

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

DORA DIAZ,

Defendant and Appellant.

Case No. S205145

**SUPREME COURT
FILED**

MAR - 7 2014

Frank A. McGuire Clerk

Deputy

Sixth Appellate District, Case No. H036414
Santa Clara County Superior Court, Case No. CC954415
The Honorable Ron Del Pozzo, Judge

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ARGUMENT

I. THE “CONSIDER-WITH-CAUTION” INSTRUCTION SHOULD NOT BE SUBJECT TO A SUA SPONTE DUTY

The consider-with-caution instruction currently embodied in CALCRIM No. 358 was born of circumstances that no longer apply, is always redundant, and is potentially harmful.¹ The requirement that trial courts sua sponte instruct the jury to view the oral statements of the accused with caution is a “rule without a reason” and should be abrogated. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882.)

Stare decisis does not require maintaining a rule that serves no purpose. It is “well established . . . that [the doctrine of stare decisis] is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case.” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1213, citation and quotation marks omitted.) The “nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Whenever an old rule is found unsuited to present

¹ The full text of CALCRIM No. 358 reads:
Evidence of Defendant’s Statements

You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

conditions or unsound, it should be set aside.” (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394, citation and quotation marks omitted.) Stare decisis is particularly unpersuasive as a reason to retain the sua sponte duty to give the cautionary instruction, because “the decision being reconsidered . . . is simply a specific, narrow ruling that may be overruled without affecting . . . a statutory scheme.” (*People v. Mendoza* (2000) 23 Cal.4th 896, 924, citation omitted.)

A. Relying on a Repealed Statute, *People v. Beagle* Imposed a Sua Sponte Duty to Give an Instruction that Merely States a Matter of Common Sense

In 1872, the Legislature enacted California Code of Civil Procedure section 2061. (Former Code Civ. Proc., § 2061 (1872), repealed by Stats. 1965, § 127, operative Jan. 1, 1967 (hereafter, section 2061).) Section 2061 stated that “on all proper occasions” a trial court should instruct the jury, among other things, that “the testimony of an accomplice ought to be viewed with distrust, and the *evidence of the oral admissions of a party with caution.*” (§ 2061, subd. 4, italics added.) This Court promptly recognized that the instruction stated a “mere commonplace within the general knowledge of jurors.” (*People v. Raber* (1914) 168 Cal. 316, 320; *People v. Wardrip* (1903) 141 Cal. 229, 232 [“mere commonplace”]; *Kauffman v. Maier* (1892) 94 Cal. 269, 283 [“matter of common knowledge”].) Because the instruction added little or nothing to the jury’s deliberation, this Court originally held that a trial court could decline to provide it, even over defense objection. (*Raber, supra*, 168 Cal. at p. 320.) Thus, for 70 years following the enactment of section 2061, the Court interpreted the statute as granting trial courts the option—not the duty—to give the consider-with-caution instruction. (*Ibid.*)

In 1943, however, the Court reversed course and held for the first time that section 2061 created a sua sponte duty. (*People v. Dail* (1943) 22 Cal.2d 642, 656.) But there is no evidence that the Legislature intended the consider-with-caution instruction to be given sua sponte. When first promulgated in 1872, section 2061 simply directed a trial court to provide the instruction “on all proper occasions.” (§ 2061, subd. 4; see also *People v. Carter* (2010) 182 Cal.App.4th 522, 533, fn. 7 [the Legislature “knows the difference between an instruction that must be requested by a party and one that does not”].)

The strongest articulation of the reasons for the sua sponte duty appeared in *People v. Bemis* (1949) 33 Cal.2d 395, where the Court stated that “no class of evidence is more subject to error and abuse,” that a witness’s recollection of the defendant’s admissions could be imprecise, and that “[n]o other class of testimony affords such temptations or opportunities for unscrupulous witnesses.” (*Id.* at p. 399, citation and quotation marks omitted.) “It was undoubtedly such considerations,” *Bemis* said, “that led the Legislature [in section 2061] to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction.” (*Ibid.*, quotation marks omitted.)

At the time, however, the consider-with-caution instruction was one of the few admonitions the trial court was obligated to give to the jury without request. Significantly, the trial court was not required to instruct on general factors pertaining to witness credibility, such as the ability to perceive or remember the defendant’s extrajudicial statements, or the witness’s bias, interest, or other motive to fabricate testimony. (See *Rincon-Pineda, supra*, 14 Cal.3d at pp. 883-884 [establishing sua sponte duty to instruct on factors concerning witness reliability].)

In 1967, the Legislature repealed section 2061. Explaining the repeal, the Law Review Commission stated that instructions enumerated in the

statute did not constitute a “definitive list of the cautionary instructions that may or must be given on appropriate occasions [citation].” (Cal. Law Revision Com. com., 21A West’s Ann. Code Civ. Proc. (2007 ed.) foll. § 2061, p. 268.) Thus, “[s]ection 2061 . . . is repealed to avoid singling out only a few of the cautionary instructions that are given by the courts.” (*Ibid.*) The clear implication of the Commission’s comment was that caution with respect to oral admissions of a party was *not* so uniquely protective or essential in criminal trials that it merited imposing on the trial court a statutory duty to instruct on the subject without a request. The Commission observed that the repeal should have no effect on “the giving of the instructions contained in the section or the giving of any other cautionary instructions.” (*Ibid.*, citation omitted.) But the Commission never suggested the “giving of the instructions” in the aftermath of the repeal was intended to be anything but elective. (*Ibid.*; see generally *People v. Valentine* (1946) 28 Cal.2d 121, 142 [“It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law”].)

