IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65856



# RESPONDENT'S ANSWERING BRIEF

**Appeal From Judgment of Conviction**
**Eighth Judicial District Court, Clark County**

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## STATEMENT OF THE ISSUE

1. In Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966),[1] this Court discussed when a lesser included instruction is required sua sponte. Considering this precedent, the doctrine of *stare decisis*, and the fact that Nevada is in the minority of jurisdictions that require sua sponte instructions, discuss whether this Court should reconsider Lisby, and if so, to what extent. For the purposes of this question, assume that Lisby requires a sua sponte lesser included offense instruction in this case.

## STATEMENT OF THE CASE

On June 27, 2013, the State charged Appellant James Daevon Manning ("Manning") by way of Information as follows: Count 1 – Robbery, Victim 60 Years

[1] Discussion of this case appears extensively throughout this Answering Brief. For the sake of readability, the State will not provide citation to the case in its Answering Brief unless directly citing to a portion of the opinion.

of Age or Older (Category B Felony - NRS 193.167, 200.380); Count 2 – Battery with the Intent to Commit a Crime (Category B Felony - NRS 200.400).

Manning's jury trial commenced on January 13, 2014. He was found not guilty on Count 1, but was found guilty of Count 2. 1 AA 131. On May 13, 2014, Manning was sentenced to a maximum term of imprisonment of 60 months, with a minimum parole eligibility of 24 months. 1 AA 143-44. The Judgment of Conviction was filed on May 15, 2014. 1 AA 143-44.

Manning filed a Notice of Appeal on June 11, 2014. 1 AA 145-46. He filed his Fast Track Statement on February 20, 2015. The State filed its Fast Track Response on March 12, 2015. Manning filed a Reply on March 19, 2015. On November 11, 2015, the Court directed full briefing on the above issue.

On January 5, 2016, Manning filed his Opening Brief. The State's Answering Brief follows.

## STATEMENT OF THE FACTS

At approximately 4:00 pm, on March 29, 2013, Thor Berg boarded a bus traveling from Sunset Station to Sam's Town. 2 AA 369. As Berg began to exit the bus, he felt someone place his or her hand in his right pocket. 2 AA 371. In that pocket, Berg carried his identification, player's cards, and cash in a bundle. Id. Berg felt pressure on the back of his knee and then fell backward. 2 AA 372. While he was falling, Berg felt the hand leave his pocket, and identified Manning as the man

who had placed his hand in Berg's pocket and knocked him to the ground. 2 AA 371. Berg watched Manning exit the back of the bus, and then noticed that the items that were in his pocket had been stolen. 2 AA 371-72.

Officer Robert Steinbach was the first law enforcement officer to arrive at the scene. 2 AA 389. When Officer Steinbach arrived on the scene, he assessed Berg's medical needs and began speaking with potential witnesses. 2 AA 389. Law enforcement officers then identified some potential suspects, and took Berg to determine if any of the men was the one who pushed him down and stole his property. 2 AA 373. Berg informed the officers that none of the suspects was the perpetrator of the crime. 2 AA 379. Officer Steinbach did not collect any video footage from the bus. 2 AA 399.

Callie Mae Borley was a passenger on the bus and witnessed the incident. 2 AA 402. Borley saw what she thought to be a wallet hanging from Berg's pocket. 2 AA 404. Borley watched Manning take the item out of Berg's pocket and knock him down. 2 AA 405-06.

Manning was subsequently arrested after having been found asleep on a playground. 2 AA 232. He was questioned about Berg's robbery and another bus robbery. 3 AA 639-75. When questioned about the incidents, Manning informed officers that he had attempted to steal phones from several people in the past, including one instance on a bus. 3 AA 654-62. Manning then told officers about

another time where he tried to snatch a phone on a bus but the victim did not have one. 3 AA 662. Manning stated that he committed these acts because he was being intimidated by Nicholas Thompson. 3 AA 653.

Prior to closing arguments, Manning asked the District Court to give an instruction on Battery. 3 AA 558. Counsel argued that Battery was the underlying force necessary to commit Robbery in this case, and was thus a lesser included offense of Robbery. 3 AA 558. The District Court found that Battery was not a lesser included offense of Robbery, and did not present the jury with a Battery instruction. 3 AA 558-559. Notably, Manning did not ask that a Battery instruction be given as a lesser included offense of Battery With Intent to Commit a Crime. Id.

## SUMMARY OF THE ARGUMENT

In courts across the country, lesser included offense instructions are regularly given upon request, should the party prove an offense is a lesser included offense and meet a threshold requirement (which varies among jurisdictions) of showing the instruction is appropriate. This case, however, presents an alternate situation. Here, neither party requested a lesser included offense instruction. The question presented is whether the District Court was obligated to intervene and provide one sua sponte.

Jurisdictions fall into three overarching categories in regard to a trial court's duty or ability to give a sua sponte instruction. In "party autonomy" jurisdictions, the decision of whether to give such an instruction lies with the parties, and the trial

court need not and cannot (absent, in some jurisdictions, special circumstances) sua sponte instruct. In "hybrid" jurisdictions, trial courts *may* give such instructions in their discretion, but are not required to. In "trial integrity" jurisdictions, trial courts *must* give instructions on any and all lesser included offenses, even if such instruction is not requested and could potentially interfere with strategy decisions. Nevada, pursuant to Lisby v. State, falls within the trial integrity category, and a lesser included offense instruction is required, absent request, if there is evidence that would absolve the defendant from guilt on the greater offense but support a finding of guilt on the lesser offense.

This case presents the opportunity for this Court to overrule Lisby and declare that an instruction on a lesser included offense should only be given upon request of a party. The doctrine of stare decisis does not prevent this Court from overruling Lisby, because its brief mention of a requirement to sua sponte instruct was not seriously reasoned and not essential to the Court's holding in Lisby. Instead, the Court borrowed California law without any meaningful consideration as to whether this requirement should exist in Nevada.

Upon this Court's review, it will find that this requirement should not exist in Nevada. Not only is this rule unsupported by Nevada precedent outside of Lisby, it has only been rarely mentioned by cases following Lisby. It is also not supported by

statutory language, and inconsistent with the modern test to determine whether an offense is a lesser included one.

Further, the criminal procedure rules in Nevada are based off of the Federal Rules of Criminal Procedure and this Court should look to the federal circuits for guidance, rather than California. Because no federal circuit has adopted a sua sponte requirement, this Court should reject such a requirement. Additionally, the vast majority of states do not impose a sua sponte duty to instruct.

Finally, the Lisby rule contravenes Nevada public policy, which promotes preservation of error for appeal, judicial economy, defense strategy, client's objectives, prosecutorial independence and an adversarial system. Each of these policy considerations militate a rejection of the Lisby rule. Thus, the Court should hold that a trial court is not required, nor permitted, to sua sponte instruct a jury on a lesser included offense if neither party has requested such an instruction.

While Manning has addressed two issues outside of the Court's Order Directing Full Briefing, neither of these issues have merit: Lisby would not have required an instruction in this case, and the defense did not request an instruction on Battery as a lesser included offense of Battery With Intent to Commit a Crime.

Therefore, the State respectfully requests that this Court OVERRULE Lisby and hold that a trial court court is not required, nor permitted, to sua sponte instruct on lesser included offenses, and AFFIRM Manning's Judgment of Conviction.

## ARGUMENT

### I

### Lisby v. State Should Be Overruled, and Instructions on Lesser Included Offenses Given Only When Requested by a Party

In Lisby, this Court considered whether it was reversible error, in a sale-of-narcotics prosecution, for the trial court to instruct (rather than fail to instruct) on the lesser included offense of possession for sale of narcotics. Looking to California precedent, the Court noted "three situations which are most commonly encountered in the problem of lesser included offenses." Lisby, 82 Nev. at 187, 414 P.2d at 595 (*citing* People v. Morrison, 228 Cal. App. 2d 707, 39 Cal. Rptr. 874 (1964)).

Per the Lisby Court, the first situation arises when "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree." Id. In such an event, a lesser included offense instruction is mandatory and must be given sua sponte. Id. (*citing* State v. Moore, 48 Nev. 405, 233 P. 523 (1925)).

The second situation arises where the evidence does not support a finding of guilt as to the lesser included offense, such as where the defendant denies *any* complicity in the crime charged, where the elements of the offenses differ, and some element essential to the lesser offense is not proven or shown to exist. Id. In this situation, it is *error* to instruct on a lesser included offense. Id.

The third situation is one the Court described as an "intermediate" situation, "where the elements of the greater offense include all of the elements of the lesser

offense because it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense." Id. at 188, 414 P.2d at 595. The Court stated that in this situation, if the prosecution has met its burden of proof of the greater offense and there is no evidence tending to reduce the greater offense, a lesser included offense instruction may be *refused*. Id. However, if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, *if requested*, instruct on the lower degree or lesser included offense." Id. (emphasis added).

After noting these three situations, the Court concluded that because the sale of narcotics was conceded, and because the defendant instead pursued an entrapment defense, the Court's instruction on the lesser included offense of possession of narcotics *without* also providing for the lesser included offense on the verdict form was not error and did not mislead the jury. Id. at 188-89, 414 P.2d at 595.

The three "situations" noted in Lisby were not essential to its holding. Notably, Lisby did not present a situation where a lesser included offense instruction was not given. Instead, such an instruction *was* given, but did not create error. Yet, Manning has relied on Lisby to contend that the trial court's failure to give a Battery

instruction as a lesser included offense of Battery With Intent to Commit Robbery was error, despite his failure to make such a request.

