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Second Degree Murder Replaces Voluntary Manslaughter in Illinois: Problems Solved, Problems Created

James B. Haddad*

I. INTRODUCTION

Effective July 1, 1987, the Illinois legislature replaced the offense of murder with first degree murder, and voluntary manslaughter with second degree murder. The legislation, however, preserved the distinction between these two grades of homicide. Thus, an unjustified knowing or intentional killing is second degree murder rather than first degree murder if the defendant killed under provoked passion or under an unreasonable belief of justification. The legislature, however, cast upon the defendant the burden of proving either of these mitigating circumstances to reduce an unjustified knowing or intentional killing to second degree murder.¹

This Article treats questions that might arise under the new statute. I avoid repeating observations made in Professor Timothy O'Neill's and Judge Robert Steigmann's thoughtful articles concerning the new statute.² Instead, I highlight our areas of disagreement.

Difficulties under the new law will generate criticisms by those who believe that, without a radical statutory amendment, trial judges could have avoided problems that arose under the former law. Although a legislative solution was necessary, the legislature should have adopted a simpler proposal to resolve existing problems without creating new difficulties. Nevertheless, the new statute solves problems that not even the most pragmatic judge

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could have resolved under the former law. The thoughtful judge should be able to handle most of the difficulties arising under the new statute.

II. THE NEED FOR A LEGISLATIVE SOLUTION

The crux of the problem under the old murder-voluntary manslaughter scheme was twofold. First, the 1961 Illinois Criminal Code (the "Code") defined murder without reference to the absence of the mitigating circumstances that supposedly distinguished murder from voluntary manslaughter. Second, the Code required proof of every element of murder, plus proof of the presence of mitigating circumstances in order to sustain a voluntary manslaughter conviction. Consistent with these statutes, the Illinois Pattern Jury Instructions ("I.P.I.") Committee in 1968 approved instructions that reflected two anomalies. The issues instruction for murder made irrelevant whether a defendant acted either out of sudden and intense passion after serious provocation, or upon the unreasonable belief that facts existed that would have justified his conduct. Moreover, whenever the jury returned a voluntary manslaughter verdict, it necessarily found that the state had proved the only elements relevant to the charge of murder. Accordingly, if it complied with those instructions, a jury would never return a voluntary manslaughter verdict without also returning a murder verdict.

My earliest memory of discussion of these anomalies includes a recollection of a statement by a thoughtful, pragmatic, and by no means anti-intellectual judge. Appreciating the theoretical concerns, the Honorable Marvin Aspen asked whether anyone had encountered a practical difficulty with the murder-voluntary

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3. See ILL. REV. STAT. ch. 38, paras. 9-1, 9-2 (1985). The phrase "mitigating circumstances" as used in this Article includes "passion-provocation" and "unreasonable belief of justification" as those terms are defined under the old voluntary manslaughter law and the new second degree murder statute.

4. See ILLINOIS PATTERN JURY INSTRUCTIONS §§ 7.02, 7.04, 7.06 (Crim.) (1st ed. 1968) (hereinafter cited as "I.P.I."). O'Neill, supra note 2, at 218, incorrectly states that in § 7.06 the I.P.I. Committee "[p]erversely" required the state to prove the absence of "unreasonable belief," thus "radically" departing from § 7.04, which required the state to prove the presence of passion-provocation. A simple reading indicates that § 7.06 did not require proof of the absence of an unreasonable belief. The Committee added this requirement only in the sample instruction § 27.01, prepared by Professor Prentice Marshall. The § 27.01 requirement that the state prove the absence of mitigating circumstances in order to obtain a murder conviction was intended to apply when either form of voluntary manslaughter was in issue. The history of the sample instruction is told in Haddad, Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach, 59 CHI.-KENT. L. REV. 23, 33, 49-56 (1982).
manslaughter jury instructions during the trial of a homicide case. He correctly asserted that juries somehow were distinguishing between murder and voluntary manslaughter. They were not signing multiple guilty verdict forms; but rather, they were choosing between murder and voluntary manslaughter, generally in accord with the verdict that the trial judge would have predicted. Judge Aspen, joined by leading constitutional scholar John Nowak and by a majority of the committee that drafted the revisions, approved instructions that left the anomalies which Professor O'Neill and I later would discuss at length.

Problems arose later, however, as juries occasionally signed verdict forms finding the defendant guilty of both murder and voluntary manslaughter in situations in which the defendant had killed only one victim. To prevent such multiple guilty verdicts some judges, without altering the basic instructions, gave the jury three verdict forms, "guilty of murder," "guilty of voluntary manslaughter," and "not guilty," and told the jury that they must sign only one of these forms. This solution defied logic and created a constitutional question. It avoided multiple guilty verdicts through the use of manifestly inconsistent instructions.

5. Judge Aspen was then a judge of the Circuit Court of Cook County and a member of the I.P.I. Committee. The recollections stated are my own and were not preserved in writing.


7. See O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DE PAUL L. REV. 107 (1982); Haddad, supra note 4. The Committee, in response to judicial criticism, eliminated the additional proposition from sample instruction § 27.01. See Haddad, supra note 4, at 33, 51.


10. The use of inconsistent instructions about a material issue may violate due process. It is fundamentally unfair for the trial court to contradict itself in instructing the jury about an important matter. See Thomas v. Leecce, 725 F.2d 246, 252 (4th Cir.), cert. denied, 469 U.S. 870 (1984); Harless v. Anderson, 664 F.2d 610, 612 (6th Cir. 1981), rev'd on other grounds, 459 U.S. 4 (1985); People v. Jenkins, 69 Ill. 2d 61, 370 N.E.2d 532 (1977). Candor requires the acknowledgment that I have advanced this claim as an advocate for the appellant in a pending appeal, People v. Flowers, No. 86-2441, Illinois Appellate Court, First District. In Flowers, the trial judge instructed the jury in the same fashion as had the trial judge in Almo, 108 Ill. 2d 54, 483 N.E.2d 203 (1985). The Illinois Supreme Court in Almo had no occasion to resolve a due process challenge to the inconsistent instructions.
judge gave instructions that mandated that if a jury found the defendant guilty of voluntary manslaughter, it must also find him guilty of murder. On the other hand, the judge told the jury that such multiple guilty verdict forms were impermissible, but did not provide the jury any basis for choosing between the contradictory instructions.

The Fourth Appellate District arrived at a different solution in People v. Bolden. The court modified the murder instructions to require that the prosecution prove the absence of the mitigating circumstances that distinguish murder from voluntary manslaughter. This approach, which Professor Prentice Marshall first had suggested in sample instructions prepared in 1968, also was flawed. If the state proved beyond a reasonable doubt that the defendant committed an unjustified knowing or intentional killing, but the jury found that the evidence was fairly close as to whether the statutorily defined mitigating circumstances had been present, the instructions directed the jury to convict the unjustified killer of neither murder nor voluntary manslaughter.

Despite Professor O'Neill's strong criticism of the I.P.I. Committee and suggestions by the Illinois Supreme Court that the Committee should find a solution, no one to this day has proposed jury instructions that would avoid the anomalies while remaining true to decided cases. As long as Illinois law provided that one of the elements of voluntary manslaughter was either pas-

13. See supra notes 4 and 7.
15. O'Neill, supra note 2, at 218.
17. Professor O'Neill suggested that the court should instruct the jury that, when the state established the elements of murder, the jury should find the defendant guilty of voluntary manslaughter instead of murder if, and only if, the state also proved beyond a reasonable doubt the presence of mitigating circumstances. His approach tracked the statutes literally, but he did not explain how the jury could be told not to sign a murder verdict in some instances when it found that the state had proved every element of murder. O'Neill, supra note 14, at 308. More significantly, when both murder and voluntary manslaughter were in issue, no case had held that the state had to establish mitigating circumstances beyond a reasonable doubt to sustain a manslaughter verdict. "Some evidence" appeared to be enough. See Haddad, supra note 4, at 39. Moreover, O'Neill's proposed instruction was inconsistent with some Illinois case law holding that sometimes...
sion-provocation or unreasonable belief of justification, the jury instruction difficulties were unavoidable. As an I.P.I. Committee member, I contemplated the problem for over a decade without arriving at a solution I viewed as satisfactory.

III. PROPOSED LEGISLATIVE SOLUTIONS

In 1982, I proposed a legislative solution for the murder-voluntary manslaughter problem. Under this recommendation, when both murder and voluntary manslaughter were in issue, proof beyond a reasonable doubt of a knowing or intentional unjustified killing would give the prosecution a conviction of at least voluntary manslaughter. If the prosecution also proved beyond a reasonable doubt that the killing had not been accompanied by either of the statutorily defined mitigating circumstances, it would be entitled to a murder conviction. My proposal included very simple jury instructions that would be given under such a statutory scheme. It also included provisions under which the prosecution could charge voluntary manslaughter when prosecutors believed that the killing was accompanied by the statutorily defined mitigating circumstances. The proposal acquired the sponsorship of Senator George Sangmeister and passed the Illinois Senate by a unanimous vote in 1983. The House Judiciary Committee, however, prevented its consideration by the full House.

