

To the Honorable MEL CARNAHAN,
Governor, State of Missouri

In the matter of
LLOYD EUGENE SCHLUP, JR.,
a condemned prisoner.

APPLICATION FOR EXECUTIVE CLEMENCY

Lloyd Schlup is not asking for mercy. He is not asking to be allowed to spend the rest of his days in prison without the possibility of parole. He is asking for that which should be his inalienable right as an American citizen: an opportunity to prove his innocence with competent evidence in a fair trial before an impartial judge and jury with the effective assistance of legal counsel. If the Governor grants any form of clemency, Mr. Schlup asks that it be granted on terms that would permit him an opportunity to prove his innocence, and eventually win his freedom. Anything less would not be true justice.

The ultimate tragedy that can occur in our system of justice is the execution of an innocent person. Although our system has certain safeguards to avoid this horrible possibility, some of them have failed Mr. Schlup, and some have been removed by the courts in response to public pressure, real and imagined, to get on with business of executing condemned prisoners. As a result, Mr. Schlup stands in danger of being executed in spite of the recent discovery of positive evidence that he is innocent, and additional evidence that undermines the integrity of the evidence on which Mr. Schlup's conviction was based.

Although the Attorney General has the power to waive procedural defenses and allow Mr. Schlup to have his evidence heard in a court of law, he has vigorously pursued a course of

action to eliminate for Mr. Schlup any possibility of a judicial remedy. The courts have closed their doors on Mr. Schlup's evidence solely because of technical procedural grounds that are not Mr. Schlup's fault, and which have nothing to do with the credibility of the witnesses and evidence. The Attorney General told the Court that "a claim of actual innocence is not reviewable ... if a state has a means of reviewing such claims....A claim of newly discovered evidence of actual innocence should be presented in a clemency proceeding." Respondent's Opposition to Petitioner's Motion for Stay of Execution, September 15, 1993, p. 4. The most recent decision from the court is in agreement with this position, holding that "the 'executive clemency' option available...precludes relief for Mr.Schlup." Schlup v. Delo, Slip No. 93-3272, p. 6 (8th Cir., October 15, 1993). The Attorney General has succeeded in shifting the burden of protecting the innocent away from the courts and onto the Governor. It is now the Governor's sole responsibility to decide whether Mr. Schlup lives or dies. If Mr. Schlup is allowed to live, the decision remains whether he will be incarcerated for the rest of his life.

As the Attorney General works to push Lloyd Schlup's fate out of the judicial process and into the political arena, he is simultaneously poisoning the public against Mr. Schlup in his statements to the media. The Attorney General is investing a great deal of his own political capital into the execution of Lloyd Schlup. The tenor of the debate over Lloyd Schlup's life

has become ugly, promising public ridicule and embarrassment to any who would come forward with knowledge supporting Mr. Schlup's innocence. Hyperbole and public, extrajudicial accusations purportedly based on confidential personnel files of witnesses have no place in the solemn decision to take a human life in the name of the State of Missouri. Although Mr. Schlup could respond in kind by pointing to circumstances which link high ranking officials in the administration of the Missouri State Penitentiary to white supremacist activities, and to Randy a/k/a Rocky Jordan, the true culprit in this case, he has chosen not to do so. Even though the State of Missouri plans to take his life, Mr. Schlup refuses to surrender one ounce of human dignity.

Randy Schaffer, a pro bono lawyer who finally succeeded in demonstrating the innocence of condemned prisoner Randall Dale Adams, observed:

I think a decision of the magnitude of sentencing another human being to death is one that is not arrived at lightly. But once you have arrived at it, I think it would take wild horses to convince you that you have convicted someone in error.

After vigorously pursuing the execution of Mr. Schlup since before his trial, no member of the prosecution is willing or able to concede the remotest possibility that Lloyd Schlup is innocent.

