STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

DONNA ALICE YOST,

Defendant-Appellant.

Supreme Court No. 119889
Court of Appeals No. 234065
Circuit Court No. 00-1304-AR-C
District Court No. 00-40700-FY-L

KURT C. ASBURY (P36595)
Attorney for Plaintiff/Appellee

BAY JUSTICE ASSOCIATES, P.C.
By: Edward M. Czuprynski (P34114)

BRIEF OF *AMICUS CURIAE*
DENNIS RICHARDSON

*** * * ORAL ARGUMENT REQUESTED * * ***

Submitted by:

JUAN A. MATEO (P33156)
GERALD K. EVELYN (P29182)
645 Griswold, Suite 2000
Detroit, MI 48226
(313) 962-3500

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STATEMENT OF JURISDICTION

On March 18, 2002, this Court granted leave to appeal in *People v Yost,* SC No. 119889. The Court allowed "other persons [to] move this Court for permission to file briefs *amicus curiae.*" Dennis Richardson, who has an application for leave to appeal pending in this Court, has accompanied this Brief with a Motion for Leave to File *Amicus Curiae* Brief.

This Court has jurisdiction to allow the filing of this Brief pursuant to MCR 7.306(C) and the Court's Order of March 18, 2002, above.

LAW OFFICES JUAN A. MATEO, 645 GRISWOLD STREET, SUITE 2000, DETROIT, MICHIGAN 48226-4108 (313) 962-3500

OTHER AUTHORITIES

21 Am Jur 2d, *Criminal Law* §413, p 685 (1981) 11

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LaFave, Israel and King, Criminal Procedure, 2d Ed, §14.3(b), p 153 (1999) 13

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INTRODUCTION AND SUMMARY OF ARGUMENT

On March 18, 2002, this Court granted leave to appeal in *People v Yost,* SC No 119889; on the same date this Court held in abeyance any decision on the application for leave to appeal, by defendant-appellant, in *People v Richardson,* SC No. 120223. In *Yost, supra,* the Supreme Court limited leave to appeal to three issues:

1. whether the refusal of the magistrate to bind the defendant over for trial was an abuse of discretion;

2. what is the applicable role of the magistrate at a preliminary examination in assessing the credibility of witnesses and how does that assessment affect the bind over decision; and

3. whether the reviewing court applied the correct standard of review in this case.

This Court further ruled that "[o]ther persons and groups may move the Court for permission to file briefs *amicus curiae.*"

Since the above issues have been addressed by defendant-appellant Dennis Richardson in two applications for leave to appeal in this Court, and since any decision on *Yost, supra,* will most likely affect the legal status of Mr. Richardson, counsel for Dennis Richardson will accompany this brief with a motion to allow him to file an *amicus* brief herein.

It is the position of Mr. Richardson, as *amicus,* that it is a necessary right and duty of a magistrate at a preliminary examination to weigh the evidence and

judge the credibility of witnesses for several, independent reasons. First, the decisions of this Court and the Michigan Court of Appeals have never wavered on the proposition that magistrates must decide credibility, rather than blindly accept all testimony, no matter how unbelievable. Second, to remove from the magistrate the issue of credibility of witnesses, would render the preliminary examination a meaningless pretrial hearing. Third, the states that provide for preliminary examinations to determine if probable cause exists support the right and duty of magistrates to consider the credibility of witnesses. Fourth, scholarly commentators on the subject of preliminary hearing procedures have concluded that public policy considerations mandate that magistrates have this power to protect the innocent and weed out criminal cases which should not be allowed to congest our court systems. Lastly, the magistrate decisions in *Yost* and *Richardson, supra,* were based on a correct interpretation of the particular facts in those cases.

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LAW OFFICES JUAN A. MATEO, 645 GRISWOLD STREET, SUITE 2000, DETROIT, MICHIGAN 48226-4108 (313) 962-3500

ARGUMENT

I. MICHIGAN HAS LONG HELD THAT MAGISTRATES MUST ASSESS CREDIBILITY AT PRELIMINARY EXAMINATIONS.

In Michigan a defendant's right to a preliminary examination is a statutory right. See MCL 766.1 *et seq.* The statutory provisions specifically include the right to cross-examine and to call witnesses in defense. MCL 766.12 states that "[a]fter the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he has any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution." The above language will be found in the original preliminary exam statute, Public Acts 1927, No. 175, c VI §12.

This Court has long recognized that "cross-examination" necessarily includes inquiry into credibility. In *People v Dellabonda,* 256 Mich 486, 488-500 (1933), the Court specifically stated that:

> One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from a witness and lay out before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony <u>or affect the credibility of the witness.</u>

(Emphasis added). See also, *Malicke v Milan,* 320 Mich 65, 70 (1948); *People v Bell,* 88 Mich App 345, 349 (1979); *Schwartz v Triff,* 2 Mich App 379, 383 (1966) *lv den,* 378 Mich 720.

In *People v Talley,* 410 Mich 378, 386 (1981), this Court reiterated that in Michigan this right of assessing credibility belongs to magistrates at the preliminary exam.

> Part and parcel of the magistrate's function of determining whether an offense has been committed and whether probable cause exists for charging the defendant therewith is the duty of passing judgment on the credibility of witnesses. *People v Paille #2,* 383 Mich 621, 627 (1970); *People v Karcher,* 322 Mich 158, 164 (1948). This was emphasized in *Paille #2,* where this Court said:
>
> > [T]he magistrate had not only the right but the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witness.
> >
> > We have often commented upon the fact that the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words.

(Emphasis added). *See also, People v Orzame,* 224 Mich App 551, 557 (1997); *People v Neal,* 201 Mich App 650, 654 (1993).

When a witness recites facts that a magistrate hears, considers and cannot believe, the magistrate must not be forced to accept that testimony or the standard of probable cause will have no meaning. This Court has clearly stated that the magistrate must go beyond the threshold of "some evidence on each element [of the crime]." *People v King,* 412 Mich 145, 154 (1981). "Probable cause signifies

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evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Justice,* (after remand), 454 Mich 334, 344 (1997). A magistrate can hardly exercise caution and prudence while making a finding of probable cause, based upon testimony he or she reasonably does not believe.

If credibility were not an issue for the examining magistrate, the judicial system would become congested with frivolous or unfounded prosecutions, based on no more than the untested allegations of civilians or police officers. Innocent citizens would be far more likely to lose their liberty while awaiting trials which may be unwarranted. As this Court explained in *People v Weston,* 418 Mich 371, 376 (1982):

> A preliminary examination functions, in part, as a screening device to ensure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed should be cleared and released as soon as possible.

(Above language cited as controlling in *People v Crawford,* 429 Mich 151, 160 (1987)).

Sufficient evidence to proceed should not include testimony which requires the suspension of disbelief. When testimony is simply not worthy of belief, it should not become the basis of further criminal prosecution.

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II. THE LAW OF OTHER JURISDICTIONS, WHEREIN PRELIMINARY EXAMINATIONS ARE EMPLOYED, AND THE OPINIONS OF COMMENTATORS ON THE LAW, OVERWHELMINGLY APPROVE THE PROPOSITION THAT THE MAGISTRATE SHOULD JUDGE THE CREDIBILITY OF WITNESSES.

Not all states rely on preliminary examinations as the mechanism for bringing accused felons to a higher court for trial or plea. Obviously, some jurisdictions, including the federal government, use grand juries, as does Michigan in certain circumstances (MCL 767.7, *et seq.*) as a preliminary hearing procedure. The grand jury system, which by its nature is both similar (probable cause is required) and different (in secret, without judicial officer, defense attorney, or defendant) allows grand jurors to judge credibility, since they are nowhere forbidden to do so. Federal precedent upholds grand jury consideration of credibility. A prosecutor's vouching for the credibility of a witness constitutes grounds to attack an indictment. *United States v De Rosa,* 783 F2d 1401, 1405 (CA 9, 1986); *United States v Al Mudarris,* 695 F2d 1182, 1187-1188 (CA 9, 1983). Common sense would dictate that a grand juror, like a magistrate, will have no meaningful function if he or she is told they must believe testimony which they simply do not believe. The United States Department of Justice recognizes this fact. In the Department's handbook, *Federal Grand Jury Practice,* §4.8, p 104 (August, 2000), the Office of Legal Education reminds United States Attorneys

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that "an attorney may properly inform the grand jurors of discrepancies in the witnesses' prior and current or expected testimony, if the jurors are also advised of their independent duty to assess the witnesses' credibility." (Emphasis added).

Other states, such as Florida, employ a non-adversary probable cause determination, based on a magistrate's review of the affidavit supporting the arrest warrant. Fl R Cr P 3.133(a). Florida, however, allows counsel to take the depositions of witnesses so counsel can examine and cross-examine the state's witnesses. Fl R Cr P 3.220.

Counsel for *amicus* has endeavored to determine from the reported decisions of sister states and territories which employ adversarial preliminary examinations whether those jurisdictions allow their magistrates to pass upon the credibility of witnesses at a preliminary examination. That effort has yielded the following summation: California, Hawaii, Illinois, Massachusetts, Michigan, Nevada, Wisconsin and Puerto Rico favor the right and duty of the magistrate to pass on credibility, while only one state, New Hampshire, specifically denies it.[1] In the states which have upheld the credibility determination, the logic of those decisions appears compelling.

[1] See, *Arlen v Keene District Court,* 109 NH 331, 251 A2d 321 (1969); *Smith v O'Brien,* 109 NH 317, 251 A2d 323 (1969). It should be noted, however, that New Hampshire uses its "preliminary hearing" as a detention procedure to see if there is sufficient evidence to warrant jailing a defendant, pending a grand jury indictment.

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In Wisconsin the precedent is clear and to the point. The Wisconsin Supreme Court succinctly stated the standard for the quantum of proof necessary for a pretrial bind over by ruling that "the examining magistrate 'has the duty of determining the credibility of the witnesses and the weight to be given to their testimony.'" *Wilson v State,* 59 Wisc2d 269, 208 NW2d 134 (1973) (Emphasis added). Citing *State ex rel Hanna v Blessinger,* 52 Wisc 2d 448, 190 NW2d 199 (1971) and *State ex rel Tessler v Kubiak,* 257 Wisc 159, 42 NW2d 496 (1950). See also, *State v Olson,* 113 Wisc 2d 245, 335 NW2d 432, 436 (1983).

