COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2017-P-1465

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE

V.

JESSE CARRILLO,
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE HAMPSHIRE COUNTY SUPERIOR COURT

BRIEF AND ADDENDUM FOR THE APPELLANT

JESSE CARRILLO,
BY HIS ATTORNEYS

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II. Whether the trial judge erred in denying the defendant's motion for a required finding of not guilty at the close of the Commonwealth's case on the charge of involuntary manslaughter.

STATEMENT OF THE CASE

Jesse Carrillo was indicted on September 28, 2015, by the Hampshire County Grand Jury: No. 15-CR-117.[1] (RA. 3-4). Count 1 of the indictment alleged involuntary manslaughter stemming from the October 2013 drug overdose death of Eric Sinacori. (RA. 3). Count 2 alleged distribution of heroin. (RA. 4). The defendant was arrested later that day. (RA. 5). He was arraigned on October 1, 2015 and released on $25,000 bail. (RA. 5).

The Court (Agostini, J.) conducted jury empanelment on May 22, 2017. (RA. 10). The Court heard

[1] References to the trial transcript will be noted by volume and page number (Tr. :) and references to the record appendix will be noted as (RA.).

motions in *limine* on May 22 and 23, 2017. (RA. 10). Trial commenced on May 24, 2017. (Tr. 3:1; RA. 10).

The defendant submitted Defendant's Trial Memorandum in order to alert the trial judge that he would be moving for a required finding of not guilty on the charge of involuntary manslaughter. (Tr. 1:20). In addition, the defendant informed the court that, in regard to the distribution count, he would be seeking a jury instruction on the lesser included crime of possession of heroin based on the evidence that the defendant and Eric Sinacori had engaged in a joint venture to obtain and possess heroin for both of their personal use. (Tr. 1:18–19). The Commonwealth "made a calculated choice" to proceed on the theory of distribution alone – reasoning that this charge did not carry with it a lesser included offense of simple possession. (Tr. 3:9). The court sent the parties jury instructions that included joint venture to possess for personal use. (Tr. 4:122–23). The Commonwealth objected to the inclusion of any lesser included offense on the distribution charge, and the court indicated that the matter would be decided at a later time. (Tr. 4:123).

After the Commonwealth rested its case-in-chief, the defendant moved for a required finding of not guilty on the charge of involuntary manslaughter. (Tr. 4:88). The motion was denied. (Tr. 4:94).[2]

Two charge conferences were conducted after the close of all evidence. (Tr. 5:46, 78). The defendant requested in writing that the court instruct the jury on possession of heroin as a lesser included offense based on the evidence that the defendant and the alleged victim of the manslaughter count had engaged in a joint venture to obtain and possess heroin for their personal use. (RA. 20). The request was denied, as was the defendant's oral motion for reconsideration. (Tr. 5:40). The court revisited the issue at the conclusion of the jury charge to note that the defendant's rights were saved on this request for the instruction. (Tr. 5:101).

The jury returned verdicts of guilty on both indictments on May 30, 2017. (Tr. 6:5). The defendant requested that the jury be polled with respect to the involuntary manslaughter count and the request was

[2] The trial judge recognized that whether the evidence was sufficient to go to the jury "is an issue" but ruled that he was going to allow the involuntary manslaughter charge to go to the jury. (Tr. 4:94).

denied. (Tr. 6:6-7). The Commonwealth moved for sentencing. (Tr. 6:9). The defendant moved for a two-day continuance in order to submit a memorandum with supporting documents prior to sentencing; the motion was granted. (Tr. 6:10). The Commonwealth moved that the defendant's bail be revoked pending sentencing. (Tr. 6:10). The court denied the Commonwealth's request and scheduled sentencing for June 2, 2017. (Tr. 6:10).

The defendant was sentenced on the distribution charge to two and one-half years in the House of Correction, with one year to serve and the balance suspended. (Tr. 7:9). He was sentenced on the involuntary manslaughter charge to five years of probation to be served following the period of incarceration. (Tr. 7:9).

The defendant immediately filed a Notice of Appeal. (RA. 28). A limited stay of execution of the sentence was granted by the trial judge. (RA. 11). On June 23, 2017, a single justice of the Appeals Court declined to extend the stay of execution of the sentence. (RA. 29). The defendant surrendered himself to the Hampshire County Superior Court on June 23, 2017, and was remanded to custody to begin serving his

sentence at the Hampshire County House of Correction. (RA. 12). The defendant appealed the decision of the single justice to a panel of the Appeals Court, who affirmed the decision on November 14, 2017. (RA. 30). The case was entered in the Appeals Court on November 27, 2017. (RA. 13).

STATEMENT OF THE FACTS

In the fall of 2013, Jesse Carrillo and Eric Sinacori were students at the University of Massachusetts at Amherst (UMASS) (Tr. 3:63; 4:104). Both Jesse and Eric suffered from heroin addiction. (Tr. 4:114, 139). Jesse drove to the Bronx to get heroin for himself and Eric on October 3, 2013. (Tr. 4:135-36). Jesse returned and gave Eric his portion of the heroin and the two parted ways. (Tr. 4:136-37). Eric was found deceased from a drug-overdose the following morning. (Tr. 3:87-88).

Eric Sinacori's Father

John Sinacori is the father of the decedent, Eric. (Tr. 3:62). Eric grew up in New Jersey, and left to attend UMass in August of 2011. (Tr. 3:63). Eric was living in off-campus housing during his junior year in October of 2013, when his father planned to visit for parents' weekend on October 4, 2013. (Tr.

3:63). That morning, John left New Jersey with Eric's step-mother to drive to Amherst. (Tr. 3:64). He had been in contact with Eric the night before, and had told Eric that he would meet him after his last class at around 1:00 p.m. on October 4. (Tr. 3:64).

John arrived in Amherst early, so he went to the building where Eric had class to wait. (Tr. 3:64). John sent Eric a text message that he was outside and continued to wait for him. (Tr. 3:64). John saw students leaving the building and noticed that Eric was not among them. (Tr. 3:64). He received no response from Eric to his text message. (Tr. 3:64). John went to get lunch with his wife and continued to try to reach Eric. (Tr. 3:65). John went to the building where Eric worked, but no one had seen him that day. (Tr. 3:65).

John had also stopped at Eric's apartment to see if he were there. (Tr. 3:65). At around 4:00 p.m., John and his wife went to Eric's apartment office to express his concern that he was unable to reach Eric and asked to be let into his apartment. (Tr. 3:66). A superintendent agreed to let John into the apartment. (Tr. 3:66). John walked into the apartment, went to the bedroom, heard a gasp from the superintendent, and

turned around to see Eric lying in the doorway of the bathroom. (Tr. 3:66).

Eric was cold to the touch and discolored. (Tr. 3:67). John ran outside and called his wife, a registered nurse, to come in from the car to try to revive Eric. (Tr. 3:67). John dragged Eric into the walkway so that his wife would have room to administer CPR, but Eric was already deceased. (Tr. 3:68). John's wife observed a needle on the bathtub (Tr. 3:68).

