Docket No:

UNITED STATES SUPREME COURT

STATE OF MAINE,
Plaintiff-Respondent,

v.

NOAH GASTON,
Defendant-Petitioner.

On Petition for Writ of Certiorari
TO THE MAINE SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTIONS PRESENTED

1. Does Maine's murder statute violate the Fourteenth Amendment to the United States Constitution because it does not require the state to prove beyond a reasonable doubt that Noah Gaston knew it was his wife and not an intruder because Maine law defines knowing as a general intent only requiring actus reus?

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JURISDICTIONAL STATEMENT

Review on Petition for Writ of Certiorari. The Petitioner makes this petition based on the jurisdiction conferred by Article III Section 1 of the United States Constitution and Rule 10 of the Supreme Court Rules. The Decision in the Maine Supreme Judicial Court deals with an important federal question and conflicts with other decisions of the Supreme Court of the United States. This petition has been timely filed by 150 days from April 29, 2021.

Appellate Jurisdiction. The Petitioner takes this appeal as of right in a criminal prosecution the notice of appeal must be filed in the district court within 21 days after entry of the order or judgment appealed. The notice of appeal in this matter was timely filed on July 16, 2020.

Original Jurisdiction. The Maine Superior Court of the State of Maine has original jurisdiction of count 1 – Intentional or Knowing Murder under 17-A MRS § 201(1)(A) and § 1158-A 1(B) and count 2 – Manslaughter under 17-A MRS § 203(1)(A), § 1252 (4) & (5), and § 1158-A 1(B). A Sentence of forty years was imposed on June 26, 2020.

PROVISIONS OF LAW

US.CA. Const. Amend. XIV (West 2021)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

17-A M.R.S. § 201(1) (West 2020)

A person is guilty of murder if the person:

A. Intentionally or knowingly causes the death of another human being;

B. Engages in conduct that manifests a depraved indifference to the value of human life and that in fact causes the death of another human being; or

C. Intentionally or knowingly causes another human being to commit suicide by the use of force, duress or deception.

STATEMENT OF FACTS

On January 14, 2016 at 6:17 am, the emergency dispatch received a call from Noah Gaston. Mr. Gaston told the operator, "I just shot my wife in the stomach. I thought she was an intruder. She got up super early in the morning and sounded crazy." The operator asked, "is she was awake?" Mr. Gaston replied "No." The operator asked, "is she breathing?" Mr. Gaston replied, "No I don't think so." The operator told Mr. Gaston that she was getting her officer started and to stay on the line with her. The operator gave him instruction and asked him to start chest compressions. In the recording you can hear Mr. Gaston counting as he tried to follow the operator's instructions until the police arrived. State's Exhibit 23 TT at 171

Within minutes of the police arriving, Mr. Gaston told Officer Justin Hubnor from the Windham Police Department what happened.

> I heard noises down here, and it was probably was like in the middle of the night, and, and I checked the bed to see if the girls were in the bed. Normally they come down early if they were going to like, make breakfast. I'm pretty sure it was like too early for that. So, after checking their beds, and I was pretty sure it sounded like a walky-talky… And did not expecting to hear or see anyone, and my wife's turned around, and started coming up the stairs…. …and I shot her. Thinking, thinking it was an intruder. Like, thinking like, holy shit, someone's about to come up the stairs at me. Um, just because of all of…the of the other noises. But I really thought she was until like, I like said something about the, I was checking um, noises. And I didn't grab my gun. I listened at the top of the stairs, and then I heard what sounded like a walky-talky. So, I don't know if you have like a device with you know, something that's playing low? Um, but it's like, the way it sounded and what the noise is. So, I checked on the girls, and the girls were in bed. And so, then I grabbed you know, I, I grabbed the shotgun and went to the top of the stairs because it sounded like whatever it was, you know the person was coming. You know I think she was even, that's not, that's, I don't even think that's accurate. Like I don't, I think when I got to the top of the stairs with the gun, I don't think there was anyone on the stairs. But, I don't think she started. And then by the time I kind of raised the gun, like of an end case, she was like halfway up the stairs, or something, or, or a couple stairs up.

State Exhibit 71 TT at 295.

