American University Criminal Law Brief

Volume 2 | Issue 2 Article 3

2007

The “Exceptionally Troubling” Murder Conviction Of Jose Garcia

Matthew Bosher

The "Exceptionally Troubling" Murder Conviction of Jose Garcia

*Matthew Bosher**

In the summer of 1991, Jose Garcia was visiting his wife's family in Matanzas, Dominican Republic.[1] On July 15, 1991, having decided to return to his home in the Bronx, Garcia went to the La Union International Airport in Puerto Plata, Dominican Republic and attempted to board a flight for JFK. Garcia had no legal status in the United States, however, and before he boarded his flight, Dominican immigration officials detected his false travel papers. Garcia was arrested and spent the night of July 15 in a Puerto Plata jail.

The next day, Garcia's wife, Ana Ortega, traveled from Matanzas to Puerto Plata and paid Garcia's bail. Garcia was released that afternoon, and, together with his wife, he returned to her family's home in Matanzas. That night – July 16, 1991 – Garcia attended a prayer service in Matanzas in memory of a local woman who died a few days earlier. Many members of Ortega's family also attended the service and spoke with Garcia and Ortega.

Around midnight on July 16, Garcia and Ortega were awakened by Ortega's friend, Alsacia Encarnacion. Because Ortega's family home had no phone service, Encanacion occasionally received calls from New York for Garcia. She had received such a call, and she told Garcia and Ortega that it was urgent. Garcia returned the call from Encarnacion's home and learned that his close friend, Cesar Vasquez, had been murdered in the Bronx earlier that night.

Garcia remained in the Dominican Republic for several weeks before returning to the U.S. Once back in the U.S., Garcia was arrested and charged with the murder of Cesar Vasquez. Garcia naturally told his attorney and anyone else that would listen that he had been *in jail* in the Dominican Republic until the afternoon on July 16 – the date of the murder – and that he spent the rest of that night (and the subsequent weeks) in the Dominican Republic. In spite of his apparently ironclad alibi, on January 8, 1993, a Bronx jury convicted Garcia of the second degree murder of Cesar Vasquez and he was sentenced to serve twenty-five years to life in prison.

The principal reason Garcia was convicted for a murder he could not possibly have committed was that the jury heard virtually nothing regarding his alibi. Garcia's trial counsel believed that the State's case was weak and that he did not need to conduct any meaningful pre-trial investigation or prepare a defense. To make matters worse, the Bronx District Attorney's Office did nothing to confirm or investigate Garcia's alibi – which was disclosed to them almost a year before trial – thereby failing to fulfill a prosecutor's basic affirmative duty to "make sure they do not convict the innocent."[2] The combination of his trial counsel's ineffectiveness, and the Bronx District Attorney's irresponsible handling of his prosecution took sixteen years from Garcia.

Yet, Garcia may actually be among the fortunate. As set forth below, Garcia's conviction has now been set aside but that only came about as a result of a series of fortuitous events and coincidences. Garcia's case illustrates the near-impossibility of post-conviction relief even for those prisoners who, like Garcia, are plainly and demonstrably innocent.

Post-Conviction Proceedings

Garcia's 1993 conviction kicked off fourteen years of appellate proceedings in both state and federal court. The New York Appellate Division denied Garcia's direct appeal in 1995, and, the following year, the Court of Appeals denied his petition for leave to appeal.[3] Next, and by this point operating *pro se*, Garcia filed for a writ of error *coram nobis* vacating the Appellate Division's decision on the bases of ineffective assistance of appellate counsel, but that too was denied in 1998.[4]

In August 2000, Garcia pursued the last remedy available in New York courts, a motion to vacate his conviction. In that motion, Garcia argued that his trial counsel had been constitutionally ineffective by, among other things, failing "to interview or present alibi witnesses at trial and to obtain documentary evidence in support" of his alibi.[5] In support of his argument, Garcia attached papers documenting his incarceration in the Dominican Republic the day of the murder and statements of witnesses able to testify as to Garcia's presence in the Dominican Republic shortly before the murder, at the time of the murder, and shortly after the murder.[6] The Bronx Supreme Court summarily denied the motion on December 7, 2000 in a cursory, hand-written order: "Evidence submitted does not tend to establish defendant's alibi. A review of the trial record fails to substantiate allegations of ineffective assistance of counsel. No other argument presented has demonstrated a sufficient basis to consider any further review."[7] There was no marshaling of the facts or relevant law, just those three conclusory sentences. Leave to appeal to the Appellate Division was denied.[8]

