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Voluntary Intoxication as a Mitigating Circumstance during the Death Penalty Sentencing Phase: A Proposal for Reform Comment.

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COMMENT

VOLUNTARY INTOXICATION AS A MITIGATING CIRCUMSTANCE DURING THE DEATH PENALTY SENTENCING PHASE: A PROPOSAL FOR REFORM

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I. INTRODUCTION

When the State of Texas seeks the death penalty against a defendant whom the jury finds guilty of a capital crime, the trial court conducts a sentencing proceeding under Article 37.071 of the Texas Code of Criminal Procedure to determine whether the defendant will receive the death penalty.[1] In deliberating the special issues of Article 37.071, the jury must "consider all evidence . . . that militates for or mitigates against the imposition of the death penalty."[2] Yet, if the defendant claims that his voluntary intoxication should reduce the severity of his punishment, Section 8.04 of the Texas Penal Code also applies.[3]

Under Section 8.04(b), the court instructs the jury that they may consider evidence of the defendant's voluntary intoxication to mitigate the penalty only if the defendant's intoxication caused him to be temporarily insane.[4] Thus, although Article 37.071 calls upon the jury to consider "all" evidence in mitigaiton of the penalty, a Section 8.04 instruction actually impairs the jury's prerogative to consider noninsane intoxication.[5]

The brutality and finality of the death penalty renders it unique among punishments such that the potential for its unjust imposition demands

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1. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a) (Vernon Supp. 1998). A defendant against whom the State seeks the death penalty may not waive his right to trial by jury. *See* TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon Supp. 1997); Eads v. State, 598 S.W.2d 304, 307 (Tex. Crim. App. [Panel Op.] 1980); *see also* TEX. CODE CRIM. PROC. ANN. arts. 1.13(b), 1.14 (Vernon Supp. 1997) (stating that a capital defendant may waive a trial by jury as long as the State is not seeking the death penalty).

A person is guilty of capital murder in Texas if he: (1) murders a fireman or peace officer acting in their official capacity; (2) intentionally commits the murder while also committing a robbery, burglary, or other aggravating crime; (3) commits the murder for remunerative purposes; (4) commits the murder while escaping from a penal institution; (5) while incarcerated, murders an employee of the penal institution; (6) while serving a term of 99 years or life imprisonment, murders another person; or (7) murders more than one person "during the same criminal transaction." TEX. PEN. CODE ANN. § 19.03(a) (Vernon 1994).

2. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(1) (Vernon Supp. 1998).

3. *See* TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994) (requiring the application of Section 8.04 when the defendant relies upon temporary insanity caused by intoxication as a mitigating factor).

4. *See* TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994). Section 8.04 also provides that voluntary intoxication is not "a defense to the commission of crime." *Id.* § 8.04(a).

5. *See* Drinkard v. Johnson, 97 F.3d 751, 774–76 (5th Cir. 1996) (Garza, J., dissenting) (questioning the manner in which the jury applied an instruction of voluntary intoxication to the special issues during the punishment phase), *cert. denied*, 117 S. Ct. 1114 (1997). Restricting the jury from considering relevant mitigating evidence is unconstitutional under the United States Constitution because the jury must be able to consider the particular circumstances of that defendant's case in arriving at a sentence. *See* Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989) (stating the requirement that a jury be allowed to "consider and give effect to" all of the defendant's mitigating evidence during sentencing).

consideration of any mitigating evidence—including noninsane intoxication.[6] By restricting a jury's ability to hear relevant evidence of noninsane intoxication, however, Section 8.04 undermines the fairness of the current sentencing scheme and produces inconsistent results. Furthermore, Section 8.04 is not available consistently to capital defendants, as illustrated by *Drinkard v. Johnson*[7] and *Williams v. State*.[8]

Prior to committing a triple murder in November 1985, Richard Gerry Drinkard shared two twelve-packs of beer with two other friends, smoked marijuana, drank scotch, and ingested other drugs.[9] In 1986, a jury convicted him of capital murder.[10] During the sentencing phase, the jury considered two special issues, to which Article 37.071 of the Texas Code of Criminal Procedure required affirmative responses before a sentence of death could be imposed: (1) whether the murders were deliberate; and (2) whether Drinkard was a continuing threat to society.[11] To guide the jury's consideration of the special issues,[12] the court instructed the jury

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6. *See* Clemons v. Mississippi, 494 U.S. 738, 750 n.4 (1990) (stating that the "death penalty is different from other punishments in kind rather than degree"); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (noting that the death penalty "is unique in its severity and irrevocability"); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (commenting that the death penalty "differs from all other forms of criminal punishment, not in degree but in kind"); Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 119–20 (1997) (recognizing the uniqueness and qualitative difference between the death penalty and other sentences due to the "dehumanizing effects of the lengthy imprisonment while the judicial proceedings go forward" resulting in "psychological torture" that causes "extreme mental anguish" and noting that "the onset of insanity while awaiting execution is not a rare phenomenon"); *cf.* Lori L. Nader, Note, Walton v. Arizona: *The Confusion Surrounding the Sentencing of Capital Defendants Continues*, 40 CATH. U. L. REV. 475, 491 (1991) (explaining the emergence of the constitutional requirement in capital sentencing that the punishment be responsive to the unique characteristics of individual).

7. 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997).

8. 937 S.W.2d 479 (Tex. Crim. App. 1996).

9. *See* Drinkard v. Johnson, 97 F.3d 751, 762–63 (5th Cir. 1996) (detailing Drinkard's activities prior to committing the triple murder), *cert. denied*, 117 S. Ct. 1114 (1997); John Makeig, *Jury Gives Carpenter Death Penalty for Hammer-Slayings of 3 People*, HOUS. CHRON., Aug. 15, 1986, at 20 (detailing the substances Drinkard ingested).

10. *See* Drinkard v. State, 776 S.W.2d 181, 181 (Tex. Crim. App. 1989).

11. *See Drinkard*, 97 F.3d at 754 n.2 (explaining the issues that the jury considered during sentencing in a death penalty case under the Texas Code of Criminal Procedure Article 37.071); *see also* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125, *amended by* Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2898–900 (defining the issues for the jury to consider during sentencing).

12. *See Drinkard*, 97 F.3d at 754 (explaining the instruction given in addition to Article 37.071 issues); *see also* Lauti v. Johnson, 102 F.3d 166, 170 (5th Cir. 1996) (providing instructions to the jury similar to those given in *Drinkard*), *cert. denied*, 117 S. Ct. 2525 (1997).

that all evidence presented during the entire trial could be considered in answering the special issues.[13] In addition, the trial court gave the jury a special instruction regarding voluntary intoxication under Section 8.04(b) of the Texas Penal Code.[14]

Pursuant to Section 8.04(b), the court instructed the jury that if the jury found Drinkard was temporarily insane as a result of his voluntary intoxication, then they could "take such condition into consideration in mitigation of the penalty attached for the offense for which the defendant is being tried."[15] Objecting to this instruction, Drinkard contended that the charge prevented the jury from considering his intoxicated state unless the jury first found that his state of intoxication amounted to temporary insanity.[16] After the court overruled the objection, the jury answered "yes" to the special issues, and the trial court sentenced Drinkard to death.[17] Although the trial court in *Drinkard* issued an 8.04(b) instruction, another trial court later withheld the instruction under similar circumstances for a different defendant.

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13. *See Drinkard*, 97 F.3d at 754–55 (instructing the jury to consider all evidence from the trial in deliberating the special issues). At the time of Drinkard's trial, Article 37.071 did not require this instruction. *See* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125 (amended 1991) (stating that only three issues were to be submitted to the jury).

14. *See Drinkard*, 97 F.3d at 755 & n.3. For the purposes of this Comment, there are two important subsections of Section 8.04. Subsection (a), relevant during the guilt-innocence phase of a trial, provides that voluntary intoxication is not a defense to crime. *See* TEX. PEN. CODE ANN. § 8.04(a) (Vernon 1994). Subsection (b) functions as a component of Article 37.071 during the sentencing phase of a capital trial; a Section 8.04(b) instruction allows the jury to consider the defendant's temporary insanity caused by voluntary intoxication as a mitigating circumstance during their consideration of the issues presented in Article 37.071. *See id.* § 8.04(b).

15. Drinkard v. Johnson, 97 F.3d 751, 755 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997). This instruction is applicable to the sentencing component of both capital and noncapital cases. *See* TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994) (allowing for the introduction of intoxication evidence irrespective of whether the crime is capital or noncapital); *Drinkard*, 97 F.3d at 754–55 n.3 (explaining that the instruction is applicable in both noncapital and capital cases).

16. *See Drinkard*, 97 F.3d at 754–55. In the special instruction, the court also defined "intoxication" as the "disturbance of mental or physical capacity resulting from the introduction of any substance into the body," and "temporary insanity" as a disturbance that the defendant "did not know that his conduct was wrong." *Id.* at 755.

17. *See id.* at 755; *Drinkard*, 776 S.W.2d at 181; *see also* Hernandez v. State, 757 S.W.2d 744, 751 (Tex. Crim. App. 1988) (en banc) (explaining that neither the judge nor the jury assesses punishment in a capital case; rather, a jury determines whether conditions exist to order for the judge to apply the law that meets those conditions), *overruled on other grounds by* Fuller v. State, 829 S.W.2d 191 (Tex. Crim. App. 1992) (en banc) (overruling *Hernandez* on the matter of jury selection).

In *Williams v. State*,[18] Jeffrey Lynn Williams was accused of committing a murder during the course of a robbery.[19] During the guilt-innocence phase of Williams's capital trial, the court instructed the jury, under Section 8.04(a), that voluntary intoxication was not a defense "to the commission of a crime."[20] At the punishment stage of the trial, however, the court *refused* to give the jury a Section 8.04(b) instruction that voluntary intoxication could be a mitigating circumstance that could support a sentence of life imprisonment.[21] The jury answered "yes" to the Article 37.071 special issues and the court sentenced Williams to death.[22] A question thus arises as to whether the court should have allowed the jury to consider Williams's intoxication as a mitigating circumstance during the punishment phase of the trial, *in addition to* instructing the panel that voluntary intoxication was not a defense.[23] Whereas Drinkard could not

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18. Williams. v. State, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996).

19. *Id.* at 482.

20. *Id.* at 488; *see* Taylor v. State, 885 S.W.2d 154, 156 (Tex. Crim. App. 1994) (recognizing that Section 8.04 eliminates voluntary intoxication as a defense to a crime and that a jury instruction to that effect was proper); Huerta v. State, 933 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, no pet.) (approving a jury instruction that voluntary intoxication is not a defense to a crime when there is evidence that the defendant was intoxicated).

21. *See Williams*, 937 S.W.2d at 489–90 (holding that the defendant was not entitled to a charge regarding voluntary intoxication, as contained in Section 8.04(b), during the punishment phase of the trial). The Court of Criminal Appeals noted that Williams did not allege that his evidence raised the issue of temporary insanity. *See id.* at 490 n.10; *see also* Rodriguez v. State, 899 S.W.2d 658, 668 (Tex. Crim. App. 1995) (holding that the instruction under Section 8.04 was not required due to a lack of evidence of voluntary intoxication); Banda v. State, 890 S.W.2d 42, 64 (Tex. Crim. App. 1994) (holding that because there was no evidence of temporary insanity caused by voluntary intoxication at trial, an instruction under Section 8.04 was not required); Miniel v. State, 831 S.W.2d 310, 320 (Tex. Crim. App. 1992) (holding that evidence of possible intoxication does not "automatically entitle" a defendant to a Section 8.04(b) instruction during the punishment phase); Cordova v. State, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987) (holding that although there was evidence of defendant's intoxication at the time of murder, there was no evidence in the record of temporary insanity, therefore no instruction under Section 8.04(b) was required); Sawyers v. State, 724 S.W.2d 24, 33 (Tex. Crim. App. 1986) (holding that because the defendant did not provide testimony as to whether he was temporarily insane or intoxicated at the time of the murder, a Section 8.04(b) instruction was not required), *overruled on other grounds by* Watson v. State, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988).

22. *See Williams*, 937 S.W.2d at 482.

23. *Compare Lauti*, 102 F.3d at 167, 169 (holding that a Section 8.04 instruction allowed the jury to consider intoxication not reaching temporary insanity, regardless of Article 37.071), *and* Drinkard v. Johnson, 97 F.3d 751, 757 (5th Cir. 1996) (concluding that noninsane intoxication was within the reach of the jury), *cert. denied*, 117 S. Ct. 1114 (1997), *with Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. App. 1991) (en banc) (stating that an instruction under Section 8.04 does not allow a jury to give mitigating effect to evidence of intoxication not rising to the level of temporary insanity), *and* Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc) (stating that the jury was required to

prevent the court from giving a Section 8.04(b) instructing to the jury, Williams could not *compel* the court to issue one during his trial.

The unpredictable applications of Section 8.04(b) in these two cases illustrate the uncertainty a capital defendant faces in determining whether and how a court will instruct the jury during the sentencing phase regarding the mitigating effect of voluntary intoxication.[24] A Section 8.04 instruction may allow the jury to consider a defendant's voluntary intoxication only if the jury finds that the defendant was temporarily insane as a consequence of it.[25] In other words, a jury may fail to give full consideration to mitigating evidence of lesser degrees of intoxication that might favor a life sentence.[26] Reconciling these apparent contradictions

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find the defendant temporarily insane before considering whether his drug use was mitigating evidence).

24. *Compare Drinkard*, 97 F.3d at 755 (noting that a jury instruction on voluntary intoxication was permitted), *and Tucker*, 771 S.W.2d at 534 (explaining that the trial court granted her request for a Section 8.04 instruction), *with Williams*, 937 S.W.2d at 482 (affirming the trial court's refusal to provide the jury with a voluntary intoxication instruction), *and* James v. State, 772 S.W.2d 84, 102–03 (Tex. Crim. App. 1989) (en banc) (stating that James was not entitled to a voluntary intoxication instruction), *vacated and remanded*, 493 U.S. 885, *aff'd*, 805 S.W.2d 415 (1990).

25. *See Drinkard*, 97 F.3d at 777 (Garza, J., dissenting) (finding that jury misinterpretation of the voluntary intoxication instruction was "reasonably likely"); Cantu v. State, 939 S.W.2d 627, 647 (Tex. Crim. App. 1997) (en banc) (suggesting that an intoxication instruction under Section 8.04 does not allow consideration of mitigating evidence, unless the defendant was temporarily insane, because this defect, in fact, was cured by the inclusion of an Article 37.071 instruction to consider all evidence in their sentencing deliberation), *cert. denied*, 118 S. Ct. 557 (1997); *Ex parte Rogers*, 819 S.W.2d at 536 (Clinton, J., dissenting) (noting that a Section 8.04 instruction requires the jury to find that the defendant was temporarily insane before considering his voluntary intoxication evidence as a mitigating circumstance); *Tucker*, 771 S.W.2d at 534 (stating that the jury was unable to consider evidence of the defendant's drug use as mitigating unless it rendered her temporarily insane); *Cordova*, 733 S.W.2d at 189 (stating that voluntary intoxication may be mitigating evidence in assessing punishment only if intoxication caused temporary insanity).

26. *See Drinkard*, 97 F.3d at 774–76 (Garza, J., dissenting) (questioning the manner in which the jury applied the instruction of voluntary intoxication to the special issues during the punishment phase); *Williams*, 937 S.W.2d at 490 (stating that in the absence of jury confusion regarding the voluntary intoxication instruction under Section 8.04(a), the Court of Criminal Appeals was unwilling to reverse the trial court's decision); Rose v. State, 752 S.W.2d 529, 554 (Tex. Crim. App. 1987) (en banc) (plurality opinion) (stating that although the appellate court was unable to determine how the jury assessed punishment, the court presumed that the jury followed the trial judge's instructions); *see also* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221 (1996) (discussing juror misunderstanding as to how to make capital sentencing decision, particularly with respect to the following areas: the factors which may be considered, the required burden of proof, and the degree of concurrence required for mitigating and aggravating factors); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 1–2 (noting the frequency of requests for clarification of instructions during capital sentencing deliberations and questioning whether jurors understood the con-

in Section 8.04 and Article 37.071 is paramount because mitigating evidence may determine whether the defendant receives the death penalty or a sentence of life.

The role of the death penalty as a form of punishment in Texas is well established.[27] A sentence of death under Article 37.071 is designed to serve as a form of retribution and as a means of incapacitation.[28] To ensure that the method by which the jury assesses punishment is compatible

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cept of mitigation); *see also* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 791 (1995) (declaring as "obvious" the fact "that juries do not (indeed cannot) comprehend pattern instructions" in capital sentencing proceedings).

27. *See* TEX. PEN. CODE ANN. § 1.02 (Vernon 1994) (stating that the objectives of the Texas Penal Code include deterrence, rehabilitation, and punishment necessary to prevent recurrence of criminal behavior). Consider, however, the two schools of thought regarding justifying punishment: retribution and utilitarianism. *See* JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 35 (3d ed. 1996). Retribution punishes an individual according to his culpability, that is, the level of punishment is in proportion to his wrongdoing. *See id.* Different utilitarian schools of thought justify punishment on the grounds of deterrence, rehabilitation, and incapacitation. *See id.* at 36. Deterrence seeks to make potential offenders, including the wrongdoer, apprehensive about committing further crime. *See* James Q. Wilson, *Thinking About Crime*, *in* JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 42 (3d ed. 1996). Rehabilitation seeks to lessen the wrongdoer's desire, or motive, for committing the offense. *See id.* at 46. Incapacitation seeks to terminate the criminal's capability to commit further crime. *See id.* at 59. Mitigating circumstances may be a reason for administering a sentence less severe than the death penalty because such evidence might show that the defendant's ability to control his actions may have been diminished at the time of the crime. *Cf.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 15 (1992) (explaining that mitigating evidence might show that the defendant's ability to conform to the law was impaired at the time the defendant committed the offense).

28. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)-(e) (Vernon Supp. 1998) (allowing for punishment in proportion to the existence of aggravating and mitigating circumstances and also providing for the permanent removal of the defendant). The death penalty in Texas serves as a means of incapacitation because it permanently removes a person from society, based on whether the convict poses a continuing threat to society. *See id.* § 2(b)(1); Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (stating that the purpose of the death penalty may also be incapacitation because it prevents the future commission of crime). To this end, jurors may give "ordinary meaning" to the term "society" during their deliberation on the first special issue; that is, the court does not inform the jury that a capital defendant's continuing threat, if any, will be confined to other individuals within the Texas Department of Corrections. *See* Sterling v. State, 830 S.W.2d 114, 120 n.5 (Tex. Crim. App. 1992) (holding that society includes populations that are incarcerated and non-incarcerated); *see also* Caldwell v. State, 818 S.W.2d 790, 798 (Tex. Crim. App. 1991) (holding that the term "society" requires no special definition in a capital murder trial).

The death penalty in Texas serves as a means of retribution because it allows punishment in proportion to the level of mitigating evidence that exists for a particular crime. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon Supp. 1998) (calling for consideration of mitigating evidence in determining whether the criminal penalty will be less severe than that of death); *Gregg*, 428 U.S. at 183 (stating that one purpose of the death penalty is

with the goals of that punishment, a jury must have the opportunity to consider any mitigating evidence that might favor a life sentence over the death penalty.[29] Whether evidence of voluntary intoxication should be admissible to mitigate punishment is a matter of continuing debate throughout the United States.[30]

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retribution, which represents the legal expression of "society's moral outrage at particularly offensive conduct").

As to the issue of rehabilitation, the death penalty does not seek to rehabilitate those sentenced to death. *See* Roy L. Stacy, Note, *Is the Death Penalty Dead?*, 26 BAYLOR L. REV. 114, 120 (1974) (citing Justice Stewart, who recognized that the death penalty "completely rejects the concept of rehabilitation"). *But see* TEX. PEN. CODE ANN. § 1.02 (Vernon 1994) (stating that the objectives of the Texas Penal Code include rehabilitation). However, a jury may consider whether the defendant is capable of rehabilitation in deciding whether he poses a continuing threat to society. *See* Jackson v. State, 822 S.W.2d 18, 25 (Tex. Crim. App. 1990).

The death penalty may also inadvertently serve other purposes, such as encouraging confessions and guilty pleas. *See* Furman v. Georgia, 408 U.S. 238, 355–56 (1972) (Marshall, J., concurring) (stating that encouraging confessions and guilty pleas may be the primary purpose underlying the death penalty, but such a purpose would violate the Sixth Amendment). Justice Marshall also rejected the appropriateness of considering whether eugenics and economy are underlying purposes of the death penalty. *See id.* at 356–59.

29. *See* Penry v. Lynaugh, 492 U.S. 302, 326 (1989) (stating that because the jury was not instructed that it could consider the defendant's mental retardation as mitigating evidence during the punishment phase of trial, the jury was not able to consider and give effect to such evidence in reaching its decision regarding sentencing). The court remanded Penry's case for resentencing to avoid imposing the death penalty because mitigating factors may have been present, which might have supported a life sentence. *See id.* at 340; *see also* Gregg v. Georgia, 428 U.S. 153, 199 (1976) (stating that the jury must be given standards which focus its decision on the defendant's particularized circumstances in order to prevent the incorrect imposition of the death penalty).

