

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TUPE SMITH,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

Court of Appeals Case No. A-14529

Superior Court No. 3AN-23-08873CR

VRA CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or a witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE PETER R. RAMGREN, PRESIDING**

BRIEF OF PETITIONER TUPE SMITH

STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
jim.torgerson@stoel.com
whitney.brown@stoel.com
jake.gerrish@stoel.com
Telephone: 907-277-1900

RIGHT TO DEMOCRACY PROJECT
1300 Pennsylvania Ave. NW 190-413
Washington, DC 20004
neil@righttodemocracy.us
Telephone: 202-304-1202

By: /s/ James E. Torgerson
James E. Torgerson, Bar No. 8509120
Whitney A. Brown, Bar No. 1906063
Jacob B. Gerrish, Bar No. 2406070

By: /s/ Neil C. Weare
Neil C. Weare, Pro Hac Vice

Attorneys for Petitioner Tupe Smith

Filed in the Court of Appeals of the State
of Alaska on May ___, 2025

Meredith Montgomery

By: _____
Clerk of the Appellate Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
AUTHORITIES PRINCIPALLY RELIED UPON	vi
I. JURISDICTIONAL STATEMENT.....	1
II. LIST OF ALL PARTIES	1
III. STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
IV. INTRODUCTION.....	2
V. STATEMENT OF THE CASE.....	3
A. Ms. Smith’s Arrest	3
B. Grand Jury Proceedings	6
C. Superior Court’s Denial of Ms. Smith’s Motion to Dismiss Indictment	9
VI. STANDARD OF REVIEW	11
VII. ARGUMENT	11
A. The superior court erred by applying a less rigorous mens rea than AS 15.56.040(a)(3) requires.....	12
1. The superior court erred by improperly treating “intentionally” and “knowingly” as interchangeable terms.....	12
2. The superior court’s atextual interpretation reads into AS 15.56.040(a)(3) a mental state other than the one the legislature chose.....	13
3. The legislative history suggests that “intentionally” should be interpreted to require forming the conscious objective that one’s action will result in misleading or deceiving a public official for the purpose of voting unlawfully.....	17
4. Reading “intentionally” to require an intent to mislead or deceive is consistent with the statutory scheme.....	21
5. The statutory purpose supports Ms. Smith’s proposed interpretation.	23
B. If the Court decides that the meaning of the term “intentionally” is susceptible of more than one meaning, the rule of lenity demands that Ms. Smith’s case be dismissed.....	24

C.	The record is clear that Ms. Smith lacked the requisite intent to mislead or deceive a public official for the purpose of voting unlawfully.	24
D.	The elements of first-degree voter misconduct under AS 15.56.040(a)(3) are (1) making a false affidavit, swearing falsely, or falsely affirming; (2) under an oath required by Title 15; (3) intending to mislead or deceive a public official for the purpose of voting unlawfully.	26
VIII.	CONCLUSION	26

TABLE OF AUTHORITIES

Cases

<i>Alaska Pub. Def. Agency v. Superior Court</i> , 450 P.3d 246 (Alaska 2019)	21
<i>Cassell v. State</i> , 645 P.2d 219 (Alaska Ct. App. 1982).....	20
<i>Commonwealth v. McHale</i> , 97 Pa. 397 (1881).....	17
<i>Grant v. State</i> , 379 P.3d 993 (Alaska Ct. App. 2016).....	24
<i>Green v. State</i> , 541 P.3d 1137 (Alaska Ct. App. 2023).....	23, 24
<i>Hentzner v. State</i> , 613 P.2d 821 (Alaska 1980)	18
<i>Huitt v. State</i> , 678 P.2d 415 (Alaska Ct. App. 1984).....	12
<i>Ives v. State</i> , 536 P.3d 757 (Alaska Ct. App. 2023).....	21
<i>Kodiak Island Borough v. Exxon Corp.</i> , 991 P.2d 757 (Alaska 1999)	21
<i>Kott v. State</i> , 678 P.2d 386 (Alaska 1984)	1
<i>Lamie v. U.S. Tr.</i> , 540 U.S. 526 (2004).....	15, 16
<i>Mobil Oil Corp. v. Higginbotham</i> , 436 U.S. 618 (1978).....	15
<i>Neitzel v. State</i> , 655 P.2d 325 (Alaska Ct. App. 1982).....	15, 17
<i>O’Brannon v. State</i> , 812 P.2d 222 (Alaska Ct. App. 1991).....	20

<i>Rubey v. Alaska Comm’n on Postsecondary Educ.</i> , 217 P.3d 413 (Alaska 2009)	21
<i>Smith v. State</i> , 28 P.3d 323 (Alaska Ct. App. 2001).....	14
<i>Speidel v. State</i> , 460 P.2d 77 (Alaska 1969)	19
<i>State v. Fyfe</i> , 370 P.3d 1092 (Alaska 2016)	11
<i>State v. Lemon</i> , No. A-2128, 1987 WL 1357102 (Alaska Ct. App. Sept. 23, 1987)	1
<i>State v. McLaughlin</i> , 860 P.2d 1270 (Alaska Ct. App. 1993).....	11
<i>State v. Simpson</i> , 53 P.3d 165 (Alaska Ct. App. 2002).....	13
<i>Stoner v. State</i> , No. A-12012, 2016 WL 1394221 (Alaska Ct. App. Apr. 6, 2016) (Mannheimer, J., concurring)	14
<i>Thomas v. Municipality of Anchorage</i> , No. A-12383, 2018 WL 3933528 (Alaska Ct. App. Aug. 15, 2018).....	13, 14, 16
<i>Turner v. State</i> , 552 P.3d 1077 (Alaska Ct. App. 2024).....	15
Federal Statutes	
8 U.S.C. § 1101	3
8 U.S.C. § 1408	3
State Statutes	
AS 11.56.040	6
AS 11.81.900	12
AS 15.07.100	22
AS 15.15.240	22

AS 15.15.340	22
AS 15.20.066	22
AS 15.20.072	22
AS 15.25.030	22
AS 15.35.055	22
AS 15.40.190	22
AS 15.56.040	passim
AS 15.56.050	12, 21
AS 15.56.199	12
AS 45.55.210	18

Rules

Alaska R. App. P. 402	1
-----------------------------	---

AUTHORITIES PRINCIPALLY RELIED UPON

AS 15.56.040. Voter misconduct in the first degree

- (a) A person commits the crime of voter misconduct in the first degree if the person
 - (1) votes or attempts to vote in the name of another person or in a name other than the person's own;
 - (2) votes or attempts to vote more than once at the same election with the intent that the person's vote be counted more than once;
 - (3) intentionally makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title;
 - (4) knowingly votes or solicits a person to vote after the polls are closed with the intent that the vote be counted.
- (b) Voter misconduct in the first degree is a class C felony.