The superintendent called 911 and emergency services arrived. (Tr. 3:69). Police officers advised John that he may not want remain to watch the removal of Eric's body, so he took their advice and left. (Tr. 3:69-70).

John was aware that some of his son's friends from New Jersey used heroin, and had expressed concerns to his son about this. (Tr. 3:71). Eric assured his father that he knew better than to use heroin. (Tr. 3:72).

The Defendant's Ex-Girlfriend

The defendant's former girlfriend, Danielle Sultan, testified that she was in a dating relationship with the defendant from March of 2010 until August of 2013. (Tr. 3:74). In August of 2013,

Ms. Sultan noticed that the defendant was acting suspiciously while he was staying at her mother's house. (Tr. 3:75). She observed the defendant exit the bathroom with his backpack, and opened it to discover a spoon and a hypodermic needle. (Tr. 3:75). Ms. Sultan confronted the defendant, and he confessed that he was using heroin, causing her to terminate the relationship. (Tr. 3:75). Ms. Sultan was unaware of the defendant's heroin use prior to this incident. (Tr. 3:75). She continued to have limited contact with the defendant, and gave him an ultimatum to inform his mother of his heroin addiction and seek help prior to Thanksgiving in 2013 or else she would tell his mother. (Tr. 3:76). Ms. Sultan confirmed with the defendant's mother that he had sought help for his addiction. (Tr. 3:79-80). Ms. Sultan was also contacted by the defendant, who expressed his gratitude to her for getting him to seek treatment. (Tr. 3:80-81).

Law Enforcement Testimony

An Amherst police sergeant testified that he responded to a report of an unresponsive male, and upon arrival at Eric's apartment, observed that Eric was deceased. (Tr. 3:87-88). There were nine bags of

heroin stamped "Tropicana" located in the bathroom, three of which were empty, along with a spoon. (Tr. 3:91-92). The sergeant also observed evidence consistent with pill and marijuana usage in addition to the heroin. (Tr. 3:101). He also testified that he wrote in his report that Eric had been working for a local law enforcement agency. (Tr. 3:102).[3] The

[3] Counsel for the defendant inquired as to what type of work Eric was doing for the police, and the Commonwealth objected. (Tr. 3:102). At side-bar, defense counsel explained that he intended to question the sergeant about his report that Eric had previously been intercepted by UMASS Police with heroin on his person and that he was taking suboxone to assist in weaning himself off of the heroin. (Tr. 3:103). The purpose of this questioning was to show that October of 2013 was not the first time that Eric had been exposed to heroin, and that as a result of that, he began working with the police. (Tr. 3:103). The court sustained the objection. (Tr. 3:103). Defense counsel moved that the Commonwealth inquire of the sergeant as to where he received the information so that defense counsel could follow up with the witness to obtain the evidence in a form that did not violate the hearsay rule. (Tr. 3:104). The court told defense counsel to inquire of the sergeant himself. (Tr. 3:104). The sergeant could not remember the name of the colleague who provided him with the information regarding Eric's work with law enforcement. (Tr. 3:105). Defense counsel moved that he be permitted to read the following sentences from the sergeant's report to the jury: "It should be known that I have knowledge that Eric had been working as a confidential informant for a local law enforcement agency. That agency had intercepted Eric with heroin on his person and learned that he was taking suboxone to assist him in weaning the drug." (Tr. 3:109). The basis for reading these statements to the jury was to draw an inference that challenged the credibility of the sergeant that he

sergeant could not remember the name of the colleague who had provided him with the information regarding Eric's work with law enforcement. (Tr. 3:105).

Another Amherst Police officer testified that he used software to create a forensic report of the decedent's cellular phone, including records of phone calls and text messages. (Tr. 4:71-76). The forensic report of Eric's cellphone, including the text message conversations with the defendant, was admitted through this witness. (Tr. 4:77). During this officer's testimony, the court also read a stipulation to the jury that "the last text message sent from Eric Sinacori's passcode-protected cellphone was sent to Joshua Stone at [21 seconds after midnight] on October 4, 2013." (Tr. 4:78).

The Commonwealth also called a trooper from the Massachusetts State Police, who testified that he conducted cell tower analysis of the defendant's

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could not remember who gave him the "bombshell information." (Tr. 3:109-10). Defense counsel argued that the defendant's due process right to present evidence in his defense is constitutionally based and overrides the rules against hearsay and that the sergeant's lack of memory suggests misconduct, which the jury should be able to weigh. (Tr. 3:110). The court declined the request. (Tr. 3:110).

phone, and that the defendant's phone traveled between Amherst and the Bronx and back during the relevant time periods. (Tr. 4:49-51).

Medical and Expert Testimony

The prosecution called a toxicologist, a medical examiner, and a chemist from the drug lab as witnesses.

The toxicologist described the results of the post-mortem toxicology testing. (Tr. 4:13). Opiates (consistent with heroin), benzodiazepines (such as Xanax), and cannabinoids (consistent with marijuana) were present in the decedent. (Tr. 4:13). She testified that the benzodiazepine present was Alprazolam (or Xanax). (Tr. 4:31). She further testified that a quantitative analysis of the Alprazolam was not conducted because the initial screen fell below the 10 percent of the internal standard that serves a baseline for whether or not to conduct quantitative testing. (Tr. 4:31-32). Free morphine was detected at a concentration of 173 nanograms per milliliter. (Tr. 4:32). 6-Acetylmorphine, a metabolite found in heroin, was also found. (Tr. 4:32-33). When asked if the initial screen levels caused her to perform quantitative testing for

opiates, the toxicologist answered that they perform quantitation on all opiates present within the case. (Tr. 4:33). There was nothing significant in the results of the THC testing. (Tr. 4:33). The toxicologist also testified that no Fentanyl was present in the testing. (Tr. 4:37).

The toxicologist testified about the "half-life" of drugs, or the amount of time it takes for a substance to break down and leave the body. (Tr. 4:40). When even a trace amount of a substance is found in a person's system, it indicates that at some point that substance was in his body. (Tr. 4:40-41). The levels of the substances found in the decedent's body were the levels present at the time of testing, and did not indicate with any specificity when the drug was ingested. (Tr. 4:41). The jury heard evidence that a September 2016 report by the Massachusetts Department of Public Health found that benzodiazepines were present in 58% of Opioid-related deaths. (Tr. 4:41-43). The jury also heard that the Food and Drug Administration had issued an "emergency box" warning (their strongest warning) in 2016, which warned consumers of the risk of death when benzodiazepines are mixed with opiates. (Tr. 4:45-46).

