SUPREME COURT OF THE STATE OF CALIFORNIA

S076785

PEOPLE OF THE STATE OF CALIFORNIA ,

Plaintiff and Respondents,

v.

PEDRO RANGEL, Jr.,

Defendant and Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MADERA

Honorable JOHN W. DeGROOT, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

(AUTOMATIC APPEAL)

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DEATH PENALTY

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PEDRO RANGEL, Jr., Defendant and Appellant.	S076785

APPELLANT'S SUPPLEMENTAL BRIEF

Appellant Pedro Rangel, Jr., submits this Supplemental Brief in regard to case authority which has emerged since the briefing was completed with the filing of Appellant's Reply Brief on December 30, 2009. See Rule 8.520 (d), Cal. Rules of Court, "matters that were not available in time to be included in the party's brief on the merits."

This Brief concerns the issue raised in Argument XI of Appellant's Opening Brief: the authority of the trial court, as a matter of constitutional separation of powers, to instruct in its discretion on a lesser related offense supported by the evidence at trial.

PRIOR AUTHORITY OF THIS COURT, PROPERLY CONSTRUED, HAS LEFT UNSETTLED THE QUESTION OF WHETHER A TRIAL COURT HAS DISCRETION TO INSTRUCT ON A LESSER INCLUDED OFFENSE SUCH AS ACCESSORY TO MURDER.

In Argument XI of Appellant's Opening Brief it is argued that this Court's opinion in *People v. Birks* (1998) 19 Cal.4th 108, while rejecting the former rule that a defendant has a constitutional right to instructions on lesser related offenses, did not foreclose the trial court discretion to instruct on lesser related offenses. The *Birks* opinion simply declined to decide the question of the trial court's independent authority to instruct on lesser related offenses.[1]

As a matter of separation of powers, the trial court should have discretion to instruct on lesser related offenses. Here, an instruction was requested on the lesser related offense of accessory, and there was substantial evidence that appellant was an accessory to murder but not a principal in the murders. The trial court concluded, incorrectly, that it did not have discretion under *Birks* to even consider reading an accessory instruction.

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[1] "We need not finally resolve the separation of powers issue here. It is enough to invoke the established principle that when reasonably possible, courts will avoid constitutional or statutory interpretations in one area which raise ' "serious and doubtful constitutional questions" ' [citations] in another." (19 Cal.4th at 135.)

Justice Werdegar, writing for the majority, has since referred to the *Birks* discussion of the separation of powers question as "gratuitous." (*People v. Hernandez* (1998) 19 Cal.4th 835, 846-847.)

Respondent's Brief simply argued that the issue was foreclosed by the *Birks* opinion. Appellant's Reply Brief reiterated the argument that there is a constitutional issue left undecided by the *Birks* opinion, and that the constitutional issue is squarely presented on this record and must be decided.

New authority has arisen since the filing of the Reply Brief which still does not confront the constitutional issue, but which muddies the water and may give the false impression that the issue has been decided.

A. Cases Are Not Authority for Propositions They Do Not Consider.

This is a well-settled principle, recognized long before the briefing in this appeal.[2] This Court has continued to apply the principle in the past two years. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 639 ["As with our jurisprudence," United States Supreme Court decisions are not authority for issues neither considered nor decided; prior California rule of no forfeiture of objection to jurors was based on misconception of the scope of holdings of United States Supreme Court, and is therefore overruled]; and see *People v. Voit* (2011) 200 Cal.App.4th 1353, *28 [prior California Supreme Court and Court of Appeal authority permitting appellate challenge to factual basis of guilty plea is not binding because the issue was not discussed in the prior appellate opinions].)

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[2] See, *inter alia*, *People v. Castellanos* (1999) 21 Cal.4th 785, 799 fn. 9, *People v. Nguyen* (2000) 22 Cal.4th 872, 879, and *People v. Davis* (2008) 168 Cal. App.4th 617, 630.

The *Birks* opinion discussed the question of whether a trial court might have the authority to instruct on a lesser related offense, but it specifically declined to decide the issue since it was not necessary to the holding. Accordingly, and until the issue is discussed and decided by this Court, there is no binding authority on the separation of powers issue.

B. Recent Opinions Recognize that the Birks Ruling Extends Only to Whether the Defendant Has a Right to Insist on Instructions on a Lesser Related Offense.

