

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL, ss.

DAR -  
APPEALS COURT No. 2021-P-0322

---

COMMONWEALTH

V.

KYLE S. DAWSON

---

COMMONWEALTH'S PETITION FOR DIRECT APPELLATE REVIEW

---

Respectfully submitted,  
THOMAS M. QUINN, III  
District Attorney

Shoshana E. Stern  
Assistant District Attorney  
Bristol District  
888 Purchase Street  
New Bedford, MA 02740  
(508) 997-0711  
BBO # 667894  
shoshana.e.stern@state.ma.us

### **REQUEST FOR DIRECT APPELLATE REVIEW**

Pursuant to Mass. R. App. P. 11(a), the Commonwealth moves this Court to grant direct appellate review on the question of whether a defendant may be charged with involuntary manslaughter where he and a coventurer commit an armed robbery, and the intended victim - acting out of a state of fear that the defendant knowingly induced for the purpose of effecting the robbery - shoots and kills the coventurer.

### **STATEMENT OF PRIOR PROCEEDINGS**

On September 27, 2018, the Bristol Grand Jury handed up Indictment No. 1873CR00344, charging the defendant, Kyle Dawson, with involuntary manslaughter (G.L. c. 265, § 13). On January 14, 2020, the defendant filed a Motion to Dismiss for Lack of Probable Cause. The Commonwealth filed an opposition on February 10<sup>th</sup>, and on February 13<sup>th</sup> a non-evidentiary hearing on the motion was held before Yessayan, J. On June 3, 2020, Judge Yessayan issued a memorandum and order denying the defendant's motion to dismiss.

On October 20, 2020, the defendant entered a conditional plea to involuntary manslaughter, preserving his right to appeal the denial of his

motion to dismiss. He also pleaded guilty to armed assault with intent to rob (G.L. c. 265 § 18(b)), assault and battery with a dangerous weapon (G.L. c. 265 § 15A(b)), and assault and battery (G.L. c. 265 § 13A(a)). Judge Dupuis imposed concurrent sentences of 10-12 years in state prison on the charges of involuntary manslaughter and armed assault with intent to rob, and concurrent terms of 3 years' probation on the other two charges, to be served from and after the state prison sentence. The defendant, who had been held as a danger pretrial, had 812 days of jail credit.

On November 5, 2020, the defendant filed his notice of appeal on his involuntary manslaughter conviction. The case entered in the Appeals Court on April 13, 2021, and the defendant filed his brief in that Court on July 7<sup>th</sup>. The Commonwealth's brief is currently due on October 29<sup>th</sup>.

#### **STATEMENT OF RELEVANT FACTS**

The evidence before the grand jury included the following:

At about 1 a.m. on August 10, 2018, the defendant and coventurer Christopher Dunton were picked up in the vicinity of 482 Cottage Street in New Bedford by

cab driver Albert Miguel. As Miguel later related in a police interview, the men "were being cool," and asked to go to 16 Bentley Street. On the drive, they and Miguel were "talking about what's been happening in the city because the guy that just killed the guy on Cottage, the shooting on Grinnell and Purchase. They was also another guy shot in the back. So, we're discussing like what's happening in the city and they're like, 'Yeah, the city's all fucked up,' you know what I mean? And like they were being cool guys, just normal dudes. Like I would have never had - and I usually get red flags where people - if I feel like weird."

When they arrived at the destination, the defendant asked Miguel for change for a fifty, which he told him he did not have. Miguel could hear the defendant "shuffling, like he was looking for money." Miguel, who was "just waiting to get paid," heard "the distinct sound . . . of a hand going into a pocket." The fare was "probably like five or six bucks."

"The next thing you know this kid" - Dunton - "starts choking me and I'm thinking like, what the fuck." Dunton placed Miguel in a chokehold, "Like I couldn't breathe. Like it actually stopped my

breathing. That's how hard they pushed on my throat." It was a "[f]ull blown like bear hug, both arms around my neck." The defendant said, "Give me your fucking money, nigga."

The defendant put a knife to Miguel's side, "which he actually only got me a little bit, but he was trying to puncture me. . . . like he was trying to get me in the stomach and I was kind of like trying to like pull away from the door." Miguel "felt something scratch me," and reported that the knife looked "like a tactical knife," a flip-open knife about three inches long. Dunton was saying, "oh, just stab this fucking, nigga, you know, fucking kill him, pretty much, like said stab him and kill him is what he was saying, something." Miguel thought, "Fuck, I'm going to die. Like this is about to get - you know, this dude's going to fucking kill me." Dunton was screaming, "Shank this nigga," and the defendant "said something but I can't remember what he was saying, but they were like, 'Oh, yeah, we're going to do it.' Like pretty much like they're all hyping each other up."

