

No. 21-5041

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

Counsel for Respondent

GREG WILLIS
Criminal District Attorney
Collin County, Texas

JOHN R. ROLATER, JR.
Appellate Division Chief
Collin County, Texas

LISA BRAXTON SMITH
Counsel of Record
Assistant District Attorney
State Bar No. 00787131
Russell A. Steindam Courts Building
2100 Bloomdale Rd., Ste. 200
McKinney, Texas 75071
(972) 548-4331 (Office)
lsmith@co.collin.tx.us

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:

“Whether Mr. Chanthakouummane is entitled to a new trial because trial counsel ignored his unequivocal direction to challenge his guilt during the culpability phase of his trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.”

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
Procedural History	1
Factual Summary.....	3
ARGUMENT	8
This Court Lacks Jurisdiction Over the Question Presented	8
The State Court's Opinion Is Unpublished	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Amos v. Scott,</i> 61 F.3d 333 (5th Cir. 1995)	9
<i>Chanthakouummane v. Davis,</i> 137 S. Ct. 280 (2016)	2
<i>Chanthakouummane v. State,</i> No. AP-75,794, 2010 WL 1696789 (Tex. Crim. App. Apr. 28, 2010) (not designated for publication).....	1, 8
<i>Chanthakouummane v. Stephens,</i> 816 F.3d 62 (5th Cir. Feb. 25, 2016)	2
<i>Chanthakouummane v. Stephens,</i> No. 4:13cv67, 2015 WL 1288443 (E.D. Tex. Mar. 20, 2015).....	2
<i>Chanthakouummane v. Texas,</i> --- S. Ct. ---, 2021 WL 160268 (2021)	2
<i>Chanthakouummane v. Texas,</i> 562 U.S. 1006 (2010)	2
<i>Coleman v. Thompson,</i> 501 U.S. 722 (1991).....	9
<i>Dodge v. Woolsey,</i> 59 U.S. 331 (1855)	9
<i>Ex parte Aubin,</i> 537 S.W.3d 39 (Tex. Crim. App. 2017).....	10
<i>Ex parte Barbee,</i> 616 S.W.3d 836 (Tex. Crim. App. 2021)	10
<i>Ex parte Chanthakouummane,</i> No. WR-78,107-01, 2013 WL 363124 (Tex. Crim. App. Jan. 30, 2013) (not designated for publication).....	2

<i>Ex parte Chanthakouummane,</i> No. WR-78,107-02, 2017 WL 2464720 (Tex. Crim. App. June 7, 2017) (not designated for publication).....	2
<i>Ex parte Chanthakouummane,</i> No. WR-78,107-02, 2020 WL 5927442 (Tex. Crim. App. Oct. 7, 2020) (not designated for publication).....	2, 8
<i>Ex parte Chanthakouummane,</i> No. WR-78,107-03, 2021 WL 1208474 (Tex. Crim. App. Mar. 31, 2021) (not designated for publication).....	3, 8, 9, 10
<i>Ex parte Medellin,</i> 280 S.W.3d 854 (Tex. Crim. App. 2008)	10
<i>Finley v. Johnson,</i> 243 F.3d 215 (5th Cir. 2001).....	9
<i>Herb v. Pitcairn,</i> 324 U.S. 117 (1945).....	9
<i>McCoy v. Louisiana,</i> 138 S. Ct. 1500 (2018).....	1, 8
<i>Wainwright v. Sykes,</i> 433 U.S. 72 (1977)	9
Rules	
Tex. R. App. P. 77.3.....	10

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Kosoul Chanthakouummane was convicted and sentenced to death in 2007 for the capital murder of Sarah Walker. Chanthakouummane seeks certiorari review of the opinion of the Texas Court of Criminal Appeals (CCA) denying his second subsequent application for state habeas relief. In particular, relying on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), he asks this Court to review whether trial counsel violated his constitutional right to determine whether to concede guilt at trial.

The CCA expressly denied relief based on an independent and adequate state ground. Thus, this Court lacks jurisdiction to review the CCA's ruling. Furthermore, the CCA's opinion is unpublished and of no precedential value; thus, it does not merit further review. For these reasons, this Court should deny Chanthakouummane's petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History

In October 2007, Chanthakouummane was convicted of capital murder and sentenced to death. The Texas Court of Criminal Appeals subsequently affirmed his conviction and sentence on direct appeal. *Chanthakouummane 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 Chanthakouummane's original state application for habeas relief. *Ex parte Chanthakouummane*, 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. *Chanthakouummane v. Stephens*, No. 4:13cv67, 2015 WL 1288443 (E.D. Tex. Mar. 20, 2015); *Chanthakouummane 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. *Chanthakouummane v. Texas*, 562 U.S. 1006 (2010); *Chanthakouummane v. Davis*, 137 S. Ct. 280 (2016).

