ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, Appellee, v. DOUGLAS J. WINE, Appellant.	:	Case No. 2012-1611 On Appeal from the Auglaize County Court of Appeals, Third Appellate District Court of Appeals Case No. 2-12-01

MERIT BRIEF OF *AMICUS CURIAE*
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INTRODUCTION

Defendant-Appellant Wine mistakenly insists that a criminal defendant possesses an absolute right to present an "all or nothing" defense and *prevent* a trial court from issuing an otherwise lawful jury instruction on a lesser included offense. Wine is mistaken because a criminal defendant has no constitutional right to block a lesser-included-offense instruction. Further, both R.C. 2945.74 and Criminal Rule 31 give trial courts *discretion* to instruct on lesser included offenses, so the Court should decline Wine's invitation to override both the statute and rule to create a new right out of whole cloth.

Wine was charged with the rape of his mother-in-law and ultimately convicted of the lesser included offense of gross sexual imposition. The Court of Appeals concluded that the evidence adduced at trial reasonably supported the jury instruction on the lesser included offense, and that decision is not at issue in this appeal.

Wine's primary problem is that he fails to root his alleged right to a lesser-included-offense instruction in any cohesive doctrinal context. His constitutional claim is not just unsupported by precedent, but it contradicts precedent. Under *Beck v. Alabama*, 447 U.S. 625 (1980) and its progeny, a criminal defendant has an Eighth Amendment right to request a lesser-included-offense instruction in a capital case; i.e., a court has a duty to *include* the instruction. Most circuits have concluded that *Beck* does not implicate due process rights and should not be extended to non-capital cases. So no constitutional limits apply outside the capital context. But if *Beck* were somehow extended to noncapital cases, that would extend the mandatory *inclusion* of a lesser-included-offense instruction; it would not create a defendant's right to *exclude* an instruction. In other words, Wine asks not to extend *Beck,* but to somehow extend and invert it at the same time. But no court has ever held that a criminal defendant has a federal constitutional right *to prevent* the trial judge from giving a lesser-included-offense instruction.

Furthermore, this Court has repeatedly indicated that the lesser-included-offense doctrine is a statutory, rather than a constitutional, concept, and Ohio's statute allows for a trial court's discretion. Thus, accepting Wine's view would not just be creating new, unmoored constitutional doctrine, but would amount to declaring R.C. 2945.74 and Criminal Rule 31 unconstitutional.

The plain text of R.C. 2945.74 and Criminal Rule 31 provide that a criminal defendant *may* be convicted of a lesser included offense—thus leaving discretion with the court, not the defendant, as to when to give an instruction. Wine offers no reading of these texts to support his erasure of judicial discretion, so he relies largely upon a misreading of *State v. Clayton*, 62 Ohio St. 2d 45 (1980). To be sure, *Clayton* includes language regarding a defendant's "right, through his counsel, to waive" a lesser-included-offense instruction. *Id.* at 47 n.2. But that "right" involved the right not to *ask* the court for one, without that silence counting as ineffective assistance of counsel; it did not involve a right to override a trial court's discretion and veto an instruction. Thus, the statute and rule preclude the approach Wine seeks, and his only proper mechanism for changing Ohio law would be to amend R.C. 2945.74 or Criminal Rule 31.

Wine's remaining arguments fail, too. His description of other states' jurisprudence does not help him: Every state court considering the issue has explicitly *rejected* the proposition that a criminal defendant has an absolute right to present an all-or-nothing defense. And the remaining other-state cases address different issues. Separately, Wine misses the mark in implicitly attacking the trial court's exercise of discretion on the facts of this case. The sole legal issue here is whether a defendant has an absolute right to veto an instruction, regardless of the facts. And in any event, the trial court did not abuse its discretion in this case.

In sum, the Court should reject Wine's unfounded argument that a criminal defendant has an absolute right to prevent a trial court from instructing the jury on a lesser included offense.

STATEMENT OF AMICUS INTEREST

This case presents the question of whether a criminal defendant has an absolute right to present an all-or-nothing defense and prevent a trial court from instructing a jury on any lesser included offenses. As the chief law officer of Ohio, R.C. 109.02, the Attorney General has a substantial interest in the correct interpretation of Ohio's criminal laws and procedure, including the proper treatment of lesser included offenses throughout the State.

