No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KOSOUL CHANTHAKOUMMANE,
Petitioner,

VS.

TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Trial Cause No. W380-81972-07-HC2
Writ Cause No. WR-78,107-02

PETITION FOR CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

I.

Is Petitioner's conviction the product of a fundamentally unfair trial that was prejudiced by the admissibility of flawed forensic scientific evidence relating to bitemark identification, hypnotically induced eyewitness identification and outdated DNA statistical protocols?

PARTIES TO PROCEEDINGS BELOW

Both parties are identified in the case caption. Because neither party is corporation, a corporate disclosure statement is not required.

LISTED RELATED PROCEEDINGS
(in chronological order)

State of Texas vs. Kosoul Chanthakoummane, Case Number 38008262906 in the 380th Judicial District Court, Collin County, Texas (2006) (Trial).

Chanthakoummane v. State, 2010 WL 1696789 (Tex. Crim. App. 2010) (direct appeal).

Ex Parte Kosoul Chanthakoummane, 2013 WL 363124 (Tex. Crim. App. 2013) (State habeas).

Chanthakoummane v. Texas, 562 U.S. 1006 (Nov. 1, 2010) (certiorari denied on direct appeal).

Chanthakoummane v. Stephens, Director, TDCJ-CID, 2015 WL 1288443 (E.D. Tex, March 20, 2015) (federal habeas decision denying COA).

Chanthakoummane v. Stephens, 816 F.3d 62 (5th Cir. 2016) (affirming denial of COA).

Chanthakoummane v. Davis, Director, TDCJ-CID, ___ U.S. ___, 137 S.Ct. 280 (Oct. 3, 2016) (certiorari denied).

Ex Parte Kosoul Chanthakoummane, 2017 WL 2464720 (Tex. Crim. App., June 7, 2017) (subsequent habeas writ denied).

Ex Parte Kosoul Chanthakoummane, 2020 WL 5927442 (Tex. Crim. App., Oct. 7, 2020) (second subsequent habeas writ denied).

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PETITION FOR WRIT OF CERTIORARI

Kosoul Chanthakoummane respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

October 17, 2007, a Texas jury convicted Petitioner of capital murder. That same jury sentenced Petitioner to death. On April 28, 2010, the Texas Court of Criminal Appeals ("T.C.C.A") affirmed Petitioner's conviction and sentence. *Chanthakoumanne v State,* 2010 WL 1696789. On November 2, 2010, the Supreme Court of the United States denied his writ of certiorari. *Chanthakoumane v Texas*, 562 U.S. 1006 (2010).

Mr. Chanthakoumane filed his petition for a post-conviction writ of habeas corpus in the trial court on April 1, 2010. *Ex Parte Kosoul Chanthakoumanne*, 2013 WL 363124 (2013). On January 30, 2013, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions of law and denied the Petitioner's request for habeas relief. *Ex parte Chanthakoumanne*, *2013* WL 363124 (Tex. Crim. App. 2013).

On January 13, 2017, Petitioner filed a successor writ of habeas corpus in the State trial court. Petitioner thereafter filed a second subsequent application for writ of habeas corpus on May 13, 2019. *Ex Parte Kosoul Chanthakoumane*, Cause No. WR-78,107-02. Petitioner asserted that the State's conviction was based largely

upon discredited sciences, including bite-mark evidence, hypnotically induced eye-witness identification and DNA.[1]

On June 7, 2017, the T.C.C.A. referred Petitioners subsequent writ to the trial court for an evidentiary hearing. On July 16, 2018, the trial court conducted an evidentiary hearing. That hearing was continued to November 1, 2018 to facilitate the presentation of further evidence. On March 29, 2019, the trial court issued findings of fact and conclusions of law recommending denial of Petitioner's subsequent State writ (APPENDIX F).

On October 7, 2020, the T.C.C.A. issued an order denying relief as to Petitioner's subsequent State writ (APPENDIX A).

JURISDICTION

This TCCA's opinion issued on October 7, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a) (APPENDIX A).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates the Eight and Fourteenth Amendments to the United States Constitution. The Eight Amendment to the United States Constitution

[1] Petitioner raised four claims in his writ: (1) that he is entitled to relief under Article 11.073 of the Texas Code of Criminal Procedure because developments in science since his 2007 trial have discredited the State's bitemark evidence, eyewitness testimony, and DNA evidence; (2) that the State's bitemark evidence, eyewitness testimony and DNA evidence constituted false evidence that violated his Fourteenth Amendment right to Due Process; (3) that the admission of the State's bitemark evidence, eyewitness testimony, and DNA evidence violated his Fourteenth Amendment right to a fair trial; (4) that he is actually innocent because the new scientific evidence debunks all of the State's evidence connecting him to the offense and, thus, his execution will violate the Eight and Fourteenth Amendments.

prohibits the infliction of "cruel and unusual punishments." The Fourteenth Amendment to the United States Constitution provides in part that "no state shall … deprive any person of life, liberty, or property, without due process of law[.]"

The questions further implicate the following statutory provisions:

Petitioner filed a subsequent State application for a writ of habeas corpus in a capital case pursuant to Article 11.071(5) of the Texas Code of Criminal Procedure. Under Article 11.071 of the Texas Code of Criminal Procedure, a court can consider the merits of a subsequent application for habeas relief if:

> the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

Alternatively, a court may consider the merits of a subsequent application for habeas corpus if:

> by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2).

Article 11.073 provides a claim for relief related to certain scientific evidence that "(1) was not available to be offered by a convicted person at the convicted

person's trial; or (2) contradicts scientific evidence relied on by the state at trial."

