No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEL RAY SANDERS — PETITIONER
(Your Name)

vs.

LORIE DAVIS/Director — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS - FIFTH CIRCUIT OF TEXAS, NEW ORLEANS, LA.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DEL RAY SANDERS #1621331
(Your Name)

810 FM 2821 RD. W.
(Address)

HUNTSVILLE, TEXAS 77349
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1) Petitioner Sanders, contends the Ninth Appellate District Court, Cause # 09-10-00047-CR, Beaumont, Texas, Erred by ruling the Trial Court of Polk County, Texas, for the 411th Judicial District, Livingston, Texas, 77351 did not err by denying his request to instruct the jury on Manslaughter (Texas Penal Code §19.04(a)(b)); and Criminally Negligent Homicide (Texas Penal Code §19.05(a)(b)). Did the omitted instructions prevent (disallow) the juror's to convict on the lesser-included charge, or even acquit on the finding of accidental? See; Appendix - Dissents.

(2) Petitioner Sanders contends the omitted jury instructions and the Fifth Circuits finding of no prejudice, and the Fifth Circuits reliance on the State Courts statement on Direct Appeal, significantly misstated even the slanted version of the facts.

Did the Fifth Circuit err in deferring to the State Court's finding that Mr. Sanders was not entitled to a lesser-included offense jury instruction? and in order to receive such instructions he must admit to "Murder" to receive them?

(3) Did the Fifth Circuit misapply the requirement on the lesser-included jury instructions ?

(4) Is the Fifth Circuit's decision in conflict with other circuits?

There was sufficient record evidence warranting an instruction on the lesser and that would permit a jury to rationally conclude guilt of the lessers. The Fifth Circuit's decision was wrong in holding that Petitioner Sanders' Constitutional rights weren't violated. Additionally, the majority's opinion was contrary to,, or involved an unreasonable application of clearly established federal law. Further, the Fifth Circuits decision rested upon an unreasonable determination of the facts in light of the evidence presented in the State's Court proceedings. Seea; Keeble v. U.S., 93 S.Ct. 1993 (1982)(The lesser-included offense doctrine is well-established). Hooper v. Evans, 102 S.Ct. 2049 (1982) (Due process requires that a lesser-included instruction be given when the evidence warrants). Williams v. Taylor, 120 S.Ct. 1495 (2000).(Unreasonable application of federal law is when a court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced).

U.S. Constitutional Amendments 6 & 14.

(Right to a fair trial, and rights to due process and equal protection of the law).

[Petitioner requests that the 5th Circuit Court's decision to be found in error and reversed in all fairness].

Matthews v. U.S., 485 U.S. 58 (1988)

To deprive the petitioner of the right to defensive instruction violates the constitution.

Stevens v. U.S., 16 S.Ct. 839 (1986)

STEVENSON

(In determining whether to instruct on the lesser offenses, the court must take into account the possibility that the jury might reasonably believe defendant only in part or might make findings different from the version set forth in anyone's testimony).

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

District State Judge	Robert H. Trapp
Petitioner	Del Ray Sanders
Polk County District Attorney	William L. Hon
Trial Counsel	James F. Keegan
Appellate Counsel	Tom Brown
U.S. Magistrate Judge	Zack Hawthorn
U.S. District Judge	Thad Heartfield
Attorney For The State Of Texas	Texas Attorney General
United States Court of Appeals Fifth Circuit, Texas	Circuit Judges
United States Supreme Court	Justices

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix E to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished. No copy founded denied w/out written order

The opinion of the 9th Dist. Court of Appeals, Beaumont, Texas court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: See Appendix (E), and a copy of the order denying rehearing appears at Appendix (E).

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was December 18, 2013. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional

Fifth Amendment

(1) No Person shall be required to answer for a capital or other infamous crime unless an indictment or presentment is first issued by a Grand Jury; (2) That no person will be placed in double jeopardy; (3) That no person may be required to testify against himself or herself; (4) Neither life, liberty, nor property may be taken without due process of law; and (5)That private property may not be taken for public use without payment of just compensation.

U.S. Constitution

Sixth Amentment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any perosn of life, libery, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

(a) The Supreme Court , a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, nothwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States: or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collaterial review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable tp produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such

pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the offical records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing scuh a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of Counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner Sanders was convicted of the Murder of his wife Linnie Jo Sanders. The Jury found him guilty of murder but did not designate under which theory of murder they so found. J.C. Fleming a inmate awaiting revocation of his parole was placed in the Polk County Jail cell with Petitioner and as a State's witness testified Petitioner Sanders talked about the death to him, and stated Petitioner was shouting the information out in the 8-man cell. Well why didn't other inmate's come forward with the same testimony? It would have corroborated J.C. Fleming's testimony. Why because I never mentioned my case to anyone while in the Polk County Jail Facilities. J.C. Fleming was secured leniency subsequently not returning to prison on revocation, and the trial records will reveal William Lee Hon, the Prosecutor has utilized J.C. Fleming in another conviction of another cell mate of J.C. Fleming about a year prior to this Petioner's trial and that J.C. Fleming also then gained trustee status and also did not go to prison on revocation charges. At trial it was also proven by testimony the other State's witness, Debra Sanders Pettioner's sister, had motive to testify against him which was a $83,000 lawsuit against her by the Petitioner, testified to by the deceased mother Doris Rhodes and both, the only states witnesses, clearly had motives to testify.

State post-convictions were filed; the Ninth District Court of Appeals Affirmed the trial courts decison, Sanders v. State, No. 09-10-00047-CR (Tex. App. - Beaumont 2011). The Texas Court of Criminal Appeals dismissed a Petition For Discretionary Review as Improvidently Granted. Three judges including Judge Sharon Keller Presiding Judge gave Mr. Sanders a favorable dissent stating Petitioner Sanders should receive a New Trial. See: Appendix - Dissenting Opinions. Sanders v. State, No. PD-0849-11. Petitioner filed a State Application for Writ of Habeas Corpus, Article § 11.07 in which the Court of Criminal

STATEMENT OF THE CASE

Appeals of Austin, Texas, denied without written order. No. 79,300-01. Sanders timely filed his Federal WHC §2254 Application which was dismissed as without merit. No. 9:14-cv-09. Petitioner Sanders moved for a Certificate of Appealability to the denial of his §2254. This Motion for a "C.O.A." Certificate of Appealability was also denied for failure to make the requisite showing. No. 17-40407. Petitioner Sanders then filed for a Panel Rehearing in cause no. 17-40407 which was subsequently denied also. Now Mr. Sanders moves this Honorable United States Supreme Court for a Writ of Certiorari to Grant and will show in his Statement of the Case the following:

The issues in this case are all legal questions or mixed questions of law and fact as they pertain to the trial courts error in denying request for jury instructions on the lesser-included offenses of Manslaughter and Negligent Homicide; The trial court erred by requiring Sanders to admit to murder in order to receive jury instructions regarding Manslaughter and Negligent Homicide. To include the 5th Circuit Court of the United States Court of Appeals in Louisiana seeks to bolster the absurdity of the verdict in this case by extending that the law requires that Mr. Sanders admit to murder to receive the lesser-included jury instructions and affirm Mr. Sanders conviction if it put forward any evidence suggesting that conclusion. Petitioner also wishes to bring to this courts attention Page # 2 of Said Dissent of his (P.D.R.) that the Honorable Judge of the Court of Criminal Appeals Austin, Texas, states: "I have been unable to find a case that requires a defendant to admit to murder to recieive instructions on a lesser-included offense:" Per Judge Johnson - C.O.C.A. Austin, Texas. In other words for the Honorable Judge Johnson to state the difficulty she has with finding a case on point in regards to Defendant's entitlement to the necessity instructions, considering the resources of the

STATEMENT OF THE CASE

State...LEXIS NEXIS, etc,. Petitioner acknowledges his difficulty to find caselaw, in lay-man capacity with limited law library access...to be on point may/can prove to be difficult as well..

Whether Mr. Sanders' actions were intentional, knowing, reckless or criminally negligent must be determined by the trier of fact. (Jury) J.C. Fleming as well as Mr. Sanders' testimony raised the possibility of a lesser mental state than that required for a conviction of murder.

