

No. 21-6001

In The
Supreme Court of the United States

—◆—
TERENCE ANDRUS,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals**

—◆—
**AMICUS CURIAE BRIEF FOR CHILDREN'S
DEFENSE FUND, FIRST FOCUS ON CHILDREN,
BREAKING CODE SILENCE, STND4YOU,
NATIONAL JUVENILE DEFENDER CENTER,
NATIONAL JUVENILE JUSTICE NETWORK,
JUST DETENTION INTERNATIONAL,
AND YOUTH LAW AND JUSTICE SCHOLARS
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici Children’s Defense Fund, First Focus on Children, Breaking Code Silence, Just Detention International, National Juvenile Defender Center, National Juvenile Justice Network, and STND4YOU, Inc., along with 16 of the country’s foremost experts in the fields of juvenile law, child well-being and youth justice,² join together on this brief because of their shared commitment to the most vulnerable children in this country. Their work seeks to address inequity and reduce harms experienced by under-resourced and under-served youth, particularly those impacted by the juvenile legal system.

Children’s Defense Fund champions policies and programs to improve the odds for America’s children. It advocates for the whole child because children don’t come in pieces. In doing so, it seeks to end child poverty, give every child a healthy start, a quality early childhood experience, a level education playing field, and safe families and communities free from violence.

¹ Pursuant to Supreme Court Rule 37, the parties in this case were provided with timely notice and consented to the filing of this brief. In addition, no party or counsel for a party made a monetary contribution to fund its preparation or submission. *See* Sup. Ct. R. 37.6. This brief was authored solely by counsel for amici, with *pro bono* assistance from UDC Youth Justice Clinic participants including Jamie Adams, Mary Brody, Olivia Chick, Tierra Copeland, Karla Hammonds, Chaz Hendrix, Tatyana Hopkins, Gun Lee, Madelyn Roura, and Ashley Taylor.

² List of individual expert amici signatories is provided as an Appendix.

First Focus on Children is a bipartisan advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. The organization leads comprehensive advocacy strategies with a commitment to seeking sustainable policy solutions that advance the interests of children of all ages.

Breaking Code Silence is a nonprofit that seeks to eradicate institutional child abuse and empower survivors. It represents children, youth, and adults who are or were incarcerated in the troubled teen industry, which includes powerfully punitive facilities purporting to provide treatment.

Just Detention International was founded in 1980 as 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 survivors of this violence get the help they need.

National Juvenile Defender Center provides national leadership on juvenile indigent defense and due process deprivations that young people face in the delinquency system by providing training, technical assistance, policy development, community-building, leadership opportunities, legislative advocacy, litigation support, and research.

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, 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.

STND4YOU, Inc. is a nonprofit organization developed to provide diversion, advocacy, and free wrap-around clinical services for Black and Latinx youth placed at-risk for delinquency and involvement with the justice system secondary to their overlooked Cognitive and Communication Disorders (CCD).

These groups, along with the individual *amici* scholars, are concerned with the important issues presented by this case, which include traumas stemming from adverse childhood experiences, harms of juvenile solitary confinement, the importance of evidence-based youth justice practices, and the need for quality representation for the youthful accused. Accordingly, they support Terence Andrus' application for relief to this Court.



SUMMARY OF ARGUMENT

After finding that youthful offender Terence Andrus received severely inadequate legal representation during his capital sentencing hearing, this Court remanded his case to the Texas Court of Criminal Appeals (CCA) to apply the second prong of *Strickland v. Washington*, 445 U.S. 668 (1984). *Andrus v. Texas*, 140 S. Ct. 1875 (2020).

The CCA was directed to carefully review all mitigating evidence advanced by habeas counsel, “a tidal wave” of new proof relating to the abuse, neglect, and traumas Terence suffered as a child. *Id.* at 1887. This included living in a violent and drug-infested environment tainted by child sex abuse, long periods in solitary confinement as a teen, and medical and other maltreatment while at the Texas Youth Commission (TYC) – an agency placed into receivership because of widespread abuse visited upon its child residents.

The CCA was required to meaningfully assess whether a “reasonable probability” exists that one juror might have “struck a different balance regarding Andrus’ moral culpability” if such mitigating information had been presented at his sentencing hearing. *See Andrus v. Texas*, 140 S. Ct. at 1887 (internal quotation and citation omitted).

The CCA did not do this.