The prosecution called the medical examiner that performed the autopsy on Eric. (Tr. 4:54). He noted that Eric had two injection sites, one in the crook of his right arm, and another higher up on his arm. (Tr. 4:55). There was also fluid in Eric's lungs, which caused the medical examiner to think that this was a drug overdose. (Tr. 4:56). The medical examiner sent samples to the toxicologist, and based on those results concluded that the cause of death was acute heroin intoxication. (Tr. 4:57-58). The medical examiner opined that the low level of benzodiazepines present in Eric's system contributed to his final opinion that the cause of death was acute heroin intoxication alone. (Tr. 4:63). No evidence was presented regarding the significance, if any, of the levels of heroin (or metabolites indicating heroin use) in Eric's system.

The jury heard evidence that Eric had conducted internet searches on using marijuana and benzodiazepines as a "potentiator" for heroin in the days before his passing. (Tr. 4:68). To potentiate in a pharmaceutical sense would be to combine two substances to get an enhanced effect. (Tr. 4:64). The medical examiner testified that some substances

continue to metabolize after death, and that benzodiazepines, to his knowledge, are not one of those substances. No evidence was presented that the defendant was aware that the decedent had been using benzodiazepines, or any other drugs, in addition to heroin. No evidence was presented that the defendant and Eric had a conversation regarding the use of potentiators.

A chemist from the drug lab testified that the Tropicana-stamped bags found in Eric's residence contained 63% heroin plus or minus 10 percent. (Tr. 4:81, 84-85). The range of purity was roughly 58 to 69% to a 95% degree of certainty. (Tr. 4:85). No evidence was presented regarding the amount of heroin in each bag as unusual, nor was any evidence presented regarding the strength of this heroin in relation to other heroin. There was also no evidence that Eric or Jesse had ever overdosed before, or that "Tropicana" heroin was attributed to other overdoses. There was no evidence that the defendant affixed the "Tropicana" label to the bags himself.

The Defendant

The defendant testified at trial. (Tr. 4:96). Jesse described his background and history of drug use and addiction. He testified that he was 28 years-old and was raised in a rural community in New York. (Tr. 4:97). His father was an alcoholic who was emotionally and verbally abusive to both Jesse and his mother on a daily basis. (Tr. 4:97-98). Jesse was 19 years-old when he watched his father pass away due to complications from cirrhosis of the liver. (Tr. 4:98).

Jesse began smoking marijuana at age 12 and moved on to cocaine use at 13. (Tr. 4:99). The cocaine came from a friend's older boyfriend. (Tr. 4:100). Jesse also experimented with hallucinogens, prescription pills, and designer drugs. (Tr. 4:100-01).

Jesse was a talented musician and entered UMass as a music major (with a concentration in flute) in the fall of 2007. (Tr. 4:102). His plan was to obtain bachelor and doctorate degrees, and return to UMass as a professor of music. (Tr. 4:103). Jesse's drug use during his undergraduate studies consisted primarily of marijuana and alcohol use. (Tr. 4:104). He entered a master's program in music theory at UMass in the fall of 2012. (Tr. 4:104).

The defendant was introduced to heroin in January of 2013, by a friend from Jesse's hometown who offered to shoot him up. (Tr. 4:105). Jesse described the feeling as blissful, like floating on a cloud. (Tr. 4:105). He desired to continue using heroin, and obtained his friend's contact information of his supplier in the Bronx. (Tr. 4:106). Jesse explained the process by which one injects heroin. (Tr. 4:107-08). He testified that he learned about his tolerance, always purchased the same heroin from the same source, and never mixed it with other drugs. (Tr. 4:109-14). Jesse consumed between 3,000 and 4,000 bags of the "Tropicana" heroin from January to October 2013. (Tr. 4:114-15). The heroin was always the same and he never experienced any adverse reaction. (Tr. 4:115).

Jesse's addiction grew worse, and he eventually began to shoot between 13 and 17 bags of heroin at a time. (Tr. 4:115). He described his addiction as "terror." (Tr. 4:116). Despite his heroin use, Jesse was able to do normal activities. (Tr. 4:116). He would attend classes and worked as a teaching assistant at UMass. (Tr. 4:116). He hid his addiction from everyone. (Tr. 4:117). By September of 2013, Jesse could not do anything without heroin. (Tr.

4:117). Every thought was about the next time he would inject heroin. (Tr. 4:117-18). Jesse attempted to quit cold-turkey, but began experiencing severe withdrawal symptoms. (Tr. 4:118-19). Mental cravings came first, followed by tremendous waves of extreme discomfort, fever, and nausea. (Tr. 4:118-19). He described how these symptoms went away within thirty seconds of consuming more heroin. (Tr. 4:120).

Jesse was never a drug dealer.[4] He had a very supportive family who provided him with money that they believed was going toward helping him enjoy life more during his studies. (Tr. 4:125-27). He shamefully recounted how nearly all of that money went towards heroin in 2013. (Tr. 4:125-27). Jesse received a check from his aunt for his birthday in the amount of $10,000 on September 20, 2013. (Tr. 4:126). He did not

[4] No evidence was presented at trial that the defendant was a drug dealer. The Commonwealth sought to introduce testimony of a witness who had used heroin with the defendant, but the court excluded the testimony on the basis that it was prior bad act evidence. (Tr. 1:45-46). In sentencing the defendant to probation on the involuntary manslaughter charge, the trial judge stated that he did not "perceive that Jesse was a drug dealer." (Tr. 7:8). The trial judge explained that he had always sentenced defendants to state prison in manslaughter cases involving an overdose because the defendants were drug dealers who profited off of the trade. (Tr. 7:8). He sentenced Jesse to five years' probation on the involuntary manslaughter conviction. (Tr. 7:9).

use this money to purchase a large amount of drugs all at once. (Tr. 4:127). Instead, he continued to make trips to his dealer in the Bronx three to four times per week to purchase $300-400 worth of heroin at a time in an effort to keep his addiction under control: he would only get enough to last a certain amount of time, thinking this would prevent him from doing too much. (Tr. 4:127-8).

Despite his efforts to keep his heroin use a secret, Jesse acknowledged that some fellow users were able to recognize him as a user based on his symptoms. (Tr. 4:124). On October 1, 2013, he received a text message from Eric Sinacori, a fellow heroin user, asking when he was going to get more heroin. (Tr. 4:129-30). They made plans to meet and Eric gave Jesse money to get him a bundle (ten bags) of heroin when he got his own heroin. (Tr. 4:131-32). Jesse drove to the Bronx and returned to UMass later that evening. (Tr. 4:132-33). Eric came to Jesse's nearby apartment where they each used their own heroin to get high. (Tr. 4:133). Eric had his own "works" for shooting heroin, and prepared his heroin in the same way that Jesse did. (Tr. 4:133-34). Eric used the heroin at Jesse's

apartment and had no negative reaction. (Tr. 4:134-35).

Eric contacted Jesse again two days later, and Jesse again went to the Bronx to get heroin for himself and Eric on October 3, 2013. (Tr. 4:135-36). Jesse returned and gave Eric his portion of the heroin. (Tr. 4:136-37). Jesse later sent Eric text messages inquiring what he thought about the heroin and how much he had used, but Eric did not respond. (Tr. 4:138). Jesse did not think anything of this, and nodded off to sleep. (Tr. 4:138, 140).