STATEMENT OF THE CASE AND FACTS

A. Wine was convicted of gross sexual imposition after the trial court included an instruction on that charge as a lesser included offense relative to rape.

The Auglaize County Grand Jury indicted Wine on the charge of rape, R.C. 2907.02(A)(2). *State v. Wine*, 2012-Ohio-2837 (3rd Dist.) ("App. Op."), at ¶ 2. The victim was Wine's mother-in-law. *Id.* at ¶ 8. Her testimony was essentially that, while spending the night at Wine's house and after having fallen asleep in the bed of Wine's son (her grandson), she awoke to discover Wine's finger in or around her vagina and his right hand under her pajamas near her chest. *Id.* at ¶¶ 9-10.

At the close of the evidence, the trial court instructed the jury on rape, as well as the lesser included offenses of sexual battery, R.C. 2907.03(A)(1), and gross sexual imposition, R.C. 2907.05(A)(1). *Id.* at ¶ 12. Wine's trial counsel objected to the instructions on the lesser included offenses. The jury ultimately convicted Wine on the charge of gross sexual imposition, a fourth-degree felony. *Id.*

B. The appeals court reduced the offense to sexual imposition, upholding the trial court's right to instruct on lesser included offenses against the defendant's wishes.

On appeal, Wine raised several assignments of error, most of which are not at issue here. With regard to the jury instructions for the lesser included offenses, the appeals court first noted that "Wine does not dispute that sexual battery and gross sexual imposition are lesser included offenses of rape." *Id.* at ¶ 17. Wine was not convicted of sexual battery, so the court declined to reach his arguments on this charge. *Id.* The court next concluded that the trial court did not abuse its discretion in instructing the jury on gross sexual imposition. The appeals court reasoned that a rational juror could have concluded that, based on the evidence adduced at trial, "sexual penetration" did not occur but "sexual contact" did occur. *Id.* at ¶ 18.

The appeals court rejected Wine's argument that he had an absolute right to waive the jury instructions on the lesser included offenses as a matter of trial strategy. *Id.* at ¶ 19. Rather, the court held that a decision by trial counsel "not to request lesser-included instructions as a matter of trial strategy *does not mean the trial court lacks discretion* to instruct the jury where the evidence, in fact, merits such an instruction." *Id.* (emphasis added).

The court concluded that the evidence at trial was insufficient to satisfy the "force" element of gross sexual imposition—because the victim was asleep during the sexual contact—but that the evidence was sufficient to demonstrate that Wine committed the lesser included offense of sexual imposition, R.C. 2907.06(A)(1). *See id.* at ¶¶ 37-52. Consequently, the court vacated Wine's conviction of gross sexual imposition and remanded to the trial court to enter a finding of guilt to the offense of sexual imposition. *Id.* at ¶ 53.

This Court accepted jurisdiction on Wine's Proposition of Law No. III: "A Defendant in a criminal trial, as a matter of trial strategy, has a right to present an 'all or nothing defense' and

refuse any lesser-included offenses instructions." The Court declined jurisdiction over Wine's other propositions of law and the State's cross-appeal.

ARGUMENT

***Amicus Curiae* Ohio Attorney General's Proposition of Law:**

> *Ohio law grants trial courts discretion to instruct a jury sua sponte on lesser included offenses, and a criminal defendant does not have an absolute right to present an "all or nothing" defense and prevent a trial court from issuing such an instruction.*

A criminal defendant does not have a constitutional right to prevent a trial court from instructing a jury on lesser included offenses. Rather, an Ohio statute and rule govern the issue. Both R.C. 2945.74 and Criminal Rule 31 give trial courts discretion whether to instruct a jury on a lesser included offense. Other than a finding of abuse of discretion, nothing overrides that discretion. And nothing grants defendants sole control over whether an instruction is given: not the Constitution, not Wine's misreading of *Clayton*, not Wine's policy preference, and not the case law from other jurisdictions. Nothing supports the contrary rule that Wine advocates. Finally, the Court should ignore Wine's attempts to reargue his fact-specific challenges to the jury instruction, as the sole issue in this case is whether a criminal defendant has an *absolute* right to present an all-or-nothing defense.

A. A criminal defendant does not have a constitutional right to prevent a trial court from instructing a jury on lesser included offenses.

