

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

BRISTOL, SS.

2022 SITTING

2022-P-0008

IN THE MATTER OF
ROLAND F. ESCOBAR JR.

ON APPEAL FROM AN ORDER OF
THE FALL RIVER SUPERIOR COURT
DENYING THE COMMONWEALTH'S PETITION
FOR PRETRIAL DETENTION

COMMONWEALTH'S BRIEF OF THE APPELLANT

Respectfully submitted,

THOMAS M. QUINN, III
District Attorney

Mary Lee
Assistant District Attorney
For the Bristol District
BBO # 561829
888 Purchase Street
New Bedford, MA 02740
Main: (508) 997-0711
Direct: 508-961-1866
Mary.E.Lee@MassMail.state.ma.us

February 14, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ISSUES PRESENTED.....	7
STATEMENT OF THE CASE.....	8
STATEMENT OF THE FACTS.....	11
SUMMARY OF THE ARGUMENT.....	17
ARGUMENT.....	19
I. THE ALLEGED PREDICATE OFFENSES QUALIFY FOR PRETRIAL DETENTION BASED ON DANGEROUSNESS UNDER CHAPTER 276, SECTION 58A.....	19
A. BECAUSE MANSLAUGHTER REQUIRES PROOF OF CAUSATION OF THE DEATH OF A HUMAN BEING IT CONSTITUTES A CRIME THAT HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE.....	23
B. THE CRIME OF ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY REQUIRES PROOF OF THE INTENTIONAL USE, ATTEMPTED USE, OR THREATENED USE OF FORCE BECAUSE THE COMMONWEALTH MUST ESTABLISH PROOF THAT THE DEFENDANT CAUSED SERIOUS BODILY INJURY, AS OPPOSED TO A SLIGHT OR MERELY OFFENSIVE TOUCHING.....	33
C. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE.....	40
II. THE EXHIBITS SUBMITTED IN SUPPORT OF THE COMMONWEALTH’S MOTION FOR PRETRIAL DETENTION PROVIDE PROBABLE CAUSE TO SATISFY THE ELEMENTS OF AN INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY AND CLEAR AND CONVINCING EVIDENCE THAT PRETRIAL DETENTION IS THE ONLY WAY TO PROTECT THE PUBLIC.....	42
CONCLUSION.....	45
ADDENDUM.....	46
CERTIFICATE OF SERVICE.....	59
CERTIFICATION.....	60

TABLE OF AUTHORITIES

Cases

Borden v. United States,
593 U.S. ____
141 S. Ct. 1817 (2021).....29, 30, 31, 33

Commonwealth v. Ashford,
486 Mass. 450 (2020).....passim

Commonwealth v. Beal,
474 Mass. 341 (2016).....29

Commonwealth v. Burke,
390 Mass. 480 (1983).....35

Commonwealth v. Burno,
396 Mass. 622 (1986).....40

Commonwealth v. Carter,
481 Mass. 352, 369 (2019)
cert. denied, 589 U.S. ___,
140 S.Ct. 910 (2020).....25

Commonwealth v. Eberhart,
461 Mass. 809 (2012).....35

Commonwealth v. Farrell,
322 Mass. 606 (1948).....35

Commonwealth v. Ford,
424 Mass. 709 (1997).....36, 40

Commonwealth v. Garcia,
482 Mass. 408 (2019).....24

Commonwealth v. Hoyt,
461 Mass. 143 (2011).....20

Commonwealth v. Levesque,
436 Mass. 443 (2002).....25, 26

Commonwealth v. Nichypor,
419 Mass. 209 (1994).....25

<i>Commonwealth v. Novo,</i> 442 Mass. 262 (2004)	20
<i>Commonwealth v. Perez,</i> 100 Mass. App. Ct. 7 (2021)	37
<i>Commonwealth v. Pina,</i> 481 Mass. 413 (2019)	24, 25
<i>Commonwealth v. Porro,</i> 458 Mass. 526 (2010)	35
<i>Commonwealth v. Souza,</i> 428 Mass. 478 (1998)	25
<i>Commonwealth v. Thomas,</i> 469 Mass. 531 (2014)	20
<i>Commonwealth v. Twitchell,</i> 416 Mass. 114 (1993)	25, 26
<i>Commonwealth v. Vieira,</i> 483 Mass. 417 (2019)	passim
<i>Commonwealth v. Vizcarrando,</i> 427 Mass. 392 (1998) S.C., 431 Mass. 360 (2000) and 447 Mass. 1017 (2006)	24
<i>Commonwealth v. Welansky,</i> 316 Mass. 383 (1944)	25, 26, 27
<i>Commonwealth v. Wentworth,</i> 482 Mass. 664 (2019)	27, 35
<i>Commonwealth v. Young,</i> 453 Mass. 707 (2009)	22, 35
<i>Garcia v. Commonwealth,</i> 481 Mass. 1005 (2018)	20, 21
<i>Johnson v. United States,</i> 576 U.S. 591 (2015)	29
<i>L.L. v. Commonwealth,</i> 470 Mass. 169 (2014)	20-21

<i>Mendonza v. Commonwealth</i> , 423 Mass. 771 (1996).....	21
<i>Scione v. Commonwealth</i> , <i>Commonwealth v. Barnes</i> , 481 Mass. 225 (2019).....	22, 23, 33, 35, 40
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	21
<i>Vasquez v. Commonwealth</i> , 481 Mass. 747 (2019).....	24, 25

Statutes

G.L. c. 90, § 24.....	32
G.L. c. 208, § 18.....	22, 49, 54
G.L. c. 208, §§ 34B-C.....	22, 49, 54
G.L. c. 209, § 32.....	22, 49, 54
G.L. c. 209A, §§ 3-5.....	22, 49, 54
G.L. c. 209C, § 15.....	22, 49, 54
G.L. c. 209C, § 20.....	22, 49, 54
G.L. c. 265, § 13.....	8, 47
G.L. c. 265, § 13B.....	35
G.L. c. 265, § 15A(c) (i).....	8, 40, 47
G.L. c. 265, § 15A(d).....	40, 47
G.L. c. 265, § 18C.....	35
G.L. c. 265, § 19.....	35
G.L. c. 265, § 22	35
G.L. c. 265, § 22A.....	35
G.L. c. 265, § 51.....	35
G.L. c. 266, § 112.....	22

G.L. c. 269, § 10.....	22
G.L. c. 269, § 10G.....	22, 27, 48, 49
G.L. c. 272, § 77.....	22
G.L. c. 272, § 94.....	22
G.L. c. 276, § 58.....	24
G.L. c. 276, § 58A.....	passim

Rules

Mass. R. App. P. 18(e).....	8
-----------------------------	---

ISSUES PRESENTED

- I. The pretrial detention statute, G.L. c. 276, § 58A, requires that a charged offense contain an element of physical force against the person of another unless the statute specifically designates the offense as a predicate offense. Manslaughter requires proof that the defendant caused the death of a human being, thereby it requires proof of the use of deadly force against another person. Likewise, the crime of assault and battery with a dangerous weapon causing serious bodily injury requires the Commonwealth to establish proof that the defendant caused serious bodily injury, thereby requiring proof of the use of physical force against another person. Whether the alleged offenses of manslaughter and assault and battery with a dangerous weapon causing serious bodily injury, qualify as predicate offenses under section 58A?
- II. Whether the exhibits submitted in support of the Commonwealth's motion for pretrial detention provide probable cause to satisfy the elements of an intentional use of force against the victim

and clear and convincing evidence that pretrial detention is the only way to protect the public?

STATEMENT OF THE CASE

The defendant, Roland F. Escobar, Jr., was arraigned in the Taunton District Court on August 4, 2021 on a complaint numbered 2131CR001623. (A.7-9).¹ He was charged with manslaughter under G.L. c. 265, § 13, assault and battery with a dangerous weapon causing serious bodily injury under G.L. c. 265, § 15A(c)(i), motor vehicle homicide by means of operating under the influence of drugs and negligent operation, motor vehicle homicide by means of operating under the influence of drugs, operating under the influence of drugs second offense, leaving the scene of personal injury-death resulting, leaving the scene of property damage, and operation of an uninsured motor vehicle. (A.7-9, 17-19).

