

# FAYETTE LEGAL JOURNAL

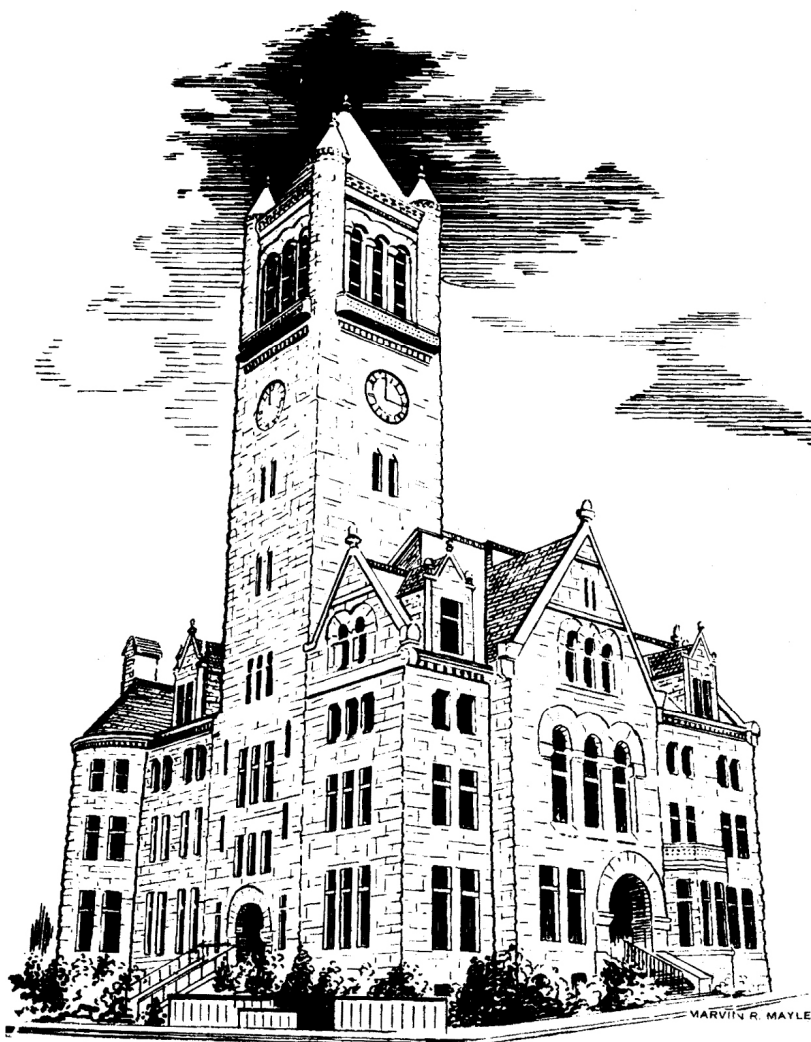
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## FAYETTE LEGAL JOURNAL

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## ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

### Third Publication

**LOUISE B. BOHNA**, late of Luzerne Township, Fayette County, PA (3)  
*Personal Representative:* Roberta L. Bohna  
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107 East Main Street  
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**MARY JANE BOZEK**, late of Menallen Township, Fayette County, PA (3)  
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Sandra A. Szymanski  
39175 Doonald Street  
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c/o Dellarose Law Office  
99 East Main Street, Suite 101  
Uniontown, PA 15401  
*Attorney:* Melinda Dellarose

**DOLORES A. BROOKS**, late of Connellsville Township, Fayette County, PA (3)  
*Personal Representative:* Pamela S. Harris  
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208 South Arch Street, Suite 2  
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*Attorney:* Richard A. Husband

**DEBORAH BURWELL**, late of South Union Township, Fayette County, PA (3)  
*Personal Representative:* Gary Miller  
486 Pleasant View Smock Road  
Smock, Fayette County 15480  
c/o Dellarose Law Office  
99 East Main Street, Suite 101  
Uniontown, PA 15401  
*Attorney:* Melinda Dellarose

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*Administratrix:* Sandra L. Chipps  
c/o Radcliffe Law, L.L.C.  
648 Morgantown Road, Suite B  
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*Attorney:* William M. Radcliffe

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*Administratrix:* Shelby D. Herman  
c/o Zebley Mehalov & White, P.C.  
18 Mill Street Square  
P.O. Box 2123  
Uniontown, PA 15401  
*Attorney:* Daniel R. White

