

1 Jon M. Sands
Federal Public Defender
2 Dale A. Baich (Ohio Bar No. 0025070)
Sylvia J. Lett (Ariz. Bar No. 017326)
3 Assistant Federal Public Defenders
850 West Adams Street, Suite 201
4 Phoenix, Arizona 85007
(602) 382-2816 voice
5 (602) 889-3960 facsimile
dale_baich@fd.org
6 sylvia_lett@fd.org

7 *Attorneys for Petitioner*

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 Jeffrey Timothy Landrigan,

No.

11 Petitioner,

**PETITION FOR A WRIT OF
HABEAS CORPUS**

12 vs.

(28 U.S.C. § 2254)

13 Ernest Trujillo, Warden, Arizona
14 State Prison Complex-Eyman; and
Charles L. Ryan, Director of the
15 Arizona Department of Corrections,

(Death Penalty Case)

16 Respondents.

17
18 The prosecution's theory at Arizona death-row prisoner Jeffrey Landrigan's
19 trial for first-degree murder was that the perpetrator had sex with the victim before
20 killing him during a bloody struggle. Preliminary postconviction DNA testing results
21 now confirm the prosecution's theory. But the prosecution was wrong about one
22 critical fact—Landrigan was not the perpetrator, as those test results also confirm.
23 The sentencing judge's finding that Landrigan was the actual killer thus lacks a
24 factual basis and must be revisited.

25 The Ninth Circuit Court of Appeals authorized Landrigan to file this second
26 or successive application for a writ of habeas corpus and stayed his execution—which
27 had been scheduled for October 26, 2010—to allow this Court to consider his
28 application. *See* 9th Cir. R. 22-3(f).

1 was the day that Fincher gave Dyer his paycheck—Wednesday, December 13, 1989.
2 (TR 6/25/90 at 46) After Dyer failed to show up for work on each of the next two
3 days, Fincher took Charles Hitchings, another coworker, over to Dyer’s apartment.
4 (TR 6/25/90 at 47) Fincher jimmed open the lock to Dyer’s apartment, then entered
5 and found Dyer sprawled out across the bed. (TR 6/25/90 at 47) Fincher had Dyer’s
6 apartment manager summon the fire department and the police. (TR 6/25/90 at 47)

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

16 While he was at Dyer’s apartment, Chambers noticed a shoeprint in a pile of
17 sugar. (TR 6/19/90 at 86) Shoeprint technicians with the police department made a
18 cast of the shoeprint. (TR 6/19/90 at 87-89) After reviewing a catalog, Chambers
19 determined that the cast impression of the shoe was similar to an Adidas Torsion
20 model shoe. (TR 6/21/90 at 4) Chambers circulated a bulletin to the other police
21 officers on patrol in the neighborhood where Dyer’s apartment was located. (TR
22 6/21/90 at 5)

23 Based on that bulletin, Chambers made contact the following Saturday,
24 December 23, with an individual who identified himself as “Jeffrey Page.” (TR
25 6/21/90 at 6-7) Chambers eventually came to know “Jeffrey Page” as Landrigan.
26 (TR 6/21/90 at 42) During an interview with Landrigan, Chambers took a pair of
27 Adidas Torsion model shoes from Landrigan. (TR 6/21/90 at 11)

28 Chambers sent a number of items to the crime lab, including a strand of hair;

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

8 On Saturday, December 16, Dr. Fred Walker performed an autopsy on Dyer's
9 body. (TR 6/25/90 at 27) The body was clothed in a shirt, blue jeans, and white
10 cotton socks when Dr. Walker began to examine it. (TR 6/25/90 at 28) He noticed
11 that there was some blood on the victim's pants, but did not know whether that blood
12 was the victim's. (TR 6/25/90 at 40) Dr. Walker did not determine the victim's
13 blood type. (TR 6/25/90 at 40) Dr. Walker was unsure whether he received any
14 hairs, but was sure that he did not receive any fingernail. (TR 6/25/90 at 41)

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

20 Karen Jones, a fingerprint examiner working for the police department,
21 compared latent fingerprints found in Dyer's apartment to fingerprints of known
22 suspects. (TR 6/21/90 at 70) Jones received 63 latent fingerprints and compared
23 them all to a known fingerprint given by Landrigan. (TR 6/21/90 at 72-74) Only
24 seven matched Landrigan (TR 6/21/90 at 77); these came from the refrigerator door,
25 the toilet tank lid, the bottom of a dinner plate, the plastic wrapper on a loaf of bread,
26 and a jar of mayonnaise (TR 6/21/90 at 77; 6/25/90 at 7, 15-16, 18). Jones did not
27 match any of the 63 latent prints to any other known prints provided by potential
28 suspects. (TR 6/21/90 at 77) She could not recall comparing any of the latent prints

1 to any “other people.” (TR 6/21/90 at 73) Nor has the State of Arizona, since
2 Landrigan’s trial, ever compared these other prints against prints in law enforcement
3 databases in an effort to identify other potential suspects.

