

Landrigan v. Trujillo

**PETITION FOR A WRIT
OF HABEAS CORPUS**

INDEX OF EXHIBITS

Selected Pleadings and Orders

***State v. Landrigan*, Maricopa County Superior Court No. CR 1990-000066**

- Exhibit A: Motion for DNA Testing (filed July 13, 2006)
- Exhibit B: Supplemental Response to Motion for DNA Testing (mailed August 15, 2006)
- Exhibit C: Order filed September 21, 2006
- Exhibit D: Supplemental Motion to Amend Order Granting DNA Testing (filed August 6, 2007)
- Exhibit E: Order filed September 13, 2007
- Exhibit F: Second Amended Petition for Post-Conviction Relief (filed July 28, 2008)
- Exhibit G: Motion to Amend Second Amended Petition for Post Conviction Relief (filed August 10, 2009)
- Exhibit H: Order filed August 10, 2009
- Exhibit I: Order filed October 8, 2009
- Exhibit J: Order filed November 23, 2009
- Exhibit K: Arizona Supreme Court letter dated April 7, 2010
- Exhibit L: Order filed October 1, 2010

Documents and Testimonial Evidence:

- Exhibit M: Report of Detective Fuqua dated December 26, 1989
This document was filed in the Maricopa County Superior Court on July 13, 2006.
- Exhibit N: Memorandum from Sgt. Stacy Hill to Det. Suzanne Shaw dated January 29, 2007
This document was filed in the Maricopa County Superior Court on August 6, 2007.
- Exhibit O: Declaration of Lisa Eager dated August 6, 2007
This document was filed in the Maricopa County Superior Court on August 6, 2007.
- Exhibit P: Summary Report of DNA Analysis from Technical Associates, Inc., dated April 22, 2008
This document was filed in the Maricopa County Superior Court on June 3, 2008.
- Exhibit Q: Declaration of Lisa Eager dated October 20, 2010
- Exhibit R: Declaration of Marc Taylor, Director of Forensic Science Laboratory at Technical Associates, Inc., dated October 20, 2010
This document was filed in the Maricopa County Superior Court on October 21, 2010.
- Exhibit S: Excerpt of Transcript of October 25, 1990
State v. Landrigan
Maricopa County Superior Court No. CR 1990-000066

Other trial transcripts are available on request.

EXHIBIT A

1 Jon M. Sands
2 Federal Public Defender
3 Sylvia J. Lett (Arizona Bar No. 017326)
4 850 West Adams Street, Suite 201
5 Phoenix, Arizona 85007
6 602.382.2816

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JUL 13 2006



MICHAEL K. JAMES, CLERK
J. HARBOUR
DEPUTY CLERK

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,
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11 Respondent,
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13 vs.
14 JEFFREY TIMOTHY LANDRIGAN,
15
16 Petitioner.

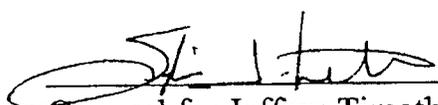
No. CR 90-00066

MOTION FOR DNA TESTING

17 Now comes the Petitioner, Jeffrey Timothy Landrigan (Landrigan), requesting
18 that this Honorable Court order DNA testing, pursuant to Ariz. Rev. Stat. § 13-4240.
19 In support of this motion, Landrigan refers to the accompanying Memorandum of
20 Points and Authorities.

21 Respectfully submitted this 13th day of July, 2006.

23 Jon M. Sands
24 Federal Public Defender
25 Sylvia J. Lett

26 
27 _____
Counsel for Jeffrey Timothy Landrigan

1 A copy of the foregoing was mailed on
2 this 13th day of July, 2006, to:

3 Kent Cattani
4 Assistant Attorney General
5 Attorney General's Office
6 Capital Litigation Section
7 1275 West Washington
8 Phoenix, Arizona 85007-2997

8 Rule 32 Unit
9 Maricopa County Superior Court
10 Phoenix, Arizona 85003

11 Honorable Thomas W. O'Toole
12 Maricopa County Superior Court
13 Central Court Building, Room 4B
14 201 West Jefferson Street
15 Phoenix, Arizona 85003

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1 Jon M. Sands
2 Federal Public Defender
3 Sylvia J. Lett (Arizona Bar No. 017326)
4 850 West Adams Street, Suite 201
5 Phoenix, Arizona 85007
6 602.382.2816

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,

No. CR 90-00066

10 Respondent,

11 MEMORANDUM OF POINTS AND
12 AUTHORITIES IN SUPPORT OF
13 MOTION FOR DNA TESTING

14 vs.

15 JEFFREY TIMOTHY LANDRIGAN,

16 Petitioner.

17 **Introduction.**

18 On January 2, 1990, Petitioner Jeffrey Timothy Landrigan ("Landrigan") was
19 indicted and charged with first-degree murder for the death of Chester Dean Dyer
20 ("victim"). Among the physical evidence found at the scene was a fingernail that was
21 never provided to the Deputy Medical Examiner. (Trial Transcript ("TR") Jun. 21,
22 1990 at 30-31, 45.) Also, hair was found in the victim's hand. (Supplemental Report
23 by Detective Richard Fuqua, Dec. 26, 1989 ("Fuqua Report") at 3 (Exhibit A).) The
24 handwritten notations on the report are of unknown origin. Neither the fingernail nor
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1 the hair were ever subjected to DNA testing. Landrigan now requests, pursuant to
2 Ariz. Rev. Stat. § 13-4240, that the court order DNA testing of the nail¹ and hair.²
3

4 The evidence offered at trial placed Landrigan in the victim's apartment at least
5 one full day before the victim was killed. There were no witnesses who placed
6 Landrigan in the victim's apartment at the time of the crime. Landrigan asserts that
7 DNA test results will provide incontrovertible evidence that someone other than
8 Landrigan was involved in the violent struggle that led to the victim's death.
9

10 A. Statement of the case.

11
12 On December 15, 1989, Chester Dean Dyer was found dead inside his
13 apartment. The victim was last known to be alive on December 13; he spoke to a
14 friend on the telephone around 8:00 p.m. that evening. On December 12, 1989,
15 Landrigan made three long-distance telephone calls from the victim's apartment. (TR
16
17
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19
20 ¹Fingernails are amenable to DNA testing. *See, e.g.,* Toshihiko Kaneshiga et al.,
21 *Genetic Analysis Using Fingernail DNA*, 20 *Nucleic Acids Res.* 5489-90 (1992); Dennis
22 McNevin et al., *Short Tandem Repeat (STR) Genotyping of Keratinised Hair: Part 1. Review*
23 *of Current Status and Knowledge Gaps*, 153 *Forensic Sci. Int'l* 237, 239 (2005). Indeed,
24 "DNA can be extracted easily from fingernail clippings by a conventional DNA extraction
25 method. Its quality is sufficient for enzymatic amplification and genotyping or individual
26 identification." Kaneshiga et al. at 5490.

27 ²Hair is also amenable to DNA testing. Although the earliest research occurred in the
mid-1980s, *see* Peter Gill et al., *Forensic Application of DNA 'Fingerprints,'* 318 *Nature*
577-78 (1985); Russell Higuchi et al., *DNA Typing From Single Hairs*, 332 *Nature* 543-46
(1988), forensic application did not occur until much later.

1 Jun. 26, 1990 at 66-68; Defendant's Trial Exhibit 85.) That day is the latest time that
2 Landrigan was placed in the victim's apartment.
3

4 On January 2, 1990, Landrigan was indicted and charged with first-degree
5 murder for the death of the victim; he was also charged with second-degree burglary
6 and theft. Prior to and throughout the course of the trial, the State offered to allow
7 Landrigan to plead to second-degree murder. (TR Jun. 18, 1990 at 9; TR Jun. 28,
8 1990 at 13.) In fact, Landrigan was initially charged with second-degree murder. On
9 June 28, 1990, Landrigan was found guilty on all counts. (Superior Court Docket
10 ("Td.") Dec. 4, 1990 at 51, 52 and 53.)
11
12

13 Law enforcement officials obtained the following evidence from the scene:
14 sixty-three latent fingerprints lifted from the victim's apartment (TR Jun. 21, 1990 at
15 72); hairs found in the victim's hand and on his face (Fuqua Report at 3); a shoe print,
16 (*id.*); and a fingernail on top of the victim's bed. (TR Jun. 21, 1990 at 30-31, 45.)
17
18

19 The physical evidence did not directly tie Landrigan to the crime. The State
20 compared Landrigan's fingerprints only to those obtained from the victim's
21 apartment; they never compared the remaining latent prints to other known inked
22 prints. (TR Jun. 21, 1990 at 77.)³ Only seven of the fingerprints matched
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25 ³This fact is significant because the Phoenix Police Department obtained inked
26 fingerprints from twelve to fifteen other suspects, including Jerry White, who was arrested
27 with Landrigan for auto theft. TR Jun. 21, 1990 at 6, 9; *see also* TR May 1, 1990 at 25-26.

1 Landrigan's prints. (TR Jun. 21, 1990 at 77.) Importantly, the Deputy Chief Medical
2 Examiner never received the fingernail. (TR Jun. 25, 1990 at 41.) Indeed, the State
3 withheld, until four days *after* the trial began, a homicide report that contained
4 information previously unknown to Landrigan and his counsel. That report noted that
5 several hairs were found in the victim's hand. (Fuqua Report at 3.) The State neither
6 investigated those hairs nor the fingernail. Justice requires that the investigation
7 should finally take place.

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11 **B. This Court has jurisdiction over this matter.**

12 Arizona Revised Statute § 13-4240(A) permits a person convicted of a felony
13 to request DNA testing of biological evidence, provided that the Petitioner meets the
14 requirements of the statute. Landrigan meets those requirements.⁴

15
16 **C. Landrigan is entitled to a mandatory order for DNA**
17 **testing of biological evidence.**

18 The court "shall" order testing when "[a] reasonable probability exists that the
19 petitioner would not have been prosecuted or convicted" had the DNA-based
20 exculpatory evidence been obtained. § 13-4240(B)(1). A reasonable probability
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⁴In addition to the requirements discussed below, the statute requires that the
26 Petitioner have been convicted of a felony and have been sentenced for that felony. Ariz.
27 Rev. Stat. § 13-4240(A). Landrigan was convicted of, *inter alia*, first-degree murder, and
was sentenced to death.

1 exists that Landrigan would not have been prosecuted or convicted had the fingernail
2 and hair been tested at the time of his trial.

3
4 The State offered only circumstantial evidence as proof of the elements of first-
5 degree murder. However, while evidence was offered that Landrigan was present at
6 the victim's residence at some time prior to the victim's death, there was no evidence
7 that Landrigan saw the victim killed or that he was even present when the victim was
8 killed. Landrigan was in the victim's apartment on December 12, 1989; the victim
9 was last known to be alive on December 13, 1989.
10
11

12 If the State had adequately investigated the biological evidence that resulted
13 from the struggle, it would have discovered that someone other than Landrigan was
14 responsible for the violence. If the State had possessed that information, a
15 "reasonable probability" exists that it would not have prosecuted Landrigan—or even
16 if it had prosecuted him, a "reasonable probability" exists that Landrigan would not
17 have been convicted. § 13-4240(B)(1).
18
19

20 Therefore, after the prosecution has been notified and has had an opportunity
21 to respond, this Court must order that the fingernail and hair be subjected to forensic
22 DNA testing. § 13-4240(B).⁵
23
24

25 ⁵The Court must also find that the fingernail and hair are available and are in a
26 condition to be tested, § 13-4240(B)(2), and that they were not previously subjected to DNA
27 testing or were not subjected to the type of testing that Landrigan is now requesting, § 13-

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D. Landrigan is entitled to a discretionary order for DNA testing of biological evidence.

Even in circumstances in which a court is not required to order DNA testing of biological evidence, it “may” order testing when 1) a reasonable probability exists that the petitioner’s verdict or sentence would have been more favorable if test results had been available at the time of trial, or 2) a reasonable probability exists that the test results “will provide exculpatory evidence.” § 13-4240(C)(1)(a).

Here, even if the State would have prosecuted Landrigan in the face of clearly exculpatory evidence, and even if Landrigan would have been convicted, a reasonable probability exists that he would have received a more favorable verdict or sentence. § 13-4240(C)(1)(a). That is, given exculpatory DNA test results that point to another person’s involvement in the violence, and given mere circumstantial evidence tying Landrigan to the crime scene, it is reasonably probable that a jury would not have found Landrigan guilty of first-degree murder. And even if the jury would have found Landrigan guilty of second-degree murder (the original charge against him), a reasonable probability exists that he would have received a more favorable sentence. *Id.*

4240(B)(3).

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Respectfully submitted this 13th day of July, 2006.

Jon M. Sands
Federal Public Defender
Sylvia J. Lett


Counsel for Jeffrey Timothy Landrigan

EXHIBIT B

TERRY GODDARD
ATTORNEY GENERAL
(FIRM STATE BAR NO. 14000)

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
1275 W. WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686
(STATE BAR NUMBER 010806)

ATTORNEYS FOR RESPONDENT

ARIZONA SUPERIOR COURT
COUNTY OF MARICOPA

STATE OF ARIZONA,

RESPONDENT,

-vs-

JEFFREY TIMOTHY LANDRIGAN,

PETITIONER.

CR-90-00066

SUPPLEMENTAL RESPONSE TO
MOTION FOR DNA TESTING

THE HON. JUDGE THOMAS O'TOOLE

(CAPITAL CASE)

The Phoenix Police Department has confirmed that the items (a fingernail and hairs) for which Petitioner Jeffrey Landrigan seeks court-ordered DNA testing have been stored by the police department and are available for testing.

.....

.....

Respectfully submitted this 15th day of August, 2006.

TERRY GODDARD
ATTORNEY GENERAL



KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION

Copies of the foregoing were deposited for mailing
this 15th day of August, 2006, to:

JON M. SANDS
FEDERAL PUBLIC DEFENDER
SYLVIA J. LETT
850 West Adams Street, Suite 201
Phoenix, Arizona 85007

Attorney for Petitioner Jeffrey Landrigan


JAN DYER

CRM90-1536
125649

EXHIBIT C

Michael K. James, Clerk of Court
*** Electronically Filed ***
09/21/2006 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

09/15/2006

HONORABLE RAYMOND P. LEE

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

KENT E CATTANI

v.

