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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)

REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

INTRODUCTION

The Answering Brief on the Merits ("ABM") reaffirms the complete absence of any precedent for the ruling in *People v. Partee* (2018) 21 Cal.App.5th 630. The State suggests there have been rare instances where authorities have applied Penal Code[1] section 32 in "refusal-to-testify cases" that did not result in appellate opinions (ABM 27), but does not identify any. Among published California caselaw, *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, is singled out as the most analogous because Partee

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

spoke to authorities in 2006 (ABM 24-25), but *Plengsangtip* involved affirmative misstatements to authorities, and the charges against Partee did not include any allegations about misstatements or any other acts in 2006, but were based solely on her refusal to testify in 2015.

Looking beyond California law, the State does not discuss any decisions from other states, or any decisions involving the federal accessory statute. (ABM 25, fn. 4.) Although the State does refer to federal sentencing guidelines governing convictions for contempt (ABM 26), the cross-references in those guidelines to the guidelines for accessory do not depend on whether a defendant was actually an accessory under federal law, and are irrelevant to the issues before this Court.

The State contends that Partee, unlike other witnesses who might refuse to testify out of fear, deserved to be punished as an accessory because she was eager to help her relatives escape punishment. (ABM 8-10, 14.) This argument simply ignores Partee's testimony about her own well-founded fears, and is based on claims about Partee's intent that are not supported by the record, most of which lack any citation to the record. (ABM 17, 18, 25, 27, 29.)

Given its inability to cite any authority even suggesting that a person who refuses to testify in a criminal case can be charged as an accessory to a crime, the State's contention that Partee had "fair warning" of her liability,

and therefore received due process, rings hollow. (ABM 27-29.) This prosecution was not, as the State suggests (ABM 29-33), a routine exercise of prosecutorial discretion, but a clear violation of the separation of powers doctrine.

This Court should reverse this unfortunate, unconstitutional decision.

ARGUMENT

I. There Is No Precedent for Charging a Witness Who Refuses to Testify in a Criminal Case as an Accessory to the Crime Being Prosecuted

A. No California Case Has Ever Applied Section 32 in Similar Circumstances

Like the Second Appellate District (*Partee, supra*, 21 Cal.App.5th at pp. 640), the State argues that, because Partee had a duty to testify, her seemingly passive refusal to be sworn constitutes the type of overt, affirmative act that can constitute "aid[]" under section 32. (ABM 15-18.) Like the Second Appellate District, the State does not cite any authority for this proposition.

There is certainly no such authority in California. In her Opening Brief on the Merits ("OBM"), Partee refuted the Second Appellate District's contention that, under circumstances similar to those in this case, California appellate courts "have held defendants were properly charged

with or convicted of being accessories," citing *Plengsangtip, supra*, 148 Cal.App.4th 825, *In re I.M.* (2005) 125 Cal.App.4th 1195, *People v. Nguyen* (1993) 21 Cal.App.4th 518, and *People v. Duty* (1969) 269 Cal.App.2d 97. (*Partee, supra*, 21 Cal.App.4th at p. 636; see OBM 19-22 and *Partee, supra*, 21 Cal.App.5th at p. 650 (Baker, J., concurring and dissenting).) The State complains that Partee "repeatedly mischaracterizes her actions as a mere failure to report a crime to authorities" (ABM 18), but in the absence of any cases analyzing section 32 in the context of a refusal to testify, the most analogous cases are those such as *Nguyen*, which reversed the section 32 convictions of defendants who either said nothing to authorities, or at least did not mislead them. (*Nguyen, supra*, 21 Cal.App.4th at pp. 538-539.)

Attempting to minimize this caselaw, the State argues that though "affirmative misrepresentation to authorities is a classic example of aiding, ... none of these cases stands for the proposition that it is the *only* way an individual can aid a principal," and none specifically dealt with a refusal to testify. (ABM 24-25 (emphasis in original).) While this is true, Partee of course acknowledges there are many other ways of being an accessory to a felon, and suggests there have been no specific holdings in refusal-to-testify cases because, prior to this one, no California prosecutor or court had considered that section 32 could apply to a person who merely refused to testify.

In an attempt to find some affirmative support in California law for its position, the State argues that like the defendant in *Plengsangtip,* who was properly charged as an accessory for making affirmative misrepresentations to authorities (*Plengsangtip, supra*, 148 Cal.App.4th at pp. 837-839), Partee "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." (ABM 25.)

