

THIRTY-ONE YEARS IN THE MAKING: WHY THE TEXAS COURT OF
CRIMINAL APPEALS' NEW SINGLE-METHOD APPROACH TO LESSER-
INCLUDED OFFENSE ANALYSIS IS A STEP IN THE RIGHT DIRECTION

By Amanda Peters¹

I. INTRODUCTION

Though the concept of a lesser-included offense is generally understood, the law governing a lesser offense's inclusion in a jury charge is often misunderstood. The lesser-included offense has been described as "a slippery concept"² that is capable of causing significant confusion among courts of law.³ It has baffled many trial and appellate courts in its application, which has resulted in mass confusion among the judges and lawyers who deal with lesser-included offense jury charges.

Part of the problem with lesser-included offenses is that there are four discrete methods to determine whether an offense is a lesser-included offense⁴ and these four methods are sometimes combined to create

¹ Visiting Professor of Law, South Texas College of Law. BA, Texas Tech University; JD, Texas Tech University School of Law.

² Patrick D. Pflaum, *Justice is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine*, 73 U. COLO. L. REV. 289, 293 (2002).

³ Andrew J. Schatkin, *1994-95 Survey of New York Law*, 46 SYRACUSE L. REV. 405, 473-476 (1995).

⁴ See *infra* Section III (discussing the differences between the strict-statutory, cognate-pleading, cognate-evidence, and inherently-related approaches to lesser-included offense analyses). Some commentators and courts have delineated five ways to analyze lesser-included offenses, while others have said there are as few as three. See e.g., *State v. Meadors*, 908 P.2d 731, 735 (N.M. 1995) (describing five approaches to lesser-included offense analysis); James A. Shellenberger & James A. Strazella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 9-13, (1995) (describing the "statutory elements approach," the "pleadings approach," and the "evidence approach"); Christen R. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445, 451-62 (discussing the "strict statutory interpretation," "cognate theory," and "Model Penal Code" approaches); Pflaum, *supra* note 2, at 295-98 (identifying five different approaches: the statutory elements approach, the pleadings approach, the evidence approach, the cognate test approach, and the hybrid approach).

innovative, hybrid methods.⁵ Of the four common law methods, two have been criticized for having the potential of violating the Due Process Clause by failing to give adequate notice to the accused.⁶ And each method could potentially cause problems if it is allowed to interfere with issues centering around Double Jeopardy.⁷ Because of these overlapping considerations and analyses, courts across the nation and across Texas have split on which method to use.⁸ The outcome is a buffet-style body of law that results in contradictory opinions within the same jurisdiction and that sometimes violates the fundamental constitutional rights of the accused.

In the past, the Federal Circuit Courts⁹ and States¹⁰ have disagreed on how to examine lesser-included offense issues. And even though the United States Supreme Court has weighed in on the matter by choosing to use only one of the four methods of lesser-included offense analysis,¹¹ it has not directed the States to choose any particular method.¹² Consequently, there remains a difference of opinion on which method to use. Some States,¹³ including Texas,¹⁴ have used each of the different methods of

⁵ See e.g., *People v. Birks*, 960 P.2d 1073, 1078 (Cal. 1998) (authorizing use of both the statutory-elements and cognate-pleading approaches); *Lilly v. State*, 649 A.2d 1055, 1061 (Del. 1994) (the Delaware statute prescribing included offenses is not limited exclusively to the standard “statutory elements” definition); *State v. Altamura*, 676 So.2d 29, 30-31 (Fla. Dist. Ct. App., 1996); *State v. Curtis*, 944 P.2d 119, 121-22 (Idaho 1997) (employing both the strict-statutory method and the cognate-pleading method in its analysis); *Com. v. Jones*, 912 A.2d 815, 818 (Pa. 2006) (using a hybrid of statutory-elements and cognate-pleadings approaches).

⁶ See e.g., *Schmuck v. United States*, 489 U.S. 705, 721 (1989) (stating that the inherently-related approach is “rife with the potential for confusion”); *Hall v. State*, 225 S.W.3d 524, 533-37 (Tex. Crim. App. 2007) (explaining that notice problems can arise when a jurisdiction uses the cognate-evidence approach).

⁷ See e.g., Blair, *supra* note 4, at 451-62 (discussing notice and Double Jeopardy concepts as they relate to lesser-included offenses); Shellenberger & Strazella, *supra* note 4, at 1 (examining lesser-included offenses and related due process concerns regarding death penalty cases). See also Kyden Creekpau, *What’s Wrong with a Little More Double Jeopardy? A 21st Century Recalibration of an Ancient Individual Right*, 44 AM. CRIM. L. REV. 1179 (2007).

⁸ See *infra* Sections III and IV.

⁹ See *Schmuck*, 489 U.S. at 710 n. 5 (stating that four Federal Circuit Courts were split about which test to apply in determining whether an offense was a lesser-included offense of the charged offense).

¹⁰ See *infra*, Section III.

¹¹ See *Schmuck*, 489 U.S. at 716.

¹² See *id.* at 716.

¹³ See e.g., *Shrum v. State*, 991 P.2d 1032, 1034-36 (Okla. Crim. App. 1999); *State v. Keffer*, 860 P.2d 1118, 133-34 (Wyo. 1993).

analysis concurrently, even though one method of analyzing lesser-included offenses sometimes runs in direct contradiction to another method. However, in Texas, at least, that has very recently changed.¹⁵

In May of 2007, in arguably the most significant opinion of the year, the Texas Court of Criminal Appeals attempted to put an end to the confusion in Texas criminal courts regarding the application of lesser-included offenses.¹⁶ For thirty-one years, the highest criminal court in Texas stood by as lower appellate and trial courts across the State floundered on the issue.¹⁷ Indeed, the Court of Criminal Appeals itself generated much of the confusion with its inconsistent pronouncements on lesser-included offenses.¹⁸ Why it took the Court so long to address this issue and to render a simplified, single-method approach remains a mystery. While many practitioners may be relieved by the Court's clarification to this incongruous body of law, the new single-method approach may ultimately prove to be both a blessing and a curse.

The author will examine the background of the lesser-included offense jury instruction in section two of this article, the methods of analysis that surround this body of law in section three, Texas's convoluted lesser-included offense jurisprudence in section four, the new, single-method approach in section five, criticisms of the Court's clarification in section six, and how it will affect and likely be received by Texas practitioners in section seven of this article.

II. AN OVERVIEW OF LESSER-INCLUDED OFFENSES

Lesser-included offenses can be traced back to both English and early-American common law.¹⁹ A lesser-included offense jury instruction permits a jury to find the defendant guilty of a less-serious offense than the originally charged offense.²⁰ The United States Supreme Court once stated that the lesser-included offense "affords the jury a less drastic alternative

¹⁴ See *Hall*, 225 S.W.3d at 530-31 n. 29 & 30 (describing the state of confusion among Texas Court of Criminal Appeals' opinions on lesser-included offense analysis).

¹⁵ See *id.* at 535.

¹⁶ See *id.* at 524.

¹⁷ See *id.*; see also *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1976).

¹⁸ See *Hall*, 225 S.W.3d at 531, n. 29 & 30.

¹⁹ See Michael G. Pattillo, *When "Lesser" is More: The Case for Reviving the Constitutional Right to a Lesser Included Offense*, 77 TEX. L. REV. 429, 432-33 (1998).

