NO. 02-18-00138-CR

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

CRYSTAL MASON,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On appeal from 432nd District Court
of Tarrant County, Texas
In Cause No. 148710D
The Honorable Ruben Gonzalez, Jr. Presiding

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ORAL ARGUMENT REQUESTED

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PRESIDING JUDGE:

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432nd District Court
Tarrant County, Texas
401 W. Belknap
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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument will assist the Court with the legal and factual issues presented here.

STATEMENT OF THE CASE

On March 28, 2018, a trial judge convicted Crystal Mason ("Ms. Mason") of illegal voting under Section 64.012(a)(1) of the Texas Election Code, which makes it a crime to "vote[] . . . in an election in which the person knows the person is not eligible to vote." Clerk's Record ("CR") at 33. The trial judge sentenced Ms. Mason to five years in prison. *Id.* The offense was a second-degree felony at the time of Ms. Mason's conviction.[1]

On March 19, 2020, this Court affirmed Ms. Mason's conviction. *Mason v. State*, 598 S.W.3d 755 (Tex. App—Fort Worth 2020) ("CoA Op."). On September 27, 2020, Ms. Mason's motion for reconsideration was denied en banc.

On March 31, 2021, the Court of Criminal Appeals granted Ms. Mason's petition for discretionary review. On May 11, 2022, the Court of Criminal Appeals issued an opinion holding that this Court erred by "failing to require proof that the Appellant had actual knowledge that it was a crime for her to vote while on

[1] In 2021, the Texas Legislature prospectively reclassified the offense as a Class A misdemeanor. Section 9.03(b) of SB 1, 87th Leg., 2nd C.S. (2021); *see also Mason v. State,* No. PD-0881-20, 2022 WL 1499513 (Tex. Crim. App. May 11, 2022) ("CCA Op.") at 1 n.1.

supervised release," and remanded the case to this Court.[2] CCA Op. at 1. Appellant files this Brief on Remand pursuant to this Court's June 29, 2022 request for briefing.

ISSUES ON REMAND

1. "The State was required to prove not only that Appellant knew she was on supervised release but also that she '*actually realized*' that 'these circumstances … in fact' rendered her ineligible to vote." CCA Op. at 9. Is the evidence in the record sufficient to show Ms. Mason "actually realized" she was ineligible to vote at the time of submitting her provisional ballot?
2. Did Ms. Mason receive ineffective assistance of counsel because her trial counsel failed to call three available witnesses who would have supported Ms. Mason's claim that she did not "actually realize" she was ineligible to vote?

STATEMENT OF FACTS

In November 2016, at the urging of her mother, Crystal Mason went to vote at her regular polling place. Reporter's Record Volume 2 ("RR2") at 116:2-11. At

[2] The Court of Criminal Appeals affirmed this Court's judgment on the other two issues on appeal, holding that "the Help America Vote Act does not preempt the Illegal Voting statute" and that this Court "did not err by concluding that Appellant 'voted.'" CCA Op. at 2.

the time, Ms. Mason was on federal supervised release for a previous federal tax conviction. "According to the lead supervisor in the probation office, no one in the office told Mason that she could not vote while on supervised release because '[t]hat's just not something [they] do.'" CoA Op. at 775 (citing RR2 at 20:9-17). Although the terms of Ms. Mason's federal supervised release included conditions detailing what she was and was not permitted to do, such as an instruction that she "shall not possess a firearm," none of the conditions addressed voting or submitting a provisional ballot. Reporter's Record Volume 3 ("RR3") at Ex.1.

Ms. Mason had nothing to gain and everything to lose from submitting a provisional ballot had she known she was ineligible to vote. Ms. Mason had no personal or pecuniary interest in the elections. RR2 at 116:8-11. As this Court found, "[t]he evidence does not show that she voted for any fraudulent purpose." CoA Op. at 779.

On the other hand, had Ms. Mason known she was ineligible to vote, submitting a provisional ballot would have jeopardized her newly rebuilt life. A mother of three and a caretaker for her brother's four children, Ms. Mason was working and going to night school to become a licensed aesthetician. RR2 at 146:12-17. Ms. Mason testified that she would not have dared to even go to the polls if she had known that it meant jeopardizing her ability to be with her kids again:

> [W]hy would I dare jeopardize losing a good job, saving my house, and leaving my kids again and missing my son from graduating from high

> school this year as well as going to college on a football scholarship? I wouldn't dare do that, not to vote.

