

COPY

SUPREME COURT COPY

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**

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

JUN 20 2014

Frank A. McGuire Clerk

Deputy

SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

I. THE SUA SPONTE DUTY TO GIVE CALCRIM NO. 358 IS JUSTIFIED NEITHER BY THE HISTORY NOR THE SUBJECT OF THE INSTRUCTION

A. The Evolving Nature of Stare Decisis Supports Abrogation of the Sua Sponte Instructional Requirement

Appellant argues that “[f]or 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.’” (ASB 1; see also ASB 31 [“142 year old requirement that a cautionary instruction must be given *sua sponte*”].) This is simply untrue. The cautionary instruction was not required *sua sponte* until 1949, almost 70 years after its inception. (*People v. Bemis* (1949) 33 Cal.2d 395, 400.) Contrary to appellant’s assertion that the *Beagle*-era instructional requirement represents a “venerable” and “long-standing” rule “that has well served our judicial system for over 140 years” (ASB 1, 4, 7), *stare decisis* does not support a *sua sponte* duty to instruct.

Historically, the extent to which trial courts were required to give a cautionary instruction—and the significance this Court placed on admonitions regarding a defendant’s unrecorded extrajudicial statements—has varied widely. Initially, the Court determined the consider-with-caution instruction stated nothing more than a “matter of common knowledge.” (*Kauffman v. Maier* (1892) 94 Cal. 269, 283.) Sixty years later, the Court adopted a contrary position and held that “no class of evidence is more subject to abuse” than testimony concerning a defendant’s extrajudicial statements. (*Bemis, supra*, 33 Cal.2d at p. 399; see also Former Code Civ. Proc., § 2061 (1872), repealed by Stats. 1965, § 127, operative Jan. 1, 1967 (hereafter, section 2061).) After *Bemis*, for a quarter

century, the Court held that a failure to provide the cautionary instruction constituted prejudicial error. But since 1964, the Court has consistently found harmless the failure to so instruct. (See *People v. Ford* (1964) 60 Cal.2d 772, 800; see also OSB 7, fn. 2 [listing cases].)¹ The variable nature and impact of oral-admissions instructions reflect the relative insignificance accorded to stare decisis in this jurisprudence.

The history of CALCRIM No. 358 also exposes the selectivity of appellant's heavy reliance on *Bemis*- and *Beagle*-era holdings. In her supplemental brief, appellant focuses on *Bemis* in general, and particularly the statement that "no class of evidence is more subject to abuse" than testimony concerning a defendant's extrajudicial statements. (See ASB 2, 5, 6, 7, 9, 10, 11, 15, 22, 30.) However, *Bemis* and its progeny represented an isolated jurisprudential phase when (1) the consider-with-caution instruction was considered especially important and (2) this Court held the failure to so instruct was prejudicial error. (See, e.g., *Bemis, supra*, 33 Cal.2d at p. 401; *People v. Beagle* (1972) 6 Cal.3d 441, 456.) Cases of that era no more represented an enduring view of the cautionary instruction than did prior cases holding that the instruction stated a "mere commonplace." (See, e.g., *People v. Raber* (1914) 168 Cal. 316, 320.)

Appellant argues that this Court and the Legislature rejected the view of the cautionary instruction as stating a matter of common knowledge.

¹ Appellant cites only one case from the past four decades, *People v. Lopez* (2005) 129 Cal.App.4th 1508, in which a court found prejudicial error arising from a failure to give the consider-with-caution instruction. (ASB 11.) However, in *Lopez* "the defendant was prejudiced by the jury being allowed to consider his invocation of his right to silence. . . . This prejudice was *compounded* by the failure to give the cautionary instructions about oral admissions," (*Id.* at p. 1529, italics added.) Even in *Lopez*, the instructional error was not itself prejudicial—it simply "compounded" prejudice arising from another error.