²⁰ See *Beck v. Alabama*, 447 U.S. 625, 633-34 (1980).

than the choice between conviction of the offense charged and acquittal.”²¹ And while the United States Supreme Court has refused to hold that a defendant in a non-capital felony case is entitled to a lesser-included offense jury charge as a matter of due process, both State and Federal courts around the nation have recognized that such charges are important procedural safeguards.²² After all, “[a] lesser-included-offense option minimizes the risk of undermining the reasonable-doubt standard” in criminal cases.²³ In other words, lesser-included offenses are valuable because without them, a jury may be willing to convict a defendant who is clearly guilty of an offense, even if it’s not the offense for which he has been charged.²⁴

Though the lesser-included-offense doctrine was originally developed to help the prosecution obtain a conviction in cases where the evidence was insufficient to prove the charged offense, over the years it has arguably become more beneficial in aiding the defense.²⁵ Many defendants, when faced with a conviction on the greater charge, would like to give the jury an opportunity to “temper justice with mercy by acquitting the defendant of the offense charged and finding him guilty of the lesser offense.”²⁶ Indeed, in practice, many more defendants request lesser-included offenses than do prosecutors.²⁷ Because prosecutors have control over the pleading of the crime alleged in the charging instrument, they typically only ask for a lesser-included offense instruction when the facts presented at trial differ from those anticipated.²⁸ And for strategic purposes, sometimes even if a lesser-included offense charge is permissible, it is not requested by either

²¹ See *id.* at 633.

²² See *id.* at 637. See also Patillo, *supra* note 19, at 459-63 (arguing that the *Beck* holding, *supra* note 20, which permits a capital murder defendant the right to a lesser-included offense, be extended to noncapital offenses).

²³ See *Holloway v. Florida*, 449 U.S. 905, 907 (1980).

²⁴ See Blair, *supra* note 4, at 462.

²⁵ See Patillo, *supra* note 19, at 432-33; 3 Charles Alan Wright, et. al., *Federal Practice and Procedure* § 515, at 20 (2d ed. 1982); see also *Keeble v. United States*, 412 U.S. 625, 633 (1973) (noting the lesser-included offense’s shift from an aide for the prosecution to a right of the defense).

²⁶ *Id.*

²⁷ See *U.S. v. Dhinsa*, 243 F.3d 635, 674 (2nd Cir. 2001).

²⁸ See Pflaum, *supra* note 2, at 296 (asserting that the cognate-pleadings approach allows prosecutors to manipulate the wording of the charging instrument so that fewer or more lesser-included offense instructions – whatever suits the prosecutor trying the case – are permissible).

the prosecution or defense and it is not submitted to the jury.²⁹ This happens when the prosecutor hopes to force the jury into convicting the defendant of the charged offense while the defense attorney desires to press the jury for an acquittal.³⁰

Judge Friendly once described the lesser-included offense as follows:

At first blush the entire doctrine. . . is a bit surprising. It could have been argued with some force that a defendant should be entitled to take the Government at its word, concentrate his trial preparation and tactics on the weakest part of the indictment and receive an acquittal if he engendered a reasonable doubt about it; if the Government wished to protect itself against failure to prove an element of the greater offense, it could have indicted for both. On the other side it could have been argued that the Government should be entitled to seek a conviction solely for the greater offense without the jury's having an option to convict only on the lesser.³¹

Judge Friendly concluded his thoughts on the lesser-included offense doctrine by stating that the reason why this remarkable doctrine persists today is because it allows both the defense and prosecution to dispose of all convictions related to the same offense at one time.³²

Entangled within the lesser-included-offense doctrine is the constitutional right to notice.³³ An accused has a right to know prior to trial what he is being charged with; this is just one aspect of a citizen's constitutional right to procedural due process.³⁴ The purpose of notice is to ensure that the defendant has an ability to prepare a defense to the criminal charges brought against him.³⁵ If a lesser-included offense is defined in the very broadest of terms, the defendant will certainly be able to defend himself against the crime he is actually charged with, but he may not be able to foresee and prepare against a merely tangentially related lesser

²⁹ See *id.* at 290-93 (arguing that allowing attorneys to forego a lesser-included-offense instruction for strategic reasons runs afoul of criminal justice).

³⁰ See *id.*

³¹ *U.S. v. Tsanas*, 572 F.2d 340, 344-45 (C.A.N.Y. 1978), *cert. denied*, 435 U.S. 995 (1978).

³² See *id.*

³³ See e.g., Shellenberger & Strazzella, *supra* note 4, at 14.

³⁴ See *Schmuck*, 489 U.S. at 717-18.

³⁵ See Blair, *supra* note 4, at 451.

offense.³⁶ It is in those cases – where the lesser-included offense is not foreseeable – that the appellate courts must examine whether the defendant was provided notice sufficient to apprise him of the charged offense.³⁷ And the result on appeal may be significantly affected by the common-law lesser-included offense approach adopted by that jurisdiction.

III. LESSER-INCLUDED OFFENSE ANALYSES

In a typical American jurisdiction, lesser-included offenses are statutorily defined.³⁸ At the core of each of these statutory definitions is the idea that a lesser-included offense requires the same proof or is subsumed by the same proof as the charged offense.³⁹ In a hypothetical case, once a party has requested that the jury be instructed to consider a lesser-included offense, the trial court must conduct a two-part test.⁴⁰ First, it must determine whether the alleged lesser is indeed a lesser-included offense of the charged offense.⁴¹ Second, it must determine whether the evidence admitted at trial demonstrates that if the defendant is guilty, he is guilty only of the lesser-included offense.⁴² If those two determinations are answered in the affirmative, then the instruction must be submitted to the jury.⁴³ While this two-part test is easy to conduct in some cases, the definition of a lesser often confounds judges and attorneys in its application.⁴⁴ That is because there are numerous ways to analyze whether an offense is truly a lesser-included offense of the charged offense.⁴⁵

There are a number of competing theories courts have used to determine whether a crime is actually a lesser-included offense of the charged

³⁶ See *Schmuck*, 489 U.S. at 709, 717.

³⁷ See *id.* at 717-18.

³⁸ See e.g., KAN. STAT. ANN. § 21-3107(c)(2) & (d) (2006); ME. REV. STAT. ANN. tit. 17 § 13-A (2007). See also Model Penal Code § 1.07 (1980); *State v. Burns*, 6 S.W.3d 453, n. 10 (Tenn. 1999) (listing nine states, including Texas, that have statutory definitions similar to the Model Penal Code's definition of a lesser-included offense). But see *Burns*, 6 S.W.3d at 466-67 (Tenn. 1999) (court opinion defining lesser-included offenses for Tennessee).

³⁹ See e.g., TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

⁴⁰ See e.g., *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *Schatkin*, *supra* note 3, at 473-476.

⁴⁵ See *supra* note 4.

offense.⁴⁶ Some judges have looked to the evidence admitted at trial to make that determination while others have looked to the elements of the respective crimes to reach their conclusion.⁴⁷ The following is an explanation of the different approaches various jurisdictions have used in deciding whether or not to submit a lesser-included offense jury charge.

A. *The Statutory-Elements Approach*⁴⁸

The statutory-elements approach is the most predictable approach. It is the approach adopted, though not mandated,⁴⁹ by the United States Supreme Court⁵⁰ and the approach used in Federal criminal cases.⁵¹ Several States use this method as well.⁵² With this approach, the judge must compare the statutory elements of the charged offense to those of the proposed lesser-included offense to determine whether the lesser has any additional elements not contained within the greater charge.⁵³ The proposed lesser must contain no additional elements than those included in the greater charge to pass the first part of the two-part test.⁵⁴ Though this method is rigid, it guarantees that the accused has notice of any and all lesser-included offenses prior to trial.⁵⁵ The statutory-elements approach “permits both sides to know in advance what jury instruction will be available and to plan

⁴⁶ See *Hall*, 225 S.W.3d at 525.

⁴⁷ See *id.* at 530-31.

⁴⁸ See *id.* at 525.

⁴⁹ See *State v. Meadors*, 908 P.2d at 731, 738 (N.M. 1995).

⁵⁰ See *Schmuck*, 489 U.S. at 706.

