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UNITED STATES OF AMERICA

Nevada's planned killing of Thomas Nevius

Introduction

“The United States is seen as executing people who have not had appropriate legal assistance, people who may be innocent, people who are mentally retarded as well as minors. We are viewed as executing disproportionate numbers of minorities and poor people...The death penalty, guns, violence in society, these cast a large cloud on America's moral leadership.” Felix G. Rohatyn, US ambassador to France 1997-2000¹

Thomas Nevius has been on death row in Nevada for nearly two decades. His case involves questions of racial discrimination, inadequate legal representation, mental impairment and diminished culpability, as well as providing a stark illustration of the ever-present cruelty of the death penalty. It is a case that epitomizes why the USA's relentless use of judicial killing continues to cast a deepening shadow over the reputation of a country that prides itself on its purported respect for human rights.

In campaigning to save Thomas Nevius from execution, Amnesty International in no way seeks to condone the crime of which he has been convicted or belittle the suffering of the relatives and friends of David Kinnamon, whose violent death in 1982 resulted in Thomas Nevius's death sentence. Nevertheless, the organization believes that the state's response is one that is neither constructive nor humane, and which serves only to perpetuate the cycle of violence and suffering.

Background to the death penalty in the USA and Nevada

In 1972 the US Supreme Court overturned the country's capital laws because of the arbitrary way in which the death penalty was being applied, but did not find capital punishment unconstitutional *per se*. A number of states, Nevada among them, quickly moved to rewrite their statutes to take account of the Supreme Court's decision. In 1976, in *Gregg v Georgia*, the Court approved selected new laws, which shared certain characteristics, including criteria designed to channel or narrow sentencing discretion, and provisions for capital trials to be separated into two distinct phases, one to determine guilt, the second to decide punishment. Executions resumed the following year. Some 700 men and women have been put to death in the country's execution chambers since then, more than 500 of them in the past decade.

¹ *America's deadly image.* Washington Post, 20 February 2001.

Twenty-five years after its *Gregg* ruling, the US Supreme Court once again presides over a capital justice system marked by arbitrariness, unfairness, discrimination, and error.² As much as the heinousness of the crime, key determinants in who receives a death sentence include who the defence lawyer is, who the prosecutor is, and on the race or social status of the defendant or victim.

Nevada reintroduced the death penalty in 1973. Between then and the end of 1999, the more than 3,300 murders committed in Nevada resulted in 127 death sentences. By January 2001, eight prisoners had been put to death, seven of them after giving up their appeals. Ninety-one men and one woman remained on death row. Among them is Thomas Nevius. He has exhausted his appeals.

Thomas Nevius's life leading up to his arrest

“Thomas derives from a broken home, and an environment where drugs and crime are prevalent conditions. Delinquent peers have had a great influence in his life... He is oftentimes manipulated by other individuals and made to be the brunt of jokes. This is probably caused by his high dependency and low intellectual level.” State report on Thomas Nevius, aged 15³

The life history of Thomas Nevius suggests that society failed him long before it decided to kill him. He was born on 15 April 1956 in Plainfield, New Jersey, into a childhood of poverty and parental neglect. He was the second of eight children born to his mother by four different men.⁴ His father had four other children in addition to the three boys he shared with Thomas's mother. The family was very poor and existed on welfare payments. Thomas's mother, with whom he lived during his early childhood, was an alcoholic. The money she used to feed her alcohol habit meant that the children frequently went hungry.

When Thomas was about five years old, he suffered a very serious accident which nearly killed him. He was severely burned when a pot of hot beans fell on him from the stove. He was in hospital for four months, and still bears scars from the incident. The following year, he was again seriously injured and taken to hospital after his younger brother hit him on the head with a mop, knocking him unconscious.

² See, for example, *USA: Failing the future - Death penalty developments, March 1998 - March 2000*, AMR 51/03/00, April 2000.

³ 1972 Commonwealth of Pennsylvania (Bureau of Correction) report on 15-year-old Thomas Nevius.

⁴ The next child born after Thomas was Leon, who was hydrocephalic, blind and quadriplegic. He was placed in an institution where he died in 1976 at the age of 17. His IQ was measured at 12.

Thomas moved in for a while with his older sister, who “adopted” him. She recalls: “My mom granted me custody by writing it out on a piece of paper, and then we got it notarized. Then I would take the paper to places like school to show them I was the guardian. The document said something like, ‘I can’t afford to feed Thomas and I can’t afford to clothe him, so he is going to live with his sister, and I am giving custody of my son to my daughter.’”⁵

In 1968, when Thomas was 12 years old, his mother moved the family to Philadelphia. There they lived in the Raymond Rosen projects, a notorious high-rise housing estate in an inner city which at the time was a minority ghetto characterized by institutional racism, poverty and violence. A Philadelphia priest familiar with the Raymond Rosen projects at that time has described it as “truly a catastrophic place to live... the atmosphere was rife with drugs, crime and violence. I always suspected that the odds of any young person making it successfully out of that kind of environment were rather nil.”⁶

Another of Thomas Nevius’s sisters has recalled: “When I was a little over twelve years old, I was raped in the high rise of the Raymond Rosen projects. I was babysitting for one of my girlfriend’s younger kids. My girlfriend’s brother who was a drug addict burst into the apartment and raped me. He tried to push me out the window and I fought with him until a maintenance man heard the ruckus and saved me from being thrown out a window of the Raymond Rosen projects on one of the highest floors. When I told my mother what happened right afterwards she said that that was my problem and that I shouldn’t have been there.”⁷

Douglas Culbreth, a Philadelphia police officer for 30 years from 1966, had extensive contact with the Raymond Rosen projects: “This environment, while harmful to everyone, had a particularly devastating effect on young men. Gang activity flourished, and there was a great deal of pressure on these boys to join a gang. Not joining meant being subjected to isolation, harassment, and ultimately physical violence... This proliferation of gang activity added to what was already a great deal of violence - we routinely responded to rape, robbery and aggravated assault calls, and gunshots were commonplace... If you didn’t live there, you didn’t go there... No one should have had to grow up there”.⁸ The projects were demolished in 1995.

In addition to living in the squalid and dangerous conditions of the Raymond Rosen projects, Thomas Nevius struggled in school because of his learning disability and his frequent moves between different schools. He was transferred to special education for the learning disabled in Harding Junior High School in 1970 after the head teacher of his school wrote that

⁵ Declaration of Mary Shirley Pierce, 7 January 2001.

⁶ Letter from Reverend David I Hagan to Governor Guinn of Nevada. Undated.

⁷ Declaration of Carol Pierce, 11 January 2001.

⁸ Letter from Douglas Culbreth to Governor Guinn of Nevada. Undated.

“it would be in the interest of Thomas to place him immediately in a Retarded Educable Program at junior high level. The boy is past 13 years of age and if we wait too much longer we may not be able to serve his needs well”.⁹

Perhaps it was already too late. In the absence of a structured home life – by now he had taken to sleeping on the porches of friends for days at a time – Thomas Nevius became involved in the “Camac and Butler” street gang and his school truancy increased. His younger brother recalls:

When Tommy got caught up in the gang, my mom lost all grips on him and he lost all grips on his life. He was just out there running the streets. And he had that learning problem, so he couldn't get much out of school. That's why he dropped out of school pretty early and started running the streets. People used to make fun of him, and call him dummy and OB, and that didn't help much either. OB was what they called people who were in special education. Back then, the OB class was in the basement, and all the rest were on the other floors. So if they saw you walking to the basement, they knew you were in the OB class.¹⁰

Ron Reiss, a Special Education teacher at Harding Junior High School when Thomas Nevius was transferred there has retrieved Nevius's school records from this time:

On his report card sheet for school year 1970-1971, his scores are very low and an “E” designation which is the same as a failing grade. He got all E's because he didn't finish. However, his behavior scores were fine. In 1970, it appears that he came nine days and, in 1971, he came four days altogether. Most of his absences were truanes. The record of the home visits by truant officers gives some indication of what was going on...

