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MISSOURI HOMICIDES: LESSER INCLUDED OFFENSES AND INSTRUCTING DOWN

PAUL N. VENKER*

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I. INTRODUCTION

Criminal law contains few areas more difficult than the subjects of lesser included offenses and instructing down—the study of which offenses can be convicted of on the basis of a given charge under the evidence in a given case. During the last decade, Missouri law has appeared particularly confused on this topic. This Article attempts to point out the sources of this confusion and offer solutions. The theories developed will be compared with the General Assembly's recent major revision of the Missouri homicide scheme.

Although Missouri's homicide scheme underwent little change from its initial development in 1835 until the major revisions in 1975, it always has presented difficulties. This was not due to weaknesses of that first non-common law murder format, but to case-by-case demands for justice. For the most part, though, the homicide scheme worked well. It consisted of first degree murder, second degree murder, and manslaughter.¹

In the early 1970's, two separate forces significantly altered the structure and operation of the homicide scheme. The first of these was a 1975 statutory change in the definitions of the homicides prompted by the United States Supreme Court's invalidation of certain death penalty statutes.² In an attempt to design a constitutionally viable system, the Missouri legislature enacted a scheme consisting of capital murder, first degree murder, second degree murder, and manslaughter.³ This hierarchy presented internal problems not present in the old system. Missouri's new criminal code, effective in 1979, did not change the homicide statutes, but sections of it affected the homicide scheme and produced additional problems.⁴

1. The statutes will be discussed in section II *infra*. The old homicide statutes were MO. REV. STAT. § 559.010 (1969) (first degree murder) (repealed); *id.* § 559.020 (second degree murder) (repealed); *id.* § 559.070 (manslaughter) (repealed).

2. *See Furman v. Georgia*, 408 U.S. 238 (1971); note 17 *infra*.

3. The statutes were MO. REV. STAT. § 559.005 (Supp. 1975) (capital murder) (repealed); *id.* § 559.007 (first degree murder) (repealed). Second degree murder and manslaughter stayed the same. Those statutes defined the homicides as they existed prior to the 1983 revisions. *See id.* § 565.001 (1978) (capital murder); *id.* § 565.003 (first degree murder); *id.* § 565.008 (second degree murder); *id.* § 565.005 (Supp. 1982) (manslaughter).

4. *Compare* MO. REV. STAT. § 556.046 (1978) (defines lesser included offenses) with *id.* § 556.031 (what Code sections apply to non-Code offenses). The designation "non-Code offense" indicates that the offense was not enacted as part of the new criminal code, effective January 1979. The present homicides were enacted in 1977 and therefore are non-Code offenses. Section 556.046 has produced significant problems. *See* Part IV *infra*.

The second change came with the Missouri Supreme Court's promulgation of mandatory jury instructions for criminal cases: the Missouri Approved Instructions-Criminal (MAI-CR). As originally adopted in 1974, the MAI-CR mirrored current homicide law, but the court soon thereafter made changes to the law of homicides and expanded upon these changes in MAI-CR. In *State v. Stapleton*,⁵ for example, the court abolished Missouri's presumption of murder and instituted in MAI-CR the automatic submission rule for manslaughter and second degree murder. Expanding on this rule, the court also promulgated MAI-CR's justified by the evidence test for instructing down in situations not governed by the automatic submission rule.⁶

Through these changes, the court dictated that homicide cases should be treated differently than non-homicide cases in instructing down.⁷ *Stapleton* and MAI-CR allowed a jury to arbitrarily choose between homicides rather than convict of the highest offense supported by the evidence.⁸

The court has encountered difficulties with the 1975 statutory homicide scheme. Old ideas unsuitable for application in the new system and new but inappropriate positions are now being tried in an attempt to obtain a grasp on this area of the law. The 1979 Criminal Code redefined the relationship of the homicides, because the code contains a new section governing lesser included offenses.⁹ Homicides as substantive offenses, however, have remained the same since 1975.

The purpose of this Article is to review and analyze the Missouri homicide scheme as an operating model. First, it looks at the operative characteristics of each present homicide as a substantive offense. Second, the mental culpability required for each homicide is examined. The third section deals with lesser included offenses and instructing down and tests the theories of MAI-CR on the homicides. Finally, recent Missouri homicide legislation is studied and compared to the existing scheme.

II. THE HOMICIDES AS SUBSTANTIVE OFFENSES

A. Capital Murder

The only Missouri homicide punishable by death is capital murder.

5. 518 S.W.2d 292 (Mo. 1975) (en banc).

6. The automatic submission rule is the ultimate posture of the justified by the evidence test. *See* MO. APPROVED INSTR.-CRIM. No. 15.00.3(d) (2d ed. 1979); *id.* No. 15.00.3 caveat c.

7. *Id.* No. 15.00.3(b) ("justified by the evidence" test).

8. *See* *State v. Martin*, 602 S.W.2d 772 (Mo. Ct. App. 1980).

9. *See* MO. REV. STAT. § 556.046 (1978); *see also* *State v. Baker*, 636 S.W.2d 902 (Mo. 1982) (en banc) (held first degree murder is not a lesser included offense of capital murder and distinguished § 556.046 from its predecessors, MO. REV. STAT. §§ 556.220-230 (1969) (repealed) in defining lesser included offenses), *cert. denied*, 103 S. Ct. 834 (1983).

Missouri Revised Statutes section 565.001¹⁰ provides that “[a]ny person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.” The elements were drawn from the pre-1975 first degree murder statute, except that the word “knowingly” was added.¹¹

B. *First Degree Murder*

The second most grievous Missouri homicide is first degree murder. This homicide deserves study because of its felony-murder roots and its significant alternations in 1975. The pre-1975 first degree murder statute had changed little since it was first enacted over one hundred years ago:

Every murder which shall be committed by means of poison, or by lying in wait, or by any kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed guilty of murder in the first degree.¹²

This statute contained the basic elements of present capital and first degree murder. Although first degree murder constituted only one homicide, there were two basic methods of proving the required mental state. In “common form” or “conventional” first degree murder, deliberation and premeditation could be inferred from the facts and circumstances of the killing.¹³ By contrast, in first degree felony-murder,¹⁴ proof of commission of one of the felonies listed in the statute could also show the accused’s state of mind.¹⁵ Missouri followed the majority position on applying the felony-murder rule: proof of the felony was required, but the felony was not an element of the murder.¹⁶

In 1975, Missouri adopted a new first degree murder statute designed

10. (1978).

11. Capital murder will not be discussed in detail because the issues will be covered in the context of the other homicides.

12. MO. REV. STAT. § 559.010 (1969) (repealed). The previous statute was virtually identical. *See* MO. REV. STAT. § 1, at 167 (1835) (first degree murder for enumerated felony murders and willful, deliberate, and premeditated killings). Prior to 1835, the statutory definition required only malice aforethought. *See id.* § 4, at 282 (1825). At common law, murder occurred when “a person of sound memory and discretion unlawfully killeth any reasonable creature, in being and under the King’s peace, with malice aforethought.” E. COKE, 3 INST. 47 (1694).

13. *See* State v. Lindsey, 507 S.W.2d 1, 4 (Mo. 1974) (en banc); State v. Foster, 61 Mo. 549, 554 (1876).

14. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 71, at 545 (1972).

15. *See, e.g.*, State v. Ford, 495 S.W.2d 408, 417 (Mo. 1973) (en banc); State v. Meyers, 99 Mo. 107, 113, 12 S.W. 516, 517 (1889).

16. *See, e.g.*, State v. Jewell, 473 S.W.2d 734, 738 (Mo. 1971); State v. Bobbitt, 215 Mo. 10, 33, 114 S.W. 511, 517 (1908).

to withstand constitutional scrutiny.¹⁷ The legislature split first degree murder into capital murder and first degree murder. The first degree murder statute, which is still in effect, provides:

Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or kidnapping.¹⁸

This statute has been called a first degree felony-murder statute because it does not require proof of a specific mental state, nor does the felony stand in lieu of a specific mental state.¹⁹ The practical distinction between present first degree murder and old first degree murder is that the specific mental states have been removed from the statute and the phrase “without a premeditated intent to cause the death of a particular individual” has been added.

This phrase has some intriguing facets. On one hand, it reveals the felony-murder fiction of intent to kill more clearly than the previous first degree murder statute. The mental state and the felonies formerly were juxtaposed, but now there is no specific mental state with which the felony’s commission is equated. At the same time, the phrase cuts against the operation of the felony-murder rule, which imputes to a defendant the requisite mental state for the murder involved. The statute, however, seems to say that a person lacking the requisite mental state for murder, premeditation, is guilty of first degree murder solely because the killing occurs during the attempt or commission of a designated felony.²⁰

Almost all of the law applicable to the felony-murder aspect of the old first degree murder statute has been carried over to the current first degree

17. For a history of the Missouri homicide statutes in relation to Supreme Court decisions holding some death penalty laws unconstitutional, see UNIVERSITY OF MISSOURI-COLUMBIA, *THE NEW MISSOURI CRIMINAL CODE: MANUAL FOR COURT RELATED PERSONNEL* § 10.3 comment (1978) [hereinafter cited as *MANUAL*].

18. MO. REV. STAT. § 565.003 (1978). The mental state elements from old first degree murder have been carried over to the capital murder statute. See *State v. Handley*, 585 S.W.2d 458, 461-62 (Mo. 1979) (en banc) (examines effect of alteration and compares first degree murder statute to its predecessor), *overruled*, *State v. Wilkerson*, 616 S.W.2d 829 (Mo. 1981).

19. See *Handley*, 585 S.W.2d at 459.

20. The problem with this statute is that “without a premeditated intent” is inconsistent with the other terms of art used to describe culpable mental states for the homicides. The Missouri Supreme Court treats the phrase as not describing an element of the offense. See MISSOURI APP. INSTR.-CRIM. No. 15.04 note 3 (2d ed. 1979). Thus, one could have a premeditated intent to kill and still be guilty of first degree murder. The phrase also creates the anomaly of second degree murder possessing a higher requisite mental state than first degree murder. See *State v. Baker*, 636 S.W.2d 902, 905 (Mo. 1982) (en banc); part III *infra*.

murder statute. For example, proof of the attempt or commission of one of the listed felonies still shows the requisite mental state for first degree murder.²¹ An accused need not have intended the killing but must have intended to commit the felony.²² Moreover, first degree murder can involve an unintentional killing because of the strict liability nature of the felony-murder rule.²³ The Missouri Supreme Court has held that the first degree murder statute clearly indicates a purpose to dispense with any culpable mental state requirement for the killing itself.²⁴ The enumerated felony involved in the homicide now becomes an element of first degree murder for purposes of double jeopardy²⁵ as well as for the substantive definition of the crime.²⁶ The felony is no longer merely a method of proving the requisite mental state.²⁷ This is the correct result, dictated by the fact that the statute no longer requires a finding of a specified mental state but does require a finding of one of the enumerated felonies as a basis for conviction.

C. *Second Degree Murder*

The second degree murder statute has remained unchanged since first enacted in 1835. Missouri Revised Statutes section 565.004 describes second degree murder: "All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."²⁸ Although the statute speaks of all "other kinds of murder at common law," no degrees of murder existed at common law. The statute refers to other kinds of murders because the defi-

21. *See, e.g.*, State v. Mahaney, 625 S.W.2d 113, 115 (Mo. 1981) (en banc).

22. State v. Newman, 605 S.W.2d 781, 786 (Mo. 1980).

23. *See* State v. O'Neal, 618 S.W.2d 31, 38 (Mo. 1981).

24. *Id.* A culpable mental state is not required if "the statute defining the offense clearly indicates a purpose to dispense with the requirement of any culpable mental state as to a specific element of that offense." MO. REV. STAT. § 562.026 (1978). *Id.* § 562.021.2 dictates when a culpable mental state is to be read into the definition of an offense. The court views the underlying felony intent as proving the intent necessary for first degree murder. *See* State v. Mahaney, 625 S.W.2d 112, 115 (Mo. 1982) (en banc). *Mahaney* seems to keep alive the concept that intent to kill is proven, while *O'Neal* states that no intent is required.

25. *See* State v. Lane, 629 S.W.2d 343 (Mo. 1982) (en banc); State v. Mahaney, 625 S.W.2d 113 (Mo. 1982) (en banc); *cf.* State v. Chambers, 524 S.W.2d 826, 829 (Mo. 1975) (en banc) (underlying felony in MO. REV. STAT. § 559.101 (1969) was not an element of the offense for purposes of double jeopardy), *cert. denied*, 423 U.S. 1058 (1976), *overruled*, State v. Morgan, 592 S.W.2d 796 (Mo. 1980).

26. *See* State v. Baker, 636 S.W.2d 902, 904 (Mo. 1982) (en banc), *cert. denied*, 103 S. Ct. 834 (1983).

27. Compare the second degree murder statute, MO. REV. STAT. § 565.004 (1978), which arguably contains a true felony murder, with the first degree murder statute, § 565.003, which requires the felony as an element.

28. (1978). This language is the same as that in MO. REV. STAT. § 2, at 167 (1835).

nitions of capital murder and first degree murder do not include all the types of common law murder.²⁹

Courts have held that the elements of second degree murder include a willful, premeditated killing of a human being with malice aforethought.³⁰ As with pre-1975 first degree murder, the mental state can be proven by two methods. In "common form" or "conventional" second degree murder, the facts and circumstances of the killing can provide the factual basis for finding malice aforethought and premeditation.³¹ In second degree felony-murder, the commission of a felony not listed in the first degree murder statute is used merely as an evidentiary substitute for proving the requisite state of mind from all the facts and circumstances of the case.³²

Although the statutory definition of second degree murder has been the same since 1835, the Missouri Supreme Court recently has been viewing it in a different light. For example, it has been held that the underlying felony in second degree felony-murder is a lesser included offense of the homicide for purposes of double jeopardy.³³ Proof of the felony thus is no longer merely a method of proving the requisite mental state.³⁴ Recently, the supreme court held that the felony in second degree felony-murder is an element of the offense.³⁵ Another new proposition was articulated in *State v. Mansfield*,³⁶ where the court stated that a defendant charged with conventional second degree murder was not put on notice that the State intended to show the requisite mental state by proving commission of a felony.³⁷ Al-

29. If capital murder, homicides committed in the perpetration of the five enumerated felonies (first degree murder), manslaughter, and excusable and justifiable homicides are set aside, remaining kinds of murder at common law include: intentional murder, non-deliberate, and homicides committed in the perpetration or attempt of a non-enumerated felony. *See State v. Chambers*, 524 S.W.2d 826 (Mo. 1975) (en banc); MISSOURI APP. INSTR.-CRIM. No. 15.16 note 3 (2d ed. 1979).

30. *See State v. Mannon*, 637 S.W.2d 674, 678 (Mo. 1982) (en banc) (citing *State v. Franco*, 554 S.W.2d 533, 535 (Mo. 1976) (en banc), *cert. denied*, 431 U.S. 957 (1977)).

31. *State v. Powell*, 630 S.W.2d 168, 170 (Mo. Ct. App. 1982); *State v. Black*, 611 S.W.2d 236, 239 (Mo. Ct. App. 1980).

32. *See State v. Chambers*, 524 S.W.2d 826, 829 (Mo. 1975) (en banc), *cert. denied*, 423 U.S. 1058 (1976), *overruled in part*, *State v. Morgan*, 592 S.W.2d 796, 801 (Mo. 1980) (en banc).

33. *See State v. Morgan*, 592 S.W.2d 796, 803 (Mo. 1980) (en banc); *see also State v. Olds*, 603 S.W.2d 501, 510 (Mo. 1980) (en banc).

34. *See State v. Chambers*, 524 S.W.2d 826, 829-30 (Mo. 1975).

35. *State v. Clark*, No. 63484 (Mo. August 31, 1982). *Clark* was decided by Division I of the court, withdrawn, and transferred to the court en banc on November 16, 1982. The court held that the felony in second degree felony-murder is not an element of the offense. *State v. Clark*, 652 S.W.2d 123, 127 (Mo. 1983). The opinion acknowledged a draft of this Article. *Id.* at 128 n.5.

