No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN, Petitioner,

vs.

ERNEST TRUJILLO,
Warden of Arizona State Prison Complex-Eyman, and
CHARLES L. RYAN,
Director of the Arizona Department of Corrections, Respondents.

***** CAPITAL CASE *****
EXECUTION SCHEDULED FOR 10:00 A.M. MST
(10:00 A.M. PDT) ON TUESDAY, OCTOBER 26, 2010

MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE APPLICATION FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

The prosecution's theory at Arizona death-row prisoner Jeffrey Landrgian's trial for first-degree murder was that the perpetrator had sex with the victim before killing him during a bloody struggle. Preliminary postconviction DNA testing results now confirm the prosecution's theory. But the prosecution was wrong about one critical fact—Landrigan was not the perpetrator, as those test results also confirm. The sentencing judge's finding that Landrigan was the actual killer thus lacks a factual basis and must be revisited.

Landrigan's first federal habeas proceedings ended in 2007 after the U.S. Supreme Court reversed this Court's grant of an evidentiary hearing relating to a claim of ineffective assistance of counsel during the penalty phase of his capital-murder trial. *See Schriro v. Landrigan*, 550 U.S. 465 (2007), *rev'g* 441 F.3d 638 (9th Cir. 2006) (en banc). Under the auspices of Arizona's postconviction DNA testing statute, *see* Ariz. Rev. Stat. § 13-4240, Landrigan has developed evidence to support a claim that he is not eligible for the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). He seeks authorization under 28 U.S.C. § 2244(b)(2) to pursue relief on this claim from the federal courts. He further asks this Court to convene an en banc panel to consider his request. *See Cooper v. Woodford*, 358 F.3d 1117, 1118 (9th Cir. 2004) (en banc).

ISSUE PRESENTED FOR REVIEW

1. **Death eligibility for felony murder.** For those like Landrigan who were convicted of felony murder, the Eighth Amendment limits death eligibility to either the actual killer or sufficiently culpable participants in the underlying felony. Postconviction DNA testing has revealed that Mr. Landrigan did not contribute any blood or semen found on the victim's clothing. Have the Arizona courts incorrectly concluded that Landrigan is the actual killer and thus eligible for the death penalty?

STATEMENT OF EXHAUSTION

Landrigan is seeking authorization to file a second or successive petition containing only one claim for relief. The Maricopa County Superior Court denied this claim by orders dated October 8, 2009 (Attachment 10), and November 23, 2009 (Attachment 11).[1] The Arizona Supreme Court denied a timely filed petition for review raising this claim on April 6, 2010. (Attachment 12) Landrigan has never previously presented this claim to any federal court.

FACTUAL BACKGROUND

The last time that Tim Fincher saw Chester Dean Dyer, the victim in this case, was the day that Fincher gave Dyer his paycheck—Wednesday, December 13, 1989.

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[1]Landrigan is submitting two sets of documentation in connection with this motion. The first set, called *attachments*, bear numbers and are meant to comply with 9th Cir. R. 22-3(b). The second set, called *exhibits*, bear letters and are meant to support the assertions contained in the Petition for a Writ of Habeas Corpus submitted with this motion as required by 9th Cir. R. 22-3(a)(1). Both attachments and exhibits are cited in this pleading.

(TR 6/25/90 at 46) After Dyer failed to show up for work on each of the next two days, Fincher took Charles Hitchings, another coworker, over to Dyer's apartment. (TR 6/25/90 at 47) Fincher jimmied open the lock to Dyer's apartment, then entered and found Dyer sprawled out across the bed. (TR 6/25/90 at 47) Fincher had Dyer's apartment manager summon the fire department and the police. (TR 6/25/90 at 47)