Instead, after criticizing this Court’s analysis and derogating its authority, the CCA side-stepped nearly all the persuasive proof presented by habeas counsel, mischaracterized mitigation evidence it did discuss, and ignored the impact and importance of expert testimony about youth trauma and counter-indicated youth justice practices.

In doing so, the CCA also abandoned decades of precedent from this Court regarding the juvenile justice system as a place of rehabilitation rather than punishment, *In re Gault*, 387 U.S. 1 (1967), adolescents as less morally culpable than adults, *Miller v.*

Alabama, 567 U.S. 460 (2012), and youth crime as often resulting from broken homes and systems. See *Edwards v. Oklahoma*, 455 U.S. 104, 115, n.11 (1982).

Moreover, the CCA took on the role of a second prosecutor, doubling down on its commitment to Terence’s execution based on a tragic criminal episode that occurred when he was high on hallucinogenic drugs. All we can know from the CCA’s “analysis” is that *it* was unmoved by the vast amount of mitigating evidence – not whether at least *one juror* would have been.

For all these reasons, this Court should grant Petitioner’s request for a fair capital sentencing hearing where he can be represented by competent counsel who understands the importance of mitigation investigation, expert testimony, and presentation of evidence relating to childhood traumas.

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ARGUMENT

I. A Sentencing Jury Would See Terence Andrus Differently if Presented with Evidence of His Traumatizing Childhood

Trial counsel’s failure to investigate and present evidence regarding Terence Andrus’ traumatic childhood contributed to Terence’s death sentence. The jury was denied information about Terence, his community, and family history, including long-term exposure to sex work, child sexual abusers, violence, substance abuse,

parental incarceration, and other deprivations. 6EHRR168-169.

As this Court recognized, 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 1877-1878 (2020); see Leila Morsy and Richard Rothstein, *Toxic Stress and Children’s Outcomes*, ECONOMIC POLICY INSTITUTE, May 1, 2019 (when “frightening or threatening situations occur too frequently” in children’s lives and they lack “protective neighborhood, family, or school conditions” to help develop self-regulation skills, toxic stress results – disproportionately impacting Black children); see also NATIONAL CHILD TRAUMATIC STRESS NETWORK, COMPLEX TRAUMA IN URBAN AFRICAN-AMERICAN CHILDREN, YOUTH, AND FAMILIES (March 2017).

Terence’s mother, Cynthia, had five children. She gave birth to her first two boys, Terence and Torad – who is disabled – when she was just a child herself. When Terence was 5 years old and Cynthia was 22 years old, she began a sexual relationship with Danyel Sims – a 16-year-old boy. Sims fathered Cynthia’s third child, Tafarra. See, e.g., 6EHRR12-117, 170-215; DX8-9; DX122A; DX140.

All the fathers of Cynthia’s children were violent individuals and/or involved in the drug trade. Terence’s own father went to prison at age 19, when Terence was one year old. 6EHRR39-40; DX122-C. To cope

and survive, Cynthia became involved in drugs and prostitution to try to support her children – and her own addiction. 6EHRR104. Thus, as this Court noted, an unfortunate “revolving door of drug-addicted, sometimes physically violent, boyfriends” were visited upon Terence and his siblings. *Andrus*, 140 S. Ct. at 1877.

In this environment of deprivation and loss, without adult guidance or support, Terence would try to “cook, clean, and get his siblings ready for school.” 6EHRR182. Torad submitted during the habeas proceedings that Terence would “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 Tafarra further shared that Terence was the only one “taking care” of her and her siblings during this period. 6EHRR42, 188.

Although Terence tried, he was just a child, and unable to protect himself or his four siblings from the many harms introduced into their young lives – including sexual abuse. For instance, Tafarra’s own father raped and abused her when all the children lived together. This resulted in her removal from the home by child protective services, while the rest of the children remained in chaos. *See* 6EHRR202, 209, 217-220.

Further, during the habeas proceedings, Terence’s difficult childhood was described in terms of Adverse Childhood Experiences (ACEs) by Dr. Scott Hammel, an expert called by Terence’s post-conviction counsel. *See, e.g.*, 6EHRR151-153. Yet neither the ACEs childhood trauma framework nor Dr. Hammel’s testimony

were referenced by the CCA as it undertook its prejudice review. Instead, the CCA offered its own unsubstantiated and somewhat preposterous arm-chair-psychology views on Terence's childhood.

