IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

DAVID PHILLIP RODRIGUEZ,

Defendant and Respondent.

S251706

Court of Appeal
Case No. F073594

Kings County
Superior Court
Case No.
12CM7070

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

After Decision by the Court of Appeal
Fifth Appellate District
Filed August 28, 2018

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Under the Central California Appellate
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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. DAVID PHILLIP RODRIGUEZ, Defendant and Respondent.	S251706 Court of Appeal Case No. F073594 Kings County Superior Court Case No. 12CM7070

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RESPONDENT'S ANSWERING BRIEF ON THE MERITS

ISSUE PRESENTED FOR REVIEW

Did the prosecutor improperly vouch for the testifying correctional officers by arguing in rebuttal that they had no reason to lie, would not place their careers at risk by lying, and would not subject themselves to possible prosecution for perjury?

INTRODUCTION

While an inmate at the Substance Abuse Treatment Facility in Corcoran, respondent David Phillip Rodriguez was involved in a melee with some correctional officers. A jury found him guilty of several felony offenses related to the altercation and he was sentenced to 14 years, eight months in prison. On appeal, Rodriguez raised several challenges to his convictions, including that the prosecutor committed the form of prejudicial misconduct known as "vouching" by arguing to the jury that the correctional officer

witnesses would not lie because lying would destroy their careers and lead to their prosecution for perjury, even though no evidence of such consequences was presented.

The Fifth District Court of Appeal reversed on that ground, finding the prosecutor's argument amounted to impermissible vouching because it relied on facts outside the record to bolster the credibility of the officer-witnesses. In so doing, the court acted in conformance with longstanding precedent from this Court holding prosecutors to an elevated standard of conduct based on their role in representating and exercising the sovereign power of the state, and condemning those who cross the line into impermissible argument by relying on facts outside the record.

Appellant contends these arguments do not amount to vouching because they are "based on common knowledge and reasonable inferences therefrom." (Opening Brief on the Merits at p. 12, hereafter "OBM.") Like the court below, a majority of federal and out-of-state courts disagree. These courts have identified three primary reasons why this line of argument is improper: it refers to facts not in evidence, it places the prestige of the government behind a witness by providing personal assurances of the witness's veracity, and it impermissibly elevates the credibility of police officers over that of other witnesses, including the defendant. Underlying all of these concerns is one inescapable reality: a prosecutor's argument that officers will be subjected to penal or career consequences if they testify

falsely is simply not true. Accordingly, as the court below correctly held, the type of argument at issue here constitutes impermissible vouching and this Court should affirm in full.

STATEMENT OF THE CASE

1. Trial Court Proceedings

On June 11, 2012, respondent David Phillip Rodriguez was charged by first-amended information with two counts of violating Penal Code section 4501,[1] assault with a deadly weapon upon an officer while confined in a state prison (Counts One and Four); section 4501.5, battery upon a non-inmate (Count Two); section 69, deterring or preventing an officer from performing his duty (Count Three); and section 664/4501.5, attempted battery on a non-inmate (Count Five.) (CT 75-77.) The information alleged a prior strike conviction for a 1998 conviction for section 245, subdivision (a)(1), assault with a deadly weapon and three section 667.5, subdivision (b) prison priors. (CT 76.)

On June 12th, 2012, the jury convicted Rodriguez of all counts and on July 30, 2012, the court sentenced him to an aggregate term of 14 years, eight months. (CT 80, 3RT 201-332, 4RT 501-548, 5RT 819.) This included the aggravated term of six years on Count One, doubled to twelve years by operation of section 667, subdivision (e)(1), and two years, eight months on

[1] All further undesignated statutory references are to the Penal Code.

Count Four, to be served consecutively. (5RT 819.) The court stayed punishment on the remaining counts pursuant to section 654. (5RT 819.)

2. Court of Appeal Proceedings

Rodriguez appealed, arguing, *inter alia*, that the prosecutor committed prejudicial misconduct by vouching for his witnesses in violation of Rodriguez's Sixth and Fourteenth Amendment rights. Specifically, he contended it was impermissible for the prosecutor to argue that the officer-witnesses had no motive to lie and would risk their careers and be subject to perjury prosecutions if they did so. In a unanimous published opinion, the Court of Appeal agreed and reversed in full.[2] (*People v. Rodriguez* (2018) 26 Cal.App.5th 890.)

The court found that the argument was improper because it "relied on facts not in evidence" and "depended on the truth of a number of propositions, none of which come close to being self-evident[.]" (*Rodriguez, supra*, 26 Cal.App.5th at p. 907.) The court noted that a prosecutor resorting to such arguments "takes advantage not of the evidence before the jury but of the good-natured inclination of lay jurors to vest their confidence in those entrusted with the enforcement of the law." (*Ibid.*) Such remarks "suggested

[2] The court also reversed for instructional error, finding that the trial court's failure to instruct the jury on the lesser included offense of simple assault amounted to prejudicial error. The Attorney General does not contest these reversals. (OBM at p. 25, fn. 4.)

By its own motion, the court ordered the opinion published on August 29, 2018.

the prosecutor knew things about disciplinary and legal risks faced by officers -- things unknown to the jury, for which the jurors should take the prosecutor's official word -- that acted to ensure officers' honesty." (*Id.* at p. 910.) Because the case turned on a credibility "swearing contest" between the officers and Rodriguez, the court found the "unwarranted boost to the prosecution witnesses' credibility could very well alter the outcome" and reversed all counts. (*Id.* at p. 911.)

The Attorney General petitioned for review. This Court granted review on November 28, 2018.

STATEMENT OF FACTS

The Prosecutor's Case

On October 27, 2011, Bryan Stephens was working as a corrections officer at the Corcoran State Prison Substance Abuse Treatment Facility. (3RT 225.) During a security check of a prison patio, he noticed an inmate, later identified as Rodriguez, in a hallway leading to the patio. (3RT 230.) Rodriguez's wrists were handcuffed, but Stephens could not see if they were connected to the waist restraint chains. (3RT 233-235.) As Rodriguez attempted to go through the doorway into the patio area, Stephens stopped him and asked where he was going. (3RT 235, 240.) Rodriguez replied: "I need to get out of here. I got to get back to the building." (3RT 235.) Stephens asked him to wait. (RT 235.) As he looked over his left shoulder, he noticed a "shiny object out of [his] peripheral vision[.]" (3RT 235.) He felt a "hard

and heavy blow" to the back of his head, causing him to see "stars" and his knees to buckle. (3RT 235-236, 255.)

