demands that a jury consider any condition that may impair or diminish a criminal defendant's culpability, or serve to mitigate his punishment. The law must provide an adequate vehicle for the jury to consider a defense to culpability that is beyond the control of the defendant and to fully evaluate his personal moral blameworthiness. Anything less is a constitutional deprivation of the individual considerations mandated by the U.S. Supreme Court. The only question that remains is how to give full effect to diminished capacity in the context of Texas law.

3. The Effect of Diminished Capacity on Mitigation

Diminished capacity affects mitigation of punishment in a variety of contexts. Under the old "deliberation" issues, a defendant's diminished capacity was similar to that of negating intent. If a defendant could not act "deliberately," then the death penalty could not be assessed. A defendant's diminished capacity impacts the "future dangerousness" special issues by raising questions as to a defendant's propensity for violence. If the homicide was solely the result of intoxication, drug abuse or dependency, or substance induced disorder, such as a cocaine induced psychotic event, then the jury should be allowed to consider the impact of those issues on a defendant's future dangerousness. Those issues may well be broad enough to allow for such consideration.

The "mitigation" special issue, however, differs substantially from other special issues. It is open-ended, allowing a jury to form its own conclusions as to what evidence is mitigating and what evidence is not mitigating.

---

180. *Id.* at 769 (citing Hendershott v. People, 653 P.2d 385, 393 (Colo. 1982)). *See also Pohlot*, 827 F.2d at 901 (suggesting that a rule barring evidence relevant to mens rea "may be unconstitutional"); State v. Gonzales, 681 P.2d 1368, 1372 (Ariz. 1984) (holding exclusion of evidence of mental disease when relevant to a material issue is a denial of due process).

181. *See Penry*, 903 S.W.2d at 769.

CONCLUSION

The capital defense bar should not give up efforts to create law on diminished capacity in Texas. It took fifteen years, from *Jurek* in 1976 to *Penry* in 1991, for mitigation to be recognized as a constitutional requirement in capital sentencing in Texas. The prophylactic nature of the law allows for theories to be developed that, while not gaining immediate acceptance, can, over time, ripen into positive results.

One possible method to speed up the process is for attorneys engaged in writ litigation to question the actions of trial counsel for failure to raise issues of diminished capacity in appropriate cases.[182] A post-conviction writ of habeas corpus is not an appeal. Rather, it is a piece of complex litigation requiring cooperation and communication between attorney and client. A capital writ of habeas corpus under the Texas Code of Criminal Procedure is a collateral attack on a judgment that involves elements of both trial and appellate procedure.

Essentially, an application for habeas corpus is a *new proceeding* initiated to raise constitutional and jurisdictional challenges to the original conviction that have not been previously adjudicated. New matters may be raised and new evidence received. As such, a writ of habeas corpus involves the investigation of facts that are not apparent from an appellate record and that cannot be resolved by a mere reading of an appellate record.[183] Indeed, there have been cases in Texas where, through investigation, facts wholly outside the appellate record were developed that led to the release of death row inmates.[184] If facts exist that would have supported a request for a charge on diminished capacity, it may be worth habeas counsel's efforts to uncover those facts and explore if a constitutional claim can be based on failure of trial counsel to similarly raise these issues or to request instructions on how these issues could best be utilized to a defendant's benefit.

182. TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon 1994).

183. *See* Calderon v. United States Dist. Court for the Cent. Dist. of Cal., 127 F.3d 782, 789 (9th Cir. 1997) (Tashima, J., dissenting) ("[M]any potential issues . . . cannot be raised on direct appeal, but must be raised on collateral review."); Ashmus v. Calderon, 123 F.3d 1199, 1208 (9th Cir. 1997) ("Meritorious habeas claims may exist outside of the record.").

184. *See, e.g., Ex parte* Brandley, 781 S.W.2d 886, 894-95 (Tex. Crim. App. 1989); *Ex parte* Adams, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989).