AS 15.56.050. Voter misconduct in the second degree

- (a) A person commits the crime of voter misconduct in the second degree if the person
 - (1) registers to vote without being entitled to register under AS 15.07.030;
 - (2) knowingly makes a material false statement while applying for voter registration or reregistration; or
 - (3) votes or attempts to vote in an election after being disqualified under AS 15.05.030.
- (b) Voter misconduct in the second degree is a class A misdemeanor.

AS 15.56.199. Definitions

In this chapter,

.

(2) “knowingly” has the meaning given in AS 11.81.900(a).

AS 11.81.900. Definitions

(a) For purposes of this title, unless the context requires otherwise,

.

(2) a person acts “knowingly” with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance[.]

I. JURISDICTIONAL STATEMENT

The superior court denied Tupe Smith’s Motion to Dismiss Indictment on October 15, 2024.¹ Ms. Smith timely filed a petition for review in this Court,² which granted review on February 5, 2025.³ This Court has jurisdiction under Alaska Rule of Appellate Procedure 402.⁴

II. LIST OF ALL PARTIES

Ms. Smith is the Defendant and Petitioner. The State of Alaska is the Plaintiff and Respondent.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- Should the phrase “intentionally makes a false affidavit, swears falsely, or falsely affirms” as it is used in AS 15.56.040(a)(3) be understood consistent with the text, legislative history, and broader statutory scheme to require the State to prove something other than a mere awareness that the statement was false?
- What are the elements of first-degree voter misconduct under AS 15.56.040(a)(3), a class C felony?

¹ [R.159]

² Petition for Review (Nov. 20, 2024); *see* Alaska R. App. P. 402(a)(1).

³ Order in No. A-14529 (Feb. 5, 2025).

⁴ *See generally State v. Lemon*, No. A-2128, 1987 WL 1357102, at *1 (Alaska Ct. App. Sept. 23, 1987) (citing *Kott v. State*, 678 P.2d 386 (Alaska 1984)).

IV. INTRODUCTION

Does “intentionally” mean “knowingly”? According to the superior court, the answer is yes, at least in Alaska’s first-degree voter misconduct statute, AS 15.56.040(a)(3). This rarely invoked statute makes it a class C felony to “intentionally make[] a false affidavit, swear[] falsely, or falsely affirm[] under an oath” required under Title 15, Alaska’s Elections Code. When it denied Ms. Smith’s motion to dismiss the indictment against her, the superior court ruled that “the intentionality component applies in regard to whether Ms. Smith *knowingly* made a false affidavit or swore falsely under oath about whether she was a U.S. citizen.”⁵ In the superior court’s view, it was sufficient that “Ms. Smith *knew* she was a U.S. national and yet selected a box claiming to be a U.S. citizen.”⁶ The superior court therefore endorsed “[t]he question presented before the grand jury,” which “was whether Ms. Smith *knowingly* and falsely claimed to be a U.S. citizen.”⁷

This was legal error. The first-degree voter misconduct statute requires that a person act more than knowingly—they must act intentionally. That means, at minimum, that mere awareness that a statement was false is insufficient. Ms. Smith respectfully contends that the statute should be understood to require that a person act with an appreciation that what they are doing is wrong—*i.e.*, with an intent to mislead or deceive a public official for the purpose of voting unlawfully. Because the record

⁵ [R.153 (emphasis added)]

⁶ [R.158 (emphasis added)]

⁷ [R.158 (emphasis added)]

reveals that Ms. Smith manifestly lacked such intent, this Court should reverse the superior court’s decision denying Ms. Smith’s Motion to Dismiss Indictment.

V. STATEMENT OF THE CASE

A. Ms. Smith’s Arrest

Ms. Smith was born in American Samoa, a U.S. territory.⁸ Legally, she is therefore a U.S. national.⁹ Ms. Smith and her family first moved to Whittier, Alaska in August 2017. Since then, Ms. Smith has become a pillar of her community, regularly volunteering at the public school that her son attends.

On the morning of November 30, 2023, Ms. Smith heard a knock on her door. Two Alaska State Troopers, including Sergeant Nathan Bucknall, introduced themselves, informed Ms. Smith that they had “an investigation” they wanted to talk to her about,¹⁰ and read her *Miranda* rights.¹¹ Ms. Smith—whose first language is not English—agreed to speak with them.¹² She did not believe she did anything wrong and welcomed the opportunity to clear up any confusion.

The interview focused on representations Ms. Smith made in certain applications filed with the State, including voter registrations in 2020 and 2022.

⁸ [R.148]

⁹ [R.94, 148] Most people born in American Samoa are labeled by federal statute as “nationals, but not citizens, of the United States.” 8 U.S.C. §§ 1408(1), 1101(a)(29). However, their legal status under the U.S. Constitution continues to be the subject of significant debate. *See, e.g.*, <https://www.reuters.com/legal/government/us-supreme-court-wont-hear-american-samoans-bid-full-citizenship-2022-10-17/>.

