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AN ANALYSIS OF ILLINOIS' NEW OFFENSE OF SECOND DEGREE MURDER

TIMOTHY P. O'NEILL*

On July 1, 1987, Public Act 84-1450 will become effective.¹ This law abolishes the offense of "voluntary manslaughter"² and replaces it with a system of degrees of murder. What used to be known as "murder"³ is now "first degree murder;"⁴ a new offense similar to voluntary manslaughter is "second degree murder."⁵ The sentencing limits for murder apply to "first degree murder;"⁶ likewise the Class One felony designation of voluntary manslaughter is retained for "second degree murder."⁷

The purpose of this article is to discuss why such a revision was necessary. Such a discussion must first begin with the changes wrought 25 years ago by the adoption of the Criminal Code of 1961.⁸

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1. This Act embodies Senate Bill 522, which was passed by the 84th General Assembly, as well as certain technical changes contained in Governor James Thompson's amendatory veto.

2. ILL. REV. STAT. ch. 38, ¶ 9-2 (1985).

3. ILL. REV. STAT. ch. 38, ¶ 9-1 (1985).

4. The text of ILL. REV. STAT. ch. 38, par. 9-1 (1985) remains unchanged; the name of the offense has been changed from "murder" to "first degree murder."

5. "Second degree murder" now occupies the section of the Code which used to define "voluntary manslaughter." ILL. REV. STAT. ch. 38, par. 9-2.

6. As with murder, when a defendant is found guilty of first degree murder the State may seek either a sentence of imprisonment or, where appropriate, a sentence of death. ILL. REV. STAT. ch. 38, ¶ 1005-5-3(c)(1). A sentence of death may be considered only when certain specified aggravating factors are present. ILL. REV. STAT. ch. 38, ¶ 9-1(b). Otherwise, the sentence for first degree murder is a term of imprisonment of not less than 20 nor more than 40 years, unless certain specified factors are present which would justify either an extended term (ILL. REV. STAT. ch. 38, ¶ 1005-8-2(a)(1)) or a sentence of natural life imprisonment. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(a)(1).

7. Thus, the sentencing range for second degree murder will be identical to that for voluntary manslaughter: not less than 4 years and not more than 15 years, unless an extended term is applicable. ILL. REV. STAT. ch. 38, ¶¶ 1005-8-1(a)(4), 1005-8-2(a)(3).

8. The Illinois Criminal Code of 1961 became effective on January 1, 1962.

ILLINOIS HOMICIDE LAW PRIOR TO THE CRIMINAL CODE OF 1961⁹

Prior to the enactment of the Criminal Code of 1961,¹⁰ Illinois homicide law strongly reflected common law.¹¹ Section 358 of the previous Criminal Code had defined murder as "the unlawful killing of a human being . . . *with malice aforethought*, either express or implied."¹² Manslaughter, on the other hand, was defined as "the unlawful killing of a human being *without malice*, express or implied, and without any mixture of deliberation whatever."¹³ Express malice was defined as "the deliberate intention unlawfully to take away the life of a fellow creature."¹⁴ When no provocation appeared or when the killing showed an abandoned or malignant heart, malice was implied.¹⁵ Thus, through 1961, Illinois courts treated malice aforethought as a necessary element of murder.¹⁶

At early common law it was helpful to consider malice aforethought as an element of murder because, at that time, the law recognized only one type of murder—the unlawful killing of another with a premeditated intent to kill.¹⁷ Malice aforethought succinctly described this state of mind. Yet the concept of malice became confusing when the common law began to recognize new types of murder not requiring a premeditated intent to kill, while continuing to ascribe malice aforethought to each new kind. For example, common law judges began to characterize unintentional killings committed in the course of a felony as murder.¹⁸ Similarly, an unintentional killing resulting from conduct evincing a "depraved heart" constituted murder.¹⁹ An unintentional killing caused by a person who was acting with intent to do serious bodily injury was likewise found to be

9. This section is largely taken from an earlier work by this author. See O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DE PAUL L.REV. 107, 109-110 (1982).

10. See *supra* note 8.

11. For a summary of the concept of murder at common law, see L. HALL & S. GLUECK, *CASES ON CRIMINAL LAW AND ITS ENFORCEMENT* 37-39 (2d ed. 1958).

12. ILL. REV. STAT. ch. 38 ¶ 358 (1959) (emphasis added).

13. *Id.* 361 (emphasis added). Furthermore, to be classified as manslaughter the killing had to be "voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection." *Id.*

14. *Id.* at 358. This intention had to be manifested by external circumstances capable of proof. *Id.*

15. *Id.*

16. See *People v. Bush*, 414 Ill. 441, 111 N.E.2d 326 (1953); *People v. Jones*, 384 Ill. 407, 51 N.E.2d 543 (1943); *People v. Pappas*, 381 Ill. 90, 444 N.E.2d 896 (1942); *People v. Brown*, 288 Ill. 489, 123 N.E. 515 (1919); *People v. Curtright*, 258 Ill. 430, 101 N.E. 551 (1910).

17. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW*, § 67, at 529 (3rd ed. 1972) [hereinafter cited as LAFAVE & SCOTT].

18. *Id.*

19. *Id.*

murder.²⁰

In all these situations, the actor lacked an express intent to kill. Nevertheless, the courts referred to these killings as "murder with malice aforethought."²¹ Consequently, rather than requiring that malice aforethought be established in every murder, the reverse became true: any act found to be murder was automatically endowed with the characteristic of malice aforethought. What began as a descriptive phrase for a necessary element of murder was reduced to a mere talisman.

HOMICIDE LAW UNDER THE CRIMINAL CODE OF 1961²²

The drafters of the Criminal Code of 1961 recognized the obsolescence of malice aforethought. The Committee Comments acknowledged that "[t]he 'malice aforethought' concept has undergone in Illinois the same reduction to actual intent, regardless of the time available for deliberation, which it has undergone elsewhere."²³ The Committee noted Illinois cases dating back to 1872 which had held that the requirement of malice aforethought did not prevent an intentional killing, preceded by only a short period of deliberation, from being considered murder.²⁴

In response to the deterioration of malice aforethought, the Committee eliminated any reference to it in the new Code. Instead, murder was defined:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause death:

- (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
- (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
- (3) He is attempting or committing a forcible felony other than volun-

20. *Id.*

21. The malice aforethought was found to be "implied", as distinguished from intentional killings, where malice aforethought was "express". *Id.* For burden of proof problems concerning implied malice, see *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

22. See note 9.

23. ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979) Committee Comments-1961, at 16-17 (revised 1972). See also *Patterson v. New York*, 432 U.S. 197, 217 (1977) (Powell, J., dissenting) (finding that killing was committed with malice has come to mean simply that heat of passion was absent).

24. ILL. ANN. STAT. ch. 38 § 9-1 (Smith-Hurd 1979) Committee Comments-1961, at 17 (revised 1972). The Committee, quoting *Peri v. People*, 65 Ill. 17, 18 (1872), stated:

To constitute malice, it is not necessary that the party should brood over and meditate upon the performance of the act for a considerable space of time; but it is sufficient if it were deliberate and intentional, without apparently well founded danger of great bodily harm, or where there is not such provocation as in law reduces the homicide to manslaughter.

