

STATE OF INDIANA)
) SS: IN THE MARION SUPERIOR COURT
COUNTY OF MARION) CRIMINAL DIVISION, COURT D32

STATE OF INDIANA)
)

v

ELLIAHS LAMAR DORSEY

CAUSE: **49D32-2004-MR-013622**

Transcript of Pre-trial Preliminary Hearing

Appearances:

HONORABLE MARK D. STONER, Judge Presiding

ROB BEATSON, State of Indiana

JESSICA PAXSON, State of Indiana

MICHELLE SHARPE, State of Indiana

RAY CASSANOVA, Attorney for Defendant

DEANA MARTIN, Attorney for Defendant

ELLIAHS DORSEY, Defendant

1 CT: Honorable Mark D. Stoner, Judge presiding.

2 ??: Please be seated.

3 CT: State versus Elliahs Dorsey. In custody Elliahs Dorsey.

4 [pause]

5 MS: Mr. Dorsey's here under 49D32-2004-MR-013622. Present in

6 person and by counsel Mr. Cassanova, Miss Martin, State

7 of Indiana by Mr. Beatson, Miss Sharpe and Miss Paxson.

8 We are set for a hearing today, limited specifically to

9 defendant's petition number 69, supporting memorandum ~,

10 defendant's number 70. State responded ~, with its own

11 memorandum. This court has reviewed. Defense then filed

12 its response to the State's memorandum. State's

13 memorandum was filed on March the 8th. Defendant filed

14 it's pleading in response to that on 70 ~, pleading 75

15 on March 15th, Court has read all of those. In essence

16 this is a request for the court to review whether or not

17 the State has sufficient evidence to proceed with filing

18 of a Capital charge against Mr. Dorsey. Parties have

19 submitted evidence and ~, some evidence and a argument.

20 The court has specifically reviewed the Probable Cause

21 Affidavit prepared by Detective Prater, and Mr.

22 Cassanova, you're actually the moving party here. Does

23 the defense wish to present any evidence to supplement

1 its position, or do you wish to simply do argument or
2 rely on what's already been filed?

3 RC: We'd like to make argument Judge and we do have some
4 additional evidence. We would like to submit the
5 depositions of Aisha Brown, Officer Joseph Charles,
6 Officer Dillon Webb ~,

7 (coughing)

8 RC: ~ Mr. Charles Ward.

9 MS: You referred to those in your memorandum but only
10 snippets, are you asking to actually in ~, incorporate
11 the entire depositions or only parts?

12 RC: Well, we ask to incorporate the entire deposition. We
13 also have per the courts, um, instruction, we have
14 another Exhibit that would specifically direct the court
15 to specific portions of those depositions.

16 MS: Okay, however you wish to proceed. Again, this is a pre-
17 trial preliminary hearing, the technical rules of
18 evidence don't apply and so, how do you wish to proceed?

19 RC: Uh, we'd like to introduce deposition A, B ~, deposition
20 A, which is Aisha Brown's deposition. Deposition B, er,
21 uh, I'm sorry, defendant's A, which is Aisha Brown's
22 deposition, defendant's B, which is Joseph Charles
23 deposition. Defendant's C, which is Officer Charles
24 Ward's deposition. Defendant D, which is Officer Dillon

1 Webb's deposition. Defendant ~, defendant's E, which is
2 a copy of the ~, which is a recording of the 911 call.

3 MS: E ~, uh, E is the 911 call?

4 RC: Correct.

5 MS: Okay.

6 RC: And then defendant's F is again, to guide the court to
7 the relevant excerpts from those depositions. Um ~,

8 MS: An executive summary if you were ~,

9 RC: Correct. So, I don't ~, (inaudible) stickers, I did put
10 stickers on them (inaudible) ~,

11 MS: Alright, did you share those with the State?

12 RC: The State should have all the depositions and the 911
13 call.

14 MS: Alright, what's the ~, let me play these back to ya, I
15 got all but two. A is deposition of Alicia Brown, B is
16 the deposition of ~,

17 RC: Officer Char ~, Joseph Charles.

18 MS: Okay, Joseph Charles, C is the Of ~, is Officer Charles
19 Ward?

20 RC: Correct.

21 MS: And D is?

22 RC: Officer Dillon Webb.

23 MS: Dillon Webb? W-E-B-B?

24 RC: Correct.

1 MS: Okay, E is 911 call and F is the, for lack of a better
2 word, executive summary of the ~, the preceding five
3 exhibits. This is for limited purposes of this hearing,
4 does State have any objection to A through F?

5 RB: No, your Honor.

6 MS: Okay, so we'll show those for limited purposes of this
7 hearing, admitted without objection. This does need a
8 sticker, (inaudible) put a sticker on F.

9 ??: (Inaudible)

10 ??: Mm Hm.

11 (clanking noises)

12 RC: And then Judge we have argument based upon, uh, the
13 information in the relevant information in those
14 Exhibits and in response to the State's response.