¹⁰ [Tr.3:16–18]

¹¹ [R.148]

¹² [R.148]

Throughout the interview, Ms. Smith indicated that she was a U.S. national, and not recognized as a U.S. citizen.¹³ She also repeatedly explained that she understood that as a U.S. national, she was not eligible to vote in U.S. Presidential elections.¹⁴ But she was not aware of any restrictions on her ability to vote in other elections.¹⁵ Ms. Smith told Sergeant Bucknall that when she fills out forms that include an option to identify herself as a U.S. national, she does so, including on Permanent Fund Dividend applications.¹⁶

Sergeant Bucknall noted that Ms. Smith had checked the “U.S. citizen” box on voter registration forms.¹⁷ Ms. Smith explained those forms did not contain a “U.S. national” option.¹⁸ She further explained that when she voted in the past, she inquired of Whittier officials which box she should check and was told that she should check the “U.S. citizen” box.¹⁹

During the interview, Sergeant Bucknall said to Ms. Smith: “[Y]ou told me when we first talked . . . , you know you’re not supposed to vote. . . . I mean, honestly,

¹³ *See, e.g.*, [Tr.8:9, 10:16–18, 14:15–16, 15:12–14, 16:1–2, 16:11–12, 24:15–16]

¹⁴ [Tr.9:18–10:1, 16:3–6, 25:15–19, 26:23–25, 38:16–39:11] It is undisputed that Ms. Smith never voted in or attempted to vote in a U.S. Presidential election. [R.149]

¹⁵ [R.149]

¹⁶ [Tr.12:22–13:9, T.19:7–10]

¹⁷ [Tr.19:11–17]

¹⁸ [Tr.19:11–18]

¹⁹ [Tr.12:23–13:9 (“[I]f I go, I will ask whoever’s in the office—because it doesn’t show that there’s a US national—that I—you know, that I’m not a US citizen. And I ask them, ‘What do I put it on?’ And they said that, you know, there’s a section where it says US national.”); 13:21–24:3 (“[I]f I go fill in an application where it doesn’t show anything US national, they usually tell me to put the US citizen. But they will write something like a note that says ‘US national’ instead of being a—at the application showing that I am a US citizen.”), 14:19–15:14]

did you just think you were just going to get one by . . . the Division of Elections”?”²⁰

Ms. Smith responded:

Oh, no, no, no. . . . It's not—it's not that. Because like I said, if I do that, I could—when usually I do the voting or anything, I let whoever that's, you know, there, that I'm—that's the only box that says you're a US citizen. . . . But I have to let them know that I'm a US national. But if there's only one—you know, the only box I can check, they said that they—you know, they will figure that out after. Because I am not a US citizen. But for whoever that's—you know, I—I have to let them know before I put that option on. I didn't know I was going to get in trouble for doing that. Because I usually let whoever the person that's there know that I'm not a US citizen. . . . So, if that's the thing, I didn't—if I knew that that would be a problem, I would not vote at all. Because if I will let a person know that I'm not a US citizen—if they give me a paper and it says US citizen, I will let them know that I'm not a US citizen. If—what box do I check—if they tell me to check the US citizen, I tell them, you know—or they will tell me that they will put it on—a note on the paper that says that I'm not a US citizen. That's what I—I explained that to you before.^[21]

At the end of the conversation, Sergeant Bucknall summarized his position as follows:

So, I'm going to be quite honest with you. Everything I've seen with all these documents and stuff and what I've been talking with you—the impression I get is that you checked the box because you want to be part of the school board and stuff like that. So, you know, the—it's pretty obvious when you look at it and it says “Are you a citizen?” And you check “yes” or “no,” and there's nothing else to check. So, that's the impression I'm getting is what probably happened here. Okay?”^[22]

Ms. Smith was confused.²³ So Sergeant Bucknall tried again:

Okay. I'll ask again. And, again, remember, you don't have to talk to us. Okay? . . . The impression I'm getting from seeing all these documents and how things went and how you'd only do this on voter forms, based off what

²⁰ [Tr.23:18–24:6]

²¹ [Tr.24:4–25:16]

²² [Tr.30:4–18]

²³ [Tr.31:3–12]

you just told me, what it seems like is you just—you’re saying you want to be involved in the REA board and the school district and all that. So, it sounds to me like you were willing to check that box, even though knowing you shouldn’t have, because you want to be involved with, like, the REA board and stuff like that. Does that kind of—does that sound accurate to what happened here or—^[24]

To that confusing and convoluted statement, Ms. Smith answered, “Yes.”²⁵

Shortly thereafter, Sergeant Bucknall informed Ms. Smith that he would be executing an arrest warrant for 10 counts of voter misconduct under AS 11.56.040, a felony.²⁶ Ms. Smith had no previous arrests or felony convictions.²⁷ She was arrested in front of her children, handcuffed, escorted to a police vehicle parked outside the apartment building where nearly all of Whittier’s residents live, and taken to Hiland Mountain Correctional Facility.²⁸

B. Grand Jury Proceedings

On January 18, 2024, the State presented a grand jury with a proposed indictment charging Ms. Smith with five felony counts of voter misconduct.²⁹ Two witnesses testified: Michaela Thompson, the division operations manager for the Alaska Division of Elections, and Sergeant Bucknall.³⁰ Thompson testified, among

²⁴ [Tr.31:11–32:7]

²⁵ [Tr.32:8]

²⁶ [R.19]; [Tr.42:6–12]

²⁷ [R.19, 20, 148]

²⁸ [R.150]

²⁹ [R.72; *see* R.23–25]

³⁰ [R.73, 78]

other things, that Ms. Smith submitted a voter registration application form with a box checked indicating that she was a U.S. citizen.³¹

Sergeant Bucknall testified about his conversation with Ms. Smith at her home. Sergeant Bucknall told the grand jury that Ms. Smith had filled out forms on which she stated she was a U.S. citizen even though she was not a U.S. citizen.³² He explained that Ms. Smith indicated that she “talked to people at the City of Whittier, who stated that even though she was a U.S. national that she should just check the U.S. citizen box . . . when she went to vote.”³³ He also represented that Ms. Smith “probably knew that she shouldn’t have voted.”³⁴

Before the jury began its deliberations, a juror asked the prosecutor, “If she had done this by accident, would that be a felony still, or would that be, like, lower?”³⁵ The prosecutor directed the juror to the language of AS 15.56.040 and responded that “the answer is that this does require an intention component of it.”³⁶