This duty of the jury to determine whether the evicence is credible and supports a finding that the defendant is guilty of only the lesser-included offense is exclusively that of the jury. Hayes v. State, 728 S.W.3d 804, 809 (Tex. Crim.App. 1987). The jury is free to selectively believe testimony presented by either the State or the defendant and may accept or reject all or part of any witness testimony including that of the defendant, if the facts of the case in evidence fairly tend to indicate manslaughter it becomes the duty of the trial court to submit manslaughter and leave to the jury the acertainment of whether or not such killing was the result of such cause and whether or not such cause was adequate even though the accused claimed the homicide an accident. Thompson v. State, 521 S.W.2d 621 (Tex. Crim. App. 1974); Lugo, 667 at 146. The jury could consider the statements made by the defendant that were presented by other sources, such as J.C. Fleming - informant (i.e., Linnie was falling down and he dragged her, and tripped over her, that he believed Linnie just needed to sleep it off). The State contends that even if the conduct described by Fleming is accepted as having occurred that Mr. Sanders threw Linnie Jo on the sofa, and she hit her head on the coffee table that conduct was an intentional act. However, to say that the act was intentional in some sense does not by itself negate lesser-included offenses, such conduct would

certainly amount to the intentionally throwing Linnie Jo onto the sofa. Petitioner submits for the Ninth Court of Appeal, to justify any intent to kill, and/or to cause serious bodily injury, in the manner that led to her striking her head on the coffee table is absurd and arbitrary, and should conclude unjust reasoning. A defendant's evidence may be weak or contradicted, the States evidence may be particularly strong, but it is the finder of fact that gets to decide what evidence to believe. The State contends that falling through the wall described a true accident with no culpability at all and therefore, could not raise the lesser culpable mental state of recklessness and criminal negligence, it is entirely possible that this accident could support a conviction for an offense with a reckless mental state, but even if the state were correct, there was still the evidence that Mr. Sanders threw Linnie Jo on the couch. Notably J.C. Flemings account does not suggest that Mr. Sanders intentionally flung Linnie Jo into the coffee table. The State claims that there comes a time in a prosecution for murder where the evidence of intent to kill or intent to cause serious bodily injury with the commission of an act clearly dangerous to human life becomes so overwhelming that any suggestion of a less culpable mental state becomes absurd and irrational. Whatever the merits of the contentions and rule that this is not one of those such cases. The State and the Court of Appeals opinion rely upon the courts decision in Cardenas v. State, In Cardenas, 30 S.W.3d 393, the Capital Murder defendant testified that he lost it and did not intend to hit the victim so hard. But the evidence showed that the victim was hit multiple times, that these blows caused complete obstruction of the victims airways, and that the victim was strangled by a ligature consistent with the towel that was found around her neck. In response to a claim that counsel was ineffective for failing to request a lesser-included offense instruction"...

the Court held given the number of blows, severity of the injuries, and particularly the evidence that the victim was also strangled with the towel, appellants statements that he lost it and did not realize how hard he hit the victim does not negate the physical evidence showing an intent to kill, consequently, counsel was not deficient for failing to request an instruction. In Cardenas, the defendant's testimony that he did not intend to hit the victim so hard said nothing about whether he intended to strangle the victim with a ligature, the cause of death was asphyxiation by a ligature and blows to the neck, and the defendant's testimony failed to account for the ligature, the testimony in the present case does not suffer from a similar deficiency. The Assistant Medical Examiner, Hines, testified that the mechanism of Linnie Jo's death was blunt-force-trauma.

The conduct that J.C. Flemings described was consistent with the mechanism of death. Blunt force injuries to the head cold have been inflicted by hitting the coffee table or by falling into a wall (or by some of the other conduct depicted in statements or testimony from Mr. Sanders). And as far as can be ascertained from the testimony, such conduct is not inconsistent with the severing of the base of Linnie Jo's neck because of the metal plate that made her particularly vulnerable to injury. The State relies upon Mathis v. State, 67 S.W.3d 926. In that case the defendant claimed that his testimony that he acted only recklessly with respect to killing Hibbar, but moments before the defendant had shot Brown. The court held that the defendant's testimony did not supply evidence upon which a jury could rationally find that the defendant's actions were merely reckless, and were not at least knowing. In arriving at it's holding the court relied upon Westbrook v. State, 28 S.W.3d 103 (Tex. Crim. App. 2000). The defendant in Westbrook also killed multiple individuals,

the court explained that after witnessing the damage that resulted from his actions with respect to the first victim, the defendant continued to fire the weapon, again at close range, into four more individuals, under these circumstances the defendant's own assertion that he did not intend to kill did not raise a lesser-included offense because the record showed that the defendant acted intentionally, or at least, knowingly when he walked into an aprartment with a high powered rifle.

In both Mathis and Westbrook, the Court of Appeals observed that the defendant testified that he did not intend to kill, but the court concluded that the evidence showed that the defendant acted at least knowingly, though the practical differences is significant Stewart v. State, 240 S.W.3d 872 (Tex. Crim. App. 2007). Westbrook at least can be seen as encompassing the theme found in Cardenas, the defendant's testimony was incomplete because, though he denied intent, he did not deny knowledge, and knowledge was enough to establish guilt for the offense, in question. Mathis, more complicated because the defendant in that case characterized his conduct as reckless, never-the-less, Mathis, may be read as holding simply that a defendant's use of the term reckless in testimony may not necessarily be the equivalent of the legal meaning of recklessness, so that it may still be true that the defendant's testimony did not in fact provide any evidence that the conduct was merely reckless. Whereas Mathis, may be subject to more-far-reaching constructions: (1) that the multiple killings made it impossible for the defendant's testimony to create a dispute about the culpable mental state; or (2) that a conclusory assertion by the defendant that he possessed the lesser mental state was insufficient to create a dispute under the circumstances. Such constructions are plausible only with respect to the culpable mental state of knowingly.

STATEMENT OF THE CASE

Both Mathias and Westbrook, stated that the record showed that the defendant acted, with at least a knowing culpable mental state. Neither opinion definitively said that the record indisputably established an intentional culpable mental state. However, regardless of the construction placed upon Mathis and Westbrook, those cases are not this case. Mr. Sanders had not previoulsy killed someone so it could not be said that he must have known that his actions would result in the death of Linnie Jo to his having previoulsy caused a death. Even if it could be argued based upon Mathis and Westbrook the defendant must have known that he would inflict serious bodily injury upon Linnie Jo because he had previously done so, the murder state requires more than knowledge, it requires intent to inflict serious bodily injury. Furthermore, without any evidence of the sequence of events or exactly how the injuries were inflicted even Assitant Medical Examiner Hines stated that "any of these injuries in isolation could have been caused accidentally". Even if Mr. Sanders knowledge with respect to serious bodily injury is subject to dispute.

In testimony, when asked "Did you intentionally kill Linnie? Mr. Sanders repled, "No I didn't, I wouldn't kill anyone". Defense counsel Keegan then followed up."Did you kill her"? Mr. Sanders repled. "No I didn't kill my wife."

Mathis, Cardenas, and Westbrook, these cases do not stand for the general proposition that overwhelming evidence of a charged offense can foreclose submission of a lesser-included-offense. While the lesser offense must still be a valid, rational alternative to the charged offense, the analysis preceeds from an assumption that the jury believed the evidence that raises the lesser-offense, overwhelming evidence of a charged offense is highly probative of whether a defendant was actually harmed by the failure to instruct the jury on a lesser offense, but once the lesser offense is raised by the evidence,

an instruction is appropriate regardless of whether the evidence is strong, weak, unimpeached, or contradicted.

The Court of Appeals (9th Dist.) erred in concluding that other evidence of intent negated the evidence from J.C. Fleming that suggested that Mr. Sanders conduct was reckless or negligent rather than intentional or knowing. It should also be held that the Court of Apppeals erred in it's overall holdings that the evidence did not raise the lesser-included-offense of Manslaughter and Criminally Nelgligent Homicide. Manslaughter and Criminally Negligent Homicide are each lesser-included offenses of murder as plead in this case. Evidence was presented which raised the issues that Mr. Sanders did not intentionally or knowingly cause the death of Linnie Jo Sanders but acted rather reckless or negligent. The evidence presented raised the issue of Manslaughter and Criminally Negligent Homicide, and the Court of Appeals erred in ruling that the trial court properly denied Mr. Sanders request for such instructions, this determination was for his jury to make, as (the sole trier of fact). The trial court abused it's discretion when it made that decision for them. If testimony is presented during a trial that raises an issue of a lesser-included offense and a charge is properly requested, a charge on that issue [must] be given to the jury. Hall v. State, 225 S.W.3d 524,535 (Tex. Crim.App. 2007).