Jesse went to class the next morning. (Tr. 4:140). When he returned, he saw multiple emergency vehicles located outside of Eric's apartment, and learned of Eric's passing through a school email a few days later. (Tr. 4:140-41). He was deeply affected when he heard this news. (Tr. 4:141). Jesse did not go to the police because he knew that there was nothing he could do to bring Eric back. (Tr. 4:141). Eric died on October 4, 2013. Jesse was not charged until September 28, 2015. (RA. 5).

Jesse testified that he now resides in Manchester, New Hampshire. (Tr. 4:141). He is an admissions specialist for the Granite House Recovery

Centers, and the house manager at Queen City Sober Living. (Tr. 4:141-42).[5]

On cross-examination, the prosecution elicited that Jesse had never obtained heroin from Eric. (Tr. 4:157). The defendant also conceded that he had heard of overdoses before and was aware that heroin could be dangerous if you take too much. (Tr. 4:158, 162). Jesse stated that he never tested the heroin to determine whether it was "laced" but made the assumption that it was not based on the consistency and number of times he had gotten it. (Tr. 4:162-63). Jesse assumed that Eric would consume the heroin that he got. (Tr. 4:163).

The Defense Expert

The defense presented an expert on heroin addiction, Dr. Sarah Wakeman, who is the medical director of the Substance Use Disorder Initiative at Massachusetts General Hospital and also serves on Governor Charlie Baker's opioid working group. (Tr. 5:7, 11). Dr. Wakeman also focuses on ways to help users avoid overdosing so that they can get to the point of receiving treatment. (Tr. 5:17). She

[5] The defendant has returned to this position since his release from custody.

testified that 40-60% of addicts are genetically predisposed to addiction. (Tr. 5:13). Other substantial factors are early exposure to drug use and early childhood trauma. (Tr. 5:13-14). Dr. Wakeman explained that opiate addiction causes changes to the brain, and that these changes can be seen on brain scans. (Tr. 5:14). Heroin withdrawal is like starving to death while standing in front of food that you are told you cannot eat, multiplied by one thousand, knowing the whole time that the heroin will make everything instantly better. (Tr. 5:21). Dr. Wakeman testified that heroin users can safely use the drug for decades without a single overdose. (Tr. 5:18).

She testified that the fact that heroin can be dangerous is more nuanced than can summed up in a single statement, explaining there are many countries that still prescribe heroin for medical uses. (Tr. 5:24). Dr. Wakeman testified that it is extremely commonplace for heroin addicts to obtain heroin for each other, to either "sell or share their drugs and very few people only use alone." (Tr. 5:29) Although most non-addicts understand the harms associated with heroin, she explained that, in contrast, addicts do not think about the risks associated with heroin when

using or sharing with others because their decision making process has been hijacked. (Tr. 5:24, 26-27).

The Defendant's Aunt

The defendant called his aunt, Mona Sarfaty, who testified that that she gave Jesse a check for $10,000 on September 17, 2013 as a birthday present. (Tr. 5:33-34). A copy of the check, which stated "gift for nephew" in the memo line, was admitted into evidence. (Tr. 5:34-35). She testified that the gift was to help Jesse with expenses while he was in graduate school, and that she had "no idea whatsoever" that Jesse was addicted to heroin at the time. (Tr. 5:33).

SUMMARY OF THE ARGUMENT

The defendant is entitled to a new trial on the charge of distribution of heroin because the trial judge erred in denying his request to instruct the jury on the lesser included offense of possession of heroin for personal use based on his joint venture with Eric Sinacori to obtain heroin for their personal use. Drawing all reasonable inferences in favor of the defendant, the court was required to give the instruction because the evidence at trial supported a rational basis for acquitting the defendant of distribution and convicting him of possession by means

of a joint venture. The defendant properly preserved this issue for appellate review by submitting his requested instructions in writing and noting his objections on the record. The defendant was prejudiced by the failure to give the instructions because the options faced by the jury were to convict the defendant of distribution, or acquit him altogether when his own testimony established that he was guilty of possession of heroin. It is likely that this error also contributed to the defendant's conviction on the involuntary manslaughter charge because the jury had no choice but to view him as a distributor of heroin.

The trial court also erred in denying the defendant's motion for a required finding of not guilty on the involuntary manslaughter charge at the close of the Commonwealth's case. The evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt where the Commonwealth's only evidence was that the defendant provided the heroin that led to the decedent's death. The mere provision of heroin, without more, does not constitute wanton or reckless conduct beyond a reasonable doubt. To hold otherwise would be to create a per se recklessness rule for the provision of heroin – such a

determination is outside the province of the judiciary and should be left to the legislature. It was reversible error to allow the involuntary manslaughter charge to go to the jury.

ARGUMENT

I. THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING THE DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF POSSESSION OF HEROIN FOR PERSONAL USE BASED ON HIS JOINT VENTURE WITH ERIC SINACORI TO OBTAIN HEROIN FOR THEIR PERSONAL USE.

The defendant is entitled to a new trial on the charge of distribution of heroin because the trial judge erred in denying his request to instruct the jury on the lesser included offense of possession of heroin for personal use based on his joint venture with Eric Sinacori to both possess heroin for personal use. The defendant properly preserved the issue for appellate review and suffered prejudice as a result of the denial of his request.

A. The Defendant was Entitled to the Requested Instruction

Where the defendant objects to the trial judge's denial of his request for a jury instruction, the Court "review[s] the omission to determine if there was prejudicial error." *Commonwealth v. Blevins*, 56

Mass. App. Ct. 206, 207 (2002) (internal citations and quotations omitted). The test for giving a lesser included offense instruction is whether the evidence at trial supports "'a rational basis for acquitting the defendant of the crime charged and convicting him of the lesser included offense.'" *Commonwealth v. Donlan*, 436 Mass. 329, 325 (2002) (internal citations omitted). "In determining whether any view of the evidence would support a lesser included offense, 'all reasonable inferences must be resolved in favor of the defendant.'" *Commonwealth v. Drewnowski*, 44 Mass. App. Ct. 687, 693 (1998) quoting *Commonwealth v. Gilmore*, 399 Mass. 741, 746 (1987). Where the evidence permits a finding of a lesser included offense, the trial court "must" instruct the jury at the defendant's request. *Blevins*, 56 Mass. App. Ct. at 207 (internal citations omitted).

The prosecution informed the court that it "made a calculated choice" to charge the defendant with distribution on the basis that there is no lesser included offense of possession on that charge. (Tr. 3:9). The defendant moved that the court instruct the jury on the lesser included offense of possession of heroin based on a theory of joint venture. "A judge

may instruct the jury on the basis of the evidence and is not bound by the legal theories advanced by the Commonwealth." *Commonwealth v. Jones*, 16 Mass. App. Ct. 931 (1983) (internal citations omitted). To assert that possession is not a lesser included offense of distribution ignores the logical reality that one must possess something first in order to then distribute it to others.

