In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STARLETTA PARTEE,

Defendant and Appellant.

Case No. S248520

Second Appellate District Division Five, Case No. B276040
Los Angeles County Superior Court, Case No. TA138027
The Honorable Allen Joseph Webster, Jr., Judge

ANSWERING BRIEF ON THE MERITS

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ISSUE PRESENTED

Was defendant properly convicted as an accessory after the fact for refusing to testify at trial after being subpoenaed as a witness and granted immunity for her testimony?

INTRODUCTION

It is undisputed that appellant helped her brother, cousin, and friends elude prosecution and punishment for the crime of murder. Because appellant refused to testify, the case against these men was dismissed not once, but twice. Appellant testified that she knew the murder case against the men was dismissed in 2008, and she knew at the time of the 2015 preliminary hearing that the case would be dismissed again if she did not testify. With this knowledge, she refused to testify, in the face of a legal obligation to do so, because she did not want her relatives and friends to go to prison. Appellant was successful, and these men were never prosecuted for the murder of Anthony Owens.

Under these circumstances, appellant was properly convicted of four counts of accessory after the fact under Penal Code section 32 because she aided those who had completed a felony with the intent that they evade prosecution.[1] Contrary to her repeated assertions, appellant's section 32 conviction did not rest on mere "passive nondisclosure" or the simple refusal to provide information to authorities that would fall short of "aiding" under the statute. (OBM at 1-3, 20-26, 36-38.) Rather, after having already provided the police with crucial inculpatory evidence and been granted immunity, appellant affirmatively violated her legal duty to testify for the admitted purpose of helping her relatives and friends avoid

[1] Unless otherwise stated, all statutory references are to the California Penal Code.

murder convictions. It is well established that a failure to act is not merely passive, but can support criminal liability, when it amounts to the violation of a legal duty. The legal duty to testify upon the granting of immunity is longstanding and central to the administration of justice.

Once appellant's actionable conduct is viewed in its proper light, it becomes clear that her conduct fell within the plain meaning of section 32, consistent with the most reasonable appraisal of legislative intent. When the Legislature amended section 32 in 1935, it expanded the statute's scope beyond harboring and concealing by including the additional aspect of aiding a principal. As this Court has made clear, these three kinds of conduct are not to be read narrowly: "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." (*People v. Nuckles* (2013) 56 Cal.4th 601, 610, quotation marks, alterations, and citation omitted.) As the court below correctly observed, appellant "did much more than simply commit contempt by refusing to testify." (*People v. Partee* (2018) 21 Cal.App.5th 630, 638.) Appellant's violation of a court order with the intent of assisting known felons avoid prosecution and punishment was certainly "overt," if not wholly "affirmative," assistance.

Nor was appellant deprived of her constitutional right to fair notice. The statutory language is sufficiently clear: A reasonable person would understand that by refusing to testify in violation of a court order, and with the specific intent of assisting a known felon escape conviction or punishment, he or she provides "some personal help to elude punishment," which is the "gist of the offense." (*People v. Nuckles*, *supra*, 56 Cal.4th at p 610, citations and internal quotation marks omitted). The absence of specific precedent on this issue does not establish that this commonsense interpretation was so novel as to be unpredictable, but rather reflects the

extremely rare set of facts this Court now addresses. Many witnesses to crimes, particularly in gang cases, refuse to testify or feign ignorance based on fears of retribution. Such witnesses are not subject to prosecution as accessories because their actions are not intended to help the principals evade arrest, prosecution, trial or punishment. Here, however, appellant admitted that she refused to testify because she did not want her relatives and friends to go to prison. Under these very limited facts, the accessory statute clearly governs, and appellant's prosecution did not rest on an unforeseeably novel interpretation of the accessory statute.

Appellant's convictions also did not violate separation of powers principles. Despite some overlap, section 32's specific intent element serves to target different, more culpable conduct from that proscribed by the contempt statute. The latter is designed to vindicate the court's authority to compel testimony and applies to all unjustified refusals, regardless of motivation or intent. In contrast, section 32 liability reasonably extends to the narrow circumstance in which the refusal is committed with the same specific intent as those who harbor and conceal known felons. That is, section 32's specific intent requirement reasonably narrows the statute so that application of its aiding aspect targets conduct analogous to that covered by the harboring and concealing aspects.

STATEMENT OF THE CASE AND FACTS

I. THE 2006 MURDER OF ANTHONY OWENS AND APPELLANT'S STATEMENT TO POLICE ABOUT THE MURDER

On August 30, 2006, Anthony Owens bought marijuana in the Imperial Courts Housing Development and was then shot and killed. (2RT 728-735.) A van matching the description of a vehicle seen fleeing the crime scene was registered to Enterprise Rent-A-Car. (2RT 746-748.) It had been rented by appellant, who had reported it stolen. (3RT 930.) The

company instructed appellant to file a police report at the Hawthorne Police Department. (3RT 931.) When appellant arrived at the police station, she was met by Detective John Skaggs and interviewed. (3RT 931, 982.)