The elements of manslaughter are that a person recklessly causes the death of a person, Sec. 19.04(a) Tex. Pen. code. The elements of Criminally Negligence Sec. 19.05(a) Tex. Pen. Code. Manslaughter and Criminally Negligent Homicide differ the charged offense of intentionally causeing the death of an individual only in the respect of a culpable mental state. Thus, by operation of Art. 37.09(3) C.C.P. Code of Crim. Proc. and the cognate pleading approach established by the Court of Appeals in Hall, Manslaughter and Criminally Negligent

Homicide are lesser-included-offenses of murder as charged and presented to the jury in this case.

The State, as it has neglected to do, [must] look at the evidence supporting a charge on a lesser-included-offense whether produced by the State or the defendant, even if contradicted by the defendant's own testimony, anything more than a scintilla of evidence may be sufficient to entitle Mr. Sanders to a lesser-included-offense charge, the credibility of evidence and whether it is controverted or conflicts with other evidence in the case may not be considered in determining whether a defensive charge or an instruction on a lesser-included-offense should be given. When evidence from any source raises a defensive issue or raises an issue that a lesser-included-offense may have been committed, the issue [must] be submitted to the jury. It is the juries duty, under the proper instructions to determine the evidence as to whether it is credible and supports the defense of the lesser-included-offense.

The only distinction between an intentionally or knowing murder and the lesser-offense of Manslaughter and Criminally Negligent Homicide lies in the culpable mental state accompanying the homicidal act, Pitonyak v. State, 253 S.W.3d 834, 846 (Tex. App. -Austin 2008). It is the condition of the mind of the accused at the time of the offense. Texas Code of Crim. Proc, Ann. art. 38.36(a)(West 2005); Guzman v. State, 188 S.W.3d 185, 188 (Tex. Crim. App. 2006); Hayward v. state, 256 S.W.3d 476,478 (Tex.Crim.App. 2005).

Based on the evidence and testimony adduced at trial, and in light of the circumstances surrounding the discovery of the body of the victim, it cannot be said that Mr. Sanders intentionally or knowingly caused the death of his wife Linnie Jo Sanders.

REASONS FOR GRANTING THE PETITION

I.

Petitioner Sanders, contends the Ninth Appellate District Court, Cause # 09-10-00047-CR Beaumont, Texas, Erred by ruling the Trial Court of Polk County for the 411th Judicial District Court, Livingston, Texas, did not err by denying his request to instruct the jury on Manslaughter (Tex. Pen. Code §19.04(a)(b)) and Criminally Negligent Homicide (Tex. Pen. Code 19.05(a)(b)).

First and Foremost, Petitioner Sanders would like to have been concise in providing this was all a terrible accident, but it's the Court's desire that Petitioner go into great length proving his innocence. Not to be redundant, but as stated in the Statement of the Case, the Honorable Judge Cheryl Johnson, states on page #2, in the favorable dissent along with Sharon Keller, Presiding Judge and Judge Paul Womack, joining, that "Quote" It is clear that confession and avoidance are required for many, if not most, legal defenses. Cornet v. State, ___S.W.3d___(Tex.Crim.App. 2012). ("[T]his Court recently pronounced, in Jaurez v. State, that 'the doctrine of confession and avoidance does not apply to all defensive issues. ...we clarified, in Jaurez, 308 S.W.3d 398 (Tex.Crim.App. 2010), that the defensive issues the doctrine does not apply to are those that' by [their] terms, negate [] the culpable mental state' required for commission of the offense.") I have been unable to find a case that requires the same for jury instructions on lesser-included offenses. Indeed, to do so would produce an absurd result; A defendant charged with assault would have to admit to the charged offense in order to get an instruction on aggravated assault, or , as in this case, Mr Sanders would have been required to admit to murder before getting a jury instruction on manslaughter. I would hold that Mr Sanders record reveals that he was entitled to the instructions

on the lesser-included offenses and, because he was denied those instructions, is entitled to a New Trial. "Unquote". To add as shown in Mr Sanders favorable dissenting opinion in which Keller P.J. filed in which Womack and Johnson JJ joined. "Quote" We would like this opportunity to clarify our case law regarding when evidence raises a lesser-included offense, and we hold that the lesser-included offenses were raised by the evidence in Mr Sanders case. I would reverse the Judgment of the Court of Appeals and Remand this case for further proceedings, because the Court does not, I respectfully dissent. "Unquote" See: Dissenting Opinions From The Court of Criminal Appeals - Austin, Texas In Appendix.

The above forementioned dissent and statement made by Judge Johnson therein confirming she has yet to find a case that requires a defendant to admit to murder in order to receive instructions on a lesser-included offens, is relevant to my Writ of Certiorari and Rule #10 that although not controlling I must indicate reasons for the Court's consideration: (A) That a court has decided an important federal question that conflicts with a decision by a state court of last resort (the Court of Criminal Appeals), or has so far departed from the accepted and usual course of judicial proceedings; (B) state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals; (C) a state court or a United States Court of Appeals has decided an important question of federal law that has not been , but should be, settled by this court, or has decided an improtant federal question in a way that conflicts with relevant decisions of this court. With the difficulties Judge Johnson is having finding any case on point in regards to my entitlement

to the necessity instructions considering all her available resources. How am I going to find caselaw in my lay-man capacity ... to be on point may/can prove to be difficult as well.

Petitioner Sanders acknowledges and sets forth herein that the standard of review and burden of Petitioner is "plain error rule" for the U.S. District Court to considerations on the merits. U.S. v. Olano, 113 S.Ct. 1770 (1993). To further this matter, Petitioner submits additional egregious error occurred with the impropriety in the 9th District Court of Appeals (Beaumont) holding that the 411th Judicial District Court did not abuse its discretion when said court denied the defendant/applicant of the lesser-included offense defense jury instructions, and thereby subsequently affirming the trial courts judgment and sentence.

Judicial reasoning was based upon an unreasonable determination of the facts of the case, which was/is contrary to clearly established case law. Petitionr submits for purposes of plain error rule, "plain" is synonymous with "clear" or equivently, "obvious", as said error clearly was prejudicial and affected the substantial rights of the defendant/applicant.

Jury instructions ... jurors must be given instructions on all elements of a charged offense, as relevant terms in the instructions must be defined accurately. Petitioner submits the misleading statement, "in regards doesn't he have to admit that he killed her in order to be entitled to those instructions." The language of the jury instructions cannot shift the burden of proof to the defendant (to defend his innocence) the prosecution must prove the guilt of a person charged with the crime.

Francis v. Franklin, 417 U.S. 307. In Ref. to Court of Criminal Appeals

REASONS FOR GRANTING THE PETITION

of Texas PD-0849-11 (P.D.R.) Petitioner adopts his (PDR) herein for any and all purposes. (Adopted by Reference Rule 10). The Court of Appeals (Brief for Appellant at Pg. 12) held that Fleming's testimony did not demonstrate that Appellant could be guilty of only manslaughter or criminally negligent homicide because of other evidence presented in the trial concerning Appellant's intent. In review of this matter the Court of Criminal Appeals erred in applying a sufficiency analysis to support the verdict. Whereas Petitioner submits clearly that a sufficiency analysis, is/was incorrect for a just and proper determination as to whether the defendant was lawfully entitled to a defense instruction for the lesser-included offense.

See: Keller, P.J., dissenting opinion and Johson, JJ., same. In reference to and in regards to evidence presented. Petitioner submits the Court of Appeals decisions are irrational and contrary to clearly established caselaw.

See: Bell, 693 S.W.2d 442. Holding that a defendant is entitled to an instruction on a lesser-included offense if evidence from any source affirmatively raises the issue, regardless of whether the evidence is "strong, weak, unimpeached or contradicted."

In Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). (per curiam) the Cage court held that the italicized language taken as a whole rendered the instruction unconsitutional... "It is plain to us that the words "substantial" and "grave" as they are commontly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard when these statements are then considered with reference to 'moral certainty' rather than evidentiary, it becomes clear that a reasonable juror could have interpreted the instructions to allow a finding of guilt based on a degree of proof below that required by the due process clause.