30. *See* Chad J. Layton, Comment, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 537 n.13 (1997) (stating that although most jurisdictions do not permit voluntary intoxication as an excuse for criminal conduct, voluntary intoxication may reduce the defendant's culpability in those jurisdictions that recognize an intoxicated defendant cannot form the requisite criminal intent necessary as an element of a crime). Layton also points out that some jurisdictions may recognize that a defendant has a duty to refrain from voluntarily placing himself in a situation where he may harm others. *See id.* at 545 (explaining that the concept of personal accountability underlies the court's decision to foreclose defendants from asserting a defense based on voluntary intoxication) (citing State v. Vaughn, 232 S.E.2d 328, 330–31 (S.C. 1977)); John Gibeaut, *Sobering Thoughts—Legislatures and Courts Increasingly Are Just Saying No to Intoxication As a Defense or Mitigating Factor*, A.B.A. J., May 1997, at 56–58 (stating that legislators in several states have initiated legislation which would eliminate voluntary intoxication as a defense to a crime, and noting that, rather than as an excuse or justification for a crime, voluntary intoxication is normally used to negate the crime's intent element). By negating the intent element of a crime, voluntary intoxication functions in a manner similarly to an affirmative defense. *See id. But see* State v. Cameron, 514 A.2d 1302, 1309 (N.J. 1986) (holding that in order for voluntary intoxication to negate the ele-

The state of Texas permits consideration of voluntary intoxication only as a mitigating circumstance when assessing punishment.[31] Evidence of voluntary intoxication, therefore, bears directly on Article 37.071 special issues.[32] A special instruction under Section 8.04(b), however, can prevent a jury from considering lesser degrees of voluntary intoxication as a mitigating circumstances.[33] Notwithstanding the apparent discrepancy, if a jury finds that there is sufficient mitigating evidence to support a sentence of life imprisonment, then Article 37.071 requires the court to im-

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ments of an offense, intoxication must be of a high level, amounting to "prostration of faculties").

Therefore, historically, voluntary intoxication was not a defense to a crime and served in some jurisdictions to actually aggravate the offense. *See* Chad J. Layton, Comment, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 536 (1997) (discussing the common law unwillingness to allow voluntary intoxication as a defense to crime and noting that, at common law, intoxication aggravated a criminal offense). As a result, most modern jurisdictions, including Texas, do not allow voluntary intoxication to serve as an *excuse* for a crime. *See id.* at 537.

31. *See* TEX. PEN. CODE ANN. § 8.04 (Vernon 1994) (providing that although voluntary intoxication is not a defense to a crime, evidence of voluntary intoxication which causes temporary insanity may be used to mitigate a defendant's punishment); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 67 (1993) (explaining that the defendant's influence of drugs or alcohol is not a justifiable excuse to the commission of a crime in Texas).

During the nineteenth century, however, judges acknowledged that the moral culpability of an intoxicated defendant could be less than that of a sober defendant. *See id.* at 67 (stating that voluntary intoxication may be relevant to circumstances of the offense as well as to the wrongdoer's background and character); Chad J. Layton, Comment, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 537 n.11 (1997) (stating that judges were troubled by not being able to give effect to a defendant's intoxication (citing California v. Hood, 462 P.2d 370, 377 (Cal. 1969))); *see also* MODEL PENAL CODE § 210.6(4)(g) (Proposed Official Draft 1962) (listing as a mitigating factor the impairment of the defendant's capacity to recognize the extent of his wrongdoing as a result of intoxication); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 847 (1978) (noting the need to accommodate (1) the defendant's liability for violent consequences of his intoxication with (2) the concept that his liability and subsequent punishment should be graded proportionally to his culpability).

32. *See* Drinkard v. Johnson, 97 F.3d 751, 762 (5th Cir. 1996) (citing defense counsel's arguments that the defendant suffered from the social disease of alcohol and drugs), *cert. denied*, 117 S. Ct. 114 (1997); *see also* Parker v. Dugger, 498 U.S. 308, 314 (1990) (stating that the defendant's intoxication is mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (noting that the mitigating evidence that a defendant offers during sentencing may be the basis for a sentence less severe than death).

33. *See Ex parte Rogers*, 819 S.W.2d 533, 536–37 (Tex. Crim. App. 1991) (en banc) (stating that a Section 8.04 instruction does not allow the consideration of evidence of voluntary intoxication not rising to the level of temporary insanity); Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc) (requiring the defendant to be temporarily insane during the commission of the crime before considering whether his drug use was mitigating evidence).

pose a sentence of life imprisonment.[34] Consequently, the court instructs the jury under Article 37.071 to consider *all* the evidence in determining whether there is sufficient mitigating evidence to preclude a sentence of death.[35] In contemplating a sentence of death, a jury must be allowed to consider any relevant mitigating evidence that would favor a sentence of life imprisonment.[36] Proponents of the current scheme contend that an Article 37.071 instruction[37] corrects any limiting or confusing effect a Section 8.04(b) intoxication special instruction may have on the jury.[38] Op-

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34. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (Vernon Supp. 1998); TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (Vernon Supp. 1998) (stating that the Texas Court of Criminal Appeals will reform the defendant's death sentence "if the court finds that there is insufficient evidence to support" an unfavorable answer to a special issue for the defendant). *But see* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f) (Vernon Supp. 1998) (allowing the jury to decide special issues without agreeing "on what particular evidence supports an [unfavorable] finding on the issue"); Note, *Excessiveness Review for Capital Defendants After* Honda Motor Co. v. Oberg, 108 HARV. L. REV. 1305, 1308 n.22 (1995) (stating that, as of 1995, the Texas Court of Criminal Appeals has not reviewed the overall appropriateness of the death sentence despite the statutory provision of Article 44.251(a)). Because the Texas sentencing statute does not require unanimity regarding which circumstances favor, or weigh against, a death sentence, the reviewing court has difficulty in determining what evidence militated in favor of, or mitigated against, a sentence of death. However, a requirement of unanimity would be unconstitutional. *See* Mills v. Maryland, 486 U.S. 367, 384 (1988) (concluding that a substantial probability existed which precluded jurors from considering evidence as mitigating unless the entire jury panel agreed on the existence of particular evidence as mitigating).

35. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1998).

36. *See* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (stating that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character . . . and any . . . circumstances of the offense . . . as a basis for a sentence less than death" (citing *Lockett*, 438 U.S. at 604)).

37. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)-(e) (Vernon Supp. 1998). As a result of the 1991 amendments to Article 37.071 of the Texas Code of Criminal Procedure, the trial court has a statutory requirement to instruct the jury, in conjunction with their consideration of the special issues, to consider "all" of the evidence in their sentencing deliberations. *See id.*

38. *See* Drinkard v. Johnson, 97 F.3d 751, 759 (5th Cir. 1996) (noting that the trial court in its general instruction "clearly and unambiguously" instructed the jury to consider all the evidence in deciding the special issues), *cert. denied*, 117 S. Ct. 114 (1997); *see also* Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (holding that an assumption could be made that the jury followed the trial court's instruction of special issues as given). *But see* Curry v. State, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (holding that there is no requirement that the jury be instructed to give mitigating effect to evidence that is potentially both mitigating and aggravating). The hope that an Article 37.071 instruction cures the defect in Section 8.04 may be misplaced because it assumes that jurors understand how to consider all of the mitigating evidence in their sentencing deliberations. *Cf.* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791,

ponents argue, however that the instructions given under Article 37.071 cannot cure the defects of Section 8.04(b).[39] Ultimately, courts must instruct juries in a manner which allows them, as the sentencers, to make "individualized assessment[s] of the appropriateness of the death penalty" in each case.[40]

This Comment considers the obstacles that arise during the sentencing phase of capital trials from Texas Penal Code Section 8.04(b)—obstacles that obstruct the path for achieving the goals of the death penalty in Texas. Part II of this Comment examines the Texas death penalty sentencing statute before and after *Penry v. Lynaugh*,[41] a case which prompted the Texas Legislature to reform the sentencing statute for capital crimes in Texas. Part III examines how Section 8.04 is applied during the guilt-innocence and punishment phases of a capital trial, determines whether a defendant is entitled to have voluntary intoxication considered as a mitigating circumstance at all in light of *Montana v. Egelhoff*,[42] and considers whether an instruction under Article 37.071 can ever be curative. Part IV examines other jurisdictions' approaches to voluntary intoxication as a mitigating circumstance during the punishment phase of a death penalty trial. Part IV also proposes reform to Section 8.04 in order to facilitate a more just application of the death penalty in Texas. This Comment is intended to address issues of concern to members of the Bench, who must decide the law and the members of the Bar, who must advocate their clients' cases in light of the law. More importantly, this Comment is directed towards Texas Legislators, in whose hands rests the ability to amend Section 8.04.

II. Mitigating Circumstances and the Texas Death Penalty

A. *The Texas Code of Criminal Procedure Article 37.071: Pre-1991*

Criticism of the Texas death penalty sentencing procedure and its application in preventing juries from considering mitigating circumstances, is not a recent phenomenon.[43] Although Texas has imposed the death

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791 (1995) (stating that jurors have severe difficulty in understanding pattern instructions in capital sentencing proceedings).

39. *See Drinkard*, 97 F.3d at 774–75 (Garza, J., dissenting) (opining that an instruction to consider all of the evidence under Article 37.071 cannot cure the limiting effect of a Section 8.04 instruction).

40. *Penry*, 492 U.S. 302, 319 (1989).

41. 492 U.S. 302 (1989).

42. 116 S. Ct. 2013 (1996).

43. *See* Daniel H. Benson, *Texas Capital Sentencing Procedure After* Eddings: *Some Questions Regarding Constitutional Validity*, 23 S. Tex. L.J. 315, 328–30 (1982) (arguing that a Texas jury cannot make a meaningful decision if mitigating evidence is not addressed in the special issues of the sentencing statute); Mary Kay Sicola & Richard R. Shreves, *Jury*

penalty since its days as a Republic,[44] the sentencing statute currently used in capital trials traces its roots to 1973.[45] Prior to 1973, Texas capital sentencing was nothing more than "unguided jury discretion."[46]

During this era of unguided jury discretion, the United States Supreme Court reviewed the death sentences of two Georgia defendants and a Texas convict in *Furman v. Georgia* and its companion cases.[47] In *Furman*, the Court questioned whether the death sentences of the three men amounted to cruel and unusual punishment, thus violating the Eighth and Fourteenth Amendments.[48] Writing separate opinions, five

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Consideration of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute, 15 AM. J. CRIM. L. 55, 65 (1988) (showing the problems with the Texas death penalty statute in comparison to statutes of other states); Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 346–47 (1992) (noting the repeated constitutional challenges to the Texas death penalty sentencing procedure); Stephen W. Macnoll, Note, *A Constitutional Analysis of the Texas Death Statute*, 15 AM. J. CRIM. L. 69, 74–75 (1988) (criticizing the Texas sentencing statute for requiring a direct relationship between mitigating evidence and the sentencing statute).

44. *See* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 348 n.23–27 (1992) (noting that Texas "has utilized capital punishment since it was a Republic" and detailing the historical use of, and legislative refinements to, the death penalty in Texas from 1848–1972).

45. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981) (stating that the statute was originally enacted by the Texas legislature in 1973 and became effective on June 14, 1973).

46. *See* Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 51 (1993) (explaining that the jury had tremendous discretion in sentencing as a result of a lack of guidance in instructions regarding factors that should weigh in favor of or against the death penalty); Gary Joseph Vyneman, Note, *Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes*, 13 WHITTIER L. REV. 763, 766 (1992) (stating that legislatures had granted capital juries unrestrained and unguided discretion in sentencing proceedings). The capital sentencing statute did not provide any guidance to the jury in assessing punishment in a capital trial; jurors could choose to sentence a defendant to death, life imprisonment, or a term of years. *See* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 348–49 (1992) (explaining that an unspecified term of confinement was an alternative sentence for capital crimes); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 54–55 (1993) (discussing the sentencing options for the jury, including confinement for a term of years).

47. 408 U.S. 238 (1972). The Supreme Court decided *Furman* with two other cases: *Branch v. State*, 447 S.W.2d 932 (Tex. Crim. App. 1969) and *Jackson v. State*, 171 S.E.2d 501 (Ga. 1969). *See Furman*, 408 U.S. at 238–40.

48. *See* Furman v. Georgia, 408 U.S. 238, 240 (1972). The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment is binding upon the individual states through the doctrine of selective incorporation of the Fourteenth Amendment Due Process Clause. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459,

justices held that the death penalty statutes in Texas and Georgia were unconstitutional.[49] The opinions of Justices Douglas, Brennan, Stewart, and White, suggest that they believed the Texas and Georgia death penalty statutes to be unconstitutional because of their infrequent, random, and arbitrary application. Such "wanton and freakish" application violated the Eighth Amendment prohibition against cruel and unusual punishment.[50]

In a dissenting opinion, Chief Justice Burger responded to assertions made by the majority regarding the random and unpredictable manner in which the death penalty was imposed.[51] Unlike those who comprised the majority holding, Burger opined that state legislatures could enact changes to their respective capital sentencing statutes, thus establishing "standards for juries and judges to follow in determining the sentence."[52]

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463 (1947) (stating that the Fourteenth Amendment would prohibit action by the state that would otherwise be banned by the Eighth Amendment).

49. *See Furman*, 408 U.S. at 239–40 (holding that the death penalty is unconstitutional and noting the five separate opinions in support of the Supreme Court's judgment); Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 5 n.17 (1994) (opining that the *Furman* "holding" is unclear because the five concurring opinions were accompanied by four dissenting opinions); 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, 78 (1992) (noting that *Furman* implicitly rendered every state statute imposing the death penalty unconstitutional because those statutes provided little or no guidance for the sentencer in capital crimes).

50. *See Furman*, 408 U.S. at 311–13 (White, J., concurring) (condemning the death penalty scheme for the infrequency of its application); *id.* at 309–10 (Stewart, J., concurring) (criticizing the randomness of the death penalty's application and analogizing the death sentence as cruel and unusual "in the same way that being struck by lightning is cruel and unusual"); *id.* at 270–74 (Brennan, J., concurring) (detailing the arbitrariness of death penalty application that violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, and opining that punishment which "does not comport with human dignity" is unconstitutional); *id.* at 244–46 (Douglas, J., concurring) (criticizing the death penalty statutes for discriminating in their application against minorities, outcasts, and those who are unpopular); *see also id.* at 358–60 (Marshall, J., concurring) (concluding that the death penalty is excessive, unnecessary, and morally unacceptable).

51. *See Furman*, 408 U.S. at 375–80, 400 (Burger, C.J., dissenting) (disagreeing with the Court's holding because: (1) the Supreme Court was not equipped with the legislative power to eliminate or reform the death penalty; and (2) the death penalty was not regarded as cruel and unusual at the time of the Eighth Amendment's adoption).

52. *See* Furman v. Georgia, 408 U.S. 238, 400 (1972) (Burger, C.J., dissenting (calling for standards the sentencing bodies in capital cases can employ in order to determine a death sentence, and urging a narrowing of the class of crimes punishable by death). *But see* Robert Taylor Lemon II, Note, *Constitutional Criminal Law—The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 TUL. L. REV. 608, 616–17 (1979) (criticizing the *Furman* opinion for failing to provide clear guidelines as to which mitigating and

If state legislatures could amend their death penalty sentencing schemes, a constitutional application of the death penalty may arise.[53]

In designing the 1973 death penalty sentencing statute, the Texas legislature adopted Chief Justice Burger's suggestions.[54] The 1973 statute required a separate sentencing proceeding to follow the guilt-innocence phase of the trial.[55] Under this version of Article 37.071, the court instructed the jury to decide three issues during the sentencing phase:

> (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.[56]

If the jury answered "yes" to all the special issues, the court imposed a sentence of death.[57]

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aggravating circumstances ought to be considered, and what weight, if any, states should require juries to give particular factors).

53. *Cf. Furman*, 408 U.S. at 375 (Burger, C.J., dissenting) (stating that if the Court "were possessed of legislative power, I would . . . at the very least, restrict the use of capital punishment").

54. *See* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125, *amended by* Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2898–900 (describing issues that a jury should consider during sentencing); *Furman*, 408 U.S. at 400–01 (Burger, C.J., dissenting) (suggesting also that state legislatures could narrow the class of crimes punishable by the death penalty); *see also*, Michael Kuhn, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410, 417 (1974) (explaining legislative attempts to reinstate the death penalty in Texas and detailing the manner in which sentencing procedures should be implemented); Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 351–53 (1992) (detailing the legislative history of the post-*Furman* sentencing statute in Texas).

55. *See* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125 (amended 1991) (requiring the court to conduct a separate sentencing proceeding once a defendant is found guilty).

56. *Id.*; *see* Jurek v. Texas, 428 U.S. 262, 269 (1976) (delineating Texas Code of Criminal Procedure Article 37.071).

57. *See* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125 (amended 1991) (requiring a jury to be unanimous in answering affirmatively to each issue before the court will impose a death sentence); Robert J. Clary, *Voting for Death: Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure*, 19 ST. MARY'S L.J. 353, 356–59 (1987) (describing the inadequacies in juror instructions with respect to the unanimity requirement and the alternative "negative" finding to special issues).

This sentencing statute passed constitutional muster in 1976 when the Supreme Court reviewed the death sentence of a Texas convict.[58] In *Jurek v. Texas*,[59] the Court held that the 1973 version of the sentencing statute "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."[60] For the purpose of this Comment, the important issue is the evolution of death penalty sentencing from a nonjury discretion statute before *Furman*, to a statute which, under *Jurek*, purports to guide the jury in its consideration of mitigating evidence.

In *Lockett v. Ohio*,[61] the United States Supreme Court considered whether the Ohio death penalty statute unconstitutionally limited the sentencer's discretion to consider the circumstances of the crime, the defendant's character, and the defendant's record as mitigating factors.[62] The Court held that the statute limited the sentencer's discretion in violation of the Eighth and Fourteenth Amendments.[63] In its holding, the

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58. *See Jurek*, 428 U.S. at 276 (upholding the Texas capital punishment statute); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (upholding the Florida capital punishment statute); Gregg v. Georgia, 428 U.S. 153, 187, 208 (1976) (upholding the constitutionality of capital punishment per se and the Georgia capital punishment statute); *see also* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 356 n.70 (1992) (detailing concurring and dissenting opinions in *Gregg*, *Proffitt*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*); J. Dwight Carmichael, Note, Penry v. Lynaugh: *Texas Death Penalty Procedure Unconstitutionally Precludes Jury Consideration of Mitigating Evidence*, 42 BAYLOR L. REV. 347, 358–59 (1990) (explaining that the Texas death penalty scheme, while narrow in its application, allowed juries to consider adequate mitigating circumstances and was thus constitutional). *But see* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (reversing the death sentence of a defendant who received the sentence to death under Louisiana's mandatory death penalty law); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (reversing the defendant's sentence of death because the mandatory capital punishment statute does not provide adequate sentencing guidance to allow the jury to consider the defendant's character, record, and circumstances of crime).

59. 428 U.S. 262 (1976).

60. *Jurek*, 428 U.S. at 274. This post-*Furman* statute allowed the defendant to present mitigating evidence at the sentencing hearing. *See id.* at 276. Allowing defendants to present mitigating evidence during sentencing, in turn, permitted the jury to review "all possible relevant information" about the defendant before imposing sentence. *See id.* Second, the *Jurek* court concluded that Texas juries have "adequate guidance" under the post-*Furman* statute to sentence the defendant properly. *See id.* The Supreme Court also praised the Texas sentencing statute for narrowing the class of offenses under which a defendant may be charged with a capital crime. *See id.*

61. 438 U.S. 586 (1978).

62. *See Lockett*, 438 U.S. at 589 (noting that the Supreme Court granted certiorari to consider whether Ohio violated the Eighth and Fourteenth Amendments).

63. *See id.* at 604 (holding that there is a constitutional requirement that the sentencer in almost all capital cases "*not be precluded*" from considering the circumstances of the

Court specified that the sentencer must not be prevented from considering "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."[64]

The court revisited *Lockett* in *Eddings v. Oklahoma*.[65] In *Eddings*, the Court addressed the issue of whether a judge's refusal to consider, as a matter of law, the defendant's upbringing and emotional disturbance before imposing the death penalty was proper.[66] Although the Court held that the Oklahoma sentencing statute was constitutional, the Court vacated the defendant's death sentence because the trial court did not give individualized consideration of his mitigating factors as required by *Lockett*.[67] In 1986, the Supreme Court reinforced the importance of mitigating evidence by holding, in *Skipper v. South Carolina*,[68] that the presence of mitigating evidence may reduce the culpability of the defendant to the extent that a life sentence should be imposed.[69] Although the Texas sentencing statute also survived a direct constitutional challenge in *Franklin v. Lynaugh*[70] in 1988, the Supreme Court's 1989 holding in *Penry*

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offense, the defendant's character or record, as mitigating factors which may support a life sentence over a sentence of death) (emphasis added); Travis A. Pearson, Comment, *Constitutional Law: The Eighth Amendment Principle of Proportionality in Noncapital Criminal Sentences*, 31 WASHBURN L.J. 394, 395 n.10 (1991) (noting that *Lockett* requires the full consideration of the defendant's mitigating evidence in sentencing).

