COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss. NO. SJC-12043

COMMONWEALTH
(Appellee)

v.

MICHELLE CARTER
(Appellant)

ON APPEAL AFTER RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY AND FROM A DECISION OF THE JUVENILE COURT OF BRISTOL COUNTY

BRIEF OF THE YOUTH ADVOCACY DIVISION OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICI CURIAE IN SUPPORT OF THE APPELLANT

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ISSUES PRESENTED

I. Whether an objective "reasonable juvenile" standard should be applied to the common law of involuntary manslaughter by wanton and reckless conduct, requiring that the juvenile engaged in conduct that was undertaken with knowledge of facts that would cause a reasonable juvenile of the same age to know that a danger of serious harm existed.

II. Whether evidence that a juvenile has encouraged another person to commit suicide constitutes the "infliction ... of serious bodily harm" for the purpose of indicting her as a youthful offender under G.L. c. 119, § 54.

STATEMENT OF INTEREST OF AMICI CURIAE

The Committee for Public Counsel Services ("CPCS") is a statewide agency established by G.L. c. 221D, §§ 1 et seq., mandated to provide counsel to indigent defendants in criminal proceedings. In particular, the Youth Advocacy Division ("YAD") of CPCS represents juvenile offenders from indigent families in delinquency, youthful offender, and post-adjudication proceedings. The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the

national ACLU, is a statewide nonprofit membership organization dedicated to defending the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Both organizations actively work to ensure the existence of a fair and effective justice system for all juveniles.

Amici submit this brief to aid in the Court's consideration of two issues raised in the case of Michelle Carter, a 17 year old, indicted as a youthful offender for manslaughter, and therefore subject to public scrutiny, criminal stigma, and adult sentencing.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented in the Defendant's brief. (D.Br. 2-3).[1]

STATEMENT OF FACTS

Amici adopt the statement of the facts presented in the Defendant's Brief. (D.Br. 4).

SUMMARY OF THE ARGUMENT

The Massachusetts and American legal systems have typically treated juveniles differently under the law. This different treatment recognized what every parent

[1] The following abbreviations will be used throughout: Defendant's brief, (D.Br. [page number]); Defendant's Addendum (D.Add. [page number]).

understands: children are different from adults. This understanding has now been confirmed by science. The difference between juveniles and adults is not a reflection of deviant morality but rather part of the normal neurological developmental process that every person experiences. The law should not ignore the tradition of different treatment, validated by science, even where conduct is alleged to have resulted in tragic consequences. To that end, this Court should adopt a "reasonable juvenile of the same age standard" by which to examine the actions of juvenile offenders charged with involuntary manslaughter (and other offenses for which culpability is determined with reference to the reasonable person). (pp. 4-36).

With respect to the reach of G.L. c. 119, § 54, this Court should construe "infliction ... of serious bodily harm" to require acts of direct violence, whereby juveniles use their body or an implement to cause serious bodily harm. Such a construction attends to the cannons of statutory interpretation and avoids serious constitutional questions as applied to Carter. (pp. 37-49).

ARGUMENT

I. Holding juveniles to the reasonable person standard is inappropriate in light of judicial recognition of recent developments in adolescent brain science, which build upon the longstanding legal recognition of the difference between juveniles and adults.

In Diatchenko v. District Attorney for the Suffolk Dist., this Court allowed current scientific research on adolescent brain development to guide its holding that sentencing a juvenile offender to life without the possibility of parole is unconstitutional under Article 26 of the Massachusetts Declaration of Rights. 466 Mass. 655, 671 (2013). The Court was compelled by the fact that "the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen ..." and the fact that juveniles "have diminished culpability and greater prospect for reform[.]" Id. at 670 (emphasis added)(internal quotation marks omitted); accord Brief for American Psychological Association et al. as Amici Curiae at 3-4 Miller v. Alabama, 132 S.Ct. 2455 (2012) (No. 10-9464) [hereinafter APA Miller Brief] *available at* http://www.apa.org/about/offices/ogc/amicus/miller-hobbs.pdf (visited, March 7, 2016).

The Court should similarly apply brain science indicating diminished culpability of adolescents to substantive criminal offenses, specifically to the common element of an "objectively reasonable person." The failure to do so would be antithetical to the principles underlying Diatchenko and would ignore the structural and functional differences between the juvenile and adult brain. Ignoring these differences produces an absurd and contradictory rule: a juvenile offender is not deemed as culpable as an adult for purposes of punishment because of differences between adult and juvenile brains but is judged culpable, or guilty, in the first place because her actions did not conform to adult expectations.

Additionally, holding juveniles to a reasonable adult standard stands in stark contrast to the almost universal treatment of juveniles as different under the law for non-criminal (and some criminal) purposes. There is no compelling reason to ignore the tradition of treating youth differently in the criminal law, especially when the wisdom of that differing treatment has now been confirmed by science. See Roper v. Simmons, 543 U.S. 551, 569 (2005) (science supports what "any parent knows," that "a lack of maturity and

an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young") (citations omitted).

Most criminal offenses include a mental state element.[2] For homicide, judges and juries sort unlawful killings into degrees of murder and manslaughter based upon the mental state of the defendant. See generally Model Jury Instructions on Homicide (2013). The defendant's mental state – her thought processes and cognitive function – is critically important to determining her level of culpability for a homicide.

Frequently, however, determining the defendant's mental state relies on what the reasonable person would have done in similar circumstances. Model Jury Instructions on Homicide at 21, 33, 43, 57, 65, 77, 85, 90 (self-defense, defense of another, murder by extreme atrocity and cruelty, murder in the second degree, voluntary manslaughter, involuntary manslaughter). This concept of the "reasonable person" grows out of a number of assumptions about social

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[2] This concept is so integral to the American criminal law that the Model Penal Code instructs the reading of mental state requirements into otherwise silent statutes unless the offense is specifically designated as a strict liability offense. Model Penal Code § 2.02(1), 2.05(1)(b).

norms, the capability of people to conceptualize their actions in light of these social norms, and the ability to foresee the consequences of their actions - all from an adult perspective. Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. Rev. 539, 547-548 (2016).

This case concerns involuntary manslaughter by wanton and reckless conduct. A defendant may be found guilty of this offense if the Commonwealth proves beyond a reasonable doubt that she intentionally engaged in "wanton and reckless conduct, that is, conduct that caused a death and was undertaken with knowledge of facts that would cause a reasonable person to know that a danger of serious harm existed." Commonwealth v. Sires, 413 Mass. 292, 302 (1992) (emphasis added).