Relying primarily on *Beck* and its progeny, Wine argues that a criminal defendant has a constitutional right to present an all-or-nothing defense and prevent a trial court from instructing a jury on lesser included offenses. Wine Br. at 6-8. Wine has it backwards. *Beck* stands for the proposition that a criminal defendant *in a capital case* has a federal constitutional right to a lesser included offense instruction. As *Beck* is premised on Eighth Amendment concerns, rather than due process, most federal circuits have declined to extend *Beck* to non-capital cases. In any

event, none of these federal cases support the proposition that a criminal defendant has a constitutional right *to prevent* an otherwise lawful lesser-included-offense instruction. Furthermore, this Court has already indicated that the lesser-included-offense doctrine is rooted in statute, not the Constitution.

In *Beck*, the United States Supreme Court recognized that a criminal defendant in a capital case has a constitutional right to a lesser-included-offense instruction (assuming such an instruction is warranted). 447 U.S. at 637-38; *see also Spaziano v. Florida*, 468 U.S. 447, 455 (1984) ("*Beck* made clear that in a capital trial, a lesser offense instruction is a necessary element of a constitutionally fair trial."). *Beck*, however, specifically declined to reach whether a constitutional right exists in noncapital cases. 447 U.S. at 638 n.14. In addition, while *Beck* contains isolated references to due process, the Supreme Court has since clarified that *Beck* is premised primarily on Eighth Amendment grounds and the unique nature of death penalty cases. As noted in *Spaziano*:

> The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In *Beck*, the Court found that risk unacceptable and inconsistent with the reliability this Court *has demanded in capital proceedings*.

468 U.S. at 455 (emphasis added); *see also Hopper v. Evans*, 46 U.S. 605, 611 (1982) ("Our holding in *Beck*, like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channeled so that arbitrary and capricious results are avoided.").

Consistent with these principles, most circuits have declined to recognize any due process component to *Beck* or to extend the *Beck* rule to noncapital cases. *See Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988) ("In a non-capital murder case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue."); *Bagby v. Sowders*, 894

F.2d 792, 796 (6th Cir. 1990) ("It appears to us that the Supreme Court's opinion in *Beck* is grounded upon Eighth Amendment concerns, rather than those arising from the Due Process Clause of the Fourteenth Amendment."); *Nichols v. Gagnon*, 710 F.2d 1267, 1269-71 (7th Cir. 1983); *Pitts v. Lockhart*, 911 F.2d 109, 112 (8th Cir. 1990) ("We agree that the failure to give a lesser included offense instruction in a noncapital case rarely, if ever, presents a constitutional question."); *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (noting that "this Court had the opportunity to extend the holding in *Beck* to non-capital cases, but declined to do so"); *Trujillo v. Sullivan*, 815 F.2d 597, 602 (10th Cir. 1987) (concluding that the "failure of a state court to instruct on a lesser offense fails to present a federal constitutional question"); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987) (notwithstanding *Beck*, "the Constitution's Due Process Clause does not require a state court to instruct the jury on lesser included offenses" in noncapital case); *see also Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. Mass. 1990) (refusing to extend *Beck* to habeas corpus review of noncapital cases).

The only circuit to extend *Beck* to non-capital cases is the lone circuit Wine cites. *See Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (3d Cir. 1988). *Vujosevic*, however, still does not support Wine's ultimate position. *Vujosevic* concluded that a criminal defendant has a right *to have the court grant his request* for a lesser included offense instruction if the evidence supports the instruction. *Id.* ("Since the evidence supported an instruction on aggravated assault, and since such an instruction was requested, the trial court committed error by refusing to give the instruction.").

The majority rule is the better one. Disputes over lesser-included-offense instructions in noncapital cases do not implicate a criminal defendant's constitutional rights at *all*. However, even if the Court were inclined to adopt the Third Circuit's minority rule, that does not support

Wine's very different argument, which is not that a defendant can *insist on giving* the instruction, but instead, that a defendant has a federal constitutional right to *veto* an otherwise lawful lesser-included-offense instruction.