There are two basic flaws in the State's analogy to *Plengsangtip* which, like *I.M., supra*, 125 Cal.App.4th at pp. 1203-1204, and *Duty, supra*, 269 Cal.App.2d at pp. 103-104, involved attempts to mislead authorities. Unlike the charges against those defendants, Partee's four counts of accessory to murder were not based on affirmative misrepresentations to authorities, and were not based on anything she did near the time of the shooting in 2006, but were based solely on her refusal to testify on June 11, 2015. The prosecution emphasized this in the charging Information (CT 49-51), in opening statement (2-RT 648-649), in jury instructions (CT 212; 5-RT 1809), and in closing argument where the prosecutor explained, "How did she aid them? By not testifying." (5-RT 1841; see also 5-RT 1843-1844.) As a result of her prior cooperation the authorities could show what Partee had told them, but that evidence did not establish the elements

of her crime, which even now the State summarizes as a refusal to testify with the requisite knowledge and intent. (ABM 27.)

By including Partee's prior cooperation in its attempt to analogize this case to *Plengsangtip*, the State inadvertently emphasizes the unique place this case holds in California jurisprudence. The lack of specific holdings in refusal-to-testify cases under section 32 is not surprising because there is no reason to believe the Legislature intended the statute to apply in such cases, as discussed in the next subsection.

In affirming Partee's convictions for refusing to testify, the Second Appellate District went against all prior California law on section 32, and this Court should reverse.

B. By Amending Section 32 in 1935, the Legislature Did Not Intend to Make People Who Refused to Testify in Criminal Cases Accessories to the Crime Being Prosecuted

Despite the absence of a single California case discussing the possibility of charging people who refuse to testify as accessories under section 32, the State insists the Legislature intended to allow such prosecutions when it amended the statute in 1935 to add "aids" to the

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earlier prohibitions on concealing and harboring. (ABM 18-21.)[2]

Although "[t]he Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof" (*People v. Harrison* (1989) 48 Cal.3d 321, 329), the State does not cite existing state, federal or common law in support of its argument. As Partee explained at some length in her opening brief, the common law imposed accessory after the fact liability for those who provided various types of aid to felons beyond just concealing or harboring them, including providing a means of escape, supporting the felon with money or food, and using force to effect a rescue. (OMB 26-28, citing *State v. Clifford* (1972) 263 Or. 436, 502 P.2d 1371, 1373-1374; 4 Blackstone's Commentaries (1916) 38; Wharton, American Criminal Law (6th ed. 1868), pp. 109-110.) Prior to the enactment of the federal accessory statute, 18 U.S.C. § 3, the federal courts also followed Blackstone. (*Skelly v. United States* (10th Cir. 1935) 76 F.2d 483, 487.)

By 1935, California had discarded the common law terminology of

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2 Prior to 1935 the statute read, "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." (§ 32, Notes.) Since 1935, the statute has described an accessory as any person who, with the requisite knowledge after commission of a felony, "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,..." (§ 32.)

accessories before and after the fact, characterizing the former in section 31 as people who "aid and abet" the commission of a crime, and the latter as people who conceal or harbor in section 32. (OBM 15-16.) The definition of "aid" in section 31 was "'not different from its meaning in common parlance. It means to assist, "to supplement the efforts of another."'" (*People v. Bond* (1910) 13 Cal.App. 175, 185 (citations omitted).) "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement of the crime." (*People v. Dole* (1898) 122 Cal. 486, 492.) Conviction under section 31 required that a person aid and abet the perpetrator by acting with knowledge of the perpetrator's wrongful purpose. (*Ibid.*; see also *People v. Beeman* (1984) 35 Cal.3d 547, 556.)

It is therefore reasonable to presume, as the State argues (ABM 20-21), that in amending section 32 the Legislature intended to broaden the type of prohibited acts to include forms of assisting felons beyond concealing a felony from a magistrate or harboring a felon, making section 32 more consistent with the contemporary law of accessories. (*People v. Wright* (2006) 40 Cal.4th 81, 92.)

But there is no reason to presume, as the State further argues (ABM 20), that the Legislature also secretly intended to make California the only

jurisdiction where people who did not act could be prosecuted as accessories to a crime. Just as there is no precedent now for the Second Appellate District's decision, there was no precedent in 1935 for such a radical expansion of the law on accessories. There is simply no reason to believe that in amending section 32, the Legislature intended to make anyone who engaged in an "overt refusal[] to testify in violation of a legal duty" subject to prosecution as an accessory (ABM 20), because neither California nor any other jurisdiction had ever considered such prosecutions advisable.

