S248520

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. STARLETTA PARTEE, Defendant and Petitioner.	Second District Court of Appeal No. B276040, Division 5 Los Angeles County Superior Court Case No. TA138027)

PETITION FOR REVIEW

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By appointment of the Court of Appeal
Independent case system

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Starletta Partee respectfully petitions this court for review following the published, split decision of the Court of Appeal, Second Appellate District, Division Five (per Dunning, J.[1]), filed in that court on March 21, 2018, and modified on April 12, 2018. A true copy of the Opinion, including the Dissenting Opinion and the Order Modifying Opinion and Denying Petition for Rehearing, is attached hereto as Exhibit A.

In the alternative, Petitioner requests this Court to grant review and transfer the matter to the Court of Appeal pursuant to California Rules of Court, rule 8.500(b)(4), to conduct further proceedings in accordance with this Court's orders.

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[1] Judge of the Orange Superior Court appointed by the Chief Justice pursuant to Article VI, section 6, of the California Constitution.

ISSUES PRESENTED ON REVIEW

I. Can a person who refuses to testify in a criminal proceeding be prosecuted and convicted as an accessory to the crime being prosecuted?

II. Can the refusal to testify in a criminal proceeding constitute sufficient evidence of harboring, concealing or aiding a principal to support a conviction as an accessory under Penal Code section 32?

III. Does the unprecedented prosecution and conviction of a person as an accessory for refusing to testify in a criminal proceeding violate the separation of powers doctrine?

IV. Does the unprecedented prosecution and conviction of a person for a crime other than contempt for refusing to testify in a criminal proceeding violate the separation of powers doctrine?

V. Does the unprecedented prosecution and conviction of a person as an accessory based solely on her refusal to testify in a criminal proceeding violate the constitutional right to due process?

NECESSITY FOR REVIEW

This case raises issues of statewide importance regarding the unprecedented prosecution and conviction of a person on four felony counts of accessory under Penal Code section 32[2] for refusing to testify in a criminal proceeding. (Calif. Rules of Court, rule 8.500(b)(1).)

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[2] Unless otherwise indicated, all future statutory references are to the Penal Code

The Court should grant review in this case because, despite the majority's assertion that prior California cases have sustained accessory convictions under similar circumstances (Opinion, Exhibit A, at 8, 10, 11), those prior decisions have limited accessory convictions to cases involving active misrepresentations to authorities, beginning with *People v. Duty* (1969) 269 Cal.App.2d 97. California is already outside the mainstream in allowing its citizens to be prosecuted as accessories based on misrepresentations as opposed to active, physical assistance, and the majority decision "places California on the extreme edge of other jurisdictions – indeed, in a group unto itself – concerning the reach of accessory after the fact punishment." (Dissenting Opinion at 15.)

Established canons of statutory construction further undermine the majority's holding. The statute defines an accessory as a person who "harbors, conceals or aids a principal" (§ 32), so "aids" should be construed as being similar to the active verbs that closely precede it. The majority's expansive, unprecedented interpretation of "aids" to include the passive refusal to testify also raises significant due process issues, because ordinary people would not understand that such a refusal could make them an accessory to the crime being prosecuted.

The majority's determination that currently available contempt penalties do not provide adequate coercive and punitive options for

prosecutors and courts, contrary to this Court's opinion in *In re McKinney* (1968) 70 Cal.2d 8, 10, 12, is at the heart of its decision. (Opinion at 10-11.) After fifty years, this Court may well want to revisit that issue but even if it agrees with the majority, the answer must come from the Legislature, which under our tripartite system defines all crimes and punishment in the first instance. (Dissenting Opinion at 17-18.) The majority in this case effectively determined that the answer should come from a deputy district attorney who devised a novel way to punish Starletta Partee when she refused to testify against her brother and three others in a gang-related shooting.

This Court should grant review so that people like Partee will not face multiple felony charges for refusing to testify against family members when that testimony would place their own family in harm's way. Despite being raised in a gang-controlled neighborhood, Partee had never been in trouble, and was making a good living while attending college, raising her daughter and helping to raise the children of others who had not survived the gang environment. After she was tricked into disclosing information about the shooting to a detective, the State used established procedures to detain and coerce her into repeating that information in court. When she refused to testify, the State could legitimately have sought to punish her for misdemeanor contempt, but instead tried to destroy her otherwise

exemplary life by taking the unprecedented step of charging her with five felonies carrying lengthy prison sentences.

If this decision stands, "accessory charges for recalcitrant witnesses are now fair game." (Dissenting Opinion at 17.) The Court should grant review to determine whether to allow this dramatic, destructive change in California law to stand.

STATEMENT OF THE CASE

The Los Angeles County District Attorney charged Petitioner Starletta Partee with four counts of being an accessory after the fact to murder in violation of section 32, and one count of refusing to testify at a preliminary hearing, a misdemeanor violation of section 166, subdivision (a)(6), all occurring on June 11, 2005. (Clerk's Transcript on Appeal ("CT") 49-51.) The Information further alleged that the accessory offenses were committed for the benefit of a criminal street gang in violation of section 186.22, subdivision (b)(1)(C). (CT 49-51.) In addition, the Information alleged that the refusal to testify benefitted a gang under section 186.22, subdivision (d), making the violation of section 166 a felony punishable by up to three years. (CT 49, 51.) At the Preliminary Hearing, the magistrate set bail at $540,000, but that was later reduced to $500,000. (CT 46, 55.)

Partee moved to set aside the information, pursuant to section 995,

on the grounds that refusing to testify at trial did not provide reasonable or probable cause for her to be held to answer for violating section 32. (CT 56-72, 75-80, 82-86.) The court denied the motion after determining "there's no law precluding it." (CT 89; Volume 2, Reporter's Transcript on Appeal ("2-RT") A4-A7.) Partee filed a petition for writ of mandate regarding the denial of the section 995 motion, which the Second Appellate District denied. (2-RT 3, 9-11; Case No. B270799, 3/18/16 Order.)

Following trial, a jury found Partee guilty on all counts, but found all of the gang allegations to be untrue. (CT 240-244, 252-255; 5-RT 1888-1892.)

On July 5, 2016, the court suspended imposition of sentence and placed Partee on probation for three years on condition she serve 365 days in county jail, with total credit for time served of 220 days, with no credit for the time spent in custody from her arrest on April 29, 2015, up through the filing of the charges in this matter on August 27, 2015. (CT 3, 277-281; 3-RT 965-966, 977-978, 996, 5-RT 2118-2126.)

Partee timely appealed on July 5, 2016. (CT 282.)

On March 21, 2018, Division Five of the Second Appellate District Court of Appeal affirmed in a split opinion partially certified for publication. (Opinion, Exhibit A; see 21 Cal.App.5th 630.)

STATEMENT OF FACTS

A. Shooting Incident in Housing Project

On August 30, 2006, Yonathan Johnson and Anthony Owens were in the Imperial Courts housing project where they had grown up. (2-RT 728-729-730, 734.) The area is controlled by the PJ Watts/Project Crips gang. (2-RT 745-747.) After shots rang out, Johnson saw Owens lying on the ground with blood coming out of the back of his head. (2-RT 734-735.) A woman driving in the area around that time heard the gunshots and was followed for awhile by a bluish Chevrolet van. (2-RT 712-716, 717-724.) She told an officer at the time that there were four black men in it. (2-RT 716-717.)

Homicide detective John Skaggs found casings at the scene indicating the use of at least two semiautomatic guns. (3-RT 912-915, 926-927, 1214-1215, 1217.) Skaggs conducted a recorded interview of Johnson, though he did not tell Johnson the interview was being recorded. (3-RT 917.) According to Skaggs, Johnson said that after hearing the shots he looked over and saw a blue/gray van with two young black males in the front seats. (3-RT 919-920.)

An officer found a van in the nearby Jordan Downs housing project that had been running quite recently. (2-RT 748-750, 3-RT 927-928.) Between the hood and the windshield of the vehicle, Skaggs found a .40

caliber casing made by Winchester, which also manufactured the casings found at the scene. (3-RT 928-929.) He also found bullet strikes or indents in the driver's door and the rear deck lid gate. (3-RT 1014-1015, 1204, 1212-1214.) Skaggs interviewed a woman who admitted she had driven four men out of Jordan Downs, and was able to identify two from a photo lineup. (2-RT 677, 3-RT 921-922, 952-956, 992-993, 1208-1210.)

B. Detective's Interview of Petitioner

The van was registered to Enterprise Rent-A-Car and had been rented to Partee, who had reported it stolen. (3-RT 930.) Partee had been instructed by Enterprise to report the theft to Hawthorne Police Department, and when she did Skaggs had Partee brought to his police station, where he conducted an interview that he secretly recorded. (3-RT 930-932, 938, 982, 996; Exhibits 11, 11A.)

Skaggs falsely told Partee that what they discussed was confidential, off the record and just between the two of them. (Supplemental Clerk's Transcript ("SCT") 84-85; 3-RT 984-986.) He also falsely told Partee that he had telephone evidence that contradicted what she was saying. (SCT 38, 45-48; 3-RT 939.) He said, "I know you're afraid," but claimed Partee never said she was afraid to testify. (SCT 49; 3-RT 989, 1004-1007.) Skaggs warned Partee that "any participation you have and any lies to me, in regards to this investigation, is a crime." (SCT 7.)

In the interview, Partee said she was going to school and had recently left a job as an accountant where she was making $37,000 per year. (SCT 42-43; 3-RT 983.) She discussed her close relationship with twin brothers named Byron and Bryant Clark, and her cousin Toyrion Green, who were members of the Carver Park Crips. (SCT 11-14, 18, 80-84; 3-RT 941-942, 949.) Nehemiah Robinson, Partee's brother had not identified as a gang member but hung out with that gang. (SCT 17-18; 3-RT 941, 949.) Partee said she was not in the gang and had never gang banged. (SCT 18-19; 3-RT 940, 982-983.)

The Clarks were with Partee when she rented the Enterprise car while hers was being repaired. (SCT 9-14.) Robinson asked to borrow the car one evening to go see a girl. (SCT 17-20, 26, 29.) Partee received a chirp from one of the Clarks the next day, asking her to report the rental car stolen, and to pick him up at a certain location. (SCT 47-52.) When she got there she saw a girl in a car along with the Clarks, Green and Robinson; the men got in her car, which already contained her 6 year old daughter. (SCT 52-55, 59, 67-68.)

They explained they were going to the projects because a girl was going to give them some money. (SCT 56-57, 58; 3-RT 942-943; 1010.) When they got there people came out shooting at them while someone else tried to block them, so they had to start shooting, and one of the others may

have been killed. (SCT 56-63, 69-70, 90-92; 3-RT 1013.) They had parked the car and no longer had any guns. (SCT 58, 62-64.) After getting food for herself and her daughter, Partee dropped them at a hotel with some money. (SCT 71-75.)

At the end of the interview, Skaggs told Partee he hoped to put a case together where he did not need to have her testify against a family member, but that if he could not she would be needed in court. (SCT 84-86; 3-RT 986-987.) Partee was crying, saying she would not testify against her brother and the others. (SCT 85; 3-RT 987-988, 990-991.) She said at first she did not think there would be any danger in telling her story because it was her family, though it would be uncomfortable because she lived in the Carver Park neighborhood. (SCT 86.) She also explained she had been a witness against her boyfriend's killer, Carver Bones, and had received pressure for that. (SCT 86-883-RT 990.) She was worried if she testified that "they going to go get my family," and she could not have that. (SCT 89.)

