

No. WR-84,438-01

**IN THE COURT OF
CRIMINAL APPEALS OF TEXAS**

EX PARTE TERENCE TRAMAINE ANDRUS,

APPLICANT.

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN
CAUSE 09-DCR-051034-HC1
IN THE 240TH JUDICIAL DISTRICT, FORT BEND COUNTY

**BRIEF OF AMICI CURIAE FIRST FOCUS ON CHILDREN,
NATIONAL JUVENILE JUSTICE NETWORK,
JUST DETENTION INTERNATIONAL, AND
TEXAS YOUTH JUSTICE EXPERT MICHELE DEITCH**

**IN SUPPORT OF
TERENCE TRAMAINE ANDRUS'S APPLICATION**

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INTEREST OF AMICI CURIAE

Amici curiae, listed below, are represented *pro bono* by local counsel Misty Farris, partner at Fears Nachawati Law Firm, and Professor Mae C. Quinn, *pro hac vice*, of the Youth Justice and Appeals Project at the University of the District of Columbia David A. Clarke School of Law (UDC-DCSL). UDC-DCSL students Carly Cerak, Pejumae Guscott, Sabrin Qadi, Axana Soltan, and Robert Taylor also assisted in the *pro bono* preparation of this brief.¹

Michele Deitch, an amicus in this matter in her individual capacity, currently holds a joint appointment as a distinguished senior lecturer at the University of Texas's Lyndon B. Johnson School of Public Affairs and Law School. Professor Deitch, J.D., M.Sc., B.A., has over 30 years of experience working on criminal justice and juvenile justice policy issues with state and local government officials, corrections administrators, judges, and advocates. Professor Deitch co-chairs the American Bar Association's Subcommittee on Correctional Oversight, helped draft the ABA's Standards on the Treatment of Prisoners, and is widely published and cited for her research and views on youth justice issues.

First Focus on Children is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. The

¹ Consistent with Texas R. of App. Pro. 11 (c), undersigned counsel state that no fee or other financial contribution has been paid for the preparation of this brief.

organization leads comprehensive advocacy strategies with a commitment to seeking sustainable policy solutions that advance the interests of children of all ages. First Focus seeks to break down silos relating to child well-being, addressing youth needs holistically.

National Juvenile Justice Network seeks to shrink our youth justice systems and transform the remainder into systems that treat youth and families with dignity and humanity. It seeks to change policy and practice through an anti-racist lens by building power with those who are most negatively affected by our justice systems, including young people, their families, people of color, and other vulnerable populations. Its youth justice work is supported by 54 state-based organizations across 44 states and the District of Columbia.

Just Detention International was founded in 1980 and is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI works to: hold government officials accountable for prisoner rape; promote public attitudes that value the dignity and safety of people in detention; and ensure that survivors of this violence get the help they need. JDI trains staff on sexual abuse prevention and response, educates prisoners about their rights, and creates policies that increase safety for LGBT and other especially vulnerable prisoners. JDI also helps make sure that survivors in detention get the crisis services they need and deserve.

SUMMARY OF THE ARGUMENT

Childhood trauma can be life altering. Years of research shows that extreme emotional, behavioral, and psychological disorders may stem from harmful childhood experiences. Terence Andrus's early years and adolescence amounted to a non-stop series of shocking deprivations, dangers, and cruelty delivered by adults who were supposed to meet his needs and shield him from harm. When Terence was born, the crimes in this case were not inevitable. Traumas changed Terence's life path.

The horrifying treatment Terence received over many years at the hands of both family and juvenile justice officials clearly contributed to the regrettable and tragic loss of life that occurred here – when Terence was just 20-years-old and high on the hallucinogen, phencyclidine (PCP). Yet Terence's sentencing jury never heard dreadful details of his life story as it considered whether he deserved execution.

In his family home Terence was essentially forgotten by his deeply drug-addicted mother, who continuously placed him and his siblings in danger by taking up with abusive men and disappearing for days into dirty hotels to satisfy her need for controlled substances. Terence was denied a childhood the moment he—a child himself—took on the role of caretaker for his siblings. He was denied a model relationship, pertinent to shaping a child's future interactions, the moment his father

was imprisoned and left his life. Instead, he was thrust into a world that forced him to try to make grown up decisions despite suffering from a learning disability and the skewed thinking that can stem from such deeply adverse formative experiences. But Terence's sentencing jury was not provided with this clearly mitigating account.

In the custody of Texas juvenile justice officials who were legally tasked with protecting and treating Terence in his teen years, the traumas continued. He was placed as a vulnerable youth with the Texas Youth Commission (TYC) in 2005, an agency where some of the top administrators were raping and abusing the children in their care. Yet at that time, TYC's horrific conduct towards youth was under the public radar—before the press and others uncovered sexual abuse and other scandals that led to the system's placement in receivership and top to bottom reforms.

Amongst other things, while Terence was at TYC his mental health needs and emergencies were treated as misbehaviors, exacerbated by deeply damaging long-term stints in solitary confinement, and largely served as the basis for his transfer to adult prison—further traumatizing a young person with unmet learning, emotional, and other challenges. But the sentencing jury in this case was not told about any of this either. Instead they were wrongly led to believe Terence was a sociopathic adult unworthy of mercy rather than a youthful offender failed and abused by even those paid to protect him during his vulnerable adolescence.

This Honorable Court is now tasked with applying the teachings of *Strickland v. Washington*, 466 U.S. 668 (1984) to determine whether this long list of obvious and grave failings on the part of defense counsel prejudiced Terence during his capital sentencing hearing. Prejudice under *Strickland* amounts to a reasonable probability that defense counsel’s ineffective assistance impacted the outcome. *See Strickland*, 466 U.S. at 688. Here that means just one juror rethinking their decision. *See Wiggins v. Smith*, 539 U.S. 501, 537-38 (2003) (“Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.”).