While this Court is "loath to depart from the doctrine of stare decisis," it may overrule precedent if there are compelling reasons to do so. City of Reno v. Howard, 130 Nev. ___, ___, 318 P.3d 1063, 1065 (2014) (quoting Armenta- Carpio v. State, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013)). A governing decision will be overruled where it is found to be "unworkable or badly reasoned." See Harris v. State, 130 Nev. ___, ___, 329 P.3d 619, 623 (2014) (*citing* State v. Lloyd, 129 Nev.___, ___, 312 P.3d 467, 474 (2013)). Further, this Court is justified in overruling former decisions where they are deemed to be clearly erroneous. Halloway v. Barrett, 87 Nev. 385, 389, 487 P.2d 501, 504 (1971).

The instant case presents such a situation. To the extent that a discussion in Lisby suggests that a district court is obligated or permitted to give instructions on lesser included offenses, absent a request, this Court should overrule Lisby and instead follow the "party autonomy" approach.

First, the sua sponte duty to instruct outlined in Lisby is unsupported by precedent relied on by the Lisby Court and is not apparent from the plain meaning of NRS 175.501.

Second, this Court has only rarely discussed, and almost never applied, the alleged sua sponte duty suggested by Lisby.

Third, the test is inconsistent with Nevada's test for determining whether an offense is a lesser included of another offense.

Fourth, while Manning suggests that this Court follow California precedent, NRS 175.501's history stems from the Federal Rules of Criminal Procedure, and because *no* federal court has imposed a sua sponte duty to instruct on lesser included offenses, this Court should follow the law of the federal circuits rather than California.

Fifth, despite Manning's contention to the contrary, the party autonomy and hybrid approaches, neither of which impose a requirement of sua sponte instruction, are utilized in the majority of states, and the trend is toward states embracing these approaches.

Sixth, the trial integrity approach is bad policy, as it contravenes Nevada policy concerning preservation of objections, invades the province of defense strategy, the accused's objectives, and prosecutorial autonomy, and runs afoul of our adversarial system.

Therefore, this Court should hold that a district court has no sua sponte obligation nor ability to instruct on lesser included offenses, and Manning's conviction should be affirmed.[2]

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[2] The State does not contest in this appeal the Court's precedent as to when a *requested* lesser included offense instruction must be given, the State and a defendant's mutual right for such an instruction when the test set in that precedent

### A. Lisby's Discussion of a Sua Sponte Requirement of Lesser Included Offense Instructions Was Unsupported by Prior Nevada Law, and Manning's Reading of NRS 175.501 and NRS 175.201 Is Incorrect

In discussing the first commonly-encountered situation involving lesser included offenses, where, "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree," the Court cited to its 1925 opinion in Moore as an example of this situation. Lisby, 82 Nev. at 187, 414 P.2d at 595. Nowhere in Moore, however, did the Court rule that a district court must sua sponte give a jury instruction on a lesser included offense.

Instead, the error assigned in that case concerned the giving of an instruction based on section 6277 of the Revised Laws of 1912, which mirrors the present language of NRS 175.201. The Court merely noted that the giving of the instruction, where there was no lesser degree of the offense alleged, did not create error. Indeed, the Court stated in Moore that "the instructions of the court taken as a whole made it clear to the jury that the appellant **should either be convicted or acquitted of the crime charged in the information.** In addition the court submitted to the jury but two forms of verdict, one, **'guilty as charged,'** and the other, **'not guilty.'**" Moore, 48 Nev. at 415, 233 P. at 526 (emphasis added). Moore fails to provide the

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is met, and this Court's definition of a lesser included offense. Instead, the State solely contests a court's duty and ability to impose a sua sponte lesser included offense instruction absent request.

precedential support it appears to provide in Lisby, as the jury in Moore was charged only to find the defendant guilty or not guilty of the charge in the charging document. Moore in no way stands for the proposition that Nevada law requires sua sponte instruction on lesser included offenses.

The Court has hinted that Moore only concerns degrees of offenses, rather than lesser included offenses:

> [I]n *Lisby*, we relied on [Moore], which relied upon section 6277 of the Revised Laws of 1912. That statute, and *Moore*, said that an instruction on lesser *degrees* of the crime must be given if there was supporting evidence. Here, however, the record fails to support the foundation for any verdict on a lesser degree.

Wilmeth v. State, 96 Nev. 403, 408, 610 P.2d 735, 738-739 (1980). Wilmeth concerned whether a district court's refusal of alleged lesser included offenses was error, but noted that Moore and its sua sponte duty concerned *degrees of offenses*, not separate offenses.

Thus, the Lisby Court's reliance on Moore in its discussion was erroneous. As stated by Wilmeth, Moore's discussion of the sua sponte requirement to instruct on lesser degrees was grounded in a *statute* that specifically addressed *degrees*. Moore did not, however, concern lesser included offenses, which are not degrees of a single offense but instead are separate crimes. This is a meaningful distinction because instruction on lesser degrees is statutorily mandated, see NRS 175.201, while instruction on lesser included offenses is not.

This Court's decision in State v. St. Clair, 16 Nev. 207, 212 (1881), suggests that Nevada law has previously not required the sua sponte giving of lesser included offense instructions. St. Clair involved a trial court's failure to give a verdict form on manslaughter in a murder prosecution. The Court concluded that defense counsel's failure to request such a form was fatal to the claim on appeal, as, "if counsel for defendant considered it important that a form of verdict for manslaughter should be given, it was their duty either to prepare the same, or, at least, to request the court to give a form of verdict for each of the lesser degrees of guilt." Id.

Therefore, Nevada precedent did not support the Court in Lisby's discussion on the mandatory requirement to give lesser included offense instructions.

Further, there is no statutory support for such a requirement. Manning relies on NRS 175.201, but his analysis is similar to the Lisby Court's erroneous analysis of Moore. In light of the plain meaning of NRS 175.201, Manning's reasoning is flawed:

> Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more *degrees* the person is guilty, the person shall be convicted only of the lowest.

(emphasis added). "When interpreting a statute, this court must give its terms their plain meaning, considering its provisions as a whole so as to read them 'in a way that would not render words or phrases superfluous or make a provision nugatory.'"

S. Nev. Homebuilders Ass'n v. Clark Cty., 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990)).

As evidenced by Wilmeth, the concept of *degrees* of offenses and *lesser included offenses* are distinct and have separate meanings. 96 Nev. at 408, 610 P.2d at 738-39. The plain meaning of NRS 175.201 cannot be read to suggest that it is necessary for a jury to be instructed on lesser included offenses, as this statute clearly refers to degrees.

The plain meaning of NRS 175.501, which governs lesser included offenses, also fails to support Manning's position. That statute reads as follows:

> The defendant may be found guilty or guilty but mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Nowhere in this language did the Nevada Legislature impose a mandatory duty on trial courts to instruct on lesser included offenses. Therefore, there is no statutory authority for such a rule.

There is no precedential or statutory authority, outside of Lisby for requiring sua sponte instruction on lesser included offenses. Instead, relying solely on California's discussion of its law in Morrison,[3] the Lisby Court stated as clearly

[3] 228 Cal. App. 2d 707, 39 Cal. Rptr. 874.

established law that the giving of lesser included offense instructions was mandatory.

This analysis stands on shaky ground, and at no point has this Court seriously considered whether this should be the rule in Nevada (unlike California, where many cases have analyzed the rule and considered its implications). The instant case presents the opportunity, and, because statutory authority for such a rule is lacking and because the rule has serious policy implications, this Court should reject the trial integrity approach.

### B. This Court Has Only Rarely Discussed, and Almost Never Applied, the "Sua Sponte" Situation Outlined in Lisby

Further, this alleged rule of Nevada law has almost never been applied. In nearly every published case citing Lisby, the alleged error concerned a district court's failure to give a *requested* lesser included offense instruction, not the district court's failure to give one sua sponte. See, e.g., Smith v. State, 120 Nev. 944, 947, 102 P.3d 569, 571 (2004); Graham v. State, 116 Nev. 23, 25, 992 P.2d 255, 256 (2000); Davis v. State, 110 Nev. 1107, 1112, 881 P.2d 657, 660 (1994); Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); McMichael v. State, 94 Nev. 184, 191, 577 P.2d 398, 402 (1978); Jackson v. State, 93 Nev. 677, 682, 572 P.2d 927, 930 (1977); Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974); Holland v. State, 82 Nev. 191, 192, 414 P.2d 590, 591 (1966).

The State's review revealed only two cases by this Court citing Lisby where the Court actually considered whether it was error for the trial court to fail to instruct on lesser included offenses sua sponte. McGuire v. State, 86 Nev. 262, 266, 468 P.2d 12, 15 (1970), Larsen v. State, 93 Nev. 397, 400, 566 P.2d 413, 414 (1977). In both cases, the Court found there was no duty to instruct based on the facts of the case.