C. Petitioner's Testimony

During her own testimony, Partee explained that the year before the shooting in this case she had been a witness to the murder of her boyfriend. (3-RT 1332; 4-RT 1514.) At the request of the district attorney she testified at the preliminary hearing in that case, even though her car was set on fire

and she was spit on, attacked at a store, called a snitch, and shunned. (3-RT 1333; 4-RT 1510-1512, 1528-1529.) At trial, she did not testify truthfully to clear her conscience, because she could not send a man away for the rest of his life. (4-RT 1515-1516, 1518-1521, 1530-1531.)

In 2006, Partee had been provided with a loaner car from Enterprise while her own car was being serviced. (3-RT 1304-1305.) She let Robinson borrow it, with the understanding he would return to the house that night. (3-RT 1306-1308.) The Clark brothers were gang members back in 2006, and she believes her cousin Green was as well, though Robinson only became one later. (4-RT 1509-1510.) Her father and uncles were also members. (4-RT 1517-1518.) Although her family includes gang members, Partee herself dislikes gangs and has no affiliation with any gang. (4-RT 1506-1507.)

After Partee could not find the car the next morning (3-RT 1308), she received a call from Bryant Clark, who asked her to report the car stolen and said he would explain later. (3-RT 1310-1312; 4-RT 1524.) She and her six-year-old daughter later went in her own car to meet Clark and the others. (3-RT 1312-1313, 1315, 4-RT 1524.) She picked up Robinson, Green and the Clarks, and was told that they had gone to the projects to meet a girl to give them some money but were attacked and had to shoot their way out. (3-RT 1314-1315, 4-RT 1519.) She asked if the car was damaged or

anyone hurt, and was told they thought a man was dead. (3-RT 1314-1315.) After getting food (3-RT 1315-1316), she gave them $60 and drove them to a hotel. (3-RT 1317.) She knew at the time they were fleeing the scene of a shooting but believed the shooting was in self-defense. (4-RT 1539-1540.)

When Partee contacted the car agency she was told to contact the police, but when she went to the Hawthorne police station to report the robbery she was handcuffed and taken to a holding cell. (3-RT 131-1319; 4-RT 1524-1525.) She was then handcuffed again and taken to another police station, where she was placed in an interrogation room with one hand handcuffed and the other chained to a chair. (3-RT 1319-1320.)

After what seemed like hours, Skaggs came in the room and took her handcuffs off. (3-RT 1320-1321.) From the beginning, Partee said she did not want to give testimony or be involved. (4-RT 1541-1542.) Skaggs recognized she was putting herself in danger by talking to him. (4-RT 1561.) Skaggs lied to her, saying before she gave a statement that it was between them, off the record, and would not leave there. (4-RT 1514-1515, 1527.) Partee confirmed the accuracy of the tape-recording of the interview. (SCT 2-93; 3-RT 1321-1322.)

D. Period Between Interview and Arrest

Partee testified that, after she made the statement to Skaggs, she was approached by a woman who was friends with the Carver gang, had heard

Partee was "snitching on the homies," and said she would kill for them. (3-RT 1333-1334.) Other people have said they knew she was not going to testify, and family members told her, "Just not to testify. Family is first." (3-RT 1333-1334.) She also received telephone calls or texts calling her a snitch and saying she was working for the CIA or the FBI. (3-RT 1334-1335.) When she came to court one day in 2007-2008, a group of women attacked her, resulting in bailiffs using mace on them and her. (3-RT 1322-1324; 4-RT 1543-1544.)

Partee did not appear on May 12, 2008, the day trial was supposed to start, so a bench warrant was issued. (3-RT 963.) The case was dismissed when she could not be served again. (3-RT 963-965, 974-975, 999-100.)

Partee worked full-time at an accounting firm doing payroll, making close to $40,000 per year while attending junior college with the hope of transferring to a four year college. (3-RT 1325-1326.) She was working under her true name while her daughter, now an honors student at a magnet school, attended other elementary schools, when she was arrested. (3-RT 1329-1331.)

E. Arrest and Preliminary Hearing

On April 29, 2015, Skaggs heard that Partee was in the area so he had her stopped and arrested for a traffic warrant. (3-RT 965-966, 977-978, 996.) Once Partee was taken to the police department, Skaggs contacted

the prosecutor to have new charges filed, along with a subpoena to have her delivered to the court against her will. (3-RT 966-967.)

At a hearing that day, the court held Partee in custody as a material witness pursuant to section 1332 (3-RT 967-968.) During the June 11, 2015 preliminary hearing forty-four days later, the prosecutor presented Partee with an immunity agreement pursuant to section 1324, but her attorney explained she would refuse to be sworn in, had been deprived of medical attention, had asked to see a doctor about a pregnancy, was vomiting blood, and was unable to sleep. (3-RT 903-905, 969-970.) When the court tried to swear her in, Partee remained silent, and the court indicated Partee would remain in custody as long as the court deemed it necessary, which could be years, if she did not answer questions from the prosecutor. (3-RT 905-906.)

After Partee did not answer questions posed by the prosecutor, the court again ordered her to be sworn in, and then held Partee "in contempt. You are going to be put into custody with no bail until such time as you change your mind." (3-RT 910.) When counsel asked the court to sign a medical order for Partee, the court said, "I'm going to do this now. She's the least of my issues at this point." (3-RT 910.) Partee explained that at a point in the proceedings where the court ordered her to "pay me some respect now," she was not trying to show disrespect to the court, but had

her head down, was vomiting, had lost over 30 pounds and was sick due to being in the first trimester of a pregnancy. (3-RT 909; 4-RT 1505-1506.)

Skaggs testified pursuant to Proposition 115 and the defendants were all held to answer. (3-RT 970-972; 1004.)

F. Time in custody, reasons for not testifying

Partee ended up spending seven and a half months in custody before her family and a family friend were able to bail her out. (4-RT 1502., 1535-1536, 1557-1560)

Partee said that she refused to testify due to her family, her life, and her daughter's life being in jeopardy. (3-RT 1335-1336.) Although she had originally told Skaggs she did not have to worry because they were family members, she found out to the contrary that she did have to worry. (3-RT 1335-1336; 4-RT 1528.) She has multiple fears, primarily for her daughter being able to live a good life without being victimized for Partee's actions. (3-RT 1336-1337.) She tearfully told the prosecutor before trial that she was afraid to testify, and that her main fear centered on her daughter. (4-RT 1562-1567.)

Although she denied being offered relocation services until just before her own trial (3-RT 1337), Partee was not interested in relocation because she did not want to leave her family, and she wanted to keep peace in the family. (4-RT 1534-1535, 1551-1553, 1564-1567.) She would not

accept immunity because it was impossible to escape her entire family, including her daughter who was trying to get into college, the seven children of her deceased brother, and the two children of her dead boyfriend, whom she also cared for. (3-RT 1337-1338.)

Skaggs continued to try to gather evidence in the murder case after it was refiled in 2015, but said Partee was the only witness who connected all four defendants to the shooting. (3-RT 1001-1003.) At some point, the case against the others was again dismissed. (3-RT 970-972; 1004.)

In almost every murder case that Skaggs has brought to court, a witness has failed to appear, recanted or otherwise changed his or her statement due to concerns about self-preservation and fear; while that is very common in gang cases, this is the only case where the witness has refused to testify. (3-RT 1000-1001, 1203-1204, 1221-1223.) Even when witnesses contradict their recorded statements on the witness stand, they are never prosecuted for perjury. (3-RT 1203-1204.)

ARGUMENT

I. There Is No Precedent for Prosecuting Anyone as an Accessory for Refusing to Testify in a Criminal Proceeding, Which Is Contrary to the Language of Section 32

A. Contrary to Majority's Claim, No Decision in California, or in Any Other Jurisdiction, Has Affirmed a Conviction as an Accessory Based Solely on a Refusal to Testify

Although the majority states that prior California Court of Appeal decisions have affirmed prosecutions for violating section 32 "[u]nder similar circumstances" (Opinion at 8), until now no California court has found that a defendant could be an accessory without making an affirmative misstatement to aid a principal who has committed a crime.

The Second Appellate District cites the primary case on the issue, *Duty, supra*, 269 Cal.App.2d 97 (Opinion at 8, 11, 12), but *Duty* explained that "the offense [of accessory] is not committed by passive failure to reveal a known felony, by refusal to give information to the authorities, or by a denial of knowledge motivated by self-interest. On the other hand, an affirmative falsehood to the public investigator, when made with the intent to shield the perpetrator of the crime, may form the aid or concealment denounced by the statutes." (*Id.* at pp. 103-104.) There has to be "more than passive non-disclosure," but in that case a jury could find "that defendant had actively concealed or aided [the principal] by supplying an

affirmative and deliberate falsehood to the public authorities, a false alibi which removed the principal from the scene of her crime ...." (*Duty, supra*, 269 Cal.App.2d at p. 104.)

Until now, California cases have carefully followed the distinction established in *Duty*. *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, another case cited by the majority (Opinion at 8, 11, 12), upheld an accessory conviction based on false statements to investigators that the victim was not at the scene and there was no murder, but clarified that while a person does not have an obligation to speak to police, a person who does so "may not affirmatively misrepresent facts concerning the crime" with the requisite knowledge and intent. (*Id.* at p. 837.)[3] The last case cited by the majority, *In re I.M.* (2005) 125 Cal.App.4th 1195 (Opinion at 8, 11, 12), upheld a juvenile delinquency petition because the juvenile's attempted to protect the principal by misrepresenting to police when a shooter began to shoot. (*Id.* at p. 1204.)

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[3] *Plengsangtip, supra*, 148 Cal.App.4th at p. 839, fn. 5, distinguished the situation in *People v. Nguyen* (1993) 21 Cal.App.4th 518, which reversed the conviction of three men as accessories to a sexual assault because, though they were all present during the assault, that awareness was insufficient to make them accessories unless afterward "they intentionally did something to help their cohorts to avoid or escape ..." (*Id.* at p. 538.) Two defendants who "refused to talk to the police" could not be accessories, and while the third waived his rights and downplayed his own role during discussions with police, he was not an accessory because he had not supplied "affirmative and deliberate falsehoods to public authorities." (*Id.* at p. 539.)

As Justice Baker explains at length in dissent, there is simply no support in California for the majority's determination that refusal to testify in a criminal proceeding – without making any affirmative misstatements to protect the principal – violates section 32. (Dissenting Opinion at 1-2, 8-15.)

Not only is there no California precedent for the majority's decision below, but there does not appear to be any precedent anywhere else in the country upholding an accessory conviction based on a refusal to testify in a criminal prosecution. The deputy district attorney who conceived of Petitioner's prosecution as an accessory was unaware of any similar prosecution anywhere in the country. (2-RT A7-A8.) On appeal, the Attorney General similarly could not cite a single decision from any other jurisdiction affirming a conviction under any other accessory based solely on the refusal to testify in a criminal proceeding. (Respondent's Brief ("RB") 18-22; see Dissenting Opinion at 1-2, 15-17.)

