

Date of Hearing: March 29, 2022
Counsel: Cheryl Anderson

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 2435 (Lee) – As Introduced February 17, 2022

SUMMARY: Restores a defendant’s right to an instruction on lesser related offenses to the offense charged, if certain conditions are met. Specifically, **this bill:**

- 1) Provides that a jury, or a judge if a jury trial is waived, upon request of a defendant, may find the defendant guilty of a lesser offense, the commission of which is closely related to the offense with which the defendant is charged if all of the following conditions are met:
 - a) The defendant relies on a theory of defense that is consistent with a conviction for the lesser offense;
 - b) The evidence of the lesser offense is relevant to, and admitted for the purpose of, establishing whether the defendant is guilty of the charged offense; and,
 - c) A basis exists, other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged.
- 2) States the intent of the Legislature to restore the defendant’s right to receive jury instructions on lesser related offenses as originally guaranteed by the California Supreme Court in *People v. Geiger* (1994) 35 Cal.3d 510.

EXISTING LAW:

- 1) Provides that the defendant may be found guilty “of any offense, the commission of which is necessarily included in that with which he is charged.” (Pen. Code, § 1159.)
- 2) Requires that in any criminal case which is being tried before the court with a jury, all requests for instructions on points of law be made to the court and all proposed instructions be delivered to the court before commencement of argument. (Pen. Code, § 1093.5.)
- 3) Specifies that before the commencement of the argument, the court, on request of counsel, must:
 - a) Decide whether to give, refuse, or modify the proposed instructions;
 - b) Decide which instructions shall be given in addition to those proposed, if any; and,
 - c) Advise counsel of all instructions to be given. (Pen. Code, § 1093.5.)

- 4) Provides, however, that if during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof. (Pen. Code, § 1093.5.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, “This bill will allow criminal courts to consider ‘lesser-related’ offenses rather than only ‘lesser-included’ offenses, restoring a practice that was in place prior to 1998. Courts would then be allowed to present additional conviction options to a jury.

“When someone is on trial for a criminal offense, a jury is presented with the charged offense and any other ‘lesser-included’ offenses. A jury must decide whether the facts support a conviction for the charged offense or a ‘lesser-included’ offense, which is one that overlaps or shares legal elements with the charged offense. In 1984, a California appellate court decided that a defendant in a criminal case was entitled to also present the jury with a ‘lesser-related’ offense – crimes that may not share all legal elements, but that would be supported by the facts of the case.

“This bill will restore fairness and due process in our criminal legal system by permitting defendants in a criminal case to present to the jury lesser ‘related’ offenses as an alternative to the underlying charge. This reform, which was in law for more than a decade in California, will help ensure that defendants are properly charged based on the facts of the case, and that they receive a just trial.”

- 2) **Jury Instructions on Lesser Related Offenses:** The trial court has a “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.” (*People v. Foster* (2010) 50 Cal.4th 1301, 1343 [citation and quotations omitted].)

“Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.” (*People v. Birks* (1998) 19 Cal.4th 108 (*Birks*).) “If a lesser offense shares some common elements with the greater offense, or if it arises out of the same criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense.” (*People v. Hicks* (2017) 4 Cal.5th 203, 208-209, citing *Birks, supra*, at pp. 119-120.)

From 1984 to 1998 a defendant was entitled to have the jury instructed on lesser-related offenses. (See *People v. Geiger* (1984) 35 Cal.3d 510, overruled in *Birks, supra*, 19 Cal.4th at pp. 116-137.) In *Geiger*, the California Supreme Court held that the trial court is required to instruct on lesser offenses when the defendant requests it, if the offense is closely related to the charged offense and the evidence provides a basis for finding the defendant guilty of

the lesser, but innocent of the charged offense. In addition, the Court indicated the rule barring conviction of both a greater and lesser offense holds true as to lesser related offenses. Hence, “[t]he conviction of a [lesser] related offense constitutes an acquittal of the charged offense.” (*Id.* at p. 528.)

The *Geiger* Court reasoned that California's due process clause (Cal. Const., art. I, § 15) requires accurate factfinding procedures leading to deprivation of personal liberty. The Court suggested that the removal of plausible lesser offenses from the jury's consideration undermines the reasonable doubt standard by imposing pressure to overconvict in order to avoid a complete acquittal. (*Geiger, supra*, 35 Cal. 3d at p. 520.) The Court determined that the considerations of fairness and accuracy which supported California's previously recognized entitlement to instructions on lesser necessarily included offenses applied with equal force to lesser related offenses. (*Id.* at pp. 518-526.)