After beginning its deliberations, the grand jury returned with several questions. The foreperson first said, “[w]e’re not quite sure if she understood prior to being charged with this.”³⁷ The prosecutor recalled Sergeant Bucknall, who elaborated: “[S]he indicated that when she would go to vote that she would tell them that she was

³¹ [R.84–85; *see* R.55–56]

³² [R.94–95]

³³ [R.96]

³⁴ [R.96]

³⁵ [R.96–97]

³⁶ [R.97]

³⁷ [R.98]

not a citizen. And they would tell her at that time to fill—just go ahead, fill out the box that says you’re a citizen, and move forward. However, when you vote, there is no—on the registry, there is no place to indicate that. So that really wasn’t a truthful statement.”³⁸ The prosecutor instructed the jurors to ignore Sergeant Bucknall’s testimony that Ms. Smith’s statements were not truthful.³⁹ Later, a juror again asked whether Ms. Smith was “aware of the difference, that if you’re a national, you can’t vote?”⁴⁰ Sergeant Bucknall responded, “[y]es.”⁴¹

The prosecutor asked Sergeant Bucknall when voter registration forms are typically filled out.⁴² Sergeant Bucknall responded that they are “[t]ypically” filled out “ahead of time” and not on the day of voting.⁴³ Finally, a juror asked the prosecutor to repeat the definition of “intentional,” recognizing that the grand jury had already heard it a “large number of times.”⁴⁴ The prosecutor read the definition, and then said:

But I just want to be very clear, the allegations here are—the intentionality doesn’t go to whether or not she wasn’t intentionally voting when she wasn’t allowed to. The intentionality component goes to whether she intentionally made a false affidavit or swore falsely or falsely affirmed under oath. And the crux of that goes to the question of, yes or no, I am a citizen of the United States. So the allegation here is that, by checking yes and then signing the documents under oath for 1 and 2, and then for 3, 4, and 5, by saying I believe that I am qualified to vote, that each of those was an intentional false affirmation or, you know, swearing falsely under oath. So that’s really the crux.^[45]

³⁸ [R.99–100]

³⁹ [R.100]

⁴⁰ [R.104]

⁴¹ [R.104]

⁴² [R.100]

⁴³ [R.100–01]

⁴⁴ [R.108]

⁴⁵ [R.108–09]

The grand jury returned a true bill as to just two of the five counts.⁴⁶ The two counts as to which the grand jury returned a true bill related to representations made on voter registration applications.⁴⁷ It returned no true bills relating to representations made on declarations of candidacy and absentee in-person ballots.⁴⁸

C. Superior Court’s Denial of Ms. Smith’s Motion to Dismiss Indictment

Ms. Smith filed a Motion to Dismiss Indictment arguing, among other things, that the State misled the grand jury by mischaracterizing the evidence and that the evidence was insufficient to support the return of a true bill.⁴⁹ The superior court denied the motion.⁵⁰

The court began by observing that “intentionally,” as that term is used in AS 15.56.040(a)(3), “requires that [a] person’s conscious objective is to cause the result.”⁵¹ In the court’s view, “[t]he intentionality component applies in regard to whether Ms. Smith *knowingly* made a false affidavit or swore falsely under oath about whether she was a U.S. Citizen.”⁵² It went on to note that Sergeant Bucknall answered two questions in the grand jury proceedings “without elaborating on the nuance of Ms. Smith’s interview answers.”⁵³ More specifically, Sergeant Bucknall “stated that he had

⁴⁶ [R.110–11]

⁴⁷ [R.110–11]

⁴⁸ [R.111]

⁴⁹ [See R.116–38]

⁵⁰ [See R.148–59]

⁵¹ [R.151]

⁵² [R.151 (emphasis added)]

⁵³ [R.155]

received acknowledgment from Ms. Smith that she knew she should not have voted. However, the statements Ms. Smith actually made in her interview with Sgt. Bucknall w[ere] not this clear-cut.”⁵⁴ In fact, “Ms. Smith stated that if she had known she could not vote, she would not have,” and “acknowledge[d] she knew she could not vote for the U.S. President but thought that she could vote in state elections.”⁵⁵

The court explained that the second instance of “misleading” testimony occurred when a juror asked whether Ms. Smith was aware that as a U.S. national, she could not vote.⁵⁶ In the court’s view, that statement was “overbroad”; in fact, Ms. Smith stated that she knew she could not vote in U.S. Presidential elections, but did not know that she could not vote in other elections.⁵⁷ In the court’s view, the statement improperly suggested Ms. Smith’s guilt.⁵⁸

Despite these “two instances of misleading information,” the court concluded the grand jury had not been misled and that sufficient evidence supported the grand jury’s true bill.⁵⁹ The court explained that it was enough that Ms. Smith “*knew* she was

⁵⁴ [R.155]

⁵⁵ [R.155] The court also observed that Ms. Smith answered “yes” in response to a compound question in which Sergeant Bucknall at once asked (1) whether Ms. Smith wanted to be involved in the REA (school) board; (2) whether Ms. Smith knew she should not check the “U.S. citizen” box; (3) whether Ms. Smith wanted to be involved in the REA board; and (4) whether that sounded accurate. [R.156]; *see supra* at p. 5–6 (quoting Sergeant Bucknall’s compound question). In the court’s view, Ms. Smith’s affirmative answer to this “confusingly worded” compound question “is not dispositive.” [R.156]

⁵⁶ [R.156]

⁵⁷ [R.156]

⁵⁸ [R.156]

⁵⁹ [R.157–58]

a U.S. national and yet selected a box claiming to be a U.S. citizen,” since “[t]he question presented before the grand jury was whether Ms. Smith *knowingly* and falsely claimed to be a U.S. citizen.”⁶⁰ In the court’s view, it did not matter if “Ms. Smith may have thought she could vote for state elections,” or even if “a voting official may have given her incorrect information.”⁶¹ Even as the court expressly acknowledged and expressed sympathy “towards the confusing nature of the PFD automatic voter registration, the lack of voting right information regarding U.S. nationals, and navigating rights as a U.S. national,” it concluded that all that mattered was that “Ms. Smith *knew* she was not a U.S. citizen and still claimed to be one multiple times.”⁶² It therefore denied Ms. Smith’s Motion to Dismiss Indictment.