As the dissent notes, while jurisdictions throughout the country prosecute as accessories those who provide physical assistance to principals, only "'a few jurisdictions have [also] added the giving of false information in certain instances'" (Dissenting Opinion at 16, quoting 2 LaFave, Substantive Criminal Law (3d ed 2017) § 13.6(a), pp. 555-556), and apparently no other jurisdiction has extended accessory prosecution to

those who simply refuse to testify in criminal proceedings. (Dissenting Opinion at 16.) California has therefore moved "to the extreme outer edge of jurisdictions – indeed, in a group unto itself – concerning the reach of accessory after the fact punishment." (Dissenting Opinion at 15.)

The majority also cites to federal caselaw treating contempt differently depending upon the intent of the defendant. (Opinion at 8-10, and 8-10, fn 4-5, citing *United States v. Brady* (1st Cir. 1999) 168 F.3d 574, 576, and *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, 978-979.) But neither case involved an actual prosecution under the federal accessory statute, which carried lower potential penalties than the actual convictions for contempt. (Dissenting Opinion at 13-14, fn. 7.)

As discussed in the next section, under California law the punishment for misdemeanor criminal contempt under section 166, subdivision (a)(6), would normally be six months in jail, but the Information filed against Petitioner stated that she was facing more than forty years in state prison due to the gang allegations. (CT 49-51.) Even assuming the majority correctly calculates her maximum punishment for five felonies at twelve years (Opinion at 6-7, fn. 3), the charging decision completely changed the potential effect on Petitioner's life.

This Court should grant review to ensure that California citizens who refuse to testify in criminal proceedings are not subjected to exponentially

harsher punishment than anywhere else in the country.

B. Section 32's Use of "Harbors, Conceals or Aids" Further Undermines to the Majority's Holding that a Person Can Violate the Statute by Refusing to Testify in a Criminal Proceeding

This Court should grant review to determine that the majority decision is not only contrary to precedent, but also to the statutory language of section 32.

Before the adoption of the Penal Code in 1872, California law distinguished between accessories before the fact of a crime, who were punished as principals in that crime, and accessories after the fact, who concealed a crime that had already been committed or harbored and protected the principal, and were subject to lesser punishment. (*People v Nuckles* (2013) 56 Cal.4th 601, 606-607; *People v. Gassay* (1865) 28 Cal.404, 405-406.) The Penal Code abrogated the distinction between accessories before and after the fact, making the former a person who "aids and assists" another under section 31, while "one who would formerly have been an 'accessory after the fact' is now guilty as an accessory, a crime separate and distinct from the principal offense" under sections 32, 33, 791 and 972. (*People v. Mitten* (1974) 37 Cal.App.3d 879, 883; see also *Nuckles, supra*, 56 Cal.4th at pp. 607-608; Code Commissioner's Note.)

Since 1935, section 32 has provided that every person who, with the requisite intent and knowledge, "harbors, conceals or aids" a principal in a

felony following the commission of that felony "is an accessory to such felony." (§ 32.) After noting that the term "aids" as used in section 32 had never been specifically defined, *People v. Elliott* (1993) 14 Cal.App.4th 1633, applied the same meaning used in the context of "aids and abets" in section 31, reasoning that the two sections "are interrelated in that they are constituent elements of a single legislative scheme." (*Id.* at p. 1641, 1641, fn. 7.) "The word 'aids' means 'to *assist*; to *supplement* the efforts of another.'... [B]eing an accessory requires something more than mere encouragement or incitement." (*Id.* at p. 1641.) There must be some "'*overt or affirmative assistance to a known felon*, ... The test of an accessory after the fact is that he renders his principal *some personal help* to elude punishment – the kind of help being unimportant.'" (*Id.* at pp. 1641-1642, quoting *Duty, supra*, 269 Cal.App.2d at p. 104 (emphasis in *Elliott*).)

As the dissent below notes, two canons of statutory construction resolve any possible ambiguity in section 32's use of the word "aids" following the clearly active verbs "harbors" and "conceals." (Dissenting Opinion at 9-10.) Under the principle of *ejusdem generis*, "when '"specific words follow general words in a statute or vice versa,"' the general words ordinarily are best construed in a manner that underscores their similarity to the specific words." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 939.) Similarly, the *noscitur a sociis* canon implies

that a word "'is known by its associates.'" (*People v. Prunty* (2015) 62 Cal.4th 69, 73.)

"[T]he common usage of the words harbor and conceal incorporates an element of affirmative assistance – the provision of food or shelter, or acts taken to hide something from view or discovery." (Dissenting Opinion at 10.) *People v. Garnett* (1900) 129 Cal.364, specifically found more than a century ago that "conceal" meant something beyond simply withholding knowledge of a crime and "necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony." (*Id.* at p. 366.)

This Court should grant review to clarify that section 32 requires overt or affirmative assistance to a known felon, whether in the form of harboring, concealing or aiding.

II. The Contempt Statutes Give Courts Sufficient Power to Coerce Witnesses and to Punish Them for Refusing to Testify in Criminal Proceedings

The majority held that, because Partee had a duty to testify once she had been given immunity, her refusal to testify at the preliminary hearing constituted active rather than passive assistance, exposing her to multiple felony convictions and a lengthy potential prison sentence as an accessory to murder. (Opinion at 6-7, fn. 3, 12-14.) Unable to find any section 32

cases to support its unprecedented decision, the Court relied on contempt decisions such as *Kastiger v. United States* (1972) 406 U.S. 441, and *People v. Smith* (2003) 30 Cal.4th 581, 624. (Opinion at 13.) This Court should grant review to determine that the cases do not support the majority's decision, and that the contempt statutes still provide the courts with sufficient power to coerce and punish recalcitrant witnesses. (*McKinney, supra*, 70 Cal.2d at pp. 8, 10, 12.)

From the beginnings of this country, American law has recognized the power of the government to imprison material witnesses and compel them to testify in court. (*Kastiger, supra*, 406 U.S. at pp. 443-444; *In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1070-1072.) Immunity statutes have been enacted nationally and in all 50 states to accommodate "the imperatives of the privilege and the legitimate demands of government to compel citizens to testify." (*Kastiger, supra*, 406 U.S. at pp. 446-447.) *Kastiger* upheld a finding of contempt for refusing to answer questions in a grand jury proceeding despite a grant of federal immunity (*id.* at pp. 442, 452-453), while *Smith* involved a finding of unavailability regarding a victim who appeared at trial and "was clearly trying to help defendant in refusing to testify against him," and who was threatened with but not found in contempt. (*Smith, supra*, 30 Cal.4th at pp. 623-624.) Neither case supports the majority's holding.

The inherent power of courts to punish contempt is well established, and this Court long ago determined that, by employing the court's statutory authority, "it is clear that the court has sufficient power to maintain its dignity." (*McKinney, supra*, 70 Cal.2d at pp. 8, 10, 12.) Courts can maintain order by:

> the coercive power of the court to jail the offender while the trial is in progress (Code Civ. Proc., § 1219), or by the punishment power of the court as it was attempted in this case (Code Civ. Proc., § 1218), or by requesting that the person be prosecuted for violation of Penal Code, section 166, subdivision (b)[now (a)(6)].

(*In re Keller* (1975) 49 Cal.App.3d 663, 670.)

A court could theoretically keep a person in custody for life under Code of Civil Procedure section 1219 (*In re Liu* (1969) 273 Cal.App.2d 135, 140, 142), but a material witness cannot be incarcerated beyond the time of trial (*McKinney, supra*, 70 Cal.2d at pp. 9-14 and p. 10, fn. 1), and a witness should not be kept in jail when there is "no substantial likelihood that further incarceration would result in [the witness'] compliance with the court order." (*In re Farr* (1976) 64 Cal.App.3d 605, 612.) In criminal trials, the court can utilize the provisions of section 1332, which also does not place a specific time limit on the incarceration of a material witness for trial. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 2075, fn. 10.) While it is clear "the statute does not confer unfettered discretion to incarcerate a material witness" (*id.* at pp. 1064-1065), the primary limit is Article I,

section 10 of the California Constitution, which states that "'[w]itnesses may not be unreasonably detained.' [Citation.]" (*Id.* at p. 1065.)

Given the substantial power wielded by trial courts over defiant witnesses, California appellate courts have been careful to ensure that those found in contempt are not punished too severely. (Dissenting Opinion at 2-5.) In determining that the available statutory remedies sufficiently enabled courts to vindicate their authority, *McKinney* rejected the prosecution's argument that a court should effectively enjoy "'unbridled'" power to punish for contempt. (*McKinney, supra*, 70 Cal.2d at pp. 12-13.) *Keller* similarly held that a court had no authority to impose multiple sentences in order to avoid the five day limitation on the sentence for contempt established in Code of Civil procedure section 1218. (*Keller, supra*, 49 Cal.App.3d at pp. 667-671.) More recently, the First Appellate District noted that "the court's inherent power to punish contempt is tempered by reasonable procedural safeguards enacted by the Legislature …." (*In re M.R.* (2013) 220 Cal.App.4th 49, 60.)

In this case, the prosecutor and the courts ignored most of those safeguards, and had already punished Partee extensively before charging her with five felonies that appeared to expose her to additional decades in state prison. (CT 49-51.) They ignored the 10 day limitation on custody for preliminary hearing witnesses in section 881 following her arrest on April

29, 2015, keeping her in custody for more than a month until the June 11, 2015 preliminary hearing, purportedly under section 1332. At that hearing, the State increased the pressure on Partee when the court found her "in contempt. You are going to be put into custody with no bail until such time as you change your mind." (3-RT 910.)

Although section 1332 is supposed to apply during a trial, there was no actual trial in progress while Partee was being held in contempt after June 11, 2015, and at some point the case against Robinson and the others was dismissed. (3-RT 970-972; 1004.) By the time the prosecution filed criminal charges on August 26,, 2015, Partee had been jailed for nearly four months, time for which she received no credit when she was finally sentenced after trial. (CT 3, 277-281; 3-RT 965-966, 977-978, 996, 5-RT 2118-2126.)

The Second Appellate District disagrees with this Court's determination in *McKinney*, and specifically disagrees with Partee's argument that "existing contempt remedies are adequate ...." (Opinion at 10.) This Court should grant review to reaffirm *McKinney*, reaffirm that prosecutors and courts are limited to their substantial power to punish for contempt those who refuse to testify in criminal proceedings and, as discussed in the next section, reaffirm that any change in the punishment available for contempt must come from the Legislature.

III. Evidence That a Person Refused to Testify in a Criminal Proceeding is Insufficient to Support A Conviction of that Person as an Accessory Under Section 32

The Court should grant review to determine whether there is sufficient evidence to convict a person of being an accessory under section 32 based solely on that person's refusal to testify in a criminal proceeding. The majority's determination that there was sufficient evidence relies on its mistaken determinations that affirmative misrepresentation is not required to constitute "aid" under section 32, and that the current contempt statutes do not provide sufficient means for courts to preserve their authority, as discussed in the preceding two sections. (Opinion at 11-14.)

The right to due process under the Fifth and Fourteenth Amendments, along with the Sixth Amendment's right to jury trial, require the prosecution to prove to a jury each element of an alleged offense beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) The due process guaranteed by the Fourteenth Amendment presupposes:

> that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense....
> A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said no rational trier of fact could find guilt beyond a reasonable doubt,...

(*Jackson v. Virginia* (1979) 443 U.S. 307, 316-317.)