Id. at 23-24.

tary manslaughter.²⁵

In addition, voluntary manslaughter was no longer described merely as a killing without malice aforethought, but rather:

(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion . . .²⁶

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . but his belief is unreasonable.²⁷

It is important to observe the symmetry between these new definitions of murder and voluntary manslaughter. Putting aside felony murder,²⁸ the statute prescribed that a murder was committed when a person acted intentionally or knowingly.²⁹ These two states of mind mirror precisely those required under unreasonable belief voluntary manslaughter.³⁰ Provocation manslaughter, on the other hand, mentions no mental state.³¹ Where a statute does not prescribe a mental state, proof of intent, knowledge, or recklessness generally is sufficient.³² Recklessly performed acts which cause death, however, come under the purview of involuntary manslaughter.³³ Therefore, murder and voluntary manslaughter require identi-

25. ILL. REV. STAT. ch. 38, § 9-1 (1985).

26. *Id.* at 9-2(a).

27. *Id.* at 9-2(b). This unreasonable-use-of-force voluntary manslaughter was not recognized prior to the adoption of the Criminal Code of 1961. See *People v. Lockett*, 82 Ill. 2d 546, 554-55, 413 N.E.2d 378, 383 (1980).

28. Under the felony murder rule, a person is guilty of murder if he kills an individual during the attempt or commission of a forcible felony other than voluntary manslaughter. ILL. REV. STAT. ch. 38, 9-1(a)(3) (1981). For a thorough discussion of the felony murder rule. See R. PERKINS & R. BOYCE, *CRIMINAL LAW* 75 (3d ed. 1982) [hereinafter cited as PERKINS & BOYCE]. This Article's analysis is inapplicable to felony murder.

29. ILL. REV. STAT. ch. 38, 9-1 (1981). Under the Code, a person intends to accomplish a certain result if "his conscious objective or purpose is to accomplish that result or engage in that conduct". *Id.* at 4-4. A person acts with knowledge of the nature or attendant consequences of his conduct when he is "consciously aware that his conduct is of such nature or that such circumstances exist". *Id.* at 4-5(a). Knowledge of a material fact includes awareness of the substantial probability that such fact exists. *Id.* "A person acts with knowledge of the result of his conduct when he is consciously aware that such result is practically certain to be caused by his conduct". *Id.* at 4-5(b).

30. Compare *id.* at 9-1(a)(1), (2) with *id.* at 9-2(b).

31. See *id.* at 9-2(a).

32. *Id.* at 4-3(b). This rule does not apply to offenses which involve absolute liability. *Id.*

33. Illinois defines involuntary manslaughter as an unintentional killing where the acts which cause the death are likely to cause death or great bodily harm to some individual, and those acts are performed recklessly. *Id.* at 9-3. A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow . . . and such failure constitutes a substantial deviation from the standard of care which a reasonable person would exercise in the situation". *Id.* at 4-6.

cal mental states—intent or knowledge—as well as an identical result: the unjustified killing of a human being.³⁴

The significance of this symmetry lies in the fact that, prior to the 1961 Code, requiring proof of malice aforethought presumed that murder contained a discrete mental element not present in manslaughter.³⁵ This relation may be expressed in the following syllogism:

1. If the elements of murder are proven, then, *a fortiori*, malice exists.
2. Malice is not present in manslaughter.
3. Therefore, a finding that murder has been proven precludes a finding of manslaughter.

Consequently, voluntary manslaughter could have been described as “murder *minus* malice aforethought.”

The elimination of malice aforethought from the old law, however, greatly simplified the murder/voluntary manslaughter dichotomy. Under the prior law, a finding of murder foreclosed the possibility of manslaughter. Implicit in a finding of murder was a finding of malice aforethought, and therefore the homicide could not have been manslaughter. Under the new Criminal Code, on the other hand, voluntary manslaughter could be proved only if all the elements of murder were proved. Like murder, voluntary manslaughter involved an unjustified homicide performed intentionally or knowingly. Unlike murder, voluntary manslaughter contained mitigating circumstances. With the elimination of malice aforethought, voluntary manslaughter became “murder *plus* mitigating circumstances.” Consequently, murder and voluntary manslaughter were no longer inherently different crimes. Instead, they were *different degrees* of the *same* crime — an unjustified killing performed intentionally or knowingly.³⁶

34. It must be emphasized that the felony murder theory is not subject to this analysis. Even accidental homicides may constitute murder under this theory. The only requisite intent is the defendant's intent to commit the underlying felony. See *People v. Jeffrey*, 94 Ill. App. 3d 455, 460, 418 N.E.2d 880, 885-86 (5th Dist. 1981); *People v. Miner*, 46 Ill. App. 3d 273, 282, 360 N.E.2d 1141, 1148 (5th Dist. 1977).

35. See, e.g., *People v. Pappas*, 381 Ill. 90, 44 N.E.2d 896 (1942) (element that distinguishes murder from manslaughter is malice); *People v. Lewis*, 375 Ill. 330, 31 N.E.2d 795 (1940) (same), *cert. denied*, 314 U.S. 628 (1941).

36. Professor Perkins, a staunch supporter of the use of malice aforethought, contends that it is a useful concept if properly understood. PERKINS & BOYCE, *supra* note 11, at 73-75. He defines it as “an unjustifiable, inexcusable and unmitigated person-endangering-state-of-mind.” *Id.* at 75. But note the two discrete mental elements running through this allegedly unified state of mind. First, it concerns what the defendant wishes to do to the victim; that is, perform a “person-endangering” act. Second, it concerns why he is acting in such a manner; that is, it is concerned with the possibility of justification, excuse, or mitigation. These are two very different concerns. Malice aforethought is thus a particularly clumsy element to include in murder because it forces the state to prove not only the effects intended by the actor vis-a-vis the victim (the “what” prong), but also to prove that the acts were unlawful, unjustifiable, inexcusable, and accompanied by no mitigating circumstances (the “why”

EFFECTS OF THE CHANGES IN THE NEW CODE

This radical change of the definition of "voluntary manslaughter" from "murder *minus* malice aforethought" to "murder *plus* mitigating circumstances" had several collateral effects.

1. *The "Lesser Included Offense" Issue And Its Effect On Jury Deliberations.*

Under the new definition, voluntary manslaughter was no longer a lesser included offense of murder.

Illinois defines an "included offense" as one that is established by "proof of the same or less than all of the facts or a less culpable mental state (or both)."³⁷ Voluntary manslaughter could not be an "included offense" under the first part of the test because it required more elements than murder, *i.e.*, it was composed of all the elements of murder in addition to "sudden and intense passion" or an "unreasonable belief in self-defense."

Nor did voluntary manslaughter have a "less culpable mental state." Illinois recognizes only four mental states: intent, knowledge, recklessness, and negligence.³⁸ Murder and voluntary manslaughter each require the same mental state—either intent or knowledge.³⁹ Thus, voluntary manslaughter was not an "included offense" of murder.⁴⁰ More properly, it was a less culpable kind of murder—"murder with mitigating circumstances."

This would have a significant effect on jury deliberations. Under the old law, a jury considering both murder and voluntary manslaughter would first consider the murder verdict. If they found the

prong). Perkins's contention that the prosecution is aided by the presumption that every homicide has been committed with malice aforethought only makes the concept seem even more irrelevant. *Id.* at 77.

The Illinois Criminal Code simplified homicide by defining unlawful killings as murder when accompanied by a specific state of mind vis-a-vis the victim. ILL. REV. STAT. ch. 38, 9-1 (1981). Section 9-2 then set forth those mitigating circumstances which would reduce those unlawful killings to voluntary manslaughter. The finder of fact need not have considered these mitigating circumstances unless there was some evidence introduced at trial which, if believed, would have reduced the crime to voluntary manslaughter. *People v. Lockett*, 82 Ill. 2d 546, 550, 413 N.E.2d 378, 381 (1980).

