No. 20-6799

IN THE
SUPREME COURT OF THE UNITED STATES

KOSOUL CHANTHAKOUMMANE,
Petitioner,
v.

THE STATE OF TEXAS,
Respondent.

(CAPITAL CASE)

On Petition for Writ of Certiorari from the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petitioner was convicted in a Texas district court of capital murder and his punishment was assessed at death. The Petitioner presents one question for review:

"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forensic scientific evidence relating to bitemark identification, hypnotically induced eyewitness identification and outdated DNA statistical protocols?"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Kosoul Chanthakoummane was convicted and sentenced to death in 2007 for the capital murder of Sarah Walker. Chanthakoummane seeks certiorari review of the Texas Court of Criminal Appeals' opinion denying his subsequent application for state habeas relief. In particular, he asks this Court to review whether the admission of certain forensic scientific evidence – bite-mark identification, hypnotically-induced eyewitness identification, and DNA evidence – deprived him of a fair trial.

There is no compelling reason to review Chanthakoummane's case.

His petition is predicated on the Texas Court of Criminal Appeals' rejection of a purely statutory, non-constitutional request for relief under article 11.073 of the Texas Code of Criminal Procedure. Consequently, this Court lacks jurisdiction to address it. In any event, the Texas Court of Criminal Appeals properly decided his claim based on the evidence before it and existing law. Furthermore, the opinion of the court below is unpublished and of no precedential value. For these reasons, this Court should deny Chanthakoummane's petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History

In October 2007, Chanthakoumanne was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals subsequently affirmed his conviction and sentence on direct appeal. *Chanthakoummane v. State*, No. AP-

75,794, 2010 WL 1696789 (Tex. Crim. App. Apr. 28, 2010) (not designated for publication). And in 2013, that court denied Chanthakoummane's original state application for habeas relief. *Ex parte Chanthakoummane*, No. WR-78,107-01, 2013 WL 363124 (Tex. Crim. App. Jan. 30, 2013) (not designated for publication). The federal district court and the Fifth Circuit Court of Appeals subsequently denied his request for federal habeas relief. *Chanthakoummane v. Stephens*, No. 4:13cv67, 2015 WL 1288443 (E.D. Tex. Mar. 20, 2015); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. Feb. 25, 2016). And this Court denied his requests for certiorari review of the state and federal courts' denials of habeas relief. *Chanthakoummane v. Texas*, 562 U.S. 1006 (2010); *Chanthakoummane v. Davis*, 137 S.Ct. 280 (2016).

Chanthakoummane's execution was then set for January 25, 2017. Two weeks before his execution date, Chanthakoummane filed a subsequent application for state habeas relief in which he alleged that recent advancements in science discredited some of the State's trial evidence, namely, eyewitness testimony, bitemark evidence, and DNA evidence. Chanthakoumanne argued he should be afforded relief under article 11.073 of the Texas Code of Criminal Procedure, which allows habeas applicants to seek relief based on newly available scientific evidence. Chanthakoummane also argued he was actually innocent and that the complained-of evidence was false, depriving him of due process and a fair trial.

On June 7, 2017, the Texas Court of Criminal Appeals stayed the execution and issued the subsequent writ, returning the application to the trial court to litigate

the four issues it raised. *Ex parte Chanthakoummane*, No. WR-78,107-02, 2017 WL 2464720 (Tex. Crim. App. June 7, 2017) (not designated for publication).

The trial court conducted a live hearing at which expert testimony and other evidence was presented by both parties. And after the hearing, the trial court issued fact findings and recommended the denial of relief. On October 7, 2020, the Texas Court of Criminal Appeals adopted the trial court's fact findings and denied relief on the subsequent writ. On December 31, 2020, Chanthakoummane filed his petition seeking certiorari review of that decision.

The State files this brief opposing the petition.

Factual Summary

The Court of Criminal Appeals summarized the relevant trial evidence in its opinion on the subsequent state habeas application as follows:

> In October 2007, a jury convicted [Chanthakoummane] of the offense of capital murder for murdering a person in the course of committing or attempting to commit robbery. Specifically, [Chanthakoummane] was convicted of murdering and robbing real estate agent Sarah Walker on July 8, 2006, in a model home where she worked in McKinney, Texas. The medical examiner who conducted the autopsy testified at trial that Walker sustained several blunt force injuries to her head, multiple bruises on her face, a broken nose, fractured teeth, defensive wounds, a bitemark on her neck, and 33 stab wounds. DNA evidence placed [Chanthakoummane] at the crime scene. [Chanthakoummane's] blood, either alone or in a mixture, was found in numerous areas inside the model home and under Walker's fingernails.
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> Walker's ring and newly purchased Rolex watch were missing when her body was found. Photographs taken from a bank surveillance video showed Walker wearing the watch and ring an hour and a half

before her murder. The State presented evidence that [Chanthakoummane] was in financial trouble at the time of the offense, which it offered as a motive for robbing Walker.

