No. S248520

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)

OPENING BRIEF ON THE MERITS

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PETITIONER'S OPENING BRIEF ON THE MERITS

INTRODUCTION

On July 11, 2018, this Court granted review on the following issues:

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?

Contrary to the Second Appellate District's assertion that California Courts of Appeal have previously sustained accessory convictions under circumstances similar to this case (*People v. Partee* (2018) 21 Cal.App.5th 630, 636), there are no precedents for prosecuting a refusal to provide information to authorities as a violation of Penal Code[1] section 32. California appellate courts have consistently held that to be convicted as a person who "harbors, conceals or aids a principal" (§ 32), a defendant must provide overt, active assistance to that principal which, if the aid consists of statements to authorities, must include active misrepresentations, not mere silence. (*People v. Duty* (1969) 269 Cal.App.2d 97.)

The decision below is contrary to California jurisprudence, to fundamental rules of statutory construction, and to authorities throughout the country. The State's unprecedented prosecution of Petitioner Starletta Partee's refusal to testify as four felony counts of accessory to murder with gang enhancements, rather than as contempt of court, also raises serious due process concerns. The appellate court confirmed her convictions in part because it determined, contrary to *In re McKinney* (1968) 70 Cal.2d 8,

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

that remedies available to prosecutors and courts under the various contempt statutes did not provide adequate coercive and punitive options. (*Partee, supra*, 21 Cal.App.5th at p. 638.) But even if this Court believes the statutory scheme should be reexamined, that job falls to the Legislature, which defines all crimes and punishment in the first instance, not to a deputy district attorney, and not to the courts.

This Court should reverse this unfortunate decision, and prevent prosecutors in the future from attempting to ruin the lives of people like Starletta Partee, who despite being raised in a gang-controlled neighborhood had never been in trouble and was making a good living while attending college, raising her own daughter, and helping to raise the children of others who had not survived the gang environment. Her refusal to testify against her brother and others should have exposed her to contempt charges, not to four felony convictions with gang enhancements.

STATEMENT OF THE CASE

The Los Angeles County District Attorney charged Partee with four counts of being an accessory 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, which 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, awarding no

credit for the time spent in custody from Partee's 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. (*Partee, supra,* 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 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.) She drove her own car, now repaired, to that location, where she saw the Clarks, Green and Robinson with a girl in a parked green car. (SCT 47-48, 52-55.) The men then moved into Partee's car, which already contained her 6 year old daughter. (SCT 52-55, 59.)

They explained they had gone 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 rental 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)[2]

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 family members

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[2] Partee lost the baby, though the court struck evidence of the miscarriage as irrelevant. (4-RT 1506.)

were involved, 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 life 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, for whom she also cared. (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 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. Convicting a Person of Being an Accessory for Refusing to Testify is Contrary to California Law, the Rules of Statutory Construction, and Authorities Throughout the Country

A. Until the Decision in this Case, California Courts Have Required an Accessory to Provide Overt Assistance to a Principal, Including Affirmative Misrepresentations to Authorities, and Have Never Affirmed a Conviction Based on the Refusal to Provide Information

Under California's "tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments." (*In re Lynch* (1972) 8 Cal.3d 410, 414.) In 1850, the Legislature adopted "An Act Concerning Crimes and Punishment" defining crimes in California. (*People v. Rocha* (1971) 3 Cal.3d 893, 898, fn. 3.) The Act continued the "common law classifications of 'accessory before the fact' and 'accessory after the fact,'" (*People v. Mitten* (1974) 37 Cal.App.3d 879, 883), defining the latter as a person who "after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the

person charged with or found guilty of the crime." (*People v. Gassay* (1865) 28 Cal.404, 405-406.) While accessories before the fact were subject to the same punishment as principals, accessories after the fact could not be imprisoned for more than two years. (*Id.* at p. 406.)

The Penal Code of 1872 discarded the common law terminology of accessories before and after the fact. (*Mitten, supra*, 37 Cal.App.3d at p. 883.) Section 31 of the new Code characterized the former as persons who "aid and abet" the commission of a crime and are considered principals in that crime, while section 32 characterized the latter as simply "accessories," while essentially retaining the definition from the 1850 Act. (§§ 30-32, 971; see also Code Commissioners' Notes for §§ 31, 32.)

Since 1935, section 32 has stated:

> 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.

(§ 32.)

A court's task in construing any piece of legislation "is to ascertain and effectuate the intended legislative purpose." (*People v. Prunty* (2015) 62 Cal.4th 59, 72; see also *In re Lance W.* (1985) 37 Cal.3d 873, 889 (legislative intent "is the paramount consideration").) "'Because the statutory language is generally the most reliable indicator of that intent, we

look first at the words themselves, giving them their usual and ordinary meaning.' [Citation.]" (*People v. Wright* (2006) 40 Cal.4th 81, 92..) "We presume the Legislature knew what it was saying and meant what it said." (*People v. Valdez* (1982) 137 Cal. App. 3d 21, 26.)