The trial court initially set Chanthakouummane's execution for January 25, 2017. Two weeks before this date, Chanthakouummane filed a subsequent application for state habeas relief. The trial court modified the execution date to July 19, 2017, but on June 7, 2017, the CCA stayed the execution and returned the application to the trial court to litigate the issues it raised. *Ex parte Chanthakouummane*, No. WR-78,107-02, 2017 WL 2464720 (Tex. Crim. App. June 7, 2017) (not designated for publication). Following a live hearing on those issues, the CCA denied relief on the merits. *Ex parte Chanthakouummane*, No. WR-78,107-02, 2020 WL 5927442, at *1-3 (Tex. Crim. App. Oct. 7, 2020) (not designated for publication). And this Court subsequently denied Chanthakouummane's request for certiorari review of that ruling. *Chanthakouummane v. Texas*, --- S. Ct. ---, 2021 WL 160268 (2021).

On May 13, 2019, Chanthakouummane filed a second subsequent application for state habeas relief. Relying on *McCoy v. Louisiana*, Chanthakouummane claimed

his trial counsel violated his constitutional right to decide not to concede guilt at trial. On March 31, 2021, the CCA dismissed the application, finding it failed to satisfy the requirements of article 11.071, section 5(a) of the Texas Code of Criminal Procedure. *Ex parte Chanthakouummane*, No. WR-78,107-03, 2021 WL 1208474, at *1 (Tex. Crim. App. Mar. 31, 2021) (not designated for publication).

On June 16, 2021, the trial court issued an order setting Chanthakouummane's execution for November 10, 2021.¹ On June 28, 2021, Chanthakouummane filed the instant petition requesting certiorari review of the Court of Criminal Appeals' dismissal of his second subsequent state writ. The petition was docketed on July 8, 2021. The State's brief opposing the petition was due August 9, 2021. The State received one 30-day extension, making its brief due September 8, 2021.

Factual Summary

The CCA summarized the evidence presented in the guilt phase of trial in its opinion on direct appeal as follows:

On Saturday, July 8, 2006, real estate agent Sarah Walker was murdered in the D.R. Horton model home where she worked in the "Craig Ranch" subdivision in McKinney, Texas. [Chanthakouummane] was charged with intentionally and knowingly causing Walker's death while in the course of committing or attempting to commit robbery.

¹ The same day, the court also issued an agreed order for DNA testing. At Chanthakouummane's request, the State has agreed to DNA test the plant stand and the broken foot from the plant stand. At trial, the State theorized that Chanthakouummane beat the victim with the stand. Testing is currently underway.

On the morning of July 8, Walker's ex-husband, Randy Tate, went to Walker's residence in Frisco, Texas. Walker planned to work at the model home that day, so Tate picked up their son early that morning. While Tate was at Walker's residence, Walker showed him a new Rolex watch that she said she had purchased the previous day. Later that morning, Walker went to a Bank of America in Frisco. Still photographs taken from the bank surveillance video showed Walker wearing a watch and a ring at around 11:45 a.m. Walker's cousin, Jessica Allen, testified that Walker often wore ornate rings and a Tag Heuer watch that she had owned for several years.

Another real estate agent, Mamie Sharpless, received a phone call at 9:40 a.m. that morning from a man who identified himself as "Chan Lee." The man told Sharpless that he found her phone number in a Keller Williams advertisement and that he wanted to look at a town house she had listed in the Craig Ranch subdivision. He said that he had just moved from North Carolina to the Dallas area, that he had graduated from the University of North Carolina at Charlotte, and that he worked for Texas Instruments. He said that he was calling from a phone booth at the 7-Eleven at Midway and Park and that he was staying in Room 245 at the "InTown Suites." When Sharpless asked him for a contact number, he said that he did not have a cell phone. The phone "cut off" before their conversation ended, so Sharpless tried to reach him by calling his hotel. Sharpless testified that she "called two InTown Suites, and one didn't have a [Room] 245, the other one did, but it just had a recording on it."

Sharpless arrived to show the town house between 11:30 a.m. and noon, and she brought her husband, Nelson Villavicencio, with her. As they sat in their car and waited, they saw a man drive by in a white Ford Mustang and park across from a D.R. Horton model home down the street. They observed the man getting out of the Mustang and starting to cross the street. They drove over to the man and asked him if he was "Chan Lee," and he replied, "No." Sharpless described him as a muscular man of Asian descent, about 5' 4" or 5' 5" tall, with a "buzz cut." She made an in-court identification of [Chanthakoummane] as the man she saw that day, but explained that he was thinner with longer hair at the time of trial.

