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 Case No. F073594

Kings County Superior Court Case No. 12CM7070

REPLY 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
RACHELLE A. NEWCOMB
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ARGUMENT

I. APPELLANT'S ARGUMENT SHOULD BE REJECTED BECAUSE IT PLACES LAW ENFORCEMENT WITNESSES IN AN INFERIOR POSITION TO OTHER WITNESSES

A. Introduction

In the Answering Brief on the Merits (ABM), appellant[1] argues the following: (1) published California appellate decisions have reached diverging opinions on the issue; (2) the weight of opinion in other jurisdictions have held arguments such as the one in the present case to be improper; (3) the prosecutor's argument assumes facts not in evidence; (4) the prosecutor's argument places the prestige of the government behind the witness; (5) the argument elevates the credibility of law enforcement witnesses over that of other witnesses; and (6) upholding the prosecutor's argument in the present case would allow defense attorneys to meet the argument by citing the asserted "rampant frequency of police perjury[.]" (ABM 20-45.)

For the reasons stated in the Opening Brief on the Merits (OBM) and below, respondent asserts: (1) before the decision by the Court of Appeal below, California cases were not conflicting on the issue; (2) while a majority of non-California jurisdictions have held such arguments to be improper, the cases holding such arguments to be proper are better reasoned and should be followed; (3) arguing that a law enforcement officer who lies on the stand faces potential perjury prosecution and adverse career

---

[1] In the Answering Brief on the Merits, Rodriguez refers to himself as "respondent" and to the People as "appellant." (E.g., ABM 8-9.) Below, the People were the respondent and Rodriguez the appellant. The People did not appeal the decision below but rather petitioned for review of that decision by this Court. Accordingly, the People continue to refer to themselves as respondent and to Rodriguez as appellant.

consequences relies on reasonable inferences and common knowledge; therefore the argument does not assume facts not in evidence; (4) merely pointing out legal and professional consequences for lying does not place the prestige of the government behind a witness; (5) this Court has previously approved arguments that police officers who lack credibility are no good as witnesses and that particular witnesses were government employees who had no reason to lie; by parity of reasoning, the argument here does not elevate the credibility of law enforcement witnesses over that of other witnesses; and (6) a prosecutor merely pointing out potential adverse consequences for lying is not the same as a defendant asserting law enforcement witnesses lie with "rampant frequency"; therefore, the prosecutor's argument does not open the door in this regard. Appellant's argument ultimately rests on the assertion that, with regard to law enforcement officer witnesses—and only law enforcement officer witnesses—the prosecutor may not argue certain commonplace inferences. Because this argument places law enforcement officers in an inferior position to other witnesses, it should be rejected.

B. *Caldwell* and *Woods* Do Not Conflict

As stated in the opening brief on the merits, before the decision of the court below, no Court of Appeal had found that an argument such as the present one was improper. (OBM 18.) In the Answering Brief on the Merits, appellant argues that *People v. Woods* (2006) 146 Cal.App.4th 106 and *People v. Caldwell* (2013) 212 Cal.App.4th 1262 "reached divergent conclusions" on the issue. (ABM 20.) Not so.

In *Woods*, the prosecutor argued as follows:

> 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. . . . Bank accounts, children's tuition. . . . Are these 12 officers willing to risk those things for Mr. Woods and his five rocks of cocaine?

(*Woods*, *supra*, 146 Cal.App.4th at p. 114.) The *Woods* court held that this constituted impermissible vouching because the prosecutor, Jones, referred to matters outside the record:

> The number of officers cited by Jones was supported by the evidence. Although no evidence indicated that anyone in the area videotaped the incident, Jones's reference to people with video cameras would most likely be understood by jurors to refer to well-known incidents in which police misconduct was captured on home video. This effectively was a reference to common experience or knowledge, and was not improper. [Citation.] Jones's reference to the presence of the names and "serial numbers" of the officers in the police report extended beyond the evidence. Jones's argument strayed farther into impermissible territory 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. Although the officers' financial obligations and experience were irrelevant to appellant's guilt, Jones 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. Moreover, to the extent Jones implied that the uncalled officers would have testified to the same facts as the officers who testified, the argument implicated appellant's Sixth Amendment rights to confront and cross-examine uncalled prosecution witnesses. [Citation.]

(*Woods*, *supra*, 146 Cal.App.4th at p. 115.) Examined in full, the reasoning of the *Woods* court shows: (1) it is fully permissible to refer to matters of common knowledge in argument, such as well-known incidents where people used video cameras; and (2) the *Woods* court was concerned with references to matters outside the record that are not common knowledge, such as references to the contents of police reports, the testimony of 12 unidentified mostly nontestifying officers, the type of prior cases those officers had been involved in, and the financial obligations the same officers had. Despite appellant's attempts to assert otherwise (ABM 23-24), the argument found improper in *Woods* bears scant resemblance to the argument in the present case—that the testifying officers had no reason to commit perjury and risk adverse career consequences to convict appellant. (4 RT 533-536.) Accordingly, the holdings in *Woods* and *Caldwell* are not inconsistent, and the holding in *Woods* does not prohibit the argument employed by the prosecutor in the present case.

