

No. WR-84,438-01

IN THE TEXAS COURT OF CRIMINAL APPEALS

EX PARTE TERENCE TREMAINE ANDRUS,
Applicant.

On Application for Writ of Habeas Corpus in
Cause 09-DCR-051034-HC1
In the 240th District Court, Fort Bend County

BRIEF OF AMICUS CURIAE EIGHT MILLION STORIES, INC.

THIS IS A CAPITAL CASE.

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INTEREST OF AMICUS CURIAE¹

Eight Million Stories, Inc. is a Houston, Texas-based non-profit organization founded in 2017 that is dedicated to transforming the lives of vulnerable youth, as Applicant Terence Andrus once was, through education, skills training, employment, and authentic relationships. Young people, especially boys of color, are disappearing from schools, the workforce, and their communities. Fueled by zero-tolerance policies and in-school policing, the school-to-prison pipeline sweeps a disproportionate number of minority, low-income youth into the criminal justice system. Further, those who emerge from the criminal justice system without support often struggle to reenter society and face a high risk of recidivism.

Eight Million Stories exists to break this lifelong cycle of poverty and incarceration by providing support and opportunities to disconnected youth who have been pushed out of the school system. The organization seeks to bridge the achievement gap by providing individualized educational programming that includes social and emotional learning, jobs skills training, career exploration, and employment opportunities. Eight Million Stories believes that providing young people who have been expelled from our school systems the opportunity to complete their education and find sustainable employment drastically reduces rates of

¹ No fee has been paid or will be paid for preparing this brief, and no person or entity other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. TEX. R. APP. P. 11(c).

recidivism. Its goal is for students to learn from their past mistakes and be in a position to rewrite their own stories.

Eight Million Stories has a compelling interest in ensuring that criminal defendants who face the ultimate punishment—many of whom are the product of the Texas juvenile-justice system—are able to present their stories to the juries that will decide their fates by offering mitigating evidence related to their backgrounds. Indeed, if Eight Million Stories existed during Mr. Andrus’ childhood, we may not be submitting this brief today. Mr. Andrus did not commit the crime for which he was sentenced to death in a vacuum. Instead, Mr. Andrus was molded by the effects of systemic injustices stretching back hundreds of years, culminating in a school-to-prison pipeline that vilifies and marginalizes boys of color.

Eight Million Stories believes that its experience with these issues will aid the Court as it considers the question presented in this case: Whether trial counsel’s deficient performance in failing to investigate and present readily available, compelling mitigating evidence, including the circumstances of Mr. Andrus’ upbringing, prejudiced him in the punishment-phase of his death-penalty trial.

STATEMENT OF FACTS

Eight Million Stories defers to the Applicant's submission for a comprehensive recitation of the facts. Briefly, as relevant to Eight Million Stories' interest, Applicant Terence Tremaine Andrus is before this Court on a writ of habeas corpus. After an extensive, eight-day evidentiary hearing that unleashed a "tidal wave" of mitigating evidence that was not presented to the sentencing jury, the trial court recommended to this Court that relief be granted and Mr. Andrus receive a new sentencing trial. *Andrus v. Texas*, 590 U.S. ___, 140 S. Ct. 1875, 1878–79 (2020) (per curiam). This Court disagreed in a *per curiam*, unpublished opinion. *Id.* at 1878. Mr. Andrus appealed the Court's decision to the Supreme Court of the United States, which held that Mr. Andrus' trial counsel's performance fell below an objective standard of reasonableness such that it was deficient within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). *Andrus*, 140 S. Ct. at 1881–85. The Supreme Court remanded to this Court to determine whether counsel's deficient performance prejudiced Mr. Andrus.

The "tidal wave" of mitigation evidence put before the trial court included the details of Mr. Andrus' unfortunate childhood and the circumstances under which he grew up. This background, and the path it set him on toward incarceration, unfortunately, is not unique. Children who grow up under circumstances like these and have no support frequently end up in the criminal justice system, an outcome

Eight Million Stories exists to prevent.

