IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People, Plaintiff and Respondent, v. **Starletta Partee**, Defendant and Appellant.	**No. S248520** 2d Dist. Div. 5, Case No. B276040 LASC No. TA138027

Application for Permission to File Amicus Curiae Brief

and

Brief of Amicus Curiae Los Angeles County District Attorney in support of Respondent the People of the State of California

Jackie Lacey
District Attorney of
Los Angeles County

Phyllis C. Asayama
State Bar No. 88919

Kenneth Von Helmolt
State Bar No. 173965

Deputy District Attorneys

Appellate Division
320 West Temple Street, Ste. 540
Los Angeles, California 90012
(213) 974-5911
(213) 893-0238 (direct)

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The People, Plaintiff and Respondent, v. **Starletta Partee**, Defendant and Appellant.	2d Dist. Div. 5, Case No. B276040 LASC No. TA138027 **Application for Permission to file Amicus Curiae Brief**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The Los Angeles County District Attorney requests leave to file an amicus curiae brief in this case in support of the position of respondent, the People of the State of California (hereafter "the People"), represented by the Attorney General of California.

The District Attorney of Los Angeles County is the head of the largest local prosecutorial agency in the United States. The Los Angeles County District Attorney conducted the murder prosecutions underlying this matter and the accessory after the fact prosecution that is the subject of this appeal.

Appellant challenged her Penal Code section 32 convictions. The Court of Appeal affirmed appellant's convictions. The amicus curiae brief bound with this application argues:

A. Penal Code section 32 is unambiguous, a construction supported by a pragmatic interpretation;

B. Appellant's felony conduct merits a felony conviction;

C. To categorically foreclose liability under section 32 would incentivize a knowing witness to remain mute.

The Los Angeles County District Attorney has read the briefs filed by the parties and believes that a need exists for elucidation of the points above. If this Court grants this application, then the Los Angeles County District Attorney, as amicus curiae, requests that this Court permit filing of the brief which is bound with this application.

Respectfully submitted,

Jackie Lacey
District Attorney of
Los Angeles County

By Phyllis C. Asayama

Phyllis C. Asayama
Deputy District Attorney

Kenneth Von Helmolt
Deputy District Attorney

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012-3266
Telephone: (213) 974-5911

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People, Plaintiff and Respondent, v. **Starletta Partee**, Defendant and Appellant.	**No. S248520** **Brief of Amicus Curiae Los Angeles County District Attorney**

INTRODUCTION

The facts suggest that in 2006 appellant's brother, cousin, and two other men whom appellant considered "family" participated in the gang-related murder of Anthony Owens. Appellant did not want to see the men convicted so she refused to testify to their inculpatory statements despite a grant of immunity. Appellant had a duty to testify and her refusal to do so aided the men: The four principals will never face trial or conviction for the crime. In a subsequent prosecution, a Los Angeles County jury found appellant to be an accessory and convicted her of four counts of violating Penal Code[1] section 32 and one count of contempt under section 166.

The Court of Appeal majority rejected appellant's construction of section 32, finding no ambiguity. A pragmatic

[1] All further statutory references are to the Penal Code unless otherwise indicated.

consideration of the procedural history supports the conclusion that the meaning of the word "aids" in section 32 admits of no ambiguity, and resort to statutory construction is unnecessary.

To the extent that a consideration of punishment is relevant – the trial court sentenced appellant to probation – her conduct was more egregious than just disobeying a court order and justifies exposure to felony punishment.

Lastly, if as appellant urges, this Court categorically forecloses section 32 prosecution under the circumstances present in this case, that may incentivize a knowing witness in some cases to opt to remain mute, as did appellant. A lay witness with a fine-tuned understanding of the admissibility of prior inconsistent statements and the (potential) limitations of liability under section 32, who wishes to help defendants avoid conviction or punishment would logically choose misdemeanor contempt over felony perjury, precluding admission of *any* of the witness's evidence – the worst possible result given the truth-seeking function of a trial.

The People respectfully request that this court affirm the judgment of the Court of Appeal.