The Commonwealth filed a motion for the defendant to be detained under chapter 276, section 58A, the

¹ Citations to the Commonwealth's Record Appendix appear as (A.___). The two-volume transcript is cited with reference to date and page number, e.g. (TR 8-25-2021, 1). The video disc that is being mailed to this Court will be cited with reference to the name of each video, e.g. St. Pierre's Shoes video. Mass. R. App. P. 18(e).

dangerousness hearing statute, and the defendant was held pending a hearing on August 11, 2021. (A.9-10, 31). The Commonwealth alleged that manslaughter and assault and battery with a dangerous weapon causing serious bodily injury were the predicate offenses. (A.31). On August 11, 2021, the defendant was found dangerous and was held without bail by the District Court Judge, Brennan, J. (A.10, 31-33).

The defendant filed a bail petition in the Superior Court, claiming error in the order of pretrial detention, namely that there is no predicate offense alleged that would allow the Court to find him dangerous and to detain him under the dangerousness statute. (A.3, 34-36). His petition was assigned docket number 2173 BP 0163. (A.3). On August 31, 2021, the Superior Court, Green, J., denied the Commonwealth's request for pretrial detention and on September 1, 2021, the Superior Court set bail at \$10,000, with conditions. (A.4, 60-61, 62-65). Judge Green found that "the Commonwealth has not shown the charged offenses qualify as predicate offenses eligible for detention under G.L. c. 276, § 58A." (A.60).

On September 17, 2021, the Commonwealth filed a petition pursuant to chapter 211, section 3, seeking leave to appeal the denial of the motion for pretrial detention. (A.13). A Single Justice of the Supreme Judicial Court, Wendlandt, J., transferred the matter to the Appeals Court Single Justice. (A.13). The Appeals Court Single Justice, Blake, J., allowed the Commonwealth's petition for leave to appeal. (A.15).

The Single Justice of the Appeals Court found that this appeal raises important questions about whether, using an elements-based approach, manslaughter and/or assault and battery by means of a dangerous weapon causing serious bodily injury could be predicate offenses under chapter 276, section 58A and that such issues are capable of repetition, yet evading review. (A.15). The Commonwealth was permitted to file a notice of appeal by October 25, 2021. (A.15). The Commonwealth filed a timely notice of appeal on October 22, 2021. (A.97). This matter was entered in this Court on January 5, 2022. (A.16).

Meanwhile on December 21, 2021, a Bristol County grand jury returned an indictment, numbered 2173CR00399, against the defendant arising from these same factual circumstances. (A.83-95). The

indictment alleged manslaughter, manslaughter while operating a motor vehicle in violation of chapter 90, section 24(1)(a), chapter 90B, section 8A, or chapter 265, section 13½, leaving the scene of personal injury and death, assault and battery with a dangerous weapon (two counts), leaving the scene of property damage (two counts), motor vehicle homicide while under the influence of drugs, and operating under the influence of drugs. (A.83-95). The Commonwealth again moved for pretrial detention and a dangerousness hearing under chapter 276, section 58A. (A.85-86). The dangerousness hearing was not held, because this appeal was pending before this Court. (A.85-86). Since January 27, 2022, the defendant has been held without bail awaiting the dangerousness hearing. (A.86, 96). The defendant had previously been held on \$10,000 cash bail and had not posted bail since Judge Green's original bail order on September 1, 2021. (A.10-12). The Taunton District Court complaint was nolle prossed. (A.12).

STATEMENT OF THE FACTS

Overview

While operating his SUV on August 3, 2021, the defendant, Roland Escobar, struck approximately twelve

vehicles and hit a pedestrian, Lisa Rocha, causing her death. (A.21, 23-24, 70-74, 78).

The defendant struck Cassidy Miller's vehicle twice and then went around her vehicle by traveling in the lane reserved for parallel parking. (A.23, 70). He kept driving and crashed into Ms. Rocha who was on foot, causing her fatal injuries. (A.21, 23, 70, 72-74). While a nearby security camera did not capture the defendant's SUV hitting Ms. Rocha, the camera footage shows two parked cars shaking from the impact at that same time.² The defendant continued driving and his final impact on other cars that ended in the roll-over of his own SUV was also captured on video.³ The video-surveillance demonstrated the jaw-dropping dangerousness of the defendant's conduct and the force he used in accomplishing his crimes.

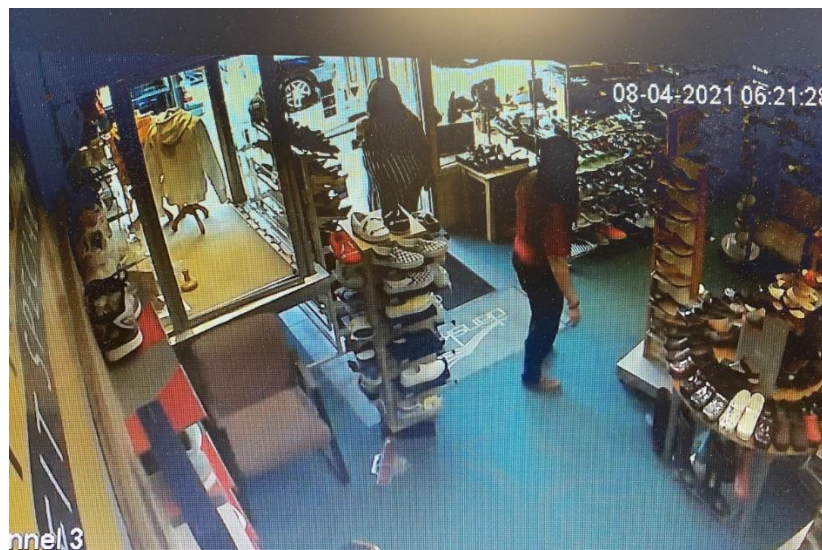
Detailed Description

² The four sets of security video were submitted as exhibits. Copies are being provided to this Court and counsel for the defendant in a separate video appendix. The St. Pierre's Shoes video show Ms. Rocha leaving a store and then, immediately after she goes outside, the two vehicles parked outside the store window shake from the impact of the collision.

³ The Taunton PD videos show the roll-over of the defendant's SUV.

On Tuesday, August 3, 2021 at approximately 4:35 p.m., the defendant was operating a Chevrolet Traverse SUV on Main Street in Taunton. (A.21, 24, 71-72, 78). While traveling on Main Street, he twice struck the rear of a vehicle being operated by Cassidy Miller, causing damage to her bumper. (A.23, 70). Ms. Miller then attempted to pull over to the right side of the road when the defendant passed her quickly on the right side of the road, partially using the lane designated for parallel parking. (A.23, 70). The defendant continued driving and side-swiped several legally parked motor vehicles with the right side of his SUV. (A.23, 70).