During this same period, Professor Timothy O'Neill had been considering the same problems. A month or two after publication of my 1982 article, O'Neill, working completely independently, the evidence could sustain a voluntary manslaughter verdict when it was insufficient to establish the elements of murder. Id. at 29-30.

Finally, when the defendant claimed that mitigating circumstances were present, it would have been confusing to tell a jury that it should not return a voluntary manslaughter verdict unless the state established the presence of mitigating circumstances. Having articulated these criticisms, I acknowledge that O'Neill's suggestion was as good as any and better than most.

19. I once suggested that courts, even without a legislative amendment, could instruct the jury as they would if the legislature adopted the scheme that I proposed. That legislative proposal is discussed in the text accompanying notes 20-24, infra. See Haddad, supra note 4, at 56-59, 64-66. I dropped that suggestion after concluding that it was inconsistent with People v. Fausz, 95 Ill. 2d 535, 449 N.E.2d 78 (1983). See Haddad, supra note 4, at 62.
20. See Haddad, supra note 4, at 44-46, 63-64.
21. Id. at 64-66.
22. See infra note 80.
24. 2 House Journal Illinois 4420-21 (June 14, 1983).
published his first article in this area, covering some of the same
ground, but adding fresh insights and a valuable historical perspec-
tive. In 1984, in his second article, O'Neill offered his own legis-
lative solution. He called for a change in the name of the
offenses, suggesting the replacement of murder and voluntary man-
slaughter with first degree murder and second degree murder re-
spectively. Under his approach, the prosecution would be entitled
to at least a conviction of second degree murder if it established
beyond a reasonable doubt that the defendant had knowingly or
intentionally killed another without justification. When it pro-
vided such proof, it would be entitled to a conviction of first degree
murder unless, from all of the evidence presented, the jury con-
cluded by a preponderance of evidence that at least one of the stat-
tutorily defined mitigating circumstances had been present at the
time of the killing.

The Honorable Robert Steigmann, judge of the Sixth Judicial
Circuit in Urbana, drafted a bill that embodied most of Professor
O'Neill's suggestions. Instead of using a "free-flowing" burden
approach, however, Judge Steigmann placed the burden on the
defendant to prove by a preponderance of the evidence the pres-
ence of mitigating circumstances in order to reduce the grade of
the offense from first degree murder to second degree murder. He
also mandated that the jury first consider the issue of first degree
murder and only go on to the question of second degree murder if
it finds beyond a reasonable doubt the presence of every element of
first degree murder, namely that the defendant had knowingly or
intentionally killed without legal justification. The Steigmann lan-
guage was adopted in all essential respects and became law effec-
tive July 1, 1987. It did not appear to permit the prosecution the
option of charging second degree murder even when prosecutors
believed that mitigating circumstances were present.

In summary, the differences between the new law and what I
characterize as the simpler solution that had been before the Gen-
eral Assembly in 1983 are as follows:

1. My proposal retained the old names of "murder" and "vol-
untary manslaughter." The new law uses the names "first degree
murder" and "second degree murder."

25. See O'Neill, supra note 7.
28. See infra note 61 and accompanying text.
30. See infra notes 79-83 and accompanying text.
2. My proposal required the state to prove beyond a reasonable doubt the absence of mitigating circumstances, when they were in issue, in order to obtain a conviction of murder rather than voluntary manslaughter. The new law requires the defendant to prove by a preponderance of evidence the presence of mitigating circumstances, when they are in issue, in order to obtain a second degree murder conviction instead of a first degree murder conviction.

3. The new law requires that juries complete their determinations as to the elements of first degree murder and to consider the issues in second degree murder only after they first find that the state has met its burden as to every element of first degree murder. My proposal did not mandate that the jury complete its deliberations as to murder before considering the issues in voluntary manslaughter.

4. My proposal would have allowed the prosecutor to charge the lesser form of homicide when mitigating circumstances were present. The O'Neil-Steigmann approach does not.

Many of the problems that judges will encounter under the new law would have been avoided under the proposal that the House Committee rejected in 1983. The differences between that proposal and the one enacted will manifest themselves in complexities sure to arise under the new statutory scheme.

IV. COMPLEXITY IN JURY INSTRUCTIONS FLOWING FROM DIFFERING BURDENS WITHIN A SINGLE CASE AND FROM LEGISLATIVE EFFORTS TO DICTATE THE ORDER OF JURY DELIBERATIONS

A. Differing Burdens

The usual Illinois approach to affirmative defenses makes for simple jury instructions. Once sufficient evidence is introduced to put into issue an affirmative defense, such as self-defense or entrapment, the prosecution must prove beyond a reasonable doubt the absence of those facts that constitute the defense in order to prevail.31 Thus, to the issues instruction for the substantive offense, the court merely adds one more proposition which the state must prove beyond a reasonable doubt.32

When the legislature instead places upon a defendant the burden of showing the facts constituting a defense by a preponderance in

order to prevail, as it did, for example, in altering the Illinois insanity defense statute, jury instructions became more complex. Now two different parties bear burdens of proof, and those burdens vary quantitatively.

Under my proposal to make voluntary manslaughter a partial affirmative defense to murder, simplicity in instructions is possible. The jury is told that to obtain a voluntary manslaughter conviction, the prosecution must prove beyond a reasonable doubt a knowing or intentional unjustified killing. To obtain a murder conviction, the prosecution additionally must prove beyond a reasonable doubt the absence of the statutorily defined mitigating circumstances. Under the proposal that became law, however, the matter is not that simple. For first degree murder, the court cannot add a single proposition to the issues instruction for second degree murder. Instead, it must tell the jury that as to some issues the burden is on the state beyond a reasonable doubt, but as to another issue, the burden is on the defendant by a preponderance. Additionally, the court must define "preponderance." Moreover, the complexity is aggravated when the "unreasonable belief" type of second degree murder is in issue. The court must instruct the jury that to establish elements of first degree murder the state has the burden of proving beyond a reasonable doubt the absence of a reasonable belief in the existence of justifying facts, but that to reduce the offense to second degree murder, the defendant has the burden of proving by a preponderance of the evidence the presence of an unreasonable belief in the existence of justifying facts.

Admittedly, complexity by itself should not be determinative in the debate over who should have the burden of proving the presence or absence of mitigating circumstances that reduce the grade of the homicide. Nor should complexity in instructions definitively resolve the policy question of which side should bear the burden of any particular affirmative defense. Nonetheless, in light of other complexities flowing from legislative efforts to structure the order

33. See ILL. REV. STAT. ch. 38, para. 6-2(e) (1987).
34. See, e.g., I.P.I. § 24-25.01A (Crim.) (2d ed. 1981) (1987 Supp.). The burden is on the prosecution to prove every element of the offense beyond a reasonable doubt. It is on the defendant to establish by a preponderance the facts constituting a defense.
35. See Haddad, supra note 4, at 64-66.
of jury deliberations under the new Illinois homicide law, the legislature should have paid serious attention to questions of complexity in the instructions that it was effectively mandating.

**B. Structuring the Order of Deliberations**

Legislative efforts to dictate the order of jurors' deliberations apparently are a relatively recent phenomenon in Illinois criminal law.\(^39\) In a 1984 law drafted by Judge Steigmann, the legislature required that jurors not reach the issue of insanity unless and until the jury has found that the prosecution had proved beyond a reasonable doubt every element of the offense charged.\(^40\) This was the prime precedent for the new homicide statute's direction that jurors consider the question of second degree murder only after they have determined that the state has proved every element of first degree murder.

When the legislature directs the order in which juries shall consider issues in a criminal case, it effectively mandates lengthy, complex jury instructions, unlike those typically employed in Illinois cases. By requiring that the jury be told that it must consider first degree murder rather than second degree murder, the legislature requires that issue instructions for the two offenses be combined. The matter becomes even more complex when insanity and guilty but mentally ill verdicts are possibilities in a case in which the jury is being charged on first degree and second degree murder.

The drafters of the instruction used a flow chart, suggested by First Assistant Appellate Defender Robert Davison, in their efforts to comply with the statutory mandate in such cases. Aided by Judge Steigmann, they converted the flow chart into appropriate instructions. When only first degree murder and "passion-provocation" second degree murder are in issue, the instruction is approximately four hundred and thirty-five words long.\(^41\) When insanity and guilty but mentally ill are also in issue, the suggested instruction is approximately eight hundred and eighty words long.\(^42\) Of course, when the court instructs on both forms of second degree murder ("unreasonable belief" as well as "passion-provocation"), each of these instructions is lengthened by approxi-

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\(^39\) Because they are different analytically, I exclude from this discussion those schemes in which the legislature has ordered bifurcated proceedings, such as the current Illinois death penalty statute, ILL. REV. STAT. ch. 38, para. 9-1 (1987).