36. 637 S.W.2d 699 (Mo. 1982) (en banc).

37. *Id.* at 703. *See also State v. Handley*, 585 S.W.2d 458, 459 (Mo. 1979) (plurality opinion) (issue was whether a charge of first degree felony-murder put the

though this proposition is clearly dictum, it may lead to the erroneous belief that these two forms of second degree murder are two different homicide categories.³⁸

The Missouri Supreme Court's view of the relationship between second degree felony-murder and double jeopardy needs reexamination. As shown by *State v. Morgan*,³⁹ the court believes that second degree felony-murder is still not a true felony-murder homicide.⁴⁰ Like the old first degree felony-murder, present second degree felony-murder does not include the felony as an element. Although first degree murder now has a felony as one of its elements because the legislature has mandated it, there has been no equivalent alteration of second degree murder.

D. Manslaughter

Manslaughter is the least serious homicide in the Missouri scheme. Missouri Revised Statutes section 565.005 provides that "[e]very killing of a human being by the act, procurement or culpable negligence of another, not declared by law to be murder or excusable or justifiable homicide, or vehicular manslaughter, shall be deemed manslaughter."⁴¹ This statute has remained almost unchanged since 1919.⁴² Quite simply, manslaughter is a killing without malice and premeditation that is neither justifiable nor excusable.⁴³ For present purposes, there are three basic types of manslaughter. First is voluntary manslaughter, which is an intentional homicide that but for proof of adequate provocation would be murder.⁴⁴ Second is invol-

defendant on notice that he could be convicted of conventional second degree murder), *overruled in part*, *State v. Wilkerson*, 616 S.W.2d 829, 833 (Mo. 1981) (en banc).

38. Conventional or felony second degree murder arguably qualify as lesser included offenses of each other under MO. REV. STAT. § 556.046.1 (1978) because second degree murder has only one substantive definition.

39. 592 S.W.2d 796 (Mo. 1980) (en banc).

40. *Id.* at 799. *Morgan* relied on *Harris v. Oklahoma*, 433 U.S. 682 (1977). *Harris* is not on point because it involved a felony-murder statute which had a felony as an element of the murder, and a trial for the underlying felony after the defendant had been convicted for the felony-murder. *Id.* at 682-83. For a discussion of double jeopardy, see Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001 (1980); Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

41. (Supp. 1982).

42. In 1982, the legislature added the phrase "or vehicular manslaughter." Other than that, the statute is the same as it was in 1919. *See* MO. REV. STAT. § 3236 (1919). Until 1909, manslaughter was divided into degrees. *See id.* §§ 4454-4468 (1909) (repealed). Section 4468 (fourth degree manslaughter) was similar to § 565.005. The 1919 revision abolished common law manslaughter. *State v. Gore*, 292 Mo. 173, 178, 237 S.W. 993, 997 (1922).

43. *State v. Sturdivan*, 497 S.W.2d 139, 142 (Mo. 1973) (en banc) (per curiam).

44. *See, e.g.*, *State v. Ayers*, 470 S.W.2d 534, 537 (Mo. 1971) (en banc); *State v. Clough*, 327 Mo. 700, 705, 38 S.W.2d 36, 39 (1931).

untary manslaughter, an unintended killing which results from an intentional non-felonious act. This is commonly called misdemeanor-manslaughter.⁴⁵ Finally, there is culpable negligence manslaughter, which occurs when the actor shows a careless or reckless disregard for human life or limb.⁴⁶ This Article focuses on voluntary manslaughter.

Manslaughter's past in Missouri has been problematic.⁴⁷ At common law, murder could be reduced to manslaughter only if there was adequate provocation, the killing occurred during the heat of passion, and there was a causal connection between the provocation, the passion, and the fatal act.⁴⁸ In 1919, the legislature removed the heat of passion requirement from the statute.⁴⁹ This was held to do away with common law manslaughter. Yet over the next five decades, Missouri courts appeared confused as to whether common law manslaughter still existed.⁵⁰

From 1969 to 1975, the law underwent significant changes.⁵¹ By the end of 1975, the Missouri Supreme Court had decided that no concrete distinction existed between manslaughter and murder, that the defendant's mental state was a question of fact for the jury, and that no evidence of provocation was required before manslaughter could be submitted to a jury.⁵² Manslaughter law has remained unchanged since then.

III. REQUISITE MENTAL STATES

The fact pattern of almost every killing constitutes, in the abstract, a prima facie case for a punishable homicide. A murder committed during a

45. See *State v. Frazier*, 339 Mo. 966, 976, 98 S.W.2d 707, 713 (1936).

46. See, e.g., *State v. Cutshall*, 430 S.W.2d 173, 176 (Mo. 1969); *State v. Studebaker*, 334 Mo. 471, 477, 66 S.W.2d 877, 879 (1933).

47. See Hunvald, *Criminal Law in Missouri—Manslaughter, A Problem of Definition*, 27 MO. L. REV. 1, *passim* (1962).

48. See R. PERKINS, CRIMINAL LAW 53 (1969). Generally, only physical violence to the actor, catching a spouse in adultery, or acting in defense of home or property mitigated common law murder to common law manslaughter.

49. *State v. Gore*, 292 Mo. 173, 187-88, 237 S.W. 993, 997 (1922).

50. See, e.g., *State v. Haynes*, 329 S.W.2d 640, 645-46 (Mo. 1959) (assumed that common law provocation is necessary to reduce murder to manslaughter).

51. See *State v. Williams*, 442 S.W.2d 61, 64 (Mo. 1969) (en banc) (Missouri no longer has common law manslaughter so only proof of facts tending to negate the malice and premeditation required to reduce murder to manslaughter). In *State v. Ayers*, 470 S.W.2d 534 (Mo. 1971) (en banc), the court overruled *Williams* to the extent it required "proof of facts," and stated that manslaughter should be instructed upon unless no evidence in the record could cause a juror to doubt whether the defendant had the requisite mental state for murder. *Id.* at 538. See also *State v. Stapleton*, 518 S.W.2d 292, 296 (Mo. 1975) (en banc) (under *Ayers*, submissible second degree murder case requires that manslaughter also be submitted to the jury).

52. See *State v. Stapleton*, 518 S.W.2d 292, 299 (Mo. 1975) (en banc).

burglary, for example, is first degree murder.⁵³ The State need only prove a causal connection between the burglary and the killing. Further, any murder committed with a deadly weapon by injury to a vital part of the body will be presumed to be second degree murder. A murder committed during the attempt or commission of a felony not listed in the first degree statute is also second degree murder.⁵⁴ A killing which results from a lawful, intentional, non-felonious act is misdemeanor-manslaughter.⁵⁵

The factual variables within each of these examples may be numerous. If a homicide is committed, there is likely a specific mental culpability which will, under the law, flow from the facts. Once the fact pattern is shown, the State can rely on it to show that the defendant had the necessary culpability. This is not true, however, for homicides in which the State must argue the requisite mental state from the facts and circumstances of the case. An example of this is capital murder, where the requisite mental culpability must be argued to and found by the jury. There is no supporting fact pattern which presumptively illustrates the requisite mental state for capital murder. The principle just articulated is not difficult, but it is basic to comprehending the operation of the homicide scheme.

Second degree murder is the pivotal homicide because an inference of at least second degree murder arises from almost every killing. For example, killing by intentionally using a deadly weapon on a vital part of the body raises a presumption of malice that will support a finding of premeditation and malice.⁵⁶ Premeditation means that the actor has thought of the act for any length of time before acting.⁵⁷ Malice aforethought is the un-

53. *E.g.*, State v. O'Neal, 618 S.W.2d 31, 38 (Mo. 1981).

54. *See* State v. Chambers, 524 S.W.2d 826, 832 (Mo. 1975) (en banc), *cert. denied*, 423 U.S. 1058 (1976), *overruled*, State v. Morgan, 592 S.W.2d 796 (Mo. 1980).

55. *See* State v. Frazier, 339 Mo. 964, 979, 98 S.W.2d 707, 714-15 (1936).

56. *E.g.*, State v. Black, 611 S.W.2d 236, 239 (Mo. Ct. App. 1981). The common law rule originated to aid prosecutors. *See* Oberer, *The Deadly Weapon Doctrine—Common Law Origin*, 75 HARV. L. REV. 1565, 1567 (1972); Comment, *The Evolving Use of Presumptions in the Criminal Law: Sandstrom v. Montana*, 41 OHIO ST. L.J. 1445 (1980). In Missouri, the presumption of murder is better classified as an inference or a permissible presumption because it is not conclusive as to the intentional act. *Cf.* Sandstrom v. Montana, 442 U.S. 510, 517 (1979) (jury instructed that the accused was presumed to have intended the ordinary consequences of his voluntary acts but not that presumption was rebuttable). Missouri's presumption or inference of second degree murder from a deadly weapon homicide requires proof beyond a reasonable doubt that the act causing the death was intentional. *See* State v. McKinzie, 102 Mo. 620, 628, 15 S.W. 149, 150 (1890); State v. Black, 611 S.W.2d 236 (Mo. Ct. App. 1981). "The law presumes malice as a concomitant of a shooting with a dangerous and deadly weapon . . . ; but the element of intent remains a question for the jury and the law raises no presumption about it." State v. Bolden, 494 S.W.2d 61, 65 (Mo. 1973) (citations omitted).

57. State v. Strickland, 609 S.W.2d 392, 394 (Mo. 1980); State v. Weiners, 66 Mo. 13, 25 (1877); State v. Powell, 630 S.W.2d 168, 170 (Mo. Ct. App. 1982). At

lawful intention to take life, which intention precedes the killing.⁵⁸

On a given set of facts, there are two avenues from an inference of second degree murder: (1) up to first degree murder and capital murder, or (2) down to manslaughter. The path to first degree murder, however, is not really "up" in the sense of additional required mental elements. Current first degree murder requires only proof of an unlawful killing and the attempt or commission of an enumerated felony. Under the old first degree murder statute, conventional first degree murder would have required additional mental culpability, and first degree felony-murder would have presumed the mental state from the underlying felony.⁵⁹ This may not be so under the present statute.⁶⁰ Thus, capital murder is the next step up from second degree murder with respect to the required mental state. By definition, capital murder differs from second degree murder in that it specifically requires, in addition to premeditation, that an unlawful killing be committed willfully, knowingly, and deliberately. It is the finding of deliberation which elevates a homicide from second degree to capital murder.⁶¹ To deliberate on a killing means to take "another's life in a cool state of blood or with a cool and deliberate state of mind."⁶²

The other avenue from a submissible case of second degree murder is down to manslaughter. Since manslaughter is the killing of another which is not murder, or justifiable or excusable homicide, once a prima facie case of second degree murder is made, there must be some evidence to support a

one time it was reversible error to omit the term "beforehand" from the jury instruction. *See State v. Harris*, 76 Mo. 361, 363 (1882).

58. *State v. Weiners*, 66 Mo. 13,21 (1877). *See also State v. Powell*, 630 S.W.2d 168, 172 (Mo. Ct. App. 1982).

59. *See State v. Jewell*, 473 S.W.2d 734, 738 (Mo. 1971).

60. *See State v. Baker*, 636 S.W.2d 902, 905 (Mo. 1982) (en banc) (mental state required for second degree murder is higher than that of first degree murder), *cert. denied*, 103 S. Ct. 834 (1983). Committing a felony listed in MO. REV. STAT. § 565.003 (1978) arguably assigns to a defendant the mental state of malice aforethought since that was what the felony-murder rule did at common law. *See State v. Curtis*, 70 Mo. 594, 598 (1879).

61. To convict of capital murder, the jury is required to find that the accused intentionally took the victim's life, knew the act was practically certain to cause the victim's death, and that the accused reflected upon taking the victim's life coolly and fully before doing so. *See State v. Morris*, 639 S.W.2d 589, 591 (Mo. 1982) (en banc), *cert. denied*, 103 S. Ct. 1438 (1983). "Willful" is equivalent to "intentional," and "knowingly" is equivalent to "intentionally" and "willfully." *State v. Holmes*, 609 S.W.2d 132, 134 (Mo. 1980) (en banc). "Deliberation" was the distinction between pre-1975 first and second degree murder. *See State v. Hyster*, 504 S.W.2d 90, 93 (Mo. 1974); MO. REV. STAT. §§ 559.010-.020 (1969) (repealed).

62. *State v. Morris*, 639 S.W.2d 589, 591 (Mo. 1982) (en banc), *cert. denied*, 103 S. Ct. 1438 (1983). *See State v. Greathouse*, 627 S.W.2d 592, 596 (Mo. 1982); *State v. Wood*, 596 S.W.2d 394, 401 (Mo.) (en banc), *cert. denied*, 449 U.S. 876 (1980); *State v. Howell*, 543 S.W.2d 836, 841 (Mo. Ct. App. 1976).

finding that the defendant lacked the requisite malice.⁶³ Thus, the distinction between second degree murder and manslaughter is malice and premeditation.⁶⁴ This is not to say that manslaughter cannot be intentional, it is just that provocation can negate the existence of malice.⁶⁵ Intentional

63. See *State v. Ayers*, 470 S.W.2d 534, 536 (Mo. 1971) (en banc); *State v. Clough*, 327 Mo. 700, 705, 38 S.W.2d 36, 38 (1931).

64. See *State v. Sturdivan*, 497 S.W.2d 139, 143 (Mo. 1973). It is not clear whether "malice and premeditation," "malice aforethought," or even "malice" alone legitimately distinguish second degree murder from manslaughter. These terms have not been kept separate. See, e.g., *State v. Curtis*, 70 Mo. 594, 598 (1879) (equated "aforethought" with "premeditation"). Missouri's definition of second degree murder would seem to include malice aforethought and premeditation. Other states use premeditation as a term for a mental state other than that involved in common law murder. See, e.g., *Parks v. State*, 333 So. 2d 906, 911 (Ala. Crim. App.) (second degree murder is "the unlawful killing of a human being with malice, but without deliberation or premeditation"), *cert. denied*, 333 So. 2d 912 (Ala. 1976); *State v. Barrett*, 130 Vt. 97, 99, 290 A.2d 14, 15 (1972) (second degree murder involves malice but not premeditation). The distinction in Missouri between "malice" and "malice aforethought" could not be more clouded. The Missouri Supreme Court has traditionally defined the two differently. See, e.g., *State v. Weiners*, 66 Mo. 13, 20-21 (1877) (one can commit manslaughter with malice by intentionally doing the wrongful act without just cause or excuse, but murder requires malice aforethought). It is well settled that manslaughter can be committed intentionally. In *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (1937), the appellant contested an instruction which allowed the jury to convict him of manslaughter if they found he had intentionally killed the victim, but without malice and without premeditation. He argued that the definition of malice made such an instruction contradictory. In affirming the conviction, the court stated:

Malice is the essential ingredient of murder; to be manslaughter the killing must be without malice. Yet the common law and the statute law of this State have always recognized that a homicide may be manslaughter though intentional, as where one kills another in a transport of passion aroused by "adequate" "lawful" or "reasonable" provocation. *State v. Ellis*, 74 Mo. 207, 215; *State v. Edwards*, 70 Mo. 480, 483. The doctrine is a concession to human frailty and proceeds on the theory that the malice is submerged or purged by the provocation. Nevertheless through all the years this court has defined malice in homicide cases as "a wrongful act done intentionally without just cause or excuse." Judge Scott said in *State v. Schoenwald*, 31 Mo. 147, 157, that is the best definition of malice to be met with in the books. . . . [M]alice is a general malignancy of purpose "which prompts a person to intentionally take the life of another without just cause, justification, or excuse, an signifies a state of disposition that shows a heart regardless of social duty and fatally bent on mischief." *State v. Yeart*, 314 Mo. 612, 630, 286 S.W.2d 29, 34.

Id. at 494-95, 116 S.W.2d at 58. It is best to heed that manslaughter is a killing without malice. The best contemporary definition of malice is in *State v. Lay*, 427 S.W.2d 394, 400 (Mo. 1968).

