

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DORA DIAZ,

Defendant and Appellant.

No. S205145

(Court of Appeal No.
H036414)

(Santa Clara County
Superior Court No.
CC954415)

APPELLANT'S SUPPLEMENTAL BRIEF

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
COUNTY OF SANTA CLARA, STATE OF CALIFORNIA,
THE HONORABLE RON DEL POZZO, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

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SUPREME COURT
FILED

MAY - 2 2014

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SUMMARY OF ARGUMENT

For the past 142 years, California has observed the rule that the trial court must instruct *sua sponte* that a defendant's unrecorded extrajudicial statements are to be treated "with caution." This court reaffirmed the rule 42 years ago in *People v. Beagle* (1972) 6 Cal.3d 441.

Under the doctrine of *stare decisis*, the People bear the heavy burden of demonstrating that the venerable rule is "unsound" or that subsequent developments have rendered the rule obsolete. (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 297.) Insofar as the People have made no attempt to argue that the doctrinal basis underlying the instructional requirement is no longer valid, there is no reason to abrogate the existing rule.

Moreover, the cautionary language found in CALCRIM No. 358 falls within the customary paradigm of those instructions which must be given *sua*

sponte since it is “necessary for the jury’s understanding of the case.’ [Citation.]” (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) Insofar as this court has held that an instruction on the factors bearing on witness credibility must be given *sua sponte*, it necessarily follows that an instruction on the special credibility problems attendant to the assessment of a defendant’s unrecorded extrajudicial statement is no less required.

Contrary to the People’s claim, the general instructions regarding witness credibility are not an adequate substitute for the cautionary instruction found in CALCRIM No. 358. The essential message of a cautionary instruction is that the jury is *required* to carefully assess a particular piece of evidence before relying on it. Since this court has determined that “no class of evidence is more subject to abuse” than testimony regarding unrecorded extrajudicial statements (*People v. Bemis* (1949) 33 Cal.2d 395, 399), a cautionary instruction is necessary to ensure that a jury carefully considers such evidence. The generic factors listed in the standard witness credibility instruction provides no such assurance since those factors do not compel the use of “caution.” This conclusion is supported by the fact that both this court and the Legislature have mandated cautionary instructions in other contexts regardless of the required use of the general instruction on witness credibility. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569 [accomplice testimony]; Penal

Code section 1127a, subd. (b) [in-custody informant testimony]; Penal Code section 859.5, subd. (e)(3) [statement of juvenile charged with murder who was custodially interrogated].)

If this court should abrogate the existing rule that the trial court must give the cautionary instruction *sua sponte*, the defendant should still be entitled to request the instruction since it is not duplicative of other instructions. In addition, CALCRIM 358 is a proper pinpoint instruction that specifies a defense theory of the case.

A new rule announced in this case may not be retroactively applied. Appellant was entitled to rely on the trial court's obligation to give the cautionary instruction *sua sponte*. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 872.) It would be unfair to apply a new rule against him.

The enactment of Penal Code section 859.5 is material in two respects. First, the statute demonstrates the Legislature's view that a generic witness credibility instruction provides insufficient guidance regarding the credibility of an unrecorded extrajudicial statement. Second, this court's abrogation of the existing rule that CALCRIM No. 358 must be given *sua sponte* will create an equal protection problem since adult defendants charged with murder will be given less protection under the instructional law than similarly situated juveniles.

The People have failed to provide any justification for a change in the law. This court should reaffirm the existing rule that a cautionary instruction must be given *sua sponte* with respect to a defendant's unrecorded extrajudicial statements.

I.

THIS COURT SHOULD REAFFIRM THE LONG-STANDING RULE THAT A TRIAL COURT HAS A *SUA SPONTE* DUTY TO INSTRUCT THE JURY THAT A DEFENDANT'S UNRECORDED EXTRAJUDICIAL STATEMENTS ARE TO BE TREATED WITH CAUTION.

In its briefing order, this court has inquired whether it should abrogate the long-standing rule that "a cautionary instruction concerning a defendant's extra-judicial statements must be given *sua sponte*, even in the absence of a statute mandating that the instruction be given?" As appellant will explain below, the existing rule should be reaffirmed.

As a starting point, it is critical to note that the instructional duty in question has been a part of California law for over 140 years. In 1872, the Legislature enacted Code of Civil Procedure section 2061 which required the trial court to instruct "on all proper occasions" that the jury was to view "the evidence of the oral admissions of a party with caution." (Former section 2061, subd. (4), repealed by Stats. 1965, ch. 299, § 127.) Sixty five years ago, this court expressly recognized that the *sua sponte* instructional duty of the

court was a prerequisite for a fair trial since the “dangers inherent in the use” of a defendant’s extrajudicial statements were “well recognized by courts and text writers. [Citations.]” (*People v. Bemis*, supra, 33 Cal.2d 395, 398.) Indeed, the most venerated of commentators on the law of evidence contemporaneously found that the instructional requirement was a necessity.

“Nevertheless, the great possibilities of error in trusting to recollection - testimony of oral utterances, supposed to have been heard, have never been ignored; but an antidote is constantly given by an instruction to the jury against trusting overmuch to the accuracy of such testimony.” (7 Wigmore, Evidence (3d. ed. 1940) section 2094, pp. 468-469.)