The Court should take this opportunity to announce that for the purpose of determining whether a juvenile has committed manslaughter (or other crimes involving "the reasonable person"[3]) her actions should be judged against the reasonable juvenile of the same

[3] "[N]one of what is said about children - about their distinctive (and transitory) mental traits and environmental vulnerabilities - is crime specific." Miller, 132 S.Ct. at 2465.

age.[4] To do otherwise unfairly holds juveniles criminally culpable under a standard that most juveniles are not capable of meeting. It also ignores the way juveniles' brains actually work. It transforms the reasonable person from a helpful tool for judging behavior into an unmoored legal fiction that inappropriately marks a juvenile as a criminal. And in the case of a juvenile charged as a youthful offender, a conviction based upon that mismatched standard can

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[4] Numerous legal scholars advocate the consideration of age to inform objective analyses used in a wide range of criminal law contexts. See, e.g., Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. Rev. 539 (2016) (recalibration of mens rea standards as applied to juveniles generally) [hereinafter Carroll]; Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. Rev. L. & Soc. Change 1 (2014) (juvenile-specific standard for consent to search under the Fourth Amendment); Lily Katz, *Tailoring Entrapment to the Adolescent Mind*, 18 U.C. Davis J. Juv. L. & Pol'y 94 (2014)(modification of entrapment law to consider the defendant's age); Shobha L. Mahadev, *Youth Matters: Roper, Graham, J.D.B., Miller, and the New Juvenile Jurisprudence*, 38-MAR Champion 14 (2014) (reasonable child standard in felony murder, accomplice liability and the admissibility of confessions); Marsha Levick & Elizabeth-Ann Tierny, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for the Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles be Behind?*, 47 Harv. C.R.-C.L. L. Rev. 501 (2012) (reasonable juvenile standard for duress defense, justified use of force defenses, provocation defense, negligent homicide, and felony murder).

lead to significant terms of incarceration in state prison - up to twenty years in the instant case.

A. Juvenile Brain Science

"[N]euroscience confirms that adolescents demonstrate cognitive processes that are distinct from adult cognitive processes." Carroll, supra at 593, citing Jay N. Giedd et al., Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 Nature Neuroscience 861, 861-62(1999); Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859, 860-61 (1999). And it is now firmly established that adolescent brain science research is relevant to the analysis of legal issues, including constitutional analysis. See Miller, 132 S.Ct. at 2458. Diatchenko, at 466 Mass. at 662, 670; see also J.D.B. v. North Carolina, 131 S.Ct. 2394, 2403 n.5 (2011) (acknowledging that juvenile brain research supports the conclusion that the *Miranda* custody analysis as applied to a juvenile must be performed from the perspective of a reasonable juvenile of the same age). Brain science thus bears upon whether a reasonable juvenile would know that her conduct created a danger of serious harm to another.

Until a juvenile reaches full psychosocial maturity, which typically occurs in early adulthood, she has diminished capacity in relation to adults in the areas of "impulse control, risk aversion, resistance to peer pressure, sensitivity to costs as well as rewards, and future orientation." Kathryn Monahan et. al, Juvenile Justice Policy and Practice: A Developmental Perspective 44 Crime & Just. 577, 590 (2015) (internal citations omitted); accord Carroll, supra at 583 (and sources cited). Juveniles also demonstrate diminished cognitive control when exposed to negative emotional situations and stress. See Alexandra O. Cohen et. al, When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts 11 (2016);[5] Laurence Steinberg & Robert G. Schwartz, Development Psychology Goes to Court in Youth on Trial: A Developmental Perspective on Juvenile Justice 26 (Thomas Grisso and Robert Schwartz eds., 2000). Of particular import, even when adolescents approach the cognitive capacities of adults, "they are less skilled than their adult

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[5] Article available at http://ac.els-cdn.com/S1878929315001292/1-s2.0-S1878929315001292-main.pdf?_tid=e7b11960-e188-11e5-998c-00000aacb361&acdnat=1457041562_077c4d6f8c70c01b74a060266d7b0fa0 (visited March 7, 2016).

counterparts in using these capacities to make real-life decisions." Carroll, supra at 583, citing Beatriz Luna et al., The Teenage Brain: Cognitive Control and Motivation, 22 Current Directions Psychol. Sci. 94, 96-99 (2013).

The "structural and functional changes [experienced by adolescents] do not all take place along one uniform timetable[.]" Laurence Steinberg, Should the Science of Adolescent Brain Development Inform Public Policy? Issues in Science and Technology 70 (Spring 2012), *available at* http://issues.org/28-3/steinberg/ (visited March 11, 2015) [hereinafter Steinberg].

> Brain systems implicated in basic cognitive processes reach adult levels of maturity by mid-adolescence, whereas those that are active in self-regulation do not fully mature until late adolescence or even early adulthood. In other words, adolescents mature intellectually before they mature socially or emotionally, a fact that helps explain why teenagers who are so smart in some respects do surprisingly dumb things.

Id.

Specifically, there are four notable structural changes and corresponding functional changes. In preadolescence and early adolescence, juveniles experience synaptic pruning, which improves executive

functioning. Monahan, supra at 582. APA Miller Brief at 27. Beginning around puberty and concluding in the early 20s, juveniles have more sensitivity than adults in their "incentive processing systems," which in turn increases "risk-taking, reward seeking and peer-influenced behaviors." Monahan, supra at 582. APA Miller Brief at 26-27. During adolescence and continuing into adulthood, the juvenile brain also undergoes myelination, the insulation of nerve fibers in the brain improving signal transmission efficiency. Monahan, supra at 582. Myelination improves connections within the prefrontal cortex and improves "response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information." APA Miller Brief, supra at 28; accord Monahan, supra at 582. The last change "is an increase in the strength of connections between the prefrontal cortex and other brain regions", which continues late into adolescence. Monahan, supra at 583. This change is important in facilitating better processing of emotional information and better self-regulation. Id.

> The different timetables followed by these different brain systems create a vulnerability to risky and reckless behavior

> that is greater in middle adolescence than before or after. It's as if the brain's accelerator is pressed to the floor before a good braking system is in place. Given this, it is no surprise that the commission of crime peaks around age 17 - as does first experimentation with alcohol and marijuana, automobile crashes, accidental drownings and attempted suicide.

Steinberg, supra at 71.

These differences do stem from the conscious and deliberate decision of the juvenile to engage in what the reasonable adult would understand to be reckless behavior, but rather from an organically-based and normal diminished capacity to appreciate risk and foresee consequences. Accord Carroll, supra at 581 citing B.J. Casey & Kristina Caudle, The Teenage Brain: Self Control, 22 Current Directions Psychol. Sci. 82, 82-83 (2013). Each of the noted structural and functional changes indicate that adolescents make decisions using different brain regions and circuitry and with different reactions to stimuli than adults. See generally Steinberg, supra; Monahan, supra. The research also indicates that (despite some individual variance) these differences manifest consistently in

adolescents.[6] Carroll, supra at 584 (and sources cited).