A few hours later, Mr. Gaston was just as open with Maine State Police Detective Ethel Ross. He told Detective Ross,

> When I got up, the way I got out of bed is like I felt that my son was there because I could feel him tossing and turning. But thought she was still there. I got out of bed and my mom

had given me these ridiculously floppy, fat socks ... I was like standing and like slipping on and thinking, you know, and, and, because I, because I heard noises downstairs. Um, oh, man, I can't believe it. And so I got out, I got up to check and when I heard, I mean, I heard just like noises like, like someone was down there. which wouldn't have alarmed me somewhat, just not like I'm, you know, like all, all, like, like ahhh, like I'm not, I'm not a fearful person. I heard these noises. It was clearly someone was down there and it sounded like creep, like it sounded like definite creeping around. And so I got out of bed, hearing noises, just went to the, the top of the stairs without anything, like no, like, you know? And so I got out of bed, hearing noises, just went to the, the top of the stairs without anything, like no, like, you know? And then what I heard was a quick shuffling and then sounded like a walkie talkie. I'm thinking like holy crap like what is that? And so I went and checked to see if the girls were in their bed. And I may have checked to see if they were in their bed when I first heard the awkward noises and then stood at the, at the stairs, top of the stairs, I think that's how it happened. So I knew that they were in their beds. I had falsely assumed that my, that my wife was in the bed with me. And I was like that's it. Like and it sounded like someone's coming towards the stairwell and I was like, oh, shit they'll be up here any second or someone ... ... is like, like right there. They're fli, it sounded like someone was like flanking. The, because the way our house goes around like that and so it was such an odd noise to hear and there were some other issues. She apparently started a laundry in the basement. We're new to the house. Like some of the, some of the noises were really different than I'm used to hearing and then with her turning what, so I don't know that she did this, but this like totally like hit me when the other guy was stan, sitting here. Is that there's a possibility of her using her SERI thing. Because whatever, whatever I heard did not sound like her. So it's like, to me I heard rsh, rsh, rsh, rsh, sh and I was like holy shit, like so, some , someone's here and so I went and grabbed the gun and put, urn, and it wasn't loaded, but I do have ammo stored up above in the closet and so I grabbed a, ah, a shell and put it in the gun and then went to the top of the stairs and she had just started like corning up the stairs, urn, but like the timing and I wear glasses and I didn't have them on. And her, like her head was down and so it just was like someone's corning up the stairs at us and so I fired. Ah, and then that's, it's like, like as, as, as it hit her, did she sort, like kind of fall backwards and then in the light of the light downstairs could I see that it was her and see what happened. Urn, and so I went down and, ah, and was, holy shit, so she, I think maybe, she maybe was able to say like call 9-1-1. Urn, and I, I don't know what I, I tried to do first. I'm pretty sure I went to go look for a phone and was trying to find like the cell phones because they're just, we leave them, you know, around the house."

State's Exhibit 66-B. TT at 467.

Troy Crabtree was called by Ethan Smith and asked to go pick up Mr. Gaston at the Windham Police Station where he was finishing his interview with Detective Ross. TT At 367. Mr. Crabtree and Mr. Smith were in charge of what they referred to as discipleship which was a less formal church meeting every Sunday. Mr. Smith and Mr. Crabtree knew Noah and Alicia from their church Missio Dei. TT 367. They took Mr. Gaston to the First Baptist Church in Portland. TT at 373. Once he was at the First Baptist Church, Mr. Gaston told Mr. Crabtree and Mr. Smith what he told Detective Ross. At the end of Mr. Gaston's recounting,

Mr. Crabtree and Mr. Smith asked, "if there was anything else that he wanted to tell us and [Mr. Gaston] said no, and that this was the only story that he could tell if he wanted to see his children again." Mr. Smith Responded, "Is there another story that you could tell?" TT at 379. Mr. Gaston replied, "No that-that is what happened." TT at 379.

The Maine Supreme Judicial Court's opinion included the operative facts. At the close of the evidence, the State and Gaston discussed the court's proposed jury instructions and verdict form. Gaston contended that "in the case of an intentional or a knowing murder where depraved indifference is not charged, the intent has to be specific both to the idea of killing and to the idea of a specific person. It can't be just someone who ends up dying." The State responded that the statute requires only the death of another human being. The court added Alicia Gaston's name in the instructions where appropriate, but the court was not persuaded by Gaston's argument that the State had to prove, as an additional element, that the defendant intended to kill the person whom he had, in fact, killed. The following instructions were given to the jury:

> The law of the State of Maine provides that: A person is guilty of murder if the person intentionally or knowingly causes the death of another human being. In order for the State to prove beyond a reasonable doubt that Noah Gaston committed the crime of murder, the State must convince you beyond a reasonable doubt of the following three facts: First, that another person, Alicia Gaston, is dead; Second, that Noah Gaston caused her death, which means that Ms. Gaston's death would not have occurred but for Mr. Gaston's conduct; and, Third, that Mr. Gaston acted either intentionally or knowingly when he caused Alicia Gaston's death. A person causes death "intentionally" if it is his conscious object to cause another person's death. On other hand, a person causes death "knowingly" if he is aware that it is practically certain that his conduct will cause another person's death.

The jury returned a guilty verdict on one count of murder and found "that the crime of murder was committed with a firearm against a person. *State v. Gaston*, 250 A.3d 137 (2020).