JEFFREY TIMOTHY PAGE LANDRIGAN (A)

SYLVIA J LETT
ION M SANDS

COURT ADMIN-CRIMINAL-PCR
VICTIM WITNESS DIV-AG-CCC

MINUTE ENTRY

8:48 a.m. This is the time set for oral argument on Defendant's Motion for DNA Testing.

State's Attorney:- Kent Cattani (telephonic)
Defendant's Attorney: Sylvia Lett (telephonic)
Defendant: Not Present
Court Reporter: Jovanna Roman

Argument is presented on the Motion.

For the reasons stated on the record,

IT IS ORDERED granting the Motion for DNA testing.

8:53 a.m. Matter concludes.

EXHIBIT D

COPY

AUG 06 2007



MICHAEL K. JEANES, CLERK
S. KENNOW
DEPUTY CLERK

1 Jon M. Sands
2 Federal Public Defender
3 Sylvia J. Lett (Arizona Bar No. 017326)
4 850 West Adams Street, Suite 201
5 Phoenix, Arizona 85007
6 602.382.2816

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,
10 Respondent,
11 vs.
12 JEFFREY TIMOTHY
13 LANDRIGAN,
14 Petitioner.

No. CR 90-00066

SUPPLEMENTAL MOTION
TO AMEND ORDER GRANTING
DNA TESTING
(Oral Argument Requested)

(CAPITAL CASE)

15
16 Petitioner Jeffrey Timothy Landrigan ("Petitioner") respectfully requests this
17 Court amend its previous order granting DNA testing to specifically comply with the
18 requirements of the Maricopa County Superior Court Exhibits Department to obtain
19 DNA testing on trial exhibits that appear to contain biological material suitable for
20 DNA testing. Petitioner requests that this Honorable Court amend its order granting
21 DNA testing dated September 15, 2006 (attached hereto as Exhibit 1), to specify the
22 items to be DNA tested pursuant to Ariz. Rev. Stat. § 13-4240. In support of this
23 motion, Petitioner refers to the accompanying Memorandum of Points and
24 Authorities.
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Respectfully submitted this 6th day of August, 2007.

Jon M. Sands
Federal Public Defender
Sylvia J. Lett

Sylvia J. Lett by ML Bunker #013173
Counsel for Jeffrey Timothy Landrigan

A copy of the foregoing was mailed on
this 6th day of August, 2007, to:

Kent Cattani
Assistant Attorney General
Attorney General's Office
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007-2997

Rule 32 Unit
Maricopa County Superior Court
101 W. Jefferson Street
Phoenix, Arizona 85003-2205

Honorable Raymond P. Lee
Maricopa County Superior Court
101 W. Jefferson St.
Suite 912
Phoenix, Arizona 85003-2205

By: *Jennifer Cody*
Jennifer Cody

1 Jon M. Sands
2 Federal Public Defender
3 Sylvia J. Lett (Arizona Bar No. 017326)
4 850 West Adams Street, Suite 201
5 Phoenix, Arizona 85007
6 602.382.2816

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,
10 Respondent,
11 vs.
12 JEFFREY TIMOTHY
13 LANDRIGAN,
14 Petitioner.

No. CR 90-00066

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
SUPPLEMENTAL MOTION TO
AMEND ORDER GRANTING DNA
TESTING

(Oral Argument Requested)

(CAPITAL CASE)

17 Petitioner Jeffrey Timothy Landrigan ("Petitioner"), a capital client under a
18 death sentence, respectfully requests this Court amend its previous order granting
19 DNA testing to specifically comply with the requirements of the Maricopa County
20 Superior Court Exhibits Department to obtain DNA testing on trial exhibits that
21 appear to contain biological material suitable for DNA testing. The reasons for
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Background.

On January 2, 1990, Petitioner was indicted and charged with first-degree murder for the death of Chester Dean Dyer (“victim”). Among the physical evidence found at the scene was a fingernail that was never provided to the Deputy Medical Examiner. (Trial Transcript (“TR”) Jun. 21, 1990 at 30-31, 45.) Also, hair was found in the victim’s hand. (Supplemental Report by Detective Richard Fuqua, Dec. 26, 1989 at 3.) Neither the fingernail nor the hair were ever subjected to DNA testing.

Petitioner moved for DNA testing of the fingernail and hair and on September 15, 2006, after hearing argument presented on the motion, the Honorable Raymond P. Lee granted the Motion for DNA testing. Exhibit 1.

Reason to Amend the Court’s Original Order for DNA Testing.

After the Motion for DNA testing was granted, Petitioner’s federal habeas defense counsel sought to procure the items for testing from the Phoenix Police Department. Despite assurances from the Respondents that the items had been stored by police and were available for testing,¹ undersigned counsel’s investigator, Lisa Eager, was informed by the Phoenix Police Department that the hair and fingernail

¹See Respondents’ Supplemental Response to Motion for DNA testing filed on August 15, 2006 (“The Phoenix Police Department has confirmed that the items (a fingernail and hairs) for which Petitioner Jeffrey Landrigan seeks court-ordered DNA testing have been stored by the police department and are available for testing.”) attached hereto as Exhibit 2.

1 evidence was missing. See Declaration of Lisa Eager at ¶¶ 5-18, attached hereto as
2 Exhibit 3.

3
4 Undersigned counsel worked diligently with the Phoenix Police Department
5 for a period of many months to locate the missing evidence and have it DNA tested
6 pursuant to the Court's Order. Exhibit 3 at ¶¶ 3-18. In spite of this diligence,
7 however, this crucial, exculpatory evidence remains lost, through no fault of
8 Petitioner's.
9

10
11 The Phoenix Police Department, however, has several other items in evidence
12 that appear to contain biological matter on them suitable for DNA testing. These
13 items include Plaintiff's Exhibit 22 - a pair of blue jeans (Levis™), and Plaintiff's
14 Exhibit 23 - a blanket. Exhibit 3 at ¶ 22. Undersigned counsel attempted to have
15 these items DNA tested but were informed by Lillian Barnett of the Maricopa County
16 Superior Court Exhibits Department that a more specific court order was required
17 before the items would be released for DNA testing. Exhibit 3 at ¶ 22. Ms. Barnett
18 also informed undersigned counsel that the case number and date of the original
19 hearing must be included in the court order before the items would be released.
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21 Exhibit 3 at ¶ 22.
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Conclusion.

Therefore, Petitioner now respectfully requests that the Court amend its previous order to comply with the specificity required by the Maricopa County Superior Court Exhibits Department. To wit, the amended order must include the following:

- 1) the case number: CR90-00066;
- 2) the date of the hearing (June 18, 1990);
- 3) the exhibit numbers of the items to be removed (Plaintiff's Exhibit #22 blue jeans (Levis™) and Plaintiff's Exhibit # 23 Blanket);
- 4) the name of the person to whom the items would be released - Lisa Eager, Investigator for undersigned counsel, the Arizona Federal Public Defender; and
- 5) that the reason is for DNA testing.

A proposed order is attached hereto.

Respectfully submitted this 6th day of August, 2007.

Jon M. Sands
Federal Public Defender
Sylvia J. Lett

Sylvia J. Lett by *Mr. Burleson*
#13173
Counsel for Jeffrey Timothy Landrigan

EXHIBIT E

ORIGINAL

CERTIFIED COPY

1 Jon M. Sands
2 Federal Public Defender
3 Sylvia J. Lett (Arizona Bar No. 017326)
4 850 West Adams Street, Suite 201
5 Phoenix, Arizona 85007
6 602.382.2816

FILED
SEP 13 2007
MICHAEL K. JEANES, CLERK
BY K. Wendroff
K. WENDROFF, DEPUTY

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,
10 Respondent,
11 vs.
12 JEFFREY TIMOTHY
13 LANDRIGAN,
14 Petitioner.

No. CR 90-00066
PROPOSED AMENDED ORDER FOR
DNA TESTING
(CAPITAL CASE)

15 IT IS ORDERED granting the Motion for DNA testing. In order to comply
16 with the requirements of the Maricopa County Superior Court Exhibits Department,
17 the court includes the following information in this order: the case number is CR90-
18 00066; the items to be DNA tested are Plaintiff's Exhibit #22 blue jeans (Levis™)
19 and Plaintiff's Exhibit # 23 blanket; said exhibits are to be released to Lisa Eager,
20 Investigator for undersigned counsel, the Arizona Federal Public Defender; the reason
21 to release said exhibits is for DNA testing.
22
23
24

25 DATED this ___ day of 9/11, 2007,

26 The foregoing instrument is a full, true and
27 correct copy of the original document.

28 Attest SEP 13 2007 20
MICHAEL K. JEANES, Clerk of the Superior
Court of the State of Arizona, in and for the
County of Maricopa.
By K. Wendroff Deputy

[Signature]
Honorable Raymond P. Lee
Judge, Maricopa County Superior Court

EXHIBIT F

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Jon M. Sands
Federal Public Defender
Sylvia J. Lett (Arizona Bar No. 017326)
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
Telephone: 602.382.2816

COPY

JUL 28 2008



MICHAEL K. JEANES, CLERK
L. SAM
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE of ARIZONA,

No. CR 90-00066

Respondent,

SECOND AMENDED PETITION
FOR POST-CONVICTION RELIEF

vs.

DEATH PENALTY CASE

JEFFREY TIMOTHY
LANDRIGAN,
Petitioner.

NOW COMES Petitioner Jeffrey Timothy Landrigan and files his Second Amended
Petition for Post-Conviction Relief pursuant to this Court's Minute Entry dated June 27,
2008.

Landrigan was convicted of Second Degree Burglary, Theft, and First Degree Murder.
On October 25, 1990, he was sentenced to "death plus twenty years" for his convictions
following a trial by jury in the Superior Court for the County of Maricopa with Judge Cheryl
Hendrix presiding (Case No. CR 90-00066). His conviction and sentence were affirmed on
direct appeal. *State v. Landrigan*, 176 Ariz. 1 (1993). He was denied relief in state and

1 federal post-conviction proceedings. *See Schriro v. Landrigan*, 550 U.S. ___ 127 S. Ct.
2 1933, 1938-39 (2007) (discussing the prior proceedings and ultimately denying relief).

3
4 Landrigan now files his Second Amended Petition for Post-Conviction Relief pursuant
5 to the Arizona Rule of Criminal Procedure 32.1(a), (e), (g), and (h), and requests relief based
6 upon two claims: (1) that Arizona's lethal-injection protocol violates the Eighth
7 Amendment's prohibition against cruel and unusual punishment under the federal and state
8 constitutions; and (2) that the results of new DNA testing not available at the time of the
9 crime are favorable to him, pursuant to such that Landrigan is entitled to an evidentiary
10 hearing. A.R.S. Section 13-4240(K). For the reasons that follow, Landrigan respectfully
11 requests that this Court grant him any needed discovery, an evidentiary hearing, and post-
12 conviction relief.
13
14

15 I. RELEVANT PROCEDURAL HISTORY.

16 A. Statement of the case.

17
18 On December 15, 1989, Chester Dean Dyer was found dead inside his apartment. The
19 victim was last known to be alive on December 13, 1989; he spoke to a friend on the
20 telephone around 8:00 p.m. that evening. On December 12, 1989, Landrigan made three
21 long-distance telephone calls from the victim's apartment. Trial Transcript ("TR") Jun. 26,
22 1990 at 66-68; Def. Trial Ex. 85. That day is the latest time that Landrigan was placed in the
23 victim's apartment.
24

25
26 On January 2, 1990, Landrigan was indicted and charged with first-degree murder for
27 the death of the victim; he was also charged with second-degree burglary and theft. But,
28

1 prior to and throughout the course of the trial, the State offered to allow Landrigan to plead
2 to second-degree murder. TR Jun. 18, 1990 at 9; TR Jun. 28, 1990 at 13. In fact, Landrigan
3 was originally charged with second-degree murder. On June 28, 1990, Landrigan was found
4 guilty on all counts. Superior Court Docket ("Dkt.") Dec. 4, 1990 at 51, 52 and 53.

6 Among the physical evidence found at the crime scene was a fingernail that was never
7 provided to the Deputy Medical Examiner. TR Jun. 21, 1990 at 30-31, 45. Also, hair was
8 found in the victim's hand. Ex. 1 at 3 (Supplemental Report by Detective Richard Fuqua,
9 Dec. 26, 1989 ("Fuqua Report")). The handwritten notations on the report are of unknown
10 origin.
11

12 Indeed, the State withheld, until four days *after* the trial began, a homicide report that
13 contained information previously unknown to Landrigan and his counsel. That report noted
14 that several hairs were found in the victim's hand. (Fuqua Report at 3.) Neither the
15 fingernail nor the hair were ever subjected to DNA testing. Landrigan's counsel has sought
16 these items of evidence since 2000. Ex. 2 (Declaration by Lisa M. Eager, Aug. 6, 2007).
17

18 **B. DNA testing in post-conviction proceedings.**

19 On July 13, 2006, Landrigan moved this Court, pursuant to Ariz. Rev. Stat. § 13-424,
20 for an order permitting DNA testing of the broken fingernail found on the victim's bed, as
21 well as the hair found grasped up in the victim's fist. Motion for DNA Testing, July 13,
22 2006.
23

24 On August 15, 2006, the State filed a Supplemental Response to Motion for DNA
25 Testing wherein it stated that the Phoenix Police Department ("PPD") confirmed that the
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28

1 fingernail and hairs were available for testing. Supplemental Response to Motion for DNA,
2 August 15, 2006. At oral argument on September 15, 2006, this Court granted Landrigan's
3 Motion for DNA testing.
4

5 After the Motion for DNA Testing was granted, Landrigan's federal habeas counsel
6 sought to procure the items for testing from the PPD based on the State's representations to
7 the Court that the PPD had the fingernail and hair in its possession. Landrigan's investigator
8 first requested that the items be made available for DNA testing on November 9, 2006, Ex.
9 2, § 8; she then made repeated requests as the police searched for the items throughout
10 December 2006 and January 2007. Ex. 2, §§ 9-13. Undersigned counsel worked diligently
11 with the PPD for many months to locate the missing evidence and have it tested pursuant to
12 the Court's Order. Ex. 2 at §§ 3-18.
13
14

15 After months of being hampered by the State's inconsistent positions on whether this
16 particular biological evidence was available for testing,¹ Landrigan's investigator received
17 a memorandum from the PPD on February 1, 2007, indicating that the fingernail and hair
18 were officially "lost." Exhibit 3.
19

20 In March 2007, the State informed Landrigan's investigator that a missing box of
21 evidence from the case had been found, mislabeled in a refrigerator (instead of properly
22 stored in a freezer). The fingernail and the hair, however, were not in the box. (Ex. 2, §§ 17-
23 21.
24

25
26
27 ¹The trials and travails of this process are explained in detail in Landrigan's Amended
28 Motion for DNA Testing, filed with this Court on August 6, 2006.