The instructions are foreign to the system of criminal instructions in Illinois, where simplicity ordinarily has prevailed. Illinois has a modern criminal code, with crisp definitions of offenses that require little judicial interpolation. As a result, Illinois courts, unlike federal courts, ordinarily are able to define issues in criminal cases with relative simplicity. By comparison to both the instructions previously used in the chapter on homicide,44 and the instructions drafted for use in connection with my proposal,45 the instructions implementing the new law are extraordinarily complex. A reading of the instructions will bring home to the reader the level of complexity that the legislature effectively has mandated.46

The theoretician might argue that reform in the penal law should not be stymied by envisioned difficulties in drafting jury instructions. The pragmatist would respond that reform is meaningless unless jury instructions can adequately inform the jury of its task by translating substantive principles into comprehensible guides for the jury. Possibly my concern is especially acute because, as present chairman of the I.P.I. Committee, I fear that when judges first are called upon to use the combined first degree-second degree-insanity-guilty but mentally ill instruction, the Committee will become a laughingstock. Nevertheless, the Committee must follow the law, a reality sometimes ignored even by scholars as perceptive as Professor O’Neill.47

The legislative effort to order jury deliberations is also a failure because it is piecemeal. Consider, for example, a case in which the court instructs the jury as to first degree murder, second degree

43. The drafters have not included in the 1987 Supplement instructions for cases in which both forms of second degree murder are in issue. Thus, they followed the precedent of the 1968 and 1981 drafters, leaving it to the judge to combine the instructions separately provided for “passion provocation” and “unreasonable belief of justification.” The instruction in the appendix to this Article demonstrates how the two forms of mitigating circumstances can be combined.
45. See Haddad, supra note 4, at 64-66.
46. See the instructions cited in notes 41-42 supra. In an appendix, I have set out a single issue instruction for a homicide prosecution with facts similar to those in a recent reported decision.
47. After condemning with vehemence the Illinois Supreme Court, Professor O’Neill wrote, “The only defense that can be offered on the courts’ behalf is their failure to receive assistance from the Illinois Pattern Jury Instructions.” O’Neill, supra note 2, at 217. During my thirteen years on the Committee, the members have believed that they must follow the decisions of reviewing courts and of the legislature. We have not viewed it as our role to guide the Illinois Supreme Court toward true law.
murder, and involuntary manslaughter. The legislature has forced the court to tell the jury to consider first degree murder before considering second degree murder and to reach the question of second degree murder only if the jury found that the prosecution has proved the elements of first degree murder. Where does involuntary manslaughter fit in? Must the court tell the jury to postpone its consideration of involuntary manslaughter until it unanimously has agreed that the prosecution did not prove the elements of first degree murder? As judges at the recent Judicial Conference argued, a court cannot very well tell the jury to complete deliberations on first degree murder before considering second degree murder without telling the jury where involuntary manslaughter (or felony-murder)\(^48\) deliberations fit. As a result, judges will have to lengthen the already extraordinarily long issues instruction mandated by the new law.\(^49\)

V. OTHER PROBLEMS FLOWING FROM EFFORTS TO DICTATE THE ORDER OF JURY DELIBERATIONS

An additional criticism of the new provision is that the legislature has mandated instructions that give greater emphasis to the more serious offense of first degree murder and retard discussion of second degree murder, even when the court has determined that the evidence supports consideration of both. Some case law suggests that courts should not tell the jury to first consider the greater offense and only later to consider the lesser offense.\(^50\) Even if courts reject this criticism about the legislative requirement that

48. Under the new statute, second degree murder is not to be considered under a count charging felony-murder, ILL. REV. STAT. ch. 38, para. 9-2 (1987), just as under former law voluntary manslaughter was not to be considered under a count charging felony-murder. A jury in a single case, however, might consider both felony-first degree murder and, under a count charging a knowing or intentional killing, second degree murder. See Committee Notes to I.P.I. §§ 7.04A, 7.06A (Crim.) (2d ed. 1981 and Supp. 1987). See also People v. Williams, 164 Ill. App. 3d 99, 517 N.E.2d 745 (3d Dist. 1987); People v. Washington, 127 Ill. App. 3d 365, 468 N.E.2d 1285 (1st Dist. 1985).

49. See the appendix for an example of a single issues instruction in a case arising under the new law.

50. See People v. Whitelow, 162 Ill. App. 3d 626, 515 N.E.2d 1327 (4th Dist. 1987), in which the court expressly condemned the practice. See also United States v. Jackson, 726 F.2d 466 (9th Cir. 1984). In Whitelow, Jackson, and cases like them, the trial court gives a "transition" instruction analytically different from the instruction at issue under the new law. A transition instruction tells jurors to consider a lesser included offense only if they do not unanimously agree that the accused is guilty of the greater offense. Under the new Illinois law, the court tells the jurors to consider second degree murder only if they agree that the state has established the elements of first degree murder. See I.P.I. §§ 7.04A and 7.06A (Crim.) (2d ed. 1981 and Supp. 1987).
the jury consider first degree murder before considering second degree murder, additional problems may remain.

For example, if in a case in which the judge instructs about both degrees of murder and about involuntary manslaughter, a judge might tell the jury that consideration of involuntary manslaughter should come after consideration of both first degree murder and second degree murder. As suggested above, the court will wish to tell the jury where the involuntary manslaughter determination fits, and this is the logical extrapolation from the new statute. But what is the justification for this ordering of consideration? The difference between first degree murder and involuntary manslaughter ordinarily will be whether the defendant killed another (1) "intentionally" or "knowingly" so as to be guilty of murder, or (2) merely "recklessly" so as to be guilty of involuntary manslaughter. Why should the jury be required to decide whether the mental state of murder was present and reach a unanimous agreement that it was not before the jury considers the alternative mental state for involuntary manslaughter? Although the case law might not suffice to sustain an attack on the legislative ordering of deliberations as the degrees of murder, it might lend support to an attack on a trial judge's decision to tell the jury to consider first degree murder before considering involuntary manslaughter.

Additionally, the number of hung juries might escalate if juries conscientiously adhere to instructions purporting to structure their order of deliberations. By telling a jury that it can consider second degree murder only if it unanimously has concluded that the state has proved every element of first degree murder, a judge may discourage the kind of give and take that historically has had a role in jury deliberations. The problem is exemplified when a judge orders completion of first degree murder deliberations before consideration of involuntary manslaughter. A jury evenly divided about whether the state has proved the requisite mental state for murder would end its deliberations hung instead of considering the less culpable alternative mental state required for involuntary manslaughter. The purists might see nothing wrong with discouraging "compromise" verdicts. Pragmatists would hope that the jurors would disregard the judge's instruction and use their common sense, unanimously agreeing on either the greater or the lesser of-

51. See supra note 48 and accompanying text.
52. ILL. REV. STAT. ch. 38, paras. 9-1(a), 9-3.
fense rather than declaring themselves hung as to the greater of-
fense and going no farther. Accordingly, if they do reach a verdict, it will only be because the jurors have disregarded the court's in-
structions as to the order of deliberations.

Finally, legislative structuring raises a question of separation of powers under the Illinois Constitution. The legislature's role is to define offenses and to provide penalties. But is it within the legisla-
tive purview to mandate the order in which jurors shall conduct their deliberations? Because of the strong line of Illinois decisions vindicating judicial prerogatives as to trial court procedures, it is possible that Illinois courts would strike down this aspect of the new statute. The most likely scenario is that, on a defendant's pre-trial motion a judge would deem unconstitutional the legisla-
tive directions about the order of jury deliberations. Then, the prosecution would appeal directly to the Illinois Supreme Court, which would be called upon to resolve the question.

VI. SECOND DEGREE MURDER IN ISSUE WHEN THE DEFENDANT HAS OFFERED NO EVIDENCE

A consensus supports the conclusion that, if the defendant wishes an instruction on second degree murder, he is entitled to it even if the defendant presented no evidence, provided that during the prosecution's case sufficient evidence was introduced to put into issue the existence of mitigating circumstances. The main controversy concerns how to instruct the jury in such a case. On the one hand, the defendant need not offer any evidence; he can point to mitigating evidence that is admitted during the prosecu-
tion's case. On the other hand, the defendant has the burden of proof on the question even though he is not necessarily required to call his own witnesses to establish mitigation. Jurors might not readily understand the distinction.

Professor O'Neill suggests that the problem would not arise if

54. See People v. Callopy, 358 Ill. 11, 192 N.E. 643 (1934), in which the court, in discussing an Illinois Supreme Court rule concerning the mode of instructing a jury, suggested that jury instructions were within the province of a state's highest court. See also People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986), and People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977) (decisions that invalidate legislative enactments that purported to regulate court procedures).