A photo depicting his head after the incident was introduced as a defense exhibit. (3RT 255-256, Defense Exhibit 8.) While acknowledging there was no apparent injury depicted in the photo, Stephens said the injury was underneath his hair. (3RT 256, 261.) He testified that he suffered a concussion, and injury to his neck and shoulder. (3RT 254.) No medical records were introduced into evidence.

Corrections Officer Roger Lowder testified that he was 60 feet away from the doorway when he heard someone yell, "Get down." (3RT 270.) He looked over and saw an inmate strike Stephens. (3RT 272.) The inmate was handcuffed at the wrist, but there were four to six inches of chain hanging down with padlocks. (3RT 275.) Rodriguez's hands were positioned in front of him, with his arms out and his hands in a fist position. (3RT 275.) Lowder saw Rodriguez strike Stephens twice by raising his arms in front of him and striking downward on the back of Stephens' head. (3RT 276.) He testified that Rodriguez had the chains wrapped in each hand. (3RT 276.)

Lowder ran towards the altercation. (3RT 276.) Two other officers, Dall and Sullins, were already on the scene. (3RT 276.) Lowder testified that he saw Rodriguez appear to turn toward Sullins and hesitate. (3RT 278.) Dall pulled out his baton and moved in to defend Sullins. (3RT 279.) As he did so, Rodriguez "moved in the direction" of Dall. (3RT 279.) Rodriguez

brought the chains in a downward motion, coming within two feet of Dall's face and upper shoulders. (3RT 279.) Sullins sprayed Rodriguez with pepper spray and Rodriguez went to the ground, where he was restrained. (3RT 279-380.)

A video of the incident was played for the jury. (Pros. Ex. 3, 3RT 284.) The video does not show the alleged assault on Stephens. As to the interaction between Rodriguez and Dall, the video sequence is grainy and choppy, and is not clear enough to make out facial features or other details. (Pros. Ex. 3, 11:42:17 to 11:42:24.) Rodriguez's hands appear to be close together, and can be seen at one point raised to shoulder height, although it is not clear whether he makes a striking motion in Dall's direction. (Pros. Ex. 3, 11:42:17 to 11:42:24.) Due to the poor quality of the video, it is not possible to determine if Rodriguez is wearing wrist or waist chains. (People's Ex. 3, 11:42:17 to 11:42:24.)

Defense Case

Rodriguez testified on his own behalf as the sole defense witness. (3RT 322.) On the day in question, he was ordered by officers to attend his education class. (3RT 324.) He requested to stay in his cell. (3RT 324.) He was emotional after recently learning that his father, grandfather and uncle had died. (3RT 324.) The prosecution stipulated that Rodriguez had learned of these deaths two weeks prior to the incident. (2RT 105-106, 3RT 324.)

Rodriguez testified that he told the instructor about the deaths and

asked to return to his cell. (3RT 325.) He was wearing his waist chains, which allowed him to touch his face but otherwise restricted his movements. (3RT 327.) He tried to walk out of the building toward the patio area. (3RT 327.) There, he was approached by Officers Stephens and Sullins. (3RT 327.) They asked where he was going, and he told them he was returning to his building. (3RT 327.) Rodriguez was crying at the time, and Stephens asked what was wrong with him. (3RT 328.) He testified that Stephens "got an attitude with me and I got an attitude with him[.]" (3RT 328.) As he tried to walk forward past Stephens, the officer "stumbled back." (3RT 328.) In the moments that followed, an alarm went off and he heard someone yell, "get down." (3RT 328-329.) He tried to run back into the classroom, but was pepper sprayed and fell to the ground. (3RT 329.)

Rodriguez testified that he was wearing his wrist restraints, and they were connected to his waist chain at the time of the incident. (3RT 329.) Asked if he tried to strike anyone with the chains, he stated: "It's physically impossible to strike them when you have them around your waist." (3RT 329.) He denied striking Stephens. (3RT 330.)

Closing Arguments

During closing argument, defense counsel called into question Lowder's ability to observe the assaults on Stephens and Dall because he was 60 feet away and because his view would have been partially obstructed by other officers. (4RT 527, 529.) He noted that Lowder's claim about having

witnessed the alleged assaults was belied by his own testimony, in which he acknowledged that his attention was first attracted by someone yelling "get down," and thus he would have only witnessed the alleged assault on Stephens after the fact. (4RT 527.) Defense counsel also noted inconsistencies in Stephens' testimony that were contradicted by other evidence, including that he did not see or notice other officers on the patio and the length of his alleged verbal exchange with Rodriguez. (4RT 528.)

During the rebuttal portion of his closing argument, the prosecutor pointed out that Rodriguez's testimony conflicted with that of the officers, and the jurors would have to decide whom to believe. Developing this theme, the prosecutor offered some reasons why the officers were credible witnesses. He told jurors: "You are going to have to address their credibility and determine who it is that you believe." (4RT 532.) He then pointed to the jury instruction on witness credibility, telling jurors: "Who in this trial, when they testified before you, had a motive to lie, the officers or the defendant?" (4RT 533.) Referring to Stephens, the prosecutor stated:

> 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?

(4RT 533-534.)

He then turned to Lowder, arguing:

> 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 --

(4RT 534.)

Defense counsel objected, arguing that the prosecution's argument assumed facts not in evidence. (4RT 534.)

The court, while not expressly overruling the objection, told the prosecutor to continue. (4RT 534.) The prosecutor went on: "To perjure himself before you and for some reason, lie and tell you that this defendant hit 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." (4RT 534.) The prosecutor then urged jurors to watch the video, arguing:

> 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?

(4RT 535-566.)

ARGUMENT

I. A PROSECUTOR COMMITS MISCONDUCT BY ARGUING 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.

A. The Practice of "Vouching" Makes the Prosecutor An Unsworn Witness, Violating The Defendant's Sixth and Fourteenth Amendment Rights To Confrontation and Due Process.

As this Court has long recognized, prosecutors are held to "an elevated standard of conduct," higher than that imposed on other attorneys "because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) The prosecutor "may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) "A prosecutor

who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair." (*People v. Frye* (1998) 18 Cal.4th 894, 969.) "The prosecution may argue all reasonable inferences from the record, and has a broad range within which to argue the facts and the law. [Citation.] The prosecutor, however, may not mislead the jury." (*People v. Doggett* (1990) 225 Cal.App.3d 751, 757-758.)

In particular, "statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct." (*People v. Bolton* (1979) 23 Cal.3d 208, 212, citing *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) Statements of supposed facts not in evidence are a highly prejudicial form of misconduct, and a frequent basis for reversal. (*Hill, supra,* 17 Cal.4th at p. 828.) The prosecutor's error need not be made in bad faith in order to constitute reversible error, since "injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally." (*Bolton, supra*, 23 Cal.3d at pp. 213-214 [internal quotation marks and citations omitted].) A more apt description of the transgression is "prosecutorial error." (*Hill, supra,* 17 Cal.4th 800 at p. 822.)