15 MS: Okay. But no other other ~, no other evidence to submit?

16 RC: No Judge.

17 MS: Alright, does the State have evidence you wish the court
18 to ~, to consider as it relates to this issue?

19 RB: No, your Honor.

20 MS: Alright. Susan, can I see F ~, (inaudible) ~,
21 (cough)

22 MS: Alright, see defendant's F as in Frank is in 15 pages, I
23 assume is an executive summary, so in the interest of
24 time ~, let me ask both sides this. In the ~, State's

1 memorandum ~, on page 5 of your memorandum ~, which is
2 the last paragraph before your designated issues re ~,
3 or issue two ~, and three ~, three dealing with the
4 constitutionality of the death penalty, and issue two ~,
5 which I think the State concedes that there ~, if there
6 isn't an aggravator then the death qualified jury isn't
7 necessary, but right before that, the State enumerates,
8 basically three facts of the Probable Cause Affidavit,
9 that it relies upon this specific issue of ~, the
10 defendant having actual knowledge that the officer was
11 in fact an officer, as opposed to could have ~, or
12 should have. The State relies on these three. I noted
13 when the defense responded in their pleading in 75 ~,
14 the State also relied upon those three factors. And plus
15 referred to some evidence that may have come from the
16 depositions, which I assume is part of what the State's
17 submitting in A through and including E, would that be
18 fair?

19 RC: The defense is submitting, yes.

20 MS: Yeah, okay. So, before I go any further, is the S ~, is
21 the State relying on any other facts other than the
22 three that you argue on page 5 of your memo, uh, the
23 three that were contained within the Probable Cause
24 Affidavit or is there additional information that the

1 State has gleaned since the original filing of the
2 Probable Cause Affidavit, uh, that supports the belief
3 that the defendant had actual knowledge that the officer
4 was in fact an officer.

5 RB: Your Honor, this stage of proceedings, the State doesn't
6 (inaudible) on any facts to meet its burden, because
7 it's a question for the trier of fact in trial where the
8 State (inaudible) case beyond a reasonable doubt. So,
9 within our memoranda, we're pointing out facts that are
10 contained in the Probable Cause that were ignored by
11 defense in their initial pleading on this issue, uh, but
12 certainly the State will present additional evidence to
13 the trier of facts as is laid out in (inaudible) the
14 defense.

15 MS: You did not answer my question, I want to be very
16 specific. Has the State developed information since the
17 filing of the Probable Cause Affidavit, other than the
18 three facts that are listed in the Probable Cause
19 Affidavit? On the issue of the defendant having actual
20 knowledge that the victim was in fact a police officer,
21 yes or no.

22 RB: Yes.

23 MS: And then what are those?

1 RB: So, for instance your Honor, I forget which letter it
2 was, but one of the defendant's Exhibits, which is the
3 actual recording of the 911 call, that was alluded to,
4 uh, in the Probable Cause Affidavit. Of course, at trial
5 when the State carries the burden of proving the
6 enhancement beyond a reasonable doubt, the State would
7 actually play the call for the jury. Uh, same with the
8 statements of Mr. Dorsey that are alluded to in the
9 Probable Cause Affidavit, of course, at trial, the State
10 would play the entire statement, for the fact finder
11 here.

12 MS: And what specific information is there contained within
13 those two items, first the 911 call, and then the 2nd,
14 Mr. Dorsey's statement, to, I assume Detective Prater?

15 RB: Correct.

16 MS: Okay, so what ~, first within the 911 call ~, what
17 specific facts is the State relying on to show the trier
18 of fact, and ~, and I want to be clear, when you're
19 showing the trier of fact, this court is the gatekeeper
20 to the evidence. As ~, as the State well knows, you can
21 present evidence to a trier of fact but ultimately at
22 the end of your case ~, when you rest, this court then
23 has an opportunity to review whether or not there's
24 sufficient information with what you have given to the

1 trier of fact, to give to the trier of fact to proceed
2 further. In other words, if there isn't prima facie
3 evidence on each element, and the element that is very
4 ~, is most concerned here, no one questions that the
5 officer was an officer in the line of duty. No one
6 questions, I think, at this point, at least, I haven't
7 seen ~, that the defendant is the person that killed ~,
8 the issue and the sole issue for this hearing is whether
9 or not the defendant had actual knowledge within the
10 requirements of Indiana United States Supreme Court law,
11 actual knowledge that the decedent was in fact a law
12 enforcement officer. Not could have known, not should
13 have known. Actual knowledge. Every, I think, both sides
14 have agreed that is the State of Indiana law and the
15 United States Supreme Court law, is it not Mr.
16 Cassanova?

17 RC: Yes, Judge.

18 MS: State?

19 RB: Yes, sir.

20 MS: So, everyone agrees on that, and so, uh ~, what within
21 then the 911 call, uh, does the State believe goes to
22 that issue?

23 RB: So to (inaudible) the 911 call, is the timing ~, between
24 the calls and the arrival of the officers, as well as

1 Mr. Dorsey's statements to the dispatcher on the 911
2 call.

3 MS: Mm Hm.

4 RB: During which he refers to the officer ~, or the
5 dispatcher as "officer" ~,

6 MS: Since the 911 call has been introduced by the defense,
7 perhaps it might be easier when the court listens to it,
8 uh, is there a designated portion within the 911 call
9 that the State believes is, uh, relevant on this point?
10 Have you broken it down into ~, into ~, time and minute
11 segments?

