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.	CASE NO. S248520 B267040 Los Angeles County Superior Court Case No. TA138027

PETITIONER'S REPLY TO BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY DISTRICT ATTORNEY

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA. 94707
(510) 528-7347 Telephone
(510) 526-3672 Facsimile
Pkleven@Klevenlaw.com

By appointment of the Supreme Court

Attorneys for Petitioner
Starletta Partee

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INTRODUCTION

The Los Angeles County District Attorney ("LACDA") has filed an amicus curiae brief that illustrates perfectly how the prosecution of Petitioner Starletta Partee violated the separation of powers doctrine.

According to the LACDA, this Court does not need to examine how courts have interpreted Penal Code[1] section 32 or comparable accessory statutes in the past because, despite that caselaw, there is no ambiguity in the term "aids," as demonstrated by the prosecution's success thus far. (Brief of Amicus Curiae LACDA ("Amicus") 6-10.) Without analyzing the legislative intent underlying section 32, the LACDA believes this Court should affirm Partee's convictions largely because the punishment prescribed by the Legislature for contempt is not sufficiently harsh to give prosecutors the tools she thinks they need to combat criminal street gangs. (Amicus 7, 10-16.) The LACDA does not acknowledge, much less refute, Partee's argument that her unprecedented prosecution violates the separation of powers doctrine. (Opening Brief on the Merits ("OBM") 39-46, Reply Brief on the Merits ("RBM") 27-31.)

The LACDA's concern is not so much the proper interpretation of section 32 as the need for prosecutors to ensure that prior inculpatory

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

statements made by witnesses will be admissible under Evidence Code sections 770 and 1235. (Amicus 13-14.) Trial testimony established that Los Angeles prosecutors fully expect frightened gang witnesses who have given statements to the police to feign a loss of memory or otherwise contradict themselves on the witness stand, making their prior inconsistent statements admissible. The Second Appellate District promoted the same rationale, finding existing remedies for contempt inadequate precisely because a witness's complete silence precludes the admission of inculpatory prior statements. (*People v. Partee* (2018) 21 Cal.App.5th 631, 638.)

The LACDA is asking this Court to legislate on behalf of California's prosecutors by approving an unprecedented expansion of accessory liability in order to overcome admissibility problems involving hearsay statements. There is no justification for distorting section 32 beyond anything intended by the Legislature.

ARGUMENT

I. This Court Should Not Expand Potential Exposure Under the Accessory Statute Beyond that Envisioned in California or Any Other Jurisdiction

Like the Attorney General and the Second Appellate District, the LACDA does not cite a single precedent for her office's decision to prosecute Partee for four felony violations of section 32, with gang

enhancements, based on Partee's refusal to testify. (Amicus 6-17.) The amicus brief simply ignores Partee's extensive review of caselaw from California, other states, federal authorities and the common law, which overwhelmingly supports her position (OBM 15-34; RBM 3-20), and Partee will not repeat it here.

Adopting what she calls a "pragmatic" approach, the LACDA instead argues that the prosecution's string of successes up to this point in Partee's prosecution suggests that "both the facts and the law support appellant's convictions." (Amicus 8-10.) The same argument would of course apply to nearly every criminal case in which this Court has granted a defendant's petition for review, suggesting there is no need for Supreme Court review of California law.

The LACDA argues that, while Partee's specific intent to shield defendants from prosecution warranted her four felony convictions under section 32, the statute might not apply to less culpable gang witnesses. (Amicus 10-12.) But as Partee explained in replying to a similar argument from the State, the expansive interpretation of section 32 being urged upon the Court could easily be used to punish other recalcitrant witnesses, including those who refuse to testify due to moral concerns. (RBM 20-23.) Like the State, the LACDA ignores most of Partee's testimony about her state of mind and, in particular, her own significant fears of retribution,

which make her quite similar to other frightened gang witnesses who decline to testify. (See discussion at RBM 20-23.)

In a footnote based entirely on hearsay regarding a purported "informal survey" of gang prosecutors, the LACDA claims there are approximately fifteen witnesses in addition to Partee who refused to testify in hardcore gang cases, though none of the others was prosecuted under section 32. (Amicus 14-15, fn. 4.) The information in the footnote is inconsistent with the evidence presented at Partee's trial, where the lead investigator testified that, while frightened witnesses often recant or otherwise change their testimony at trial, he was unaware of any other witness in a murder case who had simply refused to testify. (Volume 3, Reporter's Transcript on Appeal ("3-RT") 1000-1001, 1203-1204, 1221-1223.)[2] Detective Skaggs, who acknowledged he "absolutely" lied to Partee in order to obtain her recorded statement (3-RT 984), assured the jury that witnesses who did contradict their own recorded statements in court were not prosecuted for perjury. (3-RT 1203-1204.)