Effective January 1, 1967, the Legislature repealed section 2061. However, the repeal was not intended to abrogate the requirement that the trial court must instruct *sua sponte* on the dangers of unrecorded statements. Rather, section 2061 was “repealed to avoid singling out only a few of the cautionary instructions that are given by the courts.” (California Law Revision Commission Comment, 21A West’s Annotated California Codes (2007 ed.) p. 608.) Thus, the repeal was deemed to “have no effect on the giving of the instructions contained in the section or on the giving of any other cautionary instructions that are permitted or required to be given by decisional law.” (*Ibid.*)

Following the repeal of section 2061, the Courts of Appeal quickly reaffirmed that a *sua sponte* cautionary instruction is required with regard to

a defendant's extrajudicial statements. (*People v. Blankenship* (1970) 7 Cal.App.3d 305, 310; *People v. Reed* (1969) 270 Cal.App.2d 37, 43.) This court quickly followed suit. (*People v. Beagle*, supra, 6 Cal.3d 441, 455 and fn. 4.)

Significantly, in the 42 years since *Beagle* was decided, there has been no published criticism of its rule that a *sua sponte* cautionary instruction is required. This is so for the simple reason that the legal basis for the instruction remains as valid today as it was 142 years ago.

As was well documented by this court in *People v. Bemis*, supra, 33 Cal.2d 395, a cautionary instruction is mandated with respect to unrecorded extrajudicial statements since there is “no class of evidence . . . more subject to error or abuse.” (*Id.* at p. 399.) No one has quarreled with this conclusion nor could they reasonably do so. The question therefore becomes whether there is any justification to reverse the logical and well settled rule at issue.

Under the doctrine of *stare decisis*, precedent is to be followed in order to ensure predictability and stability in the law. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212.) Before a rule may be overturned, the burden is on the moving party to demonstrate that existing law is “unsound” or that subsequent developments have rendered the rule obsolete. (*Moradi-Shalal v. Fireman's Fund Ins. Companies*, supra, 46 Cal.3d 287, 297.) Although the People

attempt to shoulder this burden, their arguments fall well short of what is required to reverse a rule that has well served our judicial system for over 140 years.

The People's primary thesis is that the cautionary instruction "was born of circumstances that no longer obtain in criminal jury trials." (ROSB 5) Specifically, the People claim that the cautionary instruction is no longer required since juries are now instructed on an extensive list of factors concerning witness credibility. (ROSB 6.) Supposedly, this state of affairs did not exist in the past. (ROSB 3, 5-7.) The People's history is incorrect.

In 1949, this court declared that the trial court has a *sua sponte* duty to give a cautionary instruction regarding the defendant's extrajudicial statements. (*People v. Bemis*, supra, 33 Cal.2d 395, 398.) A survey of the case law between 1947 and the decision in *Beagle* in 1972 reveals that juries were routinely instructed on the factors to consider in assessing witness credibility. (*People v. Eggers* (1947) 30 Cal.2d 676, 689 ["[t]he principles applicable to the extrajudicial statements made by Eggers are fully stated in the general instructions as to credibility of witnesses."]; *People v. Gregg* (1970) 5 Cal.App.3d 502, 509 [jury was given the standard CALJIC instruction that listed "the factors by which jurors are to weigh the credibility of witnesses . . ."]; *People v. Brown* (1968) 260 Cal.App.2d 434, 440, fn. 2 [quoting text of

extensive instruction given regarding the factors to be used in considering the credibility of a witness]; *People v. Fields* (1965) 235 Cal.App.2d 1, 4 [jury was given the “customary instruction on the credibility of witnesses (CALJIC No. 52)”]; see also *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 427 [jury was instructed on “ten rules to be observed in appraising the value of a witness.”].)

Notwithstanding the routine historical use of a standard instruction on witness credibility, the People claim that things changed dramatically in 1975 when this court announced for the first time that an instruction on witness credibility must be given *sua sponte*. (*People v. Rincon-Pineda*, supra, 14 Cal.3d 864, 883-884.) There are two answers to this claim.

First, as has already been shown, it was customary to instruct on the factors relevant to witness credibility long before *Rincon-Pineda*. This was manifestly true at the time that *Beagle* was decided. In 1975, this court approved CALJIC No. 2.20 as properly reciting the factors that govern an assessment of witness credibility. (*Rincon-Pineda*, supra, 14 Cal.3d at pp. 883-884 and fn. 7.) Since No. 2.20 was in existence prior to the 1972 decision in *Beagle* (*People v. Malich* (1971) 15 Cal.App.3d 253, 267, overruled by *People v. Medina* (1972) 6 Cal.3d 484, 489), it goes without saying that the *Beagle* court was well aware of the standard witness credibility instruction when it reaffirmed the rule that the court must instruct *sua sponte* that

extrajudicial statements are to be treated with caution. (See also *People v. Gordon* (1973) 10 Cal.3d 460, 475, fn. 1, overruled in part by *People v. Ward* (2005) 36 Cal.4th 186, 212 [CALJIC No. 2.20 was given on the trial court's own motion].)