As the State notes, the Legislature in 1935 also added an intent requirement to section 32, limiting the circumstances in which people could be prosecuted as accessories. (ABM 21.) As discussed above, the concept of "aids" at the time did not include an element of knowledge or intent, which depended on the concept of "abets." (*Dole, supra*, 122 Cal. at p. 492.) In order to ensure that innocent people were not prosecuted as accessories for "aiding" a felon, the Legislature obviously needed to add an intent element to the statute as it pertained to "aids."

The Legislature's decision to impose an intent element on the "concealing" and "harboring" forms of being an accessory, where none existed prior to 1935, undermines the State's position in two ways. It is not rational to presume that the Legislature, which was limiting liability under

section 32 to people who harbored, concealed or aided a felon with the requisite intent, intended at the same time to expand liability for those who aided a felon in an unprecedented way, well beyond the definition of accessory in any other jurisdiction. In addition, the extension of the intent requirement to all three forms of being an accessory demonstrates that the Legislature intended to treat all three forms similarly, rather than making people liable for aiding a felon even without an affirmative act, while requiring affirmative acts with intent before imposing liability for harboring or concealing a felon. (See OBM 18-22; *People v. Garnett* (1900) 129 Cal.364 (concealment requires affirmative act, not mere withholding of information).)

There is simply no basis for concluding that the Legislature intended to expand liability under section 32 as the State contends.

C. The Plain Meaning of "Aids" in Section 32 Requires an Affirmative Act, and Canons of Statutory Construction Reinforce that Meaning

In her opening brief, Partee discussed the dictionary definition of the transitive verbs "harbor," "conceal," and "aid," along with caselaw under section 32 regarding the affirmative actions to harbor, conceal or aid a felon principal that were deemed necessary to make one liable as an accessory. (OBM 17-22, 25.) Except for citing *People v. Elliott* (1993) 14 Cal.App.4th 1633, 1641 (ABM 19-20), the State does not address the

definition of the various forms of being an accessory, though this is a standard means of determining legislative intent. (*People v. Prunty* (2015) 62 Cal.4th 59, 72-73.)

Elliott concluded, after reviewing caselaw regarding the meaning of "aids" under section 31, that the Legislature intended "that being an accessory ('one who aids') requires something more than mere encouragement or incitement." (*Elliott, supra*, 14 Cal.App.4th at p. 1641, citing *Duty, supra*, 269 Cal.App.2d 97, 104.) "[T]he activities of the accused, whether a single act or an entire course of conduct, must amount to overt assistance as opposed to mere incitement or encouragement." (*Id.* at p. 1642, fn. 9.)

The State contends that the meaning of "aids" in section 32 so clearly encompasses the refusal to testify that there is no need to resort to canons of statutory construction (ABM 21-24), even though *Elliott* was itself applying a fundamental rule of statutory construction in interpreting the use of "aids" in section 32 by considering how courts had construed "aid" in an "interrelated statutory provision[]," section 31. (*Elliott, supra*, 14 Cal.App.4th at p. 1641, fn. 7.)

While the State correctly notes that canons of construction such as *noscitur a sociis* (word in list is known by its associates) and *ejusdem generis* (general term in list restricted to meaning like specific terms)

should not be used to undermine legislative intent (ABM 21-23, see OBM 23-25), Partee has not, as the State contends, argued "that section 32 contemplates that aiding must be the functional equivalent of harboring or concealing." (ABM 22.) Partee contends, consistently with the canons of construction – as reinforced by the Legislature's imposition of an intent requirement on all three forms of being an accessory – that to the extent it is not clear whether the Legislature intended to require affirmative actions on the part of every person charged as an accessory, those canons reinforce her contention that the Legislature did not intend to limit exposure in cases involving harboring or concealing a felon to people who take affirmative steps, while broadening exposure in cases involving aiding a felon to people who took no affirmative steps, including the refusal to testify. (OBM 23-25.)

Contrary to the State's claim, Partee is not making an argument like the one rejected in *People v. Lee* (1968) 260 Cal.App.2d 836, 841, where the defendant contended that a vehicle could not be considered a "room or place" because the definition of "place" had to be limited to spaces similar to a "room." (ABM 23.) Partee acknowledges that a person can aid a felon in ways beyond harboring or concealing the felon, but argues that liability under all three forms should be limited to those who take affirmative steps, as is clearly required for those who harbor or conceal felons. (OBM 23-25.)

The State's reliance on *People v. Kelly* (2007) 154 Cal.app.4th 961, 967-968 (ABM 23-24), is even more misplaced. Unlike Kelly, who argued that flashlights, box cutters and slingshots did not come within the term "other instrument or tool" in a statute listing burglary tools (*id.* at pp. 965-968), Partee is not trying to limit liability under section 32 to those "who employ a limited set of means to achieve their nefarious ends." (*Id.* at p. 967.) Once again, Partee acknowledges that people can aid felons in ways not encompassed by the more limited terms "harbor" or "conceal," but argues that all accessories must take affirmative acts to harbor, conceal or aid a felon. (OBM 23-25.)