For instance, the CCA declared "skepticism" about Terence's mental illness claims since he was able to act as a parental figure to his siblings. *Andrus, Ex Parte Andrus*, 622 S.W.3d 892, 901 (Tex. Crim. App. 2021). However, Dr. Hammel testified that the level of responsibility forced upon Terence at such an early age – including many hours of daily sibling supervision, cooking, cleaning, and helping with homework – likely contributed to his mental illness as "he did not have his own emotional needs met." 6EHRR89, 183-184.

Dr. Hammel interviewed Terence, his family, and others, reviewed countless relevant family records, and offered expert insights into the complex mental health impacts of Terence's traumatic childhood and his family experiences. In doing so, he unpacked the "direct correlation" between [ACEs] and "risks for psychological, mental and physical illness" in Terence's case. 6EHRR153; *see also* Alexandra Cook, *et al.*, *Complex Trauma in Children and Adolescents*, 35 *PSYCHIATRIC ANNALS* 390 (2005) (describing "complex trauma" and its negative consequences if not properly addressed and treated).

Dr. Hammel further testified that even if Terence was not sexually assaulted and did not witness his sister's sexual assault, Tafarra's removal from the family home after the incident was highly "emotionally

disruptive.” 6EHRR218; see Robert W. Motta, *Trauma, PTSD, and Secondary Trauma in Children and Adolescents*, COGNITIVE AND BEHAVIORAL INTERVENTIONS IN THE SCHOOLS 67 (2014); see also Lisa Zoll and Leslie Davila, *Disenfranchised Trauma: The Impact on Indirect Victims*, THE NEW SOCIAL WORKER (2021) (describing siblings of sexual abuse survivors as “indirect victims” whose vicarious traumatization is significant and complex). Dr. Hammel categorized Terence’s trauma exposure as “severe.” 6EHRR194.

Such testimony led this Court to agree that Terence suffered from “very pronounced trauma and posttraumatic stress disorder symptoms from, among other things, severe neglect and exposure to domestic violence, substance abuse, and death in his childhood.” *Andrus*, 140 S. Ct. at 1882 (internal citation and quotation omitted); see JANICE L. COOPER, *ET AL.*, STRENGTHENING POLICIES TO SUPPORT CHILDREN, YOUTH, AND FAMILIES WHO EXPERIENCE TRAUMA 7-10 (Columbia Univ. – Nat’l Center For Children in Poverty 2007) (describing how exposure to abuse, neglect, sexual violence, and “chronic urban trauma” cause children to “sustain damage to critical elements of their development” and PTSD); see also NAT’L ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 77-145 (2019) (describing how ongoing childhood, community, and “historical trauma” can impact adolescent brain development, though appropriate treatment can help).

Yet, the CCA treated this testimony as inconsequential under *Strickland's* second prong and concluded that the mitigating evidence related to Terence's childhood would have made no difference to a sentencing jury. *See Ex Parte Andrus*, 622 S.W.3d 892. Such a conclusion is entirely unsupportable and demands correction by this Court.

II. Hearing the Harms Terence Endured at the Texas Youth Commission, at Least One Reasonable Juror Likely Would Have Reached a Different Sentencing Decision

Appropriate youth intervention and treatment can help mitigate the impact of childhood abuse and neglect. *See Alexandra Cook, et al., Complex Trauma in Children and Adolescents*, 35 PSYCHIATRIC ANNALS 390, 396 (2005) (explaining that careful and ongoing assessment in various domains including attachment, disassociation, cognition, and self-concept is essential for treating complex child traumas).

However, Terence did not receive appropriate treatment while placed in TYC in 2005 and 2006. Instead, the entity ultimately had to be taken over by state monitors because of its abuse of countless children in its care. Terence, segregated and subjected to daily horrors at the institution, was one of those mistreated youth. His sentencing jury was not told about these additional traumas, and somehow the CCA concluded that such evidence would not have mattered to jurors.

In 2007, shocking news broke that the Texas juvenile prison system – TYC – had been psychologically, physically, and sexually abusing children, subjecting them to many levels of harm. *See, e.g.*, Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. TIMES, March 4, 2007. This included TYC’s top administrators raping at least thirteen boys in their custody. *See* Nate Blakeslee, *Sins of Commission*, TEXAS MONTHLY, May 2007.

Children were also largely left to fend for themselves in TYC’s sick and deeply dysfunctional system. *See* Solomon Moore, *Troubles Mount Within Texas Detention Agency*, N.Y. TIMES, Oct. 16, 2007 (“Juvenile detainees as young as 13 years old slept on filthy mats in dormitories with broken, overflowing toilets and feces smeared on walls.”).