12 RB: Sir, the first ~, the 911 call that I'm referring to,
13 was at 14:42.58 would be the, uh ~,

14 MS: I'm sorry 14:42.58?

15 RB: ~ 58 ~,

16 MS: Uh huh.

17 RB: ~ to about 14:46.07.

18 MS: Was there any other section within the 911 call?

19 RB: That's the portion of the call during which the
20 defendant refers to the dispatcher as an officer.

21 MS: Okay.

22 RB: And then your Honor, obviously, the Probable Cause
23 Affidavit summarizes what the defendant stated to
24 investigators within the context of his interview that

1 would of course be played in the case ~, in the State's
2 (inaudible) ~, and I agree completely, under trial rule
3 50, the State has the burden, we present evidence, and
4 then once the State rests, the court can absolutely
5 issue a final judgment on the evidence under the
6 standard, has the case ~, has the State met the burden
7 at this point.

8 MS: Mm Hm.

9 RB: Uh, so I ~, I agree wholeheartedly, the court has the
10 authority to do that, and at that juncture, I just
11 believe at this point it's premature for a final
12 judgment on the evidence.

13 MS: I understand your argument. I respectfully disagree. I
14 think this is, uh, in the norm of law, you might be
15 correct, but this is death penalty, and this is super
16 due process. And I think because there are so many
17 things that go along with a filing of a death penalty,
18 the very existence of Mr. Cassanova and Miss Martin over
19 there, having to be death penalty qualified, the court
20 approving tens of thousands of what ultimately will be
21 hundreds of thousands ~,

22 (coughing)

23 MS: ~ of dollars of taxpayer funds, in which the court has
24 some obligation to supervise that, uh ~, uh ~, I think

1 the rules of ethics are tighter on ~, for death penalty
2 and super due process. I'll jump ahead but neither one
3 of you addressed the point that I have some concern is
4 ~, if the prosecutor, that ~, we're both familiar with
5 the rule that's ~, applicable to the prosecutor's ~,
6 rule 3.8, the rules of professional responsibility.
7 First section indicates the prosecutor in a criminal
8 case shall; A. Refrain from prosecuting a charge that
9 the prosecutor knows is not supported by probable cause.
10 And then comment number 1, is directed to that and I
11 think the State addressed that in it's argument. I'm
12 well aware that in the normal course of law, you can
13 file a charge in which probable cause has not been
14 determined. That the sole function of probable cause at
15 that point is whether or not a defendant is held and
16 that the case law is clear that even with a pre ~,
17 preliminary determination of lack of probable cause the
18 State can ultimately rech ~, achieve a conviction and
19 the lack of probable cause at the initial stage based
20 upon an ex parte communication is, uh, basically
21 irrelevant. For super due process though, in terms of ~,
22 and what I mean by that, for non-lawyers is that
23 basically under United States constitutional law we
24 recognize that when the State has elected to engage in

1 the possibility of killing the defendant as a punishment
2 for the crime that the defendant would have been
3 convicted for, because it is irreversible, that there
4 are extraordinary steps that are placed within the law
5 that ~, to guarantee that we make no mistakes, given
6 once we execute someone, we can't take it back. One of
7 those things for example is Indiana's law that provides
8 that if someone is charged with a death penalty offense,
9 that there must not ~, there must be two appointed death
10 penalty qualified ~,

11 (cough)

12 MS: ~ not just lawyers highly experienced and highly
13 trained, they must be death penalty qualified lawyers to
14 handle those. Indiana was one of the first in the
15 country to require that person charged with possibility
16 of death had two experienced lawyers representing them.
17 So, that is one of many examples of super due process
18 throughout both the trial procedure and the appellate
19 procedure. The question I'm circling all the way back
20 to, going back to the rules of professional
21 responsibility ~, is, uh, I have concerns that if the
22 State of Indiana is not able to prevail in good faith
23 that the defendant had actual knowledge that the officer
24 was a police officer at the time that he fired the

1 shots, I am concerned about, uh, a prosecutor with that
2 knowledge using in any way the death penalty as a plea
3 bargaining leverage as to whether or not that complies
4 (inaudible) with the rules of professional
5 responsibility 3.8. Neither of you have addressed that.
6 Uh, and as the trial Judge, knowing that if there is a
7 conviction there undoubtedly will be an appeal, and if
8 there is an appeal, there will undoubtedly be a PCR. And
9 I have grave concerns under the ethical rules, whether
10 or not a prosecutor can bring a criminal charge with a
11 factor of a death penalty in which there is, uh, uh,
12 very little or no direct evidence on the point. And that
13 is, the essence of what we're arguing here, and so,
14 neither one of you addressed that. Surely in 50 states
15 in our federal system it's come up before. And I would
16 ask you to supplement whatever arguments you have on the
17 ethical portion of it as well, only because, as a
18 practical matter, uh ~, I've been here on the bench or
19 in this type of courtroom for over 40 years. The number
20 of death penalty's that have actually gone all the way
21 to trial, uh, without some intervening resolution, have
22 been very, very small. And so, I have no idea where this
23 one will be, uh, and that's not, I guess my concern, but
24 my concern about any potential PCR, based upon uh, the

1 issue before me is concerning. And so, neither side
2 addressed that particular issue, and I would ask you to
3 do that in the meantime, while I go through, uh, the
4 five parts of evidence, uh, that have been submitted by
5 the defense. Now State, I did interrupt you I think, in
6 the sense that we talked about two items. You talked
7 about the 911 call, uh, in which you believe that there
8 was additional evidence from the Probable Cause
9 Affidavit. I believe you indicated there was a second
10 source which was the defendant's actual statements
11 either to the officers or Detective Prater, which one?