(ASB 22.) In support, she cites *Bemis*'s statement that to "hold that the instructions required by subdivision 4 [section 2061] state mere commonplaces . . . would be contrary to the clear mandate of the statute and the many recent cases interpreting it." (ASB 22, quoting *Bemis*, *supra*, 33 Cal.2d at p. 400, citations and quotation marks omitted.) As the quotation makes clear, *Bemis* did indeed derive significance from the fact the instruction was statutorily required. However, insofar as *Bemis* relied on section 2061 for its holding that the instruction expressed something more than common sense, that rationale disappeared with the statute's repeal. In fact, to the extent that *Bemis* rested on section 2061, the fact the statute no longer exists shows that the cautionary instruction is no longer needed.

Regardless, just as *Bemis*'s statutory roots are no longer relevant, the enduring strength of *Bemis* is not the issue. The true question concerns the continuing validity of *Beagle*'s holding that the sua sponte duty endures *absent* a statutory foundation.

In our Opening Supplemental Brief we argued that both the cautionary instruction and the sua sponte duty to give it were the result of different historical circumstances. (OSB 2-8.) Specifically, until 1975, trial courts were not required to instruct on the host of witness-credibility factors currently contained in CALCRIM No. 105, CALCRIM No. 226, and other pattern instructions. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [establishing instructional duty]; see also OSB 5-7.)

Appellant argues that the "People's history is incorrect," because for the 25 years prior to *Beagle* "juries were routinely instructed on the factors to consider in assessing witness credibility." (ASB 7-8.) Appellant misses the point. Until *Rincon-Pineda* there was no *guarantee* a jury was instructed on witness credibility at all. Absent a requirement to explain general factors bearing on witness testimony, the only way to ensure the jury viewed evidence of the defendant's extrajudicial statements with

caution was by imposing a sua sponte duty to so instruct. Now, however, directing the jury to view evidence of the defendant's statements with caution is redundant of other required instructions. (See CALCRIM Nos. 105 & 226.) Additionally, the handful of cases cited by appellant are insufficient to show that juries were, in fact, "routinely instructed" on witness credibility during the 25-year period in question. (See ASB 7-8.)

"The inherent capacity of the common law for growth and change is its most significant feature." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394, citation and quotation marks omitted.) Stare decisis is a doctrine of adaptation, not ossification. Over the past 140 years, this Court has adapted its view of the legal principles concerning oral admissions—as well the extent to which the trial court is required to instruct on those principles—to changing circumstances. Historical circumstances have rendered the sua sponte duty a "rule without a reason." (*Rincon-Pineda, supra*, 14 Cal.3d at p. 882.) The sua sponte duty to give the consider-with-caution instruction should be abrogated.

B. Evidence of a Defendant's Unrecorded Extrajudicial Statement Does Not Require a Cautionary Instruction; Our System Places Greater Faith in Jurors

Appellant contends that evidence of the defendant's extrajudicial statements "*requires* careful scrutiny due to its very nature. Since juries will not intuitively recognize this reality, a *sua sponte* instruction is required." (ASB 12.) The argument unduly elevates CALCRIM No. 358.

People v. Najera (2008) 43 Cal.4th 1132, which both parties cite in their supplemental briefs (OSB 9-12; ASB 11-14), describes when a cautionary instruction should be given sua sponte. Pursuant to *Najera*, a cautionary instruction reflects a *legal* principle that the jury—a fact-finding body—is not expected to know. For example, Penal Code section 1111 states that, as a matter of law, accomplice testimony alone cannot support a

conviction. CALCRIM Nos. 334 and 335—stating that a conviction cannot exclusively rest on uncorroborated accomplice testimony—are therefore required sua sponte. (*Najera, supra*, at pp. 1136-1137.) Because an uninstructed jury would be ignorant of this statutory requirement, the accomplice testimony instruction “qualifies as a general principle of law vital to the jury’s consideration of the evidence,” without which the jury “might convict the defendant without finding the corroboration Penal Code section 1111 requires.” (*Id.* at p. 1137, citations omitted; see also *ibid.* [corpus delicti instruction required sua sponte because it expresses a general principle of law].)

In contrast to the accomplice or corpus delicti instructions, the consider-with-caution instruction in CALCRIM No. 358 does not “derive from an extrinsic legal rule.” (See *Najera, supra*, 43 Cal.4th at p. 1138.) Rather, it merely directs the jury how to interpret the facts—“with caution.” (CALCRIM No. 358.) However, telling the factfinder the manner in which it should view the evidence is not the proper subject of a sua sponte duty. (See *Najera, supra*, at pp. 1138-1139 [examples of purely fact-based instructions not subject to sua sponte duty].)