**ALBERT HOZA**, a/k/a **ALBERT R. HOZA**, late of Bullskin Township, Fayette County, PA  
*Executor:* Robert Timothy Hoza (3)  
c/o 120 South Third Street  
Connellsville, PA 15425  
*Attorney:* David B. Reiss

**MARIE KATZ**, a/k/a **MARIE KATHERINE KATZ**, late of North Union Township, Fayette County, PA (3)  
*Executor:* Deborah Wilson  
126 Balaban Road  
Dunbar, PA 15431  
c/o Newcomer Law Offices  
4 North Beeson Boulevard  
Uniontown, PA 15401  
*Attorney:* Ewing Newcomer

**JESSE W. KELLER**, late of Bullskin Township, Fayette County, PA (3)  
*Executor:* Matthew J. Keller  
132 Woodchuck Lane  
Mount Pleasant, PA 15666  
c/o John M. Ranker & Associates, P.C.  
140 South Main Street, Suite 301  
Greensburg, PA 15601  
*Attorney:* John M. Ranker

**ROSALIE PAPINCAK**, late of Dunbar,  
Fayette County, PA (3)  
*Administrators:* Mark Papincak and  
Wayne Papincak  
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*Attorney:* J.W. Eddy

**Second Publication**

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*Administratrix:* Maria Szakal  
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Uniontown, PA 15401  
*Attorney:* Thomas W. Shaffer

**MARJORY A. CONN, a/k/a MARJORY  
ANN CONN**, late of Bullsken Township,  
Fayette County, PA (2)  
*Executor:* Christopher K. Conn  
1327 Chestnut Street  
Connellsville, PA 15425

**ALONZO KALP, JR.**, late of Saltlick  
Township, Fayette County, PA (2)  
*Executrix:* Nancy Sue Green  
3027 State Route 31  
Acme, PA 15610  
c/o 101 North Church Street  
Mount Pleasant, PA 15666  
*Attorney:* Randall G. Klimchok

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MORGAN**, late of Vandergift, Fayette County,  
PA (2)  
*Executor:* Michael R. Cossell  
600 Speers Avenue  
Charleroi, PA 15022  
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*Attorney:* David G. Petonic

**First Publication**

**NORMA RAE ALLISON, a/k/a NORMA S.  
ALLISON**, late of Perryopolis Borough, Fayette  
County, PA (1)  
c/o Webster & Webster  
51 East South Street  
Uniontown, PA 15401  
*Attorney:* Webster & Webster

**CHARLES ANSELL, JR., a/k/a CHARLES  
ANSELL**, late of Lower Tyrone Township,  
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Connellsville, PA 15425  
*Attorney:* Carolyn W. Maricondi

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*Executor:* Daniel P. Arnold  
c/o Riverfront Professional Center  
208 South Arch Street, Suite 2  
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*Attorney:* Richard W. Husband

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51 East South Street  
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*Attorney:* Webster & Webster

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*Administrator:* Alicia Guyynn  
c/o P.O. Box 760  
Connellsville, PA 15401  
*Attorney:* Carolyn W. Maricondi

**MARY L. KARWATSKY**, late of  
Connellsville, Fayette County, PA (1)  
*Executor:* David P. Karwatsky  
c/o Riverfront Professional Center  
208 South Arch Street, Suite 2  
Connellsville, PA 15425  
*Attorney:* Richard A. Husband

**NOTICE**

Notice is hereby given that a Certificate of Organization was filed with the Pennsylvania Department of State, on November 28, 2018, for a Limited Liability Company, organized under the Limited Liability Company Law of 1994, as from time to time amended. The name of the Company is Better Living Home Care, LLC having an address of 151 Zebley Road, Uniontown, PA 15401.

Jason Adams, Esquire  
Adams & Adams  
55 E. Church St., Ste. 101  
Uniontown, PA 15480  
724-437-2711

**NOTICE OF ADMINISTRATIVE  
SUSPENSION**

Notice is hereby given that Anthony John Kovach of Fayette County has been Administratively Suspended by Order of the Supreme Court of Pennsylvania dated November 14, 2018, pursuant to Rule 111(b), Pa.R.C.L.E., which requires that every active lawyer shall annually complete, during the compliance period for which he or she is assigned, the continuing legal education required by the Continuing Legal Education Board. The Order became effective December 14, 2018 for Compliance Group 1.