The LACDA, contrary to Detective Skaggs, that recanting witnesses might be prosecuted for perjury (Amicus 16), but explains that the primary

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[2] The footnote also undermines the State's contention that Partee had "fair notice" she could be prosecuted for refusing to testify under section 32 (Answering Brief on the Merits ("ABM") 27-29), which Partee has already refuted. (RBM 24-27.)

purpose of having the frightened witnesses testify is to ensure that their prior inculpatory statements can be used against defendants. (Amicus 7, 10-16.) Evidence Code section 1235 allows the prosecution to impeach witnesses with their prior unsworn statements if they contradict them or feign memory loss at trial, which is "relatively common in gang prosecutions." (Amicus 13-15.) Although the LACDA does not suggest that section 32 has ever been used to pressure a witness into testifying, she expresses concern going forward that, without that threat, savvy witnesses will start refusing to testify, accepting the six month maximum punishment for traditional contempt set by the Legislature and preventing their prior inconsistent statements from being admitted at trial. (Amicus 7, 11, 15-16, citing section 166.)

The Second Appellate District cited the same rationale in its decision below, contrasting Partee's refusal to testify with the routine, impliedly approved "conduct of victims and witnesses who, having previously made out-of-court statements concerning a crime, take the stand and then claim a lack of memory." (*Partee, supra*, 21 Cal.App.5th at p. 638.) The prior statements are admissible "if the witness's memory loss is feigned," but the appellate court believed a complete refusal to testify hinders the prosecution and "renders the contempt penalty inadequate ...." (*Ibid.*)

Accessory statutes have never been used to punish silence. (OBM 15-

34; RBM 3-20.) While prosecutors must have adequate tools at their disposal, this Court should not reject uniform prior authority in order to give prosecutors the ability to threaten recalcitrant witnesses with felony prosecution under section 32 if they refuse to testify. (Amicus 7, 13-16.) Policy considerations regarding hearsay exceptions for prior inconsistent statements, and the severity of punishment available for refusing to testify, should be addressed to the Legislature, as discussed in the next section.

II. Under the Separation of Powers Doctrine, Only the Legislature Has the Power to Prescribe Punishment for Crimes or Change the Law Governing Hearsay Exceptions

As Partee discussed in both of her briefs (OBM 41-46, RBM 27-31), only the Legislature has the authority to increase the punishment for contempt, which this Court has specifically found to be adequate. (*In re McKinney* (1968) 70 Cal.2d 8, 12.) Unlike the Second Appellate District (*Partee, supra*, 21 Cal.App.5th at p. 638), the LACDA does not reject *McKinney* but, despite advancing a number of policy reasons in favor of her position (Amicus 7, 12-16), she also does not address the separation of powers doctrine.

Given the constitutional nature of that doctrine, which precludes this Court from increasing punishment for crimes, the LACDA should lobby the Legislature to increase the punishment for contempt. That change would

largely resolve the LACDA's concerns by giving prosecutors sufficient leverage to coax witnesses into testifying so their prior inconsistent statements can be admitted, without changing the entire nature of section 32. (Amicus 7, 11, 13-16.)

Alternatively, the Legislature has the power to revise the law regarding hearsay exceptions for prior inconsistent statements, as discussed in one of the cases relied upon by LACDA. (Amicus 13, citing *People v. Martinez* (2003) 113 Cal.App.4th 400, 407-408.) *Martinez* explained that, after this Court found certain prior inconsistent statements to be inadmissible, the Legislature enacted Evidence Code section 1294, which was "intended to overcome the admissibility problems associated with out-of-court statements which are inconsistent with an unavailable witness's former testimony ...." (*Id.* at p. 409.) While the LACDA focuses on convincing this Court that prosecutors need to be able to threaten witnesses with a felony charge under section 32 to convince them to testify, the Legislature as a matter of policy might well prefer to adopt a different procedure for introducing prior inconsistent statements.

There is no reason for this Court to adopt a wholly unprecedented interpretation of section 32 simply to give prosecutors a more punitive tool than is currently available to coax frightened witnesses into taking the witness stand, often to commit perjury.

CONCLUSION

For all the reasons stated above and in her prior briefs, Petitioner Starletta Partee asks this Court to reverse her four felony convictions.

LAW OFFICES OF PAUL KLEVEN

by: _____
PAUL KLEVEN
Attorney for Petitioner
Starletta Partee

CERTIFICATE OF COUNSEL

I certify that this Petitioner's Reply to Amicus Curiae Brief of Los Angeles County District Attorney contains 1,590 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:

PETITIONER'S REPLY TO BRIEF OF AMICUS CURIAE LOS ANGELES COUNTY DISTRICT ATTORNEY

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

Starletta Partee
(address known to attorney)

Kenneth Von Helmolt
Deputy District Attorney, Los Angeles County
Appellate Division
320 West Temple Street, Ste. 540
Los Angeles, CA 90012
Kvonhelm@da.lacounty.gov

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AND,

Office of the Attorney General
300 S. Spring Street
5th Floor, North Tower
Los Angeles, CA 90013

Clerk of the Court
Second District Court of Appeal
300 S. Spring Street
Floor 2, North Tower
Los Angeles, CA 90013

California Appellate Project
Los Angeles Office
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

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Kathy Yam
KATHY YAM