IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. DANIEL ANDREW LINTON, Defendant and Appellant.	No. CR 60158 (Riverside County) California Supreme Court No. S080054

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
SUPERIOR COURT OF RIVERSIDE COUNTY
THE HONORABLE GORDON R. BURKHART, JUDGE PRESIDING

APPELLANT DANIEL ANDREW LINTON'S REPLY BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATE STATUTES

COURT RULES

JURY INSTRUCTIONS

OTHER AUTHORITIES

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APPELLANT'S REPLY BRIEF

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GUILT PHASE ISSUES

I.

THE TRIAL COURT IMPAIRED THE JURY'S ABILITY TO ASSESS THE VOLUNTARINESS OF LINTON'S CONFESSION

A. Introduction

The centerpiece of Linton's defense was that official overreaching generated a coerced confession which was both involuntary and unreliable. The only way to fairly facilitate that defense was to educate the jury about the recognized phenomenon of false confessions and enlighten the jury about the tactics used by officials to elicit Linton's confession. Respondent maintains that officials did not overreach when they interrogated Linton and that the court did not abuse its discretion when it refused to admit expert testimony about false confessions or when it restricted cross-examination of the District Attorney and

lead police officer about their interrogation tactics. To the contrary, Linton's statement to officials should have been excluded not only because it was coerced, but also because the circumstances under which it was extracted render it unreliable and potentially false in whole or in part. For that reason, the trial court erred not only in admitting the statement but also in depriving the jury of the tools necessary to assess its efficacy.

B. The Court Admitted Statements Obtained Through Official Overreaching.

1. Summary of Reply Argument

In his opening brief, Linton established that the results of the authorities' interrogations of him on November 29 and 30, 1994 should have been suppressed. Linton traced the history of the interrogations, beginning with purportedly informal questioning initiated in his bedroom by Detective Stotz and Deputy District Attorney Mitchell around 8:15 p.m. on November 29, the night of the homicide, and continuing through the following day until the 4:00 p.m., when he confessed to a prior sexually-motivated assault on Melissa that may or may not have occurred or may not have occurred as recounted. The evidence about the events of this 20-hour period confirms that the statements extracted from Linton were obtained in an atmosphere of coercion and in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and that the trial court erred in denying the defense motion to suppress them. (AOB 53-106)

Respondent attempts to segment the interrogations based on a constricted premise as to what constitutes "custody", irrespective of whether or not – and what – *Miranda* warnings were given, and what – and what not – constitutes a coercive atmosphere apt to result in a false confession. (RB 27-62) Linton will address each response separately but cautions that each part of the interrogation must be viewed as part of the whole to make a fair "totality-of-the-circumstances"

assessment. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225-226; *People v. Moore* (2011) 51 Cal.4th 386, 395) "[T]he ultimate issue of 'voluntariness' is a legal question requiring independent federal determination. [Citations]" (*Miller v. Fenton* (1985) 474 U.S. 104, 112; *People v. Boyette* (2002) 29 Cal.4th 381, 411)

2. The District Attorney and the Police Conducted a Custodial Interrogation of Linton in His Bedroom on the Evening of November 29.

Linton argued in his opening brief that despite their assurances to the contrary, the first formal "interview" of him at 8:15 p.m. on November 29, 1994 by Deputy District Attorney William Mitchell and Detective Glenn Stotz was a custodial interrogation conducted without *Miranda* warnings and should have been suppressed. By that evening, it will be recalled, the authorities already had focused on Linton as a suspect, interrogated him in the coercive atmosphere of his bedroom, utilized a plethora of interrogation techniques including false promises of leniency encompassing their "water-under-the-bridge" lie and the threat of a polygraph test, and tape-recorded the interrogation (albeit resulting in a partial, poor-quality tape). The results of this interrogation were extremely prejudicial to the defense, because they formed the context and basis for the prosecution's contention that Linton had attempted to rape Melissa two weeks, or two months, before the homicide. (AOB 61-67)

Respondent insists that either Linton forfeited this issue, or was not in custody, and/or any error was harmless. (RB 36-41, citing 9RT 1182) Respondent is mistaken.

a. The Issue Is Preserved

Contrary to respondent's contention, the issue is not forfeited. While defense counsel initially took the position that Linton was not in custody the evening of November 29, 1994, the question as to whether the questioning of him

that night was custodial is meritorious and should be reached. Custody for purposes of *Miranda* is an objective condition. (*J.D.B. v. North Carolina* (2011) 564 U.S. ___; 131 S.Ct. 2394, 2402; *People v. Morse* (1969) 70 Cal.2d 711, 722)

First, not all claims of error are prohibited in the absence of a timely objection in the trial court. A party is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights. (Penal Code, §1259; *People v. Brendlin* (2008) 45 Cal.4th 262, 267, fn. 1 [issue of statewide importance raised by prosecution for first time on appeal]; *People v. Vera* (1998) 15 Cal.4th 269, 277 [constitutional issue]; *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial]. The heart of Linton's defense is the denial of his right to due process, fundamental fairness, and not to self-incriminate, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the California Constitution. These rights are equally fundamental as those implicated in *Brendlin, Vera, Saunders* and *Holmes*, if not more so.

Second, if the issue otherwise is waived, trial counsel was ineffective in not raising it. "Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] . . . [T]he right entitles the defendant not to some bare assistance but rather to effective assistance. [Citations.] . . ." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, citing *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 and *People v. Pope* (1979) 23 Cal.3d 412, 422.) In order to prove ineffective assistance, the defendant must demonstrate both that counsel's performance was deficient and that this deficiency caused prejudicial error. (*Ledesma, supra*, at pp. 216-217; *Strickland, supra,* at pp. 684-685.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, at p. 694.)

It is often necessary to establish such ineffective assistance by means of a separate action in which additional evidence is presented pursuant to petition for writ of habeas corpus. (*People v. Pope, supra*, 23 Cal.3d at p. 422.) The California Supreme Court stressed "'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simple could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations]." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

In *People v. Plager* (1987) 196 Cal.App.3d 1537, the court reversed on direct appeal, holding that, "A criminal defense attorney has a duty to carefully and diligently investigate all defenses of fact and of law that may be available to his client; and should promptly advise him of his rights and take all action necessary to preserve them. If counsel's failure to perform these obligations results in the withdrawal of a potentially meritorious defense, defendant has not had the assistance to which he is entitled. [Citation] " 'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission' [Citation]" or where 'there simply could be no satisfactory explanation' therefor [Citation]." (*Plager, supra*, at p. 1543, citing *inter alia, People v. Pope, supra*, 23 Cal.3d 424-425.)

In this case, a habeas petition is not necessary because there was no tactical reason for the defense not to object to admission of Linton's statement and all the

evidence regarding the issue is in the record.[1] It is evident that defense counsel sought to exclude Linton's entire statement to the police after the lengthy, protracted interrogation. Yet despite the coercive atmosphere of that first meeting with the police and district attorney in his bedroom, counsel did not take the additional step of objecting to it as the foundation of Linton's statement that continued throughout the following day. (See e.g., *People v. Jones* (1994) 24 Cal.App.4th 1780, 1783, fn. 5 ["It is not necessary to resolve that issue in this case, because the absence of any possible tactical purpose for counsel's silence on the double jeopardy issue, on the facts before us, would require that we reach the double jeopardy issue on a theory of ineffective assistance of trial counsel in any event. [Citation]"]; *People v. Nation* (1980) 26 Cal.3d 169, 181 ["trial counsel's failure to obtain an adjudication of the admissibility of the critical identification evidence against his client deprived the defendant of constitutionally adequate assistance," reversed on direct appeal]; *People v. Plager, supra*, 242 Cal.App.3d at p. 1543 ["[T]his is one of those rare cases in which the appellate record demonstrates on its face that counsel's assistance was not competent and that defendant was prejudiced by that incompetence. ...There could have been no valid reason, tactical or otherwise, for trial counsel to have advised defendant to admit the prior felony allegations which would and did subject him to 10 additional years of imprisonment."].)

Accordingly, this Court can and should reach the issue as to whether the interrogation of Linton in his bedroom was conducted while he was in custody, in violation of his rights to due process, fundamental fairness, and against self-incrimination, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the California Constitution.

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[1]If this Court should decide that the issue of whether Linton was in custody the evening of November 29 needs to be raised on habeas corpus, it is respectfully requested that the Court decline to reach the issue on direct appeal, without prejudice to raising it in a subsequent habeas corpus proceeding.

b. Linton Was In Custody.

Respondent next urges that Linton was not in custody when he was questioned by the police and district attorney the evening of November 29. In support of that view, respondent takes the position that the authorities did not tell Linton he was under arrest or was not free to leave, were invited by Linton into his home and bedroom for an "interview", and obtained no inculpatory statements from Linton. (RB 37-40) Respondent's characterization ignores the reality of the situation and the totality of the circumstances surrounding the interrogation. (*People v. Moore* (2011) 51 Cal.4th 386, 395)

First, a formal arrest is not the be-all and end-all as to an inquiry whether an interrogation is custodial. If that were the case, all the police would need to do in any given case is repeat the mantra that it did not consider the suspect to be in custody and tell the suspect he did not have to talk to them and was free to leave. "When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. [Citation] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present. [Citation]" (*People v. Moore, supra,* 51 Cal.4th at p. 395, citing *People v. Boyer* (1989) 48 Cal.3d 247, 271)

As *Miranda* "does not apply to noncustodial interrogations. . . 'Police recast what would otherwise be a custodial interrogation as a non-custodial interview by telling the suspect that he is not under arrest and that he is free to leave—sometimes even after detectives have transported the suspect to the stationhouse with the express purpose of questioning him inside the interrogation room and eliciting incriminating information.' Richard A. Leo, 'Questioning the Relevance of Miranda in the Twenty–First Century,' 99 *Mich. L.Rev.* 1000, 1017 (2001) One police manual advises that 'if ... the subject appears to be

uncooperative and not likely to waive [his *Miranda* rights], consider taking the coerciveness (i.e., the 'custody') out of the interrogation by simply informing him that he is not under arrest ..., when practical to do so under the circumstances, and interview the subject without a *Miranda* admonishment and waiver." (*United States v. Slaight* (7th Cir. 2010) 620 F.3d 816, 817)

The circumstances of the authorities' interview of Linton in his bedroom encompass every indicia of a *de facto* custodial interrogation. Detective Stotz's own testimony establishes that he already was focused on Linton as a suspect. (*Moore, supra*, 51 Cal.4th at p. 395; *Boyer, supra*, 48 Cal.3d at p. 271) As respondent points out, Detective Stotz claimed he was told by a 13-year-old neighbor that Melissa told her two to three weeks before the murder that Linton tried to rape and choke her. (RB 62, 1SCT 13-14; 5RT 613) After hearing this rumor, Stotz asked Linton if he knew anything about an incident in which Melissa had been attacked in her bedroom in the middle of the night. Linton initially denied any knowledge of that attack. However, he described an incident two or three weeks earlier, in which he woke up with only his jeans on around midnight, in his front yard. He thought he might have been sleepwalking. (18RT 2752-2755)

Stotz asked to look at Linton's hands so see if there were any injuries. Linton appeared visibly nervous. His arms and hands were shaking and his palms were extremely sweaty. There was a scratch mark and a gouge mark on his lower right forearm. When asked about the scratch marks, Linton said they probably resulted from playing with the cat earlier that day. Linton walked back inside the house. (18RT 2754-2757) Based on these facts, it is disingenuous to claim the police did not think Linton was involved in the homicide.