Whether it relies solely on the plain meaning of the statute, or employs the canons of construction to assist it in determining the intent of the Legislature, this Court should hold that a person must act affirmatively to harbor, conceal or aid a felon in order to be convicted as an accessory under section 32.

D. While the Failure to Act in Violation of a Legal Duty Can Support Criminal Liability, a Witness Who Refuses to Testify in a Criminal Case is Guilty of Contempt, Not of Being an Accessory to the Crime Being Prosecuted

Like the Second Appellate District (*Partee, supra*, 21 Cal.App.5th at pp. 639-640), the State contends that Partee's refusal to testify constituted the overt, affirmative act of aiding murder under section 32 because she

had a duty to testify at the preliminary hearing. (ABM 17-18.) The State cites no authority remotely supporting this contention. At most, the authorities cited by the State establish that a person who refuses to testify can be held in contempt, which Partee admitted in her opening brief. (OBM 39-43.)

There is no dispute that a person who has a duty to act may be held criminally liable for failing to act. (ABM 17, citing *People v. Heitzman* (1994) 9 Cal.4th 189, 197.) *Heitzman* acknowledged this general principle, but actually reversed a conviction for elder abuse because it violated due process, in part because the statute imposed criminal liability on a broader class of people than would be subject to civil liability for inaction and there was no "indication, express or implied, that the Legislature meant to depart so dramatically" from general principles of liability. (*Id.* at pp. 199-201.) *Heitzman* has nothing to do with the proper interpretation of section 32 or with a refusal to testify, and provides no support for the State's contention that Partee's refusal constituted the type of affirmative act necessary to convict under section 32. (See subsections I. A-C, *supra.*)

While the other cases cited by the State do address a witness's legal duty to testify, none provides any authority for holding a witness who refuses to testify liable for any crime except contempt. *United States v. Calandra* (1974) 414 U.S. 338, for example, held that an immunized

individual could not refuse to testify before a grand jury about illegally seized evidence, and the States quotes extensively from that decision. (ABM 17-18.) As the Supreme Court explained, the "duty to testify may on occasion be burdensome and even embarrassing, It may cause injury to a witness' social and economic status. 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. [Citation.]" (*Id.* at p. 345.) But the witness in *Calandra* was not held in contempt (*id.* at p. 341), and the Court did not discuss any form of criminal liability for refusing to testify, so the case provides no support for the State's position.

Kastiger v. United States (1972) 406 U.S. 441 (ABM 17), upheld a contempt finding against a witness who refused to answer questions before a grand jury despite a grant of use immunity, rejecting his contention that only full transactional immunity would safeguard his Fifth Amendment privilege against self-incrimination. (*Id.* at pp. 448-462.) According to the Court, the existence of immunity statutes "reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." (*Id.* at p. 446.) *Kastiger* actually undermines the State's position, because Partee's prosecution was based solely on her refusal to testify, not

on any allegation that she was implicated in the murder. (CT 49-51, 212; 2-RT 648-649; 5-RT 1809, 1841, 1843-1844.)

Finally, *People v. Smith* (2003) 30 Cal.4th 581 (ABM 17-18), involved a finding of unavailability regarding a victim who appeared at trial but refused to testify based on her opposition to the death penalty. (*Id.* at p. 621.) Although the witness "was clearly trying to help defendant in refusing to testify against him," she was merely threatened with contempt, and was not even fined. (*Id.* at pp. 623-624.) The mild treatment of the recalcitrant witness in *Smith*, despite the inference that she intended to aid a principal in avoiding punishment, certainly does not support Partee's conviction on four felony counts of being an accessory to murder.[3]

Partee has not argued that the State has no ability to punish a witness's refusal to testify. Section 166, subdivision (a)(6) makes "the contumacious and unlawful refusal of a person to be sworn as a witness" the misdemeanor of contempt and, even without a criminal conviction, "if the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it,..." (Code Civ. Proc. § 1219, subd. (a).) Partee was jailed for nearly four months before she was even charged with criminal contempt or being an accessory under section 32 (CT 3-4, 45-46, 3-RT 903,

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[3] The threat posed to recalcitrant witnesses by the Second Appellate District's decision is discussed in section II, *infra*.