The California Supreme Court has, on numerous occasions, visited the subject of whether credibility should be a matter of judicial concern at preliminary examinations. In considering that question the Supreme Court of California has been unequivocal in supporting the magistrate's right to weigh credibility, while denying appellate review of that discretion.

> Although the magistrate, in reaching his decision may weigh the evidence, resolve conflicts, and give or withhold credence to witnesses, such balancing of the evidence is not within the powers of a tribunal reviewing the magistrate's order.

Perry v Superior Court, 57 Cal2d 276, 19 Cal Rptr 1, 6, 365 P2d 529 (1962). (Emphasis added). Citing *People v Jackson,* 146 Cal App 2d 553, 556, 303 P2d 767 (1957).[2]

[2] See also, *DeMond v Superior Court,* 57 Cal2d 276, 19 Cal Rptr 1, 368 P2d 865, 867-868 (1962).

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California has maintained the concept that a preliminary examination is not a perfunctory proceeding at which the accused must of necessity be sent on to a higher court for trial.

> The preliminary examination is not merely a pretrial hearing. The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.

Jones v Superior Court of San Bernardino County, 4 Cal 3d 660, 94 Cal Rptr 289, 483 P2d 1241, 1245 (1971). Citing to *People v Elliot,* 54 Cal 2d 498, 504, 6 Cal Rptr 753, 757, 354 P2d 225, 229 (1960).

Illinois is another jurisdiction which believes assessing credibility at preliminary examinations is proper. The Illinois Supreme Court has ruled that:

> [q]uestions concerning the credibility of witnesses and the weight to be given their testimony are matters for the court on the preliminary examination or for the jurors when witnesses testify before them, and this court will not substitute its judgment on such matters for that of the ... court or the jury.

People v Tilley, 411 Ill 473, 104 NE2d 499, 500 (1952). *Cert denied, sub nom, Illinois v Tilley,* 344 US 824 (1953). Cited as controlling in *People v Humphry,* 819 Ill App 3d 673, NE2d 1228, 1232 (1980).

The Nevada Supreme Court has also held that magistrates must decide, at a preliminary examination, whether they choose to believe a witness for the state or for the defense. In *Marcum v Sheriff of Clark County,* 85 Nev 175, 451 P2d 845,

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847 (1969), that court mandated that "[a]t a preliminary examination the credibility of a witness is one of the matters to be weighed by the magistrate."

In Massachusetts the Supreme Judicial Court made inquiry to the same question asked by this Court. Should credibility of witnesses be a concern of the magistrate at a preliminary examination? The unanimous answer of that court was "yes." In *Myers v Commonwealth,* 363 Mass 843, 298 NE2d 819 (1973), the court interpreted a statute, almost identical to Michigan's,[3] and held that the credibility of witnesses was an important factor in making a bind over decision. The Commonwealth had argued that neither cross-examination on credibility nor an affirmative defense should be allowed at a preliminary exam. The Court disagreed and stated:

> We fail to see how such a limited procedure could possibly effectuate the hearing's primary function of screening out cases that should not go to trial. To require such minimal proof of probable cause would render the hearing, in most instances, an empty ritual with a foregone conclusion. If the examining magistrate could simply rest his finding on the *ipse dixit*[4] of the prosecution, there would be little need of defense counsel's presence, let alone the defendant's.

Myers, supra, at 851.

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[3] Compare MCL 766.12, *supra*, with the Massachusetts Statute, GL, c 276, §38, which states in pertinent part that "The court or justice ... shall ... examine on oath the complainant and the witnesses for the prosecution, in the presence of the defendant, relative to any material matter with such charge .... [T]he witnesses for the prisoner, if any, shall be examined on oath, and may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution."

[4] *Ipse dixit* is defined by Black as "He himself said it; a bare assertation resting on the authority of an individual." *Black's Law Dictionary,* 4th Ed, p 961.

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The Massachusetts court then concluded that:

> The primary function of the probable cause hearing of screening out 'an erroneous or improper prosecution,' *Coleman v Alabama,* 399 US 1, 9, 90 S Ct 1999 [1970], can only be effectuated by an adversary hearing where defendant is given a meaningful opportunity to challenge the credibility of the prosecution's witnesses and to raise any affirmative defenses he may have.

Id. at 852. Cited as controlling in *Charles C. v Commonwealth,* 415 Mass 58, 612 NE2d 229, 235 (1993). (Emphasis added).

The Supreme Court of Hawaii adopted the language of the commentary in 21 Am Jur 2d, *Criminal Law* §413, p 685 (1981), that:

> The credibility of witnesses at a preliminary exam is a proper consideration for the judge .... Credibility of witnesses at the preliminary [hearing] is a question of fact within the province of the committing [judge] to determine and neither the trial court nor an appellate court may substitute its judgment for his [or hers] on such question.

Reed v City and County of Honolulu, 76 Haw 219, 783 P2d 98, 107 (1994).

The Federal Circuit Court of Appeals for the First Circuit was asked to determine whether Puerto Rican law allowed matters such as credibility to be considered at preliminary examinations. The appeals court likened the procedure in Puerto Rico to that in California [discussed *supra*] which allows that inquiry. Citing to *Jones v Superior Court of San Bernardino Court, supra,* the court concluded that:

> There is no substantial difference between Puerto Rico and California preliminary hearings with respect to basic scope or purpose,

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> importance of the proceeding within the judicial setting, or legal context within the criminal process. Distinguishing these two proceedings is an attempt to distinguish the 'indistinguishable.'

Rivera-Puig v Garcia-Rosario, 983 F2d 311, 325 (CA 1, 1992).

The various state supreme courts and the federal circuit court of appeals do not make reference to contrary decisions in other jurisdictions or to persuasive logic supporting the proposition that a magistrate should not have the right and duty to pass upon credibility of witnesses in conducting a meaningful preliminary hearing.

The United States Supreme Court has ruled that "[t]he ... preliminary hearing is a 'critical stage' of the state's criminal process at which the accused is 'as much entitled to such aid of counsel ... as at the trial itself.'" *Coleman v Alabama,* 399 US 1, 10, 99 S Ct 1999, 26 L Ed2d 387 (1970). Citing, *Powell v Alabama,* 287 US 45, 57, 53 S Ct 55, 77 L Ed 158 (1932). The *Coleman* court noted that at the hearing "the lawyer's examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over." *Coleman, supra,* at 399 US 1, 10. "Examination" obviously concerns the calling of witnesses in defense; "cross-examination" obviously allows the testing of credibility. (See Section I, *supra*). If counsel is truly allowed to expose such "fatal weaknesses" and prevent a bind over

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in a meaningful examination, surely the credibility of witnesses must be open to inquiry. Professors LaFave, Israel and King believe it is:

> Courts almost uniformly recognize that the magistrate has the authority to judge credibility. If that were not so, there would be no reason for allowing the defense to cross-examine prosecution witnesses and present contradicting evidence of its own.

LaFave, Israel and King, Criminal Procedure, 2d Ed, §14.3(b), p 153 (1999).

The law of other states and the commentators on those laws agree, if a preliminary examination has a primary objective "to screen out those cases where the legally admissible evidence would be insufficient to warrant admission of the case to a jury,"[5] then assessment of the credibility of witnesses must be made before trial -- at the examination.

III. PRACTICAL CONSIDERATIONS.

If the magistrate does not consider credibility then unbelievable or inherently incredible testimony will send a defendant to trial. Assume, for example, a witness, previously convicted of felonies involving theft and/or false statement, with an admitted memory problem, biased against a defendant, which witness is then able to cause a bindover, despite clear, unrefuted contrary evidence that the defendant was not even present at the scene of a crime. That result is

[5] See, *Myers, supra,* at 850, FN6.

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unacceptable and is not in the interests of justice, but it would be mandated if the magistrate was handcuffed by the suggested "no evaluation of credibility" rule.[6]

The problem is not solved by saying that a magistrate may reject only inherently incredible testimony, such as that a witness was able to see a crime a mile away, while looking through a brick wall. This Court has long held that if either side challenges testimony as being inherently incredible at a preliminary exam, the circuit judge cannot so hold, without conducting a hearing, with live testimony (except with the consent of all parties). *People v Talley,* 410 Mich 378 (1981). This would result in a more circuit court docket congestion and still leave judges deciding credibility questions.

A note in the Yale Law Journal presented a strong case for what the author termed a "forward looking" preliminary examination, rather than a "backward looking" hearing. In the former a magistrate is allowed a limited right to determine whether a prosecution should continue in a higher court, and in doing so she or he explores, *inter alia,* the credibility of witnesses. Whereas, in the latter category the magistrate determines only whether a defendant is properly charged and whether there is some evidence on all of the elements of the crime. See, Note, *The*

[6] As a practical matter, if credibility is not a question for the magistrate, it would follow, *a fortiori,* that a lawyer could not even make inquiry regarding credibility at an exam. The question, for exam purposes, would be irrelevant. This type of limitation on cross-examination which prevents a person charged with a crime from developing "facts from which bias, prejudice, or lack of credibility of prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the Sixth Amendment." *United States v Garrett,* 542 F2d 23, 25 (CA 6, 1976).

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Function of the Preliminary Hearing in Federal Pretrial Procedure, 83 Yale LJ 771 (1974). The author correctly concludes that:

> The forward looking preliminary examination would also offer several benefits to the prosecution. First, it would allow the prosecution to test its witnesses in an adversary proceeding prior to trial, thereby enabling it to avoid the double jeopardy proscription if its case is shown to be insufficient.
>
> * * * *
>
> The forward looking hearing may also benefit the criminal justice system itself. By eliminating unnecessary trial proceedings ... resources in the process as a whole might be conserved and congestion and delay in the judicial system might be reduced. A forward looking preliminary examination could also serve as a means of evaluating an area of pretrial procedure which has consistently eluded rational control: the plea bargain.

Note, *supra,* at 785-786 (Footnotes omitted).

