

No. S248520

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

SUPREME COURT
FILED

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Deputy

OPENING BRIEF ON THE MERITS

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Defendant and Petitioner.)	
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PETITIONER’S OPENING BRIEF ON THE MERITS

INTRODUCTION

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

- I. Can a person who refuses to testify in a criminal proceeding be prosecuted and convicted as an accessory to the crime being prosecuted?
- II. Can the refusal to testify in a criminal proceeding constitute sufficient evidence of harboring, concealing or aiding a principal to support a conviction as an accessory under Penal Code section 32?
- III. Does the unprecedented prosecution and conviction of a person as an accessory for refusing to testify in a criminal proceeding violate the separation of powers doctrine?
- IV. Does the unprecedented prosecution and conviction of a person for a crime other than contempt for refusing to testify in a criminal proceeding violate the separation of powers doctrine?
- V. Does the unprecedented prosecution and conviction of a

person as an accessory based solely on her refusal to testify in a criminal proceeding violate the constitutional right to due process?

Contrary to the Second Appellate District's assertion that California Courts of Appeal have previously sustained accessory convictions under circumstances similar to this case (*People v. Partee* (2018) 21 Cal.App.5th 630, 636), there are no precedents for prosecuting a refusal to provide information to authorities as a violation of Penal Code¹ section 32. California appellate courts have consistently held that to be convicted as a person who "harbors, conceals or aids a principal" (§ 32), a defendant must provide overt, active assistance to that principal which, if the aid consists of statements to authorities, must include active misrepresentations, not mere silence. (*People v. Duty* (1969) 269 Cal.App.2d 97.)

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

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

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

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

STATEMENT OF THE CASE

The Los Angeles County District Attorney charged Partee with four counts of being an accessory to murder in violation of section 32, and one count of refusing to testify at a preliminary hearing, a misdemeanor violation of section 166, subdivision (a)(6), all occurring on June 11, 2005. (Clerk's Transcript on Appeal ("CT") 49-51.) The Information further

alleged that the accessory offenses were committed for the benefit of a criminal street gang in violation of section 186.22, subdivision (b)(1)(C). (CT 49-51.) In addition, the Information alleged that the refusal to testify benefitted a gang under section 186.22, subdivision (d), making the violation of section 166 a felony punishable by up to three years. (CT 49, 51.) At the Preliminary Hearing, the magistrate set bail at \$540,000, which was later reduced to \$500,000. (CT 46, 55.)

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

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

On July 5, 2016, the court suspended imposition of sentence and placed Partee on probation for three years on condition she serve 365 days in county jail, with total credit for time served of 220 days, awarding no

credit for the time spent in custody from Partee's arrest on April 29, 2015, up through the filing of the charges in this matter on August 27, 2015. (CT 3, 277-281; 3-RT 965-966, 977-978, 996, 5-RT 2118-2126.)

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

On March 21, 2018, Division Five of the Second Appellate District Court of Appeal affirmed in a split opinion partially certified for publication. (*Partee, supra*, 21 Cal.App.5th 630.)

STATEMENT OF FACTS

A. Shooting Incident in Housing Project

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

Homicide detective John Skaggs found casings at the scene indicating the use of at least two semiautomatic guns. (3-RT 912-915, 926-

927, 1214-1215, 1217.) Skaggs conducted a recorded interview of Johnson, though he did not tell Johnson the interview was being recorded. (3-RT 917.) According to Skaggs, Johnson said that after hearing the shots he looked over and saw a blue/gray van with two young black males in the front seats. (3-RT 919-920.)

An officer found a van in the nearby Jordan Downs housing project that had been running quite recently. (2-RT 748-750, 3-RT 927-928.) Between the hood and the windshield of the vehicle, Skaggs found a .40 caliber casing made by Winchester, which also manufactured the casings found at the scene. (3-RT 928-929.) He also found bullet strikes or indents in the driver's door and the rear deck lid gate. (3-RT 1014-1015, 1204, 1212-1214.) Skaggs interviewed a woman who admitted she had driven four men out of Jordan Downs, and was able to identify two from a photo lineup. (2-RT 677, 3-RT 921-922, 952-956, 992-993, 1208-1210.)

B. Detective's Interview of Petitioner

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

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

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

The Clarks were with Partee when she rented the car while hers was being repaired. (SCT 9-14.) Robinson asked to borrow the car one evening to go see a girl. (SCT 17-20, 26, 29.) Partee received a chirp from one of the Clarks the next day, asking her to report the rental car stolen, and to pick

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

They explained they had gone to the projects because a girl was going to give them some money. (SCT 56-57, 58; 3-RT 942-943; 1010.) When they got there people came out shooting at them while someone else tried to block them, so they had to start shooting, and one of the others may have been killed. (SCT 56-63, 69-70, 90-92; 3-RT 1013.) They had parked the rental car and no longer had any guns. (SCT 58, 62-64.) After getting food for herself and her daughter, Partee dropped them at a hotel with some money. (SCT 71-75.)

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

witness against her boyfriend's killer, Carver Bones, and had received pressure for that. (SCT 86-883-RT 990.) She was worried if she testified that "they going to go get my family," and she could not have that. (SCT 89.)