A special case of referring to supposed facts outside the record is what is often described as "vouching." A prosecutor may not offer his own personal opinion based solely on his "own experience or on other facts outside the record." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207; see

also *Frye, supra*, 18 Cal.4th at p. 971.) "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1276.) "Prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying." (*United States v. Richter* (2d Cir. 1987) 826 F.2d 206, 209.)

The danger inherent in vouching is that "prosecutorial comments may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence." (*People v. Cook* (2006) 39 Cal.4th 566, 569, citing *United States v. Young* (1985) 470 U.S. 1, 18–19.) Vouching makes the prosecutor, in effect, an unsworn witness, which violates the defendant's Sixth and Fourteenth Amendment rights to confrontation and due process. (U.S. Const. 6th and 14th Amends.; *United States v. Young* (1985) 470 U.S. 1, 18-19; *Douglas v. Alabama* (1965) 380 U.S. 415, 419; *Hardnett v. Marshall* (9th Cir. 1994) 25 F.3d 875, 878; *People v. Harris* (1989) 47 Cal.3d 1047, 1083; *People v. Gaines* (1997) 54 Cal.App.4th 821, 825; *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1222.)

Vouching of that sort is dangerous precisely because a jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility

of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled." (*United States v. McKoy* (9th Cir.1985) 771 F.2d 1207, 1211; see also *United States v. Young* (1985) 470 U.S. 1, 18-19.) It is up to the jury, and not the prosecutor, to determine the credibility of a witness's testimony. (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1147.) Thus, a prosecutor's statements will be found to be improper where they "skewed the jury's ability to make that determination." (*Ibid.*)

B. The Court Below Properly Concluded The Prosecutor's Argument Constituted Improper Vouching; Such Argument Is Not A Permissible Response to Defense Counsel's Charge That Officers Were Untruthful.

At issue here is whether a prosecutor improperly "vouches" for the credibility of testifying officers by contending they had no motive to lie or would face legal or professional repercussions, such as being fired or prosecuted for perjury, by testifying falsely. As the court below noted, published California case law on this particular form of vouching is "scant" (*Rodriguez, supra*, 26 Cal.App.5th at p. 906), and the two published appellate opinions addressing similar issues reached divergent conclusions. (*People v. Woods* (2006) 146 Cal. App. 4th 106, 114–115 [impermissible vouching to argue officers would lose their "careers and their livelihood" if they perjured themselves]; *People v. Caldwell* (2013) 12 Cal.App.4th 1262 [argument that detectives would not risk careers by committing perjury was not vouching, but proper rebuttal to the defense attorney's charge that the officers had

lied].)

In *Woods*, police officers, some of whom testified, were involved in a sting operation against the defendant. The prosecutor made the following argument:

> In a day of videotapes and people standing out with video cameras, do you honestly believe that out of 12 officers that went to that location that day they all sat down and got together and cooked up what they are going to say, that they all agreed as to what was going to go into the report, and they allowed that report to be filed with their names in it and their serial numbers in it? They are going to risk their careers and their livelihood for kilos of cocaine? For some heroin? Maybe for some stolen Maserati car parts? No. For five rocks of cocaine? That's what this comes down to, ladies and gentlemen. Mr. Woods and his cocaine that he tossed that day. 12 officers, 12 individual careers, pensions, house notes, car notes.

(*Woods, supra*, 146 Cal.App.4th at p. 115.)

Defense counsel objected that there was no evidence to support the argument. (*Woods, supra*, 146 Cal.App.4th at p. 114.) The court overruled the objection. (*Ibid.*) The prosecutor continued her argument, stating "Bank accounts, children's tuition." (*Ibid.*) Defense counsel asserted a "running objection," which the court overruled. The prosecutor then continued: "Are these 12 officers willing to risk those things for Mr. Woods and his five rocks of cocaine?" (*Ibid.*) Defense counsel objected that "12 officers didn't testify." The Court of Appeal held the argument was improper:

> [The prosecutor's] argument strayed ... into impermissible territory when she implicitly suggested that all 12 unidentified, mostly nontestifying 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. Although the officers' financial obligations and experience were

> irrelevant to appellant's guilt, [the prosecutor] argued these factual matters outside of the record to attempt to establish the veracity of the few members of the group of 12 officers who testified. This constituted vouching.

(*Woods, supra*, 146 Cal.App.4th at p. 115.)

In *Caldwell, supra*, 212 Cal.App.4th 1262, defense counsel argued that detectives testified falsely about whether they used correct procedures in conducting a photo lineup. On rebuttal, the prosecutor contended that the detectives would not risk their careers by committing perjury. While conceding that the prosecutor's remarks were similar to those in other cases where vouching was found to have occurred, the Sixth District Court of Appeal nonetheless concluded that the prosecutor "was not vouching for [the police witnesses'] credibility; he was rebutting the defense attorney's charge that the officers had lied about the photo lineup." (*Id.* at p. 1271.)

The Fifth District agreed with the approach in *Woods,* and explicitly rejected the analysis of *Caldwell.* (*Rodriguez, supra*, 26 Cal.App.5th at p. 910.) The court noted there was nothing inappropriate about the defense argument challenging the officers' credibility since counsel was merely "urging the jury to draw conclusion favorable to the defendant based on an analysis of the evidence." (*Id.*) In rejecting *Caldwell's* approach, the court explained:

> An argument constitutes vouching if it bolsters a witness's credibility by relying on matter outside the record, matter the jury might improperly accept based solely on the prestige and authority of the prosecutor's office. That the challenged argument was in response to the other side's argument about the witness's truthfulness -- an argument not demonstrated to

> be erroneous in any way -- is not the test. Defense counsel does not open the door for prosecutorial vouching every time he or she argues that a prosecution witness's testimony is untrue.

(*Rodriguez, supra*, 26 Cal.App.5th at p. 910.)

The Fifth District's reasoning on this point is sound and in line with other courts that have considered the issue. (See, e.g., *United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 574-76 [defense counsel's argument that testifying officer may have had a motive to lie "was neither an invitation nor justification for the prosecutor's improper rebuttal based on matters outside the record"]; *United States v. Smith* (9th Cir. 1992) 962 F.2d 923, 934 [comments were "legitimate attempt by defense counsel to cast doubt on the credibility of a government witness"]; *United States v Molina-Guevara* (3d Cir. 1996) 96 F.3d 698, 705 [defense counsel engaged in "vigorous advocacy entirely appropriate for a case that turned on the jury's assessment of the credibility of the witnesses" and did not invite prosecutor vouching]; *State v. Mussey* (2006) 153 N.H. 272, 279 ["prosecutor's statement went beyond merely countering allegations that the officers were lying by encouraging the jury to speculate on the effect the verdict might have on their careers"]; *Sivells v. State* (Md. Ct. Spec. App. 2010) 196 Md.App. 254, 284 [prosecutors are "never *justified* in engaging in improper vouching, even in response to an improper argument by defense counsel."])

