IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JANE NUCKLES,

Defendant and Appellant.

S200612

Fifth Appellate District, No. F061562
Kings County Superior Court No. 09CM3022
Honorable Donna Tarter, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Court has granted review of the following question: Was defendant properly convicted of being an accessory to a felony for assisting another person to abscond from his parole term after serving his sentence for that felony? Appellant has argued that the elements of Penal Code section 32[1] do not include aiding someone who has absconded from parole. The respondent takes the position that there is liability as an accessory to a felony "by aiding a convicted felon with the intent that he avoid punishment for his felony conduct [by aiding him to avoid parole supervision or to avoid the consequences of having absconded from parole]." (Respondent's Answering Brief on the Merits, hereinafter RABM, p. 4.) The respondent's

[1] Hereinafter all section references are to the Penal Code unless otherwise noted.

position is not supported by the definition of punishment from the California Penal Code, but relies on extrinsic sources and a broad definition of punishment from constitutional interpretation in the context of ex post facto law. There is no need to reach beyond the statutory definition to effectuate the purpose of the law.

The respondent's position is that any aid to a parolee which avoids parole supervision qualifies as avoiding punishment because supervised parole is punishment. However, aid to a parolee does not make the aider an accessory and a party to the crime as defined in section 32. The context of section 32, the terms of the statute, and the stated legislative intent do not support accessory liability for one who aids a parolee. The conviction in this case exceeds the limits of a criminal sanction and requires reversal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Underlying Facts.

There are minor discrepancies in the record citations in the respondent's rendition of the case.

The testimony of Mr. Amaral is attributed as appellant's admission at trial that she had viewed she viewed a local paper indicating a fugitive felony warrant had issued for Adam Gray's arrest. (RABM, p. 2, fn3, citing to 5RT 656-657.) In fact, Ms. Nuckles testified that she saw the Crime

Stoppers photo with an indication that Mr. Gray was wanted for a parole violation rather than for a felony warrant. (6RT 940.) She knew he had been to prison and that he was on parole. (6RT 943.)

Respondent's introduction suggests that events happened shortly after Mr. Gray was released on parole. (RABM, p. 1.) The inference is that any parolee would know that he was in violation of conditions. (RABM, p. 13.) His release was on July 9, 2008. (5RT 634.) His parole was suspended as of July 21, 2009 and there was a warrant for his arrest from having absconded. (5 RT 636.) It was over a year after initial release on parole that he visited the Nuckles/Amaral home in August, 2009 and he was arrested there on September 3, 2009. (5RT 640, 644, 647; 6 RT 910-911, 914-915, 920.)

ARGUMENT

I

THE PLAIN, COMMONSENSE MEANING AND INTENDED EFFECT OF PENAL CODE SECTION 32 DOES NOT PERMIT CONVICTION OF A DEFENDANT WHO MERELY HELPS A PERSON WHO HAS ABSCONDED FROM PAROLE.

A. De novo review is appropriate.

Respondent argues that the case presents a mixed question of fact and law requiring a three-step analysis. (RABM, p. 5.) Reliance is on

People v. Louis (1986) 42 Cal.3d 969, 984, a case which describes a mixed question involving due diligence. (*People v. Louis, supra,* 42 Cal. 3d at p. 988.) Ultimately, the *Louis* court found no need to resolve the issue because there was error under any standard. (*Id.*, pp. 988-989.)

Where the question implicates constitutional rights, necessitating consideration of legal concepts in the mix of fact and law and an exercise of judgment about the values that animate legal principles, the factors favoring de novo review predominate. (*Smith v. Fresno Irrigation Dist.* (1999) 72 Cal. App. 4th 147, 157 citing *Ghirardo v. Antonioli* (1994) 8 Cal. 4th 791, 800-801; *People v. Louis* (1986) 42 Cal. 3d 969, 987.) De novo review is appropriate in this case.

B. The law of accessory liability focuses on whether "punishment"as set forth in section 32 includes aiding an absconding parolee.

Respondent provides a brief review of the law on principals and accessories originating in English common law. (RBAM, p. 6.) Review of English common law and the wording of California's statute prior to 1935 provide the purpose of the law. Respondent then employs a shift in wording from "punishment" to "consequences of criminal conduct" to justify including a parole violation as "punishment" within section 32. (RBAM, p. 7.) There is no authority cited for the semantic shift from

punishment to consequences. There is no citation to any source which extends the reach of the accessorial culpability to the avoidance of parole consequences for the principal.

