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STATE OF TEXAS :
: AFFIDAVIT
COUNTY OF HARRIS :

My name is **R. P. CORNELIUS**. I am an attorney licensed to practice law in the State of Texas since 1972. My bar card number is 04831500. My office address is 2028 Buffalo Terrace, Houston, Texas, 77019, and my telephone number is (713) 237-8547.

I am also admitted to the bar in good standing in the United States District Court For The Southern District Of Texas and the Fourth, Fifth, and Eleventh Circuit Courts Of Appeals, as well as, the United States Supreme Court. I am Board Certified in the field of criminal law by the Texas Board of Legal Specialization. I am a former Assistant District Attorney for Harris County, Texas, and a former Assistant United States Attorney for the Southern District of Texas. My Notice Of Appearance And Motion To Appear Pro Hac Vice has been approved in State or Federal court in the following states: California, Connecticut, Florida, Illinois, Louisiana, Michigan, New Hampshire, North Carolina, and Virginia. I have never been found ineffective, denied admission, or disciplined by any court.

I have been ordered by the Court to provide an affidavit answering several issues which have been presented to me as potential grounds for an allegation of ineffective assistance of counsel.

I did represent OBEL CRUZ GARCIA in the capital murder case for which a post conviction writ of habeas corpus has been filed and I will provide my answers to the questions I have been asked to respond to, but only because I am ordered to do so. It puts me at cross-purposes and requires me to say things that are not in the best interest of my client whom I gave a part of my life to defend and with whom I sat next to day after day in jury selection and in the trial and with whom I made decisions with and suffered with.

I am well aware that the procedure that must be followed in these cases requires the writ lawyers to essentially play devil's advocate and challenge every decision made by the trial lawyers whose lessons, skills and commitment to the client and the law is immense. I don't know the writ lawyers' actual experience, or what their actual experience is, and particularly if they have ever defended

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By: Chris Daniel
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a single case like this one or not, but I do know their responsibility and I accept it as a part of the system.

In an effort to get this affidavit before the trial Judge who actually tried this case, before she leaves the bench, I must also add that I am filing this affidavit without the benefit of my own file which I loaned to the writ lawyers with the complete understanding that I was not making a copy and they would return the file to me, but they have refused to return it.

Before I attempt to answer the specific questions my experience might be helpful. I have been trying death penalty cases since 1976 and have tried quite a few and have tried them from both sides of the table. There have been psychological issues; witness issues and decisions; expert witness issues and decisions; DNA issues; mitigation issues and decisions; and juror issues in every one of them and in virtually all of the non-death capital cases I have tried, as well as, these same issues in many of the other criminal cases I have tried since 1972 when I first began my practice. All of my practice has been in criminal law. Suffice it to say, even though I am only a lawyer and not a psychologist, or DNA analyst, and certainly not a mind reader I have a lot of experience in trying criminal cases and making decisions in real time with a lot on the line and without the benefit of years of analysis after the fact. The truth is I trust my instincts in trial.

I do hope this is of some assistance to the Court and to counsel.

I would like to make a general statement which will apply to a number of the allegations in the writ:

To make certain that I remember this correctly I conferred with Mario Madrid, JJ Gradoni, and Edna Velez; my co-counsel, our lead investigator, and our mitigation investigator, (those who had the most contact with the client), to see if their respective recollections were the same as mine and they are. Mr. Cruz Garcia would not discuss the facts of this case with us. At all. He refused to discuss it with us. His statement was that God would deliver him. God would send angels to protect him. God would turn the witnesses tongues into snakes. And other things like this. He would talk with us but not about the case. He had no intention of testifying and did not want his consulate contacted, at least with respect to helping defend the case.

I have included the affidavit of JJ Gradoni for further specific information on some of these allegations.