64. *Lockett*, 438 U.S. at 604.

65. 455 U.S. 104 (1982).

66. *See Eddings*, 455 U.S. at 109–10.

67. *See id.* at 114–17 (holding that the trial court may not exclude relevant mitigating evidence from the jury's consideration); Gary Joseph Vyneman, Comment, *Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes*, 13 WHITTIER L. REV. 763, 772 n.73 (1992) (noting that the *Eddings* opinion stands for the proposition that the sentencer may not refuse to consider mitigating evidence).

68. 476 U.S. 1 (1986).

69. *See Skipper*, 476 U.S. at 5 (holding that mitigating evidence may be grounds for a sentence less than the death penalty and thereby reversing the death penalty conviction because the defendant was prevented from presenting mitigating evidence during the sentencing phase).

70. *See* Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) (concluding that the trial court did not improperly limit the jury's consideration of the defendant's relevant mitigating evidence). In *Franklin*, the defendant unsuccessfully attempted to prove that the 1973 Texas sentencing statute disabled the jury from giving full effect to the relevant mitigating evidence at his trial. *See id.* at 183 (holding that neither the jury instructions nor the special issues of the Texas' sentencing statute interfered with the jury's consideration of relevant mitigating evidence). *But see id.* at 185 (O'Connor, J., concurring) (acknowledging that although the Texas sentencing statute did not prevent Franklin's jury from considering the mitigating evidence he introduced, Texas procedure might prevent a jury from giving a "reasoned moral response" to evidence either not relevant to, or beyond the scope of, special issue questions); Ronald J. Mann, *The Individualized-Consideration Principle and*

v. Lynaugh[71] forced the Texas legislature to retool its sentencing statute once again.[72]

In *Penry*, the Supreme Court held that the jury must be able to consider and give effect to all mitigating evidence at trial.[73] At the *Penry* trial, the jury was unable to give mitigating effect to the defendant's mental retardation and low IQ because this evidence was outside the scope of the special issues of the 1973 Texas sentencing statute.[74] That is, the jury heard evidence at trial that Penry was mentally retarded at the time he committed the murder,[75] however, the Article 37.071 special issues did not allow the jury to consider his retardation as mitigating evidence, which would have favored life imprisonment.[76] The jury could only consider this condition as *aggravating* under the "future dangerous-

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the Death Penalty As Cruel and Unusual Punishment, 29 HOUS. L. REV. 493, 527–28 (1992) (opining that *Franklin* did not present the proper situation for the Court to resolve the problem of Texas' statute because Franklin did not offer any relevant mitigating evidence).

71. 492 U.S. 302 (1989).

72. *See* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 382–83 (1992) (stating that the legislature made changes to the sentencing statute to address the concerns raised in *Penry*); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 57–58 (1993) (discussing Texas' changes to its capital sentencing procedures in response to *Penry*).

73. *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (concluding that the jury did not have the means to express a "reasoned moral response" to the defendant's mitigating evidence or retardation).

74. *See id.* at 322 (noting that the defendant's mental retardation was relevant to whether his action was deliberate, but was beyond the scope of the question submitted to the jury with regard to moral culpability); Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 8 (1994) (explaining that although the jury heard evidence of the defendant's child abuse and retardation, such evidence could only be considered in light of future dangerousness and could not reduce his culpability); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 57 (1993) (noting that Texas special issues did not allow the jury to "consider and give effect to" Penry's mitigating evidence).

75. *See Penry*, 492 U.S. at 308, 323–35.

76. *See id.* at 322–25 (concluding that the jury was not able to give mitigating effect to Penry's retardation on any of the three special issues of the Texas sentencing statute); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 57–58 (1993) (recognizing that the special issues offered the jury no means to show leniency based on the evidence that Penry introduced; explaining that without a special instruction that goes beyond the scope of the special issues in the Texas sentencing statute, the jury is unable to give the defendant a life sentence when the jury believes that the defendant (1) committed the crime deliberately and (2) poses a future threat to society); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 393 (1995) (lamenting that under the Texas death penalty scheme, Penry's retardation would have reduced his culpability while increasing his chance that the jury would find that he pose a future danger to society). Essentially, no means

ness" special issue.[77] Penry's evidence was thus a "two-edged sword;" although it appeared to reduce his blameworthiness, his retardation actually aggravated his sentence under the special issues.[78]

In *Penry*, the Supreme Court stated that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant."[79] Submitting the evidence to the jury is not enough; rather, the jury must have a means to "consider and give effect to" the mitigating evidence when pronouncing sentence.[80] Such a vehicle is necessary to allow the jury to provide a "reasoned moral response" to the evidence of the defendant's character, background, record, and circumstances of the crime.[81] As a result, the

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exists by which a jury may take into consideration any evidence that might either reduce the culpability of a defendant or justify a sentence of life. *See id.*

77. *See Penry*, 492 U.S. at 326 (finding that since the jury was not instructed to consider Penry's retardation as a mitigating circumstance, there was no means available for the jurors to state that Penry should not be sentenced to death based upon the mitigating evidence submitted regarding his retardation). *But see The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 143 n.38 (1990) (discussing Justice Scalia's opinion in *Penry* in which he argued that the goal of increasing the jury's discretion to decline to sentence a defendant to death conflicted with the goal of narrowing the jury's discretion to impose the death sentence (citing *Penry*, 492 U.S. at 359 (Scalia, J., concurring in part and dissenting in part))). Justice Scalia was particularly critical of the majority's "scheme" which called for jury consideration of all possible mitigating evidence. *See Penry*, 492 U.S. at 358–59 (Scalia, J., concurring in part and dissenting in part). Justice Scalia predicted that by allowing the jury to consider this quantity of evidence, the Court was allowing for death penalty statutes to be administered in an unpredictable and arbitrary manner, contrary to the dictates of *Furman*. *See id.* at 359–60.

78. *See* Penry v. Lynaugh, 492 U.S. 302, 324 (1989) (characterizing Penry's background of abuse and mental retardation as a "two-edged sword" because it could have served to reduce his culpability while showing that there was probability of future dangerousness). The *Penry* court also recalled that the lower court queried, "[w]hat was the jury to do if it decided that Penry, because of retardation . . . should not be executed? . . . [T]he evidence . . . did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence." *Id.* (citations omitted).

79. *Penry*, 492 U.S. at 319.

80. *Id.*; *see* Joshua Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 423–25 (1990) (explaining that even if the jury recognizes an aspect of the defendant's character as mitigating in nature, the jury is unable to so consider it, and may instead be forced to consider it aggravating because it reflects the defendant's future dangerousness). *But see* Hernandez v. State, 757 S.W.2d 744, 751–52 (Tex. Crim. App. 1988) (en banc) (noting that Article 37.071 removes discretion from jurors as to whether to impose the death penalty and prevents consideration of mitigating evidence not relevant to special issues), *overruled on other grounds by* Fuller v. State, 829 S.W.2d 191, 200 (Tex. Crim. App. 1992) (en banc) (overruling *Hernandez* on a matter of jury selection).

81. *Penry*, 492 U.S. at 328. Without a means to give such a reasoned response, there is a "risk that the death penalty will be imposed in spite of factors which may call for a less

Court held that the Texas sentencing statute violated the Eighth Amendment, and the Supreme Court remanded the case for resentencing.[82]

In summary, *Lockett*, *Eddings*, *Skipper*, and *Penry* impose requirements on how the trial court and jury must treat a defendant's mitigating evidence in capital cases.[83] A state's death penalty sentencing scheme must ensure that the jury, when sentencing the defendant, is allowed to (1) consider any mitigating evidence, (2) give effect to this mitigating evidence in accordance with the sentencing requirements, and (3) alternatively, be allowed to decide *not* to consider any mitigating evidence.[84] In large part, this doctrine helped shape the changes made to the Texas death penalty sentencing statute following *Penry*.

B. *After Penry v. Lynaugh: The Post-1991 Incarnation of Texas Code of Criminal Procedure Article 37.071*

Following *Penry*, Texas courts continued to sentence defendants to death, and the Texas Court of Criminal Appeals applied the *Penry* holding narrowly.[85] Texas courts instructed juries to consider evidence that

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severe penalty." *Id.*; *see* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor J., concurring) (calling such risk unacceptable).

82. *See Penry*, 492 U.S. at 340; J. Dwight Carmichael, Note, Penry v. Lynaugh: *Texas Death Penalty Procedure Unconstitutionally Precludes Jury Consideration of Mitigating Evidence*, 42 BAYLOR L. REV. 347, 347–48 (1990) (explaining that although the Texas death penalty statute endured 31 executions between 1974 and 1990, the United States Supreme Court criticized the sentencing scheme in *Penry* for ignoring mitigating evidence). *But see* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 364 n.107 (1992) (noting that dissenting opinions in *Penry* opined that because the Texas statute allowed jurors to "consider and give effect to" Penry's mental condition in one of the special issues, the Texas statute served as an effective vehicle for consideration of mitigating circumstances).

83. *See* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 309 (1991) (discussing the evolution and growth of the *Lockett* doctrine regarding the treatment of mitigating evidence in capital sentencing); *see also* Mills v. Maryland, 486 U.S. 367, 374–75 (1988) (acknowledging that the sentencer in a capital case must not be prevented from considering as mitigating factors the aspects of the defendant's background or circumstances of the offense, which may all support a sentence less than death (citing *Skipper*, 476 U.S. at 4; *Eddings*, 455 U.S. at 110; *Lockett*, 438 U.S. at 604)).

84. *See* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 309–12 (1991) (explaining the particular requirements of the *Lockett* doctrine); Sean Fitzgerald, Comment, *Walking a Constitutional Tightrope: Discretion Guidance and the Texas Capital Sentencing Scheme*, 28 HOUS. L. REV. 663, 693 (1991) (stating that post-*Lockett* the death penalty sentencing procedure requires the jury to consider all constitutionally relevant mitigating circumstances).

85. *See* Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 8–9 (1994) (noting that the *Penry* holding did not provide a basis for narrow interpretations); *see also* Trevino v. State, 815 S.W.2d 592, 622 (Tex. Crim. App. 1991) (en banc) (refusing to

was otherwise aggravating as mitigating,[86] but only when the defendant

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strictly apply *Penry* due to a dissimilarity in evidence), *rev'd on other grounds*, 503 U.S. 562 (1992).

86. *See* Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 66–67 (1993) (discussing the need for a *Penry* instruction when the jury cannot give effect to mitigating evidence through special issues alone). Such an instruction ensures that the jury has the opportunity to give proper effect to the defendant's mitigating circumstances, which might not otherwise be addressed in the jury's consideration of the special issues alone. *See* Riddle v. State, 888 S.W.2d 1, 7–8 (Tex. Crim. App. 1994) (en banc) (holding that an effective *Penry* instruction provides a proper means for the jury to "give effect" to the defendant's mitigating evidence because it links mitigating evidence to the defendant's culpability); Rios v. State, 846 S.W.2d 310, 316–17 (Tex. Crim. App. 1992) (en banc) (outlining the requirements for a *Penry* instruction, including: (1) clear communication that, although evidence has no bearing on jury's consideration of special issues, it may nevertheless serve as a basis for responding to one or more of the special issues in a manner favorable to the defendant; (2) telling jurors that they may use the defendant's mitigating evidence as a reason not to find that the defendant committed the crime deliberately; and (3) telling jurors that they may use mitigating evidence to answer the question of future dangerousness either "yes" or "no"); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 65–67 (1993) (elaborating on the analysis required for determining whether a *Penry* instruction is needed). Specifically, Texas courts have allowed *Penry* instructions in only two circumstances: mental retardation and brain damage. *See Rios*, 846 S.W.2d at 315 (holding that a *Penry* instruction should have been provided at trial for the defendant who scored between 55 and 67 on his IQ test); Thomas Criswell IV, *Death Penalty*: Rios *Grande: The Texas Court of Criminal Appeals Examines Mental Retardation As a Mitigating Factor in* Rios v. Texas, 47 OKLA. L. REV. 373, 375 (1994) (explaining that the Texas Court of Criminal Appeals, in light of *Penry*, allowed mentally retarded defendants to submit evidence of their retardation during the punishment phase); *see also Ex parte* McGee, 817 S.W.2d 77, 80–81 (Tex. Crim. App. 1991) (setting aside McGee's conviction of capital murder and remanding for new trial because McGee presented evidence that his conscience was impaired and that the jury was not allowed to consider this evidence). However, a defendant's mental illness does not always justify a *Penry* instruction where such evidence was not similar to that of Penry's. *See Ex parte* Lucas, 834 S.W.2d 339, 340–42 (Tex. Crim. App. 1992) (holding that Lucas's chronic schizophrenia was not comparable as mitigating evidence to that of Penry and concluding that Lucas was not entitled to a *Penry* instruction), *vacated and remanded*, 509 U.S. 918 (1993), *aff'd*, 877 S.W.2d 315 (Tex. Crim. App. 1994); *see also* Mines v. State, 852 S.W.2d 941, 950–52 (Tex. Crim. App. 1992) (rejecting a *Penry* claim of a defendant with bipolar disorder), *vacated and remanded*, 510 U.S. 802 (1993), *aff'd*, 888 S.W.2d 816 (1994). *But see* Gribble v. State, 808 S.W.2d 65, 76 (Tex. Crim. App. 1991) (holding that the jury could not give effect to the mitigating evidence of the defendant's mental illness, depression, and psychotic illusions without a *Penry* instruction). The result in *Gribble* appears to be rare, however. *See Mines*, 852 S.W.2d at 957 n.5 (Baird, J., dissenting) (revealing that, as of 1992, *Gribble* was the only case in which a defendant who did not have an "extremely low IQ and/or mental retardation" was granted a *Penry* claim by the Texas Court of Criminal Appeals).

Despite the abuse a defendant might have suffered as a child, such abuse does not warrant a *Penry* instruction to the jury. *See* Moody v. State, 827 S.W.2d 875, 896–97 (Tex. Crim. App. 1992) (holding that a *Penry* instruction was not required for a defendant whose

introduced evidence similar to that introduced in *Penry*.[87] Although the Texas Court of Criminal Appeals took minimal action in light of *Penry*, the Texas Legislature responded in 1991 to ensure that the jury could give

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mitigating evidence included the fact that his mother handcuffed him in the basement to prevent him from running away); *see also* Madden v. Collins, 18 F.3d 304, 307–08 (5th Cir. 1994) (holding that child abuse is not relevant as mitigating evidence if it did not cause the defendant to commit the murder in question and further noting that mitigating evidence must also be "beyond the 'effective reach' of the jurors" in order to warrant a *Penry* instruction). *But cf.* Skipper v. South Carolina, 476 U.S. 1, 4–8 (1986) (holding that if evidence of the defendant's background and character might prompt a jury to impose a sentence less than death, such evidence is relevant even if it is not related directly to the crime for which the defendant is charged).

For other types of mitigating evidence that did not require the trial court to provide a *Penry* instruction, *see* Richardson v. State, 879 S.W.2d 874, 883–85 (Tex. Crim. App. 1993) (holding that defendant's illiteracy, childhood poverty, and speech disorder did not warrant a *Penry* instruction; opining, however, that if there were a nexus between the mitigating factors and the commission of crime, the court's holding might have been different); Black v. State, 816 S.W.2d 350, 354–55, 365 (Tex. Crim. App. 1991) (summarizing the factors to be considered in consideration of issues under Article 37.071 and holding that a *Penry* instruction was not necessary for a former Eagle Scout and distinguished Vietnam veteran whose act of murder was his first offense because the evidence was within the reach of the jury in considering special issues), *aff'd*, 926 F.2d 394 (5th Cir. 1992).

87. *See* Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 16–17 (1994) (stating that the Texas Court of Criminal Appeals only granted "*Penry* claims" if the defendant's evidence was similar to or the same as Penry's); *cf.* Johnson v. Texas, 509 U.S. 350, 368–69 (1993) (rejecting the petitioner's claim that his youth was not seen as a mitigating factor by the jury). Prior to *Johnson*, the Texas Court of Criminal Appeals applied the following tests to determine whether a jury member could grasp the mitigating evidence and use it to answer the special issues: (1) the nexus test—whether the defendant's offense can be linked to an aspect of his background or character which may reduce his personal culpability; or (2) the level test—whether the mitigating evidence did not rise to level of *Penry* evidence. *See* Gunter v. State, 858 S.W.2d 430, 446 (Tex. Crim. App. 1993) (utilizing the nexus test to determine the connection between Gunter's disadvantaged childhood and his commission of the crime); *Ex parte* Ellis, 810 S.W.2d 208, 212 (Tex. Crim. App. 1991) (concluding that because Ellis's mitigating evidence "does not rise to the level of *Penry* evidence" it was unnecessary to provide an additional instruction to permit the jury to give effect to the evidence); *see also Trevino*, 815 S.W.2d at 622 (limiting the application of *Penry* because Trevino's evidence was not similar to Penry's). *But see* Robison v. State, 888 S.W.2d 473, 487 (Tex. Crim. App. 1994) (noting that the "specifics of evidence" as presented at trial determine whether such evidence bears on the defendant's culpability). Under *Robison*, the court appears willing to look to the manner in which the trial evidence affect the defendant's culpability in determining whether a jury is able to consider such evidence as mitigating in answering the special issues. *See id.*; *see also* Gary Taylor, *Cleft-Palate Case—Texas AG Campaigns Against Mitigation*, NAT'L L.J., May 6, 1991, at 3 (discussing the limited application of a *Penry* claim). *See generally* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 366–79 (1992) (detailing the Texas Court of Criminal Appeals' review of capital cases that generally requires the defendant's circumstances to be similar to that of Penry's).

full consideration of all mitigating factors during sentencing.[88] During the first regular session after the Supreme Court handed down *Penry*, the Texas Legislature made extensive amendments to Article 37.071 in an attempt to ensure full consideration of mitigating circumstances during sentencing.[89] Thus, the Texas Legislature recognized in 1991 that when a defendant is subject to the death penalty, the sentencer should have broad discretion to consider evidence that might weigh against a sentence of death.[90]

The amended Article 37.071 functions in two stages. First, the court charges the jury to respond to the following issues:

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88. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1998) (codifying the requirement that the jury take into consideration mitigating factors); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 58 (1993) (recognizing that "[t]he Texas Legislature revised the sentencing scheme in 1991").

89. *See* Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 22–23 (1994) (explaining that the Texas Legislature took an "expansive approach" in its interpretation of the *Penry* holding); Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 381–84 (1992) (detailing the legislative history of amendments made to the Texas death penalty statutes in 1991); *see also* Graham v. Collins, 950 F.2d 1009, 1013–14 (5th Cir. 1992) (describing the legislative history underlying changes to Article 37.071), *aff'd*, 506 U.S. 461 (1993).

Prior to the sweeping changes in 1991, the Texas Legislature amended Article 37.071 in 1981 and 1985. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 historical note (Vernon Supp. 1998) (identifying historical amendments). The Legislature amended Article 37.071(e) in 1981 to provide guidance when a jury does not answer the special issues in a manner that favors the death penalty. *See* Robert J. Clary, *Voting for Death: Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure*, 19 ST. MARY'S L.J. 353, 357 (1987) (describing the Legislature's efforts to amend Article 37.071). The 1985 amendment clarified the effective date of the capital sentencing statute with respect to the date of the defendant's offense. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1998) [Acts of 1985, 69th Leg., R.S., ch. 44, § 3, 1985 Tex. Gen Laws 434, 435]. The Texas Legislature also amended Article 37.071 in 1993 by adding subsection (i), which makes the statute applicable to offenses "committed on or after September 1, 1991." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(i) (Vernon Supp. 1998).

90. *Cf.* Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Role of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 365 (1997) (explaining the role of mitigating evidence in highlighting a capital defendant's positive qualities and explaining a defendant's violent acts in light of the defendant's past history and the unique circumstances); Kathleen D. Weron, Comment, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1112–13 (tracing the development in the Texas death penalty sentencing scheme to *Furman v. Georgia* and recognizing that, following *Furman*, state legislators attempted to provide (1) clearer criteria upon which the sentencer would choose to sentence a defendant to death, and (2) greater guidance to the capital sentencer regarding when to impose the death penalty).

> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (2) whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.[91]

The court charges the jury to "consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the . . . death penalty" in answering these questions.[92]

If the jury answers yes to each of these two issues, the court charges it to answer the third special 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.[93]

If the jury answers yes to the first two special issues and no to the third special issue, the court imposes a sentence of death.[94] The amended statute is different from the previous sentencing statute in that the court now instructs the jury to consider all the evidence available from the trial in determining the three special issues.[95] Although the new statute permits

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91. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (Vernon Supp. 1998). The issue of whether the defendant intended to kill the victim pertains only to trials in which the defendant was found guilty as a result of being a party to the victim's death. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (Vernon Supp. 1998); TEX. PEN. CODE ANN. §§ 7.01–7.02 (Vernon 1994) (providing the basis for criminal responsibility if an individual, or someone for whose conduct he is responsible, commits a crime).

92. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(1) (Vernon Supp. 1998).

93. *Id.* § 2(e). Mitigating evidence is that which reduces the blameworthiness of the defendant. *See id.* § 2(f)(4). 1998). A similar instruction, charging the jury to consider all of the mitigating evidence in their deliberations, is contained in Article 37.0711, which applies to offenses committed before September 1, 1991. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711, § 3(e) (Vernon Supp. 1998).

94. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (Vernon Supp. 1998). If the defendant was not a party to the crime, under Texas Penal Code Sections 7.01 or 7.02, then the court does not submit the second special issue to the jury. *See id.* § 2(b)(2).

95. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d) (Vernon Supp. 1998) (charging the jury to consider all admitted evidence in deliberating the three special issues). The amended statute is also different in terms of the special issues which the court submits to the jury in two ways: (1) the previous sentencing statute did not contain the second special

consideration of evidence relating to the background and character of the defendant, as well as the circumstances of the crime, the trial court continues to retain discretion as to whether such evidence is admissible at sentencing.[96]

Thus, the Texas Legislature addressed the concerns of *Penry* by attempting to allow for ample consideration of mitigating evidence.[97] Factors relating to the background or character of the defendant and the

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issue, relating to party complicity; and (2) the future dangerousness special issue, now the first issue answered by the jury, was previously the second special issue. *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (Vernon Supp. 1998) (requiring the issue of party complicity in certain cases to be submitted to the jury and listing future dangerousness as the first issue), *with* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125, *amended by* Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, 1991 Tex. Gen. Laws 2898, 2898–900 (listing only issues of deliberateness, future dangerousness, and provocation). In addition, the third special issue in the new statute was not contained in the previous sentencing statute. *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon Supp. 1998) (listing the issue of personal moral culpability), *with* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125 (*amended* 1991) (listing only issues previously contained in the Texas Death penalty sentencing statute). The first issue in the previous sentencing statute, regarding whether the killing was deliberate, was deleted in the 1991 amendments. *Compare* Act of May 28, 1973, 63d Leg., R.S., ch. 426, art. 3, 1973 Tex. Gen. Laws 1122, 1125 (*amended* 1991) (noting that whether killing was deliberate is the first issue), *with* TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1998) (enumerating issues other than whether the killing was deliberate).

96. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a) (Vernon Supp. 1998) (stating that "evidence may be presented . . . as to any matter that the court deems relevant to sentence").

97. *See Ex parte* Bower, 823 S.W.2d 284, 295–96 n.9 (Tex. Crim. App. 1991) (Clinton, J., dissenting) (stating that with the passage of amendments to Article 37.071 in 1991, "the Legislature has shown this Court the way out of the morass in which justice in capital cases is still foundering"); Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1, 24–25 (1994) (indicating that the amended statute appears to accommodate the requirements under *Penry*); Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 384–87 (1992) (detailing requirements of a proper capital sentencing statute incorporated by the amended sentencing statute); *see also* Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (finding that the Texas statute was a predictable result of *Penry*, but stating that *Penry* was wrongly decided).

The new statute provides for individualized sentencing by allowing the sentencer to consider the background and character of the defendant, as well as the circumstances of the crime. *See* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 384–87 (1992) (discussing the effects of the new statute on death penalty cases). The statute also allows the jury to "give effect to" mitigating evidence by imposing a sentence of life. *See id.* at 385. Regardless, however, of whether a capital sentencing statute enables the jury to give full effect to mitigating evidence, the post-*Penry* Supreme Court will likely require only "broad introduction of mitigating evidence at capital sentencing and . . . [a] mechanism through which such evidence [may] be considered in imposing sentence." *Id.* at 390.

circumstances of the crime are generally given effect by the jury through one of the special issues.[98] Under Article 37.071, Section 2(e), the court directs the jury to consider "all of the evidence" in determining whether a life sentence should be imposed.[99]

Whether the amendments to Article 37.071 actually permit the jury to give the sufficient mitigating effect to a factor such as voluntary intoxication, however, must be considered in light of how Section 8.04 is applied at trial. One view is that the third special issue is an adequate vehicle for considering mitigating factors previously considered to be "two-edged swords;" that is, Article 37.071, Section 2(e) now provides the jury with a vehicle to give independent mitigating weight to "any aspect of the defendant's character and record or any circumstance of his offense."[100] Another view is that the apparently broad nature of this mitigation instruction, the question remains whether Article 37.071 allows jury to consider lesser degrees of voluntary intoxication as mitigating evidence even if the court instructs the jury under Section 8.04(b) as well.

III. APPLYING TEXAS PENAL CODE SECTION 8.04

A. *Section 8.04—The Statute*

1. Background to Section 8.04

Traditionally, a defendant's voluntary intoxication has not warranted an additional instruction to the jury regarding its mitigating nature in-

98. *See* Peggy M. Tobolowsky, *What Hath* Penry *Wrought?: Mitigating Circumstances and the Texas Death Penalty*, 19 AM. J. CRIM. L. 345, 384 (1992) (stating that Texas procedures allow for "constitutionally adequate consideration of mitigating circumstances"); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 69 (1993) (noting that special issues now allow the jury to consider and give effect to the defendant's circumstances).

99. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon Supp. 1998). Beginning with new trials in 1993 for capital offenses committed before 1991, trial courts must sentence defendants under Article 37.0711, which includes a *Penry* instruction. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711, §§ 1, 3(e) (Vernon Supp. 1998) (providing that, for offenses committed before September 1, 1997, the court shall instruct the jury to take "into consideration all of the evidence" in determining whether a life sentence should be imposed).

100. TEX. CODE. CRIM. PROC. ANN. art. 37.071 § 2(e) (Vernon Supp. 1998); *see* Eddings v. Oklahoma, 455 U.S. 104, 113–15 (1982) (holding that the jury must be allowed to consider relevant mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 606–07 (1978) (requiring the death penalty sentencing scheme to permit the sentencer to consider mitigating circumstances); *see also* Skinner v. State, 956 S.W.2d 532, 541–43 (Tex. Crim. App. 1997) (noting that Section 2(e) of Article 37.071 allows mitigating evidence to be considered in death penalty cases, thereby allowing jurors to determine whether sufficient evidence exists to warrant a sentence less than death), *cert. denied*, 118 S. Ct. 1526 (1998).

struction.[101] Nonetheless, evidence of a defendant's voluntary intoxication may trigger Section 8.04 at the guilt-innocence phase and punishment phase of a trial.[102] As a result, the issue with respect to voluntary intoxication is whether Article 37.071 cures any defects that arise when the court instructs the jury as to whether voluntary intoxication is a mitigating circumstance under Section 8.04(b), or if these sentencing provisions contradict each other of these statues. Such a defect in the combined application may prevent the jury from considering the full range of evidence a defendant offers to mitigate a penalty.

Further complicating the issue of voluntary intoxication as mitigating evidence is the fact that the common law does not favor the voluntary

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101. *See* Nethery v. Collins, 993 F.2d 1154, 1161 (5th Cir. 1993) (holding that a *Penry* instruction is not needed for a defendant who was voluntarily intoxicated during the commission of a crime); Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 69 (1993) (discussing the "two-edged sword" of mitigating evidence). Havens-Cortes acknowledges that mitigating evidence which is a "two-edged sword" is evidence which obliges the sentencer to return an unfavorable response to a special issue (for example, the defendant is a continuing threat to society), but at the same time reduces the moral culpability of the defendant. *See id.* at 67–68 (noting that the jury is not compelled to answer "yes" to the special issues). However, Havens-Cortes claims that voluntary intoxication is not a "two-edged sword," whether it is a temporary condition or chronic in nature. *See id.* A defendant who murdered while voluntarily intoxicated may be someone who may compel an affirmative response to the issue of future dangerousness. This result is true particularly in light of the fact that the court will not instruct a jury that his "society" while incarcerated for life is that of the Texas Department of Corrections, a "society" in which the defendant will be unlikely to obtain intoxicants. *See* Caldwell v. State, 818 S.W.2d 790, 798 (Tex. Crim. App. 1991) (en banc) (holding that "society" requires no special definition in a capital murder trial), *cert. denied*, 503 U.S. 990 (1992). Furthermore, Havens-Cortes states that a chronic addiction may not reduce the moral culpability of the defendant. *See* Lisa L. Havens-Cortes, Comment, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 67–68 (1993). However, she states that a permanent physical impairment, such as a head injury, may be a "two-edged sword" because "the criminal's conduct may be likely to continue in the future and could compel a 'yes' response to the special issue and at the same time reduce [his] moral culpability by being burdened with a physical condition that may be no fault of [his] own." *Id.* at 68. As a result, a defendant's voluntary intoxication, whether an isolated occurrence or a chronic condition, could arguably be a "two-edged sword."

102. *Cf.* Williams v. State, 937 S.W.2d 479, 489–90 (Tex. Crim. App. 1996) (allowing instruction on voluntary intoxication during the guilt-innocence phase but not during the punishment phase); Cordova v. State, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987) (en banc) (recognizing that the trial court may provide an instruction on voluntary intoxication as a mitigating circumstance during the punishment phase only if the defendant establishes that incapacitating substances caused temporary insanity; however, the requirements of *Lockett* and *Eddings* do not mandate that the court provide instructions to the jury on how much weight to give to the intoxication evidence).

intoxication defense.[103] Consequently, Texas has long recognized that voluntary intoxication is not a defense to the commission of a crime.[104] In the past, voluntary intoxication did not mitigate the penalty attached to a crime.[105] In 1892, however, the Texas Court of Criminal Appeals held that evidence of voluntary intoxication was relevant evidence, but

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103. *See* Heard v. State, 887 S.W.2d 94, 98 (Tex. App.—Texarkana 1994, pet. ref'd) (criticizing the defense of voluntary intoxication because it allows the individual to escape criminal responsibility as a result "of his voluntary act in rendering himself of unsound mind"). Texas' restriction against the voluntary intoxication defenses has withstood constitutional scrutiny. *See* Mata v. State, 939 S.W.2d 719, 726 (Tex. App.—Waco 1997, no pet. h.) (rejecting the defendant's due process claim on the unconstitutionality of Section 8.04); *see also* Skinner v. State, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997) (refuting the assertion that Section 8.04(a)'s barring the use of intoxication evidence as a means to negate mens rea violates the defendant's due process rights), *cert. denied*, 118 S. Ct. 1526 1998). *But see* Kevin Nash, Comment, *Section 8.04 of the Texas Penal Code: A Wild Card for Mens Rea or Fair Game for a Constitutional Trump?*, 24 HOUS. L. REV. 281, 301–02 (1987) (questioning the constitutionality of Section 8.04 because it does not allow the defendant to submit evidence that might negate his mens rea).

104. *See* TEX. PEN. CODE ANN. § 8.04(a) (Vernon 1994) (stating that voluntary intoxication is not a defense to the commission of a crime); Juhasz v. State, 827 S.W.2d 397, 406 (Tex. App.—Corpus Christi 1992, pet. ref'd) (affirming that voluntary intoxication is not a defense to a crime); Clore v. State, 26 Tex. Ct. App. 624, 629, 10 S.W. 242, 244 (1889) (defining the legislative intent behind a statute in force at the time to mean that intoxication from use of "ardent spirits" should not excuse crime); Williams v. State, 25 Tex. Ct. App. 76, 89, 7 S.W. 661, 662, (1888) (construing the statute to mean that the recent use of "ardent" spirits does not excuse crime); John Schmolesky, *Criminal Law*, 38 Sw. L.J. 497, 501 (1984) (stating that Texas does not recognize voluntary intoxication as a defense to a crime). The Texas Penal Code does not allow voluntary intoxication as a defense to a crime even if the defendant offers evidence that could negate the intent element, which is otherwise necessary for a conviction, of his crime. *See* Shirley W. Butts, *Criminal Law*, 35 Sw. L.J. 493, 520 (1981) (comparing Model Penal Code Section 2.08(1), which allows intoxication to negate elements of the offense, with Texas Penal Code Section 8.04(a), which does not). *But cf.* Oregon v. Thayer, 573 P.2d 758, 759 (Or. Ct. App. 1978) (holding that Oregon law permitted the jury, based on the evidence of the defendant's voluntary intoxication, to find the defendant innocent of the greater offense and guilty of the lesser offense).

The earliest case of intoxication in a criminal case dates to 1551, in which the defendant received the death penalty for a homicide committed under the influence of severe intoxication. *See* Kevin Nash, Comment, *Section 8.04 of the Texas Penal Code: A Wild Card for Mens Rea or Fair Game for a Constitutional Trump?*, 24 HOUS. L. REV. 281, 292–93 n.100 (1987) (examining Reniger v. Fogossa, I Plowden I, 75 Eng. Rep. I (K.B. 1551)).

105. *See* Carter v. State, 154 Tex. Crim. 179, 182, 225 S.W.2d 839, 841 (1950) (reminding that drunkenness does not serve to mitigate punishment); Adams v. State, 140 Tex. Crim. 319, 321–22, 144 S.W.2d 889, 890 (1940) (stating that "mere intoxication" is insufficient to mitigate penalty; rather, temporary insanity resulting from voluntary intoxication is required for mitigation).

only to the extent that it established temporary insanity which, in turn, served only as a means to mitigate punishment.[106]

Section 8.04 of the Texas Penal Code embodies the common law's approach to intoxication:

> (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.[107]

Thus, Texas recognizes that a defendant may use evidence of temporary insanity caused by voluntary intoxication under Section 8.04(b) in an attempt to mitigate the penalty for which he is charged.[108] In order to show temporary insanity, the defendant must demonstrate that he did not know that his conduct was wrong.[109] Although, under Section 8.04(b),

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106. *See* Evers v. State, 31 Tex. Crim. 318, 325–27, 20 S.W. 744, 745–47 (1892) (holding that the trial court erred in not allowing Evers's intoxication to mitigate punishment). For a background to the development and history of Section 8.04 of the Texas Penal Code, see Kevin Nash, Comment, *Section 8.04 of the Texas Penal Code: A Wild Card for Mens Rea or Fair Game for a Constitutional Trump?*, 24 HOUS. L. REV. 281, 301–02 (1987).

107. TEX. PEN. CODE ANN. § 8.04 (Vernon 1994).

108. *Id.* § 8.04(b); Lee v. State, 874 S.W.2d 220, 224 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (elaborating on the requirements in order to raise the defense of temporary insanity as a result of voluntary intoxication); Joiner v. State, 814 S.W.2d 135, 136 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (allowing the defendant to raise the issue of temporary insanity as a result of voluntary intoxication); Schenck v. State, 624 S.W.2d 757, 757 (Tex. App.—Fort Worth 1981, no pet.) (recognizing the possibility for mitigation of punishment based on the defendant's voluntary intoxication); Mike McColloch & David W. Coody, *Criminal Law*, 37 Sw. L.J. 379, 382 (1983) (discussing voluntary intoxication as a mitigating circumstance).

109. *See Lee*, 874 S.W.2d at 224 (stating the requirement that a defendant must produce evidence that he was unaware of wrongful conduct in order to qualify for the defense of temporary insanity); *Joiner*, 814 S.W.2d at 136 (holding that in order to be considered temporarily insane as a result of voluntary intoxication, the defendant (1) must not be aware of the wrongful nature of his conduct, or (2) must be unable to conform to requirements of law which the defendant is violating); Harvey v. State, 798 S.W.2d 373, 375 (Tex. App.—Beaumont 1990, no pet.) (requiring the evidence that the defendant was unaware of the wrongful nature of his conduct); *Schenck*, 624 S.W.2d at 758 (affirming the trial court's refusal to issue an instruction on voluntary intoxication because the defendant did not

the trial court normally provides an instruction on temporary insanity resulting from voluntary intoxication during the punishment phase of trial, the court may also issue an instruction under Section 8.04(a) during the *guilt-innocence phase* to remind the jury that such voluntary intoxication is not a defense to a crime.[110]

2. The Impact of *Montana v. Egelhoff*

A recent United States Supreme Court decision, *Montana v. Egelhoff*,[111] may obviate the need to debate the use of voluntary intoxication as a mitigating circumstance. Therefore, exploring the effects of *Egelhoff* in Texas before examining any case law interpreting Section 8.04 is important.

In 1992, a Montana state court convicted James Allen Egelhoff of two counts of deliberate homicide.[112] Although the trial court permitted Egelhoff to submit evidence of his intoxication at trial, the trial court also instructed the jury that it could not consider Egelhoff's "intoxicated condition . . . in determining the existence of a mental state which is an ele-

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directly attribute the anger he felt toward his victim to his intoxicated state). The Texas Court of Criminal Appeals derives the two-prong requirement for "temporary insanity" from reading Section 8.04(b) in conjunction with Section 8.01(a) of the Texas Penal Code. *See* Sawyers v. State, 724 S.W.2d 24, 33 (Tex. Crim. App. 1986), *overruled on other grounds by* Watson v. State, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988). Section 8.01(a), titled "Insanity," provides that "[i]t is an affirmative defense . . . that . . . the actor . . . did not know that his conduct was wrong. . . ." TEX. PEN. CODE ANN. § 8.01(a) (Vernon 1994).

110. *See* Gonzales v. State, 838 S.W.2d 848, 866 (Tex. App.—Houston [1st Dist.] 1992, pet. dism'd) (noting that the trial court's instruction on voluntary intoxication should be given during the court's charge at the punishment stage). However, an instruction on voluntary intoxication at the guilt-innocence stage of trial may be appropriate when the defendant claims temporary insanity or claims that his drinking excused his acts. *Cf. id.* (holding that an instruction on voluntary intoxication was not justified because the defendant did not claim either temporary insanity as a result of his drinking or that his drinking excused his actions).

111. 116 S. Ct. 2016 (1996).

112. *See* State v. Egelhoff, 900 P.2d 260, 261 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996). Officers from the Lincoln County sheriff's department in Montana found Roberta Pavola and John Christenson in the front seat of Christenson's car. *See id.* at 261–62. Both died from a single gunshot wound to the head. *See id.* Officers found James Allen Egelhoff in the back seat yelling obscenities. *See id.* Further, officers discovered Egelhoff's handgun with two empty casings near the brake pedal of the car. *See id.* Tests later revealed gunshot residue on Egelhoff's hands and a blood alcohol content of .36 percent. *See id.* at 262. However, Egelhoff's blood alcohol content (BAC) may have been higher at the time he committed the murders than when he was actually tested. *Cf.* Jennifer L. Pariser, Note, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 141–42 (1989) (discussing the presumption that the defendant's BAC is higher during the commission of the offense than when later tested).

ment of the offense."[113] The Montana Supreme Court reversed Egelhoff's convictions, holding that (1) evidence of Egelhoff's intoxication was relevant to the issue of whether he acted purposely or knowingly, and (2) Egelhoff "had 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."[114]

The United States Supreme Court overruled the Montana Supreme Court's decision and concluded that the exclusion of evidence relating to Egelhoff's voluntary intoxication in determining his mental state was constitutional.[115] Writing the plurality opinion, Justice Scalia urged deference to the manner in which the states oversee their criminal justice systems.[116] Justice Scalia explained that nine other states, including Texas, properly bar voluntary intoxication as evidence in a manner similar to that exercised in Montana.[117] Because one-fifth of the states have rejected voluntary intoxication as a defense to the commission of crime, Scalia concluded that there was no fundamental right to use voluntary intoxication as a defense.[118]

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113. *Egelhoff*, 116 S. Ct. at 2016 (citing MONT. CODE. ANN. § 45-2-203 (1995)).

114. *Id.* at 2016.

115. *See id.* at 2025–26 (Ginsburg, J., concurring) (suggesting that the state did not violate the Due Process Clause in enacting the rule of evidence which treats voluntarily intoxicated and sober defendants the same). Unlike Justice Scalia, Justice Ginsburg did not regard Montana's statute as merely a restriction on the admissibility of evidence. Rather, she focused on the statute's redefinition of mens rea, to which no constitutional obstacle exists. *See id.* at 2024 (stating that when "[c]omprehended as a measure redefining mens rea, § 45-2-203 encounters no constitutional shoal"); *see also* John Gibeaut, *Sobering Thoughts—Legislatures and Courts Increasingly Are Just Saying No to Intoxication As a Defense or Mitigating Factor*, A.B.A. J., May 1997, at 57 (discussing that laws barring the defense of intoxication simply prevent defendants from taking advantage of drunkenness in order to escape responsibility for criminal culpability, and maintaining that although intoxication affects judgment, voluntary intoxication should not be used to establish or counteract intent). *But see id.* (discussing the criticism of state statutes, such as Montana's, which allow murder convictions despite a lack of proof regarding the defendant's mental elements).