Second, history aside, it is quite simply untrue that a general instruction on witness credibility serves as a sufficient substitute for the cautionary instruction found in CALCRIM No. 358. The essential message of a cautionary instruction is that the jury is *required* to carefully assess a particular piece of evidence before relying on it. Since we know to a moral certainty that “no class of evidence is more subject to abuse” than testimony regarding unrecorded extrajudicial statements (*Bemis*, supra, 33 Cal.2d 395, 399), a cautionary instruction is necessary to ensure that a jury carefully considers such evidence. The generic factors listed in the standard witness credibility instructions provide no such assurance since those factors do not compel the use of “caution.” (See factors listed in CALCRIM Nos. 105 and 226.)

The People next claim that *Rincon-Pineda* is parallel to this case since a previously required cautionary instruction was eliminated there. (ROSB 8.) This claim is meritless since the *Rincon-Pineda* instruction was abrogated for reasons that are entirely unrelated to the instruction at issue here.

Rincon-Pineda involved an instruction that provided that a female

complainant's testimony in a sexual assault case was to be treated with caution since a charge of sexual assault "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent." (*Rincon-Pineda*, supra, 14 Cal.3d at p. 871.) In abandoning the instruction, this court declared that there was simply no factual basis for the proposition that "those who claim to be victims of sexual offenses are presumptively entitled to less credence than those who testify as the alleged victims of other crimes." (*Id.* at p. 877.) Since the instruction unnecessarily demeaned women without providing any required protection to defendants, it was eliminated.

In contrast with *Rincon-Pineda*, the People make no effort to show that the factual basis for the instant cautionary instruction has eroded. Since it remains true that evidence of extrajudicial statements is subject to abuse, no reason exists to abrogate the instructional requirement.

As their next point, the People make the rather strange argument that the cautionary instruction is no longer necessary since this court has routinely found the omission to give the instruction to be harmless error. (ROSB 7.) This claim is illogical. Under the People's thesis, virtually all *sua sponte* instructions could be eliminated since harmless error is routinely found. This is simply implausible. Moreover, there are cases where the error has been deemed prejudicial. (*People v. Ford* (1964) 60 Cal.2d 772, 799-800; *People*

v. Bemis, supra, 33 Cal.2d 395, 401; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1529-1530; *People v. Lopez* (1975) 47 Cal.App.3d 8, 13-14; *People v. Henry* (1972) 22 Cal.App.3d 951, 957-959.)

The People next argue that CALCRIM No. 358 does not fit within the “limited set of subjects” for which *sua sponte* instruction is required. (ROSB 9.) Like the People’s primary thesis, this claim is belied by history.

As has long been the case, the trial court must instruct *sua sponte* with regard to the general principles of law that are “‘closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citation.]”.) (*People v. Najera*, supra, 43 Cal.4th 1132, 1136.) Cautionary instructions have been deemed to be within this test for quite some time.

In *People v. Putnam* (1942) 20 Cal.2d 885, this court considered a trial court’s obligation to instruct *sua sponte* with the cautionary instruction that was later abrogated in *Rincon-Pineda*. The court held that the trial judge erred by failing to give the instruction *sua sponte* since a “cautionary instruction in cases like the present one is necessary to insure a proper consideration of the evidence by the jury.” (*Id.* at p. 891.) In *Bemis*, the same thesis was advanced with respect to the necessity for a cautionary instruction regarding extrajudicial statements. (*Bemis*, supra, 33 Cal.2d at pp. 398-399.)

Nothing has changed since these venerable cases were decided. Cautionary instructions state general principles necessary for the jury's understanding of the case since jurors quite simply do not know that certain classes of evidence are more subject to abuse than others. Since even the People do not quarrel with the proposition that there are dangers inherent in the use of extrajudicial statements, it necessarily follows that *sua sponte* instruction is required concerning those dangers.

People v. Najera, supra, 43 Cal.4th 1132, cited by the People, is not to the contrary. There, this court held that there is no *sua sponte* duty to instruct the jury that a certain fact, standing alone, is insufficient to support a conviction. (*Id.* at p. 1139.) The rationale for this conclusion is that the jury needs no special instruction regarding the manner in which it is to weigh circumstantial evidence. (*Id.* at p. 1138.) The case at bar is entirely different.

Here, the subject of CALCRIM No. 358 does not involve the weighing of circumstantial evidence. Rather, the point of the instruction is that a specific class of evidence *requires* careful scrutiny due to its very nature. Since juries will not intuitively recognize this reality, a *sua sponte* instruction is required.

Nonetheless, the People persist in their analogy to *Najera* by claiming that its reasoning is applicable here since the purpose of the "with caution"

language is to assist the jury in determining whether the statement in question was “in fact made.” (*People v. Beagle*, supra, 6 Cal.3d 441, 456.) While the People have correctly stated the purpose of the cautionary instruction, they err by trying to cram that purpose within the reasoning in *Najera*.

Najera was a case involving a jury’s evaluation of “circumstantial evidence.” (*Najera*, supra, 43 Cal.4th at p. 1138.) Here, the issue involves an instruction regarding *direct* evidence (i.e. whether or not the defendant spoke certain words). Since the jury cannot properly evaluate this issue without the special knowledge that this particular brand of direct evidence is subject to abuse, a *sua sponte* instruction is required.