Garcia's only remaining recourse was federal court and the "great writ" of *habeas corpus*. Garcia – still operating *pro se* – filed his petition for a writ of *habeas corpus* in April 2002, arguing, principally, that his trial counsel had rendered ineffective assistance. The Bronx District Attorney moved to dismiss the petition because it was not filed within the one year statute of limitations.[9] Garcia argued that his petition should not be dismissed for a mere procedural defect because he demonstrated a credible claim of actual innocence, which warranted a toll of the statute of limitations. United States Magistrate Judge Kevin Fox rejected the argument and recommended that the petition be dismissed.[10]

Garcia was almost out of options. Enter Judge Lewis Kaplan, United States District Court Judge for the Southern District of New York. Although not known generally as pro-defense or a civil libertarian, Judge Kaplan is an extremely meticulous and fair jurist.[11] Moreover, Judge Kaplan has demonstrated that he has no compunction about overturning established prosecutorial conventions in the interests of fundamental fairness as he did in his now famous decision in *U.S. v. Stein*.[12]

Garcia's good fortune in having his case assigned to Judge Kaplan went further than just Judge Kaplan's scrupulousness. In reviewing the petition and Magistrate Fox's recommendation to dismiss it, Judge Kaplan's eye surely settled on the identity of Garcia's trial counsel. At the time Judge Kaplan

was considering the petition, Garcia's trial counsel was acting before Judge Kaplan in an unrelated immigration proceeding. In that other matter, *Batista-Taveras v. Ashcroft*,[13] Judge Kaplan ultimately determined that the trial counsel's performance was "grossly ineffective," and his representation of his client was so "grossly deficient" that the client was denied due process.[14]

The *Batista-Taveras* opinion was issued in September 2004. It was also in September 2004 that Judge Kaplan revived Garcia's *habeas corpus* petition and, along with it, Garcia's pursuit of justice.[15] That Garcia's trial counsel (and his incompetence) was a known quantity to Judge Kaplan at the very time Garcia's petition was under review was a critical – and extraordinarily fortuitous – fact in Garcia's favor.

Judge Kaplan remanded the matter to Magistrate Fox, required the Bronx District Attorney to respond to the petition on the merits, and appointed *habeas* counsel for Garcia.[16] Garcia's *habeas* counsel immediately began to investigate and requested an evidentiary hearing on the petition. On February 16, 2005, Magistrate Judge Fox granted the request for an evidentiary hearing. This was a critical moment; evidentiary hearings are only convened in approximately 2% of *habeas* cases but a petitioner's odds for ultimate relief skyrocket when a hearing is ordered.

The Ineffective Trial Counsel's Failure To Investigate And Present The Alibi

Garcia's burden at the evidentiary hearing was to demonstrate that his trial counsel provided ineffective assistance of counsel in violation of Garcia's 6th Amendment rights. The standard is set forth in the Supreme Court's opinion *Strickland v. Washington*:[17] counsel's assistance is constitutionally deficient when (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that the verdict would have been different but for counsel's unprofessional errors."[18]

Garcia's trial counsel agreed to testify and he was Garcia's first witness at the evidentiary hearing. His testimony as to Garcia's alibi was unequivocal: "I believed at the time of Garcia's state court trial, and I believe today, that Garcia was in the Dominican Republic at the time of Vasquez's murder."[19] As to why the jury at Garcia's trial heard virtually nothing of this alibi, the trial counsel explained that he did not investigate or prepare the alibi defense because, among other reasons, (1) he believed the government's single-witness case was weak and (2) any investigation was constrained by costs and time.[20]