910, 967-968, 970-972), a more serious punishment than suffered by anyone in *Calandra, Smith* or *Heitzman.*

The State simply has no authority for its argument that Partee's refusal to testify constituted an affirmative act subjecting her to liability under section 32, and this Court should reject it.

E. Federal Guidelines are Irrelevant to the Issues Before this Court

Although the State does not mention the federal statute regarding accessories after the fact, 18 U.S.C. § 3, it contends that the federal guidelines governing sentencing for contempt support its position. (ABM 26-27.) The State contends cryptically that Partee is incorrect "in asserting that accessory punishment arising out of criminal contempt is wholly unprecedented" (ABM 26), but would presumably agree that actually convicting and punishing a person as an accessory based on criminal contempt is wholly unprecedented, because it cites no authority to the contrary.

The State's claim that federal courts have "repeatedly found in the sentencing context that instances of criminal contempt are tantamount to being an accessory after the fact" (ABM 26), is not supported by the authorities it cites. It is true, as the State explains (ABM 26), that due to the wide variety of conduct that can constitute contempt, there is no specific guideline for federal criminal contempt, and courts are directed to

apply the most analogous offense guideline. (*United States v. Brady* (1st Cir. 1999) 168 F.3d 574, 576-577.) Where a witness has refused to testify, sentencing courts can apply the guideline for misprision, refusal of a material witness to testify, or obstruction of justice and, if there is obstruction that interferes with a criminal investigation, the court is cross-referenced to the guideline for accessory after the fact. (*Ibid.*)

While *Brady* found it was not clearly erroneous for the sentencing court to apply the accessory guideline to a defendant found in contempt for refusing to testify (*Brady, supra*, 168 F.3d at p. 576), the case actually undermines the State's suggestion that federal sentencing guidelines can assist this Court in resolving this case, because the sentencing court in *Brady* did not apply the accessory guideline on the basis of the defendant's refusal to testify. Instead, the accessory guidelines were considered appropriate because the defendant had been "'involved'" with the principal robbers and knew of their plans, his theft of a car was "'in some way'" related to the robbery, and his "'obdurate refusal to testify is part and parcel of his involvement with these individuals.'" (*Id.* at pp. 576, 579.) As discussed above, Partee's prosecution was based solely on her refusal to testify, not on any allegation that she was involved in the murder. (CT 49-51, 212; 2-RT 648-649; 5-RT 1809, 1841, 1843-1844.)

In addition, the application of the accessory after the fact guideline

does not depend on whether the defendant could actually have been convicted of being an accessory after the fact. (*United States v. Brenson* (11th Cir. 1997) 104 F.3d 1267, 1285-126.) The defendant "need not be proven to be an accessory after the fact, because the application of [the accessory guideline] is due to the cross-referencing requirement in [the obstruction of justice guideline] and not based on [the defendant] being treated as an accessory after the fact.... [His] argument that the government has the burden of proving that he qualifies as an accessory after the fact to the crimes committed by [the principal] is incorrect." (*Ibid.*)

Finally, the State makes no attempt to show that a person who refused to testify could be proven to be an accessory after the fact under 18 U.S.C. § 3. As Partee explained in her opening brief (OBM 31-33), federal accessory law is more restrictive than California's – an accessory must provide affirmative if indirect assistance (*United States v. Kessi* (9th Cir. 1989) 868 F.2d 1097, 1105), and lying to protect a suspect is not a violation of 18 U.S.C. § 3 (*United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, 1354), though it is a violation of section 32. (*Duty, supra*, 269 Cal.App.2d 97.) The State does not mention 18 U.S.C. § 3 or respond to Partee's discussion, except to note that none of the cases cited "holds that the only way an individual can aid a principal is by making an affirmative

misrepresentation to authorities." (ABM 25, fn. 4.)

The federal sentencing guidelines therefore simply have no bearing on the issues in this case, and this Court should reject the State's suggestion to the contrary. The cases cited by the State deal only with prosecutions for contempt, and do not in any way approve a hypothetical prosecution under the federal accessory statute for refusing to testify, or establish that any federal court would find that refusing to testify constitutes being an accessory after the fact under 18 U.S.C. § 3.

II. Partee's Intent In Refusing to Testify was Similar to the Intent of Other Recalcitrant Witnesses, Who Would be Subject to Prosecution Under the Second Appellate District's Interpretation of Section 32

The State argues that this Court need not heed Justice Baker's warning that "accessory charges for recalcitrant witnesses are now fair game" (*Partee, supra*, 21 Cal.App.5th at p. 652 (Baker, J., concurring and dissenting), because section 32's intent requirement will ensure that courts and juries can distinguish between recalcitrant witnesses who might refuse to testify "based on fears of retribution" (ABM 10), and someone like Partee who deserved harsh treatment as an accessory because she wanted to help murderers to go free. (ABM 8-9, 10, 14, 21 and 21, fn. 3.)