Here are my answers to the specific questions:

1. Why not hire a DNA expert.

I do not hold myself out to be a DNA expert but I must stress that I have been involved with DNA evidence in my trials since it arrived. I do know a lot about DNA evidence. I do not find the arguments advanced in applicant's First Ground For Relief compelling. I poured over the DNA evidence in this case and made the best record and argument I could to suppress it but at the end of the day the State's evidence at the hearing clearly showed that, even though the crime lab had been in shambles, this evidence, which was tested and re-tested, had been sufficiently preserved. Other than the arguments I made and the evidence I presented I do not see what other attack I could have made. It is not hard to find an expert to give an affidavit that, in his or her opinion, the DNA testing was flawed but it is not that easy in trial with experienced Assistant District Attorneys trained in DNA evidence waiting to cross examine them. I did not think and do not now think we were going to win that issue with the jury. What we needed to do, in my opinion, was to create a reasonable argument to show how his DNA could be there without him being involved in the murder, which we attempted to do by arguing a consensual sexual relationship.

2-3. Did the defendant have consensual sex with Linda Garcia.

Did the defense team know of Cesar Rios, Jose Valdez, and Hector Saavedra.

We attempted to develop through cross examination and argument a consensual sexual relationship with Diana Garcia, however without the defendant's testimony, or any witnesses to support it, we could not actually offer direct proof of this. If we had evidence of a consensual sexual relationship this would have been our best attempt to naturalize the DNA evidence. We explained this to him numerous times. He never told us about the alleged witnesses Cesar Rios, Jose Valdez, or Hector Saavedra. The defendant consistently and emphatically told us that Jesus would deliver him. That Jesus would turn the State's witnesses tongues into snakes. He was not interested in testifying or calling witnesses, or contacting his consulate.

I have contacted the investigative team to see if any of them ever heard one word about these three alleged witnesses, or any other witnesses that could help on this or any other issue, and no one has ever heard of them, except as shown in the affidavit of JJ Gradoni, where he explains that the investigators developed a "Cesar Mala Rios" from the offense reports but all efforts to find him were unsuccessful; and further, Cesar Mala Rios was never mentioned by the defendant.

4. Did we see the State's file.

Yes, many times, the files were brought to court by a number of prosecutors who worked, at various times, on the case. I am also certain that the State provided me with every piece of discovery we were entitled to. Let me address what I feel is the reason this question is being asked. During the trial I couldn't find in my files two documents that I needed to use for cross examination and each time I asked the State for another copy. Both times the State thought I was trying to imply that they had not followed the rules of discovery and commented that I should have come to their office with my file and compared every document to make certain that I had every piece of paper that I was entitled to. I thought that was a ridiculous statement and said so on the record. The State has the duty to give the defense what the defense is entitled to. The defense does not have to go to their office and figure it out. In both instances, however, I later found the documents in my files and told them so. I also expressed, sincerely, that I was not implying that they had not followed the rules of discovery I just didn't wish to delay the trial while I looked through literally a thousand pages of discovery to find the one or two pages I was having difficulty finding.

5. Did we investigate the issue of future dangerousness. Did we make contact with witnesses from Puerto Rico or the Dominican Republic.

Permit me to delve into the future dangerousness issue for a moment. Even though no juror has ever been seated by me in a death penalty case where that juror has admitted that if they, in fact, convicted someone of capital murder they would automatically find that there is at least a "probability" that person will be a continuing threat, I know better. I certainly see why that question is a part of death penalty scheme and it is very helpful in eliminating intellectually honest jurors. But, *and this is a huge "but"*, a great majority of potential jurors absolutely can not get past their

belief that they are fair minded people who want to do the right thing. *But*, in the serenity of the court room, and before they have seen the victims family cry and the crime scene photos and the autopsy photos and the bloody clothing, and the murder weapon, and on and on, they truly believe they are not hard wired to automatically find that in a case where a defendant who commits a grisly capital murder, it is, at least, automatically probable that he or she will be a continuing threat. By the way what does probability mean? [One per cent is a probability, as is 99 percent]. I have not won a case on the future dangerousness question, or seen it done. I have had a few cases where the capital murder was the defendant's only crime and I felt it was a compelling argument to challenge the State on future dangerousness but, as I said, to no avail. Another reason for this is the State does not seek the death penalty on cases where the crime is an aberration or where the defendant does not have a history. Not even in Harris County. Unless, of course, the crime itself is so horrific that no other conclusion could be drawn.

