

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA JUN 19 2019

Jorge Navarrete Clerk

PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
Plaintiff and Respondent, ) Supreme Court  
 ) Case No. S251706  
 v. ) Court of Appeal  
 ) Case No. F073594  
DAVID PHILLIP RODRIGUEZ, )  
 )  
Defendant and Appellant. )  
\_\_\_\_\_ )

\_\_\_\_\_  
Deputy

**APPLICATION TO FILE AMICUS CURIAE BRIEF**  
**and AMICUS CURIAE BRIEF IN SUPPORT OF**  
**DEFENDANT/APPELLANT**

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TO THE HONORABLE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE STATE OF CALIFORNIA:

The Los Angeles County Public Defender’s Office hereby  
applies for leave to file the attached brief as amicus curiae in  
support of defendant and appellant David Phillip Rodriguez.  
Counsel is familiar with the issues involved in this case and  
believes there is a necessity for additional argument on the issue  
as stated in this court’s docket of the case:

**“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?”**

In its published opinion the Court of Appeal reversed the holding of the trial court, finding that the prosecutor had committed prejudicial misconduct by vouching for the credibility of the government's witnesses. The vouching described in this case is all too common in our courtrooms. As head of the appellate branch of the Los Angeles Public Defender's Office, it is my job to conduct training for our attorneys and for criminal defense groups and private practitioners throughout the State of California. My most popular training program is a review of recent caselaw affecting our practice. For the past nine months, I have been concluding with a discussion of this case in which I poll the audience to ask if the attorneys have ever tried a case in which the prosecutor argued that the officers risked their jobs or charges of perjury if they lied. Nearly every attorney in attendance at all of my training programs statewide has raised his or her hand. If upheld by this court, the opinion of the Court of Appeal could put a stop to this unfair and improper practice.

The Los Angeles County Public Defender's Office is the largest office of trial counsel for criminal defendants in the State of California, with over 700 lawyers. Our Office provides counsel for all persons charged with crimes within Los Angeles County who are unable to afford private counsel. For the reasons stated here, the Los Angeles County Public Defender's Office requests



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**INTRODUCTION AND PROCEDURAL HISTORY**

Defendant David Phillip Rodriguez<sup>1/</sup> was charged and tried for assault and battery against a correctional officer while he was in custody. The testifying officers claimed that the defendant initiated an attack against the officer, and the defendant maintained that he never struck the officer. The short video which recorded the incident was too blurry to clearly support or refute either side, thus the determination of this case rested almost exclusively on the credibility of the witnesses. (Slip opn., pp. 5-7, 22-23.)

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<sup>1/</sup> Mr. Rodriguez was the defendant in the trial court, appellant in the Court of Appeal, and is now the respondent before this court. To avoid confusion, he is referred to herein as the defendant.

During the rebuttal of his closing argument, the prosecutor asked the jurors who “ ‘had a motive to lie, the officers or the defendant?’ ” (Slip opn., p. 12.) The prosecutor discussed the two testifying officers, first stating that Officer Stephens had 17 years of experience with the Department of Corrections, then asking why he “ ‘would put his entire career on the line ... [and] subject himself to possible prosecution for perjury...’ ” and again inquiring of the jurors, “ ‘What possible motive would he have to do that?’ ” (Slip opn., p. 13.)

Regarding the second officer, the prosecutor told the jurors that Officer Lowder had been with the Department of Corrections for more than 20 years. The prosecutor asked the jurors why “ ‘Officer Lowder would put his entire career with the Department of Corrections at risk, [and] subject himself to possible prosecution for perjury. ...’ ” (Slip opn., p. 13.)

Defense counsel objected that the prosecutor’s rebuttal “[a]ssumes facts not in evidence.” The trial court merely directed the prosecutor to continue, thus implicitly overruling the objection. (Slip opn., p. 13.) The prosecutor asked the jurors why Officer Lowder would “ ‘perjure himself before you’ ” and what reason would he have to lie, then answering his own question: “ ‘There’s no motive to lie that we know of.’ ” (Slip opn., p. 13.)

At the conclusion of the trial, the defendant was found guilty of the charges, and he appealed. In its published opinion,



the Court of Appeal, Fifth District, determined that the prosecutor had committed prejudicial misconduct which required reversal.