Appellant argues that rescinding the sua sponte duty to instruct with CALCRIM No. 358 would “lead to a weird inconsistency” whereby general instructions on witness credibility are “necessary for the jury’s understanding of the case, but a specific instruction on the defendant’s out of court statements is not.” (ASB 13.) This is not so. CALCRIM No. 358 is “merely a specific application” (*Najera, supra*, 43 Cal.4th at p. 1138) of more general instructions concerning witness credibility and the interpretation of evidence. The instruction is not “vital to a proper consideration of the evidence of by the jury,” such that it must be given sua sponte. (*Id.* at pp. 1138-1139, citation and quotation marks omitted.) It is entirely consistent (not to mention more efficient and less likely to sow

confusion) to require general instructions on witness credibility without specifically instructing on every subcategory of witness testimony.

Appellant's argument is also premised on an unwarranted lack of faith in jurors' intelligence. Appellant contends that because "the jury cannot properly evaluate [evidence of the defendant's unrecorded extrajudicial statements] without the special knowledge that this brand of evidence is subject to abuse, a *sua sponte* instruction is required." (ASB 13; see also ASB 12 ["jurors quite simply do not know that certain classes of evidence are more subject to abuse than others"].) In other words, without an explicit instruction, jurors are insufficiently insightful to understand that a defendant's unrecorded extrajudicial statements should be viewed with caution.

Our system places greater faith in juries than does appellant. "One of the main objects of a jury trial is to secure to parties the judgment of 12 [people] of average intelligence, who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions." (*Dunlop v. United States* (1897) 165 U.S. 486, 499; see also *People v. Coddington* (2000) 23 Cal.4th 529, 594 [courts must credit juries "with intelligence and common sense"].) To the extent that caution is needed in order to consider a given defendant's extrajudicial statement, the obligation primarily derives from the common insight that a defendant's own words can be especially probative. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) However, this straightforward notion is apparent to any reasonable juror. The idea is particularly apparent to a juror instructed on the fallibility of witness testimony, as all jurors are. (See, e.g., CALCRIM Nos. 105 & 226.) Certainly, if the hazards attending evidence of a defendant's extrajudicial statements are as profound as appellant argues, the jury will be aware of them without further instruction.

C. The Sua Sponte Duty to Instruct With CALCRIM No. 358 Exposes Overworked Trial Courts to Unnecessary Appellate Challenges

As is true with respect to other sua sponte instructional duties, requiring the trial court to decide whether CALCRIM No. 358 applies in any given case “opens the door to reversal on appeal, with the ‘blame’ then falling, in hindsight, on the overburdened trial court.” (*People v. Guiuan* (1998) 18 Cal.4th 558, 578 (conc. opn. of Baxter, J.)) This is particularly troublesome in situations where it is unclear whether CALCRIM No. 358 even applies. And that question arises with some frequency—as when it is uncertain whether a defendant’s statements tend to show guilt, or when there is evidence of both inculpatory and exculpatory statements. Although the instruction is intended to benefit the defendant, he or she can remain silent while the trial court makes its decision, then challenge the ruling on appeal. Indeed, that is precisely what appellant did here.

Citing *People v. Slaughter* (2002) 27 Cal.4th 1187, appellant describes this as an “imaginary problem [which] has already been answered by this court.” (ASB 16.) In *Slaughter*, evidence was introduced that the defendant made both inculpatory and exculpatory extrajudicial statements. The trial court gave the consider-with-caution instruction. On appeal, the defendant argued that the court erred, because the jurors might have believed the instruction required them to view the defendant’s inculpatory (not just exculpatory) statements with caution. (*Slaughter, supra*, at pp. 1199-1200.) This Court held any error was harmless. The Court stated “[j]uries understand that this instruction by its terms applies only to statements tending to prove guilt. To the extent a statement is exculpatory it is not an admission to be viewed with caution.” (*Id* at p. 1200.)