55. The Illinois Supreme Court would be the proper forum for an appeal from the invalidation of the statute. ILL. S. CT. R. 603, ILL. REV. STAT. ch. 110A, para. 603 (1987). In Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986), the prosecutor was granted leave to appeal as of right under similar circumstances.

56. See Steigmann, supra note 2, at 498; O'Neill, supra note 2 at 222; Committee Note to I.P.I. § 2.03A (Crim.) (2d ed. 1981 and Supp. 1987).
the legislature had taken his suggestion that it assign no one the burden of proof.\footnote{See O'Neill, supra note 2, at 222.} I have trouble following that suggestion. When the jury must choose between first degree murder or second degree murder depending upon the presence or absence of statutory mitigating circumstances, either the prosecution or the defense necessarily must bear the risk of non-persuasion. The court must tell the jury how to resolve the case if the evidence is evenly divided on the question of mitigating circumstances. In other words, it must specify who has the burden of proof. If the court does not, then each jury will decide on its own who has the burden, something that McCormick points out is quite undesirable.\footnote{See \textit{MCCORMICK ON EVIDENCE} § 336 (3d ed. 1984).}

O'Neill and I, along with others, agree that the jury must be told that in determining whether mitigating circumstances were present, it can consider all the evidence in the case, not just evidence presented in one party's case.\footnote{See O'Neill, supra note 2, at 222; Steigmann, \textit{supra} note 2, at 498.} This is hardly a unique problem. Even as to issues on which the state has the burden of proof, I.P.I. instructions always mandate that the jury consider all the evidence in deciding whether the state has met its burden.\footnote{See, e.g., I.P.I. §§ 7.02, 7.04, 7.06 (Crim.) (2d ed. 1981).}

The problem hardly requires the declaration that no one has the burden of proof or the creation of something called a “free-flowing burden.”\footnote{O'Neill has used the term “free-flowing burden” in various oral presentations concerning his proposal. The term designates his conception of a situation in which neither party has the burden of proof. Instead the jury is to decide based upon all the evidence whether or not mitigating circumstances accompanied the killing. See O'Neill, \textit{supra} note 2, at 222.} So far, various instructions have been suggested as a means of informing the jury that, although the defendant has the burden of proof as to mitigating circumstances, the jury must consider all of the evidence in determining whether the defendant has met this burden.\footnote{I.P.I. § 2.01A (Crim.) (2d ed. 1981 and Supp. 1987), provides in relevant part: 
If the State proves beyond a reasonable doubt that the defendant is guilty of First Degree Murder, the defendant then 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, and not guilty of First Degree Murder. In deciding whether a mitigating factor is present, you should consider all of the evidence bearing on this question. [The defendant is not required to present any evidence in order to establish the existence of a mitigating factor.]

Judge Steigmann, a member of the I.P.I. Committee, has suggested to the Committee use of a separate instruction patterned after I.P.I. § 1.02 (Civil) (1972), which provides:}

Professor O'Neill's alternative to these instructions would keep
from the jury the fact that the legislature has assigned the burden to the defendant and would instead say only that the jury must be convinced, based upon all the evidence, that the requisite mitigating circumstances have been established. The drafters of the pattern instructions could not logically adopt this solution without altering the basic form of every issues instruction in I.P.I. Criminal volume. To be consistent with O'Neill's suggestion, the instructions would have to tell the jury only that, in order to convict the defendant of a particular crime, it must be convinced, beyond a reasonable doubt, based upon all of the evidence, that the enumerated propositions have been established. In other words, the instructions would make no reference to the fact that the state must shoulder the burden of proof as to the elements of an offense. This is because, according to Professor O'Neill's reasoning, assigning a burden of proof "obfuscates" the notion that the jury can consider all the evidence in resolving an issue.

VII. PROBLEMS ARISING UNDER THE NEW NAME

The drafters of the new law insisted upon using the new names "first degree murder" and "second degree murder" in place of "murder" and "voluntary manslaughter." Because the same mitigating circumstances that distinguished voluntary manslaughter from murder now distinguish second degree murder from first degree murder, the name change was not essential. The change was not integral to the effort to straighten out burden-of-proof questions when mitigating circumstances are in issue. Moreover, the term "second-degree murder" under the new law signifies something far different than usually is signified by that term in other jurisdictions. Some prosecutors fear that juries will view "first degree murder" as more serious than murder, possibly equating it with "capital murder," and therefore will be more reluctant to convict a defendant of first degree murder. The only reason offered

"In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it."

63. See O'Neill, supra note 2, at 222.
64. Id.
66. The two degrees of murder usually are used to separate premeditated murder from unpimediated murder, a distinction created in the nineteenth century to avoid the mandatory death penalty for less serious murders. See W. LAVALLE & A. SCOTT, CRIMINAL LAW § 7.7 (2d ed. 1986).
67. I base this observation upon a conversation I had with the Hon. Fred Foreman on March 18, 1988. Mr. Foreman is State's Attorney of Lake County, Illinois, and a mem-
in support of the change of name was to attract attention to the change and to hale a new beginning.

The price of the change was more complexity. What would have been a two-page bill became a forty-page bill. Through the magic, or the mindlessness, of computers, every place in the entire Illinois Revised Statutes where the term “murder” appeared, the statute now reads “first degree murder.” Wherever “voluntary manslaughter” appeared, “second degree murder” now appears. Wherever the word “manslaughter” appeared, “second degree murder” now appears.

Eventually, this change will breed litigation. Suppose, for example, that the killer who took seven lives in 1982 through Tylenol tampering finally is caught. Under the terms of the new statute, the appropriate charge would be murder rather than first degree murder. Suppose that, after he is charged with murder, the accused raises a statute of limitations defense. Before July 1, 1987, the general statute of limitations for felonies was three years, but there was no limitations period for murder and voluntary manslaughter. Under the new law, the exceptions for murder and voluntary manslaughter have been eliminated, and have been replaced with exceptions for first degree murder and second degree murder. If the alleged killer had resided openly in Illinois for the whole period, he might claim that, because changes in statutes of limitation are procedural, the new law applies to him and bars his prosecution for murder or for voluntary manslaughter, which, as of July 1, 1987, are governed by the general three-year limitations period.

Perhaps courts would be quick to reject this claim, especially if made in the context of such a notorious prosecution. They might look beyond the plain language of the statute and conclude that...
obviously the legislature did not intend the apparent result.\textsuperscript{77} Nonetheless, courts would never have to face this and numerous other claims, including those arising under licensing-disqualification procedures, if the legislature had not changed the names of the offenses.\textsuperscript{78}

\textbf{VIII. CHARGING SECOND DEGREE MURDER}

One of the main concerns of attendants at the Judicial Conference was the possibility that the new statute does not permit a prosecutor to charge second degree murder when he or she believes that mitigating circumstances sufficient to justify reduction of the crime to second degree murder accompanied the killing.\textsuperscript{79} It seems wrong to require the prosecution to "overcharge," and, to do so may make the prosecutor look bad in the eyes of the jury. Although I once authored a proposal that would allow the prosecution to charge the lesser form of homicide when it believed that mitigating circumstances were present, the problem may be incapable of solution.\textsuperscript{80} If we treat mitigating circumstances as a partial affirmative defense to first degree murder, then second degree murder is not an offense in the conventional sense. Rather it is the

\textsuperscript{77} The court might also rely upon language of the amendatory act that specifies that the law applies only to homicides alleged to have occurred on or after January 1, 1987. \textit{See infra} note 91 and accompanying text.

\textsuperscript{78} Let us suppose that a defendant previously convicted of voluntary manslaughter applies for a license under a statute that prohibits the licensing of persons who are under the disability of one of several statutorily-enumerated felonies. Voluntary manslaughter will no longer be on the list, having been replaced by second degree murder. Or, consider the still more troubling cases where a statute formerly used the term "manslaughter" but now reads "second degree murder." \textit{See, e.g., ILL. REV. STAT.} ch. 129, para. 220.71(b) (1987). \textit{Compare ILL. REV. STAT.} ch. 129, para. 220.71(b) (1985). Formerly, the term "manslaughter" presumably included "involuntary manslaughter" as well as "voluntary manslaughter." It is hard to see how the current term "second degree murder" could possibly be construed to include "involuntary manslaughter."