This Court recently explained what is required to be an accessory in California under section 32,:

> The gist of the 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. Nuckles* (2013) 56 Cal.4th 601, 610, quoting *Duty, supra*, 269 Cal.App.2d 97, 104, discussed in detail below.)

Courts frequently turn to the dictionary to help determine what the enacting body meant to say by using particular terminology. (*Prunty, supra*, 62 Cal.4th at pp. 72-73.) The required "overt or affirmative assistance to a known felon" is consistent with the statute's use of the transitive verbs "harbor,""conceal" and "aid," each of which require a direct object – the "principal" – to receive the verb's action and complete its

meaning. (https://www.merriam-webster.com/dictionary/transitive.)[3]

The transitive verb "to harbor" someone can mean "to give shelter or refuge to: take in," or "to receive clandestinely and conceal (a fugitive from justice)." (Webster's Third New Int'l Dictionary 1031 (Unabridged ed. 1981.) In *Nuckles,* this Court found substantial evidence to support the defendant's conviction as an accessory because she invited a known fugitive to live with her and "exhibited her intent to harbor [the fugitive] by creating a contingency plan should police come looking for him and by warning her boyfriend to conceal his presence." (*Nuckles, supra*, 56 Cal.4th at p. 612.)

The transitive verb "to conceal" someone or some thing can mean "to prevent disclosure or recognition of : avoid revelation of : refrain from revealing : withhold knowledge of : draw attention from : treat so as to be unnoticed," or "to place out of sight : withdraw from being observed : shield from vision or notice." (Webster's, *supra*, at p. 469.) In retaining the verb "conceal" when it amended section 32 in 1935, the Legislature was presumably aware of decisions analyzing the term as it was used in the

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[3] As we all learned in high school, a transitive verb has a direct object. For example, in the sentence, "John wrote a check," "wrote" is transitive. An intransitive verb has no direct object. For example, in the sentence, "Joan wrote beautifully," "wrote" is intransitive.
(*People v. Hobbs* (2007) 152 Cal.App.4th 1, 10 (Richli, J., dissenting).)

original version of section 32. (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) In 1900, this Court had specifically rejected the more passive definitions of "conceal":

> [T]he word "conceal," as here used, means more than a simple withholding of knowledge possessed by a person 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. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory.

(*People v. Garnett* (1900) 129 Cal.364, 366.)

Decisions since the 1935 amendment have continued to require an accessory to take affirmative action to conceal the principal. *People v. Wallin* (1948) 32 Cal.2d 803, held that a defendant who helped a murderer to conceal her crime by assisting in the disposal of the body was "chargeable under section 32," though it reversed its conviction due to instructional error. (*Id.* at pp. 807-809.) *People v. Elliott* (1993) 14 Cal.App.4th 1633, found no evidence that a defendant had "concealed" a fugitive within the meaning of section 32 when he simply tried to hide *with* a fugitive under a tree. (*Id.* at p. 1641.)

The transitive verb "to aid" someone can mean "to give help or support to : FURTHER, FACILITATE, ASSIST." (Webster's, *supra*, at p. 44 (capitalization in original.) The defendant in *Duty, supra*, 269 Cal.App.2d 97, provided an elaborate, false alibi for a woman who was later convicted

of setting fire to her own house in the middle of the night. (*Id.* at pp. 101-103.) In resolving what it considered to be a new question in California law of whether providing false statements to public investigators could violate section 32, the Third Appellate District found that courts in other states had determined that a person did not become an accessory "by refusal to give information to the authorities ..., 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 evidence in *Duty* showed "more than passive non-disclosure. The jury could reasonably 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 ...." (*Id.* at p. 104.)

Until the decision in this case, California authorities have consistently followed the distinction struck in *Duty* between affirmative falsehoods and a simple refusal to provide information. *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, for example, recently explained that "a statement that one *knows nothing* about a crime, even if false, is equivalent to a passive nondiscosure or refusal to give information, which is insufficient to support an accessory charge." (*Id.* at p. 838 (emphasis in original.) But the Fourth Appellate District upheld defendant's accessory

conviction because he did not simply say he knew nothing about a murder, but instead falsely telling officers that the victim was not there and there was no murder, which altered the picture of what happened in an attempt to shield the principal from prosecution. (*Id.* at pp. 838-839.) "[A] person generally does not have an obligation to volunteer information to police or to speak with police about a crime. If the person speaks, however, he or she may not affirmatively misrepresent facts concerning the crime." (*Id.* at p. 837.)