TEX. CODE CRIM. PRO. art. 11.073(a). The Court may grant relief where:

> (1) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;
>
> (2) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (3) had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Id. art. 11.073(b).

STATEMENT OF THE CASE

Kosoul Chanthakoummane's guilty verdict is the product of cumulative prejudice occasioned by the admissibility of dubiously credible scientific evidence.

> What the science did in this case is it made that defense attorney get up in his opening statement and say that my client is guilty, and it was a robbery gone bad. He would not have said that if we hadn't had the physical evidence we had in this case.

See Diana Tilton, McKinney Police Homicide Detective. Forensic Files, *House Hunting*, Season 13, Episode 2 (Broadcast Sept. 19, 2008) at https://www.youtube.com/watch?v=kXwJYIACz_U ("Forensic Files").

In 2007, Mr. Chanthakoummane was denied a fair trial because the State relied on three flawed forensic scientific conclusions that were derived from: 1) hypnotically induced eyewitness identification linking Petitioner to the vicinity of the murder; 2) bitemark identification testimony linking Petitioner to the wounds inflicted on the murder victim; and 3) outdated DNA statistical protocols suggesting his DNA was found at the scene of the crime and under the murder victim's fingernails. Because the scientific community's collective understanding of these forensic sciences has now discredited them all, Mr. Chanthakoummane is entitled to a new trial. The T.C.C.A. erred in its finding that the collective prejudice occasioned by the admissibility of evidence based upon these three discredited forensic sciences does not entitle Petitioner to a new trial. (APPENDIX A) On the contrary, the admissibility of this flawed scientific evidence resulted in a total denial of

Petitioner's constitutional guarantee of a fundamentally fair trial. Mr. Chanthakoummane's case is precisely the situation envisioned by the Texas Legislature in passing Article 11.073. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(2).

All the science used to convict Chanthakoummane has been to some extent debunked. And as a McKinney Police Homicide Detective said when interviewed for Forensic Files, "What the science did in this case is it made that defense attorney get up in his opening statement and say that my client is guilty, and it was a robbery gone bad. He would not have said that if we hadn't had the physical evidence we had in this case." *See* Forensic Files. Without these discredited forensic sciences, Mr. Chanthakoummane would not be connected to this murder.

First, the State used hypnotically induced eyewitness identifications to place Mr. Chanthakoummane in the neighborhood and walking toward the model home in which Ms. Walker was killed. And this particular discredited science focused investigators on Mr. Chanthakoummane. Had they not used a junk science to create false memories of Mr. Chanthakoummane, investigators would not have sought to use bitemark-identification analysis in a misguided attempt to connect Mr. Chanthakoummane to Ms. Walker's body. Second, the Texas Department of Public Safety's discredited DNA statistical interpretation overstated the possibility that Mr. Chanthakoummane was inside that model home at some time. Finally, and most

importantly, the State used thoroughly debunked bitemark-identification evidence to convince the jury that Mr. Chanthakoummane touched Ms. Walker and inflicted a violent injury on her. That argument foreclosed any reasonable defense that Mr. Chanthakoummane was innocent.

REASONS FOR GRANTING THE PETITION

A. The two eyewitnesses made flawed identifications based on faulty hypnosis sessions and also based on serious omissions in both their in-court and out-of-court identifications.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that although "hypnotically refreshed" testimony was "controversial," the dangers associated with it could be reduced by "procedural safeguards" that this Court left to the states to adopt. As noted below, the "procedural safeguards" put in place by Texas courts allowed dubiously credible eyewitness testimony to go before the jury in this case. As a consequence of the failure of these Texas procedural safeguards, unreliable eyewitness testimony was presented to the jury and Mr. Chanthakoummane was wrongly convicted of capital murder. The procedural safeguards implemented by Texas courts under *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988) should therefore be invalidated by this Court because they do nothing to prevent law enforcement from utilizing shoddy hypnotic techniques to secure questionable eyewitness identification evidence.

Sarah Walker was a successful realtor. On July 8, 2006, Ms. Walker was showing a model home in McKinney, Texas. Sometime around noon, Ms. Walker's cousin, Jessica Allen, was talking on the phone with Walker when someone walked into the model home. At that moment, Ms. Walker ended her call with Ms. Allen. (21 RR 52). Andy Lilliston, a manager in the information technology department at FedEx, testified that he and his wife were looking at model homes that same day (21 RR 57). Around 1:20 p.m., he and his wife discovered the body of Ms. Walker in the kitchen of a model home (21 RR 62). The couple immediately called 911 (21 RR 62).

Mamie Sharpless, a realtor with Keller Williams testified at trial that on the morning of July 8, 2006, she received a phone call from a person she believed was a potential client (21 RR 87-8). The caller identified himself as Chan Lee and stated that he was interested in looking at a house that she advertised (21 RR 89). The caller stated that he was calling from a pay phone because he was from North Carolina, staying at a local hotel (21 RR 90). Before the phone call cut off, Ms. Sharpless gave the man directions but was unable to confirm a time to meet (21 RR 94). Ms. Sharpless and her husband, Nelson Villavicencio, decided to go to the subdivision and attempt to meet up with the caller. *Ibid*.

After arriving at the advertised unit, the couple parked their car and waited for the caller to arrive (21 RR 98). A little while later, a white Mustang with one male

driver passed them in their car. *Ibid*. The man got out of the car and the couple asked him if he was Chan Lee (21 RR 98-9). He responded that he was not (21 RR 100). Ms. Sharpless observed that the man was dressed in a blue colored "muscle shirt," was not tall, was of Asian descent, muscular build, and had a "buzz cut" hairstyle (21 RR 101). She never described the person as having prescription eyeglasses nor did she describe any tattoos. At trial, Ms. Sharpless made an in-court identification stating that the only difference she noticed was that Mr. Chanthakoummane's hair was longer than the day she believes she allegedly saw him outside the model home (21 RR 102).