As Sharpless and Villavicencio drove away, they noticed that the

Mustang had Texas license plates. When Villavicencio drove to the end of the block, turned around, and drove back, the Mustang was no longer there. He then drove back to the town house so Sharpless could show it to another potential buyer. As Villavicencio looked out the bedroom window while Sharpless showed the town house, he observed Walker arrive in her Porsche Boxster. Walker parked her car across the street from the D.R. Horton model home and went inside. At that point, Villavicencio also saw a white Mustang parked on the street in front of the model home. Sharpless then finished showing the town house and they left between 12:30 and 1:00 p.m. As they left the subdivision, Sharpless also noticed a white Mustang parked in front of the model home.

At about 12:30 p.m., Walker called her cousin, Jessica Allen. Allen testified that Walker was “in a really good mood” during their brief telephone conversation. They talked for about 15 minutes, then Walker “said someone had walked in and she’d call [Allen] back.”

At approximately 1:10 p.m., Andy Lilliston and his wife came to look at the D.R. Horton model home. When they entered the model home, Lilliston thought that it appeared to have been “ransacked.” He observed a large pool of blood in the dining room, where the sales desk was located. He followed a trail of blood into the kitchen, where he saw Walker lying face-up on the floor, with the upper half of her body covered in blood. Lilliston directed his wife to call 9-1-1, and they exited the model home. Lilliston ran into the street and flagged down a vehicle for help. He briefly went back inside the model home to check on Walker, but she did not display any signs of life. Lilliston then went back outside and waited for emergency personnel to arrive.

When Texas Ranger A.P. Davidson arrived at the model home, he noticed signs of a struggle in the dining room. The desk was crooked, the desk chair was out of place, a plant stand was knocked over, and a potted plant was on the floor. A pair of women’s shoes, a broken hair clip, and a broken earring were also on the floor. There was a trail of blood leading from the dining room into the kitchen. Walker’s body was on the kitchen floor, and it appeared that she had multiple stab wounds. Davidson opined that Walker had been dragged by her feet from the dining room to the kitchen because the long skirt she was wearing was rolled up to her waistline.

McKinney police officer Pete Copin discovered a bloody fingerprint on the deadbolt lock on the front door of the model home; however, he testified that there were “not enough individual characteristics for a positive identification.” Copin further observed what appeared to be blood on the plant stand, on the ceramic tile in the entryway, on the wall next to the edge of the window beside the front door, and on the pull cord for the window blinds. It also appeared that there had been blood in the kitchen sink that had been washed or diluted with water. Copin collected blood swabs and other evidence from the scene for further testing.

When Walker’s body was discovered, she was no longer wearing the watch and ring that she had been shown wearing earlier on the bank surveillance video. When the police searched Walker’s residence after her death, they found her Tag Heuer watch. The police never located her Rolex watch, but they did find the box and the receipt for the Rolex watch in her residence.

William Rohr, the Collin County Medical Examiner who performed Walker’s autopsy, testified that Walker sustained several blunt force injuries to her head. He opined that the blunt force injuries were the result of “several blows,” and that they were consistent with Walker being struck in the face and head with the plant stand in the model home. Walker had multiple bruises on her face and head, a broken nose, and fractured teeth. She had some defensive wounds, including an excised wound on her left arm and a broken fingernail on her right hand. She suffered a total of 33 stab wounds, 10 of which penetrated vital organs and blood vessels. Rohr testified that any one of those 10 wounds could have been “pretty much immediately fatal.” Walker also had a bite mark on the back of her neck that Rohr opined was inflicted “at or near her death.” Rohr testified that he preserved this evidence by using a scalpel to excise the bite mark and surrounding area.

DNA analysis linked [Chanthakouummane] to evidence from the crime scene. [Chanthakouummane’s] DNA profile was consistent with the DNA obtained from Walker’s fingernails, the window blind pull cords, the deadbolt lock and faceplate, and some of the swabs taken from the living room, kitchen, and entryway of the model home. The DNA analyst testified that only a “partial profile” was obtained from a

swab taken from the kitchen sink because the DNA extracted from that swab “was of low quality and degraded quality.” However, the set of genetic markers that she was able to detect in the partial profile “corresponded with the genetic markers observed in the DNA profile of [Chanthakouummane].”

After receiving the results of the DNA analysis, police arrested [Chanthakouummane] at his apartment on September 5, 2006. Texas Ranger Davidson testified that [Chanthakouummane] owned a white Ford Mustang and that his apartment was located three miles away from the pay phones at Midway and Park. Davidson spoke to [Chanthakouummane’s] sister, who informed him that [Chanthakouummane] had attended school in North Carolina and that he had moved from Charlotte to Dallas in February 2006. Davidson determined that Chanthakouummane had filled out a lease application at an apartment complex near the InTown Suites on Trinity Mills. Davidson also discovered that [Chanthakouummane’s] bank account was overdrawn by \$82.27 on the day before Walker’s murder. Davidson testified that [Chanthakouummane] was muscular and had a shaved head at the time of his arrest. Officer Copin, who later photographed Chanthakouummane to document his appearance, testified that he observed what appeared to be some healed cuts or scratches on [Chanthakouummane’s] hands and fingers.