12 RB: To Detective Prater.

13 MS: To Detective Prater, okay. Alright, then, again I would
14 ask you then, what specific items within Detective
15 Prater's statement, uh, do you believe, uh, is ~, is on
16 point to the ~, uh, issue (inaudible).

17 RB: Sure, your Honor, so, key within that statement to
18 Detective Prater is Mr. Dorsey's explanation of his
19 interactions over the 911 call. And then the timing of
20 the officer's arrival at the door. So essentially, his
21 statement to Detective Prater that when he talked to the
22 91 o ~, 911 operator ~, he said he didn't need to go to
23 the hospital, uh, he hears victim AB provide the address
24 over the phone to the 911 operator, uh, and that the

1 (inaudible) tells the person on the phone, you need to
2 come get him. Telling that to the person who Mr. Dorsey
3 has identified as "officer" on the 911 call, and then at
4 that time, or shortly thereafter, the police arrive, he
5 believes that people are coming to get him, (inaudible)
6 to the officer he was just speaking with on the phone
7 and then fires the shots. So, again, I would never ask
8 the court to make a final judgment based on a summation
9 of evidence that you have not actually seen or heard,
10 uh, that's not what this stage of proceedings about. So,
11 again, the State does fully prepare to try this case to
12 the fact finder first to pass the court as a gatekeeper,
13 then to the jury and to prove its burden beyond a
14 reasonable doubt. Uh, with not just the evidence that's
15 laid forth in the Probable Cause Affidavit, not just the
16 evidence that has been submitted by the defendant but by
17 calling scores of witnesses, presenting photographs,
18 diagrams, a crime scene video ~, we've done countless
19 trials that ~, sort of, uh ~,

20 MS: But ~,

21 RB: ~ widening of the scope ~,

22 MS: ~, but none of those go to the (inaudible) element,
23 correct? You can have all kinds of photos but that

1 doesn't show whether or not ~, the real crux here is
2 whether or not he had actual knowledge ~,

3 RB: And it is for the State at trial to tie together all of
4 its evidence to prove that the State has met the mens
5 rea burden.

6 MS: But the only things that you have on those other ones
7 we've talked about, you didn't mention when we were
8 talking about his statement to Detective Prater were
9 there specific pages where you believe are most relevant
10 on this issue?

11 RB: I don't have those in front of me your Honor.

12 MS: Are you intending to introduce them?

13 RB: We intend to intro ~, introduce every piece of evidence
14 we have at trial.

15 MS: Well, I'm telling you, you can do that, but you may
16 never get to that point, on a death penalty issue if I
17 don't have it now. I am telling you that in my role in
18 dealing with super due process, that I intend to deal
19 with this issue now. Particularly if it is a violation
20 of ethics. Because if the court believes that there
21 isn't sufficient information to do that, the court would
22 ~, one ~, have to consider removing the death penalty
23 charge, dismissing death penalty qualified counsel. And
24 also potentially sending the record over to the board of

1 commissioners in terms of judicial qualifications and
2 professional responsibility. I don't do that lightly, I
3 don't consider that lightly but ~, I am very concerned
4 about what I read in the Probable Cause or what I don't
5 read in the Probable Cause. And I'm very familiar that
6 the Probable Cause is an ex parte summation at the very
7 beginning of a case, which may ultimately deal with a
8 fraction of the evidence that's actually produced over a
9 long period of time. What I haven't heard from either
10 side over the course of these several years now, is that
11 there is anything more than what's in the Probable cause
12 Affidavit. Which is why I'm asking. Because to a certain
13 extent if the court makes this determination, then all
14 things, if I'm convinced that that's the ~, that there
15 isn't sufficient information to take it to a jury on the
16 issue of actual knowledge then everything else goes by
17 the wayside, in the sense of there is no death penalty,
18 there is no (inaudible), there is no two attorneys,
19 there is no constitutional challenge, there are no
20 experts being flown in. Again, uh, at the, uh, the
21 potential expenditure of tens to hundreds of thousands
22 of dollars of taxpayer money, um ~, so I just want to
23 again caution the ~, uh, prosecution to make sure that
24 you've given me everything that you think you have that

1 goes to actual knowledge, uh ~, you've given me the 911,
2 the snippet of the 911, you've indicated that there are
3 things from Detective Prater's, but at this point the
4 record is silent as to anything from Detective Prater.

5 Um, and uh ~, that's up to ~, up to you ~,

6 (coughing)

7 MS: ~ but if I don't have it and I'm not considering it then
8 it doesn't, I assume, it does not exist.

9 RB: When the court emailed the parties, to prepare this
10 hearing and invited summation of evidence, what I'm
11 hearing now is that the court would like a trial before
12 the trial?