Although the prosecution is quick to attack the evidence that Mr. Schlup has brought forth, it cannot point to a single defect in Mr. Schlup's case that does not also apply to its own witnesses who accused Mr. Schlup in the first place. The murder

for which Mr. Schlup is to be executed happened in prison; the vast majority of the witnesses are convicted felons. So, too, is one of the state's two key witnesses, John Maylee. Some, though not all, of Mr. Schlup's witnesses have on earlier occasions made statements inconsistent with their present sworn statements. So, too, have the state's key witnesses, Roger Flowers and John Maylee. Former Department of Corrections Captain Robert Faherty, who has come forward to support Mr. Schlup's already very credible alibi defense, is the object of a merciless character assassination, even though allegations made against him apply equally to Roger Flowers, who left the department under similar circumstances.¹ Although the Attorney General apparently has unrestricted access to the private personnel files of Department of Corrections employees, he has chosen not to publish or otherwise disclose the criminal record of John Maylee, the demotion of Roger Flowers, or the meritorious service of Robert Faherty that enabled him to reach the rank of Captain.

Robert O'Neal, who is on death row after being convicted in this crime, found several prisoners to testify that he acted in self-defense. Rodnie Stewart, who is serving a sentence of life without parole after being convicted in this crime, found two

¹It is also being said that Robert Faherty is coming forward because he is a white supremacist, an allegation which he adamantly denies. Ironically, Mr. Faherty is the only current or former corrections officer counsel has spoken with who does not use the word "nigger" to refer to African-Americans. A member of the media covering this case has also expressed to counsel shock at the open use of racial epithets by corrections officers in Missouri prisons.

prisoners who testified in support of his claim that he was merely an innocent by-stander when Dade was stabbed. Other prisoners exist who support neither O'Neal's claim nor Stewart's claim. Some prisoners dispute the defenses presented by O'Neal and Stewart. However, all prisoners, whether or not they lied for O'Neal or Stewart, swear that Mr. Schlup was not there. Not a single prisoner, Black or White, has said that Mr. Schlup participated in the crime. It is remarkable that only Mr. Schlup has the unanimous support of prisoner testimony. It is also remarkable that while only white prisoners came to the defense of O'Neal and Stewart, many African-American prisoners have stepped forward to say that Lloyd Schlup is innocent, including one who did so in February, 1984.

The state fought Mr. Schlup's appeal based on this new evidence strictly on procedural grounds. It has only recently addressed the substance of the evidence of Mr. Schlup's innocence, and only in the press, not the courts. The prosecution makes the absurd claim that the evidence of innocence is the product of two separate, but parallel, conspiracies. First, it says that the white witnesses who have come forward are fellow white supremacists who are lying for their comrade. If this is so, they are hanging their other comrades, Robert O'Neal and Rodnie Stewart, out to dry. Second, the prosecution says that the African-American prisoners came forward to perjure themselves on the eve of Mr. Schlup's execution in order to get him off of death row and out into the general population so that

they can kill him. This claim would be laughable if it were not for the fact that a human life hangs in the balance. But it raises the point: how far will the prosecution go to carry out the execution of a man who may well be innocent? When did we cross the line between the zeal to do justice and the zeal to win at all costs? Mr. Schlup believes that line was crossed on February 3, 1984, the day he was arrested for a crime he did not commit.

From the very beginning, the investigation into the murder of Arthur Dade took only one side: that Lloyd Schlup was guilty.

Investigators never entertained the notion that Roger Flowers and John Maylee might be lying or mistaken. When Lloyd Schlup told interrogators on the day of the murder that he was innocent, that he was the first man in the dining room, that Lieutenant Robert Faherty was with him in the hallway outside the housing unit, his statement was met with disbelief, even in the face of his demand to take a polygraph test. When Lamont Griffin Bey on February 8, 1984, said that one of Dade's attackers was still out running around the housing unit, investigators did not even ask him for a name or a description. On June 27, 1984, when Rodnie Stewart was entertaining the possibility of testifying for the state in exchange for his own life, he told prison officials that Rocky Jordan helped Robert O'Neal kill Arthur Dade. Still, no attempt was made to determine what role Jordan played in the homicide. Although it is a fact that Jordan was an informant for

the prison administration,² Mr. Schlup has no means by which to determine when this relationship began.