It should not escape notice that acceptance of the People’s position would lead to a weird inconsistency in the law whereby an instruction on the factors to be used in assessing witness credibility would be deemed “necessary for the jury’s understanding of the case” but a more direct instruction regarding the assessment of the credibility of a problematic piece of evidence (i.e. unrecorded extrajudicial statements) would not be “necessary for the jury’s understanding of the case.” (*People v. Najera*, supra, 43 Cal.4th 1132, 1136.) Such a result makes no sense.

In *People v. Rincon-Pineda*, supra, 14 Cal.3d 864, this court concluded that the jury cannot rationally analyze the credibility of a witness without

notice of the factors that are requisite to such an analysis. (*Id.* at pp. 883-884.) By parity of logic, it follows that the jury cannot fairly and rationally assess the content of an extrajudicial statement supposedly made by the defendant without the vital guidance that the statement must be viewed with caution. This principle is no less ““necessary for the jury’s understanding of the case”” than the other factors which are to be used in determining witness credibility. (*Najera*, supra, 43 Cal.4th at p. 1136.)

As their next salvo, the People point to two supposed inadequacies in the language of CALCRIM No. 358: (1) the term “tending to show guilt” goes beyond the “admissions” originally designated in now repealed Code of Civil Procedure section 2061; and (2) the instruction does not describe the reasons why extrajudicial statements are to be treated “with caution.” (ROSB 5, 13.) The first point is inaccurate and the second point does not help the People.

The People note that section 2061, subdivision 4 applied only to evidence of a party’s “admissions.” They then claim that the CALCRIM committee has gone astray by transforming “admissions” into statements “tending to show guilt.” (ROSB 5.) The People are wrong. An “admission” is a statement “tending to establish guilt when considered with the remaining evidence in the case. [Citations.]” (*People v. McClary* (1977) 20 Cal.3d 218, 230, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510,

fn. 17.) CALCRIM No. 358 correctly states the law.

As their second criticism of CALCRIM No. 358, the People claim that the instruction lacks “utility” since it fails to explain why extrajudicial statements are to be treated with caution. (ROSB 12.) While appellant disagrees that the present instruction lacks “utility,” the People’s concerns are readily met. Appellant suggests the following language that might be added to the end of CALCRIM No. 358.

“A statement tending to show the defendant’s guilt is to be treated with caution for two reasons: (1) witnesses having the best motives are generally unable to state the exact language of an oral statement, and are liable, by the omission or changing of words, to convey a false impression of the language used; and (2) no other type of testimony affords the same opportunity for witnesses to intentionally misrepresent what was actually said.”

The suggested language is taken largely verbatim with some editing from *People v. Bemis*, supra, 33 Cal.2d 395, 399. Presumably, the People will have no objection to rendering the instruction more authoritative.

As their final argument, the People present three theories in support of the thesis that a *sua sponte* duty to give CALCRIM No. 358 “generates more problems” than it resolves: (1) the instruction confuses the jury when the statements are the actus reus of the offense charged; (2) trial courts will not know what to do when a defendant’s statement is both exculpatory and inculpatory; and (3) the instruction has latent ambiguities such that defense

counsel should have to request the instruction. (ROSB 13-16.) These claims are meritless.

The People's first point is a rerun of its prior briefing. (RBOM 10-18.) Appellant therefore stands on her own prior briefing. (AABM 16-27.)

As their second point, the People proclaim that a trial court will not know what to do when a defendant's statement contains both exculpatory and inculpatory elements. (ROSB 13-14.) This imaginary problem has already been answered by this court.

In *People v. Slaughter* (2002) 27 Cal.4th 1187, the defendant complained that it was error to give the predecessor instruction to CALCRIM No. 358 since his statement to the police had been recorded. The defendant further argued that the error was prejudicial since his statement was exculpatory in nature. This court agreed that the instruction had no application to recorded statements. However, the error in giving the instruction was plainly harmless since the instruction expressly advised the jury to treat only inculpatory statements with caution. (*Id.* at p. 1200.) The identical analysis applies to CALCRIM No. 358.

No. 358 advises the jury that only statements "tending to show (his/her) guilt" are to be viewed with caution. As *Slaughter* indicates, the jury will necessarily understand that the exculpatory portions of statements are not to

be treated with caution. Thus, CALCRIM No. 358 presents no danger of confusing the jury. (*Slaughter*, supra, 27 Cal.4th at p. 1200; accord, *People v. Vega* (1990) 220 Cal.App.3d 310, 318 [where defendant's statements were both exculpatory and inculpatory, there was no error in giving a cautionary instruction since "a jury is capable of discerning whether an extrajudicial statement is an admission, which they are instructed to view with caution, or whether the statement is not an admission, to which the cautionary language does not apply."].)

As a corollary to the purported problem of a statement that contains both exculpatory and inculpatory elements, the People posit the "problem" that a trial court will face if defense counsel indicates that No. 358 is not wanted. (ROSB 14-15.) There is no problem.