1 After many months, Landrigan finally obtained information as to what items of
2 evidence were and were not available for DNA testing. Detective Fuqua noted in his police
3 report of the crime scene that “[t]here was some blood droplets on the outside of the curtain
4 towards the bed. The curtains were removed and obtained for future analysis.” Ex. 1 at 6.
5 The drapes were still stored in evidence and based upon that information, they were released
6 from property and sent to Landrigan’s DNA expert, Technical Associates, Inc. (“TAI”) for
7 DNA analysis. Ex. 2, §§ 23-24. The Maricopa County Superior Court Exhibits Department
8 also had two items in evidence that appeared to contain biological matter on them suitable
9 for DNA testing. These items were a pair of Levi’s blue jeans (Pl. Trial Ex. 23) and a
10 blanket (Pl. Trial Ex. 22) . The Levi’s jeans worn by the victim were tested because the
11 Fuqua Report indicated that “[i]n an examination of the victim’s levis [sic], it was noticed
12 that on the left leg, just slightly above the knee, was blood smear transfer on the outside
13 portion of the leg. This transfer was not consistent with the victim’s injuries.” Ex. 1 at 4.
14 Det. Fuqua also noted that the same type of blood smear transfer was “on the blue blanket
15 between the victim’s legs.” *Id.* at 4.

16
17
18 Landrigan then filed a supplemental motion to amend the Court’s order granting DNA
19 testing to specifically comply with the requirements of the Maricopa County Superior Court
20 Exhibits Department so the Department would release the Levi’s jeans and a blanket from
21 the victim’s bed for DNA testing. Supplemental Motion to Amend Order Granting DNA
22 Testing, Aug. 6, 2007. This Court granted Landrigan’s Proposed Amended Order for DNA
23 testing. Order, Sept. 13, 2007 Order.

1 In addition, this Court granted Landrigan and the State's stipulated proposed order to
2 send a buccal swab kit to the Arizona State Prison to obtain a DNA sample from Landrigan.
3
4 Order, Sept. 13, 2007. On June 3, 2008, after testing had been completed on several items,
5 Landrigan submitted a summary DNA report and requested a hearing on the matter pursuant
6 to A.R.S. Section 13-4240(K).

7
8 **C. The State moved for a warrant of execution and Landrigan received a**
9 **stay based upon *Baze* and his challenges to Arizona's lethal-injection**
10 **procedures.**

11 In the midst of the search for the missing fingernail and hair, the State of Arizona
12 sought a warrant of execution for Landrigan from the Arizona Supreme Court on July 12,
13 2007. After both parties had an opportunity to respond and reply, the Supreme Court issued
14 a Warrant of Execution. Subsequently, Landrigan filed a motion to stay the execution based
15 on the grant of certiorari in *Baze v. Rees*, 551 U.S. ___, 128 S. Ct. 34 (2007) (Mem.). After
16 the State responded, Landrigan filed his Reply. That same day, the Arizona Supreme Court
17 issued an order indicating that it would defer consideration of Landrigan's motion to stay in
18 order to permit him time to file a petition for post-conviction relief ("PCR petition").
19 Landrigan filed his PCR petition and amended it the following day. Simultaneously,
20 Landrigan filed a supplement with the Arizona Supreme Court, arguing that he was entitled
21 to relief under Arizona Rules of Criminal Procedure Rule 32.1 because the lethal-injection
22 procedure violates his state and federal constitutional rights to due process, to equal
23 protection, and to be free from cruel and unusual punishment.
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1 Four days after Landrigan filed his amended PCR petition, on October 9, 2007,
2 Landrigan received a six-page facsimile from the Attorney General's office, which purported
3 to be Arizona's procedure for execution by lethal injection. Ex. 4 (Preparation and
4 Administration of Chemicals, Oct. 9, 2007). This was in response to Landrigan's request for
5 the protocol. The document, which indicated that it was issued on October 3, 2007, appeared
6 to be an amendment and/or update to the State's lethal-injection procedure. Further, in the
7 State's Response to Landrigan's First Amended PCR Petition, the State argued that
8 Landrigan needed to amend his PCR petition to incorporate the recent changes to Arizona's
9 lethal-injection protocol.
10
11

12
13 On October 11, 2007, the Arizona Supreme Court granted Landrigan a stay of
14 execution based on the pendency of his PCR proceedings, and in light of the grant of the writ
15 of certiorari by the United States Supreme Court in *Baze*. Ex. 5. Subsequently, this Court
16 held the PCR proceedings in abeyance pending the decision in *Baze*. Minute Entry, Jan. 22,
17 2008.
18

19 On November 29, 2007, the State filed its Response to Landrigan's PCR petition. This
20 Court subsequently ordered Landrigan to file an amended petition within thirty days after the
21 United States Supreme Court issued its decision in *Baze*. Minute Entry, Jan. 22, 2008.
22

23 On November 30, 2007, undersigned counsel was notified by the State that the lethal-
24 injection protocol had again changed. This current protocol has the same issue date affixed
25 to it (October 3, 2007) as the document provided to Landrigan on October 9, 2007, but
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1 differs in substance from the previous protocol. Ex. 6 (Preparation and Administration of
2 Chemicals, Nov. 30, 2007).

3
4 On April 16, 2008, the United States Supreme Court issued its plurality decision in
5 *Baze*, in which it established for the first time that a state's lethal-injection procedures are
6 susceptible to challenge under the Eighth Amendment. Landrigan then asked this Court to
7 schedule a status conference.
8

9 At the status conference on April 28, 2008, the State indicated that it planned to file
10 a motion to dismiss Landrigan's lethal-injection claim. The parties agreed to a briefing
11 schedule and the Court set oral argument for June 27, 2008.
12

13 At oral argument on June 27, 2008, the State's Motion to Dismiss was denied; the
14 Court ordered Landrigan to file an amended Petition for Post-Conviction Relief that included
15 the DNA and lethal injection issues (set forth below); and the Court ordered an evidentiary
16 hearing regarding the constitutionality of Arizona's lethal injection procedure. *See* Minute
17 Entry, June 27, 2008.
18

19 **II. ARGUMENT.**

20 **FIRST CLAIM FOR RELIEF:**

21 **The State's intention to carry out Landrigan's death sentence**
22 **under its current method of lethal injection violates the United**
23 **States and Arizona State Constitutions.**

24 Landrigan is entitled to relief under Rule 32.1 because Arizona's current lethal
25 injection procedures violate his state and federal constitutional rights to due process, to equal
26 protection, and to be free from cruel and unusual punishment. *See* U.S. Const. amends. V,
27
28

1 VIII & XIV, Ariz. Const. art 2, §§ 4 & 15; *see also* *Baze v. Rees*, 128 S. Ct. 1520 (2008)
2 (recognizing for the first time that a prisoner under a sentence of death can, under certain
3 circumstances, prove that a state’s lethal injection protocol violates the Eighth Amendment).
4

5 Landrigan has argued that the fractured opinion in *Baze* requires this Court to
6 determine the legal standard by which it will evaluate this claim. *See* Resp. to State’s Mot.
7 to Dismiss at 14-24 (June 12, 2008). Landrigan asserts that this Court should find that the
8 controlling opinion is Justice Stevens’s because his is the narrowest opinion. *See Marks v.*
9 *United States*, 430 U.S. 188, 193 (1977) (holding that when the Court issues a plurality
10 decision, the opinion of the Justices concurring in the judgment on the “narrowest grounds”
11 should be regarded as the Court’s holding).² If, however, this Court follows the test set forth
12 in Chief Justice Roberts’s plurality opinion — which asks whether there are “feasible, readily
13 implemented” alternatives that would “address a substantial risk of serious harm” that the
14 State refuses to adopt without legitimate penological justification, *Baze*, 128 S. Ct. at 1531
15 — Landrigan still prevails.
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19 Under Arizona law, death sentences shall be carried out “by an intravenous injection
20 of a substance or substances in a lethal quantity sufficient to cause death, under the
21 supervision of the state department of corrections.” Ariz. Rev. Stat. § 13-704(a). But “a
22 defendant sentenced to death for an offense committed before November 23, 1992 shall
23 choose either lethal injection or lethal gas If the defendant fails to choose either lethal
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25

26
27 ²Justice Stevens provided a curt, one-paragraph holding in which he concluded that
28 the specific “evidence adduced” on behalf of *Baze* was insufficient for purposes of stating
an Eighth Amendment violation. *Baze*, 128 S. Ct. at 1552 (Stevens, J., concurring).

1 injection or lethal gas, the penalty of death shall be inflicted by lethal injection.” Ariz. Rev.
2 Stat. § 13-704(b). The statute prescribes no specific drugs, dosages, drug combinations, or
3 the manner of intravenous line access to be used in the execution process. In addition, the
4 statute fails to prescribe any certification, training, or licensure required for those individuals
5 who participate in the execution process. All of the details and methods involved in the
6 execution process are to be determined at the sole discretion of the Arizona Department of
7
8 Corrections (ADOC).
9

10 On information and belief, the ADOC intends to execute Landrigan by means of lethal
11 injection as set out in the November 30, 2007 Protocol. *See* Ex. 6. The November 30
12 Protocol, and the manner and means by which lethal injection executions are currently
13 performed, violate constitutional and statutory provisions enacted to prevent cruelty, pain,
14 and torture.
15

16
17 **A. The chemicals chosen by the ADOC for lethal injection**
18 **create an excessive risk that the Landrigan will suffer**
excruciating pain during execution.

19 The ADOC’s November 30 Protocol creates a substantial risk that Landrigan will
20 experience severe pain and suffering during execution. According to the protocol, the
21 ADOC intends to execute the Landrigan by injecting a sequence of three active drugs: (i)
22 sodium thiopental; (ii) pancuronium bromide; and (iii) potassium chloride. Two of these
23 substances, pancuronium bromide and potassium chloride, will cause excruciating pain or
24 suffering if administered to a condemned inmate who is not sufficiently anesthetized.
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Sodium Thiopental

1
2 The first chemical the State intends to administer to Landrigan during the lethal-
3 injection process is sodium thiopental ("thiopental"), an ultra-short-acting barbiturate that
4 in typical surgical doses produces only transient anesthesia.³ In the lethal-injection process,
5 thiopental is intended to anesthetize Landrigan, but if it is not successfully delivered into his
6 blood stream, thiopental will not provide a sufficient sedative effect for the duration of the
7 execution process. Under the November 30 Protocol, as written and/or implemented, there
8 is a substantial risk of an inadequate dose of thiopental being administered to Landrigan prior
9 to injection of the subsequent drugs. Failure to deliver the entire dose of thiopental is a
10 foreseeable occurrence given the inadequacy of the ADOC's procedures and training as
11 outlined in the November 30 Protocol. And, as a result of a failed delivery, Landrigan could
12 remain conscious or regain consciousness and experience both conscious paralysis and
13 asphyxiation induced by pancuronium bromide and the excruciatingly painful burning
14 induced by potassium chloride as it courses through the prisoner's veins, ultimately leading
15 to cardiac arrest.
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20 Thiopental is sold in powder form and must be mixed into a solution to be injectable.
21 It must be mixed and administered by a qualified individual. To deliver a five-gram dose of
22 thiopental into Landrigan's vein successfully, the executioner must prepare a solution that
23 will deliver the dose in the proper concentration, a process that requires mixing multiple vials
24
25

26
27 ³Thiopental is referred to in the November 30 Protocol as "Sodium Pentothal," a trade
28 name used by Abbott Laboratories.

1 of thiopental powder with the correct quantity of diluent, combining multiple vials into two
2 larger syringes, and ensuring that the entire amount of powder is drawn into the syringes. If
3 this process is not performed accurately, it will result in an incorrect concentration of
4 thiopental, which will prevent delivery of a reliable dose of anesthetic. Yet, the ADOC's
5 November 30 Protocol does not reasonably assure that the personnel who will mix the
6 thiopental, prepare the syringes, and deliver the drugs have adequate and appropriate training
7 and experience to perform the tasks properly. On information and belief, other states use
8 licensed pharmacists or physicians to mix the drugs, including thiopental, for lethal
9 injections.
10
11

12
13 Typically, thiopental is employed by medical professionals as a preliminary anesthetic
14 in the preparation for surgery while introducing a patient's breathing tube. Once anesthesia
15 has been induced and the breathing tube inserted, other anesthetic drugs are used to maintain
16 the patient at a "surgical plane" of anesthesia throughout the surgical procedure. Yet,
17 thiopental is the only anesthetic that will be administered by the ADOC during Landrigan's
18 execution, despite the fact that even in animal euthanasia, a longer-lasting and more stable
19 barbiturate, pentobarbital, is recommended by the American Veterinary Medical Association
20 ("AVMA"). See *American Veterinary Medical Association, AVMA Guidelines on*
21 *Euthanasia (Formerly Report of the AVMA Panel on Euthanasia)* (June 2007), available at
22 http://www.avma.org/issues/animal_welfare/euthanasia.pdf (hereinafter, "AVMA
23 Guidelines"). Similarly, under Arizona law, the preferred methods for executing impounded
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1 animals include euthanasia by sodium pentobarbital or a derivative sodium pentobarbital.
2 See Ariz. Rev. Stat. Ann. § 11-1021.
3

4 **Pancuronium Bromide**

5 The second chemical the State intends to administer to Landrigan during the lethal-
6 injection process is pancuronium bromide, also known by the trade name Pavulon.
7 Pancuronium bromide paralyzes all voluntary muscles, including the diaphragm, which stops
8 breathing by preventing air from being moved in and out of the lungs. Pancuronium bromide
9 is not an anesthetic; that is, it is not a drug that prevents consciousness or sensation. Rather,
10 pancuronium bromide is a neuromuscular blocking agent that paralyzes the muscles but does
11 not affect the inmate's consciousness, cognition, or ability to feel pain.
12
13

14 Pancuronium bromide substantially increases the risk that Landrigan will be conscious
15 during the injection of potassium chloride, an extremely painful drug. Once paralyzed by
16 pancuronium bromide, an inadequately anesthetized inmate will appear to be serene and
17 unconscious throughout the execution procedure and will be unable to speak or move or
18 otherwise inform the execution personnel that he is conscious and experiencing torturous
19 pain. Indeed, administered by itself to a conscious person, pancuronium bromide would
20 cause the person to suffocate to death slowly while remaining fully conscious.
21
22

23 Arizona is one of 30 states that prohibit the use of a neuromuscular blocking agent in
24 the euthanasia of animals, either expressly and/or implicitly by mandating the use of
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1 alternative means such as sodium pentobarbital. Ariz. Rev. Stat. Ann. § 11-1021.⁴ When
2 pancuronium bromide is administered after an initial dose of thiopental, as is called for in the
3
4 ADOC's protocol for executions by lethal injection, it creates a substantial and unacceptable
5 risk of serious harm. As such, the combination of thiopental and pancuronium bromide
6 creates the unconscionable possibility that Landrigan will be placed in a state of "chemical
7 entombment" while he consciously experiences the agony of suffocation, the intense burning
8 from potassium chloride as the chemical courses through his veins, and the pain of having
9 a cardiac arrest.