Through this amicus brief, Eight Million Stories seeks to put Mr. Andrus' story in a broader context: a Black boy living in poverty in Houston, Texas, who first encountered drugs through his mother at the developmentally sensitive age of just six, and whose experience with the now-defunct failure that was the Texas Youth Commission steered him toward recidivism, rather than reconnection with the community. Prejudice is apparent from the record. If this evidence had been presented to the sentencing jury, unquestionably at least one juror would have voted in favor of life imprisonment rather than condemning Mr. Andrus to death.

ARGUMENT

The Supreme Court of the United States decided that Mr. Andrus' court-appointed attorney was constitutionally defective. His counsel's deficient performance did not live up to the standards the legal profession maintains to protect one of society's most vulnerable populations—indigent defendants—who are entitled to certain protections, including the right to due process and the right to be assumed innocent until they are proven guilty beyond a reasonable doubt.

The question now before this Court is simple: If Mr. Andrus had been provided with adequate representation, would just one juror have voted to spare his life? The record in this case can only lead this Court to answer that question in the affirmative. As explained in more detail below, adequate representation would have

presented a veritable “tidal wave” of mitigation evidence and resoundingly demonstrated that Mr. Andrus was—and is—worthy of mercy.

I. THE SCHOOL-TO-PRISON PIPELINE DISPROPORTIONATELY AFFECTS BLACK MALE CHILDREN, AS MR. ANDRUS ONCE WAS.

Mr. Andrus is but one of countless Black male youths that have found themselves swept up in the school-to-prison pipeline. Generally, the term “school-to-prison pipeline” refers to policies and practices that intersect in a way that cumulatively results in students being pushed out of school and into prison. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1019 (2009). The negative consequences associated with incarcerating a juvenile are myriad, both to the youth themselves and to society as a whole. Empirical research shows that incarceration produces long-term detrimental effects on youth, including reinforcement of violent attitudes and behaviors; more limited educational, employment, military, and housing opportunities; an increased likelihood of not graduating from high school; mental health concerns; and increased future involvement in the criminal justice system. Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 319–20 (2016) (hereinafter, “*Dismantling*”).

Not all students are equally affected by the school-to-prison pipeline. A student’s race, class, gender, and disability status are each predictive of whether that

student will enter the pipeline. Leah Aileen Hill, *Disrupting the Trajectory: Representing Disabled African American Boys in a System Designed to Send Them to Prison*, 45 FORDHAM URB. L.J. 201, 208–09 (2017) (hereinafter, “*Disrupting*”). Students living in poverty are more likely to enter the pipeline, as are students who are Black, male, or disabled. *Id.* at 209. “Individually, each of these markers increases the chances that a student will be suspended or expelled from school and funneled into the criminal justice system.” *Id.* Mr. Andrus carried all four markers—making his involvement in the school-to-prison pipeline all too predictable.

Once a child enters the criminal justice system, the school-to-prison pipeline takes hold, as prior incarceration is by far the strongest predictor of recidivism, outweighing other factors such as parent abuse or negligence; having peers present at the time of the offense; carrying a weapon; gang membership; gender; race; poor relationships with parents; and residing in a single-parent household. *Dismantling* at 320. Moreover, incarceration does not accomplish one of its primary objectives—detering criminal behavior. *Id.* Instead, juvenile justice processing has been found to *increase* delinquency and future involvement in the justice system. *Id.*

A. Students Who Are Black and Male, like Mr. Andrus, Experience a Disproportionate Amount of Discipline.

United States Department of Education data reveals that Black and Latino children are disciplined more often, suspended more often, expelled more often, referred to the police more often, and arrested more often than their white

counterparts. See U.S. Dep't of Educ., Office for Civil Rights, *2013-2014 Civil Rights Data Collection: A First Look* (2016) (hereinafter "CRDC"), available at <https://www.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

Black students experience the highest rates of excessive discipline. *Id.* at 4. Black students are more likely to be suspended whether they are in preschools or K-12 schools. *Id.* Black students are also more likely to be expelled from school and more likely to be referred to law enforcement by school officials. *Id.* at 4.