In general, my experience as a special education teacher for 33 years has been that mentally retarded kids are followers and they often get stuck holding the bag. There can be a crowd of kids throwing rocks, all but the special education kid. Those kids will break a window and run, all but the special education kid. And that special education kid will say he didn't do it and he'll be right. But nobody will believe him.¹¹

In 1971, the 15-year-old Thomas Nevius was involved in the shooting death of a rival gang member, David Dyches, one of some 60 gang-related killings in Philadelphia that year. Thomas Nevius turned himself in when he heard the police were looking for him. He signed

⁹ Letter from Bernard Glantz to District Superintendent, Stearne School, Philadelphia, 5 November 1969.

¹⁰ Declaration of Duane “Ronnie” Pierce, 19 December 2000. “OB” stood for “orthogenically backward”, which was a term used in the USA before being replaced by “retarded educable” (RE). Children at the time commonly used the pejorative term “out-of-brains” against their “OB” peers.

¹¹ Declaration of Ron Reiss, 15 December 2000.

a confession after an interrogation which lasted over a 21-hour period.¹² Such a situation, for a teenager with mental retardation and reportedly without a lawyer present, is inherently coercive.¹³

Eleven years later, Thomas Nevius's conviction in the Dyches murder would be one of the reasons given by the Nevada prosecutor that the jury should vote for a death sentence.

There is evidence that Thomas Nevius confessed to a crime that he did not commit. His girlfriend from that time has said that "Blood", another gang member, told her that he had shot David Dyches.

Years later, Blood told me that he did the shooting of David Dyches that night in November 1971... Blood said Thomas froze at the corner, so Blood went into the door of the skating rink and yelled, "Camac and Butler," and the guys came at him and he shot the guy... I found out Blood did the shooting before Thomas came back from Las Vegas. When I told Thomas, I said, "Why didn't you ever tell me?" He said, "Because you don't tell on each other."¹⁴

One of Thomas Nevius's sisters has also sworn under oath that:

I overheard Pig, Rudy and Randy talking at our apartment and one of them said, "Tommy didn't do it, Blood did." I heard one boy say, "I know [Tommy] didn't do it." Tommy got blamed because of that clique thing - you better not tell - and Tommy was a coward. So he went along with Blood. He was always the one to get blamed. Always the one to catch everything. To me, Tommy was always the "finger man" that way. He was scared to stand up for his rightful position. If Tommy would have stood up and fought his trials he wouldn't be on death row.¹⁵

The lawyer who represented Thomas Nevius in the David Dyches case has stated:

I felt it very unlikely for Tommy to have done what he was charged with. Tommy was the type where everybody would run, and he'd just be left standing there. He was just a very nice kid, but very naive. He was barely literate, and in the 9th grade...In talking to Tommy, I remember having some doubts as to whether he was actually the one who shot David Dyches, or whether

¹² Chronology of interrogation and/or custody. City of Philadelphia Police Department.

¹³ Detained suspects with learning disabilities may be more willing to talk to police and be more susceptible to psychologically coercive questioning. They may not fully understand their rights and may base their answers on what they believe the authority figure wants to hear. In October 2000, the Governor of Virginia pardoned Earl Washington for a murder he was sentenced to death for 16 years earlier. Washington, who has mental retardation and confessed to the crime under police questioning, was cleared by DNA evidence.

¹⁴ Declaration of Lawanda Johnson, 18 December 2000.

¹⁵ Declaration of Carol Pierce, 11 January 2001.

a co-defendant, a fellow gang member known as "Blood," was the shooter. Blood was a nasty piece of work. In fact, from what I could tell, Tommy was the only decent one in the whole crew. Tommy was very nice and very cooperative and very willing to please.¹⁶

Despite his doubts, the lawyer has said that he persuaded Thomas Nevius to plead guilty to a charge of second-degree murder because of the public outcry about, and judicial hostility to, youth gang violence at the time. As was the case with the attorney who represented him at his capital trial in Nevada a decade later, the lawyer admits that he did not know that Thomas had mental retardation, partly "because it was so common for these guys not to be able to read or write". Nevius was sentenced to five to 15 years incarceration in the State Hill Correctional Institution at Camp Hill, Pennsylvania, later found by the state courts to be an inappropriate place for confining juveniles because they were not segregated from adults.¹⁷ In 1975, he was transferred to a transitional facility in anticipation of his parole on his scheduled minimum release date. On 19 November 1976 he was granted parole effective from 3 December 1976, subject to an approved plan for his release. However, the required paperwork was not forthcoming for some unexplained reason, and on 1 April 1977, frustrated by the months-long delay, Thomas Nevius left the halfway house of his own accord and went to live with his sister in New Jersey. Larry Pettiway, who grew up in Philadelphia with Thomas Nevius, has said:

When I first met Tommy, he was living a lot on the streets...Tommy was not like regular people. He was very slow-minded, and when I say slow, I mean that he was retarded... After Tommy was released from Camp Hill, he was sent to a halfway house in Philadelphia, and then was accused of escaping from there. But I don't believe that. To understand his walking away from the halfway house, you have got to remember that his mind was not right. When he thought his time was done, it was done. He didn't think he was escaping; he thought the people at the halfway house were just giving him the runaround, and so he left.¹⁸

Five years later, Thomas Nevius's "escape" from Camp Hill would be used by the Nevada prosecutor as another aggravating factor to justify Thomas Nevius's execution.

In 1977, Thomas Nevius went to Las Vegas to live with his natural father, Sonny Nevius, who found him work as a labourer in the city's Convention Center. In December 1978, Thomas Nevius had a son with Dorothea (Dottie) Benson, who had come out from Philadelphia to join him. In late 1979, she left Thomas and returned to Philadelphia with their son. Michael Nevius, one of Thomas's half-brothers says:

¹⁶ Declaration of Larrick Stapleton, 18 December 2000.

¹⁷ International standards prohibit the holding of children with adult offenders. The USA continues to violate this standard in thousands of cases.

¹⁸ Declaration of Larry Pettiway. 17 January 2001.

When that happened, Tommy was hysterical. He was crying so much. He would be crying at work and they would tell him to go home. The people Tommy worked with at the Las Vegas Convention Center really liked Tommy and they would hug him and try to console him. They genuinely seemed to care about him. After Dottie left, Tommy seemed to go downhill. He was really, really broken. Even with the trauma of his son and Dottie leaving, Tommy was not a guy to get mean. He was just very, very sad.¹⁹

A few months later, around midnight on 12 July 1980, Thomas Nevius, together with his 17-year-old half-brother David Nevius, and two friends Gregory Everett, 19, and Art Tiger, 18, broke into the apartment of David and Rochelle Kinnamon in Las Vegas in order to burgle it. The four had been drinking and using drugs. Only Rochelle Kinnamon was at home at the time. She was subjected to an attempted sexual assault during the burglary. When her husband returned home unexpectedly, the four intruders fled through the bedroom window. As they did so, one of them shot and killed 34-year-old David Kinnamon as he entered the room.

Thomas Nevius went to California after the crime and thence back to Philadelphia. There he lived with Theresa Austin, the mother of his former girlfriend, Lawanda Johnson. Although his and Lawanda's relationship had long since ended, he was still considered a member of the family. Then, on 21 August 1981, Theresa Austin's young daughter was raped and murdered. Theresa Austin recalls the tragedy:

In August 1981, my youngest daughter who was 11 years old, Benetta Pettway, was murdered and found many blocks from the house. Thomas was very upset about this when he learned what had happened... He was crying so hard because he loved Benetta like his little sister. Lawanda and he used to change her diapers when she was a baby and when Thomas stayed with us before. He was walking up and down the hallway crying. He kept saying, 'They can't do that to my little sister'. So he went out to try and find out what he could. He found the clothes she had been wearing and told the police where he found her clothes.²⁰

Thomas Nevius was questioned by police about the child's murder, and when they ran a check on him, they discovered that he was wanted in Nevada for the murder of David Kinnamon.²¹ He was extradited to Las Vegas in January 1982.

The trial: Inexperienced defence lawyer vs. emotional prosecutor

"We are conscious of the overwhelming importance of the role mitigation evidence plays in the just imposition of the death penalty. The presentation of mitigation evidence affords

¹⁹ Declaration of Michael Nevius, 17 January 2001.

²⁰ Declaration of Theresa Austin, January 2001.