A party has no right to veto an instruction that must be given *sua sponte*. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393 [defense counsel's preference that cautionary instruction should not be given "does not obviate the court's sua sponte duty . . ."]; see also *People v. Barton* (1995) 12 Cal.4th 186, 194-198.) Thus, if any portion of a defendant's statement is inculpatory, the trial court must give No. 358. If the court mistakenly accedes to the defense request not to give the instruction, the doctrine of invited error will bar defendant from benefitting from his request. (*People v. Linton* (2013) 56

Cal.4th 1146, 1196-1197 [invited error found where defense counsel declined the court's offer to include the cautionary language in the instruction].)

Finally, the People claim that it should be incumbent upon defense counsel to request No. 358 since it is essentially a tactical choice as to whether the instruction should be given when the defendant ambiguously makes both incriminating and exonerating statements. (ROSB 15-16.) This theory fares no better than the People's other points.

As appellant has already explained, there is no harm to the defense if No. 358 is given in a case where the defendant's statements are both exculpatory and inculpatory. Defense counsel need only clearly and carefully explain to the jury that *only* inculpatory statements are to be treated with caution. Any defense counsel who would consciously forego the use of No. 358 would commit malpractice in a case where an arguably incriminating statement was uttered.

People v. Livaditis (1992) 2 Cal.4th 759 does not alter this conclusion. In *Livaditis*, this court considered whether a cautionary instruction must be given by the court *sua sponte* at the sentencing phase of a capital trial. The court concluded that a *sua sponte* duty does not exist since "the distinction between mitigation and aggravation is often more blurred than the distinction between a statement that incriminates and one that does not." (*Id.* at p. 784.)

In other words, a jury might well be confused by a cautionary instruction in this context since many facially incriminating statements also contain elements of mitigation. For example, a statement “that the defendant is sorry he stabbed the victim to death is both mitigating and aggravating.” (*Ibid.*)

Although *Livaditis* does not expressly make this point, it is implicit in the court’s analysis that an incriminating statement admitted at the sentencing phase has little probative value. By the time of the sentencing trial, the jury has already found the defendant guilty. Thus, when a defendant’s statement contains both incriminating and mitigating aspects, basic fairness requires the omission of the cautionary language since it is only the mitigating portion of the statement that is relevant at the sentencing phase.

As the foregoing resume of the last 142 years of jurisprudence shows, the need for the cautionary instruction has not been eroded by any new developments nor has the principle stated in the instruction been deemed to be unsound. This court should follow the doctrine of *stare decisis* and retain the existing rule that the cautionary instruction must be given *sua sponte*.

II.

CALCRIM NO. 226 IS NOT A SUBSTITUTE FOR THE CAUTIONARY LANGUAGE FOUND IN CALCRIM NO. 358.

The People contend that the general instructions on witness credibility constitute an adequate substitute for the cautionary language found in CALCRIM No. 358. (RSOB 16-22.) This claim is meritless.

In *People v. Rincon-Pineda*, supra, 14 Cal.3d 864, this court held that a trial court must instruct *sua sponte* on factors pertaining to witness credibility. (*Id.* at pp. 883-884.) Presently, CALCRIM No. 226 provides a laundry list of matters that a jury might consider when analyzing the believability of a witness. The People point to two factors as being an adequate substitute for the “with caution” language of No. 358: (1) the degree to which the witness could “perceive the things about which the witness testified;” and (2) the degree to which the witness had a “bias or prejudice.” (ROSB 19.) In the People’s view, these factors directly relate to the reasons why the “with caution” language has been required. (ROSB 19.) This simplistic analysis cannot be accepted.

As appellant has already discussed (p. 9, supra), general instructions regarding bias or opportunity to perceive quite simply do not substitute for a specific direction that *requires* additional scrutiny of a particular piece of

evidence. A comparison of another cautionary instruction proves this point.

In *People v. Guiuan*, supra, 18 Cal.4th 558, this court considered the trial court's duty to instruct *sua sponte* with regard to accomplice testimony. The court directed that the jury must be instructed that incriminating accomplice testimony is to be "viewed with caution." (*Id.* at p. 569.) In requiring this instruction, the court observed that the "word 'caution' . . . signals the need for the jury to pay special heed to *incriminating* testimony because it may be biased" (*Id.* at p. 569, fn. 4, emphasis in original.)

Significantly, nowhere in *Guiuan* did the court even remotely suggest that the general instruction on witness credibility could substitute for the required cautionary instruction. The omission of any such discussion plainly rests on the court's conclusion that the special cautionary language is needed so that the jury will "pay special heed" to a type of evidence that is deemed to be more problematic than other forms of evidence. (*Guiuan*, supra, 18 Cal.4th at p. 569, fn. 4.)

The identical analysis applies in this case. To the extent that evidence of a defendant's extrajudicial statements is known to be subject to abuse or substantial misrecollection, a jury must be told that "special heed" is to be taken before the evidence can be used to convict. Generic instructions simply do not suffice to provide the same information.

Indeed, the logical conclusion of the People's position is that no type of cautionary instruction would ever be needed since the general factors found in CALCRIM No. 226 are always sufficient. Presumably, neither this court nor the Legislature will be swayed by this dangerous proposition. (Penal Code section 859.5, subd. (e)(3) [cautionary instruction is required when juvenile murder suspect's statement is not recorded]; Penal Code section 1127a, subd. (b) [cautionary instruction must be given upon request with respect to the testimony of an in-custody informant].)