Suzanne E. Price  
Attorney Registrar  
The Disciplinary Board of the  
Supreme Court of Pennsylvania

**LEGAL NOTICES**

**NOTICE OF INTENTION TO FILE  
ARTICLES OF AMENDMENT**

Notice is hereby given that the Bullskin Township/Connellsville Township Joint Sewer Authority intends to file articles of amendment with the Secretary of the Commonwealth in order to extend its corporate existence for an additional fifty (50) years pursuant to the provisions of the Municipality Authorities Act, as amended.

The registered office of the Authority is:  
2801 Memorial Boulevard, Suite 2-C,  
Connellsville, PA 15425

The Articles of Amendment will be filed with the Secretary no sooner than three days after the publication of this notice.

Robert Leiberger, Sr., Chairman

**NANCY L. REARICK, a/k/a NANCY  
REARICK**, late of Dawson Borough, Fayette  
County, PA (1)

*Executor:* James W. Rearick, Jr.  
c/o P.O. Box 760  
Connellsville, PA 15425  
*Attorney:* Carolyn W. Maricondi

**PAUL ANDREW STERMOCK, SR.**, late of  
Redstone Township, Fayette County, PA (1)

*Administratrix:* Karlee Stermock  
c/o Adams & Adams  
55 East Church Street, Suite 101  
Uniontown, PA 15401  
*Attorney:* Jason Adams

# Registers’ Notice

Notice by JEFFREY L. REDMAN, Register of Wills and  
Ex-Officio Clerk of the Orphans’ Court Division of the Court of Common Pleas

Notice is hereby given to heirs, legatees, creditors, and all parties in interest that accounts in the following estates have been filed in the Office of the Clerk of the Orphans’ Court Division of the Court of Common Pleas as the case may be, on the dates stated and that the same will be presented for confirmation to the Orphans’ Court Division of Fayette County on

**Monday, January 7, 2019, at 9:30 A.M.**

<u>Estate Number</u>	<u>Estate Name</u>	<u>Accountant</u>
2618-0090	REBECCA JANE COSTA	Judith D. Brown, Administratrix DBN
2605-0686	PETE CLAIM a/k/a PETER CLAIM a/k/a PETER H. CLAIM	Peter F. Davin, Administrator DBNCTA
2617-0756	RUTH NICKLOW	Donald E. Nicklow II and Dawn E. Miller, Executors

Notice is also hereby given that all of the foregoing Accounts will be called for Audit on  
**Tuesday, January 22, 2019, at 9:30 A.M.**  
in Courtroom No. 1 of the **Honorable STEVE P. LESKINEN**, or his chambers, 2nd Floor, Courthouse, Uniontown, Fayette County, Pennsylvania, at which time the Court will examine and audit said accounts, hear exceptions to same or fix a time therefore, and make distribution of the balance ascertained to be in the hands of the Accountants.

Notice is also hereby given to heirs, legatees, creditors, and all parties in interest that accounts in the following estates have been filed in the Office of the Clerk of the Orphans’ Court Division of the Court of Common Pleas as the case may be, on the dates stated and that the same will be presented for confirmation to the Orphans’ Court Division of Fayette County on

**Monday, January 7, 2019, at 9:30 A.M.**

Notice is also hereby given that all of the foregoing Accounts will be called for Audit on

<u>Estate Number</u>	<u>Estate Name</u>	<u>Accountant</u>
2618-0507	RICHARD S. BROWN	Cheryl Detwiler, Administratrix
2600-1039	AGNES S. CLAIM and AGNES S. CLAIM REVOCABLE TRUST DATED 8/14/2000	Peter F. Davin, Administrator and Trustee

**Tuesday, January 22, 2019, at 9:30 A.M.**

in Courtroom No. 5 of the **Honorable JOSEPH M. GEORGE, JR.** or his chambers, 3rd Floor, Courthouse, Uniontown, Fayette County, Pennsylvania, at which time the Court will examine and audit said accounts, hear exceptions to same or fix a time therefore, and make distribution of the balance ascertained to be in the hands of the Accountants.

# JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :  
v. :  
O'SHEA CARRINGTON THOMAS, :  
Defendant. : No. 2039 of 2017

## OPINION

Cordaro, J. October 31, 2018

### SUMMARY

Before the Court is Defendant's Petition for Writ of Habeas Corpus, challenging that the Commonwealth did not establish a prima facie case at the preliminary hearing. This Court held a hearing on the matter on September 19, 2018. For the following reasons, Defendant's Petition is granted in part and denied in part.

### BACKGROUND

As a result of a shooting that occurred on July 5, 2018, Defendant was charged with Criminal Homicide, Conspiracy to Commit Homicide, Aggravated Assault, Recklessly Endangering another Person, and Tampering with Physical Evidence. A preliminary hearing was held on October 24, 2017 before the Honorable District Justice Richard Kasunic. Defendant subsequently filed a Petition for Writ of Habeas Corpus, claiming that the Commonwealth did not establish a prim a facie case at the preliminary hearing.

In his Petition, Defendant claims that "the various witnesses the Commonwealth had testify could not identify Defendant beyond a reasonable doubt that he was the perpetrator in the crime [sic] which [sic] have allegedly been committed."

This Court held a hearing on September 19, 2018. At that time, the Commonwealth moved to admit into evidence the transcript of the preliminary hearing. The parties were then given additional time to submit briefs or memorandums of law.

### DISCUSSION

The argument that Defendant makes in his Petition-that the Commonwealth did not present any witnesses at the preliminary hearing who could identify Defendant "beyond a reasonable doubt" as the perpetrator of the crimes-is an incorrect legal standard. {1}

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{1} Defense counsel continued to argue this standard at the hearing on the Petition. However, Defendant did eventually cite the correct standard- that the Commonwealth must present a prima facie case at a preliminary hearing- in his Brief in Support of Petition, which he submitted following the hearing on the Petition.

A preliminary hearing is not a trial. *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991). The main purpose of a preliminary hearing is "to protect an individual's right against an unlawful arrest and detention." *Id.* (citing *Commonwealth v. Mullen*, 333 A.2d 755, 757 (Pa. 1975)). At a preliminary hearing, the Commonwealth "bears the burden of establishing at least a prima facie case that a crime has been committed and that the accused is probably the one who committed it." *Id.* (citing *Commonwealth v. Prado*, 393 A.2d 8, 10 (Pa. 1978); Pa.R.Crim.P. 141(d)). Importantly, "[i]t is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt." *Id.* (citing *Commonwealth v. Rick*, 366 A.2d 302,303 (Pa. Super. Ct. 1976)).

In order to show a prima facie case, the Commonwealth must present evidence with regard to each material element of the crimes charged and sufficient probable cause that the accused is the person who committed the offense. *Id.* (citing *Commonwealth v. Wojdak*, 466 A.2d 991, 996-97 (Pa. 1983). The weight and credibility of the evidence are not factors at this stage. *Wojdak* at 997. The Commonwealth may establish its burden by wholly circumstantial evidence. See, e.g., *Commonwealth v. De Petro*, 39 A.2d 838, 842 (Pa. 1944). However, circumstantial evidence must rise above mere suspicion and conjecture. *Prado* at 10.

The Defendant in the present case, O'Shea Thomas, was charged with Criminal Homicide for the death of Taekwon Commodore. Criminal Homicide is defined as intentionally, knowingly, recklessly, or negligently causing the death of another human being. 18 Pa.C.S.A. §2501(a). Criminal Homicide is classified as murder, voluntary manslaughter, or involuntary manslaughter. 18 Pa.C.S.A. §2501(b). Further, "[t]he use of a deadly weapon on a vital part of the human body is sufficient to establish the specific intent to kill." *Commonwealth v. Hilliard*, 172 A.3d 5, 12 (Pa. Super. Ct. 2017) (citing *Commonwealth v. Randolph*, 873 A.2d 1277, 1281 (Pa. 2005)).

The Commonwealth presented the following testimony at the preliminary hearing to establish a prima facie case for Criminal Homicide. Trooper Joseph Timms of the Pennsylvania State Police testified that he was called to investigate a shooting at Snowden Terrace Housing Project in Brownsville, Pennsylvania on or about July 5, 2016. (Preliminary Hearing Transcript at 49-50.) The victim of that shooting, Taekwon Commodore, was killed. (*Id.*) The Trooper obtained a death certificate for Mr. Commodore; the cause of death was listed as "exsanguination, bilateral, hemothorax and single gunshot wound to the upper posterior shoulder, right shoulder, and chest." (*Id.* at 50-51.) The death certificate of Mr. Commodore was admitted at the preliminary hearing as Commonwealth Exhibit 1. (*Id.* at 50.) Through Trooper Timms's testimony and the admission of the death certificate, the Commonwealth established the second material element of Criminal Homicide; Mr. Commodore was killed and his death was caused by a gunshot wound.

