IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 65856

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
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vs.	)	
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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REPLY ARGUMENT

Respondent argues the Court should replace Lisby's "trial integrity approach" and adopt a "party autonomy" approach. In support, Respondent makes numerous arguments and expresses its preference for the party autonomy approach by feigning concern for the rights of criminal defendants. Respondent's actual motive is far less sincere.[1] Moreover, Respondent ignores problems inherent with the party autonomy approach. If this Court adopts a party autonomy approach, these problems will likely create less certainty during trial and appellate proceedings.

[1] Clearly abrogating Lisby's trial integrity language would "help" Respondent in the instant case because Appellant would not have been entitled to a *sua sponte* instruction on the lesser included offense.

Under party autonomy the trial court is only required to instruct the jury on lesser included offenses, with evidentiary support, if the parties request the instructions. While there are legitimate criticisms with the trial integrity approach, the remedy should not be to simply replace it so Respondent can improve its position in Appellant's case.

Finally, if this Court chooses to adopt the party autonomy approach, as Respondent suggests, and require the party seeking a lesser included offense instruction to ask for one, Appellant did so here and district court incorrectly denied the request. Therefore, even under a party autonomy approach Appellant maintains this Court must reverse his conviction.

I. Lisby recognizes the trial court's obligation to fully and accurately instruct the jury regarding the law.

Contrary to Respondent's assertion otherwise, the trial integrity approach, as discussed in Lisby, is based upon proper legislative action and the trial court's inherent obligation to fully and accurately instruct the jury concerning the law applicable to a criminal case. NRS 175.501 informs a defendant that he "...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." Moreover, the district court is responsible for

ensuring that the jury is fully and correctly instructed on the law.[2] Lisby's *sua sponte* language merely synergized these two legal concepts thus placing the obligation on the trial court to instruct on lesser included offenses when warranted by the evidence.

A. Lisby's *sua sponte* duty is clear from Nevada case law and NRS 175.501.

In its attempt to convince this Court to affirm Appellant's conviction, Respondent argues Lisby's *sua sponte* duty language is unsupported by Nevada case law and is not apparent from a plain reading of NRS 175.501. RAB 11. Respondent also claims Lisby incorrectly "relied" upon State v. Moore, 48 Nev. 405 (1925), in holding that the trial court must *sua sponte* instruct on lesser included offenses when evidence is presented which absolves a defendant of guilt for the greater offense. RAB 11-12.

1. Moore confirms the trial court must instruct the jury on lesser included offense when warranted by the evidence.

Respondent claims Lisby incorrectly relied upon Moore because Moore never stated a court must *sua sponte* instruct on lesser included offenses. RAB 11. While true, Moore never explicitly stated a court must

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[2] *See* Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 588 (2005); NRS 175.161(2).

sua sponte instruct the jury on lesser included offenses when warranted by the evidence, Lisby was not citing Moore for that proposition. Lisby cited Moore to acknowledge that Nevada has long recognized the proposition that lesser included offense jury instructions should be given when the evidence only proves the lesser included offense. Lisby'a *sua sponte* language was merely an extension of this principal.

Respondent also fallaciously argues Lisby incorrectly relied upon Moore because Moore used the term "lesser degree" of an offense rather than "lesser included offense." RAB 12 (*citing* Wilmeth v. State, 96 Nev. 403, 408, 610 P.2d 735, 738-39 (1980)). In truth, there is no difference between "lesser degree" and "lesser included offenses." For example, second "degree" murder is a lesser included offense of first degree murder because second degree murder contains all the elements of first degree murder except premeditation and deliberation. Had the Nevada legislature named second degree murder "non-premeditated and deliberate murder" instead of second degree murder, it would still be a lesser included offense. *See* State v. Zimmerman, 170 Or.App. 329, 332, 12 P.3d 996, 997-98 (Ct. App. Or. 2000)(interpreting O.R.S. 136.460(1) the Oregon appellate court

made the common sense pronouncement that "the statutory reference to a 'degree inferior' means a lesser included offense."[3]))

2. Lisby and NRS 175.501 are based upon fairness concerns.

In Beck v. Alabama, 447 U.S. 625, 638 (1980), the United States Supreme Court invalidated an Alabama statute prohibiting the trial court from giving lesser included offense instructions in capital cases even when warranted by the evidence. The Court held the statute unconstitutional because it impaired the jury's fact finding role and enhanced the possibility for unwarranted convictions. Id. at 637-38. Although the Court limited its decision to capital cases, it nevertheless noted all states and federal circuits recognized the common law right for a criminal defendant to instruct a jury on lesser included offenses, even in non-capital cases, when the evidence warrants the instructions.[4] Id. at 633-37. Later, the Court acknowledged Beck's holding is based upon the U.S. Constitution's due process clause. Hopper v. Evans, 456 U.S. 605, 611 (1982)("Beck held that due process

[3] ORS 136.460(1) states, "Upon a charge for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the accusatory instrument and guilty of any degree inferior thereto or of an attempt to commit the crime or any such inferior degree thereof."

[4] The Court noted in non-capital cases even Alabama recognized a defendant's right to lesser included offense instructions. Id. at 636-37.

requires that a lesser included offense instruction be given when the evidence warrants such an instruction.").

Accordingly, in capital cases due process mandates the trial court instruct the jury on lesser included offenses when warranted by the evidence. While the Supreme Court has not extended Beck's holding to non-capital cases it has also not precluded states from doing so. Therefore, states are free to craft laws, either by statute or case, recognizing a defendant should not be convicted upon inadequate evidence when the jury has no option other than conviction or acquittal.[5]

In Nevada, "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." NRS 175.501. (Emphasis added). NRS 175.501 essentially codifies the common law practice of allowing juries to consider lesser included offenses when evidence concerning the charged, greater, offense is lacking. Lisby v. State, 82 Nev. 183, 186-87, 414 P.2d 592, 594 (1966). NRS 175.501 also acknowledges that due

[5] *See* Wilson v. State, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007)("states are free to provide additional constitutional protections beyond those provided by the United States Constitution" and "...Nevada law embraces a more expansive interpretation of constitutional rights than federal law.") Id.

process demands a defendant, who has done something wrong, should not be found guilty when the state fails to present sufficient evidence and the jury is reluctant to acquit knowing the defendant is not truly innocent.

Although Lisby's interpretation of NRS 175.501 could conceivably clash with a hypothetical defendant's express wishes, in Nevada there are other situations where a defendant's desire to pursue a particular trial strategy yields to the court's obligation to ensure he receives a fair trial. For example, the district court can deny a defendant's request for self-representation if the court is not "convinced that the defendant made his decision with a clear comprehension of the attendant risks." *See* Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996). Additionally, the court can deny a non-indigent criminal defendant's choice of counsel when the choice creates a conflict of interest which interferes with the administration of justice. *See* Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 428, 168 P.3d 703, 709 (2007). Finally, an attorney can concede his client's guilt to some charges as trial strategy over the client's objection. *See* Armenta-Carpio v. State, 129 Nev. Adv. Op. 54, 306 P.3d 395, 398 (2013).[6]

[6] Although Respondent forcefully advocates this Court adopt a party autonomy approach, Respondent never offers any position concerning who controls the decision to forego lesser included offense instructions -- the

Finally, contrary to Respondent's insinuation, NRS 175.501's use of the word "may" does not suggest a defendant can only receive a lesser included offense instruction if he requests one. Rather, "may" simply places a defendant on notice that he could be convicted of a lesser included offense if the evidence clearly discloses guilt for the lesser included offense. NRS 175.501's purpose is to ensure the most accurate verdict based upon the evidence presented. Given the statutory requirement that the court, and not counsel, instruct the jury concerning the law applicable to the case, Lisby merely recognizes it is the court's responsibility to give the lesser included offense instructions when warranted by the evidence.

B. This Court has repeatedly discussed the *sua sponte* situation outlined in Lisby.

Respondent claims this Court never "applies" Lisby's *sua sponte* duty. Respondent notes opinions which cite Lisby and claims those cases only involved "requested" lesser included offense instructions. RAB 15. Therefore, Respondent claims Lisby has no "lasting significance." Id. at 16. *See* Smith v. State, 120 Nev. 944, 947, 102 P.3d 569, 571 (2004)(trespass is not a lesser included offense of burglary); Graham v. State, 116 Nev. 23, 25, 992 P.2d 255, 256 (2000)(2nd degree murder not a lesser included offense of

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defendant or his attorney. Armenta-Carpio suggests the decision would be the attorney's and not the defendant's.