Shifting gears, the People contend that No. 226 is a sufficient instruction since some ancient decisions say that it is common knowledge that extrajudicial statements are to be treated with caution. (*People v. Raber* (1914) 168 Cal. 316, 320; *Kauffman v. Maier* (1892) 94 Cal. 269, 283.) Apparently, neither the Legislature nor this court ultimately accepted this conclusion. (*People v. Bemis*, supra, 33 Cal.2d 395, 400 [“To hold that the instructions required by [Code of Civil Procedure section 2061] state mere commonplaces within the general knowledge of the jury is tantamount to holding that the failure to give them in proper cases is not error. Such a holding would be contrary to the clear mandate of the statute and the many recent cases interpreting it. [Citations.]”].)

The People next argue that No. 226 must be deemed an adequate substitute for the cautionary instruction since this court has occasionally found harmless error by referencing the fact that the jury was otherwise instructed on witness credibility. (ROSB 20-21, citing *People v. Dickey* (2005) 35 Cal.4th 884, 906; *People v. Carpenter*, supra, 15 Cal.4th 312, 393; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225.) Without parsing the cases in exacting detail, it is sufficient to note that none of the cases found harmless error *only* because a general witness credibility instruction was given. (*Dickey*, supra, 35 Cal.4th 884, 906-907 and fn. 8 [error found harmless due to the evidence that the People's witnesses were drug addicts who had motive to lie]; *Carpenter*, supra, 15 Cal.4th at p. 393 [evidence of defendant's statement was "uncontradicted"]; *Bunyard*, supra, 45 Cal.3d at pp. 1224-1225 [jury was instructed to treat accomplice testimony with caution and to consider a witness' prior felony conviction with regard to his credibility].)

The bottom line is unassailable. The cautionary language in No. 358 is needed so that the jury will "pay special heed" to the evidence regarding the defendant's extrajudicial statements. Absent this specific direction, there can be no assurance that a jury will fully and fairly consider the evidence.

III.

A CAUTIONARY INSTRUCTION MUST BE GIVEN UPON REQUEST.

Assuming that this court will hold that the trial court has no duty to issue a cautionary instruction *sua sponte*, the People take the next step and argue that the instruction need not be given upon request. (ROSB 22-24.) This is a step too far.

Noting that a trial court has no duty to give duplicative instructions, the People reassert their claim that CALCRIM No. 226 is a sufficient substitute for a cautionary instruction. (ROSB 22-23.) Appellant will not repeat his rebuttal of the People's position. However, three additional points must be made.

First, it is significant that the Legislature is of the view that a cautionary instruction is not duplicative. In the circumstance where an in-custody informant testifies for the People, the court must instruct upon request that the testimony is to be treated "with caution and close scrutiny." (Penal Code section 1127a, subd. (b).) Since the Legislature would presumably refrain from requiring duplicative instructions, it follows that the Legislature does not believe that cautionary instructions are duplicative.

Second, in a case where the trial was conducted before section 1127a was enacted, this court held that the trial court properly refused to give the

defendant's cautionary instruction with regard to an in-custody informant. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1020-1023.) The court reasoned that the instruction was duplicative of other instructions. (*Id.* at p. 1021.) However, as has just been noted, the Legislature has taken a contrary view. To the extent that *Hovarter* has been legislatively abrogated, its reasoning can no longer be followed.

Third, a defendant is entitled to request a pinpoint instruction that specifies his theory of the case. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137.) For example, when the defendant relies on misidentification as a defense, the court is required to honor a request for an instruction that specifies factors relevant to a consideration of identification testimony. (*Id.* at pp. 1138-1139.) A cautionary instruction falls under this rubric.

The instant case is illustrative. With regard to the Penal Code section 422 charges, the defense theory was that the supposed threats were never uttered. Thus, upon request, appellant would have been entitled, like the defendant in *Wright*, to an instruction that provided guidance regarding the manner in which the jury was to view the government's incriminating evidence.

Evidence of unrecorded extrajudicial statements is the type of evidence that is subject to abuse. A defendant is certainly entitled to request the jury

instruction that has been authorized by California law for over 140 years.

IV.

IF THIS COURT SHOULD ABROGATE THE SETTLED RULE THAT THE CAUTIONARY INSTRUCTION MUST BE GIVEN *SUA SPONTE*, THE NEW RULE SHOULD NOT BE APPLIED IN THIS CASE.

The People contend that this court should retroactively apply any new rule to this case. (ROSB 24-27.) In taking this position, the People ignore the case that is most closely on point.

In *People v. Rincon-Pineda*, supra, 14 Cal.3d 864, this court abrogated a trial court's duty to instruct *sua sponte* that a charge of sexual assault is easily made but is difficult to defend. The court did not make its ruling retroactive. Rather, it was found that "the trial court in the instant case committed error in failing to comply with controlling precedent. [Citations.]" (*Id.* at p. 872.) The court then conducted harmless error review. (*Id.* at pp. 872-873.)