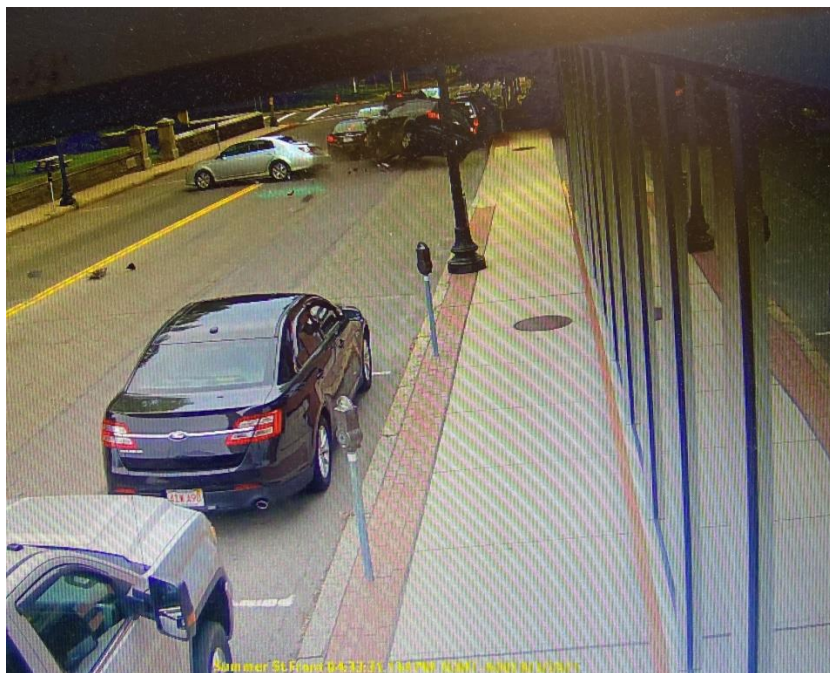
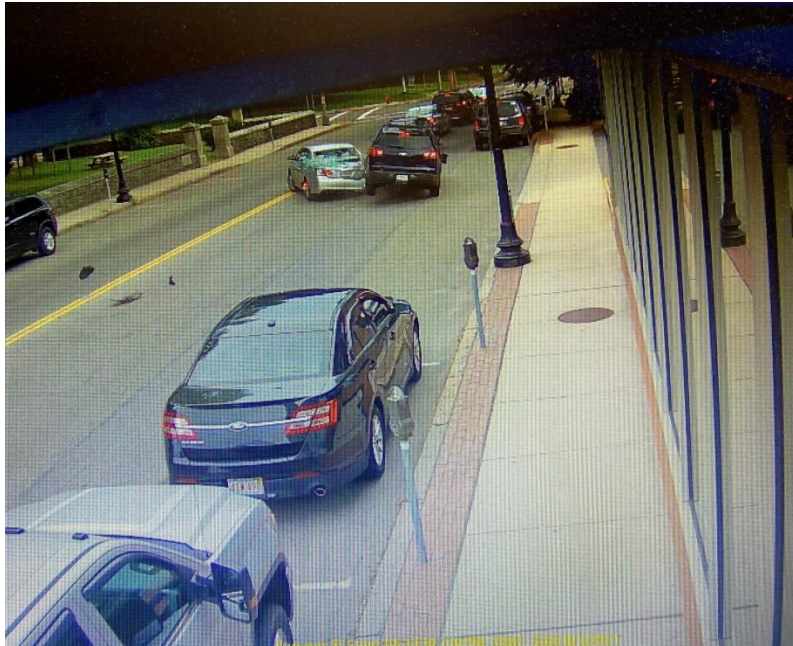
Simultaneously, Lisa Rocha, a female pedestrian was exiting St. Pierre's shoe store located at 77 Main Street. (St. Pierre's Shoes Video).



Ms. Rocha approached the driver's door of her Subaru Forrester vehicle that was legally parked in a marked parking spot on Main Street just outside of the shoe store. (A.23, 70). The defendant struck Ms. Rocha with the right front leading edge of his SUV, launching her into a Toyota Rav-4 that was parked in front of her Subaru. (A.78). Ms. Rocha suffered severe head trauma which resulted in brain exposure, extreme deep tissue torso laceration with organ injury and a compound fracture to her forearm near her elbow. (A.21, 23, 70, 72-74). Ms. Rocha was transported to Morton Hospital where she succumbed to her injuries and was pronounced dead by Dr. Zanca at 4:58 p.m. (A.73-74).

After the defendant struck Ms. Rocha, he revved his engine, spun his tires causing a screeching sound, and fled the scene. (A.21, 23, 70). He traveled east on Main Street striking a Ford F-250 being operated by Joshua Roias on the passenger side of Roias' F-250 truck. (A.23, 70). The defendant sped away from this collision and made a hard right turn onto Summer Street where his SUV rode on two wheels, almost losing control. (A.23, 70). The defendant continued traveling south on Summer Street where he rear-ended a

Toyota Avalon in the vicinity of the Taunton Police Station at 23 Summer Street. (A.23-24, 70-71, 73).



After striking that vehicle, the defendant's SUV rolled onto its right side and struck several more vehicles in the process. (A.23-24, 70-71, 73). The

defendant's SUV came to an uncontrolled final stop, after crashing into a parked Honda Pilot. (A.21, 78). Security video from the police station shows the defendant's final collision on Summer Street, where he struck a vehicle and rolled his SUV over, hitting additional vehicles. (Taunton PD video).

Police responded to the crash scene and found the defendant, unconscious but with a strong pulse. (A.24, 71). The SUV was registered to the defendant. (A.24, 71). Its registration was revoked for insurance cancellation and it had an expired temporary plate. (A.24, 71). The SUV was still running, while on its side. (A.73). The police removed the defendant through the SUV's front window. (A.24, 71). First responders noticed that the defendant displayed signs and symptoms of an opiate-induced overdose and administered Narcan. (A.24, 71, 73, 78). The defendant was transported to Good Samaritan Hospital in Brockton. (A.24, 71, 73, 78).

At the hospital, the defendant was conscious and alert. (A.21, 24, 71). He agreed to speak to police after being advised of his *Miranda* rights at approximately 7:02 p.m. (A.21, 24, 71). He stated that he was cut off by a vehicle making a U-turn,

causing him to strike a parked vehicle. (A.24, 71). He then stated that he "blacked out" and woke up in an ambulance. (A.24, 71). He admitted to consuming two shots of Fireball Whiskey, Gabapentin and Oxycodone prior to the crash. (A.24, 71). He said that the Oxycodone that he consumed may have contained Fentanyl. (A.24, 71). The police placed the defendant under arrest, following his interview. (A.24, 71).

SUMMARY OF THE ARGUMENT

I. The Commonwealth has appealed from the Superior Court judge's ruling that manslaughter and assault and battery with a dangerous weapon causing serious bodily injury are not predicate offenses under the pretrial detention statute. G.L. c. 276, § 58A. The Commonwealth must show that each of these crimes has as an element the use, attempted use or threatened use of physical force against the person of another. Manslaughter requires proof that the defendant caused the death of another person, thereby requiring proof of the use of physical force against that person. Assault and battery with a dangerous weapon requires proof that the defendant caused serious bodily injury against another person, thereby requiring proof of the

use of physical force. These crimes have a required element of the use of force, whether they are analyzed under an elements-based test or a modified categorical approach. *Infra*, pp.19-42.

II. The record before the Superior Court and this Court support probable cause for intentional assault and battery with a dangerous weapon causing serious bodily injury. The defendant's driving in this case was egregious. When a crime can be committed with either intentional or reckless acts, the Supreme Judicial Court has permitted a review of the circumstances of the crime under the modified categorical approach in determining whether a crime is a violent crime under the ACCA. *Commonwealth v. Ashford, infra*. If the *Ashford* analysis regarding intentional conduct is applied to section 58A detention hearings, then the modified categorical approach must also be included in that framework. The defendant's conduct here showed intentional use of physical and fatal force against the victim. *Infra*, pp.42-45.

ARGUMENT

I. THE ALLEGED PREDICATE OFFENSES QUALIFY FOR PRETRIAL DETENTION BASED ON DANGEROUSNESS UNDER CHAPTER 276, SECTION 58A.

The Superior Court motion judge, Green, J., denied the Commonwealth's motion for pretrial detention, when reviewing the defendant's bail petition in reference to his District Court criminal complaint. (A.60-61). Instead, Judge Green set bail at \$10,000 cash and imposed conditions. (A.62-65). The basis for denying the motion for pretrial detention was that the "Commonwealth has not shown the charged offenses qualify as predicate offenses eligible for detention under G.L. c. 276, § 58A." (A.60). The Commonwealth was permitted to appeal, as this matter raises an important question of law capable of repetition, yet evading review.⁴ (A.15).

⁴ Because this issue was significant but is one that might never get heard without a petition pursuant to chapter 211, section 3, it was not rendered moot by the setting of bail which was not posted, the nolle prosequi on the District Court complaint, or the indictment in Superior Court. Regardless, the Superior Court has ordered that the defendant be held without bail awaiting the pretrial detention hearing, if permitted by this appeal. (A.96). In this respect, the question of the applicability of section 58A to manslaughter remains a live issue, though the defendant was not indicted on assault and battery with a dangerous weapon causing serious bodily injury. (A.83-95).

As noted by the parties and the Superior Court at the hearing, this is a pure question of law. (TR 8-18-2021, 3, 8; TR 8-25-2021, 4). This Court can review the documentary and video evidence in the same manner as the Superior Court judge. *Commonwealth v. Thomas*, 469 Mass. 531, 535, n.4 (2014) (in reference to video evidence, unlike live testimony, an appellate court is in the same position as the motion judge to determine the facts and independently make the required determination). Where a motion judge only reviews documentary evidence, this Court gives no deference to the motion judge's findings. *Commonwealth v. Hoyt*, 461 Mass. 143, 148 (2011) ("In such cases, '[w]e have consistently held that lower court findings based on documentary evidence available to an appellate court are not entitled to deference.'") quoting *Commonwealth v. Novo*, 442 Mass. 262, 266 (2004).⁵ A ruling on pretrial detention under chapter 276, section 58A is reviewed for a clear error of law or abuse of discretion. *Garcia v. Commonwealth*, 481 Mass. 1005, 1006 (2018); *L.L. v.*

⁵ *Novo* was overruled in part on other grounds. *Thomas*, 469 Mass. at 542 (invocation of right to counsel).