Moreover, possession of a controlled substance is a lesser included offense of a charge of distribution. *See Commonwealth v. Perry*, 391 Mass. 808, 810, 813-14 (1984) (holding that simple possession was lesser included offense of indictments charging defendant with "manufacturing, dispensing or distribution" of a controlled substance); *see also Commonwealth v. Gagnon*, 387 Mass. 768, 769 (1982) ("[u]nder [that] indictment one who knowingly or intentionally manufactures, distributes, or dispenses heroin *possesses the heroin, actually or constructively.*") (emphasis added). The model jury instructions in both the Superior and District Courts also provide that possession is a lesser included of distribution. *See* MA Superior Court Criminal Jury Instructions, Instruction § 4.19.3 Distribution of a Controlled

Substance, n.1, MCLE (2013 Ed.) ("Generally, possession of a controlled substance is a lesser-included offense of distribution of a controlled substance."); Criminal Model Jury Instructions for use in the District Courts, Mass. Instruction § 7.800 Distribution of a Controlled Substance, n.3 (2009 Ed.) ("Possession of a controlled substance is a lesser included offense of a charge of distribution or possession with intent to distribute that controlled substance.").

The evidence at trial supported giving the instruction regarding possession of heroin. The defendant received money from the deceased, took that money as well as his own to an actual drug distributor located in the Bronx, New York, and exchanged the deceased's money, as well as his own, for heroin. The defendant then drove back to Massachusetts with the heroin, and per the joint venture, provided the deceased with the portion of the heroin that he had contributed money to purchase. At all times, the defendant held – possessed - the heroin for both himself and the decedent as he returned from New York to Massachusetts. As soon as the defendant obtained the heroin, the deceased was entitled to a portion of

that heroin, and thus he, too, possessed the heroin. "A person can also 'possess' something even if he is not its sole owner or holder. For example, a person is considered to 'possess' something which he owns or holds jointly with another person, who is keeping it for both of them." Criminal Model Jury Instructions for use in the District Courts, Mass. Instruction § 3.220 Possession (2009 Ed.).

The trial judge erred in reasoning that the defendant was not entitled to an instruction of possession based on a joint venture because he and Eric Sinacori were not together at the time the heroin was purchased. (Tr. 5:40). The Superior Court Model Jury Instructions demonstrate that the "presence at the scene" requirement of joint venture is no longer required under the new aider and abettor instruction that replaced joint venture after *Commonwealth v. Zanetti*, 454 Mass. 449, 470 (2009); MA Superior Court Criminal Jury Instructions, Instruction § 6.3 Aider And Abettor Liability, n.7, MCLE (2013 Ed.).

Joint venture liability under *Zanetti* may be established by proof that two or more individuals knowingly participated in the commission of a crime. *Commonwealth v. Bright*, 463 Mass. 421, 435 (2012).

"Participation may take the form of an agreement to be available to assist in the commission of the crime. Such an agreement need not be made through a formal or explicit written or oral advance plan or agreement; it is enough consciously to act together before or during the crime with the intent of making the crime succeed." *Id.* (internal quotations and citations omitted).

The *Zanetti* explication of joint venture liability is applicable to misdemeanors. *See Commonwealth v. Cardinal*, 85 Mass. App. Ct. 1113, *2, No. 13-P-889 (Apr. 11, 2014) ("[O]ur cases do not hold that joint venture liability applies only to felonies."). Indeed, the Commonwealth may prove possession of a controlled substance as a joint venturer under *Zanetti*. *Commonwealth v. Ormond O., a juvenile*, 92 Mass. App. Ct. 233, 236-37 (2017). In *Ormond*, the court explained that under *Zanetti* "there need only be (1) proof of the [defendant's] knowing participation in some manner in the commission of the offense and (2) proof that the [defendant] had or shared the intent necessary for the offense." *Id.* at 237. Additionally, a judge may charge on joint venture if it is warranted by the evidence regardless of

whether the Commonwealth proceeds on that theory. *See Commonwealth v. Sowell*, 22 Mass. App. Ct. 959, 962 (1986).

The Supreme Judicial Court made clear that "[a] defendant may be convicted as a coventurer when he or she is not present at the scene of a crime 'so long as the jury find that the defendant actually associated himself or herself with the criminal venture and assisted in making it a success.'" *Commonwealth v. Brown*, 477 Mass. 805, 813 (2017) (internal citations omitted). In *Brown*, the defendant provided hooded sweatshirts and a gun to friends who were planning to commit an armed robbery. *Id.* at 813-14. The defendant did not accompany his friends for the robbery and even expressed concern about what would happen with the gun. *Id.* at 813. The defendant was aware that the gun would be used in the planned robbery and that the sweatshirts would help hide his friends' faces. *Id.* at 814. This was enough for the defendant to be convicted as a coventurer to the armed robberies. *Id.*

Likewise, the defendant and Eric Sinacori were engaged in a joint venture to possess heroin for personal use: (1) the shared intent was to acquire heroin for personal use; (2) both contributed funds to

acquire the heroin; (3) Jesse drove to the Bronx to acquire the heroin for himself and Eric; and (4) when Jesse returned, pursuant to the agreement, he gave Eric's portion to Eric and kept his own portion. Both shared the same intent to possess heroin for personal use and no evidence was presented that either intended to distribute the drug any further. Just as in *Brown*, the fact that Eric stayed home while the defendant actually picked up the heroin is irrelevant where he and Eric had a shared intent and both contributed in a meaningful way.

The trial judge's reliance on *Commonwealth v. Fluellen*, 456 Mass. 517 (2010), in refusing to give the requested instruction was misplaced. (Tr. 4:172-75). The court reasoned that because *Fluellen* was decided after *Zanetti* and discussed the need for joint and simultaneous possession, "you cannot give that instruction" unless the acquisition is simultaneous. (Tr. 4:172).

Fluellen addressed whether the defendant was not guilty of distribution as a matter of law. *See* 456 Mass. at 524. There, the defendant served as a middleman for an undercover police officer, hoping to get some cocaine from the officer in exchange for

obtaining it for him. *Id.* at 524-25. The defendant's hope to share in the undercover's bounty "was insufficient to establish a shared intent to share in the drugs as a copurchaser." *Id.* at 525. Viewed in the light most favorable to the Commonwealth, "it was reasonable for the jury to infer that the defendant's hopes for compensation were analogous to the expectation of any middleman in any transaction, that his efforts will be rewarded." *Id.* at 525. The trial court in *Fluellen*, in fact, instructed the jury on the lesser included offenses of both simple possession and simple joint possession. 456 Mass. at 524 n.8 & n.9. Thus, *Fluellen* does not stand for the proposition that a lesser included instruction of possession or joint possession may not be given on a distribution charge unless the acquisition is simultaneous.