Soon after Terence’s time in TYC, Governor Rick Perry used his constitutional authority to eliminate its board of directors, terminate hundreds of employees, and create an investigative task force. In addition, an Ombudsman was brought in to help reform the system. 5EHR130-131. *See* Deborah Fowler, A TRUE TEXAS MIRACLE: ACHIEVING JUVENILE JUSTICE REFORM IN A TOUGH ECONOMIC CLIMATE (Texas Appleseed and First Focus on Children 2012); *see also* Terri Langford, *After Racial Outrage, Black Teen Inmate to Be Freed*, HOUSTON CHRONICLE, Mar. 31, 2007 (describing how some of the most vulnerable youth had their imprisonment “extended by TYC” staff as part of its “haphazard system”).

His sentencing jury was not made aware of any of this. Yet somehow the CCA concluded that such evidence was unimportant and would not have mattered to jurors. *Cf.*, *Lawmakers Cannot Ignore Victimization in the Justice System*, NEWSWEEK, Nov. 4, 2021 (essay by prosecutors documenting impacts of solitary confinement and other harms experienced by incarcerated youth and calling for more “trauma-informed and age-appropriate” interventions).

A. TYC’s Deplorable Daily Conditions and Shocking Abuse Scandal

Nor was the jury told how Terence himself was “traumatized” daily by TYC’s deep dysfunction. 5EHRR246. Instead, the sentencing jury was given the misimpression that Terence received months of quality juvenile treatment at TYC during 2005 and 2006, which he failed to appreciate or accept.

At the state habeas hearings, however, TYC’s former Ombudsman explained that while Terence was at TYC, it offered almost no meaningful therapeutic programming. 5EHRR158-159, 200. Instead, it was run by poorly trained staff, maintained dangerous youth-to-staff ratios, and consistently used solitary confinement as an intervention. 5EHRR138, 146.

Also significant, TYC leadership had near unchecked authority to release or extend incarceration for youth, making residents vulnerable to sexual predations of staff. 5EHRR135. The Ombudsman confirmed TYC often deployed “court liaison” Leonard

Cucolo as its mouthpiece at juvenile transfer hearings to justify dumping countless youth into the adult prison system without good reason. See 5EHRR236; see also *Leonard Cucolo Retires from “The Office of Leonard Cucolo”* (i.e., TJJJ), TJJJ NEWS & ANNOUNCEMENTS, July 2, 2018 (Cucolo was the “court liaison for the entire agency” for over 30 years and “provided testimony in more than 800 transfer/release hearing for determinate-sentenced offenders in juvenile courts throughout the state”), <http://tjjdblog.blogspot.com/2018/07/leonard-cucolo-retires-from-office-of.html>.

Terence was in TYC before these inhumane conditions were exposed in 2007. He was initially delivered to TYC’s Marlin intake facility at age 16, which the Ombudsman described as a “horrible place” that was “deeply disturb[ing].” 5EHRR153-154. The facility, which has since been shut down, was overpopulated. Kids banged on the steel doors of their cells to demand attention, as the guards blasted classical music to drown out their pleas. 5EHRR154.

After his time at the Marlin Unit, Terence was transferred to the Crockett Unit – which was worse yet. 5EHRR159. Crockett was understaffed and run by officers who had little more than 30 hours’ training. Many were themselves gang-involved and encouraged violence in the facility rather than rooting it out. 5EHRR160-161, 176.

Crockett was directed towards youth with mental health challenges and lower intelligence quotient (IQ) scores. Terence was supposed to receive special

services to support his learning disabilities and psychological needs. 5EHR159. He never obtained such support. In fact, Crockett was considered such a liability that it was closed after Governor Perry signed TYC reform legislation into law. 5EHR160; *TYC to Close Crockett State School, Two Other Facilities*, PALESTINE HERALD PRESS, June 3, 2011.

As this Court noted, the jury did not hear any of this mitigating evidence about TYC's deplorable conditions as context for Terence's supposed misbehaviors at the facility. *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”).

The CCA repeated these same errors while undertaking *Strickland's* prejudice analysis. It ignored this Court's instructions to consider all new mitigating evidence presented, applying careful and “record-intensive analysis.” *Andrus*, 140 S. Ct. at 1887. Instead, the CCA overlooked and mischaracterized mitigating details about Terence's time in TYC.