Five years later, notwithstanding the repeal of section 2061, this Court reimposed on trial courts the sua sponte duty to give the consider-with-caution instruction. (*People v. Beagle* (1972) 6 Cal.3d 441, 455, overruled on other grounds by *People v. Castro* (1985) 38 Cal.3d 441, 456.) As support for its holding, *Beagle* relied on *People v. Ford* (1964) 60 Cal.2d 772, 799. (*Beagle, supra*, at p. 455.) However, *Ford* had simply observed that the instruction was required by statute, namely, section 2061. (*Ford, supra*, at p. 772.) *Ford* also cited a series of cases recognizing the trial court had a sua sponte duty to give the instruction when called for by the evidence. (*Ibid.*) Those cases, as well, rested on section 2061. (*Ibid.*, citing *People v. Deloney* (1953) 41 Cal.2d 832, 840 & cases cited therein; see also *ibid.* [relying on § 2061 as imposing a sua sponte duty to give

cautionary instruction].) In other words, until *Beagle*, the sua sponte duty to provide the consider-with-caution instruction was based on a judicial interpretation of the statutory requirement in section 2061. But, by the time *Beagle* issued, the statute had been repealed.

In a footnote, the Court in *Beagle* acknowledged that the statutory foundation for the trial court's duty no longer existed. (*Beagle, supra*, 6 Cal.3d at p. 455, fn. 4.) Nonetheless, *Beagle* concluded "the repeal [of section 2061] does not affect the decisional law." (*Ibid.*, citing *People v. Blankenship* (1970) 7 Cal.App.3d 305, 310; *People v. Reed* (1969) 270 Cal.App.2d 37, 43; 7 Cal. Law Rev. Comm. Rep. (1965) p. 358.) That statement imposed a sua sponte instructional duty, divorced from its original statutory authority, which has endured for over four decades.

Indeed, the current duty has far outstripped the substantive scope of the original authorizing statute. The instruction under the statute originally applied only to the defendant's "admissions." (See § 2061, subd. 4; *Ford, supra*, 60 Cal.2d at pp. 799-800.) Through a process of accretion, the nonstatutory duty has been interpreted as applicable to any statement "tending to show guilt." (CALCRIM No. 358; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) Thus, when warranted by the evidence, *Beagle* mandates that trial courts instruct with the bracketed language of CALCRIM No. 358: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded."

B. CALCRIM No. 358 Was Born of a Different Legal Environment and No Longer Serves its Intended Purpose

Beagle's sua sponte instructional duty was born of circumstances that no longer obtain in criminal jury trials. When *Beagle* issued in 1972, the extent of the trial court's duty to instruct on witness credibility was

governed by former Penal Code section 1127, which required the court to “inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.” (Former Pen. Code, § 1127 as amended by Stats. 1935, ch. 718, § 2, p. 1942.) By contrast, trial courts now are required to instruct with an extensive list of factors concerning witness credibility. (*Rincon-Pineda, supra*, 14 Cal.3d at pp. 883-884; see also CALCRIM Nos. 105 [pretrial witness credibility instructions] & 226 [post-trial].) These factors cover such matters as a testifying witness’s (1) ability to see, hear, or otherwise perceive the things about which the witness testified, (2) capacity to remember and describe the subject of the testimony, (3) demeanor while testifying, and (4) potential prejudice. (CALCRIM Nos. 105 & 226.)

In *Beagle*’s time, trial courts were not required to so instruct, and jurors did not necessarily view witness testimony through a similarly discerning lens. (See *Rincon-Pineda, supra*, 14 Cal.3d at pp. 883-884; *People v. Gordon* (1973) 10 Cal.3d 460, 475, fn. 1.) That fact explains *Beagle*’s statement that the “purpose of the cautionary instruction is to assist the jury in determining if the [defendant’s out-of-court] statement was in fact made.” (*Beagle, supra*, 6 Cal.3d at p. 456, citing *Bemis, supra*, 33 Cal.2d at p. 400.) In a time when juries were not instructed about a witness’s motivation to lie, or about a witness’s ability to hear or recall the defendant’s admissions, the consider-with-caution-instruction added something to the jury’s understanding of its task in evaluating evidence. As stated in *Bemis* (upon which *Beagle* relied), the instruction was necessary because “it cannot be assumed that the jury will have in mind the considerations that may affect the weight or credibility of . . . the evidence of the oral admissions of a party.” (*Bemis, supra*, at p. 400; *Beagle, supra*, at p. 456.) Now, however, the trial court’s duty to instruct with CALCRIM Nos. 105 and 226 ensures the jury will consider these precise factors. The

consider-with-caution language of CALCRIM No. 358 has outlived its purpose, and is improperly perpetuated by stare decisis alone. (See *Rincon-Pineda*, *supra*, at pp. 877-878 [sua sponte duty born of different circumstances no longer applied when circumstances changed].)

This Court's own jurisprudence strongly suggests the cautionary instruction does not add significantly to the jury's store of legal knowledge. Two early cases, *Bemis* and *Ford* (issued in 1949 and 1964, respectively) found reversible error in failing to give the consider-with-caution instruction, by relying upon former section 2061. (*Ford*, *supra*, 60 Cal.2d at p. 800; *Bemis*, *supra*, 33 Cal.2d at p. 401.) Specifically, in *Bemis*, the Court found the failure to instruct prejudicial because the "Legislature has made it clear" that the instruction was necessary. (*Bemis*, *supra*, at p. 400.) Similarly, *Ford* circularly reasoned that the trial court had failed to discharge "its statutorily declared duty to give [the] cautionary instruction." (*Ford*, *supra*, at p. 800, citations omitted.) In recent decades, decisions by this Court consistently find the omission of the consider-with-caution instruction to be harmless.² The long line of authority frames this reality: no purpose is served by directing the trial courts to read a cautionary instruction, the omission of which is actually and invariably harmless.

