No. 10-73241

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN, Petitioner,

vs.

ERNEST TRUJILLO, Warden,
Arizona State Prison Complex-Eyman, et al., Respondents.

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

REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

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In the State's haste to execute Landrigan, it blithely ignores the very real possibility that Landrigan may not even be *an* actual killer in this case. That possibility demands further investigation. This Court should therefore stay Landrigan's execution—at least for as long as this Court requires to give full consideration to his request for authorization to file a second or successive habeas petition. Should this Court authorize Landrigan to proceed in district court, this Court will stay his execution pending the outcome of the proceedings before that court. *See* 9th Cir. R. 22-3(f).

Without acknowledging the results of the DNA testing, the State is trying to change its story about the murder of which Landrigan was convicted. The State's effort to oppose Landrigan's request for a stay focuses entirely on its belief that his claim is not substantial enough to warrant a stay. *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (holding that a federal court must grant a stay to consider a successive habeas application that presents "substantial grounds on which relief might be granted"). It opposes a stay for two main reasons. First, it asserts that this Court should deny a stay because Landrigan would not be able to prevail on the habeas application he submitted. Second, it asserts that Landrigan has not satisfied the statutory criteria that would allow this Court to authorize him to proceed in district court. But Respondents have conflated the standard for authorization with the

standard for prevailing on the underlying habeas petition for which Landrigan seeks authorization to file. And it entirely ignores the favorable results of the DNA testing—results the State has never disputed—in favor of two alternative theories of the murder, one of which has never been subjected to adversarial testing.

1. The State's unwillingness to identify a coherent theory of guilt simply reinforces the real possibility that Landrigan may not be the actual killer in this case.

The State contends that Landrigan will not prevail on his claim because either one of two theories of guilt foreclose the possibility that he is not the actual killer, contrary to the finding of the sentencing judge. In the first theory, Landrigan is the sole actor, and in the second, Landrigan is a relatively minor participant. Neither one accounts for the results of the DNA testing that Landrigan has conducted—results that the State does not dispute and that exclude Landrigan as the contributor of either blood or semen found on the victim's jeans, blanket, and curtain.

One of the State's theories has the advantage of being related to the evidence presented at Landrigan's trial. Paraphrasing the Arizona Supreme Court's opinion affirming Landrigan's conviction on direct appeal, the State asserts that the victim was left "face down on the bed in a pool of blood." (Response at 3) The DNA test results were based on an examination of the blanket found on the victim's bed. Presumably the victim's blood was on the blanket. Landrigan's was not. The State

asserts that "blood on one of Landrigan's shoes matched blood on the victim's shirt." (Response at 3) But the police never had a sample of the victim's blood and did not know the victim's blood type. The State asserts that the victim had "facial lacerations and puncture wounds on his body" (Response at 3) and that Landrigan "told his ex-girlfriend that he had killed a guy… with his hands." (Response at 4) There were two DNA profiles found on the victim's blanket—presumably one the victim's and one the perpetrator's. If Landrigan was the sole actor in a murder in which the victim ends up strangled to death and shows facial lacerations, then why is there none of Landrigan's DNA on the victim's blanket? The State's first theory offers no answer to this important question.

The other of the State's theories was never presented at trial (Response at 4) and thus never was subjected to adversarial testing. Under this theory, Landrigan had a partner in this crime, and it was the partner who engaged in a bloody struggle with the victim and then strangled him to death. (Response at 4) As this story begins, Landrigan was in the victim's apartment when the victim made an unwelcome sexual advance toward him, which Landrigan "cut off" and then let the partner "in through the front door." (Response at 5) 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." (Response at 5) While Landrigan had the victim "in a head

lock," the "partner hit him [the victim] until he was unconscious." (Response at 5) The partner then finished by strangling the victim with an electrical cord.

This alternative theory of the crime is *more* consistent with the DNA test results because it explains why there are two DNA profiles on the victim's blanket. But this alternative theory also does not explain why Landrigan's DNA was not found there. In this theory, Landrigan plays a significantly less culpable role in the crime—he simply let in the victim's true assailant, who was the one who engaged in the bloody struggle with the victim and then strangled the victim with an electrical cord.[1] In this theory, Landrigan may not even be eligible under *Tison*, for even those felony-murder defendants who were "present while the homicides took place" have been found not to be eligible for the death penalty. *See Tison v. Arizona*, 481 U.S. 137, 143 (1987) (quoting *State v. Tison*, 633 P.2d 335, 354 (Ariz. 1981)); *see also id*.