There can be little doubt that Terence’s tragic life story of horrifying traumas experienced up through his teenage years would have changed the thinking of at least one juror asked to consider whether a death sentence was warranted—especially in the case of an impetuous and panic-driven crime committed by a still-emerging adult under the chaos-producing influence of PCP. *See Strickland*, 466 U.S. at 690 (requiring reweighing of the “totality of the evidence” in light of new mitigation proof to discern whether the “evidentiary picture” has been meaningfully altered).

ARGUMENTS

INTRODUCTION

Capital defendants face an irreversible penalty. Defense counsel in a death penalty case thus plays a crucial role at the punishment phase of trial by investigating and presenting any mitigating factors to the jury.

In the case of Terence Andrus, the grim facts of his childhood—revealed only at the habeas hearing for the first time—never reached the jury during trial. His counsel failed to investigate or present substantive mitigating evidence that was available. The United States Supreme Court has already found such performance deficient on the first prong of *Strickland*. It has remanded Terence’s case to this Honorable court to consider prejudice under the second prong. *See Andrus v. Texas*, 140 S. Ct. 1875 (2020).

The personal nature of each juror’s decision, whether to vote death or not, has everything to do with the evidence presented. Terence’s traumatic childhood and life circumstances could have substantially affected the thinking of the jurors in this case, particularly given the State’s sometimes misleading aggravation case and arguments at trial. Amicus urges this Honorable Court to grant relief in this case in light of all the missing mitigation evidence presented below which, singularly and cumulatively, provides more than ample support for a finding of prejudice.

I. TERENCE WAS PREJUDICED DURING HIS CAPITAL SENTENCING HEARING BY DEFENSE COUNSEL’S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE ABOUT TERENCE’S MANIFOLD CHILDHOOD TRAUMAS AND THEIR NEGATIVE IMPACT ON HIS DEVELOPMENT AS AN ADOLESCENT

Trial counsel’s failure to investigate and present information regarding Terence Andrus’s tragic and deeply traumatizing childhood obviously contributed to Terence receiving a death sentence. During trial, defense counsel failed to present the jury with compelling mitigating evidence about Terence’s social history, including his long-term exposure to violence, emotional neglect, substance abuse, and the incarceration of a caregiver. 6 EHRR at 168-69.

Inexplicably, nearly none of this essential information reached the sentencing jury at Terence’s capital trial. Indeed, Terence’s counsel “not only neglected to present evidence regarding Terence’s abusive and neglectful childhood; he failed to even look into his extensive history of trauma and its long-term adverse effects on him.” *Andrus*, 140 S. Ct. at 1877-78 (2020).

Additionally, the jury needed expert guidance to fully appreciate the damaging effects of such a chaos and danger-filled childhood. If defense counsel had done his job, he could have easily found a qualified witness, such as Dr. Scott Hammel, who testified during Terence’s state post-conviction habeas corpus proceedings. Hammel provided important missing insights about the implications of adverse childhood experiences (“ACEs”) – a well-known social scientific framework for understanding the connections among childhood development, social

problems, and involvement with the legal system. 6 EHRR at 152-55; see also 39 EHRR 144 (Habeas Exhibit 123 – CDC/Kaiser-Permanente ACEs Study).

Rather, defense counsel failed to present the sentencing jury with meaningful social scientific or other expert analysis that would have helped the members understand the significance of such risk factors as strong mitigation evidence warranting a sentence of life over death. Such testimony surely would have provided the jury with important context and explanation for Terence’s crimes, likely leading to at least one juror believing that Terence should be allowed to live.

A. Missing Evidence of Extreme Neglect, Family Dysfunction, Exposure to Violence, and other Childhood Traumas

Dr. Hammel gathered information about Terence’s biological, social, emotional, and psychological history as a way to better understand Terence’s childhood in the non-forensic context, 6 EHRR at 128-29, and shed light on the manifold traumas Terence experienced as a child. 6 EHRR at 152-53. Using information from records and in-person interviews with Terence himself and other family members, Dr. Hammel easily created a clear timeline of Terence's social history. 6 EHRR at 195. But such a coherent or comprehensive timeline to track Terence’s youth was entirely missing from defense counsel’s presentation at sentencing.

The social history timeline presented by Dr. Hammel provided context regarding the traumatic exposures that likely affected Terence’s mental condition at

the time of the crime. 6 EHR at 178. For instance, Hammel explained that Terence grew up in Third Ward, a neighborhood environment full of “crack heads, smokers, prostitutes, and drug dealers.” 6 EHRR at 183. The neighborhood had a reputation for being “crime infested” and “drug infested” 6 EHRR at 24. And as a child his world was populated by people that were selling and using drugs and engaging in prostitution and other kinds of crime. 6 EHRR at 184.

In fact, Terence’s own mother, Cynthia, supported the household by selling drugs and engaging in prostitution. 6 EHRR at 104. Thus, starting at a young age, Terence was repeatedly exposed to his mother's drug use. Cynthia was “unavailable emotionally” to her children as a result of her addiction. 6 EHRR at 169. Instead, apparently in part to help feed her addiction, Terence’s mother took up with several violent men over the course of Terence’s childhood. These dangerous individuals were brought into the family unit without regard for the safety or needs of Terence and his brothers and sisters.

So beyond having a parent who was unavailable because of substance abuse, Terence and his siblings found themselves contending with the chaos of their mother’s various violent romantic relationships. 6 EHRR at 210. Indeed, as the Supreme Court correctly noted, an unfortunate “revolving door of drug-addicted, sometimes physically violent, boyfriends” were visited upon Terence and his siblings during their childhood. *See Andrus*, 140 S. Ct. at 1877.