²¹ *Slain Philadelphia girl's friend held in Vegas killing*. Philadelphia Inquirer, 26 August 1981. Robert Woodson was convicted of the murder of Benetta Pettway in 1983 and sentenced to imprisonment.

an opportunity to humanize and explain – to individualize – a defendant outside the constraints of the normal rules of evidence.” Federal Court, 2000.²²

All four co-defendants were charged with first-degree murder. The state initially filed its intent to seek the death penalty against Art Tiger and Gregory Everett, but they pleaded guilty and were sentenced to life imprisonment with and without the possibility of parole, respectively. David Nevius pleaded guilty to voluntary manslaughter and received probation in return for testifying against his brother. Their father, Sonny Nevius, was given immunity from prosecution for his part in concealing evidence. He led the authorities to where he had buried the gun used in the crime, which David had given him.

Thomas Nevius's trial took place in August and September 1982 in Las Vegas. The prosecutor was Deputy District Attorney Thomas Green from the Clark County District Attorney's Office. Thomas Nevius could not afford his own lawyer, so he was appointed counsel by the state. The lead attorney, John Graves, had never tried a capital case before.

The prosecution's case was that the four young men had entered the Kinnamon apartment with the intent to commit a burglary; that Thomas Nevius attempted to sexually assault Rochelle Kinnamon while the others looked for items to steal; and that Thomas Nevius shot David Kinnamon as the four intruders fled through the bedroom window.

Rochelle Kinnamon identified Thomas Nevius as the person who shot her husband. David Nevius testified that Thomas had the gun with him when he entered the apartment and that after the crime he admitted, while alone with David, that he had fired it.

The defence case was one of misidentification. That, although Thomas Nevius had entered the apartment with the others, he had neither attempted to sexually assault Rochelle Kinnamon nor fired any shots.

The jury found Thomas Nevius guilty of burglary, robbery, attempted assault and murder. At the separate sentencing phase, the state alleged four statutory aggravating factors to support execution: (1) that the murder was committed by a person previously convicted of another murder or violent felony – the David Dyches shooting in Philadelphia; (2) that the murder was committed by a person under sentence of imprisonment – because of his “escape” from the Philadelphia halfway house, Nevius was considered to still be under a prison sentence; (3) that the murder was committed by a person who knowingly created a great risk of death to more than one person – namely Rochelle Kinnamon, who had been in the room when the gun was fired; and (4) that the murder was committed during the course of a burglary, robbery and attempted sexual assault.

²² *Mayes v Gibson*, US Court of Appeals, 10th Circuit, 4 May 2000.

While the state drew together every conceivable aggravating circumstance, the defence lawyer failed to paint a full picture of Thomas Nevius to challenge the state's case for execution. He presented some family witnesses to testify that they loved Thomas Nevius, that he had a disadvantaged upbringing in a rough Philadelphia neighbourhood, that his mother was an alcoholic, that he had been burned as a child, and that the David Dyches killing had some characteristics of a self-defence shooting. However, the jury were left unaware of the reality of his upbringing, his mental impairment and its effects on his life, and evidence that he may not have committed the Dyches shooting at all.

The jury found all four aggravating factors, no mitigating circumstances, and sentenced Thomas Nevius to death.

Research into the decision-making of capital juries in the USA indicates that a defendant's perceived future dangerousness is highly aggravating, whereas evidence of mental retardation is highly mitigating.²³ If the jury had been presented with evidence that the defendant may not have committed the Dyches murder, and that he had mental retardation, would the outcome have been the same?

The defence lawyer has since stated: "I do not believe that Thomas Nevius received the level of effectiveness of counsel that was necessary in this capital case. The reason that I was not able to provide the necessary skill was due to my lack of experience in trying both capital cases and in handling the legal issues which must necessarily be raised and preserved for the purposes of review by both the federal and state courts".²⁴

For his part, the prosecutor was highly motivated to obtain a conviction and death sentence. He made improper comments in his closing arguments, for example, by urging the jury to vote for execution on behalf of "Rochelle Kinnamon, David and myself". His pursuit of execution seemed as much driven by emotion as professional practice, and ran the risk of inflaming the jury against the defendant. The prosecutor had been very emotional during his closing arguments. His voice choked, his eyes welled up with tears, and he reportedly broke down on two occasions. In an appeal hearing two years later in front of the Nevada Supreme Court, he was still emotional, telling the Justices that "I can't hardly talk about this case. I think it's very, very serious and the facts are just so egregious that the death penalty is really the only appropriate penalty." One of the Justices responded: "If you're that emotional about the case,

²³ *Aggravation and mitigation in capital cases: What do jurors think?* Stephen P Garvey. 98 Colum. L. Rev (1998).

²⁴ Affidavit, John J. Graves, 6 June 1989. A juror from the original trial has signed an affidavit that he supports clemency because he believes it unfair that the same lawyer who represented Thomas Nevius at trial, represented him through his state appeals and initial federal appeal. Declaration of Kip Patterson, 16 January 2001.

maybe you ought to, the next time one like this comes along tell your employer that you don't feel able to try it and that he ought to get someone else to try it. Maybe you ought to try a burglary case instead. I mean you can't come in here and start saying that this kind of conduct is to be excused because the facts of the case upset you."

The Nevada Supreme Court found that the prosecutor had engaged in improper argument, but gave the state the benefit of the doubt: "Were the evidence of guilt and of the appropriateness of the death penalty in this case of a lesser order of magnitude, we may have had to reverse this judgement and sentence on the ground of the serious and wholly unnecessary misconduct of the prosecutor".²⁵ If they had heard evidence of the defendant's mental retardation and the possible unreliability of the eyewitness testimony (see below), would the Nevada Supreme Court Justices still have reached this decision?

Deputy District Attorney Green has not just been accused of allowing his emotions to get the better of him in his prosecution of Thomas Nevius. A charge of racial discrimination has been levelled against him as well. Here, too, the appeal court judges – all of them white – have given the state the benefit of the doubt.

The allegations of racial discrimination

"The State wanted to have a lily-white jury, and by golly, that's what they got. They got an absolute white jury. We had a white victim in this case, we had a white prosecution, main witness, Ms Kinnamon, and of course we had a conviction and the imposition of the death penalty." Thomas Nevius's trial lawyer, at a post-conviction hearing before the Nevada Supreme Court, 1984.

Thomas Nevius, who turns 45 in April 2001, is African-American. David Kinnamon was white, as is Rochelle Kinnamon. At his trial, the judge, the defence lawyer and the prosecutor were all white. So, too, was the jury. An all-white jury was formed after the prosecutor removed all four blacks and both Hispanics during jury selection using *Aperemptory strikes*, the right to exclude jurors from the jury pool without giving a reason. The prosecutor used a total of seven peremptory strikes; six were used to strike non-white jurors.

At a 1984 post-conviction hearing before the Nevada Supreme Court, the prosecutor attempted to defend his actions. Nevertheless, he admitted that he had a tendency to exclude African-American from juries when there was a black defendant out of a fear that black jurors would sympathize with black defendants. Notably, his explanations included, "I think that it's impossible for me to separate the reasons that I excused them... from the fact that they were

²⁵ *Nevius v State*, 20 May 1985.

black". Below are some extracts from the transcript of the hearing. When a Justice is speaking, the record does not indicate which Justice it was:

Prosecutor: *...when I'm sitting there as a prosecutor and I have a black defendant and black jurors, the question enters my mind, "Is this juror going to show favoritism?" I am not prejudiced against blacks. I don't feel that I am. I'm from Wyoming. There were very few blacks in Wyoming. I came to Las Vegas and this issue, I was told when I came to be a prosecutor to be careful...*

A Justice: *So what you're saying, I'm sorry to interrupt you, but I hear you saying that it's okay for the prosecutor to systematically exclude blacks from the jury unless he's personally prejudiced against blacks. Now, you tell us that...*

Prosecutor: *Not so, your Honor. I'm not saying that whatsoever.*

A Justice: *Well, it sounds to me like you say that you come to your job with an, an assumption whenever there's a black defendant that the, that the black potential jurors are going to be biased... and unless you're satisfied to the contrary, you're ready to bump them. That sounds to me like what you're saying.*

Prosecutor: *Not a presumption, either, your Honor. A fear. There is a fear. I have a fear, for good reason... I've had personally two hung juries, 11 to 1 for guilty, with a black juror that I've left there with a black defendant. It's a real problem that you cannot ignore.*
.....