Officer Michael Chambers responded to the call and went to Dyer's studio apartment. (TR 6/19/90 at 74-75) Chambers noticed Dyer's body lying face down on the bed. (TR 6/19/90 at 82) The right arm was "off the bed and somewhat upward. The head was off the bed. The left arm was under the body and the body was clothed." (TR 6/19/90 at 82) The body was dressed in a shirt, jeans, and tennis shoes. (TR 6/19/90 at 83) The shirt was "pulled up at the waist toward the shoulders." (TR 6/19/90 at 100) A length of "appliance wire" or "electrical cord" was hanging from the back of the neck. (TR 6/19/90 at 94, 106) To the left of the body was a small Phillips screwdriver. (TR 6/19/90 at 100)

While he was at Dyer's apartment, Chambers noticed a shoeprint in a pile of sugar. (TR 6/19/90 at 86) Shoeprint technicians with the police department made a cast of the shoeprint. (TR 6/19/90 at 87-89) After reviewing a catalog, Chambers determined that the cast impression of the shoe was similar to an Adidas Torsion model shoe. (TR 6/21/90 at 4) Chambers circulated a bulletin to the other police

officers on patrol in the neighborhood where Dyer's apartment was located. (TR 6/21/90 at 5)

Based on that bulletin, Chambers made contact the following Saturday, December 23, with an individual who identified himself as "Jeffrey Page." (TR 6/21/90 at 6-7) Chambers eventually came to know "Jeffrey Page" as Landrigan. (TR 6/21/90 at 42) During an interview with Landrigan, Chambers took a pair of Adidas Torsion model shoes from Landrigan. (TR 6/21/90 at 11)

Chambers sent a number of items to the crime lab, including a strand of hair; Dyer's shirt, jeans and socks; and curtains from Dyer's apartment. (TR 6/21/90 at 13, 15) Chambers also described a fingernail that Detective Fuqua had found on top of the bed in Dyer's apartment. (TR 6/21/90 at 30, 45; Exhibit M) The existence of this fingernail was not disclosed to the defense until the fourth day of Landrigan's trial. (TR 6/21/90 at 46) Detective Fuqua's report also described hairs found in, or perhaps on, Dyer's hand—hairs that he "removed and secured for later analysis." (Exhibit M at 5) None of these items were subjected to any kind of testing before trial.

On Saturday, December 16, Dr. Fred Walker performed an autopsy on Dyer's body. (TR 6/25/90 at 27) The body was clothed in a shirt, blue jeans, and white cotton socks when Dr. Walker began to examine it. (TR 6/25/90 at 28) He noticed that there was some blood on the victim's pants, but did not know whether that blood

was the victim's. (TR 6/25/90 at 40) Dr. Walker did not determine the victim's blood type. (TR 6/25/90 at 40) Dr. Walker was unsure whether he received any hairs, but was sure that he did not receive any fingernail. (TR 6/25/90 at 41)

Evidence at trial showed that Landrigan *had* been in Dyer's apartment once. On the evening of Tuesday, December 12, the day before Dyer was killed, Landrigan placed three long-distance telephone calls from Dyer's apartment—two to the home of his birth mother in Yuma, Arizona; and one to the home of his adoptive parents in Bartlesville, Oklahoma. (TR 6/26/90 at 56-57, 66-67)

Karen Jones, a fingerprint examiner working for the police department, compared latent fingerprints found in Dyer's apartment to fingerprints of known suspects. (TR 6/21/90 at 70) Jones received 63 latent fingerprints and compared them all to a known fingerprint given by Landrigan. (TR 6/21/90 at 72-74) Only seven matched Landrigan (TR 6/21/90 at 77); these came from the refrigerator door, the toilet tank lid, the bottom of a dinner plate, the plastic wrapper on a loaf of bread, and a jar of mayonnaise (TR 6/21/90 at 77; 6/25/90 at 7, 15-16, 18). Jones did not match any of the 63 latent prints to any other known prints provided by potential suspects. (TR 6/21/90 at 77) She could not recall comparing any of the latent prints to any "other people." (TR 6/21/90 at 73) Nor has the State of Arizona, since Landrigan's trial, ever compared these other prints against prints in law enforcement

databases in an effort to identify other potential suspects.