Moreover, while the police and district attorney told Linton he was not under arrest and did not have to talk to them (1SCT 67), by respondent's own assessment they immediately launched into an interrogation that plainly was focused on obtaining evidence that he was involved in the homicide and

"question[ed] Linton about his whereabouts that day, how well he knew Melissa, his scratches, ... whether he still had the Middletons' house keys...[,] the alleged prior attack on Melissa, whether he killed Melissa, and whether he would be willing to take a polygraph examination. (1SCT 67-88)" (RB 38)

The interrogation was lengthy, particularly given the late hour of the evening. (*Moore, supra*, 51 Cal.4th at p. 395; *Boyer, supra*, 48 Cal.3d at p. 271) The recording of it began approximately 18 minutes before the transcription commenced and the transcription totaled eight pages with frequent gaps where the tape was unintelligible. (2CT468-476; Def. Exh. G-M)

The interrogation occurred in an intimidating atmosphere, contrary to respondent's characterization. (*Moore, supra*, 51 Cal.4th at p. 395; *Boyer, supra*, 48 Cal.3d at p. 271) In the opening brief, Linton explained at length why it was coercive for the authorities to interrogate him in the privacy of his bedroom the night of the homicide. Linton discussed the recent *United States v. Craighead* (9th Cir. 2008) 539 F.2d 1073, in which the Ninth Circuit found that an interrogation by law enforcement officers in a suspect's own home can be such a police-dominated atmosphere that the interrogation becomes custodial in nature and requires *Miranda* warnings. (AOB 62-64, citing *Craighead, supra,* 539 F.2d at p. 1077, 1082-1089, citing *Dickerson v. United States* (2000) 530 U.S. 428, 444; *Thompson v. Keohane* (1995) 516 U.S. 99, 112; *Berkemer v. McCarty* (1984) 468 U.S. 420, 442, fn. 35, and cited by *United States v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 883 [question of custodial interrogation at defendant's place of work resolved against defendant but acknowledged to be a "close case."].)

Respondent's only answer is an attempt to distinguish *Craighead* based on purportedly more coercive official behavior. In support of this premise, respondent cites as a difference the fact that Craighead was shuttled by eight armed officers to a storage room in the back of his home, one of the uniformed officers leaned against the closed door so as to block Craighead's exit, and Craighead's boss was present for support. (RB 39-40, citing *Craighead, supra*, 539 F.2d at pp. 1078-

1089) Respondent's approach ignores the fact that in this area of the law each case is *sui generis* and that it is the particular mix of factors that render one un-*Mirandized* situation noncustodial and other one custodial. "The determination of whether an in-home interrogation was custodial 'is necessarily fact intensive.' [Citation]" based on the totality of the circumstances. (*Craighead,* supra, at 1082, 1084, citing *United States v. Griffin*, (10th Cir. 1993) 7 F.3d 1512, 1518, and *Orozco v. Texas* (1969) 394 U.S. 324, 326.)

Here, respondent touts the differences in *Craighead*, but there are other distinctions that render the interrogation of Linton more likely to be viewed as custodial. Linton was substantially younger and had less life experience than Craighead. While Craighead's age and life experience are not directly addressed, he was an electronic warfare technician in the U.S. Air Force and his own home was searched, which means that he probably was career military and substantially older than Linton, both in actual years and in his station in life. (*Craighead*, supra, at p. 1077)

By contrast, Linton was 20 years old, still lived with his parents, held no job and did not even have a driver's license. He was biologically 20 years old, but his life was that of an unworldly and inexperienced teenager. (See re youth and immaturity, *Haley v. Ohio* (1948) 332 U.S. 596, 599-601; *Reck v. Pate* (1961) 367 U.S. 433, 441-442 [defendant 19 and mentally retarded]; *Doody v. Schriro* (9th Cir. 2008) 548 F.3d 847, 866-867 [defendant age 17, citing *United States ex. rel. Lewis v. Henderson* (2nd Cir. 1975) 520 F.2d 896, 901, "noting that the twenty-two-year-old suspect had 'little prior experience with police methods, thus rendering him particularly susceptible to police pressure'"]; *J.D.B . v. North Carolina, supra*, 564 U.S. at p. ___; 131 S.Ct. at p. 2394.)

Thus the fact that in *Craighead* there were more law enforcement personnel involved or that his supervisor was present does not render Craighead's interrogation custodial and Linton's noncustodial. Rather, when all the factors are evaluated together and compared, the two situations encompass equally

overbearing official conduct and both are custodial. (*Craighead,* supra, at 1082, 1084 re totality of the circumstances, citing *United States v. Griffin*, (10th Cir. 1993) 7 F.3d 1512, 1518, and *Orozco v. Texas* (1969) 394 U.S. 324, 326.)

c. Linton's Statement Describing the Prior Incident Prejudiced His Defense.

Next, respondent insists that none of Linton's statements the evening of November 29 were prejudicial and that Linton did not inculpate himself when he discussed the incident in which he woke up outside late on night, wearing only jeans and underwear. (RB 40-41) The facts plainly refute such an analysis. If respondent were correct, Linton's admission about the prior incident would have no bearing on his case, but that is not so. The prosecution case turned on whether the jury believed that Linton had attacked Melissa on a prior occasion. In closing argument the prosecutor told the jury, "[Y]ou may consider the evidence of the prior occasion to . . . prove[] a motive for the crime and his intent in going in." (30RT 4622)

Prior to the November 29 interrogation, the police had nothing to go on other than the word of a neighborhood girl who was not a witness and untested as to her credibility or her accuracy. By obtaining Linton's statement that he found himself outside and partially clothed a few weeks (or months) before the strangling, the prosecution was able to open the door to what turned out to be the cornerstone of its case, bootstrapping his intent on the prior occasion to establish intent to commit sexual assault when Melissa was killed. Thus the results of the interrogation were extremely prejudicial to the defense.

3. The District Attorney and the Police Promised Linton on the Evening of November 29 That the Prior Incident Was "Water Under the Bridge," Vitiating His *Miranda* Waiver on the Morning of November 30.

Linton argued in the opening brief that the false assurance by Detective Stotz and District Attorney Mitchell on the evening of November 29 that any prior

sexual encounter between Linton and Melissa was "water under the bridge" vitiated his waiver of *Miranda* rights in the patrol car at about 8:45 a.m. the following morning. Linton pointed out that the waiver was not knowing, because Linton was misinformed and proceeding on the misinformation that if he waived his rights and talked about the prior incident, he could not get into trouble for it, and not intelligent, because Linton was misled into not fully comprehending the consequences of talking to the authorities about the prior incident. (AOB 68-69)

Respondent counters that either the issue is forfeited, or Linton waived his *Miranda* rights in the police car the morning of November 29 and then he confessed to strangling Melissa. (RB 40-43) Respondent's reasoning is fatally flawed.

a. The Issue is Preserved.

Respondent maintains once again that this issue is forfeited, this time because Linton did not argue below that the authorities' false promises of leniency rendered his *Miranda* waiver invalid. (RB 41) For the same reasons set forth in argument B.1. above, this issue is preserved and should be reached.

b. The Waiver Was Not Knowing, Not Intelligent, and Not Voluntary.

Respondent argues that Linton knowingly and intelligently waived his *Miranda* rights on the morning of November 30. The success of this proposition hinges on the premise that the evening of November 29 was of no import and the morning of November 30 occurred in a vacuum. Of course, it did not, as respondent's own citations to the record confirm. Linton purported to waive his *Miranda* rights and told Detective Stotz how he strangled Melissa. (RB 42, citing 5SCT 146-149) This fact is not in dispute. Rather, his mental state was the crux

of this case, and Stotz immediately used "I told you last night, that's water under the bridge[]" to build a case that his mental state was to kill Melissa in the course of a sexual assault. (RB 42, citing 5SCT 150) And later during that same discussion, Stotz assured Linton again, "No that's [prior incident] got nothing to do with it." (5SCT 8-9)

Given this sequence of events, the events of the evening of November 29 the morning of November 30 are intertwined. They are, in reality, one interrogation interrupted by a nights' sleep. (5SCT 8-9)

4. The District Attorney, Police and Prosecution Psychotherapist Worked Linton Over All Day November 30, Until They Overbore His Will and Extracted an Involuntary Confession From Him Late in the Afternoon.

Linton set forth in the opening brief the litany of coercive overreaching interrogation techniques used by the authorities to extract a confession from him shortly after 4:00 p.m. on November 30. (AOB 74-89) Despite his denial at least 50 times that he did not kill Melissa in the course of an attempted sexual assault, the authorities persisted until late in the afternoon, when they finally dragged out an admission that he committed a prior sexually-motivated attack on Melissa. The interrogation reads like a textbook in disapproved overreaching techniques, including incessant repetition of the same question about sexual motivation at the time of the strangling, false promises of leniency, introduction of a district attorney into the interrogation room, introduction of a clinical psychologist into the interrogation room, and introduction of a second police officer as the "good cop." (AOB 73-89; see *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17, 7 [promises of leniency]; see also *Bram v. United States* (1897) 168 U.S. 532, 542-543, cited with approval in *Brady v. United States* (1970) 397 U.S. 742, 753-754; *Doody v. Ryan* (9th Cir. 2011) 649 F.3d 986, 1008-1009 ["tag team" of

interrogators and sleep-deprived suspect].) Ultimately, after this unsophisticated 20 year old young man still maintained his innocence amid a bombardment of accusations by all of these much-older adult professionals, Detective Stotz finally wore him down and wrung out a confession that Linton "tried to reap [sic] her ... two months ago... whatever ... whenever." (4CT 881-884)

Respondent urges that the foregoing scenario resulted in a voluntary confession because Linton was advised of and waived his *Miranda* rights, was interviewed for less than two and one half hours over the course of one day, was offered breaks to use the bathroom and eat or drink, was not restrained, was questioned in a "low-key" manner, was of normal intelligence, and was not cognitively impaired. (RB 43-59) Respondent's depiction of the evidence does not persuade.

a. False Promise of Leniency

First, respondent contends that by the time Detective Stotz promised leniency, Linton already had confessed to strangling Melissa in the bedroom. (RB 41-49) This view of the interrogation makes sense only if the totality of events on November 29 and 30 are ignored. Both Stotz and Mitchell assured Linton on November 29 that any prior interaction with Melissa was "water under the bridge" and that he was not going to get in trouble for it. Even on November 30, after Linton said, "That's until today," Stotz said, "No, that's got nothing to do with it." (5SCT 150-151) This objectively was a promise that the prior incident was not in issue, something that easily could have misled an older, more sophisticated suspect, let alone someone of Linton's age and life experience. "A confession is involuntary and therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.]" (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, 147 Cal.Rptr. 172, 580 P.2d 672, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17; see also *Bram v. United*

States (1897) 168 U.S. 532, 542-543, cited with approval in *Brady v. United States* (1970) 397 U.S. 742, 753-754.)