The depiction of Partee's state of mind in the ABM is not an accurate one. Although Partee feared retribution just like other recalcitrant

witnesses (3-RT 1335-1336; 4-RT 1528, 1534-1535, 1551-1553, 1563-1567), the State makes no mention of those fears. Asked why she had refused to testify, Partee's immediate response was, "Several reasons. It's my family, it's my life, it's my daughter's life, my family's life that's in jeopardy." (3-RT 1335.) These fears were the result of death threats from gang associates (3-RT 1333-1334), pressure from family members (3-RT 1334-1335; 4-RT 1551-1552), and threatening phone calls. (3-RT 1335.)

Throughout the ABM, the State scatters claims about Partee's intent in refusing to testify, most not supported by citations to the record.[4] While Partee acknowledged she did not want her testimony to send her brother and the others to prison for life, that was the same motivation she gave for refusing to testify truthfully at the trial of Trevor Williams, who had killed her boyfriend. (3-RT 1530-1333; 4-RT 1511-1516, 1529-1531, 1552-1553.) The State claims Partee "knew the case against the men was dismissed in 2008, and she knew that it would be dismissed again if she did not testify.

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[4] In addition to numerous statements in the introduction (ABM 8-9), the State claims without record citation that Partee acted "with the intent to help her brother ... evade conviction and punishment" (ABM 17, 18), had an "intended purpose of preventing the murder trial" (ABM 25), [indisputably] had the requisite knowledge and intent" (ABM 27), and "knew that her refusal to testify would aid her relatives and friends to avoid prosecution [and] openly admitted under oath ... 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 (*sic*) the men evade prosecution and arrest." (ABM 29.)

(4-RT 1531)" (ABM 14), but Partee's testimony on that page does not appear to refer to the later prosecution being dismissed. (4-RT 1531.) Elsewhere, Partee specifically denied understanding that the second prosecution would not go forward without her, and denied wanting to help the defendants. (4-RT 1533, 1548, 1552-1553.)

Given the significant overlap between Partee's intentions and those of recalcitrant witnesses with no prior relationship with the defendant, including fear, the intent requirement of section 32 does not answer Justice Baker's concerns about severely overpunishing recalcitrant witnesses. (*Partee, supra*, 21 Cal.App.5th at p. 652 (Baker, J., concurring and dissenting).) Even if other recalcitrant witnesses do not, like Partee, testify in their own defense, intent would usually be proven by inference from the circumstances of the case. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 469, and 469 fn. 5.) "A defendant's intent is rarely susceptible of direct proof, and may be inferred from the facts and circumstances surrounding the offense." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624,) The State argues, for example, that Partee's "violation of the court order achieved her intended purpose of preventing the murder trial of her family and friends" (ABM 25), but the State could make the same argument about any witness who refused to testify, without regard to any prior relationship with the person on trial.

One of the cases relied on by the State, *Smith, supra*, 30 Cal.4th 581 (ABM 17-18), perfectly illustrates Justice Baker's concerns. The only relationship the recalcitrant witness in *Smith* had with an accused murderer "was as his rape victim" (*id.* at p. 623), but she refused to testify against him because she opposed the death penalty, stating "'I cannot in good conscience testify" and "potential sanctions, including criminal sanctions for contempt under section 166, would not cause her to testify." (*Id.* at p. 621.) Despite her professed motive for not testifying, this Court concluded the witness "was clearly trying to help defendant in refusing to testify against him." (*Id.* at p. 624.)

According to the State (ABM 8-10, 17, 18, 25, 27, 29), and under the ruling below (*Partee, supra*, 21 Cal.App.5th at pp. 639-640), a jury could convict the victim in *Smith* of being an accessory to murder under section 32. The witness obviously knew the defendant had been charged with murder, and a prosecutor could ask a jury to infer, as this Court did, that she was refusing to testify with the intent of aiding him to avoid punishment. (§ 32.)

This Court should reject such an obviously unjust interpretation of section 32, and reverse.