13 MS: I would, no ~, no, I'm ~, I've indicated at the very
14 beginning that the rules of evidence don't apply, uh ~,
15 summary fashion is fine, I mean, for example, I've
16 indicated to you, uh, uh, for you to give me the
17 information from the 911 call, you have, that's not been
18 ~, not under the rules of evidence, it's not a trial.
19 It's just a summation. So, don't need a trial,
20 particularly don't want a trial. (chuckle) Uh, but I do
21 want some understanding in good faith from both sides as
22 to what the evidence is on ~, on the actual knowledge
23 issue. Because I think if there is not evidence of
24 actual knowledge, then unless there is some other

1 aggravator that the State is proceeding under, uh, there
2 is no aggravator to proceed with. So, uh, I just want to
3 make sure that there is actual knowledge that a
4 reasonable jury, if they heard it, could make a
5 determination on. That's basically, I'm jumping ahead,
6 um, in terms of what a directed verdict standard was,
7 but because of the super due process nature of what we
8 are talking about, and I believe that you cannot file a
9 death penalty uh, without having sufficient evidence,
10 you cannot file it, uh, without evidence and then use it
11 in any way as a plea negotiation tool. I believe that
12 creates, I believe that creates real ethical problems
13 under 3.8. And I have no idea ~, I'm pointedly not
14 asking the parties whether or not those discussions have
15 occurred, uh ~, but I am concerned about it. Because we
16 know if ~, if we go down this route ~, and if the State
17 prevails, again, I'm making no judgment on your ~, on
18 anything other than my gatekeeping function ~, if you
19 prevail, we all know that this is a 10,15,20 year
20 process. Uh, and one of the issues I'm trying to make
21 sure that it is ~, is not openly there, is the PCR
22 issues. Uh, and so, I can see them all now before me,
23 and I'm trying again as the gatekeeper and the person
24 that's responsible for the public purse in terms of

1 authorizing all of these funds, that there actually is a
2 good faith motivation moving this forward. On the soul
3 issue of actual knowledge, which is a very technical
4 legal point. Again, having nothing to do with the crime
5 itself or the value of the victim or ~, anything else,
6 it's just simply whether or not super due process allows
7 this to go forward. So ~, with that, anything else from
8 the State at this point? I've got the five things from
9 uh ~, the defense that I'll need to review, uh, they've
10 ~, part of their submission is the 911 call, so I can
11 take your sub-division from when I review that, uh, I
12 have asked both sides to, uh, do further research on 3.8
13 in terms of, uh, the ethics, and in terms of filing, uh,
14 death penalty uh, if there is an absence of evidence, um
15 ~, because I'm pretty sure there's case law there. Um ~,
16 may not be in Indiana but I'm pretty sure there is, uh
17 ~, so anything else to put in the hopper?

18 RB: May I just ask the Judge, what is the standard or
19 essentially the burden of proof the court would be
20 holding the State to at this juncture? In terms of ~, in
21 that (inaudible) cause you had mentioned ~,

22 MS: At this juncture I think it's basically, uh, whether or
23 not there is a good faith belief that the State has
24 sufficient evidence to satisfy a prima facie case on the

1 issue of actual knowledge to present to a jury in a
2 death penalty case.

3 RB: So, essentially, that's a trial rule 15 sort of, uh ~,

4 MS: I haven't looked at 15 in a while, but ~,

5 RB: (Inaudible)

6 MS: Yeah, either way, (inaudible) specific but, but, uh ~,

7 I, yeah, I would assume it would be pretty similar to

8 that. But because, again ~, I don't want to go through

9 all that stuff again, but, because this is a death

10 penalty filing, with considerable expense and

11 considerable different standards of law, again, super

12 due process, because of death penalty, that the court

13 is, um ~, taking this matter up now as opposed to ~, I

14 could do what you suggest. I could do. But if I'm wrong,

15 uh, in allowing it to go forward, then, as I say,

16 hundreds of thousands of taxpayer dollars, unrealistic

17 expectations, um ~, all kinds of other issues.

18 RB: Essentially your Honor, (inaudible) bail hearing, where

19 there is a sort of formal proceeding governed by the

20 rules of evidence where the State does in fact, call

21 witnesses, offer exhibits, present evidence and

22 argument, and at that point, the court sort of weighs

23 the State's case, to see if it met that preliminary

24 (inaudible). So, what I'm asking ~,

1 MS: I understand your question, we are n ~, we are at that
2 position now. Whether you choose to treat it as a let
3 bail, whether you choose it, I mean, I've indicated, uh,
4 beforehand that the rules of evidence didn't apply. And
5 so it's not like, no, we're not ~, no, we're not gonna
6 set this for a future hearing. I am asking right now,
7 what do you have. (chuckle) And you may put it in any
8 form, and I've accepted your summation, uh, as being
9 acceptable to the court, uh, could have done ~, come
10 through Detective Prater, could have come through
11 anybody else, I ~, I never expected you to call, uh, 26
12 witnesses, uh, or anything else on the issue, the ~, the
13 ~, as I understand from the Probable Cause Affidavit,
14 which, uh ~, uh ~, is very concise, I mean Detective
15 Prater already has the ~, the timing sequences in. Uh,
16 there's a ~, the only question I do have, quite
17 candidly, is ~, trying to remember off the top of my
18 head, but I don't have to, the Probable Cause Affidavit
19 is here, and he's included the timeline. On page ~,
20 three, at the bottom. He indicates that the 911 call is
21 placed at 2:43. That the officers mark on the scene at
22 eight minutes later. Now I have two questions there,
23 that I don't under ~, that I don't know the answer to.
24 The 2:43.19 says that's when the call was placed. It

