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“A Fatally Flawed System”

A critical investigation of the 2021 cases on the
American Death Row where 11 people were executed

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WARNING - DISTRESSING DETAILS

Acknowledgments

First, I would like to offer my gratitude to the legal teams, human rights defenders and organizations that continually contribute to the advancement of human dignity within the criminal justice system. Second, I send my thoughts to the families of both the victims and the defendants involved in this project. I hope everyone affected by these cases eventually finds peace. Third, thank you to the smartest person I know, my brother Felix, who is my biggest inspiration. Last, thank you to my supervisor, Susanne Wigorts Yngvesson, for providing guidance throughout this project.

Abstract

The death penalty in the US has long been characterized by racist prejudices and mistakes. Previous research suggests that the majority of those executed are intellectually disabled people, black people and the poor. Furthermore, innocent people are too often convicted and executed, those with intellectual disabilities lack adequate protection in the legal process and racism is an inherent part of the criminal justice system.

This essay investigates which of the 11 American people—executed in 2021—were particularly exposed or vulnerable to the death penalty from an intersectional perspective. It captures patterns regarding the defendants' identity markers and the discrimination, human rights violations or constitutional violations that occurred in the cases and legal processes, according to the defendants' legal teams. The material consists mainly of legal documents and the research questions are answered through a qualitative text analysis, with Intersectionality and Critical Race Theory as the theoretical framework.

The research show that ten out of 11 cases were problematic or indicated ambiguities. Black people, intellectually disabled people and the poor continue to be discriminated against. Several of the defendants with intellectual disabilities would not be eligible for the death penalty today. In conclusion, black poor men with intellectual disabilities and a history of abuse, along with poor women with mental health issues, intellectual disabilities and a history of abuse, were particularly vulnerable to the criminal justice system—because of the multifaceted discrimination they were exposed to.

Keywords

Capital punishment; United States; Discrimination; Racism; Intersectionality

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Introduction

1.1 Capital punishment in the US

In democracies, advocates argue that the death penalty deters the most serious crimes, is a moral balance to the wrong committed, that the adage "an eye for an eye, a tooth for a tooth" should be followed to promote a good and just society, and that it allows victims' families to find closure.¹ According to a 2021 Pew Research Center survey, a majority (60%) of adults in the US say the death penalty is morally justified for people convicted of murder. However, concerns about its administration are widespread.² Since 1973, 1551 people have been executed in the US criminal justice system. For every eighth person executed, one person has been acquitted.³

Organizations such as Amnesty International oppose the death penalty regardless of the circumstances and consider the death penalty to be the ultimate cruel, inhuman and degrading punishment. Consequently, it violates the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. The Universal Declaration of Human Rights, which was adopted by the UN in 1948, protects these rights.⁴ The primary duty bearer is the state. However, in the US where the death penalty is legal, the state itself can choose to end an individual's life.

1.2 Introduction to the subject area

In the research overview, it appears that certain groups are particularly vulnerable within the criminal justice system. According to the Death Penalty Information Center (hereinafter DPIC) the executions during 2021 included people with severe mental health issues, intellectual disability, childhood trauma, and unexamined evidence of innocence. The report argued that racism is still widespread within the criminal justice system.⁵

¹ "Death Penalty," Amnesty International, n.d., <https://www.amnesty.org/en/what-we-do/death-penalty/>.

² Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* (Washington: Pew Research Center, 2021), <https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/>.

³ "Death Penalty," Equal Justice Initiative, n.d., <https://eji.org/issues/death-penalty/>.

⁴ Amnesty International, "Death Penalty."

⁵ Death Penalty Information Center, *The Death Penalty in 2021: Year End Report* (Washington: Death Penalty Information Center, 2021), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report>.

These groups are often analyzed separately, and it is therefore of significant importance to analyze the executions in 2021 with an intersectional perspective. It is also important to investigate whether the discrimination highlighted in the research overview occurs in the cases that led to the executions in 2021, whether those who were executed belonged to several of the mentioned vulnerable groups and where in the legal process the defendants' constitutional rights were violated. Without this understanding, it becomes difficult to create change and protective legislation, especially for those who are discriminated against on multiple grounds of discrimination and are at risk of falling through the cracks.

1.3 Aim and research questions

The aim of this thesis is to capture in which of these cases the individual was particularly exposed to, or vulnerable in, the criminal justice system from an intersectional rights perspective. The aim is also to critically investigate to what extent discrimination has occurred during the legal process for these capital cases. Critical Race Theory and theories about class and power structures within society, will pervade the analysis.

This thesis seeks to answer two research questions to achieve this aim.

1. What kind of discrimination, human rights violations or constitutional violations have occurred in the cases and legal processes according to the defendants' legal teams, if any? Are there any patterns regarding the discrimination?
2. Which of the people executed in 2021 were especially exposed or vulnerable to the criminal justice system from an intersectional perspective?

Method and materials

2.1 Method

For this project, a qualitative text analysis is chosen because of the vast collection of textual materials. The aim is to capture key concepts regarding vulnerability, intersectionality and discrimination and to analyze relationships and differences. This method generates non-numerical data and focuses on new insights about intersectionality in death penalty cases, which fits the aim and research questions. The only numerical data being captured is how many of the 11 cases that, for example, were discriminated against in the legal process or were subjected to childhood abuse. Research question one is answered in 5.2: *Identity markers and the legal processes*. The findings in 5.2 is also the background for research question two, which is answered in 5.3: *Conclusions: Intersectionality*.

To gain an overview of the death penalty in the US and the executions in 2021, I began by reading *The Death Penalty in 2021: Year End Report* by DPIC. After that I made a mind map with the 11 defendants and wrote their names, skin color and gender. I also gathered information about the crimes and the legal processes. I read and wrote about one case at a time. The materials—legal documents—have been retrieved through google searches using the defendant's full name and the name of various types of court documents from the case and defense. In addition, searches have been made on American websites such as www.casetext.com, www.supremecourt.gov and www.law.justia.com. After reading various documents from each case, I selected one or two documents for every case that contained the most relevant information. While working on each case, I wrote the defendant's various additional identity markers on the mind map, such as class and intellectual disability. After writing about four different cases, I found patterns concerning life circumstances and discrimination. I then printed various findings, such as childhood trauma and intellectual disability, as headings in the results section. As I continued with the remaining seven cases, I did the same work as with the previous cases, but I only filled in the relevant information under the headings. For example, I did not include all questions, and arguments regarding Stouffer's legal process, as they all were about his due process rights and other is-

sues, regarding intersectionality or discrimination, were not captured. During the time of the project, more relevant factors were detected, such as defendants executed with covid-19 and different due process violations. These were added as headings under the results section. After working through all 11 cases I analyzed patterns, differences and similarities, and finally, the points of intersection between different grounds of discrimination using the selected theories presented below.

2.2 Limitations and materials

The time frame is limited to the cases where those sentenced to death in America were executed in 2021. This is equivalent to 11 people, ten men and one woman, of whom 55 percent were black and 45 percent were white. This limitation makes it impossible to examine similarities or differences between potential discrimination faced by women on death row. Nor is it possible to explore the discrimination that black people or intellectually disabled people generally endure. What is possible to examine, however, is whether and how systematic discrimination still occurs to people with both different and similar backgrounds, using a delimited recent time frame to examine patterns. This makes an analysis of discrimination through an intersectional perspective easier than if cases belonging to only one identity marker were selected. Moreover, this limitation has also been selected to investigate whether any defendant was not subjected to discrimination. This potential finding is relevant to an intersectional analysis—to locate possible privileges in the legal process. This would not be possible if only cases characterized by discrimination were selected.

The 11 cases are Lisa Marie Montgomery, Corey Johnson, Dustin John Higgs, Quintin Phillippe Jones, John William Hummel, Rick Allan Rhoades, Ernest Lee Johnson, Willie B. Smith III, John Marion Grant, David Neal Cox Sr. and Bigler Jobe Stouffer II. Access to the people executed is for obvious reasons non-existent. Thus, legal documents regarding the cases are used. Although there are many legal documents of relevance, this thesis will focus on documents such as petition alleging violations of human rights, plaintiff-appellee, stay of execution request, emergency petition for rehearing En Banc and emergency motion for stay of execution. The material has been selected because of both data saturation and time limitation. This limitation can

affect the analysis in such a way that all details and all individual cases of discrimination will not be found in this thesis, thus it leads to a simplified and abbreviated version of the cases, the backgrounds of the defendants, the legal processes and associated documents. Information that may be legally important may be omitted—as this report focuses on human rights. Usually, these documents highlight and summarize previous legal processes and any discrimination that may have occurred. Furthermore, I trust that the lawyers have a greater understanding and knowledge of the American criminal justice system and the specifics of the cases than I do.

