In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DAVID PHILLIP RODRIGUEZ,** **Defendant and Appellant.**	Case No. S251706

Fifth Appellate District Court, Case No. F073594
Kings County Superior Court, Case No. 12CM7070
The Honorable Edward M. Lacy, Judge

OPENING BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
LOUIS M. VASQUEZ
Supervising Deputy Attorney General
JANET E. NEELEY
Deputy Attorney General
AMANDA D. CARY
Deputy Attorney General
LEWIS A. MARTINEZ
Deputy Attorney General
State Bar No. 234193
2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 705-2308
Fax: (559) 445-5106
Email: Lewis.Martinez@doj.ca.gov
Attorneys for Plaintiff and Respondent

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2550 Mariposa Mall, Room 5090
Fresno, CA 93721
Telephone: (559) 705-2308
Fax: (559) 445-5106
Email: Lewis.Martinez@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

This Court granted review on the following issue: "Does a prosecutor improperly 'vouch' for the credibility of testifying officers by arguing that the officers had no known motive to lie, and would not place their careers at risk and subject themselves to possible prosecution for perjury by testifying falsely?"

INTRODUCTION

Appellant, an inmate in state prison, was charged with a number of crimes related to striking a correctional officer on the back of the head with his restraint chains and unsuccessfully swinging the chains at another officer. During closing argument, defense counsel stated that video and other evidence did not support the officers' version of events. In rebuttal, the prosecutor asked why would the correctional officers lie, risking their careers and possible prosecution for perjury.

The Court of Appeal concluded that the prosecutor's remarks constituted improper vouching. Not so. Vouching generally consists of either giving personal assurances of a witness's veracity or of suggesting information outside the record supports the witness's testimony. Here, it is a matter of common knowledge that a witness may suffer conviction for perjury from testifying falsely, and it is a reasonable inference that an officer who suffered such a conviction might face adverse career consequences. Accordingly, the argument was proper and did not constitute vouching.

STATEMENT OF THE CASE

On October 27, 2011, appellant, an inmate at a penal institution in Corcoran, struck Correctional Officer Stephens twice with his waist

restraint chains, causing a concussion and other injuries. (3 RT 235-237, 254, 261-262, 272-273, 276-277, 296-297, 299-301.)[1] Before other officers were able to restrain appellant, he swung the chains at Correctional Officer Dall, but missed. (3 RT 278-280, 297-298.)

The district attorney charged appellant with two counts of assault with a deadly weapon while confined in a state prison (counts 1 & 4; Pen. Code, § 4501);[2] battery on a non-inmate while confined in state prison (count 2; § 4501.5); unlawfully and by means of violence deterring and/or preventing an executive officer from performing his duty (count 3; § 69); and attempted battery on a non-inmate while confined (count 5; §§ 664, 4501.5). (1 CT 75-77.)

During trial, Correctional Officer Stephens testified that, when appellant was behind him, Correctional Officer Stephens saw a shiny object strike him "[v]ery heavy and hard" on the back of the head. (3 RT 235-237, 254.) Correctional Officer Lowder testified that he saw appellant strike Correctional Officer Stephens twice from directly behind. (3 RT 272-273, 276-277, 296-297, 299-301.)

During closing argument, defense counsel questioned the correctional officers' version of events, stating that a video and other evidence did not support Officer Lowder's version of events; that Officer Lowder could not have seen what he said he saw; and that Officer Stephen's story was not supported by photographic evidence or Officer Lowder's statement. (4 RT 526-527-529-530.)

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[1] "CT refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal. Record citations will be preceded by a volume number where appropriate.

[2] Subsequent statutory references are to the Penal Code unless otherwise noted.

During rebuttal, the prosecutor said the following:

What did Officer Stephens tell you? He told you that he was attacked. He was hit from behind. Now, I ask you what motive would he have to lie? Sort of anticipating a defense like this, when Officer Stephens was on the stand I asked him, before that day, to your knowledge, had you ever seen the defendant before? No. Did you know the defendant? No. So you are being asked to believe by the defense that Officer Stephens, an officer, I think, with 17 years of experience with the Department of Corrections, for some reason, would put his entire career on the line. He would take the stand, subject himself to possible prosecution for perjury and lie and make up some story and tell you that this guy, who he didn't know, attacked him and hit him on the back of the head. For what reason? What possible motive would he have to do that?