The night Arthur Dade was stabbed, prison investigators found out that a video camera had taken pictures showing that Lloyd Schlup was the first prisoner in line for lunch. At that time, however, Roger Flowers had already written a report stating that Lloyd Schlup was involved in the crime, but that he fled in the opposite direction from the dining room. After the video tape surfaced during depositions in the summer of 1984, Flowers changed his story to say that he did not see where the man he said was Lloyd Schlup went. Robert Faherty had also documented his encounter with Mr. Schlup in the hallway, although he was never asked to estimate the amount of time he spent in Lloyd Schlup's presence. O'Neal and Stewart asserted their fifth amendment privilege. Rocky Jordan was never questioned. John Maylee has never given the same story twice; significant facts change every time he tells it.

Corrections Officer Danny Bower was the first officer after Roger Flowers to arrive at the scene. He had been on the second tier of the housing unit, directly above Roger Flowers. He was only seconds from the scene, and he hurried down to help. In a sworn deposition and three jury trials, he swore that he never saw Lloyd Schlup at the scene of the crime. In November, 1993,

²Before Lloyd Schlup's trial, Randy Jordan was a key witness for the prosecution of Joseph Amrine, who is on death row for a stabbing that occurred in the Missouri State Penitentiary on October 15, 1985.

he told an investigator that he saw Lloyd Schlup, covered in blood, wash his hands in the sink at the same time that Robert O'Neal was throwing the knife out the window, Dade was being loaded on a stretcher, and Rodnie Stewart was being taken down to the control center. He said that it is impossible for Mr. Schlup to have been the first inmate in the dining room because he was still in the housing unit.

When Danny Bower recently talked to the investigator, he was afraid that he would get in trouble for talking about the case without first giving his superiors an opportunity to show him his prior reports and tell him what to say. Mr. Schlup believes that this is exactly what went on before his trial. There were many meetings among the state's witnesses, both in and out of the presence of the prosecutor. John Maylee complained about the pressure to change testimony in order to fit the state's theory of the case. If Danny Bower had come forth with his true version of events, he would have destroyed the state's theory of Mr. Schlup's guilt. *The man he identified was covered with blood; lab tests show that Mr. Schlup was not. The man he saw could not have been first in line for lunch; the video tape shows that Mr. Schlup was. The man he saw fled the housing unit as Dade was being carried out on a stretcher; the video tape shows that Mr. Schlup had already been in the dining room for one minute and thirty five seconds at that very moment. If Danny Bower is telling the truth today, the conclusion to be drawn is unavoidable: the man he saw was not Lloyd Schlup, yet it was*

someone who, under the circumstances, was easily mistaken for Mr. Schlup.³

How it is that Danny Bower could, nine years after the fact, depart so dramatically from the sworn testimony that he gave in a deposition and three jury trials that he saw only one perpetrator? The most rational explanation is that while he remembers what he saw, he forgot what he was instructed to say. He himself said that under normal circumstances, he would not be allowed to talk without first conferring with his supervisor. Bower also said that there was another corrections officer who was in the housing unit who saw the whole thing. Bowers says that even though this officer claims he did not see anything, this is a lie. Bowers saw him looking down on the scene of the crime. It is impossible for Mr. Schlup to know what went on among the state's witnesses; if there was collusion to withhold evidence from him and the jury, it is unlikely that Mr. Schlup could ever prove it. However, the appearance is very strong.

