In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2024-1770
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
LEANDER BISSELL,	:	
	:	Court of Appeals
Appellee.	:	Case No. CA-113158
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT

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INTRODUCTION

Leander Bissell was aware that he would probably cause serious harm to another when he sped through an active accident scene. He rammed into a firefighter, killing him and denting the car. He nevertheless kept on driving. Because that conduct was "knowing" action under Ohio law, Bissell committed felonious assault when he hit and killed Firefighter Tetrick. The trial court's conclusion on these facts was reasonable, so Bissell's conviction for felonious assault and the resulting felony murder should stand.

The Eighth District Court of Appeals misunderstood the definition of "knowing." Under Ohio law, an offender acts "knowingly" when he is "aware that [his] conduct will probably cause a certain result." R.C. 2901.22(B). The idea that a result will "probably" happen includes the possibility that it will not happen—in other words, an element of chance. The Eighth District was wrong to hold that the "element of chance" in this case downgraded knowing conduct to reckless conduct. *State v. Bissell*, 2024-Ohio-5317, ¶27 ("App.Op.").

STATEMENT OF *AMICUS* INTEREST

The Attorney General is the State's chief law officer and appears for the State in cases where it has an interest. R.C. 109.02. The State is interested in applying laws as written by the General Assembly, particularly as those laws relate to the safety of first responders and innocent bystanders on public roadways and beyond.

STATEMENT OF THE CASE AND FACTS

I. Ohio has adopted four *mens rea* categories.

The collective understanding of *mens rea* has come a long way in the last several centuries. The English legal system expressed the importance of the guilty mind in a phrase that ultimately gave us the term "*mens rea*": "'*actus non facit reum nisi mens sit rea*,' which means 'an act is not guilty unless the mind is guilty.'" Francis X. Shen, *et al.*, *Sorting Guilty Minds*, 86 N.Y.U. L. Rev. 1306, 1310 (2011). Ancient legal regimes generally included *mens rea* of some sort in their criminal codes, some more overtly than others. Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117 (1922). Even the earliest forms, at least as far back as the ninth century, acknowledged the difference between willful and accidental harm. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L. J. 815, 825–30 (1980). Over time, the law began to recognize gradations for mental states between the two extremes. One such nuance was distinguishing between *types* of accidents, such as faultless accidents and careless accidents. *Id.* at 833–36. The finer distinctions now in use—such as knowingly versus purposely and recklessly versus negligently—did not gain traction until the Eighteenth Century or later. *Id.* at 851.

At common-law, a dizzying array of descriptors sketched out the world of mental states—upwards of eighty different terms. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L. J. at 815. Words like "maliciously," "fraudulently,"

"feloniously," and "wilfully and corruptly," separated the criminal from the innocent. 1 Wayne R. LaFave, Substantive Criminal Law §5.1(a) (3d ed. 2024). Even in statutes, similar terms proliferated, such as "wilfully," "maliciously," "corruptly," "designedly," "recklessly," "wantonly," and "unlawfully." *Id.*

In the 1950s, the American Law Institute sought to clarify the landscape of mental states. Shen, *Sorting Guilty Minds*, 86 N.Y.U. L. Rev. at 1315–16. In 1962, it published the Model Penal Code, which set forth the now well-established four categories: negligent, reckless, knowing, and intentional. *Id*. at 1316. The Model Penal Code's formulation was influential, and it quickly became a centerpiece of many States' legal codes and many law school's criminal-law curricula. *Id.* at 1317–18.

Ohio was among the many jurisdictions to adopt the Model Penal Code's four categories. It did not adopt the Model Penal Code's definitions, however. It instead described those four categories with the following definitions:

> (A) A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature.
>
> (B) A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

> (C) A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.
>
> (D) A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that such circumstances may exist.

R.C. 2901.22(A)–(D).