The key phrase in the statute since 1935 is the "escape from . . . punishment." (Stats. 1935, ch. 436, sec. 1.) The death penalty is no longer the punishment applied, but that makes no difference. The criminal sanction is limited to that as prescribed in the current version of Penal Code section 32. The "gist" is to help a felon to avoid or elude punishment for the crime that was committed. (RABM, p. 8.)

C. The fact that parole is a mandatory consequence of some convictions does not render it as punishment.

Respondent argues that mandatory parole is a direct consequence of a felony conviction. (RBAM, p. 8, heading C. 1.) Parole applies to "*all* convicted felons . . . *in addition* to the prison term." (RABM, p. 9.) While this may be true for some offenses, it does not make parole the equivalent of punishment.[2] It is not a measure of good behavior or a means of reducing the prison sentence that has been imposed as punishment. Respondent's argument that a direct consequence of a felony conviction is punishment

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[2] Parole has undergone changes with Realignment. There is a transition to community supervision and release from prison after July 1, 2013 only includes parole for those convicted of specified violent, serious, or sex offender registration offenses. (See sec. 3000.08.)

glosses over the distinction. There are many consequences of a conviction which are not punishment. They may require the advice of the court or counsel; they may have attributes of punishment; and, they may be considered punishment for the purpose of a constitutional analysis which casts a broader meaning than section 32.

For example, as pointed out in *In re Resendiz* (2001) 25 Cal. 4th 230, 250, criminal convictions have "dire consequences" beyond the punishment meted out by the state. In that case, the court considered immigration law consequences such as deportation as a material matter. The requirement of advice at the time of the plea is because of the risk of dire consequences such as banishment and exile. Beyond the court's duty to advise of immigration consequences at the time of a plea, an attorney also has a duty to advise his client because of the important consequences which may inexorably flow from a conviction. (*In re Resendiz*, supra, 25 Cal. 4th at p. 250-251.) Yet, these consequences are not considered punishment.

People v. Moore (1998) 69 Cal. App.4th 626, 630 was cited in the Court of Appeal opinion as support and by respondent. (RABM, p. 8.) The lengthy quote from the case gives a littany of "direct consequences of conviction" including "punishment provided by statute [citation]; imposition of a restitution fine and restitution to the victim [citation]; . . .

the maximum parole period following completion of the prison term [citation]; registration requirements [citation]; and revocation or suspension of the driving privilege [citation]." (*People v. Moore, supra,* 69 Cal. App.4th at p. 630.)

There are "consequences" which follow inexorably from a conviction, but are still not punishment within the terms of Penal Code section 32. The list in the *Moore* case provides an example of consequences which are not punishment. Sex offender registration is a consequence, but is no longer considered a punishment in California since *In re Alva* (2004) 33 Cal. 4th 254. *Alva* found that the description of sex offender registration as punishment, as held in *In re Reed* (1983) 33 Cal.3d 914, was no longer viable. It cannot be considered a form of "punishment" regulated by either federal or state constitutional proscriptions against cruel and/or unusual punishment. "[W]e and the United States Supreme Court have moved steadily away from the *Reed* perspective, both in general and with respect to sex offender registration statutes in particular." *(In re Alva, supra*, 33 Cal.4th at p. 268.)

Alva points out an important feature of punishment:

> The object of punishment is to exact retribution for past misconduct, and to deter future transgressions by imposing painful *consequences for violations already committed.* Penal deterrence operates by warning the

> offender, and others tempted to commit the same violation, of the price to be paid for such actions.

In re Alva, supra, 33 Cal. 4th at pp. 287-288, emphasis added.

Respondent finds support in *In re Carabes* (1983) 144 Cal.App.3d 927, 930-932 as categorizing parole as a mandatory part of the prison sentence. (RABM, p. 9.) Language in the opinion seems to suggest that it is separate. "Parole is no longer an element affecting when a prisoner may be released from prison but is rather *a condition upon and in addition to imprisonment, affecting his life after he is released.* (*In re Carabes, supra,* 144 Cal. App. 3d at p. 930, emphasis added.) *Carabes* went on to consider the features of parole as punishment under the ex post facto, constitutional standard, in concluding that it should be the subject of advice at the time of a plea of guilty. (*Id.* at p. 932, citing *In re Thomson* (1980) 104 Cal.App.3d 950, 954 [a determinate term followed by a precise time for parole is an increase in punishment for ex post facto].) Without discussing the Legislative goal of parole or whether it comes within the statutory definition of punishment, *Carabes* held that a defendant "should have been advised of that consequence before entering his [guilty] plea." (*Carabes, supra,* at p. 932.)

It is clear from *Moore, Resendiz, Alva*, and *Carabes*, that the requirement of advice about parole at the time of a guilty plea does not

render it punishment. Advice about all direct consequences does not convert a consequence to the status of punishment. These cases do not suggest that punishment should be defined in any way other than as the California Legislature provided in section 32.