1st degree murder by child abuse); Davis v. State, 110 Nev. 1107, 1112, 881 P.2d 657, 660 (1994)(coercion not a lesser related offense of first degree kidnapping and no evidence presented absolving defendant of guilt for kidnapping.); Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983)(evidence from the defendant alone enough to warrant a theory of defense instruction); McMichael v. State, 94 Nev. 184, 191, 577 P.2d 398, 402 (1978)(lewd and lascivious conduct not a lesser included offense of infamous crime against nature); Jackson v. State, 93 Nev. 677, 682, 572 P.2d 927, 930 (1977)(attempted unlawful taking of a vehicle not a lesser included offense of burglary); Holbrook v. State, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974)(tampering with vehicle may be a lesser included offense of grand larceny auto but evidence clearly showed guilt for the greater offense); Holland v. State, 82 Nev. 191, 192, 414 P.2d 590, 591 (1966) [7] (assault is lesser included offense of assault with use of deadly weapon with intent to inflict great bodily harm but evidence clearly showed guilt for greater offense.).

To further support its argument, Respondent claims it could only find two published decisions where this Court addressed the trial court's *sua*

[7] Holland was overruled by Rosas, which noted prior decisions "incorrectly stated that instruction on a lesser-included offense can be refused as long as the evidence clearly showed guilt above the lesser offense." Rosas v. State, 122 Nev. 1258, 1265 fn. 10, 147 P.3d 1101, 1106 fn. 10 (2006).

sponte obligation to instruct on lesser included offenses. *See* McGuire v. State, 86 Nev. 262, 266, 468 P.2d 12, 15 (1970)(no *sua sponte* duty to instruct on receiving stolen property or larceny in burglary prosecution because no evidence supporting any theory upon which the jury could find defendant guilty of either receiving stolen property or larceny."); Larsen v. State, 93 Nev. 397, 400, 566 P.2d 413, 414 (1977)(trial court was not required to *sua sponte* instruct on false imprisonment in kidnapping prosecution because the evidence clearly showed guilt beyond the lesser offense.)[8]

Although the aforementioned cases arguably do not "apply" Lisby's *sua sponte* duty, they nevertheless acknowledge the *sua sponte* duty exists. The issue in these cases was not whether the court failed to *sua sponte* instruct on lesser included offenses supported by the evidence. Rather, the cited cases involved instructions which were not actually lesser included offenses. The question in these cases was not whether the court should have *sua sponte* instructed on lesser included offenses. Instead, the question was whether the supposed lesser included offense actually was a lesser included offense. In these cases this Court simply found that the alleged lesser

[8] *See* fn. 5.

included offense instruction did not embrace an actual lesser included offense.

Interestingly, in its effort to suggest Lisby is "seldom applied" Respondent ignores numerous unpublished decisions. *See* Wagstaff v. State, 2013 WL 3258217 (NV. June 3, 2013)(no *sua sponte* duty to instruct on battery in prosecution for lewdness with a minor because battery is not a lesser included offense); Cervantes v. State, 2012 WL 6561129 (NV. December 13, 2012)(no obligation to *sua sponte* instruct on possession of controlled substance in sale of controlled substance prosecution because no evidence presented absolving defendant of guilt for greater offense while supporting guilt for lesser offense); Evans v. State, 2014 WL 1270606 (NV. March 26, 2014) (no *sua sponte* obligation to instruct on lesser included offense of resisting an officer without the use of a dangerous or deadly because no evidence absolving guilt for the greater offense.); Follett v. State, 2013 WL 3291815 (Nev. May 15, 2013)(no *sua sponte* duty to instruct that a reasonable mistaken belief regarding consent is a defense to sexual assault because instruction did not involve a lesser included offense); Garrett v. State, 125 Nev. 1038 (NV. April 14, 2009)(no *sua sponte* duty to instruct on misdemeanor injury to property because there was no evidence absolving defendant of guilt for the greater offense and supporting guilt for lesser

offense.); Johnson v. State, 2012 WL 4039824 (NV. September 12, 2012)(appellate counsel not ineffective for failing to argue the trial court should have *sua sponte* instructed on statutory sexual seduction in prosecution for sex assault on minor under 14 because there the only evidence at trial was that the sex was without consent.).[9] These unpublished decisions disprove Respondent's claim and further demonstrate Lisby is routinely applied. In every one of these decisions this Court implicitly affirmed Lisby's holding while disagreeing with the defendant's argument concerning the lesser offense. Contrary to Respondent's suggestion otherwise, all these cases, both published and unpublished, demonstrate the ease at which this Court addresses the district court's *sua sponte* duty.

Assuming, arguendo, that Lisby's *sua sponte* duty is not routinely applied, that fact could simply suggest lesser included offenses are not generally applicable in the cases which reach this court. Indeed, not every crime in Nevada contains a true lesser included offense. Therefore, lesser included offense instructions would not be applicable in every criminal trial and subsequent appeal. This would not mean, however, that Lisby's *sua*

[9] Respondent will likely claim Appellant is improperly citing unpublished decisions. However, Appellant is not citing the aforementioned cases as legal precedent. Instead, Appellant cites the decisions solely to rebut Respondent's claim this Court seldom addresses Lisby's *sua sponte* requirement.

sponte duty, or any other issue which arises infrequently, lacks importance or significance. Many important issues do not arise in every, or even a majority, of cases. Taking Respondent's argument to its logical conclusion, this Court should essentially abrogate all precedent which infrequently arises in this Court.

C. Lisby's language is consistent with Nevada's test for lesser included offenses.

Respondent claims Lisby requirement that the court *sua sponte* instruct on lesser included offenses when evidence is presented which absolves a defendant of liability for the greater offense while supporting guilt for the lesser offense, created a class of lesser offenses "which does not necessitate a finding that each element of the alleged lesser included offense is within the greater offense." RAB 17-18. Respondent also claims Lisby created a separate situation where lesser included offense instructions must be given when "the elements of the greater offense include all 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." RAB 17.

According to Respondent, this second situation "mirrors the modern lesser included offense test." Id. Therefore, because the second situation

requires the defendant to request the instruction, and every lesser included offense would fall under the second situation, Respondent asserts defendants should have to request instructions rather than have the court issue them *sua sponte*. Respondent fundamentally misunderstands Lisby.

Pursuant to Lisby, when an offense is an actual lesser included offense and "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 must *sua sponte* give the instruction." Lisby, 82 Nev. at 187, 414 P.2d at 595. Additionally, when the offense is an actual lesser included offense but "there is no evidence at the trial tending to reduce the greater offense" the trial court is not required to give the lesser offense instruction but could do so.[10] Id. Finally, Lisby mandated "...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. at 188, 414 P.2d at 595 (emphasis added).

[10] In Rosas this Court noted prior decisions claiming the court could refuse a lesser included offense instruction if the State met it's burden of proof on the greater offense were incorrect. Rosas, 122 Nev. at 1265 fn. 10("a court must focus on whether credible evidence admitted at trial warranted a lesser included offense, not whether the evidence was sufficient to prove the greater one." Id.(*citing* Hooks v. Ward, 184 F.3d 1206, 1232 (10th Cir. 1999)).

Lisby did not create a different test for what constitutes a lesser included offense. Lisby begins with an acknowledgement that the offense **is a lesser included offense**, and then discusses under what circumstances the court must instruct on those lesser included offenses. Thus, Lisby merely set out the evidentiary requirements before a lesser included offense instruction should be given and who should initiate the request. Under the third situation, when the evidence concerning a lesser included offense supports the defendant's "theory of defense" the defendant is required to ask for the instruction. This makes sense because given the lower evidentiary standard -- "any evidence at all," rather than evidence which completely absolves a defendant of guilt, the defendant should have to request and justify why he is entitled to the instruction. Essentially, a defendant should have to justify why the evidence presented "fits" within his theory of defense and then the court must assess whether the minimum evidentiary threshold has been met before allowing the jury to consider convicting of a lesser included offense.

D. Nevada is entitled to interpret NRS 175.501 differently than Federal Courts interpret Federal Rule of Criminal Procedure 31.