Thus, Terence was the one who was expected to “cook, clean, and get his siblings ready for school,” and take care of his older special needs brother, Torad Davis. 6 EHRR at 182. As Terence’s older brother Torad explained, “when we were little, Terence used to look after us and take care of us.” *Id.* He continued that Terence “would cook for us and make us hot dogs and I remember when he would also try to help my mom out by cleaning the house.” *Id.* Terence’s sister, Tafarrah also shared that Terence was the one “taking care” of her and her siblings. 6 EHRR at 188. He made sure the kids got to school and did their homework and helped them with cleaning up. 6 EHRR at 42.

As for Terence’s biological father, he spent most of Terence’s childhood in prison. He was first sent to jail for drugs when Terence was just one year old. He did not return until Terence was fourteen. Upon Terence’s father’s return, Terence was sent to live with his father and their relationship finally began to take shape. However, Terence’s world was soon turned upside down again when his father was sent back again to prison for another six years – leaving Terence abandoned yet again. *Andrus v. Texas*, 140 S. Ct. at 1879.

Had the counsel presented a coherent and corroborated picture of Terence’s upbringing at the punishment phase of Terence’s trial, the jury surely would have had a better understanding of Terence as a child who had endured many abuses and injustices – long before he was ever in conflict with the law. It is highly likely with

such mitigating proof that at least one juror would have felt greater compassion toward Terence as a child tragically failed by his family and community, rather than an innately evil individual unworthy of mercy.

B. Sentencing Jury’s Failure to Receive Appropriate Expert Guidance on the Implications of Terence’s Turbulent Childhood and Adverse Childhood Experiences (ACEs)

Terence’s chances at life would have been even more significantly improved if defense counsel called an expert like Dr. Hammel to help jurors understand how Terence’s emotional neglect and adverse childhood experiences negatively impacted his “psychological, emotional and physical development.” 6 EHRR at 152-53. This would have placed Terence in an entirely different light than what was provided during the shamefully slim – and harmful – mitigation case presented by defense counsel at Terence’s capital sentencing hearing. *Andrus v. Texas*, 140 S. Ct. at 1883.

At the habeas proceeding, Dr. Hammel explained that Terence was exposed to what are referred to by psychologists as adverse childhood experiences or “ACEs.” ACEs are defined in terms of abuse, neglect or household dysfunction within a youth’s biopsychosocial history. 6 EHRR at 152; *see also* 39-40 EHRR Exhibits 123-127. And they are more predictive of future problems such as stunted psychological, physical, and emotional development, as well as involvement with the legal system. 6 EHRR at 152. And Dr. Hammel further unpacked the “direct

correlation between ACEs and risks for psychological, mental and physical illness.”
6 EHRR at 153.

For instance, Dr. Hammel explained that because Terence had overwhelming adult responsibilities as a child, “he did not have his own emotional needs met.” 6 EHRR at 184. Prematurely given adult responsibilities, Terence likely developed a heightened reaction to trauma, rooted in a “stance of excessive self-sufficiency.” 6 EHRR at 168. Thus, when faced with conflict or difficulties he would have believed he had to handle things quickly on his own “to survive in the world” because based upon his childhood experiences “nobody's really going to be there for him and it's all up to him.” 6 EHRR at 168.

Further applying the ACE’s framework, Dr. Hammel expounded that such an orientation may leave a child without internal structures to “discharge or mitigate their emotions,” and their emotion and thoughts will become overwhelming and confusing to process and organize. 7 EHRR at 26-7. As a result, children often act “inwardly on themselves when they feel overwhelmed and/or they act outwardly.” 7 EHRR at 26. Some may engage in external behavior problems or even resort to self-destructive behaviors to dampen down the excessive emotional response that they are having. *Id.*

Dr. Hammel also offered important insight into how parental incarceration serves as a contributor to trauma and neglect. If there is a caretaker who is there for

some of the time, and then suddenly they are gone off to prison or jail, it reinforces “the child's belief that nobody's going to really be there for me.” 6 EHRR at 187. In addition, beyond contending with a “lack of bonding,” 6 EHRR at 180, such a child may find some of their emotional needs met some of the time – but at other times they are being traumatized. This results in all kinds of confusion. 6 EHRR at 187. As a result, children end up acting inwardly on themselves when they feel overwhelmed and/or they act outwardly to self-soothe their emotions. 6 EHRR at 26.

In the end, when Dr. Hammel was asked where he would put Terence in terms of his exposure to traumatic events as a child, he replied “severe neglect.” 6 EHRR at 194. And as explained by the Supreme Court, Terence “suffered from ‘very pronounced trauma’ and post-traumatic stress disorder symptoms from, among other things, ‘severe neglect’ and exposure to domestic violence, substance abuse, and death in childhood.” *Andrus*, 140 S. Ct. at 1882.

C. Evidence of Terence’s Tragic Childhood, Coupled with Appropriate Expert Testimony Would Have Made a Significant Impact at Sentencing

In stark contrast to what occurred at Terence’s post-conviction proceedings, trial counsel failed to investigate or present any meaningful information regarding Terence’s ACEs as a matter of fact, or to offer any expert testimony to allow the jury to make sense out of these facts. Nearly any expert in childhood trauma like Dr.

Hammel could have presented meaningful information on the clinically significant traumas in Terence's childhood, including abuse, emotional neglect, household dysfunction, substance abuse, and incarceration, and offered some testimony on how it has affected Terence. 6 EHRR at 168.

This information was not only missing affirmative mitigation but was critical to blunt the prosecution's proof and arguments. It could have significantly helped with rebutting the prosecution's caricature of Terence as a violent, drug-addicted "sociopath." *See, e.g.*, 52 RR 50 ("I bring you decent people in here, and you have to listen to a sociopath."). That is, after the correct factual foundation was laid, an expert such as Dr. Hammel could have explained to the prosecution that there is a difference between sociopathy and someone who is a trauma victim. 7 EHRR at 37.