In 1998, the *Geiger* lesser-related instruction rule was abolished by the California Supreme Court in *Birks*. (*Birks, supra*, 19 Cal.4th at pp. 116-137.) The Court held that a defendant is not entitled to instruction on a lesser related offense as a matter of due process, though the parties are not foreclosed from agreeing to it. (*Birks, supra*, at p. 136, fn. 19.) The Court stated “the *Geiger* rule contravenes the principle of mutual fairness by giving the defendant substantially greater rights either to require, or to prevent, the consideration of lesser nonincluded offenses than are accorded to the People, the party specifically responsible for determining the charges.” (*Id.* at p. 126.) While not resolving whether this violates the separation of powers clause, the *Birks* Court discussed that separation of powers issues may arise. (*Birks, supra*, 19 Cal.4th at pp. 135-136.)

The *Geiger* Court had reasoned that the proper balance would be restored, similar to with lesser included offenses, by the prosecution's authority to frame the accusatory pleading from the start. The *Geiger* Court reflected:

In most cases the prosecution can foresee whether the proof is likely to develop strongly favoring a verdict on a lesser included offense, in which event the indictment should so charge, which is the prosecutor's option. If the evidence is such that a jury can rationally -- and is likely -- to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser included offense -- whether the prosecution chose to put it in the indictment or has the right later to request it or not. This recognizes 'the jury's central role in our jurisprudence, . . .

(*Geiger, supra*, 35 Cal.3d at p. 521 [citation and quotations omitted]; *Birks, supra*, 19 Cal.4th at p. 129.) Based on these same considerations, the *Geiger* Court opined “it would be fundamentally unfair to deny the defendant the right to have the court or jury consider the ‘third option’ of convicting the defendant of the related offense.” (*Geiger, supra*, 35 Cal.3d at p. 521.) The *Geiger* Court reflected: “We have repeatedly recognized the defendant's right to have the jury or court determine every material issue presented by the evidence. Denial of instructions on related offenses may affect the reliability of that fact finding process. (*Id.* at p. 526.)

The *Geiger* Court also reasoned that the prosecution would benefit from lesser related instructions: “Just as the lesser included offense doctrine serves the interests of the People by

permitting conviction of a lesser offense rather than acquittal of a clearly guilty defendant when the prosecution fails to prove the charged offense, instructions on related offenses will ensure that some guilty defendants who would otherwise go free will be punished for a crime which they committed even though it was overlooked by a prosecutor or was not charged because the prosecutor overestimated the strength of the People's evidence.” (*Geiger, supra*, 35 Cal.3d at p. 531.)

While the *Birks* Court disagreed with the *Geiger* Court and concluded a defendant is not constitutionally entitled to instruction on lesser related offenses, it noted the Legislature is free to overturn its readings of statutes. (*Birks, supra*, 19 Cal.4th at p. 117.) The *Geiger* Court opined that the option to convict of a lesser related offense was consistent with the legislative intent in providing for conviction of included offenses (Pen. Code, § 1159). The *Birk's* Court, on the other hand, concluded Penal Code section 1159 explicitly provides that the defendant may be found guilty of any offense “necessarily included” within the offense charged. (*Birk's, supra*, 19 Cal.4th at p. 118.)

This bill would statutorily restore a trial court’s duty to instruct on lesser related offenses as it existed under *Geiger*. Per the *Geiger* opinion, and as required under this bill, three conditions would have to be met to trigger the trial court’s duty to instruct on a closely related lesser offense upon the defendant’s request:

- a) The defendant relies on a theory of defense that is consistent with a conviction for the lesser offense;
- b) The evidence of the lesser offense is relevant to and admitted for the purpose of establishing whether the defendant is guilty of the charged offense; and,
- c) A basis exists, other than an unexplainable rejection of prosecution evidence, on which the jury could find the offense to be less than that charged (*Geiger, supra*, 35 Cal. 3d at p. 531.)

The *Geiger* Court acknowledged there may be circumstances in which courts grapple with a request for instruction on a lesser related offense under this standard. (*Geiger, supra*, 35 Cal.3d 510, 532, fn. 12; *Birks, supra*, 19 Cal.4th at p. 131.) To that end, the *Geiger* Court instructed: “In doubtful situations, however, the determinative factor should be whether the option to convict a defendant of a related offense is reasonably necessary to insure that the jury is afforded the opportunity to decide all material issues presented by the evidence in accord with the defendant's theory of the case, where denial of that opportunity might undermine the reasonable doubt standard.” (*Geiger, supra*, 35 Cal.3d 510, 532, fn. 12.)