⁵¹ See *id.*

⁵² See *State v. Fisher*, 686 P.2d 750, 770 (Ariz. 1984); *People v. Lowry*, 160 P.3d 396, 398 (Colo. Ct. App. 2007); *State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997); *Com. v. Jones*, 794 N.E.2d 1220, 1224-25 (Mass. App. Ct. 2003); *People v. Nyx*, ___ N.W.2d ___, WL 2051243, * 3-4 (Mich. 2007); *State v. Smith*, 916 P.2d 773, 778-79 (Mont. 1996); *State v. Johnson*, 627 N.W.2d 753, 759-60 (Neb. 2001); *Smith v. State*, 102 P.3d 569, 571 (Nev. 2004); *State v. Wortham*, 351 S.E.2d 294, 296 (N.C. 1987); *State v. Keller*, 695 N.W.2d 703, 711-12 (N.D. 2005); *State v. Kidder*, 513 N.E.2d 311, 314 (Ohio, 1987); *State v. Mitchell*, 608 S.E.2d 140, 144-45 (S.C. Ct. App. 2005); *State v. Zdiarstek*, 193 N.W.2d 833, 838 (Wis. 1972); *Keffer*, 860 P.2d at 133-34. *But see State v. McCarley*, ___ P.3d ___, 2007 WL 2141507 * 10 (Kan. Ct. App. 2007) (flatly rejecting the statutory-elements approach); *Lilly*, 649 A.2d at 1061 (the Delaware statute prescribing included offenses is not limited exclusively to the standard “statutory elements” definition).

⁵³ See *Schmuck*, 489 U.S. at 709.

⁵⁴ See *id.*

⁵⁵ See *id.* at 718.

their trial strategies accordingly.”⁵⁶ It has been praised because it not only forces prosecutors to be more precise in their charging decisions, but it also promotes judicial economy by giving the appellate courts an easy test to administer.⁵⁷

Though this method has been lauded, it also has been criticized. It is sometimes viewed as too narrow an approach because it precludes a jury from considering an offense that is closely related to the case at bar, but has a statutory element that is not in the indictment.⁵⁸ And the exclusion of a lesser-included offense in such circumstances “may unfairly invite the jury to convict on the greater offense by a standard of proof less than beyond a reasonable doubt, thereby violating the defendant’s due process rights.”⁵⁹ One of the values served by the lesser-included offense doctrine is the “reliability of the guilt determining process.”⁶⁰ However, this value is undermined when the attorneys are prevented from offering the jury more choices because of the rigidity of the statutory-elements approach.

While this method has been criticized for being too narrow in its application, it has also been criticized for being too broad. This is because it takes into consideration all possible circumstances listed in the statute, “regardless of whether or not any of these circumstances actually occurred in the case at bar.”⁶¹ Consequently, the statutory-elements approach sometimes does not permit the fact finder to closely match the lesser-included offense to the facts of the defendant’s particular circumstances.⁶²

*B. The Cognate-Pleadings Approach*⁶³

Because the statutory-elements approach does not take into consideration the facts of each criminal offense, some States use a more flexible method.⁶⁴ These States have adopted the cognate-pleadings

⁵⁶ *Id.* at 720-21.

⁵⁷ *See id.*

⁵⁸ *See* Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 202 (1984).

⁵⁹ Blair, *supra* note 4, at 447. *See also Beck*, 447 U.S. at 634 (“Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.”).

⁶⁰ Shellenberger, *supra* note 4, at 101.

⁶¹ *Id.*

⁶² *See Beck*, 447 U.S. at 449.

⁶³ *See Hall*, 225 S.W.3d at 525.

⁶⁴ *See Birks*, 960 P.2d at 1078 (California authorizes use of both the statutory-elements and

approach.⁶⁵ Whereas a statutory-elements lesser-included offense is one that is included within the elements of another offense, a cognate-lesser offense is one that is related to, but not a strict subset of the charged offense.⁶⁶ The cognate-pleadings approach uses the pleadings, rather than the statutory elements, to determine whether a lesser-included offense charge is acceptable.⁶⁷ States using this approach compare the elements, as modified by the defendant's charging instrument, to the elements of the proposed lesser-included offense.⁶⁸ If the lesser offense is described by the pleadings, then the charge is permissible. This method allows the court to consider the specific facts as stated in the pleadings, rather than being tied to the letter of the elements of the charged offense. In sum, it is a more customized approach than the statutory-elements method of analysis.

However, even this approach has its critics. Some commentators believe this approach gives prosecutors an advantage over defendants in determining whether and how many lesser-included offenses are permissible.⁶⁹ These critics claim that a prosecutor hoping for more possible lessers may draft the pleading more broadly while a prosecutor looking to restrict possible lessers may restrict the wording of the charging instrument accordingly.⁷⁰ Other critics assert that this approach defeats the purpose of a lesser-included offense, which is to give the jury an option of conviction based upon the evidence produced at trial rather than the pleadings of the charging instrument.⁷¹

C. The Cognate-Evidence Approach⁷²

Rather than examining the statutes or the pleadings, some States prefer

cognate-pleadings approaches); *State v. Greene*, 874 A.2d 750, 766-67 (Conn. 2005); *Altamura*, 676 So.2d at 30-31; *Curtis*, 944 P.2d at 121-22 (employing both the strict-statutory method and the cognate-pleadings method in its analysis); *Jones*, 912 A.2d 818 (Pennsylvania opinion authorizing use of a hybrid of statutory-elements and cognate-pleadings approaches); *Burns*, 6 S.W.3d at 463-472; *State v. Berlin*, 947 P.2d 700, 703 (Wash. 1997).

⁶⁵ See *id.*

⁶⁶ See Shellenberger & Strazzella, *supra* note 4, at 14.

⁶⁷ See *id.* at 11-12.

⁶⁸ See *Hall*, 225 S.W.2d at 526.

⁶⁹ See Pflaum, *supra* note 2, at 296.

⁷⁰ See *id.*

⁷¹ See Blair, *supra* note 4, at 467-68 (relying upon *United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980)).

⁷² See *Hall*, 225 S.W.2d at 526.

examining the evidence admitted during trial in making the lesser-included offense determination.⁷³ This approach is more generous than the two previous approaches. It allows a court to examine all the evidence admitted during the course of the trial in determining whether an offense is truly a lesser-included offense.⁷⁴ This analysis often results in a large number of possible lesser-included offenses.⁷⁵

As a general rule, the further removed the lesser offense is from the charged offense, the more likely the defendant is going to be surprised at trial by the inclusion of a lesser jury charge and the more legitimate his complaints on appeal about the violation of his due process rights.⁷⁶ And because the cognate-evidence approach is a more generous approach than the statutory-elements test or the cognate-pleadings test, it is sometimes criticized for not providing adequate notice.⁷⁷ Indeed, the cognate-evidence approach results in unpredictable and inconsistent lesser offense inclusions, which has raised legitimate concerns in some jurisdictions.⁷⁸

*D. The Inherently-Related Approach*⁷⁹

The final approach is one that is included in the Model Penal Code⁸⁰ but is not often employed by States.⁸¹ It is the most liberal approach of all. It “permits a lesser included offense instruction even if the proof of one offense does not invariably require proof of the others as long as the two

⁷³ See *id.*; see also *Hall v. State*, ___ So.2d ___, 2007 WL 866652, *8-9 (Ala. Crim. App. 2007); *Blackhurst v. State*, 721 P.2d 645, 648 (Alaska Ct. App., 1986) (the court must examine the elements of the offense, the respective theories of the case, and the evidence presented at trial); *Com. v. Day*, 983 S.W.2d 505, 509 (Ky. 1999) (statutory-elements test not necessary “so long as lesser offense is established by proof of same or less than all of the facts required to establish commission of the charged offense”); *Shrum v. State*, 991 P.2d 1032, 1034-36 (Okla. Crim. App. 1999); *State v. Baker*, 671 P.2d 152, 158 (Utah 1983);

⁷⁴ See Blair, *supra* note 4, at 449.

⁷⁵ See *id.*

⁷⁶ See *Schmuck*, 489 U.S. at 718; *Hall*, 225 S.W.3d at 532.

⁷⁷ See e.g., *Hall*, 225 S.W.3d at 532.

⁷⁸ See e.g., *State v. Jeffries*, 430 N.W.2d 728, 734 (Iowa 1988) (“Sufficient notice will not always be so likely under the cognate-evidence [approach]. This is so because of the expanded range of possible lesser offenses under [this] broader [approach].”); *Hall*, 225 S.W.3d at 532.