Where the prosecution fails to produce any evidence to establish a basic element of the crime, the conviction must be reversed because it "fails to satisfy the Federal Constitution's demands." (*Fiore v. White* (2001) 531 U.S. 225, 228-229.) While the reviewing court considers the evidence in support of a conviction in the light most favorable to the prosecution, the evidence in support of each element must still be "substantial," which is defined as evidence that is "reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "[I]t is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' [Citation.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) The court must review the entire record, not just "isolated bits of the evidence selected by the respondent.' [Citation]" *(Ibid.*)

This Court should grant review to determine that, in the absence of any evidence that Partee actively made an affirmative misrepresentation in order to aid a principal in a felony, there was insufficient evidence to convict her of being an accessory under section 32, for the reasons discussed at length in Section I, *supra*. The Court should further determine that the majority's reliance on contempt cases to argue that there was

sufficient evidence Partee had violated section 32 is unavailing, for the reasons discussed at length in Section II, *supra*.

IV. The Prosecutor and the Courts in this Case Usurped the Legislative Functions of Defining Crimes and Prescribing Punishment

If prosecutors and courts believe that existing punishment for contempt is inadequate, "[t]he answer lies in legislative reform of the existing power of the court to punish for the type of contempt committed by Keller." (*Keller, supra*, 49 Cal.App.3d at p. 671.) As this Court has explained, "in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments, and ... such questions are in the first instance for the judgment of the Legislature alone." (*In re Lynch* (1972) 8 Cal3d 410, 414.) While the judicial branch must ensure that no punishment imposed by the Legislature violates the constitutional prohibition on cruel and unusual punishment, the Legislature must be "'accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime.' [Citation.]" (*Ibid.*)

"'The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.' [Citation.]" (*In re Rosenkrantz* (2002) 39 Cal.4th 616, 662.) Article III, section 3 of the California Constitution sets forth the

tripartite system, and its "'mandate is to 'protect any one branch against the overreaching of any other branch. [Citation.]" (*Ibid.* (internal citations omitted).) One branch may take action within its sphere that incidentally duplicates a function delegated to another branch, and "the doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch." (*Ibid.*)

While the majority insists that its holding did not violate the separation of powers doctrine (Opinion at 6-11),[4] it affirmed Partee's convictions because it disagreed with her argument that "existing contempt remedies are adequate and by concluding otherwise we usurp the Legislature's function." (Opinion at 10.) This is a classic example of judicial and prosecutorial overreach, and the majority embraces it without responding to any of the authorities cited by the dissenting justice, who believes any change in punishment for refusing to testify in criminal proceedings must be left to the Legislature. (Dissenting Opinion at 2-5.)

This Court should grant review to establish that prosecutors and courts cannot determine for themselves the appropriate punishment for various crimes, and reaffirm that recalcitrant witnesses can be subjected to coercion and punishment for contempt, but cannot be thrown in prison for

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[4] Although the majority found Partee had forfeited her argument regarding overreaching (Opinion at 6-8), both the majority and the dissent address the issue, and the majority refers to it as part of Petitioner's argument. (Opinion at 6-11, Dissenting Opinion at 2-5.)

decades as accessories to the crimes being prosecuted.

V. The Majority's Unprecedented Interpretation of Section 32 Renders the Statute Unconstitutional as a Violation of Due Process

In reasoning that a duty to act can turn a failure to act into an overt or affirmative act, the majority relied in part on this Court's decision in *People v. Heitzman* (1994) 9 Cal.4th 189. (Opinion at 13.) While *Heitzman* did reassert that there must be an existing duty to take action in order to base criminal liability on the failure to act (*id.* at p. 197), the Court actually reversed a conviction for elder abuse due to the failure to act because it violated due process under the Fourteenth Amendment and Article I, section 7 of the California Constitution. (*Id.* at pp. 197-215.) Due process requires that a criminal offense be defined with "'sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (*Id.* at p 199, quoting *Kolender v. Lawson* (1983) 461 U.S. 352, 357.) The elder abuse statute not only imposed criminal liability on a broader class of people than would be subject to civil liability for inaction, but had been applied arbitrarily in the case at issue, and the conviction was reversed. (*Id.* at pp. 200-201, 206.)

As California courts have uniformly interpreted section 32 prior to

this case, there has not been a due process issue. But if the majority opinion remains the law in California, serious constitutional issues arise with the statute. As discussed in section I.B. *supra*, the use of action verbs in stating that one who "harbors, conceals or aids" a principal in a felony "is an accessory to such felony" (§ 32), would not convey to ordinary people that the passive act of refusing to testify in a criminal proceeding could possibly lead to criminal liability as an accessory. Similarly, prior interpretations of section 32 have not encouraged arbitrary or discriminatory prosecution, but the majority decision will encourage what happened here, allowing "police officers, prosecutors and juries 'to pursue their personal predilections.' [Citation.]" (*Heitzman, supra*, 9 Cal.4th at p. 200.)

This Court should grant review to determine whether the prosecution and conviction of Partee for four felonies as an accessory based on a refusal to testify that has never before resulted in anything other than punishment for contempt violated her due process rights.

CONCLUSION

For all of the above reasons, this Court should grant review or, in the alternative, grant review and transfer the matter to the Second Appellate District to conduct further proceedings in accordance with its orders.

DATED: April 30, 2018 LAW OFFICE OF PAUL KLEVEN

/s/ Paul Kleven
PAUL KLEVEN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I certify that this Petition for Review contains 7,637 words, as calculated by my WordPerfect x5 word processing program.

/s/ Paul Kleven
PAUL KLEVEN

Filed 3/21/18 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STARLETTA PARTEE, Defendant and Appellant.	B276040 (Los Angeles County Super. Ct. No. TA138027)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Allen Webster, Jr., Judge. Affirmed.

Law Office of Paul Kleven, Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Colleen M. Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts V and VI.

EXHIBIT A

INTRODUCTION

Despite a grant of immunity, defendant and appellant Starletta Partee refused to testify against four individuals charged with a gang-related murder. A jury convicted her of four felony counts of being an accessory after the fact (Pen. Code, § 32)[1] and one count of misdemeanor contempt for refusing to testify (§ 166, subd. (a)(6)).[2] The trial court suspended imposition of sentence and placed defendant on probation for three years.

Defendant raises several arguments on appeal: the prosecution overreached when it charged her as an accessory for refusing to testify, she cannot be guilty of being an accessory because her silence—refusing to testify—is not an affirmative act, her single act of refusing to testify does not support four felony convictions, the trial court failed to instruct on the elements of contempt, her statements to a detective were admitted into evidence in violation of her Fifth Amendment rights, and her trial counsel was ineffective for failing to raise the Fifth Amendment claim. We find no grounds for reversal and affirm the judgment.

FACTUAL BACKGROUND

The day after a 2006 gang-related murder, City of Los Angeles police officers found the car they believed the perpetrators drove and then abandoned. The homicide detective, John Skaggs, learned the car had been rented by defendant and

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1 All statutory references are to the Penal Code.

2 The jury found allegations that the crimes were committed for the benefit of a criminal street gang were not true. (§ 186.22, subds. (b)(1).)

that she had contacted the rental car office to report it as stolen. The rental car representative told defendant to file a report with the Hawthorne Police Department. Meanwhile, Detective Skaggs contacted the Hawthorne Police Department and asked to be notified when defendant arrived. Officers from the Los Angeles Police Department met defendant there and drove her back to Detective Skaggs's office.

Detective Skaggs surreptitiously recorded the interview with defendant. After establishing the rental car had been involved in a shooting, the detective told defendant, "Even though I don't have somebody that says that a young black female shot a gun out of a car that hurt somebody, any participation you have and any lies to me, in regards to this investigation, is a crime." The interview then focused on what defendant knew about the involvement of her brother Nehemiah Robinson, her cousin Toyrion Green, and brothers Bryant and Byron Clark, lifelong friends she considered "family," in the shooting. Defendant told the detective Robinson borrowed the rental car the evening before to visit a girl. That morning, one of the Clark brothers telephoned defendant, told her to report the rental vehicle as stolen and asked to be picked up and given money to pay for a motel room. When defendant picked them up, Robinson, Green, and the Clarks told her the previous evening had been a setup. They arrived at the girl's location, but someone blocked them in and others started shooting; they shot their way out. They thought a man was dead. They abandoned defendant's rental car and fled. They added the police would never find the guns.

Robinson, Green, and the Clarks were subsequently charged with murder. When the case went to trial in 2008, however, defendant failed to appear, although subpoenaed as a

witness. Attempts to locate her were unsuccessful, and the murder case was dismissed.

In April 2015, defendant was located, subpoenaed, and held in custody as a material witness. The criminal case against Robinson, Green, and the Clarks recommenced. During the June 11, 2015 preliminary hearing—despite a grant of immunity and after declining a relocation offer—defendant refused to testify. The trial court held her in contempt. Ultimately, the murder charges against the four men were once again dismissed.

Defendant was then charged with four felony counts of being an accessory after the fact to murder and one misdemeanor count of contempt for refusing to testify. She testified in her own trial and provided several reasons for refusing to testify in the murder case: she feared retaliation by the gang (she had experienced retaliation in the past); she feared for her safety and that of her daughter; she did not want to alienate her family; all four of the accused were family to her, and she did not want them to go to prison for the rest of their lives because of her testimony. Defendant further acknowledged that when she refused to testify in 2015 she knew her failure to appear as a witness in 2008 had led to the murder case being dismissed. But she denied she was helping her brother avoid trial. She testified: "Well, you guys are saying that I am helping my brother avoid trial. I believe you guys still have a case without me." She added she did not testify because "[f]amily is first."

DISCUSSION

I. Sections 32 and 166

Defendant was convicted of four counts of being an accessory after the fact in violation of section 32. Section 32

defines an accessory as "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." A "principal" includes "[a]ll persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31.) Being an accessory after the fact is a "wobbler" offense, punishable as either a misdemeanor or felony. (§ 33.)

"The crime of accessory consists of the following elements: (1) someone other than the accused, that is, a principal, must have committed a specific, completed felony; (2) the accused must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment." (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 836 (*Plengsangtip*); accord, *People v. Tran* (2013) 215 Cal.App.4th 1207, 1219, fn. 7 (*Tran*).) As section 32 expressly states, an accessory must know he or she is assisting a felon or one who has been charged with or convicted of a felony. (*Tran, supra,* 215 Cal.App.4th at p. 1219.) The effect of an accessory's actions is "to lessen the chance that the perpetrators will be captured and held accountable for their crimes." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1168.)

A defendant may be convicted of being an accessory even if the principal is not prosecuted. (§ 972.) Section 972 provides: "An accessory to the commission of a felony may be prosecuted, tried, and punished, though the principal may be neither prosecuted nor tried, and though the principal may have been acquitted." The prosecution against defendant as an accessory after the fact properly went forward even though Robinson, Green, and the Clarks were never brought to trial.

Defendant was also convicted of misdemeanor contempt for refusing to testify. Section 166 sets forth conduct constituting a contempt of court. Under subdivision (a)(6), a contempt includes "[t]he contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question." Contempt under section 166 is a general intent crime. (*People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1, 4.)