The prosecution, the defense and the courts all benefit when the magistrate determines credibility, subject to review on an abuse of discretion standard. A case which is dismissed at examination is dismissed without prejudice. If a prosecutor can't even establish the low threshold of probable cause with credible witnesses at the hearing, then dismissal is appropriate and the prosecutor and police are virtually unfettered in their ability to resubmit their case with credible witnesses. Furthermore, as the above note points out, an obviously guilty defendant will be more likely to plead if a judicial officer indicates that the testimony is more than mere words, it is believable words.

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Finally, as the author of the Yale Law Journal article notes:

> [i]n modern criminal law pretrial procedure is for most defendants the only criminal procedure ... The core of pretrial procedure, in theoretical terms, at the very least, is the preliminary hearing, at which police and prosecutorial discretion and the defendant's guilt are first subjected to judicial scrutiny.
>
> For this reason, if no other, the criminal justice system must pay close attention to the functioning of pretrial procedure to insure that it is providing the protections to which all accused persons are entitled.

Note, *Yale L J, supra,* at 805. (See, *People v Hall,* 435 Mich 599, 629 (1990), Cavanagh J., dissenting).

Given the serious consequences attendant to a bindover on felony charges in circuit court, we should retain the current law regarding preliminary examinations to prevent unnecessary humiliation and even temporary loss of liberty, which will result from allowing prosecutions not based on competent credible evidence.

IV. THE MAGISTRATES' DECISIONS ON CREDIBILITY IN BOTH *RICHARDSON* AND *YOST* WERE FULLY SUPPORTED BY THE RECORD.

A. THE RICHARDSON CASE[7]

Richardson is a good example of why it is important to allow the examining magistrate to assess the credibility of witnesses at the preliminary examination. The facts are not difficult. Frederick Finley, who had accompanied a group of

[7] *People v Richardson,* is also on appeal in this Court, on the credibility issue and on the separate issue of whether the magistrate clearly abused her discretion in ruling that there was insufficient evidence of gross negligence to support a finding of probable cause that an involuntary manslaughter was committed.

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shoplifters to the Lord & Taylor Department Store at the Fairlane Town Center, participated in a violent physical attack on Dennis Richardson and other Lord & Taylor loss prevention agents in the parking lot. Mr. Richardson tried to restrain Mr. Finley, a 273 pound man, who, unfortunately, died some minutes after the altercation.

Assistant Wayne County Medical Examiner, Dr. Boguslaw Pietak, testified that Finley died of asphyxiation due to neck compression (strangulation). It was the People's theory that Dennis Richardson was grossly negligent by using excessive force to restrain the combative Frederick Finley.

Two medical experts testified for the defense: forensic pathologist Dr. Ljubisa Dragovic (the Chief Oakland County Medical Examiner), and Board certified emergency room physician, Dr. Daniel Gadzinski (who treated Frederick Finley at Oakwood Hospital, and pronounced him dead). It was Dr. Dragovic's position that Finley died of heart failure and not asphyxiation (**Exhibit A**). Dr. Gadzinski testified that Mr. Finley died as a result of an unknown sudden cause <u>not</u> related to any trauma. (**Exhibit B**).

The magistrate rejected Dr. Pietak's testimony because he was not credible, while the testimony of Drs. Dragovic and Gadzinski was credible. (**Exhibit C**). The record supports that determination for the following reasons:

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1. Background and Experience

Dr. Pietak had no training in asphyxia and had never even attended a lecture on the subject. (T 146).[8]

Dr. Dragovic is Board certified in forensic pathology, with extensive experience in cases of death by asphyxiation. (T 258-261). Dr. Gadzinski also had treated victims of asphyxia many times. (T 243-244).

2. Basis of Opinion

Dr. Pietak never reviewed Mr. Finley's EMS records, or the Oakwood Hospital emergency room records, and never consulted with Dr. Gadzinski. (T 166-168). Dr. Pietak lacked information on Finley's drug history and he had not listened to an audiotape that recorded Mr. Finley's final moments of life. (T 169-170).

Dr. Dragovic, on the other hand, reviewed EMS records, Oakwood Hospital records, the audiotape of Finley's final moments, the Wayne County Medical Examiner's report, photographs, microscopic slides and the autopsy report of a third pathologist hired by the Finley family. (T 262).

[8] Numbers in parentheses refer to page numbers in the Richardson preliminary examination transcript.

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3. Evaluation of Finley's Internal Organs

Dr. Pietak's believed that Mr. Finley's internal organs were unremarkable. (T 273).

The record indicates otherwise. A normal heart weighs 350-380 grams; Frederick Finley's heart was abnormal, weighing 480 grams, indicating hypertension or the use of amphetamines or cocaine. (T 273-275). Further, the left lower chamber of Finley's heart was abnormally thick and accompanied by "thickening hypertrophy of the heart muscle..." (T 275-278). Finley's lungs were twice normal size, indicating that the heart was failing as a pump. (T 276-278). Finley's liver was enlarged and his spleen larger than average, further pointing to heart failure. (T 278).

Dr. Pietak clearly ignored the significance of this crucial data, all of which point to a cause of death other than strangulation.

4. Evidence of Asphyxia

Dr. Pietak found "some hemorrhage within the neck muscles" (T 153) that he claimed was consistent with pressure applied to the neck and asphyxiation. He conceded that there was no other evidence typically found in cases of asphyxiation, for example, there was no brain damage, a classic sign of asphyxia. Also, any

damage to Finley's throat could have resulted from efforts to insert a breathing tube. (T 175-176, 179-180, 195-197).

Dr. Gadzinski saw no evidence of asphyxiation. (T 245-249). Dr. Dragovic discounted all of Dr. Peitak's findings. (T 264-272, 282).

5. Evidence Demonstrating That Asphyxia Was Not Possible

Dr. Pietak conceded that an asphyxiated victim becomes unconscious before death, and thus cannot speak or respond to commands. (T 203-204).

In fact, witnesses to the event testified that after Dennis Richardson stopped restraining Finley, Finley had a pulse, a heartbeat, and was breathing and talking. (T 52, 67, 68, 72, 75-76, 129, 472).

6. The Peculiar Timing Of Dr. Pietak's Opinion and Report

Dr. Pietak completed his autopsy of Mr. Finley on June 23, 2000 (T 148-149), but could not determine a cause of death. (T 166). He testified that he came to his conclusion of asphyxia on June 25, 2000, but nothing in his file documents that date. (T 200). There is no documentation of Pietak's opinion about the cause of death until July 5, 2000 (T 166), after an article appeared in the Detroit Free Press quoting the Finley family's hired pathologist (Dr. Werner Spitz) that "there is no doubt that he (Finley) died from asphyxiation." Dr. Pietak admired Dr. Spitz. (T 146). Hence, the suspicious timing suggests that the newspaper article led to Dr. Pietak's conclusion, not the objective medical evidence.

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Finally, if, as he claims, Dr. Pietak made his determination before the Spitz Free Press article, then he made that determination before receiving toxicology reports on June 30, 2000. Even Dr. Pietak admitted that it "would not be appropriate medical practice" to determine cause of death before seeing toxicology reports. (T 201).

7. Conclusion

The magistrate in *Richardson* did not make a choice between two sets of credible, but conflicting, testimony. Instead, the magistrate found that "the testimony of Dr. Pietak lacks credibility as to the cause of Mr. Finley's death" for the reasons stated above: the medical examiner's failure to consult all the available evidence, his failure to note the abnormality of Finley's internal organs, the lack of classic evidence of asphyxiation, the medical examiner's failure to consider Finley's post-altercation activities, and the suspicious timing of the medical examiner's report. By contrast, "the testimony of Dr. Dragovic [was] credible as to the cause of Mr. Finley's death." Opinion September 6, 2000 (**Exhibit C**).

Thus, not only does the record in this case support the magistrate's decision on credibility, but it also illustrates why magistrates must have this right.

B. THE YOST CASE

In *People v Yost,* the prosecution charged Defendant Donna Yost with Open Murder and Felony Murder as a result of the death of her seven year old daughter,

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Monique Yost, who ingested a fatal dose of Imipramine, an anti-depressant medication prescribed for the child's bed wetting.

The People's case was based on the opinion testimony of forensic pathologist Dr. Kanu Varani.

Since the toxicology results confirmed Monique died of an Imipramine overdose, Dr. Varani would have expected his autopsy to find remnants of the Imipramine pills, if they had been taken in pill form, in the stomach or intestines. Instead, he found 200 grams of partially digested food in a semi-liquid form. Since he saw no pill residue, Dr. Varani believed that the pills were not taken intact. He further speculated that someone had to grind up the pills and mix them in a drink and provide them to the deceased child. (T, V 4, p 13)[9]. Dr. Varani then concluded that it is impossible for children at age seven to commit suicide and, therefore, homicide was the cause of death. (T, V 4, pp 14-15, 30, 48).

At the outset, the district court was troubled with Dr. Varani's opinion. The court felt that Dr. Varani's opinion was his personal assessment of the situation, and not based on scientific evidence. (T, V 4, p 17). Dr. Varani's conclusion was so troubling that the court took a recess to review the law. Finally, the court allowed Dr. Varani's opinion to stand subject to be stricken, depending upon what the "research" showed. (T, V 4, p 22).

[9] The numbers in parentheses refer to the various volumes and page numbers of the preliminary examination transcripts.)

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After the creation of a considerable record (21 witnesses having testified), the district court ruled that to conclude that a homicide had occurred, "one would have to guess or purely speculate" (Judge John C. Leaming's opinion, p 11). The district court came to the correct conclusion that Dr. Varani was not credible in this case and that credible defense witnesses had so undermined Dr. Varani's opinion that a finding of probable cause was not warranted.

1. Background and Experience

Dr. Varani's was simply unqualified to opine that a seven year old cannot commit suicide. Dr. Varani had no psychiatric or psychological education or training after medical school. He had not attended any conferences regarding psychological or psychiatric issues. He had never studied nor been medically trained in suicide. (T, V 4, p 30).