\textsuperscript{80} I proposed a statute under which the state could charge voluntary manslaughter even though voluntary manslaughter ordinarily would be viewed as a partial affirmative defense to murder. Under my proposal, by charging voluntary manslaughter, the prosecutor would have had to establish the presence of mitigating circumstances. If the defense, however, refused to stipulate to the presence of mitigating circumstances before trial, the prosecutor could elect to bring a murder charge instead. \textit{See} Haddad, \textit{supra} note 4, at 60-61, 63. Some defense lawyers, including Mr. Inman, see note 79, \textit{supra}, were critical of this somewhat convoluted effort when I presented it to the Illinois State Bar Association Criminal Justice Council in 1983. They disliked the notion that a defendant could be coerced into stipulating to the presence of mitigating circumstances. Although my proposal passed the Senate, it failed in the House. \textit{See supra} notes 20-21 and accompanying text.
result of the successful interposition of the partial affirmative defense of passion-provocation or unreasonable justification. If, however, second degree murder is to be charged, the elements must be defined, and the prosecution must be required to prove the presence of each element. Thus, if second degree murder is to be separately chargeable, and if its elements include, for example, passion-provocation, the prosecution must prove beyond a reasonable doubt the presence of passion-provocation to obtain a voluntary manslaughter conviction. The latter situation is the one of the very anomalies that the call for reform sought to eliminate.

Neither Judge Steigmann nor probably Professor O'Neill believed that under their scheme prosecutors could charge second degree murder as a separate offense. In defense of this result, they might respond that under the old system prosecutors rarely charged voluntary manslaughter as a separate offense. Prosecutors did not want to risk the loss of conviction on any charge in the event that, after charging voluntary manslaughter, they proved an intentional or knowing unjustified killing but failed to prove the mitigating circumstances necessary for a voluntary manslaughter conviction. Moreover, under the new system, prosecutors can concede in application for bond and in opening statements their belief that mitigating circumstances were present to the extent that the evidence will justify only a second degree murder conviction.

Nevertheless, some attendants at the Judicial Conference suggested that courts should sustain a prosecutor's decision to charge second degree murder. Some argued that in such a case a prosecutor would voluntarily take on the burden of proving the mitigating circumstances beyond a reasonable doubt. This approach cannot be squared with the new statute, which requires the defendant to prove by a preponderance the presence of mitigating circumstances. Moreover, even if it could be, the ordinary defendant in the typical murder case might complain that the framing of the

82. See supra notes 3-4 and accompanying text.
83. Judge Steigmann expressly makes this point. Steigmann, supra note 2, at 496. O'Neill does not, but his 1986 article, read as a whole, seems to suggest that second degree murder is a judgment that can result only when the prosecution originally charged first degree murder. See generally O'Neill, supra note 2.
84. See Haddad, supra note 4, at 37-38. Some attendants at the recent Judicial Conference suggested that Cook County prosecutors almost never charged voluntary manslaughter under the former law; prosecutors from other counties did so occasionally, charging both murder and voluntary manslaughter. These same attendants suggested that "downstate" prosecutors will be aggrieved more than Cook County prosecutors if they are not allowed to charge second degree murder.
charge by the prosecutor should not dictate who has the burden of proving mitigating circumstances for a second degree murder conviction.

Other attendants suggested that the prosecutor who sought only a second degree murder conviction could label the offense as second degree murder in the indictment or information but still allege only the elements of first degree murder, namely a knowing or intentional unjustified killing. In effect, the prosecutor would be telling the court and the jury that he only seeks a second degree murder conviction. The usual first degree murder instructions would be used except that the term "second degree" would be substituted for the term "first degree." No reference to mitigating circumstances would appear in the jury instructions. The argument is that, even if no evidence of mitigating circumstances was presented by either side, a defendant convicted of knowingly or intentionally and without justification killing another could not complain that he was convicted of second degree murder.

Substituting the name "second degree murder" for "first degree murder," but otherwise instructing as if only first degree murder were in issue, might also be the solution to a problem first recognized by Professor O’Neill. How should the system retry a defendant who had been acquitted of first degree murder but convicted of second degree murder, and who later won a new trial because of procedural error? Nevertheless, calling something "second degree murder" when the statute defines that conduct as first degree murder seems to be quite a departure from the statutory scheme.

IX. THE PROBLEM OF THE EFFECTIVE DATE

As originally drafted, the bill that became Public Act 84-1450 made no mention of whether the new law would apply to offenses committed before its effective date. I recommended to the House Committee that, in order to avoid creating the right of election for the defendant who was tried after the effective date for a pre-effective date offense, the following language should be added:

This amendatory legislation shall apply only to offenses committed on or after the effective date of the amendment. Homicides committed before such date shall be governed by the law as it existed on the date of such offenses.

Instead, the legislature amended the proposal to provide that the amendment would apply only to acts committed “on or after January 1, 1986.” The Governor's amendatory veto changed this to “on or after January 1, 1987.” The problem is that the bill does not say when it became effective, and, for want of an effective date, by operation of law, the bill apparently took effect on July 1, 1987.

We thus have a law effective July 1, 1987, that says it applies to homicides alleged to have occurred on or after January 1, 1987. If the new law is viewed as harsher to defendants than the old law, a defendant cannot be forced to accept prosecution under the new scheme for a homicide alleged to have been committed during the first six months of 1987. If, however, a defendant tried after July 1, 1987 asserted the right to be tried under the new procedure for a crime allegedly committed during that six month period, as some defendants already have, arguably he should be afforded his choice because the new law is now in effect and on its face says that it applies to acts committed after January 1, 1987. Under these circumstances, and until a reviewing court settles the matter, the court might wish to afford the defendant an election as soon as possible after arraignment.

If the defendant elects the new procedure for trial on a charge of a homicide committed during the first six months of 1987, the prosecution might have to get a new indictment or file an amended information because of the legislative decision to change the names of murder and voluntary manslaughter to first degree murder and second degree murder. At trial, the jury would have to be told that the defendant is charged with first degree murder, something that a murder indictment prepared under the old law would not do.

88. 1 Senate Journal Illinois 980, 1008 (May 14, 1985).
89. 3 Senate Journal Illinois 4674 (November 6, 1986).
91. Pub. L. No. 84-1450, § 13. In the West Publishing Co. compilation of the Illinois Revised Statutes, one must follow footnote directions closely to discover the language that says that the law applies to acts alleged to have been committed on or after January 1, 1987. Eventually the careful reader is led to a note accompanying Ill. Rev. Stat. ch. 37, para. 702-7 (1987).
93. See supra note 91.
X. Pre-Trial Discovery of "Defense" of Provocation or of Unreasonable Belief of Justification

Under Illinois Supreme Court Rule 413, the prosecution is entitled to discovery of defenses that the defendant may rely upon. Presumably when a defendant gives notice of the defense of self-defense, reasonable belief of justification, the prosecution is adequately notified that "unreasonable belief of justification" may be in issue. The harder question arises when the defense attempts to put forth a theory of provocation that would reduce first degree murder to second degree murder. Upon the prosecution's request must the defendant provide advance notice of this "defense" to first degree murder?

Under former law, voluntary manslaughter was a separate crime, not a defense to the crime of murder. The new statute does not specifically use the terms "defense" or "affirmative defense," but the scheme functions very much like a partial affirmative defense.

Various other states with somewhat similar schemes require the defense to give notice in advance of trial when it intends to rely upon facts that reduce the grade of the homicide. Although the pertinent statutes and rules are different in those jurisdictions, in Illinois there is a distinct possibility that the defense will be required under Rule 413 to give notice of its intent to rely upon mitigating facts which would reduce first degree murder to second degree murder.

A separate issue is whether the court can impose the ultimate sanction for defense non-compliance with discovery requirements: refusal to admit evidence in support of the defense theory. When the defendant has given notice of a defense of self-defense or other sort of justification, it is difficult to see how the prosecution has been prejudiced by the defense's failure to notify the prosecution of the "unreasonable belief" theory of mitigation. Again, the harder question arises where the defense has not given advance notice of the provocation theory. Until a reviewing court rules that such notice is required, trial judges might choose not to impose the ultimate sanction of exclusion of evidence.

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95. See People v. Lockett, 82 Ill. 2d 546, 413 N.E.2d 378 (1980). See also infra notes 111-14 and accompanying text.
97. See infra notes 135-36 and accompanying text.
The requirement of notice, if imposed as to second degree murder in Illinois, would not seem to violate the fifth amendment. Provocation, for example, under the new Illinois scheme is much more of a true defense than is alibi. The defendant has the burden of establishing the facts that reduce first degree murder to second degree murder. By contrast, the prosecution bears the burden of proof on every issue in the case even when the defense offers an alibi. Nevertheless, under *Williams v. Florida*, the requirement of notice of alibi does not violate the Constitution.

XI. CONSTITUTIONALITY OF PLACING BURDEN ON THE DEFENDANT

The new scheme does not require the defendant to bear the burden of negating the presence of any element of an offense. Under the new scheme there is no overlap between any element that the prosecution must prove to establish first degree murder and facts that the defense must prove to reduce the grade of the offense to second degree murder. The recent decision of *Martin v. Ohio* permitted Ohio to place on the defendant the burden of establishing self-defense. Under the analysis appearing in *Martin*, the less drastic Illinois scheme concerning grades of homicide appears constitutional.