There is little to distinguish this case from *Rincon-Pineda*. In each instance, the settled rule required that a cautionary instruction be given *sua sponte*. If the new rule was not retroactively applied in *Rincon-Pineda*, it should not be here.

The People will undoubtedly respond that cases subsequent to *Rincon-Pineda* reached a different result and are therefore binding. However, the

cases cited by the People are readily distinguishable. The controlling principle is that it is inequitable to retroactively apply a new rule to a party who may have detrimentally relied on the prior rule. (*People v. Scott* (1994) 9 Cal.4th 331, 356-358 [new requirement to object to sentencing error could not be retroactively applied].)

In the case at bar, we are faced with a situation where the defendant was fully entitled to rely on the court to give the proper jury instruction. Since the court's duty was mandatory and did not require any action on appellant's part, she "was entitled to have [her] trial conducted in accordance with the law prevailing at that time" (*Rincon-Pineda*, supra, 14 Cal.3d at p. 872.)

People v. Birks (1998) 19 Cal.4th 108 is not to the contrary. There, this court reversed the rule that a defendant was entitled upon request to an instruction on lesser related offenses. The new rule was applied to Mr. Birks since there was no danger of sandbagging him by applying "a new and unforeseen objection and waiver requirement" (*Id.* at p. 137.) Here, of course, retroactive application would constitute a de facto objection requirement since appellant would have had to request No. 358 in order to maintain his appellate claim. Such a retroactive requirement would be improper. (*Scott*, supra, 9 Cal.4th at pp. 356-358.)

People v. Cuevas (1995) 12 Cal.4th 252 is equally inapposite. In *Cuevas*, this court reversed the rule that a recanted extrajudicial identification is not, standing alone, sufficient to allow for conviction. The new rule was retroactively applied since the defendant did not detrimentally rely on the old rule which did not govern the manner in which the trial was conducted. (*Id.* at p. 276.) In this case, appellant plainly was entitled to rely on the trial court's obligation to deliver the appropriate cautionary instruction.

Finally, the People claim that appellant was not entitled to rely on settled law at the time of trial since *People v. Zichko* (2004) 118 Cal.App.4th 1055 had held that a cautionary instruction was not required with regard to a criminal threats charge. (ROSB 26.) This contention fails for two reasons.

First, *Zichko* was not controlling precedent. Rather, prior to trial, this court announced the rule that a cautionary instruction was required whether the extrajudicial statement was "made before, during, or after the crime." (*People v. Carpenter*, *supra*, 15 Cal.4th 312, 393.) The trial court was bound to follow *Carpenter*.

Second, even if the trial court did not err in failing to give No. 358 with respect to the criminal threats charge, the court unquestionably had a mandatory duty to instruct on the statements insofar as they related to the attempted murder charge. (*People v. Ford*, *supra*, 60 Cal.2d 772, 799-800

[murder conviction reversed where a cautionary instruction was not given as to the several statements used to prove the defendant's mental state].)

Appellant was fully entitled to rely on the existing rule at the time of trial. That rule must be applied and reversible error should be found. (AABM 27-39.)

V.

THE ENACTMENT OF PENAL CODE SECTION 859.5, SUBDIVISION (e)(3) IS MATERIAL TO THE INSTANT APPEAL IN TWO RESPECTS.

This court inquired in its briefing order as to whether the recent enactment of Penal Code section 859.5, subdivision (e)(3) has any effect on the issues before the court. The new statute is material in two respects: (1) it demonstrates a legislative intent that a generic witness credibility instruction is insufficient to protect a criminal defendant charged with murder; and (2) it poses an equal protection problem should this court elect to abrogate the requirement of a cautionary instruction. Each of these points will be separately addressed below.

A. The Legislature Has Affirmed That A Generic Witness Credibility Instruction Is Insufficient To Protect A Defendant Against The Misuse Of Unrecorded Extrajudicial Statements.

Penal Code section 859.5 governs the situation where the police interrogate a juvenile murder suspect at a "fixed place of detention" such as

the police station. If the police fail to electronically record the interrogation, the court is required to instruct *sua sponte* that the jury is to “view with caution” any statements made by the defendant. (Section 859.5, subd. (e)(3).) The statute is obviously material to the controversy before the court.

The People have argued that the cautionary language found in CALCRIM No. 358 is no longer needed since the generic witness credibility factors recited in CALCRIM No. 226 adequately protect the defendant. By enacting section 859.5, the Legislature has roundly rejected this concept. If No. 226 was sufficient to protect a murder defendant, there would be no need for the new cautionary instruction that must be given *sua sponte*.

The People seek to elide this obvious conclusion by focusing on the social science that reveals that juveniles are susceptible to manipulation by the police. (ROSB 28.) However, this assertion is beside the point. The instruction required by section 859.5 will not advise the jury about the frailties of juveniles. Instead, the “with caution” instruction will protect the defendant from the same dangers that are addressed by the traditional cautionary instruction (i.e. it is difficult to exactly recall oral statements and some witnesses are unscrupulous in their accounts of what was said). (*People v. Bemis*, *supra*, 33 Cal.2d 395, 399.)