The First Appellate District upheld a true finding on a juvenile delinquency petition alleging accessory to murder in *In re I.M.* (2005) 125 Cal.App.4th 1195, citing *Duty* for the proposition that a person can aid a principal "by making false or misleading statements to the authorities, and such conduct will support a conviction of accessory after the fact." (*Id.* at p. 1203.) The evidence supported a finding that the defendant "was attempting to protect" the principal by misrepresenting to police that the shooting only began after the victim had thrown down a beer bottle and reached toward his waistband. (*Ibid.*)

In *People v. Nguyen* (1993) 21 Cal.App.4th 518, the Third Appellate District reversed the convictions of three men as accessories to a sexual assault. Although they were all present during the assault, their knowledge of the crime would not make them accessories unless they "thereafter [did]

something to help the perpetrator get away with his crime. (*Id.* at p. 538.) Two defendants who "refused to talk to the police" could not be guilty for asserting their constitutional right to remain silent and, while the third waived his rights and downplayed his 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.) *Plengsangtip* specifically distinguished the facts in that case from *Nguyen*, explaining that the defendant who spoke to police had not denied that the crime occurred, and his conviction was reversed due to "the lack of any evidence that [he] did or said anything to help his cohorts escape or avoid prosecution for the sexual assault." (*Plengsangtip, supra*, 148 Cal.App.4th at p. 839, fn. 5.)

In upholding Partee's conviction on four felony counts of accessory to murder, the Second Appellate District contended California Court of Appeal cases had affirmed accessory convictions under "similar circumstances" (*Partee, supra*, 21 Cal.App.5th at p. 636), citing *Duty, Plengsangtip, I.M.,* and *Nguyen*. (*Id.* at pp. 636-637, 638, 639-640.) As the above discussion demonstrates, and as Justice Baker observed, "[t]he opinion is wrong on this point – there is nothing similar about the present circumstances and those in the cases the majority cites." (*Id.* at p. 650 (Baker, J, concurring and dissenting).)

B. Fundamental Rules of Statutory Construction Reinforce Decisions Requiring an Accessory to Provide Overt Assistance to a Principal in the Form of Affirmative Misrepresentations to Authorities

To the extent there is any ambiguity in the word "aids" as used in section 32, standard canons of statutory construction further undermine the Second Appellate District's decision. Two of these rules come into play because "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." (*Partee, supra*, 21 Cal.App.5th at p. 648 (Baker, J., concurring and dissenting).)

The first canon, *noscitur a sociis,* implies that a word "'is known by its associates,'" meaning that a statutory term "is best interpreted in light of its semantic relationship" to other terms used in the same statute. (*Prunty, supra*, 62 Cal.4th at p. 73.) Although the term "group" in the STEP Act could conceivably encompass broad collections of people, *Prunty* interpreted it more narrowly because the statute also used the more circumscribed terms "association" and "organization," which "convey the kind of shared venture that is the subject of the statute." (*Ibid.*) "[W]e must stop short of construing ["group"] so expansively that we render the other terms 'unnecessary or redundant ... or ... markedly dissimilar to the other items in the list.' [Citation.]" (*Ibid.*)

Similarly, the principle of *ejusdem generis* "'applies whether specific words follow general words in a statute or vice versa.' [Citation.]" (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342.) Regardless of the order, courts restrict the general term to a meaning similar to the specific terms, again under the presumption that if the enacting body intended the to use the general term in its broadest sense it would not have provided specific examples, which would be superfluous. (*Ibid.*) Courts must construe statutory language "'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another....' [Citation]." (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 51.)

Under both *noscitur a sociis* and *ejusdem generis*, the word "aids" should be construed in a way that is similar to the active verbs "harbors" and "conceals" that immediately precede it in section 32, even if standing alone "aids" could conceivably encompass inaction. Although neither *Nuckles* nor *Duty* specifically addressed these rules of statutory interpretation, the similar treatment of all three terms in section 32 as requiring "overt or affirmative assistance" is certainly consistent with the rules. (*Nuckles, supra,* 56 Cal.4th at p. 610, quoting *Duty, supra*, 269 Cal.App.2d at p. 104.) The State has not argued, and the Second Appellate

District did not find, that Partee did anything that could be considered harboring or concealing anyone when she refused to testify. (*Partee, supra*, 21 Cal.App.5th at pp. 639-642, and pp. 647-648 (Baker, J., concurring and dissenting).)

Elliott, supra, 14 Cal.App.4th 1633, applied yet another fundamental rule of statutory construction in interpreting the use of "aids" in section 32 by considering how courts had construed "aid" in section 31. Interrelated statutory provisions should be harmonized because "the same word or phrase should be given the same meaning within the interrelated provisions of the law." (*Id.* at p. 1641, fn. 7.)[4] "The word 'aids' means 'to *assist*; to *supplement* the efforts of another.'... This understanding that being an accessory requires something more than mere encouragement or incitement is reflected in the analysis in [*Duty, supra*, 269 Cal.App.2d at p. 104]." (*Id.* at p. 1641 (emphasis in *Elliott*).) The Fourth Appellate District then quoted the same passage from *Duty* requiring "overt or affirmative assistance to a known felon" that this Court quoted with approval in *Nuckles, supra*, 56 Cal.4th at p. 610. (*Elliott, supra*, 14 Cal.App.4th at pp. 1641-1642)

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[4] As discussed above, this rule is particularly appropriate in the context of sections 31 and 32, which address different aspects of what the common law considered the crime of accessory, with section 31 now using "aid and abet" to characterize as principals those who used to be considered accessories before the fact. (*Mitten, supra*, 37 Cal.App.3d at p. 883; Code Commissioners' Notes for §§ 31 and 32.)