These disparities cannot be explained by more frequent or serious misbehavior by minority students. As the Department of Education has made clear: "in our investigations we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students. In short, racial discrimination in school discipline is a real problem." U.S. Dep't of Justice & Dep't of Educ., *Dear Colleague Letter on Nondiscriminatory Administration of School Discipline 3* (2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>. In fact, evidence suggests that some school administrators and teachers believe that some students, particularly African-American male students, simply cannot be taught, are "unsalvageable," and are prison-bound. *Dismantling* at 327.

Similarly, boys are generally subjected to greater discipline, including suspension and expulsion, than girls. *Disrupting* at 215. National data show that

while boys and girls each make up about 50% of the student population, boys make up nearly 75% of students suspended multiple times and expelled. *Id.* at 215–16. Gender bias appears to play a role in the targeting of boys. *Id.* at 216. Evidence shows that boys are often disciplined more harshly than girls because of stereotypes about boys and aggression, but most of the research points to the multiple risks associated with being male and Black. *Id.* Black males face more negative outcomes than any other group. *Id.*; see also Pedro Noguera, *THE TROUBLE WITH BLACK BOYS AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION*, at xvii (2008).

B. Black Children Disproportionately Experience Poverty, as Mr. Andrus Did.

One in three Black children lives in poverty, which is more than twice the rate for White children. *Dismantling* at 334. The level of poverty children confront is closely tied to their health, housing opportunities, level of nutrition, and early learning opportunities, all of which affect their cognitive development. *Id.* Poverty is associated with a range of conditions that increase the likelihood a child will enter the school-to-prison pipeline:

For instance, students born into poverty do not have access to resources that can support their academic success. They often lack access to quality healthcare, which is a necessary resource for healthy development. As a result, they are more likely to suffer from health conditions that affect their school readiness. The lack of access to quality healthcare is compounded by the fact that children who endure poverty are more likely to live in areas filled with environmental toxins

that are detrimental to their health and well-being. Housing conditions in impoverished neighborhoods are often poor and inadequate. Some children do not have homes and are forced to live in homeless shelters, where the lack of permanent housing undermines their sense of security. Children who do not have adequate housing often move more frequently and do not enjoy simple comforts many of us take for granted, such as a quiet study space. Crime and violence are also associated with areas of concentrated poverty. Children growing up under these conditions can develop a “toxic stress response.” This, of course, adds to the deluge of problems children in poverty face—all of which accompany them to school.

Disrupting, at 209–10. The vast majority of schools are not prepared or designed to address the range of challenges facing children who live in poverty. *See generally* Pedro Noguera, *A Broader and Bolder Approach Uses Education to Break the Cycle of Poverty*, 93 PHI DELTA KAPPAN 8 (2011) (hereinafter “*Broader and Bolder*”).

C. Students with Disabilities, Like Mr. Andrus, Are Disciplined Disproportionately.

Children with disabilities are also overrepresented in the school-to-prison pipeline. Students with disabilities are more than twice as likely as their nondisabled peers to receive one or more out-of-school suspensions. *Disrupting* at 214; *see also* CRDC at 4. Students with emotional disturbance are suspended or expelled at significant rates compared to their peers, even though the nature of their disabilities makes it difficult for them to manage their behavior. *Disrupting* at 214; *see also* Yael Cannon et. al., *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 416 (2013) (hereinafter “*Solution*”).

Students with emotional and learning disabilities are arrested at higher rates than their nondisabled peers. *Id.* at 215. Although they represent only 12% of the student population, they represent 25% of the students referred to law enforcement or subjected to arrest. *Id.* It is estimated that anywhere between 30 and 70 percent of young people in juvenile correctional facilities have disabilities. *Id.* In one study that examined youth across multiple juvenile justice settings, 70.4% were diagnosed with at least one mental health disorder, and 79.1% of those youth also met the criteria for at least one additional mental health diagnosis. *Solution* at 422.