Unlike sociopathy, people who are trauma victims have "delays in their neurological development and emotional development and social development that affects their ability to manage their emotions and make good decisions and cope in a world." 7 EHRR at 39. In contrast, sociopaths do not necessarily have a history of trauma and tend to "find a pleasure in harming others." *Id.* Trial counsel's failure to present Terence's social history to blunt the prosecution's argument contributed to the death sentence in this case.

Had defense counsel presented mitigating evidence regarding Terence's upbringing and childhood experiences at the punishment phase of Terence's trial,

the jury would have more compassion, understanding and mercy toward Terence's traumatic childhood experiences. This would have given a meaningful effect to Terence's narrative, and at least one juror would likely have voted to spare his life. *Wiggins*, 539 U.S. at 536-38.

II. THE SENTENCING JURY IN TERENCE'S CASE SURELY WOULD HAVE STRUCK A DIFFERENT BALANCE IF THEY KNEW THE TRUTH ABOUT TYC AND THE MANY TRAUMAS THAT TERENCE SUFFERED AT THE HANDS OF UNTRAINED AND ABUSIVE JUVENILE JUSTICE OFFICIALS

In 2007, the largest scandal ever to engulf the Texas juvenile prison system – the Texas Youth Commission (TYC) – became national news. *See, e.g.,* Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, THE NEW YORK TIMES, March 4, 2007; Doug Swanson, et al., *"Fear and Intimidation" Rule Texas' Youth Prisons, Report Says*, THE SEATTLE TIMES, March 26, 2007 (recounting how the Dallas Morning News broke the story of wide-spread staff abuse of youth at TYC).

An investigation by the Texas Rangers found that thirteen boys had been raped by two of the institution's top administrators. Beyond this, the investigation demonstrated TYC was broken at every level, with staff failing to properly protect or serve youth in their care. And the children were largely left to fend for themselves in a sick and deeply dysfunctional system. *See* Nate Blakeslee, *Sins of Commission*, TEXAS MONTHLY, May 2007.

The scandal received daily news coverage and the Legislature responded by convening a joint oversight body to look into TYC abuses which met on a weekly basis. 5 EHRR 130-31. A bill, swiftly drafted, was passed by unanimous vote in the State Senate and House and signed by then Governor Rick Perry for immediate effect. *Id.* at 132. Thereafter, Governor Perry exercised his rarely used constitutional authority to eliminate the appointed board of directors, fire hundreds of people, and appoint a conservator. *Id.* The conservator created a multi-jurisdictional task force and appointed Will Harrell as Chief Independent Ombudsman to review case files and make recommendations about individual youth who should be released. *Id.* at 133. As a result, hundreds of youth who were incarcerated at TYC at that time were released to family and friends. *Id.*

Unfortunately, however, Terence Andrus was not one of those youth. Instead, following an early childhood marred by ACEs, he spent every day of eighteen months of his adolescence – between January 2005 and June 2006 – trapped and unprotected in this abusive system.

At TYC, Terence was at the mercy of untrained and deliberately indifferent staff who misdiagnosed and overmedicated him with dangerous antipsychotics. They managed his ordinary adolescent behaviors and mental health emergencies with stints in solitary confinement. And, ultimately, they dumped him into an adult

prison system rather than provide meaningful treatment, training, or support to help him cope in the community with the traumas he already endured as a child.

Yet Terence’s sentencing jury was not provided with these scathing and obviously readily-available details to properly understand him and his life experiences – or to appreciate that he had not only been failed by adults in his family, but by state juvenile justice officials who, paid to rehabilitate him, instead exacerbated his mental health problems.

A. Counsel Failed to Present the Powerful Counternarrative of TYC Scandals and Conditions in Response to Aggravating Evidence of Terence’s Behavior in TYC.

At trial, the State left the jury with the unchecked misimpression of Terence enacting “significant assaultive behavior” toward youth and staff at TYC from the beginning of his stay, followed by a downward spiral of crime and aggressive behavior. *Ex parte Andrus*, 2019 WL 622783 (Tex.Crim.App. 2019) (Richardson, J., concurrence at *4). Terence’s counsel presented no mitigating evidence in response. In fact, he presented no rebuttal at all.

Only later – once Terence received competent representation at the post-conviction stage – was it discovered that Terence’s behavioral problems at TYC were notably mild while the harms he suffered there were severe. *Andrus*, 140 S. Ct. at 1884. In fact, it was TYC that “damaged him” and “further traumatized him.” 5 EHRR 246.

Yet no evidence was presented at the sentencing stage to provide this critical counternarrative relating to TYC scandals – that Terence endured conditions while in its custody that just months later drew national media attention and outrage. *Id.* at 132. The national uproar resulted in the elimination of most TYC facilities, and notably, the TYC facilities that housed Terence. *Id.* at 140. Shockingly, the jury never heard any of this critical evidence which was presented during post-conviction proceedings.

For instance, during the state habeas hearings, Will Harrell testified on Terence’s behalf. Harrell had been appointed by Governor Perry as the First Chief Ombudsman to oversee overhaul of TYC after it made national news in 2007. 5 EHRR at 111-112. Harrell explained the scandals exposed a flood of severe issues at TYC. The facilities were overpopulated and understaffed. *Id.* The leadership had unchecked authority to release or not release youth – or send them to adult prison – which made them vulnerable and susceptible to sexual predations of staff. *Id.* at 135.

The Office of the Ombudsman further uncovered a lack of adequate education, gang intervention, and prevention programs. *Id.* at 138. The investigation revealed a significant overreliance on isolation, overuse of pepper spray, failed implementation of rehabilitation programs, poorly trained staff, and unmanageable staff-to-youth ratio issues. *Id.* at 138, 146. Further, the “resocialization program” used to rehabilitate the youth was abandoned as a failed program. *Id.* at 151. As a result of

these horrific findings, most of the facilities have been permanently shut down. *Id.* at 140.