There is simply no support in California jurisprudence for the Second Appellate District's expansive interpretation of the term "aids" in this case. After considering the usual and ordinary meaning of the word, and applying standard rules of statutory construction, this Court should reverse Partee's four accessory convictions.

C. The Common Law of Accessories, and Statutory Definitions of the Crime, Require Evidence of Overt Aid in the Form of Affirmative Misrepresentations to Authorities, Not Merely Passive Refusal to Provide Information

The Second Appellate District's decision in this case "places California on the extreme edge of other jurisdictions – indeed, in a group unto itself – concerning the reach of accessory after the fact punishment." (*Partee, supra*, 21 Cal.App.5th at p. 651 (Baker, J., concurring and dissenting).) 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, neither the Attorney General nor the Second Appellate District could cite a single decision from any other jurisdiction affirming an accessory conviction based solely on the refusal to provide information to authorities. (Respondent's Brief ("RB") 18-22; see *Partee, supra*, 21 Cal.App.5th at pp. 642-643, 651-652 (Baker, J., concurring and dissenting.)

Further review of decisions from other jurisdictions shows just how

far outside the mainstream the decision below falls. Under the English common law, an accessory after the fact was a person who, "knowing a felony to have been committed, receives, relieves, comforts or assists the felon." (4 Blackstone's Commentaries (1916) 38.) Although Blackstone suggested that "any assistance" to hinder the apprehension, trial or punishment of a felon would suffice, the examples given of the type of assistance that would "make[] the assister an accessory" all involved over acts: "furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him." (*Ibid.*)

American law has required similar overt acts of assistance, "'as, for instance, that [the assister] concealed [the felon] in his house, or shut the door against his pursuers, until he should have an opportunity of escaping, or took money from him to allow him to escape, or supplied him with money, a horse, or other necessaries, in order to enable him to escape,...'" (*State v. Clifford* (1972) 263 Or. 436, 502 P.2d 1371, 1373, quoting Wharton, American Criminal Law (6th ed. 1868), pp. 109-110.)

One prominent legal scholar criticized Blackstone's loose reference to "any assistance," noting that "the mere failure to report the felony or to arrest the felon will not suffice," and listing the various forms of assistance held sufficient in American caselaw, including harboring and concealing

the felon, helping the felon escape, tampering with evidence or witnesses, giving false testimony "and giving false information to the police in order to divert suspicion away from the felon." (2 LaFave, Substantive Criminal Law (3d ed. 2017) § 13.6(a), pp. 547-548.)[5] As the Oregon Supreme Court summarized the law in both countries:

> The examples describing criminal conduct uniformly consist of an affirmative act from which the intention to aid an offender to escape arrest, conviction, or punishment is obvious. None of the examples indicate that a mere denial of knowledge of the whereabouts of an offender at some time in the past would amount to accessorial conduct....
> Affirmative acts or statements which were clearly intended to aid or conceal are held sufficient to support conviction as an accessory.

(*Clifford, supra*, 502 P.2d at p. 1374.)

In 1969, *Duty* reviewed various decisions from other states in considering whether an affirmative misstatement to authorities violated section 32. (*Duty, supra*, 269 Cal.App.2d at pp.103-104.) In stating that "[a]ny kind of overt or affirmative assistance to a known felon" fell within section 32, *Duty* relied on cases involving active falsehoods. (*Id. at* p. 104, fn. 7.) *State v. Potter* (1942) 221 N.C. 153, 155-156, 19 S.E. 2d 257, for example, involved a defendant who helped his employee leave the scene of

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[5] The only cases cited in support of the last category were *Duty, supra,* 269 Cal.App.2d 97, and *Commonwealth v. Wood* (1938) 302 Mass. 265, 19 N.E.2d 320, which involved a defendant who aided the principal by providing false statements to investigating officers "to mislead them in their investigation for the purpose of assisting" her. (*Id.* at p. 271.)

an assault with a deadly weapon and then repeatedly lied about it to authorities, while the defendant in *Blakely v. State* (1888) 24 Tex.Ct.App. 616, 623-625, 7 S.W. 233, instructed witnesses to a murder to lie about it before a coroner's jury.[6]

Like California, other states now typically deal with the accessory offense by statute, though most characterize the crime as hindering apprehension or prosecution rather than as accessory after the fact. (2 LaFave, *supra*, at p. 552.) The kinds of assistance specifically proscribed by statute are limited to overt acts that are quite similar to the examples taken from the common law, including harboring or concealing the principal, providing a means of avoiding apprehension, tampering with evidence, warning the principal of impending discovery, and using force or deception to prevent discovery or apprehension. (*Id.* at pp. 555-556.) "To this list, a few jurisdictions have added the giving of false information in certain circumstances," including Arkansas, Iowa, Nebraska, New Jersey, North

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[6] See also *Tipton v. State* (1934) 126 Tex.Cr.R. 439, 72 S.W.2d 290, 293, distinguishing between false denials, which did not make one an accessory, and false, affirmative statements which could.