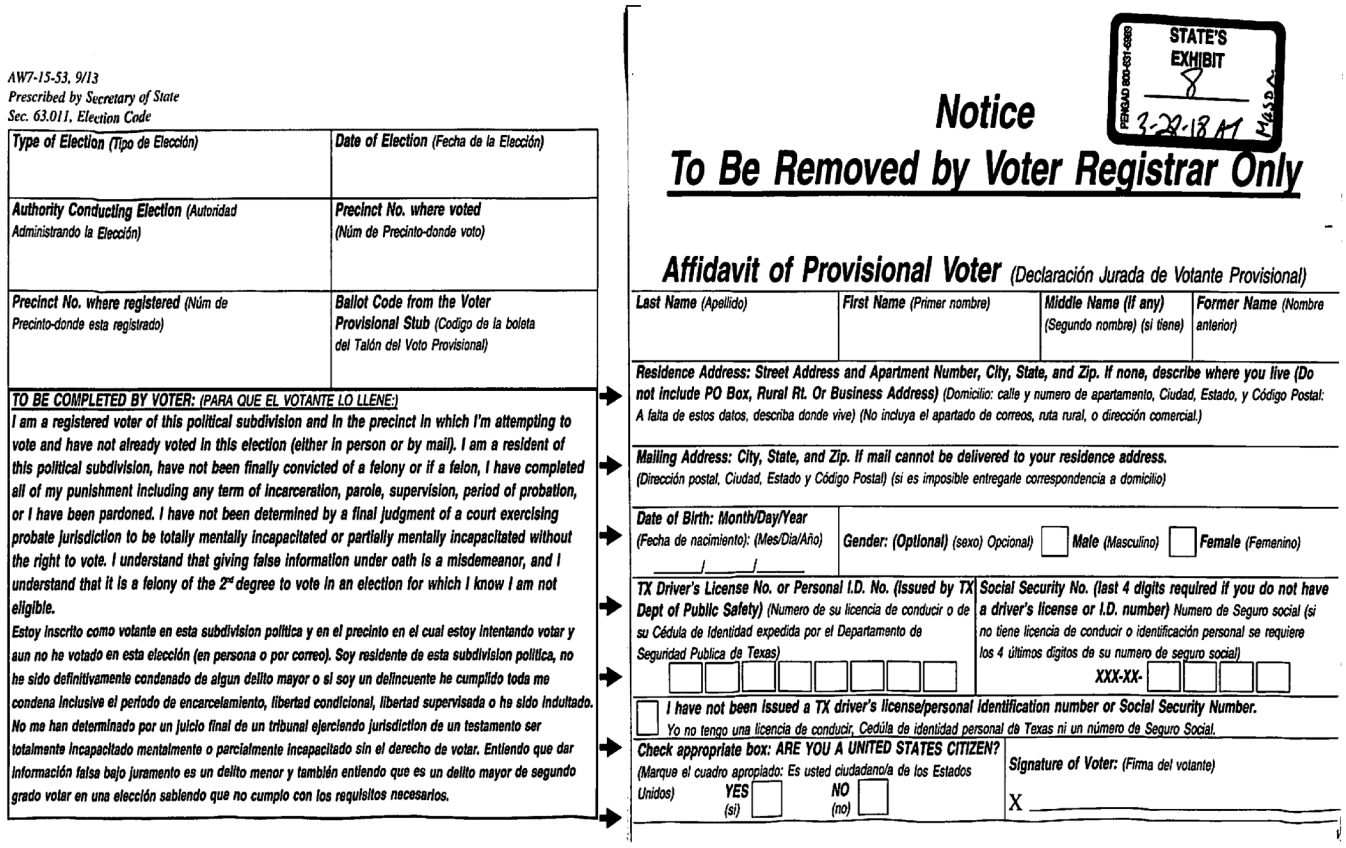
RR2 at 126:3-8; *see also* RR2 at 146:6-11 ("I would never do anything else to jeopardize to lose my kids again. I was happy enough to come home and see my baby graduate, my daughter. Now my son is graduating again. I wouldn't have dared went to the poll[s] to vote.").

The worker checking the voter-registration roll at Ms. Mason's regular polling place could not find her name after looking under both her maiden and married names. RR2 at 60:3-13. Because they could not find her name, "election workers offered to let her complete a provisional ballot" pursuant to the federal Help America Vote Act, "which [Ms. Mason] agreed to do." CoA Op. at 766.

An election worker gave Ms. Mason a provisional ballot affidavit and told her that if she was in the right location, the provisional ballot would count, and if she was not, it would not count. RR2 at 119:11-23.

The provisional ballot affidavit contains two parts. The left-hand side of the provisional ballot affidavit contains information that the election worker fills out (such as the precinct number), followed by small print in English and Spanish, which contain a series of statements. RR3 at Ex.8. Some of the statements reflect eligibility requirements to vote under Texas law; however, they do not exactly track the statute, and the form does not specify that these statements determine whether a person is in fact eligible to vote. There is no signature line on the left-hand side of the form. *Id.*

On the right-hand side of the form, under a large-font header "Affidavit of Provisional Ballot," there are numerous blank fields for individuals to fill out their personal information (including name, address, date of birth, driver's license number, and social security number). *Id.* At the bottom of the right-hand side of the form, there is a space for the individual to sign. *Id.*



AW7-15-53, 9/13
Prescribed by Secretary of State
Sec. 63.011, Election Code

Type of Election (Tipo de Elección)	Date of Election (Fecha de la Elección)
Authority Conducting Election (Autoridad Administrando la Elección)	Precinct No. where voted (Núm de Precinto-donde voto)
Precinct No. where registered (Núm de Precinto-donde esta registrado)	Ballot Code from the Voter Provisional Stub (Codigo de la boleta del Talón del Voto Provisional)

TO BE COMPLETED BY VOTER: (PARA QUE EL VOTANTE LO LLENE:)
I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and have not already voted in this election (either in person or by mail). I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote. I understand that giving false information under oath is a misdemeanor, and I understand that it is a felony of the 2nd degree to vote in an election for which I know I am not eligible.
Estoy inscrito como votante en esta subdivision politica y en el precinto en el cual estoy intentando votar y aun no he votado en esta elección (en persona o por correo). Soy residente de esta subdivision politica, no he sido definitivamente condenado de algun delito mayor o si soy un delincuente he cumplido toda me condena inclusive el periodo de encarcelamiento, libertad condicional, libertad supervisada o he sido indultado. No me han determinado por un juicio final de un tribunal ejerciendo jurisdiction de un testamento ser totalmente incapacitado mentalmente o parcialmente incapacitado sin el derecho de votar. Entiendo que dar información falsa bajo juramento es un delito menor y también entiendo que es un delito mayor de segundo grado votar en una elección sabiendo que no cumplo con los requisitos necesarios.

