Nos. 08-5652 & 08A112

IN THE
SUPREME COURT OF THE UNITED STATES

HELIBERTO CHI,

Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

EDWARD L. MARSHALL
Chief, Postconviction Litigation Division

KENT C. SULLIVAN
First Assistant Attorney General

*W. ERICH DRYDEN
Assistant Attorney General

ERIC J.R. NICHOLS
Deputy Attorney General
For Criminal Justice

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

*Counsel of Record

ATTORNEYS FOR RESPONDENT

BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

Petitioner Heliberto Chi has resided on Texas's death row for nearly six years, and his capital-murder conviction and death sentence have been final almost four years. Only now, at the eleventh hour, does Chi seek a stay of execution to request review and reconsideration of his conviction and sentence because he was not apprised of his consular-notification rights. However, the lower court properly dismissed Chi's dilatory complaint as an abuse of the writ under state law. This dismissal deprives this Court of jurisdiction to review any potential petition for writ of certiorari or to enter a stay of execution.

Chi nevertheless asks the Court to consider whether he is entitled to review and relief pursuant to the Treaty Between the Unites States and Honduras of Friendship, Commerce and Consular Rights, 45 Stat 2618 (1928). Although Chi has never specifically discussed this treaty, he has on four prior occasions raised a consular-notification claim: at trial, on state habeas review, in federal district court, and on appeal to the Fifth Circuit. Each time, the courts rejected it. This treaty does not entitle Chi to one more review because, despite his assertions to the contrary, he cannot overcome the state's application of a procedural default. What's more, the treaty is wholly irrelevant to his underlying consular-notification claim. Finally, Chi cannot make a showing of prejudice given the overwhelming evidence of his guilt. Therefore, neither certiorari review nor a stay of execution is warranted.

STATEMENT OF JURISDICTION

The Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the court below refused to consider Chi's claim based on an independent and adequate

state law ground, *i.e.*, the Texas abuse-of-the-writ doctrine as codified in Tex. Code Crim. Proc. art. 11.071, § 5. 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" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida,* 504 U.S. 527, 533 (1992); *Michigan v. Long,* 463 U.S. 1032, 1042 (1983). Consequently, neither certiorari review nor a stay of execution is permitted.

STATEMENT OF THE CASE

I. Facts Of The Crime

The Court of Criminal Appeals summarized the facts of the crime as follows:

> In the late afternoon of March 24, 2001, Chi entered the K&G Men's Store in Arlington and approached one of the employees [Celia Mendoza]. She recognized him as a former employee of the store. He questioned her about whether there were policemen on duty in the store and whether they were uniformed or in plain clothes. He also asked how many employees were working that day and she pointed them out. Chi then had a discussion with the manager, Armand Paliotta, and the assistant manager, Gloria Mendoza, in which he asked for, and was provided, the phone number of one of the employees. Chi remained in the store about 30 minutes before leaving. The store closed at 7 p.m. Paliotta, [Gloria] Mendoza, and another employee, Adrian Riojas, remained to attend to closing duties. Paliotta counted the money and prepared the bank bag for deposit, and Mendoza and Riojas shut down the computers and completed closing matters. Around 8 p.m., Chi knocked on the front door of the store and Paliotta unlocked the door and let him in. Chi

stated that he had left his wallet in the tailor shop at the back and went to look for it. The others finished their closing duties and waited for Chi at the front of the store. Paliotta, who was holding the bank bag, held the door open and prepared to set the alarm. As Chi reached the front doors, he pulled out a gun and told them to get back inside the store. Riojas went first, followed by Mendoza, and then Paliotta. Chi took the bank bag from Paliotta and told the three to go to the back of the store. As they were walking, Paliotta pushed Chi and began running to the front of the store. Chi ran after him and then stopped and fired at him. When he turned around, Riojas and Mendoza began running. Riojas ran into the warehouse, pursued by Chi. Riojas quickly found himself trapped by various locked doors. When he saw Chi approaching with his gun drawn, he began to run in a different direction. Chi shot Riojas in the back as Riojas was running from him. After Riojas fell, Chi stated, "Quedate apagado," which means, "Stay dead," in Spanish.