Respondent notes the Nevada legislature codified NRS 175.501 in 1967 when it adopted other portions of the Federal Rules of Criminal Procedure for use in Nevada state courts. RAB 20. Accordingly, because

NRS 175.501 contains language similar to Federal Rule of Criminal Procedure 31 ("FRCP 31"), Respondent claims this Court should adopt the Federal Circuit courts' position which ostensibly does not require courts to *sua sponte* instruct on lesser included offenses when warranted by the evidence.

Merely because Nevada created a statute which mirrors language in the Federal Rules of Criminal Procedure does not mean Nevada adopted, into perpetuity, case law interpreting the Federal rule. More importantly, if FRCP 31's text so clearly suggests a particular approach, and FRCP 31 is used within all Federal Circuits, then there should not be any disagreement amongst circuits regarding whether a trial court could or should instruct on lesser included offenses over a defendant's objection. Yet, there is disagreement on this precise issue within the various circuits. *See attached as exhibit* 'A.'

If there truly is a "preferable" approach under the FRCP, then every circuit would follow that approach. The fact that the various circuits disagree regarding a trial court's duty or discretion to instruct the jury on lesser included offenses suggests states should be free to interpret their statutes, based upon the FRCP, in any manner they choose. Nevada has

chosen to interpret NRS 175.501 in a manner which hopefully ensures the most accurate verdict in a criminal case.

E. A majority of jurisdictions either mandate the trial court instruct on lesser included offenses warranted by the evidence or allow the trial court to do so over the parties' objection.

There are three approaches concerning a trial court's ability to give lesser included offense instructions *sua sponte*: the trial integrity approach; the party autonomy approach; and the hybrid approach. Trial integrity jurisdictions mandate a trial court give lesser included offense instructions *sua sponte* when the evidence warrants. Hybrid jurisdictions give the court discretion to give the instructions *sua sponte* over the parties' objections. Party autonomy jurisdictions prohibit giving the instructions *sua sponte*.

Like Respondent, Appellant has created a chart which lists the approaches employed by all fifty (50) states, the District of Columbia, all eleven (11) Federal Circuits, and the territories Guam, Puerto Rico, and the Virgin Islands. *See attached as exhibit* 'A.' However, unlike Respondent's chart, Appellant's is a straightforward compilation of the jurisdiction, the approach the jurisdiction follows, and relevant authority which proves the jurisdiction follows the asserted approach. Id.

Appellant's chart demonstrates twelve (12) jurisdictions employ a true trial integrity approach: California; Hawaii; Iowa; Kansas; Louisiana; Minnesota; Nevada; North Carolina; Ohio; Rhode Island; the 10th Circuit; and Guam. *See* Exhibit A. Thirty-two (32) jurisdictions employ a hybrid approach: Alabama; Arizona; Arkansas; Connecticut; Georgia; Idaho; Illinois; Maine; Massachusetts; Michigan; Montana; Nebraska; New Hampshire; New Jersey; New York; North Dakota; Oklahoma; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Vermont; West Virginia; Wisconsin; Wyoming; 1st Circuit; 3rd Circuit; 4th Circuit; Puerto Rico; Virgin Islands; and D.C. Court of Appeals. Id. Finally, twenty-two (22) jurisdictions embrace a party autonomy approach: Alaska; Colorado; Delaware; District of Columbia; Florida; Indiana; Kentucky; Maryland; Mississippi; Missouri; New Mexico*; Oregon*; South Carolina*; Virginia*; Washington*; 2nd Circuit; 5th Circuit*; 6th Circuit*; 7th Circuit*; 8th Circuit*; and 9th Circuit*; 11th Circuit*.[11] Id.

Based upon his research Appellant concedes a minority of jurisdictions embrace a true trial integrity approach. However,

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[11] Appellant included jurisdictions noted with an asterisk (*) as party autonomy jurisdictions. However, case law from those jurisdictions does not explicitly forbid courts from giving lesser included offense instructions over a party's objection. Therefore, these jurisdictions could be considered hybrid jurisdictions.

Respondent's argument that the party autonomy approach is better simply because it is the "majority" approach is a fallacious *argumentum ad populum.* Moreover, the party autonomy approach is not even the majority approach. According to Appellant's research, a majority of jurisdictions follow the hybrid approach which preserves the trial court's ability to instruct on lesser included offenses while simultaneously respecting the parties' trial strategy.

Furthermore, if one adds hybrid jurisdictions with trial integrity jurisdictions it is clear the overwhelming majority of jurisdictions recognize either a trial court's obligation to instruct the jury on lesser included offenses or its discretion to instruct on lesser included offenses when warranted by the evidence. Respondent's suggestion that this Court adopt the party autonomy approach essentially advocates abandoning one minority approach to join another minority approach. If this Court is desirous to adopt the majority approach then it should adopt the hybrid approach.

F. The trial integrity approach is based upon the legitimate concern that a trial is the search for the truth.

Respondent argues the party autonomy approach is better because it is consistent with Nevada's requirement that parties preserve objections and it promotes judicial economy by limiting invited error. RAB 38-47.

Respondent also claims the trial integrity approach interferes with defense strategy, the defendant's objectives, contravenes the adversarial nature of the American justice system, and interferes with the state's authority and responsibility to charge the case. Id.

1. Lisby's sua sponte duty is not too onerous for this Court to apply and does not invite error.

Respondent claims when this Court addresses Lisby's *sua sponte* duty on appeal it has to "access the proof as a whole and determine whether there was evidence that could absolve the defendant of the greater offense, whether the defendant denied culpability, and whether the State has met its burden on the greater offense." RAB 39. Respondent is incorrect.

As noted, subsequent cases modified Lisby's admonition that a lesser included offense is not required when the defendant denies culpability or when the State has met its burden of proof on the greater offense. *See* Rosas, 122 Nev. at 1265 fn. 10 (prior decisions claiming the court could refuse a lesser included offense instruction if the State met it's burden of proof on the greater offense were incorrect, "a court must focus on whether credible evidence admitted at trial warranted a lesser included offense, not whether the evidence was sufficient to prove the greater one."); *and see* Id. at 1267, 174 P.3d at 1107 (a defendant can deny complicity in the charged

crime and still be entitled to a lesser included offense instruction so long as there was an evidentiary foundation for the instruction.). Therefore, currently, on appeal, when an appellant raises a Lisby issue this Court need only determine if evidence had been presented which absolved the defendant from guilt for the greater offense while supporting guilt for the lesser offense. This does not require any more effort than this Court exerts when handling sufficiency of the evidence claims.

Additionally, the party autonomy approach will do nothing to streamline this Court's review on appeal. Indeed, trial courts will invariably commit error under a party autonomy approach. For example, a trial court may decide to refuse to instruct upon request by claiming an insufficient evidentiary foundation. On appeal, this Court will then have to make two separate determinations. First, was there evidence presented to support the lesser included offense? Second, if there was the Court then must determine whether the lower court's failure to instruct was reversible error. This hardly makes appellate determinations any easier. In fact, Lisby's admonition that the trial court instruct on lesser offenses when warranted by the evidence provides a simple procedure which all trial courts should be able to apply. Indeed, Lisby's bright line rule allows this Court to

expeditiously reverse convictions should the lower court neglect or refuse to instruct when required.

Finally, Respondent claims Lisby's trial integrity approach "invites error by giving defense counsel a perverse incentive to fail to request lesser included offense instructions." *See* RAB 39. According to Respondent, "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." Id. at 39-40.

Under Respondent's paranoid hypothesis a defendant would have to ensure that evidence is elicited which completely absolves him of guilt from the greater offense while supporting guilt for the lesser offense. Without this evidence, even under Lisby, the defendant would have no chance to prevail on appeal. Then, after ensuring the evidence is elicited, the defendant would have to secretly gamble that the court will fail to offer the lesser included offense instruction, even though Lisby has mandated the court do since 1966. Respondent's slanderous argument concerning invited error serves no purpose other than to perpetuate the myth that defense attorneys routinely act underhanded.

Lisby is binding precedent. Therefore, when evidence is presented at trial absolving the defendant of guilt for the greater offense while supporting

guilt for the lesser offense, **the court must instruct the jury on a lesser included offense**. Currently there is no "perverse incentive" to invite error because a defendant cannot pursue an "all or nothing strategy" at trial. The only way the defendant can "invite error," under Lisby's trial integrity approach, is if the trial court fails to do its job and neglects to instruct on lesser included offenses when the evidence requires it to do so. Moreover, so long as the prosecutor is paying attention at trial, nothing in Lisby prohibits him from reminding the court of its obligation to give the lesser included offense instruction.