While Garcia's trial counsel made critical errors during the trial, his fundamental failure was the lack of a prompt and diligent pre-trial investigation. What Garcia's trial counsel failed to do in 1992, his *habeas* counsel did in 2005 for purposes of the evidentiary hearing. Through numerous meetings with Garcia's family and associates and a thorough investigation in the Dominican Republic, Garcia's *habeas* counsel created a documentary record consisting of, among other things:

> (1) a copy of Garcia's Dominican national identity card, authenticated through Ortega's testimony, bearing Garcia's photograph and national identity number;
> (2) an arrest intake form, identifying Garcia by name and national identity number, showing that Garcia was arrested in the Dominican Republic on July 15, 1991;
> (3) a Dominican bail document ordering Garcia's detention until payment of bail, which Ortega testified she was given at the Puerto Plata courthouse after paying Garcia's bail and presented it at the police station to obtain his release;
> (4) a copy of an airline ticket in the name Ferdinand Caraballo for a flight on June 22, 1991 from New York to Puerto Plata, with a return flight scheduled for July 18, 1991, which Garcia testified was given to him immediately before his arrest at the Puerto Plata airport on July 15, 1991;
> (5) a receipt for the airline ticket, attached to a declaration of the president of Anabella Tours, Inc., a travel agency located in Bronx County, that the receipt was made during the regular course of the agency's business, maintained in the agency's records: and
> (6) a photocopy of an unused boarding pass for a July 15 flight from Puerto Plata to New York, again in the name Ferdinand Caraballo, which Garcia testified he received at the Puerto Plata airport on July 15, shortly before being arrested for attempting to travel with false documents.[21]

All of these documents that were located in 2005 – and presumably many more given the likelihood that, over time, some documents were lost or destroyed – existed in 1992-1993 but Garcia's trial counsel made no effort to locate them and the jury knew nothing about them.[22] Assessing this evidentiary record at the October 26, 2006 hearing, Judge Kaplan observed "if the Dominican documents are what they purport to be and are true, the odds that he could have committed that murder are slim to zero. *Forget all the other evidence*."[23] In other words, the documentary record compiled by *habeas* counsel was alone sufficient to exonerate Garcia.

But there was more. At trial, Garcia's counsel did not put on a witness who could testify to firsthand knowledge of Garcia's presence in the Dominican Republic on the night of the murder. Garcia's *habeas* counsel produced an overwhelming body of testimonial evidence demonstrating that Garcia remained in the Dominican Republic after his release from jail on July 16, 1991, the day of the murder. At the evidentiary hearing, *seven* witnesses specifically testified that Garcia was in the Dominican Republic on the night of July 16 (or shortly thereafter),[24] and *four* affidavit witnesses placed Garcia in the Dominican Republic a few days after July 16.[25] If Garcia committed the murder as the jury concluded, all eleven of these witnesses were lying under oath. But the jury in 1993 heard from none of these witnesses, not because they were unavailable or unwilling to testify but because Garcia's trial counsel – who admits he was aware of some of these witnesses – never even interviewed them prior to trial.[26]

Following the evidentiary hearing, Magistrate Judge Fox – and later Judge Kaplan – concluded that Garcia's trial counsel's performance fell below an objective standard of reasonableness because he failed (i) "to present alibi evidence known to him at the time," and (ii) "to investigate Garcia's whereabouts on" the day of the murder.[27] The failure to investigate was particularly damaging; "Representation of a criminal defendant entails certain basic duties, one of which is to investigate the facts of the case so that counsel can prepare a reasonably informed defense."[28] Judge Kaplan stated emphatically that Garcia's trial counsel failed to perform that basic duty:

> Any reasonable defense attorney in [trial counsel's] position certainly would have undertaken some investigation into the defendant's whereabouts at the time of the crime. . . . After learning that his client was in the Dominican Republic only hours before the crime was committed, Guttlein should have investigated where Garcia went next. His duty was to investigate, not to make do with whatever evidence fell into his lap.[29]

Moreover, such a failure to investigate is not excused by the relative weakness of the government's case. Noting that, while, under the *Strickland* standard, great deference is given to a defense counsel's strategic decisions, Judge Kaplan stated "a decision not to prepare an adequate defense because a defense lawyer thinks the prosecution's case is weak is not 'strategic.' It is motivated by the desire to avoid work, not to serve the best interests of the defendant."[30] Nor do the costs[31] and time[32] associated with a pre-trial investigation excuse a failure to perform it.