A Justice: *...it's been a number of years since I sat as a trial judge – but I found just the converse was true. I found it didn't make one iota of difference if a man was a black or a white. If he was an honest juror, he was an honest juror, and I found the black was just as quick to lay it on the black as the white where the facts supported it. And I was a prosecutor and I went with that same philosophy, and I've found that to be true, too.*

Prosecutor: *I haven't had that much experience, your Honor, as you have.*
.....

A Justice: *You have told us in effect that you come to the jury selection process armed with the assumption that blacks are likely to be prejudiced in favor of the defendant and against the prosecution. You have to watch. You have to watch carefully against that.*

Prosecutor: *Your Honor, I don't have that assumption. I don't have that assumption. I don't have that prejudice. I have that fear and a realization that that is a possibility.*
.....

A Justice: *Will you just tell us in your own words what effect the color of these jurors' skin had on your decision to make a peremptory challenge?*

Prosecutor: *Your Honor, I think that it's impossible for me to separate the reasons that I excused them... from the fact that they were black...*

...What I look for in a jury are people that come in and are probably homeowners, somebody that gives a darn about the community, somebody that gives a dang what the law is...

A Justice: *It's beginning to look to me as though you systematically excluded blacks...*

Prosecutor: *Not so, your Honor... if I had...a black that I felt was a good juror, I wouldn't excuse him for a minute...*

A Justice: *... I guess what you're saying is, if you found a black who was chairman of the Chamber of Commerce and middle class and had one of those "support your local police" bumper stickers on, you might leave him on, but generally speaking, you would want to exclude all blacks where you have a black defendant.*

Nevertheless, the Nevada Supreme Court gave the prosecutor, rather than Thomas Nevius, the benefit of the doubt and upheld the conviction and death sentence. So, too, did the federal Ninth Circuit US Court of Appeals: "We cannot read these statements of the prosecutor during argument to the Nevada Supreme Court as compelling the conclusion that the prosecutor's challenges violated [the Constitution]. It is true that the argument over the manner of exercising peremptory challenges is a disturbing one, particularly in a capital case, but the disturbing elements are inherent in peremptory challenges under the regime of *Swain*."²⁶

The Ninth Circuit Court was referring to *Swain v Alabama*, a 1965 US Supreme Court ruling. Under *Swain*, the Supreme Court had held that a black defendant could make a *prima facie* case of discriminatory jury selection on proof that the peremptory challenge system as a whole was being corrupted, in other words that the county engaged in the systematic exclusion of black jurors in case after case. In 1986 the US Supreme Court, in *Batson v Kentucky*, rejected this part of the *Swain* decision. Instead, the Court ruled, a defendant may make a *prima facie* showing of purposeful racial discrimination in jury selection "by relying solely on the facts concerning its selection in his case." However, *Batson v Kentucky* has been ruled by the courts not to apply retroactively to Thomas Nevius's case.²⁷

²⁶ *Nevius v Sumner*, US Court of Appeals, Ninth Circuit, 22 July 1988.

²⁷ Even if *Batson* had been the controlling case in Nevius, it may not have made any difference. Under *Batson*, the US Supreme Court ruled that jurors could only be removed for "race neutral" reasons. To win an appeal on this issue, the defendant must show that "purposeful discrimination" took place. Proving "purposeful discrimination" is nearly impossible, since prosecutors need only present a vaguely plausible non-racial reason for dismissing potential jurors. At the Nevius trial, the defence lawyer challenged the prosecutor's peremptory strikes and the prosecutor stated for the record his purported reasons for rejecting each of the black jurors. They have been accepted as "race-neutral" by the courts. #1 was an unemployed maid with a 10th grade education,

The courts had also been presented with evidence of alleged comments made by the prosecutor after the trial. The defence lawyer alleged that “following the trial of the Nevius case, in 1982 or 1983, I had occasion to speak with Tom Green, the prosecutor in the case, in the hallway of the courthouse. We discussed the issue regarding his peremptory challenges of all minority jurors and Mr Green stated to me, “You don’t think I wanted all those niggers on my jury, did you?”. The lawyer also alleged that later, when discussing the appeal claim that Green had intentionally struck all minority jurors based on race, the prosecutor responded, “I did a good job of that, didn’t I?”²⁸

“If proven”, the Ninth Circuit said, these allegations “might have presented in a different light the factual issues concerning the motivation of the prosecutor in exercising his peremptory challenges.” However, the federal court noted that the allegations were not part of the state court record and that it could therefore not rule on them.

In his affidavit, in which he noted his lack of experience in defending capital clients, the defence lawyer explained that he had not made a written record of the prosecutor’s alleged comments earlier because he assumed that an evidentiary hearing would be granted and that he would be able to raise the allegation in live testimony in such a hearing. He said that “I did not realize until receiving the opinion of the Ninth Circuit that my failure to present the allegations to the state court or to make a record in the [federal] district court would foreclose consideration of the facts on appeal.”

For his part, the prosecutor has stated: “I feel very angry due to the fact that such allegations are raised and only brought to my attention at this late date when it is very difficult to retrieve from my memory any accurate recollection of the exact words that were stated during the conversation in question. I remember the fact of the conversation very well, that is, the place and approximate time of the conversation... I cannot believe that I use the term “niggers” in any such response. It is not and has never been my practice to use such term [sic]

who was afraid to sit on the jury, and had indicated that she could not be impartial. #2 was a college student in criminal justice, who was hesitant about the death penalty. #3 was acquainted with Thomas Nevius’s father. #4 was rejected because, according to the prosecutor, the defence seemed to want him so much. At the 1984 hearing before the Nevada Supreme Court, the defence lawyer did not contest the removal of #3, but contested the other three. For example, he said that three whites who sat on the jury had as limited education as #1 and were also afraid to sit on the jury. He said that others were as hesitant on the death penalty as #2 but were not rejected by the prosecution. He said that the removal of #4 clearly showed that he was removed because he was black. The Ninth Circuit stated that this was the most troubling of the prosecutor’s reasons. The prosecutor did not give his reasons for removing the two Hispanics. In 1991, the US Supreme Court, in *Powers v Ohio*, extended the *Batson* decision to cover the exclusion of jurors on the basis of race, even if they were not the same race as the defendant.

²⁸ Affidavit, John J. Graves. 6 June 1989.

and if I did in fact use the term in my response, it was only to throw it back in his face because he had used the term with me.” As to the allegation that he had said, of his use of peremptory challenges against minority jurors, “I did a good job of that, didn’t I?”, the prosecutor stated in his affidavit: “To me, the statement I made was a sarcastic response carrying the meaning that in fact the effect of my exercise of peremptory challenges in this case did exclude most of the minority jurors from the final jury, not that I had excused such jurors based on race. My use of the word “good” was not intended to convey the meaning that I did a fine thing, but rather was used to convey the sarcastic message that the effect of my use of peremptory challenges was in fact an almost complete exclusion of minority jurors”.²⁹

No evidentiary hearing has ever been held into the defence lawyer’s allegations. The Nevada Supreme Court said that “if counsel’s allegations are true, they are very disturbing”, but dismissed the allegations as not credible because the lawyer had taken so long to raise them.³⁰ In so doing, they were suggesting that the defence lawyer, who is now an administrative law judge, committed perjury. It has also denied a hearing despite the fact that the prosecutor has never unequivocally denied making the statement, but rather suggested that if he did it was because Thomas Nevius’s own lawyer had used the word “nigger” first. Either way, the racially derogatory term was used.

In 1998, the Chief Justice of the Nevada Supreme Court broke ranks from the majority and dissented in the Nevius case:

To get to the heart of the matter: We have before the court a representation by a member of the bar, an officer of this court, that the prosecutor admitted to having deliberately excluded black people from the Nevius jury and to having “done a good job of it”. The majority continues to maintain, incorrectly, I think, that the defense attorney’s charges of impermissible racial discrimination are “incredible” and that they need not be considered by the court. It is now clear to me that the uncontradicted report of the prosecutor’s racist comments must not only be considered by the court, but must be taken as mandating the reversal of the death penalty judgement... What this case is really about is whether Nevius, a black man, must go to his death by verdict of a jury that was chosen in a manner that appears to have involved the deliberate exclusion of jury members of his race...

