Lesser Included Offenses Cheat Sheet

1. 3 Tests
    a. Abstract Elements Approach
    b. Charging Instrument Approach
    c. Factual/Evidence Approach
2. Illinois Uses Charging Instrument Approach
    a. 2 Step Process
        i. Step 1 – Determine if offense is a lesser included offense
            1. Does the description of the greater offense contain a main outline of the lesser included offense?
            2. Or, can the lesser included offense be "read in" to the original charge
        ii. Step 2 – Does the lesser included offense fit within the facts of a particular case
            1. Look at evidence of trial to determine whether evidence rationally supports conviction of lesser included offense
    b. Give instruction based on "very slight evidence" – People v. Jones, 175 Ill.2d 126
3. Lesser included offense can be an offense with a different mental state
    a. Involuntary Manslaughter is lesser of First Degree Murder – People v. Lengyel, 2015 IL App (1st) 131022
    b. Reckless Conduct is lesser of Aggravated Battery – People v. Willet, 2015 IL App (4th) 103702
    c. Some Factors for Recklessness:
        i. Disparity in Size
        ii. Brutality and Duration of Beating
        iii. Severity of Victim's Injuries
        iv. Presence of Weapon
4. Who can submit a lesser included offense?
    a. The Judge – Court does not have to give the instruction just because it could have been given – People v. Garcia, 188 Ill.2d 265
    b. The Prosecutor – People v. Knaff, 196 Ill.2d 460
    c. The Appellate Court – IL Supreme Court Rule 615(b)(3)
        i. Can reduce charge to an uncharged lesser – People v. Williams, 267 Ill.App.3d 870
    d. The Defendant – People v. Brocksmith, 162 Ill.2d 224
    e. BUT NOT THE DEFENSE ATTORNEY – Look at People v. Carter, 208 Il.2d 309
5. If Lesser calls for an enhanced sentence based on a prior conviction, then defendant is sentenced to the higher class as long as prior conviction is proved up…don't get the benefit of avoiding the enhanced sentence just because it is a lesser – People v. Robinson, 374 Ill.App.3d 949
6. One-Act One-Crime
    a. Test is Abstract Elements Approach
    b. People v. Miller, 238 Ill.2d 161

c. Home Invasion with a dangerous weapon, other than a firearm, not a lesser of Home Invasion with a firearm – People v. Booker, 2015 IL App (1st) 131872 – vacated conviction completely (others remained)
d. Same with Aggravated Vehicular Hijacking and Armed Robbery with a dangerous weapon, other than a firearm, not a lesser of the charged offenses with a firearm – People v. Clark, 2016 IL 118845 – Ct reduced to Vehicular Hijacking and Robbery

7. Second Degree Murder – Not technically a lesser included offense
    a. A lesser mitigated offense – People v. Jeffries, 164 Ill.2d 104
    b. Guilty of First Degree Murder then Defendant must prove the mitigating factor by a preponderance of the evidence
    c. 2 Mitigating Factors
        i. Sudden and intense passion resulting from serious provocation
        ii. Defendant believes circumstances to be such that, if they existed, would justify the killing, but the belief is unreasonable – "imperfect self-defense"
    d. 4 Categories of Serious Provocation
        i. Substantial Physical Injury or Assault
        ii. Mutual Combat or Quarrel
            1. Mere words not enough to constitute mutual combat
            2. not a fight where someone is acting in self-defense
        iii. Illegal Arrest
        iv. Adultery of Offender's Spouse
            1. Reporting not enough, seeing texts and photos not enough
            2. Generally limited to instances where parties are caught in the act and the killing immediately follows discovery
    e. Unreasonable Belief – Imperfect Self Defense
        i. Intoxication can contribute to defendant's unreasonable belief – People v. Mocaby, 194 Ill.App.3d 441
        ii. Can look at any history between defendant and victim
        iii. Did defendant think victim was armed?
        iv. Defendant uses a weapon, but victim unarmed – can still be 2nd Degree
    f. Second Degree Murder is NOT a lesser included offense of Felony Murder
        i. People v. O'Neal, 2016 IL App (1st) 132284 – State cannot get a felony murder conviction when predicate forcible felony is based on the same act that constituted second degree murder
        ii. Not a defense of felony murder to be provoked
        iii. Same applies to involuntary manslaughter – not a lesser of felony murder