REASONS FOR GRANTING THE PETITION

"In the present case the Petitioner's due process rights were trampled ... U.S.C. 5th and 14th Amendments.

PREJUDICE

Tex. App. -Austin 1999. In absence of instructions on the lesser-included offenses requested and to which the defendant is entitled leaves teh jury with the sole option either to convict the defendant of the charged offense or to acquit him, a finding of harm is essentially automatic because the jury was denied the opportunity to convict him of the lesser-included offense. Otting v. State, 8 S.W.3d 681, ref. "...finding of harm is essentially automatic". This is true because the jury, believing the accused to have committed some crime but given the option only to convict him of the greater offense, rather than acquit altogether even though it had a reasonable doubt he really committed the greater offense.

See; Id. at 571, (Citing Beck v. Alabama, 447 U.S. 625, 634, 100 S.Ct. 2382 L.Ed.2d 392 (1980).

Applicant/defendant was entitled to the lesser-included offense, jury instructions on manslaughter and criminally negligent homicide, both lesser-included offenses of murder, manslaughter and recklessly causing serious bodily injury are both second degree felonies, and carry the asme reange of penalty. Both offenses involve the same culpable mental state of "reckless" or "recklessly". See: Tex. Pen. Code §§ 9.04(b), 22.04(e)(West). Criminally negligent homicide and causing serious bodily injury by criminal negligence are both state jail felonies. See: Tex. Pen. Code Ann. §§ 19.05, 22.04(q)(West) and carry the same range of penalty. See: Tex. Pen. Code § 12.35 (West) both involve the same culpable mental state criminal negligence.

The defendant was subjected to violations of the Texas Constitution's Article 1, Section 10 and Article 1 Section 19 including the United States Constitutional Amendments U.S.C. 5th & 14th Amendments.

[Because], the trial court's abuse of discretion, not to afford the defendant/applicant the lesser-included offense, jury instructions was/is egregious error. Said error was automatic, as aforementioned in Otting, and can never be considered as harmless.

Tex. Code of Crim. Proc. Ann. Art. 36.19. Contains the standard for both fundamental error, and ordinary reversible error. As in the present case, said jury charge error was the subject of a timely objection. "[Trial Atty. Keegan properly objects, Ref. (RR Vol.5, Pgs. 227-228)].

Appellant requested in writing and orally on the record that the jury be charged, in addition to murder, manslaughter (CR 1-62)(RR 5-222) and criminally negligent homicide (CR 1-59(RR 5-222). The trial court denied both requests (RR 5-224). The jury charge that was given to the jury authorized the jury to find Appellant guilty of murder if they found that Appellant intentionally or knowingly caused the death of Linnie Jo Sanders by inflicting blunt force trauma to her body by an unknown object or causing her body to strike an unknown object. Alternatively, the charge authorized a conviction for murder if the jury found the Appellant, with the intent to cause serious bodily injury to Linnie Jo Sanders, committed an act clearly dangerous to human life, namely inflicting blunt force trauma to her or causing her body to strike an unknown object. (CR 1-67). The jury was also charged concerning the aggravated assault count of the indictment. (CR 1-71)

The Court of Appeals overruled Appellant's complaints that the trial court erred in denying Appellant's requests for jury instructions on the lesser-included offenses of manslaughter and criminally negligent homicide and affirmed

Appellant's conviction. The court of Appeals specifically held that Fleiming's testimony did not demonstrate that Appellant could be guilty of only manslaughter or criminally negligent homicide because of other evidence presented in the trial concerning Appellant's intent.

The Court of Appeals detailed other testimony by other witnesses and concluded the "[i]n light of other evidence showing that Sanders acted intentionally, the evidence does not show that, if Sanders is guilty, he is guilty only of acting recklessly or with criminal negligence. " (Emphasis Added).

The State also introduced evidence from several other witnesses concerning the observations and opinions of investigators and neighbors which are detailed in the opinion of the Court of Appeals.

If testimony is presented during a trial that raises an issue of a lesser-included offense and a charge is properly requested, a charge on the issue must be given to the jury. Ross v. State, 861 S.W.2d 870,877 (Tex. Crim. App. 1992). A two-pronged test has been established by this Court to determine whether a defendant is entitled to a charge on a lesser-included offense. Skinner v. State, 956 S.W.2d 532, 542 (Tex. Crim. App. 1997); Arevalo v. State, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997); Royster v. State, 622 S.W.2d 442. (Tex. Crim. App. 1981); Hall v. State, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007).

First, the lesser-included offense must be included within the proof necessary to establish the offense charged, and second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. Skinner, 956 S.W.2d at 543; Rousseau v. State, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993); Hall, 225 S.W.3d at 535. The Court of Appeals found that manslaughter and criminally negligent homicide differed from the charged murder only with respect to the culpable mental state and were therefore lesser-included offenses and satisfied

the first prong of the Royster/Rousseau test.

Upon considering the second prong, however, the Court of Appeals failed to follow the required analysis firmly established by this Court. In determining whether the issue of a lesser-included offense is raised, all of the evidence presented at trial must be looked at. Havard v. State, 800 S.W.2d 195, 216 (Tex. Crim. app. 1989). The credibility of the evidence and whether any testimony conflicts with or controverts other evidence may not be considered. Marras v. State, 741 S.W.2d 395, 405 (Tex. Crim. App. 1987). It is the jury's sole duty to determine whether the evidence is credible and supports a finding that a defendant is guilty of only the lesser-included offense. Hayes v. State, 729 S.W.2d 804, 809 (Tex. Crim. app. 1987). The jury is free to selectively believe testimony presented by either the State or a defendant and may accept or reject all or a part of any witness's testimony, including that of a defendant. Havard, 800 S.W.2d at 216. The Court must look at all the evidence supporting a charge on a lesser-included offense whether produced by the State or the defendant, even if contradicted by the defendant's own testimony or other evidence in the trial. Lugo v. state, 667 S.W.2d 144 (Tex. Crim. app. 1984).

"[I]t is not necessary that the testimony of the accused be that which raises the issue of manslaughter ... if the facts of the case in evidence fairly tend to indicate [manslaughter] ... it becomes the duty ot the trial court to submit manslaughter, and leave to the jury the ascertainment of whether or not such killing was the result of such cause, and whether or not such cause was adequate ... even though the accused claimed the homicide an accident." Steen v. State, 88 Tex. Cr. R. 256, 225 S.W. 529, 531 (Tex. Crim. App. 1920); Thompson v. State, 521 S.W.2d 621 (Tex. Crim. App. 1974); Lugo, 667 at 146.

The Court of Appeals held that Fleming's testimony did not demonstrate that Appellant could be guilty of only manslaughter or criminally negligent

homicide because of other evidence presented in the trial concerning Appellant's intent. The Court of Appeals detailed other testimony by other witnesses and concluded that "[i]n light of other evidence showing that Sanders acted intentionally, the evidence does not show that , if Sanders is guilty, he is guilty only of acting recklessly or with criminal negligence." Under this Court's prior decisions, the jury was free to disbelieve such "other evidence showing that Sanders acted intentionally". The Court of Appeals, however, applied a sufficiency analysis to support the verdict rather than determining whether the evidence raised a lesser-included offense under Royster/Rousseau. In doing so, the Court of Appeals decided the issue in a way that directly conflicts with the applicable decisions of this Court and has departed from the established and accepted standard of review. For the forgoing reasons this Court should grant review. For the reasons stated, it is respectfully submitted that this Honorable Court should grant this Petition, and upon consideration of the merits of this case, reverse the judgment and remand this cause to the trial court for a New Trial.

Petitioner Sanders, previously cited case laws in support of Constitutional error, Sandstrum v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d (1979). Burden is on the State, in order to support (...) Murder Charge, to prove that the defendant had the required intent. Petitioner is requesting this Court to take Judicial Notice, that the law of Sandstrum is now fixed in federal law, and a proper application of that law to the case prevents the Court from denying relief for the constitutional error of the State Court under the harmless error standard of Rose v. Clark, 478 U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460. In Rose v. Clark, 762 F.2d 1006 (6th Cir, 1985), the Sixth Circuit held that a Sandstrum error could never be harmless where the defendant contests intent.