In *People v. Nelson* (2011) 51 Cal.4th 198, this Court summarized the extent of the *Birks* holding:

> With regard to the attempted murders of Officers Boccanfuso and Coleman, the court declined defendant's request to instruct on assault with a deadly weapon (§ 245) and negligent discharge of a firearm (§ 246.3) as lesser offenses. In *People v. Birks* (1998) 19 Cal.4th 108, this court overruled its holding in *People v. Geiger* (1984) 35 Cal.3d 510 that a defendant's unilateral request for a related-offense instruction must be honored over the prosecution's objection. (*Birks*, at p. 136; see *People v. Rundle* (2008) 43 Cal.4th 76, 146–147[3]; *People v. Yeoman* (2003) 31 Cal.4th 93, 129[4].) Defendant admits that assault with a deadly weapon and negligent discharge of a firearm are not lesser included offenses of attempted

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3 The *Rundle* opinion correctly observed that the defendant had "no right" to a lesser included offense instruction over prosecution objection. Appellant does not contend otherwise; he contends only that the trial court has jurisdiction to consider whether to give a lesser related instruction.

4 The *Yeoman* opinion also correctly observed that "a defendant has no unilateral right to an instruction on an uncharged offense that is not necessarily included within a charged offense." (*Ibid.*)

> murder, but rather lesser related offenses. Thus, under *Birks*, the court did not err. We have previously rejected an argument that the *Birks* rule violates the federal Constitution. (*Rundle, supra*, 43 Cal.4th at pp. 147–148.)
>
> (*Id.* at 215; emphasis added.)

In *People v. Hall* (2011) 200 Cal.App.4th 778, the court of appeal faced the unusual situation in which both the prosecution and the defense agreed that the jury should be instructed on child abuse as a lesser related offense to assault on a child under age eight causing death. The trial court, however, disagreed and refused to give the instruction. The *Hall* court correctly observed that the trial court has the ultimate say over whether to read a lesser related offense instruction.

> ... The ultimate decision of whether to give an instruction on an uncharged lesser related offense should not be removed from the trial court. (See *People v. Lam* (2010) 184 Cal.App.4th 580, 583 [in a case involving claims of ineffective assistance of defense counsel for failing to request a lesser related offense instruction, the court said "even if counsel had requested the instruction, no reasonable possibility existed that the prosecutor *and trial court* would have agreed to it because no substantial evidence supported it" (italics added)].)
>
> (*Id.* at 782; emphasis added.)

The *Hall* court went on to emphasize the latitude left to the trial court under the *Birks* opinion:

> ... Defendant is relying solely on the prosecutor's acquiescence in the request for the instruction. As there is no requirement that the trial court give an uncharged lesser related offense instruction even if the defendant and prosecutor agree to have it given, the trial court's refusal to give the instruction did not constitute error.
>
> (*Id.* at 783.)

The *Hall* opinion thus grasped the import of the *Birks* opinion, at least inferentially: the trial court retains the authority to instruct or not instruct on lesser related offenses. The acquiescence of the parties may be taken into account, but neither party has the final say.

C. *Other Recent Opinions Give the Incorrect Impression that Instructions on Lesser Related Offenses Are Necessarily Foreclosed by the Birks Decision.*

Although the *Birks* opinion explicitly reserved the separation of powers argument to another day, and no subsequent opinion has discussed or decided the issue, a handful of alarming opinions have treated the issue as already decided.

In *People v. Taylor* (2010) 48 Cal.4th 574, the defendant was convicted of burglarizing the home of an elderly neighbor and sexually assaulting her, resulting in her death. At trial he requested instructions on trespass as a lesser related offense. His (rather unpromising) theory was that he entered the victim's home as a trespasser, without any felonious intent, and the victim died of shock when she encountered him, before the sexual assault. This Court affirmed the denial of the lesser related instructions.

The *Taylor* court, however, seemed to take the *Birks* opinion further than it actually goes. "In *Birks* we held that instruction on a lesser related offense is proper only upon the mutual assent of the parties. (*Id.* at 112-1213, 136; see *id.* at p. 134 [allowing instruction on lesser related offenses over the prosecutor's objec-

tion interferes with prosecutorial charging discretion].) Here, because the prosecutor objected to instruction on the crime of trespass, the trial court correctly denied defendant's request." (48 Cal.4th at 622.) This doctrine of complete prosecutorial charging discretion is exactly what the *Birks* court declined to embrace.

In *People v Jennings* (2010) 50 Cal.4th 616, the Court was faced with an argument that the trial court should have instructed *sua sponte* on accessory to murder, a lesser related offense to murder, simply because there was some evidence of accessory liability, and some reason to think that the defendant may not have been a principal. In this opinion the Court seemed to imply that a lesser related offense instruction might be read on agreement of the parties.

> A defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties. (*Kraft, supra*, 23 Cal.4th at pp. 1064–1065[5]; *Birks, supra*, 19 Cal.4th at pp. 136–137.) Therefore, the trial court was not required to instruct the jury on its own motion concerning the lesser related offense of being an accessory after the fact, whether or not there was substantial evidence supporting a theory of accessory liability.
>
> (*Id.* at 668; emphasis added.)