65. See *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (1937); *State v. Hostet-*

(voluntary) manslaughter is an offense reduced from a prima facie case of murder.⁶⁶

The Missouri Supreme Court has contributed to the notion that any killing is a manslaughter. This position is incorrect, and with the enactment of the new criminal code, it appears that the mental state for manslaughter cannot slip below recklessness.⁶⁷ The issue is deciding when the evidence warrants submitting jury instructions for a lesser included offense.

This discussion of the interrelationship of the Missouri homicides is intended to provide a conceptual framework upon which the next part of this inquiry—lesser included offenses and instructing down—builds. The operating model just examined is not the same as the one the Missouri Supreme Court put in its Missouri Approved Instructions-Criminal. The distinction between the two is examined in the next part of this Article.

IV. LESSER INCLUDED OFFENSES AND INSTRUCTING DOWN

One of the most difficult aspects of homicide law is correctly determining which homicide should be submitted to a jury as a lesser included offense of another. This involves determining: (1) whether a homicide, as a matter of substantive law, is defined as a lesser included offense of another, and (2) whether the evidence will support submission.

A. *Theoretical Underpinnings of Instructing Down*

Instructing down is not new; it was employed at common law and early Missouri cases deal with it.⁶⁸ It strives to permit the jury to determine the facts when evidence of the highest offense is weak or contradictory. At

ter, 222 S.W. 750, 755 (Mo. 1920). This is true under the common law, *see* State v. Taylor, 309 S.W.2d 621 (Mo. 1958), and under the less rigid rule of State v. Ayers, 470 S.W.2d 534 (Mo. 1971) (en banc).

66. *See* R. PERKINS, *supra* note 48, at 51 (1969) (manslaughter is a "catch all"); *cf.* State v. Stapleton, 518 S.W.2d 292, 300 (Mo. 1975) (en banc); MO. APPROVED INSTR.-Crim. No. 15.18 (2d ed. 1979); *id.* No. 15.00.3 note 3.

67. *See* MO. REV. STAT. § 562.021.2 (1978) (if offense does not expressly prescribe a culpable mental state, a culpable mental state is required and is established only if a person acts purposely, knowingly, or recklessly). In State v. Mannon, 637 S.W.2d 674, 677 (Mo. 1982) (en banc), the court interpreted § 556.031.2 as making § 562.021.2 applicable to second degree murder. *But see* MANUAL, *supra* note 17, § 1.7 comment (1978). *Mannon* found that second degree murder expressly provided otherwise on the issue of its requisite mental state. MO. APPROVED INSTR.-Crim No. 15.20 (2d ed. 1979) (culpable negligence manslaughter) requires that the jury find the defendant acted with "reckless disregard for human life and safety." "Recklessly" is defined in *id.* No. 33.01, the same as in MO. REV. STAT. § 562.016.4 (1978). The reckless mental state requirement seems to be consistent with longstanding Missouri law on what constitutes culpable negligence for statutory manslaughter. *See* State v. Watson, 216 Mo. 420, 432, 115 S.W. 1011, 1015 (1909).

68. *See, e.g.,* State v. Shoemaker, 7 Mo. 177, 179 (Mo. 1841); Watson v. State, 5 Mo. 497, 499 (1838).

common law, a jury could find a defendant guilty of any lesser offense necessarily included in the offense charged.⁶⁹ The rule originated to aid the prosecution when the evidence failed to establish an element of the crime charged.⁷⁰ The accused sees the practice as a two-edged sword; it allows conviction of a crime less serious than that charged, but it also makes conviction of some crime more certain.

The function of the jury must be considered when discussing the subject of instructing down. The jury acts on society's behalf to judge the acts of a peer and to see that proper punishment is imposed. Members of the jury may acquit the defendant, but they cannot return a verdict on a lesser included offense not supported by the evidence.⁷¹ The jury's duty is to find the accused guilty of the highest offense supported by the evidence.⁷² If the jury did not have such an obligation, a defendant could receive a more lenient punishment than society has deemed appropriate for a crime. Arbitrariness in the results of two factually identical cases could also result.

The jury does not have *carte blanche* to decide what crime a defendant should be convicted of. This is illustrated in the evidentiary test that determines when to submit instructions to the jury on lesser offenses. The objective is to channel the jury's fact-finding duty so that it may not arbitrarily choose an offense. Most jurisdictions have held that before an instruction on a lesser included offense is warranted, the evidence must provide a basis for acquittal of the greater offense and conviction of the lesser.⁷³ The fed-

69. See 1 J. CHITTY, CRIMINAL LAW 250 (5th Am. ed. 1847); 2 W. HAWKINS, PLEAS OF THE CROWN 236 (6th ed. 1787).

70. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 515 n.2 (1982).

71. See *Sparf v. United States*, 156 U.S. 51 (1895); Westin, *supra* note 40, at 1012. It may seem inconsistent to say that in an undisputed *prima facie* murder case the jury can completely disbelieve the state's case and acquit, but that they cannot disbelieve only a part of the state's case and convict of a lesser offense of the offense charged. See Comment, *Jury Instructions on Lesser Included Offenses*, 57 NW. U.L. REV. 62, 66-67 (1962). The goal is to channel the jury to convict a defendant of the highest crime supported by the evidence. If undisputed evidence is put on for the higher crime and the jury does not believe it, then they do not believe the defendant is guilty. If, however, the evidence is conflicting or weak as to an element of the greater offense, then there is reason in the record to disbelieve that element. Otherwise, the jury would be unilaterally commuting punishment.

72. See, e.g., *State v. Hacker*, 214 S.W.2d 413, 416 (Mo. 1948) (proper for court to tell the jury that consideration of lower grade of an offense depends upon their failure to be convinced of a higher grade).

73. See 5 F. WHARTON, CRIMINAL PROCEDURE § 545 (12th ed. 1974); 40 AM. JUR. 2d *Homicide* § 529 (1968); see, e.g., *Chavers v. State*, 361 So. 2d 1106, 1107 (Ala. 1978); *People v. Glenn*, 200 Colo. 416, 423, 615 P. 2d 700, 705 (1980); *Commonwealth v. Santo*, 375 Mass. 299, 305, 376 N.E.2d 866, 867 (1978); *State v. Hill*, 614 S.W.2d 744, 750 (Mo. Ct. App. 1981); *People v. Scarborough*, 49 N.Y.2d 364, 368, 402 N.E.2d 1127, 1129, 426 N.Y.S.2d 224, 226 (1980); *Alger v. State*, 603 P.2d 1154, 1155 (Okla. Crim. App. 1979); *State v. Jones*, 273 S.C. 723, 729, 259 S.E.2d 120,

eral rule is the same.⁷⁴ The United States Supreme Court recently held that such an evidentiary restraint on instructing down is permissible even in death penalty cases.⁷⁵

The relationship between instructing down and the function of the jury is seen in several black-letter rules of law. A defendant may have grounds for appeal if: the evidence supported the submission of a lesser included offense instruction but the instruction was not given,⁷⁶ the defendant is convicted of an offense which was not a lesser included of the offense charged,⁷⁷ or if he is convicted of a lesser included offense not supported by the evidence.⁷⁸ No error exists if the defendant is convicted of a necessarily lesser included offense when the evidence supported conviction of a greater offense.⁷⁹ The same is true if the evidence did not support submission of the lesser included offense and the instruction was not given.⁸⁰

There are constitutional restraints on instructing down. As under common law, a defendant must have notice of the crimes for which he may be convicted on the basis of the crime charged. He cannot be convicted of a crime not specifically charged in the information or indictment unless it is a lesser included offense.⁸¹ Notice always was supplied at common law be-

125 (1979); *State v. Oien*, 302 N.E.2d 807, 809 (S.D. 1981); *State v. Bower*, 28 Wash. App. 704, 709, 626 P.2d 39, 42 (1981); *Hawthorne v. State*, 99 Wis. 2d 673, 682, 299 N.W.2d 866, 870 (Wis. 1981). This "acquittal of the greater, convict of the lesser view" is shared by the Model Penal Code. *See* MODEL PENAL CODE § 1.07(5) comment (Tentative Draft No. 5 1956).

74. *See Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sparf v. United States*, 156 U.S. 51, 53 (1895). The rule has been called the "independent evidence test" because it requires evidence which supports acquittal of the greater offense and conviction of the lesser. *See* Comment, *supra* note 71, at 65.

75. *Hopper v. Evans*, 102 S. Ct. 2049 (1982) (defendant's testimony negated any possibility that he was guilty of a lesser degree of the crime charged). *See also Beck v. Alabama*, 447 U.S. 625 (1980).

76. *E.g.*, *State v. Parker*, 324 S.W.2d 717, 721 (Mo. 1959); *State v. Shoemaker*, 7 Mo. 177, 180 (1841).

77. *E.g.*, *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937); *State v. Elliott*, 559 S.W.2d 175, 177 (Mo. 1977) (en banc); *State v. Brannon*, 55 Mo. 63, 65 (1874).

78. *E.g.*, *State v. Wilson*, 88 Mo. 13, 16 (1885).

79. *See, e.g.*, *State v. Millard*, 242 S.W. 923, 927 (1922) (although defendant was convicted of first degree murder as charged, conviction of the lesser offense instructed upon would not have been prejudicial). Surely this assumes that there is sufficient evidence of the lesser offense. *See, e.g.*, *State v. Richardson*, 364 S.W.2d 552, 554 (Mo. 1963); *Hunvald*, *supra* note 47, at 20. *But see State v. Murphy*, 341 Mo. 1229, 1238, 111 S.W.2d 132, 137 (1937) (defendant convicted of second degree murder where evidence supported conviction of first degree murder or acquittal).

80. *See State v. Kaufman*, 335 Mo. 611, 73 S.W.2d 217 (1934) (jury properly instructed on first degree felony-murder and not on manslaughter); *State v. Hayes*, 247 S.W. 165, 168 (Mo. 1922) (manslaughter instruction properly refused where evidence showed only that defendant provoked victim).

81. *State v. Billingsley*, 465 S.W.2d 569, 570 (Mo. 1971). *See also State v. Wil-*

cause proper lesser included offenses were those necessarily included in the commission of the offense charged. Problems of notice arise when legislatures designate lesser degrees of an offense as lesser included offenses even though the elements are not necessarily included in the greater offense. Missouri passed such a law in 1835.⁸²

B. *Lesser Included Offenses and Instructing Down in Missouri*

If there is not a good deal of confusion about the law of instructing down in Missouri, there is at least quite a bit of disagreement. This section will examine the statutes governing this area and the applicable MAI-CR jury instructions. Although the statutes do not completely control, they will be studied first because they contain the pre-MAI-CR position. MAI-CR then will be examined in order to see the current state of the law. Finally, the theories of MAI-CR will be tested to see whether they are sound.

kerson, 616 S.W.2d 829 (Mo. 1981) (en banc); State v. Smith, 592 S.W.2d 165 (Mo. 1979) (en banc); State v. Shoemaker, 7 Mo. 177 (1841).

82. See MO. REV. STAT. § 14, at 214 (1835). Defendants have long argued that this statute precluded conviction for an offense that was not specified as a lower degree of the offense charged even though the offense qualified as a necessarily included lesser offense. See, e.g., Watson v. State, 5 Mo. 497, 499 (1839) (defendant convicted of manslaughter on first degree murder charge). But see State v. Shoemaker, 7 Mo. 177, 180 (1841) (statute not intended to supercede common law lesser included offenses principles); Watson v. State, 5 Mo. 497, 498 (1839) (same). The court later held that the statute could not allow convictions prohibited at common law; a proper lesser degree included offense also had to be a necessarily included lesser offense. See, e.g., State v. Brannon, 55 Mo. 63, 65 (1874); State v. Shoemaker, 7 Mo. 177, 180 (1841). This situation does not appear to have affected the homicides because under the hierarchy they were necessarily included lesser offenses of one another. But see State v. Handley, 585 S.W.2d 458 (Mo. 1979) (en banc) (applied pre-1879 view to the relationship between first degree murder and second degree murder), *overruled in part*, State v. Wilkerson, 616 S.W.2d 829 (Mo. 1981) (en banc). Compare the dictum in State v. Wilkerson, 616 S.W.2d 829, 832 (Mo. 1981) (en banc), to the effect that prior to the enactment of MO. REV. STAT. § 1655 (1879) (allowed conviction of offense necessarily included in the charged offense), the only proper lesser included offense was one specifically denominated as a lesser degree of the crime charged, regardless of whether it was necessarily included in the offense charged. This dictum appears to be erroneous; the 1835 statute was not intended to preclude operation of the common law. If the *Wilkerson* dictum was correct, manslaughter would not have been a proper lesser included offense of murder. The 1879 enactment of § 1655 must have been the legislature's attempt to counteract the court's restrictive interpretation of § 14 in non-homicide cases. Such legislation is commonly employed to permit conviction of cognate offenses or allied offenses of the same nature. See Comment, *supra* note 71, at 62. *Wilkerson* appears to treat the inferior in degree test as identical to the specifically denominated lesser test.

1. Duty to Instruct Down

The trial court is obligated to instruct the jury on lesser included offenses. Missouri Revised Statutes section 546.070.4⁸³ governs the order of trial in criminal cases: "Whether requested or not, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict."⁸⁴ This statute has been interpreted to impose upon the trial court a duty to instruct on lesser included offenses,⁸⁵ but only when evidence in the record would support conviction of the lesser offense and acquittal of the greater.⁸⁶

2. Substantive Definitions of Lesser Included Offenses

Prior to the 1979 Criminal Code, the statutes permitted a defendant to be convicted of an offense which was "inferior in degree"⁸⁷ and "necessarily included" in the offense charged.⁸⁸ In retrospect, determining what pre-1975 homicides were lesser included offenses of the charged offense looks

83. (1978).

84. In 1879, MO. REV. STAT. § 1908 (1879) (presently § 546.070) was new. The Act of Mar. 20, 1901, ch. 16, 1901 MO. LAWS 140, added the phrase "whether requested or not." Prior to 1879, the duty was imposed by the common law. *See Hardy v. State*, 7 Mo. 607, 609 (1842) (duty to instruct on all the law arising in the case); *see also* MO. SUP. CT. R. 28.02(a). In *State v. Olson*, 636 S.W.2d 318 (Mo. 1982) (en banc) the court held that an instruction on a lesser included offense in a non-homicide case must be requested before a legitimate point of error can be raised. The court distinguished homicide offenses from non-homicide offenses, applying the requested or not rule only to the former. *Id.* at 322. The new Missouri homicide legislation, discussed in Part V *infra.*, has removed the requested or not language.

85. *See State v. Gotthardt*, 540 S.W.2d 62, 66 (Mo. 1976) (en banc); *State v. Tilley*, 569 S.W.2d 346, 349 (Mo. Ct. App. 1978).

86. *See State v. Howard*, 564 S.W.2d 71, 76 (Mo. Ct. App. 1978) (non-homicide); *see also State v. Wilson*, 88 Mo. 13, 16 (1885) (homicide case which applied the rule but did not cite the statute).

87. MO. REV. STAT. § 556.220 (1969) (repealed) provided:

Upon indictment for any offense consisting of different degrees, as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of *any degree of such offense inferior to that charged* in the indictment, or of any attempt to commit such offense, or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide.

(emphasis added).

88. *Id.* § 556.230 provided:

Upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a lesser offense; *and in all other cases*, whether prosecuted by indictment or information, the jury or court trying the case may find the defendant not guilty of the

straightforward.⁸⁹ All lower homicides were included within the homicide charged in the indictment because of the structure of the homicide scheme.⁹⁰ Second degree murder was an offense inferior in degree to first degree murder because it was designated as second degree murder and it was a less grievous murder than first degree murder.⁹¹ Manslaughter was an offense inferior in degree to both first and second degree murder because it was the least grievous punishable homicide.⁹²

The inferior in degree test still worked well with the 1975 change in the homicide scheme. First degree murder was an offense inferior to capital murder.⁹³ Second degree murder was an offense inferior to both capital and first degree murder.⁹⁴ Manslaughter was an offense inferior to capital murder,⁹⁵ first degree murder,⁹⁶ and second degree murder.⁹⁷ Difficulties existed, however, with the necessarily included test as between first degree and second degree murder because the requisite mental state of the latter was actually higher than that required for the former.⁹⁸ Second degree murder was necessarily included in capital murder, and manslaughter was necessarily included in all the higher homicides.

offense as charged, and find him guilty of *any offense, the commission of which is necessarily included in that charged against him.*

(emphasis added).