In the meantime, Mendoza ran toward the front of the store. She checked on Paliotta and saw that he had been shot. She called 911. Before talking to anyone, she heard the doors from the warehouse open so she set the phone down and hid beneath a rack of clothes. She could hear Chi's footsteps walking toward her and she heard Chi say, "Vente para frente," which means, "Come to the front," in Spanish. Mendoza remained where she was. After at least ten minutes, Mendoza came out from beneath the rack and checked on Paliotta again. She could no longer detect any breathing. She returned to the phone to attempt to talk to someone at 911 and heard a conversation taking place between Riojas and the operator. The police arrived and Riojas and Mendoza ran outside. Paliotta died from a gunshot wound to the back. Riojas survived.

Chi v. State, No. 74,492, slip op. at 3-5 (Tex. Crim. App. 2004).

II. Underlying Facts Of Chi's Consular Notification Claim

Prior to trial, Chi filed a motion to suppress his statement to law enforcement based on a violation of the Vienna Convention. 3 CR 385-87.[1] The

[1] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "RR"

trial court conducted a hearing outside the presence of the jury to ascertain the circumstances in which Chi made his statement. After the crime, Chi fled Texas with his girlfriend Erica Sierra and traveled to Los Angeles. En route, Chi told Sierra he murdered Paliotta, and she turned him in to the police when they arrived in Los Angeles. 34 RR 36-43, 82-84. Miguel Brambila, an officer with the Los Angeles Police Department, testified that on May 6, 2001, he came into contact with Chi when booking him. *Id.* at 44-45. Brambila told Chi he was going to be strip searched, and Chi complied. *Id.* at 45. During the search, Chi said:

> I know I'm in for murder and I know I'm going to die, but I didn't kill anyone. Yes, I committed robberies, but I didn't shoot anyone. It was the other guy. He shot the man in the back and as I turned around and walked away, he shot the other guy. I couldn't believe it. I had been smoking marijuana all day and I didn't know what was going on. I know - - are they going to kill me because I was with him when the killing happened? I know that's the penalty, but I didn't do anything.

Id. at 45-46. Then Chi said, "I know the guy that drove the car is already arrested, and the guy that killed the people, he went to San Salvador." *Id.* at 46. Chi kept on asking questions and making similar statements throughout the booking procedure. *Id.* These were all spontaneous comments. *Id.* Brambila committed this to writing after he finished booking Chi. *Id.* at 47. On cross-examination, Brambila stated that he did not inform Chi of his *Miranda*[2] rights,

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refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas record, followed by page number(s).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

nor was he aware under California law and the Vienna treaty that he had to inform Chi of his consular-notification rights. *Id.* at 48-49. However, Brambila's only purpose was to book Chi into jail after he had been arrested, not to ask Chi any questions or interrogate him. *Id.* at 51-52. Brambila also stated that the entire conversation occurred in Spanish, and he translated it to English. *Id.* at 50. Further, Chi never told Brambila that he was a foreign national. *Id.* at 52.

After the hearing, Chi's counsel objected to the admission of the statement in part because Brambila failed to warn Chi of his right to speak with a consular official, in accordance with the Vienna Convention on Consular Relations. *Id.* at 54. The defense also presented some evidence showing that the teletype fugitive warrant on Chi stated he was a Honduran citizen. *Id.* at 56. Nonetheless, the trial court overruled the motion to suppress because California, like Texas, is a bilingual state and contains numerous Hispanic citizens. Thus, if a person speaks Spanish, that is not enough to put an officer on notice that the person is a foreign national unless the person identifies himself as such. *Id.* at 55. Additionally, Brambila did not know that Chi was from Honduras, and he was in contact with Chi for only a few minutes. *Id.* at 56.