Mr. Schlup's trial was far from an adversarial testing of the government's case. Mr. Eugene Bushmann agreed to take the case for the cash-starved public defender system on what amounts to a pro bono basis. While the case was prosecuted by a skilled specialist who did not want for resources, the same is not true

³Bower was one of the officers sent to the dining room to make an arrest. He wrote a report saying that Lloyd Schlup was sitting at the same table with Robert O'Neal. The video tape shows that Lloyd never sat at the same table with O'Neal; it was Rocky Jordan who sat with O'Neal. Bower changed his story after the video tape surfaced.

of the defense. Mr. Bushmann, primarily a civil practitioner, was paid less than most lawyers charge to handle a drunk driving case. He candidly admits that there are many things he would do differently if given the opportunity to try the case over. He decided as he drove home from the trial that he would never take another criminal case, a promise to himself that he has kept. He continues to adhere to his belief that Lloyd Schlup is innocent.

Mr. Bushmann believed that Lloyd Schlup would be acquitted based on the video tape showing that he was the first one to the dining room. He believed that he could show that John Maylee was lying about his ability to see the scene of the crime. A visit to the scene of the crime would show how reasonable this belief is.⁴ Neither he nor the jury knew of John Maylee's prior felony convictions.⁵ Mr. Bushmann also believed that he could reveal enough prior inconsistent statements by Roger Flowers to discredit him. In spite of this belief, he forgot the most important of Flowers' shifts in his story--that the perpetrators fled in the opposite direction from the dining room.

Before trial, neither the prosecution nor the defense had attempted to accurately reconstruct events to determine whether

⁴Maylee's vastly different descriptions of the crime also support this belief.

⁵Maylee did not testify at Lloyd Schlup's trial; a pretrial deposition was used in lieu of his live testimony. Mr. Bushmann told the court that Maylee's unavailability satisfied the legally required foundation for the deposition. In so stipulating, he overlooked the most important defect of all: that Mr. Schlup never had an opportunity to confront and cross-examine John Maylee.

the video tape excluded the possibility that Mr. Schlup was guilty. Four events on the video tape make this possible: Mr. Schlup's entry to the dining room, the response by corrections officers to a radio call one minute and five seconds later, Robert O'Neal's entry into the dining room twenty-six seconds after that, and Arthur Dade being carried from the housing unit a few seconds later. The prosecution witnesses testified to wildly speculative estimates of the time that elapsed during different events. To counter the video tape, the state attempted to stretch out the time before the assault call went out. The prosecution had Officer Flowers estimate that it took him about two minutes to take Stewart into custody. Unknown to the jury, Flowers said in Stewart's trial that he had no idea how long this took; it could have been "a second or a minute or two." The prosecution had Captain James Eberle testify that he encountered Flowers at the control center downstairs from the housing unit, and it took him at least a minute, even though he hurried, to get up the stairs. He said he was the first officer at the scene with a radio, and he called in the assault when he saw Dade had been stabbed. Again, this estimate is wildly inaccurate; George Brooks ran from the housing unit to the dining room in thirty five seconds, and this same stairway is less than one fifth the total distance. Nevertheless, the state "proved" that the radio call went out more than three minutes after the crime, in theory giving Lloyd Schlup time to commit the murder and run to the dining room.

Defense counsel was not prepared to challenge these grossly inaccurate estimates, even though he easily could have. Neither side had made an earnest attempt to accurately calculate whether Mr. Schlup could be guilty; the truth of this is established by the fact that it was only after each side had rested its case and the court recessed for the night that the prosecution sent a witness, George Brooks, to the prison to time the distance from the scene of the crime to the dining room. Brooks was the last witness. The theory of the case on which Lloyd Schlup is to die was not carefully studied and tested for truth, integrity and precision before his trial. It emerged as an afterthought during a heated adversarial contest.

