

ZIMMERMAN: ANATOMY OF A DEFICIENT PROBABLE CAUSE AFFIDAVIT



Now that the dust has settled from the decision in the Zimmerman/Martin case not to proceed by grand jury by the Florida Special Prosecutor Angela Corey, and the decision to file a

single count of second degree murder, I want to address a couple of critical topics in the case. First is the fact that there are serious questions as to the sufficiency of the probable cause affidavit that currently constitutes not just the core, but pretty much the entire basis for the state's case. That will be the subject of the instant post. Second, will be a discussion of the mechanics of Florida's procedure for implementing its "Stand Your Ground" law and a discussion of other pending procedural aspects of the case, and that will be covered in a followup post.

A probable cause affidavit is exactly what it sounds like, a sworn affidavit delineating probable cause in a criminal case – whether it be to search a place, arrest a person or charge a crime. Whatever the particular purpose, the affidavit must delineate the factual basis to support the specific legal action sought to be pursued by the state. And the general principle common to all such affidavits, whether for search, arrest or charging, is that it must "stand on its own" based on "what is within its four corners". In lay terms, that means there must not only be sufficient information to cover all requisite elements necessary for the action, all such support must be actually in the

affidavit – not in some extraneous place or with some extraneous source.

The Zimmerman affidavit is, at least by my analysis, wholly deficient for its purpose intended, i.e. to support the criminal charge under Florida law of second degree murder against Zimmerman.

We will start with a look at what useful, and useable, information is actually contained in the affidavit. Here is a complete copy of the full three page affidavit filed by the State of Florida in the Zimmerman case. Other than captions, signatures and certifications, all pertinent information is contained in twelve text paragraphs on the first two pages. Let's look at them:

Paragraphs 1-3: The first three paragraphs give the names of the two investigators that are serving as the affiants for the affidavit and gives their background experience that qualifies them to do so. The investigators, O'Steen and Gilbreath both appear to be very experienced and appropriate for the task. No problems here.

Paragraph 4: The fourth paragraph details the types of material, evidence and sources the affiants relies on. Pretty standard stuff, again no problems here. (Interesting that the state appears to have a lot of "sworn statements" – even from cops, which is kind of unusual at this stage. Cops rarely give sworn evidence if they don't have to, and prosecutors rarely want to lock them in this early. There may have been an internal affairs type of investigation that explains this, we shall see).

Paragraph 5: The fifth paragraph is the first factually substantive material. It details that Martin was living in the gated community at the time of the event, was returning from the store (with the infamous Skittles) and was unarmed and not engaged in any criminal activity. Then, however, the affidavit blurts out a critical, but completely unexplained and unsupported claim, namely that Zimmerman was "profiling"

Martin. It does NOT allege that any such “profiling” had a racial animus or was, in any sense, illegal or improper. This is important because, while it is a rhetorically charged term, profiling is completely legal, whether for police or average citizens, so long as it not based on an improper invidious animus like race, religion, sex, etc. So, with NO allegation of improper animus here, and there is not, the profiling alleged is completely and unequivocally legal. Further, there is absolutely no specific attribution as to where this allegation came from – did Zimmerman admit it, if not what was the basis for the conclusion by the affiants? We have NO idea whatsoever, it is just a raw conclusory statement of absolutely no value whatsoever in its naked state. In short, there is nothing in Paragraph 5 that does anything to actually provide probable cause for the crime charged.

Paragraph Six: Paragraph six is much like paragraph five, except it details the intro to Zimmerman, where paragraph five did so for Martin. Zimmerman also lived in the gated community. It relates Zimmerman was “driving his vehicle” (we have no idea from where or to here) and “assumed Martin was a criminal”. Well that sounds bad right? Well, not really. First off, again, there is absolutely NO way of knowing where this information came from – did it come from Zimmerman? Was it culled from the 911 tape? Did a psychic conjure it up? We don’t know. Remember, it is seminal affidavit law that a;; pertinent facts must be supported and attributed “within the four corners of the document”. There is also a statement the 911 dispatcher told Zimmerman an officer was “on the way”. Again, there is absolutely nothing in Paragraph 6 that does anything to actually provide probable cause for the crime charged.