The CCA referenced this powerful proof only in passing, minimizing the agency's widespread sexual and other abuses against children in its care – largely youth of color. *See* TRANSFORMING JUVENILE JUSTICE IN TEXAS: A FRAMEWORK FOR ACTION (TYC Task Force 2007) (documenting TYC's receivership status and

need for reforms, including its overrepresentation of youth of color in the system).

The CCA characterized these simply as “bad conditions under which juveniles were often placed in TYC.” *Ex Parte Andrus*, 622 S.W.3d at 902. It also speculated that such evidence might not have been admissible at sentencing at all, *id.*, further abdicating the “weighty” task before it. *See Andrus*, 140 S. Ct. at 1887; *see also* Tex. Code Crim. Proc. art. 37.071, §2(a) (providing that state and defendant may present any matter “relevant to sentence, including evidence of the defendant’s background or character or the circumstances of the offense that mitigates against the imposition of the death penalty”). In the end, the CCA simply claimed none of this evidence mattered given Terence’s behavior at TYC and his “criminal conduct.” *See, e.g., Ex Parte Andrus*, 622 S.W.3d at 894, 902 (describing Terence’s juvenile court adjudications as “crimes” negating the newly presented mitigation evidence).

Such superficial analysis – including ignoring the fact that child abuse and neglect stunts growth, produces trauma, and causes maladaptive behavior – cannot justify a proper prejudice determination. Placed in their proper light, TYC’s shocking conditions would have impacted the thinking of at least one of Terence’s jurors.

B. Sham Mental Health “Treatment” and Improper Administration of Several Anti-Psychotic Medicines

TYC denied Terence proper mental health care, administered contraindicated dangerous anti-psychotic medications, and consigned him to long stints in solitary confinement. Due to TYC’s mistreatment, Terence went from having an emotional disorder upon admission, to presenting with breaks from reality and suicidal ideations, before being dumped into the adult prison system. *See, e.g., Andrus*, 140 S. Ct. at 1877.

This missing mitigation evidence, coupled with appropriate expert explanation, would have impacted the outcome of the capital sentencing hearing in his case. A jury comprised of every-day individuals from Terence’s community – mothers, fathers, sisters, and brothers – would recognize such unjust and inhuman treatment exacerbated his already vulnerable condition.

TYC staff at Marlin diagnosed Terence with a conduct disorder but “conduct disorder” was TYC’s default diagnosis. It was provided to most youth without meaningful testing, assessment, or collection of outside information. 5EHRR158; *see also* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Fifth) § III, at 474 (2013) (warning that “conduct disorder” may be “misapplied to individuals in settings where patterns of disruptive behavior are near-normative”). And Terence’s designated housing did not result in any specialized plan of care or therapeutic modality tailored to

this diagnosis or his actual needs. Instead, he was subjected to TYC's signature "Resocialization Program" at the Crockett Unit. 5EHRR149.

The Resocialization Program, as described by the Ombudsman, was a path to failure for most youth who could not master its bizarre and meaningless requirements. 5EHRR149. Among other things, it mandated youth memorize buzz phrases and use them to verbalize "thinking errors." *Id.* This part of the program was particularly cruel to children like Terence who struggled with learning disabilities. *Id.*

It is no surprise that Terence was unable to advance in an ineffective program with unrealistic expectations. 5EHRR149. Yet youth who did not fulfill the program's obligations were sanctioned and further incarcerated. *Texas Youth Commission Pays \$625,000 to Settle Abuse Suit*, PRISON LEGAL NEWS, Aug. 10, 2010 (recounting that as part of the Resocialization Program youth, among other things, had to "huddle up" to aggressively confront peers to force them to admit to wrongs they may not have committed).

TYC's gross failure to properly treat and medicate Terence harmed him. During the habeas proceeding, counsel called Dr. Scott Hammel, a child psychologist, to testify about Terence's childhood traumas, and his treatment by TYC. Dr. Hammel testified that, while reasonable minds can differ in the field, there was "significant discrepancy" between symptoms and diagnosis in Terence's case. 7EHRR85. He testified that TYC

staff made “a major mistake” in treating and medicating Terence the way they did. *Id.*

Terence’s traumas, which Dr. Hammel discussed in terms of the ACEs framework, were central to understanding Terence’s needs and actions. Yet they did not appear to factor at all into TYC’s diagnosis or Terence’s subsequent treatment by its staff. 6EHRR160-165. Instead, he was prescribed medication with dangerous long-term effects, such as hallucinations and violent episodes, for a psychotic disorder that he did not have. *See id.*; *see also* 7EHRR83.