Inta Meya, who worked at the crime laboratory, examined the shoes that Chambers took from Landrigan. (TR 6/26/90 at 6; TR 6/21/90 at 11-12) Based on an "individual characteristic" on one of the shoes (TR 6/26/90 at 10), Meya concluded that Landrigan's shoe left the print in the pile of sugar at Dyer's apartment. (TR 6/26/90 at 9-10) The right shoe had some blood on it, and Meya determined that it was human blood, Type A. (TR 6/26/90 at 11)

Meya also tested the shirt that Dyer was wearing. (TR 6/26/90 at 12; TR 6/21/90 at 15) But she did not perform any test on the shirt to determine whether human blood was present on it—she simply assumed that it was human blood and that such tests were "not necessary." (TR 6/26/90 at 13) In fact Meya's assumptions reached more broadly. Not only did she assume that the blood on the shirt was human blood, she even assumed that it was Dyer's blood. (TR 6/26/90 at 18) But she did not have a sample of Landrigan's blood. (TR 6/26/90 at 18) She did not have a sample of Dyer's blood, so she couldn't have known whether it was Type A. (TR 6/26/90 at 16-17) She did not know whether the blood on the shirt came from Dyer. (TR 6/26/90 at 20) And so she had no way of knowing whether the "blood on the shoe came from the same person as the blood on the shirt." (TR 6/26/90 at 20)

After his arrest, Landrigan was held in custody to await trial. From jail,

Landrigan made a call to his then-girlfriend, Cheryl Smith. (TR 6/21/90 at 52) On direct examination at Landrigan's trial, Smith explained that Landrigan told her that he was in jail for murder because he "killed a guy," "killed him with his hands," and that there was someone else present with him but that "that guy got away." (TR 6/21/90 at 52) On cross-examination, Smith admitted that she couldn't remember Landrigan telling her that he had been charged with murder. (TR 6/21/90 at 55) She also explained that while she was talking to Landrigan, it seemed as if there were "lots of people around." (TR 6/21/90 at 56) She explained that Landrigan had told her that he was calling her from jail (TR 6/21/90 at 57), but she also said that she thought Landrigan was lying to her about being in jail (TR 6/21/90 at 56). She further explained that Landrigan said, "No I didn't do it, another guy did it." (TR 6/21/90 at 57) Finally, Smith explained that she lied to Landrigan throughout their conversation. (TR 6/21/90 at 58)

The prosecution's theory at trial was that Dyer invited Landrigan over to his apartment where they had sex, then got dressed, and then Landrigan strangled Dyer to death during a bloody struggle. (TR 6/27/90 at 4-19) Based on that theory of the case, Landrigan was charged with and convicted of committing first-degree murder solely on the basis of felony murder. (TR 6/19/90 at 4; TR 6/27/90 at 6, 49) *See State v. Landrigan*, 859 P.2d 111, 115 (Ariz. 1993) (holding that the evidence at trial

was sufficient to sustain the first-degree murder charge on a felony-murder theory).

Before the sentencing hearing, neither party challenged Landrigan's eligibility for the death penalty on the ground that Landrigan was neither the actual killer, *see Enmund v. Florida*, 458 U.S. 782, 797 (1982), nor was he a major participant in the underlying felony who exhibited reckless indifference to human life, *see Tison v. Arizona*, 481 U.S. 137, 158 (1987). The sentencing judge nevertheless spontaneously addressed the issue:

> The Court finds from the evidence introduced at trial, the evidence at the sentencing hearing and the entire case, and with particular regard to the testimony of Cheryl Smith that she had a conversation with the defendant when he indicated that he murdered someone, the Court finds that the defendant was the actual killer, that he intended to kill the victim and was a major participant in the act. Although the evidence shows that another person may have been present, the Court finds that the blood spatters on the tennis shoes of the defendant demonstrate that he was the killer in this case.

(Exhibit S) The judge found Landrigan to be the actual killer—and thus eligible for the death penalty under *Enmund*—without acknowledging the total lack of connection between the blood on Landrigan's shoe and the blood on Dyer's shirt, without addressing the obvious credibility problems associated with Cheryl Smith's admission that she is a liar, and without identifying any other evidence in the record to support the conclusion. She then sentenced Landrigan to death. Landrigan did not challenge the sentencing judge's *Enmund* eligibility finding on direct appeal.