⁷⁹ See *Hall*, 225 S.W.3d at 526.

⁸⁰ See MODEL PENAL CODE § 1.07(4) (Proposed Official Draft 1962).

⁸¹ See *People v. Dace*, 449 N.E.2d 1031, 1037 (Ill. App. Ct. 1983); *Mayfield v. State*, 612 So.2d 1120, 1125-26 (Miss. 1992); *State v. Gopher*, 633 P.2d 1195, 1196-97 (Mont. 1981).

offenses serve the same legislative goals.”⁸² As long as the proposed lesser is within the same “species”⁸³ of crime as the greater offense, the lesser-included offense jury charge is permissible.⁸⁴

In *Schmuck v. United States*,⁸⁵ the United States Supreme Court reviewed a federal case in which tampering with an odometer was a requested lesser-included offense of mail fraud.⁸⁶ On direct appeal, the Seventh Circuit Court held that because both crimes protected against fraudulent activity, they were inherently related.⁸⁷ However, the Supreme Court disavowed the inherently-related approach by stating that the elements of tampering with an odometer are too far removed from the elements of mail fraud.⁸⁸ In criticizing and rejecting this method, the Court stated it “is rife with the potential for confusion” because “not only are there more issues to be resolved [by the court utilizing this method], but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ.”⁸⁹ However, the Supreme Court did not direct States to adopt the statutory-elements approach nor did it instruct States to reject the inherently-related method of lesser-included offense analysis.⁹⁰

IV. TEXAS LESSER-INCLUDED OFFENSE JURISPRUDENCE

Most jurisdictions across the nation adhere to one of the aforementioned theories in examining lesser-included offense charges.⁹¹ And a few use a hybrid approach, which borrows from each or some of the four common law approaches.⁹² However, some states – and Texas is one of them – have used whatever approach necessary to reach an equitable result, depending

⁸² *Schmuck*, 489 U.S. at 717.

⁸³ *Cunningham v. State*, 726 S.W.2d 151, 153-54 (Tex. Crim. App. 1987) (holding that indecency with a child is a lesser-included offense of aggravated sexual assault of a child, in part because the two crimes evolved from the same statute).

⁸⁴ See *Schmuck*, 489 U.S. at 708-09.

⁸⁵ 489 U.S. 705 (1989).

⁸⁶ See *id.* at 722.

⁸⁷ See *U.S. v. Schmuck*, 776 F.2d 1368, 1370-71 (7th Cir. 1985).

⁸⁸ See *Schmuck*, 489 U.S. at 721.

⁸⁹ *Id.*

⁹⁰ See *id.* at 716.

⁹¹ See *supra*, notes 52, 64, 72, and 80.

⁹² See *supra*, note 64.

on the circumstances of the case.⁹³ This multi-method approach has resulted in a contradictory body of law. To say that Texas case law regarding lesser-included offenses has been inconsistent would be an understatement. However, it appears other States have had trouble with this body of law as well.⁹⁴ Indeed, one Iowa court has said that lesser-included offense jurisprudence is “fraught with confusion because of the doctrine’s elusiveness in its definition and application.”⁹⁵

The unfortunate consequence of all the dubious case law is mass confusion at the trial court level. Not only have attorneys – both prosecutors and defense attorneys – been perplexed by lesser-included offenses, but so too have trial court and appellate court judges. And it’s no wonder considering the appellate courts of Texas and the Court of Criminal Appeals have handed down conflicting precedent within their own jurisdictional confines.⁹⁶ An examination of statutory law and case law is helpful to see just how desperately Texas needed a single-method approach of lesser-included offense analysis.

A. Defining “Lesser-Included Offenses”

An offense, as defined in article 37.09 of the Texas Code of Criminal Procedure, is a lesser-included offense if:

- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it 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) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged

⁹³ See *Hall*, 225 S.W.3d at 531; *Keffer*, 860 P.2d at 1126-28; *Shrum*, 991 P.2d. at 1036..

⁹⁴ See *Keffer*, 860 P.2d at 1126-28; *Shrum*, 991 P.2d. at 1036.

⁹⁵ *Jeffries*, 430 N.W.2d at 730.

⁹⁶ See *Hall*, 225 S.W.2d at 530-31.

or an otherwise included offense.⁹⁷

Prior to 1973, when article 37.09⁹⁸ was enacted, the Code of Criminal Procedure did not contain a general definition of a lesser-included offense; rather, it listed lesser-included offenses.⁹⁹ For example, assault with intent to commit murder was considered a lesser-included offense of murder because the statute said so.¹⁰⁰ Consequently, it was unnecessary for a trial court to make a determination based upon one of the four common law methods of lesser-included offense analysis; instead, the trial court simply looked to the statute for the answer.¹⁰¹ However, the enactment of article 37.09 changed that process.¹⁰² Instead of looking to the statute's enumerated list of lessers, the judge determined what lesser-included

⁹⁷TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

⁹⁸*See id.*

⁹⁹*See Hall*, 225 S.W.3d at 526-27 (citing Code of Criminal Procedure Act, 59th Leg., R.S., ch.722 § 1, art. 37.09, 1965 Tex. Gen. Laws vol. 2, 317, 463). The statute defined lessers as follows:

The following offenses include different degrees:

Murder, which includes all the lesser degrees of culpable homicide, and also an assault with intent to commit murder;

An assault with intent to commit any felony, which includes all assaults of an inferior degree;

Maiming, which includes aggravated and simple assault and battery;

Burglary, which includes every species of house breaking and theft or other felony when charged in the indictment in connection with the burglary;

Riot, which includes unlawful assembly;

Kidnapping or abduction, which includes false imprisonment; and

Every offense against the person includes within it assaults with intent to commit said offense, when such attempt is a violation of the penal law.

Code of Criminal Procedure Act, 59th Leg., R.S., ch.722 § 1, art. 37.09, 1965 Tex. Gen. Laws vol. 2, 317, 463.

¹⁰⁰*See id.*

¹⁰¹*See id.*

¹⁰²*See* TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

offenses applied based upon the language in article 37.09.¹⁰³

B. Case Law on Lesser-Included Offenses

As mentioned above, according to article 37.09, one of the ways an offense is deemed a proper lesser-included offense of the greater offense is if “it is established by proof of the same or less than all the facts required to establish the commission of the offense charged.”¹⁰⁴ There are four words in that definition that have confounded Texas courts: “facts required to establish.”¹⁰⁵ A number of Texas appellate court opinions have interpreted those words to mean the elements of the charged offense,¹⁰⁶ while others have interpreted those words to mean the evidence introduced during trial.¹⁰⁷ It is because of the Court of Criminal Appeals’ inconsistent definition of “facts required to establish,”¹⁰⁸ that intermediate appellate courts have had difficulty interpreting the meaning of those words.¹⁰⁹ Consequently, some courts have used an elements-based lesser-included offense approach¹¹⁰ while others have used an evidence-based approach.¹¹¹

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* *See Hall*, 225 S.W.3d at 527.

¹⁰⁶ *See Hall*, 225 S.W.3d at 530, n. 29 (listing twenty-three Criminal Court of Appeals’ cases using an elements-based approach).

¹⁰⁷ *See id.* at n. 30 (listing eight Court of Criminal Appeals’ cases using an evidence-based approach).

¹⁰⁸ *See Day*, 532 S.W.2d at 310-16.

¹⁰⁹ *See e.g., Farrakhan v. State*, ___ S.W.3d ___, 2006 WL 3438673 *11 (Tex. App.—Houston [1st Dist.] 2006, pet. granted).

¹¹⁰ *See id.* at *11; *Horne v. State*, ___ S.W.3d ___, 2007 WL 1745635 *3-5 (Tex. App.—Texarkana 2007, no pet. h.); *In re K.H.*, 169 S.W.3d 459, 465-66 (Tex. App.—Texarkana 2005, no pet.) (terroristic threat is not a lesser-included offense of retaliation because it has more elements).