Respondent insists that even if the assurances of the authorities were promises of leniency or benefit, they did not motivate Linton to confess to a prior attempted rape. (RB 47-49) No matter how respondent twists the facts, this characterization of the evidence does not transform the interrogation into one where Linton was not tricked by the police and prosecutors. Detective Stotz and District Attorney Mitchell assured Linton both on November 29 and 30 that any prior sexual assault on Melissa would be "water under the bridge" and he would not get in trouble for it. (5SCT 8-9, 63, 86) Stotz obtained Linton's confession for the strangling death of Melissa almost immediately the morning of November 30, but he and his team had to work Linton over for "more than six hours" before Linton "confessed" to the prior offense. (4CT 881-884) Even so, the authorities never were able to persuade Linton to confess to a sexual assault in the course of the strangling. (See AOB 75-89, citing *inter alia*, 4SCT 852-853, 863, 871-872, 881-884; 5SCT 124-125)

The Court's decision in *People v. Davis* (2009) 46 Cal.4th 539, cited by respondent, does not apply to this situation. (See RB 47) The defendant in *Davis* was Richard Allen Davis, who kidnapped and killed 12-year-old Polly Klaas during a lewd act, in a notorious 1993 crime that was publicized nationwide and spurred enactment of California's "Three Strikes" Law in the mid-1990's to remove repeat violent offenders from society and prevent them from committing heinous crimes thereafter. At the time he killed Klaas, Davis was 39 years old and had committed multiple kidnappings and residential burglaries, some accompanied by probable attempted sexual assaults. (*Davis, supra*, at p. 551, 559-560, 585) He was in the words of this Court, "no stranger to the criminal justice system and had fully waived his *Miranda* rights on previous occasions, including just six weeks earlier. . ." (*Id.* at p. 586) Under these circumstances the Court correctly found

that "his *Miranda* waiver at the beginning of the . . . interrogation was voluntary, knowing and intelligent." (Id. at p. 586)

There simply is no comparison between the older sophisticated Davis and Linton, who had no experience in the criminal justice system and was more vulnerable to coercive techniques. (*Stein v. New York* (1953) 346 U.S. 165, 185-186; *Doody v. Schriro, supra*, 548 U.S. at p. 867; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28.)

Moreover, Linton may have possessed normal intelligence but he had a history of learning disabilities and had been in special education classes in elementary school (5SCT 96; RT 1004-1006), making him more vulnerable to coercive interrogation techniques. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 286 [defendant of low average to average intelligence]; uneducated (*Arizona v. Fulminante, supra*) 499 U.S. 279, 286 [defendant dropped out of school in the fourth grade]; *Clewis v. Texas* (1967) 386 U.S. 707, 713; *Ashcraft v. Tennessee,* 322 U.S. at pp. 144, 148, 153-154 [defendant had a grade school education]; and see *Stawicki v. Israel* (7th Cir., 1985) 778 F.2d 380, 382-384.) His history of mental health issues also made him susceptible to coercion. (5SCT 97, 112-113, 232; RT 943-944, 964-968; 9RT 1094-1095) (*Greenwald v. Wisconsin* (1967) 390 U.S. 519, 520-521 (per curiam); *United States v. Hack* (10th Cir. 1986) 782 F.2d 862, 866; *Fikes v. Alabama* (1957) 352 U.S. 191, 196.)

b. Long Interrogation

Second, respondent tries to minimize of the length of the interrogation. (RB 49-52) Respondent's own characterization of the evidence is unconvincing. In truth, various members of the prosecution team, in various combinations, questioned Linton from 8:45 a.m. to 4:00 p.m. on November 30. (See AOB 72-89) The fact that he was given breaks did not obviate the fact that he knew and admitted killing Melissa, and hanging over him was the prospect that the authorities were going to recommence the interrogation at each interval.

In addition, respondent claims that, "The questioning during the interviews was low key, not aggressive." (See RB 50, citing People's Exhs. 1 and 2 in [Opposition to] Suppression Motion) This sounds like a self-serving and inaccurate portrayal of the interrogation atmosphere as heard on tape. (See Peo. Exh. 3; Def. Exh. C) Even if it were not, "being polite to a suspect questioned in a police station and telling him repeatedly that he's free to end the questioning and leave do not create a safe harbor for police who would prefer to give *Miranda* warnings after the suspect has confessed rather than before. [Citation]" (*United States v. Slaight, supra,* 620 F.3d at p. 821, citing *Craighead, supra*, 539 F.3d at p. 1080.)

c. Overreaching Tactics

Third, respondent posits that Detective Stotz and Sergeant Rodriguez did not employ the "good cop, bad cop" technique. (RB 52-53) This ignores the record. At 3:45 p.m., Sergeant Rodriguez joined Detectives Stotz and Lynn. (5SCT 220; 4CT 875; 5RT 590-591) Stotz and Lynn had kept Rodriguez apprised during the day. (9RT 1117-1119, 1124-1125, 1138-1141) At this point, Stotz became a little more aggressive in his questioning while Rodriguez was gentler: (5SCT 220-232; 6RT 775-776) As Stotz continued to question Linton more aggressively, Rodriguez soothed: "You know, Daniel, what ... we're doing now is you've got all this stuff that's in your mind and I know, Detective Stotz knows, and you know you just want to get it off your chest... (5SCT 232) Stotz told Linton, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way." (9RT 1147-1148)

Fourth, respondent suggests that Dr. Rath was not brought in by the prosecution to obtain admissions of a sexual motivation. (RB 54, 56) This is misleading. Dr. Rath was retained to interview Linton and perform a psychological evaluation. Rath understood that the purpose of the interview was to determine Linton's mental functioning and gather evidence based on Linton's

answers. He also knew that the district attorney was interested in an admission Linton had a sexual interest in Melissa either before or on the date he killed her, and that any such evidence would be presented to a trier of fact if and when the case came to trial. (23RT 3475-3479, 3525, 3534-3539) Accordingly, Dr. Rath questioned Linton as to whether he had a sexual motivation in the course of the homicide. (AOB 80-82, citing 5SCT 124-125).

d. Stress-Compliant Response

Finally, respondent insists that there was nothing coercive or otherwise untoward when Detective Stotz told Linton, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way" and Linton did not provide an involuntary confession because of that statement. (RB 53, citing 5SCT 232) This pronouncement disregards the growing recognition in both the legal and mental health community that "Interrogation-induced false confession[s] occur with alarming frequency. [Fn 160]" (Drizin & Leo, "The Problem of False Confessions in the Post-DNA World," *supra,* 82 *N.C.L. Rev.* 891, cited with approval in *Corley v. United States* (2009) 556 U.S. 303, 320-321) and that a suspect may confess in reaction to the stress of an interrogation rather than because he is guilty.

The totality of the circumstances in this case give rise to a strong inference that Linton finally confessed to sexual motivation, not because it was true but rather to end the intolerable pressure of the interrogation. (See AOB 85-87; *People v. Moore, supra,* 51 Cal.4th at p. 395) This type of false confession is termed by psychologists and legal professionals as "stress compliant" and occurs when a suspect makes a false confession as a reaction to the stress of an interrogation. (*Lunbery v. Hornbeak* (2010) 605 F.3d 754)

In 2010, shortly after respondent's brief was filed, the Ninth Circuit in *Lunbery v. Hornbeak, supra,* 605 F.3d 754, validated the body of research that

confirms the scientific efficacy of this phenomenon.[2] In *Lunbery,* the Circuit discussed the research of Dr. Richard Ofshe, "an expert witness both for prosecutors and for defendants on the psychology of interrogations and the psychology of false confessions" (*Id.* at p. 758) and a proffered expert in this case as well. Dr. Ofshe, the opinion continued, "suggested to counsel that they have Kristi [the defendant] further examined by a clinical psychologist familiar with the Gudjonsson Suggestibility Test. The author of this test was Gisli H. Gudjonsson, a faculty member of the Institute of Psychiatry, King's College, London, who had written *The Psychology of Interrogation and Confessions* (2003). In that treatise, Gudjonsson had reported on the basis of research that some confessions of crime were false. The false confessions were made either to shield another suspect or to end the stress of interrogation. There was no information on the number of false confessions. That they occurred was an established fact." (*Lunbery, supra,* at p. 758)

Although the Circuit in *Lunbery* reversed on another ground and did not reach the allegation that trial counsel failed to fully investigate whether Lunbery had given a stress-compliant confession, Judge Hawkins in his concurring opinion thought trial counsel may have been ineffective in not pursuing admission of Ofshe's expert testimony and observed, "the jurors would have been better equipped to evaluate [the defendant's] credibility and the confession itself had

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[2] In the opening brief, Linton cited the federal district court opinion in *Lunbery v. Hornbeak* (E.D. Cal. 2008), 2008 WL 4851858, which denied the petition for writ of habeas corpus filed by petitioner Kristi Lyn Lunbery but discussed the validity of the concept of "stress compliant" false confessions. (See AOB 85-86) Respondent correctly points out that this opinion is unpublished. (RB 58) At the time *Hornbeak* was reviewed for use in the opening brief, it appeared from the Westlaw citation that the district court decision was published, and it is not clear whether or not it was at one time published. In any event, in *Lunbery v. Hornbeak, supra*, the Ninth Circuit reversed the district court's denial of Lunbery's petition for writ of habeas corpus and remanded with directions to issue the writ, and again discussed stress compliant confessions. (*Lunbery v. Hornbeck, supra*, 605 F.3d at pp. 755, 758, 763-766)

they known of the identified traits of stress-compliant confessions and been able to compare them to her testimony. Reversing a conviction where the trial court excluded the testimony of the very expert involved here, the Seventh Circuit noted that Dr. Ofshe's testimony went to the heart of the defense, and had it been admitted, it "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried.' [Citations]." (*Lunbery, supra*, 605 F.3d at pp. 765-766)