In urging this Court to follow the *Caldwell* approach, appellant first attempts to distinguish *Woods*, arguing that the "gravamen" of its holding

concerned the prosecutor's references to "unnamed, mostly non-testifying officers." (OBM at p. 19.) But while the *Woods* court criticized the references to the non-testifying officers, suggesting they might implicate the defendant's Sixth Amendment right of confrontation, the court's overarching concern involved the prosecutor's reference to matters outside the record to bolster the credibility of the testifying officers by suggesting they would not risk their careers and jeopardize their financial obligations by lying. (*Woods, supra,* 146 Cal.App.4th at p. 115.) As the *Woods* court noted, such matters were "irrelevant to appellant's guilt," yet were used by the prosecutor to establish the veracity of the testifying officers. The court below properly recognized that *Woods* involved "a situation much like the one here," and correctly adopted the *Woods* approach. (*Rodriguez, supra*, 26 Cal.App.5th at p. 905.)

In faulting the court's conclusion, appellant contends the court below relied on "questionable assertions" and its reasoning is thus unsound. (OBM at pp. 21-22.) Appellant takes issue with the following passage:

> 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; or that they face a grave risk of prosecution for perjury by the very prosecutors who have presented their testimony if they do this; 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, see OBM at pp. 21-22.)

Appellant notes that the prosecutor stated only that the officers "'risked'" "'possible prosecution'" for perjury and put their careers "'at risk'" or "'on the line.'" (OBM at p. 21, RT 533-534.) Appellant reasons that because the prosecutor did not argue that the officers would "firmly" lose their jobs if they lied or that they faced a "grave risk of perjury prosecution," the Court of Appeal's reasoning is "not sound." (OBM at p. 22.) Appellant's contention on this point is not persuasive. The issue is whether the prosecutor "clearly urged that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony," not whether he delivered "firm assurance" of such consequences. (*Weatherspoon, supra*, 410 F.3d at p. 1146.)

In *Weatherspoon*, the Ninth Circuit rejected a near-identical contention, where the prosecutor argued that the officers would "*risk*" losing their jobs, pensions and a perjury prosecution if they lied. (*Weatherspoon, supra*, 410 F.3d at p. 1146.) The *Weatherspoon* court noted that the statement was not as egregious as in *United States v. Combs, supra,* 379 F.3d at p. 564, where the prosecutor argued that jurors could be "'darn sure [the agent] would get fired for perjuring himself[.]'" (*Weatherspoon, supra*, 410 F.3d at p. 1146, quoting *Combs, supra*, 379 F.3d at p. 568.) The Ninth Circuit found a "firm assurance" of repercussions was not required for the argument to be impermissible, and this "modest shade of difference in the level of impropriety" did not call for a different result. As the court explained, "the

prosecutor here (like the prosecutor in *Combs*) clearly urged that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony. That suffices for the statement to be considered improper as vouching based upon matters outside the record[.]" (*Ibid.*, citations omitted.)

Here, too, the prosecutor's statements that the officers had no motive to lie and "risked" adverse career or penal consequences if they lied clearly served to bolster the credibility of the officers. Accordingly, the court below properly found these statements amounted to impermissible vouching. To the extent *Caldwell* holds otherwise, it is out of step with the weight of authority in other jurisdictions (see Section I.C., *infra*) and contrary to this Court's longstanding policy to hold prosecutors to an elevated standard of ethical conduct.

C. The Weight of Authority In Other Jurisdictions Has Found A Prosecutor Commits Impermissible Vouching By Arguing Officers Would Suffer Legal and Professional Repercussions If They Lied.

As appellant appears to concede (OBM at p. 13, 22), the weight of authority in other jurisdictions, particularly in the federal courts, holds that a prosecutor may not bolster the credibility of testifying officers by arguing they would be subjected to penal or career consequences if they lie. (See, e.g., *Weatherspoon, supra,* 410 F.3d at p. 1146; *Combs, supra,* 379 F.3d at pp. 574–76; *United States v. Pungitore* (3d Cir.1990) 910 F.2d 1084, 1125; *United States v. Gallardo–Trapero* (5th Cir.1999)185 F.3d 307, 319; *United*

States v. Goff (5th Cir. 1988) 847 F.2d 149, 165); *United States v. Martinez* (6th Cir.1992) 981 F.2d 867, 871; *United States v. Swiatek* (7th Cir.1987) 819 F.2d 721, 731; *United States v. McMath* (7th Cir.2009) 559 F.3d 657, 668; *United States v. Boyd* (D.C.Cir.1995) 54 F.3d 868, 870; see *State v. Mussey* (2006) 153 N.H. 272, 893 A.2d 701, 705; *Spain v. State* (2005) 386 Md. 145, 872 A.2d 25, 31; *City of Williston v. Hegstad* (N.D.1997) 562 N.W.2d 91, 94–95; *State v. Whitfield* (R.I. 2014) 93 A.3d 1011, 1021; *People v. Adams* (Ill. 2012) 962 N.E.2d 410, 411.)

These courts have identified three primary reasons, either separately or in combination, why such argument amounts to impermissible vouching. First, references to career and penal consequences encourage the jury to consider facts outside the record, conveying the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant. (*Molina-Guevara, supra,* 96 F.3d at p. 704.) Second, such arguments "clearly [urge] that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony," and thus "[place] the prestige of the government behind a witness [by providing] personal assurances of the witness's veracity." (*Weatherspoon, supra*, 410 F.3d at p. 1146.) Third, such arguments impermissibly elevate the credibility of police officers over that of other witnesses, including the defendant. (*Spain, supra*, 872 A.2d at p. 32; *Adams, supra*, 962 N.E.2d at p. 411.)

Adams is illustrative of the reasoning employed by these courts.

There, the Illinois Supreme Court found the prosecutor engaged in improper vouching by arguing that the testifying officer was "risking his life – his job and his freedom and his reputation over 0.8 grams of cocaine." (*Adams, supra*, 962 N.E.2d at p. 411.) The court called the comments "impermissible speculation" because "no evidence was introduced at trial from which it could be inferred that the testifying officers would risk their careers if they testified falsely." (*Ibid.*) Further, by invoking unspecified, but assumed, punitive consequences or sanctions that might result if a police officer testifies falsely, "'a prosecutor's arguments imply that a police officer has a greater reason to testify truthfully than any other witness with a different type of job' [citation], thus violating the principle that 'a prosecutor may not argue that a witness is more credible because of his status as a police officer." (*Ibid.*, citations omitted.) The same can be said of the vouching at issue here, as found by the court below.