Rincon-Pineda supports eliminating this sua sponte obligation. There, the Court overruled another sua sponte consider-with-caution instructional

² *People v. McKinnon* (2011) 52 Cal.4th 610, 679; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307 [penalty phase of capital trial]; *People v. Ervine* (2009) 47 Cal.4th 745, 782; *People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 393, superseded on other grounds by statute as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1269 [penalty phase of capital trial]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 93-94; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225; *People v. Heishman* (1988) 45 Cal.3d 147, 166. See also *People v. Linton* (2013) 56 Cal.4th 1146, 1196-1197 [failure to give CALCRIM No. 358 invited error].

duty that had outlived its purpose. Prior to *Rincon-Pineda*, when a victim testified against an accused rapist, the trial court was required in all cases to instruct “the law requires that you examine the [victim’s testimony] with caution.” (*Rincon-Pineda, supra*, 14 Cal.3d at p. 871.) After reviewing the instruction’s history, the Court held that it improperly demeaned the credibility of sexual assault victims. (*Id.* at p. 877.) The Court further observed that “changes in criminal procedure . . . sap the instruction of contemporary validity.” (*Ibid.*) In reasoning that applies here, the Court held that the general witness credibility admonitions (which *Rincon-Pineda* made mandatory for the first time) eliminated the need for the more specific cautionary instruction at issue. (*Id.* at pp. 883-884.) Because the rape victim cautionary instruction was both irrelevant and potentially harmful, the Court held it was not to be given in any circumstance. (*Id.* at p. 882.)

Much of *Rincon-Pineda*’s reasoning leads to a similar conclusion with respect to the cautionary instruction at issue in this case. Like the instruction in *Rincon-Pineda*, CALCRIM No. 358 was born of different historical circumstances and “has outworn its usefulness.” (*Rincon-Pineda, supra*, 14 Cal.3d at p. 877.) And, like the instruction in *Rincon-Pineda*, the need for CALCRIM No. 358 has been obviated by the now-mandatory instructions on witness credibility.

In light of these changes, *Beagle*’s brief discussion of the consider-with-caution instruction’s sua sponte necessity can no longer support the rule. (See *People v. Birks* (1998) 19 Cal.4th 108, 124 [overruling instructional duty previously imposed in a case that offered “little analysis”].) Thus, as in *Rincon-Pineda*, the requirement that CALCRIM No. 358 be given sua sponte is a “rule without a reason.” (*Rincon-Pineda, supra*, 14 Cal.3d at pp. 877, 882; see also *Birks, supra*, at p. 136 [overruling unworkable requirement that court sua sponte instruct on lesser related offenses].)

C. The Consider-With-Caution Admonition Adds Little or Nothing to the Jury’s Deliberations, and Does Not Merit Inclusion in the Small Class of Nonstatutory Instructions Required Sua Sponte

“It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” (*People v. Najera* (2008) 43 Cal.4th 1132, 1136, citation omitted.)

Absent a special statutory requirement, a trial court’s sua sponte duty to instruct on general principles of law encompasses a limited set of subjects. CALCRIM No. 358 plainly fits into none of them. This is because “an instruction that tells the jury what kinds of rational inferences may be drawn from the evidence does not provide any insight jurors are not already expected to possess.” (*Najera, supra*, 43 Cal.4th at p. 1139, citation and quotation marks omitted.) “Such instructions, while helpful in various circumstances, are not vital to the jury’s ability to analyze the evidence and therefore are not instructions that must be given to the jury even in the absence of a request.” (*Ibid.*, citation, quotation marks, and fn. omitted.)

CALCRIM No. 358 is intended to help a jury determine whether the defendant’s unrecorded statement “was in fact made.” (*Beagle, supra*, 6 Cal.3d at p. 456, citation omitted.) However, ascertaining the accuracy of witness testimony—that is, asking whether the testimony reflects events as they actually happened—is a rational, commonsense exercise. And juries are instructed that they are the trier of fact entitled to decide those matters. Directing a jury to consider witness testimony with caution does nothing more than remind the jury of its role as a discriminating factfinder. Certainly, the instruction is not “necessary for the jury’s understanding of

the case.” (*Najera, supra*, 43 Cal.4th at p. 1136, citation and quotation marks omitted; see also *id.* at p. 1137, fn. 4 [instruction that simply assists the jury “in performing its assigned role of evaluating the sufficiency of the evidence” does not merit sua sponte duty].)

Najera illustrates this point. In *Najera*, the defendant was convicted of auto theft, based in part on his possession of a recently stolen vehicle. (*Najera, supra*, 43 Cal.4th at p. 1134.) The defendant argued the trial court erred by failing to instruct sua sponte with CALJIC No. 2.15, stating that recent possession of stolen property alone could not support a theft conviction. (*Id.* at pp. 1135-1136.) The defendant reasoned that CALJIC No. 2.15 was analogous to the accomplice testimony instruction (required sua sponte), stating that a conviction could not be based on an accomplice’s statements alone. (*Id.* at pp. 1136-1137.) The defendant argued both instructions required corroboration of an inherently unreliable type of evidence. The Court rejected the analogy and held the stolen property instruction was not required sua sponte. (*Id.* at pp. 1136-1139.) In pertinent part, it ruled that, because the stolen property instruction “was merely a specific application of the general instruction governing circumstantial evidence,” it was “not vital to a proper consideration of the evidence by the jury.” (*Id.* at pp. 1138-1139, citation and quotation marks omitted.)

The same reasoning applies here. CALCRIM No. 358 instructs the jury to use caution in deciding whether a defendant’s inculpatory statements were “in fact made,” a subject encompassing one aspect of the statement’s reliability. (See *Beagle, supra*, 6 Cal.3d at p. 455, fn. 5 [describing “risk of conviction on a false pre-offense statement”]; *Bemis, supra*, 33 Cal.2d at p. 299; ABM 20 [“the cautionary instruction serves the necessary purpose of advising the jury that unrecorded oral statements must be treated cautiously since they are so often erroneously reported”].)

However, as *Najera* makes clear, the unreliability of a particular class of evidence is insufficient justification for a sua sponte duty to instruct. Moreover, like the instruction discussed in *Najera*, the admonition contained in CALCRIM No. 358 is nothing more than a “specific application” of general instructions; namely those concerning witness credibility. (*Najera, supra*, 43 Cal.4th at p. 1138; see also CALCRIM Nos. 105 & 226.) CALCRIM No. 358 does not add a new element to the jury’s deliberations, and is not necessary to the jury’s understanding of the evidence.