D. The Legislative intent suggests that the purpose of parole is not punishment but successful reintegration and public safety.

Section 3000, subdivision (a)(1) is cited as support for the proposition that supervised parole is punishment. (RABM, p. 10.) However the quoted purpose of parole is not punitive. Rather, it is to aid in successful reintegration of the offender into society; supervision and surveillance for public safety; and, counseling necessary to assist in the transition between prison and discharge. (RABM, p. 10.)[3]

When the legislative intent is punishment, that intent has been made clear. For example, Welfare and Institutions Code section 202 states the purpose of the chapter. There is reference to the interests of public safety and protection, the care and treatment of minors, and the minors being held

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[3] "The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge." (Sec. 3000, subdivision (a)(1).)

accountable for their actions. Also, "[t]his guidance may *include punishment* that is consistent with the rehabilitative objectives of this chapter." (Welf. & Inst. Code, sec. 202, subd. (b), emphasis added.) There is no suggestion of an intent that parole is punishment in the Legislature's statement of intent for section 3000.

Despite the goal of assisting parolees in the transition between imprisonment and discharge, respondent suggests that the *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144 multifactor test should be applied to determine that parole is punishment. (RABM, p. 10.) The test is not appropriate. The limitations of the multifactor test were plumbed in the *Alva* decision. *Alva* recognized that a consequence of a criminal conviction might be "punishment" under the Eighth Amendment and its California constitutional equivalent, though it might not qualify as "punishment" for ex post facto purposes. (*In re Alva, supra,* 33 Cal. 4th at 273.) This Court found the factors set forth in *Mendoza-Martinez, supra,* 372 U.S. 144, to remain relevant in a number of constitutional contexts, and a lengthy consideration of the factors for ex post facto analysis in *Alva* resulted in a conclusion that sex offender registration is not "punishment" for that constitutional definition, but with the caveat that it still might be "punishment" under some "broader" test that applies to the cruel and/or

unusual punishment clauses. (*In re Alva, supra,* at p. 280.)

The issue in this case does not require any "broad" test for whether parole is punishment. This Court does not need to delve into the multifactor analysis of *Kennedy v. Mendoza-Martinez* for a constitutional analysis of parole as punishment. Rather, the definition of punishment, for the purpose of section 32, should rely on the statutory framework.

E. The statute should be construed to only criminalize assistance to escape from punishment as punishment is defined in section 18 or elsewhere in the Penal Code.

Fixing the penalties for crimes is the province of the Legislature. *(People v. McPike* (2010) 182 Cal. App. 4th 426, 436, citing *People v. Mauch* (2008) 163 Cal.App.4th 669, 674.) Appellant looked to the preliminary provisions of the Penal Code for a definition of punishment. Those provisions provide definitions and give context to the descriptions in Part I of crimes and punishments of the Penal Code. Respondent argues that sections 17, 18, and 19 should be disregarded because they are limited to defining what crimes may be punished as felonies or misdemeanors. (RABM, p. 11.) Respondent's position is that section 18 does not define the contours of punishment or create any legislative inconsistency regarding the meaning of the word punishment. (RABM, p. 12.) While the descriptive heading of section 18, "Punishment of felony not otherwise prescribed"

may be an enhancement provided by a publisher, it is more meaningful than respondent's description of it as creating "stealth wobblers." (RABM, p. 12, citing *People v. Mauch*, supra, 163 Cal.App.4th at p. 675.) *Mauch* recognized that as the purpose of the second clause of section 18. "The first clause of section 18 fixes. . . the term for felonies that do not otherwise identify a determinate prison sentence." (*Mauch, supra,* 163 Cal.App.4th at p. 675.) It provides that the punishment for felonies may consist of a period of imprisonment in state prison and a fine.

If that is unsatisfactory as a source of legislative intent as to the meaning of punishment, then this Court can also resort to the prescribed punishment for the offense of being an accessory. At the time of the instant offense, it provided "an accessory is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment." (Sec. 33.)[4] *In re Cook* (1910) 13 Cal. App. 399, 402-403 pointed out that when a criminal statute does not describe the punishment within the same code section, the punishment "is as clearly and definitely fixed and prescribed as if the language of section 18 had been expressly referred to [in

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[4]The statute was amended as part of Realignment. It now provides, "an accessory is punishable . . . by imprisonment . . . pursuant to subdivision (h) of section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment. (Sec. 33, Stats. 2011, c. 15, sec 232.)

the questioned statute]. The legislature, in other words, has itself made section 18 a part of [the questioned statute], so far as the penalty is concerned." *(In re Cook, supra,* 13 Cal.App. at p. 403.)