Finally, this Court recognizes other situations where the trial court must act *sua sponte*. *See* Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001)(although prosecutor has a duty to request limiting instruction on use of bad act evidence if he fails to do so, "the district court should raise the issue *sua sponte*."); Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985)(to ensure the accused receives a fair trial, courts must "exercise their discretionary power to control obvious prosecutorial misconduct *sua sponte*."). In these situations this Court has never held the defendant "invites error" by neglecting to remind the court of its obligation.

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2. Abrogating Lisby will only create conflict with a defendant and his counsel and will not preserve the defendant's objective.

Respondent contends Lisby contravenes this Court's supposed deference to defense strategy. RAB 41. Respondent notes in the context of ineffective assistance of counsel this Court almost always rejects any challenge to a counsel's "strategic decisions." Id. Additionally, Respondent argues Lisby could interfere with a hypothetical defendant's desire to avoid any conviction whatsoever. Id. Problematically, however, abrogating Lisby will never reconcile these concerns because many times defense strategy is at odds with a defendant's objectives.

As previously discussed, this Court has held that the trial court need not canvass a defendant to ascertain whether he agrees with his attorney's strategy to concede guilt on certain charges at trial. *See* Armenta-Carpio, 129 Nev. Adv. Op. 54, 306 P.3d at 398. Analogously, if this Court were to adopt a party autonomy approach, a defense attorney could request and receive a lesser included offense instruction even though his client desires to pursue an all or nothing strategy.

If this Court is inclined to abrogate Lisby, then it must also clarify who controls the decision to request a lesser included offense instruction. If this Court places the onus on the defendant then Armenta-Carpio should be

abrogated as well. If this Court places the onus on the attorney then doing so would do nothing to assuage Respondent's fear of invited error. Presumably the attorney and defendant, in collusion, could choose to request a lesser included offense hoping the jury will not convict on the greater offense. If the tactic proves successful, the defendant could still assert during post-conviction litigation that he never desired the instruction and his attorney violated the defendant's express wishes by seeking the instruction. As Respondent notes, NRPC 1.2(a) requires a lawyer to abide by client's decision concerning representation.

Problems between attorneys and defendants will not disappear if this Court abrogates Lisby. In fact, abrogating Lisby will only exacerbate potential conflicts. Many defendants are unskilled in the law and harbor unreasonable expectations concerning their cases. Many times their attorneys know concession on a lesser included offense is the only viable trial strategy. If a defendant desires to pursue an all or nothing strategy and the attorney desires a lesser included offense instruction, Respondent offers no suggestion regarding how a party autonomy approach will solve this dilemma. Finally, although a defendant's objective may be to avoid any conviction at all, under a party autonomy approach, with mutuality of right,

the State can obviate the defendant's objective by requesting a lesser included offense instruction.

3. *Lisby does not interfere with State's charging responsibility.*

Respondent argues Lisby's requirement that the court *sua sponte* instruct on lesser included offenses supported by the evidence "invades the province of the State's charging power." RAB 45. In support, Respondent cites authority involving situations where courts improperly amended charging documents. *See* Id. at 46. Respondent's reliance upon this authority is misplaced.

NRS 175.501 has always notified defendants they risk being found guilty of any lesser included offenses. Additionally, NRS 175.161(2) mandates the court instruct the jury on the law governing the case. By acknowledging this, Lisby does not confer "power" upon the court to charge the defendant with a crime. Instead, Lisby simply reaffirms the court's authority to instruct the jury.[12] Lisby does not allow courts to "interfere"

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[12] *See* Stromberg v. Second Judicial District Court, 125 Nev. 1, 7, 200 P.3d 509, 513 (2009)("[w]hen the decision to prosecute has been made, **the process which leads to acquittal or to sentencing is fundamentally judicial in nature.**" (emphasis added)(*citing* Esteybar v. Municipal Court for Long Beach Judicial District 5, 95 Cal.Rptr. 524, 495 P.2d 1140, 1145 (1971)).

with the State's charging power any more than the Legislature "interferes" with the State's charging power via NRS 175.501 and 175.161.

Additionally, a lesser included offense's elements are entirely within the greater offense. Therefore, a lesser included offense is not a "separate charge," but instead, essentially the same charge minus one or more elements. Therefore, when the court instructs the jury on a lesser included offense it is not adding a different charge and is certainly not amending the charging document.[13]

Lastly, assuming the court's decision to instruct on lesser included offenses could possibly be considered "amending" the charging document, this Court has recognized situations where a court can amend a charging document without "interfering with the State's charging power." For example, "if one of the parties raises the issue of amendment in the pleadings, such as a return to a writ of habeas corpus, the court may *sua sponte* order the amendment of the criminal information." Grant v. State, 117 Nev. 427, 433, 24 P.3d 761, 765 (2001).

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[13] Under Respondent's logic, if the court is actually "amending the charging document" when it gives lesser included offense instructions then the court would not be able to instruct on lesser included offenses under any circumstances, including when the defendant requests the instruction pursuant to his theory of defense.

II. Even if this Court overrules Lisby, Appellant was nevertheless entitled to a lesser included offense instruction for Battery.

Respondent claims Appellant's "contravened this Court's Order Directing Full Briefing" because the Order asked the parties to 'assume that Lisby requires a *sua sponte* lesser included offense instruction in this case.'" RAB 48. According to Respondent, Appellant's Opening Brief should have only addressed "whether Lisby should be overruled" and not whether Appellant was entitled to a lesser included offense instruction.[14] Id. In actuality, the Order directing full briefing actually asked the parties to address "whether this court should reconsider Lisby, and if so, **to what extent**." (Emphasis added). As Respondent concedes elsewhere in its Answering Brief, Lisby discussed **three** situations where a defendant would be entitled to a lesser included offense instruction. *See* RAB 7-8. Under Lisby's third situation, "...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

[14] Ironically, although Respondent chastises Appellant for allegedly litigating an issue outside this Court's Order, Respondent argues Appellant was not entitled to a *sua sponte* Battery instruction (*see* RAB 49) even though this Court's Order clearly stated, "[f]or the purposes of this question, assume Lisby requires a *sua sponte* lesser included offense instruction **in this case**."

requested, instruct on the lower degree or lesser included offense."[15] Lisby, 82 Nev. at 595, 414 P.2d at 187; *accord* Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); Brooks v. State, 103 Nev. 611, 747 P.2d 893 (1987); Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002); Estes v. State, 122 Nev. 1123, 146 P.3d 1114 (2006).

While Lisby discussed *sua sponte* instructions, it also discussed when a court must give a defendant's theory of defense instructions. Because this Court's Order asked the parties to address whether and "**to what extent**" it should reconsider Lisby, Appellant argued in his Opening Brief that even if this Court was inclined to reject Lisby's *sua sponte* language it should not overrule Lisby regarding theory of defense instructions. Therefore, Appellant did not contravene this Court's Order directing full briefing and instead, simply argued if this Court overrules Lisby's *sua sponte* language Appellant was nevertheless entitled to Battery as a lesser included offense instruction pursuant to his theory of defense.

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[15] In Rosas v. State, 122 Nev. 1258, 1267, 174 P.3d 1101, 1107 (2007), this Court clarified a defendant can deny complicity in the charged crime and be entitled to a lesser included offense instruction so long as there was an evidentiary foundation for the instruction. Although Rosas clarified Lisby on this important point, Respondent's Answering Brief ignores Rosas and asserts because Appellant "testified that he did not commit any crime" he was not entitled to a Battery lesser included offense instruction. RAB 48-49. Besides asserting an incorrect statement of law, Respondent's claim that Appellant did not admit to a Battery is incorrect as well.

III. Appellant requested an instruction on Battery as a lesser included offense of Battery with the Intent to Commit a Crime (Robbery).

Because this Court's Order Directing Full Briefing asked the parties to address whether and "to what extent" this Court should reconsider Lisby, Appellant argued this Court should not overrule Lisby regarding theory of defense instructions. *See* AOB 25-28. Accordingly, if a party must request a lesser included offense instruction, then Appellant did so and this Court should reverse his conviction. Indeed, because Appellant actually asked for the instruction perhaps his case is not the most appropriate vehicle for this Court to reconsider Lisby.