Appellant told Detective Skaggs that she had rented the van because her own car was being serviced. (Supp. CT 10.) Appellant's brother, Nehemiah Robinson, borrowed the van the night before the murder. (Supp. CT 29.) The next day, appellant received a telephone call from either Byron Clark or his brother, Bryant. (Supp. CT 12-13, 47, 50.) Clark sounded excited and told her she should report the van stolen. When she asked why, he said he would tell her later. (Supp. CT 48, 50.) He said, "Just do it for me," and asked, "Can you pick me up?" (Supp. CT 48.) Appellant asked what was happening, and Clark again said he would tell her later. (Supp. CT 48.)

Appellant related to Detective Skaggs that, after the phone conversation, she met her brother, the Clarks, and appellant's cousin, Toryion Green, near a car dealership. (Supp. CT 48, 50, 52-53.) One of them asked whether appellant had reported the car stolen. (Supp. CT 55.) She told them she had not. (Supp. CT 55-56.) Green said they had gone to the "projects" to pick up a girl, but she did not show up. (Supp. CT 56-57.) While they were waiting they heard a "pop shot." (Supp. CT 56-57.) Someone tried to block them in and they had to shoot their way out. (Supp. CT 56-57.) All four men were very excited. (Supp. CT 59.) They started talking in code. (Supp. CT 60.) Appellant thought they "didn't want to say too much" because her six-year-old daughter was also in the car. (Supp. CT 59-60.) Appellant asked if anyone was dead, and the men said they thought so. (Supp. CT 61.) They did not say who had shot during the incident. (Supp. CT 61.) Robinson told appellant that they left the van at the "Grape Street Projects" and were picked up by a "girl." (Supp. CT 62-63.) The men said the police would not find the guns. (Supp. CT 64.)

Appellant told Detective Skaggs that she did not want her brother, cousin, and friends to get in trouble, so she dropped them off on Hawthorne Boulevard. (Supp. CT 72-73.) She gave one of the Clark brothers $60, and then left. (Supp. CT 73.) She did not know where they were at the time of the interview. (Supp. CT 74.)

II. THE DISMISSED MURDER PROSECUTION AGAINST APPELLANT'S RELATIVES AND FRIENDS

The district attorney charged Robinson, Green, and the Clark brothers with murder, and the case went to trial in May 2008. (3RT 963.) Appellant was subpoenaed for the first day of trial but failed to appear, and a bench warrant was issued. (3RT 963.) Detective Skaggs tried to find appellant through surveillance and telephonic search warrants. (3RT 963.) He also obtained an out-of-state subpoena for her. (3RT 963-964.) Those attempts were ultimately unsuccessful, and the case was dismissed. (3RT 965.)

In April 2015, Detective Skaggs learned that appellant had returned to the area. (3RT 965-966.) After she was arrested on an outstanding traffic warrant, Detective Skaggs met with the prosecutor and charges were re-filed against Robinson, Green, and the Clark brothers. (3RT 966-967.) Detective Skaggs then secured a "forthwith subpoena," and brought appellant directly to the courthouse. (3RT 967.) Following a hearing, appellant was committed to custody as a material witness pursuant to section 1332. (3RT 967-968; see also 4RT 1548-1551.)

Appellant was called to testify at the preliminary hearing in the re-instituted murder case. (3RT 903.) The prosecutor told the court that he planned to grant appellant use immunity pursuant to section 1324. (3RT 903.) Appellant's attorney confirmed that he had received a copy of the immunity agreement and that he had explained it to appellant. (3RT 903-904.) He had told her that she was obligated to testify, that she no longer

had a Fifth Amendment privilege because she had been granted immunity, and that the court would likely hold her in contempt if she refused. (3RT 904.) Defense counsel advised the court that appellant nonetheless did not wish to testify and that she would refuse to be sworn in. (3RT 904.)

Appellant thereafter remained silent when the court attempted to swear her in, and she refused to answer the prosecutor's questions. (3RT 905-906, 908.) After further efforts to compel her testimony, appellant continued to remain silent. (3RT 909.) The court held her in contempt, telling her "You are going to be put in custody with no bail until such time as you change your mind." (3RT 909-910.)

Detective Skaggs testified regarding the statements appellant made during her police interview, which were admissible at the preliminary hearing pursuant to Proposition 115. (3RT 970.) The court bound the case over for trial, but the prosecution ultimately declined to proceed due to appellant's refusal to testify. (3RT 971-972.) There were no other witnesses who could tie Robinson, Green, and the Clark brothers to the murder. (3RT 1003.) There was no physical evidence connecting the men to the murder, and although their phone calls from jail were monitored, the men had made no incriminating statements. (3RT 1002-1003.) As a result, they never faced trial for the Owens murder. (3RT 1004.)

III. APPELLANT'S PROSECUTION AS AN ACCESSORY AFTER THE FACT

Following the dismissal of the murder case, the district attorney's office charged appellant with four counts of accessory after the fact and one count of contempt of court, with criminal street gang allegations as to all counts. (1CT 49-52.)