While Manning cites Rosas v. State, 122 Nev. 1258, 1264, 147 P.3d 1101, 1106 (2006), to support an allegation that the Court had an opportunity to modify Lisby before and has chosen not to, Rosas concerned a defense *request* for a lesser included offense instruction and the amount of proof required to warrant such an instruction. To use the case as an opportunity to overrule Lisby would have been beyond the scope of the controversy before the Court. Further, its discussion of the sua sponte requirement of Lisby was relegated to a footnote that explicitly stated that there was *no dispute* the defense had requested an instruction:

> Another relevant consideration, *not in dispute here*, is whether such an instruction is requested. Generally, a defendant (or the State) must request an instruction: if there is any supporting evidence, "the court must, if requested, instruct" on a lesser-included offense. . . . However, "[t]he instruction is mandatory, without request" if "there is evidence which would absolve the defendant from guilt of the greater offense . . . but would support a finding of guilt of the lesser offense."

Id. at 1264 n.9, 147 P.3d at 1106 n.9 (emphasis added). This case hardly reaffirmed Lisby nor noted its "lasting significance," and it should not impede the Court's ability to overrule Lisby.

### C. Lisby's Language is Inconsistent With the Test for Lesser Included Offenses in Nevada

Next, Lisby's test is inconsistent with Nevada's definition of a lesser included offense. This Court uses the Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932), test to determine whether charges amount to lesser included offenses. See Wilson v. State, 121 Nev. 345, 358, 114 P.3d 285, 294 (2005). "Under this test, 'if the elements of the one offense are *entirely included* within the elements of a second offense, the first offense is a lesser included offense.'" Id. at 358-59, 114 P.3d at 294 (emphasis added) (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002)). The test ultimately resolves itself on "whether the provisions of each of the different statutes require the proof of a fact that the other does not." Id. (*citing* Blockburger, 284 U.S. at 304, 52 S. Ct. at 180).

Clearly, to qualify as a lesser included offense, each element of the offense must be included within the greater offense. Yet, Lisby sets out two situations when a lesser included offense instruction must be given: (1) "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree;" and (2) "where the elements of the greater offense include all of the elements of the lesser offense because it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense." Lisby, 82 Nev. at 188, 414 P.2d at 595. Under the first

test, which does not necessitate a finding that each element of the alleged lesser included offense is within the greater offense, a sua sponte instruction is required. However, under the second test, which mirrors the modern lesser included offense test, "the court must, *if requested*, instruct on the lower degree or lesser included offense." Id. Thus, the three situations outlined by Lisby are inconsistent with Nevada's current use of the Blockburger test, because every lesser included offense would fall under the second category cited above.

### D. This Court Should Look to the Approach Taken by Federal Courts, Not California, in Deciding Whether NRS 175.501 Requires a Court to Sua Sponte Give Instructions on Lesser Included Offenses

Manning claims that because California Penal Code § 1159 is worded similarly to NRS 175.501, the Nevada statute "substantially mirrors" the California statute and mandates that the trial court sua sponte instruct on lesser included offenses. Opening Brief at 20. This reasoning is flawed for two reasons.

First, as discussed above, the plain meaning of the language of NRS 175.501 does not state that a trial court *must* give lesser included offense instructions in certain situations, even when the defense fails to request or objects to such instructions. The language of the statute is discretionary and states that it is permissible for a jury to find a defendant guilty of a lesser included offense.

Further, while Manning suggests that this Court look to California for guidance, the decisions of the federal courts on this issue are far more instructive.

For one, this Court has noted that the language of NRS 175.501 is identical to Federal Rule of Criminal Procedure 31(c),[4] and has previously followed federal precedent in determining when an offense is a "lesser included offense" under the statute:

> [U]nder Federal Rule of Criminal Procedure 31(c), which contains language identical to NRS 175.501, an offense is not a lesser included offense unless the elements of the lesser offense are an entirely included subset of the elements of the charged offense. This approach is "grounded in the language and history of the Rule and provides for greater certainty in its application."
>
> In light of the similarity in the language of Federal Rule of Criminal Procedure 31(c) and NRS 175.501, we conclude that adherence to the view . . . whereby lesser included offenses are determined by the Blockburger elements test, is sound.

Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001), overruled on other grounds by Rosas, 122 Nev. 1258, 147 P.3d 1101.

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[4] Federal Rule of Criminal Procedure 31(c) reads:

Lesser Offense or Attempt. A defendant may be found guilty of any of the following:

(1) an offense necessarily included in the offense charged;
(2) an attempt to commit the offense charged; or
(3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

While set out differently from NRS 175.501, the only meaningful difference between the language in the statute and this procedural rule is the insertion of "guilty but mentally ill" language within NRS 175.501.

Federal Rule of Criminal Procedure 30 also pertains to jury instructions. It contains a specific rule that states that a failure to object to the giving of an instruction or the failure to give a requested instruction precludes appellate review outside of plain error review. Fed. R. Crim. P. 30(d).

The legislative history of the language of NRS 175.501 further suggests that this Court look to federal precedent for guidance as to how to resolve the instant dispute. NRS 175.501 was added to the Nevada Revised Statutes by 1967 Nev. Stat. ch. 523 § 225, p. 1431, as part of the 1967 Criminal Procedure Act ("1967 Act"). The purpose of this act was "to adopt in statutory form, but not as rules of court, *the Federal Rules of Criminal Procedure*, discarding those not applicable in state courts and retaining existing Nevada statutes concerning matters not covered by the federal rules." STATE OF NEVADA, LEGISLATIVE COMMISSION OF THE LEGISLATIVE COUNSEL BUREAU, 54TH SESS., REVISION OF NEVADA'S SUBSTANTIVE CRIMINAL LAW AND PROCEDURE IN CRIMINAL CASES, BULLETIN NO. 66, REPORT OF THE SUBCOMMITTEE FOR REVISION OF THE CRIMINAL LAW TO THE LEGISLATIVE COMMISSION, at 3 (November 18, 1966) (emphasis added). This legislative history as well as the identical language between the Nevada statute and federal rule strongly suggest that this Court should look to the law of the federal circuits, rather than California, in determining whether lesser included offense instructions are mandatory, without request.

"No federal court has imposed on trial judges a duty to *sua sponte* instruct on lesser included offenses." Kubat v. Thieret, 867 F.2d 351, 365-366 (7th Cir. 1989). Each circuit has, instead, embraced the party autonomy approach or a hybrid

approach, where a trial court *may* give a lesser included offense instruction over a party's objection, but is not required to.

The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits have all found that a defendant's failure to object renders the absence of lesser included offense instructions reviewable under the plain error or invited error doctrines, and have not imposed a duty to instruct. See, e.g., United States v. Lopez Andino, 831 F.2d 1164, 1171-72 (1st Cir. 1987); United States v. Petersen, 622 F.3d 196, 202 (3d Cir. 2010) ("Petersen's claim of error is as ironic as it is misguided. He not only failed to request a lesser-included offense charge in the district court and failed to object to the charge that was given; during the charge conference, Petersen specifically declined a lesser-included offense charge that the court offered to give. Thus, we review the instruction that was given for plain error."); United States v. Lespier, 725 F.3d 437, 450-51 (4th Cir. 2013) ("[A] defendant who invites error by successfully opposing an instruction on a lesser-included offense is not entitled to benefit from that error. Lespier opposed the second-degree murder instruction as a matter of sound trial strategy, and there is no indication that this failed strategy threatens the integrity of the justice system or represents a miscarriage of justice."); Druery v. Thaler, 647 F.3d 535, 545 (5th Cir. 2011) ("Petitioner cites no case law for the proposition that trial courts have a duty to overrule such a decision made by trial counsel."); United States v. Donathan, 65 F.3d 537, 540 (6th Cir. 1995); United

States v. Lohse, 797 F.3d 515, 522 (8th Cir. 2015); United States v. Parker, 991 F.2d 1493, 1496 (9th Cir. 1993); United States v. Dingle, 114 F.3d 307, 312-13 (D.C. Cir. 1997).

Meanwhile, the Second, Tenth, and Eleventh Circuits have given the trial courts discretion in giving lesser included offense instructions over a party's objection, but have not imposed a sua sponte duty. United States v. Harary, 457 F.2d 471, 479 (2d Cir. 1972) (finding that a Court *may*, but is not required to, submit a lesser charge to the jury, but *may not* submit such a charge if there is no "disputed factual element" distinguishing the lesser and greater offenses *and* the defendant objects to inclusion of the lesser charge); United States v. Begay, 833 F.2d 900, 901 (10th Cir. 1987); United States v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993) ("We agree with the holding in Kubat that requiring a district court to give a lesser included offense instruction might be at odds with the trial strategy of defense counsel. Trial judges should be sensitive to and respectful of such difficult decisions made by counsel.").

Even the United States Supreme Court has recognized that strategic decisions may warrant foregoing lesser included offense instructions. While Manning contends that Beck v. Alabama, 447 U.S. 625, 638, 100 S. Ct. 2382, 2390 (1980), mandates instructions on lesser included offenses in capital cases, that case concerned the *statutory prohibition* of lesser included offense instructions, rather

than a trial court's duty to instruct on them absent a request. ("[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case."). Instead, the United States Supreme Court rejected such a sua sponte requirement in Spaziano v. Florida, 468 U.S. 447, 456-457, 104 S. Ct. 3154, 3160 (1984), overruled on other grounds by Hurst v. Florida, 577 U.S. ___, 193 L. Ed. 2d 504 (2016):

> Although the Beck rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him not only to waive his statute of limitations defense, but also to give the State what he perceives as an advantage – an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so. Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

Thus, even in the capital context, there is no sua sponte duty to instruct on lesser included offenses. See also Chandler, 996 F.2d at 1099; Kubat, 867 F.2d at 365-66; Look v. Amaral, 725 F.2d 4, 8-9 (1st Cir. 1984).