116. *See* Montana v. Egelhoff, 116 S. Ct. 2016, 2017 (1996) (noting that although coping with crime is within the purview of both the state and the federal government, the federal government should avoid interfering with the states' administration of justice). Such deference is inappropriate, however, under the test which the Supreme Court established in *Patterson v. New York*, 432 U.S. 197 (1977), if the state action offends a fundamental principle of justice. *See id.* (noting that states have the power to regulate internal procedures not subject to "proscription" under the Due Process Clause unless the fundamental rights of the defendant are implicated (citing Patterson v. New York, 432 U.S. 197, 201–02 (1977))).

117. *See Egelhoff*, 116 S. Ct. at 2220 n.2 (detailing cases in various jurisdictions which have upheld the restriction on voluntary intoxication as a defense to crime).

118. *See id.* at 2019–20 (explaining the difficulty in conferring the fundamental principle status to the "new common-law rule," which permits voluntary intoxication as evidence

Ultimately, *Egelhoff* reinforces the deferential stance which the United States Supreme Court takes toward the states' administration of criminal justice.[119] In *Egelhoff*, the Supreme Court allowed the state of Montana to prevent a defendant from using his voluntary intoxication to establish that he lacked the requisite mens rea to commit a crime.[120] Other states, including Texas, recognize that *Egelhoff* merely allows jurisdictions to exclude evidence of voluntary intoxication as it is used to negate the defendant's criminal intent.[121] Thus, *Egelhoff* is limited in scope. Generally, as in Montana, a state will only apply *Egelhoff* if that state has a statute barring the voluntary intoxication defense.[122]

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in determining mens rea, when one-fifth of states, including Montana, currently adhere to the "old" common-law rule, which bans voluntary intoxication evidence in considering the defendant's mens rea).

119. *See id.* at 2017 (stating that "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules") (citation omitted); Robert J. McManus, Note, Montana v. Egelhoff: *Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245, 1264–65 (1997) (acknowledging Justice Scalia's deferential bearing toward the states).

120. *See* Robert J. McManus, Note, Montana v. Egelhoff: *Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245, 1264, 1286–88 (1997) (discussing the *Egelhoff* holding as relating to exclusion of voluntary intoxication evidence in determining the defendant's mental state, and examining the value of *Egelhoff* as precedent in the context of evidence of intoxication as it lends itself to mental state). However, Mr. McManus also points out that there may be limitations in the extent to which states may apply this holding, since it conflicts with the "right to a defense doctrine." *See id.* at 1286–88 (urging courts to "be wary" in using *Egelhoff* in cases involving the "right to present a defense").

121. *See* Russell v. United States, 698 A.2d 1007, 1015 (D.C. Cir. 1997) (recognizing the *Egelhoff* holding as allowing state legislatures, consistent with due process, to redefine any element of a crime and declare that related evidence is irrelevant so long as doing so does not violate fundamental concepts of justice); United States v. Scheffer, 44 M.J. 442, 447–48 (C.A.A.F. 1996) (recognizing that *Egelhoff* dealt with Montana's legislative authority to redefine any element of an offense and that *Egelhoff* upheld Montana's statute preventing the admissibility of evidence of the defendant's voluntary intoxication where the defendant's mens rea is at issue), *rev'd on other grounds*, 118 S. Ct. 1261 (1998); State v. Mott, 931 P.2d 1046, 1052 (Ariz. 1997) (en banc) (opining that *Egelhoff* resolved the constitutionality of precluding the defendant from introducing evidence of voluntary intoxication in order to show that the mens rea element of the crime did not exist), *cert. denied*, 117 S. Ct. 1832; Williams v. State, 937 S.W.2d 479, 488 (Tex. Crim. App. 1996) (noting that *Egelhoff* supports Texas' position that the Due Process Clause was not violated in a jury charge given under Section 8.04(a)); Mata v. State, 939 S.W.2d 719, 726 (Tex. App.—Waco 1997, no pet.) (acknowledging that of *Egelhoff*'s holding supports Texas' position that evidence of voluntary intoxication may not be used in defense of a crime).

122. *See* State v. Brown, 931 P.2d 69, 76 (N.M. 1996) (explaining that a Montana statute which excludes evidence of intoxication is not a violation of a fundamental principle and distinguishing *Egelhoff* from application in the instant case because New Mexico does not have a statute barring evidence of voluntary intoxication).

Because the scope of *Egelhoff* is limited to the Section 8.04(a) prohibition of voluntary intoxication as a defense,[123] *Egelhoff* appears to be neutral with regard to Section 8.04(b). The *Egelhoff* plurality and concurring opinions do not address whether voluntary intoxication may be considered as mitigating evidence.[124] Therefore, *Egelhoff* should be applied in Texas only to reinforce the proposition that voluntary intoxication is not a defense to a crime,[125] because a defendant's voluntary intoxication at the time of the crime, *as mitigating evidence during the sentencing proceedings*, is constitutionally relevant.[126]

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123. *See* TEX. PEN. CODE ANN. § 8.04(a) (Vernon 1994) (stating that voluntary intoxication is not a defense to criminal conduct).

124. *See* Montana v. Egelhoff, 116 S. Ct. 2016, 2031 (1996). The only mention of voluntary intoxication as a mitigating circumstance in *Egelhoff* occurs in the dissenting opinion. *See id.* at 2030 (O'Connor, J., dissenting) (discussing that because the nature of crime depends upon a criminal's mind at the time of the offense, intoxication may be proper evidence for the jury, not as an excuse or in mitigation, but to show that a crime was never committed). However, Justice Scalia's discussion of a "moral reprobation of intoxicated defendants" may be used as support for the continued limitations posed by Section 8.04(b). *See Egelhoff*, 116 S. Ct. at 2018 (explaining that, at common law, intoxication served to aggravate offense); Robert J. McManus, Note, Montana v. Egelhoff: *Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245, 1283–84 (1997) (summarizing Justice Scalia's reliance on common law as the basis for upholding the Montana statute on moral grounds; lamenting, however, the narrow application of common law for moral support when the right to present a defense is a relevant fundamental right in *Egelhoff*).

Although the Court holds that the right to present evidence of voluntary intoxication as a defense to crime is not fundamental, *Egelhoff* does not address the question of whether a defendant has a right to present evidence of voluntary intoxication as mitigating evidence during the punishment phase. As a result, the right to present relevant mitigating evidence during a death penalty sentencing proceeding, which has long been held to be an essential tenet of capital jurisprudence, appears to remain untouched by *Egelhoff*. *See* Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989) (stating the requirement that the jury be able to "consider and give effect to" the defendant's mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (holding that the jury must be able to consider relevant mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating the constitutional requirement that the jury not be prevented from considering aspects of a defendant's character and offense as mitigating factors in determining if the evidence exists for a sentence less severe than death); Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (stating the requirement that, during the sentencing phase, the jury is to consider the defendant's character and circumstances of the offense in determining whether mitigating evidence exists).

125. *See* TEX. PEN. CODE ANN. § 8.04(a) (Vernon 1994) (stating that voluntary intoxication is not a defense to crime); *Egelhoff*, 116 S. Ct. at 2020 n.2 (noting that in Texas, voluntary intoxication is not a defense to a crime and citing with approval Texas Penal Code Section 8.04 and *Hawkins v. State*); Hawkins v. State, 605 S.W.2d 586, 589 (Tex. Crim. App. [Panel Op.] 1980) (stating that in Texas, evidence of the defendant's intoxication does not negate the defendant's mens rea).

126. *See* Drinkard v. Johnson, 97 F.3d 751 758 n.10 (5th Cir. 1996) (stating that the defendant's intoxication at the time of the murders is constitutionally relevant). The

B. *Section 8.04(b)—Case Law*

The application of Section 8.04(b) during trials in which the State seeks the death penalty raises the issue of whether Section 8.04(b) limits jury consideration to intoxication that amounts to temporary insanity, or if the jury is able to consider noninsane intoxication as well. The defendant is, after all, under an obligation to raise a sufficient amount of evidence of voluntary intoxication, as well as of temporary insanity caused by that intoxication, in order to qualify for a Section 8.04(b) instruction.[127] However, under *Eddings*, such an application of Section 8.04(b) unconstitutionally limits the jury's ability to consider the defendant's mitigating evidence of "noninsane" intoxication.[128] Furthermore, this impermissible limitation does not appear to be corrected by applying the mitigating evi-

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Drinkard court reached this conclusion by noting that a defendant's intoxication at the time of the crime is mitigating evidence and that mitigating evidence, as a basis for a sentence less than death, is constitutionally relevant. *See id.*; *see also* Parker v. Dugger, 498 U.S. 308, 314 (1991) (stating that the defendant's intoxication is mitigating evidence); *Lockett*, 438 U.S. at 604 (noting that evidence which a defendant offers as a basis for a sentence less than death and which deals with the circumstances of the offense is constitutionally relevant). Any judicial test that attempts to balance the state's interest in applying its rule would require a showing by the defendant that the state's limitation on his evidence offends a fundamental principle which would thus outweigh the state's interest. *See Egelhoff*, 116 S. Ct. at 2017–18 (explaining the balancing test performed under *Patterson*). Because courts recognize that evidence of a defendant's voluntary intoxication during sentencing *is* constitutionally relevant to the sentencer, Section 8.04(b) appears to stand despite any ramifications of *Egelhoff*. *See* Parker v. Dugger, 498 U.S. 308, 314 (1991) (stating that the defendant's intoxication was mitigating evidence); Drinkard v. Johnson, 97 F.3d 751, 758 n.10 (5th Cir. 1996) (majority opinion) (stating that evidence of the defendant's intoxication is constitutionally relevant), *cert. denied*, 117 S. Ct. 1114 (1997). *But cf.* Gary Joseph Vyneman, Note, *Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes*, 13 WHITTIER L. REV. 763, 803 (1992) (criticizing the Supreme Court's capital punishment jurisprudence by stating that the Court has not provided (1) consistent guidance regarding the limitation of a sentencer's discretion in considering mitigating evidence, and (2) which sentencing scheme is constitutionally proper).

127. *See* Rodriguez v. State, 899 S.W.2d 658, 668 (Tex. Crim. App. 1995) (en banc) (holding that an instruction under Section 8.04 was not required due to the lack of evidence of voluntary intoxication); Cordova v. State, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987) (en banc) (recognizing that a court must provide an instruction on voluntary intoxication as a mitigating circumstance during the punishment phase only if the defendant establishes that incapacitating substances caused temporary insanity).

128. *See Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. App. 1991) (en banc) (stating that the Section 8.04 instruction allows consideration of evidence of voluntary intoxication only if the defendant is temporarily insane); Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc) (stating the requirement that the defendant be temporarily insane during the crime to allow consideration of whether the defendant's drug use was mitigating evidence); *see also* Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (holding that the jury must be able to consider relevant mitigating evidence).

dence instruction of Article 37.071, even though Article 37.071 tells the jury to consider "all" of the evidence in their deliberations.[129]

1. Texas Cases: Section 8.04(b) Instruction Limits Consideration of Defendant's Evidence

A defendant who requests an instruction under Section 8.04(b) seeks mitigation of the penalty attached to his capital crime.[130] That is, although voluntary intoxication will not serve as a defense to his crime, Section 8.04(a) enables a capital defendant to receive a sentence of life imprisonment if during punishment phase he introduces sufficient mitigating evidence such as evidence of voluntary intoxication allowed under Section 8.04(b).[131]

As a threshold matter, the trial court must first determine whether the defendant has introduced sufficient evidence of temporary insanity caused by voluntary intoxication at the time he committed the crime to merit an instruction under Section 8.04(b).[132] In the absence of such evidence, a defendant is not entitled to a Section 8.04(b) instruction during

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129. *Compare* TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994) (requiring temporary insanity caused by voluntary intoxication in order to consider intoxication as mitigating), *with* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)–(g) (Vernon Supp. 1998) (inviting the jury to consider all of the evidence regarding mitigation).

130. *See* Williams v. State, 937 S.W.2d 479, 488 (Tex. Crim. App. 1996) (refusing to allow an instruction on "voluntary intoxication as a mitigating" factor during the sentencing phase of a trial); Cordova v. State, 733 S.W.2d 175, 190 (Tex. Crim. App. 1987)(en banc) (noting that the defendant requested an instruction on "voluntary intoxication as a mitigating factor").

131. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)–(g) (Vernon Supp. 1998) (allowing for consideration of mitigating circumstances to determine if a lesser sentence should be imposed); TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994) (allowing for temporary insanity caused by voluntary intoxication to be considered as a mitigating circumstance).

132. *See* Rodriguez v. State, 899 S.W.2d 658, 668 (Tex. Crim. App. 1995) (en banc) (holding that because there was no evidence of intoxication in the record, no instruction under Section 8.04 was required); Banda v. State, 890 S.W.2d 42, 64 (Tex. Crim. App. 1994) (en banc) (holding that because the defendant failed to produce at trial only evidence of temporary insanity caused by voluntary intoxication, a Section 8.04 instruction was not required); Miniel v. State, 831 S.W.2d 310, 320 (Tex. Crim. App. 1992) (holding that evidence of possible intoxication does not "automatically entitle" a defendant to an instruction under Section 8.04(b) during the punishment phase); *Cordova*, 733 S.W.2d at 190 (holding that although there was evidence of defendant's intoxication at the time of the murder, there was no evidence in the record of temporary insanity; therefore, no instruction under Section 8.04(b) was required); Sawyers v. State, 724 S.W.2d 24, 33 (Tex. Crim. App. 1986) (holding that since Sawyers did not provide testimony as to whether he was temporarily insane, or intoxicated for that matter, at the time of the murder, no instruction under Section 8.04(b) was required), *overruled on other grounds by* Watson v. State, 762 S.W.2d 591, 599 (Tex. Crim. App. 1988).

the punishment phase, even if the trial court instructed the jury under Section 8.04(a) during the guilt-innocence phase.[133] Once the trial court determines that there is sufficient evidence to warrant a Section 8.04(b) instruction, the issue becomes whether such an instruction unconstitutionally limits the jury's consideration of such mitigating evidence.

The Texas Court of Criminal Appeals has long acknowledged that a defendant triggers Section 8.04(b) only by showing evidence of temporary insanity caused by voluntary intoxication. In *Cordova v. State*,[134] the court stated that voluntary intoxication "may become mitigating evidence to the penalty attached to the offense for which the defendant is being tried" only if such intoxication caused temporary insanity, thus ignoring lesser degrees of intoxication.[135] Recently, in *Cantu v. State*,[136] the de-

133. *See* Williams v. State, 937 S.W.2d 479, 489–90 & 490 n.10 (Tex. Crim. App. 1996) (stating that while not required by the Eighth Amendment, an instruction on voluntary intoxication under Section 8.04(b) depends on whether it is "raised by the evidence" (citing San Miguel v. State, 864 S.W.2d 493, 495–96 (Tex. Crim. App. 1993))). The *Williams* court held that there is no affirmative constitutional requirement for such an instruction. *See id.* at 489 (maintaining that Constitution "does not require an instruction concerning voluntary intoxication as it might relate to mitigation of punishment").

134. 733 S.W.2d 175 (Tex. Crim. App. 1987) (en banc).

135. *Cordova*, 733 S.W.2d at 189. Likewise, in *Ex parte* Rogers, the Texas Court of Criminal Appeals held that an instruction under Section 8.04 does not permit the jury to give mitigating effect to the defendant's evidence of intoxication unless the defendant was temporarily insane at the time of the crime. *See Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. App. 1991) (en banc) (stating that an instruction under Section 8.04 "does not even purport to empower the jury to give mitigating effect to evidence of voluntary intoxication that does not rise to the level of temporary insanity;" noting that a juror who found an intoxicated defendant less morally culpable would be unable to give effect to that belief).

Similarly, in *Tucker v. State*, the Court of Criminal Appeals acknowledged that an instruction under Section 8.04(b) "impermissibly limited the mitigating significance the jury could have given it." Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc). The *Tucker* court also recognized that because the death penalty is different from any other sentence, the sentence imposed must be reliable. *See id.* (noting that the death penalty requires greater reliability than other methods of sentencing, particularly in how the decision to impose the penalty is reached (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)). The *Tucker* court also reaffirmed the requirement that a death penalty statute not inhibit 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" of the penalty. *See Tucker*, 771 S.W.2d at 534 (stating that a statute which prevents the sentencer from giving independent mitigating weight would create a risk that the death penalty might be imposed despite factors calling for a less severe penalty (citing *Lockett*, 438 U.S. at 604)). However, despite its misgivings with the Section 8.04(b) instruction, the Texas Court of Criminal Appeals overruled Tucker's challenge to the instruction on procedural grounds. *See Tucker*, 771 S.W.2d at 534 (holding that since Tucker's instruction on voluntary intoxication was submitted to the jury exactly in the manner she had requested, she could not complain on appeal); *see also* Matchett v. State, 941 S.W.2d 922, 938 (Tex. Crim. App. 1996) (en banc) (noting that the court instructed the jury pursuant to Section

fendant contended that the application of the instructions under Section 8.04(b) and Article 37.071 precluded the jury from giving mitigating effect to his evidence of intoxication, thus violating the requirements of *Eddings* and *Lockett*.[137] The Court of Criminal Appeals disagreed, and held that the mitigation instruction under Article 37.071 provided the jury with a means "to consider and give effect to evidence . . . of intoxication" not rising "to the level of temporary insanity."[138] The *Cantu* court reached this conclusion not on its construction and application of Section 8.04(b) but as a result of the function of the special issue in Article 37.071, which instructs the jury to consider "all" of the evidence in its sentencing deliberations.[139] Although the Texas Court of Criminal Appeals acknowledges the limiting nature of Section 8.04(b), it views Article 37.071 as curative.[140]

2. Fifth Circuit Cases: A Difference in Opinion from the Texas Court of Criminal Appeals

The Fifth Circuit has also addressed the issue of whether Section 8.04 requires the jury to consider only evidence of insane intoxication. Prior to 1996, in *Volanty v. Lynaugh*,[141] the Fifth Circuit noted that Texas Courts have interpreted Section 8.04(b) to require defendants to present evidence of temporary insanity rather than simply introducing evidence

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8.04 at the appellant's request and without his objection; therefore, the assumption is that the appellant was satisfied with the instruction at trial), *cert. denied*, 117 S. Ct. 2487 (1997).

136. 939 S.W.2d 627 (Tex. Crim. App. 1997) (en banc), *cert. denied*, No. 96-8868, 1997 WL 251228, at *1 (U.S. Dec. 1, 1997).

137. *See Cantu*, 939 S.W.2d at 647–48.

138. *See id.* at 647 (overruling Cantu's point of error because any deficiency caused by the Section 8.04 instruction was cured).

139. *See id.* at 648 (holding that because the mitigation instruction calls the jury's attention to "all" of the evidence, "no egregious harm . . . can be established"). Recall, however, that the trial court in *Penry v. Lynaugh* also instructed the jury that it could consider "all the evidence submitted in both the guilt-innocence phase and the penalty phase of the trial in answering the special issues." Penry v. Lynaugh, 492 U.S. 302, 311 (1989). Yet, the Supreme Court vacated Penry's death sentence and remanded his case for resentencing because the jury could not "consider and give effect" to Penry's mitigating evidence. *Penry*, 492 U.S. at 327–28.

140. *See Cantu*, 939 S.W.2d at 647 (stating that an Article 37.701 instruction cured any deficiency of a Section 8.04 instruction). The Court's use of "impermissible" to describe Section 8.04's limitation in *Tucker*, but subsequent lack of condemnation of such limitation in *Rogers*, *Cordova*, or *Cantu*, also suggests that the Court of Criminal Appeals no longer views Section 8.04's limitation as problematic. *See* Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc) (stating that "[t]his limitation impermissibly limited the mitigating significance the jury could have given it").

141. 847 F.2d 243 (5th Cir. 1989).

of intoxication.[142] In 1996, the Fifth Circuit addressed the issue twice and on both occasions departed from its own precedent, which created a split with the Texas Court of Criminal Appeals over whether Section 8.04 limited the jury's consideration to insane intoxication.[143]

The Fifth Circuit's first departure occurred in *Drinkard v. Johnson*.[144] Eight years after receiving a death sentence for his role in a 1985 triple murder, Richard Gerry Drinkard sought habeas relief from the United States Court of Appeals for the Fifth Circuit.[145] The limiting effect of the

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142. *See* Nethery v. Collins, 993 F.2d 1154, 1164–65 (5th Cir. 1993) (King, J., dissenting) (discussing the Texas Court of Criminal Appeals' interpretation of Section 8.04 to mean that "Nethery's evidence of intoxication *could not be considered at all—including under the special issues*—unless Nethery was so intoxicated that he was rendered temporarily insane"); *Volanty*, 874 F.2d at 244 (requiring more than mere evidence of intoxication in order to trigger a Section 8.04(b) instruction).