STATE'S EXHIBIT 8 3-28-18 AM MASON

Notice
To Be Removed by Voter Registrar Only

Affidavit of Provisional Voter (Declaración Jurada de Votante Provisional)

Last Name (Apellido)	First Name (Primer nombre)	Middle Name (If any) (Segundo nombre) (si tiene)	Former Name (Nombre anterior)

Residence Address: Street Address and Apartment Number, City, State, and Zip. If none, describe where you live (Do not include PO Box, Rural Rt. Or Business Address) (Domicilio: calle y numero de apartamento, Ciudad, Estado, y Código Postal: A falta de estos datos, describa donde vive) (No incluya el apartado de correos, ruta rural, o dirección comercial.)

Mailing Address: City, State, and Zip. If mail cannot be delivered to your residence address. (Dirección postal, Ciudad, Estado y Código Postal) (si es imposible entregarle correspondencia a domicilio)

Date of Birth: Month/Day/Year (Fecha de nacimiento): (Mes/Dia/Año) ___/___/___ Gender: (Optional) (sexo) Opcional) ☐ Male (Masculino) ☐ Female (Femenino)

TX Driver's License No. or Personal I.D. No. (Issued by TX Dept of Public Safety) (Numero de su licencia de conducir o de su Cédula de Identidad expedida por el Departamento de Seguridad Publica de Texas) ☐☐☐☐☐☐☐☐

Social Security No. (last 4 digits required if you do not have a driver's license or I.D. number) Numero de Seguro social (si no tiene licencia de conducir o identificación personal se requiere los 4 últimos dígitos de su numero de seguro social) XXX-XX-☐☐☐☐

☐ I have not been issued a TX driver's license/personal identification number or Social Security Number. Yo no tengo una licencia de conducir, Cedúla de identidad personal de Texas ni un número de Seguro Social.

Check appropriate box: ARE YOU A UNITED STATES CITIZEN? (Marque el cuadro apropiado: Es usted ciudadano/a de los Estados Unidos) YES (si) ☐ NO (no) ☐

Signature of Voter: (Firma del votante) X _____

STUB TO BE DETACHED BY VOTER REGISTRAR

Id.

Ms. Mason ensured that the information she entered on the right-side of the provisional ballot affidavit was correct. RR2 at 125:12-20; 159:23-25. She then signed the right-hand side below the information she filled out. RR3 at Ex.9. Ms. Mason testified that she did not read the left-hand side of the provisional ballot

affidavit. RR2 at 122:13-22; 125:12-20. The State's primary witness testified that he could not be sure if she read the left-hand side of the provisional ballot affidavit. State's Brief on the Merits to the Court of Appeals at 25; *see also* RR2 at 86:24-87:2. Another witness testified that from several feet away he saw her reviewing the affidavit, but his testimony was silent as to the statements on the left-hand side. RR2 at 102:7-23.

After Ms. Mason submitted her provisional ballot, election officers determined she was not eligible to vote, resulting in the rejection of her provisional ballot. RR3 at Ex.6; Tex. Elec. Code § 64.008(b). Ms. Mason's ballot was never counted. *Id.*

At trial, Ms. Mason's counsel failed to call multiple witnesses who would have provided testimony that Ms. Mason did not know she was ineligible to vote. Specifically, Ms. Mason's mother and daughter would have testified that Ms. Mason believed she was eligible to vote in the November 8, 2016 election. CR at 203; Reporter's Record Volume 1 ("RR1") at 19. Trial counsel also failed to call Ms. Mason's niece, RR1 at 19; CR at 7, who went to the polls with Ms. Mason on the date in question and would have testified that "neither on the way to the polling place nor on the way back did my aunt express any concern about whether she was actually eligible to vote." CR at 52.

SUMMARY OF ARGUMENT

Issue 1:

The evidence is insufficient to sustain Appellant's conviction for Illegal Voting. The Court of Criminal Appeals clarified that, to satisfy Section 64.012(a)(1)'s mens rea requirement, "[t]he State was required to prove not only that Appellant knew she was on supervised release but also that she '**actually realized**' that 'these circumstances … in fact' rendered her ineligible to vote." CCA Op.at 8 (emphasis added). Further, Section 64.012(a)(1)'s knowledge requirement is not a "negligence scheme wherein a person can be guilty because she fails to take reasonable care to ensure that she is eligible to vote." CCA Op. at 6.