If there are cases without significant discrimination, human rights violations or constitutional violations in the legal process, these cases will not be given the same space. The reason for this is that the research questions' focus is on potential patterns of discrimination in the cases and their legal processes, which naturally makes a potential case of no apparent discrimination less relevant for this essay—although that potential finding is still relevant for the analysis.

2.3 Theory

An intersectional perspective is used to gain a deeper understanding of how different grounds of discrimination—such as ethnicity, class, age or disability—exacerbate each other in capital punishment cases. The state's obligation to respect, protect and fulfill human rights is in focus as the subject area concerns, for example, the right to life and equal treatment. This essay is a critical analysis of the cases, so the cases will be reviewed to answer the research questions: which problems still occur, for whom and to what extent? Against this background, Critical Race Theory becomes relevant. This concept will be explained and used for a deeper understanding of the intersection between skin color and ethnicity, law and power. Concepts such as class hatred and ableism may also become relevant. Therefore, Class-Dominance Theory of Power in the US will be included in this essay.

2.3.1 Intersectionality

Kimberlé Crenshaw, a leading thinker and scholar in the intellectual movement Critical Race Theory, was the first person to use the term *Intersectionality* in 1989 as a "lens through which you can see where power comes and collides, where it interlocks and intersects."⁶

Intersectionality highlights the fact that people can be oppressed on multiple grounds of discrimination, such as race, class, gender identity and religion, at the same time. This can create a more complex and problematic form of discrimination. In conclusion, intersectionality considers multiple identity markers simultaneously and recognizes that, for example, "black" and "woman" do not exist independently of each other.⁷ An example: For a company to avoid discrimination against black people or women when hiring their employees, they can hire black men and white women. Despite hiring both black people and women, there is a discrimination-gap where black women can still be denied work.

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PHOTO: PARRISCONSULTING.CA

⁶ "Kimberlé Crenshaw on Intersectionality, More than Two Decades Later," Columbia Law School, n.d., <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later>.

⁷ Syracuse University Libraries, "FYS 101: Intersectionality," Syracuse University Libraries, September 1, 2022, <https://researchguides.library.syr.edu/fys101/intersectionality>.

2.3.2 Critical Race Theory and Class-Dominance Theory of Power

Many thinkers inspired Critical Race Theory (hereinafter CRT)—for example W. E. B. Du Bois and Sojourner Truth. The movement originated from the work of American legal scholars including Derrick Bell, Alan Freeman, Kimberlé Crenshaw and Patricia J. Williams.⁸ George William Domhoff, research professor of psychology and sociology, is the author of the book *Who Rules America?*, where he has expressed his ideas about Class-Dominance Theory of Power (hereinafter CDTP).

CRT is based on the idea that American politics and institutions are created on a racist foundation and that racial prejudice is a natural part of these policies and institutions. According to CRT, as a result, black Americans are being incarcerated at a much higher rate than other ethnic groups—despite white Americans being the ethnic majority in the US.⁹ Class-Dominance Theory of Power is based on the fact that the US as a capitalist country creates a business-owning class and a working class, where the dominant power (“the capacity of some persons to produce intended and foreseen effects on others”) is maintained by the rich. The wealthy few form a social upper class that creates institutions with an upper-class worldview. This social upper class can control the federal government in Washington through their close connections in profit and non-profit institutions.¹⁰ Furthermore, in the US, wealth is unequally distributed by race, generally leaving black families with fewer opportunities than white families. In 2016, the median wealth of black families was \$17,600 while the median wealth of white families was \$171,000. The Center for American Progress reports:

More than one and a half centuries since slavery’s abolition, America has yet to fully reckon with how to atone for this original sin. The disparities that exist between blacks and whites today can be traced back to public policies both implicit and explicit: From slavery to Jim Crow, from redlining to school

⁸ Kimberlé Crenshaw, *Critical race theory: the key writings that formed the movement* (New York: The New Press, 1995), https://archive.org/details/critica_xxx_1995_00_1144/page/n4/mode/1up.

⁹ Gabriella Borter, “Explainer: What ‘critical Race Theory’ Means and Why It’s Igniting Debate,” Reuters, September 22, 2021, <https://reuters.com/legal/government/what-critical-race-theory-means-why-its-igniting-debate-2021-09-21/>.

¹⁰ William D. Domhoff, “Who Rules America: The Class-Domination Theory of Power,” n.d., https://whorulesamerica.ucsc.edu/power/class_domination.html.

segregation, and from mass incarceration to environmental racism, policies have consistently impeded or inhibited African Americans from having access to opportunities to realize the American dream.¹¹

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PHOTO: G. WILLIAM DOMHOFF

2.4 Research ethics

The material comprises public legal documents where the identity of those executed is already available to the public. This means that the people relevant to this project will not be anonymous. The sources of the background information will be carefully reviewed to ensure that the information is not sensitive or harmful to living family members. This means, for example, that the information is based on testimonies from doctors, psychologists, family members and the defendants. Information about whether, and if so, how, the defendants have been discriminated against is not taken from news sites or organizations that are anti-capital punishment without the data being double-checked with official documents from the legal processes. It should be noted that it is beyond my knowledge if any information in this essay is based on false testimony during, for example, the trial (perjury).

¹¹ Center for American Progress, *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, (Washington: Center for American Progress, 2018), <https://www.americanprogress.org/article/systematic-inequality/>.

Background and previous research

3.1 Glossary of Legal Terms

Direct Appeal When a defendant is sentenced to death, there is a right to an automatic, non-waivable, *direct appeal* to the State Supreme Court. Mistakes during the trial are raised and it is argued that the conviction should be reversed.¹²

Direct Appeal (Certiorari) If the State Supreme Court affirms the conviction, the defendant can file a petition for *writ of certiorari* in the United States Supreme Court (hereinafter SCOTUS). It is argued that the defendant's federal constitutional rights were violated at trial.¹³

State Habeas Corpus Proceedings During the Direct Appeal, the defendant has the right to seek State habeas review and file a petition for *writ of habeas corpus* in the State Supreme Court, where claims based on facts outside the trial record may be raised.¹⁴

Executive Clemency When the appellate process is complete, *executive clemency* is the power of the Governor to grant full or conditional pardons.¹⁵

En Banc Hearing In an *En Banc Hearing*, all judges of a particular court hear a case of complexity or importance.¹⁶

¹² Bill Lockyer, *A Victim's Guide to the Capital Case Process*, PDF (Sacramento: Office of Victims' Services California Attorney General's Office, 2000), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf>, p.3-4.

¹³ Lockyer, *A Victim's Guide to the Capital Case Process*, p.4.

¹⁴ Lockyer, *A Victim's Guide to the Capital Case Process*, p.6-7.

¹⁵ Lockyer, *A Victim's Guide to the Capital Case Process*, p.15.

¹⁶ Wex Definitions Team, "en banc," Legal Information Institute, October, 2022, https://www.law.cornell.edu/wex/en_banc.

3.2 The Case Against the Death Penalty

The Case Against the Death Penalty, first published in 1973 (revised by the ACLU in 2012), was written by Hugo Adam Bedau. The report argues that the death penalty violates the US Constitution and further due process rights, i.e., it is carried out through an arbitrary and discriminatory legal process. Innocent people can and have been executed, as the death penalty is inherently irrevocable. Furthermore, black people and the poor are disproportionately affected, making the death penalty unjust. Besides this, it is inhumane and even people with intellectual disabilities are not provided with sufficient protection.¹⁷

Despite this previous research and annual reports made on the death penalty in the US, more in-depth analysis and identification of patterns regarding possible discrimination are needed. This is of importance to identify the most vulnerable in the criminal justice system and to be able to identify different opportunities to protect vulnerable individuals at an earlier stage in life, before they commit the crimes. This is one step closer to reducing the number of potential victims and respecting the human dignity of everyone, regardless of the circumstances.