In light of the wealth of new documentary and testimonial evidence proffered at the *habeas* evidentiary hearing, the second prong of the *Strickland* standard was easily satisfied: "There is little doubt that the alibi evidence, had it been produced at trial, would have altered the landscape substantially. The decision of a jury that did not weigh this evidence is not reliable."[33]

"Any reasonable defense attorney in [trial counsel's] position certainly would have undertaken some investigation into the defendant's whereabouts at the time of the crime. . . His duty was to investigate, not to make do with whatever evidence fell into his lap."
- Judge Kaplan

Accordingly, on December 21, 2006, Judge Kaplan determined, as had Magistrate Fox before him, that Garcia's trial counsel rendered constitutionally defective assistance of counsel. Garcia's petition was granted, subject to the State's right to re-try him within sixty days.

The Irresponsible District Attorney's Failure To Investigate The Alibi

Garcia's trial counsel's failure to investigate and present Garcia's alibi denied Garcia his constitutional entitlement to effective assistance, but blame for the miscarriage of justice of Garcia's conviction does not rest with the trial counsel alone.

As discussed in the last two issues of the *Criminal Law Brief* journal, a prosecutor's job is not simply to win.[34] The prosecutor's duty is twofold: to ensure that "guilt shall not escape or innocence suffer."[35] The prosecutor's responsibility to ensure that innocence does not suffer is not a new development; courts have held for more than a century that "it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes."[36] The American Bar Association Model Rules of Professional Conduct suggest an affirmative obligation on the part of prosecutors to uncover "sufficient evidence" for a determination of guilt or innocence: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[37] Indeed, as a former Justice of the U.S. Supreme Court concluded, this affirmative obligation means prosecutors must "***make sure they do not convict the innocent***."[38]

The Bronx District Attorney's Office did not make sure that it did not convict the innocent. Almost a year before Garcia's trial began, Garcia's trial counsel informed the District Attorney's Office that Garcia had been incarcerated in the Dominican Republic for attempting to travel with false papers around the time of the crime. The trial counsel encouraged the District Attorney's Office to investigate the alibi and dismiss the case.

The extent of the District Attorney's Office's effort was a March 4, 1992 letter requesting information from the U.S. Department of State regarding the passport and tourist card Garcia was carrying when he was arrested in the Dominican Republic. Specifically, the assistant District Attorney asked:

> (1) "when and where [the passport and tourist card] were issued";
> (2) "In what name these documents were issued";
> (3) "Where these documents are today," noting his "reason to believe they may have been confiscated on July 15, 1991 in the Dominican Republic"; and
> (4) for copies of the passport and tourist card.[39]

Importantly, the letter did not mention police reports or arrest and release records. The State Department provided the following response regarding "Garcia, Jose":

> INQUIRIES WITH DOMINICAN POLICE AND IMMIGRATION REVEALED THAT THE SUSPECT WAS ARRESTED 7.15.91 IN SANTO DOMINGO WHILE TRYING TO LEAVE THE COUNTRY WITH "FALSE DOCUMENTS." DOCUMENTS INCLUDING PASSPORT WERE SEIZED BY IMMIGRATION AND SENT TO POLICE. UNFORTUNATELY THE POLICE HAVE LOST ALL THESE DOCUMENTS.[40]

That was the end of the inquiry.[41] Incredibly, the Bronx District Attorney's Office never asked for or received any information or documents relating to Garcia's arrest, incarceration or release.