No rational trier of fact could have found beyond a reasonable doubt that Ms. Mason "actually realized" she was ineligible to vote. This Court has already determined that Ms. Mason "voted . . . despite the fact that she was not certain and may not have read the warnings on the affidavit form." CoA Op. at 779-80. Under that prior determination, the State has not met its mens rea burden set forth by the Court of Criminal Appeals. Accordingly, this Court should reverse the judgment of the trial court and order a judgment of acquittal.

This Court's prior determination that Ms. Mason was not certain that she was ineligible to vote under Texas law was correct. The State has offered only one theory to satisfy its mens rea burden: that Ms. Mason read the left-hand side statements of

the provisional ballot affidavit; that upon reading the left-hand side statements, she realized in the moment that such statements meant that she was ineligible to vote; but that, despite such a realization, and despite the fact that she had nothing to gain and everything to lose from doing so, she went ahead and submitted her provisional ballot anyway. This theory fails to satisfy the State's burden for at least three reasons.

First, the State's evidence is insufficient to show that Ms. Mason even read the left-hand statements. The State's main witness explicitly testified that he was not certain if she actually read the left-hand statements. The only other witness on this point did not testify specifically about the left-hand side of the affidavit.

Second, even if Ms. Mason did read the left-hand statements, there is no evidence to show that she then realized her ineligibility. The State's theory at best shows that there was documentation available to Ms. Mason from which a person hypothetically may have been able to draw an inference regarding their eligibility to vote, but it does not show that Ms. Mason subjectively understood that documentation to mean she was ineligible to vote. In *Delay v. State*, the Court of Criminal Appeals held that even sophisticated actors could not be charged with knowledge merely because they possessed documentation that could have led them to understand that their actions might violate the Election Code. *Delay v. State*, 465 S.W.3d 232, 252 (Tex. Crim. App. 2014). The Court explained that even a "substantial and unjustifiable risk" that one might violate the Election Code does not

satisfy the mens rea standard. *Id.* Likewise, even if the State showed here that Ms. Mason read the confusing statements—which do not explicitly identify themselves as setting forth eligibility requirements or explicitly mention federal supervised release—that in itself is insufficient to show that Ms. Mason "actually realized" she was ineligible to vote. Additionally, the Court of Criminal Appeals has explicitly held that such a realization cannot be inferred from the provisional ballot affidavit alone, writing that 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit." CCA Op. at 6. As such, the State's theory is patently insufficient.

Third, Ms. Mason could not have "actually realized" that she was ineligible to vote because her ineligibility was not legally certain at the time she submitted her provisional ballot. This Court was the first to make the determination that being on "federal supervised release" rendered an individual ineligible to vote under the Texas Election Code. Ms. Mason did not have the guidance of this Court's 2020 Opinion when she submitted her ballot in 2016. *Delay* establishes that "[i]n the absence of some decisional law or other authority in Texas **at that time** that had construed the Election Code so as to render [the conduct in question] illegal under the Election Code, it cannot reasonably be concluded that [an appellant] was, or even could have been, aware that" defendant's conduct violated the statute at issue. *Delay*

465 S.W.3d at 247-48 (emphasis added). Accordingly, Ms. Mason could not have "actually realized" that she was ineligible to vote.

Issue 2:

Ms. Mason received ineffective assistance of counsel because her trial counsel failed to call at least three witnesses who would have testified that Ms. Mason believed that she was eligible to vote at the time—and even after—she filled out her provisional ballot affidavit. In particular, Ms. Mason's niece, who accompanied her to the polls on the date in question, would have testified that Ms. Mason did not express any concerns about her eligibility either before or after she submitted her provisional ballot. Such testimony would rebut the State's illogical theory that Ms. Mason realized she was ineligible at the polling place but, with nothing to gain and everything to lose, submitted her provisional ballot anyway. Where a conviction hinges on competing testimony regarding a crucial element of the offense, courts have found that the failure to call witnesses other than the defendant to be ineffective assistance of counsel.

ARGUMENT

I. The evidence is insufficient to show Ms. Mason "actually realized" she was ineligible to vote when she submitted her provisional ballot.

Texas Election Code Section 64.012(a) makes it an offense to "vote[ ] . . . in an election in which the person knows the person is not eligible to vote," where eligibility is established by Sections 11.001 and 11.002 of the Election Code. On

appeal, this Court initially held that "the fact that ["Ms. Mason"] did not know she was legally ineligible to vote was irrelevant to her prosecution under Section 64.012(a)(1); instead, the State needed to prove only that she voted while knowing of the existence of the condition that made her ineligible." CoA Op. at 770.

The Court of Criminal Appeals rejected this interpretation and held that "[a] plain reading of the language in section 64.012(a)(1) requires *knowledge* that a defendant herself is ineligible to vote." CCA Op. at 6. The Court then explained that, in line with its prior precedent, particularly *Delay v. State*, Section 64.012(a)(1) requires the State "to prove not only that Appellant knew she was on supervised release but also that she '**actually realized**' that 'these circumstances … in fact' rendered her ineligible to vote." *Id.* at 9 (emphasis added). The Court of Criminal Appeals further clarified that Section 64.012(a)(1)'s knowledge requirement is not a "negligence scheme wherein a person can be guilty because she fails to take reasonable care to ensure that she is eligible to vote." *Id*. at 6.