Petitioner Attorney General<sup>2/</sup> is asking this court to find, contrary to the holding of the Court of Appeal, that the prosecutor did not vouch for the testifying correctional officers when he stated that the officers had no motive to lie, and that if they had done so, they would have been putting their entire careers on the line and subjecting themselves to possible prosecution for perjury. (Slip opn., pp. 12-13.) As amicus curiae, the Los Angeles Public Defender's Office asks that this court uphold the ruling of the Court of Appeal to find that the prosecution committed reversible misconduct by vouching for the credibility of its witnesses.

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<sup>2/</sup> The prosecution was the plaintiff in the trial court, the respondent in the Court of Appeal, and is now the petitioner before this court. To avoid confusion, the prosecution will be referred to from this point forward as the prosecutor or the prosecution.

## POINTS AND AUTHORITIES

### I

#### THE PROSECUTOR INTRODUCED INFORMATION OUTSIDE THE RECORD AND HE INVADED THE PROVINCE OF THE JURY BY VOUCHING FOR THE WITNESSES

This court has repeatedly noted that a prosecutor is permitted to “make assurances regarding the apparent honesty” of the government’s witnesses based on facts in the record, but this court also warns that “a prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence *outside* the record.” (*People v. Turner* (2004) 34 Cal.4th 406, 432-433, emphasis added, internal citations and quotation marks omitted; *People v. Bonilla* (2007) 41 Cal.4th 313, 337; *People v. Ward* (2005) 36 Cal.4th 186, 215.) In this case the prosecutor’s statement that the correctional officers could be putting their careers on the line and subjecting themselves to charges of perjury if they lied was first introduced during rebuttal. No evidence was presented to demonstrate that the officers’ jobs were at risk or that they would be charged with perjury if they lied. No employment brochures, contracts, or disciplinary guidelines were admitted into evidence to show what would be at stake if they lied; there was no basis whatsoever for the claims of the prosecutor.

In fact, recent media reports indicate exactly the opposite. As a result of Senate Bill 1421, which went into effect on January 1, 2019, previously withheld peace officer and custodial officer personnel records are now being made available to the public. The revelations are frightening. See, for example, the Mercury News story of May 4, 2019, listing multiple examples of cases in which officers lied and faced little or no consequences for everything ranging from filing false reports to “brutally slamming a woman face first” onto the floor of the jail and then “filing a misleading report about the incident.” The officers did not lose their jobs nor did they face perjury charges as a result of these nefarious acts.

(<https://www.mercurynews.com/2019/04/25/borenstein-law-enforcement-protecting-bad-cops-rather-than-the-public/>; downloaded May 23, 2019.)

In addition to describing penalties they could face, the prosecutor in this case repeatedly asked what motive the officers might have to lie, concluding that “[t]here’s no motive to lie that we know of.” (Slip opn., p. 13.) Here the prosecutor has again crossed the line: “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.” (Slip opn., p. 22.)

No evidence was presented regarding motive, thus the jurors have no way to gauge whether penalties for lying are severe or nominal or whether penalties for hitting an inmate, as the defendant's testimony indicated, would motivate an officer to lie about how the incident started. Again, media reports do not support the prosecutor's claims: officers may lie for personal gain, employment promotion, to gain access to drugs, or to maintain solidarity with fellow officers. According to BuzzFeed, the unwritten rule for correctional officers is to back up each other's stories and not reveal the misconduct perpetrated by fellow officers, that which has been "called 'the green wall of silence' — the code of silence that has turned California's state prisons into insular and isolated facilities of unconstitutional conditions, where what happens on the Inside stays on the Inside." ("The Job Made Me Do It" by Albert Samaha, BuzzFeed, August 30, 2015; see also the 2015 Special Review of the Inspector General detailing excessive use of force against inmates and retaliation against officers if they failed to follow the code of silence, found at [https://www.oig.ca.gov/media/reports/Reports/Reviews/2015\\_Special\\_Review\\_-\\_High\\_Desert\\_State\\_Prison.pdf](https://www.oig.ca.gov/media/reports/Reports/Reviews/2015_Special_Review_-_High_Desert_State_Prison.pdf).)

When the prosecutor said that the consequences for lying could be job loss or charges of perjury, he was clearly relying on information outside the record. Worse still, the information may be completely without a factual basis, and as noted in the

published case, “the jury might improperly accept [the argument] based solely on the prestige and authority of the prosecutor’s office.” (Slip opn., p. 22.) The statements may seem harmless, but they rise to the level of prejudicial error based on the effect they have on the jury:

[The prosecutor’s remarks,] 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. Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal. (Slip opn., p. 15, quoting *People v. Hill* (1998) 17 Cal.4th 800, 827-828; internal citations and quotation marks omitted, ellipsis in original.)