Thus, no federal court has imposed a sua sponte duty to instruct on lesser included offenses. Because NRS 175.501 was enacted in an effort to conform Nevada's procedural rules in criminal cases to the Federal Rules of Criminal

Procedure, this Court should look to the federal courts, not California, for guidance and follow their reasoning in determining that a court is not required to give sua sponte lesser included offense instructions.

### E. The Vast Majority of Jurisdictions Do Not Require Sua Sponte Instruction[5]

Manning cites Harbin v. State, 14 So. 3d 898, 902 (Ct. Crim. App. Al. 2009), for the proposition that "Nevada is part of a majority of jurisdictions which follow the trial integrity approach." Opening Brief at 18. However, Harbin concerned whether a court had *discretion to give* a lesser included-offense instruction over a defense objection. Id. at 907-09. Indeed, the Alabama Court of Criminal Appeals noted that its holding only permitted a court to give a lesser included instruction, but there was no *duty* to give one. Id. at 909. Further, the court noted that foregoing lesser included offense instructions may, at times, be sound trial strategy. Id.

The jurisdictions cited by Harbin and Manning concern those who permit lesser included offense instructions over a defendant's objection, and the list does not discriminate between cases where the State requested an instruction and where the Court sua sponte gave an instruction. Compare Blackhurst v. State, 721 P.2d 645 (Alaska Ct. App. 1986) (state's request), with People v. Chamblis, 395 Mich. 408, 236 N.W.2d 473 (1975), overruled on other grounds, People v. Cornell, 466 Mich.

[5] In an effort to assist the Court, the State has created the attached Exhibit 1 lists which approach each jurisdiction follows.

335, 646 N.W.2d 127 (2002), overruled on yet other grounds, People v. Mendoza, 468 Mich. 527, 664 N.W.2d 685 (2003). Thus, it does not provide a meaningful list for this Court to use in resolving the issue at hand.

Instead, the majority of states take approaches which respect the strategy decisions of the parties and do not require sua sponte instruction on lesser included offenses. See generally Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257 (1999). The Carpenter article groups jurisdictions' approaches concerning sua sponte instruction on lesser included offenses into three main categories:

> Whether to instruct on lesser-included offenses, and hence whether to prohibit or allow the All-or-Nothing Doctrine, can be divided into three categories: (1) **trial integrity jurisdictions:** those that prohibit the Doctrine's use and require the court to instruct sua sponte on provable lesser-included offenses; (2) **party autonomy jurisdictions:** those that allow the All-or-Nothing Doctrine and permit the trial parties to govern when lesser-included offense instructions are submitted to the jury; and (3) **hybrid jurisdictions:** those that limit the doctrine by providing the parties and the court concomitant right to offer lesser-included offense instructions.

Id. at 274 (emphasis added) (footnotes omitted).

While the chart within Carpenter's article is outdated and contemplates issues outside of the instant appeal, such as when the State is entitled to request a lesser included offense instruction, even it notes the rarity of the trial integrity approach. Id. at 283 ("[G]iven the historical deference paid to the freedom to develop one's

trial strategy, it is not surprising that few states actually support a pure trial integrity model.").

To aid the Court, the State has reviewed the case law of each of the fifty states and found the following trends.

**1. Trial Integrity Jurisdictions**

"Concern for the integrity of the fact-finding process is the hallmark of the trial integrity model. Consequently, in these jurisdictions the key question is whether the trial process is compromised by the omission of the lesser-included instruction." Carpenter, *supra*, at 278. In these jurisdictions, trial courts must instruct on lesser included offenses if instruction is warranted by the evidence, even absent a defense request or over a party's objection. Id. In addition to Nevada, only six other

jurisdictions have clearly adopted the trial integrity approach: California,[6] Hawaii,[7] Iowa,[8] Minnesota,[9] New Jersey,[10] and North Carolina.[11]

West Virginia has taken a more restrictive approach: a sua sponte instruction is required only if "a particular instruction is fundamental to a defendant's theory of the case." State v. Dellinger, 178 W. Va. 265, 268, 358 S.E.2d 826, 829 (1987).

Additionally, while South Carolina was categorized as a trial integrity jurisdiction in the Carpenter article, a recent concurrence has noted that "[a] trial court has a general duty to charge the law that is applicable to the facts. This duty requires the trial court to consider any lesser included charges the court determines are warranted by the facts. This general duty does not, however, amount to an absolute requirement that the trial court sua sponte charge a lesser included offense." Abney v. State, 408 S.C. 41, 51-52, 757 S.E.2d 544, 549 (S.C. Ct. App. 2014)

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[6] People v. Gray, 37 Cal. 4th 168, 219, 118 P.3d 496, 532 (2005). It appears, from the opinion in Gray, that the California Supreme Court has simplified the test in Morrison and requires a lesser included offense instruction "when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense." Further, there must be "substantial support in the evidence" for such a conviction. People v. Ortega, 240 Cal. App. 4th 956, 965, 193 Cal. Rptr. 3d 142, 152 (2015).

[7] State v. Haanio, 94 Haw. 405, 414, 16 P.3d 246, 255 (2001).

[8] In the Interest of Z.S., 776 N.W.2d 290, 295 (Iowa 2009).

[9] State v. Kobow, 466 N.W.2d 747, 752 (Minn. Ct. App. 1991).

[10] State v. Rose, 237 N.J. Super. 511, 514, 568 A.2d 545, 546 (App. Div. 1990). However, such an instruction is inappropriate if it would "surprise the prosecution." Id.

[11] State v. Brantley, 501 S.E.2d 676, 679, 129 N.C. App. 725, 729 (N.C. Ct. App. 1998).

(Pieper, J., concurring) (*citing* State v. Parker, 315 S.C. 230, 236-37, 433 S.E.2d 831, 834 (1993)).

Opinions from Ohio and Oklahoma also call into question their inclusion on the list of trial integrity jurisdictions, and instead suggest a hybrid approach which allows a defendant to waive such instructions. See State v. Clayton, 62 Ohio St. 2d 45, 47, 402 N.E.2d 1189, 1191 (1980) ("[T]he court had the duty to instruct on the lesser-included offense, but this in no way affected defendant's concomitant right, through his counsel, to waive the instruction."); McHam v. State, 2005 OK CR 28, ¶¶ 18-20, 126 P.3d 662, 669-70 (Okla. Crim. App. 2005) ("[W]hile a defendant is free to adopt an 'all or nothing' strategy with regard to any lesser-offense alternatives, the trial court is not bound by that strategy, and may instruct *sua sponte* on any lesser-related offense it believes to be supported by the evidence, without any formal request by the State."). Meanwhile, Tennessee has statutorily abrogated its trial integrity approach in lieu of a hybrid one that does not *entitle* a defendant to a sua sponte instruction but allows the court to give one. See Tn. Code § 40-118-110(b). Thus, only a handful of states maintain a sua sponte requirement to instruct on lesser included offenses.

**2. "Hybrid" Jurisdictions**

"With rhetoric from both trial integrity and party autonomy models, hybrid jurisdictions allow trial parties the freedom to request or refuse lesser-included jury

instructions while providing a procedural safety net that vests discretion in the court to instruct sua sponte." Carpenter, *supra*, at 287.

These twenty-one states permit sua sponte instruction, but do not require it. In addition to the aforementioned approaches taken by Ohio, Oklahoma, and Tennessee, courts in Alabama,[12] Connecticut,[13] Georgia,[14] Idaho,[15] Illinois,[16] Maine,[17] Massachussetts,[18] Missouri,[19] Nebraska,[20] New Hampshire,[21] New York,[22] North Dakota,[23] Rhode Island,[24] South Dakota,[25] Texas,[26] Utah,[27] and Wyoming[28] each allow trial courts discretion to give lesser included offense instructions sua

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[12] Harbin, 14 So. 3d 898.
[13] State v. Ray, 290 Conn. 24, 64, 961 A.2d 947, 971 (2009).
[14] Gagnon v. State, 240 Ga. App. 754, 755, 525 S.E.2d 127, 129 (1999).
[15] State v. Rae, 139 Idaho 650, 653, 84 P.3d 586, 589 (Idaho Ct. App. 2004).
[16] People v. Garcia, 188 Ill. 2d 265, 282, 721 N.E.2d 574, 583 (1999).
[17] 17-A M.R.S. § 13-A.
[18] Commonwealth v. Mills, 54 Mass. App. Ct. 552, 554, 766 N.E.2d 547, 549 (2002); Commonwealth v. Berry, 431 Mass. 326, 336, 727 N.E.2d 517, 526 (2000), abrogated in part on other grounds by Commonwealth v. Zanetti, 454 Mass. 449, 464, 910 N.E.2d 869, 881 (2009).
[19] State v. Smith, 949 S.W.2d 947, 950 (Mo. Ct. App. 1997).
[20] State v. Costanzo, 227 Neb. 616, 626, 419 N.W.2d 156, 164 (1988).
[21] In re Nathan L., 146 N.H. 614, 617-620, 776 A.2d 1277, 1279-81 (2001).
[22] People v. Colville, 20 N.Y.3d 20, 28-32, 979 N.E.2d 1125, 1130-33 (2012).
[23] State v. Keller, 2005 ND 86, ¶ 31, 695 N.W.2d 703, 711 (2005).
[24] State v. Mercier, 415 A.2d 465, 467 (R.I. 1980).
[25] State v. Cook, 319 N.W.2d 809, 813 (S.D. 1982).
[26] Tolbert v. State, 306 S.W.3d 776, 780-82 n.7 (Tex. Crim. App. 2010).
[27] State v. Howell, 649 P.2d 91, 95 (Utah 1982); *State v. Mitchell*, 3 Utah 2d 70, 278 P.2d 618, 621 (1955).
[28] State v. Keffer, 860 P.2d 1118, 1134 (Wyo. 1993).

sponte and over a party's objection; however, in none of these states is a court ever *required to do so*. Thus, they do not support Manning's position that the trial integrity approach, which *requires* instruction even in the absence of a request, is a majority viewpoint.