The Court of Criminal Appeals charged this Court with determining on remand whether the facts in the record are sufficient to prove beyond a reasonable doubt that Ms. Mason "actually realized" she was ineligible to vote when she submitted her provisional ballot. For the reasons set forth below, and consistent with this Court's previous determinations, the evidence is insufficient to show Ms. Mason

"actually realized" she was ineligible to vote when she submitted her provisional ballot.

A. This Court's previous determinations confirm that Ms. Mason did not actually realize she was ineligible to vote.

When this appeal was initially before this Court, this Court determined that Ms. Mason did not know or may not have known that she was ineligible to vote. The Court wrote:

> - "Although **Mason may not have known with certainty** that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law or that so voting is a crime—and although she testified that if she had known she would not have voted—she voted anyway, signing a form affirming her eligibility in the process **despite the fact that she was not certain and may not have read the warnings on the affidavit form**." CoA Op. at 779-80 (emphasis added);
>
> - "Contrary to Mason's assertion, **the fact that she did not know she was legally ineligible** was irrelevant to her prosecution under Section 64.012(a)(1)." CoA Op. at 770 (emphasis added);
>
> - "[T]he evidence does not show that she voted for any fraudulent purpose." CoA Op. at 779.

This Court's determinations, as a matter of "fact," that Ms. Mason "was not certain," "did not know," and "may not have known" about her ineligibility to vote, demonstrate that she did not "actually realize" that she was ineligible to vote—the mens rea requirement articulated by the Court of Criminal Appeals. Based on this

Court's prior determinations, this Court should reverse the trial court's judgment and enter a judgment of acquittal.

B. The evidence is insufficient to show beyond a reasonable doubt that Ms. Mason actually realized she was ineligible to vote.

This Court was correct in determining that Ms. Mason did not know or was not certain that she was ineligible to vote, and this Court should not reverse its prior determination. Ms. Mason unequivocally testified that she did not know she was considered ineligible to vote and would not have jeopardized her newly rebuilt life to submit a ballot if she had known. RR2 at 126:3-8. There was no evidence that Ms. Mason had any personal or pecuniary interest in the election. Nor is there any evidence that Ms. Mason was aware of the fact that she was considered ineligible to vote prior to arriving at the polling station. Indeed, the supervisor of her release program testified that Ms. Mason was not told that being on federal supervised release rendered her ineligible to vote. RR2 at 20:9-17.

The State's entire theory is based on the speculation that, while at the polling station, Ms. Mason read the left-hand side of the provisional ballot affidavit, immediately understood from reading that side of the ballot that she was ineligible to vote, but, despite that knowledge and despite the risks involved, filled out her correct identifying information and submitted her provisional ballot anyway.

The State's theory fails for at least three reasons: (1) the State's evidence that Ms. Mason read the left-hand statements on the provisional ballot affidavit is

speculative at best; (2) even if Ms. Mason did read the left-hand side of the affidavit, that is not sufficient to show that Ms. Mason "actually realized" she was ineligible to vote; (3) Ms. Mason could not have actually realized she was ineligible to vote because that was not legally established at the time she submitted a provisional ballot.

i. The State's theory rests entirely on speculation that Ms. Mason read the statements on the left-hand side of the provisional ballot affidavit.

The linchpin of the State's theory is that Ms. Mason read the left-hand side statements on the provisional ballot affidavit. As explained below, even if the State had offered sufficient evidence to establish that fact, that in itself would not show that Ms. Mason actually realized she was ineligible to vote. Regardless, the State's evidence on this point is speculative at best.

There is a crucial difference between the left-hand side of the provisional ballot affidavit and the right-hand side. The left-hand side of the provisional ballot affidavit contains information that the election worker fills out (such as the precinct number), followed by small print in English and Spanish, which contains the series of statements relied upon by the State. RR3 at Ex.8. There is nothing for the individual to fill out on the left-hand side of the form and no signature line.

On the right-hand side of the form, under a large font header "Affidavit of Provisional Ballot," there are numerous blank fields for individuals to fill out their

personal information (including name, address, date of birth, driver's license number, and social security number). *Id*. The right-hand side also requires an individual to check whether or not they are a citizen of the United States, one of the eligibility requirements for voting. At the bottom of the right-hand side of the form, there is a space for the individual to sign. *Id*.

With respect to whether Ms. Mason read the left-hand side statements, the State has repeatedly conceded, as it must, that its primary witness, Karl Dietrich, was not certain whether Ms. Mason actually read them. State's Brief on the Merits to the Court of Appeals at 25 ("Dietrich could not say with certainty that the Appellant actually read it . . . ."); State's Brief to the Court of Criminal Appeals at 28 (similar); *see also* RR2 at 86:24-87:2 ("You cannot tell District Judge Gonzalez that she, in fact, read the left-hand side of this ballot. You can't say that, can you? A. No."). Such speculation is insufficient to sustain the State's burden. *See Walker v. State*, No. PD-1429-14, 2016 WL 6092523, at *12 (Tex. Crim. App. Oct. 19, 2016) (finding evidence insufficient where "many of the witnesses set out what they believed had happened," but "none of the nineteen witnesses could testify as to what actually happened").