But you add to that the testimony of Officer Lowder. Officer Lowder testified this guy, the defendant, hit Officer Stephens. So, now, we have two officers involved in this lie, apparently, according to the defendant. Another officer with a long career. His was over 20 years. So we're supposed to believe that, for some reason, Officer Lowder would put his entire career with the Department of Corrections at risk, subject himself to possible prosecution for perjury - -

[Defense counsel]: Objection, your honor. Assumes facts not in evidence.

[Prosecutor]: To perjure himself - -

The Court: Excuse me. Go ahead. You may continue.

[Prosecutor]: To perjure himself before you and, for some reason, lie and tell you that this defendant hit [Correctional] Officer Stephens on the back of the head. I submit to you what reason would he have to do that? There's no motive to lie that we know of.

And I want to talk about what corroboration we have of these officers' stories. [Defense counsel] shows you the picture of Officer Stephens' head, the picture taken after the event, and he stands far away from you. You can't really see it. Thankfully, you are going to be able to take this picture back there.

Officer Stephens told you I was hit in the back of the head with a heavy metal object. What corroboration do you have of that? This picture. I'll show it to you now. You can pass it amongst yourselves. What do you see? You see a picture of the back of his head. Granted, there's hair in the way. Granted, this picture was taken directly after the incident and we know from life experience that when you get hit it looks worse later on. But what do you see when this picture is taken of the back of his head? You see redness on the back of his head, ladies and gentlemen. That corroborates what Officer Stephens had to say, that he was hit in the back of the head. It corroborates what Lowder said. I saw him hit Officer Stephens in the back of the head.

But I also want you to think about something else. The video. I showed it to you because I'm not ashamed of you seeing it, either. You are going to have the opportunity to go back to the jury room and when you deliberate, watch the video. And I ask you to watch it to your heart's content. It's short. Play it over and over. Think about this for a moment. The defense wants you to believe that Officer Stephens and Officer Lowder somehow conspired, for some reason, to lie about this guy and to say he attacked Officer Stephens when he didn't. Both of these officers work on the "C" patio. They are very familiar with it. Being familiar with it they know there's a video camera right here. This is the location of the incident. This is a camera that was recording where two officers with long tenure careers with the Department of Corrections, for some reason, conspire to tell a lie about an inmate they don't know from Adam, saying that he attacked one of them in full view of a camera that was recording. And, furthermore, preserve that video so it could be shown in a court of law. Does that make sense to you? I encourage you to watch that video because when you watch that video what you are going to see is conduct that corroborates what the officers had to say.

(4 RT 533-536.)

A jury convicted appellant as charged. (1 CT 80, 82-86.)

On appeal, appellant argued that the prosecutor's argument constituted vouching based on facts not before the jury—i.e., facts

regarding the likelihood of being fired or prosecuted that would deter the officers from lying. (*People v. Rodriguez* (2018) 26 Cal.App.5th 890, 903.) The Court of Appeal held that the prosecutor's argument that officer witnesses would not lie because of the danger to their careers and risk of prosecution relied on facts not in evidence, and constituted vouching:

> The prosecutor's argument that the officer witnesses would not lie because of the danger to their careers and the risk of prosecution for perjury relied on facts not in evidence. The impact of the prosecutor's remarks depended on the truth of a number of propositions, none of which come close to being self-evident: that law enforcement officers of long tenure are more likely to be honest than other people; that they can firmly expect to lose their jobs if they lie or exaggerate when testifying against those accused of crime; that they face a grave risk of prosecution for perjury by the very prosecutors who have presented their testimony if they do this; or that these factors are so powerful in the minds of officers that they would feel no motivation to lie in order to maximize the punishment of those who attack them. There was, of course, no evidence at trial that was relevant to any of these notions.

(*Rodriguez, supra,* 26 Cal.App.5th at p. 907.)

Respondent petitioned for review. This Court granted review on November 28, 2018.