Contrary to respondent's interpretation of the final minutes of Linton's interrogation, the record strongly suggests that Linton's confession was stress compliant. (*Lunbery, supra*, F.3d at pp. 758, 765-766) As noted in the opening brief, by 4:00 p.m. on November 30, the interrogators had accused Linton of sexually assaulting Melissa at least 50 times. (See 5SCT 66-232) Six different people – three law enforcement officers, two district attorneys, and a psychologist – had been questioning him on and off since the previous afternoon. During the last few minutes of the interview, Detective Stotz admonished Linton that, "The sooner you tell me the truth, the sooner I'll turn this machine off and the sooner we'll all be on our way." (4CT 881) Detective Rodriguez took the softer approach of assuring him, "we know you are not telling us the entire truth and we feel, okay, that if you tell the entire truth, you'll feel better." (4CT 881)

Finally, Linton confessed that he "tried to reap [sic] her ... two months ago... whatever ... whenever." It is noteworthy that he still never admitted to a sexual assault the day before, when he strangled Melissa, but rather to intent to sexually assault her during the purported incident two weeks or two months earlier. The authorities had succeeded in extracting what has all the earmarks of an involuntary confession. (Cf. RB 53) The confession should have been excluded based on circumstances that call into serious question whether it was so coerced as to be insufficiently reliable to be presented to a trier of fact.

5. Admission of Linton's Statement Was Prejudicial and Requires Reversal.

Finally, respondent asserts that based on the other evidence, admission of Linton's confession was harmless beyond a reasonable doubt pursuant to the federal constitutional standard for evaluating prejudice. (RB 60, referring to *Chapman v. California* (1967) 386 U.S. 18, 24) Once again, respondent has it wrong. Respondent places great weight on the fact that early on November 30, on the way to the police station, Linton volunteered a confession that he killed Melissa and that other evidence corroborates the confession. (RB 60) The corroborating evidence that Linton entered the Middleton home with a key and strangled Melissa, leaving DNA under her fingernails, adds nothing to what Linton admitted to the police.

On the other hand, the fact that Melissa's shorts were unzipped and that her underwear was found with his semen on the sides but not on the crotch is not sufficient to demonstrate intent to commit a sexual assault. Indeed, the most likely inference, as the district attorney suggested in closing, is that Linton took the underwear and masturbated in them after she died. (30RT 4613-4614) His actions after the killing certainly tend to show a disturbed mental state but they do not prove sexual assault at the time of the killing.

With the added evidence of Linton's confession that he tried to rape Melissa during the prior incident, however, the prosecution was able to bootstrap his motivation and cross-admit it to prove intent to commit sexual assault at the time of the homicide. This fact alone rendered the court's error in admitting the confession not harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

There is much more in the record to reinforce the confession's prejudicial effect, but respondent fails to address it. The jury not only deliberated a long time but was skeptical about Linton's confession. One juror thought "the entire

interview is a lie." (31RT 4844) This note reveals that at least one juror likely questioned the reliability of the answers produced by the police interrogations and Detective Stotz's credibility in general, a bit of skepticism which is supported by multiple instances in the record, in which he was caught lying under oath and/or distorting the truth, in order to provide "evidence" of a prior incident and Linton's sexual intent. The jury also asked: "1.Is it too far to speculate whether Melissa let Daniel into the house?", "2. Please clarify if speculation can be used in determining innocence in this case?", and "3. What is the definition of speculation?" (See argument at AOB 100-103 that juror questions is a close case indicator under *People v. Markus* (1978) 82 Cal.App.3d 477, 480.)

The jury also asked when a waiver of *Miranda* rights takes place. The court responded over defense objection that "a *Miranda* waiver is effective when a subject orally agrees to speak with investigators after his rights are read to him. There is no requirement that a *Miranda* waiver be documented in a written form, signed by the person being questioned." (31RT 4803-4815.) The defense objected that this answer deprived Linton of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (31RT 4803-4815.) This question demonstrates concern about whether Linton understood his rights when he waived them and whether that waiver was effective, critical issues with respect to his interrogation and confession.

Together, these final notes reveal that one or more jurors did not believe the interview occurred as recounted by the prosecution witnesses and were concerned about Linton's innocence of a sexual assault, but felt constrained as to how much they could speculate. Although Melissa was 12 she looked much older, and the note indicates least one of the jurors suspected that there might have been something consensual going on between her and Linton. Granted, the relationship between Linton and Melissa is unknown and if sexual was still a lewd act with a

child under 13 pursuant to Penal Code section 288, but the juror's concern raises a possible scenario that is much different than that presented by the prosecution and potentially impacts the decision to impose the death penalty, even if Linton still were guilty of felony murder based on the residential burglary.

Under these circumstances, and those set forth in additional detail in the opening brief, introduction of the fruits of the authorities' interrogations of Linton was extremely prejudicial and not harmless beyond a reasonable doubt. . (*Chapman v. California, supra,* 386 U.S. at p. 24.)

C. The Court Thwarted Defense Attempts to Educate the Jury About False Confessions.

1. Summary of Reply

Linton has demonstrated that the authorities' actions when they interrogated him on November 29 and 30, 1994 resulted in a coerced confession that should not have gone to the jury. (AOB 53-103; ARB 1-21; cf. RB 27-60) Once it was faced with the trial court's decision to admit the interrogation, the defense sought to educate the jury about the fact that false and involuntary confessions frequently are elicited by the authorities and why this phenomenon occurs. Pursuant to evidence Code section 801, experts are permitted to testify in this instance to matters "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, §801)

To that end, the defense proffered as a witness Richard Ofshe, Ph.D. prior to trial and Richard A Leo, Ph.D., at trial, both recognized experts in the area of false confessions. Had it been admitted, the testimony of Dr. Ofshe or Dr. Leo would have provided the jury with the tools to fully and fairly evaluate Linton's confession and thereby perform its duty as the trier of fact. Without it, the jury as lay people had no way of knowing that the confession was obtained in an atmosphere that calls into question its reliability. (AOB 106-107)

Accordingly, Linton argued in the opening brief that based on the body of research regarding false confessions, the case law recognizing its efficacy, and the totality of circumstances of the authorities' interrogation of him, the trial court abused its discretion in excluding Dr. Leo's testimony, a deprivation of the fundamental constitutional right to present a defense. (AOB 106-116)

Respondent counters that the trial court did not abuse its discretion when it excluded Dr. Leo's testimony on the theory that there was no competent evidence that Linton's confession was false, extensive cross-examination was sufficient to test the circumstances and reliability of the confession, the jury was apprised of Linton's mental condition through the testimony of Dr. Rath and Dr. Whiting, there were no promises of leniency, the jury did not need expert testimony to understand that a promise of leniency may result in a false confession, and in any event exclusion was harmless error. (RB 62-70, at 65, 66-67, 68, 70)

For the following reasons, each of respondent's contentions is without merit.

2. Expert Opinion Was Critical to Understanding Linton's Vulnerability to the Stress of a Coercive Interrogation and May Have Confessed Based on Pressure to Comply With the Interrogators' Demands Rather Than on the Truth of What Happened.

Linton will begin with a brief recount of the recognized body of research and recent legal authority that flatly refutes respondent's claim that a lay jury will understand how a convergence of circumstances results in a false confession. Linton already has discussed existing authorities (Argument I.D.4, *ante*. and AOB I.B.2, at 106-115) that make clear there is a growing recognition in both the legal and mental health community that "Interrogation-induced false confession[s] occur with alarming frequency. [Fn 160]" (Drizin & Leo, "The Problem of False Confessions in the Post-DNA World," *supra,* 82 *N.C.L. Rev.* 891, cited with approval in *Corley v. United States* (2009) 556 U.S. 303, 320-321) and that a

suspect may confess in reaction to the stress of an interrogation rather than because he is guilty. (*Lunbery v. Hornbeak* (2010) 605 F.3d 754, 758, decided after the opening brief was filed in this case)

The Ninth Circuit in *Lunbery* cited *The Psychology of Interrogation and Confessions* (2003) by Gisli H. Gudjonsson, a faculty member of the Institute of Psychiatry, King's College, London. "In that treatise," the Circuit continued, "Gudjonsson had reported on the basis of research that some confessions of crime were false. The false confessions were made either to shield another suspect or to end the stress of interrogation. There was no information on the number of false confessions. That they occurred was an established fact." (*Lunbery, supra,* at p. 758)

Dr. Leo's research has been cited with approval in additional other published cases since 2009 when the opening brief was filed. In *United States v. Slaight, supra,* 620 F.3d 816, the Seventh Circuit cited Dr. Leo's research with approval, found the psychological environment caused the defendant to make a confession during a custodial but un*Mirandized* interrogation, and reversed based on admission of the confession. (*Id.* at pp. 817-820) In *Crowe v. County of San Diego* (Ninth Circuit 2010) 608 F.3d 406, the court in a civil rights case found for the teenage plaintiffs based on in part on Dr. Leo's opinion that the interrogation of one of the juveniles involved was "the most psychologically brutal interrogation and tortured confession that I have ever observed." (*Id.* at pp. 417, 431)

Dr. Leo's work also has been cited in numerous peer-review journals. (See, e.g. "Police-Induced Confessions: Risk Factors and Recommendations" (with Saul Kassin, Steven Drizin, Thomas Grisso, Gisli Gudjonsson and Allison Redlich). Forthcoming in *Law and Human Behavior,* Vol. 34, pp. 3-38 (2010); "Studying Wrongful Convictions: Lessons From Social Science" (with Jon Gould). *The Ohio State Journal of Criminal Law* (200 9), Vol. 7, pp. 7-30; "False Confessions: Causes, Consequences and Implications," *The Journal of the American Academy of Psychiatry and the Law* (2009), Vol. 37, pp. 332-343; "What Do Potential

Jurors Know About Police Interrogation and False Confessions?"(with Brittany Liu). *Behavioral Sciences and the Law*, Vol. 27, pp. 381-399 (2009); "From False Confession to Wrongful Conviction: Seven Psychological Processes" (with Deborah Davis). *The Journal of Psychiatry and the Law,* Vol. 38, 9-56 (2010); "The Three Errors: Pathways to False Confession and Wrongful Conviction" (with Steve Drizin) in Daniel Lassiter and Christian Meissner, Eds. (2010). *Police Interrogations and False Confessions: Current Research, Practice and Policy Recommendations.* (Washington, D.C.: American Psychological Association), pp. 9-30; "Psychological and Cultural Aspects of Interrogations and False Confessions: Using Research to Inform Legal Decision-making" (with Mark Costanzo and Netta Shaked), Joel Lieberman and Daniel Krauss, Eds. (2009). *Psychological Expertise in Court: Psychology in the Courtroom.* Volume II. (Burlington, VT: Ashgate Publishing Co), pp. 25-56.)