Further, Jarrod Streibich, the State's only other witness who testified regarding Ms. Mason's actions when filling out her provisional ballot affidavit did not offer any testimony specific to the crucial question of whether she read the left-

hand side statements. In fact, while Streibich's testimony contradicts Dietrich's testimony on numerous key points,[3] his testimony is consistent in one critical way: Streibich also cannot and does not say that Ms. Mason reviewed the left-hand side of the provisional ballot affidavit. Rather, Streibich says only that he thought he saw Ms. Mason read the affidavit when he glanced at her from several feet away while he was busy performing other work. RR2 at 102:7-23. But no one disputes that Ms. Mason read the right-hand side of the affidavit.[4] That side does not contain the statements on which the State relies. RR2 at 122:13-22. Streibich's testimony is

[3] These inconsistencies include: the time that Ms. Mason filled out her provisional ballot affidavit, where Ms. Mason sat when she filled out the provisional ballot affidavit, and how busy the precinct was at the time. Dietrich testified that he was "quite" positive that Ms. Mason arrived at the polling place at 2:30 in the afternoon. RR2 at 85:5-12. Streibich testified that Ms. Mason came in and submitted her provisional ballot "around quarter after 4:00," which he knew because he checks his watch "every two to five minutes." RR2 at 105:15-16, 2-4. Dietrich testified that he moved Ms. Mason "away from the actual voter line," and did not dispute that they sat at a "back table." RR2 at 73:21-25; RR2 at 85:1-4; *see generally* RR3 at Ex. 10 (map of voting location). Streibich testified that he was sitting at table where voters would come in and meet with him to check for their names. RR2 at 101:10-18; RR3 at Ex. 10. Streibich testified that Ms. Mason sat 4-5 feet away from him "directly to [his] right" while there were "three lines" of voters filling up. RR2 at 101:19-23; RR2 at 102:7-17. Dietrich testified that at the time Ms. Mason submitted her ballot it was "calm" and "not rushed at all." RR2 at 72:24-25. Streibich testified that the polling place was "particularly busy" at the time Ms. Mason came in and that he was handling multiple lines. RR2 at 101:24-102:2.

[4] Indeed, Mr. Streibich's testimony is perfectly consistent with Ms. Mason's testimony that she carefully read and filled out the right-hand side, which is labeled "Provisional Ballot Affidavit." RR2 at 123:14-19 (Ms. Mason testifying that she was making sure everything she filled out matched her driver's license).

silent as to whether Ms. Mason read the left-hand side statements on the affidavit, which is the critical detail for the State's flawed sufficiency theory. RR2 at 102:7-23.

The State cannot rely on explicitly uncertain and non-specific testimony to claim that it has met its burden of proving an element of a crime beyond a reasonable doubt. *Riles v. State*, No. 02-19-00421-CR, 2021 WL 4319600, at *7 (Tex. App.—Fort Worth Sept. 23, 2021) (mem. op.) ("Although we recognize our duty to defer to the factfinder, we cannot defer to facts that weren't proved nor to inferences that aren't reasonable."); *Hacker v. State*, 389 S.W.3d 860, 873-74 (Tex. Crim. App. 2013) (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion"). Explicitly uncertain testimony about whether Ms. Mason read confusing small print statements is insufficient to demonstrate that she actually realized she was ineligible to vote. Indeed, after considering the evidence and the State's arguments, this Court previously concluded that Ms. Mason "was not certain [about her eligibility] and may not have read the warnings on the affidavit form." CoA Op. at 779-80. Accordingly, this Court should reverse the judgment of the trial court and order a judgment of acquittal because the State's evidence is insufficient to support a finding of guilt beyond a reasonable doubt.

ii. The State's speculation that Ms. Mason read the left-hand statements is not sufficient to show that she "actually realized" that she was ineligible to vote.

Even if the evidence did establish that Ms. Mason read the confusing small-print statements on the left-hand side of the affidavit—which as explained above, it does not—simply showing that Ms. Mason read the left-hand side would not be sufficient to show that Ms. Mason "actually realized" that she was ineligible to vote. The State has offered no evidence that Ms. Mason, upon supposedly reading the left-hand statements, understood that they applied to her particular and unique situation and that they meant she was ineligible to vote.

The evidentiary gap between the State's theory and the State's burden to show Ms. Mason "actually realized" she was ineligible to vote is made clear by the Court of Criminal Appeals' decision in *Delay*. There, the corporate executive defendants had ample financial, political, and legal resources to inform them of a "substantial and unjustifiable risk that their corporate political contributions would violate the Texas Election Code." *Delay*, 465 S.W.3d at 252. This included available fundraising literature and in-house counsel to apprise them of that risk. But even under those circumstances, the Court held that such facts were not sufficient to demonstrate that the *Delay* defendants **actually knew** that their actions violated the Election Code. In reaching that conclusion, the Court of Criminal Appeals explicitly pointed to the testimony of the defendants that they did not know their actions were

unlawful and the distinct absence of any evidence regarding "covert dealings" which would indicate knowledge of unlawfulness. *Id.* Accordingly, the Court concluded that "neither recklessness nor negligence" was sufficient to demonstrate "knowledge of actual unlawfulness." *Id.*

Likewise, Ms. Mason has resolutely denied having knowledge of her ineligibility to vote. RR2 at 126:3-8. The State has produced no evidence to show that Ms. Mason knew she was ineligible but was behaving covertly in order to submit her provisional ballot. Nor is there any evidence to suggest that Ms. Mason had a personal or pecuniary motivation to submit a provisional ballot despite "actually realizing" she was ineligible. Indeed, the testimony is undisputed that Ms. Mason carefully filled out her correct name and address on the provisional ballot affidavit. RR2 at 125:12-20; 159:23-25; RR3 at Ex.9. And, as this Court has previously determined, "[t]he evidence does not show that she voted for any fraudulent purpose." CoA Op. at 779.[5] In fact, the evidence shows that Ms. Mason had nothing to gain but everything to lose from submitting a provisional ballot if she actually realized she was ineligible to vote. RR2 at 126:3-8; *see also* RR2 at 146:6-11.