II. Prosecutorial Overreaching

Defendant argues charging her with crimes purportedly carrying a potential 40-year sentence[3] constituted prosecutorial

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[3] The information erroneously indicated each accessory count carried a potential 10-year enhancement based on section 186.22, subdivision (b)(1)(C). Subdivision (b)(1)(C) applies where the crime committed is a violent felony and adds 10 years to a sentence. Being an accessory after the fact is not a violent felony. (§ 667.5, subd. (c).) In any event, the jury verdict form specified section 186, subdivision (b)(1), and the applicable gang enhancement, subdivision (b)(1)(A), could add two, three, or four years to the base term. As indicated, however, the jury did not find the gang allegations to be true.

has not shown she raised this argument in the trial court. Nor does she cite any authority on prosecutorial overreaching in support of her claim. She cites no authority precluding the accessory and contempt charges based on her refusal to testify. The Attorney General did not specifically address the overreaching claim in his brief or at oral argument. Defendant forfeited the issue by failing to raise it in the trial court.

Defendant's forfeiture notwithstanding, there is precedent for an accessory conviction under the facts of this case. Under similar circumstances, our Courts of Appeal have held defendants were properly charged with or convicted of being accessories. In *Plengsangtip, supra,* 148 Cal.App.4th at pages 835 through 839, for example, the Court of Appeal held evidence adduced at a preliminary hearing sufficed to support an accessory charge where the defendant lied to a detective and falsely denied knowledge of a murder with the intent to shield the murderer. In *In re I.M.* (2005) 125 Cal.App.4th 1195, 1203-1206 (*I.M.*), the Court of Appeal held substantial evidence supported sustaining a juvenile delinquency petition where the minor, with the intent the principal escape prosecution, falsely told police the principal shot the victim in self-defense or heat of passion. And in *People v. Duty* (1969) 269 Cal.App.2d 97, 100-105 (*Duty*), the Court of Appeal concluded substantial evidence supported the defendant's accessory conviction where he gave a false alibi to the public investigator with the intent to shield the perpetrator of the crime from prosecution and punishment.

Under federal law, an individual who refuses to testify despite an immunity grant with the intent to aid a felon and who is convicted of criminal contempt may be sentenced by analogy to the crime of being an accessory after the fact. (E.g., *United States*

v. Brady (1st Cir. 1999) 168 F.3d 574, 576 (*Brady*); *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, 978-979 (*Ortiz*).) This scenario arises because there is no federal sentencing guideline specific to criminal contempt. (*Brady, supra,* 168 F.3d at p. 577; *Ortiz, supra,* 84 F.3d at p. 979.) Instead, the United States Sentencing Guidelines provide that in the case of criminal contempt, the sentencing court should adopt the sentencing guideline for the most analogous criminal conduct.[4] (U.S.S.G. §§ 2J1.1, 2X5.1[5]; *Brady, supra,* 168 F.3d at p. 576; *Ortiz, supra,* 84 F.3d at p. 979.)

In *Brady,* the defendant's refusal to testify despite immunity was motivated in part by a desire to frustrate a grand jury investigation of a robbery-murder and protect his friends. Accordingly, the sentencing guideline for accessories after the fact was appropriately applied. (*Brady, supra,* 168 F.3d at pp. 576-581.) In *Ortiz,* by contrast, the defendant's refusal to testify despite immunity was not designed to assist another defendant to escape punishment; the defendant simply did not want to testify. Under those circumstances, it was error to apply the accessory

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[4] What constitutes the most analogous criminal conduct presents a mixed question of law and fact. (*Brady, supra,* 168 F.3d at p. 577.) The federal accessory after the fact statute provides: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact." (18 U.S.C. § 3.)

[5] United States Sentencing Guideline section 2X5.1 provides in part: "If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline."

after the fact sentencing guideline. (*Ortiz, supra,* 84 F.3d at pp. 980-982; see also *Wright v. McAdory* (Miss. 1988) 536 So.2d 897, 904 [murder witness could not be held in contempt for refusal to testify where immunity grant was inadequate because it did not encompass accessory after the fact liability].)

In this case, despite being held in custody as a material witness and offered immunity and relocation, defendant's refusal to testify was motivated in part by the desire to ensure that her brother, cousin, and lifelong friends were not convicted and incarcerated. As a result, four accused murderers avoided trial and possible conviction. The prosecution, having tried in vain to compel defendant's testimony, and no doubt desiring to discourage similar behavior by other witnesses, particularly in gang-related cases, resorted to the present prosecution. We find no legal authority precluding it.

We also note defendant's refusal to testify contrasts sharply with the conduct of victims and witnesses who, having previously made out-of-court statements concerning a crime, take the stand and then claim a lack of memory. Under those circumstances, if the witness's memory loss is feigned and the record supports the conclusion that the "I don't remember" statements are evasive and untruthful, the witness's out-of-court statements are properly admitted. (Evid. Code, §§ 770, 1235; *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) Not so in a situation like this one, where defendant's refusal to testify because "[f]amily is first" did not permit her to be impeached with her prior out-of-court statements.

Defendant argues existing contempt remedies are adequate and by concluding otherwise we usurp the Legislature's function. We disagree. Defendant did much more than simply commit

contempt by refusing to testify. The jury found she refused to testify with the specific intent to help four accused murderers avoid trial, conviction, and punishment. The intent with which defendant acted distinguishes her level of culpability from that of a simple contempt. The nature and potential impact of defendant's conduct—here, the inability to prosecute accused murderers—renders the contempt penalty inadequate to enable a court to vindicate its authority and to maintain the dignity and respect that is its due. (See *In re McKinney* (1968) 70 Cal.2d 8, 12.)

Further, as discussed above, our courts recognize conduct of this nature *committed with the intent to shield an accused criminal* is punishable under the accessory law. (*Plengsangtip, supra,* 148 Cal.App.4th at pp. 835-839; *I.M., supra,* 125 Cal.App.4th at pp. 1203-1206; *Duty, supra,* 269 Cal.App.2d at pp. 100-105.) Our holding here is consistent with this prior decisional authority and does not displace the Legislature's power to prescribe punishment for crimes.

III. Sufficiency of the Evidence as to the Accessory Convictions

Defendant claims she cannot be guilty as an accessory after the fact because her silence—refusing to testify—is not an affirmative act. The Attorney General argues the law of the case doctrine applies and the issue was decided adversely to defendant when this court summarily denied her petition for a writ of mandate following the trial court's denial of her section 995 motion (*Partee v. Superior Court* (March 18, 2016, B270799) [nonpub. order]).

We disagree with the Attorney General's position. Although our order summarily denying defendant's writ petition included citations to legal authority, we did not issue an alternative writ or a written opinion. And, as defendant correctly argues, "the denial of a writ petition does not establish law of the case unless the denial is accompanied by a written opinion following the issuance of an alternative writ." (*Kowis v. Howard* (1992) 3 Cal.4th 888, 891; accord, *People v. Jones* (2011) 51 Cal.4th 346, 370, fn. 4.) The law of the case doctrine does not apply.

On the merits, however, we conclude defendant's refusal to testify supports her accessory convictions. "Mere silence after knowledge of [a felony's] commission is not sufficient to constitute the party an accessory." (*People v. Garnett* (1900) 129 Cal. 364, 366.) Some affirmative act is required. (*Ibid.*) An affirmative falsehood, for example, such as a false alibi made with the requisite knowledge and intent, will support an accessory conviction. (*Duty, supra,* 269 Cal.App.2d at pp. 101-104.) As will a false statement to police that the perpetrator acted in self-defense or in the heat of passion. (*I.M., supra,* 125 Cal.App.4th at pp. 1203-1205.) In contrast, "the mere passive failure to reveal a crime, the refusal to give information, or the denial of knowledge motivated by self-interest does not constitute the crime of accessory." (*Plengsangtip, supra,* 148 Cal.App.4th at p. 876, citing *People v. Nguyen* (1993) 21 Cal.App.4th 518, 527, 537-539.)

However, as we explained in denying defendant's writ petition: "Penal Code section 32 proscribes '[a]ny kind of overt or affirmative assistance to a known felon,' so long as the assistance is provided with the intent that the perpetrator avoid arrest,

trial, conviction, or punishment. (. . . *Duty*[, *supra,*] 269 Cal.App.2d [at p.] 104.) The failure to act is not an 'overt or affirmative' act unless there is a duty to act. (See *People v. Heitzman* (1994) 9 Cal.4th 189, 197 ['when an individual's criminal liability is based on the failure to act, it is well established that he or she must first be under an existing legal duty to take positive action'].) A witness who has been subpoenaed and given immunity that is co-extensive with the scope of her Fifth Amendment privilege has a duty to testify. (Pen. Code, § 1324; *Kastigar v. United States* (1972) 406 U.S. 441, 453; *People v. Smith* (2003) 30 Cal.4th 581, 624.)" (*Partee v. Superior Court, supra,* at pp. 1-2.) Under these circumstances, defendant's "silence" was an overt or affirmative act falling within the terms of section 32 because she had a duty to testify at defendants' preliminary hearing.

There was also substantial evidence defendant refused to testify with the requisite intent to support an accessory after the fact conviction—that Robinson, Green, and the Clarks avoid arrest, trial, conviction or punishment. Until she was questioned by Detective Skaggs—after she falsely told the rental company the vehicle had been stolen—defendant did not report the shooting and possible death to the police. As defendant explained to Detective Skaggs, she provided transportation and money to her brother, cousin, and friends and reported the rental vehicle stolen even though she knew there had been a shooting in which her brother, cousin, and the Clarks were involved; someone had been shot and likely died; her brother and his companions fled the scene and abandoned the rental car; and they disposed of the guns used in the shooting. Defendant dismissed another cousin's suggestion she send Robinson to retrieve the abandoned vehicle

saying, "I don't want [him] to get in any trouble . . . ." She told the detective she was "trying to cover for [Robinson]." When Detective Skaggs encouraged defendant to bring "those boys" in, defendant said, "I don't want to do it." She refused to "try to talk sense to them." Defendant also said she would refuse to testify against them in court because "that's my family, you help them" and she did not want her testimony to send them to prison. She was reluctant to get involved: "I know they did it. And I know it's wrong, but . . . it's my family." Further, defendant testified in her own trial that when she refused to testify in 2015, she knew criminal charges against the four individuals had been dismissed in 2008 after she failed to appear.

IV. One Accessory Count Versus Four

Defendant argues even if there was sufficient evidence to convict her as an accessory, she could not be charged with and convicted of *four* accessory counts based on her single act of refusing to testify. We disagree.

Each accessory count specifically identified defendant as aiding a single individual in violation of section 32: count 1—Robinson, count 2—Green, count 3—Bryant Clark and count 4—Byron Clark. Each count also specifically alleged defendant harbored, concealed and aided the individual "with the intent that [he] might avoid and escape from arrest, trial, conviction, and punishment for" the charged felony—murder. Each count had its own verdict form and the jury found defendant guilty as an accessory as to each individual.

As discussed above, a person is guilty of being an accessory when, after a felony has been committed, he or she aids a principal in the felony, with knowledge the principal has

committed or been charged with the felony, and with the intent that the principal avoid or escape arrest, trial or punishment. (§ 32; *Plengsangtip, supra,* 148 Cal.App.4th at p. 836.) Section 32 refers to a principal, that is, an individual who committed a crime. By her refusal to testify, defendant aided four principals—her brother, her cousin, and two others she considered family—with the intent that each of them avoid or escape trial, conviction or punishment. Under these circumstances, she was properly charged with and convicted of four separate violations of section 32.