1 doesn't say when the call concluded. It does say at 2:51
2 the officer's marked on the scene, at 1803 Edinburg
3 Square. What I don't ~, so ~, if I assumed that the call
4 concluded at 2:43, which I'm not sure I can ~, if I
5 assume it concluded at 2:43 then at most ~, there was
6 eight minutes before the officers arrive on the scene.
7 The 2nd thing I do not understand, is what does it mean
8 2:51.53 that the officer's marked on the scene? Does
9 that mean that they pulled up to the property? Or does
10 that mean that they actually climb the three stairs and
11 position themselves outside the ~, the door where Mr.
12 Dorsey is alleged to have shot through. There is a
13 difference and as ~, but what we do know is that
14 regardless of that issue ~, we know at 2:53.45 the
15 officers are advising the shots are fired. So, from the
16 2:43 to the 2:53 is at most 10 minutes between content
17 of call and when the ~, when the officer was shot. What
18 I don't know in terms of Mr. Dorsey's contact, as I
19 said, at 2:51 are they outside the door there ~, or are
20 they just simply ~, on the ground and then are ~, will
21 be proceeding to go up to the 3rd ~, or put another way
22 ~, there's no marking here as to when they knocked on
23 the door. That's not clear to me by those things. And so
24 ~, I don't know if (inaudible) (banging noise) either

1 side has any information on that, but ~, I do under ~, I
2 do understand the ~, the allegation contained within the
3 Probable Cause Affidavit that the defendant used the
4 word "officer" when he was talking to the 911 operator,
5 which, technically may be right or wrong but, it may go
6 to the defendant's state of mind. Uh ~, so, again, the
7 State, I ~, I'd want to make sure you understand I'm not
8 setting this up as a preliminary hearing for any further
9 evidence, or what I'm asking for ~, I'm asking for the
10 evidence right now. (chuckle) Cause that's what we're
11 here for. So, is there anything else other than the uh,
12 defendant statement to Prater and the 911 call which I
13 already have?

14 RB: Judge, just to answer one of your earlier questions, the
15 timeline on the 911 call, the call that you reference
16 ended at 4 ~, or 2:46.07. And that accounts for the gap
17 between the end of the call and then ~,

18 MS: Okay ~,

19 RB: ~ (inaudible)

20 MS: ~ alright, and does the ~, does the defense agree on
21 that?

22 RC: Uh, I don't know where the State's getting that
23 information ~, uh, so I can't say whether I agree or
24 disagree with it.

1 MS: Okay, I do know that in ~, in Prater's summation that at
2 2:46.19 the officers are dispatched, um ~, that ~, well,
3 I can't ~, sometimes they may be dispatched mid call,
4 sometimes they could be dispatched at end of call. Is
5 the ~, when you ~, when I review the 911 that you have
6 submitted, first off is it documented in real time like
7 Prater has here?

8 RC: It is not.

9 MS: Is it gonna show 2:43, 2:45, or is it gonna show some
10 other metric?

11 RC: It will not show that. It's just the recording, so ~,
12 based upon what we received.

13 MS: Okay, does the State know ~, I ~, I assume that 2:43.19
14 placed ~, corresponds to something else on the exhibit
15 itself.

16 RB: It's based off the CAD recording.

17 MS: Okay, and will that be at 000 ~, or will it be at
18 something else?

19 RB: So, in the CAD report it would show ~, the commencement
20 of the 911 call, so audio file it would be 000, but that
21 would correspond to a timeline on the CAD.

22 MS: Mm Hm. Again, I assume there's ~, whether it stops or
23 starts, the durations in between should correspond,
24 should they not?

1 RB: So, are you asking, I'm assuming 2:43.19 (inaudible)~,
2 (coughing)

3 MS: Assuming that is 000 ~,

4 RB: (Inaudible) then add the duration of the call ~,

5 MS: Yeah.

6 RB: ~ and that would give you the end time.

7 MS: Yes.

8 RB: I ~, I'd agree with that.

9 MS: Mr. Cassanova?

10 RC: I ~, honestly Judge I don't know enough about that to
11 agree or disagree, um ~, the State provided us with no
12 information with regard to whatever evidence they were
13 gonna present at this hearing. The information that we
14 had is that they would just be making a legal argument.

15 MS: Okay, well, I guess that will just be for me as I listen
16 to 911.

17 (papers turning)

18 MS: So, anything else?

19 RC: I would like to briefly respond with regard to the 911
20 call. First of all to point out the description of the
21 911 call and the Probable Cause Affidavit is not
22 correct. Specifically ~,

23 MS: Okay ~,

1 RC: ~ the allegation that AB was in the background yelling
2 for the dispatcher to send police ~,

3 MS: Okay, so I'm ~, so that I am clear Mr. Cassanova, on
4 what page ~, of the Probable Cause Affidavit are you
5 referring to?

6 ??: (Inaudible)

7 RC: Page ~, page 4 ~, I'm looking ~, I believe it's uh ~,

8 MS: That's the one that starts out with the timeline at the
9 top?

10 RC: Right, and I believe the reference in the State's
11 response is that last paragraph on page 4 of the
12 Probable Cause Affidavit.

13 MS: Stating AB stated she called the police ~,

14 RC: Right.

15 MS: ~ that paragraph?

16 RC: Correct, and that's where uh, I believe ~, um ~, walking
17 around the house with her phone and she was trying to
18 yell over him to send the police, that is not a correct
19 statement of the content of the 911 call.

20 MS: Okay, give me just a second, I will mark in my notes
21 that defense disputes this. And what does defense
22 believe is the correct interpretation or summation of
23 that portion.

1 RC: What AB says is "Will you please send someone here to
2 get him out of my unit". Aisha Brown never asked for the
3 police to be sent, at least there is no indication of
4 that in the 911 call. Additionally, the dispatcher never
5 says we're sending the police. The dispatcher says
6 "Someone will be over". So, Aisha Brown never requests
7 the dispatcher to send the police, she just asks that
8 they send someone. And the dispatcher never says they're
9 sending the police.

