No. 20-6799

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Respectfully submitted,

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INTRODUCTION

Although Chanthakoummane's new-science claims were initially raised in state court, this Court nevertheless has jurisdiction to consider these claims because the Texas Court of Criminal Appeal's (T.C.C.A.) denial of relief in this case violates his Fourteenth and Eight Amendment Rights under the United States Constitution.

ARGUMENT IN REPLY

1. The Court Has Jurisdiction

Chanthakoummane raised the federal law claims at issue in this case in a subsequent state habeas application pursuant to Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure. *See* Petition at 6-7, 34. To prevail on an 11.073 new science claim, Chanthakoummane must: 1) meet the successive writ requirements articulated in section 5(a) of Article 11.07; 2) establish that his claim involved scientific evidence that is currently available, but was not previously ascertainable through the exercise of reasonable diligence because said field of scientific knowledge has changed. *See* Petition at 4-7. Chanthakoummane firmly established that he 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murder; 2) bitemark identification testimony linking Petitioner to the wounds inflicted on the murder victim; and 3) outdated DNA statistical protocols suggesting his DNA was found at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. *See* Petition at 6-34.

The T.C.C.A. erred in its finding that the collective prejudice occasioned by the admissibility of now-debunked forensic scientific evidence does not entitle Chanthakoummane to a new trial. *See* Petition at 6 (APPENDIX A). Chanthakoummane properly federalized state court claims by establishing that all the debunked scientific evidence offered against him at trial by the state prejudiced the outcome of his trial in violation the Eight and Fourteenth Amendment to the United States Constitution. *See* Petition at 6.

The state correctly notes in its Response that this Court is "the ultimate arbiter of whether state court decisions conflict with the United States Constitution." *See* Respondent's Opposition Brief at 6-7. The state wrongly concludes that the state court's decision in this case rests on independent and adequate state law grounds because it reasons that "Article 11.073 is solely a creature of state law, and the [T.C.C.A.'s] denial of relief under that statute is strictly a matter of state substantive law." *See* Respondent's Opposition Brief at 6-7.

The state's position is incorrect because it completely ignores Chanthakoummane's claim that the debunked forensic science at issue in this case triggered serious violations of his right to a fair trial under the United States Constitution. It simply defies logic that this Court cannot determine, in the context

of a death penalty case, whether the T.C.C.A.'s holding relied on adequate or independent state-law grounds that are incompatible with the Eight and Fourteenth Amendments to the United States Constitution.

Chanthakoummane successfully utilized a state law, Article 11.073, to challenge the scientific evidence offered in his trial and thereby was able to reopen the record in his case. Chanthakoummane maintains that the T.C.C.A. failed to base its holding upon independent and adequate state law grounds. In fact, the T.C.C.A.'s holding regarding reliability of eyewitness evidence in this case runs contrary to well-settled case authority within the State of Texas. *See Tillman v. State*, 354 S.W. 3d 425, 441 (Tex. Crim. App. 2011) (holding that "eyewitness misidentification is the leading cause of wrongful convictions across the country"); *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"). As noted in Chanthakoummane's Petition, courts throughout the country that have grown increasingly suspicions of hypnotically enhanced testimony and eyewitness identification evidence. *See* Petition at 24.

Although the T.C.C.A. denied relief, its denial was not to the product of "an adequate foundation of state substantive law" that comports with the Untied States Constitution. *See Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). As a consequence,

and contrary to the state's position, the T.C.C.A.'s holding is not "immune" from federal review by this Court. *See* Respondent's Opposition Brief at 7. The state hedges Article 11.073 as "solely a creature of state substantive law" that is somehow beyond the reach of federal review. *See* Respondent's Opposition Brief at 7. The state's position, however, is incorrect and runs afoul of recent precedent from this Court. *See e.g. Andrus v. Texas*, 140 S. Ct. 1875 (2020) (granting state habeas applicant's petition, vacating T.C.C.A's unpublished opinion and remanding for further proceedings on federal claim); *see also Moore v. Texas*, 139 S. Ct. 666 (2019).

Finally, the state maintains that this Court should be somehow discouraged from granting certiorari review in this case because the T.C.C.A.'s opinion is unpublished. *See* Respondent's Opposition Brief at 16. The state suggests that because under Texas law an unpublished opinion form the T.C.C.A. has "no precedential value", that should somehow err against this Court granting certiorari. Opposition Brief at 16. This is a death penalty case, however, and the fact that the T.C.C.A. made the arbitrary decision not to publish its opinion should in no way factor upon the merits of Chanthakoummane's claims before this Court. *See e.g. Andrus v. Texas*, 140 S. Ct. 1875 (2020) (granting certiorari review of the T.C.C.A's **unpublished opinion** and remanding for further proceedings on capital defendant's federal claim) (emphasis added).

CONCLUSION

This Court should grant the petition for writ of certiorari.

Date: April 6, 2021

Respectfully submitted,

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