37. ILL. REV. STAT. ch. 38, par. 2-9 (1985).

38. ILL. REV. STAT. ch. 38, pars. 4-4, 4-5, 4-6, and 4-7 (1985).

39. See *supra* notes 28-34 and accompanying text.

40. Despite this, Illinois courts continued to refer to voluntary manslaughter as an "included offense" of murder. For example, the Illinois Supreme Court insisted that voluntary manslaughter had a "less culpable" mental state than murder. *People v. Hoffer*, 106 Ill. 2d 186, 194, 478 N.E.2d 335, 340 (1985). The court failed to confront the fact that Illinois *by statute* recognizes only four mental states (ILL. REV. STAT. ch. 38, pars. 4-4, 4-5, 4-6, 4-7 (1985)); apparently, the court wished to create a new mental state *sua sponte*.

defendant guilty of murder, it was unnecessary to consider the manslaughter verdict; since murder included malice, manslaughter was not a possibility. If they found the defendant "not guilty" of murder, they would then have to decide whether manslaughter, the lesser included offense, had been established.

The new definitions reversed this procedure. Now a "not guilty" on murder precluded any further inquiry; if the elements of murder had not been established, then voluntary manslaughter could not exist. Similarly, a finding of "guilty" of murder was merely the beginning of the voluntary manslaughter inquiry, for voluntary manslaughter was simply "murder *plus* mitigating circumstances." Thus, a "not guilty" verdict of murder *a fortiori* meant "not guilty" of voluntary manslaughter, while a "guilty" verdict of voluntary manslaughter by definition included a finding of "guilty" of murder.

2. *The State of Mind Needed For Voluntary Manslaughter*

Some confusion existed in the old law as to precisely what state of mind was needed for manslaughter. The issue was whether the "sudden heat of passion" rendered the act something less than intentional.⁴¹ As noted, this was clarified in the new definition. Illinois only recognized four possible states of mind in the entire Criminal Code;⁴² two of those—intentional and knowing—applied to voluntary manslaughter.⁴³

3. *Burden of Proof*

The Code failed to deal with a significant problem in the new scheme. If voluntary manslaughter was now merely "murder *plus* mitigating circumstances," which side should bear the burden of proving those circumstances and what standard of proof should be applied?

The problem manifested itself in two ways.⁴⁴ Consider a defendant on trial for murder. The State's case is totally directed towards convicting the defendant of that crime. The defendant's case, on the other hand, presents unimpeachable evidence that he acted with an

41. Compare *Moore v. People*, 146 Ill. 600, 35 N.E. 166 (1893) (suggests that the crime of manslaughter does not include an intent to kill) with *Hammond v. People*, 199 Ill. 173, 180, 64 N.E. 980, 982 (1902) (sudden passion of manslaughter did not mean that actor lacked intent to kill, but merely mitigated the gravity of the crime). See O'Neill, *supra* note 9, at 115-18.

42. *Supra* note 38 and accompanying text.

43. *Supra* note 39 and accompanying text.

44. The following hypotheticals are taken from an earlier work by this author. See O'Neill, "Murder Last Foul": A Proposal to Abolish Voluntary Manslaughter in Illinois, 72 ILL. B.J. 306, 307 (1984).

unreasonable belief in self-defense, thus reducing the murder to voluntary manslaughter. Because there is evidence in the record which, it believed by a jury, would reduce the crime to voluntary manslaughter the jury is instructed on that theory.⁴⁵ If the mitigating circumstance of "unreasonable belief" is considered one of the elements of the offense of voluntary manslaughter, then the jury will be told that the State must prove it beyond a reasonable doubt.⁴⁶ However, in our scenario the State has not proven, nor does it intend to prove, any such thing. All of the State's evidence is geared toward a murder conviction. The jury is thus compelled to find the defendant guilty of murder.

Now consider the situation in which the state charges a defendant with voluntary manslaughter. Assume the State needs to prove two elements beyond a reasonable doubt. First, it must show that defendant is a murderer, *i.e.*, one who intentionally or knowingly killed a human being with no justification. Second, it must show some type of mitigation sufficient to reduce the crime to voluntary manslaughter. Assume the State has no difficulty proving the accused is a murderer. Now assume that its evidence of mitigation is far short of being proved beyond a reasonable doubt. The defendant cannot be convicted of murder because that is greater than the crime charged;⁴⁷ and, since the State failed to prove the mitigation beyond a reasonable doubt, there must be a not guilty verdict on the voluntary manslaughter charge. The murderer then goes free. Thus, problems remained to be solved.

THE IMPACT OF THE NEW DEFINITION OF VOLUNTARY MANSLAUGHTER ON ILLINOIS COURTS

Illinois courts took little notice of the major new Criminal Code revisions in the area of homicide. Over twenty years after the Code eliminated the concept of "malice aforethought," Illinois courts continued to explain that malice was a necessary element of murder.⁴⁸ Twenty-one years after the adoption of the Code, neither the Illinois Appellate Court nor the Supreme Court could explain precisely why it was wrong for a trial judge to tell a jury "if you find [defendant]

45. *People v. Lockett*, 82 Ill. 2d 546 (1980).

46. *In re Winship*, 397 U.S. 358 (1970).

47. *See Cole v. Arkansas*, 333 U.S. 196 (1948).

48. *People v. Barney*, 111 Ill. App. 3d 669, 676, 444 N.E.2d 518, 523 (1st Dist. 1982). Numerous other cases contain the same legal error. *See, e.g.*, *People v. Evans*, 92 Ill. App. 3d 874, 979, 416 N.E.2d 377, 380 (2d Dist. 1981); *People v. Cowen*, 68 Ill. App. 3d 437, 441, 386 N.E.2d 435, 438-39 (1st Dist. 1979); *People v. Tiller*, 61 Ill. App. 3d 785, 794, 378 N.E.2d 282, 290 (5th Dist. 1978); *People v. McCord*, 46 Ill. App. 3d 389, 392, 361 N.E.2d 13, 17 (1st Dist. 1977); *People v. Walden*, 43 Ill. App. 3d 744, 752, 357 N.E.2d 232, 239 (1st Dist. 1976); *People v. Muldrow*, 30 Ill. App. 3d 209, 217, 332 N.E.2d 664, 669 (1st Dist. 1975).

guilty of murder, then you do not consider voluntary manslaughter."⁴⁹ Twenty-three years after the adoption of the Code, the Illinois Appellate Court failed to understand that an acquittal on murder barred a second prosecution for voluntary manslaughter on double jeopardy grounds.⁵⁰ Twenty-four years after the adoption of the Code, the Illinois Supreme Court continued to refer to voluntary manslaughter as a "lesser included offense" of murder.⁵¹ Judges (and lawyers) clung to their old common law idea of manslaughter and refused to look at the obvious changes made by the Illinois Criminal Code.

Likewise, the courts failed to understand that voluntary manslaughter required either an intentional or knowing state of mind accompanied by sudden passion or unreasonable belief of self-defense. Instead, ignoring the Code's insistence that only four culpable mental states exist in Illinois criminal law, the Illinois Supreme Court in 1985 insisted that voluntary manslaughter included a unique state of mind shared by no other offense in the entire Criminal Code.⁵²

The only defense that can be offered on the courts' behalf is their failure to receive assistance from the Illinois Pattern Jury Instructions. The First Edition of the instructions issued in 1968⁵³ included radically different forms for "provocation" voluntary manslaughter and "unreasonable belief" voluntary manslaughter. Nothing in the instructions indicates that the Committee understood the revisions made by the new Criminal Code. As to "provocation" voluntary manslaughter, the Committee assigned the State the burden of proving provocation beyond a reasonable doubt,⁵⁴ thus

49. *People v. Pastorino*, 90 Ill. App. 3d 921, 925, 414 N.E.2d 54, 58 (1st Dist. 1980), *rev'd*, 91 Ill. 2d 178, 188, 435 N.E.2d 1144, 1149 (1982).