Nine months later, at the beginning of Garcia's trial for murder, the prosecuting Assistant District Attorney attempted to explain the exchange with the State Department to the court but did so inaccurately:

> [W]hen the District Attorney's Office contacted the Dominican Republic to get the police reports that were the underlying supposedly arrest information, our Embassy or in effect someone is notified . . . that the police reports down there don't exist there. They were lost. . . . They were lost down in the Dominican Republic. There are no reports as to actually his arrest that exist, to my knowledge. We called them and the Embassy checked into it and the reports don't exist down there. The passport he used with a different name it's gone. Everything is gone from down there.
>
> * * *
>
> If the embassy checked, and were told by the police department down there that the records are lost, which is exactly what we were told, the police reports were lost, we are not duty bound to keep chasing after people down there in the hopes that may be they will find them. The bottom line was the inquiry was made and

> we were informed by the police department down there that they lost them. They don't have any of the reports that were generated on his arrest.[42]

But that is not what happened. The Department of State notified the District Attorney that *the documents seized from Garcia* were lost, not the police reports of his arrest. And the police records documenting Garcia's arrest, incarceration, and release were not lost and do exist – Garcia's *habeas* counsel found them. The District Attorney's Office never looked for them nor even asked for them and, worse, then suggested to the court that it had in fact done so. That such an inquiry was not made cost Garcia sixteen years of his life.

While the Bronx District Attorney's conduct was not technically the basis for any relief granted to Garcia, the point was not lost on Judge Kaplan. At the hearing on the District Attorney's objections to Magistrate Fox's Report and Recommendation, Judge Kaplan focused on the District Attorney's Office's failure to fulfill its "obligation to justice": "If you call what you did investigating to the best of your ability, then I hope your commitment to justice isn't of the same caliber. . . . [S]ending a letter to the State Department, and accepting an uncorroborated one-page response, when the issue is what records exist in the Dominican Republic is, with all due respect, a joke."[43] Perhaps even more troubling to Judge Kaplan was the District Attorney's failure to perform any investigation of Garcia's alibi in connection with the *habeas* proceeding. At the October 26, 2006 hearing, Judge Kaplan asked what the District Attorney's office had done in response to "the bundle of Dominican documents" proffered at the evidentiary hearing supporting Garcia's alibi. When the Assistant District Attorney responded the District Attorney's Office had done essentially nothing, Judge Kaplan reacted:

> You made no effort whatsoever. You've got a guy who served 15 years in jail for murder, in circumstances where if the Dominican documents are what they purport to be and are true, the odds that he could have committed that murder are slim to zero. Forget all the other evidence. And the district attorney in Bronx County has done nothing to try to find out whether they are on the level?[44]

It is difficult to say which was the more pernicious conduct: trial counsel's malfeasance or the District Attorney's Office's nonfeasance. It is plain, however, that a prosecutor's responsibility to the innocent is a first principle in the maintenance of the criminal justice system. Where, as here, a prosecutor demonstrates complete indifference to a fully exonerating defense, irreparable injustice may follow.

An "Exceptionally Troubling" Case

Judge Kaplan characterized Garcia's plight as "an exceptionally troubling case," inasmuch as, "In all probability, it resulted in a conviction and fifteen years in prison that otherwise would not have occurred."[45] Garcia's trial counsel's failure to investigate and the Bronx District Attorney's lack of interest in his alibi robbed Garcia of sixteen years, his wife of her husband and his four children of their father.

In this case, some measure of justice, albeit belatedly, has been done. Perhaps more troubling are the other cases. Garcia was fortunate in many ways. His petition was assigned to an attentive, meticulous district court judge, who assigned *habeas* counsel with the resources to investigate and document a fourteen-year-old alibi. Garcia was also fortunate that documents still existed in support of his stale alibi and that witnesses still recalled it. Garcia also had family – in particular, his wife – standing behind him to assist in the complex investigation undertaken by *habeas* counsel. Finally, Garcia's trial counsel agreed to testify at the evidentiary hearing and conceded his pre-trial mistakes rather than defend his conduct and his reputation. Many innocent prisoners do not have such advantages in attempting to make their case.

In fact, obtaining post-conviction relief may turn not on a rigorous process of truth-seeking but on a fortuitous aligning of the stars. Garcia's case demonstrates the point. Two different justices of the New York Supreme Court, the Appellate Division of the New York Supreme Court (twice), the New York Court of Appeals, and a Federal Magistrate Judge each passed – in most instances, in perfunctory fashion – on an opportunity to scrutinize Garcia's claim of innocence before Judge Kaplan stepped in and reversed the tide. As for Judge Kaplan, one wonders whether an extremely busy federal judge would have devoted the time and energy to the case but for his contemporaneous experience with Garcia's trial counsel in an unrelated immigration proceeding. This was perhaps the decisive advantage for Garcia – and an utter coincidence.