Wine also vaguely asserts that, even in the absence of a federal constitutional right, he might still have rights based on the Ohio Constitution. Wine Br. at 8. Tellingly, Wine fails to cite *any* case law in support of this proposition. By contrast, this Court's decisions repeatedly explain that the lesser-included-offense doctrine derives from a statutory, rather than constitutional, right. *See State v. Nolton*, 19 Ohio St. 2d 133, 134 (1969) (referencing "the statutory right (Section 2945.74, Revised Code) to have the trier of the facts consider and return a verdict of conviction upon lesser degrees of the crime or lesser included offenses, in lieu of conviction on the principal offense"); *State v. Loudermill*, 2 Ohio St. 2d 79, 80 (1965) ("The concept of lesser included offenses is vitalized by statute (Section 2945.74, Revised Code) not by the common law."); *see also State v. Kilby*, 50 Ohio St. 2d 21, 24 (1977) (referring to a criminal defendant's "statutory right" to a lesser included offense instruction). By attempting to bypass R.C. 2945.74 (and Criminal Rule 31), Wine is in effect asking this Court to declare the statute unconstitutional.

But Wine is wrong, and the statute and rule are not unconstitutional in giving discretion to the trial court rather than to the defendant. A criminal defendant does not have a constitutional right to present an all-or-nothing defense and prevent a trial court from instructing the jury on lesser included offenses.

B. Both the Revised Code and the Criminal Rules grant trial courts discretion to instruct a jury on lesser included offenses.

Because jury instructions for lesser included offenses in non-capital cases do not implicate a criminal defendant's constitutional rights, Wine's alleged right to present an all-or-

nothing defense must be rooted somewhere else. In Ohio, lesser included offenses are governed by statute and rule. *See* R.C. 2945.74; R. Crim. P. 31; *see also Nolton*, 19 Ohio St. 2d at 134; *Loudermill*, 2 Ohio St. 2d at 80; *Kilby*, 50 Ohio St. 2d at 24. Consistent with long-standing principles governing jury instructions generally, R.C. 2945.74 and Criminal Rule 31 bestow discretion upon the trial court, and Ohio law should not be turned on its head based on a single, out-of-context statement in *Clayton*. Rather, any change, if warranted at all, should be effected by amending either R.C. 2945.74 or Criminal Rule 31.

With regard to lesser included offenses, R.C. 2945.74 states:

> When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury *may* find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or *lesser included offense*.

(Emphasis added.) Similarly, Criminal Rule 31(C) states:

> When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant *may* be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a *lesser included offense*.

(Emphasis added.) The language used is almost identical.

The plain terms of both R.C. 2945.74 and Criminal Rule 31 provide that a criminal defendant *may* be convicted of a lesser included offense. *See, e.g.*, *State v. Elam*, 68 Ohio St. 3d 585, 587 (1994) ("Where the wording of a statute is clear and unambiguous, this court's only task is to give effect to the words used."). Similarly, neither R.C. 2945.74 nor Criminal Rule 31 bestows upon a criminal defendant the absolute right to present an all-or-nothing defense and prevent a trial court from instructing a jury on lesser included offenses.

The policy decision reflected in R.C. 2945.74 and Criminal Rule 31 is entirely consistent with the general rule that a trial court retains discretion when instructing a jury in a criminal case. It is well settled that a trial court must instruct the jury on applicable law. *See, e.g.*, *State v.*

Rockwell, 80 Ohio App. 3d 157, 169 (10th Dist. 1992) ("Jury instructions should outline the issues, state the applicable principles of law, and clarify the jury's role in the case."); *State v. Workman*, 14 Ohio App. 3d 385, 393 (8th Dist. 1984) ("The purpose of instructions to a jury is to clearly define the issues in a case, and, by a statement of the law applicable to the facts developed at the trial, assist the jury in arriving at a proper verdict."). It is equally well settled that a trial court has discretion when determining whether, and in what form, to issue a particular jury instruction. *See State v. Fulmer*, 117 Ohio St. 3d 319, 2008-Ohio-39, at ¶ 72 (noting that the "trial judge is in the best position to gauge the evidence before the jury and is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction"); *State v. Condon*, 152 Ohio App. 3d 629, 2003-Ohio-2335, at ¶ 90 (1st Dist.) ("The trial court retains discretion on how to conform the jury instructions to the evidence presented at trial.").

Notably, the trial court's discretion under R.C. 2945.74 and Criminal Rule 31 was not reduced in any way by *Clayton*, so Wine's reliance on that case is mistaken. *See* Wine Br. at 5-6. Wine's *Clayton* argument is based entirely on this statement: "Having elicited some evidence in mitigation of attempted murder, the 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." 62 Ohio St. 2d at 47, n.2. That language, regarding the defendant's "right" to waive, does not trump the trial court's discretion to decide, as *Clayton*'s context shows.