Commonwealth, 470 Mass. 169, 185, n.27 (2014). Here, however, the Superior Court decided the matter as a pure question of law. (A.60; TR 8-18-2021, 3, 8; TR 8-25-2021, 4). Therefore, this Court should review the ruling to determine whether the Superior Court made a clear error of law. See *Garcia v. Commonwealth*, 481 Mass. at 1006.

Under chapter 276, section 58A, the dangerousness hearing statute, the Commonwealth may petition the trial court for the pretrial detention of a defendant where “no conditions of release will reasonably ensure the safety of any other person or the community.” G.L. c. 276, § 58A. See also *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996). “The practice of pretrial detention on the basis of dangerousness has been upheld as constitutional because the Legislature ‘carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes....’” *Commonwealth v. Vieira*, 483 Mass. 417, 421 (2019) citing *United States v. Salerno*, 481 U.S. 739, 747, 750 (1987). In order for the Commonwealth to petition for the defendant to be detained prior to trial, there must be a predicate

offense under chapter 276, section 58A(1). See also *Commonwealth v. Young*, 453 Mass. 707, 711 (2009).

The Legislature specifically enumerated predicate offenses in section 58A.⁶ The statute also allows for the Commonwealth to move for pretrial detention on felonies that "ha[ve] as an element of the offense the use, attempted use or threatened use of physical force against the person of another" (force clause). G.L. c. 276, § 58A. See also *Scione v. Commonwealth*, *Commonwealth v. Barnes*, 481 Mass. 225, 227 (2019). In determining whether a crime qualifies under the force clause of section 58A, the Supreme Judicial Court employs a categorical approach by looking to the elements of the offense rather than the facts of the

⁶ *Scione v. Commonwealth/Commonwealth v. Barnes*, 481 Mass. 225, 227, n. 2 (2019): "The enumerated offenses in § 58A (1) include the following: 'the crimes of burglary and arson whether or not a person has been placed at risk thereof,... a violation of an order pursuant to [G.L. c. 208, § 18, 34B, or 34C; G.L. c. 209, § 32; G.L. c. 209A, § 3, 4, or 5; or G.L. c. 209C, § 15 or 20],... arrested and charged with a violation of [G.L. c. 269, § 10 (a), (c), or (m); G.L. c. 266, § 112; or G.L. c. 272, §§ 77, 94], or arrested and charged with a violation of [G.L. c. 269, § 10G].'" The non-categorical approach has been applied to section 58A regarding the abuse clause, where abuse is not an element of any criminal offense. *Scione*, 481 Mass. at 236-237.

alleged conduct. *Id.* at 228; *Vieira*, 483 Mass. at 422.

A. BECAUSE MANSLAUGHTER REQUIRES PROOF OF CAUSATION OF THE DEATH OF A HUMAN BEING IT CONSTITUTES A CRIME THAT HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE.

Section 58A does not list manslaughter as a predicate offense.⁷ Where the victim and the defendant were strangers with no prior relationship, the Commonwealth must, therefore, base its motion on a crime that has an element of the use, attempted use, or threatened use of physical force. G.L. c. 276, § 58A; *Scione*, 481 Mass. at 228-230 (aggravated rape of a child does not have that element); *Vieira*, 483 Mass. at 418 (indecent assault and battery on a child does not have that element).

However, a crime that includes an element of causation of death does have the element of use,

⁷ The residual clause, “any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result,” was deemed unconstitutionally vague in *Scione v. Commonwealth*, *Commonwealth v. Barnes*, 481 Mass. at 230. The Single Justice mistakenly stated that the Commonwealth was proceeding under the residual clause. (A.15). The Commonwealth has been proceeding under the force clause, “the use, attempted use or threatened use of physical force,” throughout these proceedings. (A.49-56; TR 8-18-2021, 6-7; TR 8-25-2021, 4, 10, 15-16, 19-20).

attempted use, or threatened use of physical force.
See *Vasquez v. Commonwealth*, 481 Mass. 747, 748
(2019). The *Vasquez* Court held that a defendant
charged with murder (who has no right to bail under
G.L. c. 276, § 58) still falls within the umbrella of
section 58A when determining dangerousness for
purposes of whether to impose bail. *Id.* at 758.
“[E]ven where a defendant has been charged with murder
in the first degree, a judge must still follow the
procedures established in G.L. c. 276, § 58A, before
denying bail if the judge would have released the
defendant on bail but for the danger the defendant
poses to the community.” *Id.*

The difference between murder and manslaughter is
intent, as opposed to the absence of force.
Commonwealth v. Garcia, 482 Mass. 408, 410-411 (2019).
“[M]anslaughter is defined as an unlawful killing
without malice.” *Commonwealth v. Pina*, 481 Mass. 413,
422 (2019). “Malice is what distinguishes murder from
manslaughter.” *Commonwealth v. Vizcarrando*, 427 Mass.
392, 396 (1998), S.C., 431 Mass. 360 (2000) and 447
Mass. 1017 (2006).

Even the offense of involuntary manslaughter is
distinguished from murder on the element of intent,

rather than force, where 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), quoting *Commonwealth v. Nichypor*, 419 Mass. 209, 217 (1994). Where murder falls within the umbrella of section 58A, *Vasquez*, 481 Mass. at 748, then its lesser included offense, distinguishable only on the element of intent, *Pina*, 481 Mass. at 422-423, necessarily falls within that umbrella of dangerousness as well.

It is true, that the force element in manslaughter may be attenuated. See *Commonwealth v. Welansky*, 316 Mass. 383, 396-399 (1944) (locking emergency exit caused death of people trapped by fire); *Commonwealth v. Twitchell*, 416 Mass. 114, 118 (1993) (parents were properly charged with manslaughter for failure to get medical treatment for their child who died from illness); *Commonwealth v. Levesque*, 436 Mass. 443, 454 (2002) (setting fire that got out of control and then leaving without alerting authorities caused death of firefighters); see also *Commonwealth v. Carter*, 481 Mass. 352, 369 (2019),

cert. denied, 589 U.S. ___, 140 S.Ct. 910 (2020) (defendant did not personally inflict bodily harm but involuntary manslaughter in the circumstances inherently involved infliction of serious bodily harm).

The force in manslaughter need not be directly applied against the victim, where the defendant has committed an intentional act that foreseeably set in motion the danger that deadly force will be applied against the victim. *Welansky*, 316 Mass. at 396-399; *Levesque*, 436 Mass. at 454; *Twitchell*, 416 Mass. at 118. Each manslaughter victim suffers life-ending physical force, regardless of whether it is applied directly or as the natural and probable consequence of the defendant's conduct. In sum, the case law shows that the element of causing a death is equivalent to an element of force. Under a categorical approach, based solely on the elements of the crime of manslaughter, the Superior Court erred in ruling that manslaughter did not qualify as a predicate offense under section 58A. (A.60).

Alternatively, the Commonwealth can meet its burden using a modified categorical approach. The case law has compared the pretrial detention statute

to the armed career criminal statute, (hereinafter ACCA) G.L. c. 269, § 10G, because the ACCA's definition of "violent crime" uses language similar to the force clause in chapter 276, section 58A. *Vieira*, 483 Mass. at 426. In construing the ACCA, the Supreme Judicial Court employed an elements-based categorical approach to the definition of violent crime when assessing proof of a requisite prior conviction, except when an offense could be proven under either a qualifying or non-qualifying theory. *Commonwealth v. Wentworth*, 482 Mass. 664, 671 (2019). When an offense includes both a qualifying and non-qualifying theory, a fact-based modified categorical approach is necessary, e.g. when assessing the sufficiency of a conviction of assault and battery. *Id.* at 671-672.