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

10 Meya also tested the shirt that Dyer was wearing. (TR 6/26/90 at 12; TR
11 6/21/90 at 15) But she did not perform any test on the shirt to determine whether
12 human blood was present on it—she simply assumed that it was human blood and that
13 such tests were “not necessary.” (TR 6/26/90 at 13) In fact Meya’s assumptions
14 reached more broadly. Not only did she assume that the blood on the shirt was
15 human blood, she even assumed that it was Dyer’s blood. (TR 6/26/90 at 18) But she
16 did not have a sample of Landrigan’s blood. (TR 6/26/90 at 18) She did not have a
17 sample of Dyer’s blood, so she couldn’t have known whether it was Type A. (TR
18 6/26/90 at 16-17) She did not know whether the blood on the shirt came from Dyer.
19 (TR 6/26/90 at 20) And so she had no way of knowing whether the “blood on the
20 shoe came from the same person as the blood on the shirt.” (TR 6/26/90 at 20)

21 After his arrest, Landrigan was held in custody to await trial. From jail,
22 Landrigan made a call to his then-girlfriend, Cheryl Smith. (TR 6/21/90 at 52) On
23 direct examination at Landrigan’s trial, Smith explained that Landrigan told her that
24 he was in jail for murder because he “killed a guy,” “killed him with his hands,” and
25 that there was someone else present with him but that “that guy got away.” (TR
26 6/21/90 at 52) On cross-examination, Smith admitted that she couldn’t remember
27 Landrigan telling her that he had been charged with murder. (TR 6/21/90 at 55) She
28 also explained that while she was talking to Landrigan, it seemed as if there were

1 “lots of people around.” (TR 6/21/90 at 56) She explained that Landrigan had told
2 her that he was calling her from jail (TR 6/21/90 at 57), but she also said that she
3 thought Landrigan was lying to her about being in jail (TR 6/21/90 at 56). She
4 further explained that Landrigan said, “No I didn’t do it, another guy did it.” (TR
5 6/21/90 at 57) Finally, Smith explained that she lied to Landrigan throughout their
6 conversation. (TR 6/21/90 at 58)

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

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

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

25 (Exhibit S) The judge found Landrigan to be the actual killer—and thus
26 eligible for the death penalty under *Enmund*—without acknowledging the total lack
27 of connection between the blood on Landrigan’s shoe and the blood on Dyer’s shirt,
28 without addressing the obvious credibility problems associated with Cheryl Smith’s

1 admission that she is a liar, and without identifying any other evidence in the record
2 to support the conclusion. She then sentenced Landrigan to death. Landrigan did not
3 challenge the sentencing judge's *Enmund* eligibility finding on direct appeal.

4 **Procedural History**

5 Landrigan was sentenced to death on October 25, 1990. The Arizona Supreme
6 Court later affirmed Landrigan's conviction and sentence on grounds not related to
7 the sentencing judge's *Enmund* finding. *See State v. Landrigan*, 859 P.2d 111 (Ariz.
8 1993). That court later denied a petition for review from the denial of a petition for
9 postconviction relief. That petition raised other claims not implicated here.

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

19 TAI tested multiple semen and blood stains that were on Dyer's jeans and on
20 the blanket on Dyer's bed, and also tested multiple blood stains on the curtains.¹
21 (Exhibit P at 2-3) On April 22, 2008, TAI reported² that Landrigan is excluded as a
22 contributor of any of the DNA from the semen or blood. (Exhibit P at 8) The testing
23 showed DNA profiles of at least two other individuals. (Exhibit P at 8-13) These

24
25 ¹Although TAI performed some initial tests suspected blood stains, it did not
26 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).

27 ²TAI's report describes the items it tested, the chain of custody of those items,
28 and the method used to determine the DNA test results.

