

PUBLIC

AI Index: AMR 51/064/2009
12 May 2009

Further information on UA 107/09 (AMR 51/056/2009, 21 April 2009) and updated (AMR 51/060/2009, 30 April 2009) – Death penalty/Legal concern

USA (Oklahoma) Donald Lee Gilson (m), white, aged 48

On 11 May, Governor Brad Henry rejected a recommendation from the Oklahoma Pardon and Parole Board that he commute Donald Gilson's death sentence to life imprisonment without the possibility of parole. Donald Gilson is scheduled to be put to death in Oklahoma's execution chamber on 14 May.

Governor Henry said: "I take all clemency recommendations very seriously, and I gave this matter the thorough deliberation it deserved. At the end of my review, I decided that this case did not merit clemency and a commutation of the jury's sentence". Since taking office on 13 January 2003, Governor Henry has received six recommendations for clemency for death row inmates from the Pardon and Parole Board. He has rejected all but two of them. There have been 34 executions in Oklahoma during his term in office.

Donald Gilson was sentenced to death in 1998 for murder in connection to the death of his girlfriend's eight-year-old son in 1995. He was convicted under Oklahoma's unique first degree murder statute that allows the death penalty for permitting child abuse resulting in death without requiring any specific intent on the part of the "permitter."

On 9 February 1996, the skeletal remains of eight-year-old Shane Coffman were found in an abandoned inoperable freezer next to the mobile home formerly rented by his mother, Bertha Jean Coffman. It was determined that Shane Coffman had died on 17 August 1995, but it was not possible to establish the cause of death. There was evidence of fractures to various bones in his body.

Bertha Coffman and Donald Gilson were charged jointly with first degree murder by child abuse. In August 1997, however, Bertha Coffman entered a guilty plea, and thus avoided the death penalty. Her sentencing by the judge was deferred until after she had testified at Donald Gilson's trial. She was later sentenced to life imprisonment without the possibility of parole. Donald Gilson was tried in 1998.

Under Oklahoma law, a person can be found guilty of first degree murder when a child is found to have died from "willful or malicious injuring, torturing, maiming or using of unreasonable force" by the defendant or the defendant "willfully" causes, procures or permits any of these acts to be inflicted upon a child.

The jurors were instructed that they had to be unanimous if they were to return a verdict of first degree murder, but unanimity was not required as to the reason they arrived at this verdict. The jury form gave them the option of recording that they were unanimous that Gilson had directly abused the child causing death; that they were unanimous that he had "permitted" child abuse murder; or that they were "divided as to the underlying theory." The jurors ticked the third of these. One of the jurors has since said in an affidavit that most of the jurors considered that Donald Gilson had been the "permitter" rather than the "committer," and that they had considered that "permitting" merely meant a failure to intervene rather than any active participation.

According to Donald Gilson's current lawyer, a number of the jurors have expressed concern at the death sentence in the light of the fact that Bertha Coffman received a life prison term: five have said that they consider his death sentence unfair; three that they would be "relieved" if his death sentence was commuted.

When the Oklahoma Court of Criminal Appeals upheld Donald Gilson's conviction and death sentence in 2000, one of the judges dissented. Judge Charles Chapel wrote that he could not uphold the death sentence because "a defendant must have some personal culpability, beyond knowing about and failing to stop another from committing a crime, before the State may impose the ultimate punishment." Judge Chapel argued that the trial judge had erred in failing to instruct the jury that it could find Donald Gilson guilty of an offence less than first-degree murder.

A three-judge panel of the 10th Circuit upheld Donald Gilson's conviction and death sentence in April 2008. Chief Judge Robert Henry dissented, noting that "evidence was presented at trial that Mr Gilson played no part in abusing Shane the day he died and that he was asleep on the couch during the abuse that led to Shane's death." He also noted that Bertha Coffman had consistently claimed that Gilson had not abused Shane on the day of or the few days before his death. "A rational jury," wrote the Chief Judge, "could have believed this evidence and found Mr Gilson guilty of culpable negligence, but not of actively permitting child abuse, as the Oklahoma statute requires for a first-degree murder conviction." He argued that the jury should have been told that it could return a verdict of second-degree manslaughter.

Gilson's lawyers petitioned for a rehearing in front of the full 10th Circuit Court. This was denied by a vote of eight to four on the question of whether the punishment was proportionate, and by a vote of six to six on the jury instruction question. One more vote on the latter would have resulted in a rehearing and eventual possible overturning of his death sentence or first-degree murder conviction.

There have been 1,161 executions in the USA since judicial killing resumed there in 1977, 89 of them in Oklahoma. There have been 25 executions in the USA so far in 2009, one of them in Oklahoma. Oklahoma has the highest rate of executions per capita of its population of any state in the USA, and the second highest per capita rate of death sentencing.

FURTHER RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible in your own words:

- explaining that you are not seeking to excuse the manner of Shane Coffman's death;
- expressing deep concern at the Governor's decision to reject the Board's recommendation for clemency;
- noting that the extent of Donald Gilson's culpability in the death of Shane Coffman remains unclear;
- noting that a number of state and federal judges have dissented in this case, and that six judges on the 10th Circuit voted to rehear the question of whether the jury should have been instructed on a lesser offence;
- noting that the trial judge and a number of jurors have expressed their concern about the disparity in sentencing of the two defendants;
- urging Governor Henry to reconsider his decision and to prevent this execution.

APPEALS TO:

Governor Brad Henry
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Fax: +1 405 521 3353
Email, via: <http://www.gov.ok.gov/message.php>
Salutation: Dear Governor

PLEASE SEND APPEALS IMMEDIATELY.