Another witness, Jamie Thomas, testified at the preliminary hearing that he was with Mr. Commodore on the night of July 4-5, prior to Mr. Commodore's death. (*Id.* at 4



-5.) Jamie Thomas stated that on that night, he was with his girlfriend, Samantha Shipley, his sister, Amanda Thomas, and his sister's boyfriend, Taekwon Commodore. (Id. at 4-5.) They traveled between two public housing developments, Snowden Terrace and South Hills Terrace, which are both in or near Brownsville. (Id. at 5-7.)

Jamie Thomas's testimony is not precisely clear at all times, but he related that the four of them were walking when they came around a corner and saw O'Shea Thomas, the Defendant, "standing on Britney's porch." (Id. at 7.) Then an argument ensued between Jamie Thomas's sister and another man named Octavius. (Id. at 8-9.) The argument was about an incident earlier that night where the police were called. (Id. at 9.) Jamie Thomas then states that his group, or some component thereof, {2} walked down the street further. (Id. at 9-10.)

Additional interactions occur, and at some point, Jamie Thomas states that four people came around a corner and "hollered for O'Shea." (Id. at 10-11.) O'Shea Thomas and an additional person came. (Id. at 11.) Jamie Thomas was standing there when suddenly he heard gunshots fired into the air by Jamal Brown. (Id.) Then additional guns started going off. (Id.) Jamie Thomas testified that he saw flashes going off in front of O'Shea Thomas and one or two other people and that bullets were going "over our heads." (Id. at 12-13, 16, 18.)

Jamie Thomas and Mr. Commodore began running down a hill to escape the gunshots. (Id. at 11-12.) At the bottom of the hill, Mr. Commodore related to Jamie Thomas that he had been shot. (Id. at 12-13.) Jamie Thomas saw a gunshot wound to Mr. Commodore's neck. (Id. at 13-14.) Jamie tried to stop the bleeding, and eventually took Mr. Commodore to the car and drove to find help. (Id. at 14-15.) By the time an ambulance reached them, Mr. Commodore was unresponsive; Jamie Thomas knew Mr. Commodore was dead. (Id. at 15.)

The Commonwealth also called Britney Foster at the preliminary hearing. Ms. Foster lives in Snowden Terrace in Brownsville. (Id. at 20.) She testified that she had known O'Shea Thomas prior to that night, although she did not have a personal relationship with him. (Id. at 20-21.) On the night of July 4-5, there were people on her porch "just chillin'," one of whom was O'Shea Thomas. (Id. at 21.) O'Shea was on her porch for a while that night. (Id.)

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{2} Jamie Thomas frequently uses the pronoun " we" in his testimony, but it is not entirely clear who all he is referring to.

At one point that night, O'Shea went into Ms. Foster's home and asked her if she could move her dog so he could get out the back door. (Id. at 22-23.) Ms. Foster put her dog upstairs and O'Shea went out the back door. (Id.) Ms. Foster testified that O'Shea had a handgun in his hand when he went into her home and when he went out the back door. (Id. at 23-39.) A couple of minutes after O'Shea went out the back door, Ms. Fos-

ter heard gunshots. (Id.) O'Shea came back in Ms. Foster's back door, gun still in hand. (Id.) According to Ms. Foster, when O'Shea came back in the house, he was worked up, irritated, kind of nervous, and shaky. (Id. at 23-24.) O'Shea also said to Ms. Foster, "I think I got him. I think I shot him." (Id.)

O'Shea Thomas was in Ms. Foster's house for ten or fifteen minutes after the gunshots, at which point Ms. Foster saw him go upstairs and heard the water in the sink running. (Id. at 25-26) After that, O'Shea left with a person named Trey Smith. (Id. at 25.) Ms. Foster also testified that she previously had heard "that Taekwon told on O'Shea." (Id. at 28.)