Thus the weight of authority does not dispute the validity of Dr. Leo's research into the unreliable results of coercive interrogation techniques, with or without *Miranda* warnings and puts to rest respondent's contention that the jury did not need expert testimony to understand that a promise of leniency may result in a false confession and that extensive cross-examination was not sufficient to test the circumstances and reliability of the confession. (Cf. RB 64-70)

Respondent asserts that this case is distinguishable from two cases cited in the opening brief, *United States v. Hall* (7th Cir. 1996) 93 F.3d 1337, and *People v. Page* (1991) 2 Cal.App.4th 161. (RB 68-69, referring to AOB 108-113) With respect to *Hall*, respondent urges that the case is not binding and the trial court was within its discretion in ruling that Dr. Leo's testimony was "highly speculative" and "its probative value, if any, is substantially outweighed by its undue consumption of time[.]" (RB 69, citing 25RT 3740)

Assuming only for the sake of argument that the trial court in 1999 was correct that the expertise of false confession experts was speculative, case authority and advances in the field in the last 13 years have overtaken that

assessment. In *Corley v. United States, supra,*, the Supreme Court observed, "No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. '[C]ustodial police interrogation, by its very nature, isolates and pressures the individual,' [Citation], and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, *e.g.,* Drizin & Leo, The Problem of False Confessions in the Post–DNA World, 82 N.C.L.Rev. 891, 906–907 (2004)." (*Corley, supra*, 556 U.S. at pp. 320-321)

With respect to *People v. Page* (1991) 2 Cal.App.4th 161, respondent contends that "the foundation for the expert testimony that the court determined was missing in this case – some evidence that Linton's confession was false – was present in *Page* as Page recanted his confession before trial and testified at trial about why he confessed to something he did not do." (RB 70) Respondent's attempted distinction is not convincing. Based on the overreaching interrogation tactics employed by the authorities in this case, there is a substantial likelihood that Linton's confession to the prior offense was false in substance, in its particulars, or both.

3. Exclusion of Expert Opinion Was Prejudicial and Requires Reversal.

Respondent maintains that even if the trial court erred in excluding the expert testimony of Dr. Leo, the error was harmless, recycling the argument that "the jury was fully informed of the circumstances of the interrogation and Linton's mental condition at that time. There was no evidence that Linton's confession was false." (RB 70) Respondent again is mistaken.

One juror instinctively questioned the police tactics and thought that the confession was "a lie." (AOB 100, citing 31RT 4844) This concern underscores the fact that had the jury been apprised of the body of research conducted by Dr.

Leo and/or Dr. Ofshe, it may well have placed little or no weight on the fruits of the interrogation. The jury could not be expected to know that a high percentage of interrogations result in false and coerced confessions. (*Corley, supra*, 556 U.S. at pp. 320-321) Thus the trial court's ruling excluded information that would have fairly informed the jury about the effect of overreaching interrogation techniques before making its own assessment about the reliability of Linton's confession and, ultimately, his guilt. For this reason and those set forth in argument I., *ante*., and in the opening brief, exclusion of the testimony of Dr. Leo was not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

D. The Court Restricted Cross-Examination of the District Attorney and Police Regarding Interrogation Tactics That Resulted in an Unreliable Confession.

1. Summary of Reply

Linton argued in the opening brief that in addition to the right to educate the jury about the science of false confessions, the defense also was entitled to make a record demonstrating the actual interrogation strategy that produced his unreliable confession. (AOB 116-157) That strategy encompassed false promises of leniency, made not only by Detective Stotz but also by District Attorney Mitchell. (AOB 128-130) The strategy also included other excessive tactics, including misleading and misrepresenting facts, and pressuring Linton to say he committed a prior attack on Melissa that may not have occurred or may not have happened the way portrayed. Even if the misrepresentations and pressured persuasion standing alone were not improper, they were unfair and devastating when used together with the false promise that anything which happened between Linton and Melissa was "water under the bridge." (AOB 131-156)

Respondent offers little to counter Linton's argument, other than to insist the trial court's restriction of cross-examination was within its discretion. In

respondent's view, the defense sought to question Detective Stotz and District Attorney Mitchell about subject matter that was irrelevant or marginally relevant, and thus any error was not of constitutional dimension. (RB 71-86) In making this argument, respondent ignores well-established precedent that for purposes of evaluating prejudice, a constitutional violation trumps discretionary application of state evidentiary guidelines. (See *Cudjo v. Ayers* (9th Cir. 2012) ___ F.3d ___: "[T]he typical presence of a general evidentiary rule in the cases cited by the California Supreme Court results from a requirement on the government, rather than a requirement on the defendant. To hold otherwise would be to turn the constitutional right to present a defense on its head." (*Cudjo* at p. ___, referring to *Chambers v. Mississippi* (1973) 410 U.S. 284)

2. The Court Denied the Defense the Ability to Illustrate That an Interrogation Strategy Replete With False Promises of Leniency Resulted in an Unreliable Confession.

When the trial court excised the testimony of District Attorney Mitchell and Detective Stotz, it left the jury with an incomplete picture of what happened during the interrogation. (See again, *People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Stone* (1999) 75 Cal.App.4th 707, 716: *People v. Williams* (1998) 17 Cal.4th 148, 162.) Mitchell's actions were especially egregious, because as a prosecutor he knew or should have known that promises of leniency may render a statement involuntary and inadmissible. (See discussion in AOB 115-131; ARB herein at 14-16) Detective Stotz was an experienced police officer and also should have known better. (AOB 131-157) (See *People v. Jimenez* (1978) 21 Cal.3d 595, 611-612, 147 Cal.Rptr. 172, 580 P.2d 672, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17; see also *Bram v. United States* (1897) 168 U.S. 532, 542-543, cited with approval in *Brady v. United States* (1970) 397 U.S. 742, 753-754.)

The jury knew that both Mitchell and Stotz repeatedly assured Linton during interrogation that he faced no exposure for any prior sexual assault on Melissa. But the jury was left in the dark as to the import of that situation. Linton's defense that his confession was coerced and unreliable was dependent in the abstract on educating the jury about the body of science that explains the phenomenon of coerced or false confessions and why they are unreliable. (See Argument C., ante.) To be fully and fairly understood, however, the abstract concept needed to be fleshed out as to what happened in the interrogation in this case and why the intimate involvement of two experienced law enforcement officials in the interrogation process was so manifestly unfair and so apt to procure an unreliable statement. Thus the court also impinged Linton's due process right to present a defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Davis v. Alaska* (1974) 415 U.S. 308, 317].)

Respondent's attempt to distinguish *United States v. Edwards* is ineffectual. It begs the question to declare that, "Unlike the prosecutor in *Edwards*, DDA Mitchell was not personally involved in the discovery of a critical piece of evidence." (See AOB 124 et seq.; RB 77) DDA Mitchell without a doubt was personally involved in discovering a critical piece of evidence, the most critical piece of all and the lynchpin of the prosecution case: Linton's statement. As the Court in *Edwards* concluded "The prosecutor's implicit testimony was devastating to Edwards's only theory of defense, and it was a blow against which he had no way to defend. Because the prosecutor was not subject to cross-examination, defense counsel did not have a fair opportunity to cast doubt on the circumstances under which the receipt was found." (*United States v. Edwards* (9th Cir. 1998) 154 F.3d 915, 922.)

In addition to DDA Mitchell's role in the initial questioning of Linton, the defense also was entitled to present his role in orchestrating the interrogation the following day. His shadow lingers through the entire day of November 30, leaving a huge gap in the body of knowledge the jury should have had to make its

decision, including but not limited to his instructions to all interrogating officers, the other district attorney involved, John Chessell, and Dr. Rath. None of this information is cumulative, because it potentially contradicts the recollection of each witness as to what he was told to do with appellant, and when.

3. Restriction of Cross-Examination About Other Marginal Interrogation Techniques Prevented the Defense From Demonstrating How Those Techniques Buttressed the Authorities' False Promises of Leniency.

Respondent also argues that cross-examination about other interrogation techniques used by Detective Stotz had marginal relevance and the court was within its discretion in limiting the testimony. (RB 79-86) But respondent's recitation of those techniques has the unexpected effect of buttressing Linton's position rather than refuting it. (See RB 81-85) Cross-examination about such techniques would have enlightened the jury as to what actually occurs in the interrogation room and why it may result in an unreliable statement by the defendant. The methods used by the authorities were particularly troublesome, because in addition to promises of leniency, Detective Stotz and others "grinded" on Linton some 50 times as to a sexual motivation he repeatedly denied and otherwise employed trickery and other techniques to "soften him up."

4. Restriction of Cross-Examination Regarding Interrogation Strategy Was Prejudicial and Requires Reversal.

Respondent offers little to counter the littany of Confrontation Clause violations that impinged Linton's Sixth Amendment rights pursuant to *Chapman v. California, supra,* 386 U.S. at p. 24. (RB 86) Respondent observes that the jury was privy to some cross-examination that impeached Detective Stotz's credibility. Yet in reasoning that further cross-examination would be cumulative and not

"produce[] a significantly different impression of [his] credibility" (RB 86), respondent actually is making the case that the defense should have been given **broade**r leeway in questioning him. By restricting the cross-examination of Stotz, the court took away from the defense another critical tool in dispelling the notion that appellant voluntarily confessed to wanting to, and attempting to, have sex with Melissa on the prior occasion. Based on the foregoing factors rendering this a close case and in combination with the other errors that impinged the jury's assessment of appellant's confession, the trial court erred in restricting the cross-examination of Stotz. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

II.