The jury deliberated until after midnight, and returned the next morning and deliberated until 11:00 a.m. before finding Mr. Schlup guilty. It asked for testimony and reports of the officers who testified, but those items were never introduced into evidence, and the request was denied. Although it saw the video tape, and it heard the testimony of two prisoners who followed Lloyd Schlup to the dining room, there was much that it never heard, including:

1. Nearly twenty eyewitnesses to the crime who could have testified that Lloyd Schlup was not there;
2. Many inconsistent statements of Roger Flowers and John Maylee that calls into question the truth of their testimony;
3. The truth about what Danny Bower and another corrections officer really saw;

4. Direct evidence that Rocky Jordan, not Lloyd Schlup, is guilty of this crime;

5. Circumstances and testimony showing that Captain Eberle was at the scene within a minute of Dade's murder;

6. Lloyd Schlup's own statement of his innocence given on the day of the murder, and corroborated by other testimony and physical evidence;

7. John Maylee's prior convictions.

Mr. Schlup was so distraught at having been convicted of a crime he did not commit that he became hysterical. The court recessed for lunch, and it was over this lunch recess that trial counsel discussed with Mr. Schlup and his mother, Mrs. Nancy Slater, the penalty stage of the trial. Only Mr. Schlup and his mother testified in the trial for his life.

One could simply examine the state's evidence and conclude that the case is riddled with reasonable doubts about Lloyd Schlup's guilt. Examination of the entire case shows that Mr. Schlup's innocence can be clearly and affirmatively established.

As the above discussion reveals, a compelling case can be made even without referring to Robert Faherty or John Green, who have provided sworn statements which, if true, eliminate any possibility that Lloyd Schlup is guilty. The government's vehement and unfair attack on these two men is merely a diversion, intended to distract from the real issue--that the government is about to kill an innocent person.

How this miscarriage of justice came about, and how the

courts failed to correct it, is of secondary importance to the moral obligation to correct it. A case can be made that Mr. Schlup is being deliberately framed for a crime committed by Rocky Jordan. A case can be made that he is the victim of overzealous advocacy by prosecutors bent on winning at all costs.

A case can be made that the state and federal courts in Missouri have deliberately turned their backs on their obligation to enforce the constitution and protect the innocent. It is enough to prompt action, however, if all that happened is that well-meaning public servants who honestly believe that Mr. Schlup is guilty have advocated a position that is probably not true, relying on the integrity of an adversarial system that is hopelessly out of balance. The state in this case has always been represented by skilled specialists who are strong advocates with ample resources to pursue the state's interests. Mr. Schlup has never been represented by anyone who fits that description.

The Missouri Constitution gives the Governor the power to grant reprieves, commutations and pardons. The General Assembly, in furtherance of the Governor's constitutional powers, has given the Governor the discretion to appoint a Board of Inquiry to "gather information, whether or not admissible in a court of law, bearing on whether or not a person condemned to death should be executed, reprieved or pardoned, or whether the person's sentence should be commuted." § 552.070 RSMo. (1986). The statute imposes a duty on all persons to cooperate with the Board's

investigation, and imposes on the Board a duty to receive and hold information in strict confidence.

Lloyd Schlup's life is squarely in the hands of the Governor. The values that apply to this weighty decision are not open to question. When Governor Roemer in Louisiana commuted Ronald Monroe's death sentence, he said, "In an execution in this country, the test ought not to be reasonable doubt. The test ought to be is there any doubt." "Execution Halted by Roemer," New Orleans Times-Picayune, August 17, 1989 p. 1. (emphasis added). No one can argue with the moral underpinnings of that standard. There is no other that could satisfy the traditional values of American justice.

WHEREFORE, Lloyd Eugene Schlup respectfully asks the Governor to:

1. Stay his execution, now scheduled for 12:01 a.m. November 19, 1993;
2. Appoint a fair and impartial Board of Inquiry, and order it to investigate and hear evidence, and determine whether there exists a reasonable doubt as to Mr. Schlup's guilt, or such other issues of fact as the Governor, in his discretion, deems appropriate;
3. Grant Mr. Schlup a pardon after he has had an opportunity to demonstrate his innocence;
4. Grant such other relief within the power and discretion of the Office of Governor which justice requires.

Respectfully submitted,

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