11 Pancuronium bromide serves no legitimate function in the context of an execution.
12 Rather, the chemical is used to prevent the executioners and witnesses from knowing whether
13 Landrigan is adequately anesthetized. In cases where the thiopental is not successfully
14 delivered to Landrigan's circulation and/or Landrigan is not adequately anesthetized,
15 pancuronium bromide will create the appearance of a serene death while masking the fact
16 that he is experiencing conscious paralysis, suffocation, and the agony of cardiac arrest from
17 the administration of potassium chloride. The use of pancuronium bromide is unnecessary
18
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21 ⁴See also Ala. Code § 34-29-131; Alaska Stat. § 08.02.050; Cal. Bus. & Prof. Code
22 § 4827; Colo. Rev. Stat. § 18-9-201; Conn. Gen. Stat. § 22-344a; Del. Code Ann., Tit. 3, §
23 8001; Fla. Stat. §§ 828.058 and 828.065; Ga. Code Ann. § 4-11-5.1; 510 Ill. Comp. Stat., ch.
24 70, § 2.09; Kan. Stat. Ann. § 47-1718(a); La. Rev. Stat. Ann. § 3:2465; Me. Rev. Stat. Ann.,
25 Tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A;
26 Mich. Comp. laws § 333.7333; Mo. Rev. Stat. § 578.005(7); Neb. Rev. Stat. § 54-2503; Nev.
27 Law § 374; N.J. Stat. Ann. 4:22-19.3; N.Y. Agric. & Mkts. § 374; Ohio Rev. Code Ann. §
28 4729.532; Okla. Stat., Tit. 4, § 501; Ore. Rev. Stat. § 686.040(6); R.I. Gen. Laws § 4-1-34;
S.C. Code Ann. § 47-3-420; Tenn. Code Ann. § 44-17-303; Tex. Health & Safety Code Ann.
§ 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

1 to bring about Landrigan's death. Absent the use of pancuronium bromide, Landrigan, while
2 undergoing execution, would be able to indicate that he was still conscious or had regained
3 consciousness prior to the lethal dose of potassium chloride.
4

5 **Potassium Chloride**

6 The third and final chemical the State intends to administer to Landrigan during the
7 lethal-injection process is potassium chloride, an extremely painful chemical which causes
8 the inmate's death by disrupting the heart's contractions, ultimately leading to cardiac arrest.
9

10 It is medically indisputable that an inadequately anesthetized inmate injected with potassium
11 chloride will experience torturous pain. As potassium chloride travels through the
12 bloodstream from the site of injection towards the heart, the chemical activates sensory nerve
13 fibers inside the veins, causing a prolonged and intense burning sensation. In the foreseeable
14 event that Landrigan is not adequately anesthetized throughout the execution procedure, the
15 potassium chloride will cause him to consciously experience the agonizing pain of this
16 excruciatingly painful chemical coursing through his veins and of cardiac arrest, while being
17 incapable of expressing his suffering due to the paralytic effects of the pancuronium bromide.
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20 Death by potassium chloride poisoning is viewed as being so inhumane that the
21 AVMA prohibits its use as the sole agent for animal euthanasia. AVMA Guidelines at 12.
22 If potassium chloride is to be used at all, the AVMA requires the practitioner administering
23 the potassium chloride to have the proper training and knowledge to ensure that the
24 euthanized animal has reached a surgical plane of anesthesia. *See id.* ("It is of utmost
25 importance that personnel performing this technique are trained and knowledgeable in
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1 anesthetic techniques, and are competent in assessing anesthetic depth appropriate for
2 administration of potassium chloride intravenously.”) The AVMA has established that the
3 appropriate anesthetic depth for the use of potassium chloride in animal euthanasia is
4 “characterized by loss of consciousness, loss of reflex muscle response, and loss of response
5 to noxious stimuli.” *Id.* Conversely, the ADOC’s November 30 Protocol lacks even the most
6 basic protections or training regimen—safeguards that Arizona requires for personnel who
7 perform animal euthanasia. Accordingly, the lethal-injection procedures set forth in the
8 November 30 Protocol used to execute inmates would be illegal if performed on household
9 pets.
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13 **B. Deficiencies in the ADOC’s lethal-injection protocol create**
14 **a substantial risk of harm**

15 Central features of the ADOC’s lethal injection protocol create a substantial risk of
16 serious harm in violation of the Eighth Amendment to the U.S. Constitution and Article 2,
17 §§ 4 & 15 of Arizona’s Constitution. Unlike the protocol in *Baze*, which “put in place several
18 important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the
19 condemned prisoner,” 528 S. Ct. at 1533 (plurality), the ADOC’s execution procedure lacks
20 the necessary safeguards to ensure that Landrigan will not be executed in a cruel and unusual
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1 manner. See also *id.* At 1552 (Stevens, J., concurring).⁵ The ADOC's November 30
2 Protocol is deficient for a host of reasons that include, but are not limited to, the following:

- 3 1. Failure to set out the execution procedures in a sufficiently clear
4 manner to ensure that the execution is carried out in a manner
5 that does not cause a substantial risk of pain and suffering;
- 6 2. Failure to adhere to contemporary standards of care in the
7 administration of percutaneous central lines and to eliminate the
8 risk that a cut-down may be used to create IV access;
- 9 3. Failure to ensure that the Department Director does not
10 authorize deviations from the procedures that would further
11 heighten the substantial risk of serious pain and suffering;
- 12 4. Failure to assure adequate visualization of the IV sites and IV
13 patency before and during an execution, and to properly assess
14 anesthetic depth throughout an execution;
- 15 5. Failure to appropriately address the individual condemned
16 inmate's particular medical condition and history;
- 17 6. Failure to ensure the participation of qualified and trained
18 personnel in the execution process;
- 19 7. Failure to provide the appropriate physical conditions to safely
20 perform the execution.

21 *See, e.g.* Ex. 7 Declaration by Mark Heath ("Heath Declaration"). The ADOC's protocol
22 is unclear and contradictory on numerous critical issues and, thus, greatly increases the risk
23 that an execution will cause severe pain and suffering to the inmate. For example,
24 under the protocol, two sets of syringes containing the three-drug formula are to be attached
25 to a "3-Gang, 3-Way Manifold" and administered simultaneously by members of the

26 ⁵In his concurrence, Justice Stevens found that "the evidence adduced by petitioners
27 fails to prove that Kentucky's lethal injection protocol violates the Eighth Amendment" under
28 either the test proposed by the plurality or by the dissent. *Baze*, 128 S.Ct. at 1552. Justice
Ginsburg's dissent, joined by Justice Souter, disagreed with the plurality's test and would
have held: "if readily available measures can materially increase the likelihood that the
protocol will cause no pain, a State fails to adhere to contemporary standards of decency if
it declines to employ those measures." *Id.* at 1569 (Ginsburg, J., dissenting).

1 execution team—one set flowing into the inmate, and the other flowing directly into a
2 disposal bucket kept in a separate room. On information and belief, the two sets are to be
3 arranged in such a manner that the individuals administering the drugs contained in the two
4 sets of syringes will not know whether their drugs will flow into the inmate or whether they
5 will flow into the disposal bucket.⁶ However, the protocol also makes provision for a single
6 back-up set of syringes to be kept in a “shadow box” in case more chemicals are needed
7 during the execution. The protocol provides no indication, however, how the executioners
8 are to determine where on the “3-Gang, 3-Way Manifold” they are to attach the set of back-
9 up syringes in order that the back-up chemicals flow into the inmate rather than directly into
10 a disposal bucket. So, for example, under the ADOC’s protocol, should more thiopental be
11 needed to adequately anesthetize the inmate, there is at least an equal chance that the back-up
12 thiopental will be administered directly into a disposal bucket rather than into the inmate.
13 *Cf. Baze*, 128 S.Ct. at 1534 (plurality) (noting that Kentucky’s “protocol calls for the IV team
14 to establish both primary and backup lines and to prepare two sets of the lethal injection
15 drugs before the execution commences”); *see id.* (“[Kentucky’s] redundant measures ensure
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22 ⁶It appears that the purpose of this is to protect the executioners from knowing
23 whether they have administered the fatal dose to the inmate. *See Ex. 7* at 4, ¶17 (noting that
24 federal lethal-injection protocol uses the same procedure so that the person administering
25 chemicals does not know whether his line is connected to inmate). This method of protecting
26 the executioners from knowing whether they have administered the fatal dose is inherently
27 flawed. All adequately qualified medical practitioners will be able to immediately recognize
28 whether the chemicals they are administering are flowing into the inmate or directly into a
disposal bucket by the amount of resistance encountered in the administration of the
chemicals. Any person unable to recognize the flow of the chemicals in this manner would
be utterly unqualified to administer the chemicals in the execution process.

1 that if an insufficient dose of sodium thiopental is initially administered through the primary
2 line, an additional dose can be given through the backup line before the last two drugs are
3 injected.”)

4
5 The protocol is also unclear as to the manner and means by which intravenous access
6 will be achieved. While the protocol states that “medical team” members will be responsible
7 for administering a percutaneous central line, it does not clearly state that percutaneous
8 central line placement is the standard or default manner of IV access, nor does it prohibit the
9 possibility of using other methods of IV access. *Cf. Baze*, 128 S.Ct. at 1528 (plurality)
10 (indicating that Kentucky’s protocol requires “both primary and secondary peripheral
11 intravenous sites in the arm, hand, leg, or foot”). For example, the protocol does not specify
12 whether peripheral vein access, as opposed to a percutaneous central line, could be used. Nor
13 does it prohibit the use of the roundly-rejected “cut-down” method of IV access (i.e.,
14 surgically exposing the vein, inserting a catheter and closing the skin with suturing)—a
15 procedure that the ADOC has used in the past. This outdated procedure has been virtually
16 abandoned in contemporary medical practice and is no longer used by most departments of
17 corrections nationwide in administering executions. The ADOC’s past use of the outdated
18 cut-down practice represents a blatant disregard for the infliction of pain and mutilation on
19 condemned prisoners, yet the protocol does not prohibit the use of such a procedure.

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24 The protocol fails to specify what factors, if any, are to be considered in choosing the
25 manner of IV access that will be used. *Cf. id.* Each method of access carries its own risks
26 and should be used only in certain circumstances, and yet the protocol does not address
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1 whether the medical team should assess factors in favor of one method of IV access over
2 another.

3
4 The protocol appears to contemplate percutaneous central line placement as a default,
5 without regard for the substantial risks and dangers associated with that method. This method
6 of IV access should only be used when medically indicated and by medical personnel with
7 extensive training in this specific procedure. Placement of a percutaneous central line is an
8 invasive, complicated surgical procedure that is difficult to perform without significant
9 training and experience. Central line placement can cause great pain, as it requires placing
10 the IV in a vein which can be anywhere from half an inch to several inches below the skin,
11 and it can cause many painful and dangerous complications. The protocol allows, and the
12 ADOC has in the past used, a percutaneous central line in situations where such use has not
13 been medically indicated. For example, on information and belief, during Arizona's most
14 recent execution in May 2007, ADOC execution team members established an "injection
15 site" in the right femoral vein of the condemned inmate's groin through percutaneous means
16 (i.e., through the skin). This highly invasive method of intravenous access was, upon
17 information and belief, not medically indicated, but rather chosen by the ADOC for its own
18 convenience. Furthermore, under the protocol the ADOC appears to be free to choose the
19 area of the body in which to place the central line. So, in addition to the groin, the ADOC
20 would be permitted to set a subclavian or jugular central line, highly risky procedures that
21 should only be attempted by qualified personnel in a hospital setting.
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1 The protocol appears not to even contemplate use of peripheral IV access. While it
2 is true that it can be difficult to insert peripheral IVs in inmates who have compromised veins
3 from drug use, and that attempts to place a peripheral IV line should not be continued after
4 a certain period of unsuccessful attempts, peripheral IV access is safer as a default method
5 of IV access because it does not involve the larger, deeper vein accessed in a central line
6 placement, and it is not an invasive surgical procedure. It is an unacceptable practice to rely
7 on central line placement as the default method of IV access, and to Landrigan's knowledge,
8 few if any other states rely on central line placement as the default or sole method of IV
9 access.
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11
12 Further heightening the substantial risks caused by the protocol's lack of clarity and
13 apparent contradictoriness, the protocol grants broad discretion to the Department Director
14 to deviate from the procedures set out therein. The Department Director has total discretion
15 to modify its execution procedures, including modifications to the drugs used, the amount
16 of dosages, the number of IV lines used to deliver the drugs, and the personnel involved in
17 carrying out lethal-injection death sentences. Where problems arise, therefore, the protocol
18 leaves ultimate supervisory and decision-making authority to a person whose position
19 requires no medical training whatsoever or even any training in the specific procedures
20 required under the November 30 Protocol. This raises the possibility, for example, that a
21 "cut-down" could be authorized upon failure to administer a percutaneous central line or that
22 administration of the second two drugs will be authorized despite a failure to adequately
23 anesthetize the inmate. Simply put, the ADOC is not subject to oversight in making changes
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1 or modifications to its lethal injection protocol, nor are there appropriate checks and balances
2 to ensure against substantial pain and suffering during the execution process.
3