In a convoluted twist of logic, the People posit that the enactment of section 859.5 evinces a legislative intent that CALCRIM No. 358 should not be given *sua sponte* in every case. (ROSB 28-29.) There is no plausible merit to this claim. The statute says nothing about No. 358 nor does it purport to limit the circumstances under which a cautionary instruction should be given. The statute can only be interpreted consistent with its plain meaning that a *sua sponte* instruction is necessarily required in the stated circumstances. (*People v. Statum* (2002) 28 Cal.4th 682, 692 [a “court may not rewrite a statute to conform to a presumed intent that is not expressed. [Citation.]”].)

The only plausible understanding of section 859.5 is that the Legislature has required that a cautionary instruction must be given *sua sponte* since the existing generic witness credibility instruction is insufficient. This legislative action thereby counsels against the repeal of the 142 year old requirement that a cautionary instruction must be given *sua sponte*.

B. If This Court Should Hold That Only Juvenile Murder Suspects Are Entitled To A Sua Sponte Instruction That Extrajudicial Statements Are To Be Treated With Caution, Appellant Will Be Deprived Of Equal Protection Under Article I, Section 7 Of the California Constitution And The Fourteenth Amendment To The Federal Constitution.

As things presently stand, all criminal defendants are treated equally with respect to their entitlement to a *sua sponte* instruction pursuant to

CALCRIM No. 358. If this court should abrogate the rule that a trial court must give the cautionary instruction *sua sponte*, an equal protection problem will arise. Since it is this court's policy to interpret the law so as to avoid constitutional problems (*San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937, 948), it follows that this court should affirm the existing rule.

“The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citation.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) The central inquiry is whether the groups are similarly situated with respect to the purpose of the law challenged. (*Id.* at pp. 1199-1200.)

In the case at bar, the two classes are: (1) a juvenile charged with murder in adult court; and (2) an adult charged with murder (or, as here, attempted murder) in adult court. Without doubt, these two classes are similarly, if not identically, situated with respect to the purpose of the law.

As has been repeatedly discussed in appellant's briefs, the purpose of a cautionary instruction with respect to unrecorded extrajudicial statements is to advise the jury that the evidence is subject to special scrutiny since it is susceptible to abuse or innocent misrecollection. This purpose is identically

served regardless of whether the defendant is a juvenile or an adult. It is the type of evidence rather than the age of the defendant which warrants the instruction.

Moreover, a mere difference in age does not render the two classes dissimilarly situated. *People v. Olivas* (1976) 17 Cal.3d 236 is on point. There, a 19 year old minor was convicted of a misdemeanor in adult court. He was committed to the Youth Authority from which he might not be released until the age of 23. This court found an equal protection violation since an adult (a person over the age of 21) could only be made to serve six months in jail. As is readily apparent, *Olivas* establishes that a mere difference in age does not render two classes dissimilarly situated.

The People will undoubtedly contend that the two classes are not similarly situated since section 859.5 applies only to the unique circumstances of jailhouse interrogations of minors. The problem with this thesis is that nothing on the face of section 859.5 shows that the Legislature has made a finding that only extrajudicial statements made by minors are subject to abuse or misrecollection. Since the "purpose" of a cautionary instruction is the same regardless of the age of the declarant, the two classes are similarly situated. (*Hofsheier*, supra, 37 Cal.4th at pp. 1199-1200 [the similarly situated requirement is measured by a consideration of the purpose of the law under

review].)

The remaining question is whether there is a rational basis for the discrimination visited upon those situated in appellant's class. (*Hofsheier*, supra, 37 Cal.4th at pp. 1200-1201.) The answer is no.

The facts of this case prove this conclusion. Here, the supposed extrajudicial remarks of appellant were all reported by hostile witnesses. This court has held that the cautionary instruction is especially important in this circumstance. (*People v. Ford*, supra, 60 Cal.2d 772, 799-800.) In the situation covered by section 859.5, the witnesses will be police officers who are, by definition, hostile to the defendant. There is no rational reason why the cautionary instruction should not be required in both circumstances.

In short, the Legislature has created a potential equal protection problem by providing instructional protection only to juvenile murder suspects. Since adult attempted murder suspects are equally entitled to the same protection, this court should avoid any constitutional problem by maintaining the present *sua sponte* instructional duty regarding a defendant's unrecorded extrajudicial statements.

CONCLUSION

For the reasons stated in appellant's briefs, this court should reverse the entire judgment.

Dated: May 1, 2014

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I certify that this brief contains 7516 words.

Dated: May 1, 2014



DALLAS SACHER
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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***APPELLANT'S SUPPLEMENTAL BRIEF*** to the following parties hereinafter named by:

X **BY ELECTRONIC TRANSMISSION** - I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

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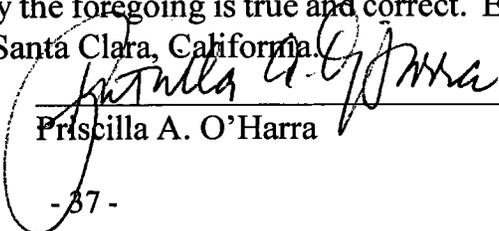
X **BY MAIL** - Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct. Executed this 18th day of May, 2014, at Santa Clara, California.



Priscilla A. O'Harra