¹¹¹ *See Campbell v. State*, 128 S.W.3d 662, 668-72 (Tex. App.—Waco 2003, no pet.) (resisting arrest held a lesser-included offense of aggravated assault on a peace officer, in part because of the evidence in the case); *Benge v. State*, 94 S.W.3d 31, 35-36 (Tex. App.—Houston [14th Dist.] 2002, pet. ref’d) (comparing the elements of reckless driving to the evidence admitted during trial to establish aggravated assault with a deadly weapon); *Walker v. State*, 95 S.W.3d 516, 519 (Tex. App.—Fort Worth 2002, pet. ref’d) (holding that fleeing from an officer, which is a traffic offense, is a lesser-included offense of evading detention, if proven by the evidence); *Morano v. State*, 662 S.W.2d 748, 749-50 (Tex. App.—Houston [14th Dist.] 1983, pet. ref’d) (“While proving attempted murder, the State proved aggravated assault.”); *Bingham v. State*, 630 S.W.2d 718, 719 (Tex. App.—[1st Dist.] 1982, no pet.) (resisting arrest can be a lesser-included offense of aggravated assault of a peace officer based upon the evidence admitted during trial by the prosecutor).

The result is an inconsistent body of law in Texas regarding lesser-included offenses. What follows is a breakdown of the cases and the facts that gave way to the inconsistent rules laid out by appellate courts across the State.

1. Texas Case Law Using the Statutory-Elements Approach

Perhaps because it is the easiest way of defining a lesser-included offense, many courts have used the statutory-elements approach. Several Texas appellate court opinions have determined, after a comparison of elements, that an offense is a lesser-included offense because it contains fewer elements or requires a lesser mens rea than the charged offense.¹¹² Examples of opinions using this approach include: (1) a finding that unlawful restraint is a lesser-included offense of aggravated kidnapping because it requires evidence of restraint, whereas aggravated kidnapping requires evidence of restraint and abduction;¹¹³ and a holding that felony-murder is a lesser-included offense of murder because it can be established with less culpability.¹¹⁴ Using the statutory-elements method of analysis, some courts have determined that a purported lesser-included offense was not permissible because it required proof of more elements than the greater offense.¹¹⁵

¹¹²See e.g., *Schweinle v. State*, 915 S.W.2d 17, 18-19 (Tex. Crim. App. 1996) (determining that unlawful restraint, which includes an element of restraint is a lesser-included offense of aggravated kidnapping, which includes elements of abduction and restraint); *Santana v. State*, 714 S.W.2d 1, 9 (Tex. Crim. App. 1986) (felony-murder a lesser-included offense of capital murder because it merely requires a lesser mens rea); *Ex parte Gutierrez*, 600 S.W.2d 933, 935 (Tex. Crim. App. 1980) (because “the misdemeanor offense of false imprisonment is established by proof of less than all the facts necessary to establish the offense of felony false imprisonment, the misdemeanor offense is unquestionably a lesser included offense of the felony offense of false imprisonment.”); *Briceno v. State*, 580 S.W.2d 842, 844 (Tex. Crim. App. 1979) (though elements for indecency with a child and indecent exposure are the same, the latter charge has a lower mens rea than the former offense).

¹¹³See *Schweinle*, 915 S.W.2d at 18-19.

¹¹⁴See *Santana*, 714 S.W.2d at 9.

¹¹⁵See e.g., *In re K.H.*, 169 S.W.3d at 465-66 (terroristic threat is not a lesser-included offense of retaliation because it has more elements); *Yandell v. State*, 46 S.W.3d 357, 361 (Tex. App.—Austin 2001, pet. ref’d) (deadly conduct not a lesser-included offense of manslaughter because it requires more culpability); *Jacob v. State*, 892 S.W.2d 905, 909 (Tex. Crim. App. 1995) (aggravated assault is not a lesser-included offense of burglary with intent to commit aggravated assault because in the latter offense, the prosecutor merely needs to prove attempted aggravated assault); *Reidweg v. State*, 981 S.W.2d 399, 404 (Tex. App.—San Antonio 1998, pet. ref’d) (criminally negligent homicide not a lesser-included offense of intoxication manslaughter because the former offense requires evidence of negligence whereas the latter offense is a strict-liability

2. Texas Case law Using the Cognate-Pleadings Approach

The cognate-pleadings method of analyzing lesser-included offenses is more tailored to the specific facts of each case than the statutory-elements method. Consequently, many Texas appellate courts favor this approach.¹¹⁶ When using this approach, courts tend to use language like “as alleged in the indictment”¹¹⁷ or “as charged in the present case”¹¹⁸ versus language that makes reference to the statutory elements.

Though the statutory-elements approach is different from the cognate-pleadings approach, both methods require the reviewing court to look to the elements required to establish the commission of the crime – whether required by the statute or the pleadings of the charging instrument – and not the evidence admitted during trial. Therefore, some jurisdictions outside of Texas find that using both the statutory-elements method and the cognate-pleading method intermittently does not result in a contradictory body of case law.¹¹⁹ However, no Texas appellate courts have expressly advocated use of a hybrid approach using both the statutory-elements and the cognate-

crime); *Johnson v. State*, 665 S.W.2d 554, 556-57 (Tex. App.—Houston [1 Dist.] 1984, no pet.) (criminal trespass is not a lesser-included offense of burglary of a building because the former’s definition of property includes more than just a building).

¹¹⁶ See e.g., *Guzman v. State*, 188 S.W.3d 185, 189 (Tex. Crim. App. 2006) (deadly conduct was a lesser-included offense of both attempted murder as alleged in the indictment and aggravated assault as contained in the jury charge); *Bell v. State*, 693 S.W.2d 434, 439 (Tex. Crim. App. 1985) (holding that “reckless conduct is a lesser included offense of [aggravated assault with a deadly weapon] in the instant case”); *Trejo v. State*, __ S.W.3d ___, 2007 WL 2178506 *2 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.) (determining that aggravated assault is not a lesser-included offense of aggravated sexual assault, as charged in this case); *Girdy v. State*, 175 S.W.3d 877, 882 (Tex. App.—Amarillo 2005), *aff’d*, 213 S.W.3d 315 (Tex. Crim. App. 2006) (aggravated assault was a lesser-included offense of aggravated kidnapping based upon the elements of the crime as alleged in the indictment); *Hayward v. State*,

117 S.W.3d 5, 14 (Tex. App.—Houston [14th Dist.], 2003) (assault a lesser-included offense of murder, as it was alleged in the indictment); *Johnson v. State*, 828 S.W.2d 511, 514-15 (Tex. App.—Waco 1992, pet. ref’d) (pleadings demonstrate that aggravated assault was a lesser-included offense of aggravated assault of a peace officer).

¹¹⁷ *Guzman*, 188 S.W.3d at 189; *Girdy*, 175 S.W.3d at 882..

¹¹⁸ *Trejo v. State*, __ S.W.3d ___, 2007 WL 2178506 *2 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.) (holding that aggravated assault is not a lesser-included offense of sexual assault based upon the pleadings of the indictment).

¹¹⁹ See *Birks*, 960 P.2d at 1078 (California authorizes use of both the statutory-elements and cognate-pleading approaches); *Curtis*, 944 P.2d at 121-22 (Idaho employs both the strict-statutory method and the cognate-pleading method); *Jones*, 912 A.2d at 818 (Pennsylvania uses a hybrid of statutory-elements and cognate-pleadings approaches).

pleadings methods.

3. Texas Case Law Using the Cognate-Evidence Approach

Combining the statutory-elements and cognate-pleading approaches does not appear to be theoretically inconsistent. However, when a jurisdiction uses the above approaches in combination with the cognate-evidence approach, one has to wonder whether appellate courts in that jurisdiction are confused about lesser-included offense jurisprudence. This third approach simply does not mesh with the former two methods of analysis. Yet, that has not prevented Texas courts from employing it in combination with the other two methods.¹²⁰ Indeed, several courts have used the cognate-evidence approach to determine that a lesser-included offense charge was appropriate.¹²¹ Courts employing this approach use language such as “under the facts of this case”¹²² or “in proving its case . . .