1 results flatly contradict the prosecution's theory at trial—that Landrigan had sex with
2 the victim, then afterward strangled him to death during a bloody struggle. Even
3 though the DNA test results implicate two other individuals in this bloody struggle
4 that led to a man's death, the State of Arizona has made no effort to match these DNA
5 profiles to those stored in any law enforcement DNA database.

6 Under Arizona's postconviction DNA testing statute, if the results of such
7 testing "are favorable to the petitioner, the court shall order a hearing." Ariz. Rev.
8 Stat. § 13-4240(K). Three months after TAI issued its report, Landrigan amended a
9 pending petition for state postconviction relief to include a request for an evidentiary
10 hearing under § 13-4240(K) in view of the favorable results of the DNA testing.
11 (Exhibit F) On August 10, 2009, the court denied Landrigan a hearing on the ground
12 that the parties did not "dispute the facts established by DNA testing of the victim's
13 pants" (which undoubtedly were "favorable" to Landrigan) and that therefore there
14 were "no issues of material fact left to be determined by an evidentiary hearing."
15 (Exhibit H at 3) That same day, Landrigan moved to amend his pending petition for
16 state postconviction relief for a second time, asserting a claim that the results of the
17 DNA testing showed that the sentencing judge erroneously concluded that Landrigan
18 was eligible for the death penalty under *Enmund*. (Exhibit G)

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

22 The DNA evidence would not have changed the trial judge's death
23 verdict. Both the trial judge and the Supreme Court, independently
24 reviewing the propriety of the death sentence, determined that the record
25 did not present mitigating evidence sufficiently substantial to call for
26 leniency. If an accomplice was involved in the murder and the
27 defendant believed he was less culpable, he could have presented this
28 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*

1 eligibility determination. Later, however, the court clarified that its October 8 order
2 disposed of that request. (Exhibit J at 1) Landrigan asked the Arizona Supreme
3 Court to review the postconviction court's denial of his *Enmund* claim, but that court
4 summarily declined to do so. (Exhibit K) On October 4, 2010, the United States
5 Supreme Court declined to review the Arizona Supreme Court's ruling. *See*
6 *Landrigan v. Arizona*, No. 10-5280, 2010 WL 2717732 (U.S. Oct. 4, 2010).

7 **First Claim for Relief**

8 **Landrigan is not eligible for the death penalty under the Eighth**
9 **Amendment because newly discovered DNA evidence demonstrates**
10 **that he neither was the actual killer nor was a major participant in**
11 **the underlying felony who exhibited reckless indifference to human**
12 **life.**

13 Because Landrigan was convicted of felony murder, *see Landrigan*, 859 P.2d
14 at 115, the Eighth Amendment forbids executing him unless an additional culpability
15 determination is made. In order for a felony-murder defendant to be eligible for the
16 death penalty, he must be the actual killer, or have attempted or intended to kill. *See*
17 *Enmund*, 458 U.S. at 797. The *Enmund* eligibility requirement can also be met with
18 a showing that the defendant was a major participant in the underlying felony who
19 exhibited reckless indifference to human life. *See Tison*, 481 U.S. at 158.
20 Furthermore, the Eighth Amendment requires that the Arizona state courts make the
21 *Enmund/Tison* eligibility finding in the first instance. *See Cabana v. Bullock*, 474
22 U.S. 376, 391 (1986).

23 **A. Landrigan obtained these newly discovered DNA test results by exercising**
24 **due diligence.**

25 The sentencing judge based her *Enmund/Tison* finding on two bits of trial
26 evidence—the blood on Landrigan's shoes and the testimony of Cheryl Smith, an
27 admitted liar, who said that Landrigan told her that he had killed a man. (Exhibit S)
28 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

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

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

12 In the fall of 2000, under the auspices of Arizona's new postconviction DNA
13 testing statute, Lisa Eager, an investigator with the office of the Federal Public
14 Defender for the District of Arizona, contacted the Phoenix Police Department to
15 determine whether the hair and the fingernail that were found in Dyer's apartment
16 still existed. (Exhibit Q ¶¶ 2-3) Eager discovered that the Phoenix Police
17 Department could not account for these items because the evidence was "gone."
18 (Exhibit Q ¶ 5) The property room told Eager that the items had been used as court
19 exhibits and were missing. (Exhibit Q ¶ 7) The Phoenix Police Department promised
20 to give Eager a statement on its letterhead indicating that the hair and fingernail had
21 gone missing but never followed through on its promise. (Exhibit Q ¶ 5; Exhibit N)

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

1 (Exhibit B) Based on that representation, the court ordered the DNA testing to be
2 conducted. (Exhibit C)