Dr. Alan Berman, a clinical psychologist and executive director of the American Association of Suicidology for the past five years, testified that scientific evidence verifies that children at age seven can and do commit suicide[10] and that

[10] Kathy Tomlinson, a close family friend who cared for Monique and her siblings, on many occasions, testified that a few months prior to her death, Monique told her she wished she were dead. (T, V 5, p 185). Monique was known to take pills on her own, including having swallowed one half bottle of vitamins, requiring a trip to the hospital. (T, V 5, p 186). Monique had been sexually assaulted at the age of four by a neighborhood girl and at the age of seven was assaulted by a 13 year old boy who was temporarily staying in her home. She had a history of running away, stealing and other behavioral problems. (T, V 2, pp 17-19). In school, Monique was classified as emotionally impaired. She was diagnosed by David Garcia, a mental health counselor, as oppositional defiant, meaning she suffered from behavioral problems that were above average. (T, V 2, pp 29-37). Social Worker Amy Benjamin, who works with severely emotionally disturbed children, described Monique as severely emotionally disturbed child and diagnosed her as suffering from Attention Deficit Disorder with Hyperactivity Disorder. (T, V

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such suicides are grossly under reported because of pressure by families to have such deaths ruled accidental and because medical examiners often incorrectly do not believe children under age ten can kill themselves. (T, V 7, p 30).

2. Basis of Opinion.

Dr. Varani performed an autopsy approximately 20 hours after Monique's death. (T, V 4, p 42). Dr. Varani based his opinion on manner of death on a negative finding, *i.e.*, the lack of pill residue in Monique's stomach and intestines. However, Dr. Varani did not know how long it would have taken for the Imipramine tablets to dissolve, nor did he know how long before her death she had ingested the medication. (T, V 4, pp 42-43). Most important, Dr. Varani simply had no scientific knowledge which would qualify him to give opinion testimony on the solubility of Imipramine tablets.

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In addition, Dr. Fleisher concluded that there was no residue of filler and binder (the materials that keep the drug in its tablet form) because those elements also easily disburse and do not cake or clump together. Dr. Fleisher pointed out that the deceased's stomach contents had been pumped at the emergency room by a nasal gastric tube and that could explain why no residue was observed. (T, V 5, pp 123-124).

Dr. Lauren Simpson, a pathologist with a subspecialty in forensic pathology, also testified for the defense. He pointed out the defects in Dr. Varani's reasoning. First, Dr. Simpson noted that the only way to know for certain what was contained in a deceased's stomach, post mortem, is to chemically analyze the contents of the stomach (which Dr. Varani failed to do). Second, Dr. Simpson testified you would not expect to see residue of Imipramine in the stomach, since the drug would have dissolved in the gastric juice after sitting there for approximately 24 to 28 hours. (T, V 7, pp 55-56). Third, Dr. Simpson stated that there is no way to tell how the pills were ingested, *i.e.*, whether they were intact or dissolved in a liquid form. (T, V 7, p 59). Finally, if the child ingested between 30 and 89 pills, it was Dr. Simpson's opinion that any slurry (residue) left would have been dissolved in the fat contents in the stomach. (T, V 7 p 72).

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3. District Court Decision

District Judge John C. Leaming heard the testimony of 21 witnesses, many of whom knew Monique personally. These witnesses provided a sad picture of a very disturbed child, who had been diagnosed as emotionally impaired and suffering from many behavioral problems.

Judge Leaming considered the scientific-medical testimony of defense experts who convinced the district court, that Dr. Varani was simply not credible in this case and had offered opinions which were well beyond the scope of his expertise. Having no credible evidence before him that there was probable cause that a murder had been committed, the district judge correctly dismissed that charge without prejudice.

The Bay County Circuit Court, the Honorable William J. Caprathe, reversed the district court's dismissal.[11] The Michigan Court of Appeals denied leave to appeal.

---

[11] Judge Caprathe apparently found that the district court judge had committed a clear abuse of discretion in his holding regarding credibility, since that is the standard of review. See, *e.g., Spalding v Spalding,* 355 Mich 382 (1959); *People v Hudson,* 241 Mich App 268 (2000); *People v Torres (on remand),* 222 Mich App 411 (1997). However, Judge Caparthe also held that there was ample circumstantial evidence of homicide in the Yost case, beyond the opinion of Dr. Varani. Because this Court has not addressed the other evidence factor, and because that issue is not raised in Richardson, counsel for *amicus* will not further discuss the question.

In Judge Caprathe's written opinion in *Yost*, he makes reference to a lower standard of proof in cases of death by poison. Citing to *People v Gerndt,* 244 Mich 622 (1928) and *People v Brown,* 37 Mich App 192 (1971). (Caprathe Opinion, pp 18-19). As counsel for Donna Yost will no doubt point out, the above

The testimony of Dr. Varani in Yost, and the testimony of Dr. Pietak in Richardson, both lacked credibility, based on the cross-examination of defense counsel and the testimony of credible experts for the defense. In each case the examining magistrate did what the law correctly tells him or her to do, judge credibility and determine probable cause thereafter. The well reasoned decisions of the district court judges should be upheld.

RELIEF SOUGHT

For all of the reasons cited in this *amicus* brief, and for the reasons cited in the briefs of defendants-appellants *Yost* and *Richardson*, this Court should reverse the Bay County and Wayne County Circuit courts and the Michigan Court of Appeals and remand these cases to the circuit courts for order of dismissals without prejudice.

Respectfully submitted,

JUAN A. MATEO (P33156)
GERALD K. EVELYN (P29182)
2000 Penobscot Building
Detroit, MI 48226
(313) 962-3500

Dated: May 9, 2002

cases are factually distinguishable from *Yost*. However, regardless of that fact, the *Richardson* case does not concern death by poison.

LAW OFFICES JUAN A. MATEO, 645 GRISWOLD STREET, SUITE 2000, DETROIT, MICHIGAN 48226-4108 (313) 962-3500

LAW OFFICES JUAN A. MATEO, 645 GRISWOLD STREET, SUITE 2000, DETROIT, MICHIGAN 48226-4108 (313) 962-3500

PROOF OF SERVICE

STATE OF MICHIGAN)
: SS
COUNTY OF WAYNE)

FRANCISCA MATEO, being first duly sworn, deposes and states that on May 10, 2002, she served copies of Brief of *Amicus Curiae* Dennis Richardson, upon:

Kurt C. Asbury
Assistant Prosecuting Attorney
Bay County Prosecutor's Office
1230 Washington Avenue
Bay City, MI 49708-5756

Edward M. Czuprynski, Esq.
Bay Justice Associates, P.C.
311 Center Avenue, #410
Bay City, MI 48708-5967

Robert Ianni
Assistant Attorney General
6520 Mercantile Way, #1
Lansing, MI 48913-0001

via United States Mails.

Francisca Mateo
Francisca Mateo

Subscribed and sworn to before me this 10th day of May, 2002.

Julie L. Chomos, Notary Public
Wayne County, Michigan
My Commission Exp.: 5/16/04

EXHIBIT A

CLEVERDON PAPER COMPANY (248) 589-1500 RECYCLED

OAKLAND
COUNTY MICHIGAN
OFFICE OF THE MEDICAL EXAMINER
L. Dragovic, M.D., Chief Medical Examiner
Firani, M.D., Deputy Chief Medical Examiner
Pacris, M.D., Deputy Medical Examiner
Ortiz-Reyes, M.D., Deputy Medical Examiner

DEFENDANT'S EXHIBIT
S
8-4-00 MS

L. Brooks Patterson, Oakland County Executive
Department of Human Services
R. Gerds, Administrator
P. Predmore, Chief Toxicologist

August 5, 2000

Juan A. Mateo, Esq.
645 Griswold Street
Suite 2000
Detroit, MI 48226-4108

Re: People vs. Richardson, Dennis

Dear Mr. Mateo:

Pursuant to your request I have reviewed the following material regarding the above captioned matter: Emergency Medical Services records, Oakwood Hospital Emergency Room records, Dearborn Police Department investigation records, transcript of the Fairlane Mall security audio tape, Wayne County Medical Examiner autopsy report issued by Dr. Boguslaw Pietak on 07/05/2000 (including 19 black and white autopsy photographs, 20 color autopsy photographs and 24 microscopic slides of WCMEO case #00-05931, Frederick Finley), as well as the report of the second (private) examination of the remains of Mr. Frederick Finley issued by Dr. Werner Spitz 06/26/2000.

Although there are substantial discrepancies between the autopsy reports, the autopsy photographs and microscopic slides are unequivocally indicative of Mr. Finley sustaining blunt force trauma to the neck consistent with being inflicted via a head lock/neck hold pattern. This mechanism of injury, as well as chest compression suggested by some statements in police records, is in and of itself capable of rendering a person dead by way of asphyxia (complete oxygen deprivation).

However, it is important to note that asphyxia does not leave opportunity for continuing vital signs (breathing, pulse/heartbeat, nodding or uttering sounds, etc.) beyond its onset. Thus, the police reports and the tape from the scene of this violent confrontation point to a more complex mechanism of Mr. Finley's death. Though documented in Dr. Pietak's autopsy report, the critical findings of grossly and microscopically abnormal heart (weight 480 grams, left ventricle wall thickness 1.9 cm) and lungs (weight: right 800 grams and left 700 grams) have been completely

ignored by conclusions rendered in both autopsies. Microscopic assessment unequivocally indicates evidence of acute congestive heart failure, with edema, congestion and intra-alveolar bleed in the lungs and acute passive congestion of the liver and spleen.

The precipitous strain of the physical confrontation (head lock; restraint) on this overweight, violently resisting and physically exhausted man placed suddenly increased functional demand on Mr. Finley's already reduced heart pumping reserve and resulted in fatal heart failure.

In consideration of the findings at the postmortem examinations and the circumstances surrounding this death, it is my opinion that Mr. Frederick Finley died of acute heart failure triggered by physical confrontation, partial oxygen deprivation and physical restraint. The manner of death is in the category of homicide.

Sincerely,

L. J. Dragovic, M.D.
Chief Medical Examiner

LJD/ph

EXHIBIT B

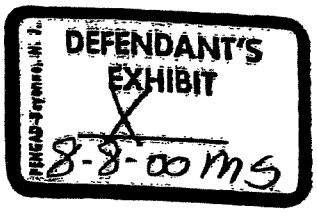
CLEVERDON PAPER COMPANY (248) 589-1500 RECYCLED

akwo. Hospital
Medical Center

101 Oakwood Blvd.
O. Box 2500
earborn, Michigan
123-2500

3.593.7000

Oakwood



CERTIFICATE OF MEDICAL RECORDS CUSTODIAN

STATE OF MICHIGAN
COUNTY OF WAYNE

NOW COMES M. S. DeCiarme, who after first being sworn deposes and says the following:

1. That the deponent is the Custodian of Medical Records Services of Oakwood Hospital and in such capacity is the custodian of the medical records of said institution.