III. The Prosecution's Unjust, Unprecedented Interpretation of Section 32 Violated Partee's Right to Due Process Because She Did Not Have Fair Warning

While acknowledging the absence of any published authority for prosecuting a person in Partee's circumstances as an accessory, the State dismisses that absence as "not dispositive of the fair notice question." (ABM 27.)[5] According to the State, "Liability under section 32 arises only rarely in refusal-to-testify circumstances" (ABM 27), suggesting liability has actually arisen under those circumstances, but cites nothing to show, even anecdotally, that there has ever been such a prosecution. The prosecutor who envisioned this new use of section 32 acknowledged he was unaware of any such prosecutions. (2-RT A7-A8.) As discussed above, the State argues that the most analogous published authority in the more than eighty years since the Legislature amended section 32 is a case that involved affirmative misrepresentations to authorities, not a refusal to testify. (ABM 25, citing *Plengsangtip, supra*, 148 Cal.App.4th 825.)

Contrary to the State's contention, the unprecedented prosecution of Partee was "unconstitutionally novel" (ABM 27), because section 32 did not give "'fair warning ... in language that the common world will understand,

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[5] In her opening brief, Partee argued that her constitutional rights to due process and jury were violated due to insufficient evidence to convict under section 32 (OBM 34-37), to which the State has given a one paragraph response reiterating its interpretation of section 32 (ABM 27), to which Partee has replied in sections I-II, *supra*.

of what the law intends to do if a certain line is passed.'" (*United States v. Lanier* (1997) 520 U.S. 259, 265, quoting *McBoyle v. United States* (1931) 283 U.S. 25, 27.) As the State suggests (ABM 28, fn. 5), Partee is arguing that her prosecution violates the third manifestation of the "fair warning requirement" described in *Lanier; i.e.*, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope,..." (*Lanier, supra*, 520 U.S. at p. 266.) "An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids." (*Bouie v. Columbia* (1964) 378 U.S. 347, 353.)

The State argues that the language of the statute, and in particular the intent requirement, "adequately and clearly conveys that conduct like appellant's is prohibited under section 32" (ABM 28), even though no one apparently realized this prior to Partee's actual prosecution, which began on August 26, 2015. (CT 3.) As the State notes elsewhere (ABM 13), when Partee refused to testify on June 11, 2015, she had been warned that she would probably be found in contempt and was found in contempt (3-RT 904, 910), but neither the court, the prosecutor nor defense counsel suggested she could be prosecuted as an accessory to murder. (3-RT 903-910.) While the State argues it was "'reasonably clear at the relevant time

that the defendant's conduct was criminal'" (ABM 29, quoting *Lanier, supra*, 520 U.S. at p. 267), it was only clear that the conduct was punishable as a criminal contempt, not that Partee could be charged as an accessory.

Rather than explaining how Partee could anticipate that her refusal to testify would subject her to prosecution as an accessory for the first time in American jurisprudence, the State makes a series of unsupported claims about her intent. (ABM 29.) As discussed in section II, *supra*, Partee did not "openly admit[] under oath" that she knew the case would be dismissed and intended to help the defendants "evade prosecution and arrest" as the State insists (ABM 29), and instead stated her belief that prosecution was still possible, while denying an intent to help. (4-RT 1531, 1533, 1548, 1552-1553.) Even assuming Partee knew she had the requisite intent under section 32, the State does not explain how she could have anticipated that her refusal to testify would subject her to liability under that statute when prior interpretations of it had all required an affirmative misrepresentation to authorities. (*Plengsangtip, supra*, 148 Cal.App.4th at pp. 837-839; *In re I.M., supra*, 125 Cal.App.4th at pp. 1203-1206, *Nguyen, supra*, 21 Cal.App.4th at pp. 538-539; and *Duty, supra*, 269 Cal.App.2d at pp. 100-105.)

The Second Appellate District's unforeseeable judicial enlargement

of section 32, like an unconstitutionally vague statute, "'may authorize and even encourage arbitrary and discriminatory enforcement.' [Citation.]" (*People v. Castaneda* (2000) 23 Cal.4th 743, 751.) As discussed in the previous section, prosecutors who decide to charge recalcitrant witnesses as accessories rather than with contempt can argue that jurors should infer an intent to help the defendant based solely on the refusal to testify, because the recalcitrant witnesses knew that a defendant who had been charged with a crime might not be prosecuted or punished without their testimony.

No one could have anticipated the State's interpretation of section 32, which would allow people like the victim in *Smith, supra*, 30 Cal.4th at pp. 621-624, to be convicted of being an accessory to murder. This Court should reverse Partee's four felony convictions and place constitutional limitations on prosecutors and lower courts.