Paragraph 7: Paragraph seven is yet more of the same. It describes that Zimmerman believed there had been unsolved break-ins in the neighborhood, and “fucking punks” and “assholes” “always get away”. Credit where due, we finally have a

specific attribution point for the statements by the affiants, it is specifically stated to be from the recorded 911 call. See, the state and affiants are capable of proper attribution when they want to. Small victory. The problem is, there is *still* NO improper or illegal activity described. None. So far, Zimmerman is judgmental and concerned about his neighborhood, but there is not one scintilla of illegal conduct.

Paragraph 8: The eighth paragraph starts out with a description of a call Martin was on supposedly at the time he was being observed and followed by Zimmerman. But, again, there is not squat for specificity or particularity, the linchpins of a proper affidavit. We are not told who the person on the phone with Martin is, what the exact time of the call, and length of call, was, and we are not told how that information is known. Was that person interviewed by cops? Did she give a sworn statement? Did these investigators talk to her themselves, or was it some other officer and, if so, who? Hearsay, and even double or triple hearsay is acceptable in an affidavit, but the path and facts establishing it must be delineated. Here it is not. Then paragraph 8 goes off the edge, veering into some of the most unattributed and nakedly conclusory statements imaginable. It alleges Martin tried to run home, Zimmerman got out of vehicle and pursued, that Zimmerman thought Martin might commit an immediate crime before cops could arrive and that the 911 dispatcher told Zimmerman to wait for the cops but Zimmerman disregarded the advice. Other than maybe being able to assume the dispatcher advice is on the tape, we have no idea who, what, when, where or how the affiants know their wholly conclusory statements. It is simply unsupported tripe. Oh, and there is *STILL* no evidence of any criminal activity whatsoever. None.

Paragraph 9: Paragraph nine starts the actual meat of the subject confrontation. Let's look at it sentence by sentence. "Zimmerman confronted Martin and a struggle ensued." Okay, how do the affiants know this, did it come from Zimmerman's

statement? Some other unidentified witness? Was there surveillance video? we have no idea. Just another completely unsupported and unattributed statement lobbed out. Even if it were to be taken at face value, it at best relates that Zimmerman confronted Martin, it DOES NOT indicate who started the "struggle". It is an absolutely critical fact, and there is no indication whatsoever given. If Zimmerman is to be charged with acting with a "depraved mind" it is hard to see how that could be if Martin started the actual physical, as opposed to verbal, "struggle". But we do not know who did so, because the affiants did not include that. It is pretty clear there is no eyewitness or other direct evidence on this fact, because the next sentence reads "During this time period witnesses heard numerous call for help and some of these were recorded in 911 calls to police." This is not only not attributed to specific witnesses (whether named or otherwise separately identified), nor is there any indication of how the affiants know it, it is completely harmless information. There is NO way to discern WHO was crying for help or whether both individuals were. The last sentence reads "Trayvon Martin's mother has reviewed the 911 calls and identified the voice calling for help as Trayvon Martin's voice." Which 911 calls? just the one that Zimmerman made? Or was there others? Did the cops eliminate Zimmerman's voice as making any pleas for help through voice print analysis? That is one of the first things that should have been done; seems telling there is no such evidence. Surely the cops recorded Zimmerman. Irrespective, even assuming Martin's mother is correct in her identification, that shows NOTHING as to who initiated the physical portion of the "struggle" or who was doing what to whom in it. In short, somewhat shockingly, there is STILL not one iota of criminal activity, of any kind, on the part of George Zimmerman stated in this affidavit.

Paragraph 10: "Zimmerman shot Martin in the chest." Zimmerman fully admitted it, and admitted it was his gun and turned it over.