Petitioner's counsel has been unable to find the exact edition of Bishop's Criminal Law quoted by *Duty* as stating "the kind of help being unimportant." (*Duty, supra*, 269 Cal.App.2d at p. 104, quoting 1 Bishop's Criminal Law, 500, § 695.) The Seventh Edition of 1882 contained the same statement, and then quoted the passage from Blackstone about providing a horse, money or victuals. (1 Bishop's Commentaries, (7th ed. 1882) 417-418, § 695.)

Dakota and Pennsylvania. (*Id.* at pp. 556-557, fn. 66.)

Modern accessory statutes specify the types of assistance that can constitute the crime in order to avoid potentially expansive interpretations of "aids" or "help," which conceivably could include the refusal to answer police questions or even the provision of bail. (See *State v. Durgin* (2008) 155 N.H. 164, 959 A.2d 196, 197-200.) The Model Penal Code, for example, specifies that an accessory is one who "harbors or conceals" another, requiring proof of actions to hide, secrete, lodge or care for another, or one who "volunteers false information to a law enforcement officer." (*Id.* at p. 198, discussing Model Penal Code § 242.3.) The New Hampshire Supreme Court determined that a person who lied to authorities about the presence of a fugitive did not violate a New Hampshire statute based on Model Penal Code section 242.3, because lying in response to inquiries initiated by authorities did not make a person an accessory. (*Id.* at pp. 197-200.)

The Washington Supreme Court recently reviewed current law in several states, including California, in determining that repeated false disavowals of knowledge of a shooter's identity did not violate its statute governing criminal assistance, reasoning that an affirmative false act or statement was necessary to constitute the requisite deception. (*State v. Budik* (2012) 173 Wash.2d 727, 272 P.3d 816, 819-822

An Oregon intermediate court decision appears to be the only

authority that could be considered consistent with the decision below. Interpreting a modern "hindering" statute, the Court held that a woman either "harbored" or "concealed" her husband when she did not respond to officers knocking on the door of her trailer, where he lived and was hiding. (*State v. Turley* (2005) 202 Or. App. 40, 120 P.3d 1229, 1234.) Ironically, the Oregon Supreme Court had previously held that a defendant's false denials that he had recently seen a fugitive did not constitute being an accessory under Oregon's prior statute, which used the older "conceal or aid" terminology. (*Clifford, supra*, 502 P.2d at pp. 1372-1375.)[7]

Federal law provides that anyone who, with knowledge that a federal offense has been committed, "receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or

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[7] On September 13, 2018, the Oregon Supreme Court heard oral argument in *State v. Carpenter* (S065374, review allowed March 1, 2018) reviewing a lower court decision that relied in part on *Turley* but held, consistently with *Duty, supra*, 269 Cal.App.2d 97, that a defendant who falsely denied knowing or recently seeing a fugitive could be found guilty of hindering under Oregon law. (*State v. Carpenter* (2017) 287 Or.App.720, 404 P.2d 1135, 1137-1140.)

punishment is an accessory after the fact." (18 U.S.C. § 3.)[8] Providing indirect financial assistance to a fugitive can support a conviction under the statute even if there is no provision of physical assistance such as food or shelter (*United States v. Kessi* (9th Cir. 1989) 868 F.2d 1097, 1105), though lying to protect a suspect "is not itself a violation of § 3." (*United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1354.) The defendant in *Prescott* had lied to investigators about the presence of a suspect in her apartment, which would not support a conviction, but the Ninth Circuit refused to dismiss the accessory charge because she had also received the suspect in her apartment and kept him there while he tampered with the evidence, so

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[8] The Second Appellate District cited caselaw regarding the appropriate punishment for federal contempt, because the sentencing guidelines did not provide a mandatory range for contempt due to the wide range of conduct that could violate the statute, and instead advised courts to consider the most analogous criminal conduct. (*Partee, supra*, 21 Cal.App.5th at pp. 637-638 and 637,, fn 4-5.) *United States v. Brady* (1st Cir. 1999) 168 F.3d 574, found that the sentencing court had reasonably decided to use obstruction of justice/accessory after the fact as the most similar offense analogies for the defendant's refusal to testify, but explained that the lower court had found that the defendant "was involved in the plot and that his refusal to testify was 'part and parcel' of that involvement." (*Id.* at pp. 579-580.) In considering whether the defendant had "corruptly" obstructed justice, the First Circuit observed this was a "very tricky question" if his only motive was not to "rat," and that "a parent's refusal to testify against a child could easily be a punishable contempt (absent a privilege) but would be less easily described as 'corruptly' motivated." (*Id.* at p. 580.) Neither *Brady* nor the other case cited, *United States v. Ortiz* (7th Cir. 1996) 84 F.3d 977, involved an actual prosecution of anyone as an accessory after the fact under 18 U.S.C. § 3.