XII. IS THE PROSECUTION ENTITLED TO THE SECOND DEGREE INSTRUCTION OVER THE DEFENDANT'S OBJECTION? CAN THE COURT GIVE THE INSTRUCTION SUA SPONTE OVER THE DEFENSE OBJECTION?

If the evidence suffices to warrant an instruction on second degree murder, but the defense wants to go to the jury on a theory of first degree murder or "not guilty," does it have that right? Under former law, the court could instruct the jury on voluntary man-

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100. The best discussion of the constitutionality of the new statute appears in Judge Steigmann's article. *See Steigmann, supra note 2, at 495*. Judge Steigmann addresses an argument presented in unrecorded testimony to a General Assembly Committee by First Assistant State Appellate Defender Robert Davison, who contended that the proposal was unconstitutional. *See also* the thoughtful discussion in O'Neill, *supra* note 2, at 221-22.
slaughter when the evidence warranted it, even if the defendant objected. Judge Steigmann, however, says that the defendant has a right to prevent the giving of a second degree murder instruction. Professor O'Neill concurs, incorrectly claiming that the statute “specifically” gives the defendant that right. The statute speaks of the procedure to be followed in a jury trial when the defense requests the giving of the second degree instruction.

I believe that the statutory language does not specifically negate the possibility of an instruction given over defense objection. As previously suggested, I cannot see how a defendant can claim prejudice on appeal when he was found guilty of second degree murder. By definition, such a finding reflects the jury’s belief that every element of first degree murder was established. Other jurisdictions with statutes analogous to the new Illinois statute allow the court to instruct on the lesser grade of homicide even over the defense objections.

When the evidence warrants the instruction but the defense lawyer says the defendant does not want such an instruction, the careful judge may choose to both admonish the defendant of his right to the instruction and obtain an on-the-record waiver. This ordinarily would preclude a later attack arising from the failure of the court to give the second degree murder instruction. One recent Seventh Circuit decision, using the rubric of “incompetency of counsel,” granted habeas corpus relief when, in the absence of a knowing waiver by the defendant himself, the judge did not give an instruction on voluntary manslaughter.

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103. Steigmann, supra note 2, at 496.
104. O’Neill, supra note 2, at 229.
106. Carried to its logical extreme, application of the expressio unius principle would preclude a second degree murder judgment in any situation other than a jury trial in which the defendant asked for a jury instruction on second degree murder. Thus, a court could never consider second degree murder in a bench trial even when the defense sought such consideration.
107. See supra Section VIII.
108. See, e.g., State v. Asherman, 195 Conn. 695, 478 A.2d 227 (1985). The Asherman opinion spoke of the proper role of a court in tones quite similar to Justice Schaefer’s in People v. Taylor, 36 Ill. 2d 483, 224 N.E.2d 266 (1967) (judge serves the public interests and need not defer to an agreement between the prosecutor and the defense not to instruct on the intermediate verdict).
109. United States ex reL. Barnard v. Lane, 819 F.2d 798 (7th Cir. 1987).
XIII. SHOULD THE COURT GIVE THE INSTRUCTION WHEN THE DEFENSE NEITHER REQUESTS THE INSTRUCTION NOR OBJECTS TO THE INSTRUCTION?

Professor O'Neill's article provides extensive, thoughtful discussion of this question. The issue will arise in reviewing courts when the evidence appears to have justified the instruction on second degree murder but when the judge gave no such instruction and the record is silent as to why the defense did not tender the instruction, and the judge did not obtain a waiver of the instruction. Under the former statutory scheme, the defendant was entitled to an "unreasonable belief" voluntary manslaughter instruction whenever the judge instructed on self-defense. As O'Neill notes, however, some reviewing courts have held that the judge did not have to give the voluntary manslaughter instruction sua sponte even under these circumstances.

The question is largely academic, under both the old and new schemes, if the trial judge properly admonishes the defendant of his right to such an instruction. If the court instructs the jury on self-defense, the defense does not tender a second degree murder instruction, and the court decides to forego the instruction unless the defendant wishes it, the court should inquire of the defendant on the record whether he wishes the instruction. If he declines the instruction, and if the court agrees not to give the instruction, the court should obtain a knowing waiver on the record. The court should follow a similar procedure when there is sufficient evidence of provocation to warrant a second degree murder instruction but when the defense has not tendered such an instruction.

XIV. BENCH TRIAL CONSIDERATION OF SECOND DEGREE MURDER

Both Professor O'Neill and Judge Steigmann conclude that the judge must not consider second degree murder in a non-jury trial when the defendant has not asked for such consideration or has objected to such consideration. They reason that because a defendant has the right to preclude jury consideration of second degree murder, he must have the right to preclude a judge's consideration of second degree murder in a bench trial. I believe

110. O'Neill, supra note 2, at 228-29.
111. See People v. Lockett, 82 Ill. 2d 546, 413 N.E.2d 378 (1986).
112. See O'Neill, supra note 2, at 228.
113. See Steigmann, supra note 2, at 496-97; O'Neill, supra note 2, at 228.
this premise is false. I also doubt whether the conclusion necessarily follows from the premise. If a court announces a judgment of second degree murder after the defendant has objected to consideration of that alternative, it is hard to see how the defendant is going to complain successfully. By definition, the judge has found all essential elements of first degree murder. A reviewing court likely will not find any prejudice. If the reviewing court reverses, it will be because the evidence, as a matter of law, failed to establish the elements necessary for first degree murder; these elements also are necessary for second degree murder.

On the other hand, if the court accedes to a request by defense counsel that it not consider second degree murder, serious problems may arise, particularly when the judge hints on the record, in finding the defendant guilty of first degree murder, that the defense made a bad choice. The specter of ineffective assistance of counsel looms.

A judge might announce a finding that the state has proved beyond a reasonable doubt every element of first degree murder. Then, the trial judge could ask the defendant whether he wishes the judge to go further and determine whether mitigating circumstances were established by a preponderance of evidence so as to reduce the grade of the offense. This approach indicates the foolishness of defense efforts to preclude a judge in a bench trial from considering the possibility of second degree murder when the evidence would warrant such consideration.

XV. HOW MUCH EVIDENCE JUSTIFIES THE GIVING OF A SECOND DEGREE MURDER INSTRUCTION?

Under the former statutory scheme, cases were very diverse as to the amount of evidence that warranted a voluntary manslaughter instruction. When the judge had refused the defense request for such an instruction, and the jury had returned a murder verdict, it appeared that quite a lot was required to entitle the defendant to the instruction. If an instruction was given, however, and the defendant was convicted of voluntary manslaughter, that defendant could argue on appeal that the instruction was unwarranted,

114. See supra note 106 and accompanying text.
115. See supra note 107 and accompanying text.
116. While arguing that the defendant has this right, O'Neil agrees that a defendant would be foolish to try to prevent the court in a bench trial from considering second degree murder. O'Neil, supra note 2, at 230.
117. See Haddad supra note 4, at 41 n.81.
and that he was guilty of "murder or nothing." When such an instance arose, very little evidence was deemed sufficient to justify the instruction.\textsuperscript{118}

The new scheme does not say how much evidence is required to warrant an instruction. Presumably, the question is analogous to the one arising under the insanity defense statute.\textsuperscript{119} In both cases, the defendant has the burden of proof by a preponderance of the evidence. Accordingly, it can be argued that something more than "some evidence" is required. The Criminal Code provision requiring "some evidence" to put into issue an affirmative defense definition is not directly applicable because it contemplates a situation in which the prosecution has the ultimate burden of negating a defense beyond a reasonable doubt.\textsuperscript{120} A judge might ask whether, when viewing the evidence from the vantage point most favorable to the defense, any reasonable jury would conclude that the requisite mitigating factors had been established by a preponderance.\textsuperscript{121}

Under the new statutory scheme, however, the court may choose to err on the side of giving the second degree murder instruction when little evidence justifies it. A defendant found guilty of second degree murder will probably not have a valid argument akin to the "murder or nothing" argument under former law.\textsuperscript{122} If he is found guilty of second degree murder when there was no evidence of mitigating circumstances, a defendant will be in no position to claim prejudice. By definition, the jury would have found the presence of every element required for first degree murder. Moreover, the "mitigating circumstances" are no longer an essential element of a distinct lesser offense, and the failure to prove them beyond a reasonable doubt will be deemed harmless.

XVI. HOW TO PROCEED WHEN THE JURY FINDS THE DEFENDANT GUILTY OF BOTH FIRST DEGREE MURDER AND SECOND DEGREE MURDER

If jurors follow the instructions, they will not find the defendant guilty of both first degree murder and second degree murder except in the rare instance that one count charges felony-murder, a second count charges an intentional or a knowing murder, and the court

\textsuperscript{118} Id.

\textsuperscript{119} ILL. REV. STAT. ch. 38, para. 6-2(e) (1987).