II. Bissell killed Tetrick while speeding through an accident scene.

Leander Bissell killed a first responder, firefighter Johnny Tetrick, who was working in a highway accident scene. It was an unusually busy accident scene because two police jurisdictions responded, meaning many police and first-responder vehicles were there. Trial Tr.62–63, 114–15. Most of the traffic (other than Bissell) had slowed to a crawl or come to a complete stop. Trial Tr.62–63, 320. But Bissell was driving up to fifty miles per hour and was swerving around emergency vehicles. Trial Tr.76, 266, 278–79, 322. In the moments before and after Bissell hit Tetrick, Bissell did not slow down, swerve, or stop despite having hit the firefighter hard enough to dent the car. Trial Tr.160, 179, 181; State's Ex.1A (video).

After Bissell's bench trial, the judge found Bissell guilty of several crimes, including felonious assault and felony murder. R.38, July 20, 2023 Judgment Entry. Felonious assault requires an offender to "knowingly" cause "physical harm to another," R.C.

2903.11(A)(1), and felony murder requires that the offender cause "the death of another as a proximate result" of a felony offense of violence (here, the felonious assault), R.C. 2903.02(B). The judge noted that Bissell alone was driving in the blocked-off lanes, "skirt[ing] around … police vehicles" and "cut[ting] back" between open and closed lanes "so he could proceed unimpeded." Trial Tr.364. He concluded that Bissell knowingly caused serious physical harm to another, making him guilty of felonious assault (and ultimately felony murder). *Id.*

The Eighth District Court of Appeals reversed Bissell's conviction in a divided decision. Relevant here, the majority found that "there was insufficient evidence that [Bissell] acted knowingly." App.Op.¶14. Focusing on Bissell's speed, the court found no precedent saying that the defendant's speed of driving could show that he was aware he would probably cause harm. *Id.* at ¶¶18–22. And comparing this case to other cases about crimes committed by driver's, it found "no evidence Bissell knowingly used his car as a weapon to cause serious physical harm." *Id.* at ¶¶19–23. On the difference between knowing and reckless conduct, it wrote that "recklessness implies an element of chance – the actor proceeding despite knowing that the conduct contains a risk that a certain result is likely," while "[k]nowing conduct means that the actor acts with a degree of certainty in one's intention that a result will occur." *Id.* at ¶27 (quotation omitted). In sum, because Bissell did not act with "certainty in [his] intention that" he would hit a first

responder, the court concluded that Bissell acted recklessly, not knowingly. *Id.* (quotation omitted).

Judge Celebrezze dissented, emphasizing that "'probable' is not equivalent to 'certain,' and while Bissell surely would not be *certain* that his actions would cause physical harm to another, it was most certainly *probable*." *Id.* at ¶48 (Celebrezze, J., dissenting). He noted that acting knowingly means acting when "aware that the … conduct will probably cause a certain result," which does not require a purpose or intent to cause the harm. *Id.* at ¶38 (Celebrezze, J., dissenting). He pointed to several facts that supported Bissell's knowledge that he would probably hit someone or something while speeding uncontrolled through the accident scene. *Id.* at ¶¶42–45. Those included Bissell's "high rate of speed," his weaving through traffic and around police cars, and the marked difference between his response to the scene compared to other drivers observing the same situation. *Id.* The dissent also pointed out that Bissell's inability to ascertain specific dangers, such as Tetrick standing in the roadway, was due to his decision to drive quickly rather than taking time to perceive each hazard. *Id.* at ¶46. In that way, Bissell effectively "clos[ed] [his] eyes and press[ed] the accelerator." *Id.*

ARGUMENT

Appellant's Propositions of Law:

> ***Proposition of Law I****: A person acts knowingly under R.C. 2901.22(B) when the person is aware that the conduct will probably cause a certain result. As a heightened form of recklessness, it does not require that person to purposefully intend to cause the resulting harm.*

***Proposition of Law II**: Something is "probable" when there is more reason for expectation or belief than not, whereas something is "likely" when there is merely good reason for expectation or belief. When a driver ignores police vehicles with flashing lights closing down highway lanes and speeds through a closed-off accident area, serious and even fatal injury to emergency personnel, other drivers, or pedestrians, is probable, not just likely.*[1]

***Proposition of Law III**: A violation of R.C. 2921.331, failure to comply with order or signal of police officer, does not require a verbal command from a police officer. Police vehicles with flashing blue lights blocking lanes conveys a "lawful order or direction" that drivers must stay out of the lane.*[2]

This case turns on the definition of "knowingly" in Ohio law. The appeals court overturned Bissell's conviction for felony murder by concluding that conduct with an element of risk cannot meet the threshold for knowing conduct. It was wrong. In Ohio law, a person can act "knowingly" even if he is not certain that harm will occur. Under the correct standard, the trial court's finding of knowing felonious assault, and the resulting felony murder, should stand.

