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In the Supreme Court of the State of California

<p>THE PEOPLE OF THE STATE OF CALIFORNIA,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>DAVID PHILLIP RODRIGUEZ,</p> <p>Defendant and Appellant.</p>

Case No. S251706
SUPREME COURT
FILED
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Fifth District Appellate Court, Case No. F073594
 Kings County Superior Court, Case No. 12CM7070

Deputy

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INTRODUCTION

Appellant, David Phillip Rodriguez, an inmate in state prison, was charged with various offenses related to an assault and attempted assault of two correctional officers. At trial, during closing argument, defense counsel questioned the truthfulness of the officers' testimony. In rebuttal, the prosecutor asked rhetorically why the officers would lie, risking their careers and possible prosecution for perjury. On appeal, appellant challenged these statements as improper vouching, and the Court of Appeal agreed. As argued in respondent's Opening Brief on the Merits (OBM) and Reply Brief on the Merits (RBM), the prosecutor's comments were improperly characterized as vouching because the prosecutor did not give personal assurances of the witnesses' veracity or refer to matters outside of the record. It is a matter of common knowledge that a witness may suffer a 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.

The Los Angeles County Public Defender's Office filed an amicus curiae brief in support of appellant that largely echoes the arguments raised by appellant and includes some anecdotal references to news articles and informal polling of criminal defense attorneys in an attempt to support those arguments. To the extent amicus curiae simply rehashes appellant's argument that the prosecutor's statements regarding possible perjury prosecution and adverse employment consequences relied on matters outside of the record, respondent has previously explained why such statements do not refer to matters outside the record. (OBM 20-21.) Respondent will not repeat those reasons here. To the extent amicus curiae's brief warrants additional discussion beyond what has already been addressed in the parties' briefs, it is discussed below.

ARGUMENT

I. THE PROSECUTOR'S ARGUMENT WAS BASED ON MATTERS OF COMMON KNOWLEDGE AND REASONABLE INFERENCES, AND DID NOT RELY ON FACTS OUTSIDE THE RECORD

In his Answering Brief on the Merits (ABM), appellant claimed that the prosecutor's argument was "based on a false premise that law enforcement officers are likely to be fired or prosecuted for perjury if they lie." (ABM 40.) Appellant relied on a number of academic articles for the proposition that "police perjury is commonplace" and "there is very often no penal or career consequences." (ABM 41-43.) Amicus curiae now cited two news articles to make the same points. (Amicus Brief 11-12.) The first article lists several examples of officers facing little to no consequences for a variety of unlawful conduct. (*Id.* at p. 11.) The other is about the alleged unwritten rule that correctional officers do not report acts of misconduct by other officers for fear of retaliation. (*Id.* at p. 12.) It is unnecessary to address whether these anecdotal examples are an accurate reflection of correctional officers in general because amicus curiae's argument rests on the same erroneous assumptions underlying the reasoning of appellant and the Court of Appeal. Appellant and the Court of Appeal erroneously presumed that the prosecutor's argument depended on whether a falsely testifying officer could "firmly" expect to lose his or her job or to face a "grave risk" of being prosecuted for perjury. (See OBM 21-22, citing *People v. Rodriguez* (2018) 26 Cal.App.5th 890, 907.) But the prosecutor stated only that officers "risked" "possible prosecution" for perjury and put

their careers “at risk” or “on the line.” (See OBM 22, citing 4 RT 533-534.)¹ Moreover, none of the examples cited in the articles relate to false testimony and any punishment, or lack thereof, for that particular form of misconduct. Even assuming that adverse consequences from untruthful testimony are rare, the prosecutor could logically ask why the officers would take *any* such risk to convict a particular defendant.