ARGUMENT

I. Procedural history, pragmatic view support conclusion Penal Code section 32 not ambiguous.

Appellant argues throughout her briefs that the prosecution overreached, that the law and/or facts do not support the charges because appellant did not "aid" accused felons within the meaning of section 32, and that permitting her convictions to stand places California "outside the mainstream." Yet, a magistrate, a superior court judge, a Los Angeles County jury and two Court of Appeal justices reviewed and approved the prosecution and conviction of appellant. The preliminary hearing magistrate held appellant to answer. The Honorable Allen Webster, Jr., of the Superior Court of the County of Los Angeles denied appellant's motion under section 995 to dismiss the information. (*People v. Partee* (2018) 21 Cal.App.5th 630, 639.) The Second Appellate District, Division Five, summarily denied appellant's petition for writ of mandate as to the section 995 denial. (*Ibid.*) A jury unanimously agreed that the evidence proved appellant's guilt on all charges beyond a reasonable doubt. (*Id.* at p. 634.) Judge Webster sentenced appellant, and Justices Dunning and Kriegler, of the Second District, Division Five, affirmed the judgment. (*Id.* at p. 639.)

While certainly not determinative, such a procedural history suggests to a pragmatic observer that, at a minimum, both the facts and the law support appellant's convictions.

Pragmatic considerations can be relevant within the application of the basic tenets of statutory construction. (*People v. Cella* (1981) 114 Cal.App.3d 905, 920.) The plain language of the statute confirms its goal is to promote the societal benefits of crime punishment and deterrence. To increase the likelihood that criminals will be caught and punished, section 32 criminalizes conduct that aids criminals; this deters others from committing crimes and from aiding criminals. The evidence adduced at the various proceedings demonstrated that appellant's conduct violated the unambiguous language and plain purpose of section 32.

To introduce ambiguity into section 32, appellant drags the word "aids" through a routine of semantic gymnastics then embarks on unnecessary statutory construction. "When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." (*W. Covina Hosp. v. Superior Court* (1986) 41 Cal.3d 846, 850.) The plain meaning of "aids" in this context ("Every person who . . . *aids* a principal . . . with the intent that said principal . . . avoid . . . trial, conviction or punishment, having knowledge that said principal . . . committed [a] . . . felony . . . is an accessory" (§ 32, italics added)) did not elude the magistrate, superior court judge, Los Angeles County jury and two Court of Appeal justices. The procedural history lends support to the conclusion that from a pragmatic standpoint section 32 is unambiguous in its express language and purpose.

The facts suggest that in 2006 appellant's brother, cousin, and two other men whom appellant considered "family" murdered Anthony Owens. Due to appellant's decision not to testify when she had a duty to do so, those men will never face trial or conviction. Appellant *aided* each of them in avoiding trial. Appellant's testimony at her own trial established her specific intent in refusing to testify was to *aid* defendants avoid trial. (*Partee, supra*, 21 Cal.App.5th at p. 640.)

The propriety of holding appellant accountable as an accessory must also have been apparent to the jury that convicted appellant, to Judge Webster in the trial court and to Justice Dunning and Justice Kriegler who properly affirmed the judgment. The People respectfully request that this Court affirm the judgment of the Court of Appeal.

II. Appellant's conduct helped four men escape trial for murder – felony conduct that merits a felony conviction.

When appellant failed to honor her trial subpoena in 2008, the People dismissed the murder case against her brother, cousin and friends. (*Partee, supra*, 21 Cal.App.5th at p. 634.) In 2015, at the accused murderers' second preliminary hearing, appellant refused to testify despite a grant of immunity and an offer of relocation. (*Ibid.*) As the Court of Appeal rightly noted, appellant had a duty to testify. (Pen. Code § 1324; Evid. Code § 911, subd. (a); *People v. Smith* (2003) 30 Cal.4th 581, 624 ["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."].) Failure to act in the face of a legal duty to do so can support imposition of criminal liability.[2] (Cf. *People v. Heitzman* (1994) 9 Cal.4th 189, 197 [daughter had no legal duty to prevent abuse of her elderly father so was not properly convicted of elder abuse].)

When appellant disobeyed the court's order to testify at the 2015 preliminary hearing, she was subject to a contempt charge under section 166, a misdemeanor, which carried a maximum punishment of six months in jail and a $1,000 fine. (§ 19.) However, appellant's refusal to be sworn and to answer material questions was motivated by more than just obstinance. Appellant testified at her own trial that one of her reasons for refusing to testify against her brother, cousin and friends was that she did not want them to go to prison as a result of her testimony. (*Partee, supra*, 21 Cal.App.5th at p. 634.) After appellant refused to testify in 2015, the People dismissed the murder case for the second time. (*Ibid.*) Appellant, acting in accord with her stated intent, successfully prevented the accused from facing trial, conviction and punishment for Owen's murder.