In urging this Court to reject the majority approach, appellant relies on several out-of-state cases that are either distinguishable on their facts or unsound in their reasoning. (OBM at p. 24.) Some of these cases did not involve the type of prosecutor argument present here, implying that the testifying officers would suffer adverse consequences if they lied. (*Lampley v. Anchorage* (Ala.CT.App.2007) 159 P.3d 515, 520 [prosecutor comment that defense was based on a "far ranging conspiracy" to distort the truth and fabricate evidence" is proper "so long as the prosecutor did not declare or

insinuate that his argument rested on his own personal assessment of the officers' credibility, or on information that had not been presented as evidence during Lampley's trial"]; *State v. Rogers* (N.C.2002) 629 S.E.2d 859, 880 [argument that state witnesses had "no axe to grind" except to tell the truth was proper; argument merely gave jurors reasons why they should believe the state's evidence.]) Thus, they do not help appellant here.

Other cases cited by appellant upheld the prosecutor's arguments based on similar reasoning as *Caldwell*, i.e. that the comments about the officers lacking motive to lie were in direct response to defense counsel's argument that they were lying. (*Thomas v. State* (Tex. App. 2013) 445 S.W.3d 201, 212; *State v. Ashcraft* (Utah 2015) 349 P.3d 664, 672.) However, as discussed in subsection B at pages 22-23, the *Caldwell* reasoning on this point is unsound.

As to those cases appellant relies on that found prosecutors may permissibly reference potential adverse legal consequences flowing from perjury (*Vasquez v. State* (Tex.Ct.App.1992) 830 S.W.2d 829, 831; *United States v Sosa* (11th Cir.2015) 777 F.3d 1279, 1295), *Rodriguez* contends these cases are wrongly-decided outliers and, for the reasons explained below, their reasoning should be rejected by this Court.

D. The Vouching At Issue Here Is Improper Because It Assumes Facts Not In Evidence.

As discussed, courts generally consider the argument at issue here improper for three distinct but related reasons: it refers to facts not in evidence, it places the prestige of the government behind a witness by providing personal assurances of the witness's veracity, and it impermissibly elevates the credibility of police officers over the credibility of other witnesses, including the defendant.

Addressing the first justification, the *Rodriguez* court found the prosecutor's argument was not only based on facts not in evidence, but depended on the truth of a number of propositions, "none of which come close to being self-evident." (*Rodriguez, supra,* 26 Cal.App.5th at p. 907.) These include:

> 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; or that they face a grave risk of prosecution for perjury by the very prosecutors who have presented their testimony if they do this; 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.)

As the Fifth District observed "[t]here was, of course, no evidence at trial that was relevant to any of these notions." (*Rodriguez, supra,* 26 Cal.App.5th at p. 907.) Thus, because the comments were not based on any of the evidence presented to the jury, "they suggested the prosecutor knew things about disciplinary and legal risks faced by officers -- things unknown

to the jury, for which the jurors should take the prosecutor's official word -- that acted to ensure officers' honesty." (*Id.* at p. 910.)

The Fifth District's reasoning on this point is sound. As the New Hampshire Supreme Court noted in considering a similar argument and finding it improper:

> [T]he prosecutor's statement effectively told the jury that if it returned a verdict of not guilty, the police officers would suffer detrimental consequences to their careers. There was no testimony regarding the likelihood of such consequences. Thus, the prosecutor's statement required the jury to speculate about these consequences and distracted it from its primary responsibility of weighing the evidence before it.

(*Mussey*, *supra*, 153 N.H. at p. 278; accord, e.g., *Adams, supra*, 962 N.E.2d at pp. 414–415; *Gallardo–Trapero*, *supra*, 185 F.3d at p. 320; *Martinez, supra*, 981 F.2d at 871; *Pungitore, supra,* 910 F.2d at 1125.) For the reasons identified by the Fifth District and these out-of-state authorities, this Court should find such argument amounts to impermissible vouching because it invites the jury to accept the credibility of an officer-witness based on facts outside the record.

While recognizing that *Rodriguez* represents the majority approach (OBM at pp. 22-23), appellant nonetheless contends that an officer's motive to lie, or the career and penal consequences of lying, are "fairly common knowledge" and thus not improper. (OBM at p. 20.) Citing several out-of-state cases that have adopted the minority approach, appellant urges this Court to find that such arguments "are properly based on matters of common

knowledge and common-sense incentives, and therefore are not vouching." (OBM at p. 24.)

This Court should decline the invitation for several reasons. First, as the *Rodriguez* court found, it is not a matter of common knowledge that law enforcement officers of long tenure are more likely to be honest than other people; that they can expect to lose their jobs if they lie or exaggerate when testifying against those accused of crime; or that they face a grave risk of prosecution for perjury by the very prosecutors who have presented their testimony if they do this. (*Rodriguez, supra,* 26 Cal.App.5th at p. 907.)

In rejecting a similar argument as that posed by appellant here, Maryland's high court noted that "[a]lthough the notion of adverse personnel implications flowing from perjured testimony by a police officer resonates at a common sense level, at no time during the trial scrutinized in the present case did the State introduce evidence from which it could be inferred ineluctably that [the testifying officer] risked his career or any of its benefits if he were to testify falsely." (*Spain v. State, supra*, 386 Md. at p. 156.) The same is true here.

Second, appellant's proposed approach would be wholly inconsistent with this Court's previous cases finding that it is "clearly ... misconduct" for a prosecutor to refer to facts not in evidence. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such statements "tend[ ] to make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination. It

has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*Bolton, supra*, 23 Cal.3d at p. 213; *People v. Benson* (1990) 52 Cal.3d 754, 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108; *People v. Kirkes, supra,* 39 Cal.2d at p. 724.)

Appellant points to several opinions from this Court which purport to uphold "factually similar arguments" involving claims of vouching. (OBM at pp. 15-16, citing *People v. Anderson* (1990) 52 Cal.3d 453, 478-479; *People v. Medina* (1995) 11 Cal.4th 694, 757; *People v. Boyette* (2002) 29 Cal.4th 381; *People v. Davenport* (1995) 11 Cal.4th 1171, 1217-1218; *People v. Redd* (2010) 48 Cal.4th 691, 741.) These cases are readily distinguishable because the Court did not consider the vouching at issue here, where the prosecutor urged jurors to find the officer testimony credible based on facts *outside* the record, i.e. that they could lose their careers or face perjury prosecutions if they lied.