III. Direct Appeal And Postconviction Proceedings

The Texas Court of Criminal Appeals affirmed Chi's conviction and sentence in an unpublished opinion on May 26, 2004. *Chi v. State*, No. 74,492. This Court denied Chi's petition for writ of certiorari on November 15, 2004. *Chi v. Texas*, 543 U.S. 989 (2004).

Chi filed a state application for writ of habeas corpus in the trial court on July 9, 2004. SHCR 2. The trial court entered findings of fact and conclusions

of law recommending that Chi be denied relief. *Id.* at 206-57. On April 27, 2005, the Court of Criminal Appeals adopted the trial court's findings and conclusions and denied Chi habeas relief. *Ex parte Chi*, No. 61,600-01 at cover and Order.

Chi filed a federal petition in the district court on April 27, 2006. *Chi v. Dretke*, No. 4:06-CV-227-A (N.D. Tex.), Docket Entry ("DE") 9. On June 21, 2006, the district court denied Chi habeas relief. DE 13; *Chi v. Dretke*, 2006 WL 1710343 (N.D. Tex. 2006) (unpublished). Chi then filed an application for a certificate of appealability ("COA") in the Fifth Circuit, but the court denied Chi's application in an unpublished opinion on March 30, 2007. *Chi v. Quarterman*, 223 Fed. Appx. 335 (5th Cir. 2007). On June 28, 2007, Chi filed a petition for writ of certiorari in this Court. On September 25, 2007, this Court denied the petition. *Chi v. Quarterman*, 128 S. Ct. 34 (2007).

Chi filed a subsequent application for habeas relief in the Court of Criminal Appeals on August 5, 2008, two days before his scheduled execution.[3] However, the state court dismissed the application as an abuse of the writ on August 6, 2008. *Ex parte Chi,* No. 61,600-04 (Tex. Crim. App. 2008) (unpublished order). The instant petition for writ of certiorari followed.

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[3] Chi also filed a subsequent application for habeas relief and an application for writ of prohibition in the Court of Criminal Appeals on October 1, 2007, two days before his first scheduled execution. The applications challenged Texas's lethal-injection protocol. However, the state court ultimately dismissed the applications. *See Ex parte Chi,* 2008 WL 2339249 (Tex. Crim. App. June 9, 2008).

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction To Consider The Claim Raised By Chi In His Petition For Certiorari Review.

The lower court's disposition of Chi's claim relies upon an adequate and independent state-law ground, *i.e.,* the Texas abuse-of-the-writ statute. *See, e.g., Moore v. Texas,* 122 S. Ct. 2350, 2352-53 (2002) (Scalia, J., dissenting); *Emery v. Johnson,* 139 F.3d 191, 195-96 (5th Cir. 1997). As stated previously, this Court has held on numerous occasions that it "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" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor*, 504 U.S. at 533; *Long*, 463 U.S. at 1042.

Moreover, in *Breard v. Greene*, 523 U.S. 371 (1998), this Court addressed whether a petitioner's consular-notification claim is subject to the procedural-default doctrine, and concluded that such claims, like constitutional claims, can be procedurally defaulted, even in a death penalty case. *Id.* at 375-77. Subsequently, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Court reiterated that position, specifically rejecting the argument that International Court of Justice ("ICJ") decisions trump domestic procedural-default rules and require states to review consular-notification claims. *Id.* at 352-58 (holding that procedural rules of domestic law govern the implementation of a treaty; thus,

just as alleged violations of the U.S. Constitution are subject to procedural defaults, so are claimed violations of the Vienna Convention).

And although this is not a federal habeas proceeding in which the Court actually retains jurisdiction to review procedurally defaulted claims, as explained in *Lambrix v. Singletary,* 520 U.S. 518, 523 (1997), and *Coleman v. Thompson,* 501 U.S. 722, 729-30 (1991), Chi nonetheless cannot demonstrate cause or a fundamental miscarriage of justice that might excuse such a default. Without question, the 1928 treaty does not provide Chi anything new; Chi has had close to six years of appellate and postconviction review to raise a claim addressing the treaty, and he has failed to do so. Moreover, as addressed below in detail, the evidence of Chi's guilt for committing capital murder is overwhelming. Thus, he cannot possibly demonstrate prejudice or a fundamental miscarriage of justice. The Court of Criminal Appeals correctly found that his second application was an abuse of the writ. Consequently, there is simply no jurisdictional basis for granting certiorari review in this case.