Since manslaughter can be accomplished through a direct use of force or an indirect use of force, as in *Welansky, supra*, then a modified categorical approach is also available in manslaughter cases. Under the modified categorical approach, the circumstances of this manslaughter are sufficient to show a direct and intentional use of force, where the defendant rammed the car in front of him twice, barreled his SUV down the lane used for parking, fatally struck the

pedestrian victim, and took off. (A.21, 23-24, 70-74, 78; attached videos). The modified categorical approach is satisfied by demonstrating that the defendant used actual force by means of his SUV against the now-deceased pedestrian. (A.21, 23, 70-74; St. Pierre's Shoes Video). "Therefore, under the modified categorical approach, it should not be difficult for the Commonwealth to prove that a defendant intentionally has used force or a deadly weapon against the person of another, in those instances where the defendant actually did do so." *Commonwealth v. Ashford*, 486 Mass. 450, 468 (2020).

The *Ashford* decision also raised the question of intent. The Supreme Judicial Court interpreted the definition of "violent crime" in the ACCA requiring proof of the *intentional* use, threatened use, or attempted use of force in order to prove a violent crime. *Ashford*, 486 Mass. at 467-468. Even if the required intent set out in *Ashford* is applied in the context of section 58A, manslaughter requires an intentional act that foreseeably set in motion the application of force to another human being. As shown above, the Commonwealth's burden is satisfied under the modified categorical approach.

The *Ashford* Court made no ruling on the requirement of intentional use of force in the pretrial detention statute, *id.*, though the *Vieira* Court previously noted the similarity of definitions in the dangerousness statute and the armed career criminal statute. *Vieira*, 483 Mass. at 426. This case, therefore, also presents a new question of law as to whether the *Ashford* analysis even applies to section 58A.

The analysis in the Massachusetts ACCA cases have been driven by the federal case law on the similar federal statute. See *Commonwealth v. Beal*, 474 Mass. 341, 349–351 (2016) adopting analysis in *Johnson v. United States*, 576 U.S. 591, 606 (2015). Even the *Ashford* Court notes that federal law was persuasive, though not binding. *Ashford*, 486 Mass. at 466. In June, 2021, the United States Supreme Court determined that the definition of “violent crime” in the federal armed career criminal law was satisfied by proof of purposeful and knowing conduct, but not recklessness or negligence. *Borden v. United States*, 593 U.S. ___, 141 S. Ct. 1817, 1822 (2021). When describing the purposeful and knowing conduct that satisfies the federal armed career criminal law, the *Borden* Court

described a fact pattern very similar to the one presented here:

Purposeful conduct is obvious. Suppose a person drives his car straight at a reviled neighbor, desiring to hit him. The driver has, in the statute's words, "use[d] . . . physical force against the person of another." The same holds true for knowing behavior. Say a getaway driver sees a pedestrian in his path but plows ahead anyway, knowing the car will run him over. That driver, too, fits within the statute: Although he would prefer a clear road, he too drives his car straight at a known victim. Or said otherwise, both drivers (even though for different reasons) have consciously deployed the full force of an automobile at another person.

Borden v. United States, 141 S. Ct. at 1826-1827

(distinguishing a fatal collision where a driver, who was rushing because he was running late, simply did not see the pedestrian). The evidence here shows purposeful and knowing conduct. This Court should once again follow the federal precedent and adopt this language from *Borden*. *Id.* If this standard is sufficient for proof at a federal trial, it must be sufficient to meet the lesser standard of proof at a pretrial detention hearing in the Commonwealth.

The *Ashford* Court acknowledged that its holding, requiring intentional use of force, seemed counterintuitive but ruled as it did to ensure that armed career criminal convictions were based on

sufficient proof of the elements, rather than arbitrary decision-making or vague instincts. *Ashford*, 486 Mass. at 467. The ACCA is intended to look backward to a person's criminal history for the purposes of according an appropriate punishment. Unlike the ACCA, the purpose of the dangerousness statute, public safety, is forward-looking. G.L. c. 276, § 58A (2) ("If the judicial officer determines that personal recognizance... *will* endanger the safety of any other person or the community....") (emphasis added). Section 58A protects the public from a defendant's anticipated future criminal conduct and his likelihood of future bad conduct that foreseeably and irreparably will harm the public.

The dangerousness statute is not a statute designed to punish the defendant, after a conviction based on a finding of proof beyond a reasonable doubt. It is a statute to prevent repetitive dangerous conduct after a showing of probable cause for a predicate offense and clear and convincing evidence that there are no conditions of release that would ensure the safety of the public. The *Borden* Court's example, which so closely tracks the facts of the defendant's case, demonstrates that the defendant's

conduct here does indeed qualify as dangerous and that such a finding is consistent with the protection of the defendant's constitutional rights.

The inclusion of manslaughter within section 58A's application is consistent with the Legislature's intent to detain dangerous persons, because the wanton and reckless conduct that underlies the crime of manslaughter is dangerous per se, as the facts of this case perfectly illustrate. The possibility that the pretrial release of the defendant might result in a repetition of the conduct that led to the charges against him here poses an obvious danger to every person who travels on Massachusetts roadways.

The statute itself allows for the detention of individuals who have committed less serious crimes, including misdemeanors involving abuse, as well as a charge of a third or subsequent operating while under the influence of liquor, G.L. c. 90, § 24. Additionally, under the precise language of the statute's force clause, a felony involving the mere threat of force is sufficient for the Commonwealth to move for pretrial detention. Here, the defendant applied deadly force to the victim with his SUV and the Superior Court's ruling that this charge was not a

crime encompassed within the force clause of section 58A is clear error.

In sum, using a categorical approach, the crime of manslaughter is a felony that has the element of the use of physical force against another in the requirement of proof of causation of death. *Scione*, 481 Mass. at 227; *Vieira*, 483 Mass. at 422. Using a modified categorical approach, the facts of this case demonstrate the defendant's use of force against the deceased victim when the defendant hit her with his SUV and sped away. The requisite intent is similarly supported by probable cause, as shown in the United States Supreme Court analysis in *Borden*. The Superior Court erred in finding that manslaughter did not qualify as predicate offense eligible for detention proceedings under G.L. c. 276, § 58A. (A.60).

B. THE CRIME OF ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY REQUIRES PROOF OF THE INTENTIONAL USE, ATTEMPTED USE, OR THREATENED USE OF FORCE BECAUSE THE COMMONWEALTH MUST ESTABLISH PROOF THAT THE DEFENDANT CAUSED SERIOUS BODILY INJURY, AS OPPOSED TO A SLIGHT OR MERELY OFFENSIVE TOUCHING.

Assault and battery with a dangerous weapon and its aggravated offense for causing serious bodily injury is not among the crimes explicitly enumerated

as a predicate offense permitting pretrial detention under G.L. c. 276, § 58A. See footnote 6, *supra* at page 22. The Commonwealth based its motion for pretrial detention on the element of use, attempted use, or threatened use of physical force in assault and battery with a dangerous weapon, causing serious bodily injury. G.L. c. 276, § 58A. (A.31).⁸

The *Ashford* Court observed that where a crime is “inherently violent”, the categorical approach applies. *Ashford*, 486 Mass. at 459 (determining that a certified conviction of assault and battery with a dangerous weapon alone was not proof of a violent crime under ACCA because of the absence of proof of intentional use of force). Here, the Commonwealth maintains that the complaint for assault and battery with a dangerous weapon, causing serious bodily injury shows dangerousness by means of a use of force because of the allegation that the defendant caused serious bodily injury. (A.17, 23-24, 70-71). The charge itself demonstrates that this was no mere offensive,

⁸ Under the indictment, the defendant was not charged with assault and battery with a dangerous weapon causing serious bodily injury. (A.82-96).

but otherwise harmless, assault and battery. Contrast *Vieira*, 483 Mass. at 424.

Our analysis turns on "the elements of the offense, rather than the facts of or circumstances surrounding the alleged conduct." [*Scione*, 481 Mass. at 228], citing [*Commonwealth v.*] *Young*, 453 Mass. [707,] 711-712 [(2009)]. That is to say, we look at the definition of the crime, rather than the facts of any one particular case. See *Commonwealth v. Wentworth*, 482 Mass. 664, 671 (2019) (noting that strict elements-based approach is appropriate where defendant has no right to trial by jury during dangerousness proceeding). Where "physical force" is an element of the offense charged, the offense qualifies under the statute. See [*Scione*], *supra* at 235-236 (setting forth, as examples, "G.L. c. 265, § 22A [rape of child]; G.L. c. 265, § 22 [rape]; G.L. c. 265, § 18C [home invasion]; G.L. c. 265, § 19 [unarmed robbery]; G.L. c. 265, § 51 [human trafficking – 'forced services']").