Slaughter holds that if a trial court mistakenly gives CALCRIM No. 358, the error is likely harmless. The case does not address the issue of

whether, when extrajudicial statements are ambiguous or subject to varying interpretations, the trial court must provide the cautionary instruction in the first instance. Rather than assure the trial courts that their instructional errors will likely be harmless, it would be better to remove the potential for error by abrogating the sua sponte duty altogether.

Eliminating the sua sponte duty and, at most, requiring CALCRIM No. 358 upon the defendant's request would also be consistent with the instruction's purpose. The witness credibility instructions contained in CALCRIM Nos. 105 and 226 inform the manner in which the jury views *all* witness testimony, whether from the prosecution or defense. Those instructions benefit both parties equally, and are therefore required sua sponte. CALCRIM No. 358, on the other hand, is intended to benefit the defendant *only*. (See *Slaughter, supra*, 27 Cal.4th at p. 1200.) The defendant is affected by CALCRIM No. 358, for better or worse. It should therefore be incumbent on the defendant, not the trial court, to elect or refuse the instruction.

II. CALCRIM NO. 358 IS REDUNDANT

CALCRIM No. 358 is redundant of a host of other instructions, particularly CALCRIM Nos. 105 and 226. (See OSB 16-22.) Appellant incorrectly argues that *Guiuan, supra*, 18 Cal.4th 558 demonstrates otherwise. (ASB 21.)

Prior to *Guiuan*, when an accomplice testified for the prosecution, the trial court was required to sua sponte instruct that the testimony be viewed "with distrust," regardless of the nature of the testimony. In *Guiuan*, the Court clarified that the sua sponte duty to give the cautionary admonition applies only to evidence that is unfavorable to the defendant. (*Guiuan, supra*, 18 Cal.4th at p. 560; see also *People v. Hamilton* (1948) 33 Cal.2d 45, 51; CALCRIM Nos. 334 & 335 [accomplice testimony should be viewed "with caution"].) Appellant argues that "nowhere in *Guiuan* did the

court even remotely suggest that the general instruction on witness credibility could substitute for the required cautionary instruction.” (ASB 21.) By parity of reasoning, appellant maintains an additional, sua sponte cautionary instruction is also required for the defendant’s extrajudicial statements, despite the general witness credibility instructions. (ASB 21.)

Guiuan does not assist appellant. First, the instructional duty in that case was based on a statutory requirement creating an extrinsic legal principle discussed *ante*. Specifically, Penal Code section 1111 states that “[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated.” “The requirement of section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that such evidence is to be regarded as untrustworthy.” (*Guiuan, supra*, 18 Cal.4th at p. 566, citation and quotation marks omitted.)

The Legislature has not expressed the same lack of faith in evidence of a defendant’s unrecorded extrajudicial statements. In fact, it has indicated otherwise. The consider-with-caution instruction contained in CALCRIM No. 358 and the accomplice testimony instruction originally arose from the same statutory source, section 2061. (§ 2061, subd. (4).) Although the danger of conviction based on accomplice testimony remains a distinct legislative concern (Pen. Code, § 1111), the evidence described by CALCRIM No. 358 no longer is the subject of a statute affecting the jury’s interpretation of the evidence. This distinction is determinative.

Second, the accomplice testimony instruction reflects different, more pronounced concerns. “[I]t is the accomplice’s motive to testify falsely in return for leniency that underlies the close scrutiny given accomplice testimony offered against a defendant.” (*Guiuan, supra*, 18 Cal.4th at p. 567, citation and quotation marks omitted.) Evidence of a defendant’s extrajudicial statements does not necessarily raise the same issues.

Third, Justice Baxter authored a concurrence in *Guiuan*, joined by Justice Chin, that supports the People’s position concerning CALCRIM No. 358:

I write separately only to indicate my uncertainty of the wisdom behind the requirement that the giving of an accomplice cautionary instruction . . . be made obligatory upon our trial courts in the first instance. . . . [S]eparate and apart from the [accomplice testimony cautionary instruction], juries are more than adequately apprised of the pitfalls of accomplice testimony by a veritable slew of other standard jury instructions, including both the general witness credibility instructions and the extensive series of instructions given to implement the statutory accomplice corroboration requirement.