Michigan embraces the "hybrid" approach in the majority of cases. Chamblis, 395 Mich. at 416, 236 N.W.2d at 477 ("Where no request to charge has been made but there is evidence during the trial which would support a conviction of a lesser offense, the trial judge may, *sua sponte,* instruct on the lesser offense."). However, in a prosecution for first-degree murder, a court *must* instruct. People v. Beach, 429 Mich. 450, 482-483, 418 N.W.2d 861, 876 (1988).

While twenty-one states take the hybrid approach, this Court should not adopt this approach and instead choose the equally prevalent party autonomy approach (discussed below). The party autonomy approach is far more prevalent among the federal circuits, for one. Further, allowing courts the discretionary ability to instruct creates an unclear standard of when sua sponte instruction is appropriate and inappropriate, and invites inconsistent application. Prohibiting district courts from instructing sua sponte instead creates a bright-line rule that can easily be followed by trial courts throughout Nevada. This approach ensures consistent practices throughout this jurisdiction and prevents error.

### 3. Party Autonomy Jurisdictions

"In contrast to the trial integrity model, under the party autonomy model the Lesser-Included Offense Doctrine exists primarily for the benefit of the trial participants who serve as the ultimate arbiter of whether the right will be invoked." Carpenter, *supra*, at 283-84. The twenty-one party autonomy states respect the strategic decisions of the parties by requiring that requests for a lesser included offense instruction be made by the parties. These jurisdictions can be grouped into three subcategories.

First, while Arizona,[29] Delaware,[30] Maryland,[31] Montana,[32] Vermont,[33] and Wisconsin[34] appear to contemplate a court's ability to instruct sua sponte, each

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[29] State v. Gipson, 229 Ariz. 484, 487, 277 P.3d 189, 192 (2012) ("When both parties object to a lesser included offense instruction, *the trial court should be loath to give it absent compelling circumstances to the contrary*.") (emphasis added).

[30] State v. Cox, 851 A.2d 1269, 1273-74 (Del. 2003).

[31] Hagans v. State, 316 Md. 429, 455, 559 A.2d 792, 804 (1989) ("[T]he trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction. It is a matter of prosecution and defense strategy which is best left to the parties. There is no requirement that the jury pass on each possible offense the defendant could have committed. We permit, for example, the State to nolle prosse an offense, and we allow plea bargains. When counsel for both sides consider it to be in the best interests of their clients not to have an instruction, the court should not override their judgment and instruct on the lesser included offense.").

[32] State of Montana v. Sheppard, 253 Mont. 118, 124, 832 P.2d 370, 373 (1992).

[33] The following discussion from State v. Nguyen, 173 Vt. 598, 601, 795 A.2d 538, 542-43 (2002), demonstrates the Vermont approach:

> In general, defendant controls the tactical decisions in the trial, including the decision whether to waive a charge on a lesser included offense. . . . Once defendant has made a tactical decision on jury instructions, he is bound by it on appeal. . . . If the court concludes, however, that defendant's strategy is "so ill-advised that it undermines a fair trial, the court may instruct the jury according to its considered view." . . . The court's decision to act sua sponte in this matter is discretionary, "and so long as the court's exercise of discretion is not abused, we will not disturb it."

[34] State v. Myers, 158 Wis. 2d 356, 364, 461 N.W.2d 777, 780-81 (1990):

> In Wisconsin the decision to request jury instructions on lesser included offenses is left largely to the parties, because the decision involves trial strategy, including the presentation and evaluation of evidence. The parties are therefore best equipped to decide when a request for lesser included offense instructions is appropriate. The state and the accused

highly discourages courts from doing so. While potentially categorized as "hybrid" jurisdictions, the expansive deference given to trial tactics and the limitations on the trial court's discretion suggest that these jurisdictions be classified as embracing party autonomy.

Delaware offers the following reasoning:

> In general the trial judge should withhold charging on lesser included offense unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics. If counsel asks for a lesser-included offense instruction, it should be freely given. If it is not requested by counsel, it is properly omitted by the trial judge, and certainly should not be initiated by the judge after summations are completed, except possibly in an extreme case.
>
> The "party autonomy" approach allows the defendant to exercise or waive the "full benefits of reasonable doubt" that a lesser included offense instruction may promote, while also allowing the prosecution to seek the proper punishment for a criminal act that a jury may not believe rises to the level of the original offense charged. We adhere to our holding that in Delaware, the burden of requesting lesser-included offense instructions is properly placed upon trial counsel, "for it is they who determine trial tactics and presumably act in accordance with a formulated strategy."

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> must assess at trial the risks and benefits of requesting jury instructions on lesser included offenses.
> . . .
> A circuit court need not instruct on a lesser included offense unless one of the parties requests the instruction . . . It is not error for the circuit court to fail to instruct *sua sponte* on a lesser included offense. . . . One rationale for this rule is that the circuit court should not unfairly interfere with the parties' trial strategy.

Cox, 851 A.2d at 1273-74. Meanwhile, Montana has noted that its public policy mandates an approach deferential to the parties:

> We conclude that under our adversarial system of justice, the prosecution and defense must have the option of foregoing a lesser charge instruction for strategic reasons. Lawyers, not judges, should try cases. Although the record does not enlighten us, both prosecution and defense counsel may have made a decision to force the jury to either convict or acquit of the offense charged without being given the opportunity to take the middle ground and convict of the lesser charge of misdemeanor sexual assault. Because mandatory *sua sponte* jury instruction on lesser offenses is inconsistent with Montana law and our public policy of allowing trial counsel to conduct the case according to his or her own strategy, we decline to adopt the minority rule.

Sheppard, 253 Mont. at 124, 832 P.2d at 373.

Other courts have approached the problem from a preservation/plain-error viewpoint. Courts in Alaska,[35] Arkansas,[36] Colorado,[37] Florida,[38] Indiana,[39]

[35] Cook v. State, 36 P.3d 710, 723 (Alaska Ct. App. 2001) Prior decisions even suggest that sua sponte instruction is error in Alaska. See Rollins v. State, 757 P.2d 601, 602 (Alaska Ct. App. 1988) (error for the trial court to sua sponte instruct on lesser included offense after case submitted to the jury).

[36] Collins v. State, 271 Ark. 825, 831, 611 S.W.2d 182, 187 (1981).

[37] People v. Aalbu, 696 P.2d 796, 810-811 (Colo. 1985):

> A trial court is not obligated to instruct on a lesser included offense unless such an instruction is requested by the defense or the prosecution. . . . The defendant's claim in this case was that he was totally innocent of any crime. It may reasonably be assumed that, in the absence of any request for an instruction on a lesser included offense, the defendant "elected to take his chance on an outright acquittal or conviction of the principal charge rather than to provide the jury with an opportunity to convict him of a lesser offense."

[38] Roberts v. State, 168 So. 3d 252, 256 (Fla. Dist. Ct. App. 1st Dist. 2015).

[39] Lane v. State, 953 N.E.2d 625, 631 (Ind. Ct. App. 2011) (alleged instructional errors must be preserved).

Kansas,[40] Kentucky,[41] Louisiana,[42] New Mexico,[43] and Virginia[44] have all considered an objection to or a failure to request a lesser included offense instruction as either a complete waiver of such an instruction, or a question worthy of plain-error or another highly deferential standard of review. Consequently, in each of these states there is no sua sponte duty to instruct.

The final grouping of states reject a sua sponte requirement and on review have not condoned a court's giving of an instruction without request. Each of these states give immense deference to the strategic decisions of the parties and do not

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[40] Technically, Kansas trial courts are required to instruct on lesser included offenses pursuant to Kan. Stat. § 22-3414. However, on appeal "[n]o party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto . . . unless the instruction or the failure to give an instruction is clearly erroneous," making Kansas a party autonomy jurisdiction in practice. Kan. Stat. § 22-3414; State v. Schoonover, 281 Kan. 453, 505, 133 P.3d 48, 84 (2006).

[41] Bartley v. Commonwealth, 400 S.W.3d 714, 731 (Ky. 2013) ("The general rule, of course, is that '[t]he trial court is required to instruct the jury on lesser included offenses when requested and justified by evidence.' . . . It is not an error, however, palpable or otherwise, for the trial court not to instruct on a lesser included offense that has not been requested."); Ky. R. Crim. P. 9.54(2) (prohibiting appellate review of alleged instructional errors not litigated at trial level).

[42] State v. Corley, 703 So. 2d 653, 668 (La. App. 3d Cir. Oct. 8, 1997) (waiver).

[43] State v. Gibbins, 110 N.M. 408, 412, 796 P.2d 1104, 1108 (N.M. Ct. App. 1990) (waiver).