3.3 Mental Illness and the Death Penalty

SCOTUS has ruled that it is unconstitutional to execute a person who is not "competent at the time of his or her execution." The American Civil Liberties Union's report *Mental Illness and the Death Penalty* (2009) claims that there are six relevant legal issues regarding mental illness and intellectual disabilities in the legal process for people accused or convicted of serious crimes. (1) In police interrogations, those with intellectual disabilities are more vulnerable to pressure and give false confessions to a greater extent. (2) Competency tests made to determine whether a defendant understands enough about the situation to stand trial are often made very fundamental, making it possible that, for example, people with schizophrenia can be tried. (3) Jurors often reject evidence of the defendants having intellectual disabilities. Many jurors are

¹⁷ "The Case against the Death Penalty," American Civil Liberties Union, 2012, <https://www.aclu.org/other/case-against-death-penalty>.

also unaware that a verdict of "guilty but mentally ill" carries the same consequences as a "guilty" verdict. (4) Many defendants with intellectual disabilities who lacked intent at the time of the crime are still being convicted. (5) Jurors often misunderstand the connection between mental illness and mitigating factors. (6) Defendants with intellectual disabilities can find it difficult to participate in their own defense.¹⁸

The report is 13 years old, and this thesis can investigate the problems that those with mental illnesses and intellectual disabilities still face in the legal process for serious crimes. In addition, this thesis will discuss if, and possibly how, these individuals may face additional difficulties because of other factors, such as economic vulnerability or childhood trauma.

3.4 Sentenced to death, but innocent

Since 1973, at least 182 people on death row in the US have been found innocent. National Geographic has conducted a report on some of these people and their stories: *Sentenced to death, but innocent: These are stories of justice gone wrong* (2021). The key findings are that factors such as skin color, ethnicity, low income and bias within the criminal justice system increase the risk of wrongful death sentences. In April 2020, 41% of those convicted were black, while black people only constituting 13.4% of the US population.¹⁹

Krone's case included untested DNA from the crime scene. Meléndez's case lacked evidence linking him to the crime, and a recorded confession of the actual killer had been available, but the prosecution had not shared it with the defense. Smith's lawyers had not called witnesses who could prove she was not guilty. In Graham's case, prosecutors had systematically excluded black jurors. Thibodeaux's confession has been ruled false as he confessed as a teenager under extended police questioning and sleep deprivation, while his confession did not even match the facts of the crime. Burrell's judge misled the jury and did not present exculpatory evidence. Prosecutors

¹⁸ American Civil Liberties Union, *Mental Illness and the Death Penalty* (New York: American Civil Liberties Union, 2009), <https://www.aclu.org/report/report-mental-illness-and-death-penalty>.

¹⁹ Phillip Morris, "Sentenced to death, but innocent: These are stories of justice gone wrong," *National Geographic*, 18/2 2021, <https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong>.

in Keine's case coerced testimony from a key witness who later recanted his statement. The prosecutor in Padgett's case avoided telling the defense that blood from the crime scene did not match Padgett's—the judge denied an appeal for a new trial. Finally, Ajamu was convicted solely on the testimony of a 13-year-old who long afterwards admitted that the testimony was false.²⁰

The report is relevant in terms of time. The primary focus is on discrimination due to identity markers, which will also be discussed in this essay, but the focus will be on multifaceted discrimination and the intersections between the defendants' identity markers and various circumstances in life. In addition, the defendants in this essay were not acquitted, but executed.

²⁰ Phillip Morris, “Sentenced to death, but innocent: These are stories of justice gone wrong,” *National Geographic*, 18/2 2021, <https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong>.

Findings and discussion

4.1 The defendants and the crimes

4.1.1 Bigler Jobe Stouffer II

Bigler Stouffer's last words were: "My request is that my Father forgive them. Thank you." Stouffer was executed on December 9, 2021.²¹

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Bigler Stouffer II. PHOTO: OKLAHOMA DEPARTMENT OF CORRECTIONS

In 1985, Doug Ivens and his girlfriend Linda Reaves were shot in Ivens' house in Oklahoma. Ivens survived the shooting, however Reaves died minutes later. The defendant, Stouffer, was dating Iven's ex-wife Velva Ivens at the time of the murder. Stouffer was convicted of Shooting With Intent to Kill and Murder in the First Degree.²²

4.1.2 Lisa Marie Montgomery

When asked if she had any last words, Lisa Montgomery said "No." Montgomery was executed on January 13, 2021.²³

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Lisa Montgomery. PHOTO: MARYVILLE DAILY FORUM/AP

After Montgomery and Bobbie Jo Stinnett met at a dog show, they continued to stay in touch through an online community dedicated to their common interest—breeding of rat terriers. Although Montgomery had undergone a sterilization procedure, in 2004 she began telling friends and family that she was expecting a child. Stinnett had a litter of puppies for sale and Montgomery, under the alias Darlene Fischer, contacted Stinnett and asked about purchasing one. The next day, December 16, 2004, the women met at Stinnett's home. Montgomery attacked Stinnett and strangled her repeatedly

²¹ The Associated Press, "Oklahoma executes man for teacher's slaying in 1985 after Supreme Court denies final appeal," *NBC News*, December 9, 2021, <https://www.nbcnews.com/news/us-news/oklahoma-prepares-execute-man-teachers-slaying-1985-rcna8153>.

²² *Stouffer v. Oklahoma*, 738 P.2d 1352 (Okla. Crim. App. 1987).

²³ Michael Tarm, Twitter post, January 13, 2021, 7:04 p.m.,

https://twitter.com/mtarm/status/1349417169076027392?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1349417169076027392%7Ctwgr%5Ed9d19657ed65c657d89f7de00b3e0bf27bd22f02%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fheavy.com%2Fnews%2Fflisa-montgomery-last-words%2F.

with a white cord, which killed Stinnett while being eight months pregnant. Montgomery cut open Stinnett's abdomen to remove her fetus. She cut the umbilical cord, took the baby in her arms and drove away. On the way home, she called her husband to tell him she had suddenly given birth to their daughter. The next day, law enforcement officers came to Montgomery's home, and she finally confessed to murdering Stinnett and abducting the child.²⁴

4.1.3 Corey Johnson

The pizza and strawberry shake for Corey Johnson's last meal “were wonderful, but I didn't get the jelly-filled donuts that I ordered. What's with that? This should be fixed.”²⁵ Corey Johnson (hereinafter Corey) was executed on January 14, 2021.²⁶

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Corey Johnson at age 52. PHOTO: COUNSEL FOR COREY JOHNSON

In the early 1990s, Corey—a former gang member in Richmond, Virginia—was running a large-scale drug ring with Richard Tipton and James Roane, Jr. During a two-month period, the three men killed ten people, including people they suspected of treachery and people with drug debts. After being involved in the seven killings of Peyton Johnson, Louis Johnson, Bobby Long, Dorothy Armstrong, Anthony Carter, Linwood Chiles and Curtis Thorne—Corey was sentenced to death.²⁷

4.1.4 Dustin John Higgs

"I did not order the murders" were Dustin Higgs' last words. He was executed on January 16, 2021.²⁸

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Dustin John Higgs. PHOTO: FEDERAL DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

²⁴ United States v. Lisa Montgomery, 635 F.3d 1074, 1079 (8th Cir. 2011), p.2–5.

²⁵ Jaelyn Diaz, “Federal Government Executes Corey Johnson For 1992 Murders,” *National Public Radio*, January 15, 2021, <https://www.npr.org/2021/01/15/957127755/federal-government-executes-corey-johnson-for-1992-murders>.

²⁶ Keri Blakinger, “COREY JOHNSON WAS EXECUTED ON JANUARY 14, 2021 IN FEDERAL PRISON.,” The Marshall Project, accessed December 27, 2022, <https://www.themarshallproject.org/next-to-die/fe/huzhb1yw>.

²⁷ Blakinger, “COREY JOHNSON WAS EXECUTED ON JANUARY 14, 2021 IN FEDERAL PRISON.”

²⁸ Michael Tarm, Twitter post, January 16, 2021, 7:35 a.m., <https://twitter.com/mtarm/status/1350330906293235713>.