89. See, e.g., *State v. Wilkerson*, 616 S.W.2d 829, 832 (Mo. 1981) (en banc) (explaining operation of §§ 556.220-230).

90. First degree murder charges necessarily included second degree murder (even though felony-murder was involved), *State v. Jewell*, 473 S.W.2d 734, 739 (Mo. 1971), manslaughter, *State v. Kelton*, 299 S.W.2d 493, 498 (Mo. 1957), and every degree of criminal homicide. *State v. Rollins*, 226 Mo. 524, 534, 126 S.W. 473, 481 (1910) (citing the predecessor of § 556.220).

91. See *State v. Rollins*, 226 Mo. 524, 126 S.W.473 (1910).

92. See *State v. Kelton*, 299 S.W.2d 493 (Mo. 1957) (citing former § 556.220); see also *Watson v. State*, 5 Mo. 497, 500 (1838).

93. *State v. Wilkerson*, 616 S.W.2d 829, 831 (Mo. 1981) (en banc). Cf. *State v. Handley*, 585 S.W.2d 458 (Mo. 1979) (en banc) (plurality) (overruled *Wilkerson* to the extent it held that conventional second degree murder was not a lesser included offense of first degree murder).

94. *State v. Wilkerson*, 616 S.W.2d 829 (Mo. 1981) (en banc).

95. The same result should apply here as between old first degree murder and manslaughter because capital murder has the same specified mental culpability as old first degree murder. See *State v. Kelton*, 299 S.W.2d 493 (Mo. 1957).

96. See *State v. Flenoid*, 617 S.W.2d 75 (Mo. 1981).

97. The 1975 revision did not change second degree murder or manslaughter.

98. *State v. Handley*, 585 S.W.2d 458 (Mo. 1979) (en banc), relied on MO. REV. STAT. § 556.230 (1969) (repealed) as stating that a valid lesser included offense could only be an offense necessarily included in the offense charged. The opinion overlooked *id.* § 566.220 (repealed), which stated that a defendant could be convicted of an offense inferior in degree to the offense charged. See also *State v. Wilkerson*, 616 S.W.2d 829, 833 (Mo. 1981) (en banc) (statute gives sufficient notice to afford due process).

Under section 556.046 of the Criminal Code of 1979,⁹⁹ there are three ways an offense becomes a lesser included offense; this Article will discuss two of them. First, an offense can be an "elements lesser," *i.e.*, an offense established by the same or less than all the facts necessary to establish the charged offense.¹⁰⁰ Second, an offense can be specifically denominated by statute as a lesser included offense.¹⁰¹ Here, lesser degrees of a crime become lesser included offenses because they are specifically denominated by statute as such, regardless of how the elements differ from those in the greater offense.¹⁰² This kind of lesser offense shall be termed a "specifically denominated lesser."¹⁰³

Whether an offense is a lesser included offense of another is a matter of substantive law. If a crime includes a lesser offense, it will include the lesser offense in all cases. If the lesser offense cannot be submitted to the jury in a particular case, it will be due to the lack of evidentiary support, not because the offense is not a lesser included offense.¹⁰⁴

3. Statutory Test for Instructing Down

Once an offense is determined to be a lesser included offense of the

99. MO. REV. STAT. § 556.046 (1978) (replacing former §§ 556.220-.230). This statute has been interpreted to require instructing down unless there is no evidence to acquit of the greater offense and convict of the lower. *See* State v. Olson, 636 S.W.2d 318, 321 (Mo. 1982) (en banc); State v. Hill, 614 S.W.2d 744 (Mo. Ct. App. 1981). Section 556.046 contains two statements concerning the substantive law of lesser included offenses: in subsection 1, it defines lesser included offenses by setting out three tests, and in subsection 2 it defines the right to instructions on the lesser included offenses submitted. The statute does not mandate instruction on all lesser included offenses. The source of that duty is § 546.070.

100. *See* State v. Smith, 592 S.W.2d 165, 166 (Mo. 1979) (en banc); MO. REV. STAT. § 556.046.1(1) (1978).

101. MO. REV. STAT. § 556.046.1(2) (1978).

102. *See* State v. Wilkerson, 616 S.W.2d 829, 832 (Mo. 1981) (en banc) (first and second degree murder).

103. Compare the specifically denominated test with the broader inferior degree test in MO. REV. STAT. § 556.220 (1969) (repealed) and its predecessors. *See* State v. Baker, 636 S.W.2d 902, 904 (Mo. 1982) (en banc). The specifically denominated lesser test focuses on the name of the crime. If it is not a second, third, or fourth degree of the charged crime, then it would not qualify as a lesser included offense. The inferior in degree test, however, was flexible enough to allow an examination of the substantive nature of the offenses involved. *See, e.g.*, State v. Watson, 5 Mo. 497, 500 (1838) (manslaughter a homicide inferior in degree to homicide of first degree murder). If the inferior in degree test was in § 556.046, there would be no problem with the present homicides being lesser included offenses of one another. Had § 556.046 been in effect with the pre-1975 homicide scheme, the homicides would still have qualified as lesser included offenses of one another.

104. This is a common stumbling block. It is imperative to separate the substantive definition of an offense as the lesser included offense of another and the question of whether the evidence in a given case supports it.

crime charged, another step must be taken before the determination can be made to submit the offense to the jury. There must be evidence in the record to support submission of the offense. Although Missouri Revised Statutes section 556.046.2¹⁰⁵ may substantively define a crime as a lesser included offense, the jury will not necessarily always be instructed on the lesser offense.

Section 556.046.2 codifies a rule that Missouri courts have applied to both homicide and non-homicide cases.¹⁰⁶ The jury may not disbelieve undisputed evidence on a factual element of the state's case; there must be an evidentiary basis to disregard the evidence of the higher offense.¹⁰⁷ Hence, the statement that under the evidence the accused was either guilty of the offense charged or guilty or no offense.¹⁰⁸

Even a true "elements lesser" offense is not necessarily submitted to the jury. If a submissible case is made for the charged offense and all the facts or elements of the lesser offense have been proven, the jury cannot disbe-

105. (1978).

106. *See* State v. Craig, 433 S.W.2d 811 (Mo. 1968) (en banc) (evidence established first degree robbery by means of a dangerous and deadly weapon and defendant was either guilty of the offense charged or no offense).

107. *See, e.g.,* State v. Norris, 365 S.W.2d 501, 504 (Mo. 1963). Although *Craig* was not a homicide case, this rule was applied to homicide cases. *See, e.g.,* State v. Ford, 495 S.W.2d 408, 417 (Mo. 1973) (en banc) (defendant either guilty of first degree murder or not guilty); State v. King, 433 S.W.2d 825, 828 (Mo. 1968) ("evidence points [only] to a killing by one lying in wait, the distinguishing element of murder in the first degree . . . [and] court was not required to instruct on second degree murder"); *cf.* State v. Hyster, 504 S.W.2d 90, 93 (Mo. 1974) (in first degree murder conviction for murder by strangulation, error not to submit second degree murder and manslaughter instructions because evidence would support them). *Hyster* is consistent with *Ford* and *King*. The factual element of the felony in felony-murder produced the rule expounded in *Ford* and *King*. The murder in *Hyster* was one for which the jury could properly determine more than one mental state due to its being a non-felony-murder. *Compare* State v. Sturdivan, 497 S.W.2d 139 (Mo. 1973) (conventional first degree murder by strangulation case where neither second degree murder nor manslaughter were instructed upon).

108. *See, e.g.,* State v. Benjamin, 309 S.W.2d 602, 606 (Mo. 1958). "Substantial evidence" defines whether the jury could have properly found a fact from the evidence. *See* City of Kan. City v. Oxley, 579 S.W.2d 113, 115 (Mo. 1979) (en banc). In instructing down, the test is whether there is any evidence which would allow the jury to disbelieve an element of the greater offense and whether there is evidence which would support conviction of the lesser offense. When a court states that there was no need to instruct down because evidence of the greater offense was "strong and substantial," *e.g.,* State v. Craig, 433 S.W.2d 811 (Mo. 1968) (en banc), it should not be taken for granted that the proper test was applied. For example, in State v. McCall, 602 S.W.2d 702, 707 (Mo. Ct. App. 1980), the substantial evidence test was used to determine whether second degree murder should be submitted in a first degree felony-murder case. The cases cited by *McCall* do not deal with instructing down.

lieve the evidence of the greater offense without some evidence to cast doubt upon it.¹⁰⁹ Applying this evidentiary test to a specifically denominated lesser offense is more easily done because it is obvious that some specifically denominated lessers possess elements different from those in the greater offense.¹¹⁰ Thus, proving the greater offense does not provide a submissible case for the lesser.

Whether the evidentiary test of section 556.046.2 applies to homicides has been questioned by dictum in *State v. Olson*.¹¹¹ The test does not presently apply to homicides. A contrary indication, however, is found in a statute that deals with applying the Code to offenses committed before and after its enactment and to non-Code offenses. Missouri Revised Statutes section 556.031.2¹¹² provides:

Offenses defined outside of this code and not repealed shall remain in effect, but unless otherwise expressly provided or unless the context otherwise requires, the provisions of this code shall govern the construction of any such offenses committed after January 1, 1979, as well as the construction and application of any defense to a prosecution for such offenses.

Consistent with this statute, section 556.046 has been held to govern the substantive definition of lesser included offenses for homicides occurring after January 1, 1979.¹¹³ Given that the evidentiary test in section 556.046 applied to homicides long before it was codified there, and given that the homicide statutes contain no indication that the test should not apply to the homicide offenses, it appears that the legislature intended the test to apply.¹¹⁴

109. *State v. Benjamin*, 309 S.W.2d 602 (Mo. 1958); *State v. Ford*, 495 S.W.2d 408 (Mo. 1973) (en banc).

110. *See, e.g., State v. Wilkerson*, 616 S.W.2d 829 (Mo. 1981) (en banc).

111. 637 S.W.2d 699 (Mo. 1982) (en banc). The MAI-CR position is that although § 556.046 applies to such non-Code offenses as murder, it should not affect the automatic submission rule with regard to the lesser offense of manslaughter. The rule is based on the definition of manslaughter, and the application of Code provisions to non-Code offenses is controlled by the statute defining the non-Code offense. MANUAL, *supra* note 17, § 1.10 comment. The court's apparent contradiction is its misstep regarding the law of manslaughter. That misconception will be discussed in Part IV *infra*. Other than where the automatic submission rule operates, the acquit/convict test is purportedly allowed to do so. As shall be seen in Part IV this is simply not true. The justified by the evidence test in MAI-CR operates where the automatic submission rule does not, thus making the only question whether a submissible case of a particular homicide has been made.

112. (1978).

113. *See State v. Baker*, 636 S.W.2d 902, 904 (Mo. 1982) (en banc). Section 556.046 is substantive and does not govern the definition of lesser included offenses for crimes committed prior to January 1, 1979. *See Baker*, 636 S.W.2d at 904; *see also* MANUAL, *supra* note 17, § 1.7 comment.

114. MAI-CR mandates that the traditional evidentiary test does not apply to homicides. Compare MODEL PENAL CODE § 1.08(5) (1956), from which

C. *Applying Section 556.046 to the Homicides*

1. Capital Murder

First degree murder cannot qualify under section 556.046 as a lesser included offense of capital murder. First, it is not an element lesser because it requires an element—a felony—which capital murder does not.¹¹⁵ Second, it is not a specifically denominated lesser of capital murder.¹¹⁶

Second degree murder, whether conventional or felony-murder, satisfies the elements test since all the elements of second degree murder are included in the elements of capital murder.¹¹⁷ The evidentiary test always would be met in a solely capital murder-second degree murder case because the only real distinction between the two is “deliberation.” Deliberation is truly a mental element of capital murder and thus, on the same set of undisputed facts, a jury could properly find this element or not find it. Use of a felony to help prove the mental state for capital murder could obviate any difficulty in deciding whether an instruction on second degree felony-murder should be submitted to the jury. Obviously it would if the proper felony were involved. On its statutory elements, however, there is no doubt that second degree murder is defined as a lesser included offense of capital murder.

Manslaughter is also an element lesser of capital murder because it is a killing that is neither murder nor excusable or justifiable homicide. Under the evidentiary test, however, a manslaughter instruction would be proper only when some evidence existed which could cast doubt in a juror’s mind as to the accused’s deliberation, premeditation, and malice. This can be done through almost any evidence of passion, excitement, or rage that could produce reasonable doubt as to the existence of malice and premeditation. Moreover, any evidence that could show that the killing resulted from the defendant’s culpable negligence would warrant an instruction on

§ 556.046.2 is copied. The Model Penal Code evidentiary test applies to homicide and non-homicide cases because if the acquit/convict test is not employed, a jury could easily reach the wrong result by arbitrarily choosing the crime of which the defendant is guilty. *Id.* § 1.08(5) comment. Section 556.046.2 should apply to homicides because nothing expressly provides otherwise and the context does not otherwise require it, as provided in § 556.031.2.

115. *See* State v. Baker, 636 S.W.2d 902, 904 (Mo. 1982) (en banc). *But see* State v. Daugherty, 631 S.W.2d 637 (Mo. 1982) (first degree murder can be submitted as a lesser included offense of capital murder); State v. Furh, 626 S.W.2d 379 (Mo. 1982) (same).

116. *See* State v. Wilkerson, 616 S.W.2d 829, 832 (Mo. 1981) (en banc) (first and second degree murder).

117. The only distinction is that deliberation is required for capital murder. This is based on the view that the felony in second degree murder is not an element of the crime. Compare this with the court’s position that the felony causes double jeopardy to operate. *See* Part II *supra*.

manslaughter.¹¹⁸

2. First Degree Murder

Conventional second degree murder is a specifically denominated lesser of first degree murder.¹¹⁹ It is not an elements lesser because it requires premeditation and malice aforethought while first degree murder does not.¹²⁰ Second degree felony-murder might never be submitted to the jury as a lesser included offense of first degree murder because the felonies involved are mutually exclusive. This does not mean that second degree felony-murder requires a felony not enumerated in first degree murder, but only that the felony patterns for these two homicides do not overlap. When the felony for second degree felony-murder is a lesser included offense of the felony for first degree murder and the evidence supports submission of the lesser,¹²¹ the two could be given in the same case.

Manslaughter is substantively defined as an elements lesser of first degree murder because it is a killing which is neither murder nor excusable or justifiable homicide. It is difficult, or uncommon, to satisfy the evidentiary test to get to manslaughter from first degree murder. Some evidence contradicting the attempt or commission of the felony should be required before the jury is permitted to disbelieve that factual element and choose manslaughter. As a practical matter, however, if such evidence is present, a second degree murder submission likely will be available, creating a situation where doubt-inducing evidence as to mental state must be in the record to escape a second degree murder conviction. As a matter of course, a prima facie case for first degree murder probably will not provide evidentiary support for a manslaughter instruction due to the nature of that higher offense.¹²²

3. Second Degree Murder

Manslaughter is an elements lesser of second degree murder because it involves a killing which is neither murder nor excusable or justifiable homicide. As discussed in an earlier section, there must be some doubt-inducing evidence in the record regarding mental culpability before the evidentiary test in the statute will be met. If second degree felony-murder is involved, the same problems arise as for first degree murder.

118. According to MAI-CR, culpable negligence manslaughter is not a lesser included offense of any other crime. MO. APPROVED INSTR.-CRIM. No. 15.20 note 5 (2d ed. 1979).

