

PUBLIC

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UA 135/08 Death penalty

USA (Oklahoma) Terry Lyn Short (m), white, aged 48

Terry Short is scheduled to be executed in Oklahoma on 17 June. He was sentenced to death in 1997 for the murder of Ken Yamamoto in January 1995.

Ken Yamamoto, a Japanese student, was living in an apartment in Oklahoma City that was located directly above the flat where Brenda Gardner, her sister Tammy Gardner and the latter's two young children lived. Terry Short was Brenda Gardner's boyfriend until they broke up in late December 1994. In the early hours of 8 January 2005, a fire broke out in the Gardners' apartment. Brenda and Tammy Gardner escaped with the children, but the fire spread to the flat above where Ken Yamamoto was sleeping. He was taken to hospital with burns to 95 per cent of his body. He died a few hours later.

Terry Short was charged with throwing a firebomb through the patio door of the Gardners' apartment, causing the fire that killed Ken Yamamoto. He was also charged with five counts of attempted murder – of the two Gardner sisters, the children and Robert Hines, who was visiting their flat at the time. At the trial, the state presented eyewitness testimony from Brenda Gardner and Robert Hines. Gardner testified that she had seen Terry Short outside the flat just before the fire, although she had not seen him throw the alleged firebomb. Hines said that he had seen Short outside the flat, but admitted that he had only assumed it was Short because the Gardners had said that he had been outside the apartment earlier.

The state presented an expert who said that a "Molotov cocktail" had been thrown into the flat. Another expert testified for the defence that in her opinion the fire scene was not consistent with a firebomb having started the fire. The state also presented the testimony of Jay Brown, a jailhouse informant, who said that Terry Short had admitted to him in jail that he had started the fire after finding Hines and Brenda Gardner having sex, and that Short had scrawled derogatory comments about Gardner on the wall of the jail cell. Brown's testimony was given in return for leniency on charges he was facing. The defence lawyers sought to present the testimony of another inmate, Mark Bayless, who had also shared the jail cell, and who they said would "refute every single word that Jay Brown testified to". However, the trial judge refused to allow Bayless to testify because the defence had revealed too late to the prosecution their intention to present him.

In its ruling on the case in 2006, the US Court of Appeals for the 10th Circuit said that Brown's testimony was "relevant to the prosecution because it served as the only testimony from an unrelated party directly connecting Mr Short to the crime." It found that the testimony of Mark Bayless, if true and credible, would have been similarly relevant and could have served to impeach Brown's credibility. It further stated that "the exclusion of relevant, probative, and otherwise admissible evidence is an extreme sanction that should be used only when justified by some overriding policy consideration". The 10th Circuit noted that there was no evidence that the defence had acted in bad faith in failing to disclose their intention to present Bayless. Indeed, the defence had suggested to the trial judge that the remedy for their tardy disclosure would be to grant the prosecution time to interview Bayless or to grant a recess in proceedings. In addition, the 10th Circuit said that Short's interest in having the Bayless testimony presented was significantly heightened by the fact that he was facing the death penalty. However, noting that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one" the 10th Circuit court concluded that although the exclusion of the Bayless testimony "deprived the jury of relevant evidence", federal judicial review was required to be "deferential" to state court decisions, and it upheld the conviction.

Brown's testimony was exploited at the sentencing by the prosecutor, who told the jury that "in jail [Short] bragged about how he'd thrown a fire bomb". In addition, highly emotional "victim impact" testimony was presented by Ken Yamamoto's mother at the sentencing. Indeed, the state Court of Criminal Appeals found in 1999 that this testimony had come "very close to weighting the scales too far on the side of the prosecution by so intensely focusing on the emotional impact of the victim's loss". One of the judges in that decision wrote a separate opinion referring to this "especially troubling" aspect of the case. However the court upheld the death sentence, as did the federal 10th Circuit despite acknowledging that the mother's testimony was "troubling", "contained irrelevant information" and that much of it was "highly emotional".

The Oklahoma Court of Criminal Appeals chastised the prosecutor for arguing that the jury should vote for execution rather than a prison sentence because it was "not justice to allow the defendant three meals a day, a clean place to sleep, and visits by his friends while the victim's mother daily grieves for her only son". The then Oklahoma County District Attorney, Robert Macy, who prosecuted Terry Short, was repeatedly condemned for such misconduct by the appeal courts (see *Old habits die hard: the death penalty in Oklahoma*, April 2001, <http://www.amnesty.org/en/library/info/AMR51/055/2001/en>).

Terry Short's jury was presented with testimony at the sentencing of his dysfunctional upbringing. According to this evidence, his mother was frequently in jail, would use intravenous drugs in front of the children and, working as a prostitute, would bring men home in front of them. The jury also heard evidence that the mother and Terry Short were physically abused by his father, and that Short may have been sexually abused by the father and stepfather. A psychiatric expert testified about the impact of Short's traumatic background on him, and that he could function well in a structured environment. In similar vein, two guards from the county jail testified that Terry Short was a cooperative and obedient inmate.

There have been 1,101 executions since judicial killing resumed in 1977, 86 of them in Oklahoma. In late 2007, the UN General Assembly passed a landmark resolution calling for a worldwide moratorium on executions. Amnesty International opposes the death penalty in all cases, unconditionally. There is no such thing as a humane, fair, reliable or useful death penalty system (see *The pointless and needless extinction of life: USA should now look beyond lethal injection issue to wider death penalty questions*, <http://www.amnesty.org/en/library/info/AMR51/031/2008/en>).

RECOMMENDED ACTION: Please send appeals to arrive as quickly as possible, in English or your own language, in your own words:

- expressing sympathy for any family of Ken Yamamoto, and explaining that you are not seeking to downplay the suffering that will have been caused by his death;
- opposing the execution of Terry Lyn Short, and the death penalty in general;
- expressing concern at the use of jailhouse informant testimony, inappropriate prosecutorial argument and potentially inflammatory victim impact testimony in this case;
- calling for clemency for Terry Short, and for his death sentence to be commuted.

APPEALS TO:

Pardon and Parole Board, First National Center, 120 N. Robinson Ave., Suite 900W, Oklahoma City, OK 73102, USA

Fax: +1 405 602-6437

Email: receptionist@ppb.state.ok.us.

Salutation: Dear Board Members

Governor Brad Henry, State Capitol Building, 2300 N. Lincoln Blvd., Room 212, Oklahoma City, OK 73105, USA

Fax: + 1 405 521 3353

Email, via: <http://www.gov.ok.gov/message.php>.

Salutation: Dear Governor

COPIES TO: diplomatic representatives of USA accredited to your country.

PLEASE SEND APPEALS IMMEDIATELY.