In Pick v. Kemp, 833 F.2d 1448 (11th Cir. 1987)(instructions establishing

presumption that defendant voluntarily intended legitimate consequences of own action unconstitutionally relieved prosecution of burden of proving intent). Also see: Kemp, 832 F.2d 546; Thomas v. Kemp, 800 F.2d 1024 (11th Cir, 1986).

Petitioner's position is, that it should be undisputed that the improper jury instruction -- Ref. The Court: Doesn't he have to agree that he killed her first in order to get those? Clearly, as the Supreme Court held in Sandstrum and in Franklin, that such instructions unconsitutionally shifted the burden of persuasion form the government to the defendant on the issue of intent. Franklin, 471 U.S. @ 313, 105 S.Ct. @ 1970; In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A Sandstrum error in the jury instructions thus "remove[s] from the prosecution the burden of proving every element of the crime beyond a reasonable doubt." Davis, 752 F.2d @ 1517. Re-emphasising the Due Process Clause of the Fourteenth Amendment protects against the conviction of an accused except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, Franklin. This State court made an unreasonable determination of facts in light of evidence in determining that Petitioner Sanders was not entitled to the lesser-included offense of Involuntary Manslaughter or Negligent Homicide.

In Beck v. Alabama, 100 S.Ct. 2382. The Supreme Court outlined that "Providing the jury with the third option of conviction on a lesser-included offense," ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard. The failure to give the jury a "Third Option" inevitably enhances the risk of an unwarranted conviction. In the above mentioned Court, the Supreme Court reversed judgment in the Beck v. Alabama, case and also ruled that lesser-included instruction must be provided. The nearly universal acceptance of the rule in both State and Federal Courts establishes the value to the defendant of this procedural safeguard. Also in Reed v. Quarterman, 504 F.3d

465 (5th Cir. 2007), the court was required to instruct on lesser-included offenses.

Petitioner Sanders refers to Hall v. State, 225 S.W.3d 524, for the (Hall 2 prong test) which was outlined as the standard, a defendant is entitled to a charge on a lesser-included offense if:

1) The offense is a lesser-included offense of the alleged offense; and,

2) some evidence is adduced at trial to support an instruction.

However, the Hall test was not conducted, the jury was denied it's job in Petitioner's case of applying the proper charge according to evidence presented at trial as a trier of facts, which also denied Petitioner the full benefit of the Hall Standard and the Reasonable Doubt Standard outlined in Beck v. Alabama and in Reed v. Quarterman.

Petitioner Sanders has established that reversible error occured and to rule against that ruling is contrary to Supreme Court precedent. Which is also a violation of the Fourth Amendment of the United States Constitution, and the Amendments which it secures under due process.

In the under cited case, Ward v. Sterness, 334 F.3d 696 adressed the subject of unreasonable . This Court stated, that unreasonableness also serves as the touchstone against which State decision's based on determination's of facts in light of evidence presented are evaluated. 28 U.S.C. 2254(d)(2). A state courts decision that rests upon a determination of fact that lies against clear weight of evidence is by definition a decision "So inadequately supported by the record" as to be arbitrary and therefore objectively unreasonable.

A state court decision is "contrary" to established Federal Law if the state court confronts facts that are "materially indistinquishable" from a relevant Supreme Court Precedent, yet reaches an opposite result. (Quoting):

(Terry) Williams v. Taylor, 529 U.S. at 405-406.

Did the Trial Courts decision to deny instruction on lesser-included offense deny Petitioner the full benefit of reasonable doubt standard as outlined in Beck Supra under due process, moreso was the courts decision to deny the instruction on the lesser-included offense contrary to the reasonable doubt standard outlined in Beck v. Alabama, also contrary to what the Fourteenth Amendment of the United States Constitution and the amendments it secures as well as contrary to the (2-prong test) in Hall v. State. Petitioner believes so...

Furthermore Petitioner has met burden of proof. Relief should be granted and claim should not be dismissed...

II. Petitioner Sanders contends the omitted Jury Instructions and the Fifth Circuit's Finding of no prejudice, and the Fifth Circuits reliance on the State Courts along with Federal Courts statements and findings, significantly misstated even the slanted version of the facts.

The Fifth Circuit erred in deferring to the State's Courts and Federal Court's findings that Petitioner Sanders was not entitled to a lesser-included offense Jury Instruction and inorder to receive such instructions he must first admit to "Murder" to recieve them.

In so arguing the Fifth Circuit fails to apprehend the distinction between a logical inference from testimonial evidence and mere speculation. Even J.C. Fleming's testimony clearly show no intent, no malice, aforethought, and also show accidental.

In Jackson, Applying the standard it is vital that the courts understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that

that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. Texas Penal Code Ann. §2.05. In contrast, an inference is a cunclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficently based on facts or evidence to support a finding beyond a reasonable douby. The trier of fact is permitted to draw multiple reasonable inferences from the evidence (direct or circumstancial) but they are not permitted to draw conclusions based on speculation.

Furthermore, the Fifth Circuit attempts to defend the verdict in the only way they can by improperly stating jury instruction requirements. In Mr. Sanders case the Fifth Circuit predicates its entire theory upon assumptions during trial that are not logically supported by the evidence it produced at trial. Many of the assumptions it posited to the jury are physically impossible; others are patently refuted by other evidence also introduced by the State, still others require such a suspension of disbelief that no rational trier of fact would have accepted them on their face. See: Gross v. State, 380 S.W.3d 181; Hooper v. State, 214 S.W.3d 9. Mr. Sanders argument is that this court cannot conclude that not including the lesser-included offense instructions was harmless, and not prejudicial. The Prosecutor shifted the burden of proof onto the accused.

The State, rather than Mr. Sanders is guilty of a "divide and conquer" approach to the evidence on review. Sanders has meticulously demonstrated how virtually all of the State's evidence 1) does not establish guilt; and 2) requires the jury to particpate in speculation. This is not a wall built of many inidvidual bricks, as prosecutors are want to say, but rather a Ponzi Scheme of speculative facts, where each conclusion supporting the State's case must rob Peter to

pay Paul.

If you construct the foundation of your fortress on a swamp, it matters little how beautifully the flying buttresses and stainded glass windows are constructed; the whole project still will sink into the swamp. In Sanders case the State's foundation was its states witness, J.C. Fleming and Sanders sister Debra Sanders testimony, both witnesses having motives to testify. While the State occupied itself with trying to sell this lemon of a case to the jury, it utterly ignored other testimonial evidence from Sanders neighbors and that there was just no motive, means, to suport killing his wife.

It glosses over the facts Mr. Sanders wife was highly intoxicated under the influence of very potent drugs and Medical Examiners statement that the majority of the wounds, bruises appear to be those which he see's more frequently in a intoxicated, drug induced individual, falling and hurting themselves. And to include what appears to be burns already in their healing stages days to weeks old. (Lips and Fingers).

A substantial right is violated whenever an error had a substantial and injurious effect or influence on the jury's verdict. Reyes v. State, 69 S.W.3d 725. Even if this is unsure whether or not the error had such an effect, it should nevertheless treat the error as harmful. Citing Webb v. State, 36 S.W.3d 164.

The utter paucity of any direct or circumstantial evidence proving Sanders was guilty made the use of these character assassinations essential for the State and devastating to the defense. Sanders respectfully submits that, no matter how remote or slight these pieces of evidence may appear, they are directly responsible for his conviction. All evidence was simply to weak to convict Sanders without bias and motive seeking State's witness, the State would and did not have any evidence to convict Sanders, and it cannot be determined that the perjured testimony from these two motivated witnesses did not contribute

to the verdict. Mr. Sanders was convicted due to these two witnesses and because one stated (sister) that the deceased was leaving Mr. Sanders, which was a lie. And most certainly no one walks away from a supposed breakup without a negative story or two getting passed between friends and confidants. Most tragically, Mr. Sanders was irrationally convicted despite the absence of any evidence to support his conviction.

Disgustingly, Mr. Sanders was convicted on pseudo-science that he had no expert witnesses on his side to rebut, and convicted on perjured testimony. This is not simply a tragedy for Mr. Sanders, however it is a tragedy for this State and for everyone the law claims to protect. No one that reads this record can confidently say Mr. Sanders meant to kill his wife. No one who reads this record can confidently say that the Justice System protects the accused from convictions absent proof beyond a reasonable doubt. This HOnorable Court uniquely has the power and authority to fix this legal catastrophe. It should render an acquittal for Sanders, in the alternative it should at least allow him a New Trial.