119. *State v. Wilkerson*, 616 S.W.2d 829, 832 (Mo. 1981) (en banc).

120. *See State v. Baker*, 636 S.W.2d 902 (Mo. 1982) (en banc); *see also* Part II *supra*.

121. This should involve the acquit/convict test on the felony enumerated in the first degree murder statute. Even the MAI-CR should concur with this because a non-homicide is involved.

122. *See, e.g., State v. Martin*, 602 S.W.2d 772 (Mo. Ct. App. 1980).

Second degree felony-murder is arguably an elements lesser of conventional second degree murder because it is proved by the same facts.¹²³ The converse is also true. This does not make either a less grievous homicide than the other. A charge of either offense should put a defendant on notice of the other.

D. Lesser Included Offenses and Instructing Down According to MAI-CR

The Missouri Supreme Court does not follow section 556.046 in deciding what is a lesser included offense and when to instruct down.¹²⁴ Since 1974, the court has promulgated mandatory pattern jury instructions for criminal cases—the MAI-CR. The notes and caveats to the instructions contain many specific directives on instructing down.¹²⁵ These comments at least imply what homicides are less included offenses of each other. The court's operating theories in MAI-CR blur the distinction between the substantive definition of an offense and the determination of whether the evidence in a given case supports its submission to the jury.

1. MAI-CR's Justified by the Evidence Test

The MAI-CR 15.00¹²⁶ evidentiary test for instructing down is one of whether a submissible case has been made for the lesser included offense. The test requires that "[i]n homicide cases, as in all others, all lesser included offenses justified by the evidence must be submitted along with the highest grade of a homicide submitted."¹²⁷ "Justified by the evidence" as used here "means that all essential elements of the offense may be found or inferred from the evidence."¹²⁸ Under this test, an elements lesser of the charged offense would always be properly submitted to the jury when its greater offense was submitted, even though the evidence of the greater offense was undisputed.¹²⁹ The court's endorsement of this statement led it to

123. See MO. REV. STAT. § 556.046.1(2) (1978); cf. *State v. Mansfield*, 637 S.W.2d 699, 704 (Mo. 1982) (en banc).

124. MO. SUP. CT. R. 28.02(a), however, follows § 546.020(4) insofar as that statute required the trial court to instruct the jury whether requested or not.

125. See MO. APPROVED INSTR.-CRIM. No. 15.00.3 caveat c (2d ed. 1979).

126. (2d ed. 1979).

127. MO. APPROVED INSTR.-CRIM. No. 15.00.3(b) (2d ed. 1979).

128. *Id.*

129. The court intended that homicides be governed by this rule rather than the traditional acquit/convict rule. See *id.* No. 17.00 note 5. The note regards the submission of lesser included offenses in non-homicide cases and specifically states that it does not cover the submission of lesser included offenses in homicides. *Id.* No. 15.00.3. "Justified by the evidence" is common parlance for instructing down in accordance with the traditional evidentiary test. See, e.g., *State v. Brown*, 245 S.W.2d 866, 868 (Mo. 1952). "Supported by the evidence" in MO. REV. STAT. § 565.006.1 (Supp. 1979) (dealing with capital murder cases) is not the same as that in MAI-CR. To so interpret it would be to give it a contradictory meaning to the instructing down test in MO. REV. STAT. § 556.046.2 (1978). There is no need to

create "the automatic submission" rule for second degree murder and manslaughter. The court requires that: (1) an instruction on manslaughter must be given when any higher homicide offense is submitted, and (2) a conventional second degree murder instruction must be given in all cases in which the court instructs on capital murder.¹³⁰ In these two cases, submission of second degree murder and manslaughter will always be justified by the evidence.¹³¹

2. Lesser Included Offenses

The Missouri Supreme Court takes the position that, with the exception of culpable negligence manslaughter, a given homicide is a lesser included offense of any higher homicide.¹³² For our purposes, the most

have a different test for capital murder cases. *See* Hopper v. Evans, 102 S.Ct. 2049, 2052 (1982); *see also* Beck v. Alabama, 447 U.S. 625, 637 (1980). The recent change in § 565.006.1 proves the legislature's desire to do away with the need to have the jury consider capital murder, first degree murder, second degree murder, and manslaughter. This indicates an intent to employ the traditional evidentiary test rather than automatically submit every homicide to the jury in a capital murder case.

130. This automatic submission rule originally applied only to second degree murder and manslaughter in any non-felony-murder case. *See* MO. APPROVED INSTR.-CRIM. No. 6.02 caveat d (1974). In first degree felony-murder cases, second degree murder and manslaughter were submitted only if the evidence would support it. *See id.* caveat a. If a first degree felony-murder case also supported a second degree murder instruction, manslaughter was automatically submitted under the second degree murder instruction. *Id.* The automatic submission rule was expanded in a 1975 revision of the first MAI-CR homicide series. MO. APPROVED INSTR.-CRIM. No. 6.02 note 4(c)(2) (1975). The rule remained unchanged except that manslaughter was to be automatically submitted in every greater homicide case, including felony-murders. The court articulated that this change was due to the nature of manslaughter but did not include culpable negligence manslaughter. *Id.*

131. MO. APPROVED INSTR.-CRIM. No. 15.00.3 caveat c (2d ed. 1979). The court stated that no felony-murder homicide is automaticallymissible, but if any lesser included offense instruction is justified by the evidence, it is of no consequence that the charge or submission of the higher offense was of conventional or felony-murder.

132. When manslaughter is submitted as a lesser included offense of any greater homicide, it is conventional manslaughter, not culpable negligence manslaughter. *Id.* caveat 1. If capital murder is the highest offense submitted, then second degree murder (conventional) and manslaughter (voluntary) must also be submitted. *Id.* No. 15.00.3(d). First degree murder and second degree felony-murder must also be given in such a case if they are justified by the evidence. *State v. Daugherty*, 631 S.W.2d 637, 645 (Mo. 1982); *State v. Fuhr*, 626 S.W.2d 379, 379 (Mo. 1982); MO. APPROVED INSTR.-CRIM. No. 15.00.3(d) (2d ed. 1979). If first degree murder is the highest offense submitted, then voluntary manslaughter must be submitted. *State v. Flenoid*, 617 S.W.2d 75, 75 (Mo. 1981); MO. APPROVED INSTR.-CRIM. No. 15.00.3(e) (2d ed. 1979). If justified by the evidence, instructions on second degree

important aspect of this position is that voluntary manslaughter is present in every higher homicide.

The court has modified MAI-CR since it became effective in 1979. In *State v. Baker*,¹³³ the court held that first degree murder cannot pass either test in section 556.046 to become a lesser included offense of capital murder. The notes for the MAI-CR 15.00¹³⁴ series thus were overruled to the extent that they allowed first degree murder to be instructed upon under a capital murder charge. Although conventional second degree murder is undoubtedly a lesser included offense of capital murder, the court has recently cast doubt on its position that second degree felony-murder is a lesser included offense thereof.¹³⁵

E. Comparing MAI-CR with the Traditional View

The real differences between MAI-CR and the traditional position in Missouri homicide law are: (1) the evidentiary test for instructing down, and (2) the substantive definition of manslaughter.¹³⁶ The scheme resulting from these two changes allows instructing down to almost any lesser homicide in any case and requires that voluntary manslaughter always be submitted as a lesser homicide. The theory of this system is that the jury is always free to determine, as a question of fact, the culpability of the defendant.¹³⁷ Dissatisfaction with this scheme has been growing. It has been described as implementing a "new policy of giving the jury in a homicide case the unfettered right to commute punishment for an offense committed and to impose the punishment it finds proper."¹³⁸ It is difficult to determine the

murder (conventional and felony-murder) must be submitted. *State v. Donovan*, 631 S.W.2d 39, 41 (Mo. 1982) (both conventional second degree murder and second degree felony-murder are lesser included offenses of first degree murder); MO. APPROVED INSTR.-CRIM. No. 15.00.3(e) (2d ed. 1979). If conventional second degree murder is the highest offense submitted, the court must instruct on conventional manslaughter. *Id.* No. 15.00.3(f). See *State v. Stapleton*, 518 S.W.2d 292, 300 (Mo. 1975) (en banc). If the evidence justifies, a second degree felony-murder instruction must be given. MO. APPROVED INSTR.-CRIM. No. 15.00.3(f) (2d ed. 1979). If second degree murder felony is the highest offense, a conventional manslaughter instruction must be given. *Id.* No. 15.00.3(g).

133. 636 S.W.2d 902 (Mo. 1982) (en banc).

134. See MO. APP. INST.-CRIM. Nos. 15.00-15.56 notes (2d ed. 1979).

135. See *State v. Clark*, 652 S.W.2d 123 (Mo. 1983) (en banc) (felony is not an element of second degree felony-murder and second degree felony-murder is a lesser included offense of capital murder) (citing a draft of this Article).

136. A non-MAI-CR manslaughter is a murder fact pattern which is determined to not be murder, due to adequate evidence of provocation, while the MAI-CR requires no evidence of provocation.

137. See, e.g., *State v. Olson*, 636 S.W.2d 318, 321-22 (Mo. 1982) (en banc) (compares jury's prerogative in homicide and non-homicide cases).

138. *State v. Martin*, 602 S.W.2d 772, 778 (Mo. Ct. App. 1980) (footnote omitted).

relationship between the justified by the evidence concept and the changed substantive definition of manslaughter. Without the latter, however, the former could not operate as it does.

1. Operation of the MAI-CR Justified by the Evidence Test

The Missouri Supreme Court has mandated that all homicides justified by the evidence should be submitted to the jury.¹³⁹ Under the court's evidence test, an elements lesser offense would always be submitted because proof of the greater offense alone places in the record evidence sufficient to support submission of the lesser. The test presents a new and unique rule for instructing down in homicide cases.¹⁴⁰ It rejects the traditional view that there must be some evidence in the record to create doubt about an element of the greater offense before instructing on the lesser offense. The traditional position recognized that the facts of a homicide could bear legal significance to a particular mental state of the defendant.

The distinction between the traditional theory and the court's rule is illustrated by dividing homicides into two groups: "presumptive degree" and "facts and circumstances." Presumptive degree homicides exist when the proof of the fact pattern will, by its legal significance, prove the mental

139. MO. APPROVED INSTR.-CRIM. No. 15.00.3(b) (2d ed. 1979) provides that justified by the evidence means that all the essential elements of the offense may be found or inferred from the evidence. This test applies to all homicides, including felony-murder. In MAI-CR (First), the acquit/convict test originally hung on in first degree felony-murder cases for instructing down to second degree murder and manslaughter. MO. APPROVED INSTR.-CRIM. No. 6.02 caveat a (1975). *See also* State v. Moore, 580 S.W.2d 747 (Mo. 1979) (en banc) (murder committed July 28, 1975); Fulsom v. State, 625 S.W.2d 249 (Mo. Ct. App. 1981) (1974 murder conviction); MO. APPROVED INSTR.-CRIM. No. 6.02 notes and caveats (1974). *Id.* No. 15.00.3(b) (the justified by the evidence test) is in a setting where manslaughter is always submissible. The Court has recently stated that the non-homicide acquit/convict test does not apply to homicides. *Id.* No. 17.00.5. In State v. Olson, 636 S.W.2d 318, 322 (Mo. 1982) (en banc), the court stated that the acquit/convict test does not operate in any murder cases. The only two homicides between which the justified by the evidence test operates are present first degree murder and second degree murder. In all other situations, the automatic submission rule operates and/or the acquit/convict rule would be satisfied anyway.

140. The court's *prima facie* gloss on this phrase apparently stems from the capital murder scheme; the court believed that in a capital murder case every lesser homicide justified by the evidence had to be submitted. If the evidence supports a finding of the elements of a particular homicide, then it is justified by the evidence. The automatic submission rule is the ultimate posture of the justified by the evidence test. Automatic submission homicides are, by definition, always justified by the evidence. The court views the homicides as differing only in mental state the way that capital murder differs from second degree murder. Missouri is isolated in this view; almost every jurisdiction uses the traditional acquit/convict test for instructing down. *See* note 73 *supra*.

state.¹⁴¹ For example, a deadly weapon homicide will contain all the elements sufficient for the jury to convict of second degree murder.¹⁴² Felony-murders also are presumptive degree homicides. The mental state of almost every homicide will be proven by showing its fact pattern because either statute or case law recognizes a particular mental culpability as flowing from those facts. Accordingly, to obtain an instruction on a lesser included offense of a presumptive degree homicide, *i.e.*, to escape the presumption, there must be some evidence to allow the jury to disbelieve some operative factual element of the state's case.

Facts and circumstances homicides require the State to convince the jury that the facts add up to a particular culpable mental state. This allows the jury to properly reach more than one decision as to mental state even without contradictory evidence as to the higher homicide.¹⁴³ A good example is the distinction between capital murder and second degree murder when only these two homicides are considered. The issue is whether the element of deliberation is present.¹⁴⁴ Deliberation is a mental state for which there is no substitute factual element. Capital murder is a true facts and circumstances homicide because it is for the jury to decide whether the defendant had the requisite deliberation for capital murder, or whether he was lacking deliberation and is guilty only of second degree murder. The justified by the evidence test transformed the Missouri homicide system into one having only facts and circumstances homicides—on one set of facts, a jury is allowed to choose any one of the homicides.

The automatic submission rule, which applies to second degree murder and manslaughter, is the ultimate posture of the justified by the evidence test. It requires great reliance on the substantive definition of the offense because it is in essence saying that there is always evidence warranting submission of a particular lesser included offense.

Under the traditional view, an automatic submission rule could operate between capital murder and second degree murder, but only when first degree murder is not considered.¹⁴⁵ If the case involves only capital murder

141. "Presumptive" is used merely for convenience; it is not intended to mean that a murder has presumptively been committed, but that if a murder is found to have been committed, it is presumptively of a certain degree.

142. *See* State v. Black, 611 S.W.2d 236, 239-40 (Mo. Ct. App. 1981).

143. A facts and circumstances homicide, although charged in the indictment or information as the highest offense, requires that the prosecutor convince the jury to reach up from a presumptive degree homicide and find the distinguishing mental state between them.

144. This relationship is the same as the permissible inference bridge between pre-1975 first degree murder and second degree murder where no felony-murder was involved. *See, e.g.*, State v. Hyster, 504 S.W.2d 90, 93 (Mo. 1974).

145. The holding of State v. Baker, 636 S.W.2d 902 (Mo. 1982) (en banc) (first degree murder is not a lesser included offense of capital murder), is not fully addressed here in terms of its affect on the relationship between those two homicides. If *Baker* were dealt with fully, first degree murder would not provide an barrier for

and second degree murder, the jury could properly convict of either murder on the same facts.¹⁴⁶ If the proper felony is involved, however, first degree murder can provide an issue barrier which the jury could not break unless some evidence in the record called into question the attempt or the commission of the felony.

Assume an accused undisputedly robbed a person and stabbed him one hundred times. The case is submitted on capital murder, first degree murder, and second degree murder. If the jury rejects capital murder, then to reject first degree murder and still get to second degree murder the jurors must find that no robbery occurred. This is a homicide case where a non-homicide offense (a felony) constitutes an operative part of a presumptive degree homicide. Is the jury allowed to disbelieve the undisputed evidence as to this factual element of the homicide even though they would not be allowed to do so outside the homicide scheme?¹⁴⁷ The traditional answer is no; second degree murder should not have been submitted because no evidence disputed commission of the felony.

The MAI-CR answer is yes, because second degree murder is automatically submissible under a capital murder charge. The jury determines the defendant's mental culpability. What would be considered a roving commission for a jury in a non-homicide case is sanctioned by the MAI-CR in a homicide case.¹⁴⁸

The situation for the automatic submission of manslaughter is no better. Felony-murders quickly point up the flaw in the rule because they involve a non-homicide offense, the felony, which bears on the defendant's mental state. In *State v. Martin*,¹⁴⁹ the defendant was charged with first degree murder for a death caused by burns and smoke inhalation from a fire the defendant allegedly set. The defendant denied setting the fire. First

the jury in a capital murder case before they could reach second degree murder because it will be based on a separate charge. *Baker* is being ignored because the interpretation given it by the court is unknown and because the structural integrity of the proposed theoretical framework will not suffer in incorporating it.