[44] Chittum v. Commonwealth, 211 Va. 12, 17, 174 S.E.2d 779, 782 (1970) (waiver).

require a court to interfere: Mississippi,[45] Oregon,[46] Pennsylvania,[47] South Carolina (as discussed above), and Washington.[48]

Therefore, the trial integrity approach is without a doubt the minority approach. While twenty states give a trial court expansive discretion to give a lesser included offense instruction, these states (outside of Michigan in the first-degree-murder context) do not *require* courts to give such instructions. Thus, Nevada should join the vast majority of jurisdictions that do not require a court to give lesser included offense instructions, and should join the twenty-one states which respect the autonomy of the parties and do not allow trial courts (unless, in some jurisdictions, there are compelling circumstances) to override trial strategy by giving a lesser included offense instruction.

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[45] Trigg v. State, 759 So. 2d 448, 451-52 (Miss. Ct. App. 2000).
[46] State v. Miller, 2 Ore. App. 353, 358, 467 P.2d 683, 686 (1970).
[47] Commonwealth v. Banks, 450 Pa. Super. 555, 570, 677 A.2d 335, 343 (1996) ("[I]n a murder prosecution, an involuntary manslaughter charge shall be given only when requested, where the offense has been made an issue in the case and the trial evidence reasonably would support such a verdict.").
[48] State v. Grier, 171 Wn. 2d 17, 45, 246 P.3d 1260, 1274 (2011) ("Finally, the State contends that the Court of Appeals decision requires trial courts to provide lesser included instructions sua sponte in the absence of a request for such instructions. . . . Such a rule would be an unjustified intrusion into the defense prerogative to determine strategy and, accordingly, we reject this requirement.").

## F. The Party Autonomy Approach Is Sound Public Policy

The party autonomy approach is far more consistent with Nevada public policy than the trial integrity approach. The following policy considerations mandate reversal of Lisby.

### a. The Party Autonomy Approach Is Consistent With Nevada's Requirement that Parties Preserve Objections, and Promotes Judicial Economy by Limiting Invited Error

It is indisputable that Nevada law typically precludes review of an alleged error if that error is not preserved. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). This Court only has the statutory discretion to address such an error if it was plain and affected the defendant's substantial rights. NRS 178.602. This rule has been found to apply even to constitutional objections. See Maestas v. State, 128 Nev. ___, ___, 275 P.3d 74, 89 (2012) (applying the rule to a first amendment claim that was not made within a motion to suppress, on the basis that the record was not fully developed, and unclear under current law).

"For an error to be plain, it must, 'at a minimum,' be 'clear under current law.'" Gaxiola v. State, 121 Nev. 633, 648, 119 P.3d 1225, 1232 (2005) (*citing* United States v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)). Further, "[a]n error is 'plain' if 'the error is so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995)

(*citing* Torres v. Farmers Ins. Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990)).

However, under the current Lisby test, to determine whether the district court was compelled to give a lesser included offense instruction even without a defense request, this Court must assess the proof as a whole and determine whether there is evidence that could absolve the defendant of the greater offense, whether the defendant denied complicity, and whether the State met its burden on the greater offense. This analysis far surpasses plain error review and flies in the face of the statutory limits on the appellate courts' review.

Additionally, a defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001), overruled in part by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011); NRS 178.602. However, the absence of lesser included offense instructions would surely benefit, rather than prejudice, the defendant in a case where the State is unlikely to succeed in proving an element of the greater offense and has not requested a lesser included offense instruction. Yet, no matter whether a defendant would benefit or be prejudiced by the absence of such an instruction, Lisby requires an instruction.

Additionally, Lisby invites error by giving defense counsel a perverse incentive to fail to request lesser included offense instructions. In the event the "all-

or-nothing" strategy succeeds, the defendant receives an acquittal. However, should it fail, the defendant can claim error by the absence of the instruction and obtain a reversal. In Nevada, invited error is not reviewable, yet Lisby allows for review of such an error. Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002).

Consequently, it reduces judicial economy in the trial and appellate courts by allowing defendants "two bites at the apple." In In re Nathan L., 146 N.H. at 619, 776 A.2d at 1280-81, the Supreme Court of New Hampshire determined that, "[r]equiring the judge *sua sponte* to raise all possible lesser-included offenses would lead to claims of error on appeal and collateral attack even when counsel has not objected at trial. This would be inconsistent with our well-settled rules regarding preservation of issues for appeal." Likewise, the trial integrity approach is inconsistent with Nevada's requirement that the parties preserve issues for appeal.

**b. The Trial Integrity Approach Interferes With Defense Strategy and the Objectives of Criminal Defendants**

Additionally, the trial integrity approach is incompatible with the immense deference Nevada law gives defense strategy. Requiring the district court to issue lesser included instructions sua sponte without a doubt interferes "with strategy of defense counsel who may opt to omit a lesser-included offense instruction in order to force the jury to find the defendant guilty of the crime charged or acquit him." Kubat, 867 F.2d. at 365-66.

In contrast, this Court has repeatedly protected the ability of attorneys to make strategic decisions during the course of a trial. In the context of ineffective assistance of counsel, this Court has found that strategic decisions are virtually unchallengeable. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Similarly, the American Bar Association Criminal Justice Standards also recognize that "[s]trategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate." ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-5.2(d) (4th ed. 2015); Colville, 20 N.Y.3d at 29, 979 N.E.2d at 1130 ("[C]ourts have uniformly decided that whether or not to ask the trial judge to instruct the jury on lesser-included offenses is a matter of strategy and tactics ceded by a defendant to his lawyer.").

Further, sua sponte instruction risks the objectives of criminal defendants. While whether to ask for a lesser included offense instruction is a strategic decision, "a lawyer shall abide by a client's decision concerning the objectives of representation." NRPC 1.2(a). The criminal defendant's lawyer knows her client's ultimate objective; the courts do not.

It may be a defendant's objective to avoid any conviction at all, as "criminal convictions carry with them certain collateral consequences." Knight v. State, 116 Nev. 140, 143, 993 P.2d 67, 70 (2000).

The most obvious collateral consequence of a criminal conviction is its potential to enhance later sentences, or be considered by a sentencing court through a presentence investigation report. "[E]ven a gross misdemeanor conviction may impact penalty considerations in a subsequent criminal action." Knight, 116 Nev. at 143, 993 P.2d at 70 (citations omitted). Also, any felony conviction may later be used as a basis for habitual criminal sentence enhancement, and many offenses, such as driving under the influence, are priorable. Hughes v. State, 112 Nev. 84, 87, 910 P.2d 254, 255 (1996); Angle v. State, 113 Nev. 757, 761, 942 P.2d 177, 180 (1997). If a criminal defendant is more concerned about the potential of a criminal conviction being considered in later criminal proceedings than he is about the sentence itself, his attorney may make a reasoned decision to forego a lesser included offense instruction to suit the defendant's objectives.

Second, any felony conviction carries severe consequences, and even if a lesser included offense conviction would reduce the sentence of the defendant, if that lesser included offense was still a felony, these consequences would still result. In Arterburn v. State, 111 Nev. 1121, 1124 n.1, 901 P.2d 668, 670 n.1 (1995), this Court determined that the expiration of a defendant's sentence did not render his appeal moot, considering the many collateral consequences of a felony convictions:

> Arterburn's status as a convicted felon affects or could affect, among other things, his civil rights and jury service, his eligibility to carry a firearm, his ability to obtain professional licenses and certain jobs, any sworn testimony, and any sentence he may receive in the future.

If a client is concerned about losing his law license, work card, his right to vote and serve on a jury, or his eligibility to possess a firearm, rather than the sentence he may receive, his attorney may reasonably choose to forego a lesser included offense to pursue the client's objective of avoiding *any* felony conviction.

Even a conviction for a first-offense misdemeanor domestic battery carries severe consequences: "(1) NRS 432B.157 and NRS 125C.230 create a rebuttable presumption that [a defendant], as a perpetrator of domestic violence, is unfit for sole or joint custody of his children; (2) [a defendant] could lose the right to possess a firearm under 18 U.S.C. § 922(g)(9); and (3) a conviction would render a noncitizen deportable under federal immigration law." Amezcua v. Eighth Judicial Dist. Ct., 130 Nev. ___, 319 P.3d 602, 604 (2014). If a defendant is charged with Battery by Strangulation Constituting Domestic Violence, and the intimate relationship is irrefutable, it is irrelevant to a defendant who is concerned about child custody implications, firearm ownership, or the risk of being deported whether he is convicted of misdemeanor domestic battery or the Category C felony he is charged with in the pleadings. His attorney will know these concerns, and pursue the client's objective. In contrast, a court will not.

Perhaps the most severe consequence of a criminal conviction, outside of incarceration, is its potential to result in a non-citizen defendant's removal from the

United States. As noted by the United States Supreme Court in Padilla v. Kentucky, 559 U.S. 356, 360, 130 S. Ct. 1473, 1478 (2010):

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, . . . **is now virtually inevitable for a vast number of noncitizens convicted of crimes.**

(emphasis added). Non-citizen residents may be deported upon conviction for any crime involving moral turpitude. 8 U.S.C. § 1227(a)(2)(A)(i). For a non-citizen resident, it may not matter what sentence he will face if he is sure to be deported upon conviction of either the greater or lesser offense. His attorney will know the possible immigration consequences and make the appropriate strategic decisions to achieve the accused's objective of avoiding deportation; on the other hand, a court may be unaware whether a defendant is a citizen or non-citizen.