I. In Ohio, "knowing" requires awareness of probable, but not certain, harm.

Like the Model Penal Code, Ohio has four mental states, which took effect in 1974 after "five years of effort by legislators, prosecutors, defense attorneys, judges, and academicians." Harry J. Lehman and Alan E. Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 Clev. St. L. Rev. 8, 30 (1974); *see also* R.C. 2901.22; Ohio Legislative Service Commission, *Summary of Am. Sub. H.B. 511 The New Ohio Criminal Code* 3–4 (1973) (commenting on R.C. 2901.22). But different jurisdictions,

[1] The Attorney General does not take a position on this Proposition of Law in this brief.
[2] The Attorney General does not take a position on this Proposition of Law in this brief.

even when adopting the Model Penal Code's categories, have not always defined terms the same way. For example, "knowledge" has at least four different meanings across different jurisdictions. 1 LaFave, Substantive Criminal Law §5.2(b). After all, the Model Penal Code is just that: a model for state legislatures' consideration, not a source of law itself. For that reason, the text of any jurisdiction's criminal code is paramount. Just as in any other context, the Court "must give effect to the words used" by the General Assembly, relying primarily on "a legislative definition [if] available." *State v. Gonzales*, 2017-Ohio-777, ¶4. Since Ohio has definitions for each mental state, courts should stick closely to those definitions.

Each of the law's four mental states has a core aspect that sets it apart from the others. Start with "purposely." "A person acts purposely when it is the person's specific intention to cause a certain result[.]" R.C. 2901.22(A). This mental state, unlike the others, requires that the offender desire a certain result or desire to engage in prohibited conduct. And it subsumes what Ohio previously called "purposely," "intentionally," "willfully," and "deliberately." *Id.*; *see also Summary of Am. Sub. H.B. 511 The New Ohio Criminal Code* at 3–4.

On the very other end of the spectrum is negligence. "A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's conduct may cause a certain result or may be of a certain nature." R.C. 2901.22(D). Negligent conduct lacks awareness of wrongdoing. Every other mental

state requires some consciousness of wrongdoing, even if only consciousness of a risk that harm will result.

In the middle are recklessness and knowledge. "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result[.]" R.C. 2901.22(C). On the other hand, "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result[.]" R.C. 2901.22(B). Neither of these requires a desire to cause harm, and both require awareness of the risk of harm; that sets them apart from intentional and negligent acts. But what sets them apart from each other?

At least two answers are plausible, but only one matches Ohio law. The first treats "knowingly" as a reference to causing harm as a "side-effect" of an intentional action. *See* Shen, *Sorting Guilty Minds*, 86 N.Y.U. L. Rev. at 1352. Under this view, the knowledge standard means, "not desiring the harm, but being willing to cause it in order to accomplish some other purpose." *Id.* Under this view, for example, a hunter would knowingly kill someone if he aimed at his prey by shooting *through* the body of another person: although not desiring to kill the victim, he was willing to do it in order to accomplish his purpose of getting the prey. But he would act only recklessly if he shot wildly in a crowded room while attempting to shoot his prey. The Model Penal Code aligns with this option by using this language for knowing conduct: "aware that it is

practically certain that his conduct will cause such a result." Model Penal Code §2.02(2)(b)(ii) (emphasis added). In other words, the result is essentially guaranteed to follow when the person acts for whatever other purpose he has.

The second answer treats knowledge as differing from recklessness only in the degree to which the actor thinks the harm is likely. Under this view, while "[a]wareness" is "key to both" knowledge and recklessness, "[i]t is the level of awareness … that separates the two levels." *State v. Clay*, 2008-Ohio-6325, ¶¶31–32 (Lanzinger, J., concurring). In the hunter example, the offender would knowingly shoot someone if he shot wildly around a crowded room. Conversely, he would be only reckless if hitting someone with his bullet was less likely but still substantially possible—perhaps if he shot wildly outside with only a few bystanders.