4 The ADOC's execution protocol lacks numerous fundamental safeguards, thus
5 substantially increasing the risk that Landrigan will suffer significant pain during the lethal
6 injection process. For example, the ADOC protocol identifies no appropriate procedures or
7 personnel for assessing whether, or ensuring that, the prisoner is properly and adequately
8 anesthetized prior to the administration of the pancuronium bromide and potassium chloride,
9 as would be required in any medical or veterinary procedure after administration of a sedative
10 and before the administration of a neuromuscular blocking agent or a painful potassium
11 chloride overdose. And by failing to require the use of an IV drip, the protocol fails to
12 establish procedures for ensuring that the IV lines are flowing throughout the execution.
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15 The protocol also does not address appropriate monitoring of either the lethal-
16 injection apparatuses or the condemned inmate, which is all the more problematic given the
17 lack of safeguards in ensuring proper anesthetic depth. *See Baze*, 128 S.Ct. at 1536
18 (plurality) ("the risk at issue [from not properly monitoring anesthetic depth] is already
19 attenuated, given the steps Kentucky has taken to ensure the proper administration of the first
20 drug"). Arizona's protocol does not make appropriate provision for ADOC execution team
21 members to visually monitor swelling, fluid leakage, or catheter dislodgement that would
22 signal IV line infiltration, extravasation, migration, or failure. Likewise, the protocol does
23 not address monitoring of the IV lines for patency. Absent the ability to constantly visualize
24 the IV lines and catheter failure, the execution team will simply administer the lethal-
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1 injection drugs without regard to the adequacy of the condemned inmate's intravenous line,
2 the sole means by which anesthetic drugs can reach the inmate. While the protocol makes
3 provision for the use of a high-resolution camera to monitor anesthetic depth, this provision
4 is wholly inadequate because, among others, it is impossible to distinguish the effects of
5 pancuronium bromide from those of thiopental with a camera. Nor is it possible, via a
6 camera, to assess potential reawakening once pancuronium bromide has been administered.
7 It simply is not possible to assess anesthetic depth via a camera. And it should additionally
8 be noted that the high-resolution camera is inadequate to the task of monitoring the IV lines
9 or catheter, because the camera either can focus on only one thing at a time, or its focus is
10 so broad that it does not allow for clear visualization of any item.
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14 The protocol states that a medical team member shall enter the chamber periodically
15 to assess anesthetic depth but it does not state which team member will do so, nor whether
16 that team member will be qualified to assess anesthetic depth. Moreover, the protocol sets
17 a time-period of three minutes after the assessment of anesthetic depth prior to administration
18 of the second and third chemicals. This arbitrary time-period is excessively risky. If the
19 team member assessing anesthetic depth is truly qualified, then the team members need to
20 be able to act upon his/her command, not be forced to wait an arbitrary amount of time
21 during which anesthetic depth may change. It is not safe to administer the pancuronium
22 bromide and potassium chloride unless the inmate is adequately anesthetized. The test must
23 be that the inmate has reached the appropriate anesthetic depth, not that an arbitrary amount
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1 of time has elapsed. In order to be meaningful, assessment of anesthetic depth must be
2 performed throughout the execution, by a person qualified to do so.

3
4 Moreover, the ADOC's protocol fails to address the individual condemned inmate's
5 particular medical condition and history. The procedures make no provision for basing the
6 amount of thiopental administered on well-recognized factors affecting its efficacy, such as
7 body weight, body fat, prior drug usage, presence of other sedating agents, level of anxiety
8 or stress, or food consumption in the hours before the execution.

9
10 Perhaps most significant, the protocol lacks necessary qualifications and training
11 requirements for personnel involved in the lethal-injection procedure, therefore increasing
12 the risk of maladministration. *Cf. Baze*, 128 S. Ct. at 1538 (plurality) (noting that "risks of
13 maladministration" are outweighed by the "safeguards [implemented] to protect against
14 them"). Although the protocol states that the "medical team" will consist of medically
15 trained personnel including "physician(s), nurse(s) and/or emergency medical technician(s)"
16 it provides no specificity as to the criteria by which the personnel will be selected, their
17 required experience, or their training. Nor does the protocol set out which types of
18 "medically trained personnel" are required to do which types of procedures. Consequently,
19 under the ADOC's current protocol, inappropriately trained personnel could be solely
20 responsible for the placement of the percutaneous central line (or other types of IV access)
21 and making critical judgments regarding line patency and drug administration.

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26 The ADOC's execution protocol fails to set forth sufficient details regarding the
27 credentials, certification, licensure, experience, or proficiency of the personnel entrusted to
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1 prepare the drugs used in carrying out execution by lethal injection. Preparation of drugs,
2 particularly for intravenous use, is a highly technical undertaking which requires training in
3 pharmaceutical methods and calculations. The protocol's failure to require that the execution
4 personnel possess such certification, licensure, or experience, as well as its failure to require
5 such training, greatly exacerbates the substantial risk that drugs will be improperly
6 administered and condemned inmates will consciously experience excruciating pain during
7 the lethal injection process. *Cf. Baze*, 128 S.Ct. at 1533 (noting that Kentucky's most
8 significant safeguard "is the written protocol's requirement that members of the IV team
9 must have at least one year of professional experience as a certified medical assistant,
10 phlebotomist, EMT, paramedic, or military corpsman").
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14 The ADOC's protocol also fails to specify the type of training that the selected
15 personnel must undergo and the proficiency level that the personnel must reach though that
16 training. As a result, there is an unconstitutional and substantial risk that the protocol will
17 not be administered as written. Such deviations create a substantial risk of severe pain due
18 to, for example, improper placement of the percutaneous central line and/or inadequately
19 administered anesthesia. *Cf. Baze*, 128 S.Ct. at 1533 (recognizing that, in Kentucky, "IV
20 team members, along with the rest of the execution team, participate in at least 10 practice
21 sessions per year").
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24 The protocol, therefore, makes no provision for qualified personnel to monitor the
25 anesthetic depth of the condemned inmate during the execution. Typically, anesthetic care
26 in the United States is performed by individuals who have received advanced training in the
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1 medical subspecialty of anesthesiology, such as physicians who have already completed their
2 residency in the specialty of anesthesiology or nurses who have trained to become Certified
3 Registered Nurse Anesthetists. Yet there is no guarantee that the ADOC personnel engaged
4 in carrying out executions will be either qualified or trained to monitor anesthetic depth,
5 undermining any effort to reasonably ensure that Landrigan is fully anesthetized prior to the
6 administration of the pancuronium bromide and potassium chloride.
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9 On March 29, 2006, the ADOC's general counsel, Robert Myers, told Human Rights
10 Watch, a non-governmental organization that monitors human rights, that while for a
11 number of years Arizona used anesthesiologists to inject drugs used for lethal-injection
12 executions, that function is no longer undertaken by a doctor.⁷ Thus, in violation of the
13 contemporary standards of decency, the ADOC has actually decreased, rather than increased,
14 the skill and training of the persons involved in executions. And there is no guarantee in the
15 protocol that such a practice will cease.
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18 The protocol also fails to mandate proper physical conditions upon which to carry out
19 the execution. For example, upon information and belief, the ADOC intends to carry out the
20 execution using extended IV lines and other equipment that are medically inappropriate to
21 perform such a procedure. The ADOC intends to use, for example, IV lines that have been
22 rigged together so that the executioners are not in the execution chamber at the time of the
23 execution, despite the fact that, on information and belief, the IV lines are not designed for
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27 ⁷Human Rights Watch, *So Long as They Die: Lethal Injections in the United States*,
28 Volume 18 No. 1(G) at 40 (April 2006), available at
<http://hrw.org/reports/2006/us0406/us0406webwcover.pdf>.

1 such a purpose. And, among others, the protocol does not ensure that there is appropriate
2 lighting and viewing range with which to safely perform the execution. Moreover, in
3 previous executions performed by the ADOC, the execution has been carried out while the
4 inmate was covered with a sheet, thus obscuring proper visualization of IV access and
5 patency. This dangerous practice, which serves no legitimate purpose whatsoever, is not
6 prohibited by the protocol.
7
8

9 **C. Feasible, readily implemented alternatives to the ADOC's**
10 **lethal injection protocol exist.**

11 Feasible, readily implemented alternative procedures exist that would significantly
12 reduce the substantial risk of excruciating pain created by the ADOC's deficient protocol.
13 As Justice Thomas observed in *Baze*, the assessment of "which alternative procedures are
14 feasible and readily implemented" will be difficult to determine and will necessarily involve
15 factual development. *Baze*, 128 S. Ct. at 1562 (Thomas, J., concurring); *see also id.* at 1567
16 (Ginsburg, J., dissenting) (noting that she would remand for further consideration). Because
17 discovery has not yet occurred in this case (this Court has agreed to set a discovery schedule
18 at the status conference on August 15, 2008), at this time it is impossible for Landrigan to
19 produce a complete list of feasible alternatives. However, a one-drug alternative or
20 employing Kentucky's protocol are feasible alternatives that the State has not adopted.⁸
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25 ⁸Experts and at least one state have indicated that a one-drug protocol is a feasible
26 alternative. *See Harbison v. Little*, 511 F.Supp.2d 872, 876-77 (M.D. Tenn. 2007) (Dr. Mark
27 Dershwitz, consulting expert for the protocol committee created by Tennessee governor,
28 "recommended that the committee adopt a one-drug protocol which provided for the
administration of 5 grams of sodium thiopental" and "there was no possibility that 5 grams
of sodium pentothal would not cause death"); *State of Ohio v. Rivera*, No. 04CR065940, slip

1 evidence were available for testing. Supplemental Resp. to Mot. for DNA Testing, August
2 16, 2006. Accordingly, this Court granted DNA testing of the fingernail and hairs (Order,
3 Sept. 15, 2006). But the State's assurances, and this Court's Order, were in vain: on
4 February 1, 2007, the State finally admitted that those crucial pieces of DNA evidence had
5 been "lost." Ex. 3.
6

7
8 Landrigan then evaluated the list of the remaining items of biological evidence in light
9 of the State's theory of the case – that Landrigan had sex with the victim, then killed him for
10 pecuniary gain. TR 6/27/90 at 12-14; *Landrigan*, 176 Ariz. at 3, 859 P.2d at 113 (noting that
11 the victim called a friend while he was "in the middle of sexual intercourse with
12 [Landrigan]"). Landrigan therefore recognized that the most important untested biological
13 material (aside from the crucial – but unavailable – hair and fingernail) involved semen and
14 blood on the victim's blue jeans, the blanket on the victim's bed and the nearby curtains.¹⁰
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18 ¹⁰The victim's shirt also had blood on it. Before trial, the State's criminalist, Inta
19 Meya, compared that blood to a small amount of blood found on Landrigan's shoe. At Trial,
20 Meya stated that "[t]he blood on the shoe could not be differentiated from the blood on the
21 victim's shirt." TR 6/26/90 at 11-13.

22 Meya then opined that the blood on Landrigan's shoe and the blood on the victim's
23 shirt were the same type. TR 6/26/90 at 19. Crucially, however, she also testified that she
24 could not tell from testing whether the blood on the shoe came from the same person as the
25 blood on the shirt. TR 6/26/90 at . And even more critically, she did not compare the blood
26 on the shirt to the victim's blood – she could not have, because the coroner did not collect
27 a sample of the victim's blood. Therefore, the victim's blood type was unavailable for
28 comparison.

29 The victim's blood type remains unknown today. The trial record is confusing as to
30 whether or not samples remain. At trial, Detective Chambers testified that he attended the
31 victim's autopsy and that Dr. Walker, the Medical Examiner, provided him "with a sample
32 of blood from the decedent's body." TR 6/21/90 at 14-15. In a supplemental report dated
33 December 15, 1989, however, the same detective noted that "[n]o liquid blood was present
34 due to decomposition of body. Petechial findings not possible for this reason." Ex. 8. This

1 **B. The “favorable” results of the DNA testing entitle**
2 **Landrigan to an evidentiary hearing.**

3 Section 13-4240(K) of the Arizona Revised Statutes mandates that “if the results of
4 the postconviction deoxyribonucleic acid testing are *favorable* to the petitioner, the court
5 shall order a hearing”(emphasis added). The results of the DNA testing are “favorable”
6 to Landrigan – as Technical Associates, Inc. (“TAI”), reported, “Jeffrey Landrigan is
7 excluded as the source of any of the DNA detected in the samples tested by Technical
8 Associates, Inc. in this case.” Ex.10 (TAI Report, 12).
9

10
11 TAI tested multiple semen and blood stains that were on the victim’s jeans and on the
12 blanket on the victim’s bed, and also tested multiple blood stains on the curtains.¹¹
13 Landrigan’s DNA profile is not present in any of the stains – thus TAI’s significant
14 conclusion that Landrigan is excluded as a contributor of any of the DNA from the semen
15 or blood.
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19 written report is consistent with Medical Examiner Walker’s trial testimony that no blood
20 sample was collected. TR 6/25/90 at 42-43.

21 Because of these inconsistencies, Landrigan is uncertain as to whether the State ever
22 retained (as it should have in a capital case) any sort of sample from the victim suitable for
23 DNA testing. Indeed, Landrigan’s searches for potential sources of the victim’s DNA have
24 been thus far unsuccessful. Landrigan’s investigator inquired as to the existence of a tissue
25 block of the victim that would yield material suitable for DNA testing but was informed by
26 the police’s long-term storage facility that its policy is to destroy any such evidence five years
27 after the end of a homicide case. Ex. 9 (Declaration of Lisa M. Eager, July 28, 2008).

28 Therefore, because the blood on the shirt and shoe has already been tested, and
because the victim’s blood type remains, as of yet, unknown, Landrigan did not pursue
further testing of these items.

¹¹The TAI Report provides an in-depth explanation of the items tested, the chain of
custody of the items, and the method used to determine the DNA test results. Ex. 10.