Further, while trial integrity jurisdictions often cite the risk of "compromise verdicts" when a third option of a lesser included offense is not available, allowing the defense and State to decline lesser included offense instructions does not lead to "compromise verdicts" any more than the trial integrity approach. Giving the jury a third option invites compromise by creating a middle ground for negotiation and settlement between those jurors who want to acquit and those who want to convict.

Compromise verdicts are instead prevented by adequate instruction on the jury's duty to follow the law and the correct procedure if the jury cannot reach a verdict.

Therefore, requiring or allowing the District Court to sua sponte instruct on lesser included offenses runs the risk of interfering both with defense strategy and a criminal defendant's objectives. These considerations mandate the abrogation of Lisby.

**c. The Trial Integrity Approach Contravenes the Adversarial Nature of the American Justice System and Interferes With the State's Authority and Responsibility to Charge the**

It is indisputable that the American justice system is adversarial in nature. The trial integrity approach, on the other hand, *requires* a court to override the judgment of the parties in submitting a lesser included offense instruction. This approach is incongruent with the nature of our justice system. Cox, 851 A.2d at 1273 ("In general the trial judge should withhold charging on [a] lesser included offense unless one of the parties requests it, since that charge is not inevitably required in our trials, but is an issue best resolved, in our adversary system, by permitting counsel to decide on tactics."). Further, "[n]ot only does such a policy impinge on the advocate's role, but the result may be to unfairly surprise both the defense and the prosecution." Sheppard, 253 Mont. at 124, 832 P.2d at 373.

Next, the sua sponte instruction on lesser included offenses invades the province of the State's charging power. "The matter of the prosecution of any

criminal case is within the entire control of the district attorney." Cairns v. Sheriff, Clark County, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973) Further, it is the District Attorney's or Attorney General's statutory duty to fashion a charging document. NRS 173.045. This Court has previously noted that a justice court lacks authority to amend a criminal complaint on its own accord: Parsons v. District Court, 110 Nev. 1239, 1244, 885 P.2d 1316, 1320 (1994) ("A *sua sponte* amendment from a felony to a misdemeanor amounts to the justice court attempting to charge a defendant absent any authority to do so, as the discretion and power to charge a defendant belong solely to the attorney general or the district attorney.").

Further, the lesser included offense doctrine arose as a tool for the prosecutor, not the courts. It "developed at common law to aid prosecutors in cases where they failed to prove the charged offense but the evidence supported conviction on a lesser offense." Rosas, 122 Nev. at 1264, 147 P.3d at 1105. A court's sua sponte instruction puts the trial court in the role of the prosecution rather than a neutral referee.

By requiring sua sponte lesser included offense instructions, Lisby condones a judicial invasion into the power of the prosecutor by allowing a court to instruct on a lesser offense that it determines fits the proof, rather than the greater offense. Contrary to Manning's position, Lisby does nothing to deter prosecutorial overreach. Opening Brief at 26. Overreach is deterred instead by the screening functions of the grand jury and preliminary hearing, which weed out charges unsupported by

probable cause. A prosecutor may still well overreach when a lesser included offense instruction is given, as the instruction provides the prosecutor with the comfort that the defendant will be convicted of, at the very least, the lesser included offense.

While trial integrity jurisdictions claim that the party autonomy approach turns courts into "gambling halls," People v. Barton, 12 Cal. 4th 186, 204, 906 P.2d 531, 541 (1995), this is not the case. Instead, the party autonomy approach recognizes that the American justice system is adversarial in nature, and it is not the role of trial courts to second-guess the strategic decisions of the parties. If the State wants to chance an acquittal when proof of an element rests on shaky ground, and the defense sees the opportunity for an outright acquittal, so be it. The trial court should honor those decisions and allow the jury to deliberate on the charged crimes. A jury trial is a search for the truth, no doubt, but it is the parties' responsibility to present the evidence that leads to the truth, and the State's role to fashion the charging document the way it sees fit. The courts should not intervene.

Based upon the foregoing, the Court should overrule Lisby and adopt the following rule: a district court is not required, nor permitted, to provide a lesser included offense instruction in the absence of a request by either the State or the defendant.

## II
## Even Under Lisby, Manning Was Not Entitled to a Sua Sponte Battery Instruction

Manning continues to litigate the issue of whether he was entitled to an instruction under Lisby, as opposed to whether Lisby should be overruled. This clearly contravened this Court's Order Directing Full Briefing which asked the parties to "assume that Lisby requires a sua sponte lesser included offense instruction in this case." However, to avoid any allegation of confession of error, the State briefly responds.

While under Lisby a district court may be required in some situations to give lesser included instructions sua sponte, the district court is not required to issue these instructions when "the evidence would not support a finding of guilty of the lesser offense or degree, e.g., where the defendant denies any complicity in the crime charged and thus lays no foundation for any intermediate verdict." Lisby, 82 Nev. at 188, 414 P.2d at 595. This scenario occurred in the instant case. At trial Manning testified that he did not commit any crime, and that he "just walked past [Berg], [he] didn't mean to like . . ." 3 AA 523. He admitted that he made contact with Berg because it was crowded on the bus and they were next to each other. 3 AA 494. This testimony shows Manning alleged and maintained that the contact was accidental and not willful, and thus did not constitute Battery. See NRS 200.481(1)(a). At no time did Manning say he willfully battered Berg, and even

though defense counsel argued in closing argument that Manning "pushed into the old man," this contention was not in evidence. 3 AA 584. "The statement of an attorney is not evidence." Rudin v. State, 120 Nev. 121, 138, 86 P.3d 572, 583 (2004). Because Manning denied complicity in the crime in his testimony, a sua sponte Battery instruction would not have been proper under Lisby. Accordingly, the District Court did not err.

## III
## Manning Did Not Request that a Battery Instruction Be Given as a Lesser Included Offense of "Battery With Intent to Commit Robbery"

Manning, again in contravention of the Order Directing Full Briefing, litigates an issue outside of the limited issue this Court has asked the parties to address, and contends that he in fact requested a Battery instruction as a lesser included offense. Opening Brief at 30-32. Again, the State briefly responds.

Prior to closing arguments Manning's counsel stated, "the last issue is that we asked for a lesser included in this case. We are of the belief, based on the testimony of Mr. Berg and Ms. Borley's testimony it shows that the battery in this case is the force required in the ***robbery.*** We'd like that included also." 3 AA 558 (emphasis added). Importantly, Manning did not mention Battery with Intent to Commit a Crime when making the request for a lesser included offense instruction. The District Court then found that Battery was not a lesser included offense of Robbery, and thus did not include the instruction. 3 AA 558-559.

The theory Manning presented to the district court was that Battery is a lesser included offense of Robbery, and that Manning's testimony provided evidence that would support a Battery conviction. Defendants, to adequately request a lesser included offense instruction, must allege correctly which offense necessarily includes the lesser offense. The Tenth Circuit in United States v. Bruce, 458 F.3d 1157, 1163-1164 (10th Cir. 2006) explained why:

> Bruce's argument that he preserved for appeal the district court's failure to *sua sponte* advise the jury on the lesser-included offense of simple assault by requesting an instruction on an entirely different offense is unconvincing. Bruce has not cited a single case which supports the notion that a request for an instruction on a particular lesser-included offense preserves for appeal all possible lesser-included offenses. . . .
>
> . . .
>
> Bruce would have this court believe a request for any lesser-offense instruction gives the district court the opportunity to analyze whether the evidence supports the giving of all possible lesser-offense instructions. The very nature of the district court's inquiry when considering a lesser-included-offense instruction, however, is a focused comparison of the lesser offense advanced by the defendant and the charge set out in the indictment. The district court must analyze whether: (1) the elements of the identified lesser offense "are a subset of the elements of the charged offense"; (2) the element "required for the greater, charged offense that is not an element of the lesser offense" is in dispute; and (3) the evidence is "such that a jury could rationally acquit the defendant on the greater offense and convict on the lesser offense." . . . In light of this focused inquiry, it simply cannot be said that in denying Bruce's request for an instruction on assault by striking, beating, or wounding, the district court was necessarily concluding a simple assault instruction was not warranted either.

(citations omitted).

Therefore, Manning never requested a Battery instruction as a lesser included offense of Battery With the Intent to Commit Robbery and the District Court did not err by refusing to issue the Battery instruction as a lesser included.

A defendant may be convicted of "an offense necessarily included in the offense charged." NRS 175.501. This Court has previously found that Battery is not a lesser included offense of Robbery. See Zgombic v. State, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990). Because Robbery can be committed without committing Battery, the District Court's rejection of the Battery instruction was correct. Manning did not ask the court to issue a Battery instruction on the basis that that Battery is a lesser included offense of Battery with Intent to Commit a Crime. Because Manning did not raise this issue at trial, he is precluded from making the argument for the first time on appeal. See Mason v. Cuisenaire, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006). As such, the District Court's decision not to issue the Battery instruction does not warrant reversal.

## CONCLUSION

For the foregoing reasons, the State respectfully requests that Lisby be OVERRULED and Manning's Judgment of Conviction be AFFIRMED.

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/ / /

Dated this 21st day of March, 2016.

Respectfully submitted,

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Nevada Bar #001565

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## CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,712 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of March, 2016.