10 MS: What does the dispatcher say?

11 RC: The dispatcher said, "Someone will be over", or words to
12 that effect, but the dispatcher never uses the word
13 "police". Additionally, when Mr. Dorsey ~,

14 MS: Let me take you back, I'm sorry, to be so pedantic about
15 it but, will you please send someone here ~, is what she
16 says?

17 RC: "Will you please send someone to get him out of my
18 unit".

19 MS: To get him out of my unit ~,

20 RC: Yes.

21 MS: And you believe the dispatcher responds as "Someone will
22 be sent over"?

23 RC: Yes, that is the last statement he makes after Aisha
24 Brown ~,

1 MS: "He"?

2 RC: ~ (inaudible) him ~,

3 MS: Is the last statement who makes?

4 RC: The dispatcher makes.

5 MS: Okay.

6 RC: On the 911 call, he gets the apartment number from Aisha

7 Brown.

8 MS: Okay, does the State dispute that?

9 RB: So, Judge, I just want to be clear, uh, when I was

10 referencing the 911 call, and Mr. Dorsey's statements

11 about the 911 call that was from Mr. Dorsey's statement.

12 Mr. Cassanova's directed the court to page 4, the last

13 paragraph, that was from Miss Brown's statement to

14 investigators. So, if ~, if there's a question of when

15 she says, while they, the police were on the phone,

16 Dorsey kept walking around the house with her phone and

17 she was trying to yell over him to send the police ~,

18 MS: Mm Hm.

19 RB: ~ that to me sounds like a ~, key point of testimony

20 that we would want to get into and obviously that Mr.

21 Cassanova would want to cross examine her on.

22 MS: Well, I ~, I would also point out as a ~, as was in my

23 response motion, if you want to talk about and rely upon

24 the testimony of Aisha Brown in proving actual

1 knowledge, she states, "It took a while for anyone to
2 arrive, for that knock on the door, and it didn't sound
3 to me like the police". I'm not gon ~,

4 RB: The portion that was contained within your memorandum ~,

5 MS: Yes, didn't knock on the door like the police. So ~, I
6 would just point out from Aisha Brown's own
7 uncontradicted sworn deposition testimony, she stated,
8 "Took a while, didn't sound like the police", and then
9 Mr. Dorsey stated, "That ain't the police". And then the
10 shots were fired. And does the State accept that
11 characterization?

12 RB: I think the State and defense disagree on the
13 characterization of the evidence contained in the
14 Probable Cause Affidavit, which is why the State is
15 advocating for this to be heard by the jury.

16 MS: And I guess our position is we now close to three years
17 and 50 depositions, and our position is there is
18 absolutely no evidence that the State has produced to
19 support actual knowledge. None. At best this 911 call,
20 at best, supports he could have known, or should have
21 known. And I will just say that I've had conversations
22 with the State about providing what evidence they would
23 present at this hearing regarding actual knowledge. I
24 have not gotten a response. The only response I have

1 gotten, is that basically this court does not have the
2 authority to grant this motion at this time.

3 (cough)

4 MS: Anything further State?

5 RB: No, your Honor.

6 MS: State, do you believe there is any direct evidence on
7 the issue of actual knowledge? As opposed to
8 circumstantial evidence?

9 RB: Your Honor, the question of whether or not there's
10 direct knowledge versus circumstantial knowledge, is a
11 question to be answered at the conclusion of the State's
12 case (inaudible).

13 MS: Now, I'm asking you whether or not, again, particularly
14 under the rules of ethics, as you make a representation
15 to a court, do you have a good faith belief that there
16 is direct evidence on the issue of actual knowledge? Yes
17 or no?

18 RB: Yes.

19 RC: I'd ask the court to direct the State to tell the
20 defense at this point what that evidence is.

21 MS: Well, I'm ~, that's at first why I asked him, so I don't
22 have ~, think he has to tell you that, he has to tell me
23 that. What is the direct evidence ~,

1 RB: Your Honor ~, Mr. Dorsey is aware that there's a 911
2 call about somebody coming to get him, he refers to the
3 of ~, or the dispatcher as "officer" multiple times.
4 Brown says to investigators that she was yelling for
5 someone to send the police. And then within a matter of
6 minutes, there's a knock at the door. And Mr. Dorsey
7 believed by his own statement, to Detective Prater that
8 he believed that those people were coming to get him.

9 MS: And so, I can play that back to you, because Mr. ~,
10 Cassanova says that is not what Brown says. That Brown
11 says send someone ~, you are saying that she said, and
12 it's ~, and it's on the 911 tape, I don't want to ~,
13 don't want to put words in your mouth, that isn't on the
14 911 tape, that she is asking for ~, and this is words
15 are weapons ~, that she is specifically asking for the
16 police to be sent over.

17 RB: No, that's not on the 911 recording. That is from her
18 statement saying that she was asking for them to send
19 the police.

20 MS: Her statement to who?

21 RB: I would have to look and see which detective she gave
22 that initial statement to, but it's the one that's
23 contained in the bottom paragraph on page four of the
24 Probable Cause Affidavit.