C. Petitioner's Testimony

During her own testimony, Partee explained that the year before the shooting in this case she had been a witness to the murder of her boyfriend. (3-RT 1332; 4-RT 1514.) At the request of the district attorney she testified at the preliminary hearing in that case, even though her car was set on fire and she was spit on, attacked at a store, called a snitch, and shunned. (3-RT 1333; 4-RT 1510-1512, 1528-1529.) At trial, she did not testify truthfully to clear her conscience, because she could not send a man away for the rest of his life. (4-RT 1515-1516, 1518-1521, 1530-1531.)

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

1506-1507.)

After Partee could not find the car the next morning (3-RT 1308), she received a call from Bryant Clark, who asked her to report the car stolen and said he would explain later. (3-RT 1310-1312; 4-RT 1524.) She and her six-year-old daughter later went in her own car to meet Clark and the others. (3-RT 1312-1313, 1315, 4-RT 1524.) She picked up Robinson, Green and the Clarks, and was told that they had gone to the projects to meet a girl to give them some money but were attacked and had to shoot their way out. (3-RT 1314-1315, 4-RT 1519.) She asked if the car was damaged or anyone hurt, and was told they thought a man was dead. (3-RT 1314-1315.) After getting food (3-RT 1315-1316), she gave them \$60 and drove them to a hotel. (3-RT 1317.) She knew at the time they were fleeing the scene of a shooting but believed the shooting was in self-defense. (4-RT 1539-1540.)

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

After what seemed like hours, Skaggs came in the room and took her handcuffs off. (3-RT 1320-1321.) From the beginning, Partee said she did

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

D. Period Between Interview and Arrest

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

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

Partee worked full-time at an accounting firm doing payroll, making

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

E. Arrest and Preliminary Hearing

On April 29, 2015, Skaggs heard that Partee was in the area so he had her stopped and arrested for a traffic warrant. (3-RT 965-966, 977-978, 996.) Once Partee was taken to the police department, Skaggs contacted the prosecutor to have new charges filed, along with a subpoena to have her delivered to the court against her will. (3-RT 966-967.)

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

prosecutor. (3-RT 905-906.)

After Partee did not answer questions posed by the prosecutor, the court again ordered her to be sworn in, and then held Partee “in contempt. You are going to be put into custody with no bail until such time as you change your mind.” (3-RT 910.) When counsel asked the court to sign a medical order for Partee, the court said, “I’m going to do this now. She’s the least of my issues at this point.” (3-RT 910.) Partee explained that at a point in the proceedings where the court ordered her to “pay me some respect now,” she was not trying to show disrespect to the court, but had her head down, was vomiting, had lost over 30 pounds and was sick due to being in the first trimester of a pregnancy. (3-RT 909; 4-RT 1505-1506.)

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

F. Time in custody, reasons for not testifying

Partee ended up spending seven and a half months in custody before her family and a family friend were able to bail her out. (4-RT 1502., 1535-1536, 1557-1560)²

Partee said that she refused to testify due to her family, her life, and her daughter’s life being in jeopardy. (3-RT 1335-1336.) Although she had originally told Skaggs she did not have to worry because family members

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

were involved, she found out to the contrary that she did have to worry. (3-RT 1335-1336; 4-RT 1528.) She has multiple fears, primarily for her daughter being able to live a good life without being victimized for Partee's actions. (3-RT 1336-1337.) She tearfully told the prosecutor before trial that she was afraid to testify, and that her main fear centered on her daughter. (4-RT 1562-1567.)

Although she denied being offered relocation services until just before her own trial (3-RT 1337), Partee was not interested in relocation because she did not want to leave her family, and she wanted to keep peace in the family. (4-RT 1534-1535, 1551-1553, 1564-1567.) She would not accept immunity because it was impossible to escape her entire family, including her daughter who was trying to get into college, the seven children of her deceased brother, and the two children of her dead boyfriend, for whom she also cared. (3-RT 1337-1338.)

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

In almost every murder case that Skaggs has brought to court, a witness has failed to appear, recanted or otherwise changed his or her statement due to concerns about self-preservation and fear; while that is

very common in gang cases, this is the only case where the witness has refused to testify. (3-RT 1000-1001, 1203-1204, 1221-1223.) Even when witnesses contradict their recorded statements on the witness stand, they are never prosecuted for perjury. (3-RT 1203-1204.)

ARGUMENT

- I. **Convicting a Person of Being an Accessory for Refusing to Testify is Contrary to California Law, the Rules of Statutory Construction, and Authorities Throughout the Country**
 - A. **Until the Decision in this Case, California Courts Have Required an Accessory to Provide Overt Assistance to a Principal, Including Affirmative Misrepresentations to Authorities, and Have Never Affirmed a Conviction Based on the Refusal to Provide Information**

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

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

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

Since 1935, section 32 has stated:

Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

(§ 32.)

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

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

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

The gist of the offense is that the accused “‘harbors conceals or aids’ the principal with the requisite knowledge and intent. Any kind of overt or affirmative assistance to a known felon may fall within these terms.... ‘The test of an accessory after the fact is that, he renders his principal some personal help to elude punishment ...– the kind of help being unimportant.’ [Citation.]”

(*People v. Nuckles* (2013) 56 Cal.4th 601, 610, quoting *Duty, supra*, 269 Cal.App.2d 97, 104, discussed in detail below.)

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

meaning. (<https://www.merriam-webster.com/dictionary/transitive>.)³

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

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

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