D. Success Is Possible with Support.

These statistics are borne out in the student population Eight Million Stories serves. Of the 150 students served to date, 93% are male, 55% are Black and 100% qualify for free or reduced lunch. The average educational proficiency of these students is 7th grade. But Eight Million Stories believes that a child's potential is not predetermined by his race, class, gender, or disability status. Success is possible for any child with the right support. The truth of this philosophy is demonstrated in the program's success—of the 150 students served thus far, 60% gained employment and 40% gained their high school equivalency diploma, while only 3% have re-offended.

The record demonstrates that success was also possible for Mr. Andrus. In the few instances in which Mr. Andrus had support in his life, he was successful.

AppEHX12, 15.² Unfortunately, Eight Million Stories did not exist until after Mr. Andrus was a teen and already swept up in the school-to-prison pipeline. Perhaps if a program like Eight Million Stories had been available to Mr. Andrus, he would not be where he is today. The ramifications of the school-to-prison pipeline in Mr. Andrus's case were clearly brought to bear through the testimony and evidence adduced at the habeas evidentiary hearing and would have resulted in at least one juror voting against the death penalty.

II. THE EVIDENTIARY HEARING RECORD IS REPLETE WITH COMPELLING MITIGATION EVIDENCE RELATED TO MR. ANDRUS' UPBRINGING.

Powerful and persuasive mitigating evidence abounds in the record of the eight-day evidentiary hearing before the trial court. Particularly with respect to Mr. Andrus' upbringing, the testimony elicited during the evidentiary hearing offers important historical context that paints a vivid picture of the circumstances under which Mr. Andrus grew up. This evidence also gives a deeper resonance to other testimony offered by witnesses who discussed various aspects of Mr. Andrus' youth, including the fact that the environment he grew up in severely impaired his development during adolescence, giving him lasting deficits in his ability to cope, to build relationships, and to react appropriately to the world around him. If the original sentencing jury had heard this testimony, at least one of the jurors would have voted

² "AppEHX" refers to an exhibit offered by Applicant that was admitted into evidence during the trial court evidentiary hearing.

for life in prison rather than the death penalty.

A. Testimony from the Writ Hearing Provides Much-Needed Context Regarding Mr. Andrus' Neighborhood.

The record reflects that Mr. Andrus was born and raised in Houston's Third Ward, "a neighborhood . . . known for its frequent shootings, gang fights, and drug overdoses." *Andrus*, 140 S. Ct. at 1879. At the evidentiary hearing in the trial court, Mr. Andrus presented Dr. Tyina Steptoe as an expert on Black Houston and, specifically, the history of Third Ward. 4EHRR200.³ Dr. Steptoe detailed the rich history of the once-vibrant neighborhood and explained the local political and racially motivated actions taken that resulted in deterioration of Third Ward.⁴ 4EHRR203–232. If the sentencing jury had heard testimony from Dr. Steptoe, or a similarly qualified expert, such testimony likely would have facilitated a deeper and more resonant understanding among the jury of the neighborhood and circumstances in which Mr. Andrus was raised.

As developed during the habeas proceeding, Third Ward is the same

³ "EHRR" refers to the Evidentiary Hearing Reporter's Record from the evidentiary hearing. The volume number is listed first and the page number is listed last. For example, here 4EHRR200 refers to volume 4, page 200 of the Evidentiary Hearing Reporter's Record.