The defendant did not contend that he could not be found guilty of distribution as a matter of law. Rather, the defendant asserted that drawing all reasonable inferences in favor of the defendant, he was entitled to an instruction of simple possession on a theory of joint venture. It was error not to allow the jury to decide the factual issue of whether the

defendant was a distributor or was engaged in a joint venture to possess heroin for personal use.

In *Commonwealth v. Blevins*, this Court held that it was prejudicial error in a trial for distribution for the judge to deny the defendant's request for an instruction on the lesser included offense of simple joint possession. 56 Mass. App. Ct. at 210. There, the evidence supported the proposition that the defendant and his friends had on occasion shared drugs, and pooled their money together to obtain the drugs for their own personal use. *Id.* at 209. Prejudicial error occurred despite the fact that the judge instructed the jury on simple possession. *See id.* at 207 n.2. The jury in the case at bar were instructed on neither.

In *Commonwealth v. Correia*, the court held that the motion judge erred in granting the defendant's motion to dismiss the charge of distribution based on a theory of joint possession. 89 Mass. App. Ct. 1125, *2, No. 15-P-512 (May 27, 2016). Nonetheless, the court explained that:

> The defendant of course remains free to press at trial his contention that he and Dorosario simultaneously and jointly acquired the crack cocaine from Baez-Perez for their shared use.

Id. This was so despite the fact that the defendant left his associate in the vehicle while he took the money and entered the drug dealer's vehicle to obtain the drugs before returning to his own vehicle. *Id.* at *1. The decision in *Correia* belies the notion that joint possession requires the physical presence of both purchasers at the moment the drugs are procured from the dealer. *See also State v. Morrison*, 902 A.2d 860, 867 (N.J. 2006). ("Two persons have joint possession of an object when they 'share actual or constructive knowing possession of' that object"); Criminal Model Jury Instructions for use in the District Courts, Mass. Instruction § 3.220 Possession (2009 Ed.)("a person is considered to 'possess' something which he owns or holds jointly with another person, who is keeping it for both of them.").

Blevins and *Correia* demonstrate that it is error for the court to prevent the jury from deciding the critical factual issue of whether the defendant is a distributor or possessor regardless of whether that usurpation of the jury's role occurs at the pre-trial stage or after the conclusion of the evidence.

Importantly, nothing in the "record even remotely suggests that" the defendant and Mr. Sinacori's

"relationship was commercial in nature." *See Morrison*, 902 A.2d at 870. Indeed, the trial judge noted at sentencing that:

> [T]he important facts are that I don't perceive that Jesse was a drug dealer . . . I don't see that in this case. I see this as one addict to another helping each other out in a perverted sense that one would view from a distance . . . I don't see this as a drug dealer taking advantage for financial gain.

(Tr. 7:6). Nor was this an instance of an individual who accompanies a buyer to a dealer and hopes to acquire a portion of the purchased drug as compensation for his efforts. *Contrast Fluellen*, 456 Mass. at 525 (defendant hoped to get cocaine in exchange for obtaining it for undercover officer); *Commonwealth v. Fernandes*, 46 Mass. App. Ct. 455, 462 (1999) (defendant hoped that undercover officer would give her drugs in exchange for obtaining them).

Whether an individual is guilty of distribution or joint possession must be a factual determination based on the totality of the circumstances, rather than an arbitrary determination of the physical location of his cohort at the exact moment of acquisition. The United States Court of Appeals for the Second Circuit held that distribution is not the

appropriate charge when faced with a fact pattern where, as here, the defendant procures drugs for the personal use of himself and another. *United States v. Swiderski*, 548 F.2d 445, 450 (2d. Cir. 1977).

> Where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a 'continuing criminal enterprise' or drug distribution.

Id. Whether physical control is exerted by both possessors at the time the illicit substance is acquired "is an irrelevancy when there is no question that the absent [party] was then *entitled* to exercise joint physical possession." *State v. Carithers*, 490 N.W.2d 620, 622 (Minn. 1992) (emphasis in the original). Moreover, this is not a case that raises concerns of a lesser included being used as a way for drug distributors to escape prosecution in situations

"involving more than a couple of defendants and a small quantity of drugs[.]" *See United States v. Rush*, 738 F.2d 497, 514 (1st Cir. 1984) (expressing concern in applying *Swiderski* to situation where nearly 20 defendants were caught with multiple tons of marijuana). The case at bar is devoid of any evidence of a commercial relationship, ledgers, large amounts of drugs, "burner" phones, or any other indicia of distribution.

The jury in the case at bar were free to believe or disbelieve the defendant's version of events, but it was for the jury to determine the factual scenario that was present. *See Commonwealth v. Campbell*, 352 Mass. 387, 398 (1967) (explaining that whether or not to believe the defendant's version of events "[I]s a question within the exclusive province of the jury."). There was simply no evidence in this case that the defendant was a drug dealer, hoped to gain anything in exchange for his actions, or had any intent other than for him and Mr. Sinacori to possess heroin for their own personal use. Under these circumstances, it was error not to instruct the jury on both distribution *and* the lesser included instruction of possession of heroin obtained during a joint venture to do so.

B. Defense Counsel Properly Preserved the Issue for Appellate Review

In order to preserve a claim of error in a jury charge, counsel "must bring the alleged error to the attention of the judge in specific terms in order to give the judge the opportunity to rectify the error[.]" *Commonwealth v. McDuffee*, 379 Mass. 353, 357 (1979). Here, the request for the denied instruction was properly preserved. The defendant alerted the court at the outset of trial that he would be seeking a jury instruction on the lesser included crime of possession of heroin based on the defendant and Eric Sinacori's joint venture to obtain and possess heroin for their own personal use. (Tr. 1:18-19). The defendant also submitted the requested instruction to the court in writing prior to the jury charge. (Tr. 5:37-38; RA. 24). The court denied both the defendant's request, and his oral motion for reconsideration. (Tr. 5:40, 44). After the jury charge, the court noted on the record that the defendant's challenge to the jury instructions regarding distribution were preserved and renewed. (Tr. 5:101).

C. The Defendant was Prejudiced by the Judge's Failure to Give the Requested Instruction

The defendant was prejudiced by the judge's failure to give the requested instruction. "While a judge has significant latitude in framing jury instructions, an objection does lie if a significant matter is not dealt with at all." *Comeau v. Currier*, 35 Mass. App. Ct. 109, 111 (1993). Here, the judge's instructions to the jury did not address a lesser included offense at all. Although the judge was not required to adopt the exact language requested by the defendant, he is entitled to relief if this Court finds that instruction on a lesser included offense was warranted. *See Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 275-76 (1990).

As discussed above, the defendant was entitled to an instruction on possession of heroin based on joint venture. The lesser included offense "has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charge and acquittal." *Beck v. Alabama*, 447 U.S. 625, 633 (1980). "[P]roviding the jury with the 'third option' of convicting on a lesser included

offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard." *Id.* at 634, quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973).