PROCEDURAL HISTORY

Landrigan was sentenced to death on October 25, 1990. The Arizona Supreme Court later affirmed Landrigan's conviction and sentence on grounds not related to the sentencing judge's *Enmund* finding. *See State v. Landrigan*, 859 P.2d 111 (Ariz. 1993). That court later denied a petition for review from the denial of a petition for postconviction relief. That petition raised other claims not implicated here.

In the summer of 2006, Landrigan sought an order from the Maricopa County Superior Court authorizing him to conduct postconviction DNA testing on the fingernail and the hairs found on or in Dyer's hand. (Exhibit A) *See* Ariz. Rev. Stat. § 13-4240. A year later, after learning that the fingernail and hairs had been lost, Landrigan asked the court to allow him to conduct DNA testing on Dyer's jeans, the blanket on his bed, and the curtains in his apartment. (Exhibit D) Landrigan forwarded these items, along with the curtains from Dyer's apartment and a buccal swab obtained from Landrigan, to Technical Associates Incorporated (TAI) of Ventura, California, for testing. (Exhibit P at 1)

TAI tested multiple semen and blood stains that were on Dyer's jeans and on the blanket on Dyer's bed, and also tested multiple blood stains on the curtains.[2]

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[2]Although TAI performed some initial tests suspected blood stains, it did not subject the blood stains on the jeans to DNA analysis. TAI is completing that testing now, and has issued preliminary results of that testing (Exhibit R).

(Exhibit P at 2-3) On April 22, 2008, TAI reported[3] that Landrigan is excluded as a contributor of any of the DNA from the semen or blood. (Exhibit P at 8) The testing showed DNA profiles of at least two other individuals. (Exhibit P at 8-13) These results flatly contradict the prosecution's theory at trial—that Landrigan had sex with the victim, then afterward strangled him to death during a bloody struggle. Even though the DNA test results implicate two other individuals in this bloody struggle that led to a man's death, the State of Arizona has made no effort to match these DNA profiles to those stored in any law enforcement DNA database.

Under Arizona's postconviction DNA testing statute, if the results of such testing "are favorable to the petitioner, the court shall order a hearing." Ariz. Rev. Stat. § 13-4240(K). Three months after TAI issued its report, Landrigan amended a pending petition for state postconviction relief to include a request for an evidentiary hearing under § 13-4240(K) in view of the favorable results of the DNA testing. (Exhibit F) On August 10, 2009, the court denied Landrigan a hearing on the ground that the parties did not "dispute the facts established by DNA testing of the victim's pants" (which undoubtedly were "favorable" to Landrigan) and that therefore there were "no issues of material fact left to be determined by an evidentiary hearing."

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[3]TAI's report describes the items it tested, the chain of custody of those items, and the method used to determine the DNA test results.

(Exhibit H at 3) That same day, Landrigan moved to amend his pending petition for state postconviction relief for a second time, asserting a claim that the results of the DNA testing showed that the sentencing judge erroneously concluded that Landrigan was eligible for the death penalty under *Enmund*. (Exhibit G)

On October 8, 2009, the Maricopa County Superior Court dismissed Landrigan's petition for postconviction relief. Noting that it had previously ruled that an evidentiary hearing was not required, the court further ruled:

> The DNA evidence would not have changed the trial judge's death verdict. Both the trial judge and the Supreme Court, independently reviewing the propriety of the death sentence, determined that the record did not present mitigating evidence sufficiently substantial to call for leniency. If an accomplice was involved in the murder and the defendant believed he was less culpable, he could have presented this fact as mitigation at his sentencing hearing. He chose not to present mitigation and that choice was upheld by the United States Supreme Court.