Vieira, 483 Mass. at 422 (footnote omitted).

"Harmful battery is "[a]ny touching 'with such violence that bodily harm is likely to result.'" *Commonwealth v. Burke*, 390 Mass. 480, 482 (1983) (superseded by statute, G.L. c. 265, § 13B, on other grounds), quoting *Commonwealth v. Farrell*, 322 Mass. 606, 620 (1948). Reckless battery is a "wilful, wanton and reckless act which results in personal injury to another" (citation omitted). *Commonwealth v. Eberhart*, 461 Mass. 809, 818 (2012); see also *Commonwealth v. Porro*, 458 Mass. 526, 529 (2010).

Intentional assault and battery by means of a dangerous weapon requires the Commonwealth to prove that the defendant committed an "intentional, unjustified touching, however slight, by means of [a] dangerous weapon". *Commonwealth v. Ford*, 424 Mass. 709, 712 (1997). The elements of the crime of assault and battery with a dangerous weapon involve the use, attempted use, or threatened use of physical force against another. The crime charged requires that a dangerous weapon be used in the unjustified and harmful touching of another person. The use of a dangerous weapon against another is the prototypical felony involving the use of force and attempted use of force against another person. The element of causing serious bodily injury indicates far more than a trifling amount of force being used on the victim. Intentional assault and battery with a dangerous weapon is a predicate offense. *Ashford*, 486 Mass. at 467-468 (construing ACCA's "violent crime").

The defendant claimed before the Superior Court that the Commonwealth must prove that the underlying offense was intentional in order for the offense to qualify as a predicate offense. (A.38). While the Supreme Judicial Court held that the force clause in

the ACCA's definition of "violent crime" was not proven merely through a conviction for assault and battery with a dangerous weapon, without more, *Ashford*, 486 Mass. at 467-468, *Ashford* did not address the pretrial detention statute at all. The Appeals Court, likewise followed suit in construing the term "violent crime" in the ACCA. *Commonwealth v. Perez*, 100 Mass. App. Ct. 7, 15 (2021). But see *Vieira*, 483 Mass. at 426 (noting similarity between definition of violent crime and the force clause in dangerousness statute).

As argued in the above section pertaining to manslaughter, *supra* at pages 30 to 32, the two statutes involve entirely different parts of statutory criminal procedure and serve different purposes. Chapter 276, section 58A is a statute involving pretrial detention and focuses on the detention of the defendant at the outset of the criminal case prior to any allegations being proven against him. The ACCA is a statute that allows for the imposition of sentencing enhancements after an individual has been convicted of a qualifying underlying criminal offense. The ACCA requires the Commonwealth to prove beyond a reasonable doubt that the defendant has prior criminal

convictions for violent crimes, while the dangerousness statute only requires the Commonwealth to allege a predicate offense upon the issuance of a complaint (probable cause) and then show by clear and convincing evidence that there are no conditions of release that would ensure the safety of the public. The ACCA sets forth the elements to be proven against the defendant at trial while the dangerousness statute is designed to protect the safety of the public while a criminal defendant awaits trial, simultaneously balancing the defendant's constitutional rights.

This case illustrates that the analysis for determining sufficiency of the evidence for the sentencing enhancement phase of a trial is ill-suited to the wholly different context of a preliminary determination of dangerousness. The question at issue here is whether force is alleged. As with the causation element in manslaughter, the defendant likewise cannot cause serious bodily injury without the application of force on another human being, particularly where the complaint here requires that the force be applied by means of a dangerous weapon. This Court should not require the Commonwealth to prove that a defendant's conduct was intentional in a

petition for pretrial detention under chapter 276, section 58A.

The Commonwealth has alleged assault and battery with a dangerous weapon, causing serious bodily injury, which is a felony offense that alleges the use, attempted use, or threatened use of physical force against another. The Commonwealth is not required to prove a predicate offense under section 58A; the Commonwealth only has to allege a predicate offense that has issued based on a finding of probable cause and then show clear and convincing evidence that there are no conditions of release that would ensure the safety of the public.

Nor does the pretrial detention statute require the Commonwealth to declare what theory it is proceeding under, at the time of the arraignment. The mere allegation of assault and battery with a dangerous weapon, causing serious bodily injury, is a predicate offense under section 58A's force clause. The categorical approach mandated by the Supreme Judicial Court in interpreting section 58A requires a determination whether the elements of the felony include the use, attempted use or threatened use of physical force against another, without reference to

intent. G.L. c. 276, § 58A; *Scione*, 481 Mass. at 227; *Vieira*, 483 Mass. at 422. As noted above, assault and battery with a dangerous weapon, whether causing serious bodily injury or not, has an intentional prong. But whether or not a person's behavior is intentional does not determine whether it is dangerous.

C. RECKLESS ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY HAS AS AN ELEMENT THE USE, ATTEMPTED USE, OR THREATENED USE OF FORCE.

Reckless assault and battery by means of a dangerous weapon requires the Commonwealth to prove an "intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another" by means of a dangerous weapon. *Ford*, 424 Mass. at 711. With respect to reckless assault and battery with a dangerous weapon, the injury must have interfered with the health or comfort of the victim. *Commonwealth v. Burno*, 396 Mass. 622, 627 (1986). Chapter 265, section 15A(c)(i) requires the Commonwealth to prove that the defendant caused a serious bodily injury. Section 15A(d) defines serious bodily injury as "bodily injury which results in permanent

disfigurement, loss of impairment of bodily function, limb or organ, or a substantial risk of death.” The element of causing a serious bodily injury is the equivalent of the use of physical force.

The inclusion of reckless assault and battery with a dangerous weapon causing serious bodily injury within section 58A’s force clause is consistent with the Legislature’s intent to detain dangerous persons. The conduct, whether intentional or wanton and reckless, that underlies the crime of assault and battery with a dangerous weapon causing serious bodily injury is dangerous per se, as the facts of this case perfectly illustrate. A motor vehicle can be an extremely dangerous weapon as demonstrated by the defendant’s operation in this case. This analysis is consistent with the Legislature’s intent in the statute to detain defendants prior to trial when they are charged with dangerous crimes.

While the Supreme Judicial Court held that reckless assault and battery did not qualify as an offense under the definition of “violent crime” in the ACCA in *Ashford, supra*, this Court should not extend that holding to the force clause of chapter 276, section 58A, given the difference between those two

statutes both in their purpose and their requisite levels of proof. The purpose of the pretrial detention statute is to detain people who are charged with dangerous offenses and one would be hard pressed to find a more serious scenario than one resulting in death or one more dangerous where a defendant places innocent and unsuspecting bystanders in harm's way.

II. THE EXHIBITS SUBMITTED IN SUPPORT OF THE COMMONWEALTH'S MOTION FOR PRETRIAL DETENTION PROVIDE PROBABLE CAUSE TO SATISFY THE ELEMENTS OF AN INTENTIONAL ASSAULT AND BATTERY WITH A DANGEROUS WEAPON CAUSING SERIOUS BODILY INJURY AND CLEAR AND CONVINCING EVIDENCE THAT PRETRIAL DETENTION IS THE ONLY WAY TO PROTECT THE PUBLIC.

The Commonwealth is not required to declare its theory of prosecution at arraignment. However, the facts before the Superior Court and this Court support probable cause for intentional assault and battery with a dangerous weapon causing serious bodily injury. The defendant's driving in this case was egregious. It is hard to fathom a situation that would pose more of a danger to members of the public than the facts before this Court. (A.21-24, 70-74, 78; video evidence).

The defendant intentionally struck a vehicle from behind twice before intentionally and illegally passing that vehicle on the right side of the road.