More and more frequently this court is being presented with claims of error arising out of racial abuses employed by prosecutors during the jury selection process. In these cases we find prosecutors presenting one kind of excuse or another for their actions, claiming that their practice of removing minorities from juries is based on “racially neutral” grounds. The prosecutor’s saying in this case that he got rid of “all those niggers” on the jury and saying that “he did a good job” of doing so can hardly be claimed to be racially neutral; and I think

²⁹ Affidavit, Thomas R. Green. 18 July 1989.

³⁰ *Nevius v Warden*, Nevada Supreme Court, 9 October 1996.

*that it is time at last that this court put a stop to what is seen by some as rampant racial bias in the criminal justice system in this state.*³¹

Evidence of racial discrimination outside of the Thomas Nevius case

*“The Special Rapporteur remains concerned at the discriminatory manner in which the death penalty is applied in the United States of America and hopes that the advent of a new millennium will also offer an opportunity for that great country to envisage penal sanctions more in line with international human rights standards and with the prevailing tendency, which is towards the abolition of capital punishment.”*³²

There have been other indications that racism existed in the Clark County District Attorney's office in the 1980s. For example, during the sentencing phase of the trial of Henry Dawson, an African American man accused of the rape and murder of a white woman in 1985, the Clark County prosecutor told the jury that Dawson had “a preference for white women” and also, that he had had a “physical relationship” with a white woman. In 1987, the Nevada Supreme Court said that it had “great difficulty in discerning any legitimate purpose for discussing such matters in a proceeding designed to determine only the extent of the punishment to be imposed on Dawson. One must ask the ugly question: Does a black man's supposed sexual preference have anything at all to do with whether he deserves to die for his deeds?” It said that it was “totally unnecessary” for the prosecutor to have introduced “this kind of hatred-engendering forensics”. The Court overturned Henry Dawson's death sentence.³³

In its ruling in the Dawson case, the Nevada Supreme Court said: “Because of the range of discretion entrusted to a jury in a capital sentencing hearing there is a unique opportunity for racial prejudice to operate but to remain undetected.” Nevertheless, the Court has failed to take consistently decisive action in cases in which racism may have infected a capital trial.

For example, during the Clark County trial of Sean Deandre White, one or more white jurors referred to the black defendant as “a gorilla, a baboon, a native tribesman who is not dangerous to his own people but would club or murder anyone outside his territory...” . The

³¹ *Nevius v Warden*, Nevada Supreme Court, 24 June 1998, Chief Justice Springer, dissenting. The dissent followed an appeal to have Justice Young disqualified from ruling on the case in 1996 because of his recent close political alliance with the Nevada Attorney General. The latter, whose office is responsible for pursuing the execution of Thomas Nevius, endorsed Justice Young during his 1996 campaigning for election to the Court. Justice Young's campaign literature included statements such as: “Justice Young: Supports the death penalty and voted to uphold it 76 times”... “Cracked down on abuses in death penalty and criminal appeals”.

³² United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. E/CN.4/2000/16. 10 February 2000.

³³ *Dawson v State*, Nevada Supreme Court, 1987.

Nevada Supreme Court upheld the conviction and death sentence in 1996. One of the Justices dissented: "The use of blatantly racist speech by non-black jurors about a black defendant reflects those jurors' racist predispositions and denied White his [constitutional] right to an impartial jury. Several of the jurors' expressions epitomize racist stereotypes of African Americans and evidence deep racial prejudice."³⁴

Several people have provided anecdotal evidence of the systematic exclusion of minority jurors in Clark County in the 1980s. A former prosecutor in the Clark County District Attorney's office and a subsequent member of the Board of Regents of the University of Nevada has said that until 1986, when the US Supreme Court handed down the *Batson v Kentucky* decision, "it was the practice of the prosecutors in Clark County to attempt to remove all African American jurors in cases in which the defendant was African American."³⁵ Other lawyers have signed affidavits making the same claim. For example: "Between 1976 and 1986, I tried over 70 cases in the Eighth Judicial District Court [where Thomas Nevius was tried]. During this time, I do not recall any case I tried in which there was more than one African-American juror, and I am not sure that there was any case I tried during that period of time in which there was even a single African-American person on a jury. It was my observation during this period that the prosecutors in the office of the Clark County District Attorney routinely removed all African-Americans from jury panels, particularly in cases in which an African-American person was the defendant."³⁶

The history of the death penalty in the USA is one of racist use, and to this day race remains an element in the application of this punishment. In 1994, a US Supreme Court Justice said: "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die".³⁷ This was echoed four years later in the 1998 report on the death penalty in the USA by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions: "Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death."³⁸ Research over the

³⁴ *White v State*, Nevada Supreme Court, 1996, Justice Rose dissenting. The racist remark emerged during the sentencing phase. The jury was then dismissed and a three-judge panel was formed to impose punishment on White. In another case involving troubling language, the Nevada Supreme Court upheld the death sentence of Edward Lee Jones, who is black. At his Clark County trial, the white prosecutor had, in front of an all-white jury, a white judge, two white defence lawyers, and another white prosecutor, referred to Jones as a "rabid animal" who had a "special death penalty quality". Although the state appeal court said that such language was "clearly inflammatory", it ruled that it was harmless error. Again, one of the Justices dissented. *Jones v State*, Nevada Supreme Court, 1997, Justice Springer dissenting.

³⁵ Declaration of James L. Buchanan II, 19 August 1996.

³⁶ Declaration of Terrence M. Jackson, 8 August 1996.

³⁷ *Callins v Collins*, 1994, Justice Blackmun, dissenting.

³⁸ E/CN.4/1998/68/Add.3, para 148.

past two decades has consistently shown a pattern of sentencing anomalies which cannot be explained without reference to racial factors, particularly in relation to the race of the murder victim. In 1990, the General Accounting Office (an independent agency of the US government) issued a report on death penalty sentencing patterns. After reviewing and evaluating 28 major studies, the report concluded that 82 per cent of the surveys found a correlation between the race of the victim and the likelihood of a death sentence. The finding was "remarkably consistent across data sets, states, data collection methods and analytic techniques. . . [T]he race of victim effect was found at all stages of the criminal justice system process . . .".³⁹

Some 700 people have been executed in the USA since executions resumed in 1977. In over 80 per cent of the cases, the victims of the crimes were white. Too few executions have been carried out in Nevada since 1977 to be able to draw conclusions, but so far 100 per cent of those executed were put to death for crimes involving white victims (eight out of eight).⁴⁰

As elsewhere in the country, blacks are disproportionately represented on death row in Nevada. The population of Nevada is about 85 per cent white, and seven per cent African American. In January 2001, there were 92 prisoners on the state's death row. Thirty-six (40 per cent) were black, and 45 (49 per cent) were white.

What the jury never knew: The evidence of Thomas Nevius's mental impairment

*"If I had been aware that Mr Nevius was retarded and brain damaged, I would not have voted to sentence him to death."*⁴¹

It was not until 1996, 14 years after his arrest, that any lawyer representing Thomas Nevius investigated his mental impairment. The appeal courts consider this evidence to have been raised too late in the process. They have therefore refused to grant an evidentiary hearing at which this mitigating evidence and the possible effect of its absence from the original trial could finally be presented in open court.

³⁹ *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, United States General Accounting Office, Report to Senate and House Committees of the Judiciary, 26 February 1990. See also: *Memorandum to President Clinton: An appeal for human rights leadership as first federal execution looms*, AMR 51/158/00, November 2000.

⁴⁰ Six of the eight people executed were white, one was Latino, and one Asian. Seven of the eight were "consensual" executions, that is, the prisoner had dropped their appeals. The last African American executed in Nevada is believed to have been James Williams put to death in the gas chamber in August 1950.

⁴¹ Declaration of Jacqueline M. Stepaniak, 13 January 2001, one of six jurors from Thomas Nevius's trial to state that they would not have voted for the death penalty if they had known of his mental impairment.

Even without obtaining an expert examination of Thomas Nevius, there was substantial evidence of his mental retardation available from his school and other records. The Special Education classes to which he had been assigned as a 13-year-old were for children whose IQs fell between 50 and 75.⁴² Around that time, in September 1969, Thomas Nevius's IQ had been assessed at 68. A 1972 Pennsylvania Department of Corrections report records the 15-year-old Nevius's IQ at 64.

