

Date of Hearing: June 23, 2026  
Counsel: Kimberly Horiuchi

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Nick Schultz, Chair

SB 1173 (Caballero) – As Amended March 23, 2026

**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) Authorizes a jury, or a judge if a jury trial is waived, upon request of a defendant, to 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) **Sponsors:** California Attorneys for Criminal Justice, Californians for Safety & Justice, and California Public Defenders Association
- 2) **Author’s Statement:** “In 1998, the California Supreme Court ruled in *People v. Birks*, that there is neither a statutory or constitutional right to have a lesser related offense presented to a jury. This decision reversed the longstanding ability of a defense attorney to request that the jury consider a lesser charge, if the facts presented at trial supported the elements of the lesser offense, but it did foreclose the possibility of restoration, but noted there is no statutory authority.

“Currently, jury deliberations are limited to the charges brought by the prosecution, even when the evidence supports a different, lesser offense. At the height of the war on crime era, the *Birks* Court reduced judicial discretion to allow for lesser charges to be considered, and narrowed a defendant’s ability to ask for lesser related crimes to be heard.

“SB 1173 restores balance in the criminal courtroom. It allows a judge to include a lesser-related offense in jury instructions if the evidence supports it. This reform strengthens due process, supports fair outcomes, ensures that juries can consider the facts before them, and helps juries connect the evidence with the appropriate offense.”

- 3) **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 penalty crime 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, as well as lesser included 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, “The 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 over-convict 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.)

- 4) **Legislative Validity:** While the *Birks* Court disagreed with the *Geiger* Court and concluded a defendant was 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 *Birks* 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.) However, this bill specifically alters Penal Code section 1159 to allow a defendant to seek a lesser related jury instruction.

Ultimately, with the benefit of nearly three decades of hindsight, it appears the *Birks* Court over-emphasized the need for district attorneys to have sole authority in determining what charges are put to a jury. This posture lead to significant over-charging and mass incarceration. Existing law today allows courts to intervene in any number of instances to provide a more equitable outcome, including granting diversion, reducing offenses from felonies to misdemeanors, striking prior convictions and enhancements, and reducing criminal sentences where the law allows for it.

Opponents to this bill contend that use of a lesser related charge is disapproved by the U.S. Supreme Court in *Schmuck v. United States* (1988) 489 U.S. 705. However, *Schmuck* stands for the proposition that, in accordance with Federal Rule of Criminal Procedure 31, subdivision (c), the defendant is not entitled to anything other than lesser included charges that appear within the charged statute. (*Id.* at 719.)

While *Birks* concluded a defendant **does not have an absolute right** to a jury instruction on a lesser related offense for purposes of due process, nothing prevents the Legislature from granting that right to a defendant. This bill would create a statutory basis for a court to issue a less-related charge where appropriate. 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.)

- 5) **Argument in Support:** According to the *ACLU California Action*, “Under current law, juries are not permitted to consider lesser related offenses at trial, but only the charges brought forth by the prosecution, even when presented evidence does not accurately reflect the charges. For example, if a jury believes the evidence proves the accused has committed a criminal offense, but the prosecutor has only presented the highest level offense, with a longer potential prison sentence than what the evidence supports, the jury must decide whether to convict someone of a crime they did not actually commit, or find the accused not guilty, even though the jury believes that an alternative offense was committed. This procedure comes from a 1998 appellate court case that overturned a previous rule allowing defendants to request jury instructions on a lesser related offense.<sup>1</sup> This ruling has left defendants without the ability to argue that an alternative charge would be more accurate, violating the principle that the evidence should dictate the offense. Prior to 1998, juries were allowed to consider lesser related offenses. SB 1173 restores this legal option.

“This limitation undermines due process and fairness. When juries are not allowed to consider all charges supported by the evidence, there is an increased risk of conviction for offenses that may not accurately align with the facts of the case. For example, someone may be arrested for attempted breaking and entering a business after hours. However, the evidence may show that the individual was recently terminated from the business, and they were vandalizing the exterior of the building out of frustration without the intent to commit burglary. If a prosecutor only presents the breaking and entering (burglary) charge and not the vandalism, a jury may never get the option to even consider the lesser related offense despite the facts supporting such an alternative. SB 1173 addresses this by giving authority to a judge to decide if evidence supports the inclusion of a lesser related offense, ensuring that the charges presented match the facts of the case.

“This legislation offers a balanced approach to criminal trial court, by allowing judges the discretion to include the jury instruction or not only when appropriate. This establishes important safeguards while continuing to allow for judicial authority. SB 1173 promotes critical protections needed to strengthen confidence in California’s criminal justice system. Ensuring that juries are fully informed of every charge that is factually supported upholds a more balanced and just process for every individual involved.”

- 6) **Argument in Opposition:** According to the *California District Attorneys Association*, “This bill would go backwards in our approach to criminal law. It also would run afoul of the California Supreme Court’s clear language noting a serious constitutional concern. This same bill, introduced four years ago (AB 2435 (Lee), 2021-2022 Sess.), failed to pass the Assembly for the same reasons it is bad policy today. The bill proposes an outdated, unconstitutional, and unworkable rule requiring courts to instruct juries on lesser related offenses. In 1998, the California Supreme Court specifically ruled that courts shall 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 30 years. SB 1173 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:

*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 Constitution’s separation of powers clause.

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

“CDAAs echo the Supreme Court’s concerns that such instructions “promotes inaccurate factfinding.” Additionally, SB 1173 in its application would lead to disparate outcomes depending on factors irrelevant to the case such as judicial draw and local county practice. The current state of the law is predictable and is applied uniformly across the state.”

- 7) **Prior Legislation:** AB 2435 (Lee), of the 2021-22 Legislative Session, was identical to this bill and failed passage on the Assembly Floor.

## REGISTERED SUPPORT / OPPOSITION:

### Support

California Attorneys for Criminal Justice (Co-Sponsor)  
 California Public Defenders Association (Co-Sponsor)  
 Californians for Safety and Justice (Co-Sponsor)  
 ACLU California Action  
 Communities United for Restorative Youth Justice  
 Courage California  
 Drug Policy Alliance  
 Drug Policy Alliance 1

Ella Baker Center for Human Rights  
Felony Murder Elimination Project  
Friends Committee on Legislation of California  
Justice2jobs Coalition  
LA Defensa  
Local 148 Los Angeles County Public Defender's Union  
San Francisco Public Defender  
San Quentin Skunkworks  
Silicon Valley De-bug  
Smart Justice California, a Project of Beyond Impact  
The W. Haywood Burns Institute

**Opposition**

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

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