\textsuperscript{120} ILL. REV. STAT. ch. 38, para. 3-2(a) (1987).

\textsuperscript{121} Compare Pedrick v. Peoria and Eastern Ry., 37 Ill. 2d 494, 229 N.E.2d 504 (1967).

\textsuperscript{122} See supra notes 113-16 and accompanying text.
instructs on second degree murder under the second count.\textsuperscript{123} In the latter instance, if the jury verdict form specifies that the jury has found the defendant guilty of felony-murder, this finding should control over a finding of second degree murder because sentencing is appropriate on the more serious charge when the verdicts are not inconsistent.\textsuperscript{124}

In cases not involving felony-murder, a jury would be acting in contravention of its instructions if it found the defendant guilty of both first degree murder and second degree murder. The verdicts would signify that the jury simultaneously has found and has not found that the defendant established by a preponderance of evidence the presence of mitigating circumstances.\textsuperscript{125} In such a case, according to the Illinois Supreme Court in \textit{People v. Hoffer}\textsuperscript{126} and \textit{People v. Almo},\textsuperscript{127} the judge should not enter judgment for either the lesser or the greater offense. \textit{Almo} suggests the judge could order the jury to resume its deliberations and to choose between the two verdicts. The judge would explain to the jury that its determination of whether the defendant proved mitigating circumstances should dictate its verdict. Alternatively, \textit{Hoffer} suggests that the judge properly could declare a mistrial because of the inconsistent verdicts.\textsuperscript{128} Unless and until a reviewing court rules otherwise, because of the costs involved in a mistrial, judges probably should elect the \textit{Almo} approach.

\section*{XVII. AREAS OF THE LAW IN WHICH MURDER-VOLUNTARY MANSLAUGHTER PRECEDENTS REMAIN GOOD LAW}

A number of other issues that were resolved under the murder-voluntary manslaughter scheme are likely to receive reconsideration under the new statutory scheme. In my view, in many in-

\textsuperscript{123} See supra note 48 (concerning felony-murder and second degree murder).
\textsuperscript{124} See, e.g., \textit{People v. Jones}, 93 Ill. App. 3d 475, 417 N.E.2d 647 (1st Dist. 1981). If the first degree murder verdict gives no indication whether it was predicated upon felony-murder, the court might err if it sentenced for first degree murder rather than for second degree murder when the jury had found the defendant guilty of both degrees of murder. See \textit{People v. Washington}, 127 Ill. App. 3d 365, 468 N.E.2d 1285 (1st Dist. 1984).
\textsuperscript{126} 106 Ill. 2d 186, 478 N.E.2d 335 (1985).
\textsuperscript{127} 108 Ill. 2d 54, 483 N.E.2d 203 (1985).
\textsuperscript{128} I believe that the return of multiple guilty verdicts of first degree murder and second degree murder is more analogous to what occurred in \textit{Hoffer} than to what occurred in \textit{Almo}. As the \textit{Hoffer} courts explained, the multiple verdicts there were inconsistent with the \textit{Hoffer} jury instructions. The \textit{Almo} multiple verdicts were perfectly consistent with the \textit{Almo} jury instructions. See supra notes 4-8 and accompanying text.
stances nothing in the new scheme would justify a result different than those reached under former law.

A. Attempted Second Degree Murder

Before the statutory change, some argued that Illinois should recognize an offense called attempted voluntary manslaughter. 129 Ultimately, the issue is one of policy. When someone committed what otherwise would have been murder while acting under intense passion after serious provocation, the law reduced the grade of the offense to voluntary manslaughter. When someone committed aggravated battery under intense passion after serious provocation, the law did not reduce the grade of the offense but instead allowed mitigating circumstances to affect sentencing on the aggravated battery conviction. The question was whether when someone committed what otherwise would have been attempted murder while acting under intense passion after serious provocation, he should have been deemed guilty of a lesser offense called attempted voluntary manslaughter or instead should have been deemed guilty of attempted murder with the mitigating circumstances allowed to affect sentencing.

Professor O'Neill, proponent of the concepts underlying the new first degree murder/second degree murder bill, has condemned the Illinois Supreme Court for not interpreting Illinois law in People v. Reagan 130 to conform to his own notions of wise policy. He favored recognition of a crime called attempted voluntary manslaughter. Both O'Neill and Steigmann argue that, because of the change from voluntary manslaughter to second degree murder, Illinois courts should recognize a crime called attempted second degree murder. 131 Their position is inconsistent with Steigmann's statement to the legislature that he intended, in writing the new law, to retain in interpreting second degree murder "all of the ... case law . . . previously applicable to the offense of voluntary manslaughter." 132

Although I would have joined O'Neill and Steigmann in arguing for an offense called attempted voluntary manslaughter, I cannot see how the change in name in any way affects the underlying ques-

130. 99 Ill. 2d 238, 457 N.E.2d 1260 (1983). See O'Neill, supra note 2, at 223, in which O'Neill wrote, "The Illinois Supreme Court, however, obstinately refused to recognize the crime of attempt voluntary manslaughter."
131. See O'Neill, supra note 2, at 223-24; Steigmann, supra note 2, at 498-99.
132. Steigmann, supra note 2, at 498.
tion previously resolved by the Illinois Supreme Court. Whatever reasons supported a refusal to recognize attempted voluntary manslaughter, the same reasons apply to deny recognition of a crime called attempted second degree murder. If a change is to be made, it should not be made because of a variance in the nomenclature of Illinois offenses that bears no analytical relationship to the questions discussed in *Reagan*. Rather it should be because of a reexamination of the underlying disputes discussed in that case.

**B. Armed Violence Predicated Upon Second Degree Murder**

The Illinois legislature provided that a person commits armed violence when he, while armed with a dangerous weapon, commits any felony defined by Illinois law. Nevertheless, the Illinois Supreme Court in *People v. Alejos*\(^{133}\) concluded that armed violence cannot be predicated upon voluntary manslaughter. The court reasoned that because an offender is armed in most instances in which he commits the Class One felony of voluntary manslaughter, the legislature could not have intended to allow prosecutors to obtain the harsher Class X penalties for such conduct by utilizing an armed violence charge predicated upon voluntary manslaughter.\(^{134}\)

Those who argue that the court should not have departed from the plain language of the armed violence statute might urge the court to allow armed violence to be predicated upon second degree murder. Whether or not *Alejos* was a sound decision, there is nothing in the new statutory scheme that affects the analysis adopted in *Alejos*. The new statute changed the name of the offenses, but it did not alter the relationship between the lesser degree of homicide, now renamed second degree murder, and armed violence. If the Illinois Supreme Court chooses to depart from *Alejos*, it should do so because of the reasons urged by the prosecution in *Alejos* and not because the legislature has provided a new name for conduct previously denominated voluntary manslaughter.

**C. Instructing on Second Degree Murder Whenever Self Defense Is in Issue**

The Illinois Supreme Court in *People v. Lockett*\(^{135}\) held that

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133. 97 Ill. 2d 502, 455 N.E.2d 48 (1983).
134. The ordinary range for a Class One felony is between four and fifteen years. For a Class X felony, the ordinary range is between six and thirty years. See ILL. REV. STAT. ch. 38, para. 1005-8-1 (1987).
135. 82 Ill. 2d 546, 413 N.E.2d 378 (1980).
when the court is instructing the jury on self-defense, it must honor a defense request for an instruction on voluntary manslaughter. The court reasoned rather abstractly that whenever there is enough evidence to require jury consideration of whether the defendant had a reasonable belief in the existence of justifying facts, there necessarily is enough evidence to require jury consideration of whether the defendant had an unreasonable belief of the existence of justifying facts. Many experienced trial judges argue that this is not so. When the prosecution’s evidence, if believed, shows a clear case of an unjustified killing, and the defense case, if believed, shows a clear case of self-defense, there may be no room for the intermediate finding that the defendant killed in an unreasonable belief of justification.

Although I side with critics of Lockett, even as I side with critics of Reagan and of Alejos, nothing in the new statutory scheme has any analytical relationship to the Lockett issue that would alter the result. If the premise of Lockett is correct, that evidence of a reasonable belief of justification necessarily includes evidence of an unreasonable belief, the change of the name of the lesser degree of homicide from voluntary manslaughter to second degree murder does not justify the overruling of Lockett.

**D. Pleas of Guilty to Second Degree Murder**

Under former law, if a defendant was charged with murder, a trial judge could accept a plea of guilty to the lesser offense of voluntary manslaughter when the prosecutor agreed to the reduced charge, when the plea was voluntary, and when there was a basis in fact for the reduced charge. It was a good idea, if not a constitutional necessity, for the court to explain to the defendant the difference between the offense charged and the offense to which he is pleading guilty.

Some judges at the recent Judicial Conference were concerned that pleas of guilty will not be possible to second degree murder.

