

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

APPLICATION FOR A STAY OF EXECUTION

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Petitioner Jeffrey Timothy Landrigan is an Arizona death-row prisoner with a scheduled execution date of October 26, 2010. Concurrently with this document, he is filing a motion seeking authorization to file a second or successive habeas application in the district court. In order to afford this Court sufficient time to address the merits of his application, Landrigan is also asking the Court to temporarily stay his execution.

In general, a federal court must stay an execution in order to afford itself sufficient time to address the merits of claims presented in a death-row prisoner's petition for a writ of habeas corpus. *See McFarland v. Scott*, 512 U.S. 849, 858 (1994) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)). This requirement applies also to successive habeas applications, at least to the extent that a federal court must afford itself time to decide whether to dismiss that successive application on procedural grounds. *See Barefoot*, 463 U.S. at 895. If the court determines that a successive habeas application presents "substantial grounds on which relief might be granted," a federal court must impose a stay. *Id.*; *see also Gerlaugh v. Stewart*, 167 F.3d 1222, 1224 (9th Cir. 1999). Landrigan's proposed successive habeas application raises substantial grounds on which to grant relief, and he is therefore entitled to a stay of execution.

The prosecution's theory at Landrigan's trial was that the perpetrator had sex

with the victim before killing him during a bloody struggle. 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.

In his successive habeas petition, Landrigan's sole claim is that newly discovered DNA test results entirely vitiate the sentencing judge's conclusion that Landrigan was the actual killer and therefore was eligible for the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982). Landrigan was convicted of first-degree murder based solely on a theory of felony murder. *See State v. Landrigan*, 859 P.2d 111, 115 (Ariz. 1993). At Landrigan's trial, a police technician testified that a blood stain on Landrigan's shoe matched blood on the victim's shirt. But the police technician admitted that she did not have a sample of either the victim's blood or of Landrigan's blood. Based largely on the police technician's testimony, the sentencing judge found that Landrigan was the actual killer and thus eligible for the death penalty under *Enmund*.

In 2007, under the auspices of Arizona's postconviction DNA testing statute, *see* Ariz. Rev. Stat. § 13-4240, Landrigan obtained authorization to conduct DNA testing on some stains found the victim's jeans, the blanket on his bed (where the

victim's body was found), and the curtains in his apartment. The results of this testing affirmatively excluded Landrigan as the source of any DNA found on these items. Armed with these favorable test results, Landrigan asked the Maricopa County Superior Court to afford him the hearing to which Arizona's postconviction DNA testing statute entitled him. *See* Ariz. Rev. Stat. § 13-4240(K). The superior court found that it was "undisputed" that the DNA test results excluded Landrigan, but nevertheless denied him a hearing.

Based on these favorable test results, Landrigan then amended a pending petition for state postconviction relief to include a challenge to the sentencing judge's *Enmund* eligibility finding on the ground that he was not the actual killer. The superior court mistook Landrigan's claim as implicating the failure to appreciate the mitigating value of the DNA evidence, and rejected the recharacterized claim as foreclosed by *Schriro v. Landrigan*, 550 U.S. 465 (2007). But the Supreme Court's *Landrigan* decision had nothing to do with the *Enmund* eligibility claim. The superior court nevertheless insisted that it had addressed Landrigan's *Enmund* claim on the merits. Both the Arizona Supreme Court and the United States Supreme Court subsequently declined to review the superior court's treatment of the *Enmund* claim.

With days to go before his scheduled execution date, Landrigan now turns to the federal courts for relief on his *Enmund* eligibility claim. The sentencing judge's

eligibility finding had no basis in the police technician's testimony, and the results of postconviction DNA testing now demonstrate that the technician's testimony was incorrect. The Arizona courts failed to acknowledge that Landrigan was using the DNA test results to challenge the sentencing judge's finding and failed to afford him the hearing to which Arizona law entitled him. Landrigan's *Enmund* eligibility claim thus presents a substantial ground on which he might obtain relief. He is therefore entitled to a stay of execution to permit this Court to fully consider his application to proceed in the district court on his claim.*

Respectfully submitted: October 21, 2010

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*If this Court should grant him authorization, it will further stay Landrigan's execution in order to allow the district court to fully consider his habeas application. See 9th Cir. R. 22-3(f).

CERTIFICATE OF SERVICE

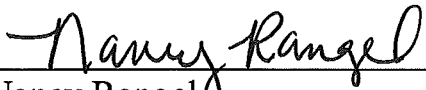
I certify that on October 21, 2010, I served this document and the required attachments on the following parties in the manner indicated:

Original motion and 3 copies:
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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)

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Nancy Rangel
Legal Secretary