Here in Brown v. State of Texas, 955 S.W.2d 276,

The Fourteenth Court of Appeals - Fort Bend Texas, reversed Brown's conviction and sentence for murder under Tex. Pen. Code §19.02 and requested that the Court establish a Bright Line Rule regarding the necessity of a voluntary conduct instruction in a jury charge. Appellant's Murder conviction was properly reversed where evidence raised the issue that appellant's conduct was not voluntary, Appellant requested a jury instruction regarding the voluntariness of his act, and the trial court denied his request.

The Court of Appeals reversed appellant's conviction holding that the denial of appellant's requested instruction on the voluntariness of his act was reversible error as appellant's testimony alone was sufficient to raise the defensive theory

requiring the charge. The State requested that the court create a Bright Line Rule regarding the necessity of a voluntary conduct instruction arguing that voluntariness was a part of the statutory requirement that Murder be committed intentionally and knowingly and that Tex. Pen. Code Ann. §6.01(a) already require voluntariness. The Court affirmed the judgment holding that the Court of Appeals properly reversed the trial court, as the admitted evidence in appellant's trial raised the issue of the conduct of appellant not being voluntary and a jury instruction was therefore required. The court affirmed the judgment holding the Court of Appeals properly reversed appellant's murder conviction as the trial court erred in denying appellant's request for an affirmative defense juror instruction regarding the voluntariness of his actions.

A defendant is entitled to an affirmative defensive instruction on every issue raised by the evidence regardless of whether it is strong, feeble, unimpeached or contradicted and even if the trial court is of the opinion that the testimony is not entitled to belief. The defendant's testimony alone may be sufficient to raise a defensive theory requiring a charge. See; Affirmative Defense: My theory in my instant case is that it was simply all accidental and my testimony along with J.C. Flemings testimony proved it. Also, Dr. Hines, Medical Examiner for the State made several comments indicating accidental death.

In determining whether any defensive charge should be given the credibility of evidence or whether it is controverted or conflicts with other evidence in the case may not be considered. When a defensive theory is raised by evidence from any source and a charge is properly requested, it must be submitted to the jury. This rule is designed to insure that the jury, not the judge, will decide the relative credibility of the evidence. When a judge refuses to give an instruction on a defensive theory issue because the evidence supporting it is weak or unbelievable, he effectively substitutes his judgment on the weight of the evidence for that of the jury. The weight of the evidence in support of an instruction is immaterial.

My defensive theory is it was accidental...

If the issue of voluntariness is raised by the evidence, a jury may be charged that a defendant should be acquitted if there is reasonable doubt as to where he voluntarily engaged in the conduct of which he is accused. The issue of the voluntariness of one's conduct or bodily movements is separate from the issue of one's mental state.

Tx Pen.Code Ann. §6.01(a) states that a person commits an offense only if he engages in voluntary conduct, including an act, an omission, or possession. Only if the evidence raises reasonable doubt that the defendant voluntarily engaged in the conduct charged should the jury be instructed to acquit. Voluntariness within the meaning of §6.01(a) refers only to one's physical bodily movements.

While the defense of accident is no longer present in the Texas Penal Code Homicide that is not the result of voluntary conduct is not to be criminally punished. The Court of Appeals relying on: George v. State, 681 S.W.2d 43 (Tex. Crim. App. 1980). In Simpkins v. State, 590 S.W.2d 129 (Tex. Crim.App.); Court of Appeals stated that because the "issue of accident", or involuntary conduct was raised by the evidence in Simpkins, the defense properly requested and obtained an instruction on involuntary conduct. Brown, 906 S.W.2d @ 568. Absent in my trial court's charge to the jury was any mention of voluntary conduct on the part of the actor.

I requested a jury charge, denied by the trial court, that included a required finding of voluntariness, specifically an instruction on an involuntary act.

As stated, even testimony raised by J.C. Fleming "Jailhouse Snitch", in which I totally deny ever talking to him nor around him about my case, shows it was all a terrible accident. I had no Motive or Intention to hurt my wife, especially to cause her death.

Once again, the State had no evidence, no witnesses, and chose their three legged pony to ride, knowing you can't trust a three legged pony. His Motive,

"Freedom". The other witness, my sister's Motive, "$83,000 thousand dollar lawsuit I had against her, which subsequently upon my imprisonment was dropped by my wife's mother (guardian).

Using these two three legged ponies, both with motives, to assist the state, the defense most certainly diverted the jury of the main road to truth. They, the State, didn't want the jury to stay on the main road because they knew where it would have taken them. Their only attempt was to send the jury through false testimony, of both the "Jailhouse Snitch" and my "Sister", down a side road. Rabbit trails that would lead them to a dead-end, where the truth didn't exist.

Even testimony by the State's Medical Examiner Dr. Merrill Hines, not only State's witness, J.C. Fleming's shows accidental findings:

Dr. Merrill Hines, Medical Examiner (State's Expert Witness) testimony:

Petitioner submits Med. exam. Hine's testimony is reflected in the colloguial of the reporter's records, and is contrary to respondents response of August 27, 2014. Medical Examiner Hines States:

I opened the skull and examined the brain and noticed a relatively small area of subdural hemorrhage, which is typically associated with head injuries or blows to the head. This indicates that blows to the head did not significantly contribute to her death.

Vol.4, pg.45, Line 4: I noticed a fracture to the spinal cord. This injury is caused by blunt force injury not so much caused by a blow to that area, but by the body being bent backwards, something you might see in car wrecks.

Vol.4, pg.47, Line 1: Had this lady had prior neck surgery? Yes, she had I saw evidence of a spinal fusion, and fixation of the neck spine.

Line 5: Did she have a metal plate of some sort placed in that area of the neck?

Line 7: Yes, she did. The metal plate was placed immediately above the fracture point.

Line 12: The results of her having the metal plate in her neck tells me it would take less force than normal to break agains. Her fused neck wouldn't flex like

a normal persons neck would. In fact less force than I expected was required to cause her injury.

Line 21: The force involved here were less than these extreme examples of falling off a cliff, balcony or getting in a car wreck.

Vol.4, pg.48, Line 5: (Question by Hon: Prosecutor): Hypothetically speaking can you envision any scenerio where the magnitude of that neck injury might be, I guess caused by this lady accidentally falling in a single story house, where she might be stumbling around?

Vol.4, pg.48, Line 9: Hines Replies: You know I think alot of things are possible. And if I was to see a video tape scenerio where she was running at full speed and triped on something and struck her chin on the corner of an object. Again running at full tilt I suppose that could cause this sort of injury it would be sort of the perfect storm.

Petitioner submits his statements: 'She was running thru house, a piece of tile come up, she slipped and landed on her head sideways and hit so hard it almost put her back on her feet again.

Vol.4, pg.48, Line 21: (Med. exam. Hines): And certainly some of these injuries do appear consistent with an intoxicated individual particularly injuries to elbow & knees.

Line 23: These injuries we see quite commonly on alcoholics and drug abusers that stagger about and bump into objects, and possibly even some of the injuries to the face and head.

Vol.4, pg.52, Line 16: (Hines): The liver lacerations may have been caused by compression of the chest. Injuries to the liver are commonly found in CPR being administered. (Q. Hon): How often do you see this type of injury by one administering CPR?

Vol.4, pg.53, Line 3: (Hines replies): More often than you think especially when a individual is not trained in CPR.

Statements reflected in sheriff's report and during the course of the criminal trial, Petitioner attempted CPR.

Vol.4, pg.57, Line 3 (Q. Hon): What were the toxicologist results concerning the presence of drugs?

Line 5: (A. Hines): Her blood did contain significant concentrations of the drugs "Corsoprodol" also known as "Soma", "Hydrocodone" which is an opiate type drug found in Vicodin.

Line 14: (Q. Hon): And to what degree if any did these drugs influence your ultimate opinion as to cause and manner of her death?

Line 7, pg.5: Hines): I believe she was under the influence of these drugs, was likely impaired or intoxicated by these drugs.

Line 4: (Q. Hon): Can these drugs cause people to become unsteady on their feet?

Line 5: (A. Hines): Yes.

Line 9: (Q. Bon): How do people injure themselves when they become disoriented or fall?

Line 11: (A. Hines): When they run into stationary objects such as furniture and injure themselves.