Dr Denis Keyes, a renowned expert in the area of mental retardation, assessed Thomas Nevius in October 2000, and concluded that the 44-year-old had an IQ of 68. His report states:

Thomas's adaptive behavior skills are very significantly underdeveloped, and strongly support the findings of his inability to adapt to normally accepted, adult social standards in most adaptive areas. These measures describe the examinee's overall functioning in communication, socialization, and daily living skills. Results of this scale indicate that Thomas's adaptive skills are within the moderate to severe range of retardation in all skill areas... His actual adaptive functioning is estimated to be developed at the level of a child approximately seven years of age...

The results of this testing strongly suggest that he does not adequately possess the fundamental skills required for basic planning and sequencing. Such skills are prerequisite in the determination of "intent" to commit a crime. Thomas is unable to see the logical connection between planning an event, carrying it through, and the inevitable consequences associated with it. The possibility that Thomas could have planned, organized, conspired, and carried out a crime like the one he was convicted of is virtually nonexistent...

Research on people with mental retardation within the criminal justice system is clear. Such individuals are often victimized in ways that have landed them in prison, and their willing acquiescence often results in them taking the blame for crimes in which they may not have participated, or had only a marginal role. The courts do not recognize the significant level of disability in many defendants with mental retardation. Appearances can be deceiving; Thomas Nevius may not look retarded, but he is.⁴³

A second expert, neuropsychologist Dr David Schmidt, who examined Thomas Nevius in September 2000, concluded that the prisoner is brain damaged, has an IQ of 68 and mental retardation.⁴⁴ Drs Keyes and Schmidt both found that Thomas Nevius is a follower, who is easily influenced by others. For example, Denis Keyes writes: "Thomas has a history of

⁴² A person of average intellectual functioning would have an IQ of 100. An IQ below 70 (or below 75 given the margin for error) is considered to be an indicator of retardation if existing concurrently with limitations in adaptive skills.

⁴³ Report on Thomas Nevius by Denis William Keyes, 11 December 2000.

⁴⁴ Dr Schmidt has also scrutinized an IQ test administered to Thomas Nevius in 1996, which placed his IQ at 78. He concluded that it had been scored incorrectly and had led to an elevated score.

allowing himself to be influenced and guided by people he trusts...[This] may have led him into a twisted sense of loyalty to those who have clearly acted against his best interests in the past. In his report, David Schmidt found that “Mr Nevius also has a strong need to please people and is easily led and is highly suggestible.”

As of February 2001, 13 of the 38 US states which retain the death penalty, as well as the federal government, prohibited the use of the death penalty against defendants with mental retardation.⁴⁵ The American Association on Mental Retardation, now in its 125th year, holds that the death penalty is disproportionate to the level of culpability possible for people with mental retardation. This expert organization is not saying that such individuals should not be held responsible for criminal acts – just not killed for them. The American Bar Association opposes the execution of such individuals. It took up this policy in 1989 after much research and deliberation. In the same year, the United Nations adopted a resolution opposing the death penalty “for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”. Over a decade later, the majority of countries that still retain the death penalty are believed to respect this international human rights standard.

Dr Keyes’s report states: “Thomas’s overall functioning placed him at approximately the lowest percentile of the US population, and below the intellectual cut-off of mental retardation. In short, ninety-nine per cent of the US population would be expected to score higher on tests of intelligence than Thomas Nevius”. Yet the State of Nevada is planning a punishment for Thomas Nevius that assumes the absolute, 100 per cent culpability of the defendant, and is reserved for fewer than one per cent of murderers, supposedly those most culpable for the most heinous of the country’s thousands of murders committed each year.

In January and February 2001, six jurors from the original trial, including the jury foreman, signed affidavits that they would not have voted for a death sentence if they had known of Thomas Nevius’s mental impairment.

A question of culpability: Was Thomas Nevius the gunman?

“Given the materials I have reviewed, it is unlikely that the gunman’s true identity will ever be known.” Eyewitness identification expert on the Thomas Nevius case, January 2001.

An alternate juror, who sat through the entire trial but was excused prior to deliberations, has signed an affidavit that he would not have voted for a death sentence in any event, because he was unconvinced that Thomas Nevius had fired the shots that killed David Kinnamon.

⁴⁵ Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, Washington.

Six days after the crime, Rochelle Kinnamon was unable to positively identify Thomas Nevius from a photo line-up. At a grand jury hearing, she testified that she had not yet made a positive identification. At a physical line-up almost two years after the crime, she identified Thomas Nevius as the gunman. At the trial, she testified that his "face has been in front of me for two years in my sleep whenever I close my eyes. There is no way I could mistake him for anyone else".

Thomas Nevius's trial lawyer has said that "prior to trial, I do not believe that I was aware that Rochelle Kinnamon had been unable to identify Thomas Nevius in a pre-trial photographic array. No investigation was made in that regard, or to determine whether any remarks were made to Rochelle Kinnamon at the time that she viewed the photograph of Thomas Nevius... I did not move to suppress the in-court testimony of Rochelle Kinnamon based upon the suggestiveness of the pre-trial identification procedure and relied solely upon the cross-examination of Rochelle Kinnamon to challenge her identification of Thomas Nevius."⁴⁶

Dr Robert Shomer, an expert on eyewitness identification and on the psychological factors that affect the accuracy of eyewitness identifications, has studied the case and raised serious questions about Rochelle Kinnamon's identification of Thomas Nevius as the gunman. His conclusions include:

The situation in which Rochelle Kinnamon made her observations was almost a paradigm of those in which very significant errors commonly are made. It was traumatic and life threatening. It involved multiple individuals of another race, her head was forced down, she lost her glasses, and she attempted to shield herself by placing her arms over her head and closing her eyes. Her identification was made a very long time after the crime in a potentially "photo biased" physical line-up, and her commitment to the identification may be associated with many discrepancies between her original reports and grand jury testimony before she had made an identification, and her later trial testimony after she had committed to an identification of Thomas Nevius.

She did, however, make some very specific observations which remained very consistent and should be given great weight. She consistently reported and testified that the gunman had on very unusually-colored green pants, shiny shoes, and a nice looking Banlon shirt.

If the green pants which she described and then identified, could not fit Thomas Nevius, then this is a major discrepancy pointing to the gunman being one of the other three men, and not Thomas Nevius. Other evidence is consistent with another individual pulling the trigger. Thomas Nevius was reportedly wearing blue garage-style pants, according to Sonny Nevius and David Nevius.⁴⁷ He was also the first one to arrive home first after the crime, which

⁴⁶ Affidavit, John J. Graves, 6 June 1989.

⁴⁷ The green trousers, taken from the Nevius home, and identified by Rochelle Kinnamon identified as those worn by her attacker, were never identified as belonging to Thomas Nevius. According to Thomas

conflicts with the statements of Rochelle Kinnamon and others that the gunman was the last one to flee the apartment. Additionally, one of the other perpetrators, Gregory Everett, made a statement that Thomas Nevius was out of the window and was running out ahead of him when Everett heard the shots being fired.

Dr Robert Shomer's report makes the following observations about the fact that Rochelle Kinnamon became more confident of her identification of Thomas Nevius as time passed:

The relationship between the confidence of a witness in an eyewitness identification of a stranger and the actual accuracy of the identification is very weak. The fact that two years after the crime Rochelle Kinnamon said that she has "no doubt" of her identification of Thomas Nevius is not at all indicative of accuracy. The fact that two years had passed should have actually made her a lot less certain than she may have been at a time closer to the crime. This "progression to certainty" is a common feature of identifications which have been proved by DNA exonerations to be completely inaccurate.

One such case involved Jennifer Thompson. On 18 June 2000 an opinion piece written by her appeared in the *New York Times*, extracts of which are reproduced below to illustrate the dangers of a prosecution's over-reliance on eyewitness testimony:⁴⁸

In 1984 I was a 22-year-old college student with a grade point average of 4.0, and I really wanted to do something with my life. One night someone broke into my apartment, put a knife to my throat and raped me. During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.