At her trial, the prosecution presented evidence about the Owens murder, appellant's police interview, and the abortive murder prosecution, as described above.

Appellant testified in her own defense about the events surrounding the murder consistently with what she had said during her police interview. (3RT 1304-1338; 4RT 1524, 1526.) She also testified that, in May 2008, Detective Skaggs attempted to serve her with a subpoena to testify. (3RT 1324-1325, 1327; 4RT 1546-1547.) Appellant would not take the subpoena, so Detective Skaggs threw it in her car. (3RT 1325.) Appellant threw it out, and Detective Skaggs told her to retrieve it or he would arrest her. (3RT 1325.) Appellant picked up the subpoena, but threw it out the window as she drove away. (3RT 1325.) Appellant did not appear in court on the date specified in the subpoena. (3RT 1327; 4RT 1547.)

Appellant refused to accept the prosecution's offer of immunity and relocation assistance because "it's impossible to escape your entire family to pick up and leave." (3RT 1337.) She did not want to relocate. (3RT 1337; 4RT 1551.) Her daughter had prom and graduation. (3RT 1337.) She did not want to miss family birthdays, and she helped care for her deceased brother's seven children. (3RT 1337-1338.) She also helped care for two of her boyfriend's children. (3RT 1338.) Appellant testified that she would rather go to prison knowing that her family was safe. (3RT 1337-1338.)

On cross-examination, appellant admitted that she did not want to testify against the four murder defendants. (4RT 1538.) She considered them all family. (4RT 1552-1553.) Appellant did not want them to go to prison as a result of her testimony. (4RT 1531.) She knew the case against the men was dismissed in 2008, and she knew that it would be dismissed again if she did not testify. (4RT 1531.)

A jury found appellant guilty on all counts, but found the gang allegations not true. (1CT 240-244.) The trial court imposed a suspended sentence and placed appellant on three years of formal probation. (1CT

277.) It ordered appellant to serve 365 days in county jail, with 220 days of custody credit. (1CT 277.)

IV. THE DECISION BELOW

The Court of Appeal affirmed appellant's convictions in a published opinion, rejecting appellant's claim that her refusal to testify was inadequate to support liability as an accessory after the fact. The court noted that "[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." (*People v. Partee*, *supra*, 21 Cal.App.5th at pp. 639-640.) Therefore, appellant'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." (*Id.* at p. 640.) Justice Baker dissented on this point, concluding that "[a] mere refusal to testify is not a proper basis for a Penal Code section 32 prosecution." (*Id.* at p. 646 (Baker, J., concurring and dissenting.) He would have held that the exclusive sanction for appellant's refusal to testify was criminal contempt. (*Id.* at p. 651.)

ARGUMENT

I. "AIDS" IN THE CONTEXT OF PENAL CODE SECTION 32 ENCOMPASSES THE VIOLATION OF AN ORDER TO TESTIFY WITH THE SPECIFIC INTENT TO ASSIST A PRINCIPAL EVADE CONVICTION OR PUNISHMENT

A. Introduction

Penal Code section 32 makes a person an accessory to a completed felony when that person "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" and with knowledge that the principal committed the felony or has been charged or convicted of it. Appellant contends that the word "aids," as used in this statute, applies only to overt

or affirmative acts of assistance to a principal, and that her refusal to testify amounted to mere silence or the passive refusal to provide information to authorities that would not satisfy the statutory requirement. Respondent, however, has never argued that mere silence or the refusal to provide information to authorities can support a conviction under section 32. And, in affirming appellant's convictions, the Court of Appeal expressly rejected the interpretation that mere silence after knowledge of a felony's commission is sufficient to render the party an accessory, holding that "[s]ome affirmative act is required . . . such as a false alibi made with the requisite knowledge and intent," or "a false statement to police that the perpetrator acted in self-defense or in the heat of passion." (*People v. Partee*, *supra*, 21 Cal.App.5th at p. 639.)

Respondent does not now contend otherwise. Rather, as the Court of Appeal correctly concluded, the refusal to testify when there is a legal duty to do so is not merely passive, but amounts to overt or affirmative conduct consistent with the statute's plain meaning and legislative intent. (*See id.* at p. 640 ["Under these circumstances, [appellant'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."].) Appellant's statutory construction arguments therefore do little more that refute a straw-man argument.[2]

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[2] Justice Baker's dissenting opinion below is grounded on the same erroneous premise: "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." (*People v. Partee*, *supra*, 21 Cal.App.5th at p. 648.)

The statute's plain meaning, as reinforced by legislative intent and this Court's interpretive glosses, contemplates that in limited circumstances the failure to testify, when joined with the requisite specific intent, supports liability as an accessory after the fact. Appellant's case falls squarely within these limited circumstances.