Respondent's Hail Mary attempt to sustain Appellant's conviction relies upon a game of semantic "gotcha." Respondent claims the court correctly denied Appellant's request for a lesser included offense instruction on Battery because "[Appellant] did not mention Battery with the Intent to Commit a Crime when making the request for a lesser included offense instruction." RAB 49. Therefore, Respondent argues Appellant requested Battery as a lesser included offense of Robbery. Id.

Appellant never explicitly stated he was entitled to an instruction on Battery as a lesser included offense of Robbery. Instead, Appellant summarized the in-chambers discussion regarding jury instructions by

mentioning his belief that the admitted battery was the force used during the intended or completed robbery. Perhaps Appellant could have been more explicit in his request. However, given the context of Appellant's case, the request is easily understandable.[16]

The State alleged two different crimes for one act.[17] Essentially, the State "hedged it bets" by charging Appellant with Battery with the Intent to Commit Robbery so that the jury could have an option to convict if it did not believe Appellant actually robbed Berg. Indeed, the State never forcefully advocated that Appellant merely battered Berg while simultaneously intending to rob him. Instead, the State always maintained Appellant **actually robbed** Berg. Therefore, given the State's theory of prosecution, and the evidence presented, Appellant would naturally request a lesser included offense instruction for Battery with the Intent to Commit a Crime

[16] Appellant notes an apparent double standard. When the State attempted to impeach Appellant with the uncharged bad acts the prosecutor stated the acts were admissible as prior inconsistent statements. AA III 497. The district court knew this was clearly incorrect but did not summarily reject her request. Instead, the court found the statements admissible for an entirely different reason. Id. at 503. Assuming the district court in Appellant's case was competent enough to realize Battery is a lesser included offense of Battery with the Intent to Commit a Crime, and assuming Appellant's request was unclear, the district court should have afforded Appellant the same consideration it afforded the prosecutor and not summarily deny the request because it was not perfectly articulated.

[17] The district court expressed concerned that Appellant should not be convicted of both Robbery and Battery with the Intent to Commit Robbery because the later essentially merges into the former. *See* AA III 559.

(Robbery) by referring to the Robbery charge because that is what the State advocated -- that the Battery was the forced used in the alleged Robbery.

Most importantly, the district court denied Appellant's request on its own initiative, not in response to the State's objection. This demonstrates the trial prosecutor recognized Appellant made a proper request. *See* AA III 358-59. Because the State did not object to Appellant's request below, notwithstanding the court's decision refusing the instruction, Respondent should be prohibited from arguing on appeal that Appellant did not make a proper request. *See* FDIC v. Rhodes, 130 Nev. Adv. Op. 88, 336 P.3d 961, 964 (Nev. Oct. 30, 2014)(Supreme Court will generally not "address arguments that are made for the first time on appeal and which were not asserted before the district court.").

Finally, Respondent's desperate argument also ignores the fact that Appellant testified and denied intending to or actually committing a Robbery. Based upon Appellant's testimony, it was clear to everyone that Appellant's theory of defense was that he battered Berg but did not intend to nor actually rob Berg. Therefore, Appellant's requested instruction would necessarily only apply to the charge of Battery with the Intent to Commit a Crime (Robbery).

CONCLUSION

Unlike Respondent, who has asserted a self-serving position ultimately at odds with its long term interests, Appellant acknowledges there are benefits and problems inherent in both the trial integrity approach and the party autonomy approach. Perhaps then the best course of action is for this Court to maintain the status quo and allow the legislature to clarify this issue. Moreover, Respondent has not presented compelling reasons to abandon Lisby. *See* City of Reno v. Howard, 318 P.3d 1063, 1065, 130 Nev. Adv. Op. 12 (February 27, 2014)("we are loath to depart from the doctrine of *stare decisis* and will overrule precedent only if there are compelling reasons to do so.")(internal citations omitted)).

Nevertheless, if this Court abrogates Lisby's *sua sponte* requirement it should not abrogate Lisby's acknowledgement that a defendant is entitled to a lesser included offense instruction pursuant to his theory of defense. If this Court does so, then here, Appellant asked for a lesser included offense

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instruction consistent with his theory of defense and there was evidence presented which supported Appellant's theory of defense. Therefore, the district court should have instructed the jury regarding Battery as a lesser included offense and its failure to do so was reversible error.

Respectfully submitted,

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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 Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6997 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 19th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of May, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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1820 Arrow Stone Court
North Las Vegas, NV 89031

BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office

Jurisdiction	Approach (TI or PA or HY)	Legal Authority
Alabama	*Hybrid*	Ala.Code 1975 § 13A-1-9 Harbin v. State, 14 So.3d 898, 908-09 (Ct. Crim. App. Al. 2009), "we hold only that a trial court, in exercising its considerable discretion in formulating its jury instructions, is not bound by such an all-or-nothing defense strategy and may instruct the jury on a lesser-included offense that is supported by the evidence if it so chooses."
Alaska	*Party Autonomy*	AK R RCRP Rule 31 Rollins v. State, 757 P.2d 601 (Ct. App. AK 1988), because "proposed instructions should be requested and ruled on prior to closing argument" the court should not have *sua sponte* instructed the jury on a lesser included offense during jury deliberations when the defendant had withdrawn the request for the instruction and chose to pursue an all or nothing strategy. (*Distinguished by* Rogers v. State, 232 P.3d 1226 (Ct. App. AK 2010)).
Arizona	*Hybrid*	AZ ST RCRP Rule 23.3 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. But if the instruction is given and supported by the evidence, a resultant conviction for the lesser included offense does not violate the defendant's constitutional rights or contravene any Arizona statute or rule."
Arkansas	*Hybrid* • It does not appear Arkansas has explicitly ruled on whether the court can *sua sponte* instruct on lesser included offenses over defendant's objection. However, the Arkansas Supreme	AR ST § 5-1-110 State v. Jones, 321 Ark. 451, 455 (1995), involved the prosecutor's request for a lesser included offense instruction and held, "Plainly, section 5-1-110(c) does not delegate the decision regarding the propriety of a lesser included offense instruction to the defendant, but requires the trial court to determine whether the proffered instruction concerns a lesser included offense and, if so, whether a rational basis exists for a verdict acquitting the defendant of the greater offense and convicting him of the lesser."

Exhibit A

	Court has implicitly acknowledged it can in Lampkin v. State, 607 S.W.2d 397 (1980), where the court affirmed the trial court's decision to instruct on a lesser included offense over defendant's objection and without a request from the state.	
California	*Trial Integrity*	Cal. Penal Code § 1159 People v. Barton, 12 Cal.4th 186, 194-95, 906 P.2d 531, 535 (1995), "We explained that a trial court must, *sua sponte*, or on its own initiative, instruct the jury on lesser included offenses…the obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given." (Internal citations omitted).
Colorado	*Party Autonomy*	C.R.S.A § 18-1-408(5) Crim. Pro. Rule 31 People v. Skinner, 825 P.2d 1045, 1046-47 (1991), If an offense is truly lesser included either party can request and get the instruction provided there's an evidentiary basis. However, Colorado allows for lesser non-included offense instructions, i.e., lesser related instructions, and the court can only give these if "if there is a rational basis for the jury to acquit the defendant of the offense charged and simultaneously find him guilty of the lesser offense" and a defendant either requests or consents to the instruction. People v. Romero, 694 P.2d 1256, 1269 (1985), court has no *sua sponte* duty to instruct on lesser included offenses ("a court is not obligated to instruct on a lesser offense unless either the prosecution or the defense requests such instruction…In the absence of a request by the defendant, it may reasonably be assumed that he 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 on