Respondent further disagrees with amicus curiae’s argument that these articles suggest the prosecutor’s comments were not based on facts, but rather relied solely on the prestige and authority of the prosecutor’s office. (See Amicus Brief 11-13.) Simply pointing out the legal and professional consequences of lying does not place the prestige of the government behind a witness. (See OBM 20-21, citing *People v. Anderson* (1990) 52 Cal.3d 453, 479 [proper to argue police officer would not risk reputation to convict one defendant] and *People v. Medina* (1995) 11 Cal.4th 694, 757 [proper to argue government witness had no reason to lie].) Moreover, arguments that are proper for other kinds of witnesses should also be proper for correctional officers, who should not be placed in a worse position before the jury merely by virtue of their profession. (See *Medina, supra*, 11 Cal.4th at p. 757, cited at OBM 16-17 [proper to argue ballistics experts appeared honest, were government employees, had no reason to lie, were not being paid for testifying, and told the truth to the jury].)

As further support for the argument that the prosecution placed the prestige and authority of its office behind its witnesses, amicus curiae cites the following passage from the Court of Appeal’s opinion:

¹ “CT” refers to the Clerk’s Transcript on Appeal; “RT” refers to the Reporter’s Transcript on Appeal.

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.

(*People v. Rodriguez, supra*, 26 Cal.App.5th at p. 907; see Amicus Brief 13.) Respondent takes issue with amicus curiae's reliance on this statement and with the import of the underlying statement itself, which seems to be that the average juror is inclined to believe law enforcement witnesses over other witnesses simply because they work in law enforcement. Neither the Court of Appeal nor amicus curiae cite any factual support for such a conclusion. To the contrary, at the close of evidence, the jurors were instructed not to consider "prejudice or a desire to favor one side or the other" in their evaluation of the witnesses' credibility. (CT 115, 131; 4 RT 508.) Before trial, the jurors were also instructed not to let "bias, sympathy, prejudice or public opinion" influence their decision, and that "[n]othing the attorneys say is evidence." (CT 110, 115, 126, 129; 3 RT 214, 217.) We presume that the jurors followed the instructions they were given (*People v. Doolin* (2009) 45 Cal.4th 390, 445 ["We presume the jury followed these instructions, ignored the prosecutor's remark, along with any displays of 'sentiment' and 'passion' by counsel, and decided the case based on the evidence admitted at trial"]), and not that they completely disregarded the instructions and based their verdict on some inherent bias in favor of law enforcement.

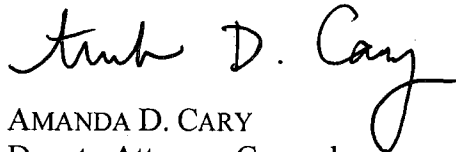
CONCLUSION

Accordingly, 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, be affirmed.

Dated: July 17, 2019.

Respectfully submitted,

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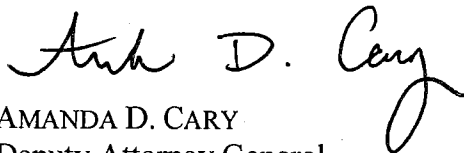
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CERTIFICATE OF COMPLIANCE

I certify that the attached **Answer to Appellant's Amicus Curiae Brief** uses a 13-point Times New Roman font and contains 1,126 words.

Dated: July 17, 2019.

XAVIER BECERRA
Attorney General of California

A handwritten signature in black ink that reads "Amanda D. Cary". The signature is written in a cursive style with a large, looping "y" at the end.

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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 July 17, 2019, I served the attached **Answer to Appellant's Amicus Curiae Brief** 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:

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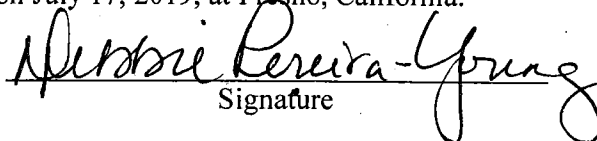
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I declare under penalty of perjury, under the laws of the State of California, the foregoing is true and correct and that this declaration was executed on July 17, 2019, at Fresno, California.

Debbie Pereira-Young
Declarant


Signature

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