IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-73241

JEFFREY TIMOTHY LANDIRGAN,

Petitioner,

v.

ERNEST TRUJILLO, et al.,

Respondents.

(Capital Case)

RESPONSE TO APPLICATION FOR STAY OF EXECUTION AND FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS PETITION

Terry Goddard
Attorney General
(Firm State Bar No. 14000)

Kent E. Cattani
Chief Counsel
Criminal Appeals/
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
CADocket@azag.gov
(State Bar Number 010806)

Attorneys for Respondents

Petitioner Jeffrey Landrigan seeks to stay his pending execution, which is scheduled for October 26, 2010, based on his assertion that he is entitled to pursue a successive federal habeas petition raising a claim that "newly-discovered" DNA test results somehow call into question the propriety of his death sentencing. In particular, he argues that the test results show that he was not the "actual killer" and is thus ineligible for the death penalty.

Under the Federal Rules of Procedure, the determination whether to grant an application for stay is based on the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

This Court should summarily reject Landrigan's request for a stay because he cannot make any showing, much less a strong showing, that he is likely to succeed on the merits in his attempt to pursue a successive petition for writ of habeas corpus. The DNA test results (which have been available for 2 years) do not exculpate Landrigan or otherwise call into question his death sentence. Landrigan has admitted being present at the murder scene and actively participating in the victim's murder. Accordingly, the test results, which simply demonstrate an absence of Landrigan's DNA on items that are not probative of guilt, do not call

into question the state courts' rejection of Landrigan's post-conviction claims and do not otherwise establish a basis for filing a successive habeas petition or for seeking injunctive relief to delay his scheduled execution.

Landrigan unsuccessfully argued in state post-conviction proceedings that the DNA test results would have changed the trial court's *Enmund/Tison* finding[1] and the sentence imposed for felony murder. The state courts (and the United States Supreme Court) properly rejected Landrigan's argument, and there is no basis for overturning the state courts' decision under any standard of review, much less that required under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Noticeably absent from Landrigan's motion for stay is a description of the facts underlying his conviction and sentence. In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1986 prison stabbing. *Schriro v Landrigan*, 550 U.S. 465, 468 (2007). Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to pick up men by showing them money. *Id.*; *State v. Landrigan*, 859 P.2d

[1]*See Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (read together, these cases hold that a defendant convicted of felony murder can be sentenced to death if the defendant was a major participant in the underlying felony and acted with reckless indifference to human life).

111, 113–14 (Ariz. 1993). On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. *Landrigan*, 859 P.2d at 113.

At some point after the phone conversations, the victim was stabbed and strangled to death with an electrical cord. The victim was left face down on the bed in a pool of blood with facial lacerations and puncture wounds on his body. An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. *Id*.

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However, he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on one of Landrigan's shoes matched blood on the victim's shirt. *Id*.

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. *Id*. at 113–14.

In addition to the overwhelming evidence presented at trial supporting Landrigan's felony murder conviction and death sentence, Landrigan subsequently provided – in a pleading submitted by his current counsel as part of his federal habeas proceedings – his own version of the murder. That version was presented through a psychological report, which was authored in 1990 by Mickey McMahon, Ph.D, an expert retained by defense counsel. The report was not presented at trial, but was offered during state post-conviction proceedings and provided the following additional information:

> [Landrigan] states that he did speed every day for the 42 days from the time he escaped from the Oklahoma prison to the time he was taken into custody in Phoenix. He goes on to admit that he only slept 14 days out of the 42 he was out, which could not help but have had an effect on his behavior at the time of the commission of the present murder charge. Finally, he admits that he "snorted" amphetamine about one and one-half hours prior to the offense and estimates that he was at the "peak" of the drug effect at the time of the offense itself.
>
> It would appear that the trigger for [Landrigan's] hitting the victim, prior to his crime partner choking him to death, was the victim making homosexual advances to him and ultimately touching him and rubbing his neck. [Landrigan] admits that the next thing that

> happened was that he had the thought to just subdue the victim, cut off his unwelcome homosexual advances, and let his partner in through the front door so that they could carry out the original plan to simply rob the victim—which he did. [Landrigan] admits to one previous homosexual experience in prison in which another inmate paid him to submit to oral sex. Afterwards [Landrigan] had a negative reaction as if he "felt dirty, not a right feeling." He admitted that the reaction continued to be with him, "bothering me for a while."
>
> According to [Landrigan], after he let his partner in, the partner began kicking the victim which galvanized the victim to get up and begin struggling with the partner, even starting to get the upper hand. [Landrigan] volunteers that he then put the victim in a head lock, and his partner hit him until he was unconscious. [Landrigan] went back to robbing the place, his original intention, while the partner took an electric cord and began to choke him to death.
>
> Afterwards, [Landrigan] and his partner left the apartment, having obtained a payroll check and a small amount of cash.

(Report of Mickey McMahon, Ph.D., at 4.)

Landrigan has thus admitted substantial involvement not only in the underlying felony, but also in murdering the victim. The fact that another person may have been involved with Landrigan does not constitute newly-discovered evidence unavailable to Landrigan at the time of trial, *see* Ariz.R.Crim.P. 32.1(e), and it does not meet Landrigan's burden under Ariz.R.Crim.P. 32.1(h) of establishing "by clear and convincing evidence that . . . the court would not have imposed the death penalty."