Two eyewitnesses — realtor Mamie Sharpless and her husband Nelson Villavicencio — also placed [Chanthakoummane] at the crime scene. Sharpless called the McKinney police department the day after the murder to report the details of a suspicious encounter they had with a man outside the model home before the offense. She reported that they had driven to the area to meet a man who had called Sharpless from a pay telephone that morning asking to view a townhome. The man said his name was "Chan Lee" and he was relocating from North Carolina. When they arrived at the townhome, no one was there, so they waited in their car until a man driving a white Mustang passed by them and parked in front of the model home. As the man was walking toward the model home, they drove up and asked him if he was Chan Lee. The man answered "no." Sharpless described him as a muscular Asian male with a buzz cut, about 5' 7" to 5' 9" tall, and wearing a blue shirt. She reported that the white Mustang was parked in front of the model home when they left the area about an hour later, which was just prior to the discovery of Walker's body.

During the State's investigation, Sharpless and Villavicencio consented to undergo hypnosis by a Texas Ranger to see if they could provide any additional details. They were unable to provide additional information, but Villavicencio assisted a forensic sketch artist with a composite sketch of the suspect after his hypnosis session. The composite sketch was released to the public along with a description of the suspect's white Mustang. The State presented both eyewitnesses at trial, who identified [Chanthakoummane] and testified about their encounter with him. Their trial testimony was consistent with their original reports, but for variances in their estimation of [Chanthakoummane's] height.

Another female realtor provided information to police which led to the apprehension of [Chanthakoummane] two months after Walker was murdered.[1] The realtor, who had previously helped

[1] The State presented this evidence in the punishment phase of trial.

> [Chanthakoummane] find an apartment, reported that [he] came to her home the night before the instant offense and repeatedly banged on her doors.[2] At the time of his arrest, [Chanthakoummane] had healing wounds on his hands and arms. [He] admitted being in the model home on the day of the offense and provided other details that corroborated the accounts of Sharpless and Villavicencio.[3] [Also, he owned a white Ford Mustang.]
>
> The State presented testimony from a dental expert, Brent Hutson, who testified that he examined [Chanthakoummane] and made impressions of his teeth. Hutson testified that he compared [Chanthakoummane's] teeth with the bitemark and concluded that [Chanthakoummane] made the bitemark on Walker's neck "within reasonable dental certainty beyond a doubt." The State mentioned the bitemark in its closing argument at the guilt phase to show the brutality of the offense.

Ex parte Chanthakoummane, No. WR-78,107-02, 2020 WL 5927442, at *1-3 (Tex. Crim. App. Oct. 7, 2020) (not designated for publication).

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[2] Chanthakoummane claimed his car had broken down, and he attempted to gain access to the realtor's home under the guise of using her phone. Frightened, the woman called the police. When the police arrived, they verified Chanthakoummane's identity, determined his vehicle was running, and sent him on his way.

[3] Chanthakoummane admitted to police that he saw a man and a woman resembling Sharpless and Villavicencio outside of the townhome. He also accurately described the color and model of the couple's vehicle.

In addition, Chanthakoummane was linked to the offense by parallels between himself and "Chan Lee." "Chan Lee" told Sharpless that he was from North Carolina; Chanthakoummane had gone to school in North Carolina and had just moved to Texas from there. "Chan Lee" told Sharpless he was calling from an InTown Suites, and Chanthakoummane had filled out an application for an apartment near an InTown Suites. "Chan Lee" spoke with an African-American accent; Chanthakoummane does, too. And lastly, "Chan" is a patent derivative of Chanthakoummane.

ARGUMENT

Chanthakoummane's case is a poor candidate for certiorari review. He seeks review of a state court's determination of substantive state law, a matter over which this Court lacks jurisdiction. Even if reviewable, the state court's decision is supported by the law and substantial, credible record evidence. Moreover, the state court's opinion is unpublished and of no precedential value. For all these reasons, this Court should deny the petition.