IV. The Second Appellate District's Determination to Affirm Partee's Conviction Because It Felt the Contempt Penalty Was Inadequate Violated the Separation of Powers Doctrine

The Second Appellate District specifically rejected this Court's conclusion that existing contempt statutes provide a California court with "sufficient power to maintain its dignity" (*In re McKinney* (1968) 70 Cal.2d 8, 12), determining instead that"the inability to prosecute accused murderers ... renders the contempt penalty inadequate ...." (*Partee, supra,*

21 Cal.App.5th at p. 638.) As Partee discussed in her opening brief (OBM 41-46), only the Legislature has the authority to increase the punishment for contempt, and the decision of the appellate court actually does "displace the Legislature's power to prescribe punishment for crimes." (*Partee, supra*, 21 Cal.App.5th at p. 638.)

Rather than address Partee's argument directly, the State contends this case simply involves prosecutorial discretion, which is itself protected under the separation of powers doctrine, and that Partee is asking this Court to misapply or ignore the rule it established in *In re Williamson* (1954) 43 Cal.2d 651, regarding general versus special statutes. (ABM 29-32.) The State is wrong on both counts.

At the outset, Partee denies that the facts of this case, as the State suggests (ABM 30), would support prosecution under both section 32 and section 166, subdivision (a)(6) governing contempt, so the concept of prosecutorial discretion simply does not apply. As discussed at length in sections I-III, *supra*, the unprecedented prosecution of Partee under section 32 was contrary to the statutory language, prior existing law, and her right of due process.

Partee recognizes that, as long as the charging decision does not discriminate against any class of defendants, a prosecutor has discretion "when an act violates more than one criminal statute." (*United States v.*

Batchelder (1979) 442 U.S. 114, 123-124.) The prosecutor has the "discretion to choose which of various available charges is most appropriate under the circumstances" (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 (internal quotations omitted)), but the prosecutor:

> "speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name. [Citation.]"

(*People v. Eubanks* (1996) 14 Cal.4th 580, 589-590.)

Although the prosecutor's determination to prosecute Partee with charges never before brought against a recalcitrant witness has to this point been upheld by the lower courts, this Court should determine that, rather than simply engaging in the proper exercise of his discretion, the prosecutor was charging Partee not only with an inappropriate charge, but with one that was not available under the circumstances. (*Manduley, supra*, 27 Cal.4th at p. 552.)

The State's reliance on the *Williamson* rule, which "'is a rule designed to ascertain and carry out legislative intent' [Citation]" (*People v. Murphy* (2011) 52 Cal.4th 81, 86), is completely misplaced. The basic premise underlying the *Williamson* rule is that "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." (*Ibid.*) The *Williamson* rule makes sense in cases such as *Murphy*, which held that since filing a false vehicle theft report violated both Vehicle Code section 10501, a misdemeanor, and section 115, a felony, "we infer that the Legislature, in specifying that such conduct constitutes a misdemeanor, intended to create an exception to the felony punishment specified in the more general statute." (*Id.* at pp. 94-95.)

But the *Williamson* rule has nothing to do with this case. As the State acknowledges, section 166, subdivision (a)(6) governing criminal contempt and section 32 "are aimed at curing different ills in our society." (ABM 32.) The State does not even suggest that in 1935 the Legislature, in amending the "general" statute, section 32, was considering whether to repeal the "special" statute, section 166, subdivision (a)(6), which it had adopted in 1872. (See *Williamson, supra*, 43 Cal.2d at p. 654.)

This Court should determine that neither the doctrine of prosecutorial discretion, nor the *Williamson* rule, justifies the decision of the Second Appellate District. By not disputing the arguments made in Partee's opening brief (OBM 41-46), the State apparently agrees that the Legislature must be "'accorded the broadest discretion possible in enacting penal statutes and in specifying punishment for crime'" (*In re Lynch* (1972) 8 Cal3d 410, 414 (citations omitted)), and that courts cannot convict

recalcitrant witnesses as accessories simply because they find existing contempt remedies to be inadequate. (*Partee, supra*, 21 Cal.App.5th at p. 638.)

This Court should hold that, in the absence of action by the Legislature, recalcitrant witnesses in criminal cases 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

This Court should not place California in a category all its own by expanding liability under section 32 to allow the prosecution of recalcitrant witness as accessories to the crimes being prosecuted. There is no precedent for the decision below, and Petitioner Starletta Partee asks this Court to reverse her four felony convictions.

LAW OFFICES OF PAUL KLEVEN

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CERTIFICATE OF COUNSEL

I certify that this Reply Brief on the Merits contains 7,038 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:

REPLY BRIEF ON THE MERITS

on the following person(s) in this action by:

Starletta Partee
(address known to attorney)

[✔] (ELECTRONIC SERVICE BY EMAIL) On March 12, 2019, I transmitted a PDF version of this document by electronic mail using the email addresses indicated above.

AND,

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 12, 2019 at Berkeley, California.

KATHY YAM