SUMMARY OF ARGUMENT

Vouching occurs when the prosecutor either places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony. Neither of those situations occurred here. Rather, the prosecutor's argument that the officers would not perjure themselves and risk their careers was based on common knowledge and reasonable inferences therefrom. Indeed, no California court squarely held that such argument was improper until the Fifth District Court of Appeal rendered its

decision in the present case. Moreover, this Court has upheld prosecutorial arguments that held some similarities to the present case, and at least one court of appeal upheld an argument very similar to the one disapproved by the court of appeal below. While a majority of state courts to consider the question have found such arguments improper, they have done so on grounds which are ultimately unsound. A minority of state and federal courts have upheld such arguments for reasons similar to those urged by Respondent here. Accordingly, the court of appeal's decision that the argument was improper should be reversed.

ARGUMENT

I. THE PROSECUTOR'S ARGUMENT DID NOT CONSTITUTE VOUCHING BECAUSE IT DID NOT RELY ON FACTS OUTSIDE THE RECORD OR INVOKE THE PRESTIGE OF THE PROSECUTOR OR HIS OFFICE

A. Vouching Occurs When The Prosecutor Either Invokes His Personal Prestige Or The Prestige Of His Office To Support The Witness's Veracity Or When The Prosecutor Suggests Evidence Outside The Record Supports The Witness's Veracity

Prosecutors may strike hard blows but are not at liberty to strike foul ones. (*United States v. Young* (1985) 470 U.S. 1, 7.) A prosecutor may commit misconduct either when the conduct infects the trial with such unfairness as to make the conviction a denial of due process or when the prosecutor uses deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) When the claim focuses on comments made before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Ibid.*)

Improper vouching may occur when a prosecutor "places the prestige of the government behind a witness through personal assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony." (*People v. Williams* (1997) 16 Cal.4th 153, 257.) "[I]t is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) For example, a prosecutor may not use his or her experience to compare a defendant's case negatively to others the prosecutor knows about or has tried. (*Id.* at p. 207.) "Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record." (*Ibid.*)

"It is not, however, misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial." (*Huggins, supra,* 38 Cal.4th at p. 207.)

B. Previous Cases In Which This Court Has Found Vouching Are Not Factually Similar To The Present Case

This Court has found improper vouching in a number of cases, none of them factually similar to the present case. The following cases are illustrative:

In *People v. Fuiava* (2012) 53 Cal.4th 622, this Court disapproved of a prosecutor affixing a "Viking" pin to the lapel of his suit coat in solidarity with deputies in the case during closing arguments:

> The prosecutor's act of—in his own words—literally "becom[ing] a Viking" in front of the jury constituted improper "vouching" in several ways. [Citation.] The prosecutor essentially gave unsworn testimony that the Vikings were not a group of rogue deputies as the defense suggested, but were, instead, simply anyone who (with the deputies' permission) wore a Viking pin in solidarity with the deputies. Further, the prosecutor placed his own prestige and the prestige of his office behind the Vikings, and in so doing, improperly interjected into the trial his personal view of the credibility of the heart of the defense case.

(*Id.* at pp. 693-694.)

The Court has found improper vouching where the prosecutor vouched for the credibility of court-appointed experts based on his personal knowledge of the experts and his use of those experts when he was a defense attorney. (*People v. Turner* (2004) 34 Cal.4th 406, 433.) The Court reasoned that his personal knowledge and prior use of the experts constituted facts outside the record. (*Ibid.*)

The court has also found a prosecutor improperly vouched for a death verdict by stating, "Because of the way I was raised I can't find a great deal of sympathy for Mr. Loker. I find it astonishing that when you compare what happened to all of the other members of his family and his religious group he's the only one that went bad." (*People v. Loker* (2008) 44 Cal.4th 691, 739-740.) The Court found that the prosecutor "improperly injected his own experiences and beliefs into the argument." (*Id.* at p. 740.)