"[h]er lying would be evidence as to her intent in doing what she did." (*Ibid.*) Lying to investigators is also insufficient to support a conviction for harboring or concealing a person subject to an arrest warrant under 18 U.S.C. § 1071, because "such a false statement, standing alone ... could not constitute the active conduct of hiding or secreting contemplated by the statute." (*United States v. Magness* (9th Cir. 1972) 456 F.2d 976, 978.)

Unlike most jurisdictions (2 LaFave, *supra*, § 13.6(b), pp. 558-559), federal law continues to punish the failure to report or prosecute a known felon as misprision of felony, though the statute, 18 U.S.C. § 4, "is not a true misprision statute in that it requires an act of concealment in addition to failure to disclose." (*Id.* at p. 559.) It has been suggested that misprision of felony never "had a meaningful existence beyond textbook writers" (*ibid.*), no doubt because, as Chief Justice Marshall succinctly explained nearly 200 years ago, "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." (*Marbury v. Brooks* (1822) 20 U.S. 556, 575-576.)[9]

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[9] Following the national trend, California recognizes only the crime of "misprision of treason" against the State (§ 38), not misprision of non-treasonous felonies.

D. This Court Should Follow *Duty*, Reaffirm Previously Consistent California Caselaw, and Bring the State Back Into the Mainstream of American Law

The decision of the Second Appellate District is contrary to what had previously been consistent California authority beginning with *Garnett,* continuing through *Duty, Nguyen, Elliott, I.M.,* and *Plengsangtip,* and ending with *Nuckles.* The decision is also contrary to fundamental rules of statutory construction and the overwhelming weight of authority throughout the country. With the exception of an outlying Oregon intermediate court decision that may not even be good law by the time the Court decides this case, there is no apparent authority in state or federal jurisprudence that even arguably supports the result below.

This Court should reverse Starletta Partee's four felony convictions.

II. Conviction on Four Counts of Accessory to Murder Violated Partee's Constitutional Rights

A. The State's Failure to Prove Each Element of the Crime of Accessory Beyond A Reasonable Doubt Violated Partee's Right to Due Process and to Trial by Jury

The prosecution in this case was based entirely on Partee's silence at the preliminary hearing on June 11, 2015 (CT 49-51, 212; 2-RT 648-6495-RT 1809), not on anything she had said or done almost 9 years earlier on the day of the shooting, August 30, 2006. The prosecution failed to

produce sufficient evidence to support a conviction on any of the first four counts accusing Partee of being an accessory to murder, because her refusal to testify on June 11, 2015, did not constitute the crime of accessory as interpreted by any California court, or by any other American court, as discussed at length in section I.

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; *In re Winship* (1970) 397 U.S. 358, 363.) 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.)

Nguyen, supra, 21 Cal.App.4th 518, reversed the accessory convictions of three men who were present at a sexual assault, due to the lack of any substantial evidence supporting the convictions. (*Id.* at pp. 538-539.) Two of the defendants "refused to talk to the police. Obviously, the exercise of the constitutional right to remain silent cannot be the basis for conviction as an accessory." (*Id.* at p. 539.) The third defendant waived his rights, admitted being present and downplayed his own role, but the Court explained that "[w]hile in some circumstances supplying an affirmative and deliberate falsehood to public authorities, such as providing a false alibi, is sufficient to make the relator an accessory (*People v. Duty, supra*, 269 Cal.App.2d at p. 104), nothing in [defendant's] statement went so far." (*Ibid.*)

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. While there was sufficient evidence to convict her of contempt, as discussed in Section III, *infra,* this Court should determine that under clear

California and American law there can be no accessory conviction based on a witness's refusal to provide information to authorities, or to testify. (*Nguyen, supra*, 21 Cal.App.4th at pp. 538=539.)

B. Unprecedented Interpretation of Section 32 Renders the Statute Unconstitutional as a Violation of Due Process

"Close cases can be imagined under virtually any statute" (*United States v. Williams* (2008) 553 U.S. 285, 306), and the constitutional requirement of proof beyond a reasonable doubt on every element of a crime, as discussed in the previous subsection, ensures that one aspect of a defendant's right to due process will be protected even in a close case. (*Ibid.*) But a conviction can also violate another due process right "if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited,..." (*Id.* at p. 304.) Vague laws violate due process because they prevent people from exercising their freedom to choose between lawful and unlawful behavior, and "may trap the innocent by not providing fair warning." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)

Such laws raise additional due process by failing to prevent arbitrary and discriminatory enforcement, because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." (*Grayned, supra*, 408 U.S. at pp. 108-109.) The statutes violate not only the federal constitution's guarantee of due process, but also Article I, section 7 of the California Constitution. (*People v. Heitzman* (1994) 9 Cal.4th 189, 197-215.)