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136. See Haddad, supra note 4, at 28 n.17. The Hon. Thomas Fitzgerald, who chaired the 1987 Judicial Conference program on the new homicide law, first pointed this out to me many years ago. He illustrated the point by using a hypothetical where the defense version of what happened was so diametrically opposed to the prosecution version that there was no possible basis for the trier of fact to adopt an intermediate version.

137. Compare People ex rel. Daley v. Suria, 114 Ill. 2d 305, 500 N.E.2d 22 (1986), requiring prosecutorial consent before a judge can dismiss a greater charge and accept a plea to a lesser charge.

138. See Henderson v. Morgan, 426 U.S. 637 (1976), and Marshall v. Lonberger, 459 U.S. 422 (1983), concerning circumstances under which the court must explain to the defendant the nature of the charge to which he is pleading guilty.
Some reasoned that if a prosecutor cannot charge second degree murder as a separate crime, the court cannot accept a plea to second degree murder. They suggested that if second degree murder really is not an offense, if it cannot be charged separately.

Even if prosecutors cannot charge second degree murder, the legislature provided a penalty for second degree murder, and the statutory scheme clearly contemplates judgments of convictions for such an offense. Perhaps the legislature would have been wiser to expressly state, as I once suggested, that pleas of guilty to the lesser form of homicide would be permissible under the new scheme and that the lesser offense of second degree murder is the result of either a plea of guilty or a successful interposition of a partial affirmative defense to the offense of first degree murder. Nevertheless, reviewing courts surely will reach this result without great difficulty.

XVII. CONCLUSION

Amendments to frequently used penal statutes always bring litigation. The new Illinois homicide law engendered more issues than would have been necessary under a simpler proposal that would have adequately addressed the problems that mandated a legislative solution. Nevertheless, trial judges, though required to give complex instructions to juries, will be able to resolve the issues that arise. In many instances, where the parties call for a revisiting of questions resolved under former law, nothing in the new statute will dictate a departure from the analysis used to resolve those questions under former law.

ADDENDUM—A JUDICIAL SOLUTION TOO LATE

On June 20, 1988, the Illinois Supreme Court in People v. Red-

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139. After I abandoned efforts to create a scheme that permitted prosecutors to charge voluntary manslaughter while still using the affirmative defense approach, see supra, note 80, I proposed instead the following language:

The charging authority shall not bring a charge of voluntary manslaughter whether by way of indictment, information, or complaint. A judgment of voluntary manslaughter may be entered only where (1) The defendant has successfully interposed the partial affirmative defense of voluntary manslaughter in accordance with this section and sections 3-2(a) and (b) of the 1961 Code of Criminal Law, as amended; or (2) A defendant charged with murder has entered a plea of guilty to the lesser offense of voluntary manslaughter, with the consent of the court and of the prosecutors.

Revolutionized the "old law" as to murder and voluntary manslaughter. It held that where the prosecution has charged murder, and where enough evidence also has been presented to entitle the defendant to a voluntary manslaughter instruction, courts must view voluntary manslaughter as an affirmative defense to murder. Under these circumstances, to obtain a voluntary manslaughter conviction, the prosecution need not prove the presence of mitigating circumstances. It need merely prove a knowing or intentional unjustified killing. However, to obtain a murder conviction where voluntary manslaughter also is in issue, the prosecution must also prove beyond a reasonable doubt the absence of mitigating circumstances.

Against this background, the court held that, where both murder and voluntary manslaughter are in issue, it is "grave" error for the court to use the approved I.P.I. 7.02 and I.P.I. 7.04 or 7.06. Instead, the court must modify the 7.02 murder instruction so that, in order to find a defendant guilty or murder, the jury must find beyond a reasonable doubt the absence of mitigating circumstances. Apparently, the court should also modify 7.04 and 7.06 voluntary manslaughter instructions, so as to delete all reference to mitigating circumstances where murder is also in issue. On the other hand, where the prosecution charges voluntary manslaughter instead of murder, it must still prove beyond a reasonable doubt the presence of the mitigating circumstances in order to obtain a voluntary manslaughter conviction.

Reddick's restructuring of Illinois law to make voluntary manslaughter a partial affirmative defense parallels my 1982 suggestions. The jury instructions required by Reddick appear to be the ones I proposed to implement an affirmative defense approach. If the Illinois Supreme Court had adopted this approach several years ago, I believe, for the reasons I stated in arguing for the superiority of this approach, that there would have been no need for Public Law 84-1450. Unfortunately, Reddick is a

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140. No. 65005 (Ill. S. Ct. June 20, 1988) (consolidated with People v. Lowe (No. 65022)). The decision does not apply to cases tried under the new second degree murder statute. The court referred to, but did not resolve, the problem of the effective date of Pub. Law 84-1450, discussed in text accompanying notes 86-93 supra. Slip op. at 8.

141. Id. at 6.

142. Id. at 8.

143. The court reversed the murder convictions even though counsel in the two matters under review had not objected to the instructions at trial, and even though counsel in one of the cases had not raised the issue on appeal. Id. at 9.

144. See Haddad, supra note 4. See also supra notes 20-24 and accompanying text.

145. See Haddad, supra note 4, at 64-66.
judicial solution too late. We now have second degree murder, and we must struggle with the problems engendered by that new legislation.
This instruction is for a case in which the judge instructs on first degree murder, both forms of second degree murder, involuntary manslaughter, insanity, and guilty but mentally ill. This is not an approved I.P.I. instruction, but rather, is the author's extrapolation from approved instructions. The manner in which the instruction integrated considerations of involuntary manslaughter is strictly the author's. The Committee has not yet adopted a position on that question.

I understand from conversations with the trial judge that the factual situation in People v. Fierer, 151 Ill. App. 3d 649, 503 N.E.2d 594 (3d Dist. 1987), would require treatment of every issue covered in this instruction if that case were to arise today.

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 __________; and,

Second: That when the defendant did so,
(1) he intended to kill or do great bodily harm to __________; or,
(2) he knew that his acts would cause death or great bodily harm to __________; and,

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 any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty [of first degree murder]. You should then consider the lesser offense of involuntary manslaughter in accordance with the directions that I provide later in these instructions.

If you find from your consideration of all of the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should go on with your deliberations [on this charge] 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 until and unless you have first determined that the State has proved 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 this case, that it is more probably true than not true that at least one of the following mitigating factors is present:

(1) that the defendant, at the time he performed the acts which caused the death of __________, acted under a sudden and intense passion resulting from serious provocation by [(the deceased)].

(2) that the defendant, at the time he performed the acts which caused the death of __________, 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 at least one of these mitigating factors is present, then you should go on with your deliberations to decide whether the defendant has proved by a preponderance of the evidence that he is not guilty by reason of insanity on the charge 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 this mitigating factor is present, then you should go on with your deliberations to decide whether the defendant has proved by a preponderance of the evidence that he is not guilty by reason of insanity on the charge of first degree murder.

You may not consider whether the defendant has met his burden of proving that he is not guilty by reason of insanity on the charge or either first or second degree murder until and unless you have first determined that the State has proved the defendant guilty beyond a reasonable doubt of the charge of first degree murder.

If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that he is not guilty by reason of insanity, then you should find the defendant not guilty by reason of insanity of whichever murder charge, either first degree murder or second degree murder, that you found earlier to be applicable, your deliberations on that charge should end, and you should return a verdict of not guilty by reason of insanity on that murder charge.

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 not guilty by reason of insanity of first degree or second degree murder, then you should continue your deliberations to deter-
mine whether the defendant is guilty but mentally ill on that murder charge.

A special verdict of guilty but mentally ill shall be returned by you instead of a general verdict of guilty if you find each of the following propositions to be present in this case:

First: That the defendant is guilty of whichever murder charge you found earlier to be applicable; and,

Second: That the defendant was not legally insane at the time he committed the murder; and,

Third: That the defendant was mentally ill at the time he committed that murder.

If you find from your consideration of all the evidence that each one of these propositions concerning the guilty but mentally ill verdict has been proved beyond a reasonable doubt, you should return the special verdict finding the defendant guilty but mentally ill of the murder charge that you earlier found to be applicable.

If you find from your consideration of all the evidence that either the second or third proposition concerning the guilty but mentally ill verdict has not been proved beyond a reasonable doubt, you should return the general verdict finding the defendant guilty of the murder charge that you earlier found to be applicable.

If in accordance with my earlier instructions you have found the defendant not guilty of first degree murder and have ended your deliberations on that charge as I instructed, you should then go on to consider the lesser offense of involuntary manslaughter. You may not consider whether the defendant is guilty of the lesser offense of involuntary manslaughter until and unless you have first determined that the State has not proved the defendant guilty of first degree murder.

[At this point, the court would define the offense of involuntary manslaughter under I.P.I. § 7.07. It would then provide an issues instruction that combines I.P.I. § 7.08 with § 24-25.01-D. The additional issues instruction alone would require another approximately four hundred and fifty words].