Nelson Villavicencio, Ms. Sharpless' husband, testified that he accompanied his wife to the model home and waited to see if Chan Lee would arrive (21 RR 112). After the man in the white Mustang arrived, Mr. Villavicencio asked if he was Chan Lee (21 RR 114). He responded that he was not. *Ibid*. The couple drove away and went into the advertised unit to prepare for another customer (21 RR 115). They waited a little while for the second customer and when he never showed up, they decided to leave and get something to eat (21 RR 119).

Later that week, the police contacted Mr. Villavicencio to help them complete a facial composite (21 RR 121). He could only complete the composite after he underwent the hypnosis session conducted by Texas Ranger Richard Shing (21 RR 121-22). Mr. Villavicencio testified that he saw the man's face outside the model

home, and he described the individual as being of Asian descent (21 RR 114). Additionally, Mr. Villavicencio spoke about his description of the man outside the model home, “He had a T-Shirt no sleeves, jeans, very athletic.” *See* Forensic Files. Like his wife, who was the only other eyewitness to see the man outside the home, Mr. Villavicencio did not describe the person as wearing prescription eyeglasses or any tattoos. Similarly, at trial Mr. Villavicencio made an in-court identification stating the only difference he noticed was that Mr. Chanthakoummane had longer hair in-court (21 RR 123).

Richard Shing, a Texas Ranger, testified outside the presence of the jury that he hypnotized Ms. Sharpless and Mr. Villavicencio (21 RR 66-70). He claimed that he was trained in hypnosis and while under hypnosis Ms. Sharpless and Mr. Villavicencio described the individual, they saw outside of the model home (21 RR 68-9). After the hypnosis session, Mr. Villavicencio met with a sketch artist, who could only produce the composite after the hypnosis session (21 RR 120-21). Mr. Chanthakoummane's trial counsel called no witnesses during the hearing to rebut Mr. Shing's hypnosis practice and procedures; nor did they cross-exam any of the identification witnesses during the trial. Thus, during the open-court proceedings, it appeared that the identification witnesses' testimony was tenable rather than faulty and unreliable.

According to the sketch artist, Officer Ray Clark, regarding the hypnosis used in this case, "Nelson [Villavicencio] just had such a brief look at this person, I was hopeful but actually kind of doubtful that it was going to work." *See* Forensic Files. The only two eyewitnesses who provided identifications, in this case, were Ms. Sharpless and Mr. Villavicencio. The couple's help with the sketch composite is what ultimately allowed investigators to focus on Mr. Chanthakoummane after it aired on the local news. *See* Forensic Files. But these identifications were ultimately flawed. Not only did the couple go through flawed and highly suggestive hypnosis sessions to help the police with the composite sketch, their in-court versus their out-of-court identifications of Mr. Chanthakoummane are laden with omissions. Mr. Chanthakoummane wears prescription eyeglasses. In 2006, his left-eye vision was worse than 20/300, and his right-eye vision was 20/400, meaning that he cannot walk or drive without his glasses (Appendix B at Ex. 1789-93). Furthermore, Mr. Chanthakoummane had a distinctive sleeve tattoo on his right arm that stretches from the top of his shoulder down to his wrist and is the complete width of his upper arm (Appendix B at Ex. 1794-97). His tattoo is a colorful depiction of a dragon, which would have been noticed when wearing a sleeveless or "muscle" shirt.

Allen P. Davidson, a sergeant with the Texas Rangers, testified that he contacted the University of North Carolina at Charlotte, who reported no records existed for a student named Chan Lee (21 RR 180). Mr. Davidson also located a

record for a man with the name of Chan Lee (21 RR 174). He responded to the man's address and knocked on the front door. (21 RR 175). A young Asian male answered the door and he asked him if he knew a man named Chan Lee. *Ibid.* The man answered that it was his brother. *Ibid*. The young man called his brother on the telephone and Mr. Davidson spoke with him. *Ibid*. After the brief conversation, Mr. Davidson ruled out Chan Lee because Mr. Lee's accent sounded like an Asian accent as opposed to an accent of a "black male" (21 RR 176).

In his subsequent post-conviction writ, Petitioner offered the highly qualified expert opinion of Dr. Steven Lynn concerning the advancement of scientific knowledge that discredited the State's hypnotically induced eyewitness identifications. Dr. Lynn is the world's leading researcher on hypnosis and recovered memories (APPENDIX B at Ex. 1594-1642). Dr. Lynn is a Distinguished Professor of Psychology at Binghamton University, a branch of the State University of New York. Additionally, he is the Director of Binghamton University's Psychology Clinic and Laboratory of Consciousness and Cognition and the Center of Evidence-Based Therapy – the treatment division of the Laboratory of Consciousness and Cognition. And he is on the faculty of the International Institute of Psychotherapy and Applied Mental Health in Cluj-Napoca, Romania, to boot (APPENDIX B at Ex. 1594).