The field of juvenile brain research continues to refine its conclusions, as the Court pointed out in Commonwealth v. Okoro, 471 Mass. 51, 60-61 (2015). But this refinement should not impede the Court from adopting the reasonable juvenile standard.

> [A]s science has built on its base of knowledge about adolescents, the research has pointed in only one direction: Youths' judgment is inherently compromised by their age and placement along the developmental continuum.

Levick, supra at 20; accord Graham v. Florida, 560 U.S. 48, 68 (2010) ("No recent data provide reason to reconsider the Court's observations in Roper about the nature of juveniles. ... [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.") The strong consensus that juveniles exhibit elevated levels of risk-taking behavior in comparison to adults due to differences between the juvenile and adult brains has been repeatedly confirmed. See generally

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[6] Variance between individuals is tolerated by objective standards. See, e.g., Joseph R. Nolan & Laurie J. Sartorio, Criminal Law § 676 (3d ed. 2001) (noting that under the common law infancy defense even a child prodigy would not be capable under the law of committing any crime).

E.P. Shulman, et al., The dual systems model: Review, reappraisal, and reaffirmation. Dev. Cogn. Neurosci. (2015).[7]

It is a proper and established practice for this Court to incorporate established scientific principles into jury instructions. For example, in Commonwealth v. Gomes, the Court recognized that there were five principles "regarding eyewitness identification for which there is a near consensus in the relevant scientific community" that compelled revision of the eye-witness model jury instruction. 470 Mass. 352, 367-368 (2015).[8] Likewise, this Court should rely on

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[7] *available at* http://dx.doi.org/10.1016/j.dcn.2015.12.010. (last visited March 7, 2016).

[8] There are numerous other cases that have adopted jury instructions or standards based upon scientific evidence. See, e.g., Commonwealth v. Johnson, 45 N.E.3d 83, 91 (Mass. 2016) (relying on social science research regarding juror reliance on identification witness confidence to declare that in-court identifications following impermissibly suggestive out-of-court identifications are inadmissible); Commonwealth v. Chappell, 473 Mass. 191, 206 (2015) (in response to defendant's arguments based on social science research, modifying instruction regarding consequences of verdict of not guilty due to lack of criminal responsibility); Commonwealth v. Bastaldo, 472 Mass. 16, 23-26 (2015) (cross-racial identification instruction adopted in light of social science); Doe v. Sex Offender Registry Bd., 466 Mass. 594, 608 (2013) (Court cautioned that SORB guidelines that "fail to heed growing scientific consensus in an area may undercut the individualized nature of the

the scientific consensus regarding juvenile decision-making capabilities and adopt a reasonable juvenile standard. As in Gomes, such a standard will aid the jury in considering the evidence through an appropriate lens. Of course, if the brain science research results in additional points of consensus, this Court will have the power to incorporate that information into additional modifications of the common law.

Through no fault of their own, adolescents simply have a different biological baseline for cognition and conduct. Thus, any given action when taken by an adolescent may signal a different state of mind than it would if taken by an adult.[9] The law must recognize, and increasingly is recognizing,[10] this difference.[11]

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hearing to which a sex offender is entitled, an important due process right."); Commonwealth v. DiGiambattista, 442 Mass. 423, 438 (2004) (scientific research confirming that minimizing a suspect's crime makes that suspect more likely to confess incorporated into Court's confession voluntariness analysis).

[9] The reasonable (adult) person standard can produce an unreliable conclusion regarding the state of mind - and therefore the guilt - of a juvenile defendant. The failure to correct that flawed standard could implicate Eighth Amendment concerns. The United States Supreme Court has held that "rules that diminish the reliability of the guilt determination" can violate the 8th Amendment. Beck v. Alabama, 447 U.S. 625, 638 (1980). In Beck, the Alabama law precluded the jury from considering a lesser included offense if the

B. Common Practice

"Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." Miller, 132 S.Ct. at 2470, quoting J.D.B., 131 S.Ct. at 2404. Indeed, the widespread creation of separate juvenile-justice systems at the turn of the twentieth century recognized the legal relevance of the differences between juveniles and adults before any confirmatory brain science existed.

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defendant had been charged with a capital offense. Id. at 628. The Court focused substantially on the fact that the determination of guilt could have been the difference between a death sentence and a lesser sentence, and that death is constitutionally different. Id. and 637-638. The "death is different" view, however, has been at least partially abandoned in the youth context. Miller, 132 S.Ct. 2455 (extending the Court's decision in Graham prohibiting life sentences for non-homicide crimes, to homicide crimes).

[10] See, e.g., Diatchenko, 466 Mass. 655; Miller, 132 S.Ct. 2455; J.D.B., 131 S.Ct. 2394; Graham, 560 U.S. 48; Roper, 543 U.S. 551.

[11] Some jurists have begun to question well-settled doctrines in light of the new brain science. See, e.g., Miller, 132 S.Ct. at 2475-2477 (Breyer, J., concurring) (adult felony-murder doctrine inconsistent with the social and neuroscientific research). Commonwealth v. Walczak, 463 Mass. 808, 811 (2012) (Lenk, J. concurring) (explaining that mitigating circumstances and defenses must be put before the grand jury when indicting a juvenile because of considerations surrounding the juvenile's age); Layman v. State, 17 N.E.3d 957 (Ind. Ct. App. 2014) (opinion vacated (May, J. concurring) (questioning adult tort-like foreseeability standard present in felony murder as applied to 16-and-17-year-old defendants in light of Miller and J.D.B.).

Carroll, supra at 576. And the Supreme Court observed in 1981 — also before the advent of adolescent brain science — that "youth is more than a chronological fact. ... It is a time and condition of life ... during [which] minors often lack the experience, perspective, and judgment expected of adults." Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982).

"The law has historically reflected ... that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." J.D.B., 131 S.Ct. at 2403. Legal restrictions on juveniles' abilities to alienate property, enter binding contracts, marry without parental consent, vote, or serve on juries stretch from the English common law across American jurisdictions today. Id. at 2403-2404 & n. 6. Notably

> even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, '[a]ll American jurisdictions accept the idea that a person's childhood is a relevant circumstance' to be considered.

Id. at 2404, citing Restatement (Third) of Torts §10 Comment *b* p. 117 (2005); see also Mathis v.

Massachusetts Elec. Co., 409 Mass. 256, 263 (1991), citing Mann v. Cook, 346 Mass. 174, 178 (1963) (children are responsible for their torts but not held to same standard of care as adults).