This Court granted Ms. Smith’s Petition for Review.

VI. STANDARD OF REVIEW

This Court reviews questions of law, including the interpretation of statutes that define criminal offenses, *de novo*.⁶³

VII. ARGUMENT

In Alaska, voter misconduct in the first degree is defined to mean “*intentionally* mak[ing] a false affidavit, swear[ing] falsely, or falsely affirm[ing] under an oath required by this title.”⁶⁴ The superior court erred by concluding that “the intentionality

⁶⁰ [R.158 (emphases added)]

⁶¹ [R.157]

⁶² [R.158. (emphasis added)]

⁶³ See *State v. McLaughlin*, 860 P.2d 1270, 1272 (Alaska Ct. App. 1993); *State v. Fyfe*, 370 P.3d 1092, 1094 (Alaska 2016).

⁶⁴ AS 15.56.040(a)(3) (emphasis added).

component applies in regard to whether Ms. Smith *knowingly* made a false affidavit or swore falsely under oath about whether she was a U.S. citizen.”⁶⁵ “Intentionally” does not mean “knowingly.” Ms. Smith submits the term “intentionally” requires the State to prove that the affiant had an intent to mislead or deceive a public official for the purpose of voting unlawfully. Because Ms. Smith manifestly lacked such intent, the Court should reverse the superior court’s decision.

A. The superior court erred by applying a less rigorous *mens rea* than AS 15.56.040(a)(3) requires.

1. The superior court erred by improperly treating “intentionally” and “knowingly” as interchangeable terms.

First-degree voter misconduct requires that a person “*intentionally* makes a false affidavit,”⁶⁶ while second-degree voter misconduct requires only that a person “*knowingly* makes a material false statement.”⁶⁷ “Knowingly” is defined for purposes of voter misconduct to mean when a “person is aware” of a particular conduct or a particular fact.⁶⁸ “Intentionally” is not defined, but this Court has recognized that “[t]his mental state of ‘knowingly’ is clearly intended as a lesser mental state than intentionally.”⁶⁹ In other words, for purposes of first-degree voter misconduct, “intentionally” means something different—and narrower—than “knowingly.”

⁶⁵ [R.153 (emphasis added)]

⁶⁶ AS 15.56.040(a)(3) (emphasis added).

⁶⁷ AS 15.56.050(a)(2) (emphasis added).

⁶⁸ AS 15.56.199(2) (defining “knowingly” to have the same meaning at AS 11.81.900(a)).

⁶⁹ *Huitt v. State*, 678 P.2d 415, 420 (Alaska Ct. App. 1984).

The superior court erred by treating these terms interchangeably. The superior court repeatedly conflated the term “intentionally” to mean the same thing as “knowingly.” It explained that “the intentionality component” of first-degree voter misconduct “applies in regard to whether Ms. Smith *knowingly* made a false affidavit or swore falsely under oath about whether she was a U.S. citizen.”⁷⁰ The superior court found it sufficient that “Ms. Smith *knew* she was a U.S. national and yet selected a box claiming to be a U.S. citizen.”⁷¹ And the court characterized the question presented to the grand jury as “whether Ms. Smith knowingly and falsely claimed to be a U.S. citizen.”⁷²

Treating the terms “intentionally” and “knowingly” synonymously was legal error. “Intentionally” must mean something other than mere awareness (knowledge) that a statement was false. Because the superior court did not recognize as much, its decision cannot stand.

2. The superior court’s atextual interpretation reads into AS 15.56.040(a)(3) a mental state other than the one the legislature chose.

Alaska courts have recognized that “the culpable mental state of ‘intentionally’ does not apply to conduct; rather, it applies only to a defendant’s attitude toward the *results* of conduct.”⁷³ By contrast, “‘knowingly’ is the culpable mental state that

⁷⁰ [R.153]

⁷¹ [R.158 (emphasis added)]

⁷² [R.158]

⁷³ *Thomas v. Municipality of Anchorage*, No. A-12383, 2018 WL 3933528, at *2 (Alaska Ct. App. Aug. 15, 2018) (emphasis in original); *see also State v. Simpson*, 53

describes purposeful or deliberate conduct.”⁷⁴ As previously noted, Alaska’s first-degree voter misconduct statute prohibits “intentionally mak[ing] a false affidavit, swear[ing] falsely, or falsely affirm[ing] under an oath required by this title.”⁷⁵ Superficially, then, AS 15.56.040(a)(3) appears to prohibit *intentionally* engaging in certain *conduct* (making a false affidavit or false affirmation under oath), creating a mismatch between the statute’s mental state requirement and the offense that it appears to proscribe.⁷⁶

The superior court could have corrected the inconsistency in one of two ways. First, the court could have done what it did: read the term “intentionally” in AS 15.56.040(a)(3) to mean “knowingly,” meaning that the statute prohibits *knowingly* engaging in certain *conduct*. But doing so required substituting a term the legislature declined to use (“knowingly”) for the word the legislature chose (“intentionally”). As the U.S. Supreme Court has repeatedly acknowledged, “[t]here is a basic difference between filling a gap left by [a legislature’s] silence and rewriting rules that [a

P.3d 165, 167 (Alaska Ct. App. 2002) (“The culpable mental state of ‘intentionally’ refers only to a defendant’s conscious desire to achieve a particular result.”).

⁷⁴ *Thomas*, 2018 WL 3933528, at *2; *see also Smith v. State*, 28 P.3d 323, 325 (Alaska Ct. App. 2001) (“When an offense requires proof that a defendant engaged in a particular kind of conduct, the State invariably will have to prove that the defendant acted ‘knowingly’ with respect to that conduct because ‘knowingly’ is the only culpable mental state that applies to conduct.”).

⁷⁵ AS 15.56.040(a)(3).