II. The 1928 Treaty Does Not Offer Chi Any Support For His Consular-Notification Claim. Moreover, Chi Has Clearly Not Suffered Any Harm Or Prejudice As A Result Of The Alleged Consular-Notification Violation.

A. Chi's claim that he is entitled to relief under the Treaty of Friendship, Commerce, and Consular Rights is procedurally defaulted. Moreover, this treaty is completely irrelevant to the consular-notification issue. Therefore, it cannot form the basis for a stay of execution.

In a twist on his consular-notification claim, Chi contends that his rights under the 1928 Treaty of Friendship, Commerce, and Consular Rights between the United States and Honduras have been violated and that he is entitled to

reparation for this violation. He further contends that the treaty is self-executing and that the lower court's procedural-default rule must give way to his rights under international law. Chi's arguments fail for several reasons.

First and foremost, Chi surely cannot invoke this treaty to overcome his procedural default. This Court has squarely held that, under international law, "'the procedural rules of the forum State govern the implementation of the treaty in that State'" unless the treaty contains a "'clear and express statement to the contrary.'" *Sanchez-Llamas*, 548 U.S. at 351 (quoting *Breard*, 523 U.S. at 375). And just a few months ago, in *Medellin v. Texas*, 128 S. Ct. 1346 (2008) ("*Medellin II*"), this Court held that (1) international judgments are not automatically enforceable domestic law and, thus, would not preempt state limitations on the filing of successive habeas petitions and (2) states are not required to provide reconsideration and review of a foreign national's claims without regard to state procedural-default rules. *Id.* at 1360, 1368. Chi's contentions that the lower court's ruling conflicts with the principles announced in *Sanchez-Llamas* and *Medellin*, Petition at 17-19, and that domestic rules of procedural default are immaterial to this treaty, *id.* at 13, are without question incorrect. Chi, moreover, has pointed to no specific language in the treaty that *expressly* permits him to hurdle the Article 11.071, § 5(a) bar imposed by the state court. Therefore, this Court is precluded from considering Chi's argument.

Second, despite Chi's assertions, this treaty has nothing to do with the rights of foreign nationals to contact the consulate in the event of arrest. The Proclamation of the treaty states that its purpose is "to promote friendly intercourse between their respective territories through provisions responsive

to the spiritual, cultural, economic and commercial aspirations of the peoples thereof..." Petition, Appendix B at 2-3. Thereafter, the treaty contains thirty articles covering a variety of issues, including trade, commerce, religious freedom, drafting of nationals for military service, and the rights of corporations and associations. And one of the main issues addressed concerns the rights of *consular officials* residing in the respective foreign country. In fact, the primary article Chi cites, Article XX, Petition at 10, refers to the rights of consular officials to contact authorities for the purpose of protecting nationals. However, not a single article addresses the circumstances facing Chi and those pertaining to a foreign national's right to contact his consulate.

Third, Chi latches on to various phrases in the treaty, such as "freedom of access to courts," "protection that is required by international law," "protecting the nationals of the State," and "security for their persons." Petition at 9-10. He calls this language explicit when it is anything but. Proclaiming that a foreign national has a "right of access to courts" and, thereby, concluding that he necessarily has a right to contact his consulate in the event of arrest requires a quantum leap of reasoning. In all likelihood, most treaties entered into by the United States will contain language that ambiguously refers to the rights of foreign nationals. If petitioners were allowed to parse language in this manner, countless treaties could then form the basis for violations of various rights, whether or not the treaty even addresses that right. And, importantly, Chi cites to no case demonstrating that this treaty actually applies to his circumstances.

