

# Problems and Procedure in Determining and Charging Lesser Included Offenses



Judge Chris Craft

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# PROBLEMS AND PROCEDURE IN DETERMINING AND CHARGING LESSER INCLUDED OFFENSES

## THE STATUTE AND SOME QUESTIONS –

### T.C.A. § 40-18-110. Charge as to lesser included offenses — Written request.

(a) When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment. However, the trial judge shall not instruct the jury as to any lesser included offense unless the judge determines that the record contains any evidence which reasonable minds could accept as to the lesser included offense. In making this determination, the trial judge shall view the evidence liberally in the light most favorable to the existence of the lesser included offense without making any judgment on the credibility of evidence. The trial judge shall also determine whether the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser included offense.

**But what if the judge, acting as 13<sup>th</sup> juror, finds that offense has not been proven beyond a reasonable doubt? Should it still be charged?**

(b) In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any lesser included offense charge.

**If a party orally requests a lesser included instruction and the trial judge denies it, can the judge proceed to charge the jury and let the attorney reduce the request to writing later, or must the judge give the attorney time to reduce the request to writing and file it first?**

(c) Notwithstanding any other provision of law to the contrary, when the defendant fails to request the instruction of a lesser included offense as required by this section, the lesser included offense instruction is waived. Absent a written request, the failure of a trial judge to instruct the jury on any lesser included offense may not be presented as a ground for relief either in a motion for a new trial or on appeal.

**What affirmative duty does the judge have to make sure the attorney requests questionable lesser included offenses in writing to protect the case from a post-conviction relief petition charging ineffective assistance of counsel?**

(d) Prior to instructing the jury on the law, the trial judge shall give the parties an opportunity to object to the proposed lesser included offense instructions. **Can this be done prior to trial, or at the end of the State's proof, or does the judge have to wait until the close of all the proof?**

If the defendant fails to object to a lesser included offense instruction, the inclusion of that lesser included offense instruction may not be presented as a ground for relief either in a motion for a new trial or on appeal. Where the defendant objects to an instruction on a lesser included offense and the judge does not instruct the jury on that offense, the objection shall constitute a waiver of any objection in the motion for a new trial or on appeal concerning the failure to instruct on that lesser included offense. The defendant's objection shall not prevent the district attorney general from requesting lesser included offense instructions or prevent the judge from instructing on lesser included offenses.

**If the defense objects to lessers because it wants an “all or nothing” verdict, and the DA agrees, should the judge have the defendant voir dired on the record before agreeing to this? Even if both sides agree, should the judge charge the lessers anyway?**

(e) When the defendant requests an instruction on a lesser included offense, the judge may condition the instruction on the defendant's consent to an amendment to the indictment or presentment, with the consent of the district attorney general, so that if there is a conviction for the requested lesser offense the request shall constitute a waiver of any objection in the motion for new trial and on appeal. The defendant may be required to execute a written document actually consenting to the amendment so that there may be a lawful conviction for the lesser offense. **Shouldn't any amendment to the indictment always be in writing, signed by the defendant, who is personally voir dired on the record?** If the district attorney general does not consent to the amendment, the defendant may raise the issue of failure to give the requested charge on appeal. This subsection (e) shall not be construed as requiring an instruction on a lesser offense.

(f) **An offense is a lesser included offense if:**

(1) **All of its statutory elements are included within the statutory elements of the offense charged;**

(2) The offense is **facilitation** of the offense charged or of an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1);

(3) The offense is an **attempt** to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1); or

(4) The offense is **solicitation** to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1).

(g) (1) Second degree murder is a lesser included offense of first degree murder as defined in § 39-13-202.

(2) Voluntary manslaughter is a lesser included offense of premeditated first degree murder and second degree murder.

(3) Aggravated sexual battery is a lesser included offense of aggravated rape.

(4) Sexual battery and sexual battery by an authority figure are lesser included offenses of rape and aggravated rape.

## **PROBLEM SCENARIOS:**

1. An indictment charges Especially Aggravated Kidnapping, charging that “the confinement or removal was accomplished with a deadly weapon or by display of any article used or fashioned to lead the alleged victim to reasonably believe it was a deadly weapon.” Is Aggravated Kidnapping a lesser, stating that “the defendant possessed or threatened the use of a deadly weapon.” What about Kidnapping, that “that the removal or confinement was under circumstances that exposed the other to substantial risk of bodily injury?”
2. An indictment charges Aggravated Rape in that the defendant “caused bodily injury to the alleged victim.” Aggravated Sexual Battery and Sexual Battery are lessers per the statute, but what about Rape? Consent or lack of consent is not mentioned in the indictment, and the four ways to commit rape are “that force or coercion was used to accomplish the act” or “that the sexual penetration was accomplished without the consent of the alleged victim and the defendant knew, or had reason to know, at the time of the penetration that the alleged victim did not consent,” or “that the defendant knew, or had reason to know, that the alleged victim was mentally defective, mentally incapacitated or physically helpless, or “that the defendant accomplished sexual penetration by fraud.”
3. An indictment charges Aggravated Assault in that the defendant “intentionally or knowingly caused bodily injury to another and the act involved the use or display of a deadly weapon.” Is Reckless Endangerment with a Deadly Weapon a lesser? (“That the defendant engaged in conduct which placed or might have placed another person in imminent danger of death or serious bodily injury and that the offense was committed with a deadly weapon.”)
4. An indictment charges Sexual Battery in that “force or coercion was used to accomplish the act.” Is Class B misdemeanor assault “that the defendant caused physical contact with another and that a reasonable person would regard the contact as extremely offensive or provocative” a lesser?
5. An indictment charges Aggravated Burglary in that the defendant “entered a habitation with the intent to commit theft without the consent of the owner.” Is Aggravated Criminal Trespass of a Habitation” (“entered a habitation and knew at the time of such entry that he/she did not have the owner’s effective consent, and was reckless about whether his/her presence would cause fear for the safety of another”) a lesser? What about Aggravated Criminal Trespass? (“knew at the time of such entry that he/she did not have the owner’s effective consent, and was reckless about whether his/her presence would cause fear for the safety of another”) What about Criminal Trespass? (“entered or remained on property or a portion thereof belonging to someone else, and did not have the owner’s effective consent to enter or remain.) If Criminal Trespass is a lesser, should the trial judge remove the words “or remain” from the instruction?

## NEW BAIL BOND AMENDMENT

### **T.C.A. §40-11-138. Release of bail bondsmen or sureties from obligations.**

(a) If the conditions of the bail bond have been performed and the defendant has been discharged from the defendant's obligations in the cause, the clerk of the court shall return to the bondsman the deposit of any cash. If the bail has been secured by real estate, the clerk of the court shall immediately prepare and forward to the register a written release of the deed of trust on the real estate. The costs of the release shall be paid by the defendant.

(b) In addition to any other provisions releasing sureties from their obligations, a bail bondsman or surety shall also be released from an obligation under a bail bond upon the disposition of the charge against the surety's principal. **A disposition shall include, but shall not be necessarily limited to, conviction, acquittal, a plea of guilty, agreement with the state, whether designated diversion or otherwise, or retirement.**