143. *Compare* Lauti v. Johnson, 102 F.3d 166, 167, 169 (5th Cir. 1996) (holding that a Section 8.04 instruction allowed the jury to consider intoxication not resulting in temporary insanity), *cert. denied*, 117 S. Ct. 2525 (1997), *and* Drinkard v. Johnson, 97 F.3d 751, 754 (5th Cir. 1996) (stating that a reasonable likelihood existed that the jury considered evidence of Drinkard's voluntary intoxication in answering Article 37.071 special issues), *cert. denied*, 117 S. Ct. 1114 (1997), *with Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. App. 1991) (en banc) (stating that an instruction under Section 8.04 limits the jury's consideration of the mitigating effect of intoxication to a level causing the defendant's temporary insanity), *and Tucker*, 771 S.W.2d at 533 (finding that a Section 8.04 instruction required the jury to find the defendant temporarily insane before considering whether drug use was mitigating evidence).

144. 97 F.3d 751 (5th Cir. 1996).

145. *See Drinkard*, 97 F.3d at 755. Although he did not raise the issue of the limiting effects of the Section 8.04(b) voluntary intoxication instruction on direct appeal, Drinkard challenged the Section 8.04 instruction during his federal habeas proceedings before both the federal district court and the Fifth Circuit. *See id.* at 754. Although the central issue of his habeas petition before the Fifth Circuit in 1996 was the instruction of voluntary intoxication, Drinkard also objected to the applicability of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. *See id.* For a discussion of the AEDPA, see Marshall J. Hartmann & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997). The *Drinkard* court's discussion of the AEDPA is beyond the scope of this comment.

On Drinkard's direct appeal to the Texas Court of Criminal Appeals in 1989, he argued three points of error concerning the voir dire phase of his trial. *See* Drinkard v. State, 776 S.W.2d 181, 182 (Tex. Crim. App. 1989). Drinkard did not submit a petition for writ of certiorari to the Supreme Court after the Texas court affirmed his conviction in 1989. *See Drinkard*, 97 F.3d at 755. After the Texas Court of Criminal Appeals denied Drinkard habeas relief, he sought federal habeas relief and obtained a stay of execution from a federal district court in 1994. *See id.*; *Killer Given Reprieve from Execution*, DALLAS MORNING NEWS, Jan. 11, 1994, at 21A (reporting that Drinkard received a stay from the federal district court). The district court ultimately denied Drinkard habeas relief and vacated his stay. *See Drinkard*, 97 F.3d at 755. After the Fifth Circuit affirmed the denial of habeas relief and vacated his stay of execution in 1996, Drinkard unsuccessfully petitioned the

jury instruction given under Section 8.04(b) and its conflict with the general instruction to consider "all the evidence," were integral parts of Drinkard's challenge.[146] After advising the jury that it "may take into consideration all of the evidence submitted" in consideration of the special issues, the trial judge gave the following instruction over Drinkard's objection:

> Evidence of temporary insanity caused by intoxication may be introduced by the defendant in mitigation of the penalty attached to the offense for which he is being tried .... Therefore, if you find that the defendant at the time of the commission of the offense for which he is on trial was temporarily insane as a result of intoxication, then *you may take such condition* into consideration in mitigation of penalty attached for the offense for which the defendant is being tried.[147]

In his habeas petition, Drinkard argued that this instruction violated the Eighth Amendment's requirement of individualized sentencing by preventing the jury from giving consideration to lesser degrees of intoxication that might serve to mitigate his sentence.[148] The *Drinkard* majority held that the special instruction under Section 8.04(b), standing alone, was constitutional because there was not a "reasonable likelihood" that this instruction placed mitigating evidence of noninsane intoxication be-

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Supreme Court for writ of certiorari. *See* Drinkard v. Johnson, 117 S. Ct. 1114 (1997). Texas ultimately executed Richard Drinkard by lethal injection on May 19, 1997. *See Around the Nation*, CHI. DAILY L. BULL., May 20, 1997, at 3.

146. *Drinkard*, 97 F.3d at 756 (noting Drinkard's first argument relating to a voluntary intoxication instruction).

147. *Id.* at 755 (emphasis added). The trial court provided this instruction in accordance with Section 8.04 of the Texas Penal Code. *See Drinkard*, 97 F.3d at 755 n.3.

148. *See id.* at 756 (recalling that *Lockett v. Ohio* declared an Ohio death penalty scheme unconstitutional because it improperly limited the jury declared consideration of mitigating evidence). However, when a jury harbors improper biases regarding the consideration of mitigating circumstances, the Sixth Amendment right to an impartial jury is also implicated. *See* Marshall Dayan et al., *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOY. L.A. L. REV. 151, 177–78 (1989) (discussing voir dire as a means for ensuring the defendant's right to an impartial jury that will be able to consider the defendant's mitigating evidence).

The Supreme Court has established the following standard for determining whether a challenged jury instruction in a capital case is unconstitutional: "[w]hether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Drinkard*, 97 F.3d at 757 (citing Boyde v. California, 494 U.S. 370, 380 (1990)). Because *Lockett* and *Eddings* constitutionally prohibit a court from excluding relevant mitigating evidence from the sentencer's consideration, the inquiry in *Drinkard* should be "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of any relevant mitigating evidence, including evidence of intoxication falling short of temporary insanity." *Id.* at 771 (Garza, J., dissenting).

yond the effective reach of the jury.[149] *Drinkard* is at odds with the Texas Court of Criminal Appeals' holding, which held in previous decisions that a Section 8.04(b) instruction required the jury to consider the defendant's intoxication *only if it reached the level of temporary insanity.*[150]

Likewise, in *Lauti v. Johnson*,[151] a 1996 Fifth Circuit case with almost identical facts to those in *Drinkard*, the panel held that the Texas instruction given under Section 8.04(b) was constitutional and did not limit consideration to insane intoxication.[152] Later, in *Narvaiz v. Johnson*,[153] a 1998 case with facts similar to *Drinkard* and *Lauti*, the Fifth Circuit panel refused to overrule the *Lauti* and *Drinkard* decisions.[154] However, in published cases in which the Texas Court of Criminal Appeals addressed the Section 8.04(b) instruction in capital trials since the Fifth Circuit ruling in *Drinkard*, the Texas Court of Criminal Appeals has not changed its position that a Section 8.04 instruction *requires a finding of temporary insanity brought on by intoxication.*[155]

Thus, the *Drinkard* and *Lauti* majority opinions ignore (1) Fifth Circuit precedent with regard to Section 8.04 (namely, *Volanty v. Lynaugh*); (2) Texas case law, which includes *Tucker v. State*, *Ex parte* Rogers, and *Cantu v. State*; and (3) the brief that the State of Texas filed in *Drinkard*, stating that Texas recognizes that instructions given to jurors under Section 8.04 *do not allow jurors to consider evidence of voluntary intoxication*

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149. *See* Drinkard v. Johnson, 97 F.3d 751, 758 (5th Cir. 1996).

150. *See Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. Ap. 1991) (en banc) (stating that an instruction under Section 8.04 does not allow the jury to consider evidence of voluntary intoxication as mitigating if it does not rise to the level of temporary insanity); *Tucker*, 771 S.W.2d at 534 (stating that a Section 8.04(b) instruction limits the jury to consider only the intoxication rising to the level of temporary insanity); Cordova v. State, 733 S.W.2d 175, 189 (Tex. Crim. App. 1987) (en banc) (stating that voluntary intoxication may be mitigating evidence only if such intoxication caused temporary insanity).

151. 102 F.3d 166 (5th Cir. 1996).

152. *See Lauti*, 102 F.3d at 167, 169 (holding that the instruction did not prevent the jury from considering Lauti's "benumbed state" as a mitigating circumstance even if not rising to the level of temporary insanity and concluding that all relevant mitigating evidence was within the jury's reach). As of this writing, *Lauti* and *Narvaiz* are the only published opinions which cite *Drinkard*'s holding on voluntary intoxication.

153. 134 F.3d 688 (5th Cir. 1998).

154. Narvaiz v. Johnson, 134 F.3d 688, 693–94 (5th Cir. 1998) (stating that *Drinkard* and *Lauti* are controlling in the Fifth Circuit and holding that the Article 37.071 instruction cured any Section 8.04 defect in the jury's instructions), *cert. denied*, 118 S. Ct. 2364.

155. *See* Williams v. State, 937 S.W.2d 479, 490 n.10 (Tex. Crim. App. 1996) (noting that "Texas law requires an instruction on voluntary intoxication as a mitigating factor in punishment if temporary insanity, caused by voluntary intoxication, is raised by the evidence"); *see also* Cantu v. State, 939 S.W.2d 627, 647–48 (Tex. Crim. App. 1997) (en banc) (holding that the defendant suffered no harm because of the mitigation instructions given under Article 37.071), *cert. denied*, No. 96-8868, 1997 WL 251228, at *1 (U.S. Dec. 1, 1997).

unless the defendant is rendered temporarily insane.[156] Consequently, *Drinkard*, *Lauti*, and Narvaiz represent a significant departure from the Texas Court of Criminal Appeals holdings with regard to the construction of Section 8.04(b). The split in interpretations as to the effect of the Section 8.04 instruction is important because such differences of judicial opinions suggest difficulties in interpreting jury instructions based on Section 8.04.[157] Moreover, in the absence of the Article 37.071 "curative" instruction, the Section 8.04 instruction may, in fact, limit the jury's ability to consider the defendant's evidence. The next question is whether the Article 37.071 instruction makes the Section 8.04 instruction constitutional.

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156. *See* Drinkard v. Johnson, 97 F.3d 751, 773 (5th Cir. 1996) (Garza, J., dissenting). The State's brief provided in pertinent part:

> Texas law permissibly limits the circumstances under which voluntary intoxication can be given mitigating effect *to those instances in which it renders the defendant unable to determine right from wrong or incapable of conforming his conduct to the law* . . . . By requiring that *voluntary intoxication result in temporary insanity* . . . Texas properly restricts the jury's considerations of mitigating evidence . . . .

Id. (emphasis added).

157. *Cf.* Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 18–19 (1996) (suggesting caution in drawing conclusions from legislation in the presence of different judicial opinions).

C. *Factors "Aggravating" the Jury's Consideration of Voluntary Intoxication as Mitigating Evidence*[158]

"However, we *assume* that the jury would follow the instruction *as given* . . . ."[159]

Both *Drinkard* and *Lauti*, as well as the Texas cases discussed earlier, rely upon the incorrect belief that, if there *were* a problem with the Section 8.04(b) instruction existed, then the mitigating evidence instruction under Article 37.071 to consider "all of the evidence" would cure any deficiency inherent in Section 8.04(b).[160] This is a bold assertion, how-

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158. *See* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 13 (discussing the legal and ordinary meanings of "aggravation"). In the title of this part, the word "aggravate" carries the colloquial meaning "exasperate." *Compare* THE CONCISE OXFORD DICTIONARY 18 (7th ed. 1988) (indicating that the colloquial meaning of aggravation is exasperation), *with* BLACK'S LAW DICTIONARY 65 (6th ed. 1990) (defining aggravation as "[a]ny circumstance attending the commission of a crime . . . which increases its guilt or enormity"). Many courts have decided that "mitigation" requires no definition in jury instructions because it is an ordinary word. *See* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 8 n.39 (detailing cases which have held that no definition of either "mitigating" or "aggravating" is necessary); *see also* United States v. Loving, 41 M.J. 213, 278 (1994) (holding that neither an explanation of the function of mitigating circumstances nor a definition of mitigation are constitutionally required), *aff'd* 517 U.S. 748 (1996); Pruett v. State, 697 S.W.2d, 872, 876 (Ark. 1985) (stating that the term "mitigation cannot be said to be vague and beyond the common understanding and experience of the ordinary juror"); People v. Lang, 782 P.2d 627, 657 (Cal. 1989) (concluding that mitigating is an ordinary word which does not require definition).

However, a jury instruction must communicate clearly to the jurors that "the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment." Spivey v. Zant, 661 F.2d 464, 471 n.8 (5th Cir. 1981). *But see* Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986) (acknowledging the *Spivey* requirement and reaffirming that "[t]he minimum constitutional requirement is that the jury instructions must guide and focus the jury's consideration of mitigating circumstances so that there is no reasonable possibility that the jury will fail to understand the meaning and function of mitigating circumstances"). Yet, the *Peek* Court opined in dicta that "the only sure way to attain the constitutional minimum is for the jury charge to explicitly define the *meaning and function* of mitigating circumstances." *Id.* (emphasis added). Although the Texas Code of Criminal Procedure does not define "aggravating circumstances," the statute requires trial courts to instruct jurors during the death penalty sentencing phase that they "shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(f)(4) (Vernon Supp. 1997).

159. Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (emphasis added).

160. *See, e.g.*, Drinkard v. Johnson, 97 F.3d 751, 760 (5th Cir. 1996) (stating that the jury likely considered evidence of lesser degrees of Drinkard's level of intoxication as a result of the Article 37.071 instruction), *cert. denied*, 117 S. Ct. 1114 (1997); Cantu v. State, 939 S.W.2d 627, 647–48 (Tex. Crim. App. 1997) (en banc) (holding that Article 37.071

ever, considering the challenges which the capital jury faces in considering mitigating evidence, the depth of problems inherent in the Section 8.04 instruction, and the inability of Article 37.071 to remedy these defects.

1. Problems with Mitigating Evidence Generally

"[M]any [jurors] began taking a stand on what the defendant's punishment should be *well before they were exposed to the statutory guidelines for making this decision.*"[161]

Mitigating circumstances offered by the defendant serve to convince the sentencer that, at the time he committed the crime the defendant suffered from an impaired or weakened ability to conform to the law compared to other persons normally placed.[162] There are many factors, aside from the trial evidence and the jury instructions, however, which affect the jury's verdict and their sentencing recommendation in a capital trial.[163]

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cured whatever defect existed in Section 8.04), *cert. denied*, 118 S. Ct. 557 (1997). Although the present version of Article 37.071 was not in effect during Drinkard's trial, this discussion is nonetheless relevant because the instruction to Drinkard's jury to consider "all of the evidence" is similar to the current version of Article 37.071, which instructs the jury likewise in the deliberation of the special issues. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(1) (Vernon Supp. 1998) (requiring the court to charge the jury that "it shall consider all evidence admitted"); *id.* § 2(e) (requiring the jury to answer the question based on its "taking into consideration all of the evidence"); Crane v. State, 786 S.W.2d 338, 354 (Tex. Crim. App. 1990) (en banc) (explaining that in capital cases, the jury is allowed to consider all evidence in answering special issues).

161. William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221 (1996) (emphasis added). Seventy-five percent of the jurors surveyed believed that the "judge's sentencing instructions to the jury . . . provided a framework for *the decision most jurors had already made.*" *Id.* at 222 (emphasis added); *see also* Robert C. Stacy II, State v. McCarver: *The Role of Jury Unanimity in Capital Sentencing*, 74 N.C. L. REV. 2061, 2080 (1996) (stating that the "majority of capital jurors have made up their minds regarding their sentencing decision before the sentencing phase of the trial even begins").

162. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 15 (1992) (explaining that mitigating evidence might show that the defendant's ability to conform to the law was impaired); *see also* BLACK'S LAW DICTIONARY 1002 (6th ed. 1990) (defining "mitigation" as "[a]lleviation, reduction, abatement or diminution of a penalty or punishment imposed by law"); *cf.* J. Thomas Sullivan, *Psychiatric Defenses in Arkansas Criminal Trials*, 48 ARK. L. REV. 439, 472 (1995) (stating that evidence of a defendant's impairment resulting from intoxication is statutorily recognized as mitigating evidence in capital sentencing proceedings). Here, the lay dictionary offers a compatible definition. *See* THE CONCISE OXFORD DICTIONARY 649 (7th ed. 1988) (defining "mitigate" as reducing the severity of punishment).

163. *See* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27–28, 40–41 (1988) (explaining the findings of jury interviews regarding which factors appear to influ-

As to the inquiry of whether the jury encounters difficulty in deliberating on the important matter of a defendant's mitigating circumstances, the short answer is yes. The first hurdle a juror encounters is comprehending the language which lawyers and judges use.[164] The jury's inability to understand their instructions highlights the jury's difficulty in addressing the defendant's mitigating evidence.[165] In a study of an actual

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ence jury results). Factors which influenced jurors to vote for death in the cases studied include: (1) presumptive, or mandatory, view of application of the death penalty in the care (a belief that the law favors the death penalty in cases in which the defendant is found guilty of first degree murder unless a reason could be found to vote for life); (2) demeanor of the defendant (juror impressions of the defendant, including "looking criminal"); (3) defense attorney's performance (poor performance by defendant's attorney may have adversely affected the sentencing outcome); (4) race; and (5) "fear of early release" (mistakenly believing that a Florida law, which actually confines a defendant for life, instead allows a release after serving only a few years in prison). *See id.* at 40–41; Michael Ross, *Is the Death Penalty Racist?*, 21 HUM. RTS. 32, 32 (1994) (asserting that in Georgia, race is the predominant factor in the jury's decision to impose the death penalty); *see also* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 431 (1990) (discussing a juror's educational level as an external factor which influences his comprehension of the jury instructions). *But see* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 391 (positing that jurors distance themselves from the sentencing decision in capital punishment trials "by relying on legal formalities").

164. *See* Walter W. Steele, Jr. & Elizabeth G. Thornberg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 100 (1988) (explaining that difficulty in writing and understanding jury instructions stems from the complexity of the law); *cf.* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1307–08 (1979) (explaining that juror confusion would decrease if courts presented instructions with clarity). *But see* Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 207 (1984) (showing skepticism of Charrow and Charrow's work because of the potential "folly" which may result from dramatically altering existing instructions).

165. *See* Walter W. Steele, Jr. & Elizabeth G. Thornberg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 109 (1988) (revealing that extensive empirical research indicates that "juror comprehension of their instructions is pitifully low"); *see also* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 791 (1995) (lamenting the weight of empirical evidence showing the inability or failure of juries to comprehend instructions from judges in the Seventh Circuit, and characterizing this inability as "polysyllabic mystification"). The Seventh Circuit made this characterization of the Illinois pattern instructions while at the same time stating that the courts have maintained an irrebuttable presumption that jurors comprehend and follow the instructions given them by the trial court. *See* Gacy v. Welborn, 994 F.2d 305, 312–14 (7th Cir. 1993) (stating that while such problems reduce the quality of justice, jury instructions, even though written in "legalese," are not unconstitutional). *But see* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986) (stating that there is no factual basis for lawyers' assertions that jurors can comprehend instructions).

jury venire in Cook County, Illinois, one juror stated, "The mitigating is against him, right? This is where I'm confused."[166] Another study reported that a juror stated during deliberations "'I still don't understand the difference between aggravating and mitigating,' and broke down in tears."[167] Beyond the problem of *understanding* the instructions lies the issue of *applying* the instructions.

The Cook County, Illinois, study revealed that one-half of the jurors did not understand that they were permitted to consider mitigating circumstances of the defendant's background, record, or crime as a basis for choosing a sentence less severe than death.[168] Another study, the Capital

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However, many commentators lament "the disparity in understanding between the lay person and those involved in the legal arena." Shelagh Kenney, Note, *Fifth Amendment—Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989, 1025 n.263 (1995); *see also* James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 665 (1995) (stating that juries which have been properly instructed properly by a judge may still render erroneous convictions); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 165 (1977) (noting that the language of members of the bar and bench may be foreign to a lay person serving as a juror); Robert L. Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456, 456 (1962) (bemoaning the fiction that a jury of laypeople can hear instructions and understand them when, in fact, lawyers and judges who crafted those instructions have spent years of study to achieve a level of understanding).

166. Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 19.

167. *Id.*

168. *See* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 793–95 (1995) (detailing the 1990 study by Professor Hans Zeisel who presented a randomly selected pool of actual jurors with evidence and instructions from a trial at which the defendant was sentenced to death). One instruction regarding the juror's consideration of mitigating circumstances was that "they may consider mitigating factors not mentioned by the court as reasons not to impose death." *Id.* at 793. *See generally* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 24–43 (explaining Professor Zeisel's survey, the use of his survey by James Free to obtain a writ of habeas corpus, the unsuccessful attempt by John Wayne Gacy to use the survey in his proceedings, and the ultimate reversal of Free's writ). Professor Zeisel's study on actual jurors refutes criticism that previous studies on mock jurors failed to measure the comprehension level of actual jurors. *See* Kimball R. Anderson & Bruce R. Braun, *The Legal Legacy of John Wayne Gacy: The Irrebuttable Presumption That Juries Understand and Follow Jury Instructions*, 78 MARQ. L. REV. 791, 793 (1995) (stating that although most juror studies use paid college students to measure juror comprehension of court instructions, results still indicate high levels of miscomprehension) (citing VALERIE P. HANS & NEIL VIDMER, JUDGING THE JURY 120–27 (1986)); *see also* Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10–12 (discussing research in the last two decades which has demonstrated, through the use of mock juries, including undergraduate psychology students, that jurors do not understand instructions given them).