Indeed, Dr. Hammel explained that without a proper supporting diagnosis, Terence was given a range of powerful medications that can cause mania, aggression, and psychosis. 6EHRR163. His medications were also changed at least five times without documented justification. He received psychotropic medications such as Seroquel, which can induce suicidal thoughts, in addition to Clonidine, Concerta, Strattera, Prozac and Adderall, all of which can have dangerous side effects. 6EHRR160-165. *See, e.g.*, Ingrid Kholstadt, *Use of Atypical Antipsychotics in Children: Balancing Safety and Effectiveness*, AMERICAN FAMILY PHYSICIAN, March 1, 2010 (warning such medications can cause “increased risk of suicide in children”); *see also* Kamala Allen, *Reducing Inappropriate Psychotropic Prescribing for Children and Youth in Foster Care*, HEALTH AFFAIRS, Apr. 17, 2015.

Unfortunately, Terence’s sentencing jury did not hear any of these facts. Neither did they hear about the

shameful state of TYC's treatment programs, which lacked sound bases. The CCA simply discounted all this too.

C. Long Stints in Solitary Confinement as a Child at TYC

Making matters worse, Terence spent frequent and extensive periods in solitary confinement, which only exacerbated his mental health issues. At the sentencing hearing, Leonard Cucolo claimed Terence needed to be held in "secure units" – meaning solitary confinement – as part of "a behavior management plan" to address his "significant assaultive behavior." 48RR69.

Cucolo's testimony framed Terence as a security threat who had to be locked down and separated from other youth. 48RR68-69. Defense counsel offered only a hearsay objection – and nothing more to clarify, mitigate, or elaborate on this topic. But as this Court recognized, Terence's behavioral problems at TYC were relatively mild while the harms he suffered there were quite severe. *Andrus*, 140 S. Ct. at 1884.

During Terence's post-conviction proceedings, TYC's investigative Ombudsman condemned the agency's prior widespread use of sensory-depriving solitary confinement, for periods of up to 90 days. 5EHRR111-112, 122. The Ombudsman properly reframed Terence's solitary confinement as abuse rather than an appropriate response to misbehavior. Solitary placement meant

Terence was deposited in a small, “[d]ark, windowless” cell with a mattress. 5EHRR154-155.

The damaging effects of solitary confinement identified by the Ombudsman – for children in particular – have been long understood in the fields of social science, medicine, and youth justice. It can cause suicidal behavior and mental illness, as well as exacerbate existing mental health conditions. *See, e.g.*, LINDSEY M. HAYES, NAT’L CTR. ON INST. & ALTERNATIVES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 42 (2004); *see also* KAYLA JAMES, THE IMPACTS OF SOLITARY CONFINEMENT, THE VERA INSTITUTE (2021).

As the Ombudsman explained during the habeas proceedings, “Ninety days in a dark, damp room with no communication . . . will do things.” 5EHRR170; *see also Remarks of Steven H. Rosenbaum, Chief, Special Litig. Section, U.S. Dep’t of Justice* (May 16, 1999) (stating “[t]he use of extended isolation as a method of behavior control . . . is an import from the adult system that has proven both harmful and counterproductive when applied to juveniles”), <https://www.justice.gov/crt/special-litigation-section-cases-and-matters-1>.

Moreover, the Ombudsman explained that TYC disciplined Terence with solitary confinement even for normal adolescent actions. Throwing paperclips and talking while on the lunch line both resulted in Terence’s solitary lockdown. 5EHRR174. Once Terence wrote a note to the TYC assistant principal saying that he heard disturbing voices in his head while in class. This was also met with solitary confinement – instead

of appropriate mental health care. 5EHRR183. Terence repeatedly was placed in solitary for reporting or exhibiting mental health episodes. *Id.*; *see also* 5EHRR179 (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”).

Exposure to TYC’s environment was so traumatizing that many youth asked to be put into solitary confinement to escape the chaos. 5EHRR155-156. Terence made nearly 40 “self-referrals.” Terence declared depression, family matters, or mental health as the reason for wanting to be placed in a secure cell. 5EHRR179; DX131. Notably, this was during the same period that staff were sexually assaulting youth at TYC.