[1]The possibility that Landrigan may have played a role in the crime that is not sufficiently culpable to warrant the death penalty led the Arizona Board of Executive Clemency to recommend a reprieve in this case. (*See* Exhibit 1; *see also* Arizona Board of Executive Clemency Hearing, October 22, 2010 DVD No. 2 at 12:52:44-12:56:02.) That recommendation is not final until approved by the Governor of Arizona. *See* Ariz. Rev. Stat. § 31-402(A). As of the time of filing, Governor Brewer has not acted on the Board's recommendation. Furthermore, evidence of "relatively minor" participation in the crime might have established a statutory mitigating circumstance, *see* Ariz. Rev. Stat. § 13-703(G)(3) (1990), *now codified at* Ariz. Rev. Stat. § 13-751(G)(3) *as stated in State v. Chappell*, 236 P.3d 1176, 1191 (Ariz. 2010), without which the sentencing judge was constrained to impose a death sentence. (*See* Exhibit 2 ¶ 7; *see also* Arizona Board of Executive Clemency Hearing, October 22, 2010 DVD No. 1 at 10:54:30-11:08:12.)

at 158. But this theory was never presented at trial, or in any adversarial setting—a presentation that should take place before Landrigan is executed. Moreover, the State doesn't take this theory seriously—if it did, it would have tried by now to identify and prosecute this partner, because the State has known for over two years that there were two DNA profiles, neither of which was Landrigan's, on the victim's blanket, jeans, and curtains.

As the State sees it, Landrigan's death-eligibility claim does not present substantial grounds on which relief might be granted because Landrigan is guilty of felony murder, the only theory of guilt submitted to the jury. Respondents' *non sequitur* argument utterly ignores the DNA test results, which entirely exclude Landrigan as a source of the blood and semen. And it completely elides the distinction between Landrigan's guilt and the constitutional limitation on imposing the death sentence on insufficiently culpable felony-murder defendants. *See Enumnd v. Florida*, 458 U.S. 782 (1982); *Tison*, 481 U.S. 137. It bears repeating that those limitations *presuppose* a valid conviction for felony murder. In the end, by reemphasizing Landrigan's guilt as to the underlying crime, the State has simply failed to present any reason why Landrigan's death-eligibility claim *doesn't* present substantial grounds for relief.

2. Landrigan has made a prima facie showing that should allow him to proceed in district court.

This Court should authorize Landrigan to proceed in the district court if he makes a "sufficient showing of possible merit to warrant further exploration by the district court" and that it is "reasonably likely that the application satisfies" the standards of 28 U.S.C. § 2244(b)(2). *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)). The fact that the DNA test results undermine the State's alternative theories of the crime demonstrates this claim's substantial merit. Furthermore, Landrigan satisfies both the diligence and innocence prongs of 28 U.S.C. § 2244(b)(2)(B).

As for diligence, Landrigan has detailed his ten-year struggle to bring the DNA test results to a federal forum after exhausting his state-court remedies in his accompanying motion for authorization, and will not repeat those details here. Nor does the State make much of an effort to dispute those details now. Instead the State argues that "evidence of an accomplice does not constitute a factual predicate that could not have been discovered previously." (Response at 10) This argument is a *non sequitur*, because evidence of an accomplice does not by itself undermine the sentencing judge's finding that Landrigan was the sole and actual killer and thus eligible for the death penalty under *Enmund*. The focus must be on Landrigan's own

conduct. *See* 458 U.S. at 798. The State has simply failed to rebut Landrigan's assertions that he exercised reasonable diligence in bringing the DNA test results to this forum.[2]

As for innocence, both parties agree that this Court has held that the innocence showing can be directed solely at eligibility for the death penalty, at least in some circumstances. *See Thompson v. Calderon*, 151 F.3d 918, 923-24 (9th Cir. 1998). The State appears to argue that the innocence showing must instead be limited exclusively to challenges to guilt with respect to the underlying offense. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). The State thus asks this Court to foreclose authorization to proceed on a second or successive habeas petition that addresses solely the constitutional limitation on death-eligibility for felony-murder defendants articulated in *Enmund* and *Tison*. But the State has identified no principled basis for limiting the scope of this Court's authority.