Jury Project (CJP), involved randomly-selected jurors who participated in capital trials.[169] The CJP found jury misunderstanding in (1) how to make the sentencing decision, (2) which factors may be considered in the sentencing decision, and (3) the degree of concurrence required for aggravating and mitigating factors.[170]

The finding that jurors tended to improperly reject mitigating considerations during sentencing deliberations is particularly troubling. Some jurors also showed their inclination *against* mitigating circumstances by responding that they believed that they were required to assess a sentence of death if certain aggravating factors existed, regardless of whether mitigating circumstances also existed that otherwise favored a sentence less severe than death.[171] These biases, whether intentional or the result of misunderstanding, ultimately reduce the fairness of the sentencing hearing.[172]

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169. *See* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 220–21 (1996) (explaining the methodology of the Capital Jury Project); David A. Scheffel, Harris v. Alabama—*A Portrait of Deference to the States in Capital Punishment*, 19 THOMAS JEFFERSON L. REV. 39, 50 (1997) (acknowledging the findings of the Capital Jury Project); Scott Burgins, *Jurors Ignore, Misunderstand Instructions*, A.B.A. J., May 1995, at 30 (detailing the Capital Jury Project as the largest study of capital juries ever undertaken and discussing the results indicating juror bias). For a thorough background to, and discussion of, the Capital Jury Project, consult the 1995 symposium issue of the Indiana Law Journal, 70 IND. L.J. 1033–1270 (1995).

170. *See* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221 (1996) (detailing the results of the Capital Jury Project surveys of jurors in North and South Carolina); *see also* Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590, 2613 (1996) (explaining the difficulties which jurors face in understanding sentencing statutes); Eugene R. Sullivan & Akhil R. Amar, *Jury Reform in America—A Return to the Old Country*, 33 AM. CRIM. L. REV. 1141, 1143 (1996) (reporting that studies have revealed that juries may not understand their instructions); Marcia Coyle, *Death Juries Get It Wrong—Study: Survey Reports They Mishear Judges' Instructions*, NAT'L L.J., March 13, 1995, at A6 (detailing issues which juries misunderstand during the capital punishment sentencing phase).

171. *See* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221–22 (1996) (finding that forty percent of jurors responding to the survey wrongly believed that they were "required" to impose the death penalty). Such a requirement, even if actually codified by the state, would violate the dictates of *Woodson*. *See* Woodson v. North Carolina, 428 U.S. 280, 304, 305 (1976) (finding mandatory capital punishment unconstitutional because of the inherent inability to allow consideration of mitigating evidence).

172. *See* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 221 (1996) (explaining the effect of the failure to consider mitigating evidence); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1161, 1170 (1995) (noting the dire consequences resulting from a jury misunderstanding its instructions and explaining how jury instructions confuse the distinctions between aggravating and mitigating).

2. Problems with Section 8.04 and the Inability of Article 37.071 to Remedy Defects

Although the majority in *Drinkard* held that the challenged Section 8.04 instruction did not prevent the jury from considering noninsane intoxication,[173] two factors support the possibility that the jury may have interpreted the Section 8.04 instruction otherwise. The brief for the State of Texas, Texas case law, and pre-*Drinkard* Fifth Circuit case law, all state that a Section 8.04 instruction can only be interpreted one way by the jury: noninsane intoxication is out of the jury's reach.[174] The different interpretations of Section 8.04 by the highest criminal court in Texas and the judges of the Fifth Circuit strongly suggests that it may not be unusual for a jury instruction under Section 8.04 to produce different interpretations as well.[175]

For example, the language of the Section 8.04(b) instruction the trial court issued to the *Drinkard* jury has three possible interpretations. As to noninsane intoxication, the trial court instructed the jury, in part, that it "may take *such condition* into consideration in mitigation of penalty attached for the offense for which the defendant is being tried."[176] The words "such condition" may be read to refer to the condition of intoxication, temporary insanity, or temporary insanity as a result of intoxication.[177]

Although the Fifth Circuit and the Texas Court of Criminal Appeals claim that the general instruction to "consider all the evidence" remedied

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173. *See* Drinkard v. Johnson, 97 F.3d 751, 754 & n.2 (5th Cir. 1996) (stating that a reasonable likelihood exists that the jury considered evidence regarding the level of Drinkard's intoxication in answering Article 37.071 special issues).

174. *See id.* at 773 (Garza, J., dissenting) (detailing the Attorney General's brief which states that the Texas Court of Criminal Appeals has held that noninsane intoxication is out of the jury's reach); *see, e.g.*, Volanty v. Lynaugh, 874 F.2d 243, 244 (5th Cir. 1989) (requiring more than mere evidence of intoxication in order to trigger a Section 8.04(b) instruction); *Ex parte* Rogers, 819 S.W.2d 533, 537 (Tex. Crim. App. 1991) (en banc) (stating that the Section 8.04 instruction does not allow the jury to give mitigating effect to evidence of noninsane intoxication).

175. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1187 n.153 (1997) (noting "significant differences between judicial statutory interpretation and jury application of law given in jury instructions"); *cf.* Walter W. Steele, Jr. & Elizabeth G. Thornberg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 109 (1988) (asserting that solutions to jury confusion require coordinated effort by the judiciary and trial bar). With disagreement underlying the interpretation of the instructions by different members of the bench, such a coordinated effort between members of the bench *and* bar would appear to be exceptionally difficult.

176. *Drinkard*, 97 F.3d at 755 (emphasis added).

177. *See id.* at 772 (Garza, J., dissenting) (explaining the different possibilities for interpreting the phrase "such condition"); *see also id.* at 771 n.1 (explaining, after results of strict grammatical analysis, that "such condition" must refer to "intoxication").

any defect in the Section 8.04 instruction, such a remedy is impossible.[178] The Supreme Court held in *Hitchcock v. Dugger*[179] that when the trial court instructed jurors that they were permitted to consider one type of evidence, the judge was implicitly instructing the jury that they could not give consideration to another type of evidence.[180] Under this analysis, by informing a jury under Section 8.04(b) that it "may take such condition," presumably of temporary insanity caused by voluntary intoxication, "into consideration in mitigation," the trial court implicitly tells the jury not to consider noninsane intoxication, notwithstanding the general instruction to consider all the evidence.[181]

Furthermore, in *Francis v. Franklin*,[182] the Court held that an instruction in a jury charge that is otherwise constitutional will not remedy an unconstitutional instruction.[183] Because discerning how the jurors at the

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178. *See id.* at 774 (stating the majority's argument that the general instructions remedied the defects in Section 8.04); *cf.* Gary Joseph Vyneman, Note, *Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes*, 13 WHITTIER L. REV. 763, 785 n.206 (1992) (acknowledging the foreclosure of mitigating evidence in the presence of a conflicting instruction, in *Hitchcock v. Dugger*, notwithstanding statute to the contrary).

179. 481 U.S. 393 (1987).

180. *See Drinkard*, 97 F.3d at 773–74 (citing Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987)). In *Hitchcock*, the Supreme Court held that the statutory mitigating evidence which the trial court instructed the jury to consider caused the jury not to consider the defendant's evidence of other nonstatutory mitigating circumstances. *See Hitchcock*, 481 U.S. at 398–99 (stating that as a result, the proceedings "did not comport" with the requirements of *Eddings*, which held that the exclusion of mitigating evidence renders death sentence invalid); James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 752 n.75 (1987) (acknowledging the reversal of the defendant's death sentence in *Hitchcock* because the jury was not allowed to consider all of the defendant's evidence in the mitigation of the sentence).

181. *See* Drinkard v. Johnson, 97 F.3d 751, 773 (5th Cir. 1996) (explaining that an instruction telling the jury what it may consider necessarily implies what the jury may not consider; discussing the maxim "expressio unius est exclusio alterius"); *see also* BLACK'S LAW DICTIONARY 581 (6th ed. 1990) (defining "[e]xpressio unius est exclusio alterius" as "[a] maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another . . . . Under this maxim, if [a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded"). Any action or instruction reasonably likely to interfere with the jury's ability to consider the defendant's mitigating evidence is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause. *See* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 309 (1991).

182. 471 U.S. 307 (1985).

183. *See* Francis v. Franklin, 471 U.S. 307, 322 (1985) (explaining that contradictory language, although permissible in nature, is not sufficient to cure the "infirmity" of impermissible language). *Franklin* identified the test for determining whether the jury was confused by such instructions as what a reasonable juror "may well have thought" in trying to

trials of any of the capital defendants discussed in this Comment applied the conflicting instructions is impossible, the conclusion that the jury instructions did not conflict is tenuous.[184] An appellate court reviewing the trial court's instructions cannot know which of the incompatible instructions the jury observed in their sentencing deliberations.[185]

In addition, the future dangerousness issue of Article 37.071 does not serve as an adequate escape valve to the defects in Section 8.04. For example, the majority in *Drinkard* incorrectly assumed that even if an instruction under Section 8.04(b) was defective, the jury could have considered and given effect to Drinkard's evidence in the future dangerousness issue.[186] Stated differently, even if Section 8.04(b) conflicted with the Article 37.071 instruction to consider all the evidence, the *Drinkard* majority concluded that the future dangerousness special issue invited the jurors to consider Drinkard's intoxication, regardless of whether it caused him to be temporarily insane.

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resolve such conflicting instructions. *See id.* at 320–21. However, the Supreme Court later clarified this test by looking to the conclusion a juror was "reasonably likely" to reach. *See* Victor v. Nebraska, 511 U.S. 1, 6 (1994) (noting that the proper question is not whether the jury "could have" applied the instructions in an unconstitutional manner, but whether a "reasonable likelihood" existed "that the jury did so"); Estelle v. McGuire, 502 U.S. 62, 72 (1991) (inquiring "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution" (quoting Boyde v. California, 494 U.S. 370, 380 (1990))); Boyde v. California, 494 U.S. 370, 378–79 (1990) (concluding that the necessity exists to settle on one formulation for deciding whether juror confusion existed); James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 657 n.291 (1995) (describing one test for jury confusion as what a reasonable juror "may well have thought" (quoting *Francis*, 471 U.S. at 320–21)).

184. *See Drinkard*, 97 F.3d at 774–75 (Garza, J., dissenting) (noting the holding of another Fifth Circuit panel in a similar case involving voluntary intoxication as a mitigating circumstance: "Nonetheless, we cannot say with confidence how the jury put the instruction and the questions together" (quoting Rogers v. Scott, 70 F.3d 340, 344 (5th Cir. 1995))). *But see Drinkard*, 97 F.3d at 760 (stating that a reasonable likelihood exists that the jury considered evidence of lesser degrees of Drinkard's voluntary intoxication in answering Article 37.071 special issues); Lackey v. Scott, 28 F.3d 486, 489 (5th Cir. 1994) (maintaining that the Texas death penalty sentencing scheme does not prevent the jury from giving mitigating weight to the defendant's evidence of voluntary intoxication).

185. *See Franklin*, 471 U.S. at 322 (stating that the reviewing court has no ability to determine which instruction the jury used); *see also* Lewis v. Jeffers, 497 U.S. 764, 774 (1990) (calling for objective standards that give specific and detailed guidance to the sentencer which, in turn, make the process for imposing death rationally reviewable by higher courts).

186. *See* Drinkard v. Johnson, 97 F.3d 751, 763–64 (5th Cir. 1996) (stating that the manner in which the evidence was presented and in which the instructions were posed to the jury suggest a reasonable likelihood that the jury did not apply this evidence with respect to whether Drinkard would be a danger in the future).

Thus, because voluntary intoxication was a central issue at the guilt-innocence phase, as well as the sentencing phase of the *Drinkard* trial, the jury may have applied *all* evidence of intoxication prospectively to the future dangerousness issue.[187] The future dangerousness issue, however, does not withstand the limitations of the Section 8.04(b) instruction because the Section 8.04 instruction regarding voluntary intoxication is relevant and worthy of consideration only when it causes the defendant to be temporarily insane.[188] Therefore, the fact that the future dangerousness issue may prevent the jury from considering noninsane intoxication as mitigating is an important matter because a defendant's future dangerousness is the first question the jury considers under Article 37.071.[189]

In summary, defendants who raise evidence of voluntary intoxication and temporary insanity may be subject to instructions under Section 8.04(a) at the guilt-innocence phase, and Section 8.04(b) during sentencing. An instruction under Section 8.04(b) impermissibly limits the jury's consideration of what is constitutionally relevant mitigating evidence.[190] In order to be fair to the defendant during sentencing in a capital punishment trial, the jury must be able to consider and give effect to all relevant mitigating circumstances.[191] The court's presumption that the jury will follow the court's instructions entails an implied presumption that the

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187. *See Drinkard*, 97 F.3d at 775–77 (discussing that, under technical parsing of the voluntary intoxication instruction, it is possible that an instruction under Section 8.04 applies to the commission of crime only, thus allowing consideration of voluntary intoxication evidence unrestricted by Section 8.04 limitation with respect to the future dangerousness special issue). *But see* Boyde v. California, 494 U.S. 370, 380–81 (1990) (stating that "[j]urors do not sit in solitary isolation booths parsing instructions").

188. *See Drinkard*, 97 F.3d at 770, 777 (Garza, J., dissenting) (stating that the trial court's instructions could have foreclosed the jury from considering lesser degrees of intoxication with regard to the future dangerousness issue); *cf.* Penry v. Lynaugh, 492 U.S. 302, 323 (1989) (stating that "we cannot be sure that the jury" could consider and give effect to the defendant's mental retardation as mitigating evidence; rather, such evidence would be considered as aggravating under the future dangerousness special issue).

189. *See* TEX. CODE CRIM. PROC. ANN art. 37.071, § 2(b)(1) (Vernon Supp. 1998) (requiring the court to submit to the jury the issue of whether the defendant poses a continuing threat to society); *see also* Johnson v. Texas, 509 U.S. 350, 354–58 (1993) (discussing the question of future dangerousness submitted to the jury under Article 37.071).

190. *See Drinkard*, 97 F.3d at 758 n.10 (stating that intoxication "at the time of the murders is clearly constitutionally relevant"). Although attorneys for the State of Texas argued that evidence of intoxication not amounting to temporary insanity was not constitutionally relevant, the *Drinkard* majority conceded that such evidence is indeed relevant. *See id.* at 773 n.5.; *id.* at 758 n.10 (stating that such evidence is clearly relevant). Because evidence of noninsane intoxication is constitutionally relevant, and previous cases have held that the Section 8.04 instruction forecloses such constitutionally relevant evidence, the *Drinkard* majority should have reversed Drinkard's conviction.

191. *See* Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (holding that the trial court may not exclude relevant mitigating evidence from the jury's consideration); Lockett

jury understands the instructions and is applying them in its "black box" properly.[192] This presumption puts too much faith in the jury's ability to resolve the impossible instructions that Texas courts issue to them.

Repeated assurances that the Article 37.071 instruction "cures" any limiting nature of Section 8.04, and that noninsane intoxication is within the jury's reach, are misplaced. These assurances ignore the fact that juries face almost impossible odds in interpreting the court's instructions correctly. An instruction under Section 8.04 that is flawed, both on its face and when applied in conjunction with Article 37.071, is almost certainly doomed to cause jury confusion and could therefore, result in an erroneous verdict.

IV. Reforming Texas Penal Code Section 8.04

A. *Alternatives from Other Jurisdictions*

The Model Penal Code offers a solution to the issue of voluntary intoxication as a mitigating circumstance in capital punishment cases. Section 210.6(4)(g) allows voluntary intoxication as a mitigating factor when, "[a]t the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."[193] This requirement is less stringent than Texas' requirement that the voluntary intoxication cause temporary insanity.[194]

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v. Ohio, 438 U.S. 586, 604 (1978) (holding that the sentencer must "*not be precluded*" from being able to consider the defendant's mitigating evidence) (emphasis added).

192. *See* United States v. Walker, 861 F.2d 810, 813 (5th Cir. 1988) (explaining the importance of imparting this presumption in the jurors' minds in order to eliminate juror confusion, but acknowledging that jurors comprehend only half of the instructions issued to them); *cf.* William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 Judicature 220, 220 (1996) (opining "that knowing what comes out of the black box is no substitute for knowing what goes on inside the box").

193. Model Penal Code § 210.6(4)(g) (Proposed Official Draft 1962); *see* James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41, 115 n.311 (1996)(explaining that several jurisdictions, including New York, have adopted variations of Model Penal Code Section 210.6); Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 Emory L.J. 71, 83 n.55 (1982) (explaining that several states that permit the death penalty also follow the Model Penal Code example of allowing, among others, intoxication as a mitigating factor in sentencing).

194. *Compare* Model Penal Code § 210.6(4)(g) (Proposed Official Draft 1962) (stating that the capacity to appreciate wrongdoing must merely be impaired), *with* Tex. Pen. Code Ann. § 8.04(b) (Vernon 1994) (requiring evidence of temporary insanity). In order to claim insanity as a criminal defense, the Texas Penal Code requires that the defendant "*not know that his conduct was wrong* or was incapable of conforming his conduct to the requirements of the law." Tex. Pen. Code Ann. § 8.01 (Vernon 1994) (emphasis added).

Although the drafters of the Model Penal Code are silent on the issue, when Section 210.6(4)(g) is viewed in light of a similar statute from Louisiana, the Model Penal Code appears to allow consideration of degrees of intoxication that do not reach the level of temporary insanity.

The Louisiana Code of Criminal Procedure lists the following circumstance among its statutory mitigating factors: "[a]t the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."[195] In *State v. English*, the jury found the defendant guilty of capital murder after finding that the defendant could distinguish right from wrong, and was therefore not insane.[196] However, on appeal, the Supreme Court of Louisiana remanded the case for resentencing, finding that the trial court should not have instructed the jury to employ the "right from wrong" test during the sentencing phase as well.[197]

The Supreme Court of Louisiana held that the proper test during sentencing under the Louisiana statute was whether the defendant's ability to appreciate the wrongful nature of his conduct was merely impaired.[198]

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195. LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West 1997).

196. *See* State v. English, 367 So. 2d 815, 816, 818 (La. 1979) (stating that the defendant pled not guilty by reason of insanity and that the general charge in the innocence-guilt phase was that "an insane person is one who is incapable of distinguishing *between right and wrong*") (emphasis added); *see also* State v. Mitchell, 674 So. 2d 250, 256 (La. 1996) (recognizing the applicability of *English* in cases where the jury is instructed on insanity during trial).

197. *See English*, 367 So. 2d at 819 (finding that the defendant was not sentenced properly). The Court stated:

> The legislature . . . provided that, in the sentencing hearing, the jury may consider as a mitigating circumstance that . . . the capacity of the offender to appreciate the criminality of his conduct . . . [was] impaired . . . By permitting the jury to consider the mental condition of the offender as a mitigating circumstance—even though he was guilty, because his mental condition did not meet the right-wrong requirements of legal insanity, *it is obvious to us that the legislature intended to permit the jury to take into consideration, in deciding not to impose the death penalty, [a] . . . mental condition short of legal insanity*. It may be a . . . defect which diminishes the offender's capacity for self-control and for forming the specific and deliberate intention to cause the killing charged, or it might be such other mental disease or defect affecting the act as the jury *might feel was of a nature that indicated that the ultimate penalty of death should not be imposed.*

Id. at 819 (internal citations and footnote omitted) (emphasis added); *cf.* James A. George, Comment, *Criminal Law and Procedure—Partial Insanity Affecting the Degree of a Crime*, 22 LA. L. REV. 664, 666 (1962) (explaining the theory of partial insanity). The theory of partial insanity, or diminished capacity, is analogous of the *English* jury's consideration of impaired ability. *See English*, 367 So. 2d at 819 n.4.

198. *See English*, 367 So. 2d at 819 (stating that during the sentencing phase, another dimension of the defendant's mental condition needs to be examined, namely that as al-

Similarly, a 1996 Louisiana case agreed with the reasoning in English court that this mitigating factor under the Louisiana Criminal Code requires only impairment of the defendant's mental capacity.[199] This statutory listing of a defendant's impairment, brought about by voluntary intoxication, allows consideration of lesser degrees of intoxication not otherwise allowed under Texas Penal Code Section 8.04(b). As a result, both the Model Penal Code and the Louisiana Code of Criminal Procedure grant the sentencer the ability to consider noninsane degrees of intoxication. Allowing the sentencer to consider a broader scope of the defendant's mitigating evidence, in turn, comports with the requirements of *Lockett*, *Eddings*, and *Penry*, which require that the sentencer not be restricted in considering the defendant's mitigating evidence.[200]

Taking a slightly different approach from Louisiana, Illinois relies less on statutory provisions and allows the sentencer greater latitude. A 1992 Illinois case illustrates how a sentencer was able to give full consideration to the mitigating nature of a defendant's intoxication. In *People v. Leger*,[201] a jury convicted the defendant of capital murder and a judge sentenced him to death.[202] On automatic appeal, the Supreme Court of Illinois reviewed whether his death sentence was excessive, considering the mitigating evidence the defendant offered during the guilt-innocence and sentencing phases of the trial.[203] In addition to other mitigating factors, the defendant also offered evidence that, at the time of the murders,

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lowed under Article 905.5(e)); *see also* James J. Sticha, Note, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 MINN. L. REV. 1615, 1628 n.79 (1996) (noting the variety of mitigating factors which Louisiana juries may consider in death penalty cases under the Louisiana death penalty sentencing scheme).