2. That on the 14th day of July, 20 00, the deponent was served with a subpoena in connection with the above entitled cause, calling for the production of medical records pertaining to:
Frederick Demondra Finley

3. That the deponent has examined the original of said medical record and has made a true and exact copy of said original medical records and that the reproduction of the original medical records attached hereto is true and complete.

M. S. DeCiarme

Subscribed and sworn to before me, a Notary Public, on this _____ day of _____, 20____.

Christine R Nott
Notary Public, Wayne Country, Michigan

My commission expires: Feb. 7, 2001

CHRISTINE R. NOTT
Notary Public, Wayne County, MI

OAKWOOD HOSPI... & MEDICAL CENTER-DEARBORN *** E/R (TEMP)

*** REGISTRATION FORM *** REG/ADM BY: PLH

MED REC #: 645744

FIN #: 28401818

Pat Name: FINDLEY ,FREDERICK
Street: 3821 ASH ST
City: DETROIT St: MI
Phone: 313-000-0000 Zip: 48208
Prv Nm1:

DOB: 04/26/68 Age: 32
SS#: 380-76-6179 Vet Ind:
Sex: M Marital St: S
Race: B
Prv Nm2:

Adm Date: 06/22/00 Nurse Stat: ERHG
Adm Time: 15:56 Room/Bed: ERHA66
Dsch Date: / / Hosp Svc: EMR
Arrv mode: AMB Cat Cd:

EMR DR: 030015 CHRISTOPHER, GARY
FAM DR: UNKNOWN
RES DR:

Adm Dx:
Complt: C P R IN PROGRESS
Dx Cmt:

Prev Adm: NEW Date: 06/22/00
Ref Fac:
Pt Type: E Rel: Ad So: EO

PATIENT EMPLOYMENT OHS #: 380766179
Occ:
Empl: UNKNOWN
Addr:
City: St:
Phn: Zip:
Occ Ind: S Date: 06/22/00 Time 15:55

NEAREST RELATIVE Rel:
Name: UNKNOWN
Addr:
City: St:
Phn: Zip:
Emp Phn:
Em Cn:

GUARANTOR Fin Cl: A Rel/Pt: S
Name: FINDLEY ,FREDERICK
Addr: 3821 ASH ST
City: DETROIT St: MI
Phn: 313-000-0000 Zip: 48208
SS#: 380-76-6179 Mom Fin#:

GUARANTOR EMPLOYER
Emp Name: UNKNOWN
Addr:
City: St:
Zip:
Phn:

INS PLAN 1 Prior: Card: Ver:
Sbr:

INS PLAN 2 Prior: Card: Ver:
Sbr:

Med:
Ob/Gyn:

Med:
Ob/Gyn:

INS PLAN 3 Prior: Card: Ver:
Sbr:

INS PLAN 4 Prior: Card: Ver:
Sbr:

000000645744 06/22/00

FINLEY, FREDERICK

Gyn:

Pt adv name
AMD: NO PT DOES NOT HAVE ONE

Pt adv phone
/ /

DATE - 06/22/00
TIME - 18:42:03
PAGE - 1

Oakwood Hospital and Medical Center
Emergency Department
18101 Oakwood Blvd
Dearborn, MI 48123 (313)-593-7445

********** MEDICAL CHART **********

Patient Name :FINDLEY FREDERICK AGE: 32 DOB: 04/26/68
Registration Date: 06/22/00 SEX: M ED#: 174.117
Account Number : Social Security Number:
Medical Record : Priority: 1

TRIAGE
Arrival : 06/22/00 - 16:41 To Room 16:43 Room : H-18
Triage : 06/22/00 - 16:41 Seen By : GADZINSKI, DANIEL S. MD
Mode Of Arrival: Amb-Dearborn Fire Seen At : 15:55
Family Doctor:
Requested Physician: Workers Comp:

CHIEF COMPLAINT / TRIAGE ASSESSMENT
Cardiopulmonary Arrest

TREATMENT PRIOR TO ARRIVAL
IV Fluid (PTA) - .9 NS (PTA) [MJD4] (16:43)
CPR (PTA) (PTA) [MJD4] (16:43)

NOTES
Stretcher to room [MJD4] (16:43)

********** MEDICAL CHART **********

032c

Oakwood

☐ Oakwood Hospital & Medical Center ☐ Oakwood Hospital Downriver Center ☐ Oakwood Hospital Seaway Center
☐ Oakwood Hospital Annapolis Center ☐ Oakwood Hospital Heritage Center ☐ Other
☐ Oakwood Hospital Beyer Center ☐ Oakwood Hospital Merriman Center

645744
FINDLEY, FREDERICK 32 M
04/23/1968
CR UNKNOWN 05/22/00
1556
FC-A OHMC-D

EMERGENCY CONTINUING CARE RECORD

Date: 6/22/00

FINDLAY

DISC. / TIME	VITAL SIGNS T	BP	P	R	O_2 SAT	PHYSICIAN'S ORDERS	DISC. / TIME	INTEGRATED PROGRESS NOTES: OAK NOTES O = Observation A = Action K = Key Outcome
							1556	pt arrives, found in parking lot at fairline approx down time 10 min c̄ CPR done immediately at scene. pt has CPR in progress - see code sheet — MB
	PTA	Zepi / Zatropa						
							1610	pt pronounced by Dr Gadzinski — MB
								Bilat knee abrasions + abrasion top of (R) foot pt log rolled ∅ evidence of trauma to posterior s-ch. superficial abrasion on (L) abd area. — MB
							1615	Dbn PD called to p/a pt belongings — MB
							1625	Dbn PD [illegible] / takes pt items family in route — MB
							1640	report to Sheri PN — MB
							1700	family viewed pers belongs c̄ police [illegible] cash & wallet. WCMC case # 00-5931 per Clark organ donation called family refuse donat pt to morgue p̄ tagged — Grabel

Anesthesia AN Infection Diseases ID Pharmacy PH Radiology R

DATE-06/22/00 Oakwood Hospital and Medical Center
TIME-18:42:03 Emergency Department
PAGE-2 18101 Oakwood Blvd
Dearborn, MI 48123 (313)-593-7445

********** MEDICAL CHART **********

Patient Name :FINDLEY FREDERICK AGE: 32 DOB: 04/26/68
Registration Date: 06/22/00 SEX: M ED#: 174.117
Account Number : Social Security Number:
Medical Record : Priority: 1

PHYSICIAN HISTORY AND PHYSICAL

HISTORY OF PRESENT ILLNESS
Physician Assessment 15:55 [DSG] (17:17)
DISCHARGE
Acuity: 1 Level 1 Exam only.
06/22/00 - 18:41 DIE -JAMES COLE, W. GRAND BLVD
Body released to morgue [CLG1] (18:41)
Family notified [CLG1] (18:41)
Medical examiner notified [CLG1] (18:41)
Coroner Case #-00-5931 [CLG1] (18:41)
Patient pronounced dead by Dr:GADZYNSKI [CLG1] (18:41)
Patient receiving CPR on arrival [CLG1] (18:41)

ID4 = Dowdell, Josette M., R.N.
RS1 = Grassel, Cheri L., R.N.

(LAST PAGE)

© 1995-98 E.S.C. Circle positives, check normals, backslash (\) negatives.

50

Oakwood Hospital and Medical Center

EMERGENCY PHYSICIAN RECORD
Cardiopulmonary Resuscitation

645744
FINDLEY, FREDERICK 32
06/22/00
15

TIME SEEN: 1555 ROOM: 18 EMS Arrival

HISTORIAN: patient paramedic translator

HX / EXAM LIMITED BY:

Initial complaint(s): collapsed found unresponsive
chest pain dyspnea abdominal pain back pain

Witnessed arrest? no / yes
was detained by Fairlane security, Pt found unresponsive

Bystander CPR? no / yes

Down-time before ACLS: 10 minutes unknown

Paramedics' initial findings:

mentation: unresponsive
respirations: no respirations; agonal respirations
pulse: none; weak ?

rhythm: asystole; vent. fibrillation; PEA brady/tachy
HR
BP
Glucose mg/dl
D-stick glucometer
ISTAT paramedics / ED

Sinus Brady → asystole

Prehospital treatment:

oxygen; bag-valve mask; intubated
CPR / thumper; defibrillated; IV fluids
epinephrine mg; atropine mg; lidocaine bolus mg; lidoc. drip mg/min; dopamine; sodium bicarb amps

(esophageal airway) Combi tube

ROS ☐ all systems neg except as marked
headache
decreased vision/hearing
cough
dyspnea
chest pain/discomfort
abdominal pain
vomiting
diarrhea
black/tarry/bloody stools
dysuria
fever
weakness
skin rash / joint pains

nothing reported

PAST HISTORY negative see nurses note
lung disease: asthma emphysema
cardiac disease
hypertension
diabetes insulin / oral / diet
stroke
other problems

INITIAL PHYSICAL EXAM
See reverse for initial rhythm and interventions

☑ Nursing Assessment Reviewed. ☑ BP, HR, RR, Temp reviewed.