Unfortunately, Terence was in TYC in 2005 and 2006 before the scandal and inhumane conditions were exposed to the public. Specifically, he was at the Marlin intake facility to which Mr. Harrell testified was a “horrible place” and he was “deeply disturbed” by what he saw there. *Id.* at 153, 54. Marlin has since been shut down. *Id.* at 141. The unit was overpopulated, and kids would bang on the steel doors of their cells to demand attention. *Id.* The guards would blast classical music to overcome the noise of the banging and to essentially mock the kids. *Id.* Mr. Harrell testified that exposure to the dorm environment was traumatizing, resulting in many youth asking to be put in isolation to get away from the chaos. *Id.* Terence made these requests repeatedly. *Id.* After completing orientation at the Marlin unit, he was transferred to Crockett. *Id.* at 159.

Crockett was allegedly oriented towards youth with mental health needs and lower intelligence quotient (IQ). *Id.* at 160. And Terence was transferred there after his time at Marlin because of his learning disabilities and mental health needs. *Id.* at 159. But Crockett was one of the first facilities to close down after the Senate bill was passed because of the danger it presented to the kids there. *Id.* at 160.

In fact, Crockett was a chronically understaffed, old building with a “remarkable array” of “black spots” which are areas that cannot be seen by staff and

allow for significant violence and dangerous situations. *Id.* Crockett staff were terminated and prosecuted for inappropriate sexual contact with youth. *Id.* at 199. Mr. Harrell testified that Crockett was “notorious” for violence and a “culture of medical restraints.” *Id.* at 161-62. During his eighteen-month detention at Marlin and Crockett, Terence was steeped into gang culture, overdosed on psychotropic drugs, and experienced long stints of solitary confinement which left him entirely traumatized. *Andrus*, 140 S. Ct. at 1877.

This counternarrative sheds a very different light upon the totality of events leading up to his conviction and sentence in this case that many would find weighty. If such shocking information about TYC abuses and Terence’s actual experience there had been presented at his capital sentencing phase, at least one juror surely would have struck a different balance.

Evidence of TYC conditions presents a powerful mitigating narrative that was completely untold. While knowledge of TYC conditions shook the state and nation, trial counsel did not attempt to even investigate TYC – let alone present evidence about its abuses to Terence’s sentencing jury. Thus, the jury heard misleading aggravating evidence of Terence’s behavior at TYC but no mitigating evidence whatsoever of TYC conditions or Terence’s experience there. *See Andrus*, 140 S. Ct. at 1882 (“[o]ver and over during the habeas hearing, counsel acknowledged that

he did not look into or present myriad tragic circumstances that marked Andrus' life" including "that [his] experiences in the custody of TYC left him badly traumatized").

This court must determine if this untold narrative was mitigating evidence that, if provided, would have impacted the jury's determination. The national media found evidence of TYC conditions to be extremely important as it aired news coverage of the scandals nightly. 5 EHRR 132. Kids and their families found evidence of TYC conditions to be deeply troubling as they sent complaints of TYC abuses weekly to the ACLU for help. *Id.* at 128. Legislators in the Senate and House who received evidence of such conditions responded swiftly and unanimously passed a bill to reform TYC. *Id.* at 132.

What is more, the governor of Texas found this evidence to be so shocking that he used his executive authority to eliminate the TYC board of directors, fire hundreds, and put a conservator and multi-jurisdictional task force in place to address the horrible conditions. *Id.* The Supreme Court of the United States affirmed that this evidence was critical in finding that the counsel overlooked "vast tranches" of "untapped" compelling mitigating evidence. *Andrus*, 140 S. Ct. at 1881, 883. And the Texas habeas court judge found "the abundant mitigating evidence so compelling, and so readily available, that counsel's failure to investigate it was constitutionally deficient performance that prejudiced Terence during the punishment phase of his trial." *Id.* at 1878.

Considering this overwhelming consensus about the significance of TYC's abuses – shared by such a wide array of people with differing backgrounds, locations, and levels of influence – it is clear that knowledge of this counternarrative would have also substantially impacted the jury here. That is, it is more than reasonably probable that at least one juror would have felt the same way and struck a different balance in considering life for Terence. *Wiggins v. Smith*, 539 U.S. at 537-38 (2003).

B. The Jury Did Not Know that Terence Was Retraumatized by TYC Staff, Received No Real Mental Health Treatment, and Was Wrongly Prescribed Dangerous Anti-Psychotic Medications

TYC, rather than providing mental health treatment and training as promised, provided a chaotic and abusive environment that misdiagnosed and overmedicated Terence, clearly making him worse, not better. The horrendous conditions Terence experienced further damaged him; he went from having a mood disorder upon admission to presenting with breaks from reality and suicidal ideations.

Surely, a jury comprised of mothers, fathers, and siblings would recognize such unjust and inhuman conditions, exacerbating Terence's already vulnerable condition, undermined the state's case for a death penalty. This is especially true given the expert testimony of Dr. Hammel, who helped properly situate these circumstances within Terence's history of ACEs. These missing facts relating to Terence's mental health mistreatment, if coupled with appropriate expert

explanation, surely would have impacted the outcome of the sentencing hearing in Terence's case.

Terence entered TYC at age 16, when TYC was not only being led by sexual predators, but its various units were staffed by a range of incompetent individuals complicit in the larger scandal. These officers, some with no more than a GED and 30-hours of training, were considered part of the youth treatment team. And as Will Harrell explained, a number of TYC officers were actually gang-involved themselves, bringing gang culture into the facility rather than rooting it out. See 5 EHRR 160-61, 176.