1 Instead, the testing of the crime scene showed DNA profiles of at least two other
2 individuals , Ex. 10 at 8-13, one of whom *might* be the victim.¹² These results are contrary
3 to what would be expected if Landrigan were intimately involved with the victim, and are
4 also contrary to the existence of a bloody struggle between Landrigan and the victim.
5

6 Therefore, because Landrigan tested the relevant and available¹³ biological evidence,
7 and has provided this Court with favorable results, he therefore respectfully submits that he
8 is statutorily entitled to an evidentiary hearing.¹⁴
9

10 **III. CONCLUSION**

11 Pursuant to Rule 32.5 of the Arizona Rules of Criminal Procedure, counsel for
12 Landrigan certifies that all grounds for relief currently known have been included in the
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14
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16 ¹²Because the victim's blood type remains unknown (*see* n. 10, *supra*), it is not
17 possible to determine his DNA profile, much less compare it to the DNA profiles found at
18 the scene.

19 ¹³Landrigan stresses the fact that the State lost critically relevant biological evidence,
20 thus denying Landrigan the ability to test the most robust evidence from the scene. *See*
supra, pp. 28-29.

21 ¹⁴Any argument that a hearing should not be granted based upon the claim that the
22 DNA evidence is not "exculpatory" is unavailing because the statutory standard is
23 "favorable" – *not* "exculpatory." A.R.S. § 13-4240(K). Landrigan reminds the Court that he
24 was originally charged with second-degree murder and that twice during the trial, the State
25 offered him the opportunity to plead guilty to second-degree murder. Pursuant to the statute,
26 therefore, the required evidentiary hearing is the proper forum to determine the effect of
27 these favorable results.

28 Second, Landrigan originally sought to test the most robust evidence – evidence which
may have actually been "exculpatory." But the State lost that evidence. The State cannot at
one turn deny Landrigan the opportunity to test critical evidence, and then at the next turn,
seek to punish him for the inability to test the evidence.

1 instant petition. For all the reasons asserted in this petition, Landrigan is entitled to relief
2 pursuant to Rule 32.1.

3
4 WHEREFORE, Landrigan respectfully prays this Court:

- 5 (1) Permit Landrigan to conduct discovery to the extent necessary to fully develop
6 and identify the facts supporting his Petition, and any defenses thereto raised
7 by the State's Answer;
8
9 (2) Permit Landrigan to amend this Petition to include any additional claims or
10 allegations not presently known to him or his counsel regarding the lethal-
11 injection or DNA evidence, which are identified or uncovered in the course of
12 discovery, investigation, and litigation of this Petition;
13
14 (3) Conduct a full and fair evidentiary hearing regarding the claims raised in this
15 Petition;
16
17 (4) Grant such other relief as may be appropriate and to dispose of the matter as
18 law and justice require.

19 Respectfully submitted this 28th day of July, 2008.

20
21 Jon M. Sands
22 Federal Public Defender
23 Sylvia J. Lett (Arizona Bar No. 017326)
24 850 West Adams Street, Suite 201
25 Phoenix, Arizona 85007
26 Tel: (602) 382-2816
27 Fax: (602) 889-3960
28 Counsel for Petitioner

By Sylvia J. Lett by
Counsel for Petitioner *McBunke*
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Proof of Service

I hereby certify on this 28th day of July, 2008, that I have mailed a copy of the foregoing Petition for Post-Conviction Relief by regular United States mail addressed to:

Kent E. Cattani
Assistant Attorney General
Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007-2997


Stephanie Bame
Secretary, Capital Habeas Unit

EXHIBIT G

COPY

AUG 10 2009

1 Jon M. Sands
Federal Public Defender
2 Sylvia J. Lett (Arizona Bar No. 017326)
Assistant Federal Public Defender
3 850 West Adams Street, Suite 201
Phoenix, Arizona 85007
4 602.382.2816



MICHAEL K. JAMES, CLERK
S. KENNOW
DEPUTY CLERK

5 Attorneys for Petitioner

6
7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 STATE of ARIZONA,
10 Respondent,
11 vs.
12 JEFFREY TIMOTHY
13 LANDRIGAN,
14 Petitioner.

Case No. CR 90-00066

MOTION TO AMEND SECOND
AMENDED PETITION FOR POST
CONVICTION RELIEF

The Honorable Raymond P. Lee

CAPITAL CASE

15
16
17 Defendant Jeffrey Timothy Landrigan, by and through undersigned counsel,
18 moves to amend his Second Amended Petition for Post-Conviction Relief pursuant
19 to Rule 32.6(d) of the Arizona Rules of Criminal Procedure.

20 A petition for post-conviction relief may be amended "by leave of court upon
21 a showing of good cause." Ariz. R. Crim. P. 32.6(d). The Arizona Supreme Court
22 has interpreted Rule 32.6(d) as adopting "a liberal policy toward amendments of
23 post-conviction pleadings." *State v. Rogers*, 113 Ariz. 6, 8, 545 P.2d 930, 932
24 (1976); *see also Canion v. Cole*, 210 Ariz. 598, 601, 115 P.3d 1261, 1264 (2005).
25 For example, if the defendant "uncovers new evidence or exculpatory evidence as a
26 result of his discovery requests, the trial court may allow amendment of the petition."
27 *Canion*, 210 Ariz. at 601, 115 P.3d at 1264.

28 On September 15, 2006, this Honorable Court granted Landrigan's Motion for

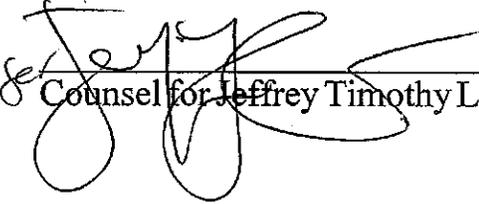
1 DNA testing. On June 3, 2008, Landrigan filed favorable DNA test results. The
2 favorable DNA test results establish that Landrigan was not the actual killer making
3 Landrigan death-ineligible because a third person's DNA – neither Landrigan's or the
4 victim's – was found on and near the victim in a crime scene that showed a bloody
5 struggle. Accordingly, Landrigan requests leave to amend his PCR to include an
6 innocence of the death penalty claim.

7 In addition, because the trial court concluded that Landrigan had actually killed
8 the victim, it did not make *Enmund/Tison* findings in this case. Now that DNA
9 evidence proves Landrigan did not actually kill the victim, unless and until
10 *Enmund/Tison* findings determine whether Landrigan is death eligible, Landrigan is
11 innocent of the death penalty.

12 Because the DNA test results prove Landrigan's innocence of the death
13 penalty, Landrigan's Motion to Amend should be granted. Landrigan's new PCR
14 claim, Claim Three to his Second PCR Petition, is attached hereto as Exhibit 1.

15 DATED this 10 day of August, 2009.

16 Jon M. Sands
17 Federal Public Defender
18 Sylvia J. Lett
19 Assistant Federal Public Defender

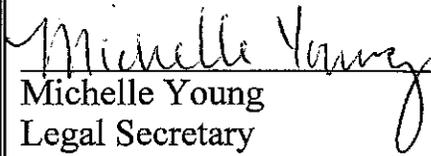
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21 Counsel for Jeffrey Timothy Landrigan
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1 A copy of the foregoing was mailed/
2 hand-delivered on this 10 day of August, 2009, to:

3 Rule 32 Unit
4 Maricopa County Superior Court
5 Phoenix, Arizona 85003

6 Honorable Raymond P. Lee
7 Maricopa County Superior Court
8 Central Court Building, Room 912
9 101 West Jefferson Street
10 Phoenix, Arizona 85003

11 Kent Cattani
12 Assistant Attorney General
13 Attorney General's Office
14 Capital Litigation Section
15 1275 West Washington
16 Phoenix, Arizona 85007-2997

17 
18 _____
19 Michelle Young
20 Legal Secretary

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EXHIBIT 1

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CLAIM THREE

The newly discovered DNA evidence shows that Landrigan is innocent of the death penalty because he was not the actual killer, and thus, his death sentence violates the Eighth and Fourteenth Amendments because it is disproportionate to his crime.

The death penalty imposed on Landrigan constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments in light of the new DNA test results that show Landrigan was not the "actual" killer. The DNA test results show that another person's DNA was found in blood at the crime scene: the bed where the victim died after a violent struggle, on drapes near the victim's bed, and on the victim's clothes. Landrigan's DNA, by contrast, was not found at the crime scene. Therefore, no confidence exists in the sentencing judge's finding that Landrigan was the actual killer who had intent to kill the victim. Thus, based upon the favorable DNA test results, Landrigan is innocent of the death penalty. Further, in order for Landrigan to be resentenced to death, Landrigan's role in the murder must be evaluated as constitutionally required under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987).

I. Procedural History

The jury verdict found Landrigan guilty of burglary, a class 3 felony (Count 1); theft, a class 1 misdemeanor (Count II); and first degree murder, a class 1 felony (Count III). TR at 26-27, Oct. 25, 1990. In the special verdict, the sentencing judge found two aggravators: that Landrigan had previously been convicted of a felony involving the use or threat of violence on another person, and that he committed the offense with the expectation that he would receive something of pecuniary value. TR at 26-27, Oct. 25, 1990. The jury found Landrigan guilty of felony murder; the sentencing judge found that there was no evidence of premeditation and considered this fact a mitigating circumstance. TR at 31-32, Oct. 25, 1990. Accordingly, without premeditation, the only theories of culpability the jury was instructed on were felony murder or accomplice culpability.

1 In the special verdict, the sentencing judge made a determination that
2 Landrigan was the actual killer, not an accomplice. TR at 32, Oct. 25, 1990. The
3 sentencing judge held:

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

12 TR at 32-33, Oct. 25, 1990.

13 Thus, in finding that Landrigan was the actual killer, the sentencing judge did
14 not do an *Enmund/Tison* analysis. As the court put it: "If [Landrigan] was not the
15 actual killer but only an accomplice to the felony that led to the killing or an
16 accomplice to the act of killing, the Court may impose death only if it finds that the
17 defendant attempted to kill – or intended to kill or that the defendant was a major
18 participant in the act which led to the killing and the defendant exhibited a reckless
19 indifference to human life."¹ TR at 32, Oct. 25, 1990.

20 II. Argument

21 The Eighth Amendment to the United States Constitution, applied to the states
22 through the Fourteenth Amendment, prohibits the infliction of punishments that are
23 disproportionate to the crime or culpability of the defendant. *Weems v. United States*,
24 217 U.S. 349, 367 (1910); *Kennedy v. Louisiana*, ___ U.S. ___, 128 S. Ct. 2641, 2650
25 (2008) (internal citations and quotations omitted). Within the context of capital
26 punishment, the United States Supreme Court has determined that the death penalty
27 constitutes a disproportionate punishment if the person to be executed did not actually
28 kill the victim, attempt to kill the victim, intend that a killing take place, or display

¹The sentencing judge's statements regarding accomplice liability are particularly confusing since the judge denied defense counsel's requests for a jury instruction on accomplice liability. TR at 80, June 26, 1990.

1 a reckless indifference to human life while acting as a major participant in an
2 underlying felony. *Enmund*, 458 U.S. at 801; *Tison*, 481 U.S. at 158; *Nordstrom v.*
3 *Cruikshank*, 213 Ariz. 434, 437 n.3, 142 P.3d 1247, 1250 n.3 (App. 2006). Thus,
4 *Enmund/Tison* findings are based on evidence of a defendant's participation in the
5 crime and his intent. In making this determination, the Supreme Court instructed that
6 the focus must be on a criminal defendant's own culpability and not that of those who
7 committed the robbery and murder because of the societal insistence upon on
8 "individualized consideration as a constitutional requirement in imposing the death
9 sentence." *Enmund*, 458 U.S. at 798 (citing *Lockett v. Ohio*, 438 U.S. 586, 605
10 (1978)) (footnote omitted).

11 In 1982, the Supreme Court examined the constitutionality of Earl Enmund's
12 death sentence imposed after he was convicted of two counts of first-degree murder
13 and one count of robbery. *Enmund*, 458 U.S. at 785. While the facts were unclear
14 as to Enmund's participation in the killings,² the Supreme Court resolved the case
15 based on the state court's finding that "driving the escape car was enough to warrant
16 conviction and the death penalty." *Id.* at 786 n.2. The Court ultimately held that
17 Enmund's sentence of death, "in the absence of proof that [he] killed or attempted to
18 kill, and regardless of whether [he] killed or attempted to kill, and regardless of
19 whether [he] intended or contemplated that life would be taken," violated the Eighth
20 Amendment. *Id.* at 801. In reaching this determination, the Court noted that a
21 defendant's "criminal culpability must be limited to his participation in the
22 [underlying felony], and his punishment must be tailored to his personal
23 responsibility and moral guilt." *Id.* at 801.

24
25 ²As the Court noted, the "Florida Supreme Court's understanding of the
26 evidence differed sharply from that of the trial court with respect to the degree of
27 Enmund's participation." *Enmund*, 458 U.S. at 786, n.2. While the trial court found
28 that Enmund "was a major participant in the robbery" and "himself shoe the
[victims]," the Florida Supreme Court determined "the only supportable inference
with respect to Enmund's participation was that he drove the getaway car." *Id.*

1 Several years later, the Supreme Court revisited the constitutionality of a death
2 sentence in another felony-murder case, *Tison v. Arizona*, 481 U.S. 137 (1987). In
3 *Tison*, petitioners Ricky and Raymond Tison were involved in helping their father
4 (who had been convicted of killing a prison guard) and another prisoner, Randy
5 Greenawalt, escape from Arizona State Prison. *Id.* at 139. A few days after the
6 escape, the group decided to steal a car from a passing motorist. *Id.* at 139-40.
7 Raymond Tison flagged down a passing vehicle with a family of four while the others
8 took the weapons and hid, lying in wait. *Id.* at 140. The family was taken hostage;
9 the Tison brothers were instructed to get water, and as they were doing so, their father
10 and Greenawalt started shooting at the family. *Id.* at 140-41. The Tison brothers saw
11 this happen, and although neither “made an effort to help the victims . . . , [they]
12 stated they were surprised by the shooting.” *Id.* at 141. All four family members
13 were killed. *Id.* Several days later, the Tison brothers were arrested, *id.*, and they
14 were eventually convicted and sentenced to death. *Id.* at 143.