AEDPA significantly "restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler v.*

Cain, 533 U.S. 656, 661 (2001); *see* 28 U.S.C § 2244. "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). *See also* Rule 9, Rules Governing § 2254 Cases ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition . . . .").

Under 28 U.S.C. § 2244(b)(3)(C), this Court "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements" of 28 U.S.C. § 2244(b)(2):

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application *shall be dismissed* unless—
>
> > **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; *and*
> >
> > **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder

> would have found the applicant guilty of the underlying offense.

(Emphasis added).

A "prima facie showing" under 28 U.S.C. § 2244(b)(3)(C) is "'a sufficient showing of possible merit to warrant a fuller exploration by the district court,'" and this Court will grant an application for a successive petition if, in light of its supporting documents, "'it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition.'" *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (*per curiam*) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)). A three judge panel must consider whether a petitioner has established a prima facie case, and its decision denying the request "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(B), (E).

In the instant case, Landrigan has not even asserted that "no reasonable factfinder would have found [him] guilty of the underlying offense." His assertions relate only to the sentence imposed and are thus not colorable under § 2244(b)(2).[2]

[2] In *Thompson v. Calderon*, 151 F.3d 918, 923–24 (9th Cir. 1998), this Court found that a claim of actual innocence of the death penalty was cognizable under section 2244(b)(2), where the petitioner challenged the lone special circumstance

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Furthermore, even if Landrigan were able to overcome the § 2244 hurdle, he would not be able to establish a basis for relief under 28 U.S.C. § 2254(d), which requires a showing that the state courts' decision unreasonably applied controlling United States Supreme Court authority or unreasonably determined the facts in light of the evidence presented in the State court proceedings. The facts outlined above, including Landrigan's own version of the murder, were considered by the state post-conviction judge in rejecting Landrigan's claim for relief based on "newly-discovered" DNA evidence.

Based on this information, Judge Raymond Lee determined that Landrigan did not establish a basis for an evidentiary hearing "under either A.R.S. § 13–4240 or Rule 32.8." (See Attachment A, M.E. 10/8/2009, at 3.) In rejecting Landrigan's claim for relief, Judge Lee stated:

> 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

(... continued)

in a capital murder. Here, Landrigan is not challenging the application of any aggravating factor—he is simply asserting he was not the actual killer. Thus, *Thompson* is arguably distinguishable. In any event, the clear language of section 2244(b) forecloses Landrigan's claim. *Compare Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997 (finding claims of actual innocence of the death penalty not cognizable under section 2244(b)(2)(B)) and *In re Medina*, 109 F.3d 1556, 1565–66 (11th Cir. 1997) (same).

> 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. [State v. Landrigan, 176 Ariz.] 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. 475 (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.

(*Id*.) Judge Lee's ruling, with which the Arizona Supreme Court and the United States Supreme Court agreed, is not unreasonable under any standard of review, and Landrigan has not established that he would be entitled to relief under 28 U.S.C. § 2254(d).

Finally, Landrigan has not demonstrated the diligence required to permit consideration of a newly proffered claim under 28 U.S.C. § 2244(B)(i). As Judge Lee noted in his order in state court, Landrigan has at best established that someone else was present with him and assisted in killing the victim. This fact

was known to him at the time of trial and sentencing, and his newly proffered evidence of an accomplice does not constitute a factual predicate that "could not have been discovered previously."

Moreover, even if Landrigan were somehow incapable of remembering the facts of the murder, his counsel has been aware of this "newly-discovered" DNA evidence for more than 2 years, but has waited until days before Landrigan's scheduled execution to seek permission to file a successive federal habeas petition based on that evidence. Landrigan has not demonstrated diligence in pursuing this claim, and he has not provided a basis for the equitable relief he now seeks. *See Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653 (1992) (noting that "last-minute or manipulative uses of the stay power constitute equitable grounds which can justify the denial of an application for stay of a state-court order of execution.").

Landrigan murdered his Arizona victim more than two decades ago. Both Arizona and the federal government have embraced a policy determination that surviving victims are entitled to a "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art 2 § 2.1(A)(10); 18 U.S.C. § 3771(a)(7); (b)(2)(A) ("proceedings free from unreasonable delay"). Moreover, the States have a strong interest in enforcing their judgments to finality. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 555–57 (1998); *Gomez v. U.S. District*

Court for N. Dist. Cal, 503 U.S. 653, 654 (1992) (*per curiam*); *In re Blodgett*, 502 U.S. 236, 239-40 (1992). Landrigan has not established an equitable basis for the relief he seeks, and this Court should deny his motion for a stay and his request for permission to file a successive federal habeas petition.

DATED this 22nd day of October, 2010.

Terry Goddard
Attorney General

/s/
Kent E. Cattani
Chief Counsel
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on October 22nd, 2010, I electronically filed this motion with the U.S. Court of Appeals for the Ninth Circuit, by using the Court's Case Management/Electronic Case Files (CM/ECF) system.

Copies of this Motion were deposited for mailing this date to:

JON M. SANDS
Federal Public Defender
Dale A. Baich
Sylvia J. Lett
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007

Attorneys for Appellant

/s/
L.L. Kugler
Legal Secretary
Criminal Appeals/
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

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