Dr. Lynn's distinguished academic and clinic positions have allowed him to conduct extensive research on hypnosis and memory (APPENDIX B at Ex. 1643-61). He is the Editor of at least eight major psychological publications related to psychology and hypnosis. *See id.* And he has been a guest editor of special hypnosis-related issues of psychological journals at least eight times. *Id.* In addition to these peer-reviewed academic journals, Dr. Lynn is the Editor of *Great Myths in Psychology*, an important book that revealed common misunderstandings about science to the public. As discussed in Dr. Lynn's affidavit, this book informed the public that memory does not work like a video recorder, a scientific principle on which the State relied to admit Ms. Sharpless' and Mr. Villavicencio's identifications, in 2010 (APPENDIX B at Ex. 1643-61). *Great Myths in Psychology* has been translated into seventeen languages so far (APPENDIX B at Ex. 1601). Dr. Lynn was nominated for the American Publishers Award for Professional and Scholarly Excellence in 2010 for his work on *Great Myths in Psychology*. He received an Honorable Mention for this prestigious award. *Id.* In addition to this honor, Dr. Lynn has received at least twelve other awards for his scholarly work in psychology; the overwhelming majority are for his work on hypnosis and recovered memories (APPENDIX B at Ex.1643-61). His publication list is long and distinguished; it highlights his impressive work in hypnosis (APPENDIX B at Ex. 1643-61).

Multiple United States and Canadian courts have qualified Dr. Lynn as an expert in hypnosis and memory (APPENDIX B at Ex. 1643-61). He has testified in major, high-profile cases, including *State v. Moore*, 902 A.2d 1212 (N.J. 2006), a New Jersey Supreme Court case which ultimately abolished the use of hypnotically altered memories in all New Jersey courts; the *Baltovich* case, which ultimately exonerated Mr. Baltovich and provided the foundation for the Supreme Court of Canada to abolish the use of hypnotically altered memories in its courts; *People v. Donna Prentice*, resulting in a hung jury (11-1 for acquittal) in a recovered-memory child-abuse case; and *Church of Scientology International v. Fishman, et al.*, No. 91-6426 HLH (TX), (C.D. Cal., 1995), which forced the Church of Scientology to dismiss its defamation suit about leaks of central church doctrine. *See id.*

The Court of Criminal Appeals also recognized Dr. Lynn's expertise when it stayed a Texas Article 11.073 petitioner's execution date based on a hypnotically induced eyewitness identification. *Ex parte Flores*, WR-64,654 (Tex. Crim. App. 2016). Although the T.C.C.A. ultimately denied relief in the *Flores* case, there is a pending petition for certiorari before this Court challenging the highly suggestive nature of hypnotically induced witness identification procedures. *See Charles Don Flores v. Texas*, Supreme Court of the United States Docket No. 20-5923 (2020).

At the trial court evidentiary hearing, Petitioner presented the expert testimony from Dr. Lynn. Dr. Lynn testified at great length concerning the myth that

hypnosis is an effective means of extracting reliable eyewitness accounts (APPENDIX C at RR 2/58 – 73). Dr. Lynn effectively debunked the notion that hypnosis can improve recall ("And seven studies now that show hypnosis neither improves recall of emotionally arousing events, nor does arousal level affect hypnotic recall much") (APPENDIX C at RR 2/71). *See* Claudia X. Alvarez & Scott W. Brown, *What People Believe about Memory Despite the Research Evidence*, 37 Gen. Psychologist 1 (2002) (a considerable portion of the American public believes that the brain permanently stores accurate records of memories).

Dr. Lynn reviewed the recordings of the hypnosis done by Mr. Shing in this case of the alleged eyewitnesses and he noted that Shing prompted them to "recall in your mind's eye what you just spoke about." (APPENDIX C at RR 2/78). It is well settled, however, that the fidelity of our memory may be compromised by many factors, including encoding conditions. Without realizing it, we regularly perceive events in a biased manner and subsequently forget, reconstruct, and distort the things we believe to be true. *See* National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 60 (2014) (citing J. T. Wixted, *The Psychology and Neuroscience of Forgetting*, 55 Ann. Rev. Psychol. 235 (2004); Y. Dudai, *Reconsolidation: The Advantage of Being Refocused*, 16 Current Opinion in Neurobiology 174 (2006); E. F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 Learning &

Memory 361 (2005)). Dr. Lynn made it clear that there's no such thing as a "mind's eye" and that to direct subjects to rely upon their "mind's eye" plants a "highly suggestive" thought in a subjects mind (APPENDIX C at RR 2/78-79) (when "Mr. Shing makes such references … he invites [a subject] to imagine what she witnessed there by increasing the risk, I would say based on the research of false recollection and probably increasing the likelihood that she will be confident in her recollections regardless of their accuracy") (APPENDIX C at RR 2/79).

Most importantly, Dr. Lynn testified about how memory worked (APPENDIX C at RR 2/120). Specifically, memories are not like files to be accessed by the person. They are not like a huge VHS bin in the brain and hypnosis can help the person retrieve those VHS tapes. *See* R. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 204 (2006) (jurors generally have a tenuous grasp on how memory works, believing that a witness on the stand is effectively narrating a video recording of events that had been captured perfectly in his or her memory).

Memories degrade and can be lost forever ("memory is not like a tape recorder") (APPENDIX C at RR 2/120). Critically, using hypnosis as a memory retrieval tool is based on the misconception that memory works like a video recorder that can be played back. In reality, memory is prone to contamination both during the encoding stage and between encoding and recollection. During a hypnosis

session, the witness is led to believe that he or she can conjure up a memory that in fact never existed in reality or was contaminated with false details from other sources. Scott Lilienfeld et al., *Myth #12: Hypnosis is Useful for Retrieving Memories of Forgotten Events, in 50 Great Myths of Popular Psychology: Shattering Widespread Myths and Misconceptions About Human Behavior* 69 (2d ed. 2010) (dispelling the common misconception that hypnosis eases the ability for people to recall forgotten events); Jeffrey S. Neuschatz et al., *Hypnosis and Memory Illusions: An Investigation Using the Deese/Roediger and McDermott Paradigm*, 22 Imagination, Cognition, & Personality 3 (2003) (finding no support for the assertion that hypnosis is an appropriate memory enhancement procedure); Elisa Krackow et al., *The Death of Princess Diana: The Effects of Memory Enhancement Procedures on Flashbulb Memories*, 25 Imagination, Cognition, & Personality 197 (2005) (explaining results of experiments showing that recall of memory was more accurate when hypnosis was not used);