Another factor I always consider is credibility. I have found, and have spoken on this subject at CLE presentations, that a defense lawyer's personal credibility with a jury is the single most important factor in a successful outcome at trial. I did not feel we had much of a chance on the issue of future dangerousness in this trial. I felt our best shot at punishment was on mitigation and I thought we had some good mitigation evidence and I banked on that. I have found that people know inherently or from some exposure to psychology that the greatest raw factor in deciding what a person will do in the future is what they have done in the past. It is hard to find an expert who will dispute this. Experts will say that this is not always the case but, let me say again, I have had no success in the past with experts on future danger. I haven't used one in some time now. This is not to say I would never use one and I imagine there could be a case where future danger is the best shot for a particular defendant but not the defendant in this case. We were not going to win on future danger in this case, in my opinion, and I was quite clearly afraid of losing my credibility with the jury by an impassioned plea that he would not be a future danger. I felt, and still feel, that if this was what the jury would deliberate on we would lose for sure. I am spending time on this issue to make it clear that this was not a rash decision, but a well thought out decision based largely on experience.

We did make contact with witnesses located in Puerto Rico or the Dominican Republic.

6. Why the lawyers did not go to Puerto Rico and the Dominican Republic.

I was confident that the investigators would do a very professional and competent job and nothing has convinced me otherwise.

7. Did we have a mitigation expert.

We did not have a person who was recognized as a quote "Mitigation Expert"; however we had my experience, which predates mitigation experts, at least in Harris County; we had a psychologist, with whom I consulted on mitigation; and a private investigator devoted to developing mitigation evidence, with my guidance and that of the psychologist.

Let me give some background on this. This case came to me at a time when the Harris County Commissioners Court cut indigent defense spending across the board. To my knowledge all of the "Mitigation Experts" in Harris County, of which there were not many at that time, refused to take cases for the money the County was willing to pay and I was forced to look out of county, which I did but to no avail. I contacted "Mitigation Experts" in Dallas and Fort Worth and none would even consider the case. I then got Judge Magee to agree to order the County Auditor to pay the original amount, which had been reduced as I said by the County Commissioners, but no one would take the case because they feared, and said they had heard, the County Auditor would not pay it even if we had an Court Order directing them and, in essence, they said life is too short to have to file a law suit to require Harris County to honor their debts. So I asked Judge Magee if she would agree to allow me to hire a psychologist to consult with on any matter of mitigation and she agreed. So instead of a "Mitigation Expert", who would be paid \$75.00 an hour, the County got to pay my psychologist \$250.00 an hour. As it turned out there really were no psychological issues to be developed.

I did not see, and do not now see, what could have been developed by an anthropologist or a sociologist.

8. Defendant's consulate.

The defendant expressed no interest at all in receiving help of any kind from his consulate.

He was given his warnings about this and it was reiterated by us and his response to almost everything was that Jesus would deliver him.

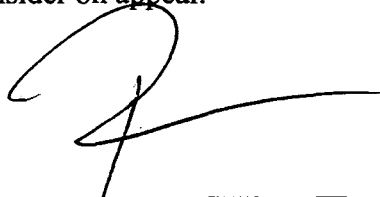
9. Trial court's report of the conversation with juror.

There is a huge difference between what we knew at the time and what has been said after the verdict was rendered. Based on what I knew at the time:

- A. I thought it was recorded and a part of the record and could be reviewed on appeal if necessary.
- B. I trusted the Judge to do what she thought to be the appropriate action in the situation.
- C. I do not now think the Judge did anything improper.

10. Not calling attorney Michael Casaretto.

Honestly, after the Judge's thorough description of the event, as related to her by Mr. Casaretto, and particularly her notes of the event, I felt that it was insignificant but noted to myself that it was recorded in the record for appellate counsel to consider on appeal.



R. P. Cornelius

SWORN TO AND SUBSCRIBED BEFORE me on this the 28th day of November, 2016.