The facts of *Anderson* illustrate the distinction. Appellant cites *Anderson* for the proposition that an argument may be based on inferences from the record, and thus it is proper to argue that a police officer would not risk his reputation just to convict one defendant. (OBM at p. 21, citing *Anderson, supra,* 52 Cal.3d at p. 479.) But in finding no vouching, the

Anderson court emphasized that "the prosecutor limited her remarks to *facts of record*, namely, the years of experience of the officers involved" and thus the argument was "clearly based on inferences reasonably drawn therefrom, rather than on her personal belief or knowledge." (*Anderson, supra*, 52 Cal.3d at p. 478, emphasis in the original.) The prosecutor in *Anderson* argued only that the officer might "jeopardize his reputation by lying on the witness stand" – a reasonable inference based on facts in evidence. (*Ibid.*)

Here, by contrast, the prosecutor went beyond commenting on the officers' experience, arguing that they risked their careers and perjury prosecutions if they testified untruthfully. There are no "facts of record" about these collateral consequences. While it is certainly conceivable that police officers might, in some cases, have a special motivation to testify truthfully in court because of a departmental policy of firing officers who give false testimony, there was no evidence of such a policy presented here. Thus, the prosecutor's argument was a clear example of "bolstering the veracity of [a witness's] testimony by referring to evidence outside the record." (*Frye, supra*, 18 Cal.4th at 971.) The prosecutor became his own unsworn witness in violation of appellant's Sixth and Fourteenth Amendment Rights to confrontation and due process. (*Young, supra,* 470 U.S. at pp. 18-19; *Douglas v. Alabama, supra,* 380 U.S. at p. 419; *Hardnett v. Marshall, supra,* 25 F.3d at p. 878; *Harris, supra,* 47 Cal.3d at p. 1083; *Gaines, supra,* 54 Cal.App.4th at p. 825; *Blackington, supra,* 167 Cal.App.3d

at p. 1222.) *Anderson* does not hold to the contrary, and does not help appellant here.

In fact, on the one occasion this Court had the opportunity to consider the type of vouching at issue here, this Court "doubt[ed] that the argument was proper," but found it harmless under the facts of the case. (*People v. Padilla* (1995) 11 Cal.4th 891, overruled on another ground.) In *Padilla*, the prosecutor insisted that his ballistics expert would have "risked his whole career of 17 years" had he lied. (*Id.* at p. 946.) This court cited approvingly to the Sixth Circuit Court of Appeal case *United States v. Martinez*, *supra,* 981 F.2d at p. 871, which "held a closely similar argument by a prosecutor (asking the jury why a state police officer would 'risk his career, 18 years in the state police, to come in here and lie ....')" amounted to improper vouching. (*Padilla, supra*, 11 Cal.4th at p. 946, citing *Martinez, supra,* 981 F.2d at p. 871.) The *Padilla* court concluded: "Although we doubt that the argument was proper, we find no reasonable probability that defendant was prejudiced by the prosecutor's argument in this case." (*Padilla, supra*, 11 Cal.4th at p. 946.)

Appellant attempts to downplay *Padilla,* arguing that the "doubt expressed" by this Court is dicta and lacks persuasive weight "in light of the lack of analysis" after the harmless error finding. (OBM at p. 18.) But by that logic, all of the authorities cited by appellant would be similarly unpersuasive since the Court in those cases did not directly consider or meaningfully

analyze the vouching at issue here. (See *People v. Avila* (2006) 38 Cal.4th 491, 566 [it is well established that "cases are not authority for propositions not considered."]) Contrary to appellant's contention, the clear signal from *Padilla* that it considered such argument impermissible is wholly consistent with this Court's precedent drawing a clear line against arguing to facts outside the record, and comports with the reasoning of most state and federal courts finding such argument improper. Accordingly, this Court should decline appellant's invitation to deviate from the majority approach and should instead adopt the reasoning of the court below.

E. Vouching Of This Type Is Improper Because It Places The Prestige Of The Government Behind A Witness.

In addition to referencing facts not in evidence, the argument at issue here is improper because it places "the prestige of the government behind a witness through personal assurances of the witness's veracity[.]" (*Necoechea, supra,* 986 F.2d at p. 1276, citations omitted.) As the court below noted, "[a] prosecutor arguing in this way takes advantage not of the evidence before the jury but of the good-natured inclination of lay jurors to vest their confidence in those entrusted with the enforcement of the law. This confidence is valuable and admirable, but if exploited it places those accused of crime at an unfair disadvantage." (*Rodriguez, supra,* 26 Cal.App.5th at p. 907.) Thus, a prosecutor's statement that an officer would risk his career if he testified untruthfully is impermissible because it "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, quoting *United States v. Torres–Galindo* (5th Cir.2000) 206 F.3d 136, 142.)

In the instant case, the prosecutor invited the jury to rely on the prestige of the prosecutor and his agents based on their "long tenure careers with the Department of Corrections," suggesting these officers would put their careers "on the line" and subject themselves to perjury prosecutions if they lied. (4RT 533-536.) This line of argument amounted to assurances to the jury that the prosecutor knew, based on facts outside the record, that these officers were telling the truth. Thus, the argument impermissibly invited the jury to rely on the prestige of the prosecutor and his agents rather than its own evaluation of the evidence. (*Torres–Galindo*, *supra*, 206 F.3d at 142.)

Compounding the error in the instant case, the prosecutor argued that if Rodriguez was to be believed, the officers must have engaged in a conspiracy to fabricate the altercation since the incident occurred in the view of security cameras. (4RT 536.) Confronted with such argument, "jurors could be expected to feel that in order to find appellant[] innocent they would have to abandon confidence in the integrity of government." (*United States v. Goff* (5th Cir. 1988) 847 F.2d 149, 164.) Explaining the danger of this line of argument, the *Goff* court noted: "'The role of the prosecutor in closing argument is to assist the jury in analyzing, evaluating, and applying the

evidence.' [Citation.] It is not to invoke jurors' loyalty to their country or its government as a reason for convicting the accused." (*Ibid.*, citations omitted.)

Appellant disputes the notion that the form of vouching at issue here places the prestige of the government behind the witness. (OBM at p. 21.) In support of this contention, appellant contrasts the facts of *People v. Fuiava* (2012) 53 Cal.4th 1171, where this Court found it was improper vouching for a prosecutor to wear a "Viking pin" in front of the jury to show solidarity with his officer witnesses. (OBM at p. 21, citing *Fuiava, supra*, 53 Cal.4th at pp. 693-694.) Appellant further notes that the argument here is dissimilar to *People v. Turner* (2004) 34 Cal.4th 406, where this Court found the prosecutor improperly vouched for the credibility of experts based on the prosecutor's prior experience with them. (OBM at p. 21, citing *Turner, supra,* 34 Cal.4th at p. 433.)