In J.D.B., the Supreme Court used this longstanding and commonsense principle to apply a reasonable juvenile standard to the determination of whether a juvenile would think she was in custody for the purposes of a Miranda analysis. The Court observed that "in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age." 131 S.Ct. at 2405. The juvenile's age may not be "a determinative or even a significant[] factor in every case." Id. at 2406. But, the Court held that age, is "a reality that courts cannot simply ignore." Id.

The Massachusetts common law traditionally treats juveniles differently. "The possible negligence of a child is 'judged by the standard of behavior expected from a child of like age, intelligence, and experience.'" Mathis, 409 Mass. 263, citing Mann, 346 Mass. at 178. While liable for their torts, children are "not ... held to the same standard of care as adults." Mann, 346 Mass. at 178. The child's age is

relevant to assigning liability even where the child's actions actually caused or contributed to the harm.

Indeed, the Massachusetts Legislature regularly draws significant distinctions between adults and children.[12] These distinctions similarly embody the notion that children have a lesser capacity for decision-making. One recently-enacted Legislative distinction - the Massachusetts junior motor vehicle operator laws - recognizes that 16.5 to 18-year-old juveniles can participate in the adult activity of driving only under specialized conditions. G.L. c. 90, § 8. These conditions remove distractions and limit the hours when juveniles can drive. Id.

Massachusetts also treats juveniles differently in many criminal law contexts. Massachusetts

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[12] See, e.g., G.L. c. 51 § 1 (setting voting age at 18); G.L. c. 149 § 62 (restricting minors from participating in certain occupations); G.L. c. 190B § 5-407 (concerning minors' inability to manage money and property); G.L. c. 231 § 85O (ability to contract begins at 18); G.L. c. 269 § 12B (restricting minor's ability to use an air rifle or BB gun); G.L. c. 112 § 12S (restricting minors' access to abortion without parental consent or judicial order); G.L. c. 231 § 85P (18 is the age of full legal capacity); G.L. c. 149 § 67 (restricting the number of hours that a minor can work); G.L. c. 207 § 7,24,25 (restricting minors' ability to marry); G.L. c. 234 § 1 (restricting jury service to those qualified to vote, i.e. those over 18); see also St. 2013, c. 84 (changing juvenile court jurisdiction to include those age 17).

historically recognized a common law infancy defense. Nolan & Sartorio, supra at §676. A child under 7 was "considered incapable of possessing criminal intent and therefore committing a crime." Id. For children between 7 and 14 a rebuttable presumption of incapacity was employed, and children 14 and older enjoyed no presumption of incapacity. Id. This defense did not consider variance between individual children, only the child's age. Id. The infancy defense has been mostly abandoned. See, e.g., Commonwealth v. Walter R., 414 Mass. 714 (1993) (no longer presumption that youth under 14 is incapable of rape); Commonwealth v. A Juvenile, 399 Mass. 451 (1987) (no presumption in favor of incapacity of 12 year old to make digital penetration of 5 year old).[13] That abandonment did not result in the treatment of children as adults, however; it resulted in the determination of

[13] The adoption of a reasonable juvenile standard is different than the defense of infancy. This standard does not preclude a juvenile from being held criminally responsible or require a presumption of incapacity. Rather it assigns criminal responsibility in line with the scientific consensus about juvenile brain development. Also, unlike the 1800s-era infancy defense, the reasonable juvenile standard takes into account the fact that brain development is incomplete in all juveniles, including those from 14-17.

responsibility within the juvenile courts, subject to juvenile sentencing.

The Massachusetts Legislature adopted a delinquency system in 1906, and "[a]lthough the original statute has been frequently amended over the years, its fundamental purpose and structure have remained essentially the same." R.L. Ireland, Juvenile Law § 1.2 (2d ed. 2006). Even as the juvenile justice system in Massachusetts has been modified to treat juveniles more harshly in some respects, the "longstanding principle that the treatment of children who offend our laws are not criminal proceedings", and "that the operative provisions of the statutes shall be liberally construed to require rehabilitative 'aid, encouragement and guidance' rather than criminal dispositions for children who offend" continues in full force. Commonwealth v. Connor C., 432 Mass. 635, 641-642 (2000); accord Ireland, supra at § 1.2. The distinct juvenile justice system serves the dual goals of protecting juveniles' constitutional rights and avoiding the "attachment of criminal stigma" to juveniles. Connor C., 432 Mass. at 642.

A recognition of the differences between juveniles and adults is also seen in Massachusetts

jurisprudence concerning custodial interrogation. In Commonwealth v. A Juvenile (No. 1), this Court held that juveniles must have the opportunity to consult with an interested adult before a Miranda waiver can be valid, unless the juvenile is over 14 and "the circumstances ... demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile." 389 Mass. 128, 134 (1983). The interested-adult rule was designed with reference to similar laws adopted by other jurisdictions, then-recent Supreme Court opinions recognizing the need for additional protections for juveniles, and science suggesting juveniles' lower capacity to understand the significance and protective function of the rights listed in the Miranda warnings. Id. at 130-132. Recently, this Court extended the interested adult rule to 17-year-old suspects in line with legislation extending juvenile court jurisdiction through the age of 17. Commonwealth v. Smith, 471 Mass. 161, 166-167 (2015).

This Court has also indicated that consideration of juvenile criminal culpability with reference to a reasonable juvenile of the same age standard is appropriate. In Ogden O., this Court declined to find

that juveniles – solely by virtue of their age – were completely incapable of forming specific criminal intent. 448 Mass. 798, 804 (2007). The Court did note, however, that

> the law presumes different levels of responsibility for juveniles and adults and, realizing that juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity.

Id. And in considering the sufficiency of the evidence, the Court appears to have applied a reasonable juvenile of the same age standard in concluding that "[t]he jury could reasonably believe that the extraordinarily dangerous nature of fire would not be lost on a ten year old boy." Id. at 802.

Other jurisdictions adopted reasonable juvenile standards in criminal cases as early as 1979, notably in cases involving negligence and recklessness. The Minnesota Supreme Court held that

> in juvenile delinquency proceedings, the question of culpable negligence [an element of second degree manslaughter] must be decided with reference to the conduct and appreciation of risk reasonably to be expected from an ordinary and reasonably prudent juvenile of a similar age.

In re Welfare of S.W.T., 277 N.W.2d 507, 514 (Minn. 1979); accord In re Welfare of R.J.R., Minn. App., No.

A04-370, slip-op. (Dec. 21, 2004) (applying reasonable 14-year-old standard in reckless discharge of a firearm case).