50. *People v. Krogul*, 115 Ill. App. 3d 734, 450 N.E.2d 20 (2nd Dist. 1983), *cert. denied*, 465 U.S. 1007 (1984).

51. *People v. Hoffer*, 106 Ill. 2d 186, 478 N.E.2d 335 (1985).

52. *Hoffer*, 106 Ill. 2d at 194, 478 N.E.2d at 340. ("This mental state [of voluntary manslaughter] is considered less culpable [than murder]"). Yet less than a year later the Supreme Court, without any reference to *Hoffer*, said "The definition of voluntary manslaughter in our criminal code does not contain language distinguishing it from murder in regard to the defendant's intention or mental state." *People v. Wright*, 111 Ill. 2d 18, 28, 488 N.E.2d 973, 978 (1986).

53. Illinois Pattern Jury Instructions - Criminal (1st ed. 1968).

54. 7.06 Issues in Voluntary Manslaughter - Intentional - Belief of Justification.

To sustain the charge of voluntary manslaughter the State must prove the following propositions:

First: That the defendant intentionally or knowingly performed the acts which caused the death of —; and

Second: That when the defendant did so he believed that circumstances existed which would have justified killing —; and

Third: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each of these

creating the problems discussed earlier. Perversely, the Committee assigned a totally different burden in "unreasonable belief" cases. There, the instruction told the jury that they could *only* convict of murder if the State proved beyond a reasonable doubt that the defendant *did not* believe he was justified in using force.⁵⁵ Conversely, the jury was told that they could *only* convict of voluntary manslaughter if the State proved beyond a reasonable doubt that defendant *did* have such a belief.⁵⁶ (Presumably — and unbelievably — defendant was somehow guilty of *neither offense* if the jury believed neither proposition beyond a reasonable doubt.)

propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Ill. Pattern Jury Instructions - Criminal No. 7.06 (1st ed. 1968).

55.

7.02 and 25.05

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of John Smith;

Second: That when the defendant did so, he intended to kill or do great bodily harm to John Smith, or

he knew that his act would cause death or great bodily harm to John Smith, or

he knew that his acts created a strong probability of death or great bodily harm to John Smith, and

Third: That the defendant was not justified in using the force which he used; and

Fourth: That the defendant did not believe that circumstances existed which justified the use of the force which he used.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of murder.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of murder.

Ill. Pattern Jury Instructions - Criminal No. 27.01 (1st ed. 1968).

56.

7.06

To sustain the charge of voluntary manslaughter the State must prove the following propositions:

First: That the defendant intentionally or knowingly performed the acts which caused the death of John Smith; and

Second: That when the defendant did so he believed that circumstances existed which would have justified killing John Smith; and

Third: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of voluntary manslaughter.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of voluntary manslaughter.

Ill. Pattern Jury Instructions - Criminal No. 27.01 (1st ed. 1968).

The Second Edition of the instructions issued in 1981 made further changes. The burden of proof on provocation manslaughter remained the same; once again, the State had to prove it beyond a reasonable doubt.⁵⁷ Changes occurred in the "murder/unreasonable belief manslaughter" area, however. Now, where that type of manslaughter was an issue, the State could prove murder *without* disproving the fact that the defendant may have had a subjective belief in the necessity of force.⁵⁸ As to unreasonable belief manslaughter, the State still had to prove that fact — defendant's subjective belief of justification — beyond a reasonable doubt.⁵⁹

57. To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of —; and

Second: That when the defendant did so, [1] he intended to kill or do great bodily harm to —; or [2] he knew that such acts would cause death or great bodily harm to —; or [3] he knew that such acts created a strong probability of death or great bodily harm to —; and

Third: That when the defendant did so, [1] he acted under a sudden and intense passion resulting from serious provocation by another; or [2] he acted under a sudden and intense passion resulting from serious provocation by some other person he endeavored to kill, but he negligently or accidentally killed —.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

III. Pattern Jury Instructions - Criminal No. 7.04 (2d ed. 1981). The first two elements constituted the offense of murder.

58. To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of —; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to —; or he knew that his acts would cause death or great bodily harm to —; or he knew that his acts created a strong probability of death or great bodily harm to —; or

Third: That the defendant was not justified in using the force which he used.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

III. Pattern Jury Instructions - Criminal 7.02 & 24-25.06A (2d ed. 1981).

59. To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of —; and

Second: That when the defendant did so, he intended to kill or do great bodily harm to —; or he knew that his acts would cause death or great bodily harm to —; or he knew that his acts created a strong probability of death or great bodily harm to —; and

Third: That when the defendant did so he believed that circumstances existed which would have justified killing; and

The effect of the Second Edition instructions was this: in any case where a jury considered both murder and voluntary manslaughter, a verdict of "guilty" on voluntary manslaughter *a fortiori* meant the defendant was also "guilty" of murder. Thus, under the Second Edition instructions, a jury returning "guilty" verdicts on both murder and voluntary manslaughter had rendered consistent findings, and judgment should have been entered on the voluntary manslaughter charge because it was "murder *plus* mitigating circumstances." Not surprisingly, juries began returning such verdicts in real cases.⁶⁰ The courts—apparently without reading the instructions—patronizingly concluded that juries did not understand the issues and found them to be inconsistent verdicts.⁶¹ In *People v. Almo*, the trial judge refused to accept a jury's guilty verdicts on both murder and voluntary manslaughter based upon unreasonable belief of self defense. The judge held they were inconsistent verdicts, even though the most cursory look at the instructions would show that they were entirely consistent: the jury found "murder *plus* mitigating circumstances" and thus found defendant guilty of voluntary manslaughter. The trial court forced the jury to deliberate further, and they then found defendant guilty of murder. Both the Illinois Appellate Court and Illinois Supreme Court affirmed; neither court apparently bothered to read the instructions.⁶²

A PROPOSED SOLUTION

In response to these difficulties with the voluntary manslaughter statute, this author in February, 1984⁶³ proposed the following changes in the law:

1. The name "voluntary manslaughter" should be abolished; instead, the offense should be called "second degree murder" in order to em-

Fourth: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

Ill. Pattern Jury Instructions - Criminal No. 7.06 (2d ed. 1981).

60. *People v. Washington*, 127 Ill. App. 3d 365, 468 N.E.2d 1285 (1984); *People v. Milner*, 123 Ill. App. 3d 656, 463 N.E.2d 148 (1984); *People v. Kendricks*, 121 Ill. App. 3d 442, 459 N.E.2d 1137 (1984); *People v. Fox*, 114 Ill. App. 3d 593, 449 N.E.2d 261 (1983).

61. *See, e.g., People v. Washington, supra*, 127 Ill. App. 3d at 375, n.2, noting the "distinction, indeed the contradiction, between murder and voluntary manslaughter."

62. *People v. Almo*, 123 Ill. App. 3d 406, 462 N.E.2d 835, *aff'd*, 108 Ill. 2d 54, 483 N.E.2d 203 (1985).

63. *See supra* note 44.

phasize its proper role as "murder *plus* mitigating circumstances." What the Code calls "murder" should be re-named "first degree murder."

2. Neither side should have the burden of proving the mitigation in the offense, *i.e.*, the sudden and intense passion or the unreasonable belief in self-defense. Instead, the jury should simply be told that as long as the mitigation rises to a specified level of proof, they should return a verdict of second-degree murder, assuming the elements of first degree murder are found to exist.