The jury at appellant's trial determined appellant refused to testify with the *specific intent* that the four men accused of

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[2] Some defaulting witnesses cannot be incarcerated. For example, a court has no power to incarcerate a victim of a sexual assault or domestic violence for refusing to testify concerning that assault. (Code Civ. Proc., § 1219, subd. (b).)

murdering Anthony Owens avoid trial, conviction or punishment. (*Id.* at p. 638.) Appellant's specific intent to aid the accused, a necessary element of guilt under section 32, but not present in every case under section 166, made her refusal to testify *felony conduct.* Shielding the principals in a murder prosecution from trial warranted exposure not only to a misdemeanor, but also to the more serious felony charge of accessory under section 32. Appellant conceded the propriety of her conviction under section 166 (AOB, p. 34), a general intent crime (*Partee, supra*, 21 Cal. App. 5th at p. 635), but argued insufficient evidence to support her accessory convictions. (AOB, pp. 34-37.) However, *all the elements* of section 32 were present as to each of the four accused: the principals' murder of Owens; and appellant, aware of their crime, refusing to testify against them specifically to aid the principals avoid trial, conviction or punishment. (*Partee, supra*, 21 Cal. App. 5th at p. 635.) Appellant's conduct was felony conduct, not misdemeanor conduct, and warranted conviction of the more serious offense. The Court of Appeal also made this point (*id.* at p. 638), which deserves emphasis.

III. With a free pass under section 32 a knowing witness has an incentive to remain mute - the worst possible result given the core truth-seeking function of a trial.

Appellant argues that this Court should reverse her convictions, and that criminal liability under section 32 should *never* be available for refusing to testify. (AOB, pp. 15 et seq.) If

the facts of appellant's case do not support liability under section 32, it is hard to imagine a refusal-to-testify case that would.

The lead investigator in the murder of Anthony Owens initially interviewed appellant in 2006. He recorded appellant's statement. Appellant related the statements the four murder defendants made to her tying themselves to the shooting. (*Partee, supra*, 21 Cal. App. 5th at p. 634-635.)

Under Evidence Code section 1235, a witness's prior inconsistent statement is admissible at trial over a hearsay objection to impeach the witness and to prove the truth of the matter asserted in the witness's prior statement. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4.) For the prior out of court statement to be admissible, the witness's testimony must be inconsistent with the prior statement. (*Ibid.*) Of course, as a threshold issue, there must *be* testimony. Where a witness refuses, as did appellant, to provide *any* testimony, a prior out of court statement, inconsistent or otherwise, is generally not admissible. (U.S. Const., 6th Amend.; *People v. Martinez* (2003) 113 Cal.App.4th 400, 407-408.)

Appellant's refusal to testify precluded admission of any evidence of the murder defendants' inculpatory statements. Had appellant taken the stand at the preliminary hearing and testified consistently with her 2006 statement, the trier of fact would have heard the murder defendants' inculpatory

statements.[3] Had appellant taken the stand and either testified falsely or feigned memory loss, her 2006 statement would have been admissible as a prior inconsistent statement, again permitting the trier of fact to hear the murder defendants' inculpatory statements. (*Hawthorne, supra,* 4 Cal.4th at p. 55.)

Appellant's silence was the only course that reliably prevented a jury from hearing the inculpatory statements of her brother, her cousin, and her lifelong friends Bryant and Byron Clark. As noted in appellant's brief, "Partee was the only witness who connected all four defendants to the shooting." (AOB, p. 14.) Without appellant's testimony, either truthful or false, the People could not prove the charges and dismissed the case. (*Partee, supra,* 21 Cal.App.5th at p. 634.) As set forth above, the unusual circumstances of appellant's case contain all the elements necessary to convict appellant of being an accessory under a plain reading of section 32.[4]

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[3] Had appellant testified at the preliminary hearing then disappeared for trial, her testimony from the preliminary hearing would arguably have been admissible at trial with a showing of unavailability under Evidence Code sections 1291 and 240.

[4] In an informal survey of 48 lawyers assigned to the Los Angeles County District Attorney's Hardcore Gang Division (HCGD), 11 reported being involved in a case over the last four years where a witness with inculpatory evidence refused to testify, preventing introduction of a prior statement that inculpated the accused. Several HCGD lawyers reported this happening more than once, bringing the approximate number of occurrences over the last four years to 15. Over the last four

If a witness can *never* incur criminal liability under section 32 for refusing to testify, that creates an incentive for a knowing witness to remain mute, precluding the trier of fact from ever hearing any of the evidence the witness is seeking to withhold. Given that the core function of a trial is truth-seeking, this is the worst possible result. (*Estes v. Texas* (1965) 381 U.S. 532, 558 [purpose of trial: a vehicle for discovering the truth].)