Line 13: (Hines): These injuries could result by falling and striking the ground with various parts of the body, including the head.

Line 16: (Hines): Those impacts could lead to abrasions and contusions of the head and in some instances bleeding around the brain, and in some cases individuals could fall and strike their head in such a way as to cause injury to the spine as well.

Line 20: (Hines): They could certainly to an extent fracture their spine.

Vol.4, pg.65, Lines 5-7): (Q. Hon): Mr. Hines do you know the legal definition of serious bodily injury? (A. Hines): I do not.

Vol.4, pg.70, Lines 17-21):(Hines): Between these two fingers we see what could represent either a healing injury possibly a burn of some sort a post-mortem

injury. It could have occurred after death or days to weeks before death.

Vol.4, pg.71 (Hines): My first impression when I saw these injures, that these injuries were caused by a lit cigarette again days to a week or so before death, in an intoxicated state.

Line 15: (Hines): People who smoke and are very under the influence of sedatives or these types of pain killers will some instances nod off while the cigarette is intheir hands and receive a burn very similar to this, in fact a lot of house fires are caused this way.

Mr. Sanders stated bed was burnt, her lips, fingers and hair. As forementioned the testing of the hair samples as to whether the hair was pulled and/or burnt, said results were not available at the time of the trial.

Line 3: (Hines): Yes, see pictures here of her elbows, this is something I see more & more as injuries sustained by somebody under the influence of drugs.

Vol.4, pg.79, Line 25: (Hines): This orthopedic hardware located in her neck.

Line 4: (Q. Hon): Is this injury frequently caused by car wrecks?

(A. Hines): Yes, a whiplash effect:

(Hines): Many of these photos of abrasions and contusions have the appearance typically found again caused by intoxicated individuals bumping into walls and falling down.

Vol.4, pg.89, Lines 2-4): (A. Hines): I don't see any evidence that the victim was grasped around the neck or stragled, no evidence of that here.

Vol.4, pg.95, Lines 1-4): (Q. Hon): It's possible that these injuries could have been caused accidentally and self inflicted?

(A. Hines): Yes, I think that's possible.

Vol.5, pg.175, Lines 21-23): (Hon Questions Sanders): Do you feel you've done anything wrong in this case?

Line 23: (Sanders A.) Yes, sir I do.

Pg. 176, Line 3: (Sanders): I've always said that I could have fallen on her,

I could have hurt her.

Line 14: (Def. Atty. Q. Hines): I understand you say it would take less pressure since her operation to break her spinal cord?

Line 18: (A. Hines): Yes.

Line 19: (Q. Defense): Would a typical person be aware it would take less pressure to break her neck?

Line 24: (A. Hines): I don't think so.

J.C. Fleming states I told him I lit cigarettes and put in her fingers.

Line 16: (Defense): Do you think the finger burns were post-mortem or before death?

Line 18: (A. Hines): I can't tell either they were well before she died and were healing.

The end of Merrill Hines, Medical Examiners testimony.

Lesser Included Offense, (Defense Instructions)

Defendants testimony alone is sufficient to raise defensive issue requiring instruction in jury charge, particularly where defendant makes proper and timely for such charge. Hayes v. State, 728 S.W.2d 804 (Tex.Crim.App. 1987). Petitioner submits his testimony is reflected in the Reporter's Records. (Del Sanders): I see her fall running to the door to let me in.

Also see: Accepting Responsibility

(RR Vol.5, Pg.175, Lines 21-23): (Hon Q. Sanders): Do you feel you've done anything wrong in this case?

Line 23: (Sanders/Defendant): Yes, sir I do.

Pg.176, Line 3: (Sanders): I've always said that I could have fallen on her. I could have hurt her, throwing her in bed, I could have hurt her.

Trial Judge has an obligation to give proper instructions, however, primary responsibility to request such instruction remains with counsel, if no instruction is requested a conviction will only be reversed if the reviewing court finds plain error. U.S. v. Gonzales, 548 F.2d 1185 (C.A. 5 (Tex.) 1977).

The State requested murder and aggravated assault instructions. Defense counsel Keegan requested negligent homicide and manslughter as lesser-included offenses. The Court denied counsel's request because the law, accoring to the court and prosecutor, required the petitioner to admit to the murder offense to receive the lessers. Counsel objected, (Vol.5, Pg. 222-4).

Prosecutor:

"Judge, I would tend to agree with the court on the status of the evidence in this case. I don't think there is any unequivical admission on the defendant's part that he caused the death of Linnie Sanders that would warrant giving a manslaughter instruction..." (Vol.5, Pg. 222).

Defense Counsel:

"That's not manslaughter. A person commits an offense if he recklessly causes the death of an individual. There is no requirement that he say "I KILLED THE INDIVIDUAL". You have to request it. He did testify to what constituted negligence. The same thing with the --and the ---I'm sorry. The prime example is I said homicide. He also said homicide in Texas includes vigilence -- Criminal negligent homicide. We have evidence from both of these from Del Ray Sanders testimony. Other than that, we've got the other people that said what he said too. I see he has got these..."

The Court:

"I've got it. I'm writing on these denied. That way you will have a record of them."

Prosecutor:

"Judge...while he certainly indicated that he may have done different things to cause her injury, you know, here again, I think he has conceeded that he killed her."

Defense Counsel:

"In response. I am unaware of any requirement that he agree that he killed her for either of these -- to get instruction."

Trial Court:

"I'm going to deny your request for a lesser-included instruction.

(RR Vol.5, Pg.224).

The Assistant Medical Examiner concluded that Ms. Sanders died as a result of blunt-force trauma injuries and the associated hemorrhage and spinal cord trauma that it was a homicide "Yes" However, a significant possiblity exists that fatal injury may have been sustained, when falling from running at an accelerated speed, see: Slips, trips and falls and/or due to being passed out or in a comatosed state, when falling striking her head upon the family coffee table (which may have severed her neck) and in turn could have caused the blunt force and the spinal cord trauma.

Assistant Medical Examiner, Merrill Hines III, acknowledged that the fact that Mrs. Sanders had a plate in her neck meant that a significant amount of less pressure was required to cause the injury that he observed. He explained (what the presence of the plate and the effects of that operation tells me is that the injures she sustained, this extreme injury normally seen in very severe blunt-force-trauma such as car wrecks, falls from height things like that could occur with significantly less force, so the fused neck would not flex like a normal persons neck would, in fact would act as a lever which indicates to me that less force than I would have expected for that sort of injury was required. Which is to say that the mere accidental falling forward w/accelerated speed and hitting the head on the coffee table could have caused wifes death. Mr. Sanders testified that wife was passed out and he believed that she just needed to sleep it off (when the possibility existed that Mrs. Sanders may have already pass

passed at this point with Mr. Sanders unaware of this knowing could plausibly explain why he was able to move and or throw wifes body around manipulating her without any resistance from her, whereas in his thinking she was (only passed out) an assessment made from his past experiences with his wife and their history of abuse of prescription medication.

The Assistant Medical Examiner Hines also testified that intoxicated individuals rarely injure themselves severely and it was extremely unlikely that she caused her own injuries by falling, rather her injuries were consistant with being thrown, forcibly pushed or accelerated.(This testimony establishes recklessness and is sufficient to warrant instructions of the lesser-included-offense of manslaughter and criminally negligent homicide (the examiner previously stated)), did not conclude whether this occurred before or after death. Further stating some of the injuries were consistent with being grabbed or moved, as some were consistent with those sustained by intoxicated individuals.

When asked and to what degree if any did the presence of Corisoprodol or Hydrocodone influence your ultimate opinion as to the cause and manner and means of death? Dr. Hines responded: I believe she was under the influence of these drugs, was likely impaired or intoxicated by these drugs (Vol.4, Pg.57:7). When asked sometimes people under the influence of these drugs become disorientated is that accurate? Dr. Hines responded, "Yes" (Vol.4, pg.58:3)(and line 13)... the contact may result in the individual falling and striking the head. (Lines 16-20) those impacts could lead to abrasions and contusions of the head and in some instances bleeding around the brain, and in some cases an individual could fall and strike their head in such a way as to cause some injury to the spine as well they could certainly to an extent fracture their spine.
(Q. Hon - to Hines): "her hair being pulled out, is that something that happens from falling?
(A. hines): I suppose if somebody fell while being held by the hair, that could

explain those injures.