C. Although The Court Has Not Considered The Exact Argument Presented Here, The Court Has Previously Approved Factually Similar Arguments

Respondent is not aware of any case in which this Court has found improper vouching to have occurred under circumstances similar to those of the present case. As discussed below, a number of cases have upheld

prosecution arguments similar, but not identical, to the argument made in this case. For example, this Court has upheld prosecutorial comments citing the years of experience of the witness (*People v. Anderson* (1990) 52 Cal.3d 453, 478-479); statements that the witnesses had no reason to lie (*People v. Medina* (1995) 11 Cal.4th 694, 757); *People v. Boyette* (2002) 29 Cal.4th 381, 433; *People v. Davenport* (1995) 11 Cal.4th 1171, 1217-1218); statements that the witnesses were government employees (*Medina, supra*, 11 Cal.4th at p. 757); statements that an officer would not risk his reputation by lying just to convict one defendant (*Anderson, supra*, 52 Cal.3d at pp. 478-479); and statements, based on the record, that the officer "went the extra distance" and took "his job seriously[.]" (*People v. Redd* (2010) 48 Cal.4th 691, 741.)

Perhaps the case most similar to the present one to come before this Court is *Anderson*. In that case, the prosecutor stated in closing, "A law enforcement officer is no good as a witness if his credibility is in doubt," and noted that "a number of them . . . are old, experienced officers. They've got 15, 20, 22 years of experience on the force." (*Anderson, supra,* 52 Cal.3d at p. 478.) The prosecutor doubted the officers would "jeopardize" their reputations by lying on the witness stand "just to convict one defendant." (*Ibid.*) This Court found that no improper vouching occurred: "[T]he prosecutor limited her remarks to facts of record, namely the years of experience of the officers involved, and her 'vouching' was clearly based on inferences reasonably drawn therefrom, rather than on her personal belief or knowledge." (*Id.* at p. 479.)

Other cases have also upheld assurances of the veracity of government witnesses, including those employed by the state. For example, in *Medina,* the prosecutor properly stated that the State's ballistics experts appeared honest, were public employees, had no reason to lie, were

not being paid for testifying, and told the truth to the jury. (*Medina, supra,* 11 Cal.4th at p. 757.) This Court reasoned, "Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts *outside* the record." (*Ibid.*, emphasis in original.)

In *People v. Peoples* (2016) 62 Cal.4th 718, 796, the prosecutor stated that the People's expert was "so much more capable, with no agenda, and serving the bottom line to you." This Court found that the prosecutor's statement was "reasonable commentary on the credibility of the witnesses and would not have been understood by the jury to vouch for the witnesses' credibility based on the prosecutor's personal beliefs or evidence outside of the record." (*Ibid.*)

In *Davenport*, there was no improper vouching where the prosecutor said of the pathologist who performed the autopsy, "He saw the body, you know. He was being paid for that, 75 bucks an autopsy. Is that guy, for 75 bucks, going to come in here and, you know, make all of his findings up or try and sway them?" (*Davenport, supra,* 11 Cal.4th at p. 1217.) "Reference to this modest payment suggested that Dr. Fischer had no motive to fabricate in making his report and that he was therefore more trustworthy than defendant's retained expert[.]" (*Id.* at p. 1218.)

Respondent is aware of *People v. Padilla* (1995) 11 Cal.4th 891.[3] In that case, the prosecutor stated that the ballistics expert, had he lied, would have "risked his whole career of 17 years." (*Id.* at p. 946.) This Court

[3] *Padilla* was overruled to the extent it required a showing of bad faith to establish prosecutorial misconduct in argument to the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

expressed "doubt that the argument was proper" but found no reasonable probability that it prejudiced the defendant. (*Ibid.*, citing *United States v. Martinez* (6th Cir. 1992) 981 F.2d 867.) However, the doubt expressed by this Court in *Padilla* is not a considered holding in light of the Court's finding of no prejudice. (*Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 340 [general observations unnecessary to the decision are dicta with no force as precedent].) Nor does the Court's comment have particular persuasive weight in light of the lack of analysis. (*Ibid.* [dicta may be considered highly persuasive when made in the course of an elaborate review of authorities or where it demonstrates a thorough analysis of the issue].) The cases cited above, particularly *Anderson*, support the conclusion that the prosecutor's argument in the present case was entirely proper.

