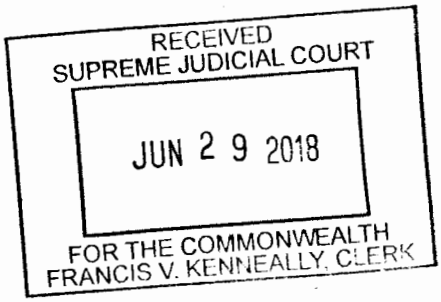
COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. No. SJC-12502

COMMONWEALTH

v.

MICHELLE CARTER



Brief of Defendant-Appellant Michelle Carter on Appeal from the Bristol County Juvenile Court

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

1. Whether Carter was wrongfully convicted of a form of involuntary manslaughter for which she was never charged where the grand jury indicted for affirmative acts but the verdict relied on a failure to act?

2. Whether the evidence at trial was insufficient to prove that (a) Carter committed any wanton or reckless act, or (b) Carter wantonly and recklessly failed to act, and (c) her conduct, whether by commission or omission, proximately caused Roy to commit suicide?

3. Whether the common law of involuntary manslaughter, as applied to encouraging suicide, is unconstitutionally vague because it fails to give adequate notice and invites arbitrary enforcement?

4. Whether the common law of involuntary manslaughter, as applied to encouraging suicide, unlawfully penalizes and chills protected speech?

5. Whether Carter was wrongfully convicted as a youthful offender, because she did not "inflict" any injury on Roy, as G.L. c.119, § 54 requires?

6. Whether the judge improperly failed to apply a reasonable juvenile standard to Carter's conduct given the evolving understanding of adolescent psychology?

7. Whether the judge violated Carter's right to present a defense and abused his discretion by excluding all expert testimony on adolescent psychology, which was relevant to Carter's culpability?

INTRODUCTION

On the night of July 12-13, 2014, Conrad Roy, III, parked his truck near Kmart in Fairhaven, started a portable pump taken from his grandfather's company, filled the truck with carbon monoxide, and committed suicide. 18-year-old Roy acted alone, as he had in his prior suicide attempts. At the time, 17-year-old Michelle Carter was 50 miles away at home in Plainville.

Nevertheless, Carter was charged with involuntary manslaughter. In the grand jury, based on cherry-picked text messages, the Commonwealth alleged Carter engaged in "a systematic campaign of coercion" against Roy "that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own." Com. v. Carter, 474 Mass. 624, 636 (2016) ("Carter I").

But the evidence at trial did not support those allegations. Focusing on the two-week period before Roy's suicide, the judge found, "the Commonwealth has not proven" that "reckless or wanton behavior" by Carter "caused the death of Mr. Roy." T.IX/3.[1] Rather, relying on a text that Carter sent later, the judge convicted her for failing to act: after Carter "instruct[ed]" Roy to get back in his truck and to proceed with his planned

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[1] "T._/_" refers to the transcript by volume/page; "Ex._" refers to an exhibit introduced at trial; and "R._" refers to the record appendix.

suicide, she did nothing to save him. T.IX/5-7.

There is no reliable record, however, of what Carter or Roy said during their last two calls on the evening of June 12, 2014. The critical text on which the verdict rests, which contains Carter's claim she told Roy to "get back in" his truck, Ex.30 (9/15/14 8:24-8:32 pm), was not a contemporaneous account, but an uncorroborated "confession," contradicted by physical evidence, that Carter made to another teen months later.

Carter is the first person ever convicted, anywhere, in such unusual circumstances. If this Court affirms, Massachusetts would be the only state to uphold an involuntary manslaughter conviction where an absent defendant, with words alone, encouraged another person to commit suicide. No state has interpreted its common law, or enacted an assisted-suicide statute, to criminalize such speech, and no defendant has ever been convicted for encouraging suicide where the defendant neither physically participated nor provided the means.

STATEMENT OF THE CASE

On February 6, 2015, a Bristol County grand jury indicted Carter, alleging that she committed involuntary manslaughter in violation of G.L. c.265, § 13, and that she was a youthful offender pursuant to G.L. c.119, § 54 ("Youthful Offender Statute"). R.29-31.

On August 10, 2015, Carter moved to dismiss the

indictments. On September 22, 2015, the hearing judge (Borders, J.) denied that motion. On October 13, 2015, Carter sought an interlocutory appeal pursuant to G.L. c.211, § 3. On July 1, 2016, in Carter I, this Court affirmed, holding the Commonwealth presented sufficient evidence to establish probable cause.

From June 6-16, 2017, Moniz, J. presided over a bench trial in Bristol County Juvenile Court. On June 9, 2017, after the Commonwealth rested, Carter moved for a required finding of not guilty, which was denied. See T.VI/4-13, 23. On June 13, 2017, at the close of evidence, the judge took the case under advisement, and on June 16, 2017, he found Carter guilty, as a youthful offender, of involuntary manslaughter. See T.IX/8; R.46.

On August 3, 2017, the judge imposed a sentence of 2.5 years (15 months to serve and balance suspended), and 5 years of probation and, also, issued a youthful offender sentencing order. See T.X/9; R47-56. The judge also allowed Carter's motion to stay her sentence pending appeal. R57.

On August 31, 2017, Carter filed a timely notice of appeal, and on January 8, 2018, the Appeals Court docketed this case. On February 5, 2018, Carter filed an application for direct appellate review. On March 14, 2018, this Court allowed Carter's application, and on March 15, 2018, it docketed this case.

STATEMENT OF THE FACTS

This appeal is not the same case that this Court heard in Carter I, because the evidence at trial told a very different story from the grand jury presentation. The evidence established that, in reality, there was no "systematic campaign of coercion" by which Carter's words "subvert[ed]" Roy's will to live and forced him to commit suicide. Carter I, 474 Mass. at 636. Rather, Roy was determined to take his own life, and Roy independently figured out how to do it.

To be sure, the teens often texted about suicide, and as this Court has recounted, Carter sometimes "encouraged" Roy, "assuaged his concerns" about suicide, and "chastised him" when he put off his plans. Id. at 626-628 n.3-6, 629 (noting that, four times on July 11-12, 2014, Carter texted, "You just [have] to do it").

But Carter also persistently tried to get Roy help, which he consistently refused. As her texts reveal, Carter did not believe Roy really "want[ed] to die," he "just want[ed] the pain to stop," Ex.30 (6/22/14 1:03 pm); see, e.g., Ex.16 (7/16/14 7:43 pm) ("I just never thought he'd do it."). That is why, on the night of July 12, 2014, when Carter feared Roy may have actually committed suicide, she frantically called and texted him, and when Roy did not respond, Carter contacted his family, who falsely assured Carter that he was fine.

In the weeks and months after Roy's death, Carter

made various uncorroborated claims, in texts to other teens, about the circumstances of Roy's suicide - most notably, that she had told Roy to "get back in" his truck. Ex.30 (9/15/14 8:24 pm). To be clear, that statement was not a contemporaneous account of what happened to Roy. Indeed, given the contrary evidence at trial, it cannot be credited, much less deemed proof beyond a reasonable doubt that Carter killed Roy.

A. Roy's personal struggles and his many prior suicide attempts

Roy took his own life after several years of personal struggles that cannot be attributed to Carter, as reflected in over 1,800 pages of his medical records. See Exs.33-45. Roy's extensive troubles included the divorce of his parents, see T.III/65-66, violent abuse by his father that, at times, required emergency medical attention, see T.VI/33-37, 110-12, 136; T.VII/86, 139; Ex.44, severe anxiety and depression, see T.III/67, 70, 75, 77, 83, 85, 87; T.VII/102-103, hospitalizations for depression and suicidal ideation, see T.III/68-69, 78-79, 84, 129-130, chronic difficulties at school, including dropping out for part of one year, see T.III/70-71, 75, 144, his sudden decision not to pursue college, see T.III/64, 89, 130-131, 239-240, and drug use, see T.III/135-136; T.VII, 86.

Most importantly, long before Carter did anything that could be construed as encouraging Roy to commit

suicide, Roy suffered persistent suicidal ideation and repeatedly attempted to kill himself. See T.III/228; T.V/94; T.VII/138. After his parents divorced, on separate occasions in October 2012, Roy twice tried to overdose on over-the-counter medications and also attempted to drown himself in a bathtub. See T.III/77-78, 81-82; T.III/252; Exs.34, 43, 45. In June 2014, Roy tried to induce water poisoning, see T.VII/138; T.VIII/97-98; and in early July 2014, less than one week before his death, Roy took Benadryl, placed a plastic bag over his head, and secured it with duct tape, see Ex.30 (7/6/14 1:28 am). This history is critical, because, as the undisputed expert evidence at trial established, the strongest predictor of suicide is a prior attempt. See T.VII/138; see also T.VII/83-84, 131 (noting Roy expressed despair about his future).

B. Roy's long-distance relationship with Carter

Starting in February 2012, when Roy and Carter met while visiting relatives in Florida, see T.III/72-73, they shared a long-distance relationship, primarily through texts and calls, see T.III/91. They rarely spent time together in person and only met each other's family and friends a few times. See T.III/86.

Carter considered Roy to be a close friend, and she tried to help with his chronic depression and other problems. See T.VII/84. The following exchange, just two weeks before Roy's suicide, is typical:

Roy: I don't feel good about anything. and nothing makes me happy anymore. so I'm stuck in this deep hole....
Carter: I'm trying my best to dig you out.
Roy: I don't wanna be dug out...
Carter: I don't know what you want me to do anymore.
Roy: Nothing you've done plenty
Carter: I'm not giving up on you, it's just every time I try to help you don't listen
Roy: I know

Ex.30 (6/29/14 1:38-2:15 pm).