146. This is the same as the difference between old conventional first degree murder and conventional second degree murder. See, e.g., *State v. Hyster*, 504 S.W.2d 90 (Mo. 1974).

147. Missouri still uses the acquit/convict test in non-homicide cases. See MO. APPROVED INSTR.-CRIM. No. 17.00.5 (2d ed. 1979).

148. Convicting a defendant of second degree murder in this setting is different than convicting of manslaughter when there is no evidence of provocation. Almost every first degree felony-murder case will contain a prima facie case of second degree murder. Therefore, a defendant could not complain that he was convicted of a crime not supported by the evidence. This is different than being convicted of manslaughter on an undisputed case of second degree murder, where traditional concepts would hold that the jury had impliedly acquitted the defendant of second degree murder and that he was convicted of a crime not supported by the evidence. Thus, in theory, he should win on appeal.

149. 602 S.W.2d 772 (Mo. Ct. App. 1980) (history and problems of MAI-CR).

degree murder and manslaughter were submitted to the jury. The jury convicted of manslaughter. The *Martin* court expressed frustration with the automatic submission rule because the rule allowed the jury to convict a person of killing another when it disbelieved that the defendant had committed the arson—the only causal link between him and the homicide.¹⁵⁰ The court reversed the conviction and discharged the defendant.¹⁵¹ If the traditional evidentiary test had been used, manslaughter would not have been submitted. The defendant would have been guilty of first degree murder (arson) or not guilty of any homicide.¹⁵²

The operation of the automatic submission rule between manslaughter and second degree murder provides another example of the MAI-CR's theoretical weakness. According to the MAI-CR,¹⁵³ when a submissible case of second degree murder exists there is evidence in the record to support a manslaughter instruction.¹⁵⁴ The legal foundation for this theory is weak.¹⁵⁵ Consider a practical setting. If the undisputed evidence shows that *A* was discovered beating *B* over the head with a golf club and that *B* died from such blows, *A* could be convicted of manslaughter¹⁵⁶ despite the absence of any evidence of provocation. It is the jury's prerogative to decide the defendant's mental culpability. The MAI-CR has done away with the presumption of murder with this position. It permits a jury to ignore the universally operating legal inferences or presumptions which warrant a verdict of guilty of murder (for example, a deadly weapon homicide) and to reduce to manslaughter without any evidence inducing doubt as to the defendant's premeditation or deliberation.¹⁵⁷ This is not what the pre-MAI-CR or early MAI-CR law permitted.¹⁵⁸

150. *Id.* at 779.

151. *Id.* at 780.

152. *See, e.g.* State v. Moore, 575 S.W.2d 253, 256 (Mo. Ct. App. 1978); *cf.* State v. McCall, 602 S.W.2d 702 (Mo. Ct. App. 1980) (discussed note 158 *infra*).

153. *See* State v. Stapleton, 518 S.W.2d 292 (Mo. 1975) (en banc).

154. *Id.* at 299. *See also* State v. Martin, 602 S.W.2d 772, 777 (Mo. Ct. App. 1980).

155. *See* State v. Ayers, 470 S.W.2d 534, 538 (Mo. 1971) (en banc).

156. *See* State v. Dixon, 563 S.W.2d 164 (Mo. Ct. App. 1978).

157. *Dixon* shows how *Stapleton's* position on a circumstantial evidence case operates. *See* note 158 *infra*. The converse of *Stapleton* is closer to reality. In a circumstantial evidence case, presumably there would be no facts to reduce murder to manslaughter, thus no manslaughter instruction should be given. *Stapleton* says that since it is not known that there *were not* mitigating circumstances the jury should be allowed to decide that issue. *Ayers* would hold only that a circumstantial evidence case could result in a manslaughter instruction. However, *Ayers* requires that the question whether mitigating evidence is present to be answered before permitting such submission. *Id.* at 538. *See also* State v. Patterson, 484 S.W.2d 278, 279-80 (Mo. 1972).

158. The majority of cases have followed the automatic submission rule for manslaughter. *See, e.g.*, State v. McCall, 602 S.W.2d 702, 707-08 (Mo. Ct. App.

How did the Missouri Supreme Court arrive at the justified by the evidence test and its corollary, the automatic submission rule? The rules are related to the court's alteration of the substantive definition of manslaughter. In *State v. Stapleton*,¹⁵⁹ the court made manslaughter the foundation homicide which is necessarily present in every murder. This contortion of long-settled substantive law transformed manslaughter into a homicide essentially proven by establishing that a killing occurred. It is undisputable that manslaughter is the lowest grade of punishable homicide, but the MAI-CR position that manslaughter is the foundation homicide is an aberration. Manslaughter has always involved the killing plus some evidence of provocation. Close examination of a few cases will show how this mutation occurred and how it lacks support.¹⁶⁰

1980) (defendant charged with first degree murder (robbery) and convicted of manslaughter, first degree robbery, and armed criminal action for stabbing robbery victim; defendant argued the evidence showed he was guilty of first degree murder or nothing at all; manslaughter conviction affirmed on basis that submissible case of manslaughter present; conviction of first degree robbery affirmed; armed criminal action verdict reversed); *State v. Sager*, 600 S.W.2d 541, 576 (Mo. Ct. App. 1980) (defendant charged with capital murder and convicted of manslaughter; conviction sustained because there was evidence in the record "sufficient to warrant a finding that appellant caused the death of the victim by stabbing and cutting her" as set out in the manslaughter instruction), *cert. denied*, 450 U.S. 910 (1981); *State v. Carter*, 585 S.W.2d 215, 216-18 (Mo. Ct. App. 1979) (submissible case of second degree murder made because defendant was discovered beating a jail employee over the head with a mop wringer; manslaughter instruction held properly submitted because it is "the jury's function to determine whether the killing was intentional . . . and committed without provocation"; defendant convicted of second degree murder); *State v. Dixon*, 563 S.W.2d 164 (Mo. Ct. App. 1978) (defendant charged with second degree murder and convicted of manslaughter on basis of beating to death a fellow state penitentiary inmate in the head with a golf club, judgment affirmed solely on basis of automatic submission rule without regard of the fact no evidence of provocation was in the record); *State v. Wood*, 531 S.W.2d 543, 545-46 (Mo. Ct. App. 1975) (defendant charged with second degree murder and convicted of manslaughter for homicide committed in 1972; defendant argued that she was guilty as charged or that she should have been acquitted for justifiable homicide; judgment affirmed solely on basis of MAI-CR automatic submission rule and *Stapleton*).

159. 518 S.W.2d 292 (Mo. 1975) (en banc).

160. *See id.* at 300-01; *State v. Ayers*, 470 S.W.2d 534, 538 (Mo. 1971) (en banc); *State v. Williams*, 442 S.W.2d 61, 64-65 (Mo. 1969) (en banc). It is not clear whether *Stapleton* was based upon confusion or whether it was the product of a preconceived notion to make instructing in homicide cases a no-fault process. The legal fiction created by the MAI-CR, if believed, makes a submission to the jury of almost every homicide matter of course. MAI-CR was designed to produce a simple, workable instruction scheme. *See Foreword* to MISSOURI BAR COMMITTEE COMMENTS ON MISSOURI APPROVED CRIMINAL INSTRUCTIONS 3 (1974).

2. The Transformation of Manslaughter

In *State v. Stapleton*,¹⁶¹ the Missouri Supreme Court faced a circumstantial evidence case involving whether a pistol in the victim's hands was discharged due to the defendant's criminal act or whether the death was accidental. The defendant claimed that the victim put the gun to her own head in jest, and that the gun went off when he attempted to slap it away, killing the victim. The jury convicted of manslaughter, rejecting second degree murder. The defendant argued on appeal that no evidence of provocation was present and therefore he either was guilty of second degree murder or should be acquitted. In affirming the manslaughter conviction, the court declared that *State v. Ayers*¹⁶² required the trial court to submit manslaughter in second degree murder cases even though there is no evidence of provocation.¹⁶³

The *Stapleton* court, relying on *Ayers*, announced the automatic submission rule with respect to manslaughter.¹⁶⁴ If a submissible case of conventional first or second degree murder is made, a manslaughter instruction must be given to the jury.¹⁶⁵

Ayers was decided four years prior to *Stapleton*. In *Ayers*, the defendant was convicted of manslaughter but did not request the instruction. In fact, he argued on appeal that the evidence did not support such an instruction and that he was either guilty of second degree murder or he should be acquitted. The homicide was committed by one of two rivals for the love of the defendant's wife. Evidence tended to prove that the defendant and the victim had a struggle in the victim's second-floor apartment: a tenant below testified that he heard the scuffling feet and then two shots. Defendant, with a bloodied shirt, was then observed leaving the apartment. He turned himself in and told the police he had shot the victim. As he left the police station with officers, "a crying, hysterical woman was in the vicinity of the front steps. Ayers said to her: I told her I was going to do it if she didn't make up her mind between him and me who she wanted, me or the boyfriend."¹⁶⁶

In upholding the manslaughter conviction, the court focused on the duty to instruct on all questions of law and upon the concept that a defendant's mental state is a question of fact to be left to the jury. The court held

161. 518 S.W.2d 292 (Mo. 1975) (en banc).

162. 470 S.W.2d 543 (Mo. 1971) (en banc).

163. *Stapleton*, 518 S.W.2d at 299-300. Probably, the most concise statement in *Stapleton* about *Ayers* is: "Affirmatively put, *Ayers* holds that when there is evidence sufficient to submit second degree murder, there is automatically evidence sufficient to submit manslaughter and that it is the function of the jury to decide whether the defendant acted with premeditation or malice. *Id.*

164. *See id.* at 301 n.1.

165. The rule was to take effect on March 1, 1975.

166. 470 S.W.2d at 536.

that *State v. Williams*¹⁶⁷ was erroneous to the extent it required proof of facts tending to show want of premeditation and malice before an instruction on manslaughter was warranted.¹⁶⁸ The *Ayers* court stated that when the defendant was charged with second degree murder, the trial court could properly have instructed only as to second degree murder if it could be said as a matter of law that there was no evidence for a verdict of guilty of manslaughter.¹⁶⁹

At first, *Ayers* and *Stapleton* may have appeared consistent. Once the ramifications of *Stapleton*'s holding became more clear, however, the court stated that aspects of *Stapleton* were being incorrectly attributed to *Ayers*.¹⁷⁰ As the protests about *Ayers* in post-*Stapleton* cases are examined, doubt develops as to whether *Stapleton* correctly analyzed *Ayers*. *Stapleton* overstated the holding in *Ayers* and took a substantial misstep in Missouri homicide law.

While *Ayers* is probably one of the most misunderstood cases in Missouri homicide law, *Williams* is one of the most underrated. Although *Ayers* criticizes *Williams* and overrules it to some extent, it also builds on it. The court held its proof of facts requirement in *Williams* was erroneous and essentially determined that the ultimate question on whether to submit a manslaughter instruction is whether there was any evidence in the record which could create doubt in a juror's mind as to the defendant's deliberation, premeditation or malice aforethought.

Ayers is almost uniformly cited as eliminating the common law presumption of murder.¹⁷¹ This is incorrect, and the cases relied upon in *Ayers* bear this out. The cases recognize that the common law presumption is a viable part of the law, but that it may be rebutted in particular cases due to the evidence.¹⁷² The cases say that a judge may refuse to instruct on man-

167. 442 S.W.2d 61 (Mo. 1969) (en banc). *Williams* settled whether Missouri still had common law manslaughter and provocation. The *Williams* proof of facts rule was at least one step away from common law manslaughter.

168. 470 S.W.2d at 537.

169. *Id.* at 538.

170. *See, e.g.*, *State v. Mudgett*, 531 S.W.2d 275, 281 (Mo. 1975) (en banc) (*Stapleton*, not *Ayers*, created the automatic submission rule), *cert. denied*, 431 U.S. 957 (1977); *see also State v. King*, 577 S.W.2d 621 (Mo. 1979) (en banc) (unanimous court adopted the automatic submission rule).

171. *See Instructing on Manslaughter—Eliminating the Presumption of Malice in Missouri Homicide Cases*, 38 MO. L. REV. 105, 106 (1973); *see also State v. Stapleton*, 518 S.W.2d 292, 298 (Mo. 1975) (en banc); *State v. Martin*, 602 S.W.2d 772, 776 (Mo. Ct. App. 1980).

172. In *Sparf v. United States*, 156 U.S. 51 (1895), the Court found as a matter of law an entire absence of evidence upon which to rest a verdict of manslaughter. *Id.* at 64. The evidence showed a conspiracy by three sailors to kill the ship's second mate. All three were convicted of murder. *Cf. State v. Bradley*, 361 Mo. 267, 269, 234 S.W.2d 556, 563 (1950) (murder during commission of robbery and failure to instruct on manslaughter held not to be error); *State v. Jones*, 64 Mo. 391, 395

slaughter only if there is no evidence which could cause doubt in a juror's mind on the defendant's mental state.¹⁷³

Ayers was centrally concerned with articulating principles of post-*Williams* provocation.¹⁷⁴ *Ayers* relieves the defendant from the *Williams* proof of facts burden of constructing a scenario of provocation or heat of passion to prove he was guilty of only manslaughter.¹⁷⁵ *Ayers* also made it the trial judge's duty under section 546.070 to determine if the question of law arose and, if so, to instruct upon it.¹⁷⁶

Ayers did not destroy the traditional Missouri presumption of second degree murder. It held only that if no doubt-inducing evidence exists in the record, manslaughter should not be instructed upon.¹⁷⁷ If the case had destroyed the presumption of murder, it would have stated that manslaughter would be properlymissible in every instance where a second degree murder case was made.¹⁷⁸ It is obvious from *Ayers* and from the opinions following it that this is not what the court held; rather, under *Ayers*, traditional ideas of negating malice and premeditation by fear, anger, or agitation still operated but were no longer restricted by the rigid demands of proof in common law manslaughter.¹⁷⁹ *Ayers* recognized that the abandon-

(1877) (no error to refuse to instruct on manslaughter on evidence that gang of men came to deceased's home, took him out and shot him). The prima facie cases of murder in *Bradley* and *Jones* were not conclusive presumptions; the jury was authorized to convict of the crime which the evidence supported or to acquit. *Bradley*, 361 Mo. at 279, 234 S.W.2d at 563; *Jones*, 64 Mo. at 395. See Part III *supra*.

173. See note 172 *supra*.

174. The defendant did not attempt to prove he was provoked. He was convicted of manslaughter and was trying to assert an implied acquittal of second degree murder and to assert that no evidence supported the manslaughter conviction. The focus of *Ayers* was Missouri's new non-common law manslaughter.

175. See note 165 *supra*.

176. 470 S.W.2d at 538.

177. This evidence was present in *Ayers*, as several opinions have observed. See, e.g., *State v. Sturdivan*, 497 S.W.2d 139, 142 (Mo. 1973).

178. *Ayers* did not say this; moreover the case is clearly limited to its facts. 470 S.W.2d at 538.

179. This is shown by the continued reliance on *State v. Clough*, 327 Mo. 700, 38 S.W.2d 36 (1931):

The authorities are fairly harmonious in holding that, in order for a homicide to be reduced from murder to manslaughter, there must be a sudden unexpected assault, encounter, or provocation tending to excite the passion beyond control. It is not the assault or the provocation alone that reduces the grade of the crime, but it is the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements of malice and deliberation necessary to constitute murder are absent, and therefore the crime is not murder, but manslaughter.