GENERAL
no evidence of trauma
unresponsive

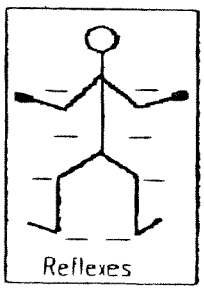
RESPIRATORY
breath sounds equal bilaterally
lungs clear
no spontaneous respirations
bag-valve-mask
ET tube / bag-valve
agonal respirations
decr. air movement
wheezing / rales
Combi tube

CVS
spontaneous pulse present
~~no spontaneous pulse~~ no pulse
chest compressions
pulse w/ CPR none poor good
heart sounds absent
irregularly irregular rhythm
extrasystoles (occasional / frequent)
JVD present
murmur grade /6 sys / dias
gallop (S3 / S4)

ABDOMEN
soft, no mass
distention
hepatomegaly/splenomegaly
mass
guarding

HEAD/NECK
atraumatic
pharynx clear
head trauma
c-spine tenderness
tracheal deviation

NEURO
pupils reactive
unresponsive / agitated / confused
pupils fixed, dilated
unequal pupils
size R mm L mm
no motor responses
abnormal response to pain
withdrawss flexion extension
Babinski reflex (L / R)
reflexes absent



Reflexes

EXTREMITIES
no signs of trauma
rigidity
pedal edema

SKIN
pallor

INITIAL EKG MONITOR RHYTHM

asystole
ventricular fibrillation
ventricular tachycardia

wide complex
narrow complex
tachycardia
bradycardia
rate= _____

sinus rhythm
atrial fibrillation
heart block 1° 2° 3°

pt had ≈ 2 min wide complex pulseless rhythm was not present

INITIAL PROCEDURES AND INTERVENTIONS

CPR

intubated by ED physician / anesthesiologist /
with # 7.0 ET tube curved / straight blade nasal / oral
breath sounds after intubation- equal R>L L>R
after ETT adjustment- n/a equal R>L L>R
placement confirmed by auscultation / ETCO2 monitor / _____

central line placed sterile technique betadine prep
right / left internal jugular subclavian femoral

pacemaker external / transvenous _____

defibrillated _____

foley catheter _____

PROGRESS NOTES:

so see CPR Flow Sheet

constant attendance by physician greater / less than 30 min _____

time _____

CPR discontinued, patient pronounced dead at 1610

family notified nursing staff

organ donor status discussed _____

discussed with Dr. _____

EKG, LABS, XRAYS

EKG __nml __abnormal: _____

Comparison w/ prior EKG _____
Cardiac Monitor- __NSR _____
Repeat EKG __unchanged _____

CBC	Chemistries		UA
see report	see report	CK	see report
nml except	nml except	CKMB	nml except
WBC	Na	Troponin	WBC
Hgb	K		RBC's
Hct	Cl		bacteria
Platelets	CO2	PT	dip:
segs	Gluc	INR	
bands	BUN	PTT	
lymphs	Creat		
monos			
eos			

ABGs time _____
pO2= ____ pCO2= ____ pH= ____ (__RA __O2- ____ L)
time _____
pO2= ____ pCO2= ____ pH= ____ (__RA __O2- ____ L)

CXR __nml / NAD __good tube placement __no infiltrates

CT __nml _____

__Crit Care- ____ min _____

CLINICAL IMPRESSION:

Cardiopulmonary Resuscitation
successful unsuccessful

Sudden Death

Pulseless Electrical Activity

Asystole

Cardiac Rhythm Disturbance
V.Tach. V.Fib. A.Fib. SVT

Acute MI
Anterior / Inferior / Lateral

Pulmonary Edema

Respiratory Failure

DISPOSITION- ☐admitted ☐Medical Examiner ☒Morgue/Funeral Home
CONDITION- ☐unchangd ☐improvd ☐critical ☐serious ☒deceasd

MD / DO

Oakwood

EMERGENCY SERVICE RECORD

	INITIAL PHYSICIAN ORDERS	TIME / INITIALS
LABS	☐ CBC/DIFF	
	☐ Chem 7	
	☐ BS	
	☐ Lytes	
	☐ BUN/CR	
	☐ PT/PTT	
	☐ SGOT, SGPT, LDH	
	☐ Mono Spot	
	☐ ETOH	
	☐ Drug Screen	
	☐ Salicylate Level	
	☐ Acetaminophen	
	☐ Lipase/Amylase	
	☐ T & H	
	☐ T & X U	
	☐ BHCG	
	☐ Rhogam/ABO	
	☐ U/A	
PANELS	☐ Cardiac/Thrombo	
	☐ Thrombo Plus	
	☐ Trauma	
	☐ Vaginal	
	☐ CSF	
	☐ Liver	
	☐ CHF	
	☐ Septic	
CULTURES	☐ Blood C/S	
	☐ Urine C/S	
	☐ Sputum C/S	
	☐ Throat C/S	
	☐ Strep Screen	
	☐ RSV	
RADIOLOGY	☐ Portable	
	☐ CXR	
	☐ Hand ☐ Wrist	
	☐ Humerus	
	☐ Elbow	
	☐ Forearm	
	☐ AC Joints	
	☐ Clavicle	
	☐ Shoulder	
	☐ Foot ☐ Ankle	
	☐ Tib Fib	
	☐ Femur	
	☐ Knee	
	☐ Hip ☐ Pelvis	
	☐ X Lat C-Sp ☐ C-Sp	
	☐ T-Sp ☐ LS-Sp	
	☐ Skull	
	☐ Facial ☐ Nasal	
	☐ Ribs	
	☐ CT	
	☐ US	
	☐ VQ Scan	
	☐ AAS	
	☐ KUB	

INITIAL PHYSICIAN ORDERS	TIME / INITIALS
☐ Old Chart	
☐ EKG	
☐ ABG	
☐ Cardiac Monitor	
☐ Pulse Ox _____ % on ☐ Room Air ☐ L _____ O2	
☐ O2 @ _____ L ☐ N/C ☐ Mask	
☐ IV:	
☐ Saline Lock	
☐ Blood Sugar (Normal = 65-100 mg/dl) BS = _____	
☐ Urine Pregnancy (Normal = Negative) ☐ Neg ☐ Pos	
Occult Blood ☐ Stool ☐ Gastric ☐ Neg ☐ Pos ☐ QC Complete (Normal = Negative)	
☐ Urinalysis (Chemstrip) ☐ Negative ☐ Positive Normal range - Glucose/Negative Bilirubin/Negative, Ketone/Negative Specific Gravity 1.001-1.035, Hemo/Negative, PH 5-9, Protein/Negative, Urobilinogen 0-1, Nitrite/Negative, Leukocyte	
☐ Breathalyzer (Normal = Negative)	
Physician:	
House Officer:	

DISCHARGE INSTRUCTIONS

TIME	B/P	PULSE	RESP	TEMP	O2 S

Disc / /Time	INITIAL PHYSICIAN ORDERS INTEGRATED PROGRESS NOTES

TIME	B/P	PULSE	RESP	TEMP	O2 S

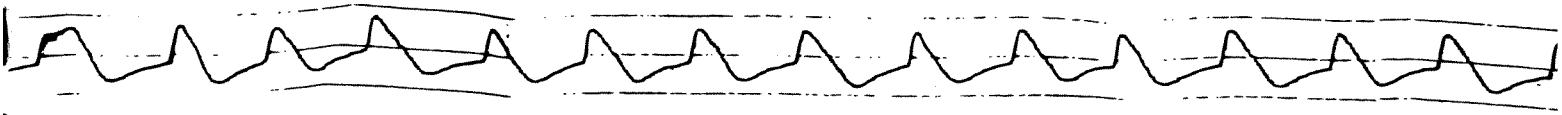
Referral:

Responsible Party Signature:

(5/00)

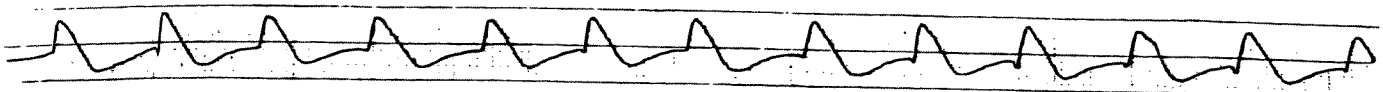
RECORD [illegible] INTERPRETATION ON THE MONITOR S1. [illegible]

RA-CE A) 06/22/2000-16:11:02 PATIENT=A [illegible] 25 mm/s (ECG 1=II, ECG 2=OFF, 15 mm/m



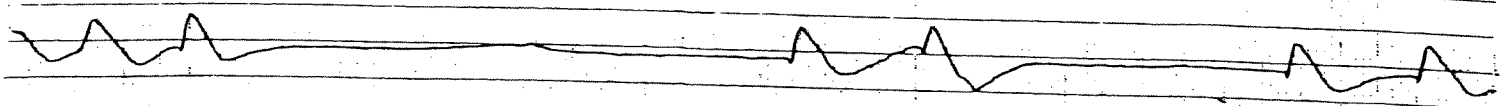
[illegible]

[illegible]=4 S 25 mm/s (ECG 1=II, ECG 2=OFF, [illegible] HR(ECG)=102 SPO2=---%



[illegible] pulse PEA

[illegible] 06/22/2000-16:11:52 PATIENT=ADULT [illegible] 25 mm/s (ECG 1=II, ECG 2=OFF, 15 mm/mV,



[illegible]

[illegible]ENT=ADULT DELAY=4 S 25 mm/s (EC[illegible] ECG 2=OFF, 15 mm/mV, ESU-REJ) HR(ECG)= 0

[illegible]

OAKWOOD HOSPITAL

CARDIOPULMONARY RESUSCITATION

DATA SHEET

Date 6/27/00 Location of Code _____

Times of Witnessed Arrest _____ Hours Unknown _____ CPR Started _____ Hours

How Recognized:

Unresponsive ☒ No Resp. ☒ No Pulse ☒ Dilated pupils ☐

Agonal Resp. ☐ Monitor ☐ Alarm ☐

[illegible] 545744

F[illegible] FREDERICK

C[illegible]/[illegible]/55

C[illegible] UNKNOWN

FC-A

Fatality

06/22/00

1555

CHIC-D

Times	1557	1601	1602	1604	1607	1610				
ECG Rhythm										
Defib. Watt/Sec.										
B/P										
Heart Rate										
Femoral Pulse Checked										
Femoral Pulse Present										
Intubated										
IV Insertion/Site	(L) AC 18g									
ABG's Drawn										
ABG Results Ph / HCO_3										
ABG Results PCO_2 / PO_2										
Method of Artificial Ventilation *		Bm								
NeuroStatus Checked										
Consciousness Restored										
Breathing Restored										
ECG Activity Restored										
Atropine		1 amp	1 amp							
Bretylium										
Calcium Chloride										
Calcium Gluconate										
Digoxin										
Dilantin										
Dobutamine										
Dopamine										
Epinephrine		1 amp		10 mg dose						
Inderal										
Isuprel										
Levophed/Regitine										
Lidocaine										
NA Bicarbonate					1 amp					
Pronestyl										
Valium										
5% DSW										
Normal Saline	WO									

Unsuccessful by Dr. [illegible]