Miguel took the opportunity presented by the distraction of the lights of a passing car to grab the

handle of his door and open it. As he did so, "I thought I was going to get stabbed because he was really like right on me, the white male with the ponytail [Dawson]. And his boy's like, 'I'm going to fucking stab this motherfucker, kill this motherfucker.'" Miguel managed to get out of the door while grabbing his gun, which he fired three times through the window at Dunton, who was still inside the cab.

Miguel had told Dunton, "get down," but he couldn't see his hands. The defendant, meanwhile, had fled out the passenger-side door - the defendant was "pretty much out of the car. And then - but I couldn't see the knife. That's what was scaring me. Like where's the knife and does this kid have another weapon that I don't see if he has a gun. You know, I don't see a knife. I don't see the hands. I can't see hands. So, I'm thinking like what if he has a gun, what if he has a knife still. Like where is the weapons; you know what I mean?" Miguel "couldn't see his hands, so I thought he had a weapon, another weapon, because his friend has a knife. How do I know he didn't have another knife or a gun? You know, his friend almost just tried killing me and he's choking

me, so you, know, how do I know that these kids, you know, weren't trying to kill me?"

Miguel called his dispatcher, and then 911, reporting that he had had a robbery attempt and shot someone. The police showed up in a minute or two.

When speaking with police at the scene, Miguel lifted his shirt to show a scratch where he said the knife had been pressed up against his side. It appeared to be fresh and consistent with an injury made by a knife.

The defendant's own eventual account to police essentially corroborated Miguel's, except that the defendant maintained that he had only pretended to have a knife, and that he had intended to pay Miguel his fare if the robbery attempt did not end up producing any money. He told police that he and Dunton had been good friends who had done state prison time together. Police determined that at that time Dunton had been serving a sentence for robbing a cab driver, and the defendant for armed assault with intent to rob. They had pled guilty to their respective offenses.

### **ISSUE OF LAW RAISED BY THE APPEAL**

This appeal raises the issue of whether, in light of this Court's opinion in *Commonwealth v. Tejada*, 473 Mass. 269 (2015), and notwithstanding this Court's opinion in *Commonwealth v. Campbell*, 89 Mass. 541, 7 Allen 541 (1863), a defendant may be charged with involuntary manslaughter where he and one or more people collaborate in a robbery attempt, and the intended victim kills one of the coventurers in self-defense. This issue was raised and preserved below.

### **ARGUMENT**

**RECENT DECISIONS OF THIS COURT SUGGEST INVOLUNTARY MANSLAUGHTER AS AN APPROPRIATE CHARGE WHERE A DEFENDANT ENGAGES IN AN ARMED ROBBERY AND THE INTENDED VICTIM, HAVING BEEN PLACED IN A STATE OF FEAR BY THE ROBBERS, SHOOTS ONE OF THEM IN SELF-DEFENSE.**

The question posed by this case is whether a defendant may properly be charged with involuntary manslaughter where he and one or more people collaborate in a robbery attempt, and the intended victim kills one of the coventurers in self-defense. This Court, in reiterating its longstanding holding that such facts could not support a felony-murder conviction, has noted that involuntary manslaughter might be an appropriate charge:

[A] tragic death does not always justify a murder conviction; the law recognizes that a person is guilty of manslaughter, not murder, punishable by up to twenty years in prison rather than a life sentence, where the killing is committed intentionally under mitigating circumstances or unintentionally but recklessly. See G. L. c. 265, § 13. See also Model Jury Instructions on Homicide 64-79 (2013). In circumstances where a defendant committing an underlying felony engaged in reckless conduct that "created a high degree of likelihood that substantial harm will result to another person," the Commonwealth might obtain an involuntary manslaughter conviction. *Id.* at 74.

*Commonwealth v. Tejada*, 473 Mass. 269, 279 (2015).

Two years later, the late Chief Justice Gants, author of the *Tejada* opinion, made a similar point in his concurrence in *Commonwealth v. Brown*, 477 Mass. 805, 832-833 (2017), in which a majority of justices voted to abolish common-law felony murder: "Where a defendant participates in an armed robbery but does not have the requisite intent for murder, the defendant will be found guilty of involuntary manslaughter if he or she acted wantonly or recklessly."