TYC staff also diagnosed Terence with a conduct disorder during intake at the Marlin Facility, and ultimately housed him in the Crocket Unit intended for youth with low-level mental health needs and "low IQ." 5 EHRR 141-169. But "conduct disorder" was essentially TYC's default disorder, provided to most youth without much meaningful testing, assessment, or collection of outside information. 5 EHRR 158. And Terence's designated housing did not result in any specialized plan of care or therapeutic modality tailored to his special needs or diagnosis. Instead he was subjected to TYC's signature "resocialization program" – now seen as shameful excuse for rehabilitative treatment that has been jettisoned. 5 EHRR 149.

But as described by Will Harrell, the resocialization program was a path to failure for most youth, who could not master its bizarre and meaningless

requirements. 5 EHRR 143. It mandated that youth memorize certain buzz phrases and then somehow verbalize “thinking errors.” 5 EHRR 149. Such a program was particularly frustrating for – and cruel to – children like Terence who struggled with learning disabilities. 5 EHRR 160. It is no surprise, therefore, that Terence performed as most of his peers and was unable to advance in a program with unrealistic expectations. 5 EHRR149.

Regarding Terence’s supposed diagnosis and accompanying medication regime at TYC, Dr. Hammel conceded that reasonable minds can differ in the field. However, there appeared to be “significant discrepancy” between symptoms and diagnosis in Terence’s case, and that TYC staff made “a major mistake” in treating and medicating him the way they did. 7 EHRR 85. Indeed, Terence’s traumas, which Dr. Hammel noted were central to understanding Terence’s needs and actions, did not appear to factor at all into TYC’s diagnosis or Terence’s subsequent treatment by its staff. 6 EHRR 160-165. Instead he was prescribed medication for a psychotic disorder that he did not have, and that could have produced dangerous long-term effects such as hallucinations and violent episodes. *See id; see also* 7 EHRR 83.

Specifically, Dr. Hammel noted that Terence was taking a range of powerful medications without a proper diagnosis to support such extreme intervention, and that could possible adverse side effects such as mania, aggression, and psychosis. 6

EHR 163. This medication was changed at least five times without any real justification in the record. Terence was simply medicated in what appeared to be an ad hoc approach, receiving psychotropic medications such as Seroquel, which can induce suicidal thoughts; in addition to Clonidine, Concerta, Strattera, Prozac and Adderall – all of which can have different dangerous side-effects. 6 EHR 160-165.

Unfortunately, however, Terence’s sentencing jury did not hear about the shameful state of TYC’s supposed treatment programs that were lacking in any sound medical basis or anything close to accepted norms in the field. His defense attorney did not explore the possibility that Terence suffered from the possibility of misdiagnosis and adverse consequences of medications that can result in displays of mania, aggression, and psychosis. And all of this is even more prejudicial, when considered along with counsel’s other shortcomings – including his failure to respond to the state’s misleading evidence and claims that Terence presented as a security threat who required constant return to solitary confinement at TYC.

C. Failure of Defense Counsel to Present Evidence Regarding Andrus’s Solitary Confinement While in the TYC System Undermined His Chances at Sentencing

Leonard Cucolo, the supposed “principal representative” for TYC regarding youth classification hearings, testified at trial. 48 RR 61. He claimed Terence was confined in “secure units for a period of time on a behavior management plan as a result of some significant assaultive behavior...”. 48 RR 69. The only response from

defense counsel, was a hearsay objection. He offered nothing more to clarify, mitigate, or elaborate on this topic.

Defense counsel's failure to investigate and present evidence regarding Terence's solitary confinement and its effects on him, both physically and mentally, prejudiced his defense. This evidence is a mitigating factor that was not available to the jury in Terence's sentencing and could have made the difference between life and death—particularly coupled with the other missing evidence at the penalty phase.

Counsel failed to satisfy his ethical obligation to investigate and present proof of the abuses Terence faced during his time incarcerated leaving the jury with only aggravating evidence about Terence's behavior and no mitigating evidence about the horrific use of solitary confinement on him. Terence's repeated traumatic time in solitary confinement, was a serious mitigating factor that never reached the jury and could have compelled at least one juror to spare his life.

In contrast, at Terence's habeas corpus hearing, former TYC Ombudsman Will Harrell testified that TYC was entirely misguided in its efforts to reform and rehabilitate youth offenders. 5 EHRR 111-112. He condemned their prior widespread use of abusive solitary confinement strategies, which were sometimes imposed upon children for periods of up to 90 days. He further noted that such harmful practices had been banned in Texas youth facilities following the TYC scandal. 5 EHRR 122.

In terms of Terence's individual experience, Harrell properly reframed Terence's placement in solitary confinement as abuse rather than any kind of appropriate response to alleged misbehavior. He painted a powerful and tragic picture for the factfinder, noting that Terence was put in a room that was, "[d]ark, windowless, no natural light; steel doors, with a window that would open and close from the outside; bean slot where food trays would be passed; concrete walls and a cement block with a mattress, more like a pad for sleeping." 5 EHRR 154 –155.

TYC disciplined and placed Terence into solitary, Harrell explained, for a range of outrageous reasons and normative adolescent actions. Indeed, as Harrell further recounted, Terence was disciplined for events such as throwing paperclips, talking while on the lunch line, and even eating a cookie in class. 5 EHRR 174.

Another time while in class, Terence wrote a note to the TYC assistant principal saying that he was hearing disturbing voices in his head. For this, he was sent to solitary confinement. 5 EHRR 183. In fact, Terence repeatedly was placed in solitary for making reports of mental health challenges or exhibiting them. *Id*; see also 5 EHRR 179 (explaining that TYC's response to Terence's requests for assistance generally was "[t]o place him in security, isolation, lock him up in a dark room all by himself").