Ohio law better fits the second option. Begin with the statutory definitions of "knowing" and "reckless" conduct. R.C. 2901.22(B), (C). "Knowing" conduct is defined as follows:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B). Reckless conduct is defined as follows:

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

R.C. 2901.22(C).

Now compare both. With knowing conduct, there is only one layer of probability: "the person is aware that the person's conduct will probably cause a certain result." R.C. 2901.22(B). But with recklessness, there are two layers. First, the person "disregards a substantial and unjustifiable risk" because he has "heedless indifference to the consequences." R.C. 2901.22(C). Second, the risk he ignores must be that "the person's conduct is likely to cause a certain result." *Id.* That reflects an uncertainty about whether the harm is, in fact, "likely." *Id.* In other words, for the knowing standard, the accused *knows that he is likely to cause harm*, and for recklessness, he *knows there is a risk that he is likely to cause harm*. The more certain the harm, the higher the *mens rea*.

Others have reached this same conclusion another way. The Legislative Service Commission commented on the amendment, noting that "[s]omething is 'probable' when there is more reason for expectation or belief than not, whereas something is 'likely' when there is merely good reason for expectation or belief." *Summary of Am. Sub. H.B. 511 The New Ohio Criminal Code* at 3–4. That view has some support; one dictionary explains that "likely suggests greater probability than possible, but less credibility than probable." *Webster's New World Dictionary of the American Language* 1132 (2nd ed. 1972) (emphasis

omitted). At the same time, the definition of "probable" is "likely to occur" and "reasonably but not certainly … expected," and a description of "likely" lists the connotation "probability … that can reasonably be expected" to occur. *Id.* at 819, 1132. And courts have also described both words in different contexts as something like an above-fifty-percent chance. *See Stinson v. England*, 69 Ohio St. 3d 451, syl.1 (1994); *State v. Bennington*, 2019-Ohio-4386, ¶17 (4th Dist.); *In re Meatchem*, 2006-Ohio-4128, ¶17 (1st Dist.).

Regardless of the reason, the result is the same: the harm need not be a virtually inevitable byproduct of the offender's actions for him to act "knowingly" under Ohio law. With this language, Ohio breaks from the Model Penal Code's definition of "knowingly," which requires that the harm be "practically certain" to occur as a result of the offender's actions. Model Penal Code §2.02(2)(b)(ii). The "practically certain" standard of the Model Penal Code is substantially higher than the reasonably-expected standard of Ohio.

This Court's precedents affirm that view and explain how it works in practice. When the resulting harm is "foreseeable," the offender acts knowingly with regard to the harm, and that remains true even if "the offender does not … predict the precise consequences of his conduct." *State v. Crawl*, 2025-Ohio-2799, ¶12 (quotation omitted). For example, many Ohio courts have held that shooting "toward or in the vicinity of another person when there is a risk of injury meets the 'knowingly' element of felonious assault." *State*

v. Wilson, 2024-Ohio-776, ¶24 (lead op.) (collecting cases). And dropping rocks over the edge of an overpass supports a conviction for knowingly causing physical harm because the rocks would "probably cause physical harm to others below." *State v. Cooey*, 46 Ohio St. 3d 20, 25 (1989), superseded by constitutional amendment on other grounds, as stated in *State v. Smith*, 80 Ohio St. 3d 89, 102 n.4 (1997).