This is such a case. The evidence presented to the grand jury showed the defendant engaging in a joint-venture robbery of a cab driver, in which his coventurer put the driver in a chokehold that pushed so hard on his throat that he was unable to breathe,

while the defendant himself held a knife pressed to the driver's ribs, cutting into his skin. As the defendant did this, his coventurer urged him to stab the driver, and the driver's impression was that the defendant was "really trying to stab me." This was certainly a circumstance in which the defendant's conduct "created a high degree of likelihood that substantial harm will result to another person." It is entirely foreseeable that a cab driver with a knife to his ribs, and in fear for his life, might be armed and might defend himself with deadly force that could kill either the defendant himself, or his coventurer. Compare *Commonwealth v. Phachansiri*, 38 Mass. App. Ct. 100, 108 (1995) (in felony-murder case, judge "made the sensible observation that if you kidnap somebody's wife it is foreseeable that 'the husband is going to try to rescue the wife, or at least do something to attempt to stop the kidnapping.'"). Indeed, in this case the driver had apparently spent the early-morning cab ride talking with the defendant and his coventurer about recent local shootings, so they would have been well aware that issues related to danger and safety were high on his mind.

It is important to note the distinctions between involuntary manslaughter and the now-abolished crime of common-law felony-murder. While they are both common-law crimes in which a defendant could find himself liable for an unintended death that resulted from an intended armed robbery, both conceptually and practically they were very different. Common-law felony murder turned on a concept of "constructive malice," "substitut[ing] the intent to commit the underlying felony for the malice aforethought required for murder." *Commonwealth v. Fredette*, 480 Mass. 75, 80 (2018), quoting *Commonwealth v. Gunter*, 427 Mass. 259, 271 (1998).

As a result of this rule, a defendant who participates in an armed robbery is guilty of felony-murder in the first degree if the defendant or an accomplice commits any act that results in death, even if the act is accidental and unintended. As a result, although in every other circumstance a killing constitutes murder only where it is committed with actual malice, where the killing occurs in the commission of an inherently dangerous felony, proof of actual malice is not required[.]

*Brown*, 477 Mass. at 831 (Gants, C.J., concurring). In other words, under the rule of common-law felony murder, it was possible to have committed first-degree murder, and to receive the accompanying mandatory

sentence of life in prison without parole, without ever having possessed actual malice.

Manslaughter, by contrast, is a killing committed without malice, *Commonwealth v. Pina*, 481 Mass. 413, 422-423 (2019), and accordingly sentenced much less severely. See *Tejeda*, 473 Mass. at 279. Involuntary manslaughter "is defined as 'the unintentional result of an act committed with such disregard of its probable harm to another as to amount to wanton or reckless conduct.'" *Pina*, 481 Mass. at 422-423, quoting *Commonwealth v. Souza*, 428 Mass. 478, 492 (1998). In this scenario, by engaging in a frightening armed robbery that made the victim fear for his life, the defendant and his coventurer created a high degree of likelihood that the victim would, if able, respond with deadly force.

It is not necessary that the defendant have intended or wanted the death to occur, nor is it even necessary that he personally have foreseen that the death might occur:

"The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." [*Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944)]. See *Commonwealth v. Gallison*,

383 Mass. 659, 665 (1981). Moreover, we have approved jury instructions which stated that "even if a particular defendant is so stupid [or] so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary normal man under the same circumstances would have realized the gravity of the danger." *Commonwealth v. Welansky*, supra at 398-399. See *Commonwealth v. Godin*, 374 Mass. 120, 129, cert. denied, 438 U.S. 917 (1977). Thus, under *Welansky*, a defendant's subjective awareness of the reckless nature of his conduct is sufficient, but not necessary, to convict him of involuntary manslaughter. Conduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice as well.

*Commonwealth v. Catalina*, 407 Mass. 779, 789 (1990).

And it is not inequitable to hold such a defendant responsible for something he did not intend, because he is neither being assumed as a matter of law to have intended it, or facing the prospect of being sentenced as if he had intended it. Contrast *Tejeda*, 473 Mass. 269 (noting "the extreme penalties and infamy associated with a conviction of murder"). Rather, the crime of involuntary manslaughter recognizes and punishes reckless disregard, causing death, as what it is.

As the defendant notes in his brief, in *Commonwealth v. Campbell*, 89 Mass. 541 (1863), this Court stated categorically that "[n]o person can be

held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose." *Id.* at 544. This Court quoted this language in *Tejeda*, but focused its analysis of the *Campbell* holding on its implications for felony-murder, while explicitly suggesting involuntary manslaughter as a substitute for a felony-murder charge in at least some circumstances. But as the defendant notes in his brief, *Campbell* itself draws no such distinction, and the very language quoted in *Tejeda* pertains to "homicides."

The defendant, while maintaining that *Tejeda* cannot be read to overrule *Campbell* with regard to the unavailability of a manslaughter charge, acknowledges that "the *Tejeda* language cannot be considered meaningless." He proposes some circumstances to which this *Tejeda* language might apply, such as in cases involving human shields, and concludes: "Certainly, other unique fact patterns might emerge that also illustrate exceptional cases falling outside the *Campbell* holding. At bottom, however, any application

of the 'reckless manslaughter' rule suggested by the *Tejeda* Court should be applied extremely cautiously."