When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines

Nevius's appeal lawyers, examination of the trousers reveals that were too small to have fitted him. A note in the trial lawyer's file identifies "green slacks" as "Michael's green slacks" [Michael Nevius is another half-brother of Thomas Nevius]. Michael Nevius has stated under oath that he asked his brother David if Thomas had told him that he fired the gun in the apartment (as David testified at trial). "From the way David reacted to my inquiry, I am convinced that Thomas just never admitted to David that he did the shooting." Michael has also said "Following David's sentencing, David told me that he had been terrified of being sentenced to prison and did whatever he had to do to avoid a prison sentence. He claimed that the lawyers told him what to say about Thomas and that he had agreed to cooperate with the prosecutors to avoid a trial". Declaration of Michael Phillip Nevius, 17 May 1999.

⁴⁸ "I was certain, but I was wrong". By Jennifer Thompson. *New York Times*, 18 June 2000. Jennifer Thompson was writing at that time to oppose the execution of Gary Graham, who was put to death in Texas on 22 June 2000, despite serious concerns about his guilt. He had been convicted on the basis of the disputed testimony of a single eyewitness.

and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.

I picked the same man in a lineup. Again, I was sure. I knew it. I had picked the right guy, and he was going to go to jail. If there was the possibility of a death sentence, I wanted him to die. I wanted to flip the switch. When the case went to trial in 1986, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Junior Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.

In 1987, the case was retried because an appellate court had overturned Ronald Cotton's conviction. During a pretrial hearing, I learned that another man had supposedly claimed to be my attacker and was bragging about it in the same prison wing where Ronald Cotton was being held. This man, Bobby Poole, was brought into court, and I was asked, "Ms. Thompson, have you ever seen this man?" I answered: "I have never seen him in my life. I have no idea who he is."

Ronald Cotton was sentenced again to two life sentences. Ronald Cotton was never going to see light; he was never going to get out; he was never going to hurt another woman; he was never going to rape another woman.

In 1995, 11 years after I had first identified Ronald Cotton, I was asked to provide a blood sample so that DNA tests could be run on evidence from the rape. I agreed because I knew that Ronald Cotton had raped me and DNA was only going to confirm that. The test would allow me to move on once and for all.

I will never forget the day I learned about the DNA results. I was standing in my kitchen when the detective and the district attorney visited. They were good and decent people who were trying to do their jobs -- as I had done mine, as anyone would try to do the right thing. They told me: "Ronald Cotton didn't rape you. It was Bobby Poole."

The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent. Ronald Cotton was released from prison after serving 11 years. Bobby Poole pleaded guilty to raping me...

Mr. Cotton and I have now crossed the boundaries of both the terrible way we came together and our racial difference (he is black and I am white) and have become friends. Although he is now moving on with his own life, I live with constant anguish that my profound mistake cost him so dearly. I cannot begin to imagine what would have happened had my mistaken identification occurred in a capital case... If anything good can come out of what Ronald Cotton suffered because of my limitations as a human being, let it be an awareness of the fact that eyewitnesses can and do make mistakes...

It is undisputed that Thomas Nevius was in the Kinnamon apartment with the intent to commit burglary and that a murder resulted during the crime. Under Nevada's "felony murder" rule, his involvement in the crime, even if he was not the gunman, is enough for a first-degree murder conviction. This is therefore not a case raising questions of actual innocence. The question is, then, if the jury had been presented with evidence, such as that provided by Dr Robert Shomer, would they still have imposed a death sentence, given that none of the other defendants received one?

Research indicates that residual doubt over the defendant's guilt is the most powerful "mitigating" fact when a US capital jury deliberates between a life and a death sentence. The same research indicates that evidence of a defendant's mental retardation is almost as powerful in terms of mitigation in jurors' minds.⁴⁹ The jury which sentenced Thomas Nevius to death were left ill-informed about both these potentially mitigating factors.

Compounding the cruelty

"Although we do not minimize the anxiety caused by the setting and staying of three execution dates over a period of eighteen years, Nevius has not demonstrated that the decision of the Nevada Supreme Court refusing to overturn his death sentence on that ground was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". US Court of Appeals, Ninth Circuit, May 2000.

The death penalty is uniquely cruel, inhuman and degrading. This case stands as testimony to that. Thomas Nevius has had three execution dates during his time on death row. In 1986, his execution was stayed by a federal district court the day before it was scheduled to take place. In 1996, the Nevada Supreme Court issued a stay a few days before the execution was due, and the same thing occurred in 1997.

The courts have refused to accept the defence team's contention that such treatment has amounted to a violation of either the US Constitution or international human rights standards. The Nevada Attorney General's Office referred to the claim of cruelty as "a hollow allegation" and stated that "[t]here is no right to an anxiety free incarceration for a death row inmate" and "the issue is not whether Nevius suffered pain, but rather whether the State's representatives took constitutionally impermissible steps in seeking to obtain execution warrants".⁵⁰

⁴⁹ *Aggravation and mitigation in capital cases: What do jurors think?* Stephen P Garvey. 98 Colum. L. Rev (1998).

⁵⁰ *Nevius v McDaniel*. State's reply briefs, 14 April 1997 and 27 April 2000.

Amnesty International believes that the death penalty is a violation of the right not to be subjected to cruel, inhuman or degrading treatment or punishment, as articulated in the Universal Declaration of Human Rights and other international instruments. Recognizing that some countries retain the death penalty, the international community has developed numerous safeguards, pending abolition in those countries. One such safeguard, as noted above, is that the death penalty should not be used against defendants with mental retardation. Another is that a person facing the death penalty must be provided with "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases".⁵¹ Another is the following: "Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering".⁵² The first two have been violated in this case. There is evidence that the state has violated the third also.

A lawyer from the Federal Public Defender's Office visited Thomas Nevius in early September 1986 shortly before he was due to be executed. Nevius had been moved to Nevada State Prison in Carson City, where the execution chamber is located, from Ely State Prison, some 300 kilometres to the east, where death row population is housed. The lawyer recalls the visit thus:

When we met, Mr Nevius was terrified about his impending execution. I have represented other clients with impending execution dates, and although the situation is an inherently stressful one, Mr Nevius appeared to me to have been in the worst shape of any client I have represented. It appeared that he had not been sleeping or eating regularly, he spoke in hushed tones, he had extreme difficulty concentrating and he seemed very depressed. I attempted to advise Mr Nevius about the progress of his case, but it was clear to me that he was not understanding what I was saying...

On September 3, 1996, soon after our first meeting, the Nevada Supreme Court stayed Thomas's impending execution. Mr Pescetta, another of Thomas's lawyers, informed Thomas of the stay verbally, and immediately sent him a copy of the stay order. The following week, around September 7, 1996, I visited Thomas in the Nevada State Prison. He had a copy of the stay order tucked into his shirt. The order was obviously well-worn. When I asked Thomas why he kept the copy of the order in his shirt, he told me "just in case there's a mistake". I asked him to explain, and he told me that he wanted the order with him at all times, because he knew it would protect him from being executed.

During our conversation, Thomas and I also discussed the fact that the stay could be lifted at any time, and that he should be prepared for that contingency. Thomas asked me when he would finally know that this round of attempted executions was over, and I explained that he could not feel very secure until he was placed on the return bus to Ely and got back to his cell.

⁵¹ UN Economic and Social Council, Resolution 1989/64, 24 May 1989.

⁵² Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, endorsed by the UN General Assembly in resolution 39/118, adopted by consensus on 14 December 1984.

From that point on, Thomas decided that that was his goal: he just wanted to return to his cell in Ely so that he would be out of danger. Near the end of September 1996, Thomas was returned to Ely.

Throughout the months of September and October, Thomas's anxiety level remained high as his case remained in constant litigation and the State of Nevada continually attempted to obtain new execution dates. On December 11, 1996, however, the United States Court of Appeals granted Thomas permission to file a habeas corpus petition in the United States District Court. Because further litigation had been expressly authorized by a federal appellate court, I believed that Mr Nevius would not face renewed threats of execution in the near future. Much to my surprise, and the surprise of the other attorneys in our office, the State of Nevada continued seeking execution dates. In early December 1996, the matter came before the state courts on two occasions for the setting of an execution date. On December 17, 1996, the state court entered an order scheduling Thomas's execution for the week of January 13, 1997.