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

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

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

24 The results of TAI's previous testing showed the presence of two individuals,
25 who TAI identified as Individual #1 and Individual #2. Individual #1 was the source
26 of the blood on the curtains; Individual #2 was the source of the semen on the blue
27 jeans, which was found on the inside front button-hole area of the jeans; both were
28 the source of blood and semen on the blanket. (Exhibit P at 8-13) However, that

1 information did not permit any conclusions as to the identity of the victim or the
2 perpetrator. Although the testing suggested that the person whose semen was on the
3 jeans would have been the victim—after all, the victim would be expected to have
4 contributed the majority of semen and sperm to clothing he was wearing—without
5 additional confirmation, that conclusion was arguable. Thus, any concomitant
6 conclusion that the other individual was the perpetrator was equally reasonable, but
7 arguable. The new results, however, provide confirmation of those conclusions.

8 **1. The new results of tests on the blood on the blue jeans indicate that**
9 **Individual #2 can be classified as the victim.**

10 The results of the new DNA tests, combined with the information from the
11 previous testing, allow the assignment of Individual #2 as the victim. This is so
12 because the *new* test results demonstrate that the blood on the jeans reflects the same
13 profile as that previously identified from the semen on the jeans: Individual #2. That
14 is, the victim was found in the jeans that contained not only semen, but also blood
15 from a single primary donor: Individual #2. (Exhibit R ¶¶ 23-25) That same person,
16 Individual #2, also contributed the majority of the blood and semen on the blanket on
17 which the victim was lying. (Exhibit R ¶¶ 19-21)

18 Thus, because the profile of the blood on the jeans and of the semen both
19 reflect the presence of Individual #2, then the victim, the person who was actually
20 wearing the semen-stained jeans, and who was bleeding from wounds acquired during
21 a violent struggle (*e.g.* TR 6/21/90 at 24-25), is reasonably identified as Individual
22 #2. Without the newly reported results of tests on the blood, this conclusion would
23 not be possible.

24 **2. The new results of tests of the blood on the blue jeans indicate that**
25 **Individual #1 can be classified as the perpetrator.**

26 Not only do the new results of the blood on the jeans permit the recognition of
27 Individual #2 as the victim, but those results also confirm the identify of Individual
28 #1 as the perpetrator. Individual #1 is the *only* contributor of the DNA profile found
in the blood on the curtain. (Exhibit R ¶ 17) Individual #1 also contributed to the

1 blood and semen on the blanket. (Exhibit R ¶¶ 20-21) Finally, the new results
2 indicate that the perpetrator, who bled on the curtains and on the blanket, also
3 contributed blood to one of the stains on the victim's blue jeans.³

4 **3. The new results from the testing of the blood on the jeans**
5 **demonstrate that the perpetrator—not Landrigan—had sex with the**
6 **victim and then killed him.**

7 These results confirm the prosecution's theory at trial—with one crucial
8 exception. The prosecution alleged that the victim and the perpetrator had sex, then
9 had a violent struggle. (Exhibit F at 29; *see also* TR 6/27/90 at 12-14) The DNA test
10 results provide clear evidence of sex and violence. The victim, Individual #2, left
11 semen on his jeans and on the blanket, and he bled on both the jeans and the blanket;
12 the perpetrator left semen on the blanket, and left blood on the curtains, on the
13 blanket, and on one area of the victim's jeans. But these results also provide clear
14 evidence that, contrary to the prosecution's theory, *Landrigan did not participate* in
15 either of the activities that the prosecution alleged led to the death of the victim.
16 Landrigan was not the actual killer.

17 This Court must dismiss Landrigan's claim unless "the factual predicate for the
18 claim could not have been previously discovered through the exercise of due
19 diligence." 28 U.S.C. § 2244(b)(2)(B)(i); *see also* *Thompson v. Calderon*, 151 F.3d
20 918, 935 n.11 (9th Cir. 1998) (Reinhardt, J., concurring and dissenting). Here,
21 Landrigan diligently sought to learn from the Phoenix Police Department whether it
22 still had the hair and fingernail available for testing and to conduct DNA testing on
23 Dyer's jeans, blanket, and curtains. Soon after Arizona enacted its postconviction
24 DNA testing statute, Landrigan began to investigate whether this evidence still

25 ³Additionally, there are low levels of alleles from other individuals present in
26 some of the samples; Landrigan is excluded as a source of any of the DNA found in
27 the samples. (*See, e.g.*, Exhibit R ¶¶ 19, 20, 23, 24) The source or sources of these
28 alleles are inconclusive, except for the presence of Individual #1 as a contributor to
one blood stain.