Mr. Sanders made statements to law enforcement agents that appear to be consistent with his possessing a less culpable mental state then required for murder. To hold that the intentional nature of the conduct implicated murder one would further have to argue that the type of intentional conduct involved was the intent to kill (though a knowingly intentional killing would have also sufficed) and/or the intent to inflict serious bodily injury, even if one concluded that such conduct described an intent to inflict bodily injury this sort of intent would also be consistent with the lesser offenses of manslaughter, criminally negligent homicide and aggravated assault.

While talking to his cellmate J.C. Fleming in Polk County Jail, Sanders confessed to being angry because she had taken all the pills. Mr. Sanders told J.C. Fleming that he threw her on the couch and her head hit the table. He also stated he then picked her up and fell thru the wall with her and that there were splinters in her head as a result. After falling thru the wall he threw her into bed.

On cross-examination Fleming clarified that Mr. Sanders did not fall thru the wall. In a recorded telephone conversation placed from jail Mr. Sanders remarked that he "chunked her around a lot." The testimony of Fleming is more than a scintilla of evidence which raised the issue that of both manslaughter and criminally negligent homicide. J.C. Fleming testified that Sanders told him he intended to set her on couch and in the process of doing so she fell forward and hit her head on the table.

The jury that convicted and sentenced Sanders could have believed that either of these events could have caused the fatal injury to her spinal cord. In that event the jury could have reasonably found that Sanders did not intentionally or knowingly cause the death of his wife but rather was either reckless or criminally negligent when he threw her on the sofa or stumbled when taking her to bed.

The Texas Court of Appeals has since Royster v. State, 622 S.w.2d 442 (Tex.

Crim. App. 1981), consistantly held that a two-prong test is to be met before a jury charge on a lesser-included offense must be given: First, the lesser included offense must be included within the proof necessary to establish the offense charged; and,

Second, some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser offense. Aguilar v. State, 682 S.W.2d 556, 558 (Tex. Crim.App. 1985).

In applying the second prong of the Royster test, the trial court's determination as to whether there is some evidence that raises an issue of a lesser included offense is distinct from the jurys ultimate determination as to whether the defendant is guilty only of the lessder offense and not the greater offense. Lugo v. State, 667 s.W.2d 144, 146 (Tex. Crim. App. 1984).

These separate considerations were delineated in Bell v. State, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985), if evidence from any source raises the issue of a lesser included offense, the charge must be given...it is ...well recognized that a defendant is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the defendant and whether it be strong, weak, unimpeached, or contradicted. It is then the jury's duty, under the proper instructions, to determine whether the evidence is credible and supports the lesser included offense.

U.S. v. Gaudin, 515 U.S. 506, 511 (1995), -- Under the Sixth Amendment of the Federal Constitution a criminal defendant is entitled to have a jury find him guilty of every element of the offense and of every offense so charged within the charging instrument, impacting upon the length of the sentence. Harrington v. Richter, 131 S.Ct. 770 (2011); Cullen v. Pinholster, 131 S.Ct. 1388 (2011)

showing that each hypothetical argument was so bogus that no fair-minded judge could possibly have found it consistent with established U.S. Supreme

Court authority.

Habeas petitioner was entitled to relief because his federal constitutional due process right was violated by the jury instruction given at his murder trial, as they permitted the jury to convict him of first-degree murder without finding separately all three elements of that crime: Willfulness, deliberation, and premeditation.

The Court held that the same jury instruction on premeditation that the inmate was challenging was Constitutionally defective and the Nevada Court's failure to correct the error was contrary to clearly established federal law, as determined by the U.S. Supreme Court.

The court found that the instruction infected the entire trial so that the conviction of the inmate violated due process.

The error was prejudicial as it went to the very heart of the case.

The issue to a jury instruction is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. The instruction must be considered in the context of the instructions as a whole and the trial record.

(2008) 549 F.3d 1191 Chambers v. McDaniel, U.S. App. LEXIS 24756

CAUSATION

The trial judge's rulings for denial of defense instructions permitted the jury in its fact findings process to disregard my claim to a lesser-included instruction that petitioner's actions weren't knowingly and intentionally and did not cause the death of my wife, and thus violated my Constitutional Rights to have every element of the crime I was charged with proven beyond a reasonable doubt.

The jury charge did not define or explain the issue of causation, §125.25(2). Petitioner Sanders contends the question of causation was/is a pivotal issue at trial and the judges failure to instruct the jury on this issue, allowed

the jury to convict without finding that every element of the crime had been proven beyond a reasonable doubt.

Petitioner submits this denial of said instruction also lessened the prosecutions burden on the element of intent...to state that the prosecutions comments in regards to (Prosecutor Hon) statement, "Judge while he certainly indicated that he may have done different things to cause her injuries, you know here again, I think he has conceded that he killed her." Said comments were unwarranted and highly prejudicial. First, issue of law and fact, the burden of intent is the prosecutions burden of proof for the higher degree offense of first degree murder. A prosecutors statement regarding law [must] be confined to what is set forth in the instruction, and [must] not mislead the jury. United States v. Berry, 627 F.2d 193, 200 (1980).

The presumption that the jury followed the trial judges final instructions to totally disregard, lesser-included offenses defense instructions, created a judicial charge error.

Texas Code of Criminal Procedure Ann. Art. 36.19, contains the standards for both fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection. Alamanza v. State, 681 S.W.3d 157 (1985).

Petitioner/Defendant's Trial Attorney Keegan, properly objected. Malik v. State, 953 S.W.2d 234 (1997).

> "...reversal is required if the error is calculated to injure the rights of the defendant, which means no more than that there must be some harm to the accused from the error."

Petitioner submits, that the reviewing courts cannot determine that the error complained of made no contribution to the conviction or the punishment that was assessed.

Said rule has been applied in a variety of contexts, it has been specifically applied to the denial of state and federal constitutional rights.

III. Did The Fifth Circuit Misapply The Requirements On The Lesser Included Jury Instructions.

Although the Fifth Circuits ruling was a single sentence ruling, Petitioner will cite Sandstrum v. Montana, 442 U.S. 510, 61 L.Ed.2d, 39 S.Ct. 2450. Jury instructions in criminal cases involving issues of intent, that law presumes a person intends the ordinary consequences of his voluntary acts, held violation of Fourteenth Amendment due process. Sandstrum, admitted killing the victim but argued that he did not do so purposely or knowingly and therefore not guilty of deliberate homicide but a lesser crime. As in Petitioner Sanders case, he also admitted he could have caused the death of his wife but it too was not intended. On certiorari the U.S. Supreme Court reversed and remanded, in a opinion by Brennan, J. expressing the unanimous view of the court, it was held that the jury instruction was unconstitutional as violating every element of a criminal offense beyond a reasonable doubt, since the jury might have interpreted the presumption in the instruction as a conclusive presumption, which would conflict with the overriding presumption of innocence which is endowed upon an accused by law and extends to every element of a crime, and which would invade the fact finding function assigned to the jury, and since the jury might have interpreted the presumption as being one shifting, impermissibly, the burden of persuasion to the defendant to prove that he lacked the requisite mental state. Rehnquist, J., Joined Burger Ch.J. concurring expressed the view that despite continued doubts as to whether the particular jury in the case at bar was so attentively attuned to the trial court's instruction that it divined the difference recognized by lawyers between "infer" and "presume" deference would be given to the judgment of the majority of the U.S. Supreme

Court that such difference in meaning could have been critical in its effect on the jury. Verdicts may not be directed against defendants in criminal cases.

IV. Is The Fifth Circuit Decision In Conflict With Other Circuits?

As stated in Sandstrum v. Montana, the 9th Circuit, it shows yes the decision is in conflict and the United States Supreme Court is to decide what effects a instruction has on a jury. Sandstrum v. Montana, was reversed and remanded.

Mr. Justice Brennan delivered the opinion of the Court:

> Both federal and state court's have held, under a variety of rationales, that the giving of an instruction similar to that challenged in Petitioner Sanders case is fatal to the validity of a criminal case and a certiorari should be granted. Due to the conflicting decisions within other circuit courts.

Petitioner chooses not to go into great length with other issues and grounds presented to this Honorable Court and prays his quest for justice, and this court will see this was all a terrible accident, will be noticed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Del Ray Sanders

Date: July 3, 2018