THE TRIAL COURT REFUSED TO EXCUSE A JUROR WHO COMMITTED MISCONDUCT

A. Summary of Reply

Juror No. 1 discussed the case with her husband and bragged about it. There is no dispute this was misconduct. (AOB 158) The trial court chose to rationalize Juror No. 1's behavior and characterize it as "venting" rather than a two-way discussion. (AOB 159) Respondent reiterates the court's view and concludes that in any event the presumption of prejudice is rebutted. (RB 86-92) In fact, the "venting" was serious misconduct not only because No. 1 talked to her husband, but also because she felt compelled to share her transgression with other jurors. As a result the entire jury pool was tainted, resulting in structural error.

B. Juror No. 1 Discussed a Specific Aspect of The Case With Her Husband.

Juror No. 1 to other jurors, first day of deliberations:

*"I'm the first to admit that **I discussed this with my husband and we were talking about the case**."* (31RT 4821)

Juror No. 1, in response to questions by the Court:

*"**I have never discussed any of his [her husband's] feelings on the case...And my husband just kind of sat there**. You know, he – you know, he didn't ask me any questions...the day that I found out I was picked -- ... I had told him that if – if I came home and I felt the need to vent, felt the need to expel, by any means, not to ask me any questions... He just kind of sat there, and he kind of knew what I was ... doing... And that was the end of it.* (31RT 4828-4830)

The Court:

*"**It's certainly ... at the edge of propriety**. And I think I've admonished her again not do it any further [sic]. But I don't think*

she's gone over the edge. And so I think to – to excuse her at this point would not be appropriate or necessary." (31RT 4842-4843)

Based on this record, respondent insists that what Juror No. 1 did was merely a "monologue" presented to her husband to "relieve stress", and not misconduct. (RB 91) Respondent does not convince. First and quite obviously, the initial actions of Juror No. 1 are a *prima facie* example of misconduct: She bragged that she discussed and talked about a specific aspect of the case with her husband. (31RT 4820-4821). (See again *People v. Nesler* (1997) 16 Cal.4th 561, 582, regarding substantial evidence standard of review)

Respondent is inaccurate in its assessment that Juror No. 1 was merely relieving stress by "venting" to her husband, citing *People v. Danks* (2004) 32 Cal.4th 269. (RB 91) In *Danks*, the Supreme Court delineated the difference between talking about specific aspects of the case, as opposed to voicing general stress over having to assess the evidence. The court explained, "It is misconduct for a juror during the course of trial to discuss the case with a nonjuror. [Citation] Here, however, Juror K.A. did not discuss the case or deliberations with her husband, but only the stress she was feeling in making the decision. That is not misconduct." (*Danks, supra,* at p. 304) By contrast, Juror No. 1 said she discussed a specific aspect of the case with her husband, to wit, that if she were in her house and someone she knew entered her house, she would not automatically scream. (31RT 4820-4821).

C. The Court's Questioning of Juror No. 1 Elicited Answers that Supported the Presumption of Prejudice.

Respondent next argues that even if Juror No. 1 engaged in misconduct, the misconduct was rebutted by her answers in response to the trial court's questioning. (RB 91-92, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1304; *People v. Loker* (2008) 44 Cal.4th 691, 754-755; *People v. Lewis* (2009) 46 Cal.4th

1255, 1309.) The presumption of prejudice was not rebutted. The jury foreperson told the court that Juror No. 1 said "if it was her and somebody came in that she knew, she wouldn't automatically scream... she said that's the issue she had discussed with her husband." (31RT 4821) Under questioning by the court, Juror No. 1 admitted that during her "monologue," she told her husband that if someone had come into the house she "would have reacted a little differently" but maintained that she did not tell him the context that Melissa screamed when she saw Linton in the house. (31RT 4829-4831)

Not only was Juror No. 1's answer to the court disingenuous (see 31RT 4836), but the truth of her transgression is set neatly between the lines. Even if she did not directly tell her husband that a female screamed when someone she knew entered her home, it would be impossible for him not to understand that a female overreacted when she saw someone she knew in her home, who should not have been there. (See 31RT 4821) Thus when the court questioned Juror No. 1 and gave her the opportunity to rehabilitate the presumption of misconduct, she actually did not succeed in doing so. (See 31RT 4829-4835, discussed at AOB 159 and RB 88)

D. Juror No. 1's Misconduct Demonstrated Actual Bias

Respondent maintains that the actions of Juror No. 1 do not demonstrate that she prejudged the case because she merely "had a concern about one aspect of the case at the beginning of trial, before she had heard all the evidence. That a juror entertained various concerns about a case during trial does not establish that the juror prejudged the case. [Citation]" (RB 92) To the contrary, Juror No. 1's actions demonstrate that she formed an opinion early in the case and conveyed that opinion to a third party. (Cf. *People v. Wilson* (2008) 44 Cal.4th 758, 836, cited by respondent, in which a juror conveyed thoughts to another juror early in the penalty trial that "this is what happens when you have no authority figure.")

E. The Error Was Structural and Requires Reversal.

Linton argued in the opening brief that Juror #1's misconduct was structural error under federal law (*Arizona v. Fulminante* (1991) 499 U.S. 279, and *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630), and demonstrated a substantial likelihood of bias under state law (*People v. Danks* (2004) 32 Cal.4th 269, 302, relying on *In re Hamilton* (1999) 20 Cal.4th 273, 295). (AOB 163) Respondent counters that there is no evidence that Juror No. 1 was biased, which is belied by the evidence. (RB 92) It is structural error when the panel contains one or more jurors actually biased against the defense. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176.) Reversal is required.

III.

THE TRIAL COURT EXCISED THE PORTION OF CALJIC NO. 2.70 THAT ADMONISHED THE JURY TO VIEW ORAL ADMISSIONS WITH CAUTION

A. Summary of Reply

Respondent contends that the omission of the final paragraph of CALJIC No. 2.70 was invited error and harmless error. (RB 93-98) The contention is misleading.

B. The Court Failed to Perform its Sua Sponte Duty to Instruct, and the Defense Did Not Invite Error By Settling For a Less-Than-Satisfactory Alternative to the Court's "All or Nothing" Ruling.

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, and on every theory of the case which is supported by substantial 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. *Sedeno* (1974) 10 Cal.3d 703, 715-716.) The trial court also has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." (*People v. Satchell* (1971) 6 Cal.3d 28, 33, fn. 10; *People v. Saddler* (1979) 24 Cal.3d 671, 681.)

"'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (*People v. Coddington* (2000) 23 Cal.4th 529, 603, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046 and superseded by statute per *People v. Zamudio* (2008) 43

Cal.4th 327.) Where the trial court makes a ruling that the defense objects to and believes is in error, the defendant "should not lose his right to contest an erroneous ruling by the trial court merely because the defendant thereafter acts prudently to mitigate the adverse effects of that ruling." (*Peo v. Eilers* (1991) 231 Cal.App.3d 288, 297)

"When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a *sua sponte* duty to instruct the jury that such evidence must be viewed with caution. [Citation] We have explained, however, that 'the purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made. [Citation.]' [Citation] Accordingly, we also have held that this cautionary instruction should not be given if the oral admission was tape-recorded and the tape recording was played for the jury. [Citation]" (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200, citing *People v. Beagle* (1972) 6 Cal.3d 441, 455; and *People v. Mayfield* (1997) 14 Cal.4th 668, 776.)

With respect to the statements made by Linton that were not tape recorded, the trial court had a sua sponte duty to instruct the jury per CALJIC No. 2.70 that oral admissions should be viewed with caution. (Cf. *People v. Mayfield* (1997) 14 Cal.4th 668, 776.) When the court refused to give the cautionary portion of the instruction at all, the defense acted as prudently it could to mitigate the adverse effects of that ruling and asked that the cautionary admonition be excised in its entire (*Peo v. Eilers* (1991) 231 Cal.App.3d 288, 297)

C. The Incomplete Instruction Was Prejudicial and Requires Reversal.

The Court erred in providing the incomplete instruction because the jury was left uninformed about the fact that Linton's unrecorded statements should be viewed with caution. The omission was especially egregious because Detective

Stotz was caught during cross-examination in at least one lie, to wit, that Linton said he tried to put his hand down Melissa's pants, when he did not say so. (AOB 174-175) At least one juror expressed skepticism about Linton's statement. It is reasonably probable that the cautionary instruction might have led that skeptical juror to a different result had been properly given. Yet respondent repeats the statements made by Linton in response to questioning by the overreaching actions of the authorities and then urges that these statements need not be evaluated because there was "no conflict regarding his unrecorded admission." (RB 95-98) Given the fact that the entire interrogation was problematic, admission of Linton's unrecorded admissions on the afternoon of November 29 was not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

IV.

THE TRIAL COURT'S ERRORS DURING THE GUILT PHASE WERE PREJUDICIAL ERROR, BOTH INDIVIDUALLY AND CUMULATIVELY.

In addition to their individual merit, each assignment of guilt phase error was contaminated by every other error. This was particularly true where the trial court admitted Linton's confession but excluded all evidence that would have educated the jury about the recognized phenomenon of false confessions and limited the instruction that would have guided the jury to view oral admissions with caution. (See arguments I. and III., *ante*.) Linton argued in the opening brief that the cumulative effect was a denial of due process and prejudicial error. (AOB 176-179, citing *inter alia*, *Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303)

Respondent dismisses this important contention in one short paragraph, pronouncing as to arguments I. through III., that there were no errors to cumulate, and as to argument IV., that the failure to instruct the jury regarding oral admissions was invited error. (RB 98) To the contrary, Linton has amply demonstrated both error and prejudice as to each issue. (See AOB 53-175)

Respondent also utterly fails to address the importance of reevaluating cumulative error in a capital case. (*People* v. *Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase]; *(People* v. *Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People* v. *Brown* (1988) 46 Cal.3d 432. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; *Irving* v. *State* (Miss. 1978) 361 So.2d 1360; *Burger* v. *Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)

Based on the foregoing and the arguments set forth in the opening brief, individually and cumulatively, the trial court's errors unfairly prejudiced appellant's defense in violation of due process. The errors resulted in an unbalanced case that unfairly tilted the evidence in favor of the prosecution. Reversal is required. (*Chambers v. Mississippi, supra,* 410 U.S. at pp. 298, 302-303.)

PENALTY PHASE

V.