Harrell provided further important insights into Terence actually placing himself into solitary confinement numerous times by way of nearly 40 different

“self-referrals.” In most such instances – while staff sexual assaults on youth were still taking place at TYC – Terence declared depression, family matters, or mental health as the reason for wanting to be placed in a secure cell. Yet, he still received write ups – referred to as “225s” – when making such requests without any official flagging such requests as unusual behavior that required heightened intervention – even after Terence tried to take his own life. 5 EHRR 179.

But as Harrell explained during the habeas proceedings, “Ninety days in a dark, damp room with no communication, school, will do things.” 5EHRR170. His assertions regarding the deeply damaging effects of solitary confinement treatment on all people – but children in particular – have long been supported by social science. See, e.g., Stuart Grassian and Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INTERNATIONAL J. OF L. AND PSYCHIATRY 49, 49 (1985)(descriptions of problematic use of solitary confinement at Walpole Prison in Massachusetts and explaining “laboratory research has demonstrated that sensory deprivation can produce major psychological effects on a man.”); LINDSEY M. HAYES, NAT’L CTR. ON INST. & ALTERNATIVES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 42 (2004)(warning about the dangers of placing youth in solitary confinement, noting “rates of suicidal behavior appeared to be higher for youth who were isolated from their peers”).

This should not have been news to any competent defense attorney. Indeed, as early as the 1990's the United States Department of Justice under the leadership of Attorney General Janet Reno was calling for an end to solitary confinement of youth in state facilities. *See Remarks of Steven H. Rosenbaum, Chief, Special Litig. Section, U.S. Dep't of Justice* (May 16, 1999), available here: <https://www.justice.gov/crt/special-litigation-section-cases-and-matters-1>, (describing juvenile confinement litigation taking place under Reno to challenge harsh conditions). Thus, even federal prosecutors knew “[t]he use of extended isolation as a method of behavior control, for example, is an import from the adult system that has proven both harmful and counterproductive when applied to juveniles.” *Id.*

Terence's repeated placement into solitary confinement by TYC officials was a mitigating factor that could have changed the outcome at trial. And, of course, such information was even more significant in Terence's case given his past traumas, learning challenges, and misdiagnosis by TYC resulting in administration of counter-indicated anti-psychotic medication – which as discussed, *supra* and *infra*, were also inexplicably missing from defense counsel's capital sentencing presentation. Such inhumane treatment only exacerbated Terence's mental health issues and if presented at trial could have swayed at least one juror to spare him of a death sentence. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000).

III. TERENCE LIKELY WOULD NOT HAVE BEEN CONDEMNED TO EXECUTION IF HIS SENTENCING JURY KNEW THE TRUE STORY OF HIS TRANSFER FROM TYC TO ADULT PRISON – AND ITS LIKELY IMPLICATIONS

Finally, defense counsel did not investigate or present mitigating evidence relating to Terence’s transfer to an adult prison from TYC. This prejudiced Terence at sentencing in at least two ways: (1) counsel’s lack of mitigation failed to show that TYC’s failure to meet his mental health needs actually caused this transfer – not his own behavioral shortcomings as suggested by the state’s case; and (2) counsel failed to present mitigation evidence on the harms of transferring youth to adult prisons, despite the overwhelming social science research and expert witnesses at his disposal during trial.

A. The Jury Should Have Heard that TYC’s Failure to Meet Terence’s Mental Health Needs Was the Real Cause of his Transfer to Adult Prison – not Behavioral Problems on His Part

With respect to the first issue, the state’s evidence at trial suggested that TYC transferred Terence to an adult prison due to “behavioral problems.” *See* 5 EHRR 189. In fact, TYC wholly abandoned its legally mandated responsibility to meaningfully rehabilitate Terence. TYC’s well-known and well-documented system failures ultimately led to Terence being sent to an adult prison for crimes of his youth – not his own shortcomings. Yet the jury never heard this at sentencing.

Instead, based upon the testimony of TYC staffer Cucolo, they were led to believe Terence received a well-rounded, age-appropriate 18-month intervention to

ensure his “successful re-entry, rehabilitation, and hopefully success within the community.” 48 RR 68. Cucolo held himself out as the “principle representative” for TYC who testified at youth blended sentencing and juvenile transfer hearings, as if that carried some special significance. 48 RR 61, 73-74.

However, as was pointed out by Will Harrell during the habeas hearing, Cucolo was little more than a custodian of records for TYC, sent to court to recount the hearsay that filled its behavioral reports, and had no meaningful personal interactions with Terence during his placement. 5 EHRR 237 In addition, the resocialization program that Cucolo testified about in glowing terms was not helpful or useful for rehabilitating youth like Terence, because it was a punitive program disguised as an incentive program.

In fact, shortly after TYC disgraced itself with the sex scandal, the resocialization program was scrapped in 2007 by a legislative mandate for being a complete failure and became referred to as “the unspeakable program.” 5 EHRR 122. Youth were not able to achieve all the goals originally set out in the program which resulted in over “90 percent of kids serving well over their minimum length of stay.” 5 EHRR 130.

As noted, the resocialization program also heavily depended on so-called “225 reports” to evaluate behavior. 5 EHRR 144. But 225 reports were just tickets for alleged bad behavior, often misused by staff for arbitrary reasons – such as trying to

show supervisors they were busy at work. *Id.* at 176. Terence received more than three hundred “225” citations while incarcerated for eighteen months. *Id.* at 177. Mr. Harrell testified this number of write-ups was “average or pretty low.” *Id.* Moreover, forty of those citations related to Terence’s self-referral citations to solitary confinement in order to escape the dorm. *Id.* at 179. TYC thus sealed Terence’s fate with frivolous write-ups and punishment for inability to memorize or regurgitate empty phrases about “thinking errors.”