The decisions defendant relies on for a contrary holding are unavailing. In *People v. Perryman* (1987) 188 Cal.App.3d 1546, 1549, the principal committed two felonies. The Court of Appeal held the defendant was nevertheless guilty of only one act of being an accessory after the fact: "The crime of accessory after the fact is complete when the accused assists the principal in escaping apprehension knowing that person has committed a felony. The number of the underlying felonies is not determinative of defendant's guilt. Even if the defendant knew the principal committed more than one crime in a single transaction, he may be charged with only one act of being an accessory after the fact." (*Ibid.*)

The issue here is not whether a principal committed multiple crimes, but whether defendant aided multiple principals. Defendant may be convicted of being an accessory as to each of the four men she aided by refusing to testify; the refusal to testify against each individual was a separate crime.

People v. Mitten (1974) 37 Cal.App.3d 879 (*Mitten*), on which defendant also relies, is less helpful. The defendant was charged with being an accessory after he helped bury two murder

victims' bodies. (*Id.* at pp. 881-882.) But the sole issue in *Mitten* was whether the trial court properly granted the defendant's motion to dismiss the information for improper venue. *Mitten* did not hold a defendant can only be convicted of one count of being an accessory when there are multiple principals within the meaning of section 32.

Defendant further notes, "The prosecution . . . refused to concede that [she] could not be punished for all five counts under section 654, even though there could be no doubt of that under applicable law." Section 654 states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." (§ 654, subd. (a).) Defendant does not explain how any punishment violated section 654. As noted above, imposition of sentence was suspended and defendant was placed on probation. (See *People v. Martinez* (2017) 15 Cal.App.5th 659, 669 [section 654 claim not ripe for adjudication where imposition of entire sentence suspended and probation granted]; *People v. Wittig* (1984) 158 Cal.App.3d 124, 137 [no double punishment issue where imposition of sentence suspended and probation granted].) Moreover, defendant does not explain how section 654 impacts her *convictions*. Section 654 prohibits multiple *punishment*, not multiple *convictions*. (*People v. Miller* (1977) 18 Cal.3d 873, 885.)

V. The Failure to Instruct the Jury on the Elements of the Contempt Charged in Count 5

Defendant argues it was reversible error per se to refuse to instruct the jury on the elements of the contempt charge including, in particular, the requisite mental state. We agree the trial court erred, but find the error harmless.

Defendant was convicted of refusing to testify in violation of section 166, subdivision (a)(6), a misdemeanor. Section 166 states: "(a) . . . a person guilty of any of the following contempts of court is guilty of a misdemeanor: [¶] . . . [¶] (6) The contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question." Contrary to defendant's argument, the trial court did instruct the jury on the requisite mental state, advising the crime of "refusing to testify at a judicial proceeding as charged in Count 5" required general criminal intent. The trial court further instructed the jury on the meaning of general criminal intent.[6] The court failed, however, to instruct the jury on the remaining elements of the crime, i.e., that defendant be sworn as a witness and then refuse to testify. This was error, as a trial court has a sua sponte duty to instruct the jury on all the elements of a charged offense. (*People v. Merritt* (2017) 2 Cal.5th 819, 824.)

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[6] The instruction read: "The following crime requires a general criminal intent: refusing to testify at a judicial proceeding as charged in Count 5. For you to find a person guilty of this crime, that person must not only commit the prohibited act or fail to do the required act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act or fails to do a required act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime."

Contrary to defendant's assertion, a failure to instruct on the elements of an offense is "amenable to harmless error analysis." (*People v. Merritt, supra,* 2 Cal.5th at p. 831) The error here was harmless. The information charged defendant with "refus[ing] to testify in a preliminary hearing" in violation of section 166, subdivision (a)(6). The evidence at trial was that defendant had refused to testify at the 2015 preliminary hearing in the murder case. Defendant admitted refusing to testify. The prosecutor explained the elements of the crime charged in count 5.[7] The prosecutor argued defendant was guilty of that crime because she refused to testify at the preliminary hearing. As we have observed, the trial court instructed the jury that the crime charged in count 5 was "failure to testify at a judicial proceeding." The jury's verdict form likewise identified the crime as "refusing to testify." The jurors, whom we presume to be intelligent and capable of understanding instructions (*People v. Bryant* (2014) 60 Cal.4th 335, 447), undoubtedly found defendant guilty on count 5 because she refused, with general criminal intent, to testify at the preliminary hearing. Here, "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict"

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[7] "I'm going to talk a bit about the law in terms of how it applies in this case. And we're going to start with count 5. The reason we're going to start with count 5 is because count 5 is the easiest count in this case. And why do I say it's the easiest? Because it has two elements that are undeniable. That the defendant was called as a witness at the preliminary hearing on June 11th of 2015. And that the defendant failed to testify. She had no lawful right [not] to testify. And she willfully disobeyed the orders of the court. She refused to answer all the questions I had asked when the court ordered her to answer those questions."

even if it had been specifically instructed on all the elements of the contempt charged in count 5. (*People v. Merritt, supra,* 2 Cal.5th at p. 831.)

VI. Defendant's Statements to Detective Skaggs

Defendant asserts her statements to Detective Skaggs about the murder should have been suppressed because she was in custody during the interview and warnings were not given pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. The "in custody" claim raises questions of fact as to the circumstances of the interrogation. (*Duty, supra,* 269 Cal.App.2d at p. 105.) But defendant did not broach this issue in the trial court.[8] As a result, the parties had no opportunity to litigate the issue and the trial court had no opportunity to make factual findings as to the circumstances surrounding defendant's interaction with the detective. (*People v. Linton* (2013) 56 Cal.4th 1146, 1166; *People v. Cruz* (2008) 44 Cal.4th 636, 669 (*Cruz*).) Defendant forfeited this argument by failing to raise it in the trial court. (*Cruz, supra,* 44 Cal.4th at p. 669.)

Anticipating the forfeiture conclusion, defendant argues her trial counsel was ineffective for failing to challenge the prosecution's use of defendant's statements to the detective. We conclude defendant has not shown her trial attorney was ineffective. "To secure reversal of a conviction upon the ground of

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[8] Defendant did briefly raise this issue during the June 11, 2015 preliminary hearing *in the murder case*, when defendant refused to testify, defense counsel argued in part that defendant had been interrogated in custody without *Miranda* warnings. The trial court found the argument irrelevant. Defendant concedes that ruling was correct.

ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.] [¶] A defendant who raises the issue on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 982.) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Here, the record does not show why defendant's trial attorney failed to raise a Fifth Amendment claim; he was not asked to explain. Nor is it established that there simply could be no satisfactory explanation. Counsel may have concluded there was little or no basis for a Fifth Amendment objection because when defendant spoke with the detective she was *not a suspect but a witness* who expressed no reservations about talking to the detective and willingly told him what she had heard and observed

in the aftermath of the murder. (See *People v. Lucas* (1995) 12 Cal.4th 415, 441-442.) Under these circumstances, defendant's ineffective assistance claim is more appropriately resolved in a habeas corpus proceeding. (*People v. Mai, supra,* 57 Cal.4th at p. 1009.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

DUNNING, J. *

I concur:

KRIEGLER, Acting P. J.

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* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

The People v. Starletta Partee
B276040

BAKER, J., Concurring in Part and Dissenting in Part

For 82 years, Penal Code section 32 has proscribed "harbor[ing], conceal[ing] or aid[ing] a principal" in his or her commission of a prior felony. (Stats. 1935, ch. 436, § 1, p. 1484.) Today, the majority affirms convictions under this statute that are, so far as the Attorney General is aware, literally unprecedented in its 82-year history. (Rec. of Oral Arg. at 17:27-18:11, 19:11-19:35; see also Resp. Br. at 18-22.) No California case has ever sanctioned use of Penal Code section 32, the accessory statute, to mete out felony punishment for a witness who merely opts to remain silent (as distinguished from a witness who affirmatively tells some falsehood in a police interview or while on the witness stand to throw the police or the jury off track). Indeed, while I cannot claim to have conducted a fully exhaustive survey, I have discovered no court in any jurisdiction *nationwide* that has ever sanctioned this sort of an accessory after the fact prosecution. (See generally 2 LaFave, Substantive Criminal Law (3d ed. 2017) § 13.6(a), pp. 547, 555-556 [reviewing the "great majority of the [accessory after the fact] provisions in the modern codes [that] specify the kinds of aid which are proscribed"—including harboring or concealing the criminal, providing means of avoiding apprehension, concealing or tampering with evidence, plus "a few jurisdictions [that] have

added the giving of false information in certain circumstances"—and observing, by contrast, "the mere failure to report the felony or to arrest the felon will not suffice" to support an accessory conviction].)

The oddity of today's decision is no accident, nor is it a manifestation of the old adage that there must be a first time for everything. It is rather a product of well-intentioned but flawed legal reasoning that courts have heretofore avoided: Believing the statutorily authorized criminal penalty for refusing to testify (six months in jail) is too light a punishment for refusing to testify against defendants charged with murder, the majority blesses the invocation of Penal Code section 32, which imposes a higher penalty. As I shall discuss, however, authority dating back at least 50 years explains that resort for what might be viewed as overly light penalties for contumacious witnesses must be to the legislative process. (*In re McKinney* (1968) 70 Cal.2d 8, 12-13 (*McKinney*); *In re Keller* (1975) 49 Cal.App.3d 663, 671 (*Keller*); see also *People v. Park* (2013) 56 Cal.4th 782, 789 ["It is the Legislature's function '"to define crimes and prescribe punishments . . ."'"].) A prosecuting office's decision to type up felony charges using a statute ill-suited to the task is no adequate substitute, and the majority errs by refusing to say so.

I

California has laws that are meant to compel recalcitrant witnesses to testify—and to punish them when they refuse. The civil contempt statutes, Code of Civil Procedure sections 1218 and 1219, allow a trial judge that finds a witness in contempt of court to imprison the witness for five days (with a $1,000 fine), or until the witness performs the act he or she omitted to perform when

being found in contempt (assuming that act "is yet in the power of the person to perform"). (Code Civ. Proc., §§ 1218, subd. (a), 1219, subd. (a).) Apart from these remedies, California also provides for criminal contempt punishment of a witness who refuses to testify when lawfully ordered to do so. Penal Code section 166 provides that a person who "contumacious[ly] and unlawful[ly] refus[es] . . . to be sworn as a witness or, when so sworn, . . . refus[es] to answer a material question" is guilty of a misdemeanor.[1] (Pen. Code, § 166, subd. (a)(6).)

Going back decades, California courts have heard—and rejected—arguments to evade the limits imposed by these statutory penalties on the ground that they are insufficiently severe to punish a refusal to testify. In *McKinney*, *supra*, 70 Cal.2d 8, a witness refused to answer questions concerning when he first came into contact with a defendant charged with the murder of a police officer and assault with a deadly weapon. (*Id.* at p. 9.) The trial court purported to hold the defendant in criminal contempt under Penal Code section 166. (*Id.* at pp. 9-10.) The Attorney General conceded on appeal that the trial court had done so improperly but argued the sentence should be upheld because the court had inherent contempt power to imprison the witness that the Legislature could not curtail. (*Id.* at p. 10.) Our Supreme Court rejected that argument, stating "[t]he Attorney General, though framing the limits of the court's inherent power in language of an 'adequate' sentence in fact argues for 'unbridled power' [citation]." (*Id.* at pp. 12-13.) The Supreme Court acknowledged a trial court's contempt power

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[1] A misdemeanor offense, of course, is punishable by six months in jail and a $1,000 fine. (Pen. Code, § 19.)