Id. at 705, 38 S.W.2d at 38. The *Clough* test has been employed before and after *Ayers*. See, e.g., *State v. Mudgett*, 531 S.W.2d 275, 280 (Mo. 1975) (en banc), *cert.*

ment of common law manslaughter accomplished in *Williams* gave rise to an expanded concept of provocation, permitting more juries to determine from proper doubt-inducing evidence whether the accused had malice and premeditation when he committed the intentional act which caused the victim's death. Moreover, the *Ayers* test is no more difficult to apply than any other legal test for what constitutes a submissible case. Many cases will lack evidence warranting a manslaughter instruction.¹⁸⁰

If there is a legitimately troublesome or a misleading statement in *Ayers*, it is where the opinion seems to set out the homicides in a hierarchy, with manslaughter being described as an intentional killing and with second degree murder and first degree murder being described as manslaughter plus some mental element.¹⁸¹ When this paragraph from *Ayers* is read as an entity, it accurately states the law at that time—an intentional killing can be manslaughter if it is without malice, premeditation, or deliberation. The observation is incorrect, however, if it was intended to convey the concept that every intentional killing is manslaughter and might be murder upon proof of additional facts.¹⁸²

Manslaughter is statutorily defined as a killing that is not murder and not excusable or justifiable homicide.¹⁸³ Thus, the question is how to get from a prima facie case of murder to manslaughter. Under *Ayers*, this involves some doubt-inducing evidence consisting of anger, fear or agitation. Given that *Ayers* requires some of this evidence, the studied paragraph cannot mean that the presumption of murder no longer existed. At most it recognized that the common law concept of provocation—an inflexible and narrow mechanism to escape the presumption of malice on a prima facie case of murder—died with common law manslaughter.

Stapleton interpreted *Ayers* as holding that manslaughter is present in every prima facie second degree murder case.¹⁸⁴ *Stapleton's* ultimate accomplishment was to equate the relationship between second degree murder and manslaughter with the permissible inference bridge between conventional first degree murder and conventional second degree murder.¹⁸⁵ To accomplish this, *Stapleton* relied on *Ayers* and *State v. Johnson*.¹⁸⁶ In *Johnson*, the trial court was reversed for failing to instruct on second degree murder

denied, 426 U.S. 910 (1976); *State v. Jackson*, 496 S.W.2d 1, 4 (Mo. 1973); *State v. Ginnings*, 466 S.W.2d 675, 677 (Mo. 1971).

180. *See, e.g.*, *State v. Bradley*, 361 Mo. 267, 234 S.W.2d 556 (1950); *State v. Jones*, 64 Mo. 391 (1877); *see also State v. Sturdivan*, 497 S.W.2d 139, 142 (Mo. 1973).

181. 470 S.W.2d at 537-38.

182. *See State v. Gore*, 292 Mo. 173, 237 S.W. 993 (1922).

183. *See Parts II & III supra*.

184. 518 S.W.2d 292, 300 (Mo. 1975) (en banc).

185. This served to make manslaughter, rather than second degree murder, the pivotal homicide in the Missouri scheme. *See Part III supra*.

186. 505 S.W.2d 94 (Mo. 1974).

when a circumstantial evidence case of conventional first degree murder existed.¹⁸⁷ *Stapleton* liberally quoted *Johnson* on the permissible inference of the element of deliberation from the evidence in the case and then drew a direct parallel between how a jury can find the element of "deliberation" for first degree murder and how it can find the malice and premeditation necessary for second degree murder.¹⁸⁸ The court held that manslaughter was a foundation homicide, a homicide from which the prosecutor could attempt to convince the jury that the facts and circumstances showed the defendant had the requisite mental state for second degree murder.¹⁸⁹

Stapleton truly abolished the presumption of second degree murder. As observed earlier, though, *Stapleton* cannot be said to have properly relied on *Ayers* for this result. *Ayers* cut the ties to common law manslaughter and only required a trial judge to determine whether as a matter of law a juror could find from the evidence in the record that the defendant was of such an excited or impassioned state of mind that he did not possess the malice and premeditation necessary for murder. *Stapleton* was an extension of *Ayers*¹⁹⁰ which misconceived the substantive law of manslaughter and second degree murder as *Ayers* declared it.

The manner in which *Stapleton* attempts to distinguish between second degree murder and manslaughter, *i.e.*, that the former requires the intent to kill and the latter does not, is unworkable for a jury. It puts the ultimate question of the required mens rea to the jury without guidance. The jury cannot rely upon a presumption of malice arising from an intentional killing.¹⁹¹ It seems that in *Stapleton* the court got caught on the *Ayers* language

187. *Id.* at 95-96.

188. 518 S.W.2d at 300.

189. The *Stapleton* court observed:

Johnson and the instant case are circumstantial evidence cases. The principal distinction between second degree murder and manslaughter is that the former requires a finding of intent to kill (premeditation and malice aforethought). If the accused intended to kill the deceased, then he is guilty of murder in the second degree (unless provocation prevents conviction of murder in the second degree). The intent to kill may be inferred from the circumstances. In *Johnson* the only evidence of deliberation was circumstantial. Here, the only evidence of intent to kill is circumstantial. The evidence authorized an inference of intent to kill but did not compel such a finding. If the jury did not find intent to kill, then the defendant could still be guilty of manslaughter because it does not require that element.

518 S.W.2d at 300-301.

190. See MO. APPROVED INSTR.-CRIM. No. 6.02 note 4(c)(2) (1974). However, *Stapleton* interpreted *Ayers* as plainly requiring creation of the automatic submission rule.

191. *Stapleton* and MAI-CR request that the jury pass on the issue of manslaughter in every prima facie conventional second degree murder case by asking whether the accused had the intent to kill and whether the intent to kill was pro-

that a felonious, intentional killing is only manslaughter unless malice and premeditation are present (which would be second degree murder) or unless deliberation is present (which would be first degree murder).¹⁹² If so, the *Stapleton* court incorrectly interpreted this language in *Ayers* to mean that the presumption of second degree murder was gone. Earlier cases made statements nearly identical to that in *Ayers* and were not seen as having this effect.¹⁹³ *Ayers* merely underscores that the State has the burden of proof on the issue of a defendant's guilt of any punishable homicide. When a homicide is committed and the *corpus delicti* proven, the presumption of malice and premeditation arises. *Ayers* did not alter this.

Manslaughter can be a homicide which results from an intentional act. Such a killing is manslaughter when provocation negates the existence of malice. Thus, society recognizes certain fact patterns which show that the

voked. No evidence of provocation is required. If *A* walks calmly into an ice cream parlor and shoots *B*, whose back is turned, in the head five times, causing death, the jurors could on the basis of ten witnesses' uncontradicted testimony find that *A* committed manslaughter, rather than second degree murder, due to provocation. The problem is that the *Stapleton* request requires a jury to decide, without any guidance, one of the most difficult questions of criminal law: did the actor possess the malice required for murder? *Stapleton* must be abandoned and Missouri must return to the common law concept that a homicidal act committed intentionally raises a presumption of malice. If the jury decides the act was intentional, then malice is present. Then the jury may consider whether provocation evidence reduces the murder to manslaughter. If not, the jury should convict of at least second degree murder or acquit if it finds that the defendant did not commit the act intentionally or with culpable negligence.

192. *Ayers*, 470 S.W.2d at 537-38.

193. See *State v. Gore*, 292 Mo. 173, 237 S.W. 993 (1922). The court dealt with the alleged failure to properly define manslaughter, i.e., terms like "heat of passion" and "lawful provocation":

All reference to manslaughter at the common law was omitted in the act of 1919. Every killing of a human being is now manslaughter unless done deliberately, premeditatedly, or maliciously, or under circumstances found by the jury to be justifiable or excusable. This statutory definition does away with heat of passion as a necessary element of the crime, and such element need no longer be included in an instruction defining the facts necessary for the jury to find in order to return a verdict of guilty of manslaughter.

Id. at 187-88, 237 S.W. at 996-97 (emphasis added). The defendant was convicted of manslaughter and there was evidence to support provocation. *Id.* at 180, 237 S.W. at 994. The every killing statement is wrong to the extent it was intended to make manslaughter the pivotal homicide. Since 1919, the statutes have defined manslaughter as a homicide which is not murder; manslaughter is reached by deciding that murder was not committed. This could be said only if the malice which arises from most any and all homicides committed by an intentional act is somehow negated. Evidence of non-common law provocation is needed to negate it.

actor was incensed into uncontrollable fear or anger.¹⁹⁴ An evidentiary basis for provocation always has been required, and *Ayers* did not change this. By contrast, *Stapleton* and the MAI-CR allow the jury to find sufficient provocation without any evidence of it.¹⁹⁵ If *Stapleton's* statements about the distinction between second degree murder and manslaughter were truly followed, provocation would play no part in a jury's choice between the homicides. The jury should merely be asked whether it believes beyond a reasonable doubt that the accused had the intent to kill.¹⁹⁶

Another aspect of *Stapleton* which illustrates its misinterpretation of *Ayers* is the significance it places on the fact that it was a circumstantial evidence case.¹⁹⁷ This seems to show that the *Stapleton* court believed that the *Ayers'* evidence test meant that where there was no direct testimony as to how the killing occurred, it could not be said as a matter of law that no provocation was involved. *Stapleton* articulates that a circumstantial evidence case, more than any other, warrants submission of manslaughter to the jury. *Ayers* does not support this proposition because it required evidence of provocation. If the evidence of the killing was circumstantial, there would probably be no evidence of anger, fear or agitation, and under

194. See *State v. Gadwood*, 342 Mo. 466, 116 S.W.2d 42 (Mo. 1937).

195. See MISSOURI APPROVED INSTR.-CRIM. No. 15.14 (2d ed. 1979) (in conventional second degree murder jury must decide whether the defendant was provoked before it can convict of second degree murder). This instruction

does not require the state to produce direct or eye-witness evidence that the defendant acted without provocation. The facts submitted . . . may be inferred by the jury from proven facts and circumstances. Once a prima facie case of conventional second degree murder is made out, it will be the jury's function to determine whether or not the killing was intentional, *State v. Bolden*, 494 S.W.2d 61, 65 (Mo. 1973), and committed without provocation. *State v. Stapleton*, 518 S.W.2d 292, 299-300 (Mo. banc 1975).

Id. note 3.

196. The *Stapleton* delineation between second degree murder and manslaughter allows a conviction for manslaughter if the jury decides that the intent to kill was not present. Thus, one who had no intent to kill or even any intent to commit the act which resulted in death could be convicted of manslaughter. An unintentional act resulting in death could support a second degree murder conviction. See, e.g., *State v. Guyton*, 635 S.W.2d 353, 359 (Mo. Ct. App. 1982) ("Manslaughter is a residuary homicide offense; an unintentional killing of another which did not occur in the commission of a dangerous felony."). *Stapleton* and MAI-CR seem to insure that a defendant is convicted of some crime. The results are unsatisfactory because they allow the jury to acquit a defendant of second degree murder where the evidence is uncontradicted, and convict of manslaughter on evidence that the defendant is either guilty of second degree murder or is innocent. In *Stapleton*, for example, the evidence supported second degree murder or accidental shooting (ruling out the unlikely conclusion that the defendant was convicted of culpable negligence manslaughter).

197. See note 189 and accompanying text *supra*.

Ayers a trial judge could properly say that as a matter of law no juror could possibly find provocation.¹⁹⁸

V. TIME FOR A CHANGE

Despite the flaws of MAI-CR's operative theories, the Missouri Supreme Court has reaffirmed its position that the traditional acquit/convict evidentiary test does not apply to homicide cases.¹⁹⁹ Moreover, the court's view of manslaughter shows no sign of changing. Recently the Missouri General Assembly enacted a comprehensive revision of the homicide scheme.²⁰⁰ This new legislation merits examination because of the bearing it will have on the future of this area of criminal law in Missouri.

A. *The New Homicides*

The most grievous homicide in the new scheme is first degree murder. It replaces capital murder as the Missouri homicide punishable by death.²⁰¹ First degree murder is committed if one "knowingly causes the death of another person after deliberation upon the matter."²⁰² This homicide is a true facts and circumstances murder (just as capital murder was) because it has no felony-murder facet. Both "knowingly" and "deliberation" are statutorily defined.²⁰³ The former has a traditional meaning under Missouri law.²⁰⁴ So also does the definition of deliberation, which is the "cool reflection for any length of time no matter how brief."²⁰⁵ This is substantially

198. The *Ayers* court was concerned with the evidence in the record. To apply the test as *Stapleton* does essentially requires the State to prove that there was no provocation before a manslaughter instruction can be refused. This would be an impossible burden to carry in a circumstantial evidence case. It also requires that the jury speculate as to how the homicide may have occurred. *Ayers* explicitly required evidence of provocation and thus would not have warranted *Stapleton's* conclusion.

199. See *State v. Olson*, 636 S.W.2d 318 (Mo. 1982) (en banc).

200. Act of June 15, 1983, 82d Gen. Assembly, 1st Reg. Sess. S.B. No. 276, 1983 Mo. Legis. Serv. 134 (West) (to be codified in scattered sections of MO. REV. STAT.). The new law repeals, effective July 1, 1984, many of the sections previously discussed: MO. REV. STAT. §§ 546.070, 562.076, 565.001, .003, .004, .008, .014, .016, .021, .026, .031, .050, .060 (1978); *id.* §§ 556.061, .005, .006, .012, 577.005 (Supp. 1982). 1983 Mo. Legis. Serv. at 134, 154.

201. Capital murder is replaced with first degree murder in all the death penalty provisions. See, e.g., *id.* at 147-48 (to be codified at MO. REV. STAT. § 565.032).

202. *Id.* at 143 (to be codified at MO. REV. STAT. § 565.020).

203. For the definition of knowingly, see MO. REV. STAT. § 562.016 (1978). Deliberation is now defined in 1983 Mo. Legis. Serv. 139-40 (West) (to be codified at MO. REV. STAT. § 565.002(3)).

204. See MO. REV. STAT. § 562.016.3 (1978); note 61 *supra*.

205. 1983 Mo. Legis. Serv. 139 (West) (to be codified at MO. REV. STAT. § 565.002(3)); note 61 *supra*.

consistent with Missouri's prior definition of this term.²⁰⁶ There seems to be a merging of the previous terms or concepts of premeditation and deliberation because of the "for any length of time no matter how brief" language. This idea comes from the now discarded "premeditation."²⁰⁷ It is difficult to say whether this blending is a step down in required mental culpability or is a similar, more straight forward concept of deliberation.

Second degree murder is now committed when a person: (1) knowingly or with the purpose of causing serious physical injury to another person, causes the death of another person,²⁰⁸ or (2) recklessly causes the death of another under "circumstances manifesting extreme indifference to the value of human life."²⁰⁹ Recklessness and indifference can be proven by the attempt or commission of the felony, but is not limited to such a method.²¹⁰ The statute has an operative felony-murder rule that includes every felony.²¹¹ Second degree felony-murder now includes felonies formerly contained in the first degree murder statute. Thus, proof of the attempt or commission of any felony should prove the requisite mental state for second degree murder.

The statute also has a conventional murder side, which does not require the same culpable mental state as the felony-murder side. The recklessness and indifference used for second degree felony-murder appears to be a lesser mental state²¹² than "knowingly" for conventional second degree murder and seems to be an effort to pull the felony-murder rule within the mental culpability perimeters of the criminal code.²¹³

The new manslaughter statute closely resembles the traditional common law definition of manslaughter but appears to be tempered by modern constitutional concerns. Manslaughter is a homicide that would be conventional second degree murder²¹⁴ except that the actor was under the influ-

206. See note 61 *supra*.

207. Premeditation means that the defendant has thought of the act for any length of time before acting. *State v. Strickland*, 609 S.W.2d 392, 394 (Mo. 1980); *State v. Weiners*, 66 Mo. 13, 25 (1877).

208. 1983 Mo. Legis. Serv. 142 (West) (to be codified at MO. REV. STAT. § 565.021.1(1)).

209. *Id.* (to be codified at MO. REV. STAT. § 565.021.1(2)).

210. Under new § 565.021.1(2), the felony-murder rule is not the only way to establish recklessness and indifference.

211. Compare MO. REV. STAT. § 565.003 (1978) (felony-murder rule operates only for rape, arson, burglarly, robbery, and kidnapping).

212. *Id.* § 562.021.3.