During a kidnapping in January 1996, three women, Amika Black, Mishann Chinn and Tanji Jackson, were shot and killed by Willis Haynes. Higgs, Haynes and Victor Gloria had offered the young women a ride home but instead they drove them to the Patuxent National Wildlife Refuge, where prosecutors claim Higgs ordered Haynes to “shoot them dead”. The jury gave Higgs nine death sentences for the Route 197 murders. Haynes was given life imprisonment instead of the death penalty.²⁹

4.1.5 John Marion Grant

John Grant shouted, “Let's go!” before being executed on October 28, 2021.³⁰

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John Marion Grant. PHOTO: DEPT OF CORRECTIONS

In 1998, Grant had served 20 of his 130-year prison sentence in Oklahoma for four armed robberies. On November 13 the same year—allegedly after arguments about Grants' food tray—Grant stabbed food service supervisor Gay Carter repeatedly with a "shank." After murdering Carter, Grant tried to stab himself—running into a wall with the "shank" against his chest. Grant was sentenced to death for First Degree Murder.³¹

4.1.6 Quintin Phillippe Jones

Quintin Jones' last words were: "Love all my friends and all the friendship's that I have made. They are like the sky. It's all part of life, like a big full plate of food for the soul. I hope I left everyone a plate of food full of happy memories, happiness and no sadness. I'm done warden." Jones was executed on May 19, 2021.³²

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Quintin Phillippe Jones. PHOTO: NODEATHPENALTY.SANTEGIDIO.ORG

In 1999, Jones beat his great-aunt Berthena Bryant to death after being denied money for drugs. He was 20-years old and on heroin and cocaine. Before the jury voted, the

²⁹ United States v. Higgs, 353 F.3d 281 (4th Cir. 2003).

³⁰ Dimitris Kouimtsidis, “Final words of death row inmate John Marion Grant during 'horror' execution,” *Daily Star*, October 29, 2021, <https://www.dailystar.co.uk/news/world-news/final-words-death-row-inmate-25326696>.

³¹ Grant v. State of Oklahoma, 58 P.3d 783, 2002 OK CR 36 (Okla. Crim. App. 2002).

³² Ian Molyneaux, “Triple killer Quintin Jones' final words before being put to death by lethal injection,” *Daily Star*, May 20, 2021, <https://www.dailystar.co.uk/news/world-news/triple-killer-quintin-jones-final-24146037#>.

prosecution argued that Jones was beyond redemption and a future threat to society. New York Times journalist Suleika Jaouad wrote: “During his 21 years on death row, Quin has been the epitome of a prison success story.”³³ Mattie Long, Berthena Bryant's sister, has, along with Jones’ twin brother Benjamin, forgiven Jones and asked for clemency.³⁴

4.1.7 John William Hummel

In John Hummel’s last moments, he said: “I truly regret killing my family. I am thankful for all the thoughts and prayers for my family over the last few days. I love each and every one of you.” Hummel was executed on June 30, 2021.³⁵

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John Hummel. PHOTO: DEATHPENALTYINFO.ORG

In December 2009, Texas authorities went to former marine Hummel's house because of a fire—inside they found Hummel's pregnant wife, five-year-old daughter and father-in-law dead. Hummel confessed to the killings, dumping the murder weapons and setting the house on fire.³⁶ Prior to this crime, Hummel had no criminal record and was honorably discharged from the military.³⁷

4.1.8 Rick Allan Rhoades

Rick Rhoades did not give any last statement and was executed on September 28, 2021.³⁸

Due to copyright reasons, the image is missing in the electronic edition.

Rick Rhoades. PHOTO: THEFORGIVENESSFOUNDATION.ORG

³³ Suleika Jaouad, “Quintin Jones Is Not Innocent. But He Doesn’t Deserve to Die.,” *The New York Times*, May 10, 2021, <https://www.nytimes.com/2021/05/10/opinion/quintin-jones-texas-death-row-clemency.html>.

³⁴ Mattie Long, *Declaration of Mattie Long*, PDF (San Antonio: 2021), <https://static1.squarespace.com/static/605bb1bcbe46f922dac0b6a9/t/608b386109b4950f50c2cd44/1619736674259/09+Mattie+Long+Declaration.pdf>, p.1–2; Benjamin Jones, *Declaration of Benjamin Jones*, PDF (Baton Rouge: 2021), <https://static1.squarespace.com/static/605bb1bcbe46f922dac0b6a9/t/608b39dab1e84a02f1bd15c3/1619737050600/10+Benjamin+Jones+Declaration.pdf>, p.5–7.

³⁵ Khaleida Rahman, “John Hummel's Last Words Before Texas Execution,” *Newsweek*, July 1, 2021, <https://www.newsweek.com/texas-executes-john-hummel-last-words-regret-murder-1605847>.

³⁶ *Hummel v. Lumpkin*, 141 S. Ct. 330, 208 L. Ed. 2d 71 (2020), p.1–4.

³⁷ *Hummel v. Lumpkin*, 141 S. Ct. 330, 208 L. Ed. 2d 71 (2020), p.11.

³⁸ Death Penalty Information Center, “Texas Executes Rick Rhoades, the First Execution from Harris County in Two Years,” *Death Penalty Information Center*, September 27, 2021, <https://deathpenaltyinfo.org/news/texas-set-to-execute-rick-rhoades-the-first-execution-from-harris-county-in-two-years>.

While in custody for a school burglary, Rhoades gave a written statement confessing to killing Charles and Bradley Allen—whose dead bodies were found by a neighbor in September 1991, a month prior to the burglary. The crime occurred after Rhoades encountered Charles Allen outside his house and the two began arguing. Charles went into his house and Rhoades followed, believing that Charles was getting a gun. Once inside the house, the fight turned violent, and Rhoades stabbed Charles to death. Bradley then entered the room. Rhoades stabbed him to death before taking some cash and clean clothes and leaving the dead brothers. Rhoades had been released from prison less than 24 hours before the murders.³⁹

4.1.9 Ernest Lee Johnson

In Ernest Johnson's last statement, he wrote: "I want to say that I love my family and friends." Ernest Johnson (hereinafter Ernest) was executed on October 5, 2021.⁴⁰

Due to copyright reasons, the image is missing in the electronic edition.

Ernest Lee Johnson. PHOTO: JEREMY S. WEIS

Ernest murdered convenience store employees Mary Bratcher, Fred Jones and Mabel Scruggs during an attempted robbery in February 1994. Ernest was under the influence of cocaine and had borrowed a gun to rob the store in Columbia, Missouri. After resistance from the victims, he shot them and then beat them to death with a claw hammer. While being questioned about the murders, Ernest stated that he did not care if the officers shot him.⁴¹ Pope Francis sent a letter requesting clemency for Ernest, putting emphasis on the sacredness of all human life.⁴²

4.1.10 Willie B. Smith III

Willie Smith did not give any last statement before being executed on October 21, 2021.⁴³

³⁹ Rhoades v. Davis, 914 F.3d 357 (5th Cir. 2019).

⁴⁰ Christine Hauser and Jesus Jiménez, "Ernest L. Johnson Is Executed Despite Pleas From Pope and Others," *The New York Times*, October 4, 2021, <https://www.nytimes.com/2021/10/04/us/pope-francis-ernest-lee-johnson-execution.html>.

⁴¹ Missouri v. Johnson, 968 S.W.2d 686 (Mo. 1998).

⁴² Kim Bellware, "Missouri is slated to execute Ernest Johnson. Lawmakers and the pope want his life to be spared.," *The Washington Post*, October 2, 2021, <https://www.washingtonpost.com/nation/2021/10/02/ernest-johnson-cori-bush/>.

⁴³ Death Penalty Information Center, "Alabama Executes Intellectually Disabled Death-Row Prisoner," *Death Penalty Information Center*, October 21, 2021, <https://deathpenaltyinfo.org/news/alabama-executes-intellectually-disabled-death-row-prisoner>.

Due to copyright reasons, the image is missing in the electronic edition.

Willie B. Smith awaits verdict. PHOTO: THE BIRMINGHAM NEWS

Smith was convicted of the murder of Sharma Ruth Johnson in 1991 during a robbery and kidnapping at an automatic teller machine in Jefferson County, Alabama. Both Smith and Johnson were 22 years old when she was abducted at gunpoint. After Smith stated to Angelica Willis—17-year-old at the time and indicted for the murder—that he would have to kill Johnson because she could tell the authorities about the robbery and kidnapping, Willis recalled Smith shooting Johnson in the head.⁴⁴

4.1.11 David Neal Cox Sr.

David Cox said: “I want my children to know that I love them very much and that I was a good man at one time,” before being executed on November 17, 2021.⁴⁵

Due to copyright reasons, the image is missing in the electronic edition.

David Neal Cox. PHOTO: MISSISSIPPI DEPARTMENT OF CORRECTIONS

Cox and his ex-wife Kim had two children together, D.C. and J.C. After Kim learned that Cox—stepfather to Kim's daughter L.K.—had raped L.K., they separated in 2009 and Cox was arrested for statutory rape and child abuse. Kim and the kids stayed at her sister's house because of Kim's fear of Cox. While in prison, Cox told his cellmates that he would kill Kim when he got out. When Cox was released on bond in 2010, he went home to Kim's sister's house with a gun he purchased on the way. Kim's sister and J.C. escaped and called the police but Kim, L.K. and D.C. were held hostage for over eight hours. Before a SWAT team entered the home and found Kim's dead body, Kim had to witness Cox sexually assault L.K. Kim died after bleeding out from a gunshot wound.⁴⁶ Cox waived his appeals and held that he was “worthy of death.”⁴⁷

⁴⁴ Smith v. Alabama, 838 So. 2d 413 (Ala. Crim. App. 2002).