"must 'be sufficient to enable the courts to vindicate their authority and maintain the dignity and respect due to them' [citation]" but concluded the existing sanctions provided by the Legislature, i.e., the civil and criminal contempt statutes already described, were adequate for a trial court to vindicate its authority and maintain its dignity. (*Id.* at p. 12.)

In a case decided seven years later, *Keller*, *supra*, 49 Cal.App.3d 663, the Court of Appeal again rejected an argument that would permit an end-run around the sanctions that the contempt statutes provide for refusing to testify. In that case, a college professor witnessed an attempted robbery and provided a statement to the police, but later informed the prosecution he would not testify if called as a witness at trial "for reasons of conscience." (*Id.* at p. 664.) The prosecution sought the professor's testimony anyway and he refused to answer six questions concerning the attempted robbery. (*Id.* at pp. 665-666.) The professor was held in contempt on six separate counts (corresponding to the six questions) and sentenced to 15 days in jail (five days each for three of the questions) and a $1,500 fine ($500 each for the other three questions). (*Id.* at p. 666.)

On appeal, Keller argued the imposition of cumulative penalties for his refusal to answer a series of related questions was improper. (*Keller*, *supra*, 49 Cal.App.3d at p. 666.) The Court of Appeal agreed and held the trial court exceeded its authority in making multiple contempt findings for what amounted to one contempt. (*Id.* at p. 669.) In the course of so holding, the *Keller* court acknowledged the argument that "the maximum punishment which [it held] the court can here lawfully impose (five days in jail and/or [a] $500 fine (Code Civ. Proc., § 1218)) may not be 'significant' or 'substantial' *enough* to

effectuate its objective of promoting a recalcitrant witness to testify . . . ." (*Id.* at p. 671.) But, importantly, the Court of Appeal explained this was "not a proper ground on which to analyze whether one or more contempts has taken place" because "[t]he answer lies in legislative reform of the existing power of the court to punish for the type of contempt committed by Keller." (*Ibid.*) The *Keller* court specifically cautioned that permitting counsel "to devise questions that might stand up as separate contempts" were "mere devices to permit effective punishment and are unfitting to the dignity of the judicial process." (*Ibid.*)

In the many years since *McKinney* and *Keller*, the Legislature has not seen fit to significantly increase the penalties set by the contempt statutes, which, with the possible exception of the coercive contempt remedy (Code Civ. Proc., § 1219), continue to authorize a maximum of six months in jail. The prosecution in this case, however, apparently believed—mistakenly, in my view—that it had come upon a means of taking action where the Legislature has not.

II

Defendant Starletta Partee (defendant) is Nehemiah Robinson's sister and Toyrion Green's cousin. Both men, along with two others, were charged with murder in connection with what was alleged to be the gang-related shooting of victim Anthony Owens (Owens).

After the alleged murder, Los Angeles Police Department detective John Skaggs interviewed defendant (the interview was recorded). During the interview, defendant made statements tending to incriminate the four men as having committed, or having been involved in, Owens' murder. As the majority opinion

details, defendant thereafter failed to appear as a witness at the trial of the four men, the case against the men was dismissed, police later located defendant and took her into custody, prosecutors then re-filed the case against the men, and when called as a witness at the preliminary hearing in the re-filed case where all four men were present, defendant refused to be sworn to testify and refused to answer questions posed by the prosecutor. Following defendant's refusal, the murder case against defendant's brother, her cousin, and the other two men was again dismissed.

The prosecution responded by charging defendant with one count of criminal contempt under Penal Code section 166 for refusing to testify at the preliminary hearing. The prosecution also went further—invoking Penal Code section 32 to charge defendant with four felony counts of being an accessory to the murder after the fact (one count for each of the four accused murderers). The prosecution further elected to add a gang enhancement allegation in connection with all five charged counts, which substantially increased the maximum prison sentence defendant faced if convicted.[2]

Defendant proceeded to trial on all five charged counts against her. The only evidence introduced by the prosecution in an effort to establish she "harbor[ed], conceal[ed], or aid[ed]" (Pen. Code, § 32) her brother, cousin, and the other two men was defendant's silence in court, i.e., her refusal to take the witness

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[2] The gang allegation, if found true, would make the otherwise misdemeanor violation of Penal Code section 166 eligible for punishment as a felony. (Pen. Code, § 186.22, subd. (d).) In rendering its verdict, the jury in this case found the gang allegations not true.

oath and to answer any questions. Testifying in her own defense, defendant maintained she refused to testify in the murder case because she feared gang retribution and because the four defendants were either actually family or like family to her. Apparently unpersuaded,[3] the jury convicted defendant on all counts charged against her.

At sentencing, the experienced trial judge declined to impose anywhere near the maximum authorized custodial sentence.[4] Instead, and likely understanding the issue was no longer whether defendant could be coerced into testifying against her brother and the other accused men but rather how severely she should be punished for refusing to do so, the trial judge placed defendant on probation for three years.[5]

The imposition of a probationary sentence, however, does not make this a no-harm-no-foul case. A felony conviction carries

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[3] The jury was instructed with CALCRIM No. 440 on the elements of a Penal Code section 32 violation. The instruction informed the jury it must find defendant "either harbored, concealed or aided the perpetrator" after the felony (the alleged murder) had been committed. The jury was provided no further definition of the term "aided."

[4] During the sentencing hearing, the judge noted that over the course of his 45 years in the "business," this case was "one of the first times [he had] ever seen a case in which someone is prosecuted for refusing to testify after they've been given full immunity."

[5] The trial judge stated he found the argument that the four men charged with murder would have been convicted had it not been for defendant's refusal to testify to be "conjecture, speculation and maybe guesswork."

various consequences a misdemeanor does not, and as I now explain, defendant's silence when called as a witness was insufficient to prove a violation of the accessory statute.

III

All legal sources that courts properly consult lead to the same conclusion: a mere refusal to testify is not a proper basis for a Penal Code section 32 prosecution. The conclusion flows from the text of the accessory statute as informed by established canons of statutory interpretation; from California precedent that has addressed the bounds of who may be prosecuted as an accessory; and from the laws and practices of sister states, some of which recognize the special problem of punishing a witness for refusing to incriminate family members.

A

Penal Code section 32 provides in full as follows: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony." The elements of the offense therefore required proof that defendant *both* "harbored, concealed, or aided" the accused murder defendants and did so with the intent they avoid trial, conviction, or punishment. (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1219, fn. 7 [listing all elements of a Penal Code section 32 violation].) The majority's extended discussion of defendant's intent correctly concludes that element was satisfied. But intent is not the critical issue in this

case. What was lacking is proof that defendant's silence amounted to harboring, concealing, or aiding her brother and his confederates.

No one believes there was evidence that would allow the jury to conclude defendant "harbored" or "concealed" defendant and the other three men—not the Attorney General and not the majority. The meaning of those verbs simply would not support such a finding. So the question of affirmance or reversal of the Penal Code section 32 convictions reduces to what "aid[ed]" means as used in Penal Code section 32 and whether defendant's preliminary hearing silence meets that definition.

The ordinary understanding of the word "aid" is susceptible to more than one definition, but most suggest some affirmative act of assistance. Oxford's definition, for instance, states the verb means "[t]o give help, support, or assistance to (a person); to relieve from difficulty or distress, to succor." (Oxford English Dict. Online (2018) http://www.oed.com/view/Entry/4303?rskey=TgKZpp&result=5&isAdvanced=false#eid [as of March 19, 2018].) The element of affirmative assistance that is suggested by that definition is consistent with common usage; one would not usually say, for instance, that when two rival companies intend to bid on a contract and one fails to submit its bid on time, the untimely bidder has come to the aid of the other company.

Insofar as there is ambiguity in Penal Code section 32's use of the term "aided," however, the venerable *ejusdem generis* canon of statutory interpretation assists (aids, if you will) in resolving it.[6] "[T]he principle of *ejusdem generis* suggests that

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[6] Use of the *noscitur a sociis* canon (*People v. Prunty* (2015) 62 Cal.4th 59, 73 ["a word literally 'is known by its associates'"]) would also come to the same point.

when "'specific words follow general words in a statute or vice versa,'" the general words ordinarily are best construed in a manner that underscores their similarity to the specific words." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 939.) With regard to the text of Penal Code section 32, the general word "aids" follows the more specific words "harbors" and "conceals," and a potentially broader understanding of "aids" should instead be cabined to meanings more akin to "harbors" and "conceals."

As we have already seen, there is not even an argument that what defendant did here would constitute harboring or concealing. And as a conceptual matter, the common usage of the words harbor and conceal incorporates an element of affirmative assistance—the provision of food or shelter, or acts taken to hide something from view or discovery. (*People v. Garnett* (1900) 129 Cal. 364, 366 ["The word 'conceal,' as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony"] (*Garnett*); see also *United States v. Shapiro* (2d Cir. 1940) 113 F.2d 891, 892-893.) Penal Code section 32's use of "aids" should be understood similarly, i.e., to permit conviction only where an accused aids a felon in some affirmative sense.

This element of affirmative assistance went unsatisfied by the proof at trial. Defendant's conduct was entirely passive—remaining silent when asked to take the witness oath and saying nothing when the prosecutor posed a series of questions to see if she would testify. While it might fairly be said defendant refused

to aid the prosecution, that does not mean she also thereby aided her brother and the other accused men within the meaning of Penal Code section 32.

B

California cases that have addressed the meaning of Penal Code section 32 support the conclusion I reach. The majority concludes otherwise by applying precedent incorrectly.

Let us begin with the meaning of Penal Code section 32 as a general matter. Our Supreme Court has explained, as I have concluded from the text of the statute, that there must be proof of affirmative assistance to obtain a Penal Code section 32 conviction: "The gist of the [Penal Code section 32] offense is that the accused '"harbors, conceals or aids" the principal with the requisite knowledge and intent. Any kind of overt or affirmative assistance to a known felon may fall within these terms . . . . "The test of an accessory after the fact is that, he renders his principal some personal help to elude punishment [ ]—the kind of help being unimportant." [Citation.]' (*People v. Duty* (1969) 269 Cal.App.2d 97, 104[ ].)" (*People v. Nuckles* (2013) 56 Cal.4th 601, 610 (*Nuckles*); see also *Garnett*, *supra*, 129 Cal. at p. 366 ["[C]oncealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an [accessory]"].) The majority quotes this language from *Nuckles* but fails to accord it the significance it deserves (particularly the Court's reference to *affirmative* assistance) when analyzing the sufficiency of the evidence to support the Penal Code section 32 convictions.

Furthermore, the *Nuckles* court cited the Court of Appeal's decision in *People v. Duty*, *supra*, 269 Cal.App.2d 97 (*Duty*) with approval, and *Duty* even more precisely addresses the meaning and scope of Penal Code section 32 as relevant to the key issue presented here. In *Duty*, there was evidence that the defendant provided a false alibi for another suspected of arson. (*Id.* at pp. 102-103.) The question was whether this "inferably false statement" to the fire investigators was sufficient to convict the defendant as an accessory after the fact. (*Id.* at p. 103.)