But while it's true this Court has not had the occasion to consider witness vouching in this exact context, the Court has never signaled that the prohibition against witness vouching should be limited to blatant expressions of a prosecutor's personal opinion of, or prior experience with, a particular witness. In fact, the danger here is more insidious. The prosecutor appeared before the jury as an agent of the government and his statement about the officers' credibility, based on facts not before the jury, effectively placed the government's prestige behind the officers. (See *Weatherspoon, supra*, 410

F.3d at p. 1146, *State v. Mussey, supra*, 153 N.H. 272, 278.) As the New Hampshire Supreme Court held, "[t]he representative of the government approaches the jury with the inevitable asset of tremendous credibility – but that personal credibility is one weapon that must not be used." (*State v. Mussey, supra*, 153 N.H. at p. 278.) Here, the prosecutor improperly wielded the credibility of his office and his agents to bolster the believability of his own witnesses. This is an improper use of the prestige of the government.

F. This Line Of Argument Impermissibly Elevates The Credibility of Law Enforcement Officers Over the Credibility of Other Witnesses, Including The Defendant.

Third and finally, the prosecutor's comments during closing argument constituted improper vouching because they "implied improperly that the witness's status as a police officer entitled him to greater credibility in the jury's eyes than any other category of witness about which the same might have been argued." (*Spain v. State, supra,* 386 Md. at pp. 157–158; see *Fultz v. Whittaker* (W.D.Ky.2001) 187 F.Supp.2d. 695, 706 fn. 7 ["It is axiomatic that a jury cannot regard a police officer's testimony as more or less credible solely by virtue of their status as police officers"]; *People v. Clark* (1989) 186 Ill.App.3d 109 ["[i]t is established that a prosecutor may not argue that a witness is more credible because of his status as a police officer"]; *Reyes v. State* (Fla. Dist. Ct. App. 1997) 700 So.2d 458, 461; *United States v. Boyd* (D.C.Cir.1995) 54 F.3d 868.)

Although the prosecutor may argue a witness is telling the truth based

on the circumstances of the case and inferences from the evidence presented (e.g. *People v. Boyette, supra,* 29 Cal.4th at p. 433), this Court has never condoned an argument that a police officer may be deemed more credible simply because he or she is a police officer. To the contrary, this Court has signaled that such argument is improper (*Padilla, supra*, 11 Cal.4th at p. 946) and this practice has been uniformly condemned in other jurisdictions. As Maryland's high court explained:

> By invoking unspecified, but assumed, punitive consequences or sanctions that might result if a police officer testifies falsely, a prosecutor's arguments imply that a police officer has a greater reason to testify truthfully than any other witness with a different type of job. Although the factfinder generally is made aware that a witness who is a police officer is testifying as to events witnessed while on duty as a police officer, a prosecutor must be careful not to insinuate that the credibility of statements made in this capacity may be assessed at a level of scrutiny other than that given to all witnesses.

(*Spain v State, supra*, 386 Md. at p. 158.) Here, too, the prosecutor's argument implied that the correctional officers had a greater reason to testify more truthfully than other witnesses, including the defendant.

Importantly, this insinuation is improper not only because it usurps the jury's role in assessing credibility, but because it is based on a false premise: that law enforcement officers are likely to be fired or prosecuted for perjury if they lie. A prosecutor, held to a heightened ethical standard as representative of the sovereignty, is prohibited from "propounding outright falsehoods" to the jury. (*Hill, supra,* 17 Cal.4th at p. 821; see *Davis v. Zant* (11th Cir. 1994) 36 F.3d 1538, 1548 n.15 ["prosecutors have a special duty

of integrity in their arguments"]; *United States v. Myerson* (2d Cir. 1994) 18 F.3d 153, 162 fn.10 ["the prosecutor has a special duty not to mislead;" the should "never make affirmative statements contrary to what it knows to be the truth"]); *Walker v. City of New York* (2d Cir. 1992) 974 F.2d 293, 301.)

The type of prosecutorial argument at issue here is improper for the simple reason that it is not true. As one legal scholar concluded, the phenomenon of "testilying" is "an open practice in the criminal justice system," yet "there are typically no repercussions for police who lie or for the prosecutors who put them on the stand." (Julia Simon-Kerr, *Systemic Lying* (2015) 56 Wm. & Mary L. Rev. 2175, 2207[3]; see David N. Dorfman, *Proving the Lie: Litigating Police Credibility* (1999) 26 Am. J. Crim. L. 455, 457–58 ["Judges, prosecutors and defense attorneys report that police perjury is commonplace, and even police officers themselves concede that lying is a regular feature of the life of a cop."][4])

Yet while there is "rampant frequency of police perjury," there is very often no penal or career consequence for doing so. (Keane, Peter, *Why Cops Lie* (2011) Golden Gate University School of Law Publications, 534.)[5] As Professor Keane[6] notes, officer perjury "is the routine way of doing business

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[3] Available at: https://scholarship.law.wm.edu/wmlr/vol56/iss6/5

[4] Available at: http://digitalcommons.pace.edu/lawfaculty/533/.

[5]Available at: https://digitalcommons.law.ggu.edu/pubs/534

[6] Keane is dean emeritus of Golden Gate University School of Law and a former San Francisco police commissioner.

in courtrooms everywhere in America." (*Ibid.*) Police "systematically perjure themselves" because "they get away with it." (*Ibid.*) Prosecutors, tasked with charging and prosecuting perjury cases, would be aware of the reality that adverse consequences rarely follow untruthful testimony. A lay juror would have no reason to be so aware. Thus, the argument at issue here is uniquely dangerous because it has the tendency to sway jurors about an officer's credibility based on information known only to the prosecutor that is, in fact, untrue.

In the instant case, the fallacy inherent in the prosecutor's argument was not lost on the court below, which recognized why the public might view those who exercise authority "with suspicion, and to fear their possible corruption." (*Rodriguez, supra*, 26 Cal.App.5th at p. 907.) The court demonstrated how defense counsel might have exploited this suspicion with a fictionalized argument suggesting why the officers may have been motivated to lie:

> "The jury instructions say you may consider witnesses' possible motivations for lying. The prosecutor says you should believe his witnesses because they have no motive to lie, while my client is untruthful. But if you consider the facts, you'll see it's just the opposite. On the day in question, Mr. Rodriguez was a prisoner and an addict. He had nothing to gain by a deliberate attack on those guarding him, and a great deal to lose: more time in prison; the loss of his place at the SATF; perhaps a beating by the guards. And, of course, he would have no chance of getting away with these alleged crimes. Inside a prison he could not flee, could not claim an alibi or mistaken identity. The only possible outcome was finding himself at the bottom of a pile of guards, on video. Deliberately attacking these guards would quite simply be insane. My client is telling the truth because he had no motive to commit the crimes and powerful motives not to do so.