Instructions comparable to CALCRIM No. 358 are not given sua sponte. This indicates there is nothing inherent in the instruction itself justifying such a duty by the trial court. When a defendant makes false or misleading extrajudicial statements concerning the charged crime that “tend[] to prove a consciousness of guilt,” CALCRIM No. 362 directs the jury to ascertain the statements’ “meaning and importance.” The instruction further admonishes that, standing alone, the extrajudicial statements are insufficient to support a conviction. Statements “tending to prove a consciousness of guilt” (CALCRIM No. 362) are in many senses analogous to statements “made by [the] defendant tending to show [his] guilt” (CALCRIM No. 358). Both types of evidence may be conveyed by an unreliable or biased witness. Both types confront the defendant with the damning evidence of his own words, largely rebuttable only by his own testimony. (See *Bemis, supra*, 33 Cal.2d at p. 399.) And both of these cautionary instructions state matters of common sense in relation to specific items of evidence. Specifically, the instructions direct the jury to consider the evidence with caution, or decide its “meaning and importance.” (CALCRIM Nos. 358 & 362.)

Despite these similarities, CALCRIM No. 362 is not required sua sponte—nor are many other instructions that serve similarly commonsense

functions.³ There is nothing sacrosanct about the function served by CALCRIM No. 358 that distinguishes it from these other instructions.

Comparing the text of CALCRIM No. 358 with its purpose further highlights the instruction's lack of utility. The instruction was based on the concern that unrecorded admissions may be inaccurately recalled by a witness, and that admissions by the accused afford temptations "for unscrupulous witnesses to torture the facts." (*Bemis, supra*, 33 Cal.2d at p. 399.) However, the text of the instruction does not convey those concerns. To the contrary, CALCRIM No. 358 assumes that in considering inculpatory statements "with caution," the jury of its own accord and intelligence *knows* to consider matters such as a witness's faulty memory or willingness to lie. At most, then, the instruction might serve as a mild catalyst, causing the jury to ask, for example, if the evidence shows the witness had a motive to fabricate the defendant's statements, or imprecisely recalled the details of those statements. However, we must "credit jurors with intelligence and common sense." (*People v. Coddington* (2000) 23 Cal.4th 529, 594.)

The jury is intelligent enough to derive these commonsense considerations from the bare "consider with caution" admonition. So, too, it is intelligent enough to derive those same considerations from instructions, already given in every criminal case, relating to the credibility of witnesses and to the evaluation of evidence.

³ *Najera, supra*, 43 Cal.4th at page 1139 provides a partial list of instructions not required sua sponte. These include, for example, instructions concerning propensity evidence of prior sexual offenses, domestic violence, and child abuse. (CALCRIM Nos. 852 & 1191.) Although this type of evidence is may often be more damning than evidence of a defendant's "inculpatory statements," it does not require a sua sponte cautionary instruction. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 920.)

D. The Inflexibility of the Sua Sponte Duty Creates More Problems than it Resolves

Requiring the trial court to instruct with CALCRIM No. 358 generates more problems than it is intended to resolve. First, as shown in the People's opening and reply briefs, the instruction should never be given when the statements at issue constitute the charged crimes. When the defendant's inculpatory statements are also "corpus statements," the reasonable doubt, burden of proof, and witness credibility instructions supersede CALCRIM No. 358. In addition, CALCRIM No. 358 could confuse the jury concerning the burden of proof. (See OMB 10-16; RMB 2-7.) The risk of confusion also exists when the defendant's statements constitute both crimes themselves *and* evidence of other charged crimes. (See OMB 15-18; RMB 7-9.)

Second, an inflexible sua sponte duty fails to accommodate situations in which the defendant's statements are ambiguous. Although CALCRIM No. 358 pertains only to statements "tending to show . . . guilt," the trial court may have difficulty determining whether the evidence is best classified as inculpatory or noninculpatory. For example, a defendant might make an unrecorded statement that he stabbed and killed the victim in self-defense. To the extent the statement concedes a homicide, it is inculpatory. Insofar as it forswears legal liability for the killing, the statement is exculpatory. (See *Slaughter, supra*, 27 Cal.4th at p. 1199 [concerning similar statements]; *People v. Vega* (1990) 220 Cal.App.3d 310, 317-318.) The bench notes to CALCRIM No. 358 direct the judge to provide the instruction when "the jury heard both inculpatory and exculpatory . . . statements attributed to the defendant." In light of this requirement and the more general sua sponte duty, the trial judge may be bound to instruct with CALCRIM No. 358. The defendant, however, might prefer the instruction not be given. Specifically, the defendant might

strongly believe that directing the jury to consider her statements with caution could weaken her claim of self-defense. CALCRIM No. 358 is intended to benefit the defendant, but the sua sponte duty may require the court to give the instruction even over the defendant's objection.⁴ The defendant should be permitted to formulate her own trial strategy and decline the instruction—thereby placing the risk of doing so on herself, rather than the trial court—if she wishes.

Third, ambiguous statements like the one described above “create an unreasonable risk that trial and appellate courts will disagree in a particular case, and that appellate precedents will conflict, thus detracting from the fair and efficient administration of justice.” (*Birks, supra*, 19 Cal.4th at p. 131, fn. omitted.) A sua sponte duty requires the trial court, rather than the defendant, to determine whether a witness's testimony triggers the admonition contained in CALCRIM No. 358. Whether the defendant agrees or disagrees with the trial court's determination, the defendant may remain silent, then complain of error on appeal. This is particularly inappropriate with respect to ambiguous statements for which a legitimate argument can be advanced as to either interpretation. Because the defendant will suffer any harm arising from the instruction, it is the defendant who should be required to elect it. To do otherwise is to permit the defendant to “sit quietly during the course of his trial; create a situation which may be to his advantage or disadvantage and require the court to make an election on his behalf without being bound by that election.

⁴ It is not clear whether the trial court is required to instruct with CALCRIM No. 358 over the defendant's objection. In *Linton*, the defendant requested the instruction not be given. (*Linton, supra*, 56 Cal.4th at p. 1196.) On appeal, the defendant argued the trial court's failure to instruct was error. Without directly addressing whether the trial court had a duty to give the instruction, the Court held any error was invited by defense counsel. (*Id.* at p. 1197.)