The Washington Court of Appeals held that for the purpose of manslaughter by reckless conduct, a juvenile's actions are measured against an objective standard that takes into account the juvenile's age. State v. Marshall, 39 Wash. App. 180, 183-184 (1984); accord State v. A.G., 72 P.3d 226 (Wash. 2003) (applying reasonable juvenile standard applied to defendant's conduct in unpublished section of the opinion); State v. R.L., 133 Wash.App. 1009, No. 56272-0-I., slip-op. (May 30, 2006) (reasonable 12 year old standard in reckless burning case). The Court of Appeal of Louisiana assessed whether a defendant's conduct constituted an "egregiously gross deviation from the standard of care to be expected of a 14-year-old youth under similar circumstances" for the purpose of affirming his conviction of negligent homicide. In re Malter, 508 So.2d 143, 145 (La. Ct. App. 1987). The Arizona Supreme Court held in deciding whether the defendant was guilty of criminally negligent property destruction "that riding a shopping cart in a parking lot when done by a fifteen year old is an activity

that must be judged by the standard of fifteen year olds of like age, intelligence and experience." In re William G., 963 P.2d 287, 293 (Ariz. 1997). Finally, in J.R. v. State, the Alaska Court of Appeals held that for the purpose of second degree murder by extreme recklessness, the juvenile defendant's actions must be assessed "against the standard of a reasonable person of his age, intelligence, and experience under similar circumstances." 62 P.3d 114, 119 (Alaska App. 2003).

In Marshall, the Washington Supreme Court reasoned that the definition of reckless conduct, which involved assessment of how a reasonable person would have acted "in the same situation," dictated the appropriateness of considering youth in the analysis. Marshall, 39 Wash. App. at 183. Massachusetts law also asks the fact-finder to consider the reasonable person in "similar circumstances" when a defendant is charged with wanton and reckless involuntary manslaughter. See Commonwealth v. Catalina, 407 Mass. 779, 789 (1990) ("[c]onduct which a reasonable person, in similar circumstances, would recognize as reckless will suffice . . ."). The inclusion of the phrase "similar circumstances" should be read to include objective

consideration of the juvenile's youth because to do otherwise would allow the phrase to be robbed of perhaps its most significant meaning. Accord ABA Standards on Juvenile Delinquency and Sanctions § 3.2, Commentary ("the actor's situation" includes consideration of youth when there is evidence presented that the youth's conduct was reasonable in light of his "age, maturity, and mental capacity").

The Supreme Court employed similar reasoning in J.D.B. There, the Court noted that the consideration of the reasonable adult can strip away the effectiveness of the reasonable person standard with respect to juveniles, observing that "the custody analysis would be nonsensical absent some consideration of the suspect's age."[14] 131 S.Ct. at 2405. The Court further observed that the failure to

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[14] In describing the nonsensical analysis engendered by holding the 13-year-old suspect to an adult standard, the Supreme Court explained that:

> [w]ere the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand [the juvenile's situation]. To describe such an inquiry is to demonstrate its absurdity.

131 S.Ct. at 2405.

take age into consideration would make the inquiry artificial and confusing. Id. at 2407. Adopting a reasonable juvenile standard will similarly clarify the reasonable person inquiry and increase the accuracy of the factual analysis.

Courts and legislatures have long known what the science confirms: juveniles are not adults. Age has and can provide an objectively discernible standard upon which juries and judges can assess the criminal responsibility of the juvenile in a manner consonant with fairness and justice. To continue to apply an adult standard to children in light of tradition, and confirmed by science, works a miscarriage of justice.

C. Adopting a reasonable juvenile standard does not conflict with this Court's holding in Commonwealth v. Okoro.

The Court confronted a somewhat related issue in Okoro, 471 Mass. at 64-67. The Court held that a juvenile defendant is not "incapable of forming the intent required for murder in the first or second degree simply by virtue of being fifteen," and observed that "the mere fact that the defendant was fifteen years old when the events occurred cannot be the basis in and of itself for a finding that the defendant lacked the necessary mental state to commit

the crime." Id. at 66 n. 23 (emphases added). In doing so, the Court, as it did in Ogden O., held that youth is not a per se bar to being found guilty of criminal offenses, but youth may be relevant to the defendant's state of mind. Id. at 66; Ogden O., 448 Mass. at 804. Amici do not request that this Court hold that a juvenile's youth, alone, renders her completely incapable of forming a particular mental state.

Amici instead urge this Court to hold juveniles to a standard they are developmentally capable of meeting. This means that for crimes to which the objectively reasonable person standard applies, the jury will be explicitly able to consider what the reasonable juvenile would have comprehended about the circumstances and the consequences of her actions in those circumstances. The jury will then compare the actions of the juvenile defendant to the reasonable juvenile. To be sure, juveniles will still be convicted or adjudicated delinquent using the reasonable juvenile standard. But the standard under which their actions are judged will take into account the very real differences between adults and children that adolescent brain science confirms.

Okoro itself supports the notion that it is appropriate to consider evidence about "the development of adolescent brains" when assessing the defendant's state of mind, including general evidence about adolescent development. 471 Mass. 51, 66-68 (endorsing trial judge's ruling permitting expert testimony "regarding the development of adolescent brains and how this could inform an understanding of this particular juvenile's capacity"). Moreover, in Okoro, the question concerned Okoro's subjective intent, not an objective standard of intent. Thus, it was appropriate to employ an expert who incorporated adolescent brain science into a more comprehensive assessment of the defendant's capacity to form the intent required for conviction. 471 Mass. at 66-67.

Expert testimony is not similarly required when the question of culpability relies on an objective standard. By adopting a reasonable juvenile standard, fact-finders will be instructed to incorporate an assessment of how youth may have affected the defendant's culpability as the Court endorsed in Okoro. And this Court noted in Gomes the utility of providing jurors with an objective standard by which

to assess the evidence in light of science. Objective instructions:

> offer certain advantages over expert testimony: 'they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role...

Gomes, 470 Mass. at 377.[15] As is affirmed in J.D.B, the reasonable juvenile standard is objective and can be readily applied:

> officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

J.D.B., 131 S.Ct. at 2407. Juries too will be able to make these distinctions.

D. This Court can change the common law

To the extent that adopting a reasonable juvenile standard is a change in the Massachusetts common law, such adoption warranted and permissible. "Manslaughter is a common-law crime that has not been codified by statute in Massachusetts, so its elements are derived

[15] Of course, nothing precludes the parties from offering additional evidence on the point.

from the common law." Commonwealth v. Rodriguez, 461 Mass. 100, 106-107 (2011), quoting Commonwealth v. LeClair, 445 Mass. 734, 740 (2006). This Court undoubtedly has the power to change and extend the common law. See, e.g., Commonwealth v. Labrie, ___ Mass. ___, slip-op. at 17 (holding that nonachievement is not an element of attempted murder); Smith, 471 Mass. 161 (extending interested adult rule for interrogations to 17 year olds); Commonwealth v. Matchett, 386 Mass. 492 (1982) (modifying the common law of felony-murder in the second degree to require evidence of a conscious disregard of risk to human life).