B. The Failure to Act in Violation of a Legal Duty Generally Supports Criminal Liability

Contrary to appellant's insistence, she did much more than simply fail to report a crime or provide information to authorities. It is undisputed that she refused to give immunized testimony, even though she had a legal duty to testify, and she did so with the intent to help her brother, cousin, and friends evade conviction and punishment. Appellant's plan succeeded, and these men were never brought to trial for the murder of Anthony Owens.

An individual who has a legal duty to act can be subject to criminal liability for failing to take action. The key to such liability is the existence of a legal duty. "Unlike the imposition of criminal penalties for certain positive acts, which is based on the statutory proscription of such conduct, 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." (*People v. Heitzman* (1994) 9 Cal.4th 189, 197.)

As the Court of Appeal correctly concluded, under California law and longstanding federal and California Supreme Court precedent, a witness like appellant "who has been subpoenaed and given immunity that is co-extensive with the scope of her Fifth Amendment privilege has a duty to testify." (*People v. Partee*, *supra*, 21 Cal.App.5th at pp. 639-640, citing § 1324; *Kastigar v. United States* (1972) 406 U.S. 441, 453, and *People v. Smith* (2003) 30 Cal.4th 581, 624.) "The duty to testify has long been recognized as a basic obligation that every citizen owes his Government." (*United States v. Calandra* (1974) 414 U.S. 338, 345.) "Witnesses under

subpoena and present in court have a duty to testify in accordance with the rules of evidence, a duty trial courts have the power to enforce." (*People v. Smith* (2003) 30 Cal.4th 581, 624.) "The duty to testify may on occasion be burdensome and even embarrassing. . . . Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure." (*United States v. Calandra*, *supra*, 414 U.S. at p. 345, citation omitted.)

Although appellant repeatedly mischaracterizes her actions as a mere failure to report a crime to authorities, which there is no legal to duty to do, it is undisputed that she was called to testify at the June 11, 2015, preliminary hearing, granted immunity, and ordered to be sworn in and answer questions. (3RT 903-904, 969.) Nonetheless, appellant remained silent when the court attempted to swear her in, and she refused to answer the prosecutor's questions. (3RT 905-906, 908.) Moreover, she engaged in this conduct—refusing to testify in the face of a legal duty—with knowledge of the murder and the intent to help her brother, cousin and friends evade conviction. Such conduct is a far cry from the much more common situation faced by prosecutors and courts when a witness refuses to testify or feigns ignorance based on fears of retribution.

C. The Failure to Testify in Violation of a Court Order, with the Intent to Help Another Evade Prosecution, Is Affirmative Conduct that Amounts to Aiding within the Meaning of Section 32

Reviewing courts independently determine issues of law, such as the interpretation and construction of statutory language. (*Bruns v. E-Commerce* (2011) 51 Cal.4th 717, 724.)

It is well settled that the objective of statutory construction is to ascertain and effectuate legislative intent. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) Because the statutory language is generally

the most reliable indicator of intent, a reviewing court looks first to the words of the statute, giving them their usual and ordinary meaning and construing them in in the context of the statutory scheme. (*People v. Johnson* (2015) 61 Cal.4th 674, 682; see also *Madrigal v. Victim Compensation and Government Claims Board* (2016) 6 Cal.App.5th 1108, 1113 ["[t]he words must be construed in context and in light of the statute's obvious nature and purpose," and "[t]he terms of the statute must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention."].) If the language of the statute is ambiguous and supports more than one reasonable interpretation, a reviewing court looks to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, the statutory scheme of which the statute is a part, and contemporaneous administrative construction, as well as questions of public policy. (*In re Derrick B.* (2006) 39 Cal.4th 535, 539.)

The language used in Penal Code section 32 is neither ambiguous nor subject to more than one interpretation. It defines an accessory as a person who "aids" a principal after the commission of a felony with the intent that the principal escape conviction:

> Every person who, after a felony has been committed, harbors, conceals or aids 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 word 'aids' has not been specifically defined by either statute or case authority in the context of section 32; however, that word has been defined by case authority in the context of section 31 (in the context of defining the phrase 'aiding and abetting') . . . ." (*People v. Elliot* (1993) 14 Cal.App.4th 1633, 1641.) "The word 'aids' means 'to *assist*; to *supplement*

the efforts of another,'. . ." (*Ibid.*) That reasonable and commonsense interpretation fully comports with the statute's obvious nature and purpose of punishing people who knowingly and intentionally help felons evade arrest, trial, conviction or punishment. Therefore, this Court should use the ordinary meaning of the word "aids"—to assist or to supplement the efforts of another—in determining the conduct the Legislature intended section 32 to encompass.

The legislative history of section 32, although limited, also supports an "ordinary meaning" interpretation of the word "aids," as opposed to the much narrower definition suggested by appellant. When the California Penal Code was enacted in 1872, section 32 defined accessories without including one who "aids": "All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories."