Clayton addressed whether defense counsel's failure to *request* a lesser-included-offense instruction amounted to ineffective assistance of counsel, or whether the trial court's failure to instruct sua sponte amounted to plain error. In that context, the Court explained that there could

be sound strategic reasons for defense counsel *not to seek* such an instruction. In other words, the "right" in *Clayton* was the defendant's right to ask or not, not a right to have the trial court grant a defendant's request in either direction. *Id.* at 47-48. Since the case focused on the defendant's choice to ask, the Court had no need to address the court's discretion in responding to a defendant's request; that explains why the Court did not discuss the statute or rule in the case, as neither was at issue.

In addition, *Clayton*'s statement about the "right" to waive also must be understood in light of the context that all of footnote two in *Clayton* (which contains the statement) was a response to a misunderstanding of *State v. Muscatello*, 55 Ohio St. 2d 201 (1978), in which this Court held:

> Where, in a prosecution for aggravated murder, the defendant produces or elicits some evidence of the mitigating circumstance of extreme emotional stress described in R. C. 2903.03, the question of his having committed the lesser included offense of voluntary manslaughter *must be submitted* to the jury under proper instructions from the court.

Id. at syllabus, ¶ 4 (emphasis added). In *Clayton*, the defense had elicited some evidence of fit of anger, thereby implicating the lesser included offense of manslaughter. 62 Ohio St. 2d at 47, n.2. Therefore, one reading of *Muscatello* suggested that a manslaughter instruction *had to be* submitted to the jury in *Clayton*. The *Clayton* Court clarified that *Muscatello* did not mandate a lesser-included-offense instruction *in all instances*, but instead allowed room for defendants not to seek one, and for courts to agree or disagree with the defendant's request.

Thus, as the appeals court here correctly recognized, *Clayton* did not address, and thus does not govern, the separate issue of whether a criminal defendant has a right to override a trial court's discretion and prevent the trial court from giving an otherwise proper lesser-included-offense. *See, e.g.*, *State v. Griffie*, 74 Ohio St. 3d 332, 333 (1996) (citing *Clayton* in the context

of evaluating an ineffective-assistance-of-counsel claim). *Clayton* did not undermine either the statute or rule granting discretion to the trial court.

Consequently, with no authority to override the Revised Code or the Criminal Rule, Wine has no sound argument for overcoming the statute's and rule's allowance for trial court discretion in instructing juries on lesser included offenses. What Wine seeks is a change in the law, and such a change would require an amendment to R.C. 2945.74 or Criminal Rule 31.

C. No court has ever adopted Wine's position that a criminal defendant has an absolute right to prevent a trial court from instructing a jury on lesser included offenses, and the Court should decline to adopt such a rule.

In light of the clarity of Ohio's statute and rule, and the lack of any constitutional override of them, Wine's attempt to rely on the law of other jurisdictions is irrelevant here. *See* Wine Br. at 8-10. Nevertheless, the Attorney General notes that Wine misconstrues these cases. First, rather than supporting Wine, the cases addressing the issue have concluded that a trial courts *can* issue a lesser included offense instruction over a criminal defendant's objection. The remaining cases address different issues and are easily distinguishable. Accordingly, this Court should decline Wine's invitation to be the first jurisdiction in the country to conclude that a criminal defendant has an absolute right to prevent instructions on lesser included offenses.

As a threshold matter, even with his misunderstanding of the case law, Wine notably admits that states have taken different approaches on this issue. That undercuts his arguments elsewhere that the federal constitution mandates adoption of his view. *See* Wine Br. at 11-13. If due process (or some other federal constitutional right) really compelled a specific result, then states would not have the discretion to adopt different approaches.

Even as a matter of each state's law, apart from any constitutional claim, the cases show that several states have affirmatively *rejected* Wine's view, concluding instead that a criminal defendant does *not* have an absolute right to prevent a trial court from instructing a jury on lesser

included offenses. For example, Wine cites Arizona, Florida, and Nebraska, but those states have all rejected the notion that a criminal defendant may prevent a trial court from giving a lesser-included-offense instruction. *See Arizona v. Gipson*, 277 P.3d 189, 192 (Ariz. 2012) (upholding the trial court's decision to sua sponte instruct the jury on a lesser included offense *over the objections of both the prosecution and the defense*, and concluding that, "if the instruction [on the lesser included offense] is given and supported by the evidence, a resultant conviction for the lesser included offenses does not violate the defendant's constitutional rights or contravene any Arizona statute or rule"); *Florida v. Johnson*, 601 So.2d 219, 220 (Fl. 1992) (noting that the "State has a right to insist on the giving of instructions on permissive lesser included offenses *over the defendant's objection*") (emphasis added); *Nebraska v. Smith*, 822 N.W.2d 401, 413 (Neb. 2012) (reiterating the long-established rule that "a court may give a lesser-included instruction *over a defendant's objection*") (emphasis added).