D. At Least One Court Of Appeal Has Upheld An Argument Similar To The Issue Presented Here; Before The Present Case, No Court Of Appeal Held To The Contrary

Before the present case, no court of appeal has found that argument such as the one in the present case was improper. To the contrary, the Sixth District Court of Appeal upheld an argument very similar to the one in the present case. (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1270.) In that case, in response to a defense allegation that detectives lied about a photo lineup, the prosecutor argued that the officers would not commit perjury and "put their career on the line" for the case. (*Id.* at p. 1270.) The Sixth District Court of Appeal held that the argument did not constitute misconduct: "This response to defense arguments did not amount to the prosecutor's personal assurance of the officers' veracity or place the prestige of the district attorney's office behind the officers, and we do not find a reasonable likelihood the jury understood the prosecutor's rebuttal in those

ways." (*Ibid.*) The Sixth District rejected the defendant's reliance on *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142 and *United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 574-576, stating that although the prosecutor made similar arguments to the ones found improper in the federal cases, "he was not vouching for their credibility; he was rebutting the defense attorney's charge that the officers had lied about the photo lineup." (*Id.* at p. 1271.)

True, in *People v. Woods* (2006) 146 Cal.App.4th 106, the Second District Court of Appeal held the prosecutor argued improperly when she

> implicitly suggested that all 12 unidentified, mostly nontestifying officers, would testify to the same factual version of what occurred during the incident or its aftermath; the same 12 officers had been involved in a case or cases involving higher stakes such as kilos of cocaine, heroin, and stolen Maserati parts, but had not risked their careers for the higher stakes case or cases; and the same 12 officers had mortgages, car loans, and children in private schools.

(*Id.* at p. 115.) The *Woods* court concluded that this was vouching and, to the extent the prosecutor argued that officers not called as witnesses would have testified to the same facts as testifying officers, implicated the defendant's confrontation rights. (*Ibid.*) Thus, the gravamen of the *Woods* holding related to references to unnamed, mostly non-testifying officers including specific references to prior cases in their career as well as their mortgages, car loans, and private school tuitions, none of which was in evidence. Accordingly, *Woods* does not support the proposition that it is improper to argue testifying officers have no motive to lie and would not commit perjury and risk their careers by testifying falsely.

In sum, existing appellate authority in this state supports the argument given by the prosecutor in the present case.

E. Arguing That Officers Have No Motive To Lie And Would Not Place Their Careers At Risk And Subject Themselves To Possible Prosecution For Perjury Is Based On Matters Of Common Knowledge And Reasonable Inferences And Constitutes Proper Argument

Now that the question is presented squarely to this Court, respondent submits the Court should follow *Caldwell* and hold that arguing that officers had no known motive to lie, and would not place their careers at risk and subject themselves to possible prosecution for perjury by testifying falsely is proper argument, and does not constitute vouching.

It is clearly proper to argue that a witness has no motive to lie on the stand; and this analysis does not change simply because the witness is a government employee. (*Medina, supra,* 11 Cal.4th at p. 757; *Davenport, supra,* 11 Cal.4th at pp. 1217-1218.) Accordingly, this portion of the prosecutor's argument in the present case is entirely proper.

As for the references to potential perjury charges and adverse career consequences, it is fairly common knowledge that a witness who lies under oath is subject to prosecution for perjury. Indeed, one version of the oath given to witnesses states specifically that the witness shall give evidence "under penalty of perjury[.]" (Code Civ. Proc., § 2094, subd. (a)(2); see also Evid. Code, §710 [oath required of every witness except child under age 10 or dependent person with substantial cognitive impairment].) Accordingly, reference to the officers potentially facing perjury charges if they gave false testimony does not refer to matters outside the record and is therefore not improper for that reason. (*People v. Wharton* (1991) 53 Cal.3d 522, 567 [counsel may state matters not in evidence but which are common knowledge].)

Similarly, it is readily inferable that a police officer charged with or convicted of perjury might face serious career consequences. (See *Anderson, supra,* 52 Cal.3d at p. 479 [argument properly based on inferences from the record—proper to argue that police officer would not risk his reputation just to convict one defendant]; see also *People v. Montes* (2014) 58 Cal.4th 809, 870 [prosecutor properly argued witness's veracity based on the facts her statements remained the same before and after she received her deal].)

It is also clear such arguments do not "place[] the prestige of the government behind a witness through personal assurances of the witness's veracity[.]" (*Williams, supra,* 16 Cal.4th at p. 257.) Such an argument bears no relationship to, say, wearing a "Viking pin" in front of the jury to show solidarity with deputies (*Fuiava, supra,* 53 Cal.4th at pp. 693-694), or to vouching for the credibility of experts based on the prosecutor's own experience with the experts. (*People v. Turner, supra,* 34 Cal.4th at p. 433.) Because the argument is based on common knowledge and reasonable inferences therefrom, it is not improper vouching.