In this case, the defendant's own testimony established that he was guilty of possession of heroin. By instructing on distribution alone, the jury was left with the choice of acquitting the defendant outright, when they knew he was guilty of some crime, or convicting him of a more serious crime because they had no other option. *See Beck*, 447 U.S. at 634 ("We cannot say that the availability of a third option – convicting the defendant of [a lesser included] – could not have resulted in a different verdict.").

The defendant was further prejudiced in that the failure to instruct the jury on possession based on joint venture likely drove the conviction on the involuntary manslaughter charge. The defendant admitted that he was guilty of possession of heroin. Faced with only an instruction on distribution, the jury had no choice but view the defendant as a drug distributor. As the trial judge noted with respect to past manslaughter cases, "[e]ach one had a drug dealer who was making money off of that . . . I think that's

the cost of doing business if you're a drug dealer." (Tr. 7:6). It cannot be denied that had the jury been given the option of viewing the defendant as anything other than a drug dealer, this would have played a role in making a determination of recklessness.[6]

The failure to provide the requested jury instruction contributed to the verdict of guilty on distribution of heroin. For the above reasons, the defendant is entitled to a new trial for distribution of heroin.

II. IT WAS ERROR NOT TO GRANT THE DEFENDANT'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY ON THE INVOLUNTARY MANSLAUGHTER CHARGE.

The defendant moved at the close of the Commonwealth's case for a required finding that the defendant was not guilty of involuntary manslaughter because the evidence was insufficient to support a

[6] The defendant argues *infra* that he was entitled to a required finding of not guilty on the involuntary manslaughter charge. The defendant maintains that the evidence was insufficient as a matter of law to sustain the conviction. In the alternative, the defendant requests a new trial on the charge of involuntary manslaughter if the Court grants a new trial on distribution on the grounds that the failure to instruct on the lesser included offense influenced the conviction on involuntary manslaughter. *See Commonwealth v. Alphas*, 430 Mass. 8, 14 n.7 (1999) ("[I]f one cannot say . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

verdict of involuntary manslaughter based on wanton or reckless conduct. (Tr. 4:88). "The essence of wanton or reckless conduct is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944). "To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent, and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm." *Id.*

The Court has emphasized that there is a critical distinction between ordinary negligence and gross negligence on the one hand, and wanton and reckless conduct on the other. *Boyd v. National Railroad Passenger Corporation*, 446 Mass. 540, 548 (2006).[7] "Reckless conduct involved a degree of risk and a voluntary taking of that risk so marked that, compared

[7] The definition of wanton or reckless conduct is identical in criminal and civil cases. *Sandler v. Commonwealth*, 419 Mass. 334, 336 (1995). Civil cases are routinely cited as precedent on this issue in criminal decisions, and vice versa. *See, e.g., Commonwealth v. Levesque*, 436 Mass. 443 (2002) and *Boyd, supra*.

to negligence, there is not just a difference in degree but also a difference in kind." *Id.* at 547-48, quoting *Welansky*, 316 Mass. at 400. The Commonwealth must prove beyond a reasonable doubt that "the risk created by the defendant's conduct must be *substantially* greater than that which would constitute negligence, and the risk must be one involving an easily perceptible danger of death or grave physical harm." *Boyd*, 446 Mass. at 553 (emphasis in original).

Massachusetts case law has never held that providing heroin to someone who overdoses, as the single fact underling the prosecution, is sufficient to support a conviction for involuntary manslaughter. Instead, the cases always reflect a finding, that *with additional facts*, it was wanton or reckless conduct for the defendant to provide heroin to the individual.

A review of Massachusetts cases in which defendants have been convicted of involuntary manslaughter after providing heroin that resulted in death establishes that plus factors are required to jump from distribution to involuntary manslaughter:

- Defendant personally injected the decedent with heroin, *Commonwealth v. Vaughn*, 43 Mass. App. Ct. 818, 821 (1997).

- Decedent died from a combination of cocaine, heroin, and methadone. Defendant provided the methadone as well as the money used to purchase the cocaine and heroin to use in a speed ball, and injected the decedent with additional cocaine after she experienced an adverse reaction to the mixture. *Commonwealth v. Osachuk*, 43 Mass. App. Ct. 71, 73-75 (1997).
- Defendant knew that decedent suffered a near-fatal overdose just two months prior, had observed the decedent use multiple bags of heroin, knew that the decedent used speed balls and stated that the heroin he obtained was stronger than other heroin they had previously used. *Commonwealth v. Morin*, 78 Mass. App. Ct. 1129, No. 10-P-94 (Feb. 28, 2011).
- Defendant knew his heroin was highly potent, that user had low tolerance, had overdosed in the past, and could not handle whole bag of this type of heroin. *Commonwealth v. Catalina*, 407 Mass. 779, 790 n.12 (1990).[8]

[8] The Supreme Judicial Court has held that the provision of heroin of unknown strength to someone who subsequently dies is sufficient to support an indictment for involuntary manslaughter. *Commonwealth*

- Heroin sold by defendant was twice as strong as the average dose and was responsible for at least two prior overdose deaths. *Commonwealth v. Auditore*, 407 Mass. 793, 796 (1990).

The additional factors presented in other cases would have been superfluous if the provision of heroin alone was sufficient to convict. *See Morin*, 78 Mass. App. Ct. 1129 at *1 ("[s]ignificantly, in order to establish that the defendant's conduct was wanton and reckless, the Commonwealth did not merely rely on the inherent dangers of heroin use, but pointed to additional factors."). The case at bar is notably lacking a single aggravating factor. There was no evidence during the Commonwealth's case that:

- The heroin was unusually strong.
- The defendant provided additional drugs, such as cocaine or benzodiazepines, to the decedent.
- The defendant personally injected the decedent.

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v. Perry, 416 Mass. 1003 (1993). The Court explained that in such cases, it was only dealing with the *McCarthy* probable cause standard and was "[n]ot concerned with whether sufficient evidence exists to warrant a finding of his guilt beyond a reasonable doubt." *Catalina*, 407 Mass. at 789-90; *Commonwealth v. Auditore*, 407 Mass. 793, 797-98 (1990) ("emphasizing that we are dealing only with the standard of probable cause, we conclude that these facts and considerations bring this case within the principles discussed in *Catalina*.") (internal citations omitted).

- The defendant knew that the decedent suffered a previous heroin overdose, or had a low tolerance.
- The defendant knew that the heroin was responsible for prior overdose deaths.