Roy frequently talked with Carter about suicide, texting her, "I want to die," and telling her, "I'm going to kill myself, I've got plans, I'm researching." T.VIII/93; see T.VII/82 (Roy "talk[ed] about killing himself, continuously, on and off," with Carter); T.VII/111-112 (Roy told Cater he had "negative, suicidal" thoughts "every day" and "all day."); Ex.30 (6/29/14 7:11 pm) ("You don't know how serious I am, I want to [commit suicide] really bad. the past week I've been researching, and ... I'm gonna do it.").

In the weeks before his death, Roy searched online about suicide methods, and he sent links and images to Carter. See T.IV/207-208; T.V/143-144; T.VI/98-99; see also Ex.46 (digital evidence of multiple web searches about suicide methods on Roy's laptop).

Carter did not drive the discussions with Roy about suicide. To the contrary, whatever Carter tried to talk about, Roy turned their conversation back to suicide. For example, when Carter asked Roy to "hang[] out," he responded that he might die before their next date.

Carter: When are we hanging out? Soon right?
Roy: Yeah if nothing bad happens to me.
Carter: What do you mean?
Roy: the past 3 days that's all I can think about and it's in my head now
Carter: Thinking about what? Killing yourself
Roy: Yes

Ex.30 (6/25/14 12:08-12:21 pm).

Multiple times, Roy insisted he would kill himself and, then, stopped communicating with Carter, leaving her to wonder if Roy had actually done it, until he next surfaced. See, e.g., Ex.56 (10/10/12 3:36-10:38 pm) ("Conrad? Please answer me"); Ex.30 (6/26/14 5:54-6:27 pm) ("you tell me you will all the time I don't want you to say it if you don't mean it because then I worry"); Ex.30 (7/3/14 10:53 pm-7/4/14 12:25 am) ("This isn't real right you're not actually doing this right now are you?"); Ex.30 (7/4/14 11:24 pm-7/5/14 1:51 am) ("Are you okay?"); Ex.30 (7/9/14 10:38 pm-7/10/14 9:50 am) ("Conrad please answer me right now you're scaring me").

Carter repeatedly encouraged Roy to seek "professional help," telling him, "You aren't gonna get better on your own ... You need professional help like me, people who know how to treat and fix it." Ex.30 (6/1/14 5:42 pm); see Ex.30 (6/1/14 7:04 pm) ("I just really think [treatment] will help you, Conrad. I don't want you feeling this way anymore. I want you to be happy."). Knowing Roy suffered from debilitating anxiety, Carter sent him articles on coping strategies. See Ex.30 (6/1/14 5:42 pm). She even tried to get Roy to

quit smoking. See Ex.30 (7/1/14 9:17 pm) ("You just need to find something healthy that makes you feel just as good."). Roy always rejected her suggestions.

Shortly before Roy's suicide, Carter underwent inpatient treatment for an eating disorder, see T.IV/135, and she urged Roy to join her in the hospital:

> I'm gonna go away to [McLean Hospital] for my eating disorder to help me overcome it and stuff. The place also deals with psychiatric problems and disorders too so they can help you over some [of] this. I think it will really help you. And we can go together so we will be there for each other.

Ex.30 (6/1/14 5:42 pm); see T.III/50-51; T.VII/92-93. Again, Roy refused, insisting nothing any doctor "would do or say would help him or change the way he feels." T.IV/155; see Ex.30 (6/1/14 7:04 pm) ("I don't need anyone else tellin[g] me what to do.").

C. Roy's decision to end his own life

Around 6:20 pm on July 12, 2014, Roy left his mother's house in his truck with the water pump that he had obtained from his grandfather's shop. See T.III/101.

Phone records indicate that Roy spoke twice with Carter. First, Roy called Carter at 6:28 pm, and they talked for nearly 45 minutes; then, after a short break, Carter called Roy at 7:12 pm, and that call lasted for more than 45 minutes. See T.V/25-26; Ex.23-2 (AT&T report). No direct evidence, such as audio recordings or contemporaneous notes, revealed what Roy and Carter may

have said to each other during these calls.

Carter later claimed, in texts to other friends, that she was on the phone with Roy when he died, see, e.g., Ex.20 (7/13/14 10:09 pm) ("He died while talking to me on the phone."). But no evidence established Roy died before the second call ended, and the medical examiner could not determine the precise time of death. See T.V/80. The physical evidence from the scene indicates that, at the end of the second call, Roy was still alive. In fact, before passing out, Roy tucked his phone under the waistband of his shorts, where the police later found it. See T.III/176.

D. Carter's panicked reaction and her continued desire to help Roy

Almost immediately after the second call ended, Carter called Roy, over and over, nearly every minute, at 7:59 pm, 8:02 pm, 8:03 pm ... through 8:36 pm, but Roy did not answer. See T.V/27-28, 44; Ex.23-2. Carter panicked and texted Roy, "Please answer me. I'm scared are you okay? I love you please answer." Ex.30 (7/12/14 9:19 pm). Although Roy talked about killing himself earlier that day, as he had many times before, Carter "never thought he would actually do it." T.IV/29.

At 10:29 pm, when Carter still had not heard from Roy, she texted Roy's sister, Camdyn, that she was worried about Roy and asked, "do you know where your brother is?" T.III/225, 232. After checking with Roy's

mother, Roy's sister falsely assured Carter that Roy was alive, well, and asleep at his father's house. See T.III/102-103, 225-226, 230-232; see also Ex.30 (7/12/14 10:38 pm) (Carter to Roy: "You're at your dad's... Camdyn told me. I'll get you help soon I guess. I thought you actually did it.").

Then, in the morning on July 13, 2014, when Carter still had not heard back from Roy, she again texted him:

> I'm going to tell your mom that you need to get help. I can't stand to see you this way anymore and you can't live like this. You need to get help whether you want to or not.
>
> Did you do something??! Conrad I love you so much please tell me this is a joke. I'm so sorry I didn't think you were being serious Conrad please don't leave us like this. I let you down I'm so sorry I should [have] saved you, I need you please answer me. I'm gonna get you help and you're gonna get better we will make it thru this.

Ex.30 (7/13/14 10:01-10:41 am) (emphasis added).

E. The discovery of Roy's body and his suicide note to Carter

Later on July 13, 2014, a Fairhaven police officer found Roy's body in his truck. See T.III/162-170. An autopsy determined Roy had succumbed to carbon monoxide poisoning from the water pump. See T.III/58-59; Ex.1.

In his suicide note to Carter, Roy explained, and took responsibility for, his fatal choice:

> To Michelle ... This life has been challenging and troublesome for me but I'll forever be in your heart and we will meet up someday in Heaven.... Take anything from my room at my moms/dads to remind you of me.... I'm sorry

> about everything. I am messed up I guess. I wish I could express my gratitude but I feel brain dead. I love you and greatly appreciate your effort and kindness toward me... I ♥ you.

Ex.27; see T.III/127. According to Dr. Peter Breggin, the only psychiatrist to testify at trial: "[Roy] says he loves her, and he thanks her for all the goodness and kindness that she's given him. It's not about being bullied." T.VII/137. Roy's note belies the Commonwealth's charge that Carter coerced his suicide.

F. Carter's so-called "confession" about the circumstances of Roy's suicide

In his verdict, the judge relied heavily on a single text that Carter sent to her friend, Sam Boardman, more than two months later. On September 15, 2014, in a rambling exchange with Boardman, Carter wrote:

> [Lynn Roy is] divorced so she like tells me that a lot of people on his side of the family (some aunts and uncles) and Conrads grandpa like treats her kinda poorly and not supportive of what happened and stuff like Coco [Conrad's nickname] was very sensative and he took things to heart. And his grandpa and dad (her ex) didnt treat him that good and always pressured him and stuff and it gave him so much anxiety. And I always told him to not spend as much time with them because he just couldn't handle it and it made him worse being around them but he worked for them like they owned that tug boat company and Coco always felt pressured to live up to their expectations. But with all his issues and stuff he couldn't and that was a big part of his decision to commit suicide. And so his mom just tells me how they and like some aunts and uncles on that side just dont have much sympathy and his grandpa especially doesnt seem to even care at all which drives me insane but his mom and I both agree he will live with the guilt. And she just like tells me all about that and about her new boyfriend and stuff and

> I mean I like that she tells me these things I want to help her I just get ovwhelmed sometimes with what she says like she expects me to know what to tell her and I want to tell her the best things I can because I promised Coco I'd help his mom and sisters get thru this like I told him I wont let them go thru depression and I told him I'd help them and always be there but now that I think of it, youre right she is depressed so I failed Coco I wasnt supposed to let that happen and now I'm realizing I failed him. Sam his death is my fault like honestly I could have stopped him I was on the phone with him and he got out of the car because it was working and he got scared and I fucking told him to get back in Sam because I knew he would do it all over again the next day and I couldnt have him live the way he was living anymore I couldnt do it I wouldnt let him. And therapy didnt help him and I wanted him to go to McLean with me when I went but he would go in the other department for his issues but he didnt wanna go because he said nothing they would do or say would help him or change the way he feels. So I like started giving up because nothing I did was helping and but I should of tried harder like I should of did more and its all my fault because I could of stopped him but I fucking didnt all I had to say was I love you dont do this one more time and hed still be here and he told me he would give me signs to know he is watching over me but I havent seen any and I just idk I'm sorry about this rant I just needed to get that off my chest and its finally all sinking in

Ex.20 (9/15/14 8:24-8:32 pm) (emphasis added). Despite having sent hundreds of texts to friends about Roy's suicide, see, e.g., Ex.20 (7/20/14 1:26 pm), Carter's "confession," sent two months after the fact, was the only text in which she claimed that Roy "got out of the [truck]" or that she "told him to get back in." T.IX/5.