Before Congress enacted § 2244(b)(2)(B)(ii), a federal court could entertain a

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[2]The State also argues that the state postconviction court's rejection of Landrigan's claim was not unreasonable. But that is a question for the district court to fully consider should this Court authorize Landrigan to proceed there. It is for this Court simply to determine whether there are substantial grounds for relief that warrant a stay, *see Barefoot*, 463 U.S. at 895, and whether Landrigan has made a *prima facie* showing of diligence and innocence such as to warrant "a fuller exploration by the district court." *Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (quoting *Woratzeck*, 118 F.3d at 650).

successive habeas petition in the face of a showing a "fundamental miscarriage of justice" that "probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). That showing extended to claims of "innocence of the death penalty," which required a showing "that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). For felony-murder defendants, the Eighth Amendment imposes an additional eligibility requirement as articulated in *Enmund* and *Tison*. Assuming that Congress meant to codify *Sawyer* in § 2244(b)(2)(B)(ii), *see Thompson*, 151 F.3d at 923, then that statute allows this Court to authorize Landrigan to proceed on his death-eligibility claim in district court. A contrary interpretation of that statute would foreclose federal habeas review of an entire category of constitutional claims and work an unconstitutional suspension of the writ. *See* U.S. Const. art. I, § 9, cl. 2; *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

3. The nature of this stay request should not counsel against granting it because Landrigan recently completed state-court review of his death-eligibility claim based on the new DNA test results.

Finally, the State urges this Court to deny Landrigan a stay because it views his request for a stay as a "last-minute or manipulative use[]" of the stay power. (Response at 10) But the State has not argued that Landrigan is to blame for the fact that it took over six years for him to obtain from the Phoenix Police Department

evidence that its own officers had collected from the scene of the crime. And Respondents' counsel contributed to that delay by informing the Maricopa County Superior Court that better, more probative evidence was available when in fact the police knew all along that better, more probative evidence had been lost. The last-minute nature of Landrigan's stay request is entirely attributable to the fact that the Arizona state courts have only recently foreclosed any possibility of relief based on the DNA test results, and Landrigan is now ready to challenge that denial in federal court as unreasonable. *See* 28 U.S.C. § 2254(b), (d).

For the foregoing reasons, Landrigan asks that the Court impose the stay required by *Barefoot*, 463 U.S. at 895, if it cannot rule on his request to proceed in district court before his scheduled execution on Tuesday.

Respectfully submitted: October 23, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Michelle L. Young
Legal Secretary
Capital Habeas Unit

EXHIBIT 1

EXHIBIT 1

Landrigan Clemency: Discussion of DNA & Reprieve

Speakers: John LaSota, Member, Arizona Board of Executive Clemency
Duane Belcher, Sr., Chairman, Arizona Board of Executive Clemency

[19:33/12:52:44]
LaSota: . . . If a motion is in order –

Belcher: Yeah, if there's no other comments –

LaSota: Then . . . I would move that we recommend that the Governor grant . . . Mr. Landrigan a reprieve until such time as the *Arizona* courts – state courts . . . can make a determination regarding the pending issues of DNA testing . . . regarding the crime scene of Mr. Landrigan's homicide. [. . .]

[20:08]
I don't think there's any question he did it. . . .If. . . there were another person there, which is not a totally implausible theory . . . and . . .that other person actually did the . . . killing, he [Landrigan] could've said to somebody, "I, y'know, I just killed a guy" as part of a cabal of a two-person operation" . . . and to me, he's not as culpable, and not as deserving as the death penalty, which I think is . . . your point <looks at Belcher> <Belcher nods and says, "Yeah"> , as if he actually the ki-- THE killer. Sure, we have . . . doctrines of . . . that bring him into it just as . . . equally from a . . . conviction of the crime standpoint, but to me he's – he wouldn't be as deserving of the death penalty as would be the actual killer. I think the DNA will help establish that he *was* the actual killer, but if it establishes that he *wasn't*, then we have a different kettle of fish.

Stinson: I will . . . second that motion because . . . I would like to see these court arguments . . . court cases resolved. <attempts to talk over each other> . . . including the DNA.

Belcher: A second by Ms. Stinson.

[21:19/12:54:31]
[. . .]

[22:32/12:55:44]
Belcher: The decision of the board regarding a reprieve by a vote of . . . 3-1, has been to recommend to the governor a reprieve, and that was specific to the resolution of the DNA testing in the *state* court <LaSota nods> . . .
[22:50/12:56:02]

Legend:
. . . : uhs, stutters, repeats, etc. deleted
[...]: text deleted

EXHIBIT 2

EXHIBIT 2

Declaration by Cheryl Hendrix

I, Cheryl Hendrix, declare under penalty of perjury the following to be true to the best of my information and belief.

1. I am over the age of nineteen, and I currently reside in Port St. Lucie, Florida. I am a retired member of the Arizona State Bar.

2. From 1982 to 2001, I was a Superior Court Judge in Maricopa County, Arizona.

3. During my tenure as a superior court judge, I presided over at least seven capital cases at the trial level, and imposed a sentence of death on a number of occasions.