(Exhibit I at 5) In its October 8 order, the court did not address Landrigan's request to amend his petition to include a challenge to the sentencing judge's *Enmund* eligibility determination. Later, however, the court clarified that its October 8 order disposed of that request. (Exhibit J at 1) Landrigan asked the Arizona Supreme Court to review the postconviction court's denial of his *Enmund* claim, but that court summarily declined to do so. (Exhibit K) On October 4, 2010, the United States Supreme Court declined to review the Arizona Supreme Court's ruling. *See*

Landrigan v. Arizona, No. 10-5280, 2010 WL 2717732 (U.S. Oct. 4, 2010).

STANDARDS FOR AUTHORIZATION

Because he wishes to seek federal habeas relief for a second time, Landrigan must obtain authorization from this Court to do so because his first federal habeas petition was denied on the merits. *See McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). In order to obtain authorization, he must make a "prima facie showing of due diligence and actual innocence." *Morales v. Ornoski*, 439 F.3d 529, 531 (9th Cir. 2006); *accord Cooper v. Woodford*, 358 F.3d 1117, 1119, 1123 (9th Cir. 2004) (en banc). Landrigan can make this showing as to his death-eligibility claim, and so this Court should authorize him to proceed on the attached application for a writ of habeas corpus. *See id.* at 1123.

1. Landrigan has been reasonably diligent in seeking relief on his death-eligibility claim.

The sentencing judge based her *Enmund/Tison* finding on two bits of trial evidence—the blood on Landrigan's shoes and the testimony of Cheryl Smith, an admitted liar, who said that Landrigan told her that he had killed a man. (Exhibit S) But newly discovered DNA evidence—evidence that could not have been previously discovered through the exercise of due diligence—shows that Landrigan's blood was not found on the victim's clothing. This fact demonstrates that the blood on

Landrigan's shoes had no bearing on the sentencing judge's *Enmund* determination, and also shows that the sentencing judge's reliance on Smith's testimony was entirely erroneous.

In April 2000, the Arizona legislature enacted a statute that provided for postconviction DNA testing of "any evidence that is in possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence." S.B. 1353, 44th Leg., 2d Sess., 2000 Ariz. Legis. Serv. ch. 353 (Ariz. 2000), *codified at* Ariz. Rev. Stat. § 13-4240(A). Before seeking DNA testing under this statute, the defendant who seeks testing must demonstrate to the court that the evidence he seeks to have tested still exists. *See* Ariz. Rev. Stat. § 13-4240(B)(2).

In the fall of 2000, under the auspices of Arizona's new postconviction DNA testing statute, Lisa Eager, an investigator with the office of the Federal Public Defender for the District of Arizona, contacted the Phoenix Police Department to determine whether the hair and the fingernail that were found in Dyer's apartment still existed. (Exhibit Q ¶¶ 2-3) Eager discovered that the Phoenix Police Department could not account for these items because the evidence was "gone." (Exhibit Q ¶ 5) The property room told Eager that the items had been used as court exhibits and were missing. (Exhibit Q ¶ 7) The Phoenix Police Department promised

to give Eager a statement on its letterhead indicating that the hair and fingernail had gone missing but never followed through on its promise. (Exhibit Q ¶ 5; Exhibit N)

Meanwhile, Landrigan obtained relief from his death sentence in the Ninth Circuit. *See Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (en banc), *rev'd*, 550 U.S. 465 (2007). Believing still that DNA testing might exonerate him of guilt, Landrigan formally requested from the trial court authorization to conduct postconviction DNA testing of the hair and fingernail under Arizona's statute. (Exhibit A) The Arizona Attorney General's Office responded to Landrigan's request and informed the court that the hair and fingernail were available to be tested. (Exhibit B) Based on that representation, the court ordered the DNA testing to be conducted. (Exhibit C)

Eager then contacted the Phoenix Police Department and asked to have the hair and fingernail sent out for testing. (Exhibit O ¶ 3) The Phoenix Police Department had recently completed an inventory of its freezers, but could not find the hairs or fingernail. (Exhibit O ¶ 6) Finally on January 29, 2007, the Phoenix Police Department admitted that the hair and fingernail not only were lost but might also never have been included in initial processing of the forensic evidence in this case. (Exhibit N)