Oakwood

Oakwood Hospital
& Medical Center

ORGAN/TISSUE DONATION INFORMATION FORM

[illegible]1818 645744
FINSLEY ,FREDERICK 32
04/26/1968
DR UNKNOWN
06/22/
1555
FC-A
OHMC-C

DATE OF EXPIRATION: 10/22/00

IS DECEASED A POTENTIAL DONOR FOR:
(SEE BACK OF FORM FOR ADDITIONAL INFORMATION)

COST CENTER: _____

- ☐ ORGAN, TISSUE, EYES
- ☐ TISSUE, EYES
- ☐ EYES
- ☐ NOT A CANDIDATE

REASON DECEASED IS NOT A CANDIDATE:

- ☐ > 75 YEARS OLD
- ☐ IV DRUG ABUSE
- ☐ LEUKEMIA/LYMPHOMA
- ☐ INFECTIOUS DISEASE
- ☐ CARCINOMA OTHER THAN BRAIN OR SKIN

WAS CONSENT GRANTED: ☐ YES ☑ NO

ORGAN/TISSUE DONATION CONSENTED TO:
(PLEASE CHECK ALL THAT APPLY BELOW)

☐ HEART	☐ HEART VALVE	☐ PANCREAS	☐ BONE
☐ LUNGS	☐ LIVER	☐ KIDNEYS	☐ INTESTINE
☐ EYES	☐ CORNEA	☐ SAPHENOUS VEIN	
☐ SKIN	☐ TOTAL BODY DONATION (FOR RESEARCH ONLY)		

CONSENT NOT REQUESTED BECAUSE:

- ☐ NO FAMILY MEMBER AVAILABLE TO GIVE CONSENT
- ☐ PATIENT IS A JOHN/JANE DOE
- ☐ ACTUAL NOTICE OF CONTRARY INDICATIONS BY DECEDENT
- ☐ ACTUAL NOTICE OF OPPOSITION BY FAMILY MEMBER WHO WOULD OTHERWISE BE ASKED TO CONSENT
- ☑ KNOWLEDGE THAT ORGAN DONATION WAS CONTRARY TO DECEDENT'S RELIGIOUS BELIEFS

PHYSICIAN WHO PRONOUNCED PATIENT: Dr. Bodzynski
(PLEASE PRINT)

NAME & TITLE OF PERSON WHO REQUESTED CONSENT: Sheri Grassel RN
(PLEASE PRINT)

Oakwood

☐ Oakwood Hospital & Medical Center ☐ Oakwood Hospital Beyer Center ☐ Oakwood Hospital Seaway Center
☐ Oakwood Hospital Annapolis Center ☐ Oakwood Hospital Heritage Center

FINDLEY FREDERICK 645744
04/23/1953
CR UNKNOWN
FC-A
05/
15
OH
FINDLAY

PATIENT PROPERTY DISPOSITION RECORD

[ ] PATIENT RETAINING PROPERTY:
I understand that safekeeping is provided for money and valuables and that Oakwood Healthcare System and its representatives will not be responsible for loss or theft of property that I retain.

[X] PROPERTY DISPOSITION: If the patient cannot be responsible for their belongings, complete the following list. Send a copy of thi sheet to the Cashier with valuables and make sure to label items appropriately. If a patient is unable to sign, you must document the reason

IF ALL PROPERTY IS NOT RELEASED MARK THE RETAINED BOX	FLOOR W/PT	CASHIER	SECURITY	ANOTHER FACILITY	ME	PHARMACY	FAMILY	HOSPITAL *RETAINED
Dentures ☐ upper ☐ lower								
☐ Glasses ☐ Contacts								
Hearing Aid ☐ right ☐ left ☐ inner ear ☐ outer ear								
☐ Purse ☐ Wallet								
Money - Amount: $604								
Watch								
Keys gold look key charm / Set of keys.								
Jewelry - Describe: gold color bracelet / gold look necklace								
Mastermoney card #1 Debra Cooks #2 David Huff.								
Luggage # of pieces: CC# his name		CITI Bank		NATIONAL CITY Mastercard		Debra Cook		
☐ Prothesis ☐ Wheelchair ☐ Walker ☐ Crutches ☐ Cane								
Medications 2 SS Cards #1 380-76-6179 Frederick Demondra F #2 383 84 6114 Frederick Findley								
☐ Beeper ☐ Cellular Phone								
Other								
Clothes including shoes & belts. Place a C/O after cut off clothing. Clothing discarded at family's request. FAMILY INITIALS:								
Clothing: ☒ Shirt/Blouse ☐ Pants ☒ Socks/Hose ☒ Shoes ☒ Underwear ☐ Bra ☐ Slip ☐ Skirt ☐ Dress ☐ Sweater								
List Additional Clothing: Shirts / ralph lauren.								
MCI calling card - name carla sullivan 2 pin # on seperate sheet								

Clothing: ☒ Shirt/Blouse ☐ Pants ☒ Socks/Hose ☒ Shoes ☒ Underwear ☐ Bra ☐ Slip ☐ Skirt ☐ Dress ☐ Sweater

white polo sport cut off wash cover

[ ] CLOTHING AT BED SIDE. [ ] PROPERTY SECURED FOR PATIENT SAFETY.
[ ] NO VALUABLES WITH PATIENT. [ ] ALL VALUABLES RELEASED TO THE FAMILY AT THE PATIENT'S REQUEST.
I have reviewed this form and agree with the disposition of valuables.

Patient — Employee Witness — Employee Witness

* IF ALL PROPERTY IS NOT RELEASED, MARK THE RETAINED BOX FOR THE SPECIFIC PROPERTY & DESIGNATE WHERE THE PROPERTY IS LOCATED IN A CORRESPONDING BOX.

Staff Releasing Property — Patient or Individual Receiving Property/Relationship to Patient #385 Dun PD

Oakwood

032209

64574
FINCLEY FREDERICK
03/25/1962
03 UNKNOWN

GENERAL CONSENT TO TREATMENT

Name of Patient: _____

Type of Treatment: ____ Inpatient ____ Emergency ____ Clinic ____ Ambulatory

Date: _____ Time: 153

Patient Number: _____

1. CONSENT TO INPATIENT, EMERGENCY, CLINIC OR AMBULATORY FACILITY SERVICES

I request and authorize the type of health care services checked above as my physician, his/her assistants or designees (collectively called "the physicians") advise. These include routine diagnostic, radiology and laboratory procedures, routine therapeutic procedures, routine drugs, and routine medical, nursing and hospital care. I understand that in emergencies it may be advisable to expand or deviate from the services listed here in order to preserve my life or health. I consent to thes expanded services and procedures. I understand that Facility personnel care for me according to the physicians' instruction

2. CONSENT TO USE OF BLOOD

I understand that due to medical circumstances I may need a blood transfusion. I understand that all blood used at the Facility is obtained from or at the direction of the American Red Cross in conformity with its policies. I also understand that there are unavoidable risks of blood transfusions, including the risk of transfusion reactions, complications in administering the blood, and transmission of blood-borne diseases. I consent to the administration of blood, blood plasma and other blood products to me, and I assume all the risk of such a blood transfusion.

3. CONSENT TO TESTING AND DISPOSAL OF BODILY FLUIDS AND TISSUE

I understand that the Facility may perform non-diagnostic laboratory tests upon specimens of blood, urine and other bodily fluids/tissues that are withdrawn from me for diagnostic purposes, and the Facility may dispose of these specimens as it chooses.

4. RELEASE OF INFORMATION

I authorize the Facility to release any and all information from my medical record, including:

- information about communicable diseases and serious communicable diseases and infections as defined by statute and Michigan Department of Public Health Rules, which include venereal disease "VD", tuberculosis "TB", human immunodeficiency virus "HIV", acquired immunodeficiency syndromes "AIDS" and AIDS related complex "ARC".
- substance abuse treatment information protected by 42 Code of Federal Regulations Part 2.
- psychological and social services information including communications made by me to a psychologist or social worker to:
  - a. any third party payor or insurance company (for example Medicare, Medicaid, Blue Cross/Blue Shield, commercial health insurers, automobile no-fault insurers, workers' disability compensation insurers, health maintenance organizations, preferred provider organizations, and managed care plans) which are responsible in whole or in part for paying my health care bill so that the Facility may be paid for its services
  - b. any health care facility or physician to which I am referred or transferred for continuity of care; and
  - c. any independent auditors or reviewers retained by the Facility, or by any third party payor or insurance company (for example Medicare, Medicaid, Blue Cross/Blue Shield, commercial health insurers, automobile no-fault insurers, workers' disability compensation insurers, health maintenance organizations, preferred provider organizations, and managed care plans) so that these reviewers can analyze quality, utilization and/or charges.
  - d. my current or potential employer, if the purpose of the medical examination and/or treatment arises from or pertains to my current or prospective employment, e.g., an employment physical or care and treatment arising from a workplace injury.
  - e. any Oakwood Healthcare System hospital, nursing home, facility, entity or physician for continuity of care.

This release authorization shall be effective so long as is necessary to accomplish the purpose for which it is given. With respect to substance abuse information (if any), this consent may be revoked at any earlier time unless the Facility has already released information in reliance upon it.

* Facility: The term "Facility" is just a convenient description and does not ...