(*Guiuan, supra*, 18 Cal.4th at pp. 577-578 (conc. opn. of Baxter, J.), citation and quotation marks omitted.) However, because the issue was not before the Court, the concurrence “reserve[d] . . . concerns and possible objection to the sua sponte nature of the instructional requirement for another day.” (*Id.* at p. 578.) The same concerns apply to current discussion of the sua sponte duty to give CALCRIM No. 358.

Although, as recognized in our opening supplemental brief, CALCRIM No. 358 is meant to draw the jury’s attention to a witness’s potentially faulty memory or bias against the defendant, such concerns are not explicitly reflected in the “consider with caution” text of the instruction. (ASB 19.) In response, appellant suggests CALCRIM No. 358 be significantly expanded to state that “witnesses having the best motives are generally unable to state the exact language of an oral statement, and . . . no other type of testimony affords the same opportunity for witnesses to intentionally misrepresent what was actually said.” (ASB 15.)

Even weighted with that language, the instruction would still be redundant of the general witness credibility instructions, as would be any similar directive. CALCRIM Nos. 105 and 226, for example, already tell the jury to consider the witness’s ability to recall the subject of his or her

testimony, as well as any motive to lie. (See also *People v. Harrison* (2005) 35 Cal.4th 208, 253-254 [in light of general instruction on witness credibility, additional instruction concerning potentially biased witness was redundant].) In addition, appellant's proposed instruction would be argumentative. It would impermissibly "invite the jury to draw inferences favorable to the defendant from specified evidence on a disputed question of fact." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

Moreover, concerns regarding the fallibility of a witness's perception and memory, and a witness's ability to lie to the defendant's detriment, apply to almost all percipient testimony. Although the *effect* of evidence concerning a defendant's inculpatory statements might be particularly damaging, reliability issues are not unique to that type of evidence. Because appellant's proposed instruction suggestively selects one class of evidence for additional caution—when the concerns animating that caution apply to almost all percipient witness testimony—it is doubly argumentative.

III. SHOULD THIS COURT REPEAL THE SUA SPONTE DUTY TO INSTRUCT WITH CALCRIM NO. 358, THE RULE SHOULD OPERATE RETROACTIVELY

When the Court abrogates a judicially-created instructional requirement, it is "customary" for the change to "be applied to the instant defendant himself, and [to be] otherwise fully retroactive." (*People v. Birks* (1998) 19 Cal.4th 108, 136, citation omitted; see also OSB 24-27.)

Nonetheless, appellant argues any decision to abrogate the sua duty to instruct on oral admissions of the defendant should apply only to future cases. (ASB 26-29.) Appellant asserts, in essence, that she detrimentally relied on the trial court's sua sponte duty to give the cautionary instruction. (ASB 27, ASB 28 ["detrimentally rely"], 29 [appellant "was fully entitled to rely on the existing rule"].)

Appellant's claim of reliance is belied by her utter failure to request CALCRIM No. 358 or remind the court of the cautionary instruction. (See 2 CT 239-242 [appellant's motions in limine, with no discussion of CALCRIM No. 358]; 2 RT 477-478, 507-509 [jury instruction discussions between court and parties].) Nor did appellant acquire a cognizable reliance interest in the existing rule. (See *Birks, supra*, 19 Cal.4th at pp. 136-137 ["When he committed his criminal conduct, defendant acquired no cognizable reliance interest [citation] in escaping conviction on the pleadings by the means set forth in *Geiger*"].) With respect to the jury's findings, appellant had the same incentive to assert reasonable doubt as to her inculpatory extrajudicial statements, whether or not the trial court read the cautionary instruction. (See also OSB 26-27.)