[citation].” (*People v. Toro* (1989) 47 Cal.3d 966, 975, disapproved of on other grounds by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; see also *People v. Prettyman* (1996) 14 Cal.4th 248, 293 (dis. opn. of Brown, J.) [increasing number of sua sponte instructions do “little to improve the quest for justice in the trial courts while frequently generating an argument for reversal on appeal,” citation omitted].)

In *People v. Slaughter, supra*, 27 Cal.4th 1187, the defendant was arrested and gave a recorded statement in which he admitted shooting the three victims, but said that he shot one victim by accident, and the other two in self-defense. (*Id.* at p. 1199.) Pursuant to CALCRIM No. 358’s predecessor, the trial court instructed to consider the defendant’s “admissions” with caution. (*Ibid.*) Because the statements were recorded, and the instruction only applied to unrecorded statements, the Court held it was error to give the instruction. (*Id.* at p. 1200.) However, the Court found any error harmless because the instruction, by its terms, only applied to inculpatory admissions, and to “the extent a statement is exculpatory it is not an admission to be viewed with caution.” (*Ibid.*, citation and quotation marks omitted; see also *People v. Williams* (2008) 43 Cal.4th 584, 638-639 [discussing ambiguous statements]; *People v. Livaditis* (1992) 2 Cal.4th 759, 783-784; *Vega, supra*, 220 Cal.App.3d at pp. 317-318.) The holding in *Slaughter* rested on the fact the statements were recorded and the instruction was not prejudicial. It did not address the question of the trial court’s sua sponte duty vis-à-vis ambiguous statements. Trial courts therefore remain in the difficult position of deciding when to instruct with CALCRIM No. 358, a problem potentially compounded by the defendant’s desire to decline the instruction.

Recognizing the difficulty of applying the consider-with-caution instruction to ambiguous statements, this Court has, in a related context, already held the instruction should not be given sua sponte. In the penalty

phase of capital trials, “[w]hether a particular statement is aggravating or mitigating is often open to interpretation.” (*Livaditis, supra*, 2 Cal.4th at p. 783.) “A statement, for example, that the defendant is sorry he stabbed the victim to death is both mitigating and aggravating. It admits guilt but also expresses remorse. It is unclear whether the defense would desire to tell the jury to view such a statement with caution.” (*Id.* at p. 784.) Thus, at the penalty phase, the cautionary instruction need only be given upon request. (*Ibid.*) Although this holding rested in part on “the differences between guilt and penalty trials” (*id.* at p. 783), the concerns animating the ruling in *Livaditis* are not confined to penalty phase evidence.

As discussed above, a defendant’s statements can be ambiguous in guilt trials as well. In these circumstances, imposing an unyielding *sua sponte* duty to instruct with CALCRIM No. 358—a duty that might prevail even when the trial court and parties believe the instruction is confusing or harmful—offers no advantage over the standard practice of making such an instruction available, at most, on request. (See *Birks, supra*, 16 Cal.4th at p. 131 [rescinding rule that turned out “to be over or underinclusive,” citation and quotation marks omitted].) To the extent the instruction is ever applicable, trial counsel, not an already overburdened trial court, should bear the responsibility of determining its necessity.

II. THE SUA SPONTE DUTY TO INSTRUCT WITH CALCRIM NO. 358 IS REDUNDANT IN LIGHT OF OTHER INSTRUCTIONS, INCLUDING MANDATORY INSTRUCTIONS REGARDING WITNESS CREDIBILITY

“The purpose of the cautionary instruction is to assist the jury in determining if the [defendant’s extrajudicial] statement was in fact made.” (*Beagle, supra*, 6 Cal.3d at p. 456, citing *Bemis, supra*, 33 Cal.2d at p. 400.) To this end, the instruction directs the jury to consider evidence of the defendant’s inculpatory statements “with caution.” (CALCRIM No. 358.)

This purpose is served by other, more specific instructions already required in every trial.

The trial court must sua sponte instruct on factors pertaining to witness credibility. (*Rincon-Pineda, supra*, 14 Cal.3d at pp. 883-884; see also Pen. Code, § 1127.) Primary among these instructions are CALCRIM Nos. 105 and 226, which are required before and after the presentation of evidence, respectively. The nonbracketed portion of the more thorough instruction, CALCRIM No. 226, reads:

You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- How well could the witness see, hear, or otherwise perceive the things about which the witness testified?
- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- What was the witness's attitude about the case or about testifying?

- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

(CALCRIM No. 226.)⁵

CALCRIM Nos. 105 and 226, which were not required in *Beagle's* time, specifically address the concerns that have been offered to justify CALCRIM No. 358. CALCRIM No. 358's consider-with-caution

⁵ The bracketed portion of the instructions, to be given sua sponte when merited by the evidence, further advises:

- [Did other evidence prove or disprove any fact about which the witness testified?]
- [Did the witness admit to being untruthful?]
- [What is the witness's character for truthfulness?]
- [Has the witness been convicted of a felony?]
- [Has the witness engaged in [other] conduct that reflects on his or her believability?]
- [Was the witness promised immunity or leniency in exchange for his or her testimony?]

[¶]

[If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good.]

If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

instruction is intended to remind the jury that witnesses are “generally unable to state the exact language of an admission.” (*Bemis, supra*, 33 Cal.2d at p. 399.) However, CALCRIM Nos. 105 and 226 address this precise issue, by directing the jury to consider “[h]ow well the witness could see, hear or otherwise perceive the things” about which they testified, and to ask “how well [the witness was] able to remember and describe what happened.” CALCRIM No. 358 is also intended to remind the jury that evidence of the defendant’s admissions affords “temptations or opportunities for unscrupulous witnesses to torture the facts.” (*Bemis, supra*, at p. 399.) CALCRIM Nos. 105 and 226 address this issue as well, by asking the jury to consider whether “the witness’s testimony [was] influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided.”

Moreover, although CALCRIM No. 358 is intended to highlight potential witness inaccuracy or bias, neither concern is made explicit in the text of the instruction. (*Bemis, supra*, 33 Cal.2d at p. 399.) Instead, the jury is expected to imply these considerations from the simple consider-with-caution admonition. CALCRIM Nos. 105 and 226, on the other hand, specifically address these issues. To the extent that CALCRIM No. 358 serves any purpose, CALCRIM Nos. 105 and 226 achieve the same end more explicitly and effectively. (See *Carter, supra*, 15 Cal.4th at p. 393 [failure to give consider-with-caution instruction was harmless because “the court fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit the testimony”].)