15 The *Tison* Court had to determine whether a death sentence was
16 disproportionate where neither petitioner intended to kill the victims. *Id.* at 138. The
17 Court noted that its decision in *Enmund* had only considered two distinct subsets of
18 felony murders. At one pole, where capital punishment was disproportionate to the
19 crime, was “the minor actor in an armed robbery, not on the scene, who neither
20 intended to kill nor was found to have had any culpable mental state.” *Id.* at 149. At
21 the other pole, where capital punishment could be proportionate to the crime, was
22 “the felony murderer who actually killed, attempted to kill, or intended to kill.” *Id.*
23 at 150. In *Tison*, however, the brothers did not fit into either category; rather, their
24 participation was “major rather than minor” and “the record would support a finding
25 of the culpable mental state of reckless indifference to human life.” *Id.* at 151. In
26 resolving this issue, the Court held that a defendant who does not kill may
27 nevertheless be sentenced to death if he was a major participant in the felony
28 committed and if he acted with reckless indifference to human life. *Id.* at 158; *see*

1 also *Kennedy*, 128 S. Ct. at 2650 (noting that the *Tison* Court “allowed the
2 defendants’ death sentences to stand where they did not themselves kill the victims
3 but their involvement in the events leading up to the murders was active, recklessly
4 indifferent, and substantial”).

5 In agreeing with the state court that the facts were sufficient to show that the
6 *Tison* brothers were major participants to the underlying felonies, the Court observed:

7 Far from merely sitting in a car away from the actual scene of the
8 murders acting as the getaway driver to a robbery, each petitioner was
9 physically present during the entire sequence of criminal activity
culminating in the murder of the Lyons family and the subsequent flight.

10 *Tison*, 481 U.S. at 158. This active involvement included brothers Raymond and
11 Ricky Tison, in a successful attempt to free their father, bringing an “arsenal of lethal
12 weapons into the Arizona State Prison which he then handed over to two convicted
13 murderers, one of whom [they] knew had killed a prison guard in the course of a
14 previous escape attempt.” *Id.* at 151.

15 As to whether the brothers did, in fact, possess the culpability necessary to be
16 sentenced to death – reckless indifference to human life – the Court remanded for the
17 state court to make that determination. *Id.* at 158.³ While the Court did not reach this
18 conclusion, it did provide examples of instances of where an individual may not
19 intend to commit murder, but “may be among the most dangerous and inhumane of
20 all” – one such example is the “person who tortures another not caring whether the
21 victim lives or dies, or the robber who shoots someone in the course of the robbery,
22 utterly indifferent to the fact that the desire to rob may have the unintended
23 consequence of killing the victim as well as taking the victim’s property.” *Id.* at 157.

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26 ³The Arizona Supreme Court remanded the case to the trial court to make
27 relevant findings under *Enmund/Tison*, but the trial court determined that a hearing
28 was unnecessary and resentenced both brothers to death. *State v. Tison*, 774 P.2d 805,
805 (Ariz. 1989). The Arizona Supreme Court, again, remanded for a hearing. *Id.*
at 806. Ultimately, the brothers were sentenced to life.

1 In the two decades since it decided *Tison*, the Supreme Court has revisited
2 proportionality and culpability issues related to death sentences on several occasions.⁴
3 Recently, the Court in *Kennedy v. Louisiana* faced the question of whether
4 punishment of death for someone convicted of raping a child, where there was neither
5 an intent to kill the child nor the resulting death of the child, violated the Eighth
6 Amendment. 128 S. Ct. at 2646. The Court considered “the standards elaborated by
7 controlling precedents and by the Court’s own understanding and interpretation of the
8 Eighth Amendment’s text, history, meaning, and purpose.” *Id.* Ultimately, the Court
9 held that “a death sentence for one who raped but did not kill a child, and *who did not*
10 *intend to assist another in killing the child*,” violated the constitution. *Id.* at 2650-51
11 (emphasis added).

12 The *Enmund* and *Tison* cases and their progeny stem from the Supreme Court’s
13 principle that “the Eighth Amendment’s protection against excessive or cruel and
14 unusual punishments flows from the basic precept of justice that punishment for a
15 crime should be graduated and proportioned to the offense.” *Id.* at 2649 (internal
16 citations and quotations omitted). The Court has also cautioned that capital
17 punishment must “be limited to those offenders who commit a narrow category of the
18 most serious crimes and whose extreme culpability makes them the most deserving
19 of execution.” *Roper*, 543 U.S. at 568 (internal quotation marks and citations
20 omitted).

21
22 ⁴*See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it was
23 unconstitutional to execute juvenile offenders who were under 18 years of age);
24 *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits
25 the execution of persons who are mentally retarded); *Penry v. Lynaugh*, 492 U.S. 302
26 (1989) (holding that the Eighth Amendment does not prohibit the execution of
27 persons who are mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361 (1989)
28 (holding that the Eighth Amendment does not prohibit the execution of juvenile
offenders who were 16 or older); *Thompson v. Oklahoma*, 487 U.S. 815 (1988)
(holding that the Eighth Amendment prohibits execution of person who committed
crime when less than 16 years of age).

1 Landrigan no longer falls within this “narrow category” because the favorable
2 DNA test results prove his innocence of the death penalty because he is not the actual
3 killer. Further, before Landrigan can be resentenced to death, *Enmund/Tison* findings
4 must be performed to ensure compliance with the constitutional mandate that only the
5 most culpable be put to death. Under Arizona law, a trier of fact is specifically
6 required to make *Enmund/Tison* findings in the aggravation phase of a capital trial.
7 Ariz. Rev. Stat. § 13-703.01; *see also State v. Nichols*, 219 Ariz. 170, 172-73, 195
8 P.3d 207, 209-10 (App. 2008).⁵

9 What is now known from the favorable DNA test results is that there is no
10 scientific basis for assuming that the blood spatter on Landrigan’s shoe matched that
11 found on the victim’s shirt; and there is newly discovered DNA findings that show
12 another person’s DNA is at the crime scene and on the victim’s jeans.

13 At trial, the State’s prosecution of Landrigan rested upon the theory that
14 Landrigan had sex with the victim. Then, Landrigan robbed him and the two engaged
15 in a violent struggle, which resulted in the victim’s death. TR at 12-14, June 27,
16 1990; *State v. Landrigan*, 176 Ariz. 1, 3, 859 P.2d 111, 113 (1993). That struggle
17 was evidenced by the bloody hairs found clutched in the victim’s hand, as well as by
18 the broken fingernail found near his body.⁶ Because the police “lost” the broken
19 fingernail and bloody hairs, Landrigan requested that the semen and blood on the
20 victim’s blue jeans, and blood on the nearby curtains and the blanket from the

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24 ⁵The current statute requires a jury to make this determination, *see* A.R.S. § 13-
25 703.01(P) (Supp. 2005), even though a jury determination is not constitutionally
26 required, *Ring v. Arizona (Ring III)*, 204 Ariz. 534, 563-65 ¶¶ 97-101, 65 P.3d 915,
944-46 (2003).

27
28 ⁶The fingernail belonged to neither the victim or Landrigan. TR at 30-31, June
21, 1990.

1 victim's bed, be tested for the presence of DNA.⁷ The DNA test results show that two
2 DNA profiles are present on the evidence tested. Thus, according to the
3 prosecution's theory that there was a violent struggle during the robbery that resulted
4 in the victim's death, a logical conclusion is that at least one DNA profile must be
5 that of the actual killer. Neither of the two DNA profiles is Landrigan's. Landrigan's
6 DNA profile was not found on any of the multiple semen and blood stains tested and
7 the DNA test results completely undermine the State's theory that Landrigan killed
8 the victim.⁸

9 Further, there is no scientific basis for the sentencing judge's assertion that
10 "blood spatters on the tennis shoes of [Landrigan] demonstrate that he was the killer
11 in this case." TR at 33, Oct. 25, 1990. At trial, the State's criminalist, Inta Meya,
12 testified that "[t]he blood on the shoe could not be differentiated from the blood on
13 the victim's shirt." TR at 11-13, June 26, 1990. Meya then opined that the drop of
14 blood on Landrigan's shoe and the blood on the victim's shirt were the same type, TR
15 at 19, June 26, 1990; but crucially, she also testified that she could *not* tell from
16 testing whether the blood on the shoe came from the *same person* as the blood on the
17 shirt. TR at 19, June 26, 1990. Most critical, however, was that Meya never
18 compared the blood on the shirt to the victim's own blood, so it is unknown whether
19 the blood on the victim's shirt is the victim's blood. TR at 20, June 26, 1990. Thus,
20 it is unclear whether the blood on the victim's shirt is the victim's or the perpetrator's.
21 Equally unknown is the origin of the blood on Landrigan's shoe, and there is simply
22 no evidence that the drop of blood on Landrigan's shoe is that of the victim's.

23 In addition to the new DNA evidence that demonstrates Landrigan's innocence
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26 ⁷See Second Amended Petition for Post-Conviction Relief, Ex. 1 (Crime Scene
27 Diagram) (filed with this Court on July 28, 2008).

28 ⁸See Second Amended Petition for Post-Conviction Relief, Ex. 10 (Report of
Technical Associates, Inc.) (filed with this Court on July 28, 2008).

1 of capital felony murder, the sentencing judge also relied on suspect testimony from
2 Cheryl Smith at trial. Cheryl Smith was Landrigan's purported ex-girlfriend of three
3 months whom he called from jail. RT at 49, June 21, 1990. Smith testified that
4 Landrigan told her he was in jail for murder and that he "said he killed a guy . . . with
5 his hands." RT at 52, June 21, 1990. Smith also testified that Landrigan said that
6 there was someone else present but "that guy got away." RT at 52, June 21, 1990.
7 On cross-examination, however, Smith recanted her previous testimony and admitted
8 that, in fact, Landrigan told her that he did not kill anyone and that another guy was
9 responsible for the death. RT at 57, June 21, 1990. Smith's "correction" of her
10 testimony on cross-examination is truthful, as it accurately states the content of the
11 transcript from the telephone conversation taped by the Maricopa County Jail.
12 Telephone Tr. 1-20, May 11, 1990, attached hereto as Exhibit A. The telephone
13 transcript from Landrigan's jailhouse call with Smith revealed:

14 Smith: What'd you do it for?
15 Landrigan: Well, it don't matter. I did it with my hands. Me and
16 Smith: Yeah.
17 Landrigan: And he killed him. They ain't got him. He disappeared.

18 * * *

19 Landrigan: This phone's bugged you know, there really isn't a whole
20 lot I can say.
21 Smith: Whose phone, that phone you're on?
22 Landrigan: Sure. Well, like I said all I did was knock him out, the
23 other guy killed him.

24 Exhibit A at 5, 9-10.

25 Because the telephone transcript clearly shows that Landrigan claimed another
26 man was responsible for the victim's death, the trial court should not have relied on
27 Smith's non-credible trial testimony in making its determination that Landrigan was
28 the actual killer.

Landrigan was initially charged with second-degree murder, and during the
course of his trial, the State made numerous offers to Landrigan to plead guilty to
second-degree murder. Landrigan declined and exercised his constitutional right to

1 go to trial. The favorable DNA test results now show that Landrigan did not
2 participate in the victim's murder. In light of this newly discovered evidence, a
3 resentencing under *Enmund/Tison* must be held.

4 It is not a stretch of the imagination to conclude that the sentencing judge,
5 Judge Hendrix, would not have imposed a death sentence if she knew there was no
6 physical evidence proving that Landrigan committed the crime, and that the evidence
7 suggested another perpetrator. We already know that Judge Hendrix would not have
8 sentenced Landrigan to death if trial counsel had presented the mitigation evidence
9 that was developed during the collateral proceedings. Instead, she "would have
10 concluded that the mitigating factors outweighed the aggravators presented by the
11 state," and that the mitigating circumstances "were sufficient to call for leniency."
12 Petitioner's Response to the State's Motion to Dismiss the Second Amended Petition
13 for Post-Conviction Relief, Ex. 1 ¶¶ 14, 15, 17 (Declaration by Cheryl Hendrix) (filed
14 with this Court on May 13, 2009).⁹ Landrigan's case originally was a second degree
15 murder case with multiple plea offers proffered by the prosecution, which Landrigan
16 rejected due to his long-standing and well-documented brain damage. This case
17 never was and is not now a death penalty case.

18 Landrigan's punishment is disproportionate to his crime and the execution of
19 those who assist in committing a felony but did not kill or intend to kill another
20 person is unconstitutional. *Enmund*, 458 U.S. 782. For the foregoing reasons,
21

22 ⁹At the time Judge Hendrix sentenced Landrigan to death, she remarked: "I find
23 the nature of the murder in this case is really not out of the ordinary when one
24 considers first degree murder, but I do find that Mr. Landrigan appears to be
25 somewhat of an exceptional human being. It appears that Mr. Landrigan is a person
26 who has no scruples and no regard for human life and human beings and the right to
27 enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr.
28 Landrigan appears to be an amoral person." TR at 33-34, Oct. 25, 1990. Judge
Hendrix now knows the truth about Landrigan, a brain-damaged man who, as
described above, may not be the actual killer.

1 Landrigan is innocent of the death penalty and must be resentenced.

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EXHIBIT H

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

08/07/2009

HONORABLE RAYMOND P. LEE

CLERK OF THE COURT
B. Kredit
Deputy

STATE OF ARIZONA

KENT E. CATTANI

v.

JEFFREY TIMOTHY PAGE LANDRIGAN (A)

SYLVIA J LETT

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

RULING

The Court has reviewed the following pleadings:

1. the defendant's Second Amended Petition for Post-Conviction Relief, filed July 28, 2008;
2. the State's Motion to Dismiss Second Amended Petition for Post-Conviction Relief, filed February 2, 2009;
3. the defendant's Response to the State's Motion to Dismiss Second Amended Petition for Post-Conviction Relief, filed May 13, 2009;
4. the State's Reply to Response to the State's Motion to Dismiss Second Amended Petition for Post-Conviction Relief, filed July 6, 2009;
5. the defendant's Motion to Strike State's Reply to Response to the State's Motion to Dismiss Second Amended Petition for Post-Conviction Relief, filed July 9, 2009; and
6. the State's Response to Motion to Strike/Motion to Permit Supplemental Briefing in Light of *Dickens v. Brewer*, filed July 24, 2009.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

08/07/2009

The defendant raises two claims in his petition: (1) Arizona's lethal injection protocol is unconstitutional, and (2) favorable results of DNA testing entitle him to an evidentiary hearing. The State has moved to dismiss, contending that the defendant has failed to establish a colorable claim for relief. For the reasons that follow, the Court has determined that under Rule 32.8, an evidentiary hearing is not required to determine issues of material fact regarding either claim. However, the Court will allow the parties to present oral argument as previously scheduled on September 4, 2009.