This section was amended to its current form in 1935. The amended section expanded the prohibited conduct from harboring and concealing to harboring, concealing, and *aiding* a principal, as it appears in the current version of the statute. In addition, it added the requirement that an accessory act with the intent that the principal "avoid or escape from arrest, trial, conviction or punishment." In making these changes, it is reasonable to infer that the Legislature intended to expand section 32 to include conduct beyond that of harboring and concealing, while at the same time limiting the application of section 32 to individuals with the requisite intent. Appellant identifies nothing in the (admittedly sparse) legislative history indicating an intent to apply a specialized definition of "aids" that would encompass the making of affirmative misrepresentations to authorities, while excluding overt refusals to testify in violation of a legal duty. Certainly, appellant fails to undercut the reasonable inference that the Legislature intended to expand the scope of liability beyond those who

harbor and conceal to those who provide aid in the word's ordinary sense—a sense that would reasonably encompass both types of conduct. Moreover, by adding a specific intent requirement applicable to all three categories of conduct, the Legislature provided reasonable limits on the circumstances in which aiding would support criminal liability for accessories.[3]

In her effort to limit the definition of "aids" in the context of section 32, appellant argues that this court should apply the principles of statutory construction known as *ejusdem generis* and *noscitur a socciis*. (AOB 23-25.) In essence, both of these principles state that "when a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*Moore v. California Bd. of Accountability* (1992) 2 Cal.4th 999, 1011-1012.) Under these canons, "a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." (*Id.* at p. 1012.) However, as this Court cautions, "[c]anons of construction—such as the *noscitur a sociis* canon underscoring the value of considering terms in a list in their statutory context—are not mechanical devices, but instead tools that can help us do what we always aspire to do when construing a statute: avoid redundancies, reach a reasonable conclusion about the meaning of terms, and give effect to the Legislature's purpose." (*People v. Garcia* (2016) 62 Cal.4th 1116, 1123-1124.)

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[3] This distinction tends to refute Justice Baker's argument in dissent below that application of section 32 to persons like appellant means that "accessory charges for recalcitrant witnesses are now fair game." (*People v. Partee*, *supra*, 21 Cal.App.5th at p. 652 (conc. opn. of Baker, J.)

Recourse to these two canons is unnecessary here because they apply only when needed to resolve some ambiguity in the statute: "'The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.'" (*United States v. Powell* (1975) 423 U.S. 87, 91, quoting *Gooch v. United States* (1936) 297 U.S. 124, 128; see *In re Corrine W.* (2009) 45 Cal.4th 522, 531 [noting the principle of *ejusdem generis* is merely "helpful" only when "no better indication of legislative intent is available"].) Appellant relies on these canons to establish that aiding was not meant to encompass mere silence or passive failure to provide information, but—like harboring and concealing—requires overt or affirmative assistance. (OBM at 23-26.) Again, neither respondent nor the Court of Appeal has interpreted "aids" in section 32 as encompassing wholly passive conduct. Thus, to the extent appellant relies on these interpretive canons to show that the Legislature intended that aiding did not extend to mere silence or the passive refusal to provide information to authorities, she is refuting an argument of her own creation.

At the other extreme, to the extent appellant argues that section 32 contemplates that aiding must be the functional equivalent of harboring or concealing (*see* OBM at 24-25), any reliance on these interpretive canons is misplaced. Such canons cannot be used "'to defeat the obvious purpose of legislation.'" (*United States v. Powell*, *supra*, 423 U.S. at p. 91, quoting *Gooch v. United States*, *supra*, 297 U.S. at p. 128.) By adding the term "aids" to the previously-included "harbors" and "conceals," the Legislature broadened the statute's scope beyond the latter kinds of conduct. In contrast, appellant argues that cases holding that an affirmative misrepresentation to authorities amounts to more than passive nondisclosure somehow implies a widely held understanding that violating a court order to testify with section 32's requisite intent does not. Such a

rigid application of interpretive canons would defeat the legislative purpose of section 32 by excluding conduct presumptively within the statute's plain meaning.

Courts have previously rejected similar arguments. The Court of Appeal in *People v. Lee* (1968) 260 Cal.App.2d 836 held that these principles could not be applied to undermine legislative intent. There, the defendant challenged his conviction for violating Health and Safety Code section 11556. That section stated: "It is unlawful to visit or to be in any room or place where any narcotics are being unlawfully smoked or used with knowledge that such activity is occurring." The defendant, who was arrested in a car, argued that a car was not a "place" within the meaning of the statute. He argued "that since the general word 'place' follows the more specific word 'room' in section 11556, then, under the rule of *ejusdem generis*, the general word (place) should be limited to spaces similar to the specific word (room)." (*Id.* at p. 840.) The court was not persuaded:

> It is apparent that said section 11556 was enacted as an aid in eliminating or controlling traffic in narcotics, and that the word "place," as used in the section, was intended to designate a location or space other than that which is ordinarily referred to as a room in a building or structure. If the word "place," as used therein, were to be interpreted, under the doctrine of *ejusdem generis*, as meaning a room in a building, it is apparent that such an interpretation would tend to defeat the legislative purpose of eliminating or controlling traffic in narcotics. Appellant's asserted interpretation of the word 'place,' as used in the section, is not sustainable.