And that is what is "troubling" about Mr. Garcia's case. While he has been vindicated, it took a remarkable series of events to undo the murder conviction wrought by an incompetent defense counsel and an irresponsible prosecutor. Most are not so lucky.

** Matthew Bosher, a former associate at Willkie Farr & Gallagher LLP, represented Jose Garcia in connection with his habeas corpus petition. The views expressed in this article are Mr. Bosher's and not necessarily those of Willkie Farr & Gallagher. Mr. Bosher can be reached at: mbosher@alumni.virginia.edu.*

---

[1] Most of the facts set forth in this article are recited in one of two opinions: (1) Magistrate Judge Kevin Fox's Report and Recommendation that Garcia's *habeas corpus* petition be granted, *Garcia v. Portuondo*, 02 Civ. 2312 (LAK) (KNF), 2006 U.S. Dist. Lexis 85173 (S.D.N.Y. Aug. 30, 2006) [hereinafter *Garcia* R&R]; and (2) Judge Lewis Kaplan's Order granting Garcia's petition, *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006) [hereinafter *Garcia* Order].

[2] United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part).

[3] *Garcia* R&R, 2006 U.S. Dist. Lexis 85173 at *13.

[4] *Id*.

[5] *Id*.

[6] *Id*. at 14.

[7] *Id*.

[8] *Id*.

[9] 28 U.S.C. § 2244(d)(1)(A) requires that state prisoner petitions be filed within one year of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such a review." The judgment convicting Garcia became final on July 3, 1996 when his

time to seek certiorari from the United States Supreme Court expired. Thus, Garcia's *habeas* petition was untimely after July 3, 1997. *See* Garcia v. Portuondo, 334 F. Supp. 2d 446, 450 (2004).

[10] *See Garcia*, 334 F. Supp. at 450.

[11] For an overview of Judge Kaplan's career and judicial record, *see* Paul Davies, *Bench on Fire*: *KPMG Judge Grills Prosecutors*, Wall St. J., Aug. 5, 2006, at B1.

[12] 435 F. Supp. 2d 330 (2006)*: see also* Joshua G. Berman and Machalagh Proffit-Higgins, *Prosecuting Corporations: The KPMG Case and the Rise and Fall of the Justice Department's 10-year War on Corporate Fraud,* 2 Crim. Law Brief 2, 25 (Spring 2007).

[13] 03 Civ. 1968 (LAK), 2004 U.S. Dist. LEXIS 19136 (S.D.N.Y. Sep. 22, 2004).

[14] *Id*. at **17-18.

[15] Judge Kaplan determined that, although the petition was not filed within the statutory limitations period, the statute of limitations was tolled "because Garcia's was one of the exceedingly rare cases in which the petitioner makes out a credible claim of actual innocence." *Garcia* Order, 459 F. Supp. 2d at 274.

[16] *See Garcia*, 334 F. Supp. 2d at 462. Judge Kaplan appointed Martin Klotz of Willkie Farr & Gallagher LLP to represent Garcia in the habeas proceedings.

[17] 466 U.S. 668 (1984).

[18] *Garcia* Order, 459 F. Supp. 2d at 280, 289. The *Strickland* standard is notoriously difficult to meet. The cases are legion in which conscience-shocking behavior by counsel is deemed constitutionally sufficient. *See, e.g.,* People v. Garrison, 47 Cal. 3d 746, 786 (1989) (counsel provided effective assistance even though "he consumed large amounts of alcohol each day of the [capital murder] trial . . . in the morning, during court recesses, and throughout the evening" and, on the second day of trial, was "arrested for driving to the courthouse with a .27 percent blood-alcohol content"); Schwander v. Blackburn, 750 F.2d 494, 499 (5th Cir. 1985) (counsel provided effective assistance even though he did not consult with defendant until the first day of aggravated robbery trial); Pickens v. Gibson, 206 F.3d 988, 1001 (10th Cir. 2000) (counsel provided effective assistance even though he made no opening or closing statement and failed to cross-examine the prosecution's witnesses in any meaningful way); Ingrassia v. Armontrout, 902 F.2d 1368, 1371 (8th Cir. 1990) (counsel provided effective assistance even though he did not interview alibi witnesses because he determined they would not be believed); Burdine v. Johnson, 231 F.3d 950, 952, 964 (5th Cir. 2000) (no presumption of prejudice even though counsel "repeatedly dozed and/or slept" during capital murder trial because court could not determine whether counsel slept during "critical stages"); Elliot v. Williams, 248 F.3d 1205, 1206, 1214 (10th Cir. 2001) (no prejudice even though defense counsel made no opening or closing statement and presented no defense after the state rested its case).