4. In 1990, I presided over the capital case *State v. Landrigan*, CR 90-00066. At that time, judges, not juries, imposed sentences in capital cases by weighing aggravating circumstances against mitigating circumstances. Under the statute, a judge was required to impose a sentence of death if the state proved one or more aggravating circumstances, and if the mitigating circumstances were insufficient to call for leniency.

5. At Jeffrey Landrigan's sentencing hearing, he engaged in a number of inappropriate outbursts and interrupted his trial attorney, who was trying to present testimonial evidence from two witnesses – Mr. Landrigan's ex-wife and

birth mother. It was clear Mr. Landrigan did not want to have either his ex-wife or his birth mother testify.

6. In spite of Mr. Landrigan's refusal to allow his birth mother and ex-wife to testify, I asked his trial attorney to proffer any evidence he had in support of mitigation.

7. In Mr. Landrigan's case, the evidence proffered at the sentencing hearing by his trial attorney was not sufficient to show leniency. The law required that I impose the death penalty.

8. The paucity of the evidence proffered by trial counsel surprised me. I had given him all the time he requested to prepare for the sentencing hearing. I even remarked on the record in open court that I received very little information about Mr. Landrigan's difficult family history.

9. In addition, Mr. Landrigan's unexplained belligerence, contradictions of defense counsel's avowals in mitigation and prior criminal history led me to conclude he was an amoral person. His outbursts, combined with the summary presentation of potentially mitigating circumstances by his trial attorney, left me with no alternative; that I was required by law to impose the death penalty for what otherwise was a case in which I would have imposed a life sentence.

10. Recently, I reviewed documents submitted in support of Mr. Landrigan's

federal habeas corpus proceedings, including: a Declaration by Thomas C. Thompson, Ph.D.; a pre-trial report prepared by Mickey McMahon, Ph.D., as well as a Declaration he signed; family trees of Mr. Landrigan's birth and adoptive families; Declarations by Phil Hill, Josephine Snyder, Darrel Hill, Shannon Sumter, Robert Forrest, Arthur Athens, Donna Clark, Kevin Clark, Joe Harris, Jane Shannon, Sandra Martinez, Otis Schellstede, Robert Martinez, George LaBash, and David Stebbins; medical records pertaining to Mr. Landrigan from the Jane Phillip Medical Center; the trial investigator's time logs, an undated letter signed by Virginia Gipson; the Special Verdict in *State v. Eastlack*; and an article written in the ARIZONA REPUBLIC newspaper about Mr. Landrigan's case after he was sentenced to death.

11. I also reviewed parts of Mr. Landrigan's federal habeas corpus petition, parts of the briefs filed by Mr. Landrigan in the United States Court of Appeals for the Ninth Circuit and United States Supreme Court, and the opinions issued by those courts.

12. I viewed a copy of the February 10, 1999, 60 MINUTES II television broadcast about Mr. Landrigan and his birth father.

13. I was surprised to learn that Mr. Landrigan met with psychologist Mickey McMahon, Ph.D., before the sentencing hearing, and that Dr. McMahon

submitted a report to Mr. Landrigan's trial attorney that discussed Mr. Landrigan's mental health issues. I was dismayed to learn that Dr. McMahon recommended further psychological testing but that trial counsel never authorized Dr. McMahon or any other mental health expert to conduct the recommended psychological/psychiatric evaluation.

14. If the information outlined above that I have reviewed, especially the evidence of Mr. Landrigan's organic brain damage, the impact of fetal alcohol syndrome on his behavior, his genetic predispositions and the apparent abandonment by his birth mother, had been presented at the sentencing hearing, I would have concluded that the mitigating factors outweighed the aggravators presented by the state.

15. The Declaration by Dr. Thompson, which was not presented at sentencing, most impressed me. If I had heard testimony from Dr. Thompson, or a similar expert, at the time of sentencing, I would have had no choice but to find that the statutory mitigating circumstances had been established and were sufficient to call for leniency.

16. Information about Mr. Landrigan's biological family and his genetic background would be relevant and mitigating to the extent there is a genetic predisposition to non-conforming conduct, that is to commit criminal activities.

17. In sum, had trial counsel presented any of the mitigating information that I have reviewed – which was available at the time of sentencing – Mr. Landrigan would not have been sentenced to death.

18. Up until now, I always believed that if any constitutional errors occurred in Mr. Landrigan's case then a higher court would correct them. Since the courts have not corrected this injustice, I am compelled to submit this declaration on Mr. Landrigan's behalf.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 17th day of October, 2007, in Port St. Lucie, Florida.

Cheryl K Hendrix

Cheryl Hendrix