Dr. Lynn also testified regarding the numerous studies that he did on hypnosis and memories. His first study tested whether hypnosis would improve memory and concluded that it did not (RR 2/63). The second was one that looked at age regression and its efficacy (APPENDIX C at RR 2/65). In that study, a person was hypnotized and asked to go back to when he was very young and talk about a particular item. *Id.* When the person's parents were contacted, they only

corroborated the hypnotized persons recall 21% of the time (APPENDIX C at RR 2/65). Another study by Dr. Lynn showed that the longer the delay, the more likely there would be false reporting in response to hypnosis. (APPENDIX C at RR 2/67).

Yet another study conducted by Dr. Lynn showed the importance of expectation (APPENDIX C at RR 2/69). The dangerous conclusion from this study was that if a person believes that hypnosis will improve memory, then hypnosis will improve memory. *Id.* Dr. Lynn also conducted a "flashbulb memory test" to measure the emotional reaction to events that occurred one to three days prior (APPENDIX C at RR 2/63). When the experts followed up 11-12 weeks later, they found that those participants who were under hypnosis had memories that were the least consistent over time. *Id.*

Dr. Lynn further testified regarding the "impossible memories" study (APPENDIX C at RR 2/73). Participants were age regressed back to 1978. *Id.* A female participant was then asked if she had a cabbage patch doll. *Id.* Boys were asked if they had a He-man doll. *Id.* These toys, however, were not released until three years later. Nevertheless, twenty percent of the hypnotized subjects reported having those toys. *Id.*

Dr Lynn also discussed the so-called *Zani* guidelines (APPENDIX C at RR 2/75) (*citing*) *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988). Texas trial courts are required to conduct a "*Zani* hearing" to assess whether "procedural

safeguards" were followed by law enforcement during hypnotically induced witness identifications. The *Zani* "procedural safeguards are: 1) the training of the person doing the hypnosis; 2) the importance to record the interview; 3) the level of corroborating information; 4) induction techniques; and 5) the fact there is only the interviewer in the room. *Id.*

Dr Lynn also testified as to issues he had with the interviews conducted in the present case. In the Sharpless interview, Dr. Lynn noted that it is dangerous to imply to the person that through hypnosis that they can access the subconscious mind (APPENDIX C at RR 2/77-78). Dr. Lynn stressed that there is no conscious or subconscious mind. *Id.* Dr Lynn also discussed the faulty notion of a "mind's eye" that was discussed at great length in both interviews of Mimi Sharpless (APPENDIX C at RR 2/79). Dr. Lynn stressed that the mind does not have an eye (APPENDIX C at RR 4/79). Contrary to the interviewer's suggestion to these witnesses that they will be able to remember with hypnosis, Dr. Lynn opined that they will not. *Id.* "Suggestive identification procedures have the power to influence what an eyewitness believes she has seen. And poorly encoded memories are especially susceptible to deterioration and revision under such procedures." *See* Brief of the Innocence Project As *Amicus Curie* In Support of Petitioner Charles Don Flores, Case No. 20-5923 (2020) (*citing*) Thomas D. Albright, *Why Eyewitnesses Fail*, 114 Proc. Nat'l Acad. Sci. 7758, 7761 (2017).

Dr Lynn was also extremely troubled by the fact that the interviewer interjected that the person of interest in this case was Asian. He noted that this is suggestive language will cloud and change the memories had by the interviewee. *Id.* This sort of interview tactic can create a false memory. *Id*. ("Mr. Shing offers the highly suggestive statement, you know there are certain features that Asians have … this could well have led her to develop a highly stereotypic image or memory of the individual she witnessed, which influenced the sketch that was generated and increased her confidence in the accuracy of her identification") (APPENDIX C at RR 2/79). Courts around the country have acknowledged that blind identification proceedings are essential to safeguarding the integrity of the identification procedures. *See, e.g.*, *State v. Lawson*, 291 P.3d 673, 705 (Ore. 2012) (noting that "administrator knowledge [of the suspect] significantly affects reliability"); *see, e.g.*, Ryauu M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004) ("[W]itnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low").

Dr Lynn also viewed the tape of the Villaviencio interview (APPENDIX C at RR 2/80). Again, the interviewer talked about the mind's eye. *Id.* Dr. Lynn again stressed this was not proper. *Id.* In this case, the interviewer also allowed

Villaviencio to freeze frame and sharpen the image in his mind. In Dr. Lynn's expert opinion, the mind simply cannot perform this function (APPENDIX C at RR 2/80).

Also troubling, was that Dr Lynn observed that there was no pre-hypnotic sketch done in this case (APPENDIX C at RR 2/81). Dr. Lynn correctly noted that a pre-hypnotic sketch assists in trying to show what information an eyewitness had before being hypnotized and if the hypnosis was helpful in getting a better sketch of the alleged suspect (APPENDIX C at RR 2/82). Moreover, Dr. Lynn added that in this case, there was no indication whether either subject talked about how hypnotized they were in the interviews with the Texas Ranger (APPENDIX C at RR 2/82). In addition, Dr Lynn debunked the long-held belief that accessing memories is like putting a tape in a tape recorder (APPENDIX C at RR 2/103) and stressed that the field of hypnosis is ever changing, not stagnant, with new ideas being found as recently as 2015 (APPENDIX C at RR 2/ 104-105).