Fourth, Chi contends that this treaty is "plainly" self-executing, even though it mentions nothing of the kind. In *Medellin II*, this Court explained that

treaties are not domestic law unless (1) Congress has enacted implementing statutes or (2) "the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." 128 S. Ct. at 1356 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005)). Chi does not argue that Congress has enacted an implementing statute. Instead, he points to other friendship treaties that have been deemed self-executing and, in essence, argues that the treaty with Honduras is as well because it is similar in type. Petition at 10. He also refers to multilateral treaties adopted after the Vienna Convention in order to show that he has individual rights. *Id.* at 12-13. However, Chi points to no specific language in *this* treaty demonstrating that it was intended to apply as domestic law, nor does he cite to any case proclaiming that the treaty is self-executing. Absent that express language, this Court cannot construe the treaty otherwise. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial function. It would be to make, and not to construe a treaty.") (quoting *In re The Amiable Isabella*, 19 U.S. (6 Wheat) 1, 71 (1821)).

Fifth, Chi alleges that he is entitled to cessation and reparation for the alleged violation pursuant to Article I of the treaty. Petition at 14-16. However, Article I mentions reparation, or compensation, only for the taking of property. *Id.*, Appendix B at 3. The article does state that foreign nationals are entitled to "that degree of protection that is required by international law." *Id.* Yet it also states that foreign nationals shall enjoy the same privileges as nationals

"submitting themselves to all local laws and regulations duly established." *Id.* It further mentions "access to courts" and "security for their persons and property" in conjunction with "conforming to the local laws" and "submitting to conditions imposed upon [the home state's] nationals." *Id.* Therefore, if Chi can argue that the generic and rather ambiguous language of the treaty entitles him to relief, the Director can surely argue the opposite: that the treaty supports the position that foreign nationals are subject to the same state procedures as nationals. Ultimately, it is evident that this treaty fails to clarify these issues, let alone provide Chi a substantive right and remedy.

Finally, as stated above, Chi has on four prior occasions raised a claim pertaining to consular-notification rights, each time logically focusing on the Vienna Convention. However, this is the first time he has premised his claim on the 80-year-old treaty between the United States and Honduras. If the treaty actually provided Chi with a legitimate right and basis for relief, as he proclaims it does, surely he would not have waited until two days before his scheduled execution – when he filed his subsequent state habeas application – to brief the matter. Chi's dilatoriness in bringing this argument to any court highlights its lack of merit. And considering the number of years this treaty has been in existence, as well as the number of appeals Chi has received while he has resided on death row, his assertion that raising this argument at the last minute was unavoidable, Petition at 22, is completely disingenuous.

B. Chi has received multiple reviews of his consular-notification claim, and it is evident that he has suffered no prejudice due to the alleged consular-notification violation.

Throughout these last-minute proceedings, Chi has argued that he has not received proper review and reconsideration of his consular-notification claim. But that contention is not meritorious. First, following a hearing that occurred *during trial*, the trial court rejected Chi's Vienna Convention claim, finding that there were no legitimate grounds on which to suppress Chi's statement to Brambila. On state habeas review, the trial court entered findings and conclusions rejecting the argument that Chi was somehow prejudiced by not being informed of his consular-notification rights. SHCR 225-32. Then, on federal habeas review, the federal district court held that Chi "would be hard pressed to [show prejudice] given the compelling evidence of his guilt for a capital offense and the litany of other bad acts he committed before and during his incarceration." *Chi v. Dretke*, No. 4:06-CV-227-A (N.D. Tex.) at 10-11. Subsequently, the Fifth Circuit agreed with the district court that Chi would not be able to demonstrate prejudice given the facts of the case. *Chi v. Quarterman*, 223 Fed. Appx. at 439 n.3.