3. Preponderance of the evidence should be the quantum of proof needed to establish the existence of the mitigating circumstances. Proof beyond a reasonable doubt has no place in such a reckoning; by the time the jury is considering mitigating circumstances they have already found the defendant guilty of murder beyond a reasonable doubt. If mitigation exists by a preponderance of the evidence, defendant should be guilty of only second degree murder.

The drafter of the bill which became Public Act 84-1450, Judge Robert Steigmann,⁶⁴ considered these recommendations and adopted most of them. The new law changes the offense to second degree murder and specifies that mitigation must be proved by a preponderance of the evidence.⁶⁵ In place of the "free-floating" burden of proof, however, the new law unfortunately places the burden of establishing the mitigating evidence on the defendant.⁶⁶

EFFECTS OF THE NEW LEGISLATION

1. *The Constitutionality of the Provision*

The United States Constitution provides that no person may be convicted of any offense unless each element of guilt is established beyond a reasonable doubt.⁶⁷ Moreover, the Illinois Criminal Code establishes that "[n]o person shall be convicted of any offense unless his guilt is proved beyond a reasonable doubt."⁶⁸ Despite this, it is clearly constitutional to require the defendant to produce sufficient evidence of mitigation to reduce a charge of murder for first degree to second degree.

The new Illinois scheme is strikingly similar to that found constitutional by the United States Supreme Court in *Patterson v. New York*.⁶⁹ *Patterson* dealt with a state statute defining murder as intentionally causing the death of another person. It also provided that a person otherwise guilty of murder could reduce her offense to manslaughter if she proved by a preponderance of the evidence that

64. Judge of the Circuit Court, 6th Judicial Circuit, Urbana, Illinois.

65. Public Act 84-1450 at 4213.

66. *Id.*

67. *Winship*, *supra* n.46.

68. ILL. REV. STAT. ch. 38, par. 3-1 (1985).

69. *See supra*, note 23.

she had acted under extreme emotional disturbance. The Court found such a scheme proper, because establishing the extreme emotional disturbance “[did] not serve to negative any facts of the crime which the State [had] to prove in order to convict of murder.”

Likewise, under the new Illinois scheme a person who either intentionally or knowingly kills someone without justification is guilty of first degree murder. Establishing the mitigating circumstances of second degree — either sudden passion or unreasonable belief of self-defense — does not change the fact that the person is still a *murderer*; it merely results in a less severe punishment. Thus, the mitigating circumstances do not establish “guilt” as defined in the Illinois Code; they merely prove that defendant is less culpable than other murderers. Therefore, placing this burden on the defense is constitutional.⁷⁰

Yet there is a problem with placing the burden on the defendant which has nothing to do with constitutional principles. Consider a situation in which the prosecution’s case-in-chief includes testimony that the defendant acted under sudden and intense passion resulting from serious provocation. The defense decides to rest without presenting any evidence and requests that the jury be instructed on second degree murder. In this situation, the jury must be carefully instructed that the failure of the defense to offer any evidence does not preclude the jury from finding that the defense has met its burden of showing mitigation by a preponderance of the evidence. Essentially, the jury’s function is to make a Solomon-like decision whether any mitigating evidence exists anywhere in the record which militates in favor of leniency, *i.e.*, a finding of second degree murder. Which side produced the mitigating evidence is utterly irrelevant. As this author has previously argued, allocating this burden to a specific party only obfuscates what is essentially an act of mercy on the part of the fact-finder.⁷¹

70. The principles supporting this type of analysis were again endorsed by the United States Supreme Court last term in *McMillan v. Pennsylvania*, 106 S. Ct. 2411, (1986) (state may properly treat possession of a firearm during commission of an offense as a sentencing consideration to be proven by a preponderance of the evidence, rather than an element to be proven beyond a reasonable doubt, even though proof of such a fact entitles defendant to a mandatory five year sentence), and again this term in *Martin v. Ohio*, 107 S.Ct. 1098 (1987) (no violation of due process for state to place burden of proving self-defense on defendant under Ohio’s “aggravated murder” statute).

71. See O’Neill, *supra* n.44, p. 307. Fortunately, Judge Steigmann, the bill’s author has unequivocally stated that the statute places no burden of presenting evidence upon the defendant. See Steigmann, *First and Second Degree Murder in Illinois*, 75 ILL. BAR J. 494 (May 1987).

2. *Eliminating the Problem of the Rendition of Guilty Verdicts for Both Murder and Voluntary Manslaughter*

Changing the names of "murder" and "voluntary manslaughter" to "first degree murder" and "second degree murder" should eliminate the aforementioned problem of juries returning guilty verdicts on both crimes. What is needed is a revision of the Illinois Pattern Jury Instructions which emphasizes the relation between the two offenses and is structured so that the jury understands that it should return a guilty verdict on *either* first *or* second degree murder, but not both. Examples of such instructions are included in the Appendix to this article.

3. *The Offense of "Attempt Second Degree Murder"*

Voluntary manslaughter was the unjustified, intentional or knowing killing of a human being, with the actor either possessing an unreasonable belief in self-defense or being in a state of sudden and intense passion resulting from serious provocation.⁷² Let us assume, however, that under the prior definitions an actor 1) intended to kill another person and 2) had either an unreasonable belief in self-defense or acted with sudden and intense passion. If the victim died, obviously the defendant was guilty of voluntary manslaughter. But what if the victim lived? In that case, the defendant acted with intent to kill but failed. Therefore, he was guilty of "attempt murder." However, the mitigating circumstances of voluntary manslaughter were present. He was thus guilty of "attempt murder *plus* mitigating circumstances." Since "murder *plus* mitigating circumstances" constituted the offense of "voluntary manslaughter", it was clear that "attempt murder *plus* mitigating circumstances" constituted the offense of "attempt voluntary manslaughter."

The Illinois Supreme Court, however, obstinately refused to recognize the crime of "attempt voluntary manslaughter."⁷³ The effect of this perversity was that if an actor *killed* a person under voluntary manslaughter circumstances, he was guilty of voluntary manslaughter — a Class One Felony. But if an actor *failed* in his attempt to kill under voluntary manslaughter circumstances, he was guilty of attempt murder, a Class X felony. The new names of the offenses will eliminate this anomaly and clarify the fact that a person can be guilty of either "attempt first degree murder" or "attempt second degree murder."

72. ILL. REV. STAT. ch. 38, par. 9-2 (1985) *repealed* by Public Act 84-1450.

73. *People v. Reagan*, 99 Ill. 2d 238, 457 N.E.2d 1258 (1983).

4. *Double Jeopardy Effects of A Conviction of Second Degree Murder*

Just as voluntary manslaughter was not a lesser included offense of murder, so too is second degree murder not a lesser included offense of first degree murder. A lesser included offense has either fewer elements or a less culpable mental state.⁷⁴ Second degree murder does not have fewer elements than the first degree murder; indeed, it embodies all of first degree murder *plus* mitigating circumstances. Nor does second degree murder technically have a less culpable mental state; like first degree, it requires an intentional or knowing state of mind.

This presents some procedural difficulties. Consider a defendant charged with armed robbery; he is convicted of simple robbery. If the robbery conviction is reversed and remanded for a new trial, the defendant can be retried only for robbery; the Double Jeopardy Clause forbids retrial on armed robbery because he has already been acquitted of the "armed" element. The general rule is that conviction on a lesser-included offense operates as an acquittal on the greater charge.⁷⁵

The situation is different in second degree murder. When a jury convicts on second degree murder, rather than first degree murder, it has not found that the elements of first degree murder are missing. Rather, it has found *all* the elements of first degree murder *as well as* mitigating circumstances. There has been no showing that the elements of first degree murder have not been proven.