II. A factfinder could conclude that Bissell acted knowingly.

Whether and how much the defendant perceived his action's riskiness is a fact inquiry that juries or factfinders infer from all the circumstances. *Crawl*, 2025-Ohio-2799 at ¶12. Because juries "cannot look into the mind of another," they instead rely on "all the facts and circumstances in evidence" to judge the "mind of the defendant" at the time of the crime. *State v. Teamer*, 82 Ohio St. 3d 490, 492 (1998). And when there is "sufficient evidence such that a reasonable trier of fact could have found that the state had proven guilt beyond a reasonable doubt, a reviewing court may not reverse a conviction." *Id.*

With that background understanding of Ohio's *mens rea* standards, a factfinder could conclude that Bissell knowingly feloniously assaulted Tetrick. Start with the crime: "No person shall knowingly … [c]ause serious physical harm to another." R.C. 2903.11(A)(1). The question is whether a reasonable factfinder could conclude that Bissell knew that he would probably cause serious physical harm to another by speeding through the accident scene at approximately fifty miles per hour. In other words, would seriously hurting someone be a reasonably expected result of Bissell's actions?

The facts support such a conclusion. The accident scene was awash with police cars, more than a usual accident scene because two police jurisdictions responded. Trial Tr. at 62–63, 114–15. Bissell undoubtedly saw those police cars, so it is reasonable to infer that he was aware of the police presence and the natural hazards of driving where first responders are busy at work. Moreover, all the other drivers, by slowing down and proceeding cautiously, signaled to Bissell that the road was not clear and safe to speed down. Trial Tr.62–63, 320. More yet—and this might be the key fact—Bissell did not brake or swerve in the slightest when he approached or hit Tetrick. Trial Tr. 179; State's Ex.1A (video). He drove straight through him, without slowing down. Since the impact with Tetrick was hard enough to dent Bissell's car, Trial Tr.160, 181, a reasonable factfinder could conclude that Bissell heard or felt the impact and did not even instinctually tap the brakes. A reasonable factfinder could infer that Bissell was *not surprised* by hitting something as he sped through—in other words, that he already knew he was likely to hit something. As is relevant here, there was certainly more than "sufficient evidence" for "a reasonable trier of fact" to draw those conclusions. *See Teamer*, 82 Ohio St. 3d at 492.

As a final note, this analysis is not the same as negligence analysis. Looking at the facts to conclude that the accused "[was] aware" of the probability of harm is an exercise of inferential reasoning. R.C. 2901.22(B). It is not ascribing culpability because he "fail[ed] to perceive or avoid a risk" that a reasonable person would have seen. R.C.

2901.22(D). Although expectations about the natural reactions to the situation can help inform inferences about a defendant, the ultimate question is what was in *his* head at the time.

III. The Eighth District's analysis erred.

The Eighth District went astray because it misunderstood Ohio's *mens rea* standards. Although the Eighth District correctly recited the legal standards, App.Op.¶17, it ultimately jettisoned them.

First, the court confused the standards for knowing and intentional conduct, relying on a misstatement of the law by another Eighth District case. *See* App.Op.¶27. In *State v. Robinson*, a prior court had opined that "[k]nowing conduct means that the actor acts with a degree of certainty in one's intention that a result will occur." 2007-Ohio-3646, ¶10 (8th Dist.). That standard is nothing like what the statute says. An "intention that a result will occur" is the language of intentional actions, not knowing acts. *See* R.C. 2901.22(A). In other words, it elevated "knowing" to "intentional." In the process, it compared Bissell's conduct with the conduct of drivers who had intentionally caused harm—an inapt comparison for this case. App.Op.¶¶19–22. It then reasoned that no evidence showed that Bissell "knowingly used his car as a weapon," App.Op.¶23, invoking intentional harm rather than knowing action.

Second, the court wrongly concluded that elements of uncertainty in the result mean the conduct must be merely reckless. It ultimately decided that Bissell's conduct was

reckless, not knowing, because it involved "knowledge of the surrounding circumstances and acting anyway disregarding a substantial risk." App.Op.¶26. While that analysis may conform to the Model Penal Code, it does not align with Ohio law. An element of risk—that harm is probable but not guaranteed—is consistent with Ohio's definition of knowing action.

* * *

A reasonable factfinder could conclude that Bissell acted knowingly. He plowed ahead at dangerous speeds despite being aware that he would probably seriously injure someone. And when he hit Tetrick, the evidence suggests that he was not surprised. Although it would be possible to come to a different conclusion, the Eighth District's job was not to retry the case as it did. This Court should reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the Eighth District's decision.

Respectfully submitted,

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