The Court of Appeal observed that, at the time of its decision (in 1969), the question of "[w]hether a falsehood to the police or other public investigators may violate the accessory statute is a new question in California." (*Duty*, *supra*, 269 Cal.App.2d at p. 103.) The court explained that "[a]ccording to some American decisions, the offense is not committed by passive failure to reveal a known felony, by refusal to give information to the authorities, or by a denial of knowledge motivated by self-interest. On the other hand, an affirmative falsehood to the public investigator, when made with the intent to shield the perpetrator of the crime, may form the aid or concealment denounced by the statute." (*Id.* at pp. 103-104.)

The *Duty* court upheld the defendant's accessory conviction, but only because the defendant "had actively concealed or aided [the suspected arsonist] by supplying an affirmative and deliberate falsehood to the public authorities," which meant there was "more than passive non-disclosure." (*Id.* at p. 104.) Later California cases continue to adhere to this same principle: that an affirmative false statement can qualify as aiding an accused felon and may support an accessory after the fact conviction, but mere passive non-disclosure may not. (See, e.g., *People v.*

Plengsangtip (2007) 148 Cal.App.4th 825, 838 ["Indeed, a statement that one *knows nothing* about a crime, even if false, is equivalent to a passive nondisclosure or refusal to give information, which is insufficient to support an accessory charge"] (*Plengsangtip*); *People v. Nguyen* (1993) 21 Cal.App.4th 518, 539 [citing *Duty* for the proposition that "in some circumstances supplying an affirmative and deliberate falsehood to public authorities, such as by providing a false alibi, is sufficient to make the relator an accessory" but holding nothing in the defendant's statement to police investigators (which downplayed his role at the scene of the robberies) went so far].)

Despite the lack of evidence of any affirmative assistance to support a Penal Code section 32 conviction here, the majority nevertheless affirms defendant's conviction—offering two reasons to justify the result it reaches. Neither withstands scrutiny.

First, the majority opinion states "there is precedent for an accessory conviction under the facts of this case" because California courts have upheld convictions "[u]nder similar circumstances." (*Ante* at p. 8.) The opinion is wrong on this point—there is nothing similar about the present circumstances and those in the cases the majority cites. Rather, all of the California cases the majority cites are factually dissimilar in the most critical respect: each involves an affirmative false statement made by the defendant, not, as here, mere silence that constitutes passive non-disclosure.[7] (*Ante* at p. 8 [citing *Plengsangtip*, *supra*,

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[7] The majority's citations to Federal sentencing guidelines cases are not persuasive for at least two related reasons. First, the Federal sentencing guidelines are advisory guides to punishment and the task, when no guideline clearly applies, is to find one that is most analogous even if dissimilar. The

148 Cal.App.4th at pp. 835-839 {"the defendant lied to a detective"}; *In re I.M.* (2005) 125 Cal.App.4th 1195, 1203-1206 {the minor "falsely told police the principal shot the victim in self-defense"}; *Duty*, *supra*, 269 Cal.App.2d at pp. 100-105 {the defendant "gave a false alibi to the public investigator"}].)

Second, the majority argues "defendant's 'silence' was an overt or affirmative act falling within the terms of [Penal Code] section 32 because she had a duty to testify" at the murder suspects' preliminary hearing. (*Ante* at p. 13.) As outlined by the majority, the argument is that she had a duty to testify because she had been subpoenaed and given immunity, and "'when an individual's criminal liability is based on the failure to act, it is well established that he or she must first be under an existing legal duty to take positive action.'" (*Ante* at p. 13.) This argument proves both too little and too much.

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sentencing guidelines have nothing to say about the elements of an offense, and the majority cites no Federal case that holds a mere refusal to testify permits a *conviction* for being an accessory after the fact. Indeed, in both *United States v. Brady* (1st Cir. 1999) 168 F.3d 574 and *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, the recalcitrant witnesses were charged with and convicted of criminal contempt, not being accessories after the fact. (*Brady*, *supra*, at p. 576; *Ortiz*, *supra*, at p. 978.) Second, in the Federal scheme, there is no felony-misdemeanor dichotomy as there is in California; both criminal contempt and being an accessory after the fact are punishable as felonies, with the criminal contempt statute (not the accessory statute as in California) being the one that authorizes more severe punishment—up to life in prison. (18 U.S.C. §§ 3, 401; see also *United States v. Wright* (1st Cir. 2016) 812 F.3d 27, 31-32.)

It is of course true that criminal liability for failure to act can only attach where there is a duty to act, but that does not resolve the key question, namely, *what* criminal liability? Defendant refused to testify when properly compelled, and there is a remedy for that: criminal contempt. The majority's argument therefore at most proves that defendant was properly convicted of *some* criminal offense and offers nothing persuasive to specifically establish that a conviction for "aiding" her brother and the other men, within the meaning of Penal Code section 32, was proper. At the same time, the argument also proves too much because if this is an "affirmative act" case, the majority leaves few that would not be; every possibly recalcitrant witness will get a subpoena, and every such witness, according to the majority, will therefore have a duty to testify and be an accessory to the related felony when refusing, so long as there is proof of the requisite knowledge and intent.[8] I see no reason to believe the Legislature intended to reach so far, and 82 years of criminal practice in this state tends to show otherwise.

C

So far as I am aware, today's decision places California on the extreme outer edge of jurisdictions—indeed, in a group unto itself—concerning the reach of accessory after the fact punishment. As summarized by Professor LaFave, the specifics of what type of aid will suffice to support an accessory conviction

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[8] The grant of immunity to defendant is beside the point and therefore does not cabin the majority's rationale. It is the subpoena that provides the compulsion—granting immunity simply removes an otherwise viable objection to complying with the subpoena.

vary somewhat from state to state, but "[f]ive kinds of aid usually are proscribed: (1) harboring or concealing the criminal; (2) providing him with certain means (e.g., a weapon, transportation, a disguise) of avoiding apprehension; (3) concealing, destroying or tampering with evidence; (4) warning the criminal of his impending discovery or apprehension; and (5) using force, deception or intimidation to prevent or obstruct the criminal's discovery or apprehension. To this list, a few jurisdictions have [also] added the giving of false information in certain circumstances." (2 LaFave, *supra*, § 13.6(a), pp. 555-556, footnotes omitted [citing state statutes].) None of these categories extends to mere silence in the face of compulsion to testify.

Moreover, some sister states have partially or completely exempted a defendant from accessory liability where the person who the defendant assists is a close family member. (See, e.g., Mass. Gen. Laws, ch. 274, § 4 ["Whoever, after the commission of a felony, harbors, conceals, maintains or assists the principal felon or accessory before the fact, or gives such offender any other aid, knowing that he has committed a felony or has been accessory thereto before the fact, with intent that he shall avoid or escape detention, arrest, trial or punishment, shall be an accessory after the fact . . . . The fact that the defendant is the husband or wife, or by consanguinity, affinity or adoption, the parent or grandparent, child or grandchild, brother or sister of the offender, shall be a defence to a prosecution under this section"]; Fla. Stat. § 777.03 ["Any person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, who maintains or assists the principal or an accessory

before the fact, or gives the offender any other aid, knowing that the offender had committed a crime and such crime was a third degree felony . . . with the intent that the offender avoids or escapes detection, arrest, trial, or punishment, is an accessory after the fact"].)[9] California obviously has no similar exemption, and I do not argue it should. But we as a court should be especially wary of rendering a decision that makes this state a marked outlier, particularly when we have not considered all of the circumstances in which the more severe punishment of the accessory statute might be used in place of the established contempt statutory scheme (e.g., for a defendant who declines to incriminate his or her child when subpoenaed to testify).

IV

If today's decision stands, accessory charges for recalcitrant witnesses are now fair game. The majority believes that is a good thing, and I agree that solving crimes and bringing perpetrators to justice is undeniably important. But there are countervailing considerations when deciding how strongly to punish someone who does not assist in prosecuting crimes, and some weighing of the appropriate penalty in the balance is necessary. The Legislature has already done that weighing, and there are no workarounds.

The People do have an argument that some updating of the long-established contempt sanctions for refusing to testify, at least in certain cases, deserves consideration. But they are

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[9] Other states do not provide an exemption for certain familial relationships but do provide for a reduction in punishment when the felon aided is a close family member. (See generally 2 LaFave, *supra*, § 13.6(a), p. 557.)

arguing in the wrong place. The halls of the capitol in Sacramento, not Los Angeles-area courtrooms, is where that case must be made.

Defendant's Penal Code section 166 conviction is properly affirmed. I respectfully dissent from the affirmance of defendant's four Penal Code section 32 convictions.

BAKER, J.

Filed 4/12/18 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STARLETTA PARTEE, Defendant and Appellant.	B276040 (Los Angeles County Super. Ct. No. TA138027) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

The opinion filed on March 21, 2018 is modified as follows:

1. On page 1, include an additional counsel for Plaintiff and Respondent, to read as follows: "Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Colleen M. Tiedemann and Ilana Herscovitz Reid, Deputy Attorney Generals, for Plaintiff and Respondent."

2. On page 2, lines 7-8, delete "The trial court suspended imposition of sentence and placed defendant on probation for three years" and replace it with "The trial court suspended imposition of sentence and placed defendant on probation for three years on the condition, among others, that she serve 365 days in the county jail"

3. On page 2, line 22, delete "The day after" and replace it with "On the day of"

4. On page 4, lines 24-25, delete "She added she did not testify because "[f]amily is first" and replace it with "She added that when her family members discovered she had spoken with Detective Skaggs, they told her not to testify because "[f]amily is first."

These modifications do not change the judgment.

Defendant's petition for rehearing is DENIED.

KRIEGLER, Acting P.J. DUNNING, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA:

I am a citizen of the United States. My business address is 1604 Solano Avenue, Berkeley, CA. 94707. I am employed in the County of Alameda, where this mailing occurs. I am over the age of 18 years, and not a party to the within cause. On the date set forth below, I served the foregoing document(s) described as:

PETITION FOR REVIEW

on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Los Angeles County District Attorney
Compton Branch
200 W. Compton Blvd., 7th Floor
Compton, CA 90220

Clerk
Los Angeles Superior Court
Compton Courthouse
200 W. Compton Blvd, Ste 403
Compton, CA 90220

Starletta Partee
(address known to attorney)

[✔] (BY MAIL) I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing on April 30, 2018, following ordinary business practices.

and

Office of the Attorney General
300 S. Spring Street
5th Floor, North Tower
Los Angeles, CA 90013
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California Appellate Project
Los Angeles Office
520 S. Grand Avenue, 4th Floor
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Second District Court of Appeal
300 S. Spring Street
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Los Angeles, CA 90013

[✔] (TRUEFILING SERVICE)A PDF version of this document will be e-Served through TrueFiling electronic service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 30, 2018 at Berkeley, California.

/s/ Kathy Yam
KATHY YAM

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **People v. Partee**
Case Number: **TEMP-1WK28206**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **PKleven@Klevenlaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/30/2018
Date

/s/Paul Kleven
Signature

Kleven, Paul (95338)
Last Name, First Name (PNum)

Law Office of Paul Kleven
Law Firm