C. Cases Approving the Arguments Employed in the Present Case Are Better Reasoned and Should Be Followed

Appellant asserts that the weight of authority in other jurisdictions has found 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." (ABM 26-29.) The People agree that the majority of courts in other jurisdictions would likely hold arguments such as the ones made in the present case improper. However, the People have also shown why the reasoning in the cases from those jurisdictions is unsound. (See OBM 22-24.) The People have also shown that a minority of jurisdictions have approved arguments similar to those made in the present case. (OBM 24.) This Court has previously adhered to better-reasoned minority views, and respondent respectfully requests that the Court do so again here. (E.g.,

People v. Scott (1994) 9 Cal.4th 331, 353 [applying "practical and straightforward" reasoning to adopt the minority view that sentencing errors can be forfeited].)

D. Appellant's Reasons for Categorizing the Argument in the Present Case as Vouching Are Unpersuasive

Appellant identifies three reasons why arguments such as the one in the present case constitute impermissible vouching: (1) the argument conveys the impression that evidence not presented to the jury but known to the prosecutor supports the charges; (2) the argument urges the existence of legal and professional repercussions that ensure the credibility of the officers' testimony and therefore place the prestige of the government behind the witness; and (3) such arguments impermissibly elevate the credibility of police officers over that of other witnesses. (ABM 27.)

Respondent has previously shown how references to perjury and potential adverse career consequences do not refer to matters outside the record. (OBM 20-21.) For the contrary assertion, appellant cites *United States v. Molina-Guerva* (3d Cir. 1996) 96 F.3d 698, 704 (*Molina-Guerva*). (ABM 27.) However, *Molina-Guerva* is factually different from the present case. In that case, the prosecutor

> told the jury that it was "insulting" and "ridiculous" to think that the United States would put on a witness who would lie and assured the jury that "Agent [Lugo] did not lie to you."

(*Ibid.*) It is quite understandable how the prosecutor's assurance that the United States would not put on a witness who would lie might lead the jury to believe that the prosecutor knew more than the jury heard. But the prosecutor in the present case did nothing of the sort. Accordingly, *Molina-Guerva* does not support appellant's proposition.

As to the argument that legal and professional repercussions ensure the credibility of the officer and therefore place the prestige of the

government behind the witness, appellant cites *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1146. (ABM 27.) For reasons previously stated, respondent disagrees with the reasoning in *Weatherspoon* to the extent that case suggests that merely pointing out legal and professional consequences to lying places the prestige of the government behind the 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].)

Finally, for the proposition that such arguments impermissibly elevate the credibility of police officers over other witnesses, appellant cites *Spain v. State* (Md. 2005) 872 A.2d 25, 31 and *People v. Adams* (Ill. 2012) 962 N.E.2d 410. (ABM 27-28.) However, those courts' conclusions in this regard are arguably inconsistent with this Court's reasoning in *Anderson*, in which this court found no improper vouching occurred where the prosecutor argued that the officers, who had many years of experience on the force, would not jeopardize their reputations by lying on the stand, and that a police officer is no good if his credibility is in doubt. (*People v. Anderson*, *supra*, 52 Cal.3d at p. 478, cited at OBM 16.) Certainly, if it is proper to argue that a police officer whose credibility is in doubt is no good, and that an officer of long experience is unlikely to lie to catch one defendant, as this Court held in *Anderson*, *supra*, 52 Cal.3d at page 478, then it should similarly be permissible to argue that a police officer who lies on the stand may suffer adverse career consequences, which the *Spain* and *Adams* courts found to be improper. (*Spain*, *supra*, 872 A.2d at p. 31; *Adams*, *supra*, 962 N.E.2d at pp. 414-415.) Put another way, arguments that are proper for other kinds of witnesses should also be proper for law enforcement officers. Law enforcement officers should not be put into a

worse position before the jury merely by virtue of being police officers. (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].)

E. Appellant's Attempts to Distinguish Prior Authority by This Court Fail

Appellant argues that the cases cited by respondent are distinguishable from the present case 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.

(ABM 33.) However, inferring from the record that a police officer might suffer adverse career consequences or perjury convictions is no different in principle from inferring that a police officer whose credibility is in doubt is "no good as a witness" (*Anderson, supra*, 52 Cal.3d at p. 478) or that ballistics experts were government employees who were not being paid to testify and had no reason to lie (*Medina, supra*, 11 Cal.4th at p. 757). Accordingly, respondent submits that the cases holding such arguments to be proper were correctly decided. (OBM 24, citing *State v. Ashcraft* (Utah 2015) 349 P.3d 664, 667, 672; *United States v. Sosa* (11th Cir. 2015) 777 F.3d 1279, 1295-1296;[2] *Vasquez v. State* (Tex.Ct.App. 1992) 830 S.W.2d 829, 831.)

---

[2] The *Sosa* court declined to find error under the "plain error" standard absent an objection by the defendant. (*United States v. Sosa, supra*, 777 F.3d at p. 1296.)