Other states agree, including Texas, Kentucky, and California. The established rule in Texas is that, as long as the evidence supports the instruction, a "court may submit the lesser included offense [to the jury], even over defendant's objection." *Willis v. Texas*, 761 S.W.2d 434, 436 (Tex. Ct. App. 1988) (citation omitted). The Kentucky Supreme Court has observed that "the giving of an instruction on lesser-included offenses when the evidence would permit a jury to rationally find a defendant guilty of a lesser-included offense and acquit him of the greater offense is not erroneous, even if given over the defendant's objection." *Smith v. Kentucky*, 737 S.W.2d 683, 688 (Ken. 1987). In California, trial courts not only are permitted to instruct the jury on lesser included offenses but also have an affirmative obligation to issue such instructions sua sponte. *See California v. Breverman*, 960 P.2d 1094, 1101 (Cal. 1998) ("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 its being given.") (citations omitted).

Several of the cases cited by Wine involved situations different from, or even the opposite of, Wine's situation, such as a defense counsel's failure to request an instruction, followed by an appeal insisting the court should have instructed anyway. For example, both *Washington v. Grier*, 246 P.3d 1260, at ¶¶ 42-47, 55, 67-68 (Wa. 2011), and *Vickers v. Arkansas*, 898 S.W.2d 26, 27-29 (Ark. 1995), involved ineffective-assistance-of-counsel claims based on the failure to request a jury instruction. In *Shrum v. Oklahoma*, 991 P.2d 1032, 1037 (Ok. 1999), the court ultimately concluded the trial court did not err in instructing the jury on first-degree heat-of-passion manslaughter as a lesser included offense of first degree malice, both because defense counsel failed to object and because the evidence supported the instruction. In *Montana v. Sheppard*, 832 P.2d 370 (Mont. 1992), the issue was whether Montana trial courts should have the obligation to sua sponte instruct the jury on lesser included offenses. *See id.* at 372 (describing the ultimate question as whether Montana should "adopt the California rule that where the evidence clearly supports it, a lesser-included offense instruction must be given by the court sua sponte, even if not requested by the defense").

Wisconsin v. Myers, 461 N.W.2d 777, 780-81 (Wis. 1990) contains some isolated dicta indicating that the decision to request jury instructions on lesser included offenses should be "left largely" to the parties and that a trial court "need not instruct on a lesser included offense unless one of the parties requests the instruction." This dicta, however, is still consistent with the principle that a trial court retains ultimate discretion. Further, *Myers* neither considered nor ruled on whether a criminal defendant has an absolute right to prevent an instruction on a lesser

included offense. *Id.* at 779 (noting that "[n]either the state nor the defendant challenged the [jury] instructions at trial or on appeal").

Finally, Wine's discussion of Michigan is completely off-base. *See* Wine Br. at 9 (citing *Michigan v. Cornell*, 646 N.W.2d 127, 135 (2002), for the proposition that "[s]ome states do not allow a lesser-included offense to be a misdemeanor"). While Michigan at one point adopted the misdemeanor cut-off rule, this has not been the law for over thirty years. *See Cornell*, 646 N.W.2d at 136 ("In *People v. Stephens*, 416 Mich. 252, 255, 330 N.W.2d 675 (1982), this Court overruled the misdemeanor cutoff rule articulated in [*People v. Chamblis*, 395 Mich. 408, 236 N.W.2d 473, (1975)].").

In sum, the case law from other jurisdictions does not support—and, in fact, undercuts—Wine's argument that a criminal defendant may veto an otherwise lawful lesser-included-offense instruction.