⁴ Dr. Steptoe is a professor of history at the University of Arizona. 4EHRR196. She received her Ph.D. from the University of Wisconsin in 2008. *Id.* She specializes in the history of the United States since the Civil War with a particular focus on race and gender and social and cultural history. 4EHRR197. The University of California Press published her book *Houston Bound: Culture and Color in a Jim Crow City* in 2015. 4EHRR197–198. It is a history of Houston from around World War I through the Civil Rights Movement. 4EHRR198. The book explains how different groups of migrants who came to Houston affected notions of race and culture within the city. *Id.* Dr. Steptoe also was born and raised in Houston. *Id.* Both her scholarly research and personal experience encompass Third Ward.

neighborhood where Mr. Andrus' mother, his biological father, and the male authority figures in his life grew up. AppEHX8, 9. The testimony elicited explained that this neighborhood was an epicenter of the crack epidemic in the 1980s and 1990s, Mr. Andrus' formative years. 4EHRR225–229. Drug use, distribution, and other forms of vice were a way of life during Mr. Andrus' childhood in this community, which was also shaped by larger social forces of economic neglect and racial discrimination spanning more than a century. 4EHRR210–229; AppEHX8-18.

As further developed in the habeas hearing, before the Civil War, counties like Fort Bend, Brazoria, and Matagorda that surround Houston were known as the “Texas Sugar Bowl” because of the rich, fertile land surrounding the area, which was very good for growing crops like sugar cane and cotton. 4EHRR204. The region therefore experienced a rapid expansion based on a plantation economy, which also led to the importation of Black slaves. *Id.* By the 1850s and the decade leading up to the Civil War, much of the Sugar Bowl had a Black slave majority population. *Id.*

Evidence developed during the habeas hearing also showed that, when Houston was formed in 1836 following the Battle of San Jacinto, six geopolitical entities, known as “wards,” were created in the area surrounding downtown. *Id.* Each ward had its own political representation. 4EHRR205. Because of the size and the structure of the wards, each ward felt like its own small town with its own business

and entertainment districts. *Id.* The wards ceased to exist as official political entities around the turn of the Twentieth Century, but they continued to exist as discernible neighborhoods around Houston for decades thereafter, and are still recognizable ways to refer to different neighborhoods. 4EHRR205–206.

As developed in the writ hearing testimony, Third Ward’s history as a Black community goes back to the Reconstruction Era. 4EHRR210. Third Ward is the site of the first public property purchased by African Americans in Houston: Emancipation Park. *Id.* But Third Ward did not have its own schools initially; all African-American children in the city had to go to school in Fourth Ward, the old Freedmen’s Town. 4EHRR210–211. Segregated schools were part of the legacy of the Jim Crow era that began right after the Civil War. 4EHRR213. Because the school board tended to allot more money to white schools, Houston’s Black schools were always underfunded. 4EHRR214. In addition to segregated schools, Houston’s railroads, street cars, and other public spaces and businesses were also segregated by the 1890s. 4EHRR213. The segregation of Houston was nearly complete by 1910, further compelling the concentration of African Americans in certain wards. *Id.*

During World War I, Houston’s economy expanded rapidly because the expansion of the ship channel permitted ocean-going vessels to enter the Port of Houston. 4EHRR207. A major rise in the exportation of cotton and oil meant the availability of more jobs, attracting diverse people to the city. *Id.* The Black people

moving into the area mostly settled in the Third, Fourth, and Fifth Wards, as these were historically Black neighborhoods. 4EHRR208.

As also developed during the habeas proceeding, the racial hierarchy created by legal segregation was buttressed by use of violent coercion. 4EHRR217. In some cases, mob violence communicated the message of racial inequality. *Id.* There was also a thriving and highly organized Ku Klux Klan in Houston right after World War I, reflecting a Klan revival across the United States. 4EHRR217–218. The mayor of Houston at the time publicly joined the Ku Klux Klan. 4EHRR218. Members of the police department were in the Klan. *Id.* Additionally, police brutality was common in Black communities. *Id.*

Before the push for integration began after World War II, Third Ward had its own thriving Black businesses and institutions—more vibrant than other southern cities, like New Orleans, Memphis, or Atlanta. 4EHRR219. But with the construction of interstate highways in the late 1950s—particularly I-45 that cut through Third Ward—the neighborhood started to decline. 4EHRR220–221. The interstate cut Third Ward off from other parts of the city and made mobility without a car very difficult. 4EHRR220. This development in turn led businesses to close down. 4EHRR220–221. Those who could afford to do so began to move out—particularly members of the Black middle class. 4EHRR230.