The consequence for submitting a self-referral to solitary was a disciplinary write-up (referred to as a “225”). Inexplicably, no TYC official stepped in to inquire about the number of self-referral “225” write-ups Terence received or flagged such requests as unusual behavior – even after Terence attempted suicide. *Id.*; *see also* Nate Blakeslee, *Hidden in Plain Sight*, TEXAS OBSERVER, Feb. 23, 2007 (noting a “culture of secrecy and retaliation” at TYC, where “staff and students did not have faith that their complaints would be dealt with seriously”).

Evidence of Terence’s repeated placement into solitary confinement by TYC officials could have easily swayed at least one juror to spare him a death

sentence. *See, e.g., Williams v. Taylor*, 529 U.S. 362 (2000). Yet the CCA discounted or mischaracterized this evidence, too.

III. Youth-Centered Expert Testimony and Analysis Would Have Educated the Jury and Protected Against Erroneous and Outdated Thinking About Childhood Behaviors

The CCA minimized Terence’s childhood traumas, suggesting it was just his bad luck to grow up in a “bad neighborhood,” *Ex Parte Andrus*, 622 S.W.3d at 900, and wind up in some “bad conditions” at TYC. *Id.* at 902. Doing so it made a mockery of the knowledgeable experts presented during Terence’s habeas proceedings, as well as this Court’s teachings that children are vulnerable persons who may be harmed by their surroundings. *See Eddings v. Oklahoma*, 455 U.S. 104, 115, n.11 (1982) (“youth crime, as such, is not exclusively the offender’s fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth”) (internal citation and quotation omitted).

The CCA also repeatedly treated Terence’s childhood behaviors as those of an adult. Doing so discounted the youth-centered expert testimony offered during the habeas hearings and this Court’s jurisprudence holding youth are less culpable than adults and our juvenile justice system is a venue focused on rehabilitation and not punishment. *See In re Gault*, 387

U.S. 1 (1967); *see also, e.g., Miller v. Alabama*, 567 U.S. 460 (2012).

For instance, the CCA ignored the expert opinions of TYC’s own Ombudsman, in addition to his fact testimony. As noted, the Ombudsman made clear that TYC’s Resocialization Program heavily depended on so-called “225 reports” to evaluate behavior. 5EHRR144. But writing “225 reports” was like giving tickets, often misused by staff for arbitrary reasons – such as trying to show supervisors they were busy at work. 5EHRR176.

Although Terence received approximately three hundred “225” citations in eighteen months at TYC, the Ombudsman testified this number was “average or pretty low.” 5EHRR177. In fact, the Ombudsman was “surprised” at how few citations Terence received in TYC’s “violent” and “savage environment.” 5EHRR189. He likened it to a “Lord of the Flies” scenario where “sometimes you have to fight to get by . . . kids don’t really have a choice.” *Id.*

The Ombudsman’s testimony was based upon his expert role at TYC. He read thousands of documents relating to Terence’s case alone – in addition to reviewing countless more while working to reform the institution. 5EHRR115-118. Yet the CCA failed to refer to the Ombudsman’s TYC juvenile justice expertise. *Ex Parte Andrus*, 622 S.W.3d at 901 (apparently referring to the Ombudsman as “[t]he habeas witness who testified to the mildness of [Terence’s] behavior”). Instead, it took issue with this Court’s discussion of the

Ombudsman's findings: "Although the Supreme Court described [Terence's] infractions at TYC as 'notably mild,' we conclude that a jury would have been convinced otherwise." *Id.* at 901.

The CCA further discounted the facts and opinions offered by the Ombudsman when it asserted, "[t]he sheer number of times [Terence] was removed from the general population indicates he posed a serious, ongoing problem of violence, which was considered so serious that he was transferred to adult prison." *Ex Parte Andrus*, 622 S.W.3d at 902. But this claim fails to acknowledge that at least forty of those citations related to Terence's own self-referral to solitary confinement. 5EHRR179, 183.

These claims also falsely suggest Terence *needed* to be transferred to an adult prison by TYC because of his poor behavior and failure to successfully complete his TYC treatment. *See* 5EHRR179; *see also Ex Parte Andrus*, 622 S.W.3d at 894. Terence did not *need to be* transferred to adult prison. That cruel and harmful outcome, denying Terence possible appropriate treatment, was brought about by TYC officials. That transfer itself is another part of the mitigation case overlooked by defense counsel, prejudicing Terence during his capital sentencing proceedings.