¹²⁰ See e.g., *Bartholomew v. State*, 871 S.W.2d 210, 213 (Tex. Crim. App. 1994) (“While we cannot say that speeding and racing are always lesser included offenses of reckless driving, we hold that under the facts of this case the offenses of speeding and racing are lesser included offenses of reckless driving.”); *Moreno v. State*, 702 S.W.2d 636, 640 (Tex. Crim. App. 1986) (criminal trespass held to be a lesser-included offense of burglary of a habitation because of the evidence admitted at trial); *Aguilar v. State*, 682 S.W.2d 556, 559 (Tex. Crim. App. 1985) (evidence at trial proved requisite lesser-included offense charge); *Chanslor v. State*, 697 S.W.2d 393, 394-397 (Tex. Crim. App. 1985) (evidence at trial of aiding suicide warranted a lesser-included offense charge in solicitation of murder case); *Broussard v. State*, 642 S.W.2d 171, 173 (Tex. Crim. App. 1982) (“[T]he issue is whether or not the State, in each case, when presenting its case to prove the offense charged, also includes the lesser included offense.”); *Eldred v. State*, 578 S.W.2d 721, 723 (Tex. Crim. App. 1979) (“In proving its case on aggravated robbery, the State established a theft.”); *Sutton v. State*, 548 S.W.2d 697, 699 (Tex. Crim. App. 1977) (evidence raised lesser-included offense of resisting arrest in aggravated assault trial); *Jones v. State*, 532 S.W.2d 596, 601 (Tex. Crim. App. 1976) (proof at trial established lesser offense); *Campbell*, 128 S.W.3d at 668-72 (resisting arrest held a lesser-included offense of aggravated assault on a peace officer, in part because of the evidence in the case); *Benge*, 94 S.W.3d at 35-36 (comparing the elements of reckless driving to the evidence admitted during trial to establish aggravated assault with a deadly weapon); *Walker*, 95 S.W.3d at 519 (holding that fleeing from an officer, which is a traffic offense, is a lesser-included offense of evading detention, if proven by the evidence); *Morano v. State*, 662 S.W.2d at 749-50 (“While proving attempted murder, the State proved aggravated assault.”); *Bingham*, 630 S.W.2d at 719 (resisting arrest can be a lesser-included offense of aggravated assault of a peace officer based upon the evidence admitted during trial by the prosecutor).

¹²¹ See *id.*

¹²² *Walker*, 95 S.W.3d at 519.

the State established [the lesser-included offense].”¹²³ Using this approach, courts have determined that despite having entirely different elements, aiding suicide is a lesser-included offense of solicitation of murder¹²⁴ and reckless driving is a lesser-included offense of aggravated assault with a deadly weapon.¹²⁵ Courts using both the statutory-elements and the cognate-pleadings methods have not been incongruous in their approach to lesser-included offense analysis because both of those methods look to the elements as pled in the indictment or as contained within the statute. However, courts using those elements-based approaches seem theoretically inconsistent when pairing them with use of the cognate-evidence approach, which looks to the evidence admitted at trial, rather than the elements of the offenses being compared. Nevertheless, the Court of Criminal Appeals itself has employed elements-based approaches along with evidence-based approaches,¹²⁶ which has only further confused appellate courts, trial courts, and practitioners.

4. Texas Case Law Using the Inherently-Related Approach

Recently, the Court of Criminal Appeals implicitly denied that the inherently-related approach had been used in Texas.¹²⁷ However, there is at least one Court of Criminal Appeals case – *Cunningham v. State*, 726 S.W.2d 151 (Tex. Crim. App. 1987) – that used this method of analysis in determining that a lesser-included offense instruction was warranted. The *Cunningham* Court held that indecency with a child was a lesser-included offense of aggravated sexual assault of a child, despite the fact that the proposed lesser contained a specific-intent element that the charged offense did not.¹²⁸ The Court of Criminal Appeals held, however, that despite the elemental differences, the offenses came from the same “species” of sexual assault crimes.¹²⁹ The Court went onto say that the Texas legislature never

¹²³ *Eldred*, 578 S.W.2d at 722.

¹²⁴ *See Chanslor*, 697 S.W.2d at 394-397.

¹²⁵ *See Bengel*, 94 S.W.3d at 35-36.

¹²⁶ *See Hall*, 225 S.W.3d at 530-31.

¹²⁷ *See id.* at 526, 530-31 (claiming that only one jurisdiction – Montana – employed this test and stating that Texas’s own jurisprudence utilized a cognate-elements approach and a cognate-evidence approach).

¹²⁸ *Cunningham*, 726 S.W.2d at 153-54 (holding that despite creating two distinctly separate sexual assault statutes, the legislature inferred a specific intent for both statutes, even though the charged offense did not explicitly contain a specific intent).

¹²⁹ *Id.* at 154.

meant to dispense with a specific intent for aggravated sexual assault of a child, despite the statute's plain language that indicated otherwise.¹³⁰

The Court seemed to say that because the two crimes had once been included together under one statute, they were cut from the same cloth, so to speak.¹³¹ Accordingly, the Court held that since the prosecutor would prove that the accused had an intent to arouse himself or the victim in most aggravated sexual assault cases, indecency with a child was a permissible lesser offense of that crime.¹³²

If it is inconsistent to use the first two methods along with the third method, it is even more inconsistent to use the inherently-related approach in conjunction with other methods. What is most shocking, however, is the fact that Texas has employed all four methods to reach a decision on the admissibility and appropriateness of a lesser-included offense. This is precisely why Texas practitioners, trial courts, and appellate courts needed the Court of Criminal Appeals to establish a single-method approach regarding lesser-included offense analysis.

V. A SINGLE APPROACH FOR LESSER-INCLUDED OFFENSES

*Hall v. State*¹³³ is an incredibly significant opinion. One gets a sense of the Court's urgency to clarify the law on lesser-included offenses from the fact that the Court did not need to address the law on lesser-included offenses in *Hall*, but did so anyway.¹³⁴ An explanation of the facts and rule set out in *Hall* will be discussed in this section.

A. *Hall v. State*, 81 S.W.3d 927 (Tex. App.—Dallas 2002).

Aaron Junior Hall was charged in Dallas County with committing the

¹³⁰ See *id.*

¹³¹ See *id.* at 153-54.

¹³² See *id.* at 154-55.

¹³³ 225 S.W.3d 524 (Tex. Crim. App. 2007).

¹³⁴ See *Hall*, 225 S.W.2d at 537; see also *Hall v. State*, 81 S.W.3d 927 (Tex. App.—Dallas 2002), *aff'd*, *Hall v. State*, 225 S.W.2d 524 (Tex. Crim. App. 2007). The Court of Criminal Appeals disregarded several of the State's issues included within its petition for discretionary review, which centered on whether the defendant preserved his right to contest the submission of the lesser-included offense charge. See *id.* at 537. The Dallas Court of Appeals' opinion was legally accurate and did not raise an issue about which method of analysis is most constitutionally appropriate. See *supra*, Section IV, A.

offense of murder by shooting and killing Marco Grigsby.¹³⁵ The jury charge permitted the jurors to find the defendant guilty of aggravated assault by threat as a lesser-included offense of murder.¹³⁶ It is not apparent whether the prosecutor or defense attorney requested the lesser-included offense jury charge for aggravated assault by threat.¹³⁷ The jury found Hall guilty of aggravated assault by threat and the trial court sentenced him pursuant to the jury's determination.¹³⁸ The lower appellate court held that because the alleged lesser offense required proof of a threat and the charged offense of murder did not, aggravated assault by threat was not a lesser-included offense of murder.¹³⁹ Consequently, the Dallas Court of Appeals held that the trial court lacked authority to convict Hall of aggravated assault by threat and acquitted him.¹⁴⁰ The State then filed a petition for discretionary review with the Court of Criminal Appeals.¹⁴¹

B. Hall v. State, 225 S.W.2d 524 (Tex. Crim. App. 2007).

The Court of Criminal Appeals "granted review [of Hall's case] to resolve ambiguities and conflicts in [its] decisions about the method of determining whether the allegation of a greater offense includes a lesser offense."¹⁴² After examining the various methods used in the nation's lesser-included offense jurisprudence, the Court examined Texas's statutory definition of lesser-included offenses and a significant opinion from 1976, *Day v. State*,¹⁴³ which defined the "facts required to establish" language found in article 37.09.¹⁴⁴

In *Hall*, the Court of Criminal Appeals determined that the *Day* Court's definition of the language in article 37.09 was erroneous.¹⁴⁵ Though the *Day* Court initially determined that a reviewing court ought to use the statutory-elements approach without any reference to the facts, on a motion

¹³⁵ See *Hall*, 81 S.W.3d at 928.