D. The trial court's exercise of its discretion is not at issue, and, in any event, it did not abuse its discretion.

The sole issue here is whether a criminal defendant has an absolute right to prevent a trial court from instructing a jury on a lesser included offense. Nevertheless, Wine continues to raise his "complete defense" argument and question the propriety of the trial court's specific instruction in this case. *See* Wine Br. at 11, 14-16. Those issues are not part of the proposition of law accepted by this Court and are irrelevant to the resolution of the case. However, even if the Court were to examine whether the lesser included offense instruction was proper, there was no abuse of discretion here.

First, the distinction between the issue here, regarding a defendant's alleged unilateral control over a lesser-included-offense instruction, and the separate fact-based issue of abuse of discretion in a given case, is indisputable. If Wine's legal proposition were correct, it would not

matter whether the facts warrant an instruction, as the defendant's wishes control in all cases. Indeed, the fact that many cases discuss the propriety of an instruction in various factual scenarios shows that trial courts, not defendants, decide. If defendants' wishes controlled regardless, courts would not need to wrestle with when the facts warrant discretion; they would merely turn to the defendant and ask for his preference.

Thus, Wine's claim is actually undercut, not supported, by the cases discussing whether, based on the *specific evidence* adduced at trial, a lesser-included-offense instruction was erroneously provided or withheld. *See* Wine Br. at 11. It is black-letter law that a lesser-included-offense instruction should be provided only if supported by the evidence. *See, e.g., State v. Solomon*, 66 Ohio St. 2d 214, 220-21 (1981); *Kilby*, 50 Ohio St. 2d at 24; *see also Watts v. Indiana*, 885 N.E.2d 1228, 1232-34 (Ind. 2008) (concluding that, in a prosecution for murder, the trial court committed reversible error in giving an instruction on voluntary manslaughter when there was no evidence of sudden heat). In some instances, the evidence introduced at trial or the defense's theory of the case supports the decision not to give a lesser-included-offense instruction, even though such an instruction might otherwise be warranted. *See Nolton,* 19 Ohio St. 2d at 134-35 (concluding that, in a prosecution of shooting with intent to wound, the trial court did not err in refusing to instruct the jury on the lesser included offenses of assault with a dangerous weapon and assault and battery when defendant claimed he shot the victim in self-defense); *State v. Wilkins*, 64 Ohio St. 2d 382, 387-388 (1980) (concluding that, in a prosecution for rape, the trial court did not err in refusing to instruct the jury on the lesser included offense of sexual battery when defendant claimed the sexual conduct was consensual). Accordingly, none of these cases support the proposition that a criminal defendant has an absolute right—whether under due process, statute, rule, or common law—to prevent a trial court from instructing a jury

on a lesser included offense. Wine's discussion of those cases, though, combined with his repeated appeals to the alleged unfairness in his case, shows that he seeks to inject a separate issue into the case—one not granted review and not before the Court.

Further, even if the Court were to allow Wine to challenge the trial court's exercise of discretion here, it would not help Wine, as no abuse of discretion occurred. This Court has explained that trial courts must look to *all* the evidence adduced at trial, and that a so-called complete defense does not *preclude* giving an instruction on a lesser included offense. *Wilkins* noted that, as a result of *Nolton*, there had been "some confusion" as to whether a jury could be instructed on lesser included offenses if a complete defense is presented. 64 Ohio St. 2d at 388. *Wilkins* specifically rejected the notion that "[s]uch a rigid ruling" was ever intended. *Id.* Rather, a lesser-included-offense instruction is still appropriate if "the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense." *Id.* at 388; *see also Solomon*, 66 Ohio St. 2d at 221 ("[I]f due to some ambiguity in the state's version of the events involved in a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted.").

When placed in the proper context, therefore, Wine's repeated complaints regarding the "contact" instruction and references to his so-called "complete defense" are a red herring. Wine challenged the evidentiary support for the jury instructions in his appeal below. The appeals court held that based on the evidence adduced at trial—*i.e.*, the testimony of the victim—a rational juror could have concluded that "sexual penetration" did not occur but "sexual contact"

did. App. Op. at ¶ 18. The appeals court was right, and Wine offers no sound reason to disturb that ruling, especially on a fact-bound basis not before the court.

CONCLUSION

For the above reasons, the Court should affirm the judgment below.

Respectfully submitted,

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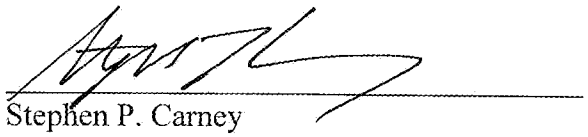

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