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5 The opinion in *People v. Kraft* (2000) 23 Cal.4th 978, 1064, was actually limited to a unilateral demand by the defendant: "Even were there evidence supporting a theory of accessory liability, which the trial court properly found lacking, defendant was not entitled to instructions on lesser related offenses." (emphasis added.)

It would be more accurate to say that under *Birks* the defendant may not demand an instruction on a lesser related offense. Certainly, there is no *sua sponte* duty to instruct on a lesser related offense. But a trial court retains the authority and the discretion, under the separation of powers doctrine, to instruct on a lesser related offense regardless of the position of the parties.

Up to this point there has not been an opinion which both discusses and decides the separation of powers argument. Simple citations to *Birks,* which expressly reserved the issue, are inapposite.

D. The Doctrine of Separation of Powers Requires that the Trial Court Retain the Authority to Instruct on Lesser Related Offenses.

This Court has rejected arguments that accessory instructions should have been given as related to a defense theory. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 213 ["An accessory instruction was not essential to defendant's defense."]; *People v. Schmeck* (2005) 37 Cal.4th 240, 291-292 [no request for instruction].)

Appellant here makes a distinct argument, apart from any duty to instruct on defenses. The trial court must at least consider a lesser related offense when it is supported by the evidence and the issue is brought to its attention, and whether or not it is raised by the defense case.[6] A failure to exercise trial court discretion in this situation is a denial of due process and a violation of separation of powers.

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[6] Similarly, the trial court must instruct on a lesser included offense when it is brought to the court's attention, even where the defense and the prosecution both object to it. (*People v. Barton* (1995) 12 Cal.4th 186.)

There is no doubt that the lower courts have been confused by the lack of a holding on the separation of powers issue.[7] For instance in *People v. Hall, supra,* in the course of ruling that the trial court has the unilateral authority to deny a lesser related instruction agreed upon by the parties, the court of appeal quoted language from *People v. Jennings, supra,* 50 Cal.4th at 668, which seems to imply that the trial court could also grant such a requested instruction, even though the lesser related offense wasn't charged: "...California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties." (200 Cal.App.4th at 781, quoting *Jennings*.) If the trial court has the authority to instruct or not instruct on an uncharged offense, it appears that it has something very near to independent judicial authority over this subject, in accord with the separation of powers doctrine.

As stated by the *Hall* court, "[t]he ultimate decision of whether to give an instruction on an uncharged lesser related offense should not be removed from the trial court." (200 Cal.App.4th at 783.) In support of this broad constitutional power in the trial court, the *Hall* court cited *People v. Lam, supra.*

The *Lam* court also recognized some degree of trial court authority on this subject. The *Lam* court first recognized several restricting principles: (1) there is

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[7] Anecdotally, it appears that some California trial courts have taken the bit in their teeth and instructed on uncharged lesser related offenses, where failure to do so would be unwise or grossly unfair to the parties.

no *sua sponte* duty to instruct on lesser related offenses; (2) the trial court is not obligated to grant the defendant's request for a lesser related offense instruction, even if it is supported by substantial evidence; and (3) a trial court errs if it instructs on a lesser related offense over the prosecutor's objection. The *Lam* court concluded that from these principles "it follows that under the appropriate circumstances a court may choose to grant a defendant's request for a lesser related instruction if substantial evidence supports the instruction and the prosecutor consents." (184 Cal.App.4th at 783.)

The prosecution objected to the reading of accessory instructions here. But the trial court had the independent discretion to read the instructions, and that discretion should have been exercised.

Fundamentally, a discussion and decision on the separation of powers issue by this Court is still lacking. Intervening opinions since *Birks* have not confronted or discussed the separation of powers issue. For the reasons stated in prior briefing (see Reply Brief at pp. 58-69), the constitutional issue should be addressed, discussed and decided, and the trial court should be deemed to have the independent discretion and authority to instruct on lesser related offenses.

CONCLUSION

For the foregoing reasons, appellant's conviction must be reversed for failure to consider and deliver an instruction on accessory to murder as a lesser related offense.

Date: December 14, 2011

Respectfully submitted,

CHARLES M. BONNEAU
Attorney for Appellant

STATEMENT OF COMPLIANCE

Pursuant to Rule 8.520 (d), Cal. Rules of Court, the foregoing Brief is in Times New Roman font, 13-point, and contains a word count of 2,563.

Date: December 14, 2011

CHARLES M. BONNEAU
Attorney for Appellant

CASE NAME: **PEOPLE v. RANGEL**
CASE NO.: **S076785**
COURT: **SUPREME COURT OF CALIFORNIA**

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of Sacramento, California. I am over the age of eighteen years and not a party to the within cause; my business address is 331 J Street, Suite 200, Sacramento, CA 95814.

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