Appellant disputes respondent's characterization of the court's statements in *Padilla*[3] as dicta. According to appellant,

> by that logic, all of the authorities cited by [respondent] would be similarly unpersuasive since the Court in those cases did not directly consider or meaningfully analyze the vouching at issue here.

(ABM 35-36.) However, the cases decided by this Court that are cited by respondent directly considered the issue of vouching. Some, such as *Anderson* and *Medina*, considered circumstances not far removed from the circumstances in the present case. Similarly, the Sixth District Court of Appeal in *Caldwell* found arguments similar to those made in the present case—that the officers would not commit perjury and put their careers on the line—were a proper response to defense argument. (*People v. Caldwell*, *supra*, 212 Cal.App.4th at p. 1270, cited at OBM 18-19.) Thus, the holdings in such cases as *Anderson*, *Medina*, and *Caldwell*, on which respondent relies, are not dicta, as these courts fully considered the issues of vouching that had been presented to them. *Padilla*, by contrast, did not, as it decided the issue on harmless error. (*Padilla*, *supra*, 11 Cal.4th at p. 946.) It is telling that this Court in *Padilla* cited none of its prior precedent on vouching, such as *Anderson* or *Medina*, the latter decided less than a month previously. Rather, the Court cited one federal case, *United States v. Martinez* (6th Cir. 1992) 981 F.2d 867. (*Padilla*, *supra*, 11 Cal.4th at p. 946.) In light of the lack of analysis of the issue in *Padilla*, that case has little persuasive force regarding the issue in the present case.

//

//

//

---

[3] *People v. Padilla* (1995) 11 Cal.4th 891.

F. Appellant's Assertion That Police Perjury Is Commonplace Erroneously Assumes the Prosecutor's Argument Depended on the Certainty of Adverse Legal or Career Consequences for Lying

Appellant argues that the prosecutor's argument "is based on a false premise: that law enforcement officers are likely to be fired or prosecuted for perjury if they lie." (ABM 40.) To support the argument, appellant relies on a number of sources for the proposition that "police perjury is commonplace" but that "there is very often no penal or career consequences for doing so." (ABM 41-43.)

Appellant's argument falls into the same fallacy committed by the Court of Appeal below, i.e., it assumes that the prosecutor's argument depended on the officers "firmly" expecting to lose their jobs if they lied or exaggerated while testifying or facing a "grave risk" of being prosecuted for perjury if they did so. (See OBM 21-22, citing *People v. Rodriguez* (2018) 26 Cal.App.5th 890, 907.) However, 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.)[4] Even assuming appellant's premise is true—that adverse consequences from untruthful testimony are rare—the prosecutor could logically ask why the officers would take any such risk to convict this particular defendant.

Appellant submits that allowing arguments such as those used by the prosecutor below would permit defense arguments "citing the rampant frequency of police perjury, which, although widely-recognized as true, is not evidence before the jury." (ABM 44-45.) Not so. First, respondent disputes that it is "widely-recognized" that law enforcement officers commit perjury with "rampant frequency[.]" Second, there is a fundamental difference between pointing out to the jury the potential risk of

[4] "RT" refers to the Reporter's Transcript on Appeal.

perjury and adverse job consequences to a witness who lies on the stand versus purporting, as appellant does, to state the frequency with which police officers (or any other group of people) lie on the stand and then using that purported frequency to argue that the particular witnesses who testified lied (or did not lie) in the case at hand. To permit one argument thus does not "open the door" to the other argument.

CONCLUSION

It is clear that police officers are not to be considered inherently more credible than other witnesses. However, they also should not be deemed less credible. Appellant's argument boils down to an assertion that, with regard to law enforcement officer witnesses—and only law enforcement officer witnesses—the prosecutor should not be able to argue commonplace inferences that such witnesses would not risk adverse job consequences and potential perjury convictions by lying. That view places law enforcement witnesses in an inferior position to other witnesses. Accordingly, appellant's position, and the position of the Court of Appeal below, should be rejected.

Dated: May 7, 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
RACHELLE A. NEWCOMB
Deputy Attorney General

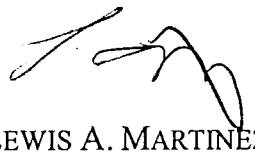
LEWIS A. MARTINEZ
Deputy Attorney General
Attorneys for Plaintiff and Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached **Reply Brief on the Merits** uses a 13 point Times New Roman font and contains 2,840 words.

Dated: May 7, 2019

XAVIER BECERRA
Attorney Generalof California



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

FR2016301535
95316822.doc

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rodriguez**

No.: **F073594 / 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; my business address is 2550 Mariposa Mall, Room 5090, Fresno, CA 93721.

On May 8, 2019, I served the attached **Reply Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Fresno, California, addressed as follows:

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

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

Fifth Appellate District (Fresno)
Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816-4736

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 May 8, 2019, at Fresno, California.

W. Garber
Declarant

W Garber
Signature

FR2016301535
95316902.docx