At the charge conference, Counsel objected to the generalized person langue in the charge. TT at 1052. Defense Counsel wanted the instructions to say [t]hat instead of a person, that it just be intended to kill Alicia Gaston. TT at 1053. Mr. Gaston's counsel articulated that the instructions as drafted could be any person and it did not have to be specific to Alicia Gaston. TT 1052. Defense

Counsel thought that "in the case of an intentional or a knowing murder where depraved indifference is not charged, that the intent has to be specific both to the idea of killing and to the idea of a specific person." TT at 1052 Defense Counsel also stated it could not "be just someone who ends up dying." TT at 1052. Defense Counsel had planned to argue that it had to be a specific person. TT at 1058. The Trial Court specifically instructed Defense Counsel not to make that argument. TT at 1058.

The State explained its plan to argue a depraved indifference theory of murder during this discussion over specific person during the charge conference. TT 1058. Reading from her opening the Assistant Attorney General told the court: "Noah Gaston pulled the trigger on his Mossberg shotgun in order to kill the person on the stairs. He succeeded in killing the person on the stairs. That's murder." TT at 1059. Defense Counsel informed the Court that if the State argued a depraved indifference theory of murder at closing, it would draw an objection. TT 1054. After the State's closing, Defense Counsel objected to this argument. TT at 1096.

The Trial Court endorsed the States reading of the law, "I agree with the State that, in my view, the Legislature has defined the elements of the crime and the elements of the crime of murder have been enacted as the death of a human being. TT at 1058. Jury was instructed that another person, Alicia Gaston is dead; . . . Third that Mr. Gaston acted either intentionally or knowingly when he caused Alicia Gaston's death. TT at 1129. Defense Counsel objected to the instructions as given for reason described in the charge conference. TT at 1143. The jury began its deliberations. On November 20, 2019, the jury sent a note that read "to satisfy element 3 of murder must Mr. Gaston have acted intentionally or knowingly to cause the death of Alicia Gaston specifically or is it sufficient to act either knowingly or intentionally to cause the death of another person. The Court responded by directing the jury to page 2 and 4 of written jury instructions. Mr. Gaston was

convicted. The Court sentenced Mr. Gaston to 40 years.

After the verdict, Gaston renewed his motion for judgment of acquittal and made a motion for a new trial based on his argument that the State was required to prove an intent to kill a specific person. The court denied both motions, stating that "any rational fact-finder could have found beyond a reasonable doubt that Mr. Gaston acted intentionally or knowingly when he caused the death of Alicia Gaston" considering that from the testimony a "rational jury could have unanimously found beyond a reasonable doubt that Mr. Gaston actually knew that the person coming up the stairs was in fact his wife, Alicia Gaston, when he discharged a shotgun into her abdomen when standing in relatively close proximately to her." The court also determined that the jury instructions were appropriate.

The Maine Supreme Judicial Court did not address the scienter aspects of knowing in its decision upholding the Trial Court's decision not give the requested instruction. Instead, the Maine Supreme Judicial Court adopted the State's argument:

> In *State v. Mann*, the defendant argued that the proposed jury instruction "needed to inform the jury that prosecutors bore the burden of proving that the fatal blow was not inflicted in self-defense." 2005 ME 25, ¶ 11, 868 A.2d 183. In that case, we stated that "[e]ven if we assume[d] that [the defendant]'s proposed instruction adequately state[d] Maine law, was generated by the evidence, and was not misleading or confusing, the trial court's instructions adequately covered the prosecution's burden of proof." *Id.* We concluded that "[w]hen jury instructions closely parallel the provisions of the Maine Criminal Code, they are adequate to provide the jury with the necessary information." *Id.* ¶ 13. Here, the court's instructions closely paralleled the language of the statute, and the court properly denied Gaston's request for additional jury instructions.

State v. Gaston, 250 A.3d 137, 145 (2020). The Maine Supreme Judicial Court simply sidestepped the issue. Instead of recognizing Mann's holding applied to a collateral matter that did not negate scienter, the Maine Supreme Judicial Court simply applied it to the facts here even though scienter would have been negated if the person on the stairs had been an intruder. This issue is more complex

than the opinion below suggests.

Moreover, the due process requirement of the Fourteenth Amendment's effect on Maine's interpretation of knowing seemed to be lost on the Maine Supreme Judicial Court. Their comment on the Fourteenth Amendment did not even mention that mens rea requirements of knowing under federal law:

> Gaston also contends that his due process rights were violated when the State included Alicia Gaston's name in the indictment instead of the phrase "another human being." Although the indictment included Alicia Gaston's name, it also included that it was "all in violation of 17-A M.R.S. § 201(1)(A)"; this statute requires that the defendant cause the death of another human being. 17-A M.R.S. § 201(1)(A) (2021). Therefore, the indictment was sufficient to apprise Gaston of the charge against him and allow him to prepare a defense; the fact that the State put a specific name in the indictment does not change the elements required by the statute. See State v. Gauthier, 2007 ME 156, ¶ 17, 939 A.2d 77 ("The test for determining whether an indictment is sufficient is whether an accused of reasonable and normal intelligence would, by the language of the indictment, be adequately informed of the crime charged and the nature thereof, so that the accused could properly prepare his defense." (alteration omitted) (quotation marks omitted)).