- 3) **Argument in Support:** According to the *California Attorneys for Criminal Justice*, a co-sponsor of this bill, “Under existing law, when there is reasonable doubt about whether the prosecution proved a defendant’s guilt on the offense charged at trial, but the evidence is overwhelming that the defendant is guilty of committing one or more lesser-related offenses, jurors are not given the option of finding the defendant guilty on any of these lesser offenses. Instead, jurors are forced into the all-or-nothing prospect of either finding the defendant guilty of the charged crime – despite their reasonable doubt – or acquitting the defendant entirely. Restoring a defendant’s right to lesser-related offenses will increase the accuracy of

jury verdicts and help to ensure that defendants are not convicted of more serious crimes when a lesser-related offense better fits the facts established at trial.

“Jurors should be given the option of convicting on a lesser offense if it is established by the evidence, regardless of whether it is considered a lesser-included offense or a lesser-related one. The difference, in short, is that if a lesser offense contains an element that is not included in the greater offense, it is a lesser-*related* offense. Lesser-*included* offenses, in contrast, contain some (but not all) of the elements of the greater offense, and no elements that are not included in the greater. This hyper-technical definition should not be used as a basis to deny a defendant the right to jury instructions on lesser offenses.

“In 1984, in *People v. Geiger* (1984) 35 Cal.3d 510, the California Supreme Court held that a defendant in a criminal case had a right under the California Constitution to have the jury provided with the option of convicting on lesser-related offenses. Thus, for example, if a defendant was charged with burglary after he broke a shop window, he could request that the jury be instructed on the lesser-related offense of vandalism if the jurors had a reasonable doubt about whether he intended to steal from inside the store.

“But in 1998, during the height of the “tough on crime” era, the California Supreme Court overturned this rule, eliminating a defendant’s right to instructions on lesser-related offenses. (*People v. Birks* (1998) 19 Cal.4th 108.) This change has likely resulted in individuals serving more time incarcerated than if the jury had the option to consider alternative offenses. It has also created a process which may result in unwarranted acquittals when the defendant was in fact guilty of a lesser-related crime, but the jury simply received no instruction on this crime. The *Birks* court concluded that the California Constitution did not guarantee the right to lesser-related offenses. But nothing in the decision stops the Legislature from establishing such a right by statute.

“AB 2435 (Lee) would simply restore the practice of allowing defendants to have a jury instructed on lesser-related offenses, which, as noted above, was the law for 14 years. Defendants should not have to endure harsher convictions and longer sentences when the facts of the case better support conviction on a lesser-related offense. This bill will make the judicial processes fairer for defendants and ensure that individuals who can be proven guilty of a lesser offense do not go entirely acquitted. Under AB 2435, juries will be presented all appropriate options for conviction on lesser offenses, instead of being unnecessarily constrained.

- 4) **Argument in Opposition:** According to the *California District Attorneys Association*, “In 1998 the California Supreme Court specifically ruled that courts should not instruct on lesser related offenses, holding that prior opinions authorizing such a practice were simply “wrong.” (*People v. Birks* (1998) 19 Cal.4th 108, 136.) This has been the law of the land in California for nearly 25 years. AB 2435 states that the intent of the bill is to restore this “wrong” practice as authorized in *People v. Geiger* (1984) 35 Cal.3d 510, a criticized Justice Rose Bird era opinion. The best argument against this bill can be found in the Supreme Court’s own language in the *Birks* opinion:

[W]e now agree that *Geiger* represents an unwarranted extension of the right to instructions on lesser offenses. *Geiger's* rationale has since been expressly repudiated for federal purposes by the United States Supreme Court, and it

continues to find little support in other jurisdictions. The *Geiger* rule can be unfair to the prosecution, and actually promotes inaccurate factfinding, because it gives the defendant a superior trial right to seek and obtain conviction for a lesser uncharged offense whose elements the prosecution has neither pled nor sought to prove. Moreover, serious questions arise whether the holding of *Geiger*, ostensibly based on the due process clause of the California Constitution, can be reconciled with other provisions of the same charter. By according the defendant the power to insist, over the prosecution's objection, that an uncharged, nonincluded offense be placed before the jury, the *Geiger* rule may usurp the prosecution's exclusive charging discretion, and may therefore violate the separation of powers clause.

“(*People v. Birks*, *supra*, 19 Cal.4th at 112-113.)

“We must therefore respectfully oppose this bill.”

REGISTERED SUPPORT / OPPOSITION:

Support

California Attorneys for Criminal Justice (Co-Sponsor)
 Californians for Safety and Justice (Co-Sponsor)
 A New Way of Life Re-entry Project
 Alliance for Safety and Justice
 Communities United for Restorative Youth Justice (CURYJ)
 Courage California
 Ella Baker Center for Human Rights
 Essie Justice Group
 Friends Committee on Legislation of California
 Initiate Justice
 Santa Cruz Barrios Unidos INC.

3 Private Individuals

Opposition

California District Attorneys Association
 San Diego County District Attorney's Office

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