¹³⁶ See *id.*

¹³⁷ See *id.* at 930-31.

¹³⁸ See *id.* at 928.

¹³⁹ See *id.* at 930-31.

¹⁴⁰ See *id.* at 931.

¹⁴¹ See *Hall*, 225 S.W.2d at 534.

¹⁴² See *id.* at 525.

¹⁴³ 523 S.W.2d 302 (Tex. Crim. App. 1976).

¹⁴⁴ See *Hall*, 225 S.W.3d at 527.

¹⁴⁵ See *id.* at 528.

for rehearing, the Court mistakenly held the opposite.¹⁴⁶ The final – and erroneous – determination in *Day* was that trial and appellate courts had permission to look at the evidence admitted during trial to determine whether a crime was a lesser-included offense of the charged offense.¹⁴⁷ Ironically, not only did the *Day* court contradict itself in its holdings between the first hearing and the rehearing, but it appears the Judges themselves took “conflicting positions” on the issue.¹⁴⁸ Because of this confusion among the Judges, the *Hall* Court noted that over the years, twenty-three Court of Criminal Appeals’ opinions held that courts should review the pleadings or elements to determine whether a lesser crime is indeed a lesser-included offense,¹⁴⁹ while eight Court of Criminal Appeals’ opinions held that courts should examine the evidence presented during trial in making that determination.¹⁵⁰ Moreover, the author of the *Day* opinion disavowed the holding a mere eight weeks after penning it.¹⁵¹ Nevertheless, the Court of Criminal Appeals “[u]ntil today . . . frequently ignored [the author’s] protestations, and continued to say that Article 37.09 as interpreted in the opinion on rehearing in *Day* requires consideration of the evidence in making the decision.”¹⁵²

After asserting that the *Day* opinion, issued 31 years ago, erroneously defined “facts required to establish,” the *Hall* Court declared that the proper definition of “facts required” was determined by the language of the charging instrument.¹⁵³ After all, the Court concluded that to define that phrase otherwise could quite possibly violate the defendant’s constitutional rights.¹⁵⁴ The *Hall* Court summed up its holding by stating

We now hold that the [cognate-]pleadings approach is the sole test for determining in the first step whether a party may be entitled to a lesser-included-offense instruction. . . . The first step in the lesser-included-offense analysis, determining whether an offense is a lesser-included offense

¹⁴⁶ *See id.*

¹⁴⁷ *See id.* at 528-30.

¹⁴⁸ *See id.* at 528, 530.

¹⁴⁹ *See id.* at n. 29.

¹⁵⁰ *See id.* at n. 30.

¹⁵¹ *See id.* at 530; *see also Graves v. State*, 539 S.W.2d 890, 892 (Tex. Crim. App. 1976) (Judge Odom’s concurring opinion).

¹⁵² *See Hall*, 225 S.W.3d at 530.

¹⁵³ *See id.* at 531.

¹⁵⁴ *See id.* at 532-34.

of the alleged offense, is a question of law. It does not depend on the evidence to be produced at the trial. It may be, and to provide notice to the defendant, it must be, capable of being performed before trial by comparing the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense. . . . To hold otherwise would be contrary to the better analysis of the statute and might run afoul of the requirements of due process by making it impossible to know before trial what lesser offenses are included within the indictment, yet making it possible at the end of the trial to convict for any offense that was incidentally shown by the evidence.¹⁵⁵

In its conclusion the *Hall* Court disavowed the *Day* holding and all of the opinions that relied upon an evidence-based approach.¹⁵⁶ The result of this holding is that at least eight Court of Criminal Appeals' opinions and countless lower appellate court opinions have been overruled. And because of this opinion, Texas courts now have a single-method lesser-included offense approach: all courts are to abandon evidence-based methods of analyzing lesser-included offense charges and must now adhere to a cognate-pleadings analysis.¹⁵⁷

VI. CRITICISM OF THE *HALL* OPINION

While the *Hall* Court clarified the lesser-included offense body of law in Texas, it spent too much time explaining how this case law disaster began with *Day*¹⁵⁸ and not enough time addressing issues that needed to be addressed. The Court's reliance on one of the four common methods of analysis instead of a reliance on the statutory "facts required to establish"¹⁵⁹ language may be the basis for future criticism. And the fact that the Court remained silent on the doctrine of mutuality, as it applies to lesser-included offenses, has left open the question of whether a defendant may waive right to notice and seek a lesser-included offense instruction that would be

¹⁵⁵ *Id.* at 535-37.

¹⁵⁶ *See id.* at 537.

¹⁵⁷ *See id.* at 535.

¹⁵⁸ 523 S.W.2d 302 (Tex. Crim. App. 1976).

¹⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

impermissible under the cognate-pleadings test. This section will examine these criticisms in more depth.

A. Does the Cognate-Pleadings Approach Negate Article 37.09?

One glaring criticism of the *Hall* opinion is that the Court of Criminal Appeals failed to interpret the “facts required to establish” language found in Texas Code of Criminal Procedure article 37.09.¹⁶⁰ Instead, it held that it was using the cognate-pleadings approach as “the sole test for determining . . . whether a party may be entitled to a lesser-included offense.”¹⁶¹ The problem with this blanket statement of Texas’s new and improved lesser-included offense jurisprudence is that it makes absolutely no reference to the statute it purports to clarify.

The role of an appellate court is to give plain meaning to the statutes and to “employ additional methods of analysis only when the statutory language is ambiguous or the statute, as worded, would lead to absurd results.”¹⁶² The meaning of “facts required to establish”¹⁶³ does not appear to be vague. The Court arguably overcorrected itself by ignoring the language of the statute entirely in creating its revised approach to lesser-included offense analysis. Indeed, the Texas legislature did not state in article 37.09 that a lesser-included offense is an offense that is permissible if it passes the cognate-pleading test.¹⁶⁴

In *Farrakhan v. State*,¹⁶⁵ a case involving the exact same issues that were addressed by *Hall* – which, incidentally, is currently before the Texas Court of Criminal Appeals – one of the Houston courts of appeals interpreted “facts required to establish”¹⁶⁶ by examining the language of the statute closely and without reference to a common law lesser-included offense method of analysis.¹⁶⁷ The *Hall*¹⁶⁸ Court would have remained more faithful to its primary role had it done the same. After all, “[i]n a

¹⁶⁰ *Id.*

¹⁶¹ *Hall*, 225 S.W.3d at 535.

¹⁶² See TEX. GOV’T CODE ANN. § 312.002(a) (Vernon 2005); *Jordan v. State*, 36 S.W.3d 871, 873 (Tex. Crim. App. 2001).

¹⁶³ TEX. CODE. CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

¹⁶⁴ See *id.*

¹⁶⁵ ___ S.W.3d ___, 2006 WL 3438673 (Tex. App.—Houston [1st Dist.] 2006, pet. granted).

¹⁶⁶ TEX. CODE. CRIM. PROC. ANN. art. 37.09 (Vernon 2007).