In December 1996 and January 1997, I spoke on the telephone with Thomas several times about his impending execution. I informed Thomas that he was legally entitled to a stay, that in my opinion the State had obtained an execution warrant for no legitimate reason, that the execution should not go forward, and that we would take immediate action in order to secure a stay. I also informed Thomas that our predictions about what the courts would do had been wrong before, so there were no guarantees that the execution would not take place...

In early January 1997, Thomas telephoned in a state of panic. He was extremely concerned that he was being "rolled up" [made to prepare] to go to the execution chamber in Carson City on January 8, 1997. I believed that such an experience would be particularly traumatic to Thomas.

On January 7, 1997, we obtained a stay of execution in Thomas's case. At around 4pm on January 8, 1997, I spoke with Thomas and told him about the stay. Thomas explained to me that he had been "rolled up" to go to Carson City that morning, but at the last minute an announcement was made on the loudspeaker in his cell that the trip to Carson City had been "cancelled". No one from the prison had told him about the stay of execution that had been entered in his case the day before.⁵³

Edward Dougherty, a psychologist who examined Thomas Nevius in 1999 offered the following opinion on the effect of such scheduling of execution dates:

This man views the world in the simplest concrete terms. The imposition of a pending execution has a dramatic effect on him in that in his reasoning ability, he feels that it is true and will definitely take place with no possibility of being stopped... Considering a person of Mr Nevius's low functioning level, it is quite evident from the psychological tests and the clinical interview that Mr Nevius's ability to handle severe stress is greatly limited. The repeated "mock executions" greatly infringe on this man's already compromised ability to cope.

⁵³ Declaration of Timothy P. O'Toole, 23 August 1999.

Records from Ely State Prison's Mental Health Unit made upon Thomas Nevius's return from Nevada State Prison on 25 September 1996, state: "Inmate off train from Carson City. Received stay of execution of death warrant. Sergeant Bainbridge said inmate was crying all day." An entry in the medical records the following day states: "Inmate Nevius was speaking in a very low voice and seemed very depressed. Inmate Nevius stated to me that he was very nervous due to his pending case and that he could be shipped out any day for the death penalty to be carried out. While talking to him Nevius sounded as if he was going to start crying anytime. Inmate Nevius is not acting normal. I feel Nevius is very close to committing suicide."

One of Thomas Nevius's sisters has given her view on what he has been subjected to:

Tommy almost got executed several years ago. In fact, he almost got executed a couple of times. The first time, he called me and told me about it. Then a little while later, he said it wasn't going to happen. Then he called me again and said they were going to do it. Each time, he lost more and more weight. I told him, "You've got to eat". But he said he couldn't.... When he talked to me, he felt very sluggish and down and very afraid. I always told him, "Don't worry, you'll be fine"... Then, when the execution was put off, I'd tell him, "Good, now you can eat and get your weight back." To me, that's torture. He's already served so much time, and then they have to say, "We're going to execute you today". Then it's, "No, we're not". Back and forth. That's torture to do something like that to somebody...⁵⁴.

Torture is universally condemned and outlawed, including by those who advocate the death penalty. Yet an execution is an extreme, purposeful, physical and mental assault on a person already rendered helpless by the state - the essential elements of torture. If carrying out mock executions is condemned as torture, how should we describe the mental anguish of people who are given years to contemplate being poisoned by lethal injection at the hands of the state? The intervention of a legal process to allow such cruelty does not make it any less painful. The fact that the death penalty is imposed in the name of justice does not mitigate the suffering and humiliation.

This is a punishment that is a symptom of, not a solution to, a culture of violence. What is more, it creates more victims. Thomas Nevius's sister concluded her statement about her brother with the following: "Tommy is my life... He is my brother, and he is my protector. I protected him when he was young, and when he got older, he protected me. We're inseparable... I'm crazy about him. If anything happens to him, I don't know what I'll do."

In 1988, relatives of condemned prisoners in South Africa presented a petition to their country's then President. In it they wrote: "To make a person sit, day after day, night after night, waiting for the time when he will be led out of his cell to his death is cruel and barbaric... To be a mother or father and watch your child going through this living hell is a torment more

⁵⁴ Declaration of Mary Shirley Pierce, 7 January 2001.

painful than anyone can imagine.” Their plea was made at a time when abolition of the death penalty seemed an impossibility for South Africa. Yet, in 1995, it rid itself of judicial execution, as part of its continuing efforts to escape its history of racial and social conflict.

When the South African relatives made their plea, Thomas Nevius had already been on death row in the USA for six years. And six years after South Africa abolished the death penalty, Nevada is still planning to kill Thomas Nevius, despite the fact that his death sentence is a product of a capital justice system riddled with arbitrariness, discrimination and error. His case serves to illustrate how far out of step the USA is on this fundamental human rights issue.

Conclusion: Time for decency

“Thomas Nevius has failed to make a substantial showing that he was denied any constitutional rights. It is time for this saga to finally end.” Nevada Attorney General’s Office⁵⁵

If the Nevada authorities now speak of the need for finality in this case, they have not always done so. For a five-year period between 1989 and 1994, the State of Nevada ignored a court order directing it to respond to a defence appeal brief in the Thomas Nevius case. By so doing, it allowed proceedings in the case to come to a halt. The Nevada Supreme Court expressed its disquiet: “We are concerned about the almost five year delay in this case, and surprised that the state offered no explanation for its lack of diligence.”⁵⁶ Nevertheless, as with all Thomas Nevius’s claims over the years, the court gave the state the benefit of the doubt: “[W]e do not believe the delay prejudiced appellant or denied him due process.”

Another way of looking at the fact that the Nevada Attorney General’s Office ignored the case for five years is that it was, in effect, acknowledging that the execution of Thomas Nevius is not necessary. It is not. His execution will amount to nothing more than a futile act of state-sanctioned vengeance.

It is now a dozen years since the US Supreme Court ruled, by five votes to four in the case of John Paul Penry, that the execution of defendants with mental retardation did not violate “evolving standards of decency” in the USA. One of the dissenting Justices wrote: “Killing mentally retarded offenders does not measurably further the penal goals of either retribution or deterrence... the execution of mentally retarded individuals is no more than the needless imposition of pain and suffering”.⁵⁷ Twelve years on, a total of 13 states have voted to outlaw

⁵⁵ *Nevius v McDaniel*, state reply brief. April 2000.

⁵⁶ *Nevius v Warden*, Nevada Supreme Court, 9 October 1996.

⁵⁷ *Penry v Lynaugh*, 1989, Justice Brennan dissenting.

the use of the death penalty against defendants with mental retardation compared to the one, Georgia, which had done so at the time of the Supreme Court's shocking 1989 decision. Other states are currently considering such legislation. At the time of writing, Sheila Leslie, a member of the Nevada legislature was working on such a bill to be introduced in the current legislative session. It seems that, slowly, standards of decency in the USA are evolving to meet international standards.

In the *Penry* decision, the US Supreme Court said that, although it was not unconstitutional to execute a defendant with mental retardation, the jury must be allowed to consider the evidence of such a mental disability in deciding upon punishment. Thomas Nevius's jury was denied this opportunity because no one who represented him bothered to investigate it for 14 years. By then it had been "procedurally defaulted" as an appeal issue.

The jury's sentencing verdict cannot be relied upon. Six of the jurors from the original trial have signed affidavits that they would not have voted for a death sentence if they had known about Thomas Nevius's mental retardation. A seventh has stated that he supports commutation of the death sentence because he believes that it was unfair that Thomas Nevius had the same lawyer at the trial and his initial appeals. Given that a Nevada capital jury has to be unanimous in voting for a death sentence, if any one of them had voted against death, a life sentence would have resulted.

The evidence of racial discrimination in Thomas Nevius's case is profoundly disturbing and the courts' response to it unsatisfactory. This evidence of racism is made no less disturbing by the fact that it is far from unique in US capital cases.⁵⁸

The power of executive clemency exists precisely to compensate for the rigidities of the court system. The Nevada clemency authorities should act where the courts have failed and commute Thomas Nevius's death sentence. It is the only decent thing to do.

⁵⁸ See *Killing with prejudice: Race and the death penalty in the USA*, AMR 51/52/99, May 1999.