By the close of the prosecution's case, the only testimony presented by the Commonwealth was that the defendant provided the heroin to the decedent who then died after injecting himself.[9] Even in the light most favorable to the Commonwealth, the evidence was not such that any rational trier of fact could have found the defendant guilty of involuntary manslaughter

[9] The prosecution contended that the defendant's text message to Eric reading "Ehh???" followed by another text message that read, "How much Tropicana did u drink" was sufficient to show that the defendant "was aware that his heroin alone could be the cause of an overdose death." (Tr. 4:93-94). The first text message, inquiring as to how Eric liked the heroin, and the second asking him how much he tried, occurred less than two minutes apart. This is ambiguous at best and does not show recognition of a likelihood of death. The defendant was merely curious as to how Eric liked the heroin. The short period of less than two minutes between the messages sent by the defendant is such a small amount of time that the defendant would have no reason to think anything was wrong. The prosecution's reliance on the text messages sent by the defendant to Eric as a basis for the involuntary manslaughter charge to go to the jury is too slender a reed upon which to rest proof beyond a reasonable doubt.

beyond a reasonable doubt.[10] *See Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979).

The trial court's error in denying the defendant's motion for a required finding of not guilty on the involuntary manslaughter charge at the close of the Commonwealth's case effectively created a per se involuntary manslaughter rule by the provision of heroin alone, something the State Legislature has not done.

Some states do have per se manslaughter laws in effect for the provision of drugs that result in death. *See e.g.* NJ Rev. Stat. § 2C:35-9, *Strict Liability for Drug-Induced Deaths*, (2013); 18 Pa. Stat. § 2506, *Drug Delivery Resulting in Death*, (2014). Other courts to consider the issue have determined that it is inappropriate for the judiciary to create a per se manslaughter rule for the provision of heroin where the legislature has not done so. *See*

[10] Although the defendant's testimony cannot be considered in evaluating the denial of a required finding of not guilty at the close of the Commonwealth's case, it confirmed that none of the aggravating factors were present here: 1) Jesse testified that he used this brand of heroin thousands of times without an adverse reaction; 2) Jesse had done the heroin with Eric two days earlier without incident; and 3) Eric had his own "works" and demonstrated that he knew how to use heroin. *See Commonwealth v. Kelley*, 370 Mass. 147, 150 n.1 (1976).

State v. Shell, 501 S.W.3d. 22 (Mo. Ct. App. 2016); *State v. Miller*, 874 N.W.2d. 659 (Iowa Ct. App. 2015). In *State v. Shell*, the prosecution contended that the conviction for involuntary manslaughter was supported because the defendant acted recklessly in providing heroin to the decedent, as the defendant was aware of the risks associated with injecting heroin and ignored those risks by providing the heroin. 501 S.W.3d. at 32. The court noted that this case was different from prior involuntary manslaughter cases where the defendant had told the decedent how much heroin to use, prepared the heroin and loaded it into the syringe. *Id.* citing *State v. Voss*, 2016 WL 145727 (Mo. App. E.D. 2016). In reversing the defendant's conviction, the Missouri court explained that, "To rule as the State suggests and hold that the Defendant acted recklessly simply by providing Decedent with heroin would create a per se involuntary manslaughter rule, which we are unwilling to impose upon criminal defendants absent clear legislative intent." *Shell*, 501 S.W.3d. at 33.

Likewise, the Iowa Court of Appeals in *State v. Miller*, held that the mere delivery of heroin, without more, does not establish recklessness to support an

involuntary manslaughter conviction. 874 N.W.2d. at 665. Again, the court differentiated from prior cases in which convictions were upheld due to aggravating factors in addition to the provision of heroin. *Id.* at 665-66 citing *State v. Hoon*, 2012 WL 836698 (Iowa Ct. App. Mar 14, 2012) (defendant knew victim was visibly intoxicated at time of delivery and that victim would take the drugs without moderation) and *State v. Block*, 2000 WL 1587760 (Iowa Ct. App. Oct. 25 2000) (defendant provided both methadone and Xanax to decedents and knew that decedents had never taken methadone alone or in combination with Xanax). In reversing the defendant's conviction in *Miller*, the Iowa court held that "adopting a rule of strict liability for death resulting from delivery of a controlled substance is a policy decision best addressed by the legislature rather than the judiciary." *Miller*, 874 N.W.2d at 665.

The trial court's decision effectively changed the law so that the provision of heroin that results in a death is involuntary manslaughter, making the act of transferring heroin, where it results in a death, a strict liability crime. The legislature is currently considering such a bill, Senate Bill No. 2158, which

indicates their view that it is not currently a strict liability crime to distribute heroin where it results in a death.[11] "It is the province of the judiciary to say what the law is, or what it was. The legislature can only say what it will be." *Fletcher v. Peck*, 10 U.S. 87, 123 (1810). The trial court did not accurately apply current Massachusetts law, which requires a plus factor in addition to the mere distribution of drugs, in order to find wanton and reckless conduct sufficient for a conviction of involuntary manslaughter.

Simply put, the tragedy that occurred on October 4, 2013, was not the product of the defendant's making a choice to risk death or grave physical harm to Eric Sinacori.

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[11] Senate Bill No. 2158 is currently pending with the Committee on Senate Rules, and has been since the end of March. Order S. 2313, https://malegislature.gov/Bills/190/S2313 (last accessed April 23, 2018). The bill, if adopted, would add Section 59 to Chapter 265 and read "Any person who, in violation of chapter 94C, manufactures, distributes, or dispenses heroin . . . is strictly liable for a death which results from the injection, inhalation or ingestion of that substance, and shall be punished by imprisonment for life or for any term of years as the court may order, and by a fine . . . provided, however, that the sentence of imprisonment imposed upon such person shall not be reduced to less than 5 years, nor suspended . . ." S. 2158, available at https://malegislature.gov/Bills/190/S2158 (last accessed April 23, 2018).

Conclusion

For the foregoing reasons, this Court should reverse the defendant's conviction and remand the case for a new trial on the charge of distribution of heroin. Additionally, this Court should direct that a required finding of not guilty be entered on the charge of involuntary manslaughter, or that the defendant be granted a new trial on this indictment as well.

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April 24, 2018

CERTIFICATION

Counsel for the defendant certifies, pursuant to Mass. R. App. P. 16(k) that the brief complies with the rules of court that pertain to the filing of briefs.

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April 24, 2018

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Re: Commonwealth v. Jesse Carillo
A.C. No. 2017-P-1465

Dear Mr. Stanton:

Enclosed please find for filing one (1) copy of the Defendant's brief and record appendix in the above-referenced case.

I hereby certify that one (1) copy of the brief has been electronically mailed to Cynthia Von Flatern, Assistant District Attorney, to her address at the Northwestern District Attorney's Office, 1 Gleason Plaza, Northampton, MA 01060, cynthia.von.flatern@state.ma.us.

In accordance with Mass. R. App. P. 13(a)(ii), I hereby attest, under the pains and penalties of perjury, that the Defendant's brief in this matter was electronically mailed to the court on April 24, 2018.

Yours sincerely,

J. W. Carney, Jr.
B.B.O # 074760

JWC/cs
enclosures
cc: Cynthia M. Von Flatern, Assistant District Attorney