In addition to CALCRIM Nos. 105 and 226, the trial court frequently must (or may, depending on the circumstances) provide a host of other, relevant instructions. These include instructions on: reasonable doubt (CALCRIM No. 220); eyewitness identification (CALCRIM No. 315);

prior statements as evidence (CALCRIM No. 318); the defendant's right not to testify (CALCRIM No. 355); statements to peace officers without proper *Miranda* advisements (CALCRIM No. 356); the defendant's adoptive admissions (CALCRIM No. 357); the limitation on convicting a defendant based on her out-of-court statements alone (CALCRIM No. 359); and the limited use of false statements as showing the defendant's consciousness of guilt (CALCRIM No. 362). The jury further is directed "[p]ay careful attention to all of the[] instructions and consider them together." (CALCRIM No. 200.) In light of the panoply of other instructions, the one-sentence consider-with-caution admonition contained in CALCRIM No. 358 adds nothing of substance to the jury's deliberation. This is particularly true where the instruction expresses nothing more than a "matter of common knowledge." (*Kauffman, supra*, 94 Cal. at p. 283.)

This Court repeatedly has found that other instructions supplement, indeed obviate, the consider-with-caution instruction. In a case where the trial court neglected to give the predecessor to CALCRIM No. 358, the Court found the error harmless because the trial court "did in other respects thoroughly instruct the jury on judging the credibility of witnesses." (*Dickey, supra*, 35 Cal.4th at p. 906 [listing instructions]; see also *id.* at p. 884 [instruction's absence not prejudicial when "there is no conflict in the evidence about the exact words used, their meaning, or whether the words were repeated accurately"].) In another case, the failure to give CALCRIM No. 358 was harmless because the trial court otherwise "fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit the testimony" concerning the defendant's statements. (*Carpenter, supra*, 15 Cal.4th at p. 393.) And, in a third case, the trial court's failure to give the consider-with-caution instruction was not prejudicial where other, standard instructions "adequately alerted the jury to view the [witnesses' testimony] with caution." (*Bunyard, supra*, 45 Cal.3d

at p. 1225.) The import of these holdings is clear. Even without CALCRIM No. 358, the jury is “thoroughly” and “fully” admonished to view evidence of the defendant’s statements with caution. (*Carpenter, supra*, at p. 393; *Dickey, supra*, 35 Cal.4th at p. 906.) A trial court is not required to give duplicative instructions. (See *People v. Caitlin* (2001) 26 Cal.4th 81, 152.) The same should be true of CALCRIM No. 358.

Cautionary instructions are only one means of defining the jury’s view of the evidence. Should trial defense counsel further desire the jury consider evidence of the defendant’s statements “with caution,” counsel can employ all the tools of an advocate to achieve this end. Cross-examination can reveal weaknesses in a witness’s account, expert testimony can expose witness memories as inaccurate, and closing argument can specifically direct the jury’s attention to the alleged infirmities. As stated in a similar witness-credibility context, “the listing of factors to be considered by the jury will sufficiently bring to the jury’s attention the appropriate factors, and . . . an explanation of the *effects* of those factors is best left to argument by counsel, cross-examination of witnesses, and expert testimony where appropriate.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1143, fn. omitted [concerning expert testimony]; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1110.) CALCRIM No. 358 is not only duplicative of other instructions, it serves a relatively minor purpose compared to counsel’s cross-examination and argument.

Finally, any suggestion that CALCRIM No. 358 is necessary because it targets evidence of statements “tending to show [the defendant’s] guilt,” and focuses specifically on something which other instructions do not, is unavailing. This argument was implicitly rejected by the long line of cases holding a failure to give the consider-with-caution instruction was harmless in light of other instructions given. (See, *ante*, at p. 7, fn. 2 [listing harmless error findings].) Had a focus on inculpatory statements added

anything of substance to the jury's deliberations, its omission would not have been universally harmless. In addition, other pattern instructions concerning corpus delicti, the defendant's statements as showing a consciousness of guilt, and general witness credibility—not to mention the jury's common sense—permit or encourage the jury to consider the import of the defendant's out-of-court statements.

**III. CALCRIM No. 358 SHOULD NEVER BE REQUIRED;
ALTERNATIVELY, IF THE INSTRUCTION IS EVER
APPROPRIATE, ITS APPLICABILITY SHOULD BE MEASURED BY
THE STANDARD FOR PINPOINT INSTRUCTIONS**

CALCRIM No. 358 is neither required by statute, nor by the California or United States Constitution. Rather, it has been perpetuated by caselaw alone. Overruling *Beagle's* judicially imposed duty to instruct would remove the only extant rationale for CALCRIM No. 358. It then would be subject to the standards governing other nonstatutory, nonconstitutionally mandated instructions. Under those standards, however, no situation exists in which CALCRIM No. 358 would be required, even upon the defense's request.

A defendant "has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered." (*People v. Sears* (1970) 2 Cal.3d 180, 190.) However, "the general rule is that a trial court may refuse a proffered instruction if it is . . . duplicative." (*People v. Gurule* (2002) 28 Cal.4th 557, 659, citation omitted; see also *People v. Bolden* (2002) 29 Cal.4th 515, 558 [trial court need not give a requested instruction that "merely duplicates other instructions"].) As discussed above, CALCRIM No. 358 is redundant of other, required instructions, particularly CALCRIM Nos. 105 and 226. It is difficult to imagine a situation in which CALCRIM No. 358 adds something to the jury's deliberation not already covered by other instructions. Rather, it is always duplicative. (See *People v. Hovarter*

(2008) 44 Cal.4th 983, 1020-1022 [requested instruction to consider testimony of in-custody informant with caution was redundant of other credibility instructions].)