[19] Affidavit of Jorge Guttlein Submitted In Connection With Evidentiary Hearing ¶ 2, *Garcia v. Portuondo*, 459 F. Supp. 2d 267 (S.D.N.Y. 2006) (02-Civ. 2312).

[20] *Id*.

[21] *Garcia* Order, 459 F. Supp. 2d at 276.

[22] Trial counsel also possessed certain documents supporting Garcia's alibi at the time of trial but he failed to move them into evidence. *Id*. at 275.

[23] Transcript of October 26, 2006 Hearing on Objections to Magistrates Report and Recommendation [hereinafter October 26, 2006 Hearing Transcript] at 10:21-23 (emphasis added), *Garcia*, 459 F. Supp. 2d 267.

[24] *Garcia* Order, 459 F. Supp. 2d at 277.

[25] *Id*.

[26] *Id*. at 275-76.

[27] *Id*. at 278.

[28] *Id*. at 280.

[29] *Id*. at 286.

[30] *Id*. at 287.

[31] *Id*. at 288 ("having accepted the responsibility of representing a criminal defendant, counsel owed a duty to his client that will on occasion require him to make financial outlays that might be considered unfair for an ordinary businessman, who, unlike a licensed attorney, has not voluntarily adopted an enhanced ethical obligation to society") (quoting Thomas v. Kuhlman, 255 F. Supp. 2d 99, 111 (E.D.N.Y. 2003).

[32] *Garcia* Order, 459 F. Supp. 2d at 288.

[33] *Id*. at 289.

[34] *See* Angela Davis, *Prosecutors Who Intentionally Break the Law*, 1 Crim. Law Brief 1, 16 (Spring 2006); Randall Eliason, *The Prosector's Role: A Response to Professor Davis*, 2 Crim. Law Brief 1, 15 (Fall 2006).

[35] Randall Eliason, *The Prosector's Role: A Response to Professor Davis*, 2 Crim. Law Brief 1, 16-17 (Fall 2006) (quoting *Berger v. U.S*., 295 U.S. 78, 88 (1935)).

[36] Appeal of Nicely, 18 A. 737, 738 (Penn. 1889).

[37] Model Rules of Prof'l Conduct R 3.8 1 cmt. (2002).

[38] United States v. Wade, 388 U.S. 218, 256 (1967) (White, J., dissenting in part and concurring in part) (emphasis added).

[39] *See* Respondent's October 12, 2004 Memorandum of Law In Opposition to Petition at Exhibit 9, *Garcia*, 459 F. Supp. 2d 267.

[40] *Id*.

[41] More than fourteen years later, the District Attorney's Office acknowledged that this exchange represented the extent of its investigation in the Dominican Republic. At the October 26, 2006 hearing before Judge Kaplan, the assistant representing the District Attorney stated that the information received from the State Department was only this "one-page notation that the records were lost." October 26, 2006 Hearing Transcript, *supra* note 23, at 10:11-12.

[42] Transcript of State Trial Record at 79:18-21, 80:2-9, 83:2-13, *Garcia*, 459 F. Supp. 2d 267 (emphasis added).

[43] October 26, 2006 Hearing Transcript, *supra* note 23, at 11:24-25, 12:12-14, 18-21.

[44] *Id*. at 10:19-25.

[45] *Garcia* Order, 459 F. Supp. 2d at 295.