Nevertheless, based on this text, the judge found that, on July 12, 2014, after starting the pump and while

talking on the phone with Carter, Roy stepped out of the truck, and Carter instructed him to get back in, even though that uncorroborated claim is inconsistent with the physical evidence and contemporaneous record.

G. Roy's detailed plan to commit suicide

The evidence at trial also established that, contrary to the notion that "Carter's actions overbore [Roy's] willpower," Carter I, 474 Mass. at 635, it was Roy, not Carter, who researched the idea, developed the details, obtained the necessary equipment, picked the spot to park his truck, and put his fatal plan in motion. See T.IX/3-4 (finding Roy took "significant actions of his own" to plan, prepare for, and commit suicide).

On July 2, 2014, Roy sent to Carter a website link about "the best way to kill yourself," listing carbon monoxide as an option. Ex.30 (7/2/14 4:09 pm). When they first discussed carbon monoxide, Roy introduced the idea as his "new plan." Ex.30 (7/4/14 9:58-10:06 am) ("Carbon monoxide ... I want to deprive myself of oxygen.").

By July 6, 2014, Roy figured out how to poison himself, with information he obtained from his internet research, not from Carter. See Ex.30 (7/6/14 4:25-4:59 pm) ("All you really need is an enclosed space, I could get a tube to go to a tent from the exhaust in my truck. The website that I found said that could work.").

After dismissing various options, such as buying a gas tank or using his parents' car, Roy settled on a

method to produce carbon monoxide.

Carter:	Well there's more ways to make CO. Google ways to make it...
Roy:	Omg ... portable generator that's it
Carter:	That makes CO?
Roy:	yeah! It's an internal combustion engine.
Carter:	Do you have one of those?
Roy:	There's one at work.

Ex.30 (7/7/14 10:57-11:08 pm) (Roy: "I was thinking turning it on in my truck and passing out asleep."). But when Roy attempted suicide, on July 9, 2014, his generator failed. See Ex.30 (7/10/14 9:50 am).

At that point, Roy turned his attention to "a pump" that he planned to "use instead." Ex.30 (7/11/14 4:59 pm). Carter did not "help" Roy "determine the method" of his suicide, Carter I, 474 Mass. at 626 n.4, because she had no useful information or practical advice for Roy. It is revealing that Carter asked, "what's the pump thing do?" Ex.30 (7/11/14 5:06-5:14 pm). Thus, without any assistance from Carter, in the days before his death, Roy prepared for his suicide. See Ex.30 (7/11/14 8:58 pm) ("I have everything ready in my truck."); Ex.30 (7/12/14 4:28 am) ("I have everything lined up!").

Although the limited presentation to the grand jury may have cast Roy as an "equivocating young victim," Carter I, 474 Mass. at 624, the full record at trial showed the opposite: he was a determined, capable, young man who was driven by his struggles and depression to end his own life.

SUMMARY OF THE ARGUMENT

Carter was wrongfully convicted of a form of involuntary manslaughter for which she was never charged. The grand jury indicted her for wanton and reckless acts - verbally encouraging Roy to commit suicide - but the trial judge convicted her based on a finding that, having created a danger by telling Roy to "get back in" his truck as it filled with carbon monoxide, she then wantonly and recklessly violated a resulting duty to save him. (P.19-21)

The evidence at trial was insufficient to prove Carter guilty of involuntary manslaughter beyond a reasonable doubt. The judge rejected, and the evidence did not support, the Commonwealth's theory that Carter's words were so coercive, powerful, or overwhelming that they compelled Roy to kill himself. Roy's suicide was the direct result of his own personal struggles and hopelessness. The judge's key finding that Carter told Roy to "get back in" his truck to continue his planned suicide was based on a single uncorroborated text message, contradicted by physical evidence, that Carter sent months later. And the Commonwealth failed to prove causation, because it presented no evidence that Roy would have survived his suicide even if Carter had tried to summon help. (P.21-36)

The common law of involuntary manslaughter, as applied to encouraging suicide with words alone, is

unconstitutionally vague, because it fails to give fair notice of prohibited conduct and speech or to provide guidance for law enforcement (P.36-45), and the law also unlawfully penalizes protected speech. (P.45-49)

Carter was wrongfully convicted as a youthful offender because she did not "inflict," or threaten to "inflict," serious bodily injury, as G.L. c.119, § 54 requires. As courts have unanimously held, "infliction" requires direct, physical contact of a forceful nature, more than mere causation. (P.49-55)

The judge erroneously failed to apply a "reasonable juvenile" standard in deciding whether 17-year-old Carter's conduct, or her alleged failure to act, was wanton and reckless. Because both the law and science recognize that juveniles demonstrate a lack of maturity, act impulsively, and discount risks, it is unfair and irrational to convict a juvenile for failing to act like a reasonable adult. (P.56-57)

The judge violated Carter's right to present a defense and abused his discretion by excluding all testimony by a defense expert on recent advances in the psychological science of adolescent development and the neuroscience of the adolescent brain. Such testimony would have materially affected the evaluation of words and conduct by Carter, Roy, and other juvenile witnesses. (P.58-60)

ARGUMENT

I. Although the grand jury indicted Carter based on a wanton and reckless affirmative act, the judge wrongfully convicted Carter for a wanton and reckless failure to act.

The 5th Amendment and art. 12 provide, "no one may be convicted of a crime punishable by a term in the State prison without first being indicted for that crime by the grand jury." Com. v. Barbosa, 421 Mass. 547, 549-550 (1995); see Russell v. U.S., 369 U.S. 749, 770-771 (1962). "It is without doubt the general rule that 'a crime must be proved as charged and must be charged as proved.'" Com. v. Costello, 392 Mass. 393, 403 (1984), quoting Com. v. Grasso, 375 Mass. 138, 139 (1978). In this case, however, Carter was found guilty after trial of a type of involuntary manslaughter for which she had never been indicted by the grand jury.

To sustain an involuntary manslaughter conviction, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in wanton or reckless conduct that caused the victim's death. See Com. v. Life Care Ctrs. of Am., Inc., 456 Mass. 826, 832 (2010), citing Com. v. Welansky, 316 Mass. 383, 397 (1944). The fatal conduct can take two distinct forms: an affirmative act or a failure to act, where a person has a duty of care. See Carter I, 474 Mass. at 630-631.

Here, as this Court recognized, the grand jury indicted Carter based on her affirmative acts, id. at

631 (distinguishing "conduct" from "failure to act" and recognizing "[t]he indictment was returned on the basis of [Carter]'s wanton and reckless conduct"). In contrast, the judge convicted Carter for a failure to act, in violation of a duty to alleviate a risk to Roy that Carter allegedly created. See T.IX/5-8.

> Knowing that Mr. Roy is in the truck, knowing the condition of the truck ... Ms. Carter takes no action in furtherance of the duty that she has created by instructing Mr. Roy to get back into the truck.

T.IX/7; see T.IX/8 (citing "[her] failure to act").

In reaching the failure-to-act verdict, the judge expressly relied on Com. v. Levesque, 436 Mass. 443 (2002), in which this Court held, "where one's actions create a life-threating risk to another, there is a duty to take reasonable steps to alleviate that risk," and "the reckless failure to fulfill this duty can result in a charge of manslaughter." T.IX/6-7; see T.VIII/87 (suggesting counsel address Levesque in closings).

Put simply, the verdict against Carter was based on the judge's finding that Carter failed to call for help, or to stop Roy, when he went through with his plan to commit suicide. See T.IX/7 ("She did not call the police or Mr. Roy's family... She called no one... she did not issue a simple additional instruction - get out of the truck."). That verdict was inconsistent with the grand jury's indictment based on a claim that Carter coerced

Roy to commit suicide.

Because the theory on which Carter was indicted and the theory on which she was convicted "constitute[] separate and distinct theor[ies] of guilt," Com. v. Pimental, 54 Mass. App. Ct. 325, 327 (2002); see Com. v. Catalina, 407 Mass. 779, 789 (1990) (referring to "the Welansky theory" of failure-to-act manslaughter), her conviction must be vacated.

II. The Commonwealth did not present sufficient evidence to prove beyond a reasonable doubt that, by any act or failure to act, Carter committed involuntary manslaughter.

To sustain an involuntary manslaughter conviction, the Commonwealth must prove beyond a reasonable doubt that the defendant engaged in wanton and reckless conduct - an affirmative act or failure to act - and that the defendant's conduct proximately caused the victim's death. See Com. v. Godin, 374 Mass. 120, 126 (1977). In this case, the Commonwealth did not present sufficient evidence of an affirmative act, see Part II.B., or a failure to act in the face of a self-created duty, see Part II.C. Moreover, under either theory, the Commonwealth did not prove Carter's conduct proximately caused Roy's death. See Part II.D.

In finding that Carter unlawfully killed Roy, because she failed to save him when he committed suicide, the judge divided the evidence into three "periods." T.IX/3. The first lasted from June 30, 2014, to July 12,

2014, when Roy sent his last text to Carter. The second, on which the judge focused almost exclusively, ran from later in the evening of July 12, 2014, to July 13, 2014, when the police found Roy's body. The third included everything else, both before and after.