Until the unprecedented decision in this case, section 32 did not raise any real due process concerns. Under *Garnett, Duty, Nguyen, Elliott, I.M., Plengsangtip,* and *Nuckles*, California citizens reasonably understood that they could not be convicted as an accessory unless they engaged in overt, affirmative actions with the requisite knowledge and intent. (*Nuckles, supra*, 56 Cal.4th 601 at pp. 610-612; *Garnett, supra*, 129 Cal. at p. 366.) They further understood that refusing to provide information could not lead to their conviction under the statute, but that affirmative misrepresentations to authorities could result in an accessory conviction. (*Plengsangtip, supra*, 148 Cal.App.4th at pp. 837-839; *I.M., supra*, 125 Cal.App.4th at pp. 1203-1204; *Elliott, supra*, 14 Cal.App.4th at pp. 1641-1642; *Nguyen, supra*, 21 Cal.App.4th at pp. 538-539; and *Duty, supra*, 269 Cal.App.2d at pp. 103-104.)

A person who, like Starletta Partee, was under an obligation to testify in a particular proceeding had fair notice of a possible contempt charge for failing to testify, but would have no idea that her refusal to testify transformed her into an accessory for murder, because that had never

before happened in California. The deputy district attorney who filed four felony charges against Partee admitted that he was unaware of any similar prosecution, not only in California, but anywhere in the country. (CT 49-51; 2-RT A7-A8.)

The Second Appellate District's decision impermissibly delegates to low level prosecutors the basic policy determination of what the appropriate potential punishment for recalcitrant witnesses should be, without any controls on their subjective, *ad hoc* decisions. (*Grayned, supra*, 408 U.S. at pp. 108-109.)

By reversing Partee's four felony convictions, this Court would appropriately limit prosecutors and courts to the punishment available under current California law.

III. Under the Separation of Powers Doctrine, Only the Legislature Can Determine that California's Contempt Statutes Do Not Give Courts Sufficient Power to Coerce Testimony from Reluctant Witnesses, or to Punish Any Refusal to Testify

A. Coercive Measures Employed Against Partee

On April 29, 2015, the prosecution utilized the provisions of section 1332 to put Partee in custody as a material witness. (3-RT 967-968.) In contrast to section 881, which places a 10 day limit on the length of time a material witness at a preliminary hearing can be incarcerated (§ 881, subd.

(d)), there is no statutory time limit on the commitment of a material witness under section 1332. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 2075, fn. 10.) The State kept Partee in custody for more than a month, until the June 11, 2015 preliminary hearing. 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, 970-072, 1004.)

After the case against Robinson and the others was dismissed (3-RT 970-972; 1004), the prosecution charged Partee with contempt under section 166, subdivision (a)(6). In a Complaint filed on August 26, 2015, nearly four months after Partee first went into custody, the prosecution alleged that she had violated section 166, subdivision (a)(6), which is normally a misdemeanor, and added gang enhancements to transform the offense into a felony punishable by up to three years in state prison. (CT 3-4; see § 18, subd. (a).) The State also charged Partee with four additional felonies as an accessory to murder, each with gang enhancements, subjecting her to a total sentence of at least 12 years. (CT 45-46, 49-51; *Partee, supra*, 21 Cal.App.5th at p. 636, fn. 3.)

By the time the prosecution filed criminal charges against Partee on August 26, 2015, she had already been in custody for nearly four months, 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.)

B. Contempt Statutes Provide Sufficient Power to Coerce and Punish

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 v. United States* (1972) 406 U.S. 441, 443-444; *Francisco M., supra*, 86 Cal.App.4th at pp. 1070-1072.) The power to compel testimony is not absolute and must yield to the Fifth Amendment's privilege against self-incrimination, but 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." (*Id.* at pp. 446-447.)

In California, section 1332 allows the court to "detain a material witness when it finds good cause to believe that the witness will not attend the trial and testify." (*Francisco M., supra*, 86 Cal.App.4th at p. 1064.) While "the statute does not confer unfettered discretion to incarcerate a material witness" (*id.* at pp. 1064-1065), the limitation is based on Article I, section 10 of the California Constitution, which states that "'[w]itnesses may not be unreasonably detained.' [Citation.]" (*Id.* at p. 1065; see also pp. 1075-1077.)

Upon a finding of contempt for refusing to perform an act within a person's power to perform, "he or she may be imprisoned until he or she

has performed it" under Code of Civil Procedure section 1219. While a court could theoretically keep someone in custody for life under that statute (*In re Liu* (1969) 273 Cal.App.2d 135, 140, 142, 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.) Courts may also punish contempt under Code of Civil Procedure section 1218 by sentencing a person for up to 5 days in jail, or by requesting a misdemeanor charge under section 166. (*In re Keller* (1975) 49 Cal.App.3d 663, 670.)