213. New § 562.021 shows that at least a reckless state of mind is required unless the statute specifically dispenses with a requisite mental culpability.

214. This is the second degree murder in new § 565.012.1(1) but not in new § 565.021.1(2). However, this does not mean that voluntary manslaughter could never be submitted as a lesser included offense of a second degree felony-murder. There would have to be evidence to allow the jury to find that the homicide was not a felony-murder and that there was adequate provocation.

ence of sudden passion arising from adequate cause.²¹⁵ The defendant has the burden of "injecting the issue" of this mitigating influence.²¹⁶ There must be evidence to support the provocation issue,²¹⁷ but the trier of fact must find in favor of the defendant if it has any reasonable doubt on this issue.²¹⁸ Thus, the new statute avoids the pitfall of putting the burden of proof on the defendant.²¹⁹ This statute resembles the rule announced in *State v. Ayers*.²²⁰

The defendant has the burden of injecting the issue of provocation, but he is not specifically responsible to produce the evidence.²²¹ Thus merely requesting a manslaughter instruction should satisfy his affirmative duty under the statute. The trial court has a statutory duty,²²² however, to determine whether the evidence supports a manslaughter instruction. *Ayers* could be used to analyze this question—can it be said as a matter of law that no evidence of provocation exists in the record? If not, the manslaughter instruction should be given and the jury decides whether the evidence proves adequate provocation. If the jurors have reasonable doubt whether provocation caused the accused to commit the homicide, then manslaughter is the homicide that has been committed. If the evidence is clearly not supportive of any provocation, then the instruction should not be given.²²³ By articulating a test for submitting the instruction, this new format goes one step further than *Ayers* because it states that a juror's reasonable doubt on the provocation issue must be resolved in favor of the defendant.²²⁴

B. Lesser Included Offenses and Instructing Down

The new statute qualifies the trial court's long standing duty to instruct the jury in writing upon all questions of law arising in a case.²²⁵

215. 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.023.1).

216. See MO. REV. STAT. §§ 556.051, .061(2) (1978).

217. *Id.* § 556.051.

218. *Id.* § 556.051(2).

219. See *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (placing burden on defendant is unconstitutional).

220. 470 S.W.2d 534 (Mo. 1971) (en banc).

221. Merely because evidence must be in the record does not mean the burden of proof is on the defendant. In common law manslaughter, the defendant had the burden of convincing the jury that the provocation caused him to kill, whereas here the jury's reasonable doubt on the issue means that they must find in the defendant's favor.

222. 1983 Mo. Legis. Serv. 135 (West) (to be codified at MO. REV. STAT. § 546.070(4)).

223. This is the converse of MO. REV. STAT. § 556.051(1) (1978).

224. *Id.* § 556.051. *Ayers* embodied the reasonable doubt concept employed in the new statute.

225. See 1983 Mo. Legis. Serv. 135 (West) (to be codified at MO. REV. STAT. § 546.070(4)).

Under the new homicide act, no instruction on a lesser included offense shall be submitted unless one of the parties requests it.²²⁶

Missouri Revised Statutes section 556.046²²⁷ "shall be used for the purpose of consideration of lesser offenses by the trier of all homicide cases."²²⁸ Therefore, the acquit/convict test of section 556.046 governs instructing down for the homicides.²²⁹ A trial court need not instruct a jury upon a lesser included offense unless there is evidence to support conviction of a lesser and acquittal of the greater.

The new scheme contains two exceptions to this rule. First, the evidence test cannot be used to thwart a party's affirmative duty to request an instruction.²³⁰ This exception shows that section 556.046 requires the trial court to instruct down if the evidentiary requirement therein is met.²³¹

The second exception in Missouri Revised Statutes section 565.025.1²³² states that section 556.046 and section 565.025 are to be disregarded in cases with second degree murder charges. There, the trier of fact shall consider both conventional second degree murder and second degree felony-murder if the evidence supports them.²³³ Although it is not clear whether this exception is intended to alter the evidentiary test where the new "only if requested" instruction rule functions, it has some obvious and reasonable ramifications. Most importantly, it will keep felony-murder rule homicide alive in Missouri.

The statute says only that a charge of second degree murder can serve as a foundation for instructions on both conventional and felony-murder.²³⁴ As a corollary, the phrase "supported by the evidence" in section 565.021.3 must be the "substantial evidence" test discussed earlier.²³⁵ This is true because rather than being a lesser included offense situation, it deals with the conventional and felony-murder facets of one homicide. Thus, on a charge of second degree murder, whether conventional or felony murder, the jury could consider a conventional second degree murder instruction

226. *Id.* at 145 (to be codified at MO. REV. STAT. § 565.025.3).

227. (1978).

228. 1983 Mo. Legis. Serv. 145 (West) (to be codified at MO. REV. STAT. § 565.025.1).

229. *See* text accompanying note 111 *supra*.

230. 1983 Mo. Legis. Serv. 145 (West) (to be codified at MO. REV. STAT. § 565.025.3).

231. This shows a blurring of the concepts of when an offense is a lesser included offense and when to instruct down. It also seems to show that § 556.046 is still being interpreted to put an instructing duty upon a trial court. *See* Part IV *supra*.

232. This refers to § 565.021.3. The reference in this section to § 565.025 is presumably to the no instruction unless requested rule in § 565.025.3.

233. 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.021.3).

234. The mental culpability for these two homicides is different.

235. *See* note 108 *supra*. Both forms of second degree murder are to be considered only if warranted by the evidence.

and, if the evidence satisfied the felony-murder rule, they could also consider a second degree felony-murder instruction. To employ the acquit/convict test here would ignore the legislature's intent to make second degree murder a homicide possessing a felony-murder rule and its desire to permit a jury to consider both aspects of this homicide in determining a defendant's guilt or innocence.

In an apparent effort to simplify the determination of lesser included offenses, the new homicide statute also contains a list of lesser degree offenses.²³⁶ The relationship between this designation and section 556.046.1, which sets out the three methods by which one offense can be a lesser included offense of another, is not clear. Perhaps the word "included" is omitted because some lesser offenses are not necessarily included within the greater offense as they were at common law.²³⁷ It also seems that the "lesser degree" language misses the mark if it is an attempt to apply the "specifically denominated lesser" test in section 556.046.1(2). In the purest form, "specifically denominated lessers" should involve a hierarchy of number degrees of an offense of the same name, like first and second degree murder.²³⁸ The "lesser degree offense" list in the new statute, however, provides notice of what lesser offenses one could be convicted of on the basis of a charge of the greater offense.²³⁹ The new statute makes no attempt to set out what we have termed elements lessers, but it does state that section 556.046 "shall be used for . . . consideration of lesser offenses . . . in all homicide cases."²⁴⁰

Second degree murder committed knowingly or under the serious physical injury aspect of the definition would qualify as an elements lesser of first degree murder.²⁴¹ Second degree felony-murder also would qualify

236. 1983 Mo. Legis. Serv. 145 (West) (to be codified at MO. REV. STAT. § 565.025.2).

237. If so, then "included" should have been taken out of MO. REV. STAT. § 556.046 (1978).

238. See note 103 *supra*.

239. "Denominated" is flexible enough to include "designated." For instance, the lesser included offense list in 1983 Mo. Legis. Serv. 145 (West) (to be codified at MO. REV. STAT. § 565.025.2) designates offenses as lesser offenses. MO. REV. STAT. Section 556.046.1 (1978) sets out three ways an offense can be a lesser included offense, but *id.* § 565.025.1 does not state that it controls over § 556.046.1. If strictly read, the lesser included offense list seems to be without foundation in the Code as establishing lesser included offenses. This is academic because § 556.046 will make lesser included offenses (elements lessers) of all those listed in § 565.025.2 though not necessarily for the reasons given there. The list cannot be said to exclude the operation of § 556.046.1.

240. 1983 Mo. Legis. Serv. 145 (West) (to be codified at MO. REV. STAT. § 565.025.1).

241. Knowingly must be a lesser grade of mental culpability than deliberation. The distinction separated second degree murder from capital murder and old first degree murder. See Part III *supra*.

as an elements lesser because the felony-murder is not an element of second degree murder but merely a method of proof. The relationship between conventional first and second degree murder embodies the permissible inference bridge that existed between old first degree murder and second degree murder and, more recently, between capital murder and conventional second degree murder. Second degree murder is also a specifically denominated lesser of first degree murder. Finally, as set out in section 565.025.2(1)(a), second degree murder is also a lesser degree offense of first degree murder.

The statute states that voluntary manslaughter²⁴² is also a lesser degree offense of first degree murder. The specifically denominated lesser test in section 556.046 does not warrant this conclusion. Although not a literal reading of that test, the statute does provide sufficient notice of the lesser offenses of the charged offense. This is unnecessary though, because where manslaughter really qualifies as a proper lesser included offense is an elements lesser of first degree murder. This is so because manslaughter is defined as a homicide that, but for provocation, would be second degree murder.²⁴³ This definition of manslaughter does not mean that it is limited only to second degree murder cases; the use of second degree murder in manslaughter's definition is only a point of reference.²⁴⁴ Moreover, the requirement of sudden passion is not an element of manslaughter, but rather a circumstance allowing a logical distinction between manslaughter and murder. There must be some evidence of provocation to allow a defendant to inject the issue.²⁴⁵

The new statute also states that involuntary manslaughter²⁴⁶ is a lesser degree offense of first degree murder.²⁴⁷ An instruction on this type of manslaughter should not be submitted unless the murder is a conventional murder or a felony-murder where the evidence casts doubt upon commission of the felony.

Voluntary manslaughter is an elements lesser of second degree murder because it would be second degree murder but for the existence of sudden passion arising from adequate cause.²⁴⁸ It does not literally qualify as a specifically denominated lesser, but the new statute gives proper notice that it is a lesser offense with its lesser degree offense language. This is unnecessary, however, since an offense need only qualify under one of the tests in

242. See 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.023.1(1)).

243. *Id.* (to be codified at MO. REV. STAT. § 565.023).

244. This is a slight modification of the traditional manslaughter definition--a homicide which but for provocation would be murder.

245. MO. REV. STAT. § 565.051(1) (1978).

246. 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.024.1(1)).

247. *Id.* at 145 (to be codified at MO. REV. STAT. § 565.025.2(1)(c)).

248. *Id.* at 144 (to be codified at MO. REV. STAT. § 565.023).

section 565.046 to be a proper lesser included offense. There must be evidence of provocation before an instruction on voluntary manslaughter is submitted.

Involuntary manslaughter²⁴⁹ is an elements lesser of second degree murder under section 565.021.1(2) because it is a homicide committed recklessly, and that form of second degree murder requires a finding of recklessness and extreme indifference to the value of human life. Because these two components of the requisite second degree mental state are proven by the felony-murder rule,²⁵⁰ it seems that instructing down to involuntary manslaughter²⁵¹ would be proper only in two situations. The first would be a felony-murder fact pattern where the acquit/convict test is satisfied as to the commission or attempt of the felony. The second situation involves a conventional second degree murder that does not involve a felony-murder fact pattern and which is arguably committed recklessly. This seems to follow from the open-ended character of section 565.021.1(2), which describes second degree felony-murder.²⁵² It states that the required recklessness and extreme indifference to human life are established by the felony murder rule but other evidence can also show it.

C. *Thoughts On The New Scheme*

Second degree murder is the pivotal homicide due to its all-encompassing felony-murder subframe. Formerly, an attempt or commission of a felony specified in the first degree murder statute would allow bypassing second degree murder in building a case, but now all felonies are on equal footing. It is hard to conceive of a homicide being committed when a felony is not. Thus, the mandatory consideration rule in section 565.021.3 may force felony-murder into every case possible. Therefore, the distinction between second degree murder and manslaughter should be a brighter line. If the felony-murder rule is satisfied then before any type of manslaughter can be instructed upon, there must be evidence contrary to the attempt or commission of that felony. This should limit involuntary manslaughter instructions to those traditional involuntary manslaughter fact patterns which bear evidentiary earmarks of a homicide less grievous than second degree murder.²⁵³ Thus, if it is an undisputed felony-murder, no involuntary manslaughter instruction can be given; if the felony is proven, the recklessness and extreme indifference required for second degree murder are established.

249. *Id.* (to be codified at MO. REV. STAT. § 565.024.1(1)).

250. Proof of the felony establishes these two components of the requisite mental state.

251. 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.024).

252. *Id.* at 143 (to be codified at MO. REV. STAT. § 565.021.1(2)) (recklessness and indifference can be established by proof other than the attempt or commission of felonies).

253. *See, e.g., State v. Yates*, 301 Mo. 255, 271-72, 256 S.W. 809, 814 (1923).

Defendants will not doubt argue that involuntary manslaughter is an elements lesser of a reckless and indifferent second degree murder and therefore they are entitled to a manslaughter instruction.

The traditional rules discussed earlier should be employed in conventional second degree murder to create the presumption of a homicide committed knowingly or with the purpose of causing serious physical injury. The statute seems to be geared for that approach with its "serious physical injury" language. Like its felony-murder complement, this phrase seems to include every possible physical injury fact pattern for a homicide. Therefore, even in a conventional second degree murder case the jury should convict of second degree murder if the act was intentional. Of course, the defendant can inject the issue of voluntary manslaughter, but there must be evidence of influence of sudden passion arising from adequate provocation.²⁵⁴ As for involuntary manslaughter,²⁵⁵ the defendant could argue that the homicide was committed recklessly, but he should have to point to evidence warranting a conviction thereof and acquittal of second degree murder. As a practical matter, the redefinition of second degree murder and involuntary manslaughter should make a second degree murder conviction more likely than under the old definitions, but overall they seem consistent with prior law.²⁵⁶

The relationship between first degree murder and second degree murder is such that the State will be asking the jury to believe that the homicide was committed with more than a knowing or reckless and indifferent state of mind. This is a true permissible inference because there is no factual element substitute for the first degree murder mental state of deliberation. Thus, even though a defendant is charged with first degree murder there will always be an instruction on second degree murder, but not necessarily on first degree murder. If there is a validly operating automatic submission rule situation in this new homicide scheme, this is certainly it.

VI. CONCLUSION

Two problems exist with the present homicide scheme. First, the homicides are not organized in an order of descending gravity. Second, the Missouri Supreme Court's present approach in dealing with the homicides as substantive offenses and its position on the interrelationship of the homicides as exemplified by the MAI-CR presents difficulties.

The 1975 homicide scheme over-extended a good format. The 1835

254. 1983 Mo. Legis. Serv. 144 (West) (to be codified at MO. REV. STAT. § 565.023.1(1)).

255. *Id.* (to be codified at MO. REV. STAT. § 565.024.1).

256. *E.g.*, State v. Yates, 301 Mo. 255, 271-72, 256 S.W. 809, 814 (1923) (shooting into a room not intending to hit anyone would be involuntary manslaughter). The new statute could create problems for juries because of its fine line between second degree murder and involuntary manslaughter. At the least, "extreme indifference" should be defined.

homicide scheme basically consisted of common law murder (second degree murder) and a murder involving deliberation (first degree murder). The 1975 scheme attempted to stretch this one step further by using half of "old" first degree murder to serve as capital murder. As a result, the death penalty was still imposed for a deliberate murder, just as under the pre-1975 murder scheme. Too much concern, however, was given to designing a constitutional capital murder statute, and the solid performance of the old scheme was taken for granted. Splitting old first degree murder into capital murder and first degree murder created problems in the scheme.

The new homicide format provides an opportunity to learn from these past errors. It attempts to reinstate, as far as permissible, the traditional relationship between murder and manslaughter as well as to return to the acquit/convict evidentiary test for instructing down. Its two-murder format is a substantial improvement over its stilted, three-murder predecessor.

The new legislation also demands revision of MAI-CR. The court needs to re-examine its views on the interrelationship of the homicides and instructing down in homicide cases. The present theoretical foundations of MAI-CR are weak. Revision of MAI-CR and proper application of the new homicide scheme could help eliminate the confusion and misunderstanding regarding lesser included offenses and instructing down in homicide cases.