⁷⁶ *See generally Stoner v. State*, No. A-12012, 2016 WL 1394221, at *5 (Alaska Ct. App. Apr. 6, 2016) (Mannheimer, J., concurring) (providing a table describing which culpable states apply to which categories of elements).

legislature] has affirmatively and specifically enacted.”⁷⁷ Accepting the superior court’s position that AS 15.56.040(a)(3) criminalizes making a false affidavit *knowing* it is false (*i.e.*, checking the “U.S. citizen” box despite knowing one is not a U.S. citizen) requires rewriting a rule that the Alaska legislature affirmatively and specifically enacted: that the mens rea applicable to AS 15.56.040(a)(3) is “intentionally,” not knowingly.

The State may argue that courts on occasion have read “intentionally” to mean “knowingly.”⁷⁸ For example, in *Turner v. State*,⁷⁹ this Court considered language in a second-degree robbery statute providing that it is a crime to take property from another if “the person uses . . . force upon any person with intent to . . . prevent or overcome resistance to the taking of the property or the retention of the property after taking.”⁸⁰ The Court recognized that “the language does make it clear that the defendant must use force ‘with intent to’ accomplish a particular result, namely preventing or overcoming resistance to the taking of property.”⁸¹ But the Court determined that “[t]his language does not specify a mental state applicable to the defendant’s use of force.” It therefore concluded that the missing mental state for the use-of-force

⁷⁷ *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

⁷⁸ *See, e.g., Turner v. State*, 552 P.3d 1077, 1081 (Alaska Ct. App. 2024) (citation omitted); *Neitzel v. State*, 655 P.2d 325, 332 (Alaska Ct. App. 1982).

⁷⁹ 552 P.3d 1077.

⁸⁰ *Id.* at 1079.

⁸¹ *Id.*

element (a conduct element) had to be “knowingly” because only “knowingly” could apply to a conduct element.⁸²

This case is different. Here, there is no missing mental state for first-degree voter misconduct. The applicable mental state is clear: it is “intentionally.”⁸³ Given the legislature’s choice to assign a mental state of “intentionally” to this crime, the superior court was not free to substitute a different mental state for the legislature’s choice of mens rea.

To avoid running afoul of the legislature’s choice of mental state, Ms. Smith submits that the Court should read a “result” element into AS 15.56.040(a)(3): namely, the requirement that the defendant acted with the intent to mislead or deceive a public official for the purpose of voting unlawfully. This interpretation does less damage to the statutory text than the one the State proposes—it avoids changing a mens rea that the legislature affirmatively assigned.⁸⁴ Doing so would also avoid a mismatch between the statute’s mental state (“intentionally”) and the element to which it applies (a result element).⁸⁵ And for the reasons that follow, it is consistent with the legislative history.

⁸² *Id.* at 1081–82.

⁸³ AS 15.56.040(a)(3).

⁸⁴ *See Lamie*, 540 U.S. at 538.

⁸⁵ *See Thomas*, 2018 WL 3933528, at *2.

3. **The legislative history suggests that “intentionally” should be interpreted to require forming the conscious objective that one’s action will result in misleading or deceiving a public official for the purpose of voting unlawfully.**

Alaska courts have not discussed the meaning of the term “intentionally” as it is used in AS 15.56.040(a)(3), including whether it should be understood only to apply to the statute’s conduct element, or whether the statute also contains a result requirement to which the term also applies. Determining what mental state applies to a particular element in a criminal statute requires understanding the legislature’s intention when it enacted the statute.⁸⁶ That, in turn, involves looking to the common law, the Model Penal Code (on which the Alaska criminal code is based), Alaska draft criminal codes, and the Alaska Revised Criminal Code ultimately enacted by the legislature.⁸⁷ Here, voter misconduct was not illegal at common law,⁸⁸ and the Model Penal Code does not address voter misconduct and therefore provides no clarification of the appropriate mental state.

Fortunately, the legislative history offers some guidance. The predecessor statute to AS 15.56.040 was enacted in 1960.⁸⁹ It provided: “**False Swearing.** Any person who *wilfully* makes a false affidavit or swears falsely under any oath required by the election code, or who *wilfully* swears or affirms falsely under an oath required

⁸⁶ *Neitzel*, 655 P.2d at 326–27.

⁸⁷ *Id.* at 327.

⁸⁸ *See Commonwealth v. McHale*, 97 Pa. 397, 404 (1881) (“Offences against the election laws are unknown to the common law.”).

⁸⁹ SLA 1960, ch. 83, § 11.18.

by the election code, shall be guilty of a felony.”⁹⁰ In 1980, the language was revised to take its current form.⁹¹ The committee responsible for drafting the revisions explained that the chapter describing election offenses, including voter misconduct in the first degree, was “rewritten to bring it into conformity with the revised criminal code which will become effective January 1, 1980.”⁹² In other words, the 1980 revisions to the first-degree voter misconduct statute were clerical in nature. The substitution of the term “intentionally” for the term “wilfully” did not substantively change the meaning or applicability of the existing statute.

Because the 1980 revisions did not alter the statute’s meaning, Alaska courts’ understanding of the term “wilfully” sheds light on the way the current statute (which instead uses the term “intentionally”) should be understood. During the same year that the legislature made its revisions to the statute that became AS 15.56.040(a)(3), the Alaska Supreme Court decided *Hentzner v. State*.⁹³ That case concerns the meaning of the term “wilful” in former AS 45.55.210(a), which provided that a wilful violation of the Securities Act could result in a felony conviction punishable by a \$5,000 fine or one to five years of imprisonment.⁹⁴ The court observed that there were “several

⁹⁰ *Id.* (emphases added).

⁹¹ See SLA 1980, ch. 100, § 205 (“A person commits the crime of voter misconduct in the first degree if he . . . intentionally makes a false affidavit, swears falsely or falsely affirms under an oath required by the Alaska Election Code (AS 15.05–AS 15.60).”).