If accessory liability under section 32 is off the table, a witness in court who made a prior out of court statement inculpating defendants who intends that the principals avoid trial, conviction or punishment has two options. In the first option, the witness could take the stand then feign lack of memory or testify inconsistently with their prior statement. This is relatively common in gang prosecutions. (AOB, pp. 14-15; *Partee, supra*, 21 Cal.App.5th at p. 639.) False testimony, however, is unlikely to prevent the trier of fact from hearing the witness's evidence inculpating defendants, and would potentially expose the witness to four years of custody for perjury under section 118. Appellant selected a second option: remain mute – refuse to be sworn or to answer any questions. This makes the witness's prior out of court statement inadmissible, achieving the goal of aiding the defendant(s) by keeping inculpatory evidence from the trier of fact, as it did in appellant's case, and, if

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years, the HCGD has, as a conservative estimate, prosecuted between 700 and 800 cases. Appellant has been the only person prosecuted as an accessory for refusing to testify.

prosecution under section 32 is precluded, exposes the witness only to misdemeanor contempt under section 166.

Assuming a knowing and rational actor, would not most witnesses under similar circumstances remain mute? This achieves the goal of helping the principals avoid conviction or punishment, and exposes the witness to significantly less custody time – six months under section 166 for violating their duty to testify versus four years under section 118 for committing perjury. Taking accessory liability off the table for refusing to testify creates a powerful incentive for a knowing witness not to take the stand. In those few cases, such as appellant's, where evidence of all the necessary elements exists beyond a reasonable doubt, prosecution under section 32 of a witness who refuses to testify should not be precluded as a matter of law.

CONCLUSION

Based on the foregoing, the People respectfully request that this Court affirm the judgment of the Court of Appeal.

Respectfully submitted,

Jackie Lacey
District Attorney of
Los Angeles County

By Phyllis C. Asayama

Phyllis C. Asayama
Deputy District Attorney

Kenneth Von Helmolt
Deputy District Attorney

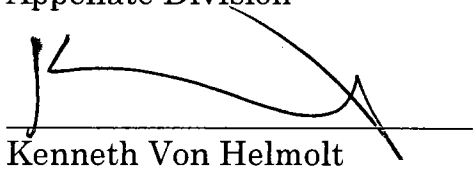
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, Brief of Amicus Curiae was produced using 13-point Roman type, and contains approximately 2,659 words, including footnotes, which is less than the 14,000 words permitted by this rule. This count excludes tables, signature lines and the verification. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: This day 15th of April, 2019

Los Angeles County
District Attorney's Office
Appellate Division



Kenneth Von Helmolt
Deputy District Attorney
Attorney for Amicus Curiae

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

The People v. Starletta Partee; Case No. S248520; 2d Dist. No. B276040; LASC No. TA138027

The undersigned declares under the penalty of perjury that the following is true and correct:

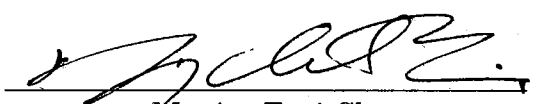
I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled **Application for Permission to File Amicus Curiae Brief and Brief of Amicus Curiae Los Angeles County District Attorney in support of Respondent the People of the State of California** by placing a true copy thereof, enclosed in a sealed envelope for collection and mailing following our ordinary business practices in the County of Los Angeles, California, and/or via electronic service to the email addresses indicated below. I am readily familiar with this agency's practices for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid, and addressed as follows:

Office of the Attorney General
State of California
300 South Spring Street
Los Angeles, CA 90013
(Colleen.Tiedemann@doj.ca.gov)

Hon. James C. Chalfant
Dept. 85
111 North Hill Street
Los Angeles, CA 90012

Paul Kleven
1604 Solano Ave.
Berkeley, CA 94707
(Pkleven@Klevenlaw.com)

Executed on April 15, 2019, at Los Angeles, California.



Monica Tsai Chen

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Von Helmolt, Kenneth (173965)
Last Name, First Name (PNum)

Kenneth Von Helmolt

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Mr. Kleven:

Attached please find a copy of the amicus curiae brief filed by the Los Angeles County District Attorney in this matter. It was also served on your AOL email via Truefile.

Thank you for your professional courtesy in this matter.

Kenneth M. Von Helmolt
Deputy District Attorney
Appellate Division
District Attorney's Office
320 W. Temple Street, Ste. 540
Los Angeles, CA 90012
kvonhelm@da.lacounty.gov
Ofc: (213) 893-0238
Fax:(213) 217-5104