The Court has used this power to change or clarify the common law with regard to involuntary manslaughter. See Commonwealth v. Levesque, 436 Mass. 443 (2002) (extending situations to which involuntary manslaughter by omission can apply); Catalina, 407 Mass. 779 (changing the theory of unlawful-act manslaughter to only be applicable in the case of a battery); see also Commonwealth v. Welansky, 316 Mass. 383, 400 (1944) (clarifying that involuntary manslaughter involves wanton and reckless conduct, not merely negligent conduct). To direct the substance of

these changes, this Court employed principles and standards from tort law. Levesque, 436 Mass. at 449-450; Welansky, 316 Mass. at 399-401. As discussed above, supra at 19-20, tort law in Massachusetts employs the reasonable juvenile standard. Adopting this standard in the criminal law comports with the importation of tort standards into the law of involuntary manslaughter in Levesque and Welansky.

This Court has also made significant changes in the common law of homicide when compelled by scientific advances. In Commonwealth v. Lewis, this Court abolished the "year and a day rule" as applied to homicide because "the rule appear[ed] anachronistic upon a consideration of the advances of medical and related science in solving etiological problems as well as in sustaining or prolonging life in the face of trauma or disease." 381 Mass. 411, 414-415 (1980). Similarly, this Court made significant changes over time in the jury instructions regarding eye-witness identification due to scientific developments. See, e.g., Gomes, 470 Mass. at 365-367 (introducing instruction based upon five scientifically accepted principles); Commonwealth v. Santoli, 424 Mass. 837, 845-846 (1997) (removing confidence in instruction due

to lack of correlation between confidence and accuracy); Commonwealth v. Rodriguez, 378 Mass 296, 302 (1979) (recognizing "special problems" with the reliability of eye-witness identification).

Changing the common law of involuntary manslaughter to incorporate a reasonable juvenile standard would harmonize civil and criminal law and attend to the significant scientific advances regarding adolescent brain development. This Court should abandon the now anachronistic and disproven view that juveniles and adults share the same ability to make decisions and align the common law with the scientific consensus about the juvenile brain.

E. Legislative intent

The adoption of a reasonable juvenile standard does not contravene legislative intent. On two occasions this Court held that legislative intent precluded a holding that juveniles are entirely incapable of forming specific criminal. Ogden O., 448 Mass. at 803-805 & n. 6. Okoro, 471 Mass. at 65. The Legislature commanded this result by "determin[ing] that a youth is capable of committing certain crimes." see also Okoro, 471 Mass. at 65; see also Ogden O., 448 Mass. at 803-805 & n. 6. The ability to convict

juvenile defendants of criminal offenses, however, is entirely consistent with different treatment of juveniles in those proceedings. For example the "interested adult" rule applies to all juveniles, even those tried as adults. See, e.g., Commonwealth v. Guyton, 405 Mass. 497 (1989) (reversing 16-year-old defendant's first degree murder conviction in superior court who did not consult an interested adult and did not effectively waive his Miranda rights); accord Okoro, 471 Mass. at 66 (testimony about the general development of adolescent brains admissible to determine the juvenile-defendant's "capacity for impulse control and reasoned decision-making"). Therefore, unlike Okoro and Ogden O., the Legislature has not commanded any particular rule and this Court retains all of its inherent common law power to define the elements of manslaughter.

Particularly, with respect to a youthful offender, the reasonable juvenile standard is consonant with the purpose of the legislatively-created juvenile justice system: to treat children "not as criminals, but as children in need of aid, encouragement and guidance." G.L. c. 119 § 53. The statement of purpose found in § 53 remained unchanged

when the Legislature adopted the "youthful offender" provisions in St. 1996, c. 200. Connor C., 432 Mass. at 640; see also Ireland, supra, at 1.2 & n. 4.

Youthful offenders remain within the jurisdiction of the juvenile courts, indicating that the youthful offender provisions are "not a punitive scheme strictly akin to the adult criminal justice system. "Rather [they are] primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders[.]" Commonwealth v. Walczak, 463 Mass. 808, 827 (2012) (Lenk, J., concurring). Significant discretion remains in the hands of juvenile court judges in deciding punishment for youthful offenders. G.L. c. 119 § 58; Walczak, 463 Mass. at 829-830.

The reasonable juvenile standard affects only the process by which the jury or judge determines guilt. Under the proposed standard, juveniles charged with crimes involving a reasonable person standard may be held criminally responsible - as intended by the Legislature - but by a standard appropriate to their development.

II. Encouraging another to commit suicide does not constitute the infliction of serious bodily harm in G.L. c. 119 § 54.

This Court requested amicus briefs addressing "whether evidence that a juvenile has encouraged another person to commit suicide constitutes the 'infliction or threat of serious bodily harm' for the purpose of indicting her as a youthful offender under G.L. c. 119, § 54." Amici focus on whether such evidence constitutes infliction of serious bodily harm, and urge this Court to hold that it does not. Properly interpreted, "infliction . . . of serious bodily harm" encompasses only direct physical acts, not speech.

A. Plain meaning and legislative intent

"The act [(St.1996, c.200)] does not define the phrase 'infliction or threat of serious bodily harm.'" Commonwealth v. Clint C., 430 Mass. 219, 225 (1999). But this Court has made clear that whether the juvenile may be indicted as a youthful offender relies on the conduct of the particular juvenile, not the offense with which she is charged. Id. at 226.

"As with all matters of statutory interpretation, [this Court] look[s] first to the plain meaning of the statutory language." Commonwealth v. Mogelinski, 466

Mass. 627, 633 (2013). Language that is clear and unambiguous is given its ordinary meaning, within the bounds of reasonableness and the "purpose and history of the statute." Id. "[The Court] derive[s] the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Commonwealth v. St. Louis, 473 Mass. 350, 355 (2015).

"Any ambiguity in a criminal statute must be strictly construed against the government." Commonwealth v. McGhee, 35 N.E.3d 329, 338 (2015) (citation omitted). See also Commonwealth v. Libby, 472 Mass. 93, 96 (2015) (statutes that allow a derogation of liberty "are to be strictly construed"). Narrow construction

> not only helps avoid possible constitutional due process problems, but also helps ensure that individuals are not deprived of liberty without a clear statement of legislative intent to do so.

Id. at 96-97. Indictment under G.L. c. 119, § 54 allows juveniles — who otherwise would be subject only to DYS custody — to be incarcerated in adult prisons for lengthy terms. The statute is the gatekeeper between staggeringly different losses of liberty, and

it should be construed narrowly in light of this grave purpose and effect.