Jurors show a “good-natured inclination ... to vest their confidence in those entrusted with the enforcement of the law.” When that confidence is “exploited it places those accused of crime at an unfair disadvantage.” (Slip opn., p. 18.) Such vouching usurps the jury of its decision making independence and permits the jurors to accept the “ ‘government’s view of the evidence’ ” without making its own assessment of the witnesses’ credibility. (Slip opn., p. 16; quoting *People v. Cook* (2006) 39 Cal.4th 566, 593.)

II  
THE PROSECUTOR'S REBUTTAL STATEMENTS WERE  
NOT REASONABLE INFERENCES TO BE DRAWN  
FROM THE EVIDENCE

Misconduct is committed when a prosecutor argues statements of facts outside the evidence. (Slip opn., p. 15; with reliance on *People v. Bolton* (1979) 23 Cal.3d 208, 212 and *Hill, supra*, 17 Cal.4th at 827-828.) There are exceptions for matters which are deemed to be common knowledge, and the prosecutor is afforded broad discretion regarding the reasonable inferences which may be drawn from the evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; additional citations omitted; see also *Turner, supra*, 34 Cal.4th at 432-433; *Bonilla, supra*, 41 Cal.4th at 337; *Ward, supra*, 36 Cal.4th at 215; slip opn., p. 15.)

Whether prison guards face the threat of job loss and/or perjury charges if they lie is not common knowledge, nor would such conclusions be deemed reasonable inferences to be drawn from the evidence. The prosecutor's statements during his rebuttal were powerful claims without any factual basis, leading the jurors to believe that the officers could face the most serious consequences if they lied and that they would have no motive to lie.

At first glance it might appear that the facts of this case are comparable to those in *People v. Anderson* (1990) 52 Cal.3d 453, in which the prosecutor's remarks regarding officers'

credibility were found not to constitute vouching. The prosecutor argued, “ ‘A law enforcement officer is no good as a witness if his credibility is in doubt,’ ” and she noted that “ ‘a number of them ... are old, experienced officers. They’ve got 15, 20, 22 years of experience on the force.’ ” She also “expressed her doubt that any of them would ‘jeopardize’ his reputation by lying on the witness stand ‘just to convict one defendant’ ” whereas the defendant only needed to testify one time, so he “ ‘doesn’t have anything else to lose,’ ” and “ ‘so what if you do catch him in a few lies?’ ” (*Anderson, supra*, 52 Cal.3d at 478, ellipsis in original.)

The distinction between the two cases is subtle, but important. In both cases the prosecutors noted the years of service of the testifying officers, but the prosecutor in *Anderson* only spoke about jeopardizing their reputations if the officers were caught lying. This could be a reasonable inference from the evidence; anyone caught in a lie about work performance might be putting his reputation on the line. In this case, however, the prosecutor went beyond the record to argue that the officers could be risking their careers and charges of perjury as a result of lying (slip opn., p. 13), yet there was no basis in the evidence for these claims, nor could they be deemed common knowledge or reasonable inferences.

If this court finds the statements of the prosecutor to be “reasonable inferences” drawn from the evidence, then a

defendant should also be permitted to argue the opposite, that it is “common knowledge” that officers beat up inmates, that they lie, that they always back up each other’s stories, and that officers who testify falsely almost never face charges of perjury. In fact, the Court of Appeal created a hypothetical closing, flipping the prosecutor’s argument upside down, arguing instead that the defendant’s credibility was assured because he had so much to lose as a result of hitting an officer, that he would never do so, whereas jail beatings are common, and officers lie all the time to cover these actions. (Slip opn., pp. 18-19, fn. 4.) If such an argument were offered in trial, the prosecution would surely object, and “[n]o trial judge would allow defense counsel to argue in such a way, and properly so.” (Slip opn., p. 19, fn. 4.)

These arguments are not based on evidence before the jury, nor could they be characterized as common knowledge or reasonable inferences to be drawn from the evidence presented. “Yet it seems prosecutors continue to argue that officers would never lie for reasons of which the jury never hears any evidence, and trial courts continue to permit it. ... [T]he practice should be stopped. ...” (Slip opn., p. 19, fn. 4.)







## PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012. I served the foregoing Application to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Petitioner in *People of the State of California v. David Phillip Rodriguez*, Supreme Court Case No. S251706, as follows:

**By U.S. Mail:**

On June 10, 2019, I enclosed a copy of the documents identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service with the postage fully prepaid, addressed as follows:

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