Petitioner argued that Dr. Lynn's expert testimony established that his conviction was obtained by way of unreliable eyewitness identifications resulting from improper hypnotic scientific practices. As noted supra, Dr. Lynn persuasively established that new scientific studies establish that the hypnosis techniques utilized by Mr. Shing in this case invited highly suggestive eyewitness identification evidence that prejudiced the outcome of Petitioner's 2007 trial. These hypnotic

practices were highly suggestive and fell outside the acceptable bounds noted in the *Zani*.

Despite this mountain of credible expert testimony from Dr. Lynn, the trial court concluded that Dr. Lynn "overestimated the dangers of suggestibility and confabulation and entirely disregarded the actual consequences of using hypnosis in this case" (APPENDIX F at 27). Both the trial court and the T.C.C.A. instead sided with the State's hypnosis expert, Dr. David Spiegel, M.D., who disagreed with Dr. Lynn's contention that recent studies have changed the field of scientific knowledge regarding hypnosis (APPENDIX A at 7-8). The T.C.C.A. concluded that Petitioner failed to establish that the critiques against hypnotism in a forensic setting contained in recent scientific studies were not known and available at the time of his trial.

> Spiegel testified at the evidentiary hearing that the same myths and risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980s. Spiegel's testimony was corroborated by the State's introduction of studies articles from that time period.

(APPENDIX A).

Three justices on the T.C.C.A. declined to adopt the court's finding. Justices Newell, Richardson and Walker noted in their *per cuiriam* dissenting opinion that:

> Hypnosis has been discredited, at least according to one court, as a forensic discipline to uncover forgotten memories. Although the State's expert testified that the risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980s, **the risks associated with eyewitness identification have become more apparent over time.**

(APPENDIX D) (emphasis added).

The dissenting justices added that as noted in the case of *Tillman v. State*, 354 S.W. 3d 425, 441 (Tex. Crim. App. 2011), "eyewitness misidentification is the leading cause of wrongful convictions across the country." (APPENDIX D); *see also Tillman*, 354 S.W. 3d at 437 (noting that "law enforcement and reform agencies throughout the country have taken note of the scientific community's findings, forming task forces and developing new procedures to improve the reliability of eyewitness identifications").

The justice's dissenting view is consistent with courts throughout the country that have grown increasingly suspicions of hypnotically enhanced testimony and eyewitness identification evidence. *See also* National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, 7-29 (2014). In *State v. Moore*, 902 A.2d 1212, (N.J. 2006), the New Jersey Supreme Court recently revisited and expressly overruled *State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981) (the very case that the Texas Court of Criminal Appeals relied on in formulating the *Zani* "procedural safeguards" for use of hypnosis as a means for "refreshing memory reliable enough to be vetted in the criminal adversarial process)." *See State v. Moore*, 902 A2d 1212 (N.J. 2006); *see also Zani*, 758 S.W.2d at 237.

In *Moore*, the New Jersey Supreme Court held that due to intervening advances in scientific understanding, the *Hurd* guidelines for admitting hypnosis-

enhanced testimony were no longer tenable, as they could not be effective in controlling for the "harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice." *Moore*, 902 A.2d at 1213. The court also noted that while the *Hurd* guidelines were supported and recommended at the time by a leading expert in the field, Dr. Martin Orne, by 2006 the degree of consensus that existed was enough to roundly reject hypnotically enhanced testimony as an unreliable source of evidence. *Id.* at 1228-29 ("[T]here is a lack of empirical evidence supporting the popular notion that hypnosis improves recall. . . . The theory that hypnosis is a reliable means of improving recall is not generally accepted in the scientific community."); *see also State v. Lawson*, 291 P.3d 673, 686-87 (Ore. 2012) (recognizing specific factors that undermine reliability of eyewitness identification evidence and establishing new framework for evaluating the admissibility of any given eyewitness evidence); *see also State v. Henderson*, 27 A.3d 872, 919-23 (N.J. 2011) (criticizing the *Manson v. Brathwaite* test, including that suggestion may itself affect the seeming "reliability" of the identification).

Contrary to the T.C.C.A's finding in this case, the above authorities demonstrate an important shift in the scientific consensus since Mr. Chanthakoummane's trial. Accordingly, Petitioner should therefore be granted a new trial so that he can present the previously unavailable evidence illustrating the circumstances that made the eyewitness identifications in this case highly unreliable.

B. Mr. Chanthakoummane was convicted based on discredited bitemark-identification evidence.

Dr. Brent Hutson, a dental consultant for the Collin County medical examiner, testified outside the presence of the jury that he observed the injury on Sarah Walker's neck (22 RR 13). At trial, he reiterated most of his testimony in the presence of the jury. *See* (22 RR 239; 22 RR 247; 22 RR 259). First, Dr. Hutson conducted a dental exam, photographed the evidence, and measured the injury. *Ibid*. He then fabricated a custom tray to fit over the bitemark area and took an alginate impression. *Ibid*. After he made the impression, he created a stone model of that impression (22 RR 14). Finally, he made a master epoxy mold of the master cast and additional refractory casts (22 RR 14).

Dr. Hutson then met with Mr. Chanthakoummane and conducted a full dental exam, which included making alginate impressions of his teeth (22 RR 16-7). After that, he made stone impressions of Mr. Chanthakoummane's teeth (22 RR 17). Then, he conducted an examination to compare the cast from the neck injury and Mr. Chanthakoummane's casts by comparing an overlay computer image (22 RR 18). Additionally, he made a mirror image of the photographs for the comparison (22 RR 21). His opinion was that Mr. Chanthakoummane's teeth were responsible for the patterned injury (22 RR 18). He stated, "[i]t is my opinion within dental certainty, that the teeth of the suspect were responsible for that patterned injury[.]" *Ibid*.