The term "infliction" is at best ambiguous. The word is derived from the Latin verb infligere, which means "to dash or strike." The Oxford English Dictionary, vol. VII (2d ed. 1989). Modern dictionary definitions of the term "inflict" generally retain, at least as one definition, the original notion that the word includes a physical striking. See, e.g., id. ("To lay on as a stroke, blow, or wound; to impose as something that must be endured; to cause to be borne"); Merriam-Webster's Collegiate Dictionary (11th ed. 2003) ("a: to give by or as if by striking . . . b: to cause (something unpleasant) to be endured"). Other courts have taken these definitions to indicate that the term infliction requires a direct physical act, not merely but-for causation. See, e.g., State v. Dudley, Iowa App., 810 N.W.2d 533, slip-op. at *4 (Jan. 19, 2012) ("term connotes an intentional, directed action on the part of the actor" not proximate causation); State v. Bates, Ohio App. Ct., No. 97APA02-171, slip-op at *5 (Dec. 2, 1997) (inflict connotes direct action by one person upon another,

otherwise legislature would have used more general term: cause).

The terms "inflict" and "infliction" are used in many statutes, but this Court has infrequently addressed their meaning. See Commonwealth v. Lent, 420 Mass. 764, 769 (1995) (for purposes of G.L. c. 277, § 62, using knife to control and attempt to rape victim "inflicted" violence in Massachusetts); Commonwealth v. Travis, 408 Mass. 1, 8 (1990) (similar, kidnapping inflicted violence in Massachusetts); Commonwealth v. Macloon, 101 Mass. 1, 2 (1869) (defendants "inflicted" injury or violence by committing 20 assaults upon deceased and then left debilitated victim outside without food). The cases in which the Court has addressed the meaning involve direct physical acts, and there is nothing that indicates that a verbal act would suffice.

Because there is no single clear definition of "inflict," the legislative intent is particularly important. The youthful offender act, St. 1996, c. 200 ("act") added the contested language into G.L. c. 119, § 54. The act responded to societal concerns about juvenile gun violence and violent crimes committed by juveniles. See State House News Service (July 24,

1996); State House News Service (July 20, 1996); State House News Service (March 16, 1996). In Clint C., this Court indicated that the "infliction or threat" language was meant to include "violent crimes" broadly and only certain "non-violent crimes, such as possession or distribution of a firearm[.]" 430 Mass. at 226; accord Felix F. v. Commonwealth, 471 Mass. 513, 516 (2015) (dismissing youthful offender indictment because distributing heroin, although capable of causing serious bodily harm, not a threat for purpose of G.L. c. 119, § 54). There is no indication that the Legislature sought to include speech within the prohibition on infliction of serious bodily harm.

Given the rules of strict construction required in the circumstances, the term "infliction" should be construed to apply to conduct that is a direct physical act causing the requisite level of injury.

B. Interpreting G.L. c. 119, § 54 to reach Ms. Carter's conduct raises significant constitutional issues

The "infliction . . . of serious bodily harm" clause of § 54 does not affirmatively define a

prohibited act.[16] If the Court adopted a construction of "infliction" that encompassed Carter's speech, such construction would render the statute unconstitutionally vague as applied to Carter. And as explained below, such a construction would threaten protected speech.

1. Standard for analyzing vague statutes

"The void for vagueness doctrine requires that criminal statutes be defined in terms that are sufficiently clear to permit a person of average intelligence to comprehend what conduct is prohibited."[17] Clint C., 430 Mass. at 227; Accord Skilling v. United States, 130 S. Ct. 2896, 2927-28 (2010). A penal statute violates due process if it requires ordinary people, "at peril of life, liberty or property[,] to speculate as to [its] meaning." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

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[16] See United States v. L. Cohen Grocery, 255 U.S. 81, 89 (1921) ("Observe that the section forbids no specific or definite act. . . . It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."); Coates v. City of Cincinatti, 402 U.S. 611, 616 (1971) (prohibited conduct must be defined with "reasonable specificity").

[17] YAD focuses on the fair notice - not the arbitrary enforcement - component of the void for vagueness doctrine for the purpose of this argument. Clint C., 430 Mass. at 227.

"A more stringent vagueness test is used[,]" where as here, "the rights of free speech or association are involved." Butler v. O'Brien, 663 F.3d 514, 520 (1st Cir. 2011). Indeed, even when "violence or threats of violence ... occurs in the context of constitutionally protected activity ... 'precision of regulation is demanded.'" NAACP v. Claiborne Hardware, 458 U.S. 886, 916 (1982).

For the reasons stated in section I, and in particular with regard to a statute that only applies to juveniles, the vagueness inquiry here should be whether the ordinary juvenile of average intelligence would have understood the statute to reach her conduct. Evaluating whether a statute providing for punishment of juveniles as adults is comprehensible to the average adult would be nonsensical and unfair.

2. Vagueness doctrine as applied to Carter

Under any vagueness test, and certainly under the more stringent test applied in the First Amendment context, G.L. c. 119, § 54 is vague as applied to Ms. Carter's conduct. She did not have sufficient notice that her conduct was both criminal by adult

standards,[18] and punishable by twenty years in state prison through operation of G.L. c. 119, § 54.

Ms. Carter verbally expressed her encouragement for Roy to commit suicide via text message and phone calls. (D.Br. 4). Carter was not present. She did not imply that any negative consequence would flow from Roy's failing to heed her words. Contrast Commonwealth v. Washington W., 462 Mass. 204, 210 (2012) (pushing victim to ground constituted implied threat of further force if victim resisted penetration). Roy, regrettably, inflicted harm upon himself by running a compression pump in his truck. (D.Br. 4).

To a reasonable juvenile, the statute is even more vague in this context. Anyone who has been a juvenile knows that intense or fraught romantic relationships are precisely those situations where even the most reasonable juvenile uses (by adult standards) bad judgment. Carter was 17 and in a romantic relationship with 18-year-old Roy. D.Br. 4 n. 1. Roy had previously attempted suicide and failed. D.Add. 10, 42, 49. Carter repeatedly suggested that Roy should seek professional help. D.Add. 35 (Carter

[18] Amicus endorses the defendant's argument that the manslaughter statute is vague as applied to Carter's conduct. (D. Br. 28-30).

happy Roy is taking medication), 35-38 (Carter encourages Roy to go to McClean Hospital), 45 (Carter proud of Roy for telling counselor he was suicidal), 50 ("the mental hospital would help you"), 51 ("I would get help"). She then questioned why he had not committed suicide, if that was what he wanted. D. Add. 50-51. Finally, Roy specifically requested that Carter tell him how to kill himself. D. Add. 51. She obliged. D. Add. 51.