(A.23, 70, 73-74, 78). He then struck several parked vehicles but nevertheless continued to drive, despite the collisions. (A.23, 70, 73-74, 78). He then struck the victim who was on foot, killing her. (A.23, 70, 73-74, 78). After slamming into the victim, the defendant intentionally fled the scene at a high rate of speed while revving his engine and spinning his tires. (A.23, 70, 73-74, 78). He then struck another vehicle and still continued to drive turning onto Summer Street, where he collided with additional vehicles and rolled his SUV over, rendering himself unconscious. (A.23-24, 70-71, 73-74, 78). While this egregious behavior could certainly provide probable cause for reckless assault and battery by means of a dangerous weapon causing serious bodily injury, it also sets forth probable cause for intentional assault and battery with a dangerous weapon causing serious bodily injury.

When a crime can be committed with either intentional or reckless acts, the Supreme Judicial Court has permitted a review of the circumstances of the crime under the modified categorical approach in determining whether a crime is a violent crime under the ACCA. *Ashford*, 486 Mass. at 459-460. If the

Ashford analysis regarding intentional conduct is applied to section 58A detention hearings, then the modified categorical approach must also be included in that framework. In other words, the Commonwealth must be permitted to establish probable cause based on the facts alleged that at least one of the theories of proof for the charged crime establishes intentional use of force. Otherwise, a violent assault and battery with a dangerous weapon will be per se excluded from the dangerousness statute. For example picking up a firearm, disabling the safety, aiming it, pulling the trigger, and shooting a person would not qualify. If *Ashford* applies to the dangerousness statute, the modified categorical approach must be imported along with the requirement of intentional use of force.

The Commonwealth has shown that there is probable cause that the defendant committed an intentional assault and battery with a dangerous weapon causing serious bodily injury and a manslaughter. The Superior Court erred in concluding that the Commonwealth has not shown the charged offenses qualify as predicate offenses eligible for detention under section 58A. The Legislature's enactment of

section 58A demonstrated the public policy that dangerous people should be held in custody prior to trial. This defendant's conduct demonstrated his dangerousness. The Superior Court erred in finding that the allegations here do not warrant a finding of dangerousness.

CONCLUSION

The Commonwealth respectfully requests this Court to vacate the Superior Court's denial of the Commonwealth's motion for pretrial detention.

Respectfully submitted,

THOMAS M. QUINN III
DISTRICT ATTORNEY
BRISTOL DISTRICT

/s/ *Mary Lee*

MARY LEE
Assistant District Attorney
Bristol District
888 Purchase Street
New Bedford, MA 02740
Direct: 508-961-1866
Mary.E.Lee@MassMail.state.ma.us
BBO# 561829

February 14, 2022

ADDENDUM

1. G.L. c. 265, § 13.....	47
2. G.L. c. 265, § 15A(c) (i).....	47
3. G.L. c. 265, § 15A(d).....	47
4. G.L. c. 269, § 10G.....	48
5. G.L. c. 276, § 58A.....	49
6. Order Denying Commonwealth's Motion for Pretrial Detention.....	57

G.L. c. 265, § 13

Whoever commits manslaughter shall, except as hereinafter provided, be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail or a house of correction for not more than two and one half years. Whoever commits manslaughter while violating the provisions of sections 102 to 102C, inclusive, of chapter 266 shall be imprisoned in the state prison for life or for any term of years.

Any business organization including, without limitation, a corporation, association, partnership or other legal entity that commits manslaughter shall be punished by a fine of not more than \$250,000. If a business organization is found guilty under this section, the appropriate commissioner or secretary may debar the corporation under section 29F of chapter 29 for a period of not more than 10 years.

G.L. c. 265, § 15A(c) (i)

Whoever:

(i) by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury;...

shall be punished by imprisonment in the state prison for not more than 15 years or in the house of correction for not more than 2½ years, or by a fine of not more than \$10,000, or by both such fine and imprisonment.

G.L. c. 265, § 15A(d)

For the purposes of this section, "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

G.L. c. 269, § 10G

(a) Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph (a), (c) or (h) of section 10 shall be punished by imprisonment in the state prison for not less than three years nor more than 15 years.

(b) Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.

(c) Whoever, having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than 15 years nor more than 20 years.

(d) The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such person shall have served the minimum number of years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply

to any person 18 years of age or over charged with a violation of this section.

(e) For the purposes of this section, "violent crime" shall have the meaning set forth in section 121 of chapter 140. For the purposes of this section, "serious drug offense" shall mean an offense under the federal Controlled Substances Act, 21 U.S.C. 801, et seq., the federal Controlled Substances Import and Export Act, 21 U.S.C. 951, et seq. or the federal Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901, et seq. for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution or possession with intent to manufacture or distribute a controlled substance, as defined in section 1 of said chapter 94C, for which a maximum term of ten years or more is prescribed by law.

G.L. c. 276, § 58A

(1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions for a felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another or any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result, including the crimes of burglary and arson whether or not a person has been placed at risk thereof, or a violation of an order pursuant to section 18, 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209 A or section 15 or 20 of chapter 209C, or arrested and charged with a misdemeanor or felony involving abuse as defined in section 1 of said chapter 209A or while an order of protection issued under said chapter 209A was in effect against such person, an offense for which a mandatory minimum term of 3 years or more is prescribed in chapter 94C, arrested and charged with a violation of section 13B of chapter 268 or a charge of a third or subsequent violation of section 24 of chapter 90 within 10 years of the previous conviction for such violation, or convicted of a violent crime as defined in said section 121 of said chapter 140 for which a term of

imprisonment was served and arrested and charged with a second or subsequent offense of felony possession of a weapon or machine gun as defined in section 121 of chapter 140, or arrested and charged with a violation of paragraph (a), (c) or (m) of section 10 of chapter 269; provided, however, that the commonwealth may not move for an order of detention under this section based on possession of a large capacity feeding device without simultaneous possession of a large capacity weapon; or arrested and charged with a violation of section 10G of said chapter 269, section 112 of chapter 266 or section 77 or 94 of chapter 272.

(2) Upon the appearance before a superior court or district court judge of an individual charged with an offense listed in subsection (1) and upon the motion of the commonwealth, the judicial officer shall hold a hearing pursuant to subsection (4) issue an order that, pending trial, the individual shall either be released on personal recognizance without surety; released on conditions of release as set forth herein; or detained under subsection (3).

If the judicial officer determines that personal recognizance will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a federal, state or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

- (iv) abide by specified restrictions on personal associations, place of abode or travel;
- (v) avoid all contact with an alleged victim of the crime and with any potential witness or witnesses who may testify concerning the offense;
- (vi) report on a regular basis to a designated law enforcement agency, pretrial service agency, or other agency;
- (vii) comply with a specified curfew;
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, without a prescription by a licensed medical practitioner;
- (x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;
- (xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;
- (xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;
- (xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
- (xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

The judicial officer may at any time amend the order to impose additional or different conditions of release.

Participation in a community corrections program pursuant to chapter 211F may be ordered by the court or as a condition of release; provided, however, that the defendant shall consent to such participation.

(3) If, after a hearing pursuant to the provisions of subsection (4), the district or superior court justice finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, said justice shall order the detention of the person prior to trial. A person detained under this subsection shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court or for a period exceeding 180 days by the superior court excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2). A justice may not impose a financial condition under this section that results in the pretrial detention of the person. Nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the person to reasonably assure his appearance before the courts.

(4) When a person is held under arrest for an offense listed in subsection (1) and upon a motion by the commonwealth, the judge shall hold a hearing to determine whether conditions of release will reasonably assure the safety of any other person or the community.

The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a continuance on motion of the attorney for the commonwealth may not exceed three business days. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed. The person shall be

afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. Prior to the summons of an alleged victim, or a member of the alleged victim's family, to appear as a witness at the hearing, the person shall demonstrate to the court a good faith basis for the person's reasonable belief that the testimony from the witness will be material and relevant to support a conclusion that there are conditions of release that will reasonably assure the safety of any other person or the community. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness. The facts the judge uses to support findings pursuant to subsection (3), that no conditions will reasonably assure the safety of any other person or the community, shall be supported by clear and convincing evidence. In a detention order issued pursuant to the provisions of said subsection (3) the judge shall (a) include written findings of fact and a written statement of the reasons for the detention; (b) direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consultation with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.

(5) In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature

and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction; provided, however, that if the person who has attained the age of 18 years is held under arrest for a violation of an order issued pursuant to section 18 or 34B of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A or section 15 or 20 of chapter 209C or any act that would constitute abuse, as defined in section 1 of said chapter 209A, or a violation of sections 13M or 15D of chapter 265, said justice shall make a written determination as to the considerations required by this subsection which shall be filed in the domestic violence record keeping system.