Although it is now widely recognized that bitemark analysis—when used to make 'positive' matches - masquerades as a reliable scientific discipline, Mr. Chanthakoummane was convicted prior to the scientific community reaching that conclusion. *See* C.M. Bowers, *Problem-Based Analysis of Bitemark Misidentifications: The Role of DNA*, Forensic Sci. Int., 159 Supp. 1 (2006) ("dental literature concerning bitemark methodology is surprisingly thin and sorely lacking in rigorous scientific testing"); D.K. Whittaker, Some laboratory studies on the accuracy of bitemark comparison, 25 Int'l Dent. J. 166 (1975) (suggesting that because identification of bitemarks on pig skin was unreliable, similar difficulties may be encountered in identifying bites on human skin); I.A. & D. Sweet, *The Scientific Basis for Human Bitemark Analyses-A Critical Review*, 41 Sci. & Justice 85 (2001) ("review revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bitemark comparisons"); I.A. Pretty, *A Web-Based Survey of Odontologists' Opinions Concerning Bitemark Analyses*, 48 J. Forensic Sci. 1117 (2003) ("survey[ing] forensic dentists to obtain their views on a number of crucial components of bitemark theory and contentious areas within the discipline").

As a consequence, bitemark opinions do not meet the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), because it has no empirical or scientific

support. *See Ex Parte* Chaney, No. WR-84,091-01, 2018 WL 6710279 (Tex. Crim. App. 2018). Despite bitemark analysts' "scientific sounding titles" and "certifications," bitemark identification is simply an unscientific opinion that is not "helpful in deciding a perpetrator's identity" because "the theory and assumptions on which the identification is based, the data supporting the theory, and the methodology used" are not scientifically sound; *See also Daubert*, 509 U.S. at 591 (noting the requirement that expert testimony assist the trier of fact "goes primarily to relevance."). They are not scientifically sound because "the theory is based on unsupportable assumptions, the data is absent and the methodology lacks science-based professional guidelines and standards, and its conclusions are entirely subjective. Absent empirical support, the testimony can have no tendency to make a disputed issue of identity more or less probable."

The T.C.C.A. agreed that Petitioner had met his burden and established that Dr. Hutson's bitemark identification theories have been totally discredited by the scientific community (APPENDIX A at 7). ("Under the new scientific standards, Huston's bitemark comparison testimony would not have been admissible"). Despite correctly concluding that the bitemark evidence in this case was inadmissible junk science, the T.C.C.A. nevertheless erroneously concluded that "even without the bitemark comparison testimony, the jury still would have convicted Applicant based on the strength of the remaining evidence." *Id.*

C. The statistical interpretation method of calculating the probabilities of inclusion used to convict Mr. Chanthakoummane have now been invalidated and new protocols are in place.

Peter Copin of the McKinney Police Department responded to process the house for forensic evidence (21 RR 204). At the time of the trial, he previously only responded to two other homicide scenes. (21 RR 205). Mr. Copin collected blood evidence from various parts of the home, including from the inside of the deadbolt, the front window pull cords, a plant stand, the hardwood floor, and the kitchen sink (21 RR 209-11).

At trial, the State presented DNA evidence allegedly liking Petitioner to the murder. Dr. Stacy McDonald deputy chief of physical evidence at the Southwestern Institute of Forensic Sciences, testified about her DNA analysis at trial (22 RR 262). She initially scanned the items for blood and then did the DNA analysis on them (22 RR 265). She received buccal swabs, the window blind pull cords, fingernail clippings, a faceplate, and a swab from the bitemark (22 RR 267-68). She further testified that the sample from the pull cords and the fingernail clippings contained a mixture of at least two individuals (22 RR 272-74; 278-79). Ms. McDonald also stated that she calculated a statistical weight (22 RR 279). For all the samples, she either calculated the likelihood ratio, which is the statistical means to compare two different explanations for the evidence or the random match probability, which is the statistical means to calculate the rareness of a DNA profile in the population (22

RR 280-83). Based on her calculations, Ms. McDonald testified that there were two hypotheses she had: 1) the DNA mixture was either a mixture of the decedent and Mr. Chanthakoummane; or 2) it was a mixture of the decedent and an unknown, unrelated male contributor. *Ibid*. She excluded the later. *Ibid.*

McDonald found a single DNA profile matching Petitioner's profile on swabs from the living room (L-3 and L-4), swabs from the kitchen (K-13 and K-15), and the deadbolt (APPENDIX F at 21). McDonald found a DNA profile matching Petitioner in a mixed profile found on the pull cords, Sarah Walker's fingernail clippings and a swab from the kitchen (K-12), the faceplate, and a swab from the entryway (E-5) (APPENDIX F at 21).

The Texas Forensic Science Commission recently determined that the type of calculation methodology utilized in Petitioner's 2007 trial is now unreliable. The lab, however, used this type of unreliable statistical determination as evidence at Mr. Chanthakoummane's trial. The jury therefore returned a verdict of guilt against Petitioner based in part upon outdated statistical DNA interpretation guidelines. Because the 2007 guidelines are now outdated, the State was forced to re-evaluate the samples collected in this case utilizing the DNA procedures and guidelines published in 2015. That re-evaluation of the data resulted in new and different DNA correlations than those offered into evidence by the State at Petitioner's 2007 trial (APPENDIX E at RR 3/19-35). Accordingly, these 2015 modifications relating to

the interpretation of DNA profile samples is new relevant scientific evidence as defined under article 11.073.