1 existed—a necessary step for obtaining judicial authorization to conduct the
2 necessary testing. The Phoenix Police Department is largely responsible for the
3 more-than-six-year delay between the time that Landrigan initially asked it to locate
4 this evidence and the time it finally concluded that the evidence had been
5 irretrievably lost. Thus, Landrigan exercised reasonable diligence in obtaining the
6 newly discovered DNA evidence in time to present it to the state courts in a manner
7 that would allow them to grant relief from his death sentence. Thus Landrigan’s
8 claim survives the diligence requirement in § 2244(b)(1)(B)(i). *See Quezada v.*
9 *Scribner*, 611 F.3d 1165, 1167-68 (9th Cir. 2010) (equating “due diligence” with
10 reasonable diligence).

11 **B. The newly discovered DNA evidence, taken together with the evidence**
12 **presented at trial and the findings of the sentencing judge, demonstrates**
13 **that the sentencing judge’s *Enmund* eligibility determination was**
14 **erroneous.**

15 In order to grant relief on this claim, this Court must also determine that the
16 facts underlying it, “viewed in light of the evidence as a whole,” are “sufficient to
17 establish by clear and convincing evidence that, but for constitutional error, no
18 reasonable factfinder would have found the applicant guilty of the underlying
19 offense.” 28 U.S.C. § 2244(b)(2)(B)(ii). Legal determinations made by state courts
20 are ordinarily subject to the limitation on relief set forth at 28 U.S.C. § 2254(d). *See*
21 *Cooper v. Brown*, 510 F.3d 870, 919-20 (9th Cir. 2007). As Landrigan will explain,
22 the Arizona courts did not expressly address this properly raised claim for relief. This
23 Court must therefore independently review the state-court record to see whether
24 § 2254(d) precludes relief. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir.
25 2000).

26 Two decisions of the Maricopa County Superior Court relating to Landrigan’s
27 postconviction petition constitute the last reasoned state-court decision on this claim
28 and are therefore relevant for assessing the proper level of deference under § 2254(d).
See Stanley v. Schriro, 598 F.3d 612, 623 n.7 (9th Cir. 2010). First, the superior court

1 ruled that the new “DNA evidence would not have changed the trial judge’s death
2 verdict” because the fact that an accomplice may have been involved could have been
3 presented as mitigating evidence, which in the court’s view Landrigan chose not to
4 present. (Exhibit I at 5) Second, the superior court emphasized that the October 8
5 ruling was meant to address “all the pleadings” filed in his postconviction case,
6 specifically including the request to amend the petition to include a death-eligibility
7 challenge based on *Enmund* and *Tison*. (Exhibit J at 1) The superior court never
8 expressly indicated whether it was denying that request on procedural grounds
9 relating to the timeliness of the request to amend or on the merits of the
10 *Enmund/Tison* challenge. This Court therefore must presume that the superior court
11 denied the *Enmund/Tison* claim on the merits. *See Murdoch v. Castro*, 609 F.3d 983,
12 989 (9th Cir. 2010) (en banc). But because the superior court never articulated a
13 reasoned basis for denying the claim on the merits—indeed, it never even
14 acknowledged that Landrigan was challenging his *eligibility* for the death penalty and
15 not the sentencing judge’s *selection* of that penalty for him—this Court must
16 independently review that court’s rejection of his *Enmund/Tison* challenge. *See*
17 *Delgado*, 223 F.3d at 981-82.

18 The sentencing judge found Landrigan eligible for the death penalty under
19 *Enmund* only. That is, she concluded only that Landrigan was the actual killer
20 (Exhibit S), and thus did not base her conclusion on the equivalent finding of major
21 participation and reckless indifference to human life. *See Tison*, 481 U.S. at 158
22 (“Rather, we simply hold that major participation in the felony committed, combined
23 with reckless indifference to human life, is sufficient to satisfy the *Enmund*
24 culpability requirement.”). She concluded that Landrigan was the actual killer
25 because (1) there was blood on his shoes and (2) he told Cheryl Smith, an admitted
26 liar, that he had killed someone. (Exhibit S) But those findings were unsupported by
27 any evidence presented at trial, as the new DNA evidence now confirms.

28 The fact that there was blood on Landrigan’s shoe is inconsequential. Inta