		a lesser offense.")
Connecticut	*Hybrid*	CT. R. SUPER CT. CR § 42-29 State v. Ortiz, 804 A.2d 937, 941 (Ct. App. 2002), "we have stated that even in the absence of a request at trial for a jury instruction on a lesser included offense, an appellate court may invoke the Whistnant doctrine 'where the trial court record justifies its application' and order that the judgment be modified to reflect a conviction on the lesser offense and that the defendant be sentenced thereon." State v. Jacobowitz, 480 A.2d 557, 560 (CT. 1984), Generally, the parties must request a lesser included offense instruction in order to get one but the appellate court will review the lower court's failure to give a lesser included offense instruction *sua sponte*, when warranted by the evidence but not requested at trial, for plain error.
Delaware	*Party Autonomy*	DE ST TI 11 § 206(b) DE R SUPER CT RCRP 31 State v. Cox, 851 A.2d 1269, 1274 (2003), "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.'"
District of Columbia	*Party Autonomy* • D.C. recognizes the trial court should be an active participant during a trial and even	Superior Court Rules -- Criminal (SCR -- Criminal) Rule 31(c) Hawthorne v. U.S., 829 A.2d 948, 952 (D.C. Ct. App. 2003), "...we hold that a trial court is under no duty to sit quietly and refrain from even mentioning a lesser included instruction until one of the parties requests it (assuming that one is

	suggest lesser included offenses if warranted, but should only give the instruction if the parties agree. By implication, the D.C. courts will not overturn a decision to give a *sua sponte* instruction when there was no objection at trial.	warranted under the circumstances). Rather, the court may give a lesser included instruction if requested to do so or if the prosecutor or defense counsel "affirmatively agrees" to one when the court suggests it." *See also* Shuler v. U.S., 98 A.3d 200, 208-09 (D.C. Ct. App. 2014).
Florida	*Party Autonomy*	Fla. R. Crim. P. Rule 3.490 Fla. R. Crim. P. Rule 3.510 Jones v. State, 484 So.2d 577, 578 (FL. 1986), court has no *sua sponte* duty to instruct, "Petitioner's counsel below chose to base its defense on a sole ground-that petitioner had not done the act-and thus put the state to its proof. The record below indicates a classic waiver of the right to have the jury instructed on lesser included offenses." Branam v. State, 265 So.2d 555, 556 (Dist. Ct. App. 2nd Dist. 1972), "Failure of the trial judge to instruct the jury on lesser included offenses was neither prejudicial nor reversible error when no request for such additional instructions was timely made by the complaining party."
Georgia	*Hybrid*	Ga. Code Ann., § 16-1-6 Griggs v. State, 693 S.E.2d 615, 618 (Ct. App. 2010), "A trial court, *sua sponte*, may charge a jury on a lesser[-]included offense if the evidence justifies it." (*Citing* Gagnon v. State, 525 S.E.2d 127 (Ct. App. 1999)). *See also* Smith v. State, 745 S.E.2d 683, 688 (Ct. App. 2013), "Trial courts are authorized to charge on lesser included offenses as long as the charge is supported by the evidence and the indictment sufficiently places the defendant on notice of the crimes which he must defend."

Hawaii	*Trial Integrity*	HI ST § 701-109(4) State v. Haanio, 94 Haw. 405, 414, 16 P.3d 246, 255 (2001), "Acceding to an 'all or nothing' strategy, albeit in limited circumstances, forecloses the determination of criminal liability where it may in fact exist. Thus, elevating a 'winner take all' approach over such a determination is detrimental to the broader interests served by the criminal justice system. We now conclude that the better rule is that trial courts must instruct juries on all lesser included offenses as specified by HRS § 701-109(5), despite any objection by the defense, and even in the absence of a request from the prosecution." (*overruled on other grounds by* State v. Flores, 13 Haw. 43, 57, 314 P.3d 120, 134 (2013)(holding that the court's failure to give lesser included offense instruction where there's evidentiary support is reversible error.)
Idaho	*Hybrid*	I.C. § 19-2132 I.C. § 19-2312 Idaho Criminal Rules (I.C.R.), Rule 31(c) State v. Watts, 963 P.2d 1219, 1222 (Ct. App. 1998), "We recognize that a defendant may, as a trial tactic, prefer that no lesser included offense instruction be given. The defendant may prefer to gamble that the jury will not be convinced to convict on the charged offense and will therefore be forced to acquit even though the evidence proves a lesser offense. However, we do not perceive that our statute gives the defendant a right to pursue this course, nor do we believe that justice would be served by such a rule." *See also* State v. Rae, 84 P.3d 586, 589 (Ct. App. 2004), "Accordingly, the district court had authority to *sua sponte* instruct on lesser included offenses provided the giving of such instructions was reasonable based on the evidence presented."
Illinois	*Hybrid*	720 ILCS 5/2-9 People v. Garcia, 721 N.E.2d 574, 583 (IL. 1999), "under appropriate circumstances, a trial court possesses the discretion to instruct a jury *sua sponte* on lesser-included offenses, even where the State does not request such instruction and the defendant objects."

Indiana	*Party Autonomy*	IC 35-31.5-2-168 Williams v. State, 451 N.E.2d 687, 690 (Ct. App. 4th Dist. 1983), "A defendant waives any alleged error for failure to instruct on the lesser included offense by failing to tender the instruction he desires to the trial court." Ledesma v. State, 761 N.E.2d 896, 899 (Ct. App. In. 2002), "If there is a serious evidentiary dispute about the elements distinguishing the greater offense from the lesser offense and if 'a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.'"
Iowa	*Trial Integrity* • Iowa's approach is contradictory. Iowa courts are required by statute to give lesser included offense instructions when warranted by the evidence. However, the appellate court reviews the issue for plain error if defendant didn't request an instruction or object to the court's failure to give it. In this sense Iowa could be seen as a hybrid jurisdiction.	I.C.A. Rule 2.6(3) State v. Spates, 779 N.W.2d 770, 773-74 (2010), "Iowa Rule of Criminal Procedure 2.6(3) requires the trial court to instruct on lesser-included offenses, 'even though such instructions have not been requested.' Notwithstanding the trial court's duty in this regard, we have a long-standing requirement that, to preserve error on a trial court's failure to instruct on a lesser-included offense, 'a defendant must request a lesser-included offense instruction or object to the court's failure to give it.'" (Internal citations omitted).
Kansas	*Trial Integrity* • Kansas requires the court to instruct on lesser included offenses when the evidence warrants, but	K.S.A. 21-5109 K.S.A. 22-3414 State v. Williams, 295 Kan. 506, 521-22, 286 P.3d 195, 205 (2012), "Further, the giving of lesser included crime instructions is not a matter of discretion with the trial judge. K.S.A. 22-3414(3) directs that "where there is some evidence which would reasonably justify a conviction of some

	a trial court's failure to instruct is apparently reviewed for harmless error.	lesser included crime ..., the judge *shall* instruct the jury as to the crime charged and any such lesser included crime." However, Court's failure to *sua sponte* instruct on a lesser included offense with evidentiary support is reviewed for clear error. Id. at 523-24, 286 P.3d at 206-07.
Kentucky	*Party Autonomy*	KRS § 505.020 Kentucky Rules of Criminal Procedure (RCr) Rule 9.86 Bartley v. Comm., 400 S.W.3d 714, 731 (KY. 2013), "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."
Louisiana	*Trial Integrity* • Louisiana has "responsive verdicts" which means the trial court must instruct and give the jury the option of convicting for the greater offense and all lesser included offenses warranted by the evidence.	LSA-R.S. 14:5 LSA-C.Cr.P. Art. 803 LSA-C.Cr.P. Art. 814 LSA-C.Cr.P. Art. 815 Two different standards of review: (1) State v. Simmons, 817 So.2d 16, 19 (La. 2002), "when the defendant requests that the jury be instructed on the law applicable to an offense which is truly a lesser and included offense of the charged offense, the trial court has no discretion to refuse to give the requested instruction." (2) If the defendant doesn't object to the court's failure to offer lesser included offense instructions or doesn't propose them himself, then the appellate court reviews for plain error. *See* State v. Hubbard, 708 So.2d 1099, 1107 (Ct. App. 5th Cir. 1998).
Maine	*Hybrid*	17-A M.R.S.A. § 13-A State v. Giglio, 441 A.2d 303, 310 (ME. 1982), Citing 17-A M.R.S.A. § 13-A, Maine supreme court approved lower court's decision to instruct on lesser included offenses over defendant's objection.

