CONCURRING OPINION BY LEVINSON, J.

"In order to reconcile the competing interests of the prosecution and defendants, as well as to insure that juries are appropriately instructed in criminal cases," we held, in State v. Kupau, 76 Hawai'i 387, 879 P.2d 492 (1994), as follows:

> The trial judge must bring all included offense instructions that are supported by the evidence to the attention of the parties. The trial judge must then give each such instruction to the jury unless (1) the prosecution does not request that included instructions be given and (2) the defendant specifically objects to the included offense instructions for tactical reasons. If the prosecution does not make a request and the defendant makes a tactical objection, the trial judge must then exercise his or her discretion as to whether the included offense instructions should be given. The trial judge's discretion should be guided by the nature of the evidence presented during the trial, as well as the extent to which the defendant appears to understand the risks involved.

Id. at 395-96, 879 P.2d at 500-01 (footnotes omitted). By way of illustration of "the nature of the evidence" by which the trial courts were henceforth to be guided in the exercise of their discretion, we explained that,

> [f]or example, although there may be sufficient evidence to support a guilty verdict as to a charged offense, if the weight of the evidence is to the contrary but supports guilt as to an included offense, the trial judge would be justified in giving an instruction regarding the included offense, even if it has not been requested by the prosecution and the defendant has expressly objected to it for tactical reasons.

Id. at 396 n.14, 879 P.2d at 501 n.14.

With the benefit of hindsight, I am now of the view that the roadmap drawn in Kupau by which the trial courts were to navigate the proper exercise of their discretion in instructing the jury regarding supportable included offenses, when the prosecution did not request that any such instructions be given and the defendant tactically objected to them, is at best unhelpful, at worst confusing, and probably incompatible with the proposition that "'the ultimate responsibility properly to instruct the jury . . . [lies] with the circuit court and not

with trial counsel.'" Id. at 395, 879 P.2d at 500 (quoting Briones v. State 74 Haw. 442, 472-73, 848 P.2d P.2d 966, 980 (1993) (Levinson, J., concurring)) (brackets in original).

I agree with the majority that the better view was unanimously expressed by the California Supreme Court in People v. Barton, 906 P.2d 531 (Cal. 1995), which vacated the California Court of Appeal's decision -- People v. Barton, 23 Cal.Rptr.2d 649 (1993) -- that we cited with approval sixteen months earlier in Kupau. That view is the following, to which I now subscribe:

> In a criminal trial, it is ordinarily the trial court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.
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> We conclude that a defendant may not invoke tactical considerations to deprive the jury of the opportunity to consider whether the defendant is guilty of a lesser offense included within the crime charged. A trial court should instruct the jury on any lesser included offense supported by the evidence, regardless of the defendant's opposition. . . .
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> "Our courts are not gambling halls but forums for the discovery of truth." (People v. St. Martin (1970) 1 Cal.3d 524, 533, 83 Cal.Rptr. 166, 463 P.2d 390.) Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-assessment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

Barton, 906 P.2d at 532, 536 (footnote omitted).[1]

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[1] The Barton court qualified the foregoing analysis with the caveat that

> [a] trial court need not, however, instruct on lesser included offenses

(continued...)

Accordingly, I join in the majority's holding "that, in jury trials beginning after the filing date of this opinion, the trial courts shall instruct juries as to any included offenses having a rational basis in the evidence without regard to whether the prosecution requests, or the defense objects to, such an instruction." Majority opinion at 2 (footnote omitted).

[1](...continued)
when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime (for example, when the only issue at trial is the defendant's identity as the perpetrator). Because in such a case "there is no evidence that the offense was less than that charged ([People v.] Sedeno, [518 P.2d 913 (1974)]), the jury need not be instructed on any lesser included offense.

906 P.2d at 536 n.5. I am not certain that I understand what footnote five means, and so I do not necessarily endorse it. The caveat would appear, however, to be the functional equivalent of the indisputable proposition that the trial court "is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense," see HRS § 701-109(5) (1993), combined with the trial court's prerogative of granting a motion for judgment of acquittal, see Hawai'i Rules of Penal Procedure Rule 29 (2000).