IV. ELIMINATING THE SUA SPONTE DUTY TO INSTRUCT WITH CALCRIM NO. 358 DOES NOT IMPLICATE EQUAL PROTECTION

Appellant maintains that "an equal protection problem will arise" should this Court rescind the sua sponte duty to instruct with CALCRIM No. 358. (ASB 32.) Appellant's argument arises from the recent Legislative mandate that when a juvenile murder suspect is interrogated in police custody, unrecorded evidence of the interrogation must be accompanied by the instruction: "Consider with caution any statement tending to show defendant's guilt made by (him/her) during [the interrogation]." (Use Note to CALCRIM No. 358 (Spring 2014 ed.) p. 160; see also Pen. Code, § 859.5, subd. (e)(3).) Appellant reasons that "[a]s things presently stand, all criminal defendants are treated equally with respect to their entitlement to a *sua sponte* instruction pursuant to CALCRIM No. 358." (ASB 31-32.) Should CALCRIM No. 358 no longer be required in response to evidence of a defendant's inculpatory statements, appellant continues, only juveniles will receive the benefit of the cautionary

instruction. Appellant claims this result would violate the right of adult criminal defendants to the equal protection of the laws. (ASB 31-34.)

Appellant's argument fails. "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." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, citations, quotation marks, and italics omitted.) The issue is not whether the groups are "similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*Id.* at pp. 1199-1200, citations and quotation marks omitted.)

Where custodial interrogation is concerned, courts must not "blind themselves to the differences between minors and adults." (*People v. Lessie* (2010) 47 Cal.4th 1152, 1167; see also *In re Eric J.* (1979) 25 Cal.3d 522, 530 [adult and juvenile criminals not similarly situated].) "[A] juvenile subject of police interrogation cannot be compared to an adult subject," in part because "events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (*J.D.B. v. North Carolina* (2011) ___ U.S. ___ [131 S.Ct. 2394, 2403-2404], citations and quotation marks omitted.) Inculpatory evidence emerging from a juvenile interrogation is potentially less reliable. Compared to adult defendants, juveniles against whom this evidence is used at trial have a greater interest in ensuring the jury views it with caution. Both generally and in these specific circumstances, juvenile subjects of interrogation are not similarly situated to adult defendants.

Appellant also fails to satisfy the second prong of the equal protection test, that the classification adopted by the state and the resulting difference in treatment of the two groups bear no rational relationship to a legitimate state purpose. (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.) A "classification that neither proceeds along suspect lines nor infringes

fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.) To the extent that equal protection is implicated at all, a rational basis exists for sua sponte instructing a jury to view evidence of juvenile interrogations with caution, but not imposing the same duty concerning evidence of adults’ extrajudicial statements. Reliability issues that attend evidence of juvenile interrogations do not necessarily apply to the evidence described in CALCRIM No. 358. (See *J.D.B.*, *supra*, ___ U.S. ___ [131 S.Ct. at pp. 2402-2408]; *Lessie*, *supra*, 47 Cal.4th at pp. 1165-1167.) It is rational and understandable for the Legislature to impose a mandatory cautionary instruction for the former type of evidence, but not the latter.

Finally, even assuming appellant is correct and Penal Code section 859.5 creates an equal protection problem, the remedy is not, as appellant argues, to maintain *Beagle*’s sua sponte instructional duty. Rather, the proper remedy would be for this Court hold that the Penal Code section 859.5 admonition only be given upon request. Then, minors and adults each would receive cautionary instructions in the same way. Again, the Legislature repealed the law formerly providing for the cautionary instruction in criminal cases generally, indicating its intent that the instruction not be required sua sponte. (§ 2061.) If equal protection truly stood as a barrier to abrogating the *Beagle* instructional duty, the remedy most consistent with legislative intent would be for the section 859.5 instruction to be available on request.

Appellant’s equal protection concerns do not justify maintaining a sua sponte obligation to instruct with CALCRIM No. 358. This is particularly so in light of the countervailing interests already detailed.

CONCLUSION

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

Dated: June 20, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL REPLY BRIEF uses a 13 point Times New Roman font and contains 4,287 words.

Dated: June 20, 2014

KAMALA D. HARRIS
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A handwritten signature in black ink, appearing to read 'LFADEM', with a stylized, somewhat scribbled appearance.

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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 June 20, 2014, I served the attached **SUPPLEMENTAL REPLY 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
Santa Clara, CA 95050
(2 copies)

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

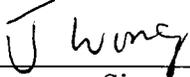
Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Superior Court of California
County of Santa Clara
Criminal Division - Hall of Justice
Attention: Criminal Clerk's Office
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 June 20, 2014, at San Francisco, California.

J. Wong

Declarant



Signature