Respectfully submitted

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 21, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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# EXHIBIT 1

# EXHIBIT 1

| JURISDICTION | PARTY AUTONOMY | TRIAL INTEGRITY | HYBRID |
|---|---|---|---|
| | | | |
| **United States Courts of Appeals** | | | |
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| 1st Circuit | X | | |
| 2d Circuit | | | X |
| 3d Circuit | X | | |
| 4th Circuit | X | | |
| 5th Circuit | X | | |
| 6th Circuit | X | | |
| 7th Circuit | X | | |
| 8th Circuit | X | | |
| 9th Circuit | X | | |
| 10th Circuit | | | X |
| 11th Circuit | | | X |
| D.C. Circuit | X | | |
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| **States** | | | |
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| Arizona | X | | |
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| New Jersey | | X | |
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| Rhode Island | | | X |
| South Carolina | X | | |
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| Vermont | X | | |
| Virginia | X | | |
| Washington | X | | |
| West Virginia | | X | |
| Wisconsin | X | | |
| Wyoming | | | X |

[1] In First Degree Murder cases.

[2] In most cases.

## Pure Trial Integrity Jurisdictions

| Jurisdiction | Authority |
|---|---|
| | |
| California | People v. Gray, 37 Cal. 4th 168, 219, 118 P.3d 496, 532 (2005) |
| Hawaii | State v. Haanio, 94 Haw. 405, 414, 16 P.3d 246, 255 (2001) |
| Iowa | In the Interest of Z.S., 776 N.W.2d 290, 295 (Iowa 2009) |
| Minnesota | State v. Kobow, 466 N.W.2d 747, 752 (Minn. Ct. App. 1991) |
| Nevada | Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966) |
| New Jersey | State v. Rose, 237 N.J. Super. 511, 514, 568 A.2d 545, 546 (App. Div. 1990) (unless instruction would surprise prosecution) |
| North Carolina | State v. Brantley, 501 S.E.2d 676, 679, 129 N.C. App. 725, 729 (N.C. Ct. App. 1998) |

## Limited Trial Integrity Jurisdictions – Sua Sponte Instruction Required When Fundamental to Defense Theory of Case

| Jurisdiction | Authority |
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| | |
| West Virginia | State v. Dellinger, 178 W. Va. 265, 268, 358 S.E.2d 826, 829 (1987). |

**Hybrid Jurisdictions – No Sua Sponte Instruction Required, But Court in Its Discretion May Do So**

| Jurisdiction | Authority |
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| | |
| Alabama | Harbin v. State, 14 So. 3d 898, 902 (Ct. Crim. App. Al. 2009) |
| Connecticut | State v. Ray, 290 Conn. 24, 64, 961 A.2d 947, 971 (2009) |
| Georgia | Gagnon v. State, 240 Ga. App. 754, 755, 525 S.E.2d 127, 129 (1999) |
| Idaho | State v. Rae, 139 Idaho 650, 653, 84 P.3d 586, 589 (Idaho Ct. App. 2004) |
| Illinois | People v. Garcia, 188 Ill. 2d 265, 282, 721 N.E.2d 574, 583 (1999) |
| Maine | 17-A M.R.S. § 13-A |
| Massachusetts | Commonwealth v. Mills, 54 Mass. App. Ct. 552, 554, 766 N.E.2d 547, 549 (2002); Commonwealth v. Berry, 431 Mass. 326, 336, 727 N.E.2d 517, 526 (2000). |
| Missouri | State v. Smith, 949 S.W.2d 947, 950 (Mo. Ct. App. 1997) |
| Nebraska | State v. Costanzo, 227 Neb. 616, 626, 419 N.W.2d 156, 164 (1988) |
| New Hampshire | In re Nathan L., 146 N.H. 614, 617-620, 776 A.2d 1277, 1279-81 (2001) |
| New York | People v. Colville, 20 N.Y.3d 20, 28-32, 979 N.E.2d 1125, 1130-33 (2012) |
| North Dakota | State v. Keller, 2005 ND 86, ¶ 31, 695 N.W.2d 703, 711 (2005) |
| Ohio | State v. Clayton, 62 Ohio St. 2d 45, 47, 402 N.E.2d 1189, 1191 (1980) |
| Oklahoma | McHam v. State, 2005 OK CR 28, ¶¶ 18-20, 126 P.3d 662, 669-70 (Okla. Crim. App. 2005) |
| Rhode Island | State v. Mercier, 415 A.2d 465, 467 (R.I. 1980) |
| South Dakota | State v. Cook, 319 N.W.2d 809, 813 (S.D. 1982 |

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| Tennessee | Tn. Code § 40-118-110(b) |
| Texas | Tolbert v. State, 306 S.W.3d 776, 780-82 n.7 (Tex. Crim. App. 2010) |
| Utah | State v. Howell, 649 P.2d 91, 95 (Utah 1982); *State v. Mitchell*, 3 Utah 2d 70, 278 P.2d 618, 621 (1955) |
| Wyoming | State v. Keffer, 860 P.2d 1118, 1134 (Wyo. 1993) |
| 2nd Circuit | United States v. Harary, 457 F.2d 471, 479 (2d Cir. 1972) |
| 10th Circuit | United States v. Begay, 833 F.2d 900, 901 (10th Cir. 1987) |
| 11th Circuit | United States v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993) |

## Trial Integrity Approach in First Degree Murder Cases, Otherwise Hybrid Jurisdiction

| Jurisdiction | Authority |
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| | |
| Michigan | People v. Beach, 429 Mich. 450, 482-483, 418 N.W.2d 861, 876 (1988) |

## Party Autonomy Jurisdictions – Sua Sponte Instruction Only Permitted When Extreme Case, No Duty to Instruct

| Jurisdiction | Authority |
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| | |
| Arizona | State v. Gipson, 229 Ariz. 484, 487, 277 P.3d 189, 192 (2012) |
| Delaware | State v. Cox, 851 A.2d 1269, 1273-74 (Del. 2003) |
| Maryland | Hagans v. State, 316 Md. 429, 455, 559 A.2d 792, 804 (1989) |
| Montana | State of Montana v. Sheppard, 253 Mont. 118, 124, 832 P.2d 370, 373 (1992) |
| Vermont | State v. Nguyen, 173 Vt. 598, 601, 795 A.2d 538, 542-43 (2002) |
| Wisconsin | State v. Myers, 158 Wis. 2d 356, 364, 461 N.W.2d 777, 780-81 (1990) |

## Party Autonomy Jurisdictions – Preservation/Plain Error Approach

| Jurisdiction | Authority |
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| | |
| Alaska | Cook v. State, 36 P.3d 710, 723 (Alaska Ct. App. 2001) |
| Arkansas | Collins v. State, 271 Ark. 825, 831, 611 S.W.2d 182, 187 (1981) |
| Colorado | People v. Aalbu, 696 P.2d 796, 810-811 (Colo. 1985) |
| Florida | Roberts v. State, 168 So. 3d 252, 256 (Fla. Dist. Ct. App. 1st Dist. 2015) |
| Indiana | Lane v. State, 953 N.E.2d 625, 631 (Ind. Ct. App. 2011) |
| Kansas | Kan. Stat. § 22-3414; State v. Schoonover, 281 Kan. 453, 505, 133 P.3d 48, 84 (2006). |
| Kentucky | Bartley v. Commonwealth, 400 S.W.3d 714, 731 (Ky. 2013) |

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| Louisiana | State v. Corley, 703 So. 2d 653, 668 (La. App. 3d Cir. Oct. 8, 1997) |
| New Mexico | State v. Gibbins, 110 N.M. 408, 412, 796 P.2d 1104, 1108 (N.M. Ct. App. 1990) |
| Virginia | Chittum v. Commonwealth, 211 Va. 12, 17, 174 S.E.2d 779, 782 (1970) |
| 1st Circuit | United States v. Lopez Andino, 831 F.2d 1164, 1171-72 (1st Cir. 1987) |
| 3d Circuit | United States v. Petersen, 622 F.3d 196, 202 (3d Cir. 2010) |
| 4th Circuit | United States v. Lespier, 725 F.3d 437, 450-51 (4th Cir. 2013) |
| 5th Circuit | Druery v. Thaler, 647 F.3d 535, 545 (5th Cir. 2011) |
| 6th Circuit | United States v. Donathan, 65 F.3d 537, 540 (6th Cir. 1995) |
| 7th Circuit | Kubat v. Thieret, 867 F.2d 351, 365-366 (7th Cir. 1989) |
| 8th Circuit | United States v. Lohse, 797 F.3d 515, 522 (8th Cir. 2015) |
| 9th Circuit | United States v. Parker, 991 F.2d 1493, 1496 (9th Cir. 1993) |
| D.C. Circuit | United States v. Dingle, 114 F.3d 307, 312-13 (D.C. Cir. 1997) |

## Party Autonomy Jurisdictions – No Duty to Instruct, No Endorsement of Authority to Sua Sponte Instruct

| Jurisdiction | Authority |
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| Mississippi | Trigg v. State, 759 So. 2d 448, 451-52 (Miss. Ct. App. 2000) |
| Oregon | State v. Miller, 2 Ore. App. 353, 358, 467 P.2d 683, 686 (1970) |
| Pennsylvania | Commonwealth v. Banks, 450 Pa. Super. 555, 570, 677 A.2d 335, 343 (1996) |

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| South Carolina | Abney v. State, 408 S.C. 41, 51-52, 757 S.E.2d 544, 549 (S.C. Ct. App. 2014) (Pieper, J., concurring). |
| Washington | State v. Grier, 171 Wn. 2d 17, 45, 246 P.3d 1260, 1274 (2011) |