In addition, “[i]nstructions should also be refused if they might confuse the jury.” (*Gurule, supra*, 28 Cal.4th at p. 659, citation omitted.) As already discussed, when the defendant is charged with statement-crimes alone, directing the jury to consider the defendant’s statements with caution is not only redundant, it is potentially confusing. (See OMB 10-18; RMB 2-9.) In these circumstances, CALCRIM No. 358 is never appropriate. When a defendant is charged with both statement-crimes *and* nonstatement-crimes, the instruction remains potentially confusing. Should the instruction ever be given in this situation, it should be at the defendant’s request. In this manner the trial court is relieved of making a decision on the defendant’s behalf, and risking error.

Should a situation arise (and we cannot imagine that it would) where (1) CALCRIM No. 358 is not duplicative of other instructions, and (2) the defendant is not charged with a statement-crime, CALCRIM No. 358 might be available upon request. In these circumstances, the admonition should be given if it meets the traditional requirements for a pinpoint instruction. First, CALCRIM No. 358 should “relate particular facts to a legal issue in the case or ‘pinpoint’ the crux of [the] defendant’s case.” (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.) Second, “substantial evidence” must show the defendant uttered inculpatory, unrecorded statements. (*People v. Burney* (2009) 47 Cal.4th 203, 246.) And third, the instruction must not otherwise be argumentative, duplicative, or potentially confusing. (*Ibid.*) Should the trial court erroneously refuse the instruction, the error must be measured by asking whether it was “reasonably probable” that the failure to instruct prejudiced the verdict. (See *People v. Earp* (1999) 20 Cal.4th 826, 887.)

It bears repeating that even when CALCRIM No. 358 is available, defense counsel may prefer the jury not receive the instruction. In *Linton*, for example, defense counsel requested a modified version of CALCRIM No. 358. When the trial court declined to instruct with the amended text, defense counsel “made a deliberate, tactical choice to have the court omit the cautionary instruction altogether.” (*Linton, supra*, 56 Cal.4th at p. 1197.) Counsel also may wish to avoid drawing attention to the defendant’s inculpatory statements. (See *Carpenter, supra*, 15 Cal.4th at p. 393.) Accordingly, whether to give such an instruction is best left to the tactical considerations of the defense.

IV. A REPEAL OF THE SUA SPONTE DUTY TO INSTRUCT WITH CALCRIM NO. 358 SHOULD APPLY RETROACTIVELY

Repeals of court-created doctrine are presumed to apply retroactively, both to the defendant in question and to pending cases. (See *People v. Birks, supra*, 19 Cal.4th at p. 136.) *Birks* provides the best model for resolving this issue. Before *Birks*, *People v. Geiger* (1984) 35 Cal.3d 510, 530 permitted a defendant to request the jury be instructed on “lesser related offenses,” i.e., offenses that bore some relationship to the charged crimes, but whose elements were not necessarily included in the charged crimes. *Birks* overruled *Geiger*, and held that defendants were no longer entitled to instructions on lesser related offenses. (*Birks, supra*, at pp. 124-135.) The Court applied the repeal retroactively: “[O]ur holding, as is customary for judicial case law, may be applied to the instant defendant himself, and is otherwise fully retroactive. Due process does not preclude such a result, since the new rule we announce today neither expands criminal liability nor enhances punishment for conduct previously committed.” (*Id.*, at pp. 136-137, citations omitted.) In particular:

When he committed his criminal conduct, defendant acquired no cognizable reliance interest in escaping conviction on the pleadings by the means set forth in *Geiger*. Defendant does not

suggest his case would have been conducted differently absent the *Geiger* rule, and neither he nor any other defendant could easily make such a claim. With or without *Geiger*, a criminal defendant has the same incentive to establish, by whatever available means, that the prosecution has failed to prove the elements of charged or necessarily included offenses beyond a reasonable doubt.

(*Birks, supra*, at pp. 136-137, citations omitted.)

Similarly, abrogating the sua sponte duty to instruct with CALCRIM No. 358 neither expands criminal liability nor enhances punishment, and due process concerns therefore do not apply. Nor are “reliance interests” implicated. (See *Birks, supra*, 19 Cal.4th at pp. 136-137.) A defendant subject to the new rule would not have pursued a different trial strategy from one subject to the old rule. Whether CALCRIM No. 358 is required sua sponte or not required at all, the defendant would have attempted to lessen the effect of his inculpatory extrajudicial statements. (See *ibid.*; see also *People v. Cuevas* (1995) 12 Cal.4th 252, 257.) Irrespective of CALCRIM No. 358, “defendants have a strong motivation to challenge the sufficiency of the evidence of the charged offenses.” (*People v. Rundle* (2008) 43 Cal.4th 76, 147, citation omitted, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

People v. Cuevas, supra, 12 Cal.4th 252 is also persuasive. Prior to *Cuevas*, an extrajudicial identification that was unconfirmed by another identification at trial and uncorroborated by other evidence was constitutionally insufficient to sustain a conviction. (*People v. Gould* (1960) 54 Cal.2d 621, 631.) *Cuevas* overruled this standard, and held that a witness’s recanted, extrajudicial identification alone could support a conviction. (*Cuevas, supra*, at p. 257.) Further, *Cuevas* applied the change retroactively. (*Id.* at p. 275.) In relevant part, the Court held the decision was retroactive because “so long as there is substantial evidence supporting his conviction, defendant has no cognizable interest in escaping conviction

through the operation of a rule that would have required additional evidence.” (*Id.* at pp. 275-276.) The Court noted that “defendant has not asserted that he would have pursued a different trial strategy or offered different evidence” had the eyewitness corroboration requirement been repealed before his trial. (*Id.* at p. 276, citation omitted.)

The same principles control here. CALCRIM No. 358 has far less impact on the jury’s evaluation of the evidence than the instruction in *Cuevas*, which limited how the jury could consider the facts. Thus, concerns about retroactive elimination of the sua sponte duty to give CALCRIM No. 358 are even less substantial than those found unpersuasive in *Cuevas*. (*Cuevas, supra*, 12 Cal.4th at pp. 275-276.) As in *Cuevas* and *Birks*, a defendant subject to the new rule would not pursue a different trial strategy from one subject to the old rule. (*Birks, supra*, 19 Cal.4th at pp. 136-137; *Cuevas, supra*, at p. 276.)