The judge found that, during the first period, Carter engaged in unspecified wanton and reckless acts (presumably, sending texts that encouraged suicide), but that she did not cause Roy's suicide. He found that, in the second period, Carter created a risk to Roy (by telling him to get back in the truck), but then failed to act to save Roy. He said nothing about evidence from the "third period." The complete record, viewed as a whole, does not support the verdict.

A. A conviction must be based on evidence that constitutes proof beyond a reasonable doubt, not speculative inferences.

"In reviewing a claim of insufficient evidence," this Court "ask[s] 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Com. v. Brown, 479 Mass. 600, 608 (2018), quoting Com. v. Latimore, 378 Mass. 671, 677 (1979); see Jackson v. Virginia, 443 U.S. 307, 319 (1979).

This post-trial analysis of the evidence is more exacting than the pre-trial evaluation of the presentation to the grand jury. See Carter I, 474 Mass.

at 447 (noting probable cause "requires considerably less" than proof beyond a reasonable doubt). Only "reasonable" inferences may be drawn from the evidence, Com. v. Longo, 402 Mass. 482, 487 (1988), and a conviction may not rest on "the piling of inference upon inference or conjecture and speculation," Com. v. Mandile, 403 Mass. 93, 94 (1998). When "[t]he inferential leaps that the Commonwealth asks are too great," this Court has not hesitated to vacate convictions. Com. v. Swafford, 441 Mass. 329, 339-343 (2004) (reversing murder convictions).

B. The Commonwealth did not prove Carter committed any affirmative act in reckless disregard of likely harm to Roy.

"Wanton or reckless conduct usually consists of an affirmative act 'like driving an automobile or discharging a firearm.'" Levesque, 436 Mass. at 447 (emphasis added), quoting Welansky, 316 Mass. at 397; see Life Care Ctrs. of Am., Inc., 456 Mass. at 832, quoting Com. v. Catalina, 407 Mass. 779, 789 (1990) (holding involuntary manslaughter "generally involves a willful act that is undertaken in disregard of the probable harm to others that may result").

At trial, the Commonwealth presented no evidence that Carter engaged in any affirmative act that caused Roy to commit suicide. As the judge found, it was Roy who "secured the generator," "located his vehicle in an unnoticeable area," and "start[ed] the pump" to fill his

truck with carbon monoxide. T.IX/4. Carter's sole connection to Roy's suicide was through her words. Before Carter I, however, no involuntary manslaughter case in Massachusetts had ever held that words alone can constitute an "affirmative act" sufficient to establish wanton and reckless conduct.

There are two problems with the notion that, by texting with or speaking to Roy, Carter intentionally engaged in an affirmative act that constituted wanton or reckless conduct and caused Roy's death. The first problem is constitutional: as discussed below, see Parts III & IV, interpreting involuntary manslaughter to reach encouraging suicide with words alone violates due process and infringes on free speech. The second problem is practical: the judge did not find that Carter's words were so coercive or manipulative that they constituted anything akin to a physical force that compelled Roy to commit suicide, and the evidence at trial did not come close to supporting such a finding.

In Carter I, this Court held there was sufficient evidence before the grand jury to establish probable cause, emphasizing "the coercive quality of [Carter's] final directive" that Roy should "get back in" his truck. Id. at 634-635. This Court stated, repeatedly, that the grand jury could have found Carter's "command" to Roy, and her "control over his actions," caused his suicide. Id. at 635-636; see id. at 635 (suggesting "[Carter]'s

actions overbore [Roy]'s will"). In effect, based on the Commonwealth's bare allegations and the limited pre-trial record, this Court concluded the grand jury could have decided that, with her words alone, Carter put the proverbial gun to Roy's head.

That is not what really happened. After hearing all the evidence, the judge rejected the allegation that Carter waged a "systematic campaign of coercion" which "acted to subvert [Roy's] willpower." Id. at 636. There was substantial evidence that, for most of their relationship, it was Roy who talked about, planned, and attempted suicide, while Carter tried to help him, by encouraging him to seek professional mental health treatment. See Ex.30 (6/1/14 5:42 pm).

Thus, the judge found the Commonwealth had not proven that, during the two-week period leading up to Roy's death, Carter engaged in any acts that "caused the death of Mr. Roy." T.IX/3. Rather than point to any persistent pressure by Carter, the judge found, "Roy was struggling with his issues and see[k]ing a way to address and took significant actions of his own toward that end." T.IX/3. Among other evidence, the judge noted Roy conducted "extensive" research on suicide, "spoke of [suicide] continually," obtained the means to commit suicide, and set the fatal process in motion. T.IX/3-4. The judge also recognized the import of Roy's prior suicide attempts, T.IX/4, given the undisputed expert

evidence that the strongest predictor of suicide is a prior attempt, see T.VII/138.

The conviction cannot be sustained, therefore, on the ground that, by her "verbal conduct," Carter engaged in an "affirmative act," akin to driving a car or shooting a gun, that compelled Roy to commit suicide. Such a conclusion would conflict with the law of the Commonwealth and the well-supported conclusions of the judge, who did not convict Carter on that theory.

C. The Commonwealth did not prove Carter recklessly failed to act despite a duty to alleviate a self-created risk to Roy.

A conviction for involuntary manslaughter can be based on a failure to act where the Commonwealth proves that "the defendant had a duty to act and did not do so." Com. v. Twitchell, 416 Mass. 114, 117 (1993). In this case, focusing on the "second period," immediately before Roy's death, the judge found Carter had a duty to save Roy from a risk that she created, but that she failed to act, and that her failure constituted wanton or reckless conduct and proximately caused Roy's death. As the Commonwealth argued in closing, "After creating the harm, [Carter] obviously did nothing to alleviate it... she could have easily called for help, and she didn't." T.VIII/115.

"Generally, there is no duty to prevent another from committing suicide." Nguyen v. MIT, 479 Mass. 436, 448 (2018). Nevertheless, a duty to act for the safety

of another may be established where the defendant has a "special relationship" to the victim, see, e.g., Twitchell, 416 Mass. at 117-118 (parents and children); Slaven v. Salem, 386 Mass. 885, 888 (1918) (wardens and prisoners), or where the defendant's actions create a life-threatening condition, see Levesque, 436 Mass. at 449-453. In the latter case, the reckless failure to take reasonable steps to alleviate the danger may constitute involuntary manslaughter. See id.

Because Carter had no legally cognizable special relationship with Roy, the question is whether Carter created a life-threatening risk to Roy and, as a result, owed a duty to stop his suicide. There are no bright-line rules about when a defendant will be deemed to have created a risk that is sufficient to trigger a duty to act, but the cases imposing such a duty are helpful. They all involve defendants who, unlike Carter, committed harmful physical acts that actively and directly subjected their victims to serious risks.

In Levesque, the defendants accidentally kicked over a candle and started a deadly fire in a warehouse. See 436 Mass. at 446-447. Without reporting the fire, the defendants fled, and firefighters who responded later died. See id. Several subsequent decisions featured defendants who supplied heroin to their victims (or injected it), caused fatal overdoses, but failed to secure help when the victims were in distress. See, e.g.,

Catalina, 407 Mass. at 783.

A physical act, like starting a fire or injecting heroin, is a universal feature of these self-created duty cases, not an incidental fact. In Levesque, this Court held, "[W]here one's actions create a life-threatening risk to another, there is a duty to take reasonable steps to alleviate the risk." 436 Mass. at 449 (emphasis added) (citing cases that all involved physical violence by defendants who left their victims to die). The duty to act for the safety of another is a narrow exception to the rule that no one is required to serve as a "Good Samaritan." The law should not be interpreted to impose a broad duty where a defendant has not physically created the relevant danger.

In this case, Carter did not engage in any affirmative act that created the "life-threatening risk" that brought Roy to the Kmart plaza. Id. at 450. Carter did not accompany Roy to the parking lot. Nor did she acquire the pump, set up the device in the truck, start it, confine Roy in the vehicle, or leave him to die. Plainly, Carter did not engage in any physical act that created the serious risk of Roy's suicide, and as a result, she had no duty to act as a matter of law.

"The recognition of a novel common-law duty is a matter that necessarily raises important legal and policy issues." Com. v. Pugh, 462 Mass. 482, 493 (2012) (refusing to find a "duty to summon medical

assistance"). To find Carter had a duty to Roy would open the door wide to an otherwise narrow exception.

D. The Commonwealth did not prove Carter's conduct proximately caused Roy's suicide.

To establish involuntary manslaughter, the Commonwealth must prove beyond a reasonable doubt that the defendant's wanton and reckless conduct, whether by commission or omission, proximately caused the victim's death. See id. at 496 (vacating involuntary manslaughter conviction due to insufficient evidence of causation). Notably, in Com. v. Bowen, 13 Mass. 356 (1816), the 200-year-old case that the judge cited as precedent, the jury acquitted the defendant, because although he encouraged the prisoner in a neighboring cell to commit suicide shortly before that prisoner's public hanging, the evidence left "a doubt whether the advice given by him was, in any measure, the procuring cause" of the decedent's suicide. Id. at 360-361.