Therefore, despite four reviews of the issue, including a live hearing in open court, Chi insists on being given another. This would be an exercise in futility. First, his consular-notification claim pertains only to what happened when he was in Brambila's presence. As shown above, Brambila did not know Chi was from Honduras and had no reason to believe Chi was a foreign national. *See Ex parte Medellin*, 2008 WL 2952485, *4 n.2 (Tex. Crim. App. 2008) ("In the

melting pot that is America, many U.S. citizens have ethnic names, but are native born or naturalized. Our laws do not assume that those who were born in a foreign country or who have ethnic surnames are not fellow citizens.") (Cochran, J., concurring). Further, Brambila did not ask Chi any questions, Chi spontaneously made the statements implicating himself in the crime, and this was not a custodial interrogation. For example, it is clear that there can be no violation of the privilege against self-incrimination where a defendant makes spontaneous statements in a non-interrogation setting. *Miranda,* 384 U.S. at 478 ("volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today"). Further, In *Sanchez-Llamas,* this Court held that exclusion of evidence is not an appropriate remedy for a violation of consular-notification rights. 548 U.S. at 350 ("neither the Vienna Convention nor our precedents applying the exclusionary rule support suppression of Sanchez-Llamas' statements to police"). Therefore, even if Officer Brambila somehow violated Chi's rights, the trial court was not required to suppress Chi's statement.

Second, and more importantly, in *Breard v. Greene*, this Court determined that even if a consular-notification claim is properly raised and proved, "it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." 523 U.S. at 377. Here, the surviving K&G Men's Store employees, Gloria Mendoza and Adrian Riojas, identified Chi as the gunman and explained how he carried out the crime. 33 RR 111-36, 159-84. Celia Mendoza confirmed Gloria Mendoza's and Riojas' testimony that Chi had been in the store earlier in

the day. In fact, she had a conversation with Chi during which Chi asked her questions regarding whether any policemen were in the store and who would be working there later in the night. *Id.* at 51-53. An employee of an adjacent store testified that a white pickup truck that had a Spanish radio-station bumper sticker was in the parking lot at the time of the offense and appeared to be running. 34 RR 22-24. Gloria Mendoza also saw the white pickup. 33 RR 125. Jose Soto testified that he lived with Martin Esparza, and Esparza lent Alejandro Sierra, Erica's brother, his white pickup truck the day before the offense. *Id.* at 117-18. Soto also lent Sierra a .357 pistol and 11-12 bullets. 34 RR 119. Chi was with Alejandro Sierra at the time. *Id.* at 119-20. When Sierra returned the day after the offense in the white truck, Chi was still with him, and Soto noticed that Chi did not have any hair. *Id.* Soto got the gun back but not all of the bullets. *Id.* at 124-25. The police confiscated the gun, and ballistics testing showed that the bullets taken out of Paliotta's and Riojas's bodies were fired from the .357. *Id.* at 122-23; 35 RR 10-11, 43-44, 67. Further, two auto salesmen testified that Chi bought a 94 Suzuki Sidekick and a 95 Isuzu Trooper on March 25, 2001, the day after the offense. Chi made down payments for the cars in cash. 34 RR 99-106, 108-110. One of these salesmen, Rutilio Alvarez, saw Chi the day after he sold Chi the car, and Chi had cut his hair. *Id.* at 111. Finally, Erica Sierra testified that Chi confessed to her to committing the murder. *Id.* at 83-84.

In short, the evidence of Chi's guilt is overwhelming. Chi's admission to Brambila made no difference in the outcome of the trial. In fact, Chi admitted to only being at the crime scene; he blamed someone else for committing the

offense. Thus, the trial court's admission of this testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Moreover, Chi has supplied no reason why the authorities's failure to inform him of his right to contact the consulate prejudiced his trial. Indeed, Chi avoids the facts of the case altogether. Consequently, Chi cannot demonstrate any prejudice or harm resulting from the alleged violation, and he is not entitled to certiorari review or a stay of execution.

CONCLUSION

For the foregoing reasons, the Court should deny Chi's petition for writ of certiorari and motion for stay of execution.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

/s/ W. Erich Dryden
*W. ERICH DRYDEN
Assistant Attorney General
Postconviction Litigation Division

*Counsel of Record

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132

ATTORNEYS FOR RESPONDENTS