> "Now consider the motives the guards have for lying. Here's a prisoner who talked back, acted out, caused a big disruption. The guards can't have that. They have to make an example. They have to put the prisoner in his place, show him who's boss. If they beat him, well, there are cameras and there might be consequences. How to punish the prisoner and get away with it? Nothing easier. Check the video, see what you can plausibly claim consistent with it. Then go to the D.A. Exaggerate what happened within the limits of that plausibility. Was my client just having a freakout over the deaths of his family members? Say it was a deliberate attack instead. Did one officer bump his head? Say Mr. Rodriguez viciously slammed him on the head with chains—once, twice, whatever (though it's better when the officers get their stories straight). Make sure you describe an aggravated assault, because that's a serious felony, not just an assault, which is a misdemeanor. Lock him up for a long, long time beyond the sentence he's already serving. That'll send a powerful message to any other prisoner who might think about crossing us.
>
> "But the prosecutor says nothing like this could ever happen, because the officers would fear for their jobs and pensions and would risk prosecution for perjury. Nonsense. Maybe in fantasyland -- not in the real world. How many times have you read in the newspaper that an officer was fired and jailed for perjury? Yet studies have shown that working in law enforcement involves quite a bit of lying, more than in civilian life. Officers know they can get away with it, because they have that code of silence, the omerta you have heard about; because prosecutors will not go against them; because the system is their system.
>
> "So now think again about that question the prosecutor asked you: who's more likely to be lying?"

(*Rodriguez, supra*, 26 Cal.App.5th at p. 907, fn 4.)

As the Fifth District noted, this hypothetical argument "is filled with improper statements, and they are all improper in the same way the prosecutor's argument was improper in this case: They assume, and depend for their persuasive power on, alleged facts of which no evidence was presented to the jury, and of which no evidence probably could be presented." (*Rodriguez, supra*, 26 Cal.App.5th at p. 907, fn 4.) The court's reasoning on this point is sound and should be adopted by this Court.

G. Upholding This Type Of Argument Would Open The Door To Similar Arguments In Future Cases, Creating An Uncertainty In the Law By Blurring the Line Between Proper Argument And Impermissible Speculation.

As this Court has recognized, "the line between permissible and impermissible argument may sometimes appear unclear[.]" (*Hill, supra*, 17 Cal.4th at p. 823.) However, this Court has been unwavering on two key principles: that a prosecutor may properly draw conclusions from the evidence, but may not assume or state facts outside the record (e.g. *People v. Valdez* (2004) 32 Cal.4th 73, 133), and that prosecutors, as representatives of the sovereign state, must be held to "an elevated standard of conduct." (*Hill, supra,* 17 Cal.4th at p. 820.) To sanction the prosecutor's argument here would run afoul of both principles, creating uncertainty for parties navigating the line between proper argument and impermissible speculation.

Should this court adopt the approach suggested by appellant, it could, for example, open the door to the kind of defense argument described by the court below in footnote four. (*Rodriguez, supra*, 26 Cal.App.5th at p. 907, fn 4.) Defense attorneys are not constrained by the heightened standards of prosecutors, or their recognized duty not to impede the truth. (See, e.g., *United States v. Wade* (1967) 388 U.S. 218, 256-258 ["defense counsel has no comparable obligation to ascertain or present the truth."]) Thus, if prosecutors are permitted to vouch for the credibility of officer-witnesses by citing to information outside the record, defense attorneys should be allowed to meet such argument by citing the rampant frequency of police perjury

which, although widely-recognized as true, is not in evidence before the jury.

As the court below found, "No trial judge would allow defense counsel to argue in such a way, and properly so." (*Rodriguez, supra*, 26 Cal.App.5th at p. 907, fn 4.) Recognizing that prosecutors continue to argue in this manner, and trial courts continue to permit it, the court urged that "the practice should be stopped." (*Ibid.*) For the reasons discussed, this Court should heed the call of the court below and find the kind of vouching at issue here is improper.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeal in full.

Dated: March 29, 2019

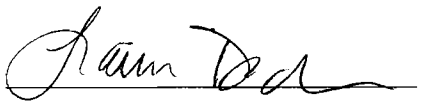
Respectfully submitted,

Lauren E. Dodge
Attorney for Respondent
David Phillip Rodriguez

CERTIFICATION OF WORD COUNT

(CAL. RULES OF CT., RULE 8.520(C)(1))

I, Lauren Dodge, appellate counsel of record for David Phillip Rodriguez, do hereby certify that according to Microsoft Word, the word processing program used to generate this brief, the word count of this brief is 9965, excluding tables.

Dated: March 29, 2019 By: 

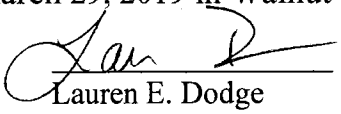
ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
(Code Civ. Proc., § 1013a(2))

I, Lauren E. Dodge, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 1250 Newell Avenue # 220, Walnut Creek, CA 94596. On March 29, 2019, I served the persons and/or entities listed below by the method checked. For those marked "served electronically," I transmitted a PDF version of Respondent's Answering Brief on the Merits by TrueFiling electronic service or to the email service addresses provided below. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below:

Office of the Attorney General P.O. Box 944255 Sacramento, CA 94244-2550 Attorney for Respondent State of California SacAWTTrueFiling@doj.ca.gov X Served Electronically __ Served by Mail	Central Calif. Appellate Program 2150 River Plaza Dr., Ste. 300 Sacramento, CA 95833 eservice@capcentral.org X Served Electronically __ Served by Mail
Office of the District Attorney Kings County 400 West Lacey Blvd. Hanford, CA 93230 __ Served Electronically X Served by Mail	Kings County Superior Court The Hon. Edward M. Lacy 1640 Kings County Drive Hanford, CA 93230 __ Served Electronically X Served by Mail
David Phillip Rodriguez, AM0657 Pelican Bay State Prison P.O. Box 7500 Crescent City, CA 95532 __ Served Electronically X Served by Mail	Fifth District Court of Appeal 2424 Ventura Street Fresno, CA 93721 X Served Electronically (via truefiling) __ Served by Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 29, 2019 in Walnut Creek, California.



Lauren E. Dodge
CSB # 225583