F. The Court Of Appeal's Reasoning Below Relies On Questionable Assertions

The Court of Appeal made several questionable assertions in support of its conclusion that the argument here was improper:

> The impact of the prosecutor's remarks depended on the truth of a number of propositions, none of which come close to being self-evident: that law enforcement officers of long tenure are more likely to be honest than other people; that they can firmly expect to lose their jobs if they lie or exaggerate when testifying against those accused of crime; that they face a grave risk of prosecution for perjury by the very prosecutors who have presented their testimony if they do this; or that these factors are

> so powerful in the minds of officers that they would feel no motivation to lie in order to maximize the punishment of those who attack them.

(*Rodriguez, supra,* 26 Cal.App.5th at p. 907.)

But the prosecutor stated only that the officers "risked" "possible prosecution" for perjury and put their careers "at risk" or "on the line." (RT 533-534.) The prosecutor did not say that the officers would "firmly" lose their jobs if they lied or that they faced a "grave" risk of perjury prosecution, as the Court of Appeal suggested. Regardless whether or not officers of long tenure are less likely to lie than other people, this Court has explicitly held that it was proper to mention the years of experience of the officers involved. (*Anderson, supra,* 52 Cal.3d at p. 479.) Accordingly, the reasoning of the Court of Appeal is not sound.

G. Other States And Federal Courts Have Disapproved The Arguments Employed Here, But Their Reasoning Is Unsound And In Some Respects Contrary To This Court's Prior Cases

Respondent acknowledges that courts in other jurisdictions to have concluded arguments such as the one in the present case are improper. (E.g. *United States v. Weatherspoon, supra,* 410 F.3d at p. 1146 [argument that police officers would not lie and risk prosecution, loss of jobs, and loss of pensions]; *United States v. Gallardo-Trapero* (5th Cir. 1999) 185 F.3d 307, 319-321 [harmless error to argue federal agents and prosecutor would not commit perjury and endanger their careers]; *United States v. Boyd* (D.C. Cir. 1995) 54 F.3d 868, 871-872 [argument experienced officers would not put their careers and pensions on the line]; *Davis v. State* (Fla. Ct.App. 2006) 937 So.2d 273, 276 [argument officers would not lie and risk their careers]; *Sivells v. State* (2010) 196 Md.App. 254, 278-279 [argument officers would risk losing pensions and jobs by giving false testimony];

People v. Clark (NY 1986) 120 A.D.2d 542, 544 ["why would [the officers] get on the stand and commit perjury?"]; *State v. Williams* (1996) 41 Conn.App. 180, 183-185 [suggestion that a finding for the defense was tantamount to finding that police officers had committed perjury]; *State v. Brooks* (Ohio Ct.App. 2008) 891 N.E.2d 797, 801 [argument that deputies were "throwing their jobs away" to convict defendant; no police officers indicted in county on perjury charges in last 30 years—argument put jury in posture of feeling they had to find defendant guilty or cost two police officers their livelihoods].)

Differing rationales have been put forth for such holdings. Sometimes courts have held that such arguments rely on facts outside the record. (*Weatherspoon, supra,* 410 F.3d at p. 1146.) Other courts have stated that it is ultimately an argument that the witness should be believed because he is a police officer. (*Donaldson v. State* (2010) 416 Md. 467, 492.) Similarly, courts have stated comments about the risk to an officer's career "may invite the jury 'to rely on the prestige of the government and its agents rather than the jury's own evaluation of the evidence.'" (*State v. Whitfield* (R.I. 2014) 93 A.3d 1011, 1021, citing *United States v. Torres-Galindo* (1st Cir. 2000) 206 F.3d 136, 142.)