[5] To the extent the Court of Criminal Appeals Opinion also holds that to be guilty of committing an offense under section 64.012(a)(1), individuals must know they are violating "the Election Code," CCA Op. at 4, 8, the State has clearly failed to meet this burden. There are no facts on the record that would establish that Ms. Mason had any knowledge of the Election Code, much less knowledge that she was violating it.

The only evidence the State relies on to show Ms. Mason's actual knowledge of her ineligibility is part of the left-hand side of the provisional ballot affidavit that the State claims could have informed Ms. Mason about her ineligibility if she had read it. But just as the existence of documentation in the form of fund-raising literature and access to in-house counsel in *Delay* was not sufficient to demonstrate that those sophisticated actors were **actually aware** of their alleged violation of the Election Code, so too here, the existence of a few words in small print on half of a provisional ballot affidavit cannot show Ms. Mason's realization of actual ineligibility.

This is especially so given the form and content of the provisional ballot affidavit. The left-hand side of the provisional ballot affidavit—the side at issue here—contains confusing statements in small print in two languages. The statements do not appear under the heading of "Affidavit of Provisional Voter" and do not contain a signature line like the one that appears under the right-hand side of the ballot where the person fills out their personal information.

Critically, the statements in the affidavit do not state that being on federal supervised release renders an individual ineligible to vote. Indeed, they do not use the term "federal supervised release" at all. Further, the content of the statements do not exactly track the eligibility requirements set forth under Texas law, and the

statements do not explicitly establish that they are setting forth any generally applicable voter eligibility requirements.

Even if the State could show that a "reasonable" person would understand from reading the statements that they applied to Ms. Mason's situation, that is not sufficient to demonstrate that Ms. Mason herself "actually realized" in the moment that they applied to her and meant she was ineligible to vote.[6] As the Court of Criminal Appeals has squarely established, the mens rea requirement here is not a "negligence scheme wherein a person can be guilty because she fails to take reasonable care to ensure that she is eligible to vote." CCA Op. at 6. Accordingly, even a "substantial and unjustifiable risk" that one might violate the Election Code is not sufficient to meet the State's burden. *Delay*, 465 S.W.3d at 252. Instead, the State must provide proof of an actual realization of one's ineligibility to vote. Here, there is none.

Finally, the Court of Criminal Appeals has already rejected the State's mens rea theory, which relies solely on an inference of knowledge from a provisional ballot affidavit. The Court of Criminal Appeals has held that a provisional ballot

[6] Ms. Mason's hindsight statement (after already having been charged with illegal voting, and having been inundated with the fact that the State considered her ineligible to vote) that the statements are clear cannot be divorced from her testimony that she did not read the statements; nor can it establish that on the date of the alleged offense she actually read those statements and in that moment understood their precise meaning and their application to her situation, and then submitted a provisional ballot anyway.

affidavit alone is not sufficient to meet Section 64.012(a)(1)'s mens rea requirement. In discussing what it means to know that one is ineligible to vote, the Court held that Section 64.012(a)(1) "**does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit**," noting that "[t]his reading is consistent not only with *Delay* but also with the Legislature's intent." CCA Op. at 6 (emphasis added).[7] Here, the State asks this Court to do exactly what the Court of Criminal Appeals said was impermissible. Because the State's theory requires the Court to infer Ms. Mason's knowledge solely from the provisional ballot affidavit, it runs contrary to the Court of Criminal Appeals holding and must be rejected.

iii. Ms. Mason could not have realized that she was ineligible to vote because her ineligibility was not legally established at the time.

In 2016, at the time Ms. Mason submitted her provisional ballot, there was no decisional authority holding that being on "federal supervised release" renders an

[7] In a separate part of its Opinion, the Court evaluated the significance of Section 64.012(c), which was passed by the 2021 legislature to clarify that a provisional ballot affidavit does not demonstrate that a person knows that they are ineligible to vote as required by the statute. The Court of Criminal Appeals declined to determine that Section 64.012(c) itself was sufficient to "decriminalize Appellant's conduct" because the statute by its terms indicates that the State could provide other evidence to demonstrate knowledge on the part of accused people. CCA Op. at 4. The Court did not conduct a review of the evidence, instead remanding the case back to this Court to determine the sufficiency of the evidence under section 64.012(a)(1). Later, the Court discussed 64.012(a)(1)'s mens rea standard and made clear that actual knowledge cannot be inferred from a provisional ballot affidavit.

individual ineligible to vote under Texas law. Indeed, this Court was the first to make that determination in its 2020 decision. CoA Op.771-73. Lacking such authority at the time, Ms. Mason could not have "actually realized" she was ineligible to vote when she submitted her provisional ballot.