⁴⁵ Kenneth Garger, “Mississippi Executes Man Who Killed Wife, Sexually Assaulted Stepdaughter,” *New York Post*, November 17, 2021, <https://nypost.com/2021/11/17/david-neal-cox-who-killed-wife-sexually-assaulted-stepdaughter-executed-in-mississippi/>.

⁴⁶ Cox v. Mississippi, 578 U.S. 979, 136 S. Ct. 2010, 195 L. Ed. 2d 222 (2016).

⁴⁷ Garger, “Mississippi Executes Man Who Killed Wife, Sexually Assaulted Stepdaughter.”

4.2 Identity markers and the legal processes

4.2.1 Childhood trauma and socioeconomic status

Montgomery's mother Judy Montgomery was an alcoholic which resulted in Montgomery's permanent brain damage. Her entire childhood was marked by physical and sexual abuse, forced prostitution and neglect. The consequences of the torture have been compared to the trauma experienced by former child soldiers. As a young child, Montgomery was left in a high chair for hours if she didn't finish her food and she was often beaten with various objects in the house. If Montgomery wet her bed, she was punished with a cold shower and if she spoke or made noises that disturbed Judy, she duct-taped Montgomery's mouth. Judy's husband Jack Kleiner, a "mean drunk", punched, kicked and choked Montgomery. Diane, Montgomery's 4-year-old sister, was regularly raped by Judy's friend while Montgomery, age 4, was in the same bed. Social services moved Diane from their home but left Montgomery behind without investigating her situation. When Montgomery was 13, Jack also began raping her. He threatened to kill her family and rape her little sister if she resisted or told anyone. By the time Montgomery turned 14, she had moved 17 times. The family eventually moved to an isolated trailer with no running water. Montgomery had to stay in a small room built by Jack on the outside of the trailer. There, Jack would rape her up to three times a week for years. At the age of 15, Judy began sexually exploiting Montgomery, forcing her to have sex with men for services. Simultaneously, Jack began bringing home friends who anally, orally and vaginally raped Montgomery for hours on end and when they finished, they would urinate on her. According to experts "this was the beginning of Lisa's dissociative disorder, a mental illness that severs Lisa's connection with reality. She also developed complex post-traumatic stress disorder."⁴⁸

Before Corey turned 12, he had moved almost 10 times, which deprived him of a sense of stability. Where they moved depended on Corey's mother's boyfriends, her drug addiction and other private interests. Because of the records—with evidence of Corey's intellectual disability—remaining at the places the family constantly moved

⁴⁸ "IACHR Petition," Death Penalty Worldwide, accessed 2022-12-29, PDF, <https://www.deathpenaltyworldwide.org/wp-content/uploads/2020/10/IACHR-Petition.pdf>, p.7–10.

away from, Corey never received a diagnosis. Corey's mother was addicted to heroin and physically abused him with her heroin-addicted boyfriend. Corey's mother has been described as cold and narcissistic, mocking him for his intellectual disabilities. Eventually she abandoned Corey, age 13, to the social service system. When Corey turned 18, he was sent home from his last placement despite a note written by a social worker describing her concern about "Corey's ability to survive given his mother's values and lifestyle."⁴⁹

Benjamin explained Jones was likeable and more than the horrible things he did "during the short time that he was severely addicted to drugs and running around with bad influences." Jones lacked moral support and positive role models. They never had goals for the future because the family lived in poverty. Jones' mother was addicted to drugs and physically abused her children regularly. She also said she never loved them. Jones' father was never present, as he was convinced that the children were not his. The twins were moved around to different family members. After being separated at the age of 10, Jones tried to kill himself three times. One time "Quin shot himself in the chest." Benjamin later learned that Jones may have been sexually abused by one of their other siblings and that Jones numbed the pain with drugs and alcohol.⁵⁰ Jones' mother once threatened him with getting a gun and shooting him.⁵¹

Grant's abusive single-mother had nine children including Grant— "To say he was born into progressively worsening poverty and unmet medical and emotional needs would be an understatement." When Grant was born, his oldest sister was six years old and had to take care of her siblings. Grant started stealing when he was nine years old to provide for himself and his siblings.⁵² When Grant was 12 years old, he was sent to the Missionary Cosmopolitan Home in Wewoka and later Oklahoma's Boley State School for Boys and the Helena State School for Boys. The publicized and widespread scandal called "Oklahoma Shame" was about Oklahoma's treatment of the charges in its juvenile institutions. During this time, Grant was in two of their facili-

⁴⁹ Donald P. Salzman, Ronald J. Tabak and Thania Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson* (New York: Skadden, 2020), https://drive.google.com/file/d/1fIglzDJtPIHxu9-nMS49o_rqU8plKwTp/view, p.5-7.

⁵⁰ Benjamin Jones, *Declaration of Benjamin Jones*, p.1-4.

⁵¹ Mattie Long, *Declaration of Mattie Long*, p.2.

⁵² Sarah M. Jernigan and Meghan LeFrancois, *JOHN MARION GRANT: A Case for Clemency* (Oklahoma City: Office of the Federal Public Defender, 2021), <https://drive.google.com/file/d/1knMxPUpch1ozegKNg1pKEx2Xxwe8tKXD/view>, pp.4-9.

ties. News articles wrote about whippings, rapes, assaults and solitary confinement as punishment on children for up to 108 days. Other boys in the institutions during the same time as Grant, testified that the abuse happened to Grant. Family members testified that Grant's personality changed after the institutionalization and that he returned with mental health issues. Experts held that incarceration of children—with these conditions—was likely to result in “irreversible emotional injury.”⁵³

During the trial, Rhoades' defense lawyers focused on the fact that Rhoades had been severely abused before being adopted at the age of four. Both his biological mother and adoptive mother testified about his turbulent childhood. For example, Rhoades witnessed his biological mother get raped by his biological father. He was also almost drowned by his mother's boyfriend. When he was adopted, he "hid food, defecated in the closet and drawers." The lawyers held that the childhood trauma led to his brain abnormality which impaired his judgment.⁵⁴

During his childhood, Hummel was controlled by his mother, which later in life made him unable to express his emotions.⁵⁵ Hummel's sister Neata Woody has said that her parents abused them growing up, that their mother used a belt to punish them. Neata took care of Hummel, even though their mother was at home. In addition, she held that her brother and his wife had financial problems.⁵⁶ Similarly, Smith had an abusive father, and the family lived in abject poverty. Because of the family's socio-economic status, they could not hire a lawyer for Smith.⁵⁷

Not only were several of the defendants not given fair conditions as children, but as exemplified by the cases of Montgomery, Corey, Grant and Jones, the state also failed to protect the children when the state had the opportunity. In Grant's case the state itself was even one of the perpetrators. Moreover, no child should have to steal to afford food or attempt to take their own life repeatedly without access to help. As noted earlier, the state has an obligation to respect, protect and fulfill the human rights of all, especially children's rights.

⁵³ Jernigan and LeFrancois, *JOHN MARION GRANT*, pp.9–18.

⁵⁴ “Rhoades v. Davis, No. 16-70021: Appendix A,” Supreme Court of the United States, accessed 2022-12-29, PDF, https://www.supremecourt.gov/DocketPDF/18/18-9614/102526/20190610153229347_Appendix.pdf, a7, a.13, a.54, a65–a66.

⁵⁵ Hummel v. Lumpkin, No. 19-8792 (2020), p.6, 12–13.

⁵⁶ Hummel v. Lumpkin, No. 19-8792 (2020), p.9–10.

⁵⁷ Equal Justice Initiative, “Alabama Executes Willie Smith,” *Equal Justice Initiative*, October 10, 2021, <https://eji.org/news/willie-smith-alabama-execution/>.