Thus the Phoenix Police Department confirmed that the most important

physical evidence that it had recovered from the crime scene would never be tested. Landrigan then asked the superior court to expand its DNA testing order to include Dyer's jeans, the blanket from his bed, and the curtains from his apartment. (Exhibit D) The court did so. (Exhibit E) Eager then sent the jeans, the blanket, and the curtains to TAI for testing. (Exhibit O ¶ 21) On April 22, 2008, TAI formally reported that Landrigan was excluded as a source of any DNA found on those items. (Exhibit P at 8-13)

Due to an unintentional oversight, TAI did not complete a DNA analysis of the blood found on Dyer's jeans. Its 2008 report was therefore necessarily incomplete. At Landrigan's request, the Maricopa County Superior Court then released the jeans back to TAI so that TAI could complete the testing that the court had ordered in 2007. (Exhibit Q at 1) On October 20, 2010, TAI provided preliminary results of its new round of testing. (Exhibit R)

As explained more fully in the attached petition for a writ of habeas corpus, TAI's new preliminary results confirm the prosecution's theory at trial—with one crucial exception. The prosecution alleged that the victim and the perpetrator had sex, then had a violent struggle. (Exhibit F at 29; *see also* TR 6/27/90 at 12-14) The DNA test results provide clear evidence of sex and violence. The victim, Individual #2, left semen on his jeans and on the blanket, and he bled on both the jeans and the

blanket; the perpetrator left semen on the blanket, and left blood on the curtains, on the blanket, and on one area of the victim's jeans. But these results also provide clear evidence that, contrary to the prosecution's theory, *Landrigan did not participate* in either of the activities that the prosecution alleged led to the death of the victim. Landrigan was not the actual killer.

This Court must authorize Landrigan to proceed in the district court if it concludes that he has made a *prima facie* showing of diligence in developing the factual basis of his claim. *See* 28 U.S.C. § 2244(b)(2)(A)(i), (b)(3)(C); *cf. Morales v. Ornoski*, 439 F.3d 529, 532-33 (9th Cir. 2006) (denying authorization because the petitioner did not make a *prima facie* showing of diligence). Here, Landrigan diligently sought to learn from the Phoenix Police Department whether it still had the hair and fingernail available for testing and to conduct DNA testing on Dyer's jeans, blanket, and curtains. Soon after Arizona enacted its postconviction DNA testing statute, Landrigan began to investigate whether this evidence still existed—a necessary step for obtaining judicial authorization to conduct the necessary testing. The Phoenix Police Department is largely responsible for the more-than-six-year delay between the time that Landrigan initially asked it to locate this evidence and the time it finally concluded that the evidence had been irretrievably lost. Thus, Landrigan exercised reasonable diligence in obtaining the newly discovered DNA

evidence in time to present it to the state courts in a manner that would allow them to grant relief from his death sentence. *See Quezada v. Scribner*, 611 F.3d 1165, 1167-68 (9th Cir. 2010) (equating "due diligence" with reasonable diligence).

2. In light of the results of testing the newly discovered DNA evidence, Landrigan is not eligible for the death penalty.

In addition to the required diligence showing, Landrigan must make a *prima facie* showing that in light of the new DNA evidence, "no reasonable factfinder would have found him guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). In this case, Landrigan contends that the DNA evidence shows that he was not eligible for the death penalty because he did not "himself kill, attempt to kill, or intend that a killing take place," *Enmund v. Florida*, 458 U.S. 782, 797 (1982), and because he was not a major participant in the underlying felony and did not act with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 158 (1987). Because the new DNA evidence, taken together with the evidence presented at Landrigan's trial, warrants further exploration of the validity of Landrigan's death sentence, this Court should authorize him to proceed in the district court. *See Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (citing *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997)).