[Chanthakouummane] was transported to the McKinney Police Department, where he was interviewed by Officer Randall Norton. [Chanthakouummane] at first denied ever being in McKinney in his white Mustang. Upon further questioning, he stated that his car had broken down at “a model house,” that he knocked on the door but no one answered, that he took “like three or four steps” inside and asked if anyone was home but no one was there, and that he spoke to a man and a woman in a green or blue “Corolla or Camry” as he left. Next, he admitted that he went to the kitchen sink for a drink of water, but said that he “didn’t know how to use the faucet because the hot water came out,” so he left. He acknowledged that he had “old cuts” on his hands “from work,” so it was possible that he could have been bleeding when he was inside the model home. He also acknowledged that he had sold some of his own property for cash at a pawn shop on Greenville Avenue, including a tape deck, a drill, and an inexpensive Kenneth Cole watch.

Forensic dentistry consultant Brent Hutson examined [Chanthakouummane] and made impressions of his teeth. Hutson compared [Chanthakouummane's] teeth to the bite mark on Walker's neck and found enough similarities that he was "unable to exclude [Chanthakouummane] from that population of individuals that could have inflicted this injury." Hutson concluded "within reasonable dental certainty beyond a doubt" that [Chanthakouummane] was responsible for the bite mark on Walker's neck.²

Chanthakouummane, No. AP-75,794, 2010 WL 1696789, at *1-4.

ARGUMENT

This Court Lacks Jurisdiction Over the Question Presented

Chanthakouummane's petition stems from the dismissal of his second subsequent state writ application seeking relief based on *McCoy v. Louisiana. Ex parte Chanthakouummane*, 2021 WL 1208474, at *2-3. Chanthakouummane sought review of this claim in the CCA under article 11.071, section 5(a)(1) of the Texas Code of Criminal Procedure. *Id.* He argued the claim was reviewable because its legal basis was previously unavailable. *Id.* The CCA dismissed the application. *Id.* It determined the claim did not meet the statutory requirements for review and, thus, was procedurally barred under the statute. *Id.* at 3. Review of the CCA's ruling lies outside of this Court's jurisdiction.

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

² Dr. Hutson's bite-mark identification testimony was discredited during the subsequent state writ proceedings. The CCA determined, however, that "even without the bitemark comparison testimony, the jury still would have convicted Chanthakouummane based on the strength of the remaining evidence." *Ex parte Chanthakouummane*, 2020 WL 5927442, at *7.

with the United States Constitution. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Dodge v. Woolsey*, 59 U.S. 331, 336 (1855). But it may not review questions of federal constitutional law if the last state court to consider the claim expressly denied relief based on a state ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *See 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."); *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."). A dismissal satisfies the "independent" and "adequate" requirements if it "clearly and expressly" indicates that it rests on a state ground which bars relief, and the bar is strictly or regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001) (citing *Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995)).

The CCA expressly and clearly stated that it was dismissing Chanthakouummane's claim based on a procedural state-law ground. *Ex parte Chanthakouummane*, 2021 WL 1208474, at *2-3. In doing so, the CCA cited to another case in which it held a *McCoy* claim did not present a previously unavailable legal

basis for relief under article 11.071, section 5(a)(1). *Id.* at 3 (citing to *Ex parte Barbee*, 616 S.W.3d 836 (Tex. Crim. App. 2021)). Moreover, the CCA regularly dismisses subsequent applications for non-compliance with article 11.071, section 5(a)(1). *See e.g., Ex parte Aubin*, 537 S.W.3d 39, 44 (Tex. Crim. App. 2017); *Ex parte Medellin*, 280 S.W.3d 854, 855-56 (Tex. Crim. App. 2008). Given the CCA’s expressly stated independent and adequate basis for dismissing Chanthakouummane’s *McCoy* claim, this Court lacks jurisdiction to review it.

The State Court’s Opinion Is Unpublished

Additionally, the CCA’s opinion is unpublished and, thus, has no precedential value. 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. The fact that the CCA’s opinion cannot be used to affect any future Texas defendants further weighs against granting certiorari review.

CONCLUSION

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

Respectfully submitted,

/s/ Lisa Braxton Smith

GREG WILLIS
Criminal District Attorney
Collin County, Texas

LISA BRAXTON SMITH
Assistant District Attorney
Texas State Bar No. 00787131
Russell A. Steindam Courts Building
2100 Bloomdale Road, Ste. 200
McKinney, Texas 75071
(972) 548-4331
lsmith@co.collin.tx.us