Id., at n6 144. Despite having been briefed and presented at oral argument, the Maine Supreme Judicial Court refused to acknowledge this Court's growing jurisprudence and precedent on scienter. In particular, the opinion made no attempt to reconcile how willful and knowing have been defined for purposes of federal law by this Court. Mr. Gaston asks this Court to accept this petition for that purpose.

ARGUMENT

I. The Maine Supreme Judicial Court was incorrect when it held that intentional and knowing murder did not require Mr. Gaston to be aware of the fact that made his conduct wrongful.

The Trial Court instructed the jury, over Mr. Gaston's objection, that the State only had to

prove that he intentionally or knowingly intended to kill a human being, despite indicting him on the charge of causing the death of his wife, Alicia Gaston. This improperly states the law on intentional or knowing murder and therefore the jury's verdict should be vacated.

Mr. Gaston asserted then and asserts now that intentional or knowing murder requires some proof that he had knowledge that the figure coming up the stairs at him was Alicia and not an intruder meaning to harm him or his family. After the conclusion on the day before the Court expected to have the charge conference, however, the State began asserting for the first time a general intent theory of murder that only required proof of the intent to kill and not the intent to kill Alicia Gaston. The State's theory is an echo of a position taken by Justice Thomas in his dissent to *Elonis v. United States*:

> But general intent requires *no* mental state (not even a negligent one) concerning the "fact" that certain words meet the *legal* definition of a threat. That approach is particularly appropriate where, as here, that legal status is determined by a jury's application of the legal standard of a "threat" to the contents of a communication. And convicting a defendant despite his ignorance of the legal—or objective—status of his conduct does not mean that he is being punished for negligent conduct. By way of example, a defendant who is convicted of murder despite claiming that he acted in self-defense has not been penalized under a negligence standard merely because he does not know that the jury will reject his argument that his "belief in the necessity of using force to prevent harm to himself [was] a reasonable one."

575 U.S. 723, 135 S. Ct. 2001, 2022 (2016) (Thomas, J. *dissenting*) (emphasis in original). Like Justice Thomas in his dissent, the State wants to dispense with the scienter element of intentional and knowing in favor of the generalized intent to kill another human being. The State's position is contrary to *United States v. Bishop*, 412 U.S. 346 (1973), which held "willfully" requires the violation of a known legal duty in a tax fraud case, and was implicitly rejected by *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (requiring knowledge of the legal status that prohibited possession of a firearm). The State's theory, adopted by the Trial Court, is an outdated view of the state of law.

A. Due Process requires the State put a defendant on notice of the elements of its charges which it failed to do by presenting this as general intent theory of murder based on depraved indifference instead of the specific intent crime required for intentional and knowing murder.

Mr. Gaston's defense relied on the facts alleged in the State's indictment – that he had intentionally or knowingly caused the death of Alicia Gaston. The way the indictment charged Mr. Gaston supported the idea that he had to know it was Alicia because it failed to charge a depraved indifference theory of murder and identified Alicia by name without mentioning that she was a human being. Mr. Gaston was well within the confines of the law when he insisted that he neither intended to kill Alicia nor that he had to rely on a collateral matter like mistaken self-defense. The Trial Court should have told the jury when they asked, that the state had to prove that Mr. Gaston knew it was Alicia.

This is not a case that can be dismissed by some version of the maxim that ignorance of the law is no excuse. This Court has specifically rejected the idea that collateral matters like mistaken self-defense are untenable as a state of mind defense:

> In contrast, the maxim does not normally apply where a defendant "has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct," thereby negating an element of the offense. *Ibid.*; see also Model Penal Code § 2.04, at 27 (a mistake of law is a defense if the mistake negates the "knowledge ... required to establish a material element of the offense"). Much of the confusion surrounding the ignorance-of-the-law maxim stems from "the failure to distinguish [these] two quite different situations."

Rehaif, at 2198. Those two defenses, mistake or self-defense, are collateral matters independent of the scienter element that Mr. Gaston asks for in this case. The Trial Court misunderstood this aspect of the defense presented by Mr. Gaston until the note from the jury forced the Trial Court to recognize the problem. When the Court refused to clarify its instructions, Mr. Gaston was prejudiced by the inaccurate statement of the law.