1 MS: Okay.

2 RC: And I will just point out Judge that while there are a
3 couple of occasions in which Miss Dorsey addresses the
4 911 dispatcher as officer, the first thing he ~, when he
5 gets on the phone, says ~, "Bro', you ~, you ain't even
6 really the police". 911 dispatcher does not identify
7 himself as the police, but as the 911 dispatcher.

8 MS: So, is that contained within your argument or anything
9 else?

10 RC: It is in the 911, the audio of the 911 call.

11 MS: Okay. Alright, I have these six things to read from the
12 defense. I have the sub parts from the 911 call argued
13 by the State. I've asked the parties to ~, do further
14 research on the application of 3.8 as it relates to
15 death penalty, and lack of probable cause. So, I know I
16 will need to read that. Is there anything else then for
17 this record that the court needs to consider? Other than
18 what I've already heard. And then the next question will
19 be is whether or not you want additional time to brief
20 what I'm asking, besides the 3.8 thing that I've asked
21 you to brief.

22 RC: Judge, I mean, we'd briefly like to restate the law with
23 regard to this, I know we stated it in our response
24 pleading, but, again, we feel under 35.34.18A, this

1 court can consider evidence outside the charge itself to
2 determine a motion to dismiss.

3 MS: I think I already have, haven't I?

4 RC: Correct. I guess my con ~, the State's ~,

5 MS: And both sides agree that Caster is controlling ~,

6 RC: Correct.

7 MS: ~ both sides conceded that, actual knowledge is
8 required, not could have, or should have to the point
9 where a jury if this goes to a jury, a jury will get a
10 specific instruction on that point.

11 RC: And I will point out that in each of the depositions we
12 presented to the court, uh, the deposition of Aisha
13 Brown, again, she's saying that didn't sound like a
14 knock from a police officer, didn't announce as a police
15 officer, took a while for that to arrive after the call.
16 Mr. Dorsey said, "That's not the police" ~, before the
17 shots were fired. Officer Joseph Charles approaches, he
18 says there's no radio traffic, no unusual discussion as
19 they're approaching, up to the door, he knocks on the
20 door, he doesn't announce himself. He never announces
21 himself before the shots are fired. Uh, again, the same
22 uncontradicted testimony from Officer Webb and Ward,
23 with regard to no one announced themselves as police
24 officers, heard nothing from inside the apartment before

1 the shots were fired. Uh, no radio traffic as they were
2 walking up. Did not arrive to the scene with lights and
3 sirens.

4 MS: And no one is saying that that's bad police work, that's
5 just saying (inaudible) ~,

6 RC: No, I ~,

7 MS: ~ that's the factual ~,

8 RC: ~ absolutely not, I want to be clear about that.

9 MS: ~ how they chose to address this particular dispatch
10 call.

11 RC: Uh, yes ~,

12 MS: I wanted to be very clear on that, no one is ~, is
13 saying that that was wrong, that there was anything
14 improper about that. There may have been very good ~,
15 good police reasons why they did all of those things.

16 RC: Correct, I ~, I just want to be sure, again ~, I will
17 say it again, we're 3 years and about 50 depositions
18 into this, and from the defense perspective, there is no
19 evidence the State has presented on the issue of factual
20 knowledge.

21 MS: Okay, anything else State?

22 RB: No, your Honor.

23 MS: How much time do you want to enlighten the court about
24 3.8 and make any other record that you wish to on this

1 point? I'm gonna be gone for the next two weeks so I'm
2 not under a time deadline.

3 RB: I guess just for the purpose of the 3.8 issue, is the
4 court interested in hearing about any negotiations
5 between the parties up to this point or just on the ~,
6 the notion of how (inaudible) impact, uh, hypothetical.

7 MS: I ~, I am not interested at this point in what there
8 have been ~, what negotiations have occurred. I am very
9 concerned about this legal issue, whether or not
10 negotiations could occur where part of the negotiation
11 would be the State would drop death penalty in exchange
12 for ~, that's my concern, that's my ~, that's my concern
13 as to whether or not you could legally, ethically do
14 that if there is an absence of evidence that gets you to
15 a good faith showing to a jury that aggravator exists.
16 That's what I'm concerned about. So, I don't want to do
17 it ~, the rest of it, cause it would only confirm
18 whatever concerns I have. I want to know, just, as an
19 ethical posture, whether or not the government can use
20 the death penalty as a negotiating tool if the
21 government lacks good faith to believe the mitigator,
22 specific evidence on the mitigator exists. So ~, I'm
23 pretty sure there is case law on that point. May not be
24 in Indiana but ~, so, with that, anything further? I

1 think you've all given me your ~, your argument, your
2 evidence, um ~, the only thing I guess maybe I didn't
3 get an answer was how much time do you want? I certainly
4 don't need it before two weeks.

5 RB: Um ~, we could present something to the court in two
6 weeks Judge.

7 MS: What is today ~, today is the 17th ~, 24th, Saturday is
8 April the 1st. Does April 30th give you enough time?

9 ??: April 30th or ~,

10 MS: Yeah.

11 (various voices)

12 MS: I'm in March aren't I ~,

13 ??: Yeah. (chuckle)

14 MS: Sorry, does March 30th give ya enough time?

15 RB: Yeah, that works for the State.

16 MS: Defense?

17 RC: Yes, Judge.

18 MS: Okay, anything else for the record then folks? As far as
19 I'm concerned that concludes the matter.

20 ??: Thank you, Judge.

21 CT: All rise.

22 (End of audio) (1:03:43.7)