While the defendant's approach is thoughtful, the Commonwealth disagrees with his reading of *Tejeda*: the language about the availability of a manslaughter charge in appropriate circumstances is in response to a contention by the Commonwealth, in that case, "that someone should be found guilty of murder for a violent death and, without the proximate cause theory of felony-murder, there is the risk that no one will be punished for the death of a bystander mistakenly shot by an armed robbery victim or by a police officer[.]" *Tejeda*, 473 Mass. at 279.

Moreover, to the extent that putting a cab driver in fear for his life, under circumstances where he cannot get away, would otherwise constitute wanton and reckless conduct foreseeably causing a death, to exempt it from classification as involuntary manslaughter can only be a policy choice. That is a choice this Court made in *Campbell*, and reiterated in *Tejeda* with regard to felony-murder: "Under the Commonwealth's 'proximate cause theory,' a joint venturer would be vicariously liable for an act resulting in death even if it were committed by a

person who was resisting the underlying felony or attempting to apprehend the persons committing it, provided that resistance or an attempt to apprehend would be reasonably foreseeable by a person initiating the underlying felony, *which it always would be.*" *Tejeda*, 473 Mass. at 275 (emphasis added). But in light of the distinctions drawn in *Tejeda* and *Brown* between felony-murder and involuntary manslaughter, and the considerable evolution in the law generally since 1863, the Commonwealth submits that if this Courts wants to continue to exempt circumstances such as those in this case from the usual rules of involuntary manslaughter, it should say so explicitly.

**STATEMENT OF REASONS WHY  
DIRECT APPELLATE REVIEW IS APPROPRIATE**

Direct appellate review is appropriate in this case because it presents a "question[] of first impression or novel question[] of law which should be submitted for final determination to the Supreme Judicial Court." Mass. R. App. P. 11(a).

As explained in the Argument, above, this case raises the question of whether the common-law crime for which the defendant was indicted is one that now exists in Massachusetts. The key dispute between the

parties is over how recent decisions by this Court are to be read in light of a much-earlier decision by this Court. More fundamentally, this case raises the question of what the law on this point *should* be, and the public-policy arguments made by both sides are best addressed by the Court that is "responsible for the content of th[e] common law." See *Brown*, 477 Mass. at 836 (Gants, C.J. concurring). For these reasons, direct appellate review is appropriate here.

Respectfully submitted,

**THOMAS M. QUINN, III**  
District Attorney

/s/ Shoshana Stern  
Shoshana E. Stern  
Assistant District Attorney  
Bristol District  
BBO # 667894  
888 Purchase Street  
New Bedford, MA 02740  
(508) 997-0711  
shoshana.e.stern@state.ma.us

**CERTIFICATE OF SERVICE**

I, Shoshana E. Stern, hereby certify that I have this date, October 20, 2021, served a copy of the Commonwealth's Petition for Direct Appellate Review, with Appendix, RE: *Commonwealth v. Kyle S. Dawson*, Appeals Court No. 2021-P-0322, on counsel for the defendant by e-filing (or e-mailing) to his attorney, Suzanne Renaud, [Suzanne.Renaud.Esq@gmail.com](mailto:Suzanne.Renaud.Esq@gmail.com).

Signed under the pains and penalties of perjury.

**/s/** Shoshana E. Stern  
Shoshana E. Stern  
Assistant District Attorney  
For the Bristol District  
BBO # 667894  
888 Purchase Street  
New Bedford, MA 02740  
Main: (508) 997-0711  
[Shoshana.E.Stern@MassMail.State.MA.US](mailto:Shoshana.E.Stern@MassMail.State.MA.US)

October 20, 2021

**CERTIFICATION**

**Commonwealth v. Kyle S. Dawson**

**DAR-\_\_\_\_\_, APPEALS COURT No. 2021-P-0322**

As counsel for the Commonwealth, I certify that this brief complies with the rules of court that pertain to the filing of petitions for direct appellate review. This petition is produced in a monospaced font, 12-point Courier New, and the Argument begins on the middle of page 8 and ends on page 16. Mass. R. App. P. 11(b).

**/s/** Shoshana E. Stern  
Shoshana E. Stern  
Assistant District Attorney  
For the Bristol District  
BBO # 667894  
888 Purchase Street  
New Bedford, MA 02740  
Main: (508) 997-0711  
[Shoshana.E.Stern@MassMail.State.MA.US](mailto:Shoshana.E.Stern@MassMail.State.MA.US)

October 20, 2021