Indeed, CCA's apparent conclusion that Terence's transfer from TYC to adult prison was appropriate due to his "behavioral problems" fails to account for the Ombudsman's insights into TYC's mismanagement and improper treatment of youth in its care. The

Ombudsman explained that TYC's arbitrary system resulted in "90 percent of kids serving well over their minimum length of stay." 5EHRR130.

A reasonable juror could conclude that well-documented system failures at TYC are what led to Terence being transferred to an adult prison – not his own shortcomings. But the jury never heard the expert testimony supporting such a conclusion. Instead, based upon the trial testimony of TYC staffer Cucolo, the jury was left believing that Terence received a well-rounded, age-appropriate 18-month intervention. 48RR61, 68, 73-74.

Cucolo, however, was little more than a custodian of records for TYC. As the Ombudsman explained based upon his expert knowledge and review of Terence's TYC records, Cucolo had no personal interaction with Terence. He simply recounted the hearsay that filled TYC's behavioral reports. 5EHRR237; *see also* "The Office of Leonard Cucolo," *supra* ("It was Cucolo's job to testify on behalf of the agency's position," relying on hearsay notes of administrators and caseworkers to make presentations to juvenile court judges who "weighed if a youth would be paroled or moved to an adult prison").

Terence was likely further harmed by his transfer to adult prison following his time in TYC. Placement in adult prisons for childhood wrongdoing increases the risk of youth recidivism and overlooks capacity for change. These facts were well known at the time of Terence's trial in 2012. *See, e.g.,* 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); MICHELE DEITCH, JUVENILES IN THE ADULT CRIMINAL JUSTICE SYSTEM IN TEXAS (LBJ School of Public Affairs – University of Texas 2011).

Thus, the jury should have heard more than the state's evidence relating to Terence's transfer to adult prison, including harms that result from such actions. Without this information, the capital sentencing process was unfairly skewed during a trial where the prosecutor himself declared that jurors had "not heard one mitigating circumstance" about Terence's life. 51RR60. Yet the CCA ignored the Ombudsman's expert testimony about TYC's failings in contrast to youth justice best practices.

As previously noted, the CCA similarly disregarded the Adverse Childhood Experiences (ACEs) expertise offered by Dr. Scott Hammel, who provided important insights about Terence's tragic home life and experiences at TYC. *See, e.g.*, 6EHRR151-153. For instance, Dr. Hammel explained that ACEs such as those experienced by Terence, including childhood abuse, neglect, or household dysfunction, can predict future problems including stunted psychological, physical, and emotional development, as well as involvement with the legal system. 6EHRR152; 39-40 Hab. Ex. 123-127. *see also* NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, ADVERSE CHILDHOOD EXPERIENCES PREVENTION STRATEGY at 2 (CDC 2020)

(describing “adverse childhood experiences” studies going back to 1998).

Providing details about Terence’s childhood along with expert information about the long-term effects of untreated trauma surely would have generated greater empathy for Terence. When the entire record is properly considered, a reasonable probability exists that at least one juror would have struck a different balance in the sentencing verdict. CCA’s cursory analysis contravened this Court’s direct instructions and established precedent. *See, e.g., Wiggins v. Smith*, 539 U.S. 538 (2003).



CONCLUSION

At trial, the prosecution painted an irredeemable caricature of Terence. Terence’s trial attorney did nothing meaningful in response. This Court found that counsel wholly failed to investigate or present any coherent mitigation case. He thus squandered Terence’s chances of life during the crucible of his capital punishment case. And the jury unanimously sentenced Terence to die.

Contrary to the CCA’s conclusory claims that failed to consider the entire record, if defense counsel had provided a careful account of Terence’s childhood, time in TYC, and transfer to adult prison, as was presented during the post-conviction proceedings in this matter, at least one juror would have changed his or her vote in this case.

Unfortunately, the jury did not have a chance to learn the truth about Terence's childhood of deprivation, danger and cruelty delivered by adults who were supposed to protect him. These facts of extreme child abuse and neglect, solitary confinement, administration of harmful medication, and improper delivery to the adult prison system would have allowed the jury to see Terence as a traumatized youth. Meaningful expert testimony and analysis would have further allowed the jurors to further understand the depths of TYC's dysfunction and the impact of ACEs on children. Taken together, such evidence would have caused at least one juror to strike a different balance and changed his or her vote, granting Terence life incarceration.

For all the stated reasons, Amici urge a finding of prejudice under *Strickland* and relief for petitioner Terence Andrus.

Respectfully submitted,

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