This scientific data was not in existence at the time of Applicant's 2007 conviction. When the DNA evidence in this case was recalculated in accordance with the 2015 standards, the results relating to the DNA evidence offered in Applicant's 2007 trial were impacted. The statistical changes triggered by recalculation of the DNA samples weakened the statistical reliability of some of the samples presented to the jury in the 2007 trial (APPENDIX E at RR 3/29-33, State's Exhibit 12).

> [T]he State asked Dr. McDonald to re-evaluate the results in applicant's case using corrected FBI database and SWIFS' new procedures and guidelines. When she did, the statistical significance of some of the results changed, and the State furnished the new results to applicant. (3 WRR 19-35, State's Writ Exhibit 12).

(APPENDIX F at 22).

Table 1. Conclusions with most conservative statistic for inclusions[1,2]

Sample	Number of contributors	Comments	Sarah Walker	Kosoul Chanthakoummane	Robert Hawkins	Jeremy Miller	Jane Lillston	David Lillston	Michelle Leonard	Brad Holden	Randall Tate	Jesse Spivey	Adrian Grimmon
12AT1. Stain from pull cord	2		1.14 G [LR]	216 M [LR]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
12BT1. Stain from pull cord	2		1.14 G [LR]	216 M [LR]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
13NT1. Stain from fingernail clippings	2		ISNS	1 in 5.09 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
15AT1. Stain from razor	1		1 in 174 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
15B. Stained swabs – "...from bite mark"	1		1 in 174 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
24. Stained swab – "L-3"	1		Excluded	1 in 38.1 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
25. Stained swab – "L-4"	1		Excluded	1 in 38.1 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
26. Stained swab – "L-5"	1		1 in 174 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
27. Stained swab – "K-8"	1		1 in 174 G [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded
28. Stained swab – "K-12"	2		1 in 222 M [mRMP]	1 in 89.8 T [mRMP]	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded	Excluded

[1] SI symbols - M = Million (10^6); G = Billion (10^9); T = Trillion (10^{12}); P = Quadrillion (10^{15}); E = Quintillion (10^{18}); Z = Sextillion (10^{21}); Y = Septillion (10^{24})

[2] Abbreviations – ECF = Epithelial cell fraction.; SCF = Sperm cell fraction.; ISNS = Item is an intimate sample collected from the individual; therefore, she is an expected contributor to the DNA profile obtained from this sample. No statistical weight provided.; N/A = Not applicable. No non-victim genetic markers were detected; therefore, no conclusions were made.; NR = No DNA typing result.; Sp+ = Spermatozoa were detected by microscopic examination.; Sp- = Spermatozoa were not detected by microscopic examination.; A = Additional genetic marker(s) were detected that could not be attributed to the listed individuals.; R = An additional genetic marker was detected at a trace level. Trace level genetic marker is consistent with recognized rare genetic events observed in a single contributor.

Analyst Initials

(3 WRR 19-35, State's Writ Exhibit 12).

Petitioner argued that the diminished statistical correlations linking Petitioner to the crime scene that resulted from the revised statistical analysis standards negatively impacted the outcome of his trial. In addition to the discredited forensic bitemark science and dubious hypnotic evidence offered at trial against Mr. Chanthakoummane, the State presented the jury with the above discredited methods of DNA analysis purportedly tying him to the model home in which Ms. Walker was killed.

In 2015, the laboratory that analyzed the State's DNA evidence, the Texas Department of Public Safety, admitted that at the time of Petitioner's trial, it used unsound science to analyze those samples. Although the interpretation standards changed between 2007 and 2015, the State continued to compare Petitioner's DNA samples against a less than comprehensive dataset. Mr. Chanthakoummane is of Laotian descent. Despite that fact, Dr. McDonald utilized a Chinese and Vietnamese DNA dataset in this case because she determined that would be closest in comparison to a Laotian population (APPENDIX E at 47) ("there was a request to find a population database close to Laotian, so the FBI had a Chinese and Vietnamese database, so I used those as well").

Despite the State's admission that it relied on unsound DNA science and a non-Laotian database, the trial court concluded that the 2007 and 2015 DNA re-evaluation put applicant at the scene of the murder:

> "[s]pecficially applicant's profile was found on the townhome's kitchen sink, the living room floor, entryway floor, front door deadbolt, and the pull cords to the blinds in the window beside the front door. Second, and more importantly, the DNA evidence puts applicant on the victim's body, namely, on Sarah Walker's fingernails.

(APPENDIX F at 24)

T.C.C.A. adopted the trial court's finding and held that the recalculated DNA evidence did not "weaken the overall strength of the evidence linking Applicant to

the murder." APPENDIX A (noting that the "linchpin of the State's case was the DNA evidence found at the scene and under Walker's fingernails").

The State's expert, however, conceded in her testimony that DNA profile comparisons are not utilized as a tool to "match" two sets to each other, but only to determine whether the profiles are "included or excluded" (APPENDIX E at 38) ("Right, if you're asking me whether or not we testify to identity, the answer is no").

The cumulative impact of the above unreliable statistical interpretations, however, when coupled with the junk bitemark evidence and suggestive hypnotic evidence offered by the State, did prejudice the outcome of Petitioner's case. Contrary to the T.C.C.A.'s holding, Mr. Chanthakoummane has met his burden under Article 11.073 of the Texas Code of Criminal Procedure and was denied a fair trial based upon dubious scientific evidence. Accordingly, Petitioner is entitled to a new trial.

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant certiorari in this case.

Date: December 31, 2020

Respectfully submitted,

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