

# “More is Lesser” Defense Instructions

---

2023 ROBERT O. DAWSON CONFERENCE ON CRIMINAL  
APPEALS

MAY 10–12, 2023

PRESENTER: HON. JESSE F. MCCLURE III

1

Disclaimers and  
Hints...

I do not speak for the Court.

I am not trying to predict the future.

Read the underlined words; let the rest  
wash over you.

2

## Overview

- Lesser-Included Offenses
  - 2-step inquiry: Is it a lesser included? Was it raised?
- Case illustrations
- Self-defense
- Miscellaneous other instructions
  - Necessity
  - Concurrent Causation
  - Art. 38.23

3

## Lesser-Included Offenses

---

- Statutory basis found in Tex. Code Crim. P. Art. 37.

- Art. 37.09 provides:

A lesser-included offense is one that:

(1) [] is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) [] differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;

(3) [] differs from the offense charged [] only in the respect that a less culpable mental state suffices to establish its commission; or

(4) [] consists of an attempt to commit the offense charged or an otherwise included offense.

4

## Lesser-Included Offenses

---

- Whether a defendant is entitled to an instruction on a lesser-included offense is a unique combination of facts and law.
- The defendant must point to specific evidence raising the lesser included, but the burden is low.
- The defendant is required to produce “anything more than a scintilla of evidence” demonstrating that if the defendant is guilty, he is *guilty only* of the lesser offense.

5

## Lesser-Included Offenses

---

- All of this amounts to a 2-step inquiry:
  - Step 1 - Legal question: is the offense actually a lesser included of the charged offense?
  - Step 2- Fact question: Was the lesser-included offense raised by specific evidence in the record, providing a rational basis on which the jury could reject the greater offense and find the defendant guilty only of the lesser?

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: "More is Lesser" Defense Instructions

Also available as part of the eCourse

[2023 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the  
2023 Robert O. Dawson Conference on Criminal Appeals session  
"More is Lesser" Defense Instructions"