Mr. Gaston should have been allowed to focus the jury's attention on what he believed was happening in the darkness of those early morning hours in 2016. Mr. Gaston's attempt to focus the jury attention was through the use of common law principles that should have been applied to Maine's murder statute:

> By contrast, we have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law. In Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), for example, we addressed whether materiality is required by federal statutes punishing a "scheme or artifice to defraud." Id., at 20, and 20–21, nn. 3–4, 119 S.Ct. 1827 (citing 18 U.S.C. §§ 1341, 1343, 1344). Unlike the statute in Wells, which contained no common-law term, these statutes did include a common-law term—"defraud." 527 U.S., at 22, 119 S.Ct. 1827. Because common-law fraud required proof of materiality, we applied the canon to hold that these federal statutes implicitly contain a materiality requirement as well. Id., at 23, 119 S.Ct. 1827. Similarly, in Evans v. United States, 504 U.S. 255, 261–264, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992), we observed that "extortion" in 18 U.S.C. § 1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law.

Carter v. United States, 530 U.S. 255, 266 (2000). Mr. Gaston was simply asserting that the common law term required proof he knew the fact that made his conduct illegal and that the figure coming up the stairs was his wife. The question was not could Mr. Gaston shoot the person coming up the stairs and be entitled to acquittal because of mistake or self-defense because those are just collateral matters:

> This case is similar. The defendant's status as an alien "illegally or unlawfully in the United States" refers to a legal matter, but this legal matter is what the commentators refer to as a "collateral" question of law. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

Rehaif, at 2198. The question at the top of those stairs that early morning was "do I know that I have no right to fire because that is my wife Alicia coming up the stairs?" Mr. Gaston's answer was tragically wrong but not because he understood the facts such that his acts constituted intentional or knowing murder.

B. Maine has historically described these legal principles as malice

aforethought and that analytical framework has largely survived the adoption of the Model Penal Code as theories of express malice or implied malice.

While it was unnecessary to prove that a specific plan to cause the death of a specific person existed under Maine's old murder principles, it was necessary for the evidence to support either a finding of express malice or implied malice:

> Express malice exists where one with a sedate, deliberate mind, and a formed design, doth kill another; which formed design is evidenced by external circumstances discovering the inward intention, as by lying in wait, antecedent menaces, former grudges, and concerted schemes to take life. Implied malice is an inference of law upon the facts found by a jury. It exists where one attempts to kill or maim one person, and in the attempt kills another against whom no injury was intended, or in general, in any deliberate attempt to commit a felonious act, and death is occasioned in the execution of such attempt, although the original intention may not have been to take life. When the killing is unlawful, and neither express nor implied malice exists, the crime is reduced from murder to manslaughter. But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, justify or excuse the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice which the law raises from the act of killing, by evidence in [defense].

State v. Knight, 43 ME 11, 35 (1857). Under the old rubric of malice, it was unnecessary to charge a specific express or implied theory of murder, but these historical distinctions of malice eventually served as the underpinnings of Maine's current murder statute. The concept of express malice would develop into what is referred to currently as the intentional or knowing theory of murder while the concept of implied malice would develop into what is currently known as the depraved indifference theory of murder.

In cases such as this, when the identity of the soon-to-be-decedent was unknown, Maine law has always required either an implied malice theory of murder (pre-code) or, later, a depraved indifference theory of murder (post-code). Again, *Knight* should be highlighted because transferred intent is an implied theory of malice.

> Implied malice is an inference of law upon the facts found by a jury. It exists where one attempts to kill or maim one person, and in the attempt kills another against whom no injury was intended, or in general, in any deliberate attempt to commit a felonious act, and death is occasioned in the execution of such attempt, although the original intention may not have been to take life.

State v. Knight, 43 ME 11, 35 (1857). As an example, the Maine Supreme Judicial Court upheld a jury instruction providing a concrete example of how this theory could play out:

> "Now, supposing that you visualize another man sitting on the side of a hill with a rifle - - - a loaded rifle in his hand and a passenger train, although we don't have any left, going by and he just shoots abandonly right at them. He doesn't have any specific intent to kill anybody but certainly that would be a reckless, brutal act with a high potential of loss of life. That would be an illustration of murder implied. Malice aforethought not express but implied, see, that would be a highly reckless action quite likely to result in death even though he has no specific intent to kill and, finally, the man, as I said before, sits down, picks up some reason in his mind to intentionally kill another human being, secures a gun, loads it, waits in ambush and shoots him deliberately; that would, of course, be malice aforethought expressed."

State v Lewisohn, 379 A.2d 1192, 1207 (Me. 1977). This fictional scenario offered by the judge in *Lewisohn* is exactly the difference between what the State argued and what is necessary to prove intentional and knowing murder. What occurred in that stairway is exactly what it would be to shoot at the moving passenger train because the State lacked the evidence Mr. Gaston intended to kill Alicia, rather than a shadowy intruder. It is the very distinction the State made in their closing argument: The State simply failed in their attempt to portray the events of this case as somehow proving that Mr. Gaston knew it was Alicia coming up the stairs at him.