This Court Lacks Jurisdiction Over the Question Presented

Chanthakoummane seeks certiorari review of the Texas Court of Criminal Appeals' denial of his request for habeas relief under article 11.073 of the Texas Code of Criminal Procedure. He attempts to couch his claim in constitutional terms. He contends the lower court's denial of relief under article 11.073 deprived him of "a fair trial." *See* Petition at 6-7, 34. And he contends the ruling implicates his constitutional right to due process and the constitutional prohibition against cruel and unusual punishment. *See* Petition at 3-4. Yet these allegations and references to the Eighth and Fourteenth Amendments are the sum of Chanthakoummane's briefing on the purported constitutional consequences of the lower court's ruling. The remainder of his petition merely challenges the resolution of his statutory claims and, in particular, the propriety of the fact findings on which the denial of relief was predicated. Such matters lie beyond this Court's jurisdiction.

This Court is the ultimate arbiter of whether state court decisions conflict

with the United States Constitution. *Dodge v. Woolsey*, 59 U.S. 331, 336 (1855). But it does not have jurisdiction to review state court decisions resting on independent and adequate state law grounds. *See Wainwright v. Sykes*, 433 U.S. 72, 81 (1977) ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

Article 11.073 is solely a creature of state law, and the Court of Criminal Appeals' denial of relief under that statute is strictly a matter of state substantive law. The Texas Legislature enacted article 11.073 in 2013. Tex. Code Crim. Proc. art. 11.073. Before its enactment, "newly available scientific evidence *per se* generally was not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of [the Texas Court of Criminal Appeals] or the United States Supreme Court, unless it supported a claim of 'actual innocence' or 'false testimony.'" *Ex parte Robbins*, 478 S.W.3d 678, 689-90 (Tex. Crim. App. 2014). Article 11.073 established a new legal basis for habeas relief in those cases

where a habeas applicant could show by a preponderance of the evidence that they would not have been convicted if newly available scientific evidence had been presented at trial. *Id*. at 690.

In his subsequent state habeas application, Chanthakoummane alleged he was entitled to habeas relief under article 11.073 because of newly available scientific evidence in the fields of bitemark analysis, hypnotically refreshed memory, and DNA analysis.[4] After a live evidentiary hearing, the trial court found Chanthakoummane had failed to satisfy the statutory requirements for relief. *See* Petitioner's Appendix A. On review, the Texas Court of Criminal Appeals adopted the trial court's findings and denied relief under article 11.073. *Ex parte Chanthakoummane*, 2020 WL 592744, at 2-3. That decision is a state court ruling on substantive state law not reviewable by this Court.

The State Court Correctly Decided the Question Presented

Even if reviewable, the lower court's decision on the merits of Chanthakoummane's article 11.073 claim is thoroughly supported by the law and the facts. Further review would not alter the outcome of Chanthakoummane's quest for state habeas relief.

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[4] Chanthakoummane also separately attacked the State's scientific evidence as unconstitutionally false or "flawed" and contended he was actually innocent. He does not challenge the rulings on those claims in his certiorari petition, however.

Article 11.073's Requirements for Relief

Article 11.073 applies to relevant 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. Proc. art. 11.073(a). To obtain relief under article 11.073, Chanthakoummane had to prove that:

> (1) "relevant scientific evidence is currently available and was not available at the time of [his] trial because the evidence was not ascertainable through the exercise of reasonable diligence by [him] before the date of or during [his] trial; and"
>
> (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 [he] would not have been convicted."

See Tex. Code Crim. Proc. art. 11.073(b)(1) & (2).

State Court's Findings

The lower court's findings on Chanthakoummane's article 11.073 claims can generally be summarized as follows:

> - Developments in the science of DNA analysis necessitated a recalculation of the statistical significance of the DNA results. And individualized bitemark pattern matching has been discredited and disavowed by the scientific community. But even with the recalculated DNA results and the exclusion of the bitemark evidence, Chanthakoummane would have been convicted; and
>
> - The 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-1980's and, thus, were known and available at the

time of Chanthakoummane's trial.

Ex parte Chanthakoumanne, 2020 WL 5927442, at *3.[5]

These findings were based on substantial, credible evidence presented in the live evidentiary hearing.