McKinney determined that, given the ability to hold witnesses during the duration of judicial proceedings under Code of Civil Procedure section 1219, summarily imprison them for 5 days under Code of Civil Procedure section 1218, and have them prosecuted under section 166, "it is clear that the court has sufficient power to maintain its dignity." (*McKinney, supra*, 70 Cal.2d at p. 12.) While courts must vindicate their authority and maintain their dignity, the Legislature retains the ability to curtail the contempt power of the courts, which "should not have unbridled power to summarily commit a citizen to prison for a term of years, however long,' [Citation]" (*Ibid;* see also *In re M.R.* (2013) 220 Cal.App.4th 49, 60 ("the

court's inherent power to punish contempt is tempered by reasonable procedural safeguards enacted by the Legislature"), and *People v. Earley* (2004) 122 Cal.App.4th 542, 550 ("long-suffering trial court" could not summarily find defendant guilty on 5 counts of violating section 166 during trial and impose 5 consecutive 6-month sentences).)

The Second Appellate District specifically disagreed with this Court's determination in *McKinney*, arguing that "the inability to prosecute accused murderers ... renders the contempt penalty inadequate ...." (*Partee, supra*, 21 Cal.App.5th at p. 638.) Whatever the merits of the Court's opinion on this issue, only the Legislature has the authority to increase the punishment for contempt, as discussed in the next section. Contrary to the Second Appellate District's claim, prior California decisions have not recognized that "conduct of this nature ... is punishable under the accessory law," regardless of the defendant's intent. (*Ibid.*) The decision below is simply not consistent with *Plengsangtim, supra*, 148 Cal.App.4th at pp. 835-839, *I.M., supra*, 125 Cal.App.4th at pp. 1203-1206, or *Duty, supra*, 269 Cal.App.2d at pp. 100-105, and instead "displace[s] the Legislature's power to prescribe punishment for crimes." (*Partee, supra*, 21 Cal.App.5th at p. 638.)

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

Under the California Constitution, "power is divided among three coequal branches, ... and ... those charged with the exercise of one power may not exercise any other." (*People v. Bunn* (2002) 27 Cal.4th 1, 14.) While "the tripartite system of government assumes a certain degree of mutual oversight and influence ... the Constitution does vest each branch with certain 'core' ... or 'essential' ... functions that may not be usurped by another branch." (*Ibid.*) Article III, section 3 of the California Constitution establishes the tripartite system, and its "'mandate is to 'protect any one branch against the overreaching of any other branch.' [Citation.]" (*In re Rosenkrantz* (2002) 39 Cal.4th 616, 662.) 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.]" (*In re Lynch* (1972) 8 Cal3d 410, 414.)

In arguing that the decision below was justified in part because existing contempt remedies are inadequate (*Partee, supra*, 21 Cal.App.5th at p. 638), the Second Appellate District engaged in classic judicial overreach, attempting to usurp the core "function of the legislative branch

to define crimes and prescribe punishments." (*Lynch, supra*, 8 Cal.3d at p. 414.) If prosecutors and courts believe the 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" particular defendants. (*Keller, supra*, 49 Cal.App.3d at p. 671.)

It is up to the Legislature in the first instance, for example, to determine whether it would be appropriate to punish defendants more harshly if their contemptuous conduct interfered with a murder prosecution (*Partee, supra*, 21 Cal.App.5th at p. 638), or whether the defendants' familial relationship with the accused should affect their punishment. (See *Brady, supra*, 168 F.3d at p. 580; 2 LaFave, *supra*, at p. 557.) But concern about the adequacy of contempt remedies does not justify reversing decades of consistent California precedents construing the offense of being an accessory under section 32, or ignoring the overwhelming nationwide jurisprudence rejecting attempts to impose accessory liability on people who have chosen silence. People like Starletta Partee should not be forced to face lengthy prison sentences or commit perjury to avoid testifying against their own family members.

This Court should hold 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 over a decade as accessories to the crimes being prosecuted.

CONCLUSION

For all the above reasons, appellant Starletta Partee asks this Court to reverse her four felony convictions under section 32.

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by: 

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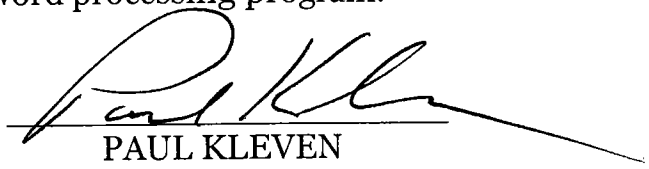
CERTIFICATE OF COUNSEL

I certify that this Opening Brief on the Merits contains 10,650 words, as calculated by my WordPerfect X5 word processing program.



PAUL KLEVEN

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:

OPENING BRIEF ON THE MERITS

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

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[✔] (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 October 22, 2018, following ordinary business practices.

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 October 22, 2018 at Berkeley, California.

Kathy Yam
KATHY YAM