Understanding the underpinnings of Maine's murder law is not an unnecessary "historical analysis," as inferred in some arguments made by the State. Rather, the historical development of implied malice is still relevant to interpreting the requirements of Maine's current Murder statute. The historical view of malice was last used to explain depraved indifference in 2017:

> The depraved indifference murder statute, section 201(1)(B), has replaced a common law definition of murder that allowed a fact-finder to convict a person of murder upon

> "proof of conduct which objectively evaluated is characterized by a high death producing potential." *State v. Woodbury*, 403 A.2d 1166, 1172–73 (Me. 1979) (quotation marks omitted). Depraved indifference is derived from the concept of "implied malice," which is distinct from the state of mind characterized by the Criminal Code as recklessness because recklessness requires a subjective awareness of a risk. *Id*. at 1172–73 & n.9. We have not construed depraved indifference as incorporating a culpable mental state. Instead, we have construed section 201(1)(B) "to deal with those few instances in which, although the defendant did not act intentionally or knowingly, his conduct, objectively viewed, created such a high tendency to produce death that the law attributes to him the highest degree of blameworthiness." *State v. Lagasse*, 410 A.2d 537, 540 (Me. 1980) (emphasis added*); see also State v. Thongsavanh*, 2007 ME 20, ¶ 38, 915 A.2d 421 ("The offense does not require evidence of a defendant's subjective state of mind.").

State v. Cummings, 166 A.3d 996, 1001 (Me 2017). There can be no doubt that the historical concept of malice is as relevant to the current murder statute as it was to the pre-1976 murder statute. The Maine Supreme Judicial Court's use of the historical analysis could not be clearer and the State's confusion over it can be explained only by their refusal to acknowledge the damage the historical analysis does to their position. The State's failure to charge depraved indifference should have been fatal to the conviction by its very admission because the State argued an implied malice theory of murder – transferred intent.

Rather than address how the Maine Supreme Judicial Court should define the difference between the intentional and knowing theory of murder and the depraved indifference theory of murder, the State offered only misdirection by saying they simply argued the "plain language of the intentional or knowing murder alternative delineated in section 201(1)(A) – that it had to prove that Gaston intentionally or knowingly engaged in conduct that caused the death of "another human being." The State also relies on the fact that "[a]s charged in the indictment, that human being was Alicia Gaston." This argument was entirely adopted by the Maine Supreme Judicial Court.

The act of causing the death of an unnamed and unknown human being is not "intentional or knowing" murder; it is depraved indifference murder. While to date declining to define the

difference, the Maine Supreme Judicial Court has acknowledged there are two independent theories of murder in Maine: intentional and knowing or depraved indifference. There is nothing about what the State argued to the jury that involves the plain language of the 17-A M.R.S. § 201. The plain language would have required an understanding of the historical analysis and the terms express malice and implied malice.

C. Intentional and knowing murder requires a different level of scienter than depraved indifference murder.

Unlike this Court, the Maine Supreme Judicial Court has not addressed the claim of intentional or knowing requires proof of scienter and not just the intention to cause death to some other human being. The closest the Maine Supreme Judicial Court has come to addressing scienter in this way has been in the context of the abnormal condition of mind defense. In *State v. Proia*, this Court found it wasn't error when a trial court found the defendant was acting consistently "through the lens of his delusional apprehension of reality," one that did not "prevent him from acting with the required culpable states of mind." *State v. Proia*, 168 A.3d 798, 802 (2017). More recently, the Court again addressed the abnormal condition of the mind defense in *State v Weyland*, 2020 ME 129, __ A.3d __, when finding the lower court acted within its discretion when it found the defendant "acted with a culpable state of mind on the day of the offense." If the decisions in *Proia* and *Weyland* exemplify proof of scienter, however, they suggest intentional and knowing murder is not satisfied by the intention to kill another human being generally.

The requirement of specific intent for "intentional or knowing" is supported by Maine's criminal statutes requiring four culpable states of mind. Maine law subsumes the concept of willfully into intentional and knowing:

> **1.** A person is not guilty of a crime unless that person acted intentionally, knowingly, recklessly or negligently, as the law defining the crime specifies, with

> respect to each other element of the crime… When the state of mind required to establish an element of a crime is specified as "willfully," "corruptly," "maliciously" or by some other term importing a state of mind, that element is satisfied if, with respect thereto, the person acted intentionally or knowingly.
>
> **2.** When the definition of a crime specifies the state of mind sufficient for the commission of that crime, but without distinguishing among the elements thereof, the specified state of mind applies to all the other elements of the crime…

17-A M.R.S.§ 34 (West 2020). The statute's language establishes willfully as having a parity with intentional or knowing. The timing of the legislative enactment is significant here: willfully has already been defined as requiring intentional violation of a known legal duty in *United States v. Bishop*. There is no indication the legislature intended to create a less stringent version of willfully. This aspect of malice with its two subsets of express and implied malice as applied under the old murder rubric was lost in the more straightforward articulation of murder based on the theory of intentional or knowing theory of murder or the depraved indifference theory of murder in the current statute that divides malice into two theories.