1. The evidence established that Roy caused his own death.

Suicide cases present special difficulties with respect to causation because suicide has long been considered "'a voluntary willful choice' by a person who is 'in effect both the victim and the actor.'" Webstad v. Stortini, 924 P.2d 940, 945 (Wash. 1996), quoting In re Sponatski, 220 Mass. 526 (1915); see McLaughlin v. Sullivan, 123 N.H. 335, 337 (1983) ("[T]he act of suicide is considered a deliberate, intentional and intervening

act which precludes a finding that a given defendant, in fact, is responsible for the harm."). Here, Roy made the tragic decision to commit suicide, and neither Carter's encouragement nor her failure to call for help proximately caused Roy's death.

The evidence, summarized in Part A of the Statement of Facts, revealed that Roy's suicide was the direct result of his struggles and hopelessness, not Carter's encouragement or pressure. See T.VII/83-84, 131.

The coercion narrative also ignores the fact that, in their relationship, Roy had "more authority" than Carter, T.VII/130 ("[Roy]'s older. He ... graduates high school. He drives. He's out working."), and he routinely rejected her requests, both large - such as seeking mental health treatment - and small - like listening to her songs, see Ex.30 (6/21/14 2:12-11:22 pm), and visiting her, see Ex.30 (6/28/14 12:54-3:21 pm).

By focusing on the limited evidence in the "second period," which started only after Roy's last text to Carter on the evening of July 12 and ended by the discovery of his body on July 13, the judge ignored the dynamics of their relationship and overlooked the extensive record from the preceding periods during which Roy researched suicide, talked with Carter about suicide, prepared to commit suicide, and experienced active suicidal ideation (including before he met Carter). In this way, the judge misapprehended the

tragic reality of Roy's death. Roy's own decision was the "efficient cause, the cause that necessarily sets in operation the factors which caused the death." Com. v. Rhoades, 379 Mass. 810, 825 (1980).

2. Carter's "confession" did not prove that she told Roy to "get back in" his truck, and the evidence refuted that claim.

The judge found that Roy "broke the chain of self-causation" because, while talking to Carter, he stepped out of the truck, and then, Carter "instructed" Roy to "get back in." T.IX/5, 7. The only source of that critical finding is dubious: a single line in a rambling text that Carter sent, on September 15, 2014, more than two months after Roy's suicide, to her friend, Sam Boardman. T.IV/153-55; see Carter I, 474 Mass. at 629 (recognizing the "contents" of the calls is "only available" from the text to Boardman).

To avoid wrongful convictions based on unreliable evidence, this Court has adopted the "corroboration rule" for confessions, which prohibits a conviction based solely on a defendant's uncorroborated confession. See Com. v. Forde, 392 Mass. 453, 457 (1984).

> [The rule's] purpose is to prevent "errors in convictions based upon untrue confessions alone," [and] its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

Smith v. U.S., 348 U.S. 147, 153 (1954); see Wong Sung

v. U.S., 371 U.S. 471, 488-489 (1963) ("[A] conviction must rest on firmer ground than the uncorroborated admission ... of the accused.").

Carter is precisely the sort of person whom the corroboration rule is intended to protect. The evidence at trial showed that, like Roy, she was "a person suffering a mental or emotional disturbance," Forde, 392 Mass. at 458; see T.IV/37-38, 55, 70-71, 115, 132-134; T.VII/67, 175-176, 193-194 (testimony about Carter's mental health issues and hospitalization), and the Commonwealth cast her the consummate fabulist, see T.VIII/117 (Commonwealth's closing: "Is the Defendant a liar in some of these texts? Absolutely.").

Further, at least some of her statements about the circumstances of Roy's death were inconsistent with the evidence. Carter claimed she had not called Roy's family to check on him, but in fact, she texted with his sister. Ex.10 (7/12/14 10:18 pm). Carter also claimed she heard Roy dying, but the police found Roy's phone tucked in the waistband of his shorts, which indicates Roy was not on the phone with Carter when he died.

Carter may have confabulated about what Roy was doing in the truck, dramatized her role in a later text to another teen, or simply been mistaken, but her claim - that Roy got out of the truck, that she told him to get back in, and that he did so - cannot be credited. Indeed, since Carter was not physically present,

whatever she may have believed or Roy may have said, she had no way to know whether Roy ever actually exited the truck at all.

In explaining his verdict, the judge claimed to have "looked for independent corroboration of some of the statements that Ms. Carter made," specifically noting the photographs of the pump. T.IX/6. But Roy previously told Carter about his plan to commit suicide with a generator or pump, see Ex.30 (7/11/14 4:59 pm), and Carter learned from Roy's sister that the police found Roy's body in his truck with a "generator," see Ex.20 (7/13/14 10:07-10:09 pm). Carter's claim about hearing a nondescript noise did not make more reliable her claim to have been on the phone with Roy when he died. More importantly, the judge identified no evidence to corroborate Carter's claims in her texts; nor do the photographs that investigators took after Roy's death remotely substantiate that critical aspect of the case, at the heart of the judge's verdict.

3. No evidence proved causation, namely that, if Carter had called for help, Roy would have lived.

A fundamental aspect of causation, in the context of involuntary manslaughter, is proof that the defendant engaged in wanton or reckless conduct "'without which the death would not have occurred.'" Pugh, 462 Mass. at 500, quoting Rhoades, 379 Mass. at 825. "Speculation that [Roy] would have survived if [Carter] had summoned

medical [or other] help does not satisfy the Commonwealth's burden of proving causation beyond a reasonable doubt." Id. at 500. In other words, to sustain the conviction, the Commonwealth must be able to point to evidence from which a rational trier of fact could conclude that, if Carter had sought help on the night of July 12, 2014, Roy would not have died. The Commonwealth cannot identify any such evidence, because it presented none at trial.

This Court wrestled with a similar causation problem in Com. v. Pugh, 462 Mass. 482 (2012), an involuntary manslaughter case arising from the death of a baby during an unassisted childbirth. The Commonwealth charged, and the judge found, that the defendant had a duty to call for help, when she realized the baby was "breech," and that her failure to act rendered her criminally liable. This Court reversed, holding the Commonwealth presented "insufficient evidence that any omission by the defendant," such as her failure to call 911 "caused the baby's death." Id. at 501.

Here, "such speculation is particularly inadequate," because the Commonwealth presented "no expert testimony as to what assistance, once summoned, medical professionals could have rendered, or whether that assistance would have been successful." Id. at 500-501. As in Pugh, there was insufficient evidence that any "omission" by Carter "caused" Roy's death, Carter

"cannot be convicted of involuntary manslaughter" for failing to call for help. Id. at 501.

The factual record, here, is even weaker than the Commonwealth's evidence in Pugh, where the Commonwealth's experts testified that, if the defendant had called for help during her contractions, it was "likely" or "possible" that her baby would have survived. Id. at 501. At trial in this case, the Commonwealth presented no evidence about what would have happened if Carter called Roy's family or 911, and it called no expert to opine that, if Carter sought help, Roy would have survived his suicide attempt.

Dr. Faryl Sanders, the medical examiner, testified that Roy died of "acute carbon monoxide poisoning." T.V/77; see Ex.26. Dr. Sanders testified a carbon dioxide level of "70 percent would absolutely be lethal," and Roy had a level of 71 percent. T.V/68-69, 87. But Dr. Sanders could not pinpoint with similar precision when exactly Roy died or how quickly. See T.V/64, 80 ("[T]here's no reliable way to accurately determine time of death."). Dr. Sanders testified that, in general, carbon monoxide poisoning can result in death in approximately 20 minutes, see T.V/72-73, but she acknowledged that, depending on the circumstances, the process can be much faster (or slower), see T.V, 81-83. Regarding Roy, Dr. Sanders lacked basic data, such as how much carbon monoxide the pump generated (it was

not even preserved as evidence), how quickly the truck filled with gas, and what baseline level of carbon monoxide he had in his body. T.V/84.

The lack of any evidence about the timing of Roy's death defeats the Commonwealth's case, because neither Dr. Sanders nor any other witness testified that, if Carter had called Roy's mother, a friend, or 911, Roy would have lived. It is entirely possible that Roy would have died within a few minutes of starting the pump.

There was no evidence that Roy even told Carter where he had parked his truck. The last specific place that Roy mentioned to Carter was the "park and ride" in Fairhaven, see Ex.30 (7/12/14 10:46 am), not the Kmart plaza which is a few miles away. Without knowing Roy's whereabouts, Carter could not have promptly directed first responders to his truck.

Finally, at trial, there was no evidence that Roy would have listened to Carter, if she had told him to get out of the truck. The Commonwealth speculates that if Carter had done something, anything, Roy would not have died. But speculation is not evidence, and it fails to prove Carter committed involuntary manslaughter.

III. Interpreting involuntary manslaughter to permit Carter's conviction violates due process, because it fails to provide fair notice of prohibited conduct and invites arbitrary enforcement.

Under the 5th Amendment and art. 12, due process requires a criminal law to give adequate notice of

prohibited conduct and to establish meaningful guidance for enforcement. But the common law of involuntary manslaughter leaves a person of ordinary intelligence — to say nothing of a juvenile — left to guess the conduct - let alone the speech - that may be punished in relation to assisted suicide, and it provides no criteria to distinguish a sympathetic case of euthanasia from a culpable case of unlawful killing. If the Commonwealth wants to regulate suicide, it should follow the national trend and enact a specific statute.