In the post-War era, economic opportunities disappeared as the

neighborhoods became abandoned—Houston’s Wards became centers of vice, particularly drugs and prostitution. 4EHRR223–224. When official red-light districts closed, vice tended to spread to neighborhoods comprised of a more transient population, as Third Ward was then becoming. *Id.* As a result, people came into the neighborhood looking for drugs and prostitution. 4EHRR224. Before the 1980s, the primary drug was heroin; then the neighborhood became the epicenter for the crack cocaine epidemic. *Id.*

The writ hearing testimony further set forth how Houston was one of the first cities devastated by crack cocaine. 4EHRR225. By 1984, it was a serious concern in terms of addiction and the rising crime rate that the drug epidemic spawned. *Id.* The inexpensive nature of crack allowed it to take root in working class communities. 4EHRR226. A crack rock could be purchased for as little as \$5, but the resulting high only lasted for about 15 minutes, and it induced an urge for more, keeping addicts coming back. *Id.* When people ran out of money, they turned to robbery and shoplifting to get the funds to purchase more. 4EHRR227.

During this same time, there was also a rise in codeine abuse in Houston. *Id.* Codeine is a prescription drug that people tended to mix with liquids—such as beer or soda. 4EHRR228. The concoction was colloquially referred to as “lean,” “sizzurp,” or “drank.” *Id.* The epidemic involving these drugs continued into the 1990s when Mr. Andrus was growing up there. *Id.* To be sure, several witnesses

specifically recalled Mr. Andrus' mother frequently partaking in drank, often in front of her children. AppEHX5, 9, 11, 12, 13, 14.

By the 1990s, Third Ward, as a center of drug use and distribution, had primarily an underground economy, centered almost entirely around forms of vice. 4EHRR228–229. Kids grew up with illegal conduct all around them—people selling and doing drugs, engaging in prostitution, robbing, and killing. Again, these were all actions Mr. Andrus witnessed from a young age. AppEHX9, 10, 11, 13.

The rising crime rate caused further depopulation of Third Ward. 4EHRR229–230. As a result, Third Ward, which had formerly had class, if not racial, diversity became populated exclusively by those who could not afford to leave. 4EHRR230. This process affected the tax base and, by extension, school funding. *Id.* As the neighborhood got poorer and less desirable, businesses shuttered. *Id.* Those left behind, if they did not own a car, had difficulty finding employment. 4EHRR231. They had to leave the neighborhood to find a job. *Id.* In a city the size of Houston, public transportation was an option, but it was very difficult. 4EHRR231–232.

In sum, the writ hearing testimony clearly explains that by the time Mr. Andrus was born and throughout his childhood, Third Ward was deeply afflicted by poverty and vice. The mitigating circumstances of Mr. Andrus' crime began decades before he was even born. At least one juror, hearing this context, likely would have voted against sentencing Mr. Andrus to death.

B. Featured Testimony Contextualizes the Testimony of Other Witnesses.

The historical context of Third Ward also gives greater resonance to other testimony in the record. For example, Dr. Scott Hammell⁵ explained that Mr. Andrus suffered physiological changes to his brain as a result of trauma in his childhood, including his early exposure to violence, death, severe emotional neglect, substance abuse, domestic violence, and distrust. 6EHRR168–169. This trauma, according to Dr. Hammell, stunted Mr. Andrus’ emotional development. 6EHRR181. Other evidence in the record reiterates this point. AppEHX5.

Dr. Hammell also detailed Mr. Andrus’ social history, including his relationship to his relatives, the circumstances of his neighborhood, the incarceration of family members, and the violence and drug use in his family. 6EHRR169–215. Dr. Hammell’s evaluation revealed that Mr. Andrus was exposed to trauma in such a way that he exhibits post-traumatic stress disorder symptoms and suffers from mood disorder. 7EHRR52. A deeper understanding of these mitigating circumstances is formed against the backdrop of Third Ward’s vibrant history and its later association with poverty and vice.