The Commonwealth also called Alexia Monique Neil to testify at the preliminary hearing. On the night of July 4-5, Ms. Neil was at the South Hills Terrace public housing development. (Id. at 40-42.) Ms. Neil was in her car in the parking lot of South Hills Terrace after the shooting in Snowden Terrace. Ms. Neil stated that a lot of people were talking about the shooting, including Jamal Brown, O'Shea Thomas, Bill Brown, and a person named Isaiah who is not identified further. (Id. at 42, 48.) Ms. Neil knew O'Shea Thomas prior to this encounter and was able to identify him at the preliminary hearing. (Id. at 43-44.) At the preliminary hearing, the assistant district attorney for the Commonwealth asked Ms. Neil, "At any point, did O'Shea make any comments about what had happened?" to which Ms. Neil answered, "Yes. He said, yeah I hit that nigger". (Id. at 43.)

Based on the testimony of the witnesses at the preliminary hearing, the Commonwealth presented a prima facie case that O'Shea Thomas shot and killed Taekwon Commodore. The testimony of the witnesses tends to corroborate the events such that it is more than plausible that O'Shea was the perpetrator of the homicide. O'Shea also made several statements to different witnesses at different times where he claims to have shot someone. And while there was no direct evidence or testimony of anyone who saw O'Shea shoot the gun that killed Mr. Commodore, the Commonwealth may establish its burden through wholly circumstantial evidence.

Jamie Thomas's testimony that he saw O'Shea Thomas on Britney's porch that night is corroborated later by the testimony of Britney Foster, who also saw O'Shea Thomas on her porch. Jamie Thomas also testified that there was an argument between Mr. Commodore and some other people, at which point O'Shea Thomas was called to come out. Ms. Foster saw O'Shea Thomas walk through her house and out her back door with a gun, heard an argument outside, and then heard gunshots.

While Jamie Thomas stated that he did not see for certain that O'Shea Thomas shot a gun, he did testify that he saw flashes coming from the direction of O'Shea Thomas when the gunshots were going off. And while several other people had guns and were firing them off, the Commonwealth established through the testimony of both Ms. Foster and Ms. Neil that at two separate times and in two distinct places after the shooting O'Shea Thomas made statements to the effect that he shot someone. Ms. Foster also

testified that O'Shea Thomas seemed worked up, irritated, nervous, and shaky when she saw him come back into her house after the gunshots.

Because Mr. Commodore was shot in the neck, a vital part of the body, a specific intent to kill can be inferred.

Whether the witnesses who testified at the preliminary hearing are to be believed and the extent to which their testimonies are credible are questions for the finders-of-fact. Further, the Commonwealth need not prove its case beyond a reasonable doubt at the preliminary hearing. It is sufficient at this point that the Commonwealth establish sufficient probable cause that O'Shea Thomas intentionally, knowingly, recklessly, or negligently caused the death of Taekwon Commodore. The Commonwealth has met that burden.

O'Shea Thomas is also charged with Criminal Conspiracy to Commit Homicide. Under the Pennsylvania statutes, a person is guilty of Criminal Conspiracy with another person or persons to commit a crime if, with the intent of promoting or facilitating its commission, the defendant agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime. 18 Pa.C.S.A. §903(a)(1).

To establish a *prima facie* case for the crime of Conspiracy, the Commonwealth must show that the defendant entered into an agreement to commit or aid in an unlawful act with another person or persons with a shared criminal intent, and that an overt act was done in furtherance of the conspiracy. *Commonwealth v. Dantzler*, 135 A.3d 1109, 1113-14 (Pa. Super. Ct. 2016) (citing *Commonwealth v. Feliciano*, 67 A.3d 19, 25-26 (Pa. Super. Ct. 2013)). Because direct evidence of intent and agreement is often unattainable, conspiracy may be proven entirely from overt acts, relationship, conduct, or circumstances of the parties. *Commonwealth v. Neckerauer*, 617 A.2d 1281, 1288 (Pa. Super. Ct. 1992) (citing *Commonwealth v. Davis*, 458 A.2d 248, 250 (Pa. Super. Ct. 1983)).