A. Footnote 11 in Carter I did not resolve the due process issue.

Before trial, this Court held that involuntary manslaughter was "neither objectively nor subjectively vague" as applied to Carter. Carter I, 474 Mass. at 631 n.11. That decision reflected the limited, one-sided record before the grand jury, which inaccurately cast Carter as the diabolical, coercive villain and Roy as the vulnerable, compliant victim. But the judge rejected that characterization, and the more complete record at trial does not support it. In fact, Roy and Carter were troubled teens who shared a long-distance relationship, largely through texts. It was Roy who suggested the two form a suicide pact as "Romeo and Juliet," but Carter refused, saying "we're not dying." T.X/144. Now, based on all the evidence, this Court must decide if the law gave fair notice to Carter that she could be convicted

of manslaughter for verbally encouraging Roy's suicide and, also, provided guidance to law enforcement whether her conduct warranted prosecution.

B. The common law of involuntary manslaughter fails to give fair notice that a person, like Carter, may be convicted for encouraging another person to commit suicide.

A law "must 'define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited.'" Com. v. Zubiel, 456 Mass. 27, 30 (2010), quoting Twitchell, 416 Mass. at 123. Further, where a law is "capable of reaching expression sheltered by the 1st Amendment," due process "demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974).

Before Carter I, no case held whether a direct, physical act is "a prerequisite of involuntary manslaughter." 474 Mass. at 632 n.14. Absent judicial guidance, "persons of common intelligence" were forced to "guess at [the] meaning" of the law, as it might apply to an absent defendant who, with only words, encouraged a suicide. That vagueness is especially apparent when the common law in Massachusetts is considered against the evolving national landscape of legal sanctions and social norms concerning suicide.

1. In considering criminal culpability for another person's suicide, most states have shifted from common law murder to statutory assisted suicide.

Dating back to the American colonies, the common

law "punished or otherwise disapproved of both suicide and assisting suicide." Washington v. Glucksburg, 521 U.S. 702, 711 (1997). Over time, however, given difficulties with applying the common law of murder and manslaughter to an area as fraught as assisted suicide, most states adopted the "modern statutory scheme" that "treats assisted suicide as a separate crime, with penalties less onerous than those for murder." People v. Kevorkian, 527 N.W.2d 714, 736 (Mich. 1994); see Glucksburg, 521 U.S. at 715 & n.11 (reviewing laws on "aiding" suicide, starting with New York in 1828).

By the late 20th century, "few jurisdictions, if any, ... retained the early common-law view that assisting in a suicide is murder." Kevorkian, 527 N.W.2d at 736. Rather, new statutes "mitigate[d] the punishment for assisting a suicide by removing it from the harsh consequences of homicide law and giving it a separate criminal classification more carefully tailored to the actual culpability of the aider and abettor." In re Joseph G., 34 Cal. 3d. 429, 434-435 (1983).

By Carter's trial in 2017, most states had adopted statutes that prohibited aiding or assisting suicide as a crime distinct from murder. In those states,

> The difference between murder and aiding suicide generally hinges upon whether the defendant actively participates in the overt act that directly causes death, or whether he merely provides the means of committing suicide.

In re Sexson, 869 P.2d 301, 305 (N.M. 1994). Notably, Carter neither actively participated in Roy's suicide nor provided the physical means of his death.

In twelve states, statutes require proof that the defendant gave "physical assistance." For example, a 1996 Rhode Island law provides that a person commits a felony punishable by ten years of imprisonment if, "with the purpose of assisting another person to commit suicide," the person "provides the physical means" or "participates in a physical act by which another person commits or attempts to commit suicide." R.I. Gen. L. § 11-60-3 (emphasis added).[2]

In other states, courts have interpreted these laws to require physical assistance, not merely verbal encouragement. For instance, despite the broad language of Cal. Penal C. § 401, the California courts narrowly construed the law to require active involvement, such as "furnishing the victim with the means of suicide":

> Although on its face the statute may appear to criminalize simply giving advice or encouragement to a potential suicide, the courts have ... required something more than mere verbal solicitation of another person to commit a hypothetical act of suicide. Instead, the courts have interpreted the statute as

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[2] See also Ariz. Rev. Stat. § 13-1103; Ga. Code § 16-5-5; Ill. Stat. c. 720 § 5/12-34.5(a)(2); Idaho Code § 18-4017(a)-(b); Ind. Code § 35-42-1-2.5(b); Kan. Stat. § 21-5407; Ky. Rev. Stat. § 216.302; Md. Code, Crim. Law § 3-102(2)-(3); Ohio Rev. Code § 3795.04; S.C. Code § 16-3-1090; Tenn. Code § 39-13-216.

> proscribing the direct aiding and abetting of a specific suicidal act.... Some active and intentional participation in the events leading to the suicide are required in order to establish a violation.

In re Ryan N., 92 Cal. App. 4th 1365, 1374 (2001) (affirming conviction of defendant who encouraged victim and "actively participated in her actual suicide attempt by helping her to obtain the pills, combining at least two bottles of pills together, and handing them to her").

2. Massachusetts has fallen behind the national trend and failed to address the complex issues in suicide cases.

Massachusetts is an outlier, because it has no assisted-suicide law, and "[m]anslaughter is a common-law crime that has not been codified by statute." Carter I, 474 Mass. at 632 n.11. Moreover, there is little, if any, case law in Massachusetts on assisted suicide.

Before Carter I, this Court "never ... had the occasion to consider [a manslaughter] indictment against a defendant on the basis of words alone." Id. at 633. Thus, even if this Court determines the facts adduced at trial could support an involuntary manslaughter conviction, that holding should not be retroactively applied to Carter. To do so would violate the Ex Post Facto Clause and art. 24. See Com. v. Wilkinson, 415 Mass. 402, 408 (1993).

In Carter I, this Court acknowledged that it "cannot define where on the spectrum between speech and physical acts involuntary manslaughter must fall." 474

Mass. at 634. But if this Court cannot draw that line, persons of ordinary intelligence cannot be expected to know, with any certainty, how to avoid crossing it.[3]

In the absence of any assisted-suicide cases as precedent, the closest analogy appears to be the self-inflicted death cases, Com. v. Atencio, 345 Mass. 627 (1963) (affirming convictions of physically present defendants who, during game of Russian roulette, handed gun to victim), and Persampieri v. Com., 343 Mass. 19 (1961) (affirming conviction of physically present defendant who loaded gun for his battered wife, told her how to pull the trigger, and berated her to do it). Yet neither case held that a physically absent person, who does not actually provide the means of death or actively

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[3] In Carter I, this Court suggested "consciousness of guilt" evidence could save involuntary manslaughter from unconstitutional vagueness. 474 Mass. at 631 n.11. But whatever Carter thought about her conduct, the risk of arbitrary enforcement in suicide cases is an "independent reason[]" to find the law violates due process, Hill v. Colorado, 530 U.S. 703, 732 (2000). Even if evidence that Carter deleted texts or lied to police - which she disputed at trial - showed she had fair notice, law enforcement lacked required guidance. Further, such evidence is "insufficient" to affirm Carter's conviction. Com. v. Gonzalez, 475 Mass. 396, 408 (2016). It "does not necessarily mean that the person is in fact guilty, because feelings of guilt are sometimes present in innocent people," Com. v. Toney, 385 Mass. 575, 585 n.6 (1982), citing Miller v. U.S., 320 F.2d 767, 773 (D.C. Cir. 1963). That is especially true of an immature, emotional juvenile, like Carter, who may feel "at fault" in a moral sense and fear punishment from parents or peers.

participate in the suicide, commits an unlawful killing by telling another person to take his or her own life. Put another way, Atencio and Persempieri, unusual cases predating cellphones and texting by decades, did not give fair notice of criminal liability for a "virtually present" person who verbally encourages a suicide.

Carter did not provide Roy with the physical means to commit suicide, and she was not actually present when he took his own life. Indeed, Carter had no physical involvement in the suicide. Roy obtained the pump, placed it in his truck, and started it, and Roy was alone when he died. The contention that "conduct similar to that of [Carter]" was found to be unlawful in Atencio or Persempieri cases ignores these critical differences. Carter I, 474 Mass. at 632 n.11.

C. In the context of assisted suicide, the common law of involuntary manslaughter is subject to arbitrary enforcement.

"A vague statute ... offends due process because of 'its lack of reasonably clear guidelines for law enforcement and its consequent encouragement of arbitrary and erratic arrests and prosecutions.'" Com. v. McGhee, 472 Mass. 405, 413-414 (2015), quoting Com. v. Sefranka, 382 Mass. 108, 110 (1980).

Although the goal of "curbing criminal activity" is "weighty," it "cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity," Kolender v. Lawson, 461 U.S.

352, 361 (1983), because "the clarity of the crime," even one involving death, "does not obviate the danger of arbitrary and discriminatory enforcement," Com. v. Wilbur W., 479 Mass. 397, 414 (2018) (Gants, C.J., concurring). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." Smith, 415 U.S. at 574.

In Carter I, this Court expressed confidence that it could "easily distinguish" this case from more sympathetic instances of assisted suicide, which may not constitute involuntary manslaughter:

> [This case] is not about a person seeking to ameliorate the anguish of someone coping with a terminal illness and questioning the value of life. Nor is it about a person offering support, comfort, and even assistance to a mature adult who, confronted with such circumstances, has decided to end his or her life.

474 Mass. at 636. The full record from trial, however, demonstrates that confidence was misplaced.

The trial evidence showed that Carter was "seeking to ameliorate the anguish" of Roy, who suffered from severe depression, and "question[ed] the value of life." Id. Who is to say whether a particular case is an acceptable assisted suicide or a blameworthy killing? Can a person assist her elderly friend to end the pain of terminal ALS but not encourage her young friend to

end the despair of chronic depression? What if the defendant spoke out of exasperation to someone who "cried wolf" about suicide, or hoped to provoke a crisis that could lead to treatment? Although due process does not permit courts, much less prosecutors, to differentiate, on "an ad hoc and subjective basis" between such cases, Grayned v. Rockford, 408 U.S. 104, 108-109 (1972), neither the common law nor this Court's opinion in Carter I provides any meaningful criteria to prevent arbitrary enforcement of the law.