⁹² Letter to Governor Jay Hammond from the Election Review Committee RE Proposed Revisions to Title 15, Sept. 18, 1979, [https://www.akleg.gov/library/Recall/CH%20100%20SLA%201980/SB%20312%20\(1980\)/SSTA11%20SB%20312.pdf](https://www.akleg.gov/library/Recall/CH%20100%20SLA%201980/SB%20312%20(1980)/SSTA11%20SB%20312.pdf) (PDF p. 236).

⁹³ 613 P.2d 821 (Alaska 1980).

⁹⁴ *Id.* at 824–25.

possibilities” for how to understand the term “wilful”: “One is that the defendant must act intentionally in the sense that he is aware of what he is doing; another is that the defendant must be aware that what he is doing is illegal; and a third is that the defendant must know that what he is doing is wrong.”⁹⁵

The court adopted the last meaning.⁹⁶ The court emphasized that criminal liability requires “the existence of a guilty mind during the commission of the act.”⁹⁷ It observed that with respect to certain “malum in se” crimes—those like statutory rape that “reasoning members of society regard as condemnable”—“awareness of the commission of the act necessarily carries with it an awareness of wrongdoing.”⁹⁸ But where “there is no broad societal concurrence that [the conduct charged] is inherently bad,” more than mere conscious action is needed to satisfy the criminal intent requirement.⁹⁹ To sustain a conviction for such crimes, proof of a conscious purpose to cause harm is required.¹⁰⁰

The same is true here. First-degree voter misconduct is not the sort of inherently evil or immoral act that “carries with it an awareness of wrongdoing.”¹⁰¹ It involves no

⁹⁵ *Id.* at 825.

⁹⁶ *Id.*

⁹⁷ *Id.* (internal quotation marks and citation omitted).

⁹⁸ *Id.* at 826.

⁹⁹ *Id.* The court explained that in an earlier case, it held that failing to return a rental car at the time stated in the rental agreement “fell within this category.” *Id.* (citing *Speidel v. State*, 460 P.2d 77 (Alaska 1969)). There, the court “held that proof of a conscious purpose to injure the owner of the vehicle was required to sustain a conviction.” *Id.* (citing *Speidel*, 460 P.2d at 80–82).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

violence or harm to a specific individual. It is so rarely prosecuted that counsel for Ms. Smith have been unable to identify a single case that explores the statute’s meaning. Simply put, it is not *malum in se*. “Thus, criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense[.]”¹⁰²

The criminal conduct described in AS 15.56.040(a)(3) therefore involves both a conscious objective and outcome. The statute’s reference to the “affidavit” or “oath required by this title” underscores this point. The “affidavit” here is directed toward a result: a voter certification appearing *on a voter registration application*. Put differently, to be chargeable under AS 15.56.040(a)(3), an affiant must not merely check a particular box but must check that box *in order to vote unlawfully*.¹⁰³ Proving that Ms. Smith checked the box that read “U.S. citizen” despite being aware she was not a U.S. citizen is insufficient to sustain a conviction for voter misconduct in the first degree because it would criminalize conduct without requiring a guilty mind. The crime of first-degree voter misconduct requires proving a *culpable* mindset—that Ms. Smith’s conscious objective was to deceive a public elections official into believing the veracity of the required oath so that she could vote unlawfully.¹⁰⁴

¹⁰² *Id.*

¹⁰³ See generally *Cassell v. State*, 645 P.2d 219, 223 (Alaska Ct. App. 1982) (noting that even if the terms “wilfully and knowingly” did not automatically “render the statute a specific intent crime,” the requirement of specific intent was nevertheless implicit in the legislature’s use of other terms in the statute).

¹⁰⁴ See *O’Brannon v. State*, 812 P.2d 222, 229 (Alaska Ct. App. 1991) (explaining that for an action to be “willful,” “the defendant must engage in conduct with the awareness that it violates the [law], but need not be motivated by the intent to violate the [law]”).

4. Reading “intentionally” to require an intent to mislead or deceive is consistent with the statutory scheme.

Reading “intentionally” as Ms. Smith suggests also ensures consistency across the statutory scheme.¹⁰⁵ As previously noted, voter misconduct in the first degree—the crime with which Ms. Smith is charged—requires “*intentionally* mak[ing] a false affidavit, swear[ing] falsely, or falsely affirm[ing] under an oath required under this title.”¹⁰⁶ Voter misconduct in the second degree, a misdemeanor, is set forth in AS 15.56.050(a)(2), and requires “*knowingly* mak[ing] a material false statement while applying for voter registration or reregistration.”¹⁰⁷ If the Court accepts the superior court’s argument that “intentionally” means “knowingly,” then the two statutes criminalize essentially the same thing: making a false statement on voter registration materials despite knowing the statement is false. This approach would flout the ordinary rule that “when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”¹⁰⁸ There is no reason to interpret the two provisions in a manner that

¹⁰⁵ “[W]hen we engage in statutory construction, we must, whenever possible, ‘interpret[] each part or section of a statute with every other part or section, so as to create a harmonious whole.’” *Ives v. State*, 536 P.3d 757, 763 (Alaska Ct. App. 2023) (quoting *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999)).

¹⁰⁶ AS 15.56.040(a)(3).

¹⁰⁷ AS 15.56.050(a)(2).

¹⁰⁸ *Alaska Pub. Def. Agency v. Superior Court*, 450 P.3d 246, 254 n. 40 (Alaska 2019) (recognizing principle that “[d]ifferent words used in the same, or a similar, statute are assigned different meanings whenever possible” (internal quotation marks and citation omitted)); see also *Rubey v. Alaska Comm’n on Postsecondary Educ.*, 217 P.3d 413, 416 n.9 (Alaska 2009).

collapses the distinction between the two when an alternative interpretation that distinguishes between them is available.

Furthermore, interpreting first-degree voter misconduct to require an intentional result element ensures that the statute does not sweep in oaths that have nothing to do with voting. As previously discussed, AS 15.56.040(a)(3) refers to making a false affidavit or falsely affirming under an oath “required by this title.” The Alaska Election Code requires oaths for a wide variety of activities, which are scattered throughout Title 15: oaths applying to voting absentee,¹⁰⁹ helping voters who need assistance with voting,¹¹⁰ and requesting special-needs ballots.¹¹¹ An expansive reading of AS 15.56.040(a)(3) like the one the superior court adopted would penalize actions not of voters but of elections officials¹¹² and candidates for office.¹¹³ The universe of oaths to which AS 15.56.040(a)(3) applies is necessarily cabined by the statute’s mental state, ensuring that it is applicable only to individuals who act with a conscious objective to mislead or deceive a public official into counting a vote that should not have been counted—that is, to commit voter misconduct.