A reasonable juvenile would not know that expressions of support for a romantic partner's fervent desire to end his pain — however unwise and misguided — would constitute a criminal "infliction" of serious bodily harm. Even among adults,

> the philosophical proposition that life is intolerable and suicide preferable has been frequently expressed. Illustrations . . . include such recognized works as "Hamlet's 'to be or not to be' soliloquy, in which he lists human sufferings and declares that suicide is preferable to life [Shakespeare, *Hamlet*, Act III, Scene 1]; [ ] the sixteen suicides in Shakespearian drama alone; [ ] Tolstoy's novel, *Anna Karenina*, in which Anna, concluding life and love are a 'stupid illusion' and suicide the only way out, throws herself under a train; [ ] Sylvia Plath's autobiographical *The Belljar*, in which she presents a passionate, reasoned defense of her own 'rational' suicide; [ ] Arthur Miller's Pulitzer prize-winning play, *Death of a Salesman*, where Willy Loman, confronting failure of his dreams, defends

> his planned suicide as a 'courageous' way finally to achieve something and 'takes more guts than to stand the rest of ... life ringing up zero ...';

McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 995 n.4 (Cal. Ct. App. 1988) (brackets in original) (Ozzy Osbourne 'Suicide Solution' protected speech). Socrates is generally lionized for committing suicide rather than betraying his beliefs. Dist. Attorney for Suffolk Dist. v. Watson, 381 Mass. 648, 684 & n.24 (1980) (Liacos, J. concurring) (characterizing Socrates' choice to commit suicide rather than escape as "noble" or "self-respecting"). Iconic American songs discuss suicide as a legitimate option. See, e.g., Richard M. Jones, "Trouble in Mind" (Paramount Records 1924) ("I'm gonna lay my head, On some lonesome railroad line, Let the two-nineteen train, Ease my trouble in mind").

The Buddhist Lotus Sutra praises Bodhisattva Sarvasattvapriyadarsana's act of self-immolation as "the most sublime worship of the law," which helped thousands of people attain enlightenment. Saddharma-Pundarîka Or, The Lotus Of The True Law. Translated By H. Kern (1884) Sacred Books of the East, Vol XXI; http://www.sacred-texts.com/bud/lotus/lot22.htm

(visited March 13, 2016). Indeed, this teaching was the direct inspiration for the iconic[19] 1963 suicide by self-immolation of Buddhist monk Thích Quảng Đức, which is often credited with having destroyed support for the Diem regime in Viet Nam. S. Jacobs, Cold War Mandarin: Ngo Dinh Diem and the Origins of America's War in Vietnam, 1950–1963 149 (2006). Similarly, the suicide of Mohamed Bouazizi is generally regarded as a sad but understandable act that resulted in the oppressive Tunisian government's being deposed and that triggered the 2011 "Arab Spring". See Kareem Fahim, Slap a Man's Pride Set Off Tumult in Tunisia, the New York Times (Jan. 21, 2011), *available at* http://www.nytimes.com/2011/01/22/world/africa /22sidi.html (visited March 16, 2016). In this societal context, a reasonable juvenile would not have been able to readily discern that distant speech constituted infliction of serious bodily harm that could result in an adult prison sentence.

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[19] Associated Press photographer Malcolm Browne won the Pulitzer prize for images of this event. http://www.ap.org/explore/the-burning-monk/ (visited March 14, 2016) (note images of second monk pouring gasoline on Thich). The image continues to have a cultural impact, e.g., popular rock band Rage Against The Machine used the image for their debut album. See Id.

3. A broad construction of the "infliction" clause would raise First Amendment concerns

Holding that Carter's actions can constitute the criminal infliction of serious bodily harm, would render G.L. c. 119, § 54 capable of proscribing otherwise-protected speech. Posit a Buddhist youth who, at a heated political meeting in Massachusetts, expresses strong support for Tibetan monks who self-immolated. In a room filled with devout adherents, the juvenile argues that the Dalai Lama had told the Times of India that he approves self-immolation if the motivation is worthy.[20] A fellow adherent participating by Skype and known to strictly adhere to the Dalai Lama's teachings then self-immolates outside a Boston event featuring Chinese government officials. Under the Commonwealth's theory, the youth inflicted serious bodily harm by espousing his sincerely held (if mistaken) religious views. The prospect is both chilling and incompatible with the right to freedom of

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[20] See Special: The Dalai Lama, The Times of India, http://www.timesnow.tv/videoshow/4423746.cms (visited March 13, 2016); but see The Telegraph, Teenage monk sets himself on fire on 53rd anniversary of failed Tibetan uprising (March 13, 2012), *available at* http://www.telegraph.co.uk/news/worldnews/asia/tibet/9139760/Teenage-monk-sets-himself-on-fire-on-53rd-anniversary-of-failed-Tibetan-uprising.html (visited March 16, 2016) (Dalai Lama "does not encourage" self-immolation).

speech. See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). ("where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'")

Confining the infliction of serious bodily harm to direct physical acts during which juveniles use their hands or an implement to injure someone simultaneously removes the vagueness inherent in the statute, narrows the statute to avoid conflict with the freedom of speech, and implements the legislative objective of allowing some physically violent youth to be sentenced as adults in a judge's discretion.

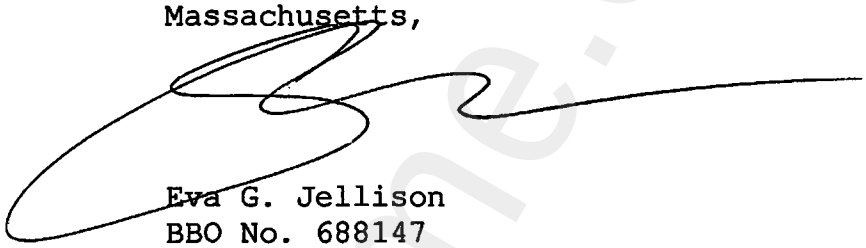
CONCLUSION

A reasonable juvenile of the same age standard should apply to criminal laws that employ a reasonable person standard. Such a standard harmonizes substantive criminal law with procedural criminal law and civil law, and accounts for a broad scientific consensus.

Also, this Court should find that "infliction ...of serious bodily harm" for the purpose of G.L. c. 119, § 54 cannot be accomplished by a juvenile verbally encouraging an adult to commit suicide. Such

a construction would violate the canons of statutory interpretation and would render the statute vague as applied to Ms. Carter.

On behalf of the Youth Advocacy Division of the Committee For Public Counsel Services and the American Civil Liberties Union of Massachusetts,



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Certificate of Compliance

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers).

/s/ Eva G. Jellison

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Certificate of Service

I hereby certify under the pains and penalties of perjury that I have today made service on counsel for both parties by sending a copy of the Amicus Brief via first class mail to:

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