4.2.2 Brain injury, intellectual disability and mental health issues

When Montgomery was 17, she became engaged to her older stepbrother Carl at Judy's instigation. Before she turned 18, she had “experienced nine out of ten adverse childhood experiences that can lead to trauma.” Montgomery's brain damage has been visible when scanning her brain and brain material has been missing which in practice led to difficulties in her ability to regulate emotions, plan, think through actions and control impulses. In other words, “the trauma impaired her functioning in every sphere of her existence.” Montgomery lived in dire poverty and between 1984 and 2000, she moved 43 times. After divorcing Carl, she married Kevin Montgomery who continued to physically and sexually abuse her. For example, “Carl shoved Lisa, who was naked and getting out of a shower, against a wall heater that burned her flesh while he forced her to have sex. He beat her, tied her in stress positions, poured hot wax on her, forcibly inserted glass bottles in her anus and vagina, held a knife to her throat, and sexually assaulted her.” After giving birth to four children in four years, Montgomery was sterilized under pressure from Carl and Judy. Montgomery lived with bipolar disorder and her mental health deteriorated more and more. Her psychotic symptoms appeared regularly, “She descended into a near constant state of dissociation and depersonalization.” Montgomery began drinking heavily.⁵⁸

Corey's lawyers stated that: “Corey Johnson suffers from all of the impairments identified by SCOTUS in *Atkins v. Virginia* that undergird why the Court held that the death penalty cannot be applied to people with intellectual disability.”⁵⁹ For various reasons, “No appellate court has ever reviewed a lower court ruling based on the comprehensive evidence that now exists, evidence showing Mr. Johnson is categorically ineligible for the death penalty.” Instead, his defense team argued that he was not intellectually disabled. Today, new medical and legal standards exist compared to when Corey grew up and was convicted. Corey was described as “easily influenced”, having troubles functioning alone on a day-to-day basis. Currently, there are three criteria in the definitions of intellectual disability—Corey met all of them. When he was eight, 12, 16 and 23 he scored 72, 75, 65 and 73 respectively on IQ tests, showing a signifi-

⁵⁸ “IACHR Petition,” Death Penalty Worldwide, p.13–17.

⁵⁹ Salzman, Tabak and Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson*, p.8.

cant limitation in Corey's intellectual functioning. A wide variety of testimonies has described significant limitations in Corey's adaptive functioning. At 45, Corey was tested for the last time, with results showing that he “was still at an elementary school level.”⁶⁰

Forensic psychologist Dr. McGarrahan held that Hummel may have suffered from a combination of personality disorders, including narcissistic, antisocial, schizoid, and borderline personality disorders. Dr. McGarrahan held that Hummel killed his family “in a flood of emotional rage” after 30 years of repressed emotions because of his controlling mother and military service.⁶¹

The U.S. Court of Appeals for the Eleventh Circuit agreed that the analysis used in Smith's case is outdated and faulty. The court acknowledged that Smith's low intellectual functioning would make him ineligible for the death penalty today but would not retroactively apply the decisions. For example, Smith had “the reading skills of an eighth grader and the math skills of a sixth grader.”⁶² In conclusion, Alabama violated the Americans with Disabilities Act by failing to provide assistance to Smith when he chose his method of execution. Lethal injection is a more painful method than nitrogen hypoxia but Smith's intellectual disability made it impossible for him to make this decision without help.⁶³

Similarly, Missouri used a medically outdated and unconstitutionally restrictive definition of intellectual disability before executing Ernest. He was constitutionally barred from execution under *Atkins v. Virginia*—using the death penalty against individuals with intellectual disability is equal to cruel and usual punishment. In IQ tests, he scored between 67 and 77 (“below the threshold generally recognized as intellectually disabled.”). In addition, Ernest’s mother lived with severe addiction which led Ernest to be born with fetal alcohol syndrome. During a surgery for Ernest’s brain tu-

⁶⁰ Salzman, Tabak and Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson*, p.1–4.

⁶¹ *Hummel v. Lumpkin*, No. 19-8792 (2020), p.11–14.

⁶² Equal Justice Initiative, “Alabama Executes Willie Smith.”

⁶³ Equal Justice Initiative, “Alabama Executes Willie Smith.”

mor in 2008, 20 percent of his brain tissue was removed, further reducing his intellectual capacity.⁶⁴

4.2.3 Misogyny and socioeconomic status

First, Montgomery's defense was led by David Owen. He had no experience with clients with mental illness, nor with women who had been sexually assaulted. Following the recommendation of national experts, Judy Clarke joined the defense team. Because of Owen's inability to accept that a woman was leading the case, he asked the male federal judge Gary Fenner for help—Fenner ordered that Clarke would be removed from the case. Owen was left in charge with Frederick Duchardt, "known throughout the United States for his poor record in representing individuals accused of capital crimes." The investigator Ron Ninemire admitted he was "not going to take any orders from any damn woman" and another male in the defense team stated that he "simply didn't believe in mitigation." Second, in a petition for writ of habeas corpus, Montgomery stated that "her trial lawyers were grossly ineffective." The district court denied relief and refused to grant a Certificate of Appealability, she could not appeal. Third, "Mrs. Montgomery's trial attorneys bungled her defense and failed to present the full extent and impact of her childhood torture and sexual abuse. There are too many failures to discuss each in depth here; Mrs. Montgomery's post-conviction lawyers in federal post-conviction proceedings catalogued the oversights, mistakes, misrepresentations, and inattention in five hundred pages."⁶⁵

The state first failed to protect Montgomery from future abuse when they moved Diane from the house without investigating Montgomery's situation. Later—after being told by Montgomery what was happening to her—Montgomery's cousin David Kidwell failed to make a report, even though he was a police officer. School administrators further failed to act after Montgomery's grades deteriorated and she always wore dirty and ragged clothes. After nine months of knowing, Judy reported the rapes to the Child Welfare Office. No action was taken as the social worker trusted

⁶⁴ Bellware, "Missouri is slated to execute Ernest Johnson. Lawmakers and the pope want his life to be spared."; Death Penalty Information Center, "Missouri Moves to Execute Intellectually Disabled Death-Row Prisoner, As Former Governor, Court Justice, and Faith and Rights Leaders Seek Mercy."

⁶⁵ "IACHR Petition," Death Penalty Worldwide, pp.3–5, 19–25.

Judy could protect Montgomery, without the knowledge that Judy herself was sexually exploiting her. According to Judy, she took Montgomery to see a local doctor. The doctor—despite knowing about the rapes—did not report it to the police, even though being mandatory under Oklahoma law. Judy eventually divorced Jack and testified about the sexual abuse of Montgomery in the divorce proceedings. She stated that “He was in her. He was pumping her.” The judge did not report this. To retain custody, Montgomery and her mother attended family counseling meetings during the divorce proceedings. Although the counselors noted Judy's lack of empathy, the violence at home and Montgomery's inability to express emotions, they failed to report the abuse to authorities—even though it is mandatory under Oklahoma law.⁶⁶

4.2.4 Due process challenges

Higgs' maintained his innocence for 25 years. It has been proven beyond doubt Haynes killed the women and there is no evidence that Higgs had either motive or control over Haynes' actions. Higgs' conviction rested solely on Gloria's testimony. In addition, Haynes testified that Higgs' did not threaten him. Meanwhile, Gloria confessed and was used as a key witness in both the trials of Haynes and Higgs.⁶⁷ Until 2012 it was unknown to Higgs that Gloria was a suspect in an unrelated homicide in Baltimore after the Route 197 murders. The same day that Gloria was named as the killer in the Baltimore murder, "Baltimore authorities were in contact with the federal authorities responsible for Mr. Higgs's capital prosecution." This evidence was withheld from Higgs for 13 years.⁶⁸ Among all the people involved in the Baltimore murder, Gloria was the only one never questioned or charged.⁶⁹ Accordingly, Higgs argued that Gloria was not charged because his credibility needed to be protected as he would be a key witness in Higgs' federal triple murder trial. Gloria was protected in exchange for his testimony against Higgs. In conclusion, the government withheld the information regarding Gloria required under *Brady v. Maryland* (1963).⁷⁰

⁶⁶ "IACHR Petition," Death Penalty Worldwide, p.10–12.

⁶⁷ "Higgs v. Watson: 7th Cir. Stay Motion 2021-1-14," Death Penalty Information Center, accessed 2022-12-29, PDF, <https://documents.deathpenaltyinfo.org/Higgs-v-Watson-7th-Cir-Stay-Motion-2021-1-14.pdf>, p.6–8.

⁶⁸ "Higgs v. Watson: 7th Cir. Stay Motion 2021-1-14," Death Penalty Information Center, p.8–12.

⁶⁹ "Higgs v. Watson: 7th Cir. Stay Motion 2021-1-14," Death Penalty Information Center, p.13.