(6) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(7) A person aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his

right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance with or without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the petition having been filed. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas

corpus for the appearance forthwith of the petitioner before the superior court.

The superior court shall in accordance with the standards set forth in section fifty-eight A, hear the petition for review under section fifty-eight A as speedily as practicable and in any event within five business days of the filing of the petition. The justice of the superior court hearing the review may consider the record below which the commonwealth and the person may supplement. The justice of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.

(8) If after a hearing under subsection (4) detention under subsection (3) is ordered or pretrial release subject to conditions under subsection (2) is ordered, then: (A) the clerk shall immediately notify the probation officer of the order; and (B) the order of detention under subsection (3) or order of pretrial release subject to conditions under subsection (2) shall be recorded in (i) the defendant's criminal record as compiled by the commissioner of probation under section 100 and (ii) the domestic violence record keeping system.

45

Findings and Order Regarding Bail, including COVID-19 factors	Docket No. 2173 BP00163 21310 P01623	Trial Court of Massachusetts The Superior Court
BRISTOL, SS SUPERIOR COURT		
Commonwealth v. <u>Roland Escobar</u>	County <u>Bristol</u>	
<input type="checkbox"/> Bail set at arraignment <input checked="" type="checkbox"/> Petition for review of bail <input type="checkbox"/> Review of bail set by magistrate <input type="checkbox"/> Changed circumstances Other: <u>MARC J. SANTOS, ESQ.</u> <u>CLERK/MAGISTRATE</u>		
After hearing, at which the Commonwealth requested <u>\$25,000</u> and the defendant requested <u>\$10,000</u>		
<input type="checkbox"/> the defendant is released on personal recognizance. <input checked="" type="checkbox"/> bail is set at \$ <u>10,000</u> cash, or \$ <u>100,000</u> surety, <input checked="" type="checkbox"/> with conditions stated on the Order of Pretrial Conditions of Release. See Bail Findings, below. <input type="checkbox"/> the petition for review of bail is denied.		
This decision is without prejudice to reconsideration, on a further showing of: _____		
Dangerousness		
<input checked="" type="checkbox"/> § 58A motion filed. The Commonwealth has moved to detain the defendant as dangerous, under G. L. c. 276, § 58A. After a hearing, I find there are conditions of release, including considerations of bail, that will reasonably assure the safety of other persons and the community, and that will reasonably assure the defendant's appearance at future court proceedings. See § 58A Findings and Order form.		
<input type="checkbox"/> No § 58A motion filed. The Commonwealth has not moved to detain the defendant as dangerous, under § 58A. Therefore, in setting bail, I have not considered whether release of the defendant will endanger the safety of any other person or the community.		
Bail Findings		
The Commonwealth has rebutted the presumption of the defendant's release on personal recognizance, according to the factors stated in G. L. c. 276, §§ 57, 58, or 58A, as appropriate; no non-financial conditions of release alone will adequately assure the defendant's future appearance before the court; and setting bail is necessary to assure the defendant's appearance at future court proceedings. Duration of pretrial incarceration to date: _____		
Amount defendant can afford		
The defendant has the ability to post bail in the amount of \$ _____ cash, based on the following (check all that apply):		
<input type="checkbox"/> the defendant is indigent <input type="checkbox"/> Probation Service intake <input type="checkbox"/> representations of (e.g., defendant, defense counsel) _____ <input type="checkbox"/> the defendant's financial resources, including income and net assets, and financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents <input type="checkbox"/> other: _____ <input checked="" type="checkbox"/> have not been presented with sufficient credible information to determine the amount of bail the defendant can post.		
the amount the defendant can afford is sufficient to assure the defendant's appearance in the future, on the conditions stated on the Order of Pretrial Conditions of Release, if any.		

* *The Commonwealth has not shown the charged offenses qualify to preclude offenses eligible for detention under G.L.C. 276, § 58A*

☐ An amount greater than the defendant can afford is necessary to assure the defendant's future appearances, based on the following:

- ☐ the charged offense(s) (strength of case, nature and circumstances, potential penalty): _____
- ☐ the defendant's background (family ties, residence status, employment, history in community, mental illness, substance use disorder): _____
- ☐ the defendant's criminal history (convictions, crimes while on bail or court supervision, probation violations): _____
- ☐ restraining orders (alleged conduct is "abuse" or violates a restraining order, history of restraining orders): _____
- ☐ the defendant's risk of flight (use of an alias, false identification, failure to appear at court proceedings, flight to avoid prosecution): _____
- ☐ The bail amount was determined by considering: _____
- ☐ The Commonwealth's interest in this bail amount outweighs the potential adverse impact of pretrial detention on the defendant and his or her immediate family or dependents.

COVID-19 factors

- ☐ the defendant is entitled to a rebuttable presumption of release because the defendant is neither detained under G. L. c. 276, § 58A, nor charged with an excepted offense under *CPCS v. CJTC*, 484 Mass. 431 (2020), Appx. A.
- ☐ the Commonwealth has rebutted the presumption of release by proving, by a preponderance of the evidence, that release would result in an unreasonable danger to the community or that the defendant presents a very high risk of flight.
 - ☐ the court imposes bail in the amount stated above for the reasons stated above.
 - ☐ the Commonwealth has not rebutted the presumption of release.
 - ☐ the court orders the defendant released on personal recognizance on conditions, if any.
- ☐ the defendant is not entitled to a rebuttable presumption of release because the defendant is either detained under § 58A, or charged with a violent or otherwise serious offense excepted by *CPCS v. CJTC*
- the court ☐ imposes ☐ declines to impose bail in an amount higher than the defendant can afford after considering the following factors:
 - the general risk of the defendant's exposure to COVID-19 in custody
 - the defendant ☐ is ☐ is not particularly vulnerable to COVID-19 due to a ☐ preexisting medical condition or ☐ advanced age
 - if released, the defendant ☐ would ☐ would not pose a safety risk to the victim, the victim's family, witnesses, the community, or the defendant
 - the proposed release plan ☐ will ☐ will not ensure the safety of the defendant and others
 - probation detainee: violation(s) is ☐ alleged new offense ☐ technical

If the defendant is released, and if the defendant has tested positive or is symptomatic for COVID-19, or is in quarantine, this order will take effect after completion of quarantine.

Further explanation: _____

Additional conditions of release: ☐ no additional conditions are required; ☒ the defendant shall abide by the conditions stated on the Order of Pretrial Conditions of Release, or the G. L. c. 276, § 58A form, if applicable, which conditions are necessary and sufficient reasonably to assure the safety of other persons and the community, and the defendant's appearances at future court proceedings.

Date: 8/21/21

Superior Court Justice: Karen F. Ryan

Jan. 28, 2021

CERTIFICATE OF SERVICE

I, Mary Lee, hereby certify that I have this date, February 14, 2022, served a copy of the Commonwealth's Brief RE: *In The Matter Of Roland F. Escobar Jr.*, Appeals Court No. 2022-P-0008, on counsel for the defendant by e-filing or e-mailing to the office of

James M. Caramanica
120 North Main Street, Suite 306
Attleboro, MA 02703
caramanicalaw@gmail.com

Signed under the pains and penalties of perjury.

/s/ Mary Lee

Mary Lee
Assistant District Attorney
For the Bristol District
BBO # 561829
888 Purchase Street
New Bedford, MA 02740
Main: (508) 997-0711
Direct: 508-961-1866
Mary.E.Lee@MassMail.state.ma.us

February 14, 2022

CERTIFICATION

**In The Matter Of Roland F. Escobar Jr.,
2022-P-0008**

As counsel for the Commonwealth, I certify that this brief complies with the rules of court that pertain to the filing of briefs. This brief is produced in monospaced font, Courier New 12, and contains no more than 50 pages from the statement of the issues through the conclusion. Mass. R. App. P. 16(k), 20(a)(2).

/s/ Mary Lee

Mary Lee
Assistant District Attorney
For the Bristol District
BBO # 561829
888 Purchase Street
New Bedford, MA 02740
Main: (508) 997-0711
Direct: 508-961-1866
Mary.E.Lee@MassMail.state.ma.us

February 14, 2021