What should happen, then, where a conviction for second degree murder is reversed on procedural grounds and a new trial is ordered? Since the jury found defendant guilty of "first degree murder *plus* mitigating circumstances," should defendant have to stand trial for first degree murder again?

Clearly, fundamental fairness demands that since the defendant has already "run the gantlet"⁷⁶ of the first degree murder charge at the first trial — and was instead convicted of second degree — that he should not have to face the charge of first degree murder. The Double Jeopardy Clause could enter the picture if we instructed the jury at the first trial that, if they find defendant guilty of second degree murder, they should explicitly acquit defendant of first degree murder. The problem with entering a judgment of acquittal is that it is not entirely accurate; again, the verdict of second degree

74. ILL. REV. STAT. ch. 38, par. 2-9 (1985).

75. *Green v. United States*, 355 U.S. 184 (1957).

76. *Id.* at 190.

murder explicitly includes all the elements of first degree murder.⁷⁷

There is a way to trigger the Double Jeopardy Clause without resorting to a formal acquittal. The instant problem is analogous to the situation which faced the United States Supreme Court in *Bullington v. Missouri*.⁷⁸ The defendant in *Bullington* was convicted of capital murder. Following a hearing, the jury sentenced him to life imprisonment rather than death. On appeal, he was granted a new trial on procedural grounds. The Court ruled that Missouri was barred from again seeking the death penalty at retrial. For purposes of double jeopardy, the Court found several reasons why the Missouri sentencing proceeding was comparable to a trial. First, the discretion of the jury was confined to only two options: death or life imprisonment without possibility of release for 50 years.⁷⁹ Second, the jury's decision was guided by substantive standards and was based on a procedure which resembled a trial.⁸⁰ Third, the prosecutor had to prove certain statutorily defined facts beyond a reasonable doubt before death could be imposed.⁸¹

The instant situation is similar to Missouri's scheme. Like Missouri, the fact-finder in our statute has carefully limited options: first degree murder, second degree murder, or neither. Like Missouri, the fact-finder's decision is fettered by specific guidelines in making that decision; moreover, in our situation the evidence is actually presented at trial. Unlike Missouri's system, the burden is on the defendant, rather than the State, to prove the statutory factors. Yet this appears to be a distinction without a difference.

Thus, *Bullington* probably supports the idea that once a defendant has been convicted of second degree murder, the Double Jeopardy Clause forbids her from ever again being tried for first degree murder. Nevertheless, a trial judge can eliminate future problems by simply entering a judgment of acquittal on first degree murder whenever there is a judgment of guilty on second degree murder.

5. *Retrial on the Charge of Second-Degree Murder.*

Assume that for procedural reasons a conviction on second degree murder is reversed and remanded for a new trial. How the retrial is conducted depends on which type of second degree murder is

77. Thus, the situation is different from that in *Green*, where the conviction on second degree murder was found to be inconsistent with, and an implied acquittal of, first degree murder. See *Green*, at 203, n. 2-3.

78. 451 U.S. 430 (1981).

79. *Id.* at 438.

80. *Id.*

81. *Id.*

at issue.

First, consider where the first trial was concerned with second degree murder based on an unreasonable belief of self-defense. The jury at the first trial had three options: 1) they could have found that the killing was unjustified and that the defendant was guilty of first degree murder; 2) they could have found that the killing was justified because the defendant acted with a reasonable belief that deadly force was necessary, and thus the defendant was not guilty of any crime; or 3) they could have found that defendant had a subjective, albeit unreasonable, belief in the need for deadly force and that he was guilty of second degree murder. Assume the jury convicted on second degree murder and the Appellate Court reverses on a procedural matter and remands for a new trial. As demonstrated above, a retrial on first degree murder should be barred by the Double Jeopardy Clause.⁸² Therefore, at the retrial the only issue is whether defendant is guilty of second degree murder or nothing. That is, the jury at the retrial should be instructed that they *must* assume defendant in fact had a subjective belief that deadly force was necessary; if they find that belief reasonable, they must acquit; if they find that belief unreasonable, they must convict on second degree murder.

A different situation presents itself if the original trial was concerned with second degree murder based upon the provocation theory. The jury at the first trial had three choices: 1) they could have found that defendant committed an unjustified killing and was guilty of first degree murder; 2) they could have found that defendant did not commit an unjustified murder and was therefore not guilty of any crime; or 3) they could have found that the defendant committed an unjustified murder but performed the act in a state of sudden passion caused by a reasonable provocation, and was thus guilty of second degree murder. Assume the jury found the defendant guilty of second degree murder and the Appellate Court reverses on a procedural matter and remands for a new trial. Again, retrial on first degree murder is barred by the Double Jeopardy Clause.⁸³ At a retrial, the defendant could seek an acquittal by challenging whether he actually killed the victim or whether he had the proper *mens rea*. But, in reality, when second degree murder based on provocation is an issue, a verdict on that charge is usually a *victory* for the defendant. The typical scenario is that the State charges the defendant with first degree murder; at trial, the defendant does not deny the murder, but rather agrees that it was performed under provocation; the jury is then instructed on both first and second de-

82. See notes 75-81 and accompanying text.

83. *Id.*

gree murder. Thus, the defendant will have actually conceded the elements of first degree murder, and is merely asking the jury to find sufficient mitigation to reduce it to second degree. A second degree murder conviction is the best possible outcome for the defendant. If a retrial is then ordered for procedural reasons, the defendant actually has two options. First, he can choose to plead to the second degree charge and eliminate a retrial on that issue; that, after all, is what he may have desired in the first place. Second, if he demands retrial, the only issues open to the jury are whether the defendant caused the killing and whether he had the proper *mens rea* — in other words, the issues involved in first degree murder. If the jury finds that either of these elements has not been proved beyond a reasonable doubt, they should acquit the defendant. If the jury at retrial finds the elements of first degree murder beyond a reasonable doubt, double jeopardy precludes the entry of such a verdict;⁸⁴ since the fact-finder at the first trial found the defendant proved provocation by a preponderance of the evidence, the judge at the second trial must then enter a judgment of second degree murder.

6. *When Second Degree Murder Can be Considered as an Alternative in a First Degree Murder Case*

The issue of when a fact-finder at a first degree murder trial may consider second degree murder as an alternative presents several problems. The manner in which Illinois has treated this issue in the murder/voluntary manslaughter context provides guidance for dealing with this issue under the new first degree murder/second degree murder scheme.

A. *When Defendant is Tried For First Degree Murder Before a Jury*

1. *If The Defendant Requests A Second Degree Murder Instruction*

If there was evidence in the record which, if believed by a jury, would reduce the crime of murder to voluntary manslaughter, then a voluntary manslaughter instructions tendered by the defendant had to be given.⁸⁵ Conversely, a voluntary manslaughter instruction tendered by the defendant could not be given to the jury where the evidence clearly demonstrated that the defendant was guilty of ei-

84. *Id.*

85. *People v. Simpson*, 74 Ill. 2d 497, 384 N.E.2d 373 (1978); *People v. Handley*, 51 Ill. 2d 229, 235, 282 N.E.2d 131, 136 (1972); *People v. Joyner*, 50 Ill. 2d 302, 306, 278 N.E.2d 756 (1972).

ther murder or nothing.⁸⁶ If, however, such mitigating evidence existed, a trial court had a duty to even correct faulty voluntary manslaughter instructions which might be tendered by the defendant.⁸⁷

At the same time the failure of a defendant to request and tender a voluntary manslaughter instruction resulted in the waiver of any claim on appeal that such an instruction should have been given to the jury.⁸⁸

These rules are directly applicable to first and second degree murder.