THE TRIAL COURT EXCLUDED EVIDENCE ABOUT COERCED CONFESSIONS, LEAVING A LINGERING DOUBT THAT LINTON WAS ENTITLED TO LENIENCY

A. Summary of Reply

Linton argued in the opening brief that under state and federal constitutional and statutory law he had the right to demonstrate lingering doubt about the circumstances of the crime and the aggravating and mitigating circumstances, and that the trial court erred in depriving him of that right. (Pen. Code §190.3, subd. (k); *People v. Gay* (2008) 42 Cal.4th 1195; U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7,15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604) The evidence excluded by the trial court encompassed the testimony of false confession expert Richard Leo, Ph.D., regarding the mechanism by which coerced confessions occur in a police setting; psychologist Cecil Whiting, Ph.D., as to his own clinical observations of Linton's psychologist makeup and opinion about Linton's mental state at the time of the strangling; and DDA William Mitchell concerning the circumstances of the interrogation. (See AOB 180-194)

Respondent answers with respect to the testimony of Dr. Leo and DDA Mitchell that the trial court properly exercised its discretion in excluding this evidence. This segment of the argument is based on the premise that there was no foundation that the confession was false and the evidence bore little probative value. (RB 98-101) Respondent further contends with respect to the testimony of Dr. Whiting that the court did not abuse its discretion because Linton's statements to him two and a half years after the murder were self serving and unreliable. (RB 103-104) In the alternative, respondent insists that any error in excluding the

evidence was not prejudicial under the "reasonable possibility" standard. (RB 100, 104)

Respondent's assessment is flawed and should be rejected.

B. The Testimony of Dr. Leo and DDA Mitchell Was Critical to the Jury's Understanding That Overreaching Interrogations Result In Coerced Confessions, Leaving a Lingering Doubt About Linton's Mental State at the Time of the Strangling.

Respondent insists the testimony of both Dr. Leo and DDA Mitchell had little probative value and that the trial court was within its discretion in excluding Dr. Leo's testimony because there was no foundation that Linton's confession was false. (RB 98-99) But the falsity of Linton's confession is not the issue, as the authorities cited by both parties point out. (See again, Pen. Code §190.3, subd. (k); *People v. Gay* (2008) 42 Cal.4th 1195; *People v. Hamilton* (2009) 45 Cal.4th 863, 912; U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7, 15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio* (1978) 438 U.S. 586, 604)

Rather, where as here a jury is charged with the grave responsibility of deciding whether or not to impose death, section 190, subdivision (k), empowers the jury to show mercy and spare a convicted capital defendant's life based on extenuating circumstances. This is not an optional inquiry: Section 190, subdivision (k) provides that "the trier of fact **shall** take into account any of the following factors if relevant... (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Pen. Code, §190.3, subd. (k) [emphasis added].)

One would be hard-pressed to find a more compelling case for serious consideration of lingering doubt. There is no dispute that Linton strangled Melissa to death. The situation becomes muddy because the key to both the guilt and penalty determination is the reliability of his confession. Linton has argued that as

to the guilt determination, a constellation of errors rendered the confession unreliable as to whether he intended to sexually assault Melissa when he killed her. However, even if the jury reached a fair and just guilt determination based on Linton's confession, the penalty phase required a second evaluation of the circumstances of his interrogation. Such an evaluation to be fair would give the jury the tools to judge whether this young, immature defendant confessed in an environment of confusion and uncertainty that merited a sentence of life without the possibility of parole rather than death.

Stated simply, the inquiry denied Linton in this case went to the essence of a lingering doubt determination. "[R]esidual doubt about a defendant's guilt is something that juries may consider at the penalty phase under California law, and a trial court errs if it excludes evidence material to this issue. [Citations.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-967, cited in *People v. Gay, supra,* at p. 1219-1220.) Linton was entitled to introduce all relevant mitigating evidence that might persuade the jury to return a verdict less that death. (U.S. Const., Amends. 8 and 14; Cal.Const., art. I, §§ 7, 15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

C. The Testimony of Dr. Whiting Was Critical to the Jury's Understanding Of Linton's Mental State At the Time of the Strangling.

The same argument applies as to the testimony of Dr. Whiting. The essence of lingering doubt was Linton's mental state: As the defense argued, "we're not talking about anything more than the support for Dr. Whiting's opinion that Daniel was suffering a panic attack. And this really has to do with Daniel's statements to Dr. Whiting concerning his physical sensation concerning what he was physical [sic] feeling at the time. And it is supported by the record we have in front of Your Honor when he told Dr. Rath how scared he was, scared, scared, scared, scared. Too scared. 'Even if I did find her attractive, I was too scared.' ...

And if Dr. Rath had, I submit, really been looking for evidence of his true intent at the time and not trying to gather the prosecution's evidence, he might have obtained from Daniel Linton the additional information that he had heart palpitations or shortness of breath or whatever it was, narrowing of vision, all those things that might contribute or assist Dr. Whiting and might assist Daniel at this state in showing that he was suffering a panic attack." (31RT 4920)

Dr. Whiting's observations were critical to understanding Linton's psyche and to deny the jury this information hobbled a fair determination of lingering doubt. (U.S. Const., Amends. 8 and 14; Cal.Const., art. I, §§ 7, 15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Hawkins* (1995) 10 Ca1.4th 920, 966-967, cited in *People v. Gay, supra,* at p. 1219-1220.)

VI.

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT A NEIGHBOR SAW A NAKED LATE-NIGHT MALE INTRUDER IN THE AREA THREE YEARS EARLIER, RESULTING IN MORE LINGERING DOUBT

Linton argued in the opening brief that the possibility a third-party was the intruder several weeks before the strangling was relevant to a lingering doubt. He explained that the incident described by neighbor Bettie Mercado had a tendency to reinforce the defense contention that another individual was the intruder in the prior incident described by Melissa. That possibility, in turn, reinforces the likelihood that Linton's admission to the prior incident was coerced by the authorities and resulted in a confession that was false or unreliable, in whole or in part. (AOB 195-201, citing *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325, 329)

Respondent counters this argument in the same way as the other lingering doubt argument, *ante.,* insisting it was not relevant. Interestingly, though, respondent offers no logical explanation of the striking similarity between the two intruder incidents and poses an inapt *reductio ad absurdum* distinction that one man was naked and one had on his underwear. (RB 106-107; see AOB 200-201)

This evidence should have been admitted for the same reasons set forth in argument V. *ante.* It was extremely relevant not to whether or not Linton strangled Melissa but rather as to the possibility that he was not the previous intruder, casting a lingering doubt on the sexual motivation he was coerced to admit. (U.S. Const., Amends. 8 and 14; Cal.Const., art. I, §§ 7, 15, and 17; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *People v. Hawkins* (1995) 10 Ca1.4th 920, 966-967, cited in *People v. Gay, supra,* at p. 1219-1220.)

VII.

THE TRIAL COURT ADMITTED EMOTIONALLY CHARGED TESTIMONY AND POIGNANT PHOTOGRAPHS AS VICTIM IMPACT EVIDENCE

Linton argued in the opening brief that the trial court erred when it admitted victim impact evidence pursuant to Penal Code section 190.3, subdivision (a). That evidence was a series of photographs of Melissa, referred to during the penalty phase testimony of her mother, father, and friend Jessica Holmes. (AOB 202-214; see 32RT 4968-5015) In addition to the photos actually entered into evidence, these prosecution witnesses were looking at several other photographs during their testimony. (See 32RT 4968-4971 [Peo. Exh. 1-16, 18], 4991-4998 [Peo. Exh. 17, 19, 20, 22 and 23]) The photographs and testimony were so emotion-provoking that their introduction rendered the trial fundamentally unfair and violated Due Process pursuant to *Payne v. Tennessee* (1991) 501 U.S. 808, 825. (AOB 202-214)

Respondent disagrees and characterizes the evidence as "a brief glimpse into the life of Melissa," not too extensive, and properly admitted. (RB 108-114) Respondent's view should be rejected.

The victim impact evidence introduced in appellant's case was so voluminous, inflammatory and unduly prejudicial as to "divert the jury's attention from its proper role [and] invite[] an irrational, purely subjective response[.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 836.) The jury was so moved by the testimony of Melissa's parents, accompanied with reminiscences of events depicted by the photographs, that four jurors were either actively weeping or wiping their eyes during Mr. Middleton's testimony. (See 32RT 4998-5001 and Justice Stevens' concern about photographs depicting the victim's life, at *Kelly v. California* (2008) 555 U.S.1020, discussed at length in the opening brief.)

Later, the defense argued against admission of all of the photographs, noting, "Several members of the jury were crying. I think the court reporter was crying, the one we have here now. We have – so these – these pictures will evoke emotion and drying. [para.] Now, they're supposed to make a rational, reasoned decision as to what happens to Daniel Linton. Is the Court now going to allow Mr. Mitchell to put in that stimulus so that they can begin crying again during their deliberations and make – and try to make this reasoned, rational decision with the pictures being used to evoke the emotional response again? [para.] There's way too many of them to justify this kind of – their receipt into evidence." (35RT 5510-5511; See *People v. Raley* (1992) 2 Cal.4th 870, 916 [in deciding whether victim impact evidence violates the federal Constitution, this Court examines victim impact evidence to determine if it "led the jury to be overcome by emotion."].)

The emotional and inflammatory nature of the victim impact testimony and argument in this case, and sheer quantity of this evidence, was so out of proportion to the evidence introduced in other cases as to shift the focus of the jury from "a reasoned *moral* response" to appellant's personal culpability and the circumstances of his crime (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319) to a passionate, irrational, and purely subjective response to the sorrow of Melissa Middleton's family. (See *Cargle v. State* (Ok.Cr.App. 1995) 909 P.2d 806, 830 ["The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process."].)

The emotionally charged and detailed testimony introduced in this case was precisely the type of evidence that *Payne* and progeny recognized as unduly prejudicial and likely to provoke irrational, capricious, or purely subjective

responses from the jury. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.) Introduction of this testimony violated appellant's rights to due process and a fair trial under the Fifth and Fourteenth Amendments, and contravened the need for rationality and reliability in the application of the death penalty mandated by the Eighth Amendment.

VIII.

THE TRIAL COURT INSTRUCTED ABOUT MITIGATING FACTORS NOT SUPPORTED BY THE EVIDENCE, PER CALJIC NO. 8.85

Linton argued in the opening brief that the trial court's instruction with CALJIC No. 8.85 was error. The failure to delete inapplicable factors deprived him of his rights to an individualized sentencing determination based on permissible factors relating to him and the crime. In addition, this error, by artificially inflating the factors on death's side of the scale, violated the Fifth, Sixth, Eighth and Fourteenth Amendments' requirement of heightened reliability in the death determination. *(Ford* v. *Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck* v. *Alabama* (1980) 447 U.S. 625,637.) (AOB 215-222)

Respondent counters that instruction with CALJIC No. 885 was proper and that this Court's prior precedent should not be reexamined, referring to *People v. Lindberg* (2008) 45 Cal.4th 1, 50-51, citing *People v. Ramirez* (2006) 39 Cal.4th 398, 469 . (RB 114-115; also cited at AOB 220)

Linton disagrees. In this case, it is reasonably likely that the instruction confused and misled the jury. The listing of a number of mitigating requirements that the Linton did not meet could have no effect other than to lead a juror to conclude that his case for mitigation does not measure up to the standards for life in prison set by law.