⁷⁰ "Higgs v. Watson: 7th Cir. Stay Motion 2021-1-14," Death Penalty Information Center, p.17–18.

Furthermore, Hummel's trial lawyer Larry Moore, after having Hummel as a client and failing to show mitigation evidence, worked in the D.A.s office seeking Hummel's death. Hummel's lawyer Michael Mowla called this "an irresolvable conflict of interest."⁷¹ Before Rhoades' trial, the prosecutor exercised her peremptory strikes against Berniece Holiday, a black woman, and Gregory Randle, a black man. Rhoades' legal team held that the court's action was a violation under *Batson v. Kentucky* (the peremptory strikes may not be racially motivated).⁷²

Grant's legal team held that the state and his trial lawyers misleadingly argued the crime was a random act of violence after not getting as much food as he wanted. The defense failed to show evidence about the relationship Grant had with Carter, showing that the crime happened after the only friend he had rejected him. The "sudden abandonment" could have been used as mitigating evidence.⁷³ Grant's trial lawyers failed to explain the crime and present the abuse he had been subjected to. During the legal process, Grant's counsel both married and divorced one another, hardly speaking to each other during the divorce. In addition, the Oklahoma Bar Association later investigated co-counsel Amy McTeer about her mental competency as she had suffered from undiagnosed bipolar disorder during Grant's trial—her law license was revoked.⁷⁴

Stouffer's legal team raised questions about the trial, for example regarding the jury selection process, where the voir dire was not carried out individually. One argument was that one juror had "failed to disclose a previous arrest."⁷⁵ In addition, Hummel's legal team pointed out that his constitutional rights were violated as "a number of potential jurors who were summoned for Appellant's trial [were] excused by Bailiff Morales outside of the presence of Appellant and his attorneys and without the knowledge or consent of Appellant or his attorneys."⁷⁶

The protocol that was used as evidence that Jones would be a danger in the future has subsequently been rejected in death penalty cases as it is a flawed methodolo-

⁷¹ Brant Bingamon, "Death Watch: Defense to D.A. – A Conflict of Interest?" *The Austin Chronicle*, March 13, 2020, <https://austinchronicle.com/news/2020-03-13/death-watch-defense-to-d-a-a-conflict-of-interest/>.

⁷² *Rhoades v. Davis*, 852 F.3d 422 (5th Cir. 2017), p.14–18.

⁷³ Jernigan and LeFrancois, *JOHN MARION GRANT*, pp.23–29.

⁷⁴ Jernigan and LeFrancois, *JOHN MARION GRANT*, p.31–34.

⁷⁵ *Stouffer v. State*, 147 P.3d 245 (Okla. Crim. App. 2006).

⁷⁶ *Hummel v. State*, No. AP-76,596 (Tex. Crim. App. 2013), p.13.

gy. The jury and the court discredited the new neuroscientific findings that showed that people's brains were not fully developed and matured at the age of 18—the brain is not fully matured until a person's mid-20s. During Jones' federal habeas proceeding, his state-appointed legal team missed filing deadlines and did not raise relevant legal issues, nor did they challenge the misleading evidence leading to the death sentence.⁷⁷

As previously noted, Corey's defense did not raise the fact that he was intellectually disabled, nor did the jury hear from first-hand witnesses about his childhood and the traumas he experienced. In addition, they did not present the jury with evidence regarding how Corey's experiences and trauma affected him, particularly because of his intellectual disability. In summary, his defense team lacked a mitigation expert and partly because of this, they did not properly investigate his life.⁷⁸

One of Smith's trial lawyers was later disbarred, and another "had been admitted to the bar only eight months before Mr. Smith's trial, which was her first trial as a practicing attorney." In addition, Alabama was one of few states where a unanimous jury verdict was not required and in Smith's case two judges voted against the death penalty. After Alabama denied Smith's request to have his pastor with him in the execution chamber, Smith's legal team held that Alabama's decision violated federal law—the right to religious exercise. SCOTUS barred the execution because of the decision and Justice Elena Kagan wrote in an opinion that "the law guarantees Smith the right to practice his faith free from unnecessary interference, including at the moment the State puts him to death."⁷⁹

4.2.5 Racial bias

A majority—six of eleven—of the executed defendants were black: Corey, Ernest, Higgs, Smith, Jones and Grant, even though, as previous research and CRT claims, the majority of the American population is white. There is no evidence that the trauma, after childhoods marked by abuse and neglect, was treated—arguably partly because of the socioeconomic vulnerability of most of the families. This can be the aftermath

⁷⁷ Clemency For Quin, "Clemency For Quin," *Change.org*, n.d. <https://www.change.org/p/texas-governor-greg-abbott-clemency-for-quin>.

⁷⁸ Salzman, Tabak and Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson*, p.5–7.

⁷⁹ Equal Justice Initiative, "Alabama Executes Willie Smith."

of racist policies such as redlining and school segregation and further, be an example of the racial wealth gap which has “consistently impeded inhibited African Americans from having access to opportunities to realize the American dream,” in accordance with CDTP-theories. Grant's mother had children with five different men and Grant's father was a dark-skinned black man, leading Grant to be treated differently in the family.⁸⁰ Even if the family does not belong to the social upper class, it is an example of the racist beliefs that exist in society and according to CDTP, laid the foundation for these notions to be institutionalized.

Furthermore, racial prejudice has been shown in several of the cases, notably in Corey’s and Jones’ cases. As Corey grew up "New York City area schools were under significant pressure not to label urban Black students as intellectually disabled." Co-rey’s lawyers have highlighted that racial bias led to the failure, or reluctance, to diagnose Corey and further that prejudices and societal fear about violent black offenders were part of the legal process—as the prosecutor made arguments to the jury that did not reflect "the demographics of the community where his crimes occurred."⁸¹ In Jones’ case, attention has been drawn to unequal treatment as Riky Roosa—the 18-year older white ringleader—was convicted of two murders but sentenced to life with the possibility of parole.⁸² In addition, prior to opposing Ernest's disability claim, Alabama had opposed claims by prosecutors arguing several black defendants were wrongly convicted.⁸³

Although Rhoads himself was white, it is important to note that his claim under Batson is about racial bias, indicating racism within the system. It is impossible to discuss or determine whether Cox, through his white privilege, was treated better than others in the legal system since he—unlike the others—confessed, waived his appeals and "volunteered" to be put to death. However, Stouffer’s legal team tried to stay his execution based on problems regarding the lethal injection. Like Cox, Stouffer was a white man. Even though his team raised legal questions about the trial, these argu-

⁸⁰ Jernigan and LeFrancois, *JOHN MARION GRANT*, p.6–7.

⁸¹ Salzman, Tabak and Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson*, p.5.

⁸² Clemency For Quin, “Clemency For Quin.”

⁸³ Death Penalty Information Center, “Missouri Moves to Execute Intellectually Disabled Death-Row Prisoner, As Former Governor, Court Justice, and Faith and Rights Leaders Seek Mercy,” *Death Penalty Information Center*, October 1, 2021, <https://deathpenaltyinfo.org/news/missouri-moves-to-execute-intellectually-disabled-death-row-prisoner-as-former-governor-court-justice-and-faith-and-rights-leaders-seek-mercy>.

ments were not based on an assumption that Stouffer was discriminated against. In other terms, the two white men without claims on intellectual disability and/or trauma, had no claims regarding discrimination in their cases. The other three white defendants—Montgomery, Hummel and Rhoades—introduced strong claims regarding mental health issues and severe trauma. In addition, these three cases highlighted due process challenges, including a conflict of interest, a Batson claim and misogyny.

Furthermore, claims regarding sexual orientation and age have not been captured, even though it is important to mention that when Jones committed his crime at the age of 20, his brain was no more developed than that of juvenile offenders who cannot be sentenced to death. This suggests that there was possibly an unsubstantiated perception by the jury and the judge, of black youths or children as more developed than other children and youths of the same age. Similarly, it can be compared to Corey's case, where his legal team raised the societal fear of violent black offenders.

4.2.6 Covid-19, botched executions and a lame duck period

After being diagnosed with Covid-19, Higgs and Corey experienced symptoms up to a month later. The district court held that—because of the lung damage—Higgs and Corey would suffer from flash pulmonary edema.⁸⁴ The pain inflicted on the defendants with lethal injection met the Eighth Amendment standard justifying injunctive relief—"Flash pulmonary edema creates 'a sensation of drowning akin to waterboarding.' That same sensation 'is deliberately elicited in the enhanced interrogation technique called waterboarding, which is... a form of torture.'"⁸⁵

Despite state officials saying the execution was carried out without complications, eyewitnesses claimed Grant vomited repeatedly and severely convulsed throughout the body—for up to 15 minutes. The autopsy report confirmed this.⁸⁶ Consequently, the Oklahoma Pardons and Parole board recommended clemency for

⁸⁴ "COVID Emerg App Stay Execution," Supreme Court of the United States, accessed 2022-12-17, https://www.supremecourt.gov/DocketPDF/20/20A131/166372/20210114171025562_21-01-14_COVID_EmergAppStayExecution.pdf, p.11–15.