D. The given jury instructions only reflected the general intent theory.

The jury instructions delivered at the close of evidence did not require proof of scienter and allowed for a conviction under a theory of depraved indifference murder even though that theory was not charged. Maine's criminal statutes allows murder to be charged as either a theory of intentional and knowing or a theory of depraved indifference:

> A person is guilty of murder if the person:
>
> A. Intentionally or knowingly causes the death of another human being;
>
> B. Engages in conduct that manifests a depraved indifference to the value of human life and that in fact causes the death of another human being; or
>
> C. Intentionally or knowingly causes another human being to commit suicide by the use of force, duress or deception.

17-A M.R.S. § 201(1) (West 2020). At the end of trial, Mr. Gaston was charged with one count of intentional or knowing murder by an indictment that did not charge the depraved indifference theory of culpability. At the charge conference, the State asserted that murder only required the intent to kill another human being. Mr. Gaston objected to this theory of intent, asserting that the State had to prove that Mr. Gaston knew it was not just another human being but that he knew it was Alicia. Because the intentional and knowing theory of culpability requires the State to prove the element of scienter that Mr. Gaston was aware of the facts that made his actions unlawful it was necessary to prove that he intended or knew it was Alicia on the stairway. The Trial Court chose to deliver a general intent instruction that did not require proof that Mr. Gaston knew it was Alicia and the jury convicted Mr. Gaston.

The Trial Court decision to deliver a general intent instruction was born out of its failure to recognize intentional or knowing required something more than the intention to act, or knowing that you acted; it required knowledge the actions were unlawful. A characterization determined by Mr. Gaston's knowledge of the identity of the figure charging up the stairs at him. There was very little evidence from the attendant circumstances that allowed for the inference that Mr. Gaston knew the figure on the stairs was Alicia and no evidence Mr. Gaston subjectively knew it was Alicia until after the shot gun fired. Had the figure been an actual intruder, Mr. Gaston would not be guilty of a crime.

Mr. Gaston requested jury instructions that referred to Alicia Gaston instead of another person. This request was a correct statement of the law in that he had to know it was Alicia for his conduct to be wrongful. It wasn't enough in this case that someone died because Mr. Gaston engaged in conduct that demonstrated a depraved indifference to human life nor was he required to rely on the notion of mistaken self-defense that resulted in the death of his wife. It was entirely legitimate for him to insist that the charged theory of murder required the state to prove that he knew

it was Alicia and jury instruction did not require that in this case.

II. Due process was violated because "Intentional and knowing" because federal law defines knowing as requiring specific intent and knowledge of the fact that makes the conduct unlawful.

Over time, this Court has begun actively defining the proof necessary for the knowing culpable state of mind applied in federal criminal trials. In so doing, it has been addressing the misconception in the application of knowing and redirecting the focus from the act (e.g., was the person conscious of doing an act) to the mental state (e.g., did the person know an act was wrong).

> The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea,* scienter, malice aforethought, guilty knowledge, and the like. Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." We therefore generally "interpret [ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."

Elonis at 2009 (internal citations omitted). In requiring scienter in this way, *Elonis* clarifies the burden of proof required to prove an element of a crime – knowing now requires some fact establishing consciousness of wrongdoing:

> [18 U.S.C. §] 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *United States v. X–Citement Video,* 513 U.S. 64 72, 115 S.Ct. 464 (1994) (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating *something* is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence

> from wrongful conduct" is the threatening nature of the communication. *Id.,* at 73, 115 S.Ct. 464. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Id., at 2011. These scienter terms are a part of Maine's current murder statute. There is no doubt that Maine requires scienter for murder. The problem comes in determining to what degree that scienter must be specific. Mr. Gaston asserts that his case lays in the void between *Staples v. United States*, 511 U.S. 600 (1994) and *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Mr. Gaston asks this Court to determine the level of specific intent required for the knowing culpable state of mind.

At least two of this Court's prior decisions support the idea that general intent is enough for murder in Maine. Justice Thomas has articulated the caution with which this Court has expanded the requirement of scienter:

> In this case, as in *Staples*, a general intent requirement suffices to separate wrongful from "otherwise innocent" conduct. Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring, as Staples did, general intent—i.e., proof of knowledge with respect to the actus reus of the crime. And once this mental state and actus reus are shown, the concerns underlying the presumption in favor of scienter are fully satisfied,for *270 a forceful taking —even by a defendant who takes under a good-faith claim of right—falls outside the realm of the "otherwise innocent." Thus, the presumption in favor of scienter does not justify reading a specific intent requirement—"intent to steal or purloin"—into § 2113(a).