2. *If the Defendant Fails to Request a Second Degree Murder Instruction*

If the evidence in a murder case raised the issue of voluntary manslaughter, and the defendant did not request such an instruction, the decision whether to so instruct the jury was committed to the discretion of the trial judge.⁸⁹ At least one appellate court decision held that the failure of a trial judge to *sua sponte* instruct the jury on voluntary manslaughter could never be considered reversible error.⁹⁰

What might possibly constitute an abuse of the judge's discretion in this area was unclear. In *People v. Lockett*,⁹¹ the Illinois Supreme Court held that whenever a self-defense instruction was tendered in a murder case, the trial court also had to tender an "unreasonable belief" voluntary manslaughter instruction. This was necessary because a jury always had two options if it found that a defendant had a subjective belief in self-defense: if the belief was reasonable, the defendant was not guilty of any crime, but if the belief was unreasonable, the defendant was guilty of voluntary manslaughter.⁹² Thus, in such a case, a trial judge apparently had to tender an "unreasonable belief" voluntary manslaughter instruction even over the defendant's objection.⁹³ In *People v. Lewis*,⁹⁴ however, the First District Appellate Court rejected defendant's contentions that 1) the trial judge had a *sua sponte* duty to tender a voluntary manslaughter instruction in a *Lockett* situation⁹⁵ and 2) that, at the

86. *People v. Simpson*, *supra* n.85; *People v. Craven*, 54 Ill. 2d 419, 282 N.E.2d 131 (1973).

87. *People v. Joyner*, *supra* n.85.

88. *People v. Taylor*, 36 Ill. 2d 483, 224 N.E.2d 266 (1967).

89. *Id.*

90. *People v. White*, 8 Ill. App. 3d 416, 291 N.E.2d 46 (1972).

91. 82 Ill. 2d 546, 413 N.E.2d 378 (1980).

92. *Id.* at 552.

93. *See People v. Falkner*, 131 Ill. App. 3d 706, 475 N.E.2d 964 (2d Dist. 1985).

94. 97 Ill. App. 3d 982, 423 N.E.2d 1157 (1st Dist. 1981).

95. *Id.* at 987-88.

very least, the record should indicate that the court had actually exercised its discretion in reaching that decision.⁹⁶ Justice Rizzi, in dissent, argued that an exercise of discretion should not be assumed on a silent record.⁹⁷

The passage of the new act provides Illinois courts with an opportunity to eliminate confusion in this area of the law. The new act specifically provides that, in a first degree murder prosecution, a second degree murder instruction should be tendered to the jury only if requested by the defendant.^{97.1} *Lockett* should be interpreted to mean that *whenever* self-defense is an issue, an instruction on second degree murder based on an unreasonable belief in self-defense should always be tendered to the jury, *unless* the defense explicitly objects to the procedure. It is only logical that, if the jury finds defendant had a subjective belief of the need for self-defense, they should be told that they must tender different verdicts based on the reasonableness of that subjective belief. Yet, if a defendant wishes to preclude a jury from a "compromise" verdict of second degree murder, the defendant should be able to restrict the jury's options to "first degree murder or nothing". That type of trial strategy should remain the prerogative of the defense.

There is no reason why the Illinois Pattern Instructions should not adopt this as a black letter rule: whenever a jury is instructed on self-defense in a first degree murder case, they should also be instructed on "unreasonable belief" second degree murder, unless the defendant objects.⁹⁸ The "automatic" nature of this rule argues in favor of allowing a defendant on appeal to raise a judge's failure to observe it as plain error.

A different rule should be used, however, when a defendant fails to tender a "provocation" second degree murder instruction. Although nothing should preclude the judge from suggesting this option, she should have absolutely no duty to comb the second for evidence of "sudden passion". Clearly, the new act places the burden of requesting such an instruction on the defendant. The new act allows a defendant to gamble on a "first degree murder or nothing" verdict. Thus, the new act provides that a defendant can always prevent a second degree murder instruction from being tendered to the jury.⁹⁹

96. *Id.* at 988-89.

97. *Id.* at 993-97.

97.1 Public Act 84-1450.

98. The converse of this rule is equally true: if a defendant raises the issue of "unreasonable belief" second degree murder, then the trial court should automatically instruct the jury on self-defense as well. It would be difficult to conceive of a situation in which defense strategy would argue against instructing a jury on self-defense.

99. Such a rule would also eliminate a problem with sufficiency of the evidence such as that manifested in *People v. Fausz*, 95 Ill. 2d 535, 449 N.E.2d 78 (1983). See

B. *When Defendant is Tried For First Degree Murder At a Bench Trial*

A defendant being tried for murder at a bench trial had absolutely no right to restrict the trial judge from considering the possibility of a finding of voluntary manslaughter.¹⁰⁰

Even though the new Act states that a first degree murder defendant should have an absolute right to prevent a jury from considering second degree murder, it is silent regarding a bench trial. Judge Steigmann argues that the defendant at a bench trial should have a similar right. Symmetry would appear to support this, although in reality it might appear foolhardy for a defendant to attempt to prevent a judge from finding that the murder was accompanied by mitigating circumstances.

7. *Challenging the Sufficiency of the Evidence of a Second Degree Murder Conviction*

Several problems arise in the area of a defendant-appellant asking an appellate court to reverse a second degree murder conviction based on insufficiency of the evidence.

If a defendant-appellant is challenging a second degree murder conviction which is based on unreasonable belief of self-defense, she has two possible tacks. First, she can argue that a reversal is mandated because one of the elements of first degree murder is not present, that is, that the State failed to prove that the defendant actually performed an unjustified killing either knowingly or intentionally.¹⁰¹ In the alternative, she can argue that even though she performed the requisite acts, her belief in the need for deadly force was *reasonable*, rather than unreasonable; thus, rather than being guilty of second degree murder, she is guilty of no crime.¹⁰²

If a defendant-appellant is challenging a second degree murder conviction based upon provocation, the options of challenging on insufficiency of the evidence are more limited. As in "unreasonable belief" second degree murder, a defendant can assert that one of the elements of first degree murder is not present and that the second degree conviction must be reversed outright.¹⁰³ A different situation presents itself if a defendant has been found guilty of the first degree murder elements beyond a reasonable doubt, but is merely

infra n. 105.

100. *People v. Taylor*, *supra* n.88; *People v. Binion*, 132 Ill. App. 2d 257, 267 N.E.2d 715 (2d Dist. 1971) (dictum).

101. *See* P.A. 84-1450 at 4206.

102. *See* P.A. 84-1450 at 4213.

103. *See* P.A. 84-1450 at 4214.

challenging the sufficiency of the evidence of sudden passion and provocation. The mischief here is obvious. If the defendant-appellant convinces the court that the existence of the sudden passion or provocation has not been established by a preponderance of the evidence, then the defendant is arguably not guilty of second degree murder, but is rather guilty of first degree murder. However, the Appellate Court is barred from entering a judgment of first degree murder because defendant was acquitted of this charge at trial and a judgment of first degree murder would violate double jeopardy principles.¹⁰⁴ Thus, according to this scenario, a defendant clearly guilty of first degree murder goes free.