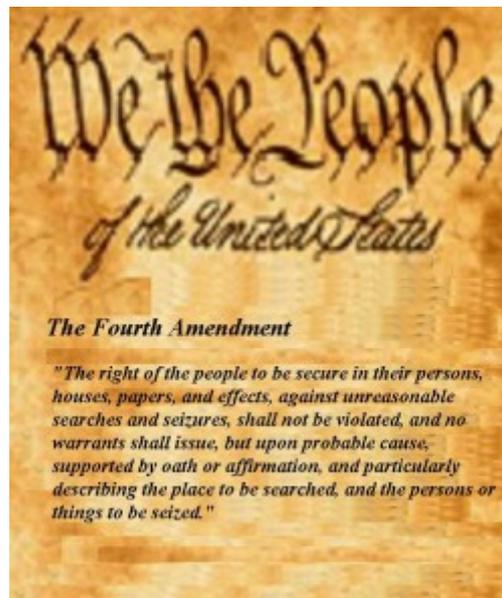
Well, that at least establishes a homicide has occurred, as a homicide is defined as the killing of one human by another human. There is, however, STILL nothing establishing how or why this homicide was criminal. Seriously there is nothing in the affidavit to establish criminality, much less a "depraved mind" on the part of Zimmerman.

Paragraphs 11-12: The final two paragraphs of the core affidavit add nothing in the way of criminality. Paragraph eleven establishes Martin died of a gunshot wound and paragraph twelve relates that the cops have other evidence and want a charge of Second Degree Murder. Nothing in these last two paragraphs bolsters criminality whatsoever.

And that, folks, is it. It is completely lacking in requisite and necessary attribution for the extremely few and, really, innocuous facts it does present, and the rest

comprises nothing but unsupported and wholly conclusory statements meant to infer criminal activity, but which do not even do a competent job of that.

In short, it is shit. To be honest, this affidavit, within its "four corners" arguably does not even meet the necessary burden of probable cause for Manslaughter under Florida section 782.07, much less the "depraved mind" necessary under Florida's Second Degree Murder charge under section 782.04(2) as charged in the information. George Zimmerman may have committed a crime, but it is not demonstrated in this



affidavit, and certainly is not as to the crime charged, Second Degree Murder. Charles Blow can praise this thing until the cows come home in the august pages of the New York Times, but it is still a pile of junk.

But the above discussion is all about what is in the affidavit, let's talk about what is *not* in the affidavit as well. The affidavit goes out of its way to spin innocuous and perfectly legal activity into some nebulous vignette of implied criminality, yet self servingly there is not a single fleeting reference to Zimmerman's claim of having acted in self defense. To be sure, in charging a case, a prosecutor is going to frame the facts to support her charge. But that does not mean she can blithely ignore patently exculpatory facts known to her and germane to the interests of justice. Angela Corey's affidavit is thusly not just deficient, but dishonest in a very slimy, even if not unethical way. It is patently offensive in that regard.

The case is also patently overcharged. As stated above, I think it is more than arguable that the probable cause affidavit does not even support manslaughter, but it is not remotely close to supporting second degree murder. This is an embarrassment not only for Angela Corey, but the magistrate who signed off on this bunk. It makes the criminal justice system look horrible.

None of this is to say I think George Zimmerman is innocent of any crime for the incident that led to Trayvon Martin's death, nor is it to say that the state may not possess sufficient evidence to convict Zimmerman of some crime at a trial. In fact, I am highly disturbed by Zimmerman's behavior and Martin's death. All I am saying is, is that while there may be probable cause to charge Zimmerman, it has in no way, shape or form demonstrated by the State of Florida's official legal statement that is supposed to be the foundation for charging Zimmerman. Zimmerman should not be charged, nor sitting in a county detention, based on this document; yet there he is.

There are other developments in the procedural case, involving the trial judge, upcoming bail determination hearing and assertion of the official Stand Your Ground affirmative defense. I will come back in the next day or two to address those items.