Two of the factors in CALJIC No. 8.85 are particularly problematic. Factor (d) instructs the jury, once again, to consider: "Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Factor (h) instructs the jury to evaluate, "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." Taken together these instructions easily could have been interpreted by the jury as

a mandate not to consider appellant's mental impairment if (1) it was not "extreme" under (d) and therefore (2) what mental disease he did have, if any, under (h) that led him to strangle Melissa, was not mitigating if it was not extreme.

Inclusion of these factors readily could have further impinged the fairness of the deliberative process because appellant's mental state was the only issue in this case and was critical for the jury to evaluate whether or not he provided a false confession, as set forth in arguments above. Based on the closeness of the case, as evidenced by the length of deliberations and the number of questions posed by the jury that went directly to appellant's state of mind, it is reasonably likely that this error affected the death verdict. Reversal is required.

IX.

THE TRIAL COURT FACILITATED MULTIPLE ACTS OF PROSECUTOR MISCONDUCT

Linton argued in his opening brief that the prosecutor's misconduct during his penalty trial was prejudicial error. That misconduct encompassed argument in which the prosecutor demonized defense counsel, vouched for his own integrity and that of the prosecution team, argued facts not in evidence, and appealed to public passion and sentiment. (AOB 233-249) Respondent answers that these contentions were proper argument and/or reasonable inferences based on the evidence. (RB 118-137) Respondent's view is flatly refuted by the record.

Linton will not repeat each and every instance in which the prosecutor engaged in misconduct but offers these examples:

A. Attack on Defense Counsel

Prosecutor's argument: "Particularly appalling is the audacity of defense counsel in calling or evoking Melissa Middleton's name in an attempt to make a plea for the lesser sentence in this case. Not only appalling, it was offensive." (36RT 5618)

Authority disapproving argument as misconduct: "An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable." (*People v. Hill* (1998) 17 Cal.4th 800, 832, citing 5 Witkin & Epstein, supra, Trial, § 2914, p. 3570.) "While a prosecutor may properly sympathetically portray a victim, he may not include defense counsel as a villain who was attacking the victim. [Citation.] By so doing, he casts aspersions on the defendant's right to defend himself and to be represented by counsel. [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 704.) "Moreover, such misconduct cannot be justified even though the prosecutor's remarks may be in

reply to those made by defense counsel. [Citations]" (*Pitts, supra,* at p. 704.) "A defendant's conviction should be based on the evidence adduced at trial, and not on the purported improprieties of his counsel." (*People v. Sandoval* (1992) 4 Cal.4th 155, 183)

B. Vouching for Prosecution Witnesses

Prosecutor's argument: "And perhaps the most glaring example of a technique used to divert attention away from the defendant, who is the focus of these proceedings, is to paint other people, other persons, as the bad guy, as the bad guy. It's been the big bad D.A. in this case who's overfilled it, who's overcharged it, who's made or tried to make it look, according to the defense, as if the defendant did more than he actually did, committed more crimes than he actually did." (36RT 5609-5610)

Authority disapproving argument as misconduct: It is unacceptable for a prosecutor to vouch for the veracity of a witness by attesting to the credibility of that witness. (See *People v. Perez* (1962) 58 Cal.2d 229, 245-247; *People v. Johnson* (1981) 121 Cal.App.3d 94.) Vouching "constitutes improper argument if there is substantial danger that jurors will interpret the statement of opinion or belief as being based on information other than evidence adduced at trial, but not if it is merely the prosecutor's view of deductions and inferences warranted by the evidence. [Citations]" (*People v. Pitts, supra*, 223 Cal.App.3d at p. 702, fn. 27, citing *People v. Adcox* (1988) 47 Cal.3d 207, 236-237; *People v. Bain* (1971) 5 Cal.3d 839, 848; *People v. Kirkes* (1952) 39 Cal.2d 719, 723-724; *People v. Prysock* (1982) 127 Cal.App.3d 972, 997.)

C. Arguing Facts Not In Evidence

Prosecutor's arguments:

"...And the most glaring, unremorseful and disgusting fact of this case is that with Melissa's face, dead face, fresh in his mind, the defendant, Daniel

Linton, his sexual urges unrequited, had to satisfy himself using Melissa's underwear." (36RT 5605-5606)

"Nothing Daniel Linton did the next day, November 30, 1994, when the officer came to pick him up at his house to talk to him some more, nothing he did that day can erase or mitigate what he had done to Melissa and to her family the prior day. When you're looking for any sign of remorse that is important as a mitigating factor in this case, look at his actions on the day that it counts, on the day that it matters, on the day when one would be revolted. (36RT 5606-5607)

"I suggest to you it's not enough in this case. The defendant will have a life, if you let him have life without parole. He will have a community of people that he deals with. He will have his friends. He will have money to buy things. He will have television. He will have books. He will have visits from his family..." (36RT 5605-5606)

Authority disapproving argument as misconduct: 'Statements of supposed facts not in evidence ... are a highly prejudicial form of misconduct, and a frequent basis for reversal.' (*People v. Hill, supra,* 17 Cal.4th at p. 828, citing *People v. Pinholster* (1992) 1 Cal.4th 865; *People v. Bolton* (1979) 23 Cal.3d 208, 213; *People v. Benson* (1990) 52 Cal.3d 754. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57; *People v. Kirkes* (1952) 39 Cal.2d 719, 724; 5 Witkin & Epstein, supra, Trial, § 2901, p. 3550.)

D. Appeal to Public Passion and Sentiment

Prosecutor's argument: "I'd suggest to you that a death verdict, ladies and gentlemen, is the ultimate validation of what we hold and value most dear in our community and as individuals: Our life, our children, and the sanctity of our home. And if you were to find that death is the appropriate sentence for Mr. Linton, you are doing no more than affirming in the loudest voice possible those values in our community. (36RT 5619-5620)

Authority disapproving argument as misconduct: It also is misconduct to appeal to the jury's passion or prejudice and/or urge jurors to personalize the case. "An argument by the prosecution that appeals to the passion or prejudice of the jury is improper." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 696, citing *People v. Haskett* (1982) 30 Cal.3d 841, 863; *People v. Talle* (1952) 111 Cal.App.2d 650, 676.)

X.

THE TRIAL COURT FAILED TO MAKE A FULL INQUIRY INTO JUROR MISCONDUCT

Linton argued in the opening brief that juror misconduct occurred during the penalty phase – as well as the guilt phase – when at least two jurors had side communications by email with Juror No. 9, the foreperson. Instead of questioning these jurors as requested by the defense, the trial court elected to not follow up by either questioning them or looking at the emails. (AOB 250, 255-256)

Respondent insists that the trial court's inquiry was sufficient and established that there was no misconduct. In respondent's view, the trial court made enough of a record when it stated that the errant jurors apparently were venting about hurt feelings and was within its discretion when it concluded *ipse dixit* that it would be inappropriate to call the jurors in and ask them if they had kept their admonitions. (RB 138-140) Respondent further contends that "there was no evidence of a strong possibility that prejudicial misconduct occurred, and because there were no disputed, material issues of fact, the trial court properly declined to inquire further." (RB 142-143)

Respondent's argument begs the question as to the contents of the emails. The possibility that juror misconduct has occurred implicates a defendant's Sixth Amendment rights and therefore any error in failing to inquire and develop a record as to allegations of misconduct should be evaluated under the harmless-beyond-a-reasonable-doubt standard of prejudice set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. The prosecution will not be able to carry its burden of negating prejudice in this instance. The specter of juror misconduct reinforces the fact that protracted deliberations occurred and that the determination of penalty was close and difficult, at one point leading to a deadlock. (see argument I, *ante*.) At least two emails were exchanged between individual jurors but not all of the jurors, and they were factionalized as to what other jurors were

advocating, raising a serious question as to whether the verdict reached was truly unanimous. (13CT 3664; 36RT 5697-5698)

By not exercising its discretion and conducting an evidentiary hearing as to what were the actual points of contention between the two jurors (as opposed to the foreman's hearsay recounting of what they said), the trial court failed to develop the record when heated and serious accusations were being cast about. Accordingly, the court abused its discretion in failing to conduct an evidentiary hearing and deprived the defense of the ability to make a full record. (See *People v. Hedgecock, supra*, 51 Cal.3d at p. 420.) The trial court's decision not to fully question the errant jurors and rule accordingly was an abuse of discretion, not harmless beyond a reasonable doubt and requires reversal. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

XI.

THE TRIAL COURT DENIED LINTON A FAIR PENALTY PHASE DETERMINATION BASED ON THE CUMULATIVE EFFECT OF EXCLUSION OF LINGERING DOUBT EVIDENCE, IMPROPER INSTRUCTION AS TO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES; ADMISSION OF EMOTIONALLY CHARGED VICTIM IMPACT EVIDENCE; AND FAILURE TO REIN IN PROSECUTORIAL EXCESS

Respondent ignores the cumulative prejudice of penalty phase error, just as it ignored this issue as to the guilt phase.

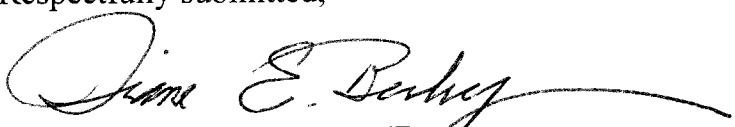
For the same reasons, the trial court's errors unfairly prejudiced Linton's penalty phase right to due process. (*People* v. *Hayes* (1990) 52 Ca1.3d 577, 644 [court considers prejudice of guilt-phase instructional error in assessing that in penalty phase]; *(People* v. *Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People* v. *Brown* (1988) 46 Ca1.3d 432. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584,605,609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; *Irving* v. *State* (Miss. 1978) 361 So.2d 1360; *Burger* v. *Kemp* (1987) 483 U.S. 776, 785 ["duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case"].)Reversal is required. (*Chambers v. Mississippi, supra,* 410 U.S. at pp. 298, 302-303.)

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(l), California Rules of Court, states that an Linton's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 47,600 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit. Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 16,935 words.

Dated: December 24, 2012

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

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)
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I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is 6520 Platt Avenue, PMB 834, West Hills, California 91307-3218.

On December 20, 2012, I served the within Appellant's Reply Brief on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at West Hills, California, addressed as follows:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day, with postage thereon fully prepaid at West Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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DIANE E. BERLEY