IV. Interpreting involuntary manslaughter to reach encouraging suicide with words alone infringes on free speech, because it is neither necessary nor narrowly tailored to serve the compelling state interest in preserving human life.

Because the judge convicted Carter for what she said, or failed to say, not what she did, this case implicates free speech under the 1st Amendment and art. 16. Any law that regulates speech about suicide must survive strict scrutiny, but the common law of involuntary manslaughter, which may criminalize and chill a wide range of speech, is not narrowly tailored to serve the state interest in preserving human life.

A. Footnote 17 to Carter I did not resolve the free speech issue.

In Carter I, this Court stated that "[t]he speech at issue" is not protected, because "the Commonwealth has a compelling interest in deterring speech that has a direct, causal link to a specific suicide." 474 Mass.

at 636 n.17. That statement, however, did not answer the constitutional question that Carter now presents on appeal, based on the evidence at trial.

As noted above, see Part II.A., this Court must now consider the full factual record and apply the more rigorous post-trial standard of review to determine whether, in fact, Carter's speech had a "direct, causal link" to Roy's suicide. While the judge found Carter recklessly encouraged Roy to commit suicide, he rejected the Commonwealth's contention that Carter actually assisted Roy, and no evidence from the trial supports that conclusion. Further, the free speech problems in this case cannot be side-stepped by asserting a "direct, causal link" to Roy's death.

B. Carter's words encouraging Roy's suicide, however distasteful to this Court, were protected speech.

"The hallmark of the protection of free speech is to allow the 'free trade in ideas' - even ideas that the overwhelming majority of people may find distasteful or discomforting." Virginia v. Black, 538 U.S. 343, 358 (2003) (cross burning); see Texas v. Johnson, 491 U.S. 397, 414 (1989) (flag burning).

"Speech in support of suicide, however distasteful, is an expression of a viewpoint on a matter of public concern." Minnesota v. Melchert-Dinkel, 844 N.W.2d 12, 24 (Minn. 2012). Thus, such speech, even when it involves depravity or dishonesty, is "entitled to special

protection as the 'highest rung on the hierarchy of 1st Amendment values.'" Id., quoting Snyder v. Phelps, 562 U.S. 443 (2011).

Although "the government may regulate certain categories of expression," Black, 538 U.S. at 358, those categories are "well-defined and narrowly limited," Chaplinksy v. New Hampshire, 315 U.S. 568, 571-572 (1942), such as fighting words, obscenity, true threats, and incitement, see U.S. v. Alvarez, 567 U.S. 707, 717-718 (2012) (listing categories). None applies to Carter's speech in this case. See Melchert-Dinkel, 844 N.W.2d at 21 (holding encouraging suicide does not fall into any of the familiar categories).

C. A criminal law that penalizes a person who encourages another person to commit suicide cannot survive strict scrutiny.

As this Court noted, in the context of Carter's speech, the common law of involuntary manslaughter is subject to "strict scrutiny." Carter I, 474 Mass. at 636 n.17, citing Mendoza v. Licensing Bd. of Fall River, 444 Mass. 118, 197 n.12 (2005); Com. v. A Juvenile, 368 Mass. 580, 584 (1975) (holding any law that "regulates speech requires the strictest of our scrutiny").

To survive strict scrutiny, "a content-based regulation" on speech "must be 'necessary to serve a compelling state interest and ... narrowly drawn to achieve that end.'" Op. of the Justices to the Senate, 436 Mass. 1201, 1206 (2002), quoting Simon & Schuster,

Inc. v. N.Y. Crime Victims Bd., 502 U.S. 105, 118 (1991).

Undeniably, the Commonwealth has "an unqualified interest in the preservation of human life." Carter I, 474 Mass. at 636 n.17, citing Glucksberg, 521 U.S. at 728. But that fact begins, rather than ends, the constitutional analysis. Any law penalizing speech must be narrowly tailored to serve such a compelling state interest. See R.A.V. v. St. Louis, 505 U.S. 377, 395 (1992); see Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 794, 805 (2011) (although there was "no doubt" that "a State possesses legitimate power to protect children from harm," holding a law regulating violent video games did not "survive strict scrutiny").

In this case, because involuntary manslaughter may prohibit speech that merely encourages suicide, the law must be narrowly tailored to serve the state interest in preserving life. Few courts have considered such laws, and the most prominent case is Minnesota v. Melchert-Dinkel, 844 N.W.2d 12 (Minn. 2012), which held that an assisted-suicide law survived strict scrutiny only to the extent that it prohibited conduct or speech that assists, or enables, a person to commit suicide. See id. at 23. The law was found to be unconstitutional insofar as it prohibited speech that "encourages" or "advises" another person to commit suicide. Id. at 24.

The line between assisting and encouraging can be hard to draw, but the former entails "enabl[ing]" the

act in a specific, significant way. Id. at 23. Speech that makes a suicide possible, not merely by "rall[ying] courage," but by providing critical information, may be assistance (e.g., Melchert-Dinkel told victims how to hang themselves without a high ceiling). Id. at 24. Encouragement, even if ugly or strident, remains protected, and a law that penalizes such speech (or chills related speech about suicide, including by physicians or family) is unconstitutional.

Arguably, the Minnesota law still violates free speech by penalizing assisting suicide with words alone, see id. at 26 ("'[A]ssists'... requires an action more concrete than speech.") (Page, J. dissenting), but this much is clear: under the Minnesota court's analysis, Carter engaged in protected speech by verbally encouraging Roy to go through with his suicide plan.

V. The Commonwealth failed to prove beyond a reasonable doubt that, for the purposes of the Youthful Offender Statute, Carter "inflicted" serious bodily harm on Roy.

The Youthful Offender Statute authorizes an indictment against a juvenile who "is alleged to have committed an offense that involves the infliction or threat of serious bodily harm." G.L. c.119, § 54 (emphasis added). Infliction means direct, physical causation, not proximate causation, and the evidence at trial established that Carter did not inflict any harm on Roy. Even if Carter's encouragement proximately

Consistent with this plain meaning, state courts have unanimously interpreted "inflict" to mean a specific form of causation that "contemplates physical contact of a forceful nature." People v. Modiri, 39 Cal. 4th 481, 493 (Cal. 2006).[4] For example, in State v. Morris, 2016 Ohio 5490 (Ohio Ct. App. Aug. 24, 2016), the court vacated an aggravated-robbery conviction, holding the defendant did not "inflict" physical harm on the victim, who suffered injuries when she jumped from a balcony to escape an attempted robbery. Because Ohio law (like Massachusetts law) does not define "inflict," the court applied "its plain and ordinary meaning," that is "to give by, or as if by, striking." Id. at 6. The court further reasoned:

> The legislature's use of the word "inflict," instead of "cause," indicates that something more than but-for causation is required to prove the harm element of aggravated robbery under [Ohio law]. The word "inflict" implies some direct action by one person upon another. [W]e conclude [the victim]'s injuries were not

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[4] See also State v. Jackson, 855 N.W.2d 201, *5-6 (Iowa Ct. App. 2014) ("[W]e ... interpret 'inflict' to mean an intentional action directed at the [victim] ... to directly, not merely proximately, cause the injury."); Smith v. State, 21 N.E.3d 121, 126 (Ind. Ct. App. 2014) (interpreting "inflict" to mean the direct causation of physical injury); State v. Phillips, 317 P.3d 236, 239 (Or. 2013) ("A person need not inflict physical injury personally to "cause" that injury[.]"); Pratt v. Altendorf, 692 N.W.2d 115, 118 (N.D. 2005) ("Using its general and ordinary meaning, 'inflicting' is a word of action, such as striking, beating, or imposing.").

> caused by any direct action on the part of [the defendant]. Rather, they happened indirectly as a result of her jump.

Id. at 6-7 (emphasis added).

Federal courts have likewise interpreted "inflict," in criminal laws, to be "narrower" and "more precise" than "cause." U.S. v. Zabawa, 719 F.3d 555, 557-559 (7th Cir. 2013) ("What inflict conveys is a sense of physical immediacy: to cause harm directly, by physical force."). Invoking a famous Shakespearean suicide, the Seventh Circuit has observed, "[t]his meaning holds almost anywhere one looks: ... Othello dies from a wound that he inflicts upon himself, even though Iago proximately caused him to do it." Id. at 559-60.

The ordinary meaning of "infliction" is consistent with the legislative purpose of the Youthful Offender Statute. The requirement that a juvenile inflict serious bodily harm was a criterion that the legislature added to the law "to limit the number of juveniles being tried as adults." Com. v. J.A., 478 Mass. 385, 389 (2017). Juveniles charged as adults "can no longer avail themselves of the same protections afforded to delinquent children," Doe v. Att'y Gen., 425 Mass. 210, 213 n.8 (1997), and they face "substantially greater penalties," Com. v. Dale D., 431 Mass. 757, 759 (2000). Thus, "it is hardly absurd to conclude that, in choosing the word 'inflict' rather than 'cause,' [the legislature] meant to tighten the causal chain between

action and injury" before stripping a young defendant, like Carter, of juvenile protections and exposing her to adult punishments. Zabawa, 719 F.3d at 560-561.