¹⁰⁹ AS 15.20.066(b)(2).

¹¹⁰ AS 15.15.240.

¹¹¹ AS 15.20.072(c)(5).

¹¹² *See* AS 15.07.100 (providing for oath of elections registration official); AS 15.15.340 (providing for oath of additional election officials).

¹¹³ *See, e.g.*, AS 15.25.030 (providing for filing declaration of candidacy); AS 15.40.190 (providing oath for petitions for the nominations of candidates); AS 15.35.055 (requiring judges of the court of appeals to file declaration of candidacy for retention).

5. The statutory purpose supports Ms. Smith’s proposed interpretation.

The remaining legislative history of AS 15.56.040(a)(3) is limited. But this Court has recognized that a statute’s underlying purpose aids in its interpretation.¹¹⁴ Here, interpreting AS 15.56.040(a)(3) to criminalize making a false statement with the intent to mislead or deceive for the purpose of voting unlawfully makes practical sense and is consistent with the statute’s purpose.

To begin, the statutory purpose is evident in the statute’s plain language: to prohibit “voter misconduct.”¹¹⁵ A statute prohibiting “voter misconduct” does not prohibit voter *mistake*. It therefore should not be read as a free-standing perjury provision. Instead, its very title indicates that the statute is meant to criminalize voting with wrongful intent.

The legislature instead must have been concerned about discouraging false statements that have the effect of deceiving a public official into counting a vote that should not have been made. That purpose, unlike one that criminalizes erroneous or false statements without actual consequences, is both administrable and advances the goal of preventing voter misconduct.

¹¹⁴ See *Green v. State*, 541 P.3d 1137, 1144 (Alaska Ct. App. 2023).

¹¹⁵ AS 15.56.040.

B. If the Court decides that the meaning of the term “intentionally” is susceptible of more than one meaning, the rule of lenity demands that Ms. Smith’s case be dismissed.

“Under the rule of lenity, ‘when a statute establishing a criminal penalty is reasonably susceptible of more than one meaning, the statute should be construed so as to provide the most lenient penalty.’”¹¹⁶ In this way, ambiguous “penal statutes should be construed against the government.”¹¹⁷

Ms. Smith maintains that the text and legislative history of AS 15.56.040(a)(3) is clear: the legislature intended to criminalize false statements performed *intentionally* to mislead or deceive public officials for the purpose of voting unlawfully. But if the Court concludes that the legislature’s intent “cannot be ascertained or remains ambiguous,” it should apply the rule of lenity and interpret the statute such that “intentionally” means “intentionally,” not knowingly.¹¹⁸ As the section that follows explains, such an interpretation requires dismissal of this action.

C. The record is clear that Ms. Smith lacked the requisite intent to mislead or deceive a public official for the purpose of voting unlawfully.

Applying the interpretation of “intentionally” described above, the charges against Ms. Smith case must be dismissed. There is no question that Ms. Smith lacked an intent to mislead or deceive a public official in order to vote unlawfully when she checked “U.S. citizen” on voter registration materials. The record indicates that Ms.

¹¹⁶ *Green*, 541 P.3d at 1147 (quoting *Grant v. State*, 379 P.3d 993, 995 (Alaska Ct. App. 2016)).

¹¹⁷ *Grant*, 379 P.3d at 995.

¹¹⁸ *Id.* at 995–96.

Smith believed the citizenship requirement applied only to Presidential elections;¹¹⁹ that she asked for and received clarification from City of Whittier officials that, for the purposes of local elections, U.S. nationals should mark the “U.S. citizen” box;¹²⁰ and that she would not have checked the “U.S. citizen” box if she had known doing so was wrong.¹²¹

Applying the correct interpretation of “intentionally,” Sergeant Bucknall’s mischaracterizations of Ms. Smith’s testimony were material to the grand jury’s consideration of whether Ms. Smith committed first-degree voter misconduct. As the trial court recognized, Sergeant Bucknall’s statements suggested that Ms. Smith intended to take an action that she knew was wrong.¹²² Accordingly, the indictment cannot stand. The superior court erred by declining to dismiss it.

¹¹⁹ [Tr.9:18–10:2, 16:3–6, 16:20–24, 25:18–19, 26:19–25, 39:2–11.]

¹²⁰ [Tr.12:22–13:9, 14:12–15:10]

¹²¹ [Tr.25:3–5 (“So, if that’s the thing, I didn’t—if I knew that that would be a problem, I would not vote at all.”)]

¹²² [R.155 (“Sgt. Bucknall stated that he had received acknowledgment from Ms. Smith that she knew she should not have voted.”), 156 (observing that Sergeant Bucknall’s testimony that Ms. Smith was aware that, as a U.S. national, she could not vote, “implies Ms. Smith was aware that all of the elections are open to U.S. citizens only and not her as a U.S. national” and “improperly suggests her guilt beyond Ms. Smith’s interview”)]

D. The elements of first-degree voter misconduct under AS 15.56.040(a)(3) are (1) making a false affidavit, swearing falsely, or falsely affirming; (2) under an oath required by Title 15; (3) intending to mislead or deceive a public official for the purpose of voting unlawfully.

For the reasons described above, Ms. Smith asserts that AS 15.56.040(a)(3) contains three elements. To convict under the statute, the government must prove that a person:

1. Made a false affidavit; swore falsely; or falsely affirmed
2. Under an oath required by Title 15; and did so
3. Intending to mislead or deceive a public official for the purpose of voting unlawfully.

VIII. CONCLUSION

For the foregoing reasons, Ms. Smith asks this Court to reverse the superior court's denial of her Motion to Dismiss Indictment.