The Commonwealth at the preliminary hearing did not present any evidence that O'Shea Thomas conspired with anyone else to kill Taekwon Commodore. Although O'Shea was called for outside when the argument erupted, and there were multiple people shooting guns off that night, there does not appear to be any evidence in the Record that O'Shea entered into some sort of agreement beforehand to kill Mr. Commodore, or that his conduct was such that a conspiracy can be inferred. Many of the people involved in the argument that took place before the shooting are not even identified by the witnesses. There was no evidence presented that O'Shea Thomas knew any of these people, and if so, how he knew them.

Further, the Commonwealth does not even mention that O'Shea Thomas is charged with Criminal Conspiracy in the Memorandum of Law the Commonwealth submitted after the hearing on Defendant's Petition. That Memorandum does not argue any facts

that tend to prove that it established a prima facie case for Criminal Conspiracy. And while that alone does not preclude the issue, this Court does not see how the testimony presented at the preliminary hearing could be interpreted to establish a conspiracy to commit homicide. As a result, this charge against O'Shea Thomas shall be dismissed.

O'Shea Thomas is also charged with Aggravated Assault. Aggravated Assault is defined as an attempt to cause serious bodily injury to another, or causing such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa.C.S.A. §2702(a)(1). Serious bodily injury is bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S.A. §2301.

The Commonwealth relies on the same evidence to establish a prima facie case for the elements of Aggravated Assault as it does to show Criminal Homicide. Further, the charge of Aggravated Assault here is a lesser-included offense of Criminal Homicide. See *Commonwealth v. Musselman*, 396 A.2d 625, 625 n.1 (Pa. 1979). In accordance with the prior analysis regarding the charge for Criminal Homicide, the Commonwealth has also met its burden to establish a prima facie case for Aggravated Assault. See *Hilliard*, at 13-14 (Commonwealth established prima facie case of attempted homicide; therefore, Superior Court on appeal did not need to separately address lesser-included offense of aggravated assault).

This applies also to the crime of Recklessly Endangering Another Person, with which O'Shea Thomas was additionally charged. That crime is defined as a reckless engagement of conduct that places or may place another person in danger of death or serious bodily injury. 18 Pa.C.S.A. §2705. Because this crime is a lesser-included offense of Criminal Homicide, the Commonwealth has established a prima facie case for Recklessly Endangering Another Person. See, *Musselman* at 625 n.1; *Hilliard* at 13-14.

O'Shea Thomas was lastly charged with Tampering with Physical Evidence. Tampering with or Fabricating Physical Evidence is defined as altering, destroying, concealing, or removing any record, document, or thing with intent to impair its verity or availability in a proceeding or investigation when the perpetrator believes that an official proceeding or investigation is pending or about to be instituted. 18 Pa.C.S.A. §4910(1). To establish the offense of tampering with evidence, the Commonwealth must show three interrelated elements: (1) the defendant knew that an official proceeding or investigation was pending (or about to be instituted); (2) the defendant altered, destroyed, concealed, or removed an item; and (3) the defendant did so with the intent to impair the verity or availability of the item to the proceeding or investigation. *Commonwealth v. Toomer*, 159 A.3d 956, 961 (Pa. Super. Ct. 2017) (citing *Commonwealth v. Jones*, 904 A.2d 24, 26 (Pa. Super. Ct. 2006)); but cf, *Commonwealth v. Gettemy*, 591A.2d 320, 323-24 (Pa. Super. Ct. 1991) (where Commonwealth did not establish prima facie case at preliminary hearing for charge of tampering with evidence).

The Commonwealth relies on Ms. Foster's testimony to establish a prima facie case for this charge. Ms. Foster related that she saw O'Shea Thomas come back into her house after the gunshots, that O'Shea went upstairs, and that she heard the water running from her sink. Further, Ms. Foster testified that she thinks she saw O'Shea give the gun to Trey before leaving her house, but isn't one-hundred percent sure. (Preliminary Hearing Transcript at 27.) The Commonwealth also states in its Memorandum of Law that the gun used in the shooting has yet to be located.

This evidence alone is insufficient to establish a prima facie case that O'Shea Thomas committed the crime of Tampering with Physical Evidence. To start with, Ms. Foster's testimony is that she heard water running in her sink in the upstairs after O'Shea returned to her house from outside. The Commonwealth's argument is that, by washing his hands after discharging a firearm, O'Shea Thomas was tampering with evidence by removing the gunshot residue from his hands. This argument is not persuasive.