(*Id.* at p. 841.)

In *People v. Kelly* (2007) 154 Cal.App.4th 961, the court addressed whether box cutters, flashlights, or slingshots qualified as burglary tools within the meaning of "other instrument or tool" in section 466. The court rejected the analysis in *People v. Gordon* (2001) 90 Cal.App.4th 1409,

which applied the principle of *ejusdem generis* to conclude that a ceramic spark plug chip did not fall within the meaning of "other instrument or tool" because it was not similar to the other tools specifically enumerated in the statute. (*Id.* at pp. 966-967.) The *Kelly* court reasoned as follows:

> Under *Gordon*'s interpretation, section 466 authorizes law enforcement to apprehend only burglars and would-be burglars who employ a limited set of means to achieve their nefarious ends, while malfeasants who use other means to break and enter are immunized from punishment even where the evidence establishes their intent to use the tool or instrument in their possession to commit burglary. We see nothing in the statute that indicates this is what the Legislature intended. To the contrary, we think the plain import of "other instrument or tool," and the only meaning that effectuates the obvious legislative purpose of section 466 includes tools that the evidence shows are possessed with the intent to be used for burglary.

(*Id.* at p. 967-968.)

Here, much like the defendants in *Lee* and *Kelly*, appellant attempts to limit the definition of "aids" in a way that would defeat the legislative purpose of section 32: to punish people who knowingly and intentionally help felons evade arrest, trial, conviction or punishment. It would be improper to apply the principles of statutory construction in that way.

Appellant also argues that the definition of "aids" should be limited to affirmative misrepresentations to authorities because that is the only way it has historically been applied in California. (OBM 20-22, citing *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, *In re I.M.* (2005) 125 Cal.App.4th 1195, *People v. Duty* (1969) 269 Cal.App.2d 97, *People v. Nguyen* (1993) 21 Cal.App.4th 518.) While an affirmative misrepresentation to authorities is a classic example of aiding, as her authorities demonstrate, none of these cases stands for the proposition that it is the *only* way an individual can aid a principal, and none found that the violation of a duty to testify with the specific intent of assisting a known

felon avoid conviction and punishment amounted to a mere passive failure to assist authorities. To the contrary, application of the same reasoning those cases employed to distinguish between the culpable conduct in providing false or misleading information and the licit behavior in refusing to volunteer information provides at least as much, if not more, support for respondent's position.[4]

For instance, *Plengsantip* acknowledged that "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. (*People v. Plengsangtip*, *supra*, 148 Cal.App.4th at p. 836.) "If the person speaks, however, he or she may not affirmatively misrepresent facts concerning the crime, with knowledge the principal committed the crime and with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment." (*Id.* at p. 837.) By the same token, appellant did not remain silent, but chose to provide information to the police, but when immunized and legally compelled to testify about that information, affirmatively and overtly violated that order with the requisite specific intent. Unlike in *People v. Nguyen*, *supra*, 21 Cal.App.4th at pp. 527-539, where the defendant was truly passive and said nothing "to help his cohorts escape or avoid prosecution for the sexual assault," (*People v. Plengsangtip*, *supra*, 148 Cal.App.4th at fn. 5, p. 839), appellant's violation of the court order achieved her intended purpose of preventing the murder trial of her family members and friends. (*People v. Partee*, *supra*, 21 Cal.App.5th at p. 638; 3RT 1003-1004.)

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[4] Appellant also cites several out-of-state and federal cases addressing affirmative misstatements. (OBM 26-33.) None of these cases, however, holds that the only way an individual can aid a principal is by making an affirmative misrepresentation to authorities.

Nor is appellant correct in asserting that accessory punishment arising out of criminal contempt is wholly unprecedented. As the Court of Appeal pointed out, the federal courts have repeatedly found in the sentencing context that instances of criminal contempt are tantamount to being an accessory after the fact. The United States Sentencing Guidelines do not specify a punishment for criminal contempt, but direct sentencing courts to apply the most analogous offense guideline. Thus, defendants convicted of federal criminal contempt are punishable, by analogy, as being an accessory after the fact when they refuse to testify despite an immunity grant with the intent to aid a felon, because there is no federal sentencing guideline specific to criminal contempt. (*People v. Partee*, *supra*, 21 Cal.App.5th at p. 637, 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.)

The *Brady* decision is illustrative. There, the defendant refused to testify in a murder prosecution despite an order by the district court, and he subsequently pleaded guilty to criminal contempt. The sentencing judge applied the accessory-after-the-fact provision of the federal sentencing guidelines, having found that Brady had been criminally involved with the other two defendants and had substantial knowledge of their plans. The First Circuit affirmed, holding that the district court could have concluded that Brady's refusal to testify was motivated, not by an abstract desire not to testify, but because he wanted to impede the investigation and protect his co-conspirators. (*United States v. Brady*, *supra*, 168 F.3d at p. 580.)