In particular, the findings related to the DNA evidence are supported by the testimony and reports of Dr. Stacy McDonald, the DNA analyst who conducted the original DNA analysis and testified at Chanthakoummane's trial. In 2007, McDonald testified that a DNA profile matching Chanthakoummane's was found – alone or in a mixture with the victim's profile – throughout the crime scene[6] and under the

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[5] With respect to Chanthakoummane's allegations that his constitutional rights to due process and a fair trial were violated, the lower court's findings can generally be summarized as follows:

(1) The DNA evidence and the eyewitness testimony were not false. The recalculated DNA results still showed Chanthakoummane was at the crime scene and under the victim's fingernails. And the eyewitnesses' trial testimony was consistent with their pre-hypnosis accounts;

(2) Furthermore, the bitemark testimony identifying Chanthakoummane as the source of the bitemark on the victim's body was false, but it was not the linchpin of the State's case. Due to the combined strength of the remaining evidence, Chanthakoumanne failed to show a reasonable likelihood that the bitemark testimony affected the jury's verdict; and

(3) With respect to actual innocence, the court summarily found Chanthakoummane had failed to prove by clear and convincing evidence that no reasonable juror would have convicted him.

Ex parte Chanthakoummane, 2020 WL 5927442, at *4.

[6] It 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. *See*

victim's fingernails. *See* Petitioner's Appendix E at 14-19; Petitioner's Appendix F at 19.

In 2015, McDonald recalculated the statistical significance of the prior results taking into account corrections to the FBI database and reinterpreting the DNA mixtures utilizing newly instituted guidelines and procedures. Some of the results remained the same. Other results changed, but where previously statistically strong, they remained so. Chanthakoummane was not excluded where previously included; and no conclusive results turned inconclusive. *See* Petitioner's Appendix E at 26-37; Petitioner's Appendix F at 22-24. In short, the DNA evidence still strongly implicates Chanthakoummane in the murder.

With respect to the use of hypnosis to facilitate a witness's recall, the court's findings are supported by the testimony of Dr. David Spiegel, the State's expert. Dr. Spiegel is a research and clinical psychiatrist and professor of psychiatry at Stanford University with extensive forensic experience in the field of hypnosis and memory. *See* Petitioner's Appendix F at 17. Moreover, he served as a member of the American Medical Association panel that examined the use of hypnosis in a forensic setting in 1985. *Id*. Dr. Spiegel testified that the myths regarding memory and hypnosis and the risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980's. *See id*. at 17-18. This

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Petitioner's Appendix F at 22.

testimony was corroborated by numerous articles and studies, some of which Chanthakoummane's own expert, Dr. Lynn, cited. *See id*. at 18.

Finally, with respect to the bitemark evidence, the lower court accepted the opinion of Dr. Brent Hutson, Chanthakoummane's odontologist, and noted reports issued by the National Academy of Science, the Texas Forensic Science Commission, the President's Council of Science and Technology, and the American Board of Forensic Odonotology, all of which confirmed that the science no longer supports "matching" a person's teeth to a mark left on skin. Indeed, the science now completely disavows individualization. *See id*. at 13-14. However, the lower court also noted the strength of the recalculated DNA evidence, the consistency of the eyewitnesses' pre-hypnosis descriptions and trial testimony, and the existence of other incriminating evidence, including Chanthakoummane's admissions linking him to the scene at the time of the murder. From this evidence, the court determined the jury would have reached the same verdict. *Ex parte Chanthakoummane*, 2020 WL 5927442, at *6-7.

Chanthakoummane takes issue with the lower court's assessment of the evidence. He contends his conviction is predicated on "unreliable statistical interpretations" of the DNA evidence, "junk bitemark evidence," and "suggestive hypnotic evidence." *See* Petition at 34. According to Chanthakoummane, the recalculation of the DNA results "weakened [their] statistical reliability," and the compared profiles could not be said to "match." *See* Petition at 31, 34. In addition, he

asserts the eyewitnesses underwent "flawed and highly suggestive hypnosis sessions," their descriptions were "laden with omissions," and their identification testimony was unreliable. *See* Petition at 12, 22. Finally, he claims the lower court erroneously concluded that the inadmissible bitemark evidence did not affect the verdict. *See* Petition at 28. Each of these assertions is patently refuted by the record.

First, not all of the DNA results changed. The DNA profile found in the mixture on the pull cords is still 216 million times more likely to be that of the victim and Chanthakoummane than the victim and someone else. *See* Petitioner's Appendix F at 23. And with respect to the profile found in the living room and on the deadbolt, if you were to randomly select a person from the population, you would still expect to find that profile 1 in 38.1 billion people. *Id*. Moreover, the DNA results that did change did not lose their inculpatory significance. For instance, McDonald originally determined that the results of the profile in the mixture on the fingernails was 16.5 billion times more likely to be the victim and Chanthakoummane than the victim and someone else. In 2016, she determined that you would expect to find the profile 1 in 5.09 billion people. Thus, the statistical weight of the results remains extremely high. *See* Petitioner's Appendix F at 23. Also, Chanthakoummane misconstrues McDonald's testimony about whether the profile found matched his profile. While agreeing that no DNA analyst could testify as to identity, she also testified that "we would say [a set of genetic markers detected in a single source profile] matched a

set of genetic markers from a known individual." *See* Petitioner's Appendix E at 37-38.