Maryland	*Party Autonomy*	Hagans v. State, 559 A.2d 792, 804 (1989), "the 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. … 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."
Massachusetts	*Hybrid*	Com. v. Berry, 727 N.E.2d 517, 527 (MA. 2000), "…when the evidence would warrant a conviction of the lesser included offense and the element differentiating the offenses is in dispute, the judge may give the instruction despite objection by both the Commonwealth and the defendant. If the defendant alone cannot control which theories of criminal liability are submitted to the jury, both sides should not be able to do so. If, however, in these circumstances (either no request at all or objection by both sides) the judge chooses to give such an instruction, such action will not be reversed on appeal, absent a substantial risk of a miscarriage of justice."
Michigan	*Hybrid* • Michigan is a hybrid jurisdiction for all non-capital offenses. For capital offenses Michigan is a trial integrity jurisdiction.	M.C.L.A. 768.32 People v. Till, 323 N.W.2d 14, 17 (Ct. App. MI 1982), "A trial judge may instruct *sua sponte* on a lesser-included offense if the evidence adduced at trial would warrant conviction of the lesser offense and defendant has been afforded fair notice of the lesser-included offenses. Nevertheless, he is not required to do so unless the defendant is charged with first-degree murder." (Internal citations omitted).
Minnesota	*Trial Integrity*	MN ST § 609.04 MN ST § 631.14 State v. Al-Nasser, 690 N.W.2d 744, 750 (Minn.2005), "A trial court **must** submit an instruction on a lesser offense when: (1) the offense in question is an "included" offense; and (2) a rational basis exists for the jury to convict the defendant of the lesser offense and acquit him of the greater crime. Unless waived by the defendant, it is error not to submit a lesser-included offense

		except in those extraordinary cases in which the failure to do so is otherwise supported by a proper exercise of the trial court's discretion and no prejudice to defendant results.
Mississippi	*Party Autonomy*	Miss. Code Ann. § 99-19-5 Trigg v. State, 759 So.2d 448, 451 (Ct. App. 2000), "'[C]ase law does not impose upon a trial court a duty to instruct the jury *sua sponte,* nor is it required to suggest instructions in addition to those which the parties tender.'" (*Quoting* Giles v. State, 650 So.2d 846, 854 (Miss. 1995)).
Missouri	*Party Autonomy*	V.A.M.S. 556.046 State v. Kobel, 927 S.W.2d 455, 460 (Ct. App. 1996), "Numerous cases hold that a trial court will not be convicted of error, plain or otherwise, in failing to *sua sponte* give a lesser included offense instruction where, as here, it was not requested by defense counsel."
Montana	*Hybrid*	MCA 46-16-607(2), "A lesser included offense instruction must be given when there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense." State v. Sheppard, 832 P.2d 370, 372 (Mont.1992), "However, the general rule in Montana is that the court **may** instruct the jury *sua sponte* if evidence supports such an instruction." In Montana if the defendant is entitled to a lesser included offense instruction, but a request was not made in the trial court, the Montana Supreme Court will not reverse a conviction absent plain error. Id. at 373.
Nebraska	*Hybrid*	Neb.Rev.St. § 29-2025 State v. Pribil, 395 N.W.2d 543, 549 (1986), "We therefore hold that it is not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings."

Nevada	*Trial Integrity*	NRS 175.501 Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 593 (1966), 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 lessor offense or degree. The instruction is mandatory, without request."
New Hampshire	*Hybrid*	In re Nathan L., 776 A.2d 1277, 1281 (N.H. 2001), "We therefore hold that a trial court has the discretion to raise a lesser-included offense *sua sponte* at the conclusion of the trial for submission to the jury or to consider it as the trier of fact in a non-jury trial. The better practice is for the court to indicate to the parties at the close of the evidence its intention to raise a lesser-included offense and to give both sides an opportunity to express their views on the subject. Even if both sides object, however, the court may consider the lesser offense if the two prerequisites for doing so are met."
New Jersey	*Hybrid* • Trial courts are not obligated to instruct on lesser included offenses when the evidence warrants, but are allowed to do so.	N.J.S.A. 2C:1-8(d) State v. Choice, 486 A.2d 833, 834 (N.J.1985), if evidence supports conviction for lesser offense and instruction is requested but not given, the error is reversible. And while court should instruct *sua sponte* when the evidence **clearly** warrants the instruction, it is not reversible per se if the court does not instruct and there was no request. Also, it may be inappropriate to *sua sponte* instruct on lesser included offenses where the instruction would surprise either the State or the defense.
New Mexico	*Party Autonomy**	NMRA, Rule 5-608 NMRA, Rule 5-611(d) State v. Boeglin,731 P.2d 943, 948 (N.M. 1987), "we hold that the defendant's right to a jury instruction on second degree murder as a lesser included offense of first degree murder, warranted by the evidence, may be waived. Defendant here failed to object to the instructions given or to tender instructions on second degree murder but in fact knowingly, intelligently, and voluntarily waived his right to the lesser included offense instruction." (*See also* State v. Villa, 98 P.3d 1017 (N.M. 2004)). State v. Jernigan, 127 P.3d 537, 544 (N.M. 2005),

		court's failure to give lesser included offense instruction when warranted and requested by defendant is reversible error. State v. Archuleta, 772 P.2d 1320, 1322 (Ct. App. 1989), "We hold that, in a bench trial, a finding of a lesser included offense can be requested by either party or considered *sua sponte* by the trial court, where the evidence supports such a charge."
New York	*Hybrid*	McKinney's CPL § 300.50 People v. Colville, 979 N.E.2d 1125, 1130 (Ct. App. 2012), "a trial court in New York may 'in its discretion' submit a lesser-included offense 'if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater' (CPL 300.50[1]). And where a reasonable view of the evidence supports submission of a lesser-included offense, the court '*must* do so' if 'requested by *either party*.'" (CPL 300.50[2] [emphases added]). People v. Edwards, 16 A.3d 226, 227 (Sup. Ct. App. Div. 1st Dept. 2005), "The court's decision to submit assault in the second degree (Penal Law § 120.05[2]) as a lesser included offense of assault in the first degree (Penal Law § 120.10(1)), on its own motion and over the objections of both the prosecution and defense, was a provident exercise of discretion."
North Carolina	*Trial Integrity*	N.C.G.S.A. § 15-170 State v. Brantley, 501 S.E.2d 676, 679 (N.C.1998), "it is well settled that '[w]hen there is some evidence supporting a lesser included offense, defendant is entitled to a jury instruction thereon even in the absence of a specific request for such instructions.'"
North Dakota	*Hybrid*	Rule 31, N.D.R.Crim.P State v. Keller, 695 N.W.2d 703, 711 (N.D. 2005), "Generally, absent a request for an instruction on a lesser included offense, a trial court need not give such an instruction. Either the prosecution or the defense may request a lesser-included-offense instruction, or the court may on its own give such an instruction. (Internal citations omitted).

Ohio	*Trial Integrity*	R.C. § 2945.74 State v. Conley, 43 N.E.3d 775, 782 (Ct. App. 2nd Dist. 2015), "However, as recently stated by the Ohio Supreme Court, trial strategy cannot prevent an instruction on a lesser included offense where the evidence warrants it." (*Citing* State v. Wine, 18 N.E.3d 1207 (OH. 2014)).
Oklahoma	*Hybrid*	22 Okl.St.Ann. § 916 McHam v. State, 126 P.3d 662, 669-70 (Ct. App. Ok. 2005), "The trial court has a responsibility to instruct the jury on all of the law applicable to the evidence presented. If the defendant requests instructions on a lesser related offense, the trial court should give them if the evidence reasonably makes out a prima facie case for that offense. We reiterate the principal holding in Shrum: if the State requests instructions on a lesser related offense, the trial court is free to give them, even over the defendant's objection, so long as they do not unfairly surprise the defense. We clarify Shrum by holding that while 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."
Oregon	*Party Autonomy**	O.R.S. § 136.460 O.R.S. § 136.465 State v. Miller, 467 P.2d 683, 686 (Ct. App. 1970), "While in some cases trial judges would be warranted in inquiring whether defense counsel wished to submit instructions on lesser included offenses, trial judges have no duty to give such instructions *Sua sponte*."
Pennsylvania	*Hybrid*	Com. v. Davis, 480 A.2d 1035, 1043-44 (PA. 1984), "no error was committed in the court's *sua sponte* addition of the simple possession charge."