⁸⁵ "COVID Emerg App Stay Execution," Supreme Court, p.19–20 ; Salzman, Tabak and Charmani, *Petition to President Donald J. Trump for Executive Clemency and Commutation of Death Sentences On Behalf of Corey Johnson*, p.9.

⁸⁶ Death Penalty Information Center, "Autopsy Shows John Grant Suffered Pulmonary Edema and Intramuscular Hemorrhage and Aspirated Vomit During Oklahoma Execution," *Death Penalty Information Center*, February 14, 2021, <https://web.archive.org/web/20220216164304/https://deathpenaltyinfo.org/news/autopsy-shows-john-grant-suffered-pulmonary-edema-and-intramuscular-hemorrhage-and-aspirated-vomit-during-oklahoma-execution>; "John Grant Autopsy Report," Internet Archive, accessed December 17, 2022, <https://web.archive.org/web/20220217201402/https://documents.deathpenaltyinfo.org/John-Grant-Autopsy-Report.pdf>.

Stouffer. A Board member said: “That process is obviously flawed. We have had individuals on the table suffering for 20 and 30 minutes apiece. And I don’t think that any humane society ought to be executing people that way until we figure out how to do it right.” The US Court of Appeals for the Tenth Circuit described what happened to Grant without using the words "vomit" or “convulsions” and did not grant Stouffer a stay.⁸⁷ If the state granted the stay, it would have given legitimacy to the claims that Grant suffered unnecessarily during his execution. These examples cannot be directly linked to intersectionality but depicts a penalty which cannot ensure the defendants their right not to be subjected to torture. However, the competence of the legal teams and possible bias of judges may have influenced the outcome.

Furthermore, Higgs, Montgomery and Corey were executed right before the inauguration of Joe Biden—during a lame duck period. Higgs' legal team highlighted the fact that it could not weigh more heavily to continue an arbitrarily accelerated execution schedule than to ensure Higgs' constitutional rights.⁸⁸ In addition, Texas carried out the execution of Jones without media witnesses—even though reporters were present at the prison, not being let in the viewing room. The execution was “a failure of transparency.”⁸⁹ In October 2020, the US set a date for Montgomery's execution, without notifying her legal team—making it difficult for her to exhaust her rights.⁹⁰ These examples raise questions about the state's motives or bias. Altogether, these questions should not need to be asked when the defendants have rights that the state must ensure, and the executions are irrevocable.

4.3 Conclusions: Intersectionality

Montgomery was the only woman to be executed in 2021. She was also the only defendant who suffered a long period of sexual violence and forced prostitution. Montgomery’s family suffered financially, and she was—because she was a girl—exploited

⁸⁷ Death Penalty Information Center, “Oklahoma Executes Bigler Stouffer After Governor Rejects Board Recommendation for Clemency, Federal Courts Deny Stay,” *Death Penalty Information Center*, December 7, 2021, <https://deathpenaltyinfo.org/news/oklahoma-governor-rejects-board-recommendation-for-clemency-for-bigler-stouffer-federal-courts-deny-execution-stay>.

⁸⁸ “Higgs v. Watson: 7th Cir. Stay Motion 2021-1-14,” *Death Penalty Information Center*, p.30.

⁸⁹ Death Penalty Information Center, “Citing ‘Inexperience’ and ‘Miscommunication,’ Texas Conducts Execution Without Media Witnesses,” *Death Penalty Information Center*, May 24, 2021, <https://deathpenaltyinfo.org/news/citing-inexperience-and-miscommunication-texas-conducts-execution-without-media-witnesses>.

⁹⁰ “IACHR Petition,” *Death Penalty Worldwide*, p.5.

by her mother. That the state failed to protect Montgomery as a child may be because of various factors, such as the family's socioeconomic status, misogyny, or an ignorance or unwillingness to understand the vulnerability of young girls, especially when their relatives are the perpetrators. Here, there may have been a false sense of security because Judy herself is both a woman and a mother. Regardless of the reasons for the state's repeated failure to protect Montgomery, it is established that several adults with knowledge of the abuse, failed the law and her rights as a child and a young girl. In addition, being a woman made her extra vulnerable in her legal process—where her own defense team expressed, and acted out of, misogyny. Her history of abuse and neglect, along with the evidence supporting her mental health issues and brain damage, adds another layer of vulnerability—where Montgomery arguably had a harder time expressing her feelings during her childhood, and later, because of the traumas she lived with, had difficulty participating in the best way possible in her own legal process led by misogynistic men. It is, however, worth mentioning that Montgomery did not have to endure racial bias because she was white.

Claims concerning violations of religious freedom have not been found in many cases, but the difficulties Smith initially faced may have to do with racial prejudice and ableism, because there was no other basis for the court's initial refusal. Jones', Ernest's, Corey's and Smith's cases—all black men—showed the continuing difficulty in raising intellectual disability claims even with strong evidence, as several of them would be categorically ineligible for the death penalty today. Alabama's repeated opposition to claims concerning black defendants, suggests that Ernest's legal issues regarding his intellectual disability may have been enhanced because of his skin color. The importance of a good legal team—investigating the defendant's life and presenting all mitigating evidence—should be mentioned again. Besides Montgomery's and Smith's cases, most of the defendants came from vulnerable socioeconomic backgrounds, making it difficult for the defendants and their families to afford experienced and talented lawyers. Naturally, this could increase the possibility that the defendants will be discriminated against and that their right to due process will be violated. Evidence illustrates that in these cases, the legal teams mainly failed to present mitigating evidence. These mistakes or omissions indicate either ineffective counsel or bias and

while the former may be true, it can nonetheless be because of subconscious bias—violating the defendant's constitutional rights, regardless. For instance, Grant's trial counsel was completely ineffective and Hummel's trial lawyer was significantly biased. In addition, even the state failed its obligations, leaving the defendants more vulnerable. For example, the state failed to notify Montgomery's legal team about her execution date and did not give Smith access to help when deciding his execution method, even though the state had knowledge of their intellectual disabilities.

Higgs' claim about the incentivized testimony of a co-defendant, not least after reading *Sentenced to death, but innocent*, evokes a strong feeling of Higgs' possible innocence. Moreover, the jury voting on Jones' future when he was just 20 years old, with the prosecution arguing that he was beyond redemption—which turned out to be false—further supports the notion that it is difficult to win over the state as a poor, black man when the state has already decided on who they intend to accuse of a certain crime. A lack of will from the prosecution to understand the circumstances that led the defendants to the crime have been captured. For example, Grant was put to death by the same state guilty of the institutionalized abuse he was exposed to during his childhood. More social safety nets during the defendants' childhoods could have stopped them from the path they took, possibly saving their victims.

To conclude the analysis, ten out of 11 cases were problematic or indicated ambiguities. The aim of this essay has been to capture patterns regarding discrimination and identify which of the defendants were extra vulnerable in the criminal justice system. Class hatred, misogyny, ableism and racial bias have indeed characterized most of the cases at different levels—both in society prior to the convictions and in the legal processes leading up to the executions. From an intersectional perspective, black poor men with intellectual disabilities and a history of abuse, along with poor women with mental health issues, intellectual disabilities and a history of abuse, were particularly vulnerable—because of their life circumstances as well as the multifaceted discrimination they were exposed to. These individuals include Montgomery, Smith, Corey and Jones. However, Higgs' case shows it can be enough to be a black man in the wrong place and at the wrong time. In conclusion, the findings show that capital punishment in the US still is a fatally flawed system—where black people, intellectually disabled

people and the poor continue to be discriminated against, without sufficient protection by, and from, the state. This equates to a serious form of injustice in the American criminal justice system.

4.4 Future research

Even though the majority on death row are men, it would be interesting to examine just female defendants in relation to intersectionality in the criminal justice system and on death row. Due to this project's time limitation, it was not possible to compare Montgomery's case with other female defendants—in order to investigate if there were patterns regarding misogyny, or if Montgomery suffered less discrimination than, for example, a black woman with a similar background.

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