In sum, the fact that an affirmative misrepresentation to authorities falls within the definition of "aids" as used in section 32 does not imply that silence in the face of a court order to testify does not. The ordinary meaning of the word and the legislative history of section 32 demonstrate that it was intended to criminalize the conduct of an individual who renders

assistance to a principal with the requisite knowledge and intent. Appellant did just that.

D. There Was Sufficient Evidence to Support Appellant's Accessory Convictions

Appellant claims that her accessory convictions violated her rights to due process and a fair trial because the state failed to prove all of the required elements of the crime, since her refusal to testify did not satisfy the "aiding" element of the accessory charge. (AOB 34-37.) It is well settled that "[t]he prosecution bears the burden of proving all elements of the offense...and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those element ... ." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) For the reasons set forth above, the word "aids" in the context of section 32 does not require affirmative misrepresentations to authorities. Appellant refused to testify, despite a grant of immunity, and it is undisputed that she had the requisite knowledge and intent. Therefore, the state proved all of the elements of the offense, and appellant's accessory convictions are constitutionally sound.

II. APPELLANT HAD FAIR WARNING THAT HER REFUSAL TO TESTIFY, IN VIOLATION OF A COURT ORDER AND WITH THE INTENT TO AID OTHERS EVADE PROSECUTION, SUBJECTED HER TO LIABILITY AS AN ACCESSORY

Appellant claims that she was deprived of her due process right to fair notice that her conduct violated section 32 because her prosecution was based on an "unprecedented interpretation" of that statute. (AOB 37-39.) Appellant is mistaken. The absence of published authority addressing a prosecution like appellant's is not dispositive of the fair notice question. Liability under section 32 arises only rarely in refusal-to-testify situations, but that does not make the statute unclear, or its application in this case unconstitutionally novel.

The right to due process requires "fair warning in language that the common world will understand of what the law intends to do if a certain line is passed." (*United States v. Lanier* (1997) 520 U.S. 259, 265, citation, alterations, and quotation marks omitted; see also *People v. Castenada* (2000) 23 Cal.4th 743, 751.) In other words, no one may be held criminally responsible for conduct that he or she "could not reasonably understand to be proscribed." (*United States v. Lanier, supra, 520 U.S. at p. 265,* citations and quotation marks omitted.) Thus, neither vague statutory language nor a novel judicial construction of a statute may support criminal liability, and any ambiguity in a criminal statute is generally resolved in favor of a defendant. (*Id.* at p. 266.) In all of these circumstances, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." (*Ibid.*)[5]

There was no due process violation here. The plain language of the statute adequately and clearly conveys that conduct like appellant's is prohibited under section 32, for the reasons explained above. In particular, the statute's requirement of an intent to help others evade criminal consequences reasonably gives warning to those who would undertake to facilitate such evasion. Moreover, the fact that federal sentencing courts routinely punish criminal contempt under the accessory statute in analogous circumstances, where there is an intent to help persons avoid prosecution,

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[5] Appellant relies on cases addressing the "void for vagueness" doctrine (*see* OBM at 37; *United States v. Williams* (2008) 553 U.S. 285, 306; *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108), but she does not challenge section 32 on the ground that the statute is unconstitutionally vague on its face. Rather, respondent understands appellant to invoke the "related manifestation[] of the fair warning requirement" that prohibits criminal liability based on an unforeseeably novel construction of a statute. (See *United States v. Lanier*, *supra*, 520 U.S. at p. 266.)

refutes the premise that such liability is unprecedented and shows that accessory liability under these limited circumstances is foreseeable.

Far from falling into a trap for the unwary, appellant knew that her refusal to testify would aid her relatives and friends avoid prosecution and punishment for a violent murder. She openly admitted under oath that she knew about the murder, that she knew the case against her relatives and friends would be dismissed if she did not testify, and that in refusing to testify she intended help the men evade prosecution and arrest. The lack of appellate court authority specifically extending accessory liability to this kind of conduct does not establish that her prosecution and conviction was so unforeseeably novel that it violated due process. Contrary to appellant's insistence, "unprecedented" is not the gravamen for a due process notice violation. Instead, the lack of precedent reasonably reflects the rarity of appellant's conduct, not any widespread understanding that such conduct falls outside the reach of accessory law. Because it was "reasonably clear at the relevant time that the defendant's conduct was criminal," there was no fair warning problem in this case. (See *United States v. Lanier*, *supra*, 520 U.S. at p. 266.)

III. THE STATE DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE BY PROSECUTING APPELLANT AS AN ACCESSORY AFTER THE FACT

Appellant also alleges that the state violated the separation of powers doctrine by prosecuting her as an accessory after the fact rather than simply holding her in contempt for refusing to testify. (AOB 39-46.) She argues that contempt is the exclusive sanction prescribed by the Legislature in these circumstances, and that by choosing to proceed with the felony accessory charges, the prosecution usurped the legislature's role of "defining crimes and prescribing punishment." (AOB 44.)