199. *See* Ward v. Whitley, 21 F.3d 1355, 1364 (5th Cir. 1994) (stating that the "impairment of mental capacity due to intoxication was a statutory mitigating factor"); *cf.* Krista DeLargy & John P. Nolan, *Capital Punishment*, 84 GEO. L.J. 1326, 1342 n.2436 (1996) (explaining that even though the prosecutor encouraged the jury during closing arguments in *Ward v. Whitley* to disregard the law, no misconduct occurred).

200. *See* Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989) (requiring that the jury be permitted to "consider and give effect to" mitigating circumstances, by means not otherwise available in the sentencing scheme); Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (holding that the trial court may not exclude relevant mitigating evidence from jury's consideration); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (recognizing that the constitutional requirement exists that the sentencer in capital cases not be prevented from considering mitigating factors which may support life sentence over sentence of death).

201. 597 N.E.2d 586 (Ill. 1992).

202. *See* People v. Leger, 597 N.E.2d 586, 589 (Ill. 1992); David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1587 n.21 (1996) (noting that, in *Leger*, the Illinois Supreme Court employed a proportionality review to determine whether factors existed which warranted a sentence less than death).

203. *See Leger*, 597 N.E.2d at 610–13; *see also* David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of*

he was under a blackout caused by combining his medication with alcohol consumption.[204] Although aggravating factors were present, such as killing his victims while invading their home, the Supreme Court of Illinois also found that there were sufficient unique factors, in addition to the defendants intoxication, to reduce his sentence to life imprisonment.[205]

Similarly, lower courts in Illinois have recognized that a defendant's voluntary intoxication, when viewed alone, is normally insufficient to favor charging the defendant with a *lesser crime*.[206] These holdings are consistent with the Illinois Criminal Code, which recognizes that voluntary intoxication may serve as a *defense* to a crime only under extreme circumstances.[207] Although the Illinois Criminal Code does not enumerate voluntary intoxication as a mitigating factor, the Code does not re-

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Its Prevention, Detection, and Correction, 51 WASH. & LEE L. REV. 359, 418 (1994) (detailing previous cases examined under a proportionality review).

204. *See Leger*, 597 N.E.2d at 592–93 (explaining Leger's medication and alcohol consumption prior to murders). Leger also offered the following mitigating evidence: he enjoyed good relations with other people in the community, he did not display any violent tendencies, and he had a positive military service record. *See id.* at 612; People v. Smith, 685 N.E.2d 880, 900–01 (Ill. 1997) (vacating death sentence and recalling previous instances, such as that in *Leger*, where "such an extreme penalty was found to be inappropriate, in light of any relevant mitigating factors").

205. *See Leger*, 597 N.E.2d at 592–93 (discussing the facts of the case which led the court to reduce the sentence to a term of natural life imprisonment); Susan Skiles, *Criminal Law & Procedure—Death Sentence*, CHI. DAILY L. BULL., Aug. 7, 1992, at 1 (noting that although the court affirmed Leger's conviction, it held that the death penalty was excessive in light of Leger's lack of significant criminal history, his emotional, marital, and drinking problems, as well as his need to take medication for injuries); *see also* People v. Smith, 685 N.E.2d at 900 (approving the court's review and vacation on death penalty if punishment is found to be extreme in light of mitigating factors (citing People v. Leger, 597 N.E.2d 586, 589 (Ill. 1992))).

206. *See* People v. Dare, 488 N.E.2d 1304, 1307 (Ill. App. Ct. 1986) (acknowledging that voluntary intoxication alone is insufficient as a mitigating factor to reduce the crime of murder to manslaughter); People v. Smith, 464 N.E.2d 824, 827 (Ill. App. Ct. 1984) (stating that "voluntary intoxication . . . in and of itself, is an insufficient mitigating factor to reduce the crime of murder to voluntary manslaughter"). In fact, at least one lower court in Illinois has held that, in order for voluntary intoxication, by itself, to serve as a mitigating circumstance, the intoxicating effect on the defendant must be severe. *See* United States *ex rel.* Williams v. Washington, 913 F. Supp. 1156, 1161–62 (N.D. Ill. 1995) (stating that voluntary intoxication, by itself, will not reduce the crime of murder to manslaughter); People v. Crosby, 614 N.E.2d 199, 201 (Ill. App. Ct. 1993) (stating that voluntary intoxication will mitigate the conduct charged if "the intoxication is so extreme as to suspend the power of reason").

207. 720 ILL. COMP. STAT. ANN. 5/6–3 (West 1997). With respect to a defendant's intoxicated or drugged condition, the Illinois statute provides that:

> [a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either :
>
> (a) Is so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense; or

strict consideration of voluntary intoxication to cases of temporary insanity.[208] Nonetheless, as *Leger* shows, voluntary intoxication may be a mitigating circumstance in reducing the defendant's penalty.[209]

These different approaches to voluntary intoxication as a mitigating circumstance allow the sentencer unfettered ability to consider evidence relevant to the mitigation of a potential death sentence. None of the approaches laud the defendant's intoxication. Rather, these examples recognize the sentencer's right to consider evidence of a defendant's intoxication as a mitigating factor in rendering a sentencing decision, enabling the sentencer to punish the defendant in proportion to his culpability.[210]

(b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Id.; *see* Timothy P. O'Neill, *Illinois' Latest Version of the Defense of Voluntary Intoxication: Is It Wise? Is It Constitutional?*, 39 DEPAUL L. REV. 15, 17 (1989) (discussing the Illinois provisions for defendants introducing evidence of intoxication).

208. *See* 720 ILL. COMP. STAT. ANN. 5/9-1(c) (West 1997) (providing a non-exhaustive list, which does not include voluntary intoxication, of possible mitigating factors for use in death penalty sentencing); 720 ILL. COMP. STAT. ANN. 5/6-3 (West 1997) (discussing voluntary intoxication as defense only). The Illinois death penalty statute provides for a separate sentencing hearing, at which time the judge or jury considers the presence and weight of the factors that might mitigate against or militate in favor of the death penalty. *See* 720 ILL. COMP. STAT. ANN. 5/9-1 (West 1997) (detailing the Illinois death penalty sentencing scheme); Patricia Hartmann, *Factors in Aggravation and Mitigation: A Trap for the Sentencing Judge?*, 33 DEPAUL L. REV. 357, 357–59 (1984) (detailing potential problems of mitigating and aggravating factors for the sentencer).

209. *See* People v. Leger, 597 N.E.2d 586, 611–12 (Ill. 1992) (finding the defendant's overall mitigating circumstances favored life imprisonment and failing to conclude that drug or alcohol intoxication was severe enough to carry the weight of mitigation alone as an individual mitigating factor). The Fifth Circuit reached a similar conclusion almost fifty years ago. *See* Kemp v. Government of Canal Zone, 167 F.2d 938, 942 (5th Cir. 1948) (remanding Kemp's case for a sentence of life imprisonment after finding that evidence of Kemp's role in the murder was circumstantial, that Kemp had been drinking heavily, and that no motive existed); Chad J. Layton, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 536 n.5 (1997) (explaining that *Kemp* is an example of mitigating evidence resulting in a lesser sentence rather than an acquittal).

210. *See* Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (stating the requirement of individualized sentencing in capital trials, and that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant"); Vanessa L. Bellino, Note & Comment, *Is the Power to Be Lenient Also the Power to Discriminate?—An Analysis of Justice Blackmun's Evolving Perspective on Jury Discretion in Capital Sentencing*, 5 TEMP. POL. & CIV. RTS. L. REV. 75, 90 (1995) (discussing *Penry* requirement of individualized sentencing).

B. *A Proposal for Reform*

"Most jurors are not well-versed in the law, and . . . jury instructions [should] improve juror comprehension, to further the goal of a fair trial."[211]

In order to ensure that the jury considers and gives effect to all the constitutionally relevant mitigating evidence, the jury must understand their instructions. Therefore, an important goal behind reshaping Section 8.04 is to ensure that the jury instructions that arise under the statute are understandable.[212] Thus, changes to Section 8.04 should be geared toward helping jurors understand that they may consider and give effect to all evidence of defendant's intoxication.[213] These changes are especially necessary in light of Texas' "directed statute" scheme, which focuses jurors away from mitigating evidence not related to the special issues.[214]

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211. Shelagh Kenney, Note, *Fifth Amendment—Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989, 1026 (1995); *see* William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 290 (acknowledging an abundance of evidence that jurors do not understand their instructions, which frequently are "vague and incomprehensible"); *see also* Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 876 (1995) (stating that even when instructions are revised, jurors are likely to understand only eighty percent, or less, of the law); *cf.* Victor v. Nebraska, 511 U.S. 1, 25 (1994) (Ginsburg, J., concurring) (stating that jury understanding is "scarcely advanced" when juries are given instructions "with uninstructive circularity").

212. *See* Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1085–86 (1991) (calling for greater attention in the penalty phase instructions); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 355 n.101 (1995) (explaining that a sentencing statute, in order to be constitutionally acceptable, must provide specific guidance to the sentencer).

213. *See* Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (holding that the trial court may not exclude relevant mitigating evidence from the jury's consideration); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that there is a constitutional requirement that the sentencer in almost all capital cases "*not be precluded*" from being able to consider mitigating circumstances) (emphasis added); *see also* Skipper v. South Carolina, 476 U.S. 1, 4–8 (1986) (holding that evidence of the defendant's background and character is relevant if it might cause the jury to impose a sentence less than death even if it is not related directly to crime for which defendant is charged).

214. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1075–76 (1995) (alleging that directed sentencing statutes such as those in Texas and Oregon discourage presentation and consideration of mitigating evidence by jurors); Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES, Summer 1994, at 165–66 (lamenting the Oregon statute which forced jurors to adhere strictly to criteria without considering mitigating circumstances or testimony which might have favored a life sentence).

Amending Section 8.04 to help the jury consider a broader range of evidence would ensure that the jury's sentencing decision directly reflects the defendant's culpability.[215] The statute can facilitate such an understanding if it allows the jury to consider all degrees of intoxication, including degrees of intoxication not reaching the level of temporary insanity. Therefore, the Texas Legislature should amend Section 8.04 of the Texas Penal Code to read as follows:

Section 8.04: Intoxication

(a) Voluntary intoxication does not constitute a defense to the commission of crime.[216]

(b) When evidence exists *of the defendant's impaired ability to appreciate the wrongful nature of his conduct as a result of intoxication*, the court shall instruct the jury that the jury may consider this evidence as a factor which reduces the severity of defendant's punishment. The court will make this instruction to the jury so long as three conditions exist:

(i) either the prosecution or the defendant introduces evidence of defendant's intoxication during the trial;

(ii) the defendant introduces evidence during the trial that the intoxication, mentioned in (i), impaired his ability to appreciate the wrongful nature of his conduct; *and*

(iii) the defendant introduces evidence that his ability to appreciate the wrongful nature of his conduct, mentioned in (ii), occurred at the time he committed the crime.

(c) for the purposes of this section:

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215. *See* Chanse McLeod, Comment, *Walking a Constitutional Tightrope: Discretion Guidance and the Texas Capital Sentencing Scheme*, 28 HOUS. L. REV. 663, 705 (1991) (asserting that a capital sentencing statute should allow sentencers the discretion to grant mercy while focusing their attention on the defendant's individual considerations); *cf.* Delo v. Lashley, 507 U.S. 272, 275 (1993) (per curiam) (reaffirming the proposition that the sentencer must be given an opportunity to consider in mitigation aspects of the defendant's background, record, or character, as well as circumstances of crime as basis for a sentence other than death).

216. TEX. PEN. CODE ANN. § 8.04(a) (Vernon 1994). *But see* Kevin Nash, Comment, *Section 8.04 of the Texas Penal Code: A Wild Card for Mens Rea or Fair Game for a Constitutional Trump*, 24 HOUS. L. REV. 281, 308–09 (1987) (advocating a change which would pattern Section 8.04 after the Model Penal Code, thus allowing voluntary intoxication to negate mens rea of a crime, but only so far as such intoxication would reflect a reckless mental state); MODEL PENAL CODE § 2.08 (Proposed Official Draft 1962) (stating that intoxication of the actor is not a defense unless it negatives an element of the offense; but when recklessness is an element of the offense, unawareness of risk due to self-induced intoxication is immaterial). The important changes that Mr. Nash proposes are beyond the scope of this Comment. Thus, for simplicity, the changes proposed in this Comment address the proper consideration of voluntary intoxication as mitigating evidence.

(i) "intoxication" occurs when an individual does not have the normal use of his physical or mental abilities as a result of introducing any substance into his body;[217]
(ii) "during the trial" refers to either the guilt-innocence phase, or the sentencing phase.

This proposed statute is slightly longer than the current version of Section 8.04. However, this statute is an improvement over the current statute for two reasons. First, jury instructions based on the proposed statute will allow the sentencer to consider a broader range of constitutionally relevant mitigating evidence in assessing punishment. This expansion will ensure that the defendant is punished in proportion to his culpability.[218]

Second, the proposed statute is clearer than the current Section 8.04. The proposed statute is organized so that the jury can understand each component of the evidence in relation to other components.[219] In addition, the proposed statute omits the term "mitigation" in favor of the phrase "reduces the severity of" because reducing jargon helps promote

217. *See* TEX. PEN. CODE ANN. § 8.04(d) (Vernon 1994) (defining "intoxication" as meaning "disturbance of mental or physical capacity resulting from the introduction of any substance into the body"); BLACK'S LAW DICTIONARY 822 (6th ed. 1990) (defining "[i]ntoxication" as a "[t]erm [that] comprehends [a] situation where, by reason of taking intoxicants, an individual does not have the normal use of his physical or mental faculties"). This proposal is a hybrid of both definitions and emphasizes the intoxicated state without saying that such a state occurs as a result of "taking intoxicants."

218. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 35 (1997) (stating that "[t]he concept of culpability is used as a reference point to assess the defendant's guilt and punishment"); Van W. Ellis, Note, *Guilty but Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing*, 43 DUKE L.J. 87, 95 (1993) (stating that capital punishment is not applied to defendants who lack adequate culpability).

219. *See* Tavoulareas v. Piro, 817 F.2d 762, 808 (D.C. Cir. 1987) (calling for a "logically-ordered set of directions for consideration" by the jury in lieu of a "laundry list of law without discernible structure"); Amiram Elwork et al., *Juridic Decisions—In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 169 (1977) (recommending a logical organization of paragraphs in jury instructions and approving of hierarchical structure where "high-level concepts are broken down into their lower-level components and are then integrated").

jury understanding.[220] The proposed Section 8.04 also minimizes the use of the passive voice, which aids in comprehension.[221]

Furthermore, under the proposed Section 8.04, the statute requires the court to instruct the jury that it may consider as mitigating evidence "*the defendant's impaired ability to appreciate the wrongful nature of his conduct as a result of intoxication.*" This instruction reduces confusion about which evidence the jury will consider as mitigating—evidence of intoxication, evidence of impaired ability, or evidence of impaired ability, caused by intoxication. As a result, the proposed statute is less ambiguous than the current Section 8.04.[222]

This proposal is consistent with the retributive nature of the Texas death penalty.[223] Amending Section 8.04 would help promote the idea of punishing an individual in proportion to their culpability by allowing the jury to consider evidence of the defendant's lesser degrees of intoxica-

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220. *See* Winegeart v. State, 665 N.E.2d 893, 900 (Ind. 1996) (acknowledging that jury instructions become easier to understand when courts eliminate legal jargon); Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 532 (1986) (emphasizing the importance of replacing legal jargon with simple words in order to simplify instructions); Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1412–13 (1994) (bemoaning the failure to put jury instructions in "plain English"); David U. Strawn & Raymond W. Buchanan, 59 JUDICATURE 478, 482 (1976) (criticizing the use of jargon in jury instructions).

221. *See* William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 740 (1981) (confirming that passive forms are an obstacle to juror comprehension).

222. *See* TEX. PEN. CODE ANN. § 8.04(b) (Vernon 1994) (stating that "[e]vidence 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"); Boyde v. California, 494 U.S. 370, 380–81 (1990) (reminding that jury members "do not sit in solitary isolation booths parsing instructions for subtle shades of meaning" as lawyers do, rather, "[d]ifferences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting"); Drinkard v. Johnson, 97 F.3d 751, 772 (5th Cir. 1996) (Garza, J., dissenting) (suggesting that jury instruction based on Section 8.04 has different interpretations because of difficulty in telling which condition is to be considered as mitigating evidence), *cert. denied*, 117 S. Ct. 1114 (1997).

223. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (stating that one purpose of the death penalty is retribution); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (Vernon Supp. 1998) (allowing punishment in proportion to the level of mitigating evidence that exists for the crime); JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 35 (3d ed. 1996) (indicating that retribution punishes an individual according to his culpability, that is, for a retributivist, the level of punishment is in proportion to the actor's wrongdoing).

tion.[224] This proposal is also consistent with fairness because it clarifies the requirements for issuing an instruction under Section 8.04(b) to the jury.[225] Because the proposed statute merely requires the defendant to introduce evidence that his intoxication impaired his ability, the proposed statute allows the jury to decide whether the evidence establishes that the defendant actually was impaired. Under the current Section 8.04, the defendant may introduce evidence of intoxication in an attempt to mitigate his sentence, the court may still conclude that the evidence does not establish the defendant's temporary insanity and, therefore, refuse to issue an instruction on the mitigating effect of the defendant's intoxication.[226] However, under the proposed statute, if either party raises evidence at trial that comports with the requirements of the statute, the court *shall* issue an instruction to the jury.

V. CONCLUSION

Critics of Section 8.04(b) assert that Texas has virtually removed the role of voluntary intoxication as mitigation for sentencing purposes.[227] The Eighth Amendment requires that the court allow the defendant to

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224. *See* Tison v. Arizona, 481 U.S. 137, 171 (1987) (Brennan, J., dissenting) (explaining that differences in punishment are essential in order to maintain the relationship between liability and culpability); United States v. Cordoba-Hincapie, 825 F. Supp. 485, 488 (E.D.N.Y. 1993) (stating that because "blameworthiness hinges upon a culpable state of mind, defendants' punishments must be limited by their culpability").

225. *Compare* Williams v. State, 937 S.W.2d 479, 489–90 (Tex. Crim. App. 1996) (refusing to allow an instruction that voluntary intoxication may be mitigating at sentencing phase), *with* Tucker v. State, 771 S.W.2d 523, 534 (Tex. Crim. App. 1988) (en banc) (permitting an intoxication instruction).

226. *See Williams*, 937 S.W.2d at 489–90 (refusing to allow an instruction that voluntary intoxication may be mitigating at the sentencing phase even though the court provided an instruction that voluntary intoxication is not a defense to crime during the guilt-innocence phase); Rainey v. State, 949 S.W.2d 537, 543 (Tex. App.—Austin 1997, pet. filed) (stating that the "*court must submit an instruction on voluntary intoxication only* if the evidence tends to show the intoxication caused temporary insanity in the defendant") (emphasis added); White v. State, 866 S.W.2d 78, 85 (Tex. App.—Beaumont 1993, no pet.) (allowing trial court discretion in issuing an instruction under Section 8.04(b)).

227. *See* John Gibeaut, *Sobering Thoughts--Legislatures and Courts Increasingly Are Just Saying No to Intoxication As a Defense or Mitigating Factor*, A.B.A. J., May 1997, at 58 (noting that Texas defense lawyers "complain that [Texas] has practically eliminated the role of intoxication in mitigation for sentencing purposes"). One Texas capital defense lawyer stated that "[t]here have been people with serious intoxication claims who have been executed. Sadly, some of them have been my clients." *See id.* (quoting Professor Jeffrey J. Pokorak, St. Mary's University School of Law, San Antonio, Texas); *cf.* Robert J. McManus, Note, Montana v. Egelhoff: *Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245, 1288 (1997) (acknowledging critics' agreement that failure to consider any evidence of voluntary intoxication evidence is "too restrictive to prove rational").

present relevant mitigating evidence. Texas appears to comply with this mandate by allowing defendants to introduce evidence of their intoxication in mitigation of their sentences. However, Section 8.04(b) requires courts to instruct juries that they cannot consider or give effect to this evidence unless it rises to the level of temporary insanity. Yet, juries in capital cases must be allowed the opportunity to consider all mitigating evidence in their deliberations because of the harsh and permanent nature of the death sentence.

Article 37.071 is not curative of the limiting effects of Section 8.04(b); thus, the Texas intoxication statute unconstitutionally restricts the sentencer in a capital trial from considering relevant mitigating evidence. This restriction has the potential of resulting in erroneous verdicts and a deprivation of justice. The long-term fairness of the Texas death penalty scheme, therefore, necessarily depends upon reform.

The changes advocated in this Comment add additional margins of constitutional safety and fairness. Because the degree of juror comprehension of instructions is already low, the proposed changes to Section 8.04 strive to clarify how a jury may apply a capital defendant's mitigating evidence to reduce the harshness of his sentence. Rather than encouraging the use of intoxication as a means to obtain a lighter sentence, the proposed changes to Section 8.04 are designed to empower the sentencer, particularly in a capital trial, with wider discretion and the ability to exercise prudence in deciding the severity of punishment to impose.