Oakwood Hospital & Medical Center
Oakwood Hospital Heritage Center
Oakwood Annapolis Center
Oakwood Hospital Seaway Center
Oakwood Hospital Bayer Center

Oakwood

CARDIAC MONITORING SUPPLEMENT RECORD

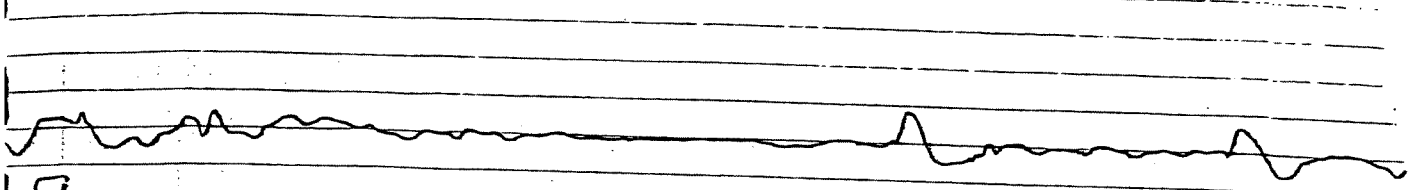
[illegible]-18 645744
FINDLEY ,FREDERICK
04/25/1968
DR UNKNOWN
FC-A

06/22/00
1556
OHMC-D

Place Time and Interpretation on Monitoring Record

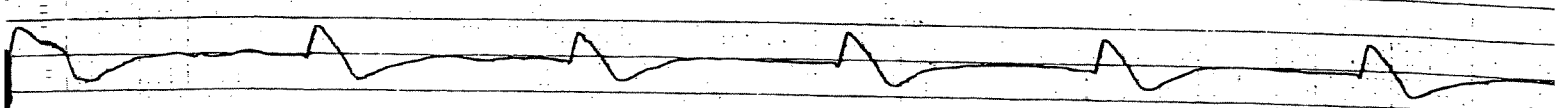
Findlay

ESU-REJ) HR(ECG)=--- SPO2=---. .7/ 60 < 84> ECG 1(TRACE A) 06/22/2000-



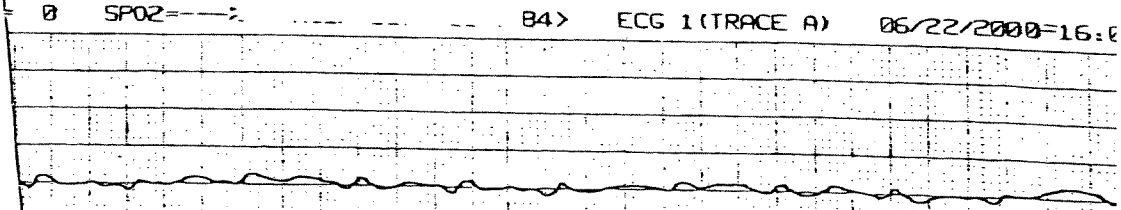
PCR 1557 ΦCPR CPR findlay

ET-IT=ADULT DELAY=4 S 25 mm/s (ECG 1=II ...mV, ESU-REJ) HR(ECG)= 39 SPO2=



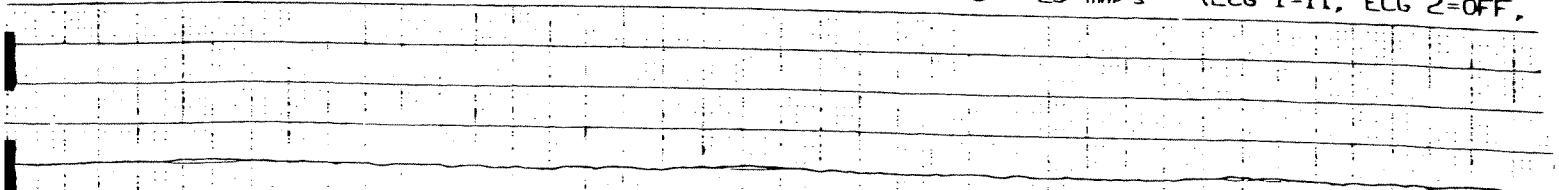
CPR findlay

0 SPO2=---> 84> ECG 1(TRACE A) 06/22/2000-16:0



find

1(TRACE A) 06/22/2000-16:06:35 DELAY=4 S 25 mm/s (ECG 1=II, ECG 2=OFF,



ΦCPR findlay

EXHIBIT C

CLEVERDON PAPER COMPANY (248) 589-1500 RECYCLED

STATE OF MICHGAN

IN THE 19th DISTRICT COURT FOR THE CITY OF DEARBORN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Docket No. D013758
Hon. Virginia A. Sobotka

-vs-

DENNIS RICHARDSON,

Defendant.

_____/

KEVIN G. SIMOWSKI (P34358)
Deputy Chief Prosecuting Attorney
MAURICE G. MORTON (P56541)
Assistant Prosecuting Attorney
Wayne County Prosecutor's Office
Homocide Unit, 10th Floor, FMHJ
1441 St. Antoine
Detroit, MI 48226
(313 224-2882

JUAN A. MATEO (P33156)
GERALD K. EVELYN (P29182)
Attorneys for Defendant
645 Griswold Street, Suite 2000
Detroit, MI 48226
(313) 962-3500

_____/

OPINION OF THE COURT

HON. VIRGINIA A. SOBOTKA (P20768)
19th District Court
16077 Michigan Avenue
Dearborn, MI 48126
(313) 943-2136

Procedural Background

The defendant, Dennis Richardson, a Lord and Taylor loss prevention officer, was charged in the complaint and warrant on July 7, 2000, with one count of Involuntary Manslaughter; MCL 750.321, arising out of the death of Frederick Finley on June 22, 2000 in the parking lot of the Fairlane Town Center. A preliminary exam was held before the Court on August 8, 2000 and August 9, 2000. The Court entertained final argument on August 30, 2000.

Standard of Review

The purpose of a preliminary examination is to determine whether a crime has been committed and whether there is probable cause for charging the defendant with that crime. MCL 766.13; MSA 28.931. Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. *People v. Vasher,* 167 Mich App 452, 456; 423 NW2d 629 40 (1988). At the preliminary examination, the prosecutor is not required to prove each element beyond a reasonable doubt. *People v.*

Coddington, 188 Mich App 584, 591; 470 NW2d 478 (1991). However, there must be some evidence from which these elements can be inferred. *Id.* The definition of the required standard of proof at preliminary examinations was specifically stated by the Michigan Supreme Court in *People v. King,* 412 Mich 145, 154 (1981) as follows:

> The inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. The magistrate is required to make his determination "after an examination of the whole matter." Although the prosecution has presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should not bind the defendant over on the offense charged but may bind him over on a lesser offense as to which he is so satisfied...

In addition, an examining "magistrate has the duty to pass judgment not only on the weight and competency of the evidence, but also the credibility of the witnesses, and may consider evidence in defense. *Id at 153.*

As previously stated, the offense with which Defendant Richardson is charged is involuntary manslaughter. The elements of Involuntary manslaughter are set forth in the Criminal Jury Instructions 2nd Edition at Chapter 16.10 and are essentially as follows:

First, that the defendant caused the death of the deceased, that is, that the deceased died as a result of the Defendant's action.

Second, in doing the act that cause the deceased's death, the defendant acted in a grossly negligent manner.

Third, that the defendant caused the death without lawful excuse or justification.

Findings of Fact

In connection with the first element, the cause of death of the deceased Mr. Finley, the Court had the opportunity to hear testimony from two well trained and qualified physicians. Dr. Pietak testified for the prosecution and Dr. Dragovic testified on behalf of the defense. While both doctors agreed on the physical symptoms for asphyxiation/heart failure, each differed in their opinion regarding cause of death. Dr. Pietak testified that Mr. Finley died as a consequence of asphyxiation. Conversely, Dr. Drogovic testified that Mr. Finley's cause of death was attributable to acute heart failure.

Significant in this Court's judgement is the fact that both doctors testified that the normal objective findings for asphyxiation were not present, i.e., broken blood vessels in the eyelids, eyes and face. Dr. Pietak's opinion that Mr. Finley died of asphyxiation was primarily based upon his observation of bruising in the neck and an examination of police reports and not on medically objective evidence. The credibility of Dr. Pietak's findings

are further called into question by virtue of the fact that he rendered his opinion as to the cause of Mr. Finley's death before reviewing the toxicology results, despite his testimony indicating he had observed Mr. Finley possessed an enlarged heart and enlarged lungs. The Court finds the testimony of Dr. Pietak lacks credibility as to the cause of Mr. Finley's death.

The Court finds the testimony of Dr. Dragovic credible as to the cause of Mr. Finley's death. Dr. Dragovic testified that Mr. Finley possessed an enlarged heart, enlarged lungs and an enlarged liver all of which were classic symptoms of heart failure. Further, Dr. Dragovic testified that Mr. Finley's heart condition was present for quit some time before the incident involving the Defendant and Mr. Finley. Clearly in this Court's mind the cause of death of Mr. Finley was that as opined by Dr. Dragovic, namely that Mr. Finley's cause of death was due to acute heart failure triggered by physical confrontation, partial oxygen deprivation and physical restraint.

Notwithstanding the foregoing determination as to the actual cause of Mr. Finley's death, the Court will next examine whether there is probable cause to believe that Defendant Richardson acted in a grossly negligent manner. Michigan Criminal Jury Instructions, 2nd Edition, at Chapter 16.18 sets forth a three-part test for gross negligence:

(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another,

(2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand;

(3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.

A careful and close examination of the transcript and each witnesses' testimony and a review of the audio tapes does not reveal that any action on the part of Defendant Richardson caused the death of Mr. Finley. There is no testimony that Defendant Richardson used excessive force or otherwise acted in a grossly negligent way as defined by law. While prosecution witness Tania Ellis testified that she observed Defendant Richardson's arms around Mr. Finley's neck and head area, her testimony did not indicate that Defendant Richardson acted in a grossly negligent manner, nor did it indicate that Defendant Richardson choked Mr. Finley or used excessive force.

In light of the aforementioned medical evidence, no fair minded person can interpret witness Ellis' testimony in such a way other than to

conclude that Defendant Richardson acted in a proper manner and exercised the ordinary care and diligence expected of a loss prevention officer in the performance of his duty. This determination is supported by the testimony received by this Court wherein it was revealed that Mr. Finley actually attacked one of the male Lord and Taylor loss prevention officers with both fists. Testimony further revealed that at the same time, a woman in Mr. Finley' party also became assaultive with the female security guards. Due to the physical reaction of Mr. Finley, a call for help went out to the Mall Security Police. In addition testimony given before this Court describes Mr. Finley on the ground kicking with the defendant holding him. Significantly, in the face of confrontation, the record indicates that the defendant on several occasions addressed Mr. Finley: "Sir, calm down, Sir , Get Up, Can you hear me?"

Conclusion

Based upon the foregoing, this Court concludes that the testimony of the witnesses and the evidence presented is insufficient to establish that there is probable cause that the offense of involuntary manslaughter was committed. Therefore, the People's motion to bind over for trial on the complaint and warrant is denied. The case is dismissed and the Defendant is discharged.

Virginia A. Sobotka

19th District Court Judge

September 6, 2000