"[P]rosecutorial discretion is basic to the framework of the California criminal justice system. [Citations.] This discretion, though recognized by statute in California, is founded upon constitutional principles of separation of powers and due process of law." (*People v. Jerez* (1989) 208 Cal.App.3d 132, 137.) The prosecuting authorities, exercising executive functions, generally have the sole discretion to determine whom to charge with public offenses and what charges to bring. The discretion to choose which of various available charges is most appropriate under the circumstances arises from """"the complex considerations necessary for the effective and efficient administration of law enforcement."""" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552, citing *People v. Birks* (1998) 19 Cal.4th 108, 134.) "[U]nder the doctrine of separation of powers, courts must scrupulously avoid interfering with the executive's prosecutorial function, including the exercise of its broad charging discretion." (*People v. Cortes* (1999) 71 Cal.App.4th 62, 79.)

A prosecutor's exercise of discretion to choose more serious offenses or seek a greater penalty rarely violates the separation-of-powers doctrine:

> "It is true, of course, that a prosecutor's exercise of discretion to charge a defendant with a felony rather than a misdemeanor when the facts of the case would support either charge will frequently have a variety of effects on the ultimate judicial disposition of the matter. A prosecutor's charging decision may, for example, determine whether a defendant is convicted of an offense for which probation may not be granted, or for which a specific punishment is mandated. Those familiar consequences of the charging decision have, however, never been viewed as converting a prosecutor's exercise of his traditional charging discretion into a violation of the separation-of-powers doctrine."

(*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 555, quoting *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 82.)

Here, the prosecution acted wholly within its discretion when it charged appellant with four counts of felony accessory after the fact. Appellant's conduct satisfied all of the necessary elements of the crime. That her conduct also amounted to contempt did not limit the available punishment or the prosecution's discretion to charge the greater offense. It is not uncommon that more than one offense will cover a defendant's conduct, and it is inherent in our system that the prosecution retains discretion in such circumstances to decide which offense to charge.

In essence, appellant argues that the Legislature intended conduct such as hers to be prosecuted exclusively under the contempt statute, rather than the more general accessory statute. (AOB 41-43.) Application of this Court's longstanding *Williamson*[6] rule shows why she is mistaken.

"Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86.) This "rule applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.'" (*Ibid.*, quoting *People v. Watson* (1981) 30 Cal.3d 290, 295-296.) "In its clearest application, the rule is triggered when a violation of a provision of the special statute would inevitably constitute a violation of the general statute." (*Murphy, supra*, 52 Cal.4th at p. 86.) However, when the general statute includes an element not present in and imposes a punishment harsher than the special statute, "it

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[6] *In re Williamson* (1954) 43 Cal.2d 651.

is reasonable to infer that the Legislature intended to punish such conduct more severely." (*Murphy*, *supra*, 52 Cal.4th at p. 87.) "As a result, the *Williamson* rule will not apply when, for example, a felony statute requires a more culpable mental state than a misdemeanor statute proscribing the same behavior." (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1007, citing *People v. Watson*, *supra*, 30 Cal.3d at pp. 295-297.)

The elements of accessory after the fact do not correspond to the elements of misdemeanor contempt. "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. Plengsantip*, *supra*, 148 Cal.App.4th at p. 836.) Misdemeanor contempt of court under section 166, subdivision (a)(6), on the other hand, is a "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." Under these elements, a violation of the contempt statute does not necessarily result in the violation of the accessory statute because the latter requires an individual to have the requisite knowledge and specific intent that his or her actions help the principal avoid arrest, trial, conviction or punishment. Misdemeanor contempt has no such requirement.

Indeed, the two offenses are aimed at curing different ills in our society. The accessory statute is aimed at preventing the kind of assistance to criminals that would allow their crimes to go unpunished; criminal contempt proscribes citizens from interfering with the justice system generally. As shown above, section 32 liability reasonably extends to the

narrow circumstance in which defendants refuse to fulfill a duty testify with the same specific intent as those who harbor and conceal known felons.

CONCLUSION

Appellant's accessory convictions should be affirmed.

Dated: February 7, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON THE MERITS** uses a 13 points Times New Roman font and contains **7,881** words.

Dated: February 7, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Starletta Partee**
No.: **S248520**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **February 7, 2019**, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Allen Joseph Webster Jr., Judge
Los Angeles County Superior Court
Compton Courthouse, Department E
200 West Compton Boulevard
Compton, CA 90220

On **February 7, 2019,** I caused one (1) **original and** eight (8) **copies** of the **ANSWERING BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Golden State Overnight.**

On **February 7, 2019**, I electronically served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy to California Court of Appeal via this Court's TrueFiling system.

On **February 7, 2019**, I served the attached **ANSWERING BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

Erick Siddall, Deputy District Attorney
Via Email: Courtesy Copy

California Appellate Project (CAP-LA)
Via Email: CapDocs@lacap.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 7, 2019**, at Los Angeles, California.

Nora Fung
Declarant

Signature

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