

**PROCESS ERROR BY REFUSING THE REQUESTED CHARGE ON
MURDER, WHICH WAS A LESSER INCLUDED OFFENSE IN THIS
CASE. U.S. CONST., AMEND. XIV.**

The evidence at trial raised the lesser included offense of murder because there was evidence that, if believed, would authorize the jury to find that Applicant engaged in consensual sexual conduct with complainant at some time before he fought with her and killed her. There was evidence from which the jury could have found that Applicant had a romantic relationship with complainant, that she allowed him into her home that night, that she engaged in sexual intercourse with him and that they had a disagreement which escalated into violence when Jack Shadbolt called or appeared up at the house.

The erroneous denial of the requested lesser offense option, as raised by the evidence, automatically constitutes "some harm" under this Court's applicable standard, calling for reversal of Applicant's conviction. This ruling summarily deprived Applicant of any vehicle for which he could have benefitted from this, his only defense..

Applicant's counsel presented a timely request for the jury to be charged on the lesser included offense murder. (RR. 28, 4) The court refused the request, and the case was submitted to the jury only on the theory of capital murder as an intentional killing in the course of aggravated sexual assault. Tex. Penal Code § 19.03 (a)(2). (CR 1., 161-166). The error was thus properly preserved for review. See **Boles v. State**, 598 S.W.2d 274, 278

(Tex. Crim. App. 1980); Art. 36.15, V.A.C.C.P. Because murder, as defined by the Penal Code in the abstract, is a lesser included offense of capital murder, and because there was evidence at trial which, if believed, would permit a rational jury to find that the sexual intercourse between Applicant and complainant was consensual rather than assaultive, but that he did later fight with her and kill her, due process requires that the jury should have been given the opportunity to convict Applicant of the offense of intentional murder. Tex. Penal Code § 19.02 (Vernon). A refusal of this requested charge, denied Applicant his statutory right to this instruction under Art. 36.14, V.A.C.C.P. This, in turn, denied Applicant his due process and due course of law rights to be convicted only upon proof beyond a reasonable doubt of every element of the offense. U.S. CONST., AMEND. V, XIV. See **Beck v. Alabama**, 447 U.S. 625, 635, 100 S.Ct. 2382, 2388 (1980).

Two-Part Test for Instruction on Lesser Included Offense

The determination whether a defendant is entitled to his requested instruction of a lesser offense is a two-step process, based upon the elements of the offenses and the facts of the case. See **Moore v. State**, 969 S.W.2d 4, 12 (Tex. Crim. App. 1998) First, the requested lesser offense must be one that is included within the elements of the charged offense as defined by state law. Second, the offense is a lesser included one if it is raised by the evidence at trial so that a defendant is entitled to an instruction giving the jury the option of convicting him for that lesser offense. Id.

- 1) Murder is a Lesser Included Offense of Capital Murder in the Abstract.

Art. 37.09, V.A.C.C.P. sets out the scheme for determining whether a particular offense is in the abstract, a lesser included offense of another, and when conviction for the lesser can be had upon indictment for the greater. The pertinent provision in this case is subsection 1 of the statute, which states that an offense is a lesser included one if, "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged". *Id.* This Court has held that murder is a lesser included offense of capital murder according to the statutory definition. *Moore v. State*, 969 S.W.2d at 12.

2.) **Murder Was Raised by the Evidence in This Case Which Negated the Aggravating Element of Sexual Assault.**

The second part of the test, the "raised by the evidence" requirement, has long been a part of Texas law, even without reference to constitutional protections. Since the 1800's it has been the rule that a defendant is entitled to an instruction on all defensive issues raised by the evidence, regardless of whether the evidence supporting the defensive theory is contradicted.

The "raised by the evidence" requirement is met if there is evidence from any source that negates or refutes the aggravating element of the greater offense (in Applicant's case, sexual assault) and if without that element, the evidence shows the defendant is guilty only of the other, lesser offense (in Applicant's case, murder). In such a case, the jury must be given the option of convicting a defendant of the lesser offense rather than being left with the sole option of acquitting the Defendant entirely of any offense, when jurors are convinced