When construing statutes, the court must "ascertain the intent of the enacting legislative body" in order to "adopt the construction that best effectuates the purpose of the law." (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55.) To that end, the court "first examine[s] the words of the statute, 'giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent." (*Id.* at p. 55.) "If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (Ibid.) If "the statutory language may reasonably be given more than one interpretation, courts may consider extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*People v. King* (2006) 38 Cal.4th 617, 622.)

The statutory language should be given the interpretation which is clear from its context. Escaping punishment, in the context of section 32, means escaping from serving the term of imprisonment which flows from

the commission of the felony. It does not encompass other consequences, including parole supervision. The only need for extrinsic aids or a multifactor test is if there is a need to analyze what is to be considered punishment in a constitutional context. Since that is not necessary to a decision in this case, there is no need to search for some other definition of punishment.

F. The avoidance of arrest for a parole violation warrant or the avoidance of parole supervision makes no difference so long as there is no assistance to a new felony as a parole violation.

Respondent views appellant's action as having "helped him to abscond from parole which is punishable as a parole violation." (RABM, p. 12.) Gray was already an absconder who was wanted on a fugitive arrest warrant after his parole had been suspended. (RABM, p. 14.) Respondent cannot have it both ways.

Respondent argues that appellant conflates motive with intent and that the necessary intent was to aid Gray to evade parole supervision. (RABM, p. 14.) "She conveniently overlooks the fact that she aided a convicted felon to abscond from parole supervision entirely." (RABM, p. 12.) Respondent relies on 15 CCR section 2000, subdivision (b)(75) which defines a parolee at large as "an absconder from parole supervision, who is officially declared a fugitive by board action suspending parole." Whether

she concealed Gray to protect him from a parole violation or a return to parole supervision, either result is not with an intent to escape punishment for the felony for which the prison sentence was complete.

G. The section 32 violation defines criminal liability for only the parties to a crime.

Respondent argues that "Gray himself could have been prosecuted as an accessory if the evidence showed that he solicited appellant's aid to avoid punishment." (RBAM, p. 16.) The argument relies on *People v. Wallin* (1948) 32 Cal.2d 803, 806-807 which is characterized as similar to the situation in this case. (RBAM, p. 16.)

Wallin involved the crime of murder. Once the murder was completed, the murderess enlisted the aid of Wallin in disposing of the body. The murderess' testimony described how they dug a grave and buried the body. The conviction against Wallin was reversed because the jury was not instructed that they had to find corroboration for the murderess's testimony based on her liability as an accomplice. The reasoning rested on criminal responsibility as an accessory after the fact to the crime of murder.

Respondent's position is that Gray committed the offense of absconding. Therefore he was a principal. If he were to ask for aid from Ms. Nuckles to avoid parole supervision, he would become an accessory to his own absconding offense. (RABM, p. 15-16.) The argument fails

because the Penal Code does not describe any crime of absconding from parole. He could not have been so charged, he would not be entitled to the full panoply of rights which attend a criminal jury trial. He could only be subject to the penalties as proscribed in the California Code of Regulations, an administrative code.

Respondent ignores the context of section 32, which defines parties to a crime. The focus should be on holding those responsible as accessories if they assist those who are seeking to avoid punishment for a crime. The focus on an expanded definition of punishment takes the element out of the context of the criminal statute.

CONCLUSION

The appellate court erred in concluding that a parolee who has absconded is punishable as a principal for the underlying felony which initially resulted in his prison term. The conviction of Jane Nuckles, as an accessory for helping an absconding parolee avoid potential administrative sanctions must be reversed. It is for the Legislature and not the courts to devise a criminal sanction for harboring and concealing the whereabouts of a parolee who is known to have violated parole.

Dated: November 20, 2012

Respectfully submitted,

DEANNA LAMB
Counsel for Appellant
JANE NUCKLES

Certificate of Appellate Counsel
Pursuant to rule 8.520(c) of the California Rules of Court

I, Deanna Lamb, appointed counsel for appellant, certify pursuant to rule 8.520(c) of the California Rules of Court, that I prepared this reply brief on behalf of my client, Jane Nuckles and that the word count for this opening brief is 4174.

This brief complies with the rule that limits a reply brief to 8,400 words, including footnotes. I certify that I prepared this document in WordPerfect 15 and that this is the word count WordPerfect generated for this document.

Dated: November 21, 2012

Deanna Lamb
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On November 21, 2012, I served the attached:

- **APPELLANT'S REPLY BRIEF ON THE MERITS**

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on November 21, 2012, at Sacramento, California.

Sheila Brown