Illinois courts foolishly allowed this type of mischief in the murder/voluntary manslaughter area. In *People v. Fausz*,¹⁰⁵ the Illinois Supreme Court reviewed a voluntary manslaughter conviction and found no evidence of either provocation or unreasonable belief in self-defense.¹⁰⁶ It thus reversed the voluntary manslaughter conviction; because Fausz had been explicitly acquitted of murder at trial, he was found not guilty of any criminal homicide.¹⁰⁷

Fausz was incorrectly decided. Obviously, a defendant cannot be guilty of a criminal offense unless the State proves each element of guilt beyond a reasonable doubt.¹⁰⁸ *Fausz's* error was defining the mitigating circumstances of "sudden passion/provocation" as an "element" of voluntary manslaughter. Understanding why "sudden passion/provocation" is not an "element" of second degree murder will *a fortiori* explain why it was also not an element of voluntary manslaughter. The Illinois Criminal Code provides that "[n]o person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonable doubt."¹⁰⁹ Whether sentenced under first degree or second degree, the convicted defendant is nonetheless guilty of murder. The "sudden passion" factor of second degree murder does not establish *guilt*; it is not an "element" which establishes culpability; on the contrary, it merely shows that *that particular murderer is less culpable than other murderers*. A person convicted of second degree murder has simply been "given a break". Thus, under the principles of *Patterson v. New York*,¹¹⁰ the "sudden passion/provocation" factor in second degree murder is not an "element" of that offense.

104. See U.S. CONST. amend. V; ILL. CONST. art. I, sec. 10 (1970).

105. 95 Ill. 2d 535, 449 N.E.2d 78 (1983).

106. *Id.* at 539-40.

107. *Id.* at 541. No court at any level in the *Fausz* case recognized that verdicts of "not guilty" if murder and "guilty" of voluntary manslaughter were legally inconsistent verdicts. See *supra* notes 57-61 and accompanying text.

108. ILL. REV. STAT. ch. 38, par. 3-1 (1985).

109. *Id.*

110. See *supra* note 23 and accompanying text.

This fact has a serious effect on a defendant's ability to appeal a second degree murder conviction based upon insufficiency of the evidence of "sudden passion/provocation". Such a defendant-appellant is *not* denying that he is a murderer; rather, he is perversely *complaining* that the fact-finder showed leniency by only finding him guilty of second degree, rather than first degree murder. Such an appellant is alleging no prejudice; if a defendant cannot show he was prejudiced, he simply has no issue to raise on appeal. This is because Supreme Court Rule 615(a)¹¹¹ establishes that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" on appeal.¹¹² An Appellate Court simply has no power to find that a "substantial right" of a murderer was violated when he was convicted of a *lesser*, rather than a greater, degree of murder. Thus, the Appellate Court lacks jurisdiction over such a claim.

Allowing a defendant to challenge the sufficiency of mitigating evidence would violate other interests as well. Double jeopardy concerns aside, one reason why the State cannot appeal an acquittal on grounds that the defendant should have been found guilty beyond a reasonable doubt is that the jury simply has the right to ignore all instructions and acquit the defendant in an exercise of leniency.¹¹³ Likewise, a jury might find that a murderer should be punished under second degree, rather than first degree, for reasons totally unrelated to the instructions tendered to them. A convicted murderer should obviously not be able to exploit this exercise of leniency into an acquittal on all charges of criminal homicide.

Thus, under either Rule 615(a) or on jury leniency principles, a defendant should not be allowed to appeal a "provocation" second degree murder conviction on grounds of insufficiency of evidence of provocation. If a defendant is convicted of "provocation" second degree murder, the Appellate Court should affirm as long as it finds that the State has established the elements of first degree murder beyond a reasonable doubt.

8. *Hattery Problems in the First Degree/Second Degree Murder Case*

In *People v. Hattery*,¹¹⁴ the Illinois Supreme Court faced a situation in which defense counsel at a capital murder trial used the strategy of conceding his client's guilt at the trial and then arguing for leniency during the death sentencing hearing. In reversing the

111. ILL. REV. STAT. ch. 110A, par. 615(a) (1985).

112. *Id.*

113. *United States v. Powell*, 469 U.S. 57 (1984).

114. 109 Ill. 2d 449, 488 N.E.2d 513 (1985).

conviction, the Court held:

“Counsel may not concede his client’s guilt . . . where a plea of not guilty has been entered, unless the record adequately shows that defendant knowingly and intelligently consented to his counsel’s strategy.”¹¹⁵

Hattery arguably has relevance to the new murder degrees statute. Consider a defendant charged with first-degree murder. He pleads “not guilty” and goes to trial. His defense consists of admitting the killing, but arguing that it was the result of sudden passion from a reasonable provocation and that he is only guilty of second degree murder. Note that trial counsel, similar to *Hattery*, will actually be *conceding guilt* on the elements of first degree murder;¹¹⁶ he will merely be arguing that the provocation should reduce it to second degree murder.

On the other hand, one could argue that *Hattery* has no applicability; counsel, after all, is not suggesting that the jury should return a verdict on first degree murder. Yet, despite the “not guilty” plea, counsel is conceding that all the elements of that offense are present beyond a reasonable doubt. To avoid appellate embarrassment, trial counsel may wish to make a pretrial showing on the record that the defendant is knowingly and intelligently consenting to this strategy.

CONCLUSION

Illinois’ former murder/voluntary manslaughter dichotomy was replete with serious conceptual difficulties. The new first degree/second degree statutory scheme has the potential to cure most of the old problems. This will be accomplished only if all participants in the criminal justice system are willing to replace obsolete jury instructions and outmoded common law concepts with new instructions and ideas consistent with our revised statute.

115. 109 Ill. 2d at 465.

116. See *supra* note 114 and accompanying text.

APPENDIX

Subsection (c) of Section 9-2 (Second Degree Murder) is set forth as follows:

(c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.

The proposed instructions are as follows:

PROPOSED IPI-CRIMINAL 2.01.

The defendant is charged with the offense of First Degree Murder. The defendant has pleaded not guilty to that charge. You are to decide based upon the evidence in this case whether to return a not guilty verdict, a verdict of guilty of First Degree Murder, or a verdict of guilty of Second Degree Murder.

PROPOSED IPI-CRIMINAL 7.05A

A mitigating circumstance exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable.

PROPOSED IPI-CRIMINAL 7.02, 7.06 AND 24-25.06A
COMBINED

To sustain the charge of first degree murder, the State must prove each of the following propositions:

First: That the defendant performed the acts which caused the death of John Smith; and

Second: That when the defendant did so, he either —

- (1) intended to kill or do great bodily harm to John Smith;
- or
- (2) knew that his act would cause death or great bodily harm to John Smith; or
 - (3) knew that his acts created a strong probability of death or great bodily harm to John Smith; and

Third: That the defendant was not justified in using the force which he used.

If you find from your consideration of all the defendant has proved by a preponderance of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty [of first degree murder] and your deliberations [on this charge] should end.

(Note: Use of the brackets in the above paragraph depends upon whether first degree murder is the only charge or whether there are other charges for the jury to consider.)

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should go on with your deliberations to decide whether a mitigating factor has been proved so that the defendant is guilty of the lesser offense of second degree murder instead of first degree murder.

You may not consider whether the defendant is guilty of the lesser offense of second degree murder instead of first degree murder until and unless you have first determined that the State has proven beyond a reasonable doubt each of the propositions of first degree murder.

The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. By this I mean that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true that the following mitigation is present: that the defendant, at the time he performed the acts which caused the death of John Smith, believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.

If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.

PROPOSED IPI-CRIMINAL 26.01

The defendant is charged with the offense of first degree murder. If you find that the State has proved the defendant guilty beyond a reasonable doubt of the offense of first degree murder, you must then decide whether the defendant has proven by a preponderance of the evidence that he is guilty of the lesser offense of second degree murder instead of first degree murder. Accordingly, you will be provided with three verdict forms: "Not Guilty", "Guilty of first degree murder", and "Guilty of second degree murder."

From these three verdict forms, you should select the one verdict form that reflects your verdict and sign it as I have stated. You should not write on the other two verdict forms at all. Only one of these three verdict forms is to be signed by you.