

SUPREME COURT COPY

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SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

CERTIFIED SPECIALIST – APPELLATE LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

April 26, 2013

Frank McGuire
Clerk/Administrator
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *People v. Daniel Andrew Linton*
California Supreme Court No. S080054

Dear Mr. McGuire:

By appointment of this Court, I am the attorney for appellant Daniel Andrew Linton in the automatic appeal from a judgment of death. The case has been set for oral argument on May 8, 2013, at 1:30 p.m. This letter is to inform the Court of the focus issues, as requested in the Court's calendar notice letter dated March 1, 2013.¹

FOCUS ISSUES

Although I would be pleased to respond to questions from the Court regarding any issues raised in the appeal, I anticipate that my argument will focus primarily on the following, referenced by the Roman numeral used in the Opening and Reply Briefs (AOB and ARB):

1. Reliability of Confession

Daniel Linton's confession to the authorities on November 30, 1994 that he tried to

¹Upon receipt of the March 1, 2013 letter and at the suggestion of assisting attorneys at CAP-San Francisco, I scheduled a moot court on April 22, 2013, at the CAP office. I appeared at that moot court and the issues in this case were discussed and analyzed at length. While this focus letter was due ten days after notice of argument on April 5, 2013, I believe that with the benefit of CAP's input and analysis, the letter will be of much more assistance to the Court. I have been in regular communication with Lise Jacobsen, the Deputy Attorney General assigned to this matter, and have informed her what I believe will be the focus issues. I will e-mail a copy of this letter to Ms. Jacobsen after it is sent, in addition to the hard copy.

DEATH PENALTY

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APR 29 2013

rape Melissa Middleton on a prior occasion was extracted in an atmosphere that calls into question its reliability. In denying the defense request to call Richard Ofshe, Ph.D. and Richard A. Leo, Ph.D., recognized experts who have collaborated in their research into the phenomenon of false confessions, the trial court denied Linton his federal constitutional right to present a defense pursuant to the Fourteenth Amendment to the United States Constitution. (AOB: I.B.; ARB: I.C.)

The research of Drs. Ofshe and Leo confirms based on empirical studies that false confessions are a widespread problem in the criminal justice system. The existence of false confessions and the reasons why false confessions occur with regularity in the criminal justice system are matters “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (Evid. Code, §801; *Corley v. United States* (2009) 556 U.S. 303, 320-321; *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754.) The jury as lay people had no way of knowing from common experience that Linton’s confession was obtained in an atmosphere that calls into question its reliability. By refusing the testimony of these experts, the trial court deprived the jury of its ability to fairly assess whether the confession was to be believed or not believed. (AOB: I.B.; ARB: I.C.)

The interrogation of Linton itself resulted in a confession that was unreliable under the rubric drawn from empirical studies set forth in the literature and case law about false confessions. That rubric includes but is not limited to, promises of leniency; aggressive and repetitive questioning, particularly the repetition of the accusation at least 50 times that Linton tried to sexually assault Melissa; lengthy questioning of a young and inexperienced suspect by two police officers, two district attorneys and one clinical psychologist; and the resulting likelihood that Linton confessed to the prior offense not because it was true but rather to end the intolerable stress of the interrogation. (*Lunbery v. Hornbeak, supra*, 605 F.3d at 758, and research cited in AOB: I.B.4.a. – I.B.4.d.; ARB: I.C.2.) It also is important to remember that Linton never confessed to committing the murder in the course of an attempted rape or lewd act. Rather, the authorities only were able to elicit a confession that he attempted to rape Melissa on the prior occasion alleged in the information, which was cross-admissible as to his mental state and actions at the time of the murder.

2. Prejudice

Admission of the interrogation and confession and exclusion of the expert testimony was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 384 U.S. 18, 24) If the confession had been excluded, the remaining evidence was insufficient to convict Linton in Count I of the special circumstances of attempted rape and lewd act by force on a child (Pen. Code, §§190.2(a)(17)(iii) and (v), in Count III of attempted rape and in Count IV of lewd act by force with a child. (Pen. Code §§664/261; 288(b).) If the confession had been admitted together with the expert testimony of Drs. Ofshe and Leo, it is likely the jury, already skeptical about the confession, would have found Linton not guilty as to these same

counts. It also is important to remember that Linton never confessed to committing the murder in the course of attempted rape or lewd act. Rather, the authorities only were able to elicit a confession that he attempted to rape Melissa on a prior occasion.

3. Remedy

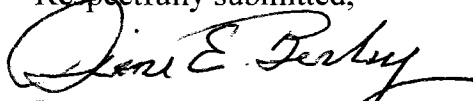
There is a significant difference between how a jury would view the special circumstance of murder during the commission of a residential burglary (Count I, Pen. Code §190.2(a)(17)(vii); Count II, Pen. Code, §459), and murder during the commission of an attempted rape and lewd act by force on a child. A jury evaluating murder during the commission of a burglary alone would be compelled to find a special circumstance but would be far less likely to decide to impose the death penalty. For that reason, the appropriate remedy is a reversal of the penalty of death.

ADDITIONAL AUTHORITIES

Please also inform the Court that I intend to rely on additional authority not in the briefing. In particular, I intend to rely on *People v. Westmoreland* (2013) 213 Cal.App.4th 602 [decided 2-5-13, pet. for rev. filed 3-13-13]. In *Westmoreland*, the Court of Appeal held that a detective's representation to a suspect that he would not be subject to life imprisonment if he confessed to a murder in the course of a robbery was a false promise of leniency and resulted in an involuntary confession. (*Id.* at pp. 610-614, cited with approval on other grounds in *People v. Barba* (2013) ___ Cal.App.4th ___ [2013 WL 1694992, 4-19-13].)

Thank you for your assistance in this matter. Feel free to contact me if you require further information.

Respectfully submitted,



DIANE E. BERLEY
Attorney for Appellant
Daniel Andrew Linton

PROOF OF SERVICE BY MAIL

State of California)
)
County of Los Angeles)

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 April 26, 2013, I served the within **Focus Letter Regarding Issues at Oral Argument** 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:

Clerk, California Supreme Court
350 McAllister Street
San Francisco, CA 94102

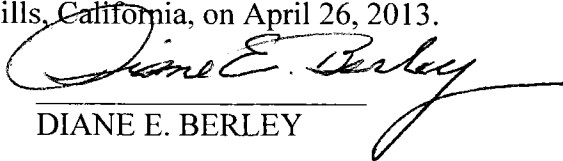
Department of Justice
Attorney General's Office
110 West "A" Street, Ste. 1100
San Diego, CA 92101
Attn: Lise Jacobsen, Deputy

California Appellate Project,
San Francisco
101 2nd Street, Suite 600
San Francisco, CA 94105
Attn: Scott Kauffman,
Staff Attorney

Daniel Andrew Linton, #P44800
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San Quentin, CA 94974

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.

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed at West Hills, California, on April 26, 2013.


DIANE E. BERLEY