Respondent has already refuted the argument that such remarks rely on facts outside the record. As for the arguments that such remarks ultimately state a police officer should be believed because he is a police officer, or that they rely on the prestige of the government, this is simply not so. Arguing a police officer has no reason to lie, and would not risk adverse career consequences or perjury prosecution to do so, is no different in this regard than arguing a police officer of long experience would not risk his reputation just to convict one defendant; that a ballistics expert was a public employee and had no reason to lie; or that a pathologist received

only a modest payment and therefore had no reason to fabricate a report—all arguments this Court has found to be proper. (*Anderson, supra,* 52 Cal.3d at p. 479; *Medina, supra,* 11 Cal.4th at p. 757; *Davenport, supra,* 11 Cal.4th at pp. 1217-1218.) Accordingly, the reasoning of these courts should not be followed.

H. Other Courts Outside Of California Find The Arguments At Issue Here To Be Proper Based On The Reasoning Urged Here: Because They Are Based On Matters Of Common Knowledge

Other courts outside of California have held similar arguments to be proper. (*Lampley v. Anchorage* (Ala. Ct.App. 2007) 159 P.3d 515, 520 [prosecutor could emphasize that defense rested on "the questionable assumption of a far-ranging conspiracy to distort truth and fabricate evidence"]; *State v. Rogers* (N.C. 2002) 629 S.E.2d 859, 880 [argument state's witnesses "had no axe to grind"]; *Thomas v. State* (Ct.App. Tex. 2013) 445 S.W.3d 201, 211-212 [argument officers had "no vested interest to lie, put their reputation and their jobs on the line"]; *State v. Ashcraft* (UT 2015) 349 P.3d 664, 667, 672 [argument officer had "no axe to grind" and would put his career on the line if he were to "make up stuff"]; *United States v. Sosa* (11th Cir. 2015) 777 F.3d 1279, 1295 [asking why agent would perjure herself].) Such courts take the approach urged in the present case—that similar arguments are properly based on matters of common knowledge and common-sense incentives, and therefore are not vouching. (*Ashcraft, supra,* 349 P.3d at p. 672 [argument based on "common-sense incentives;" *Vasquez v. State* (Tex. Ct.App. 1992) 830 S.W.2d 829, 831 [common knowledge that committing perjury incurs risks]; *Sosa, supra,* 777 F.3d at p. 1295 [merely acknowledging that adverse legal consequences flow from perjury not vouching].) For the reasons stated above, respondent urges a similar approach here. Accordingly, the Court of Appeal's contrary decision should be reversed.

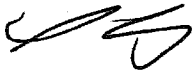
CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court of Appeal's decision be reversed, and appellant's conviction, except for the convictions for assault with a deadly weapon,[4] be affirmed.

Dated: January 25, 2019.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
LOUIS M. VASQUEZ
Supervising Deputy Attorney General
JANET E. NEELEY
Deputy Attorney General
Amanda D. Cary
Deputy Attorney General



LEWIS A. MARTINEZ
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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[4] Appellant's convictions for assault with a deadly weapon (counts 1 and 4) were reversed on grounds of instructional error. (*Rodriguez, supra,* 26 Cal.App.5th at pp. 898-902) Respondent does not contest these reversals in this Court. (See, Pet. for Review at p. 5, fn. 2.)

CERTIFICATE OF COMPLIANCE

I certify that the attached **Opening Brief on the Merits** uses a 13-point Times New Roman font and contains 5,247 words.

Dated: January 25, 2019.

XAVIER BECERRA
Attorney General of California

LEWIS A. MARTINEZ
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Rodriguez***
Case No.: **S251706**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 29, 2019, I served the attached **Opening Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

Lauren Dodge
Attorney at Law
1250 Newell Avenue, #220
Walnut Creek, CA 94596
Representing Appellant, RODRIGUEZ
One Courtesy Copy for Counsel's Client

Central California Appellate Program
2150 River Plaza Drive, Suite 300
Sacramento, CA 95833
FR2016301535
E-served via eservice@capcentral.org

The Honorable Keith Fagundes
District Attorney
Kings County District Attorney's Office
1400 West Lacey Boulevard
Hanford, CA 93230

County of Kings
Hanford Courthouse
Superior Court of California
1640 Kings County Drive
Hanford, CA 93230-5997

I declare under penalty of perjury, under the laws of the State of California, the foregoing is true and correct and that this declaration was executed on January 29, 2019, at Fresno, California.

Debbie Pereira-Young
Declarant


Signature

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