⁵ Dr. Hammell is a clinical psychologist who was formerly employed at the Texas Youth Commission. 6EHRR119. Dr. Hammell interviewed Mr. Andrus on three occasions, spoke to his family members, and reviewed relevant records in preparation for his testimony at the evidentiary hearing. 6EHRR130.

Similarly, featured testimony regarding Third Ward's history contextualizes the school-to-prison pipeline Mr. Andrus found himself in when he was sent to the Texas Youth Commission. Will Harrell⁶ detailed Mr. Andrus' time of incarceration at the Texas Youth Commission, including the dangerousness of the facility Mr. Andrus was placed in, the lack of appropriate mental health care, the fact that he was unduly placed in isolation for weeks at a time, the lack of proper mental health diagnosis due to undertrained staff, and the fact that his prescribed medication was not appropriate or adequately distributed. 5EHRR161–163, 158, 179–81.

Mr. Harrell reviewed Mr. Andrus' Texas Youth Commission Records and determined that Mr. Andrus was unfairly held accountable for failing to succeed in a behavioral program that was later discredited and that Mr. Andrus was sent to the Texas Department of Criminal Justice when he should not have been. 5EHRR121–122. Harrell testified that Mr. Andrus' time at the Texas Youth Commission damaged and traumatized him and that Mr. Andrus received no meaningful assistance from the program. 5EHRR246.

The testimony from the evidentiary hearing also demonstrates that Mr. Andrus, when adequately supported, was capable of being a productive, successful

⁶ Will Harrell served as Southern Regional Policy Counsel for the American Civil Liberties Union and was appointed by former Governor Rick Perry to serve as the first Chief Independent Ombudsman over the Texas Youth Commission. 5EHRR111–112. In the evidentiary hearing, Mr. Harrell also detailed the scandal that resulted in the legislative reformation of the Texas Youth Commission and that Mr. Andrus was incarcerated prior to the legislative reform while the events uncovered by the scandal were occurring. 5ERHH140–160.

member of society, but that he was ensnared in a cycle of poverty and incarceration. For example, family friends Sean Gilbow and Phyllis Garner testified that they took in Mr. Andrus after his release from incarceration with the TYC and the TDCJ. 6EHRR48, 95. They testified that Mr. Andrus abided by the rules of the house and did his assigned chores. 6EHRR49, 95–96. He was focused on finding steady employment and got a job working with Mr. Gilbow on an oil rig. 6EHRR97. Mr. Gilbow was subsequently arrested for selling drugs and sent back to prison, leaving Mr. Andrus without transportation to the job. *Id.* Ms. Garner attempted to get Mr. Andrus a job with the company where she had long been employed, but his criminal history proved to be a barrier. 6EHRR98. Repeatedly, Mr. Andrus was unable to secure a legitimate job because of the adult record resulting from TYC’s decision to transfer him to TDCJ to serve out the end of his sentence. *Id.*

Through the testimony of these witnesses, the domino effects of the school-to-prison pipeline become apparent, as do the consequences of failing to support young Black men in an effort to pull them out of it.

None of the aforementioned mitigating evidence was put before the jury.

III. PREJUDICE IS APPARENT FROM THE RECORD BEFORE THIS COURT.

It bears repeating that *none* of the foregoing evidence was put before the sentencing jury. The jury learned nothing about Mr. Andrus’ upbringing or early life whatsoever. They heard only the deeply misleading testimony of Mr. Andrus’

mother, who falsely created the impression of a hard-working single mother, and Mr. Andrus' father, who was barely present in Mr. Andrus' life due to his own extended stints in prison. As the Supreme Court summarized the evidence adduced at the evidentiary hearing:

The evidence revealed a childhood marked by extreme neglect and privation, a family environment filled with violence and abuse. Andrus was born into a neighborhood of Houston, Texas, known for its frequent shootings, gang fights, and drug overdoses. Andrus' mother had Andrus, her second of five children, when she was 17. The children's fathers never stayed as part of the family. One of them raped Andrus' younger half-sister when she was a child. The others—some physically abusive toward Andrus' mother, all addicted to drugs and carrying criminal histories—constantly flitted in and out of the picture.

