

PUBLIC

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Death penalty / Legal concern

21 April 2009

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

Donald Gilson is due to be executed in Oklahoma on 5 May. He 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'. The Oklahoma Pardon and Parole Board has voted to recommend clemency. Its recommendation is not binding on Governor Brad Henry.

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. At the time the body was discovered, Bertha Coffman was living with Donald Gilson in his mobile home with her four other young children. The children, two of whom were malnourished and emaciated, were taken into care and the two adults were arrested. It was determined that Shane Coffman 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 in so doing 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 dies from "willful or malicious injuring, torturing, maiming or using of unreasonable force" by the defendant or he or she "willfully cause[s], procure[s] or permit[s]" any of these acts to be inflicted upon a child. "Willfully" was defined for Gilson's jury to mean "a willingness to commit the act or omission referred to, but does not require any intent to violate the law, or to acquire any advantage". "Permitting" was defined to mean "to allow for the care of a child where one knows or reasonably should know" the child is being placed at risk of abuse.

The jurors were instructed that they had to be unanimous on a verdict of first degree murder, but that their unanimity was not required as to the theory under which they arrived at this verdict. The jury form gave them the option of recording that they were unanimous that Gilson directly abused the child causing death; that they were unanimous that he "permitted" child abuse murder; or that they were "divided as to the underlying theory". The jurors ticked the latter finding. 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 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.

In its ruling on Donald Gilson's case in April 2008, the US Court of Appeals for the 10th Circuit noted that "we have not found another first-degree murder statute similar to Oklahoma's". In an appeal to the US Supreme Court in November 2008, Gilson's lawyers asserted that he is "believed to be the only person in the United States on death row for an offense premised on 'permitting' another to commit murder. Research indicates that no one in the 232-year history of this nation has been executed on such an offense". In February 2009, the Supreme Court announced that it would not take the case.

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: "The crime of *permitting* requires only that the defendant allows another to commit child abuse murder. No action is required – all that is necessary is that the defendant knows that child abuse is occurring but does not stop someone else from committing the crime". He argued 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 possible relief.

On 14 April 2009, the Oklahoma Pardon and Parole Board voted three to two that Governor Henry should commute Donald Gilson's death sentence. Among the witnesses against execution was the trial judge who said that the evidence did not justify the death penalty. According to media reports, he said: "It wasn't fair for Mr Gilson to get a death penalty when she got life without parole. From the evidence I heard, I thought probably she was at least as much responsible, if not more, than he was." The Board also heard expert evidence of the organic brain damage Donald Gilson suffered as a result of a near fatal car accident in 1993, which resulted in a 30 to 40 per cent loss of the volume of his right frontal and temporal lobes. More importantly, Donald Gilson suffered 25 to 30 per cent loss of brain in the area of executive functioning. This is the area of the brain needed for decision-making. This evidence was not presented to his trial jury.

There have been 1,158 executions in the USA since judicial killing resumed there in 1977, 89 of them in Oklahoma. There have been 22 executions in the USA so far in 2009, one of them in Oklahoma.

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;
- 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;
- welcoming the recommendation for clemency by the Pardon and Parole Board;
- urging Governor Henry to commute Donald Gilson's death sentence.

APPEALS TO:

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

PLEASE SEND APPEALS IMMEDIATELY.