Even if "inflict" were ambiguous, and arguably synonymous with "cause," there are two reasons to read narrowly the Youthful Offender Statute in Carter's favor as requiring the direct, physical causation of harm to justify a youthful offender indictment. Under the rule of lenity, the Youthful Offender Statute, like all criminal statutes, must be "construed narrowly." Com. v. Clint C., 430 Mass. 219, 225 (1999). Moreover, § 54, like all juvenile laws, must be "construed liberally," because "children, as far as practicable, shall be treated, 'not as criminals, but as children in need of aid, encouragement, and guidance.'" Metcalf v. Com., 338 Mass. 648, 651 (1959), citing G.L. c.119, § 53.

C. The Commonwealth presented no evidence that Carter was the direct, physical cause of any harm to Roy, much less his suicide.

A "virtually present" defendant, many miles away from another person, cannot "inflict" serious bodily harm, in the sense of striking a blow, with words alone over the phone or by text. All the more so, if a remote defendant merely fails to act, to prevent another person from hurting himself or to save him, she has not "inflicted" harm, in the sense of striking another. Even if the defendant is deemed the proximate cause of injury or death, the defendant has not "inflicted" that harm.

Focusing on "threat" rather than "infliction," this Court applied the same distinction to interpret narrowly the Youth Offender Statute in Felix F. v. Com., 471 Mass. 513 (2015). The Commonwealth argued the charged offense, possession with intent to distribute heroin, necessarily involved the "threat of serious bodily harm," because heroin causes "drug overdoses" and "the drug trade is associated with acts of violence." Id. at 515. But the Commonwealth did not prove "the juvenile's direct connection to any violence or threat of violence in the commission of the offense." Id.

Rejecting that argument, this Court interpreted the statutory text of § 54 in light of the legislative intent in "setting forth the 'threat [of serious bodily harm]' requirement for a youthful offender indictment," and it held, "the definition of 'threat' in the juvenile offender statute requires a communication or declaration, explicit or implicit, of an actual threat of physical injury." Id. (emphasis added).

Just as a "threat" must be an "actual threat of physical injury," id. at 515, "infliction" requires the direct, physical cause of injury, see Hoshi H., 72 Mass. App. Ct. at 21 (vacating youthful offender indictment because defendant's conduct "facilitating [her friend's] escape and avoiding arrest [after shooting] did not involve the requisite infliction or threat of serious bodily harm described in the statute").

VI. The judge erroneously failed to evaluate 17-year-old Carter's conduct under the standard of a "reasonable juvenile."

Both forms of involuntary manslaughter incorporate an objective standard of reasonableness. See Com. v. Sires, 413 Mass. 292, 302 (1997) ("reasonable person"); Levesque, 436 Mass. at 450 ("reasonable care"). For these purposes, a reasonable person is a typical adult, and reasonable care is the care that an adult would ordinarily demonstrate in a given situation.

But "children cannot be viewed simply as miniature adults," J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011), because they "demonstrate a lack of maturity and underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking," Diatchenko v. Dist. Att'y, 466 Mass. 655, 660 (2013), citing Miller v. Alabama, 567 U.S. 460, 471 (2012). It would be unfair and irrational to convict a juvenile for failing to act like an adult, because reasonable conduct to a teenager may be reckless conduct for an adult.

Where a manslaughter conviction turns on a failure to act, the defendant should be judged based on the risk (if any) that a reasonable peer would discern and the action (if any) a juvenile should take. Cf. Mathis v. Mass. Elec. Co., 409 Mass. 256, 263 (1991) ("[A] child is 'judged by the standard of behavior expected from a child of like age, intelligence, and experience'"), quoting Mann v. Cook, 346 Mass. 174, 178 (1963).

In this case, however, when evaluating the evidence concerning 17-year-old Carter, the judge failed to apply a reasonable juvenile standard. The judge failed to consider that, like Roy, Carter was an immature, impulsive adolescent who struggled with mental health issues and that, given her juvenile stage of brain development, she discounted risks, underappreciated her responsibility to alleviate them, and lacked a mature understanding of how to do so.

It was reasonable, if regrettable, for a juvenile in Carter's position to doubt Roy's threats of suicide, given his history of "crying wolf," or to hope Roy's suicide attempt might precipitate a crisis that would force the Roys to get their son professional help. It was also reasonable, from a teen's perspective, for Carter to heed Roy's demand not to alert anyone to his plans, or else risk his hatred. See Ex.30 (6/29/30 7:38 pm) (Roy: "and the only way id hate you is if you told people about this. U hear me?" Carter: "I'm not gonna tell anyone."). Finally, it was certainly reasonable for 17-year-old Carter to accept the false assurance from Roy's family, on the night of July 12, 2014, when she asked if Roy was "okay." Ignoring this reality, the judge erroneously convicted Carter.

VII. The judge erroneously excluded all testimony by a defense expert on adolescent psychology, which would have put Carter's conduct in proper context, whatever standard of care was applied.

The defense moved in limine to admit the expert testimony of forensic psychologist, Frank DiCataldo, Ph.D., regarding recent advances in the psychological science of adolescent development and the neuroscience of adolescent brain development. His testimony was intended to educate the fact-finder about how adolescents differ from adults in their thinking, decision-making, and self-regulation abilities.

The judge found that Dr. DiCataldo qualified as an expert and that evidence about "the undeveloped adolescent brain ... has garnered recognition in Massachusetts" as reliable science. R.32. Still, the judge excluded the testimony: because Dr. DiCataldo had not examined Carter, or applied his expertise to her situation in particular, the judge ruled that the "reliability of his theory as it would apply to this case cannot be tested," and his testimony "would invite and require speculation by the jury." R.34-35.

In denying Carter's motion and excluding all of Dr. DiCataldo's testimony, the judge abused his discretion and violated Carter's right to present her defense, as guaranteed by the 6th Amendment and art. 12, which provide "'every subject shall have the right to produce all proofs that may be favorable to him.'" Com. v. Polk, 462 Mass. 23, 33 (2012), quoting Washington v. Texas,

388 U.S. 14, 19 (1967).

The judge also departed from this Court's guidance on expert testimony about psychological issues. In Com. v. Okoro, 471 Mass. 51 (2015), this Court upheld the decision to admit similar expert testimony:

> regarding the development of adolescent brains and how this could inform an understanding of [a] particular juvenile's capacity for impulse control and reasoned decision-making .... This information was beyond the jury's common knowledge, [and] it offered assistance to the jury in determining whether the defendant was able to form the intent required[.]

Id. at 66; see id. at 67 n.23 ("[A] defendant's young age can be a factor in evaluating the defendant's mental state[.]"). Nothing in Okoro suggests, much less holds, that an examination is a prerequisite of admissibility.

This Court has permitted experts to testify about psychological issues that bear on credibility or reliability, without any prior examination of a party or witness. For example, in Com. v. Shanley, 455 Mass. 752 (2010), the Commonwealth presented expert testimony regarding the usual behavior of sexually abused children to rebut claims by defense counsel that young victims had fabricated their stories. See id. at 757, 766; see also Polk, 462 Mass. at 33-36 (allowing expert testimony on dissociative disorder without a diagnosis of the victim); Com. v. Goetzendanner, 42 Mass. App. Ct. 637, 641-646 (1997) (same for battered women syndrome).

By erroneously excluding all testimony from the

defense expert on adolescent psychology, the judge deprived Carter of her right to present evidence that would have put in context her conduct, state of mind, and influence, if any, on Roy's suicide. "Because such evidence, if credited, would materially affect the ... evaluation of [the] credibility and reliability" of the evidence from Carter, Roy, and other juvenile witnesses, Carter was "constitutionally entitled to present the evidence." Polk, 462 Mass. at 38-39.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Michelle Carter respectfully requests that this Court vacate her conviction and order the entry of a judgment of acquittal or remand for a new trial.

Respectfully submitted,

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ADDENDUM

U.S. Constitution, Article 1, Section 10

No State ... shall pass any ... ex post facto law.

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law[.]

U.S. Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor[.]

Massachusetts Declaration of Rights, Article 12

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him ... And every subject shall have a right to produce all proofs, that may be favorable to him . . . and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment . . . without trial by jury.

Massachusetts Declaration of Rights, Article 16

> The right of free speech shall not be abridged.

Massachusetts Declaration of Rights, Article 24

> Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government.

Massachusetts General Laws Chapter 119, Section 53

> Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

Massachusetts General Laws Chapter 119, Section 54

> The Commonwealth may proceed ... by indictment as provided by chapter two hundred and seventy-seven, if a person is alleged to have committed an offense against a law of the Commonwealth while between the ages of fourteen and 18 which, if he were an adult, would be punishable by imprisonment in the state prison, and the person has previously been committed to the department of youth services, or the offense involves the infliction or threat of serious bodily harm in violation of law... Complaints and indictments brought against persons for such offenses, and for other criminal offenses properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), shall be brought in accordance with the usual course and manner of criminal proceedings.

Massachusetts General Laws Chapter 265, Section 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.

CERTIFICATE OF COMPLIANCE

I, Daniel N. Marx, as counsel for Defendant-Appellant Michelle Carter, hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure.

Daniel N. Marx

Dated: June 29, 2018

CERTIFICATE OF SERVICE

I, Daniel N. Marx, as counsel for Defendant-Appellant Michelle Carter, hereby certify that on this 29th day of June, 2018, I have caused the foregoing brief to be served by first-class U.S. mail, postage prepaid on counsel of record for the Commonwealth:

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