Lethal Injection Issue

The Court agrees with the State that in prior status conferences and hearings, both parties agreed that this Court could rely on the evidence developed in *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, the federal action brought by several Arizona death row inmates challenging the constitutionality of Arizona's lethal injection protocol under 42 U.S.C. §1983. On July 1, 2009, U.S. District Judge Wake issued an order granting the State's Motion for Summary Judgment in that litigation. His order recited 21 pages of undisputed facts. Based on this Court's review of those facts and the pleadings in this Rule 32 proceeding, there is no difference between the facts the parties rely upon in making their arguments and the facts established in *Dickens*. The defendant has not shown what, if any, additional facts would be presented at an evidentiary hearing. Moreover, the *Dickens* plaintiffs were represented by the same office (the Federal Public Defender) as the defendant, and the defendant's attorneys have reviewed the discovery developed in that case.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

08/07/2009

Therefore, the Court finds that it can accept the facts as stated in the *Dickens* order and an additional evidentiary hearing is not required under Rule 32.8 to determine issues of material fact regarding the defendant's lethal injection claim.

DNA Issue

As with the lethal injection issue, the parties do not dispute the facts established by the DNA testing of the victim's pants, blanket and curtains; they contend that the Court should draw different conclusions based on these facts. Therefore, there are no issues of material fact left to be determined by an evidentiary hearing.

IT IS THEREFORE ORDERED as follows:

1. Denying the defendant's Motion to Strike State's Reply to Response to the State's Motion to Dismiss Second Amended Petition for Post-Conviction Relief.
2. Denying the defendant's request for an evidentiary hearing as set forth in his Second Amended Petition for Post-Conviction Relief and subsequent pleadings.
3. Setting this matter for oral argument on **September 4, 2009 at 11:00 a.m.** before Judge Raymond Lee, Southeast Facility, 1810 S. Lewis, Mesa, AZ, courtroom 6. The purpose of this oral argument is to allow counsel the opportunity to address whether the conclusions expressed by Judge Wake's July 1, 2009 Order in *Dickens* should or should not be accepted and incorporated by this Court. Defense counsel shall inform the Court 14 days before this hearing whether or not the defendant waives his presence.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

EXHIBIT I

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

HONORABLE RAYMOND P. LEE

CLERK OF THE COURT
B. Kredit
Deputy

STATE OF ARIZONA

KENT E. CATTANI

v.

JEFFREY TIMOTHY PAGE LANDRIGAN (A)

SYLVIA J LETT

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

RULING

The Court has reviewed all the pleadings regarding the defendant's Amended Petition for Post-Conviction Relief. The defendant raises two claims in his petition: (1) Arizona's lethal injection protocol is unconstitutional, and (2) favorable results of DNA testing entitle him to a new trial. For the reasons that follow, the Court finds that neither claim warrants relief.

Lethal Injection Claim

The defendant first challenges the constitutionality of Arizona's lethal injection protocol. This Court previously ruled that it accepts the findings of fact as stated in *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, the federal action brought by several Arizona death row inmates challenging the constitutionality of Arizona's lethal injection protocol under 42 U.S.C. §1983. It now also accepts Judge Wake's conclusion that Arizona's lethal injection protocol does not violate the Eighth Amendment.

There is no clearly established federal law holding that lethal injection in general or Arizona's protocol in particular constitutes cruel and unusual punishment. *See Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520, 1530 (2008) ("This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."); *State v. Andriano*, 215 Ariz. 497, ¶¶61-62 (2007) ("the United States Supreme

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

Court has never held that death by lethal injection is cruel and unusual absent specific procedures for implementation, nor does Andriano cite any cases to that effect"). To the contrary, *Baze* upheld the constitutional validity of Kentucky's three-drug lethal injection protocol. *Id.* at 1537-38.

As Judge Wake and other jurists have noted, the *Baze* decision did not provide a majority opinion or decision. In such a circumstance, the United States Supreme Court has instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977)(quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)(plurality opinion)). However, there are no reliable means of determining the "narrowest grounds" presented in *Baze* because three blocks of Justices provided three separate standards for determining the constitutionality of a mode of execution. As a consequence, the *Baze* plurality further instructed that "[a] State with a lethal injection protocol similar to the protocol we uphold today" would not violate the Eighth Amendment. 128 S.Ct. at 1537 (Roberts, C.J., joined by Kennedy and Alito, JJ.). This Court believes that it is this basis upon which the Arizona Supreme Court will analyze Arizona's lethal injection protocol: the protocol does not violate the Eighth Amendment if it is similar to Kentucky's or provides greater protection against the risk of severe pain than Kentucky's.¹

After *Baze*, and during the *Dickens* litigation, the Arizona Department of Corrections (ADOC) revised its lethal injection protocol to add additional safeguards to ensure that there is no substantial risk of severe pain to the inmate. *See*, ADOC Department Order 710, Execution Procedures.² This Court agrees with Judge Wake's finding that this amended protocol provides more safeguards than does Kentucky's protocol against the risk that the sodium thiopental will be improperly administered and the pancuronium bromide and potassium chloride will be administered to a conscious inmate. Although the defendant contends that using only a fatally-sufficient dose of sodium thiopental would avoid any possibility of severe pain from the pancuronium bromide and potassium chloride, the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions;" it protects only against a substantial risk of serious harm. *Baze*, 128 S.Ct. at 1529.

¹ The Court notes that although the defendant also claims that lethal injection violates the Arizona Constitution, he makes no separate argument and cites no authority supporting the proposition that the Arizona Constitution provides greater protection than the Eighth Amendment. Therefore, the Court confines its analysis to whether Arizona's protocol violates the Eighth Amendment.

² ADOC Department Order 710 is published in its entirety on its website:

http://www.azcorrections.gov/Zoya_DO710.aspx

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

The defendant also states that his challenge is not simply to the drugs themselves, but the selection of the people in charge of administering the drugs, and the safety measures in place to prevent potential suffering. These contentions are identical to those raised by the plaintiff inmates in *Dickens*, and are also resolved by ADOC's amended protocol.

This Court finds that it agrees with Judge Wake's findings and conclusions regarding the constitutionality of Arizona's lethal injection protocol, and incorporates in its entirety the *Dickens* order. Based upon these findings and conclusions, Arizona's three-drug protocol is "substantially similar" to the protocol approved by the United States Supreme Court in *Baze* and does not violate the Eighth Amendment. *Dickens v. Brewer*, at 38 (concluding that the Arizona Protocol is substantially similar to Kentucky's, does not subject inmates to a substantial risk of serious harm, and "the record does not demonstrate a substantial risk that [ADOC] will violate the Arizona Protocol in the future in a manner that is sure or very likely to cause needless suffering").

The Court finds that the defendant has failed to state a colorable claim for relief regarding his lethal injection claim.

DNA Claim

The Court also previously ruled that the facts were not in dispute regarding the results of the DNA testing, and therefore an evidentiary hearing was not required under either A.R.S. §13-4240 or Rule 32.8.

Semen and blood present on the victim's pants, blanket and curtains were tested and no DNA matched the defendant's. The Court finds that this fact would not have affected the jury's verdict of guilt or the trial court's sentence of death. The Arizona Supreme Court stated that the facts as follows:

"Evidence at trial established that the victim's body was found in his residence on December 15, 1989. According to the testimony of a friend ('Michael'), the victim had been a promiscuous homosexual who frequently tried to 'pick up' men by flashing a wad of money. This would invariably occur after he got paid. The victim told Michael that he had recently met a person named 'Jeff,' with whom he wanted to have sex. The victim's physical description of Jeff was later found to closely approximate defendant.

"Michael received three phone calls from the victim on Wednesday, December 13, 1989. During the first, the victim said he had picked up Jeff, that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

they were at the apartment drinking beer, and he wanted to know whether Michael was coming over to 'party.' Approximately 15 minutes later, the victim called a second time and said that he was in the middle of sexual intercourse with Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff a job. Jeff spoke with Michael about employment, and asked if he was going to come over. Michael said no. During one of these conversations, the victim indicated that he had picked up his paycheck that day.

"The victim failed to show up for work the following day, and calls to him went unanswered. On Friday, a co-worker and two others went to the victim's apartment and found him dead. He was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

"Cause of death was ligature strangulation. Medical testimony at the presentence hearing indicated that the victim probably was strangled after being rendered unconscious from blows to the head with a blunt instrument.

"Acquaintances testified that the apartment usually was neat. When the body was found, however, the apartment was in disarray. Drawers and closets were open; clothes and newspapers were strewn on the floor. The remnants of a Christmas present lay open and empty at the foot of the bed. In the kitchen area were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers, and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on the floor. A clear impression of the sole of a sneaker appeared in the sugar. Neither the paycheck nor its proceeds were located. Although the apartment had been ransacked, nothing else seemed to be missing.

"When defendant first was questioned, he denied knowing the victim or ever having been to his apartment. When arrested, however, he was wearing a shirt that belonged to the victim. Seven fingerprints taken from the scene matched defendant's. The impression in the sugar matched his sneaker, down to a small cut on the sole. Tests also revealed that a small amount of blood had seeped into the sneaker. The blood matched that found on the shirt worn by the victim.

"Defendant's ex-girlfriend testified that she had three telephone conversations with him in December of 1989. During one of those, defendant told her that he was 'getting along' in Phoenix by 'robbing.' Defendant placed the last

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

call to her from jail sometime around Christmas. He said that he had 'killed a guy ... with his hands' about a week before." *State v. Landrigan*, 176 Ariz. 1, 3-4, 859 P.2d 111, 113-14 (1993).

In reviewing the sufficiency of the evidence of the defendant's guilt, the Supreme Court found that "[t]he evidence clearly placed defendant, who admitted getting along by 'robbing,' and who was wearing one of the victim's shirts when arrested, in the ransacked apartment" and defendant admitted to his ex-girlfriend that he killed a man about a week before December 23rd, and the blood on his shoe matched that on the victim's shirt." *Id.* at 4-5.

The new DNA evidence does not undermine the defendant's guilt; it shows only that someone else may have been involved in the crimes. In fact, the defendant admitted to his psychological expert that he went to the victim's apartment intending to rob the victim, and assisted an accomplice in murdering the victim. He told the expert that he put the victim in a headlock while his accomplice hit the victim. As shown by the Supreme Court's statement of facts, the new DNA evidence is not the only physical evidence linking the defendant to the crimes. Based on the evidence admitted at trial and the defendant's admissions, the DNA evidence would not have changed the jury's verdict of guilt.

The DNA evidence also 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. *Id.* at 7. 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. *Schriro v. Landrigan*, 550 U.S. 465 (2007). The Arizona Supreme Court agreed with the trial judge that the defendant's comments at the sentencing hearing "demonstrate a lack of remorse that unfavorably distinguishes him from other defendants and supports imposition of this severe penalty." *State v. Landrigan*, 176 Ariz. at 7-8.

The Court finds that the defendant has failed to state a colorable claim for relief regarding the DNA evidence claim.

IT IS THEREFORE ORDERED dismissing defendant's Amended Petition Post-Conviction Relief.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

EXHIBIT J

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

11/19/2009

HONORABLE RAYMOND P. LEE

CLERK OF THE COURT
B. Kredit
Deputy

STATE OF ARIZONA

KENT E. CATTANI

v.

JEFFREY TIMOTHY PAGE LANDRIGAN (A)

SYLVIA J LETT

APPEALS-PCR
CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

RULING

The Court has reviewed the defendant's Motion for Rehearing. The defendant reiterates arguments he made in prior pleadings, particularly regarding the necessity for an evidentiary hearing. The Court addressed that issue in a prior ruling. As the Court stated in its ruling dismissing the Second Amended Petition for Post-Conviction Relief, the Court reviewed all the pleadings regarding that petition. The Court's dismissal of the petition encompassed a denial of the defendant's 8/10/09 request to amend the petition, and considered all of the defendant's

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

11/19/2009

arguments, including his state constitutional arguments. For all of these reasons, and no good cause appearing,

IT IS ORDERED denying the defendant's Motion for Rehearing.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>

EXHIBIT K



Supreme Court

RACHELLE M. RESNICK
CLERK OF THE COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

SUZANNE D. BUNNIN
CHIEF DEPUTY CLERK

April 7, 2010

RE: STATE OF ARIZONA v JEFFREY TIMOTHY LANDRIGAN
Arizona Supreme Court No. CR-10-0011-PC
Maricopa County Superior Court No. CR1990-000066

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 6, 2010, in regard to the above-referenced cause:

ORDERED: Petition for Review [of Denial of Post-Conviction Relief] = DENIED.

Rachelle M. Resnick, Clerk

TO:

Kent E Cattani

Sylvia J Lett

Jeffrey Timothy Landrigan, ADOC #82157, Arizona State Prison

Diane Alessi

Amy Sara Armstrong

Dale A Baich

Michael K Jeanes

cf

EXHIBIT L

MICHAEL K. JEANES, CLERK
BY *J. Lamez* DEF
FILED

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE of ARIZONA,
Respondent,

Case No. CR 1990-000066

vs.

[PROPOSED] ORDER FOR
RE-RELEASE OF EVIDENCE FOR DNA
ANALYSIS

JEFFREY TIMOTHY
LANDRIGAN,

Petitioner.

CAPITAL CASE

IT IS ORDERED granting Landrigan's Motion to Re-release Evidence for DNA
Analysis.

IT IS FURTHER ORDERED releasing from evidence in case number CR90-
00066, Plaintiff's exhibit #22 (LevisTM blue jeans), to Sandra Zahirieh, investigator
with the Federal Public Defender for the District of Arizona, for the purpose of DNA
testing.

DATED this 28th day of Sept, 2010.

Judge, Maricopa County Superior Court