As for the eyewitnesses – Sharpless and Villavicencio – their identification of Chanthakoummane was not the unreliable product of a suggestive procedure. The record evidence shows the hypnosis procedure was not suggestive. The sessions were conducted by a licensed hypnotist formally trained in the use of hypnosis in a forensic setting. *See* Petitioner's Appendix F at 27. In compliance with Texas law,[7] the hypnotist followed state mandated guidelines specifically designed to minimize or eliminate the risks and concerns associated with its use. *See* Petitioner's Appendix F at 27-30.

Chanthakoummane invites this Court to overturn Texas law governing the admission of hypnotically refreshed eyewitness testimony. He claims it fails to protect against unreliable identifications. In support, he cites to a previously pending certiorari petition in another Texas case, *Flores v. Texas* (No. 20-5923), which also presented an article 11.073 attack on the science of hypnotically refreshed memory. This Court has declined Flores' invitation to take up the issue, denying his petition in January 2021. *Flores v. Texas*, 2021 WL 231588 (2021).

Chanthakoummane also cites to the lower court's dissenting opinion in the

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[7] *See State v. Medrano*, 127 S.W.3d 781 (Tex. Crim. App. 2004); *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988).

instant case in which three judges advocate revisiting the issue. *Ex parte Chanthakoummane*, No. WR-78,107-02, 2020 WL 5927445, at *1 (Tex. Crim. App. Oct. 7, 2020). The dissenting opinion notwithstanding, the Court should deny Chanthakoummane's invitation to take up the issue as well.

Whether or not Texas law adequately polices the forensic use of hypnosis, the hypnosis sessions Sharpless and Villavicencio participated in had no impact whatsoever on their memory. Before they underwent hypnosis, each gave the police a description of the suspect, and those descriptions were the only source of information about the suspect for quite some time. *See* Petitioner's Appendix F at 28. Their descriptions did not change during or after their hypnosis sessions. *See id*. Both consistently described the suspect's vehicle as a white Mustang with Texas plates, and they described the suspect himself as an Asian male, with a very short buzz cut, a muscular or athletic build, wearing a blue tank top, muscle shirt, or golf shirt. *See id*. at 29. Their descriptions varied from each other's only with respect to whether the suspect wore shorts, pants, or jeans. *See id*. Furthermore, their in-court identifications of Chanthakoummane were strongly corroborated by other evidence, not the least of which was Chanthakoummane's admissions to seeing a couple matching the description of Sharpless and Villavicencio driving the same make and model vehicle as the couple drove. *See* Petitioner's Appendix F at 30.

Lastly, it is undisputed that the bitemark evidence was unreliable. But the

record firmly establishes that the jury would have convicted Chanthakoummane without it. The DNA evidence still strongly links Chanthakoummane to the crime. It was the linchpin of the State's case. *See* Petitioner's Appendix F at 22-24. The eyewitness testimony was reliable and credible, and Chanthakoummane's own admissions put him at the scene at the time of the murder. *See id*. at 27-31. Plainly put, there can be no doubt that the State apprehended, prosecuted, and convicted the very person who killed Sarah Walker.

To the extent Chanthakoummane claims the contrary, article 11.073 afforded him the means to present and substantiate his claim. Moreover, the lower courts provided him a full and fair hearing on the matter. He did not receive relief because he is not entitled to it. Further review will not alter that fact.

The State Court's Opinion Is Unpublished

Finally, the fact that the Texas Court of Criminal Appeals issued an unpublished opinion on this matter further weighs against granting certiorari. Rule 77.3 of the Texas Rules of Appellate Procedure states that "unpublished opinions [of the Texas Court of Criminal Appeals] have no precedential value and must not be cited as authority by counsel or by a court." *See* Tex. R. App. P. 77.3. Therefore, certiorari is unnecessary because the opinion cannot be used to affect any future Texas defendants.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that the Court deny Chanthakoummane's petition for writ of certiorari.

Respectfully submitted,

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