For one thing, washing one's hands is a hygienic necessity. It is something that most people do or should do regularly, and for more reasons than just to remove gunpowder residue from their hands. It would be impractical to hold that defendants who wash their hands between when a crime is committed and when an investigation takes place has committed the further crime of Tampering with Evidence. Moreover, the Commonwealth has not cited any cases where washing hands alone constitutes Tampering with Physical Evidence.

The Commonwealth's second argument is that O'Shea tampered with evidence by giving the gun to Trey Brown after coming back in to Ms. Foster's house. However, this argument is unpersuasive as well. Ms. Foster testified that she "thinks" she saw O'Shea give Trey the gun, but wasn't one-hundred percent sure. Mere speculation is not sufficient to establish a prima facie case. And even if O'Shea did hand the gun to Trey before leaving Ms. Foster's residence, the two of them left together so it is unclear how this fact supports a charge of Tampering with Evidence.

The Commonwealth's third argument is that, because the Commonwealth still does not have the gun used in the shooting, the Defendant must have concealed or destroyed it. Just because the Commonwealth is missing evidence is not in itself sufficient to show that a defendant tampered with evidence. The Commonwealth failed to establish a prima facie case with respect to the charge of Tampering with Physical Evidence. AB a result, this charge shall be dismissed.

Finally, when Defendant filed his Petition for Writ of Habeas Corpus, he only challenged that the Commonwealth did not establish a prima facie case at the preliminary hearing. This was Defendant's only challenge at the hearing on the Petition as well. However, after the Court ordered the parties to submit either a brief or a memorandum of law in support of their positions after the hearing, Defendant filed a Brief in Support of Writ of Habeas Corpus and Suppression of Evidence, in which he now seeks to suppress certain evidence. Because this issue was not raised in Defendant's Petition or at

the hearing on the Petition, this Court will not entertain the suppression issue at this time.

### CONCLUSION

With respect to the charges of Criminal Conspiracy to Commit Homicide and Tampering with Physical Evidence, the Commonwealth failed to present a prima facie case at the preliminary hearing. Those charges against the Defendant shall be dismissed.

With respect to the charges of Criminal Homicide, Aggravated Assault, and Recklessly Endangering another Person, the Commonwealth did present a prima facie case at the preliminary hearing.

Defendant's Petition for Writ of Habeas Corpus is therefore granted in part and denied in part. This case shall be listed for trial.

### ORDER

AND NOW, this 31st day of October, 2018, in consideration of Defendant's Petition for Writ of Habeas Corpus, and after a hearing on the Petition, it is ORDERED and DIRECTED that the Petition is GRANTED IN PART and DENIED IN PART.

The Commonwealth failed to present a prima facie case at the preliminary hearing with respect to the charges of Criminal Conspiracy to Commit Homicide (18 Pa.C.S.A. §903(a)(1)) and Tampering with Physical Evidence (18 Pa.C.S.A. §4910(1)). Those charges against Defendant shall be dismissed.

The Commonwealth did, however, present a prima facie case at the preliminary hearing with respect to the charges of Criminal Homicide (18 Pa.C.S.A. §2501(a)), Aggravated Assault (18 Pa.C.S.A. §2702(a)(4)), and Recklessly Endangering Another Person (18 Pa.C.S.A. §2705). The Commonwealth shall list this case for trial.

BY THE COURT:  
Linda R. Cordaro, Judge

ATTEST:  
Clerk of Courts

## LUNCH & LEARN SERIES

### FCBA LUNCH & LEARN SERIES

The Fayette County Bar Association's first presentation in its Lunch & Learn Series in 2019 will be:

- Date: Wednesday, January 16th from 12:00 p.m. to 1:30 p.m.
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topic: **What the Non-Bankruptcy Attorney Needs to Know about Bankruptcy**
- Presenter: Charles Zebley, Esquire

#### CLE Credit

1.5 hours of Substantive CLE credit for the program. The fees are as follows:

Members of the FCBA

- No charge for attendance without CLE Credit
- \$10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2012

- No charge for attendance with CLE Credit

Non-members of the FCBA

- \$10 fee for attendance without CLE Credit
- \$20 fee for attendance with CLE Credit

**\*\* All fees to be paid at the door \*\***

A light lunch will be provided.

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to [cindy@fcbar.org](mailto:cindy@fcbar.org) on or before Monday, January 14th.

-Professional Ethics Committee of the Fayette Bar Association



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