Yet, after a mere 18 months in TYC custody, Cucolo reportedly concluded that Terence was “not responding to the treatment program” and asked the court to transfer him to an adult prison. 48 RR 73-74. But as Will Harrell testified during Terence’s post-conviction proceedings, there was nothing “unusual” about Terence’s behavior in TYC custody. In fact, the ombudsman was “surprised” at how few citations Terence received in a “violent atmosphere” and “savage environment.” 5 EHRR 189. He likened TYC to a “Lord of the Flies” scenario where “sometimes you have to fight to get by . . . kids don’t really have a choice.” *Id.*

There is a reasonable probability that if the jury heard how unsuccessful the resocialization program was generally, and how its failings contributed in particular to Terence’s transfer to adult prison, the outcome in this case likely would have been different. People should not be punished for what is outside of their control, and that

is something the jury should have been permitted to consider—especially in a capital punishment case.

B. Trial Counsel Further Squandered the Opportunity to Educate the Jury About the Harms of Terence’s Transfer from TYC to Adult Prison and Their Likely Impact on a Teen Like Terence

Terence should not have been transferred to the adult prison following his time in TYC for a crime committed while a child. Instead, the long accepted best practice in a case such as Terence’s was supportive juvenile aftercare in the community – an available alternative in his case. 48 RR 70; *see also* David M. Altschuler & Troy L. Armstrong, Office of Juvenile and Delinquency Prevention, U.S Dep’t of Just., *Intensive Aftercare for High-Risk Juveniles: A Community Care Model 1* (1994) (describing benefits of community-based supports such as intensive aftercare for juvenile justice system placed youth).

Transferring youth to adult prisons obstructs the window of opportunity and capacity for change and increases recidivism significantly. Adult prisons do not have the ability to meet the needs of young people because, among other things, they lack the resources and specialized staff training needed. CAMPAIGN FOR YOUTH JUSTICE, *THE CONSEQUENCES AREN’T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 7* (2007).

These facts were well-known at the time of Terence’s trial in 2012. For instance, in 2007, the Center for Disease Control and Prevention found that juveniles

transferred to adult prisons subsequently committed more violent crime than youth offenders who remained in the juvenile system. Angela McGowan et. al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*, 32 AM. J. PREVENTATIVE MED. S7, S7-28 (2007).

In 2010, the Department of Justice released a report offering similar findings, specifically noting that placing juvenile offenders into adult prisons had “produced the unintended effect of increasing recidivism, particularly in violent offenders, and thereby promoting a life-course of criminality.” Richard Redding, U.S Dep’t of Just., *Juvenile Transfer Laws: An Effective Deterrent to Delinquency* at 8 (2010)(further recounting that youth encounter brutal experiences in adult prisons and are taught further antisocial behaviors); *see generally* MICHELE DEITCH, JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM IN TEXAS (LBJ School of Public Affairs – University of Texas 2011).

The jury should have heard more than the state’s evidence relating to Terence’s transfer to adult prison from TYC, including the long-documented proof of harms that result from such actions and evidence about the alternative of community-based supports and aftercare that was rejected by TYC. Jeff Slowikowski, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Just., *Highlights From Pathways to Desistance: A Longitudinal Study of Serious*

Adolescent Offenders (March 2011) (“offenders who receive community based services following incarceration are more likely to attend school, go to work, and reduce offending”); *see also* Edward Mulvey & Carol Shubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court* (2012)(finding most youth sent to adult prison returned in a few years, debunking the deterrence argument).

Instead, Terence’s attorney did nothing to counter the misimpression that Terence was an irredeemable, unreachable youth who failed out of juvenile treatment and had to be sent to adult prison as a result, rather than being released to the community. But it was TYC that wholly failed Terence and then exacerbated those harms by having him transferred to an adult prison to be further traumatized as a teen. Without this information, the capital sentencing deliberation process was unfairly skewed during a trial where the prosecutor himself declared jurors had “not heard one mitigating circumstance” about Terence’s life. 51 RR 60.

CONCLUSION

At trial, the prosecution painted an irredeemable caricature of Terence. Terence’s trial attorney did almost nothing meaningful in response. In fact, as the United States Supreme Court has already found, he wholly failed to investigate or present any coherent mitigation case. He thus squandered Terence’s chances at life

during the crucible of his capital punishment case. And the jury unanimously sentenced Terence to die.

If defense counsel had provided a meaningful account of Terence's childhood, as was presented during the post-conviction proceedings in this matter, it is undeniable that at least one juror would have changed his or her vote. Indeed, as was described above, the evidence presented during the habeas hearing in this case was not just adequate to support a different outcome but amounted to a landslide of mitigating facts that all but demands a non-death sentence.

Unfortunately, the jury in this case did not have a chance to learn the truth about Terence's childhood of shocking deprivations, dangers, and cruelty delivered by adults who were supposed to protect and help him. The facts of extreme neglect, abuse, dysfunction, and exposure to violence as a child would have correctly informed the jury of Terence as a trauma victim not a sociopath. Similarly, if the jury knew about the child sexual abuse scandal and inhumane conditions at TYC that stunned the nation and shaped Terence's teenage years – including misdiagnosis, over-medication, repeated long stints in solitary confinement, and harmful transfer to adult prison – it seems unquestionable that at least one juror would have struck a different balance and changed his or her vote.

For all these reasons, Amici urge a finding of prejudice under *Strickland* and relief for applicant Terence Andrus.

Certificate of Compliance

I hereby certify, pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), that the word count as determined by the word processing program is 8319, excluding those parts as permitted by rule 9.4(i)(1)—assuming that Rule 9.4(i)(2)(F) applies to this sui generis circumstance.

/s/ Misty A. Farris

Certificate of Service

I hereby certify that on September 11, 2020, a true and correct copy of the above and foregoing motion was forwarded to all counsel of record by the Electronic Service Provider, if registered, otherwise by email, as follows:

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