Rhode Island	*Trial Integrity* • Rhode Island's approach is similar to Iowa's approach. Courts are required to give lesser included offense instructions when warranted by the evidence. However, the appellate court reviews the issue for plain error if defendant didn't request an instruction or object to the court's failure to give it.	RI ST § 12-17-14 Dist. R. Crim. P., Rule 31 Super. R. Crim. P., Rule 31 State v. Brezinski, 731 A.2d 711, 714-15 (R.I. 1999) recognizes the trial court has a duty to instruct the jury regarding the law and that duty includes the obligation to instruct on lesser included offenses when warranted by the evidence. However, if the defendant fails to object to the court's decision not to instruct on lesser included offenses then the supreme court reviews for plain error. *See also* State v. Mercier, 415 A.2d 465, 467 (R.I. 1980).
South Carolina	*Party Autonomy**	Abney v. State, 757 S.E.2d 544, 547 (Ct. App. 2014) (refusing to find ineffective assistance of counsel by recognizing that counsel's failure to request lesser included offense instruction could be a reasonable trial strategy). State v. Parker, 433 S.E.2d 831, 834 (S.C. 1993), "since there was no duty on the court to *sua sponte* provide the charge, and since the charge was not warranted by the evidence, this issue is without merit."
South Dakota	*Hybrid*	SDCL § 23A-26-8 State v. Cook, 319 N.W.2d 809, 813 (S.D. 1982), "It is the duty of the trial court to instruct the jury as to the law applicable to the case. The defense does not have the option of precluding the court from carrying out this duty in hopes of forcing an 'all or nothing' verdict. Thus, the trial judge may instruct *sua sponte* on a lesser included offense if the evidence adduced at trial would warrant conviction of the lesser charge and if the defendant has been afforded fair notice of those lesser included offenses." (Internal citations omitted).

Tennessee	*Hybrid* • Tennessee was a trial integrity jurisdiction until 2016 when the State legislature amended T.C.A. § 40-18-110 which now makes Tennessee a hybrid jurisdiction.	Tenn. R. Crim. P., Rule 31(d) T. C. A. § 40-18-110(b), "In the absence of a written request from a party specifically identifying the particular lesser included offense or offenses on which a jury instruction is sought, the trial judge may charge the jury on any lesser included offense or offenses, but no party shall be entitled to any lesser included offense charge."
Texas	*Hybrid* • Does not mandate the court instruct on lesser included offenses. Texas appears to give courts the option of instructing on lesser included offenses, but if the record is clear the defendant chose to pursue an all of nothing strategy, the appellate court will not review whether the court should have nevertheless given the instruction.	Vernon's Ann.Texas C.C.P. Art. 37.08 Garcia v. State, 440 S.W.3d 728, 731-32 (Ct. App. Tx. 2013). Texas allows defendant's to pursue an "all or nothing" strategy. However, because the trial court is required to instruct on the "law applicable to the case," the appellate court reviews the record to determine whether the lesser included offense was "law applicable to the case." If so, and the record discloses the defendant chose to pursue an all or nothing strategy, then it is not error for the trial court to fail to *sua sponte* instruct on a lesser included offense. Moreover, if the defendant explicitly rejects a lesser included offense, the appellate court will not review the issue on appeal.
Utah	*Hybrid*	U.C.A. 1953 § 76-1-402 State v. Dyer, 671 P.2d 142, 145 (UT 1983), "This Court has recognized on numerous occasions the prerogative of the trial court to submit or consider lesser included offenses whenever the interest of justice so requires…Clearly, the trial court has the authority to submit a lesser included offense in the absence of a specific request by counsel."

Vermont	*Hybrid*	13 V.S.A. § 14 State v. Ngyyen, 795 A.2d 538, 542-43 (VT. 2002)"In general, defendant controls the tactical decisions in the trial, including the decision whether to waive a charge on a lesser included offense…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.'" (*Quoting* In re Trombly, 627 A.2d 855, 857 (VT. 1993)).
Virginia	*Party Autonomy**	Marsh v. Comm., 530 S.E.2d 425, 430-31 (Ct. App. 2000), "Appellant made a tactical decision not to request or proffer a lesser-included instruction in hopes that the jury would find that the Commonwealth failed to prove an element of the felony charge and acquit her. Because the record fails to show that appellant requested or tendered an instruction on Code § 18.2–186(A) any time before the jury rendered its verdict, her post-conviction request was too late to be considered and is barred under Rule 5A:18." Craig v. Comm., 538 S.E.2d 355, 358 (Ct. App. 2000), "Code § 19.2–266.1 does not limit the offering of lesser-included instructions to the accused."
Washington	*Party Autonomy**	RCWA 10.61.003 RCWA 10.61.006 RCWA 10.61.010 State v. Hoffman, 804 P.2d 577, 609 (WA. 1991), "We are here asked to hold that trial courts must *sua sponte* instruct on all lesser included offenses over the express objections of the defendants. That is not the law of this state, and we decline to so rule. Generally, the failure to give a particular instruction is not error when no request was made for such an instruction; nor are lesser included offense instructions required when not requested."

		questionable. As the district court said, '[s]uch a ruling would compel the judge to present jury instructions at odds with the trial strategy of [defense] counsel.' Accordingly, we hold that the trial court did not violate Kubat's due process rights by not instructing the jury on the offense of unlawful restraint." (Internal citations omitted).
8th Circuit	*Party Autonomy**	FRCP 31 U.S. v. Williford, 309 F.2d 507, 509 (8th Cir. 2002), "A defendant is entitled to a lesser included offense instruction only if a proper request is made. Because Williford did not request a lesser included offense instruction, we review his claim only for plain error...We find no plain error in the district court's failure to *sua sponte* submit a lesser included offense instruction."
9th Circuit	*Party Autonomy**	FRCP 31 U.S. v. Parker, 991 F.2d 1493, 1496 (9th Cir. 1993), "Because defense counsel did not request a lesser included offense instruction at trial, the court's failure to give such an instruction *sua sponte* is reviewed for plain error." U.S. v. Lone Bear, 579 F.2d 522, 523 (9th Cir. 1978), "Appellants contend that the trial court erred by refusing to give some of their proposed instructions and by not *Sua sponte* instructing the jury on lesser included offenses. Their contention fails for several reasons: First and foremost is the fact that appellants did not object to the instructions which were given, nor did they request any instructions on lesser included offenses."
10th Circuit	*Trial Integrity*	FRCP 31 U.S. v. Cooper, 812 F.2d 1283, 1285 (10th Cir. 1987), "The trial judge must give instructions to the jury as required by the evidence and the law where the parties so request or not, and to do so although objections are made. The trial judge is charged with the responsibility for instructing the jury. This is not controlled by the parties as their function and duty is to bring to the court's attention the instructions they consider applicable and the reasons why they should be given."

11th Circuit	*Party Autonomy**	FRCP 31 U.S. v. Chandler, 996 F.2d 1073, 1099 (11th Cir. 1993), "Trial judges should be sensitive to and respectful of such difficult decisions made by counsel. Accordingly, we find that because Chandler did not request an instruction or object to the omission of an instruction for the lesser included offense of murder for hire, the district court did not err by failing to give such an instruction *sua sponte*."
Puerto Rico	*Hybrid*	T. 34 Ap. II, § 147 Pueblo v. Girau, 2 P.R. Offic. Trans. 222, 225 (Sup. Ct. P.R. 1974), implies that court can give instructions if warranted but if defendant fails to object the issue is not reviewable on appeal.
Virgin Islands	*Hybrid*	Follows Federal Rule of Criminal Procedure 31 McIntosh v. People, 57 V.I. 669, 683-84 (Sup. Ct. V.I. 2012), "Because McIntosh did not request an instruction on the lesser included offense of simple possession, and did not object when the instructions were given, we review for plain error. Here, we find that the trial court's 'failure' to *sua sponte* instruct on the lesser included offense did not constitute plain error. There was no reasonable ground for the jury to find that McIntosh possessed the marijuana but did so without intent to distribute it to another person."
Guam	*Trial Integrity*	8 G.C.A. § 90.27 Angoco v. Bitanga, 2001 Guam 17; 2001 WL 799555 (Sup. Ct. Guam 2001), "trial courts must issue lesser-included offense instructions if there is a rational basis for such as shown by substantial evidence, without regard to whether such instructions were requested or objected to by the parties." However, if court does not do so, and there is no request to do so, the supreme court reviews for plain error.

D.C. Circuit Court of Appeals	*Hybrid*	FRCP 31 Walker v. U.S., 418 F.2d 1116, 1119 (D.C. Cir. 1969), "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."