Certainly, the new rule would retroactively apply to appellant. Appellant was charged with making criminal threats, and her extrajudicial statements constituted one of the charged crimes. However, as detailed in our opening brief on the merits, CALCRIM No. 358 does not apply under these circumstances. The bench notes to the instruction state: “When a defendant’s statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction does not apply. (*People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057).” (Use Note to CALCRIM No. 358 (Fall 2010 ed.) p. 115; see also 5 Witkin Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 685, p. 1058 [citing *Zichko* as holding that a trial court is not required to give CALCRIM No. 358 when criminal threats are charged].) In light of the existing law *not* to give CALCRIM No. 358 when criminal threats are charged, appellant cannot argue that she relied on the trial court’s duty *to* give the instruction.

Retroactive application of the new rule is also appropriate because the decision by the Court of Appeal in this case created a conflict in the intermediate courts. (See Ct.App. Typed Opn. at p. 35 [holding *Zichko* was wrongly decided].) Where this Court “resolves a conflict between lower court decisions, there is no clear rule on which anyone could have justifiably relied to bar retroactive application.” (*People v. Watson* (2008) 43 Cal.4th 652, 689, citation and quotation marks omitted.)

Should the Court’s holding not apply retroactively, appellant’s verdicts would remain the same. Because appellant was charged with making criminal threats, the trial court properly declined to provide CALCRIM No. 358. (See OBM 10-18; Reply 2-9.) Even if the court erred by not instructing with CALCRIM No. 358, the error was harmless as found by the Court of Appeal. (See Ct.App. Typed Opinion pp. 36-37; OBM 18-21; Reply 9-12.)

V. THE ADOPTION OF PENAL CODE SECTION 859.5, SUBDIVISION (e)(3) SUPPORTS FINDING NO SUA SPONTE OBLIGATION TO INSTRUCT WITH CALCRIM NO. 358

In 2013, the Legislature enacted a general requirement that custodial interrogations of juvenile murder suspects be recorded. (Pen. Code, § 859.5, subd. (a).) However, if the court finds the defendant was subject to a custodial interrogation, and the interrogation was not recorded, “the court shall provide the jury with an instruction, to be developed by the Judicial Council, that advises the jury to view with caution the statements made in that custodial interrogation.” (§ 859.5 subd. (e)(3).)⁶

Both Penal Code section 859.5, subdivision (e)(3) and CALCRIM No. 358 concern cautionary instructions relating to a defendant’s extrajudicial statements. However, CALCRIM No. 358 pertains generically to the

⁶ At the time of this brief, the Judicial Counsel’s jury instruction was not yet available.

unrecorded, inculpatory statements of an accused. Section 859.5 applies to the much narrower class of unrecorded statements of a (1) juvenile, (2) who is asked questions “reasonably likely to elicit incriminating responses,” (3) by law enforcement officers (4) who have a reasonable belief the suspect may have committed murder, (5) while the juvenile was in a “fixed place of detention,” (6) absent an exigency, a refusal to be recorded, or an interrogation conducted under the laws of another jurisdiction. (§ 859.5, subs. (a), (b), (e)(3), (g)(1).)

It is an accepted fact that custodial interrogations of minors raise “special problems.” (*People v. Lessie* (2010) 47 Cal.4th 1152, 1166-1167.) Both the United States Supreme Court and this Court have “emphasized that admissions and confessions of juveniles require special caution and that courts must use special care in scrutinizing the record to determine whether a minor’s custodial confession is voluntary.” (*Id.* at pp. 1166-1167, citations and internal quotation marks omitted.) These special considerations flow from a lack of maturity, experience, and perspective that renders juveniles particularly susceptible to overbearing police pressures. (See, e.g., *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394, 2403-2404].) Those concerns have almost nothing to do with the vast majority of more generic statements “tending to show [the defendant’s] guilt,” as described in CALCRIM No. 358.

Section 859.5, subdivision (e)(3) instructs the Judicial Council to develop a consider-with-caution admonition for unrecorded statements of juveniles interrogated as murder suspects. However, had the Legislature believed that CALCRIM No. 358 already required a sua sponte consider-with-caution admonition in *every* case concerning a defendant’s unrecorded inculpatory statements, it would not have promulgated section 859.5, subdivision (e)(3). If CALCRIM NO. 358 applied sua sponte, requiring an

additional cautionary instruction for juvenile defendants subject to custodial interrogation would have been redundant.

Likewise, that the Legislature decided to impose a sua sponte instructional duty for specific types of unrecorded statements—but has not imposed that duty for the broad category of statements described by CALCRIM No. 358—implies a considered decision not to do so. (See *Carter, supra*, 182 Cal.App.4th at p. 522, fn. 7 [the Legislature “knows the difference between an instruction that must be requested by a party and one that does not”].)

Almost 60 years ago, the Legislature repealed the statutory basis for the consider-with-caution instruction. Yet, with little legal analysis to justify the result, *Beagle* and its progeny mandated both the instruction and the sua sponte duty to give it. The legal landscape has changed since this Court decided *Beagle*. Any rationale that might once have justified its rule has vanished. The generic cautionary admonition in the current instruction is duplicative at best. When statement-crimes are implicated, the instruction is also potentially confusing.

A cautionary instruction such as that in CALCRIM No. 358 should no longer be given. At most, the cautionary instruction should only be given on request as a pinpoint instruction.

CONCLUSION

The People respectfully request that the judgment of the Court of Appeal be affirmed.

Dated: March 7, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 8,930 words.

Dated: March 7, 2014

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "LUKE FADEM". The letters are stylized and connected, with a prominent "L" and "M".

LUKE FADEM
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Diaz**

No.: **S205145**

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 March 7, 2014, I served the attached **OPENING SUPPLEMENTAL 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Dallas Sacher
Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
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(two copies)

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
191 North First Street
San Jose, CA 95113-1090

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 March 7, 2014, at San Francisco, California.

Tan Nguyen
Declarant

Tan Nguyen
Signature