¹⁶⁷ See *Farrakhan*, ___ S.W.3d ___, 2006 WL 3438673 at *10.

¹⁶⁸ 225 S.W.3d 534 (Tex. Crim. App. 2007).

statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."¹⁶⁹ Accordingly, even though the *Hall*¹⁷⁰ Court clarified the body of law in general, it used the wrong approach to reach the end result.

B. Does the Doctrine of Mutuality Apply to this New Method?

Despite the fact that the *Hall*¹⁷¹ Court clearly instructed lower appellate and trial courts to use only the cognate-pleadings test with lesser-included-offense analysis,¹⁷² it did not directly address whether, upon written waiver of notice, a defendant might be able to request a lesser-included offense that is not permissible under the cognate-pleadings test. As one court has stated, "[n]otice is not an issue when the defendant makes [a lesser-included offense] request because the request itself constitutes a waiver of the right to notice."¹⁷³ And the entire point of adopting the cognate-pleadings test over the cognate-evidence test is to avoid notice concerns.¹⁷⁴ So what happens when the defendant waives his right to notice and requests a lesser-included offense that, if requested by the State, might have violated the defendant's right to notice? The *Hall*¹⁷⁵ Court failed to address this issue.

While some States employ a doctrine of mutuality,¹⁷⁶ which means that if a lesser-included offense is not permissible for one party, it is not permissible for the other party, Texas has never addressed this issue. The United States Supreme Court explained the advantage that a defendant may have in waiving notice by stating, "the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction."¹⁷⁷ Though a cognate-pleadings method appears to result in identical treatment no matter which side requests the lesser-included offense, the Court should have addressed

¹⁶⁹ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

¹⁷⁰ 225 S.W. 3d 534 (Tex. Crim. App. 2007).

¹⁷¹ *Id.*

¹⁷² *See id.* at 535.

¹⁷³ *Meadors*, 908 P.2d at 42.

¹⁷⁴ *See Hall*, 225 S.W.3d at 530-35.

¹⁷⁵ 225 S.W.3d 534 (Tex. Crim. App. 2007).

¹⁷⁶ *See e.g., Wiggins v. State*, 902 A.2d 1110, 1113 (Del. 2006); *Keffer*, 860 P.2d at 1133.

¹⁷⁷ *Schmuck*, 489 U.S. at 718.

this issue, which will likely be raised by cases in the future.

Though some courts find the doctrine of mutuality just and predictable, at least one commentator has voiced criticism about it.¹⁷⁸ He says that “predictability is little consolation to the criminal defendant, who may predict through the application of the elements test that he will not receive a jury instruction on [a lesser-included offense] that would possibly be a more accurate assessment of his true guilt.”¹⁷⁹ Though this author was talking specifically about use of the statutory-elements test, the same can be argued with the application of the cognate-pleadings test as well: is the “what’s-good-for-the-goose-is-good-for-the-gander approach” the way that courts should look at lesser-included offense instructions? And does the fact that Texas has failed to address this issue in *Hall*¹⁸⁰ (or in any other case, for that matter) an indication that the defendant is entitled to depart from the cognate-pleadings test when he waives notice? Or is it an indication that unless specified otherwise, both sides play by the same set of rules? Some clarification on this issue from the State’s highest criminal court is necessary.

VII. WHAT, IF ANYTHING, WILL CHANGE WITH THIS SINGLE-METHOD ANALYSIS?

While it is apparent that the confusion among courts in Texas regarding lesser-included offense doctrine had a trickle-down effect, it is unknown why the highest criminal court in Texas failed to resolve inconsistencies in this body of law sooner. Certainly, the Court was aware prior to 2007 that its own opinions and the opinions of the lower appellate courts, not to mention trial court decisions, used inconsistent methods of analysis. Although one may never know exactly why the Court waited so long, judges, prosecutors, and defense attorneys will likely agree that the uncertainty among the courts has, at times, worked to each group’s advantage. And now that there is but one method to choose from, most practitioners will be relieved and at the same time, disappointed. The following is a brief prediction about how each group of practitioners affected by the new single-method approach will likely receive it.

¹⁷⁸ See Pattillo, *supra* note 19, at 436.

¹⁷⁹ *Id.*

¹⁸⁰ 225 S.W.3d 534 (Tex. Crim. App. 2007).

A. *Relief for Trial and Appellate Judges*

While the single-method approach may prevent some judges from modifying trial outcomes, thereby frustrating them, most trial courts will likely welcome the new approach. Trial courts have been exasperated by the inconsistent appellate court decisions prior to *Hall*¹⁸¹ and the reversals of convictions.¹⁸² Likewise, appellate judges have a single method to use and will likely welcome its streamlined approach to lesser-included offense analysis.

B. *Restricted Prosecutorial Discretion During Trial*

Prosecutors have discretion on what charges will be filed against a defendant, how the charging instrument will be worded, and whether to recharge the defendant under a different criminal theory prior to trial.¹⁸³ This single-method approach will likely result in more pre-trial charging instrument changes and fewer lesser-included offense jury instructions, which permit the jurors to alter the charge after the trial has commenced. If a prosecutor does not establish every element of the offense during trial, and if the lesser-included offense relied upon before in similar cases is no longer permissible using the cognate-pleadings approach, the jury will be required to acquit the defendant.¹⁸⁴ Hence, prosecutors will need to be more accurate and honest in assessing the weaknesses of each case prior to trial.

C. *Defense Attorneys May Be the Hardest-Hit Group*

As stated before, lesser-included offenses are requested more often by defense attorneys than by prosecuting attorneys.¹⁸⁵ Therefore, the new single-method approach will likely have the most profound affect on this group of practitioners. Having disposed with more liberal methods of analysis, the Court of Criminal Appeals has made it more difficult for

¹⁸¹ *Id.*

¹⁸² See e.g., *Farrakhan*, __ S.W.3d __, 2006 WL 3438673 *11 (sifting through conflicting Court of Criminal Appeals precedent to hold that the appropriate lesser-included offense analysis should consider the elements, not the evidence, in the case).

¹⁸³ See Pattillo, *supra* note 2, at 437.

¹⁸⁴ *Beck*, 447 U.S. at 634.

¹⁸⁵ See Wright, *supra* note 25, at n. 3.

defense attorneys to proffer lesser-included offenses to juries.¹⁸⁶ In practice, this means that defense attorneys will get fewer lesser-included instruction requests granted. Whether fewer instructions will result in fewer acquittals or fewer convictions remains to be seen. But one thing is certain: the one-method standard will likely affect defendants and the attorneys representing them the most, since it is most often requested by them.¹⁸⁷

VIII. CONCLUSION

Though the body of law known as the lesser-included offense is “not without difficulty in any area of the criminal law,”¹⁸⁸ the *Hall*¹⁸⁹ opinion has made lesser-included offense jurisprudence in Texas much less complicated. The single-method approach is a welcomed change over the four-method pick-which-approach-you-like-the-best-approach that had been sanctioned through silence prior to the *Hall*¹⁹⁰ opinion. Though the *Hall*¹⁹¹ Court failed to address some important issues that perhaps could be addressed in *Farrakhan v. State*,¹⁹² a case that involves the same lesser-included-offense issues that were addressed in *Hall*,¹⁹³ the state of the law is much clearer and will likely be embraced by most practitioners. The Court of Criminal Appeals should be embarrassed that it took this long to address the confusion among appellate courts and practitioners. However, the Court’s clarification on lesser-included offense instructions is better late than never.

¹⁸⁶ See *Hall*, 225 S.W.3d at 535.

¹⁸⁷ See *Dhinsa*, 243 F.3d at 674.

¹⁸⁸ *Tsanas*, 572 F.2d at 344.

¹⁸⁹ 225 S.W.3d 534 (Tex. Crim. App. 2007).

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² ___ S.W.3d ___, 2006 WL 3438673 (Tex. App.—Houston [1st Dist.] 2006, pet. granted).

¹⁹³ 225 S.W.3d 534 (Tex. Crim. App. 2007).