Starting when Andrus was young, his mother sold drugs and engaged in prostitution. She often made her drug sales at home, in view of Andrus and his siblings. She also habitually used drugs in front of them, and was high more often than not. In her frequently disoriented state, she would leave her children to fend for themselves. Many times, there was not enough food to eat.

After her boyfriend was killed in a shooting, Andrus' mother became increasingly dependent on drugs and neglectful of her children. As a close family friend attested, Andrus' mother "would occasionally just take a week or a weekend and binge [on drugs]. She would get a room somewhere and just go at it."

With the children often left on their own, Andrus assumed responsibility as the head of the household for his four siblings, including his older brother with special needs. Andrus was around 12 years old at the time. He cleaned for his siblings, put them to bed, cooked breakfast for them, made sure they got ready for school, helped them with their homework, and made them dinner. According to his siblings, Andrus was "a protective older brother" who "kept on to [them] to stay out of trouble." Andrus, by their account, was "very caring and very loving," "liked to make people laugh," and "never liked to see people cry." While attempting to care for his siblings, Andrus

struggled with mental-health issues: When he was only 10 or 11, he was diagnosed with affective psychosis.

At age 16, Andrus was sentenced to a juvenile detention center run by the Texas Youth Commission (TYC), for allegedly “serv[ing] as the ‘lookout’” while he and his friends robbed a woman of her purse. While in TYC custody, Andrus was prescribed high doses of psychotropic drugs carrying serious adverse side effects. He also spent extended periods in isolation, often for purported infractions like reporting that he had heard voices telling him to do bad things. TYC records on Andrus noted multiple instances of self-harm and threats of suicide. After 18 months in TYC custody, Andrus was transferred to an adult prison facility.

Andrus v. Texas, 590 U.S. ___, 140 S. Ct. 1875, 1879–80. Mr. Andrus’ childhood and upbringing, and the neighborhood that served as its backdrop, were critical pieces of mitigating evidence and the jury heard nothing whatsoever about them.

The Supreme Court instructs that, in order to determine whether Mr. Andrus has shown prejudice, this Court must consider the totality of the available mitigation evidence adduced at trial and at the habeas proceeding, and weigh that totality of evidence against the aggravating evidence. *Id.* at 1886. “[P]rejudice exists if there is a reasonable probability that, but for his counsel’s ineffectiveness, the jury would have made a different judgment about whether Andrus deserved the death penalty as opposed to a lesser sentence.” *Id.* at 1885–86 (citations omitted). Because Mr. Andrus’ death sentence required a unanimous jury recommendation, “prejudice here requires only ‘a reasonable probability that *at least one juror* would have struck a different balance’ regarding Andrus’ ‘moral culpability.’” *Id.* (quoting *Wiggins*, 539

U.S. 510, 537–538 (2003)) (emphasis added).

Mr. Andrus was not predestined to commit the crime for which he was sentenced to death. But at least one juror presented with the mitigating evidence adduced at the habeas proceeding could see that the deck was stacked against him. At least one juror would have seen the mitigating circumstances warranted, and accordingly would have granted, mercy.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and correct copy of the foregoing Brief of Amicus Curiae the Innocence Project was electronically delivered to the following individuals on this 11th day of September, 2020:

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. Pro. 73.1, undersigned counsel certifies that this document complies with:

1. The length limitations of Tex. R. App. Pro. 73.1(d) because this document contains 5,795 words excluding appendices, exhibits, cover page, table of contents, table of authorities, and certificate of compliance.
2. The typeface requirements of Tex. R. App. Pro. 73.1(e) because this document has been prepared in 14-point Times New Roman font.

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