A. *This Court may authorize the filing of a second or successive habeas petition that challenges only eligibility for the death sentence.*

Congress has decreed that the courts of appeals may authorize the filing of a second or successive habeas petition if that petition challenges the petitioner's guilt as to the "underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). This Court has further interpreted this phrase to include challenges to a petitioner's eligibility for the death penalty. *See Thompson v. Calderon*, 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc). Landrigan is seeking authorization to file a second or successive habeas application challenging his eligibility for the death penalty under *Enmund* and *Tison*. This Court has jurisdiction under § 2244(b)(2)(B)(ii) to entertain his request. *See Thompson*, 151 F.3d at 923-24.

B. *Landrigan has made a prima facie showing that he is not eligible for the death sentence because he was not the actual killer and because he was not a major participant in the underlying felony who exhibited reckless indifference to human life.*

In order to obtain authorization to file his habeas application, Landrigan must make a *prima facie* showing that he is not eligible for the death penalty under *Enmund* and *Tison*. *See* 28 U.S.C. § 2244(b)(3)(C); *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006). In this case, the fact that Landrigan was excluded as either of the sources of the DNA found on the victim's curtains, blanket, and jeans constitutes a *prima facie* showing that he was not the actual killer in this case.

The DNA testing result also constitutes a *prima facie* showing that Landrigan was not a major participant in the underlying felony who exhibited reckless indifference to human life, because the results of the DNA testing raise serious doubts as to whether Landrigan was present *at all* during the bloody struggle that led to the victim's death in this case. In *Tison*, for instance, the U.S. Supreme Court remanded for further proceedings to determine whether a participant in the underlying felony who also was "present at the murder site, did nothing to interfere with the murders, and after the murders even continued on the joint venture," 481 U.S. at 145 (quoting *State v. Tison*, 690 P.2d 755, 757-58 (Ariz. 1984)), nevertheless did not exhibit the reckless indifference to human life required to impose the death penalty on a felony-murder defendant, *see id.* at 158 (remanding for further proceedings). In Landrigan's case there is less evidence of participation in the underlying felony than in *Tison*. Landrigan was certainly in Dyer's apartment the night before Dyer was killed, and none of Landrigan's fingerprints suggest any involvement with the violent struggle that preceded Dyer's death. Coupled with this trial evidence, the result of the DNA testing certainly undermines any speculation that Landrigan could have acted with reckless indifference to Dyer's death, even assuming that Landrigan was present to witness it.

The result of the DNA testing thus undermines any confidence a reviewing

court can have in the sentencing judge's determination that Landrigan was the actual killer in this case. As explained in the attached petition for a writ of habeas corpus, the sentencing judge's *Enmund* finding lacked any support in the evidence presented at trial. Any appellate court, applying the ordinary standards of appellate review, would have vacated that finding on direct appeal. Landrigan has made a *prima facie* showing that but for constitutional error, no reasonable factfinder would have found him eligible for the death penalty under *Enmund* and *Tison*. This Court therefore should authorize him to file the attached petition for a writ of habeas corpus in the district court, and stay his execution in accordance with Circuit Rule 22-3(f) until the district court rules on the merits of the claim contained in that petition.

CONCLUSION

By conducting postconviction DNA testing, Landrigan has shown that he probably was not the actual killer in this case. The sentencing judge incorrectly found him eligible for the death penalty because she erroneously concluded that he was the actual killer. This Court should therefore authorize him to seek relief from the district court on this claim and stay his upcoming execution until the district court rules on his habeas petition.

Respectfully submitted: October 21, 2010

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CERTIFICATE OF SERVICE

I certify that on October 21, 2010, I served either the original or a copy of this document on the following parties in the manner indicated:

Original motion: (and required attachments) (by Federal Express overnight)	Clerk of Court United States Court of Appeals for the Ninth Circuit 95 Seventh Street San Francisco, California 94103
One copy of motion: (and required attachments) (by hand delivery)	Kent E. Cattani Assistant Attorney General Arizona Attorney General's Office 1275 West Washington Street Phoenix, Arizona 85007

Nancy Rangel

Nancy Rangel
Legal Secretary