Carter, at 269-270. Under a general intent theory of murder, the intent to kill is the dividing line between lawful and unlawful conduct. This Court, though, has adjusted the level of intent on the need distinguish innocent conduct. While many might draw that line at killing a human being, that is not the line traditionally drawn by murder convictions and killing itself is not the line between innocent conduct and unlawful conduct.

To some extent, Mr. Gaston is asking this Court to infer a specific degree of scienter into the human being element. Recently, the Court reiterated this historical legacy of making this kind of

inference:

> The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion. See, *e.g. X–Citement Video,* 513 U.S. at 70, 115 S.Ct. 464; *Staples v. United States*, 511 U.S. 600, 610, 114 S.Ct. 1793 (1994); *Liparota v. United States*, 471 U.S. 419, 425, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); *United States v. Bailey*, 444 U.S. 394, 406, n. 6, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *Morissette v. United States*, 342 U.S. 246, 250–251, 72 S.Ct. 240 (1952). We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. See *Staples*, 511 U.S. at 605, 114 S.Ct. 1793. And we have interpreted statutes to include a scienter requirement even where "the most grammatical reading of the statute" does not support one. *X-Citement Video*, 513 U.S. at 70, 115 S.Ct. 464.

Rehaif at 2196-97. This principle was well established when the State charged Mr. Gaston with the death of his wife. In this case, Mr. Gaston asks the Court to apply the definition of knowing from *Rehaif* to the human being element of murder in Maine. While it may not be innocent conduct to kill another human being, something more than general intent to kill is necessary to distinguish murder from an act of self-defense. The indictment did in fact charge him with killing Alicia and not a human being.

While Justice Thomas has clearly expressed many reservations about expending an inference of specific intent, he has also articulated circumstance where specific intent may be necessary. Again, *Carter* explains when scienter should be expanded:

> The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct." X–Citement Video, supra, at 72, 115 S.Ct. 464. In Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), for example, to avoid criminalizing the innocent activity of gun ownership, we interpreted a federal firearms statute to require proof that the defendant knew that the weapon he possessed had the characteristics bringing it within the scope of the statute. Id., at 611–612, 114 S.Ct. 1793. See also, e.g., Liparota v. United States, 471 U.S. 419, 426, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985); Morissette, 342 U.S., at 270–271, 72 S.Ct. 240. By contrast, some situations may call for implying a specific intent requirement into statutory text. Suppose, for example, a statute identical to § 2113(b) but without the words "intent to steal or purloin." Such a statute would run the risk of punishing

> seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his. Reading the statute to require that the defendant possess general intent with respect to the actus reus—i.e., that he know that he is physically taking the money—would fail to protect the innocent actor. The statute therefore would need to be read to require not only general intent, but also specific intent—i.e., that the defendant take the money with "intent to steal or purloin."

Carter, at 269. Mr. Gaston asserts that the element of human being in Maine's murder statute suffers from such a defect that requires the inference of specific intent. Simply put, not every instance of causing someone's death is unlawful. The lawful or unlawful line is often a matter of the status of a human being. In other words, the line in this case is between killing his wife and killing an intruder both of whom would be human beings. Mr. Gaston asks the Court to apply this principle to his case.

III. The United States Supreme Court should grant the Petition for a Writ of Certiorari to resolve what specific intent is required for the knowing culpable state of mind.

The Court should take this opportunity to resolve this injustice. Mr. Gaston has been sentenced to 40 years for the act of trying to protect his family because that protective act carried with it the intention to kill. The knowing standard as defined by Maine law is simply inadequate in separating the lawful act of defending his family from the unlawful act of killing his wife. The Court should now apply the full import of knowing as defined in *Rehaif*.

The case is an excellent vehicle for enforcing the idea that the knowing culpable mental state requires a defendant to be aware of the facts that make his conduct unlawful. The Indictment charged the crime of intentional and knowing murder a theory of express malice and not depraved indifference murder a theory of implied malice. The Indictment specifically identified Alicia by

name and not just a human being. Counsel structured Mr. Gaston's defense around the idea that self-defense and a mistake would never overcome the jury's resistance to finding justification for Mr. Gaston's acts that resulted in his wife's death. Counsel articulated the state of mind defense at the charge conference and was specifically order not to argue that defense to the jury. In this case, the issue has been squarely presented throughout the trial process.

Defining how the culpable state of mind of knowing operates in the context of murder affects more than just Mr. Gaston. Maine has adopted the Model Penal Code for its murder statute. This case would resolve this issue for every state that has also adopted the Model Penal code's definition of murder.

CONCLUSION

The Supreme Court Should review the conclusion of the Maine Supreme Judicial Court and Grant this petition for writ of certiorari.

Dated at Portland, Maine this 26th day of September 2021.

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