In *Delay*, the Court made clear that a defendant cannot be charged with actual knowledge of a legal proposition that lacked decisional authority at the time the alleged offense was committed. There, in addition to establishing the mens rea required for a knowing violation of the Election Code, the Court also analyzed the requisite mens rea for a violation of Texas's money laundering statute, Tex. Penal § 34.02. The Court of Criminal Appeals interpreted that statute to require that the defendant "be aware of the fact that the transaction involves the proceeds of criminal activity." *Delay*, 465 S.W.3d at 247.

The Court of Criminal Appeals ultimately concluded that the evidence was not sufficient to sustain a conviction because there was no clearly established authority holding that the defendant's conduct was illegal: "[i]n the absence of some decisional law or other authority in Texas at that time that had construed the Election Code so as to render [conduct in question] illegal under the Election Code, it cannot reasonably be concluded that the appellant was, or even could have been, aware that [defendant's conduct] involved the proceeds of criminal activity." *Id.* 247-48; *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (in the context of qualified

immunity, the Supreme Court has noted that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful"); *Morris v. Dearborne*, 181 F.3d 657, 665 (5th Cir. 1999) (similar).

Likewise, absent any "decisional law or other authority" that would have established that Ms. Mason was ineligible to vote, the State cannot demonstrate that Ms. Mason was aware that she was ineligible to vote. This Court determined in its 2020 Opinion that Ms. Mason was ineligible to vote because the term "supervision" as used in Section 11.002(a)(4)(A) includes post-imprisonment federal supervised release. CoA Op. at 771. But prior to this Court's opinion, there was no decisional authority that would have so informed Ms. Mason.

In fact, this Court noted "the term 'supervision' as used in Section 11.002(a)(4)(A) is not defined in the Election Code" or "the Code of Criminal Procedure." *Id.* Further, at the time Ms. Mason submitted her provisional ballot, the decisional authority that existed equated supervision to probation. *See, e.g.*, *Speth v. State*, 6 S.W.3d 530, 532 n.3 (Tex. Crim. App. 1999) ("We use the terms probation and community supervision interchangeably in this opinion."). But it is clear that Ms. Mason was not on probation. *United States v. Ferguson*, 369 F.3d 847, 849 n.5 (5th Cir. 2004) ("Supervised release is different than probation: 'probation is

imposed instead of imprisonment, while supervised release is imposed after imprisonment.'").[8]

Ms. Mason was also not informed by any other authority that she was ineligible to vote. Her supervised release officer testified that she was not told about her ineligibility, and nothing in the list of conditions for her supervised release would have informed her of it. RR2 at 20:9-17; RR3 at Ex.1. Indeed, even prominent Texas politicians have opined on the non-obvious nature of Ms. Mason's ineligibility. Representative Dustin Burrows, the Republican sponsor of House Resolution 123, which establishes the will of the Texas House of Representatives that "a mistaken, honest belief" does not constitute the necessary mens rea for the Illegal Voting offense, stated "I would not have known that being on supervised release would have made you ineligible." H.J. of Tex., 87th Leg., 2nd C.S. 321 (2021)[9]; *see also* CCA Op. at 7.

This Court's Opinion is the first legal authority holding that being on federal supervised release renders an individual ineligible to vote under Texas law. But, at the time Ms. Mason submitted her provisional ballot, she lacked this Court's guidance on this issue. Under *Delay*'s clear precedent, the lack of decisional

[8] Ms. Mason was also not on parole, the other condition specified by Section 11.002(a)(4)(A).

[9] *Available at* https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY06FINAL.PDF#page=8.

authority means that Ms. Mason could not have actually realized that she was ineligible to vote.

II. Ms. Mason received ineffective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, Ms. Mason must show that "(1) [her] counsel's performance fell below an objective standard of professional competence and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Monreal v. State*, 947 S.W.2d 559, 561 n.2 (Tex. Crim. App. 1997) (en banc) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, (1984); *see also Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (recognizing same).

In its previous opinion, this Court held that Ms. Mason's counsel was not deficient for failing to call witnesses addressing Ms. Mason's subjective knowledge and whether she intended to "vote illegally" because Ms. Mason's subjective knowledge was not at issue. CoA Op. at 785. Now that the Court of Criminal Appeals has squarely established the relevance of Ms. Mason's subjective knowledge, this Court should reevaluate Ms. Mason's ineffective assistance of counsel claim.

The critical issue in this case is whether the State demonstrated beyond a reasonable doubt that Ms. Mason "actually realized" she was ineligible to vote at the

time she submitted a provisional ballot. CCA Op. at 8. Her trial counsel's failure to present witnesses who would have provided crucial testimony about Ms. Mason's belief that she was eligible to vote falls below an objective standard of professional competence.

"An attorney has a professional duty to present all available testimony and other evidence to support the defense of his client." *State v. Thomas*, 768 S.W.2d 335, 336 (Tex. App.—Houston [14th Dist.] 1989, no pet.). "When challenging an attorney's failure to call a particular witness, an 'applicant must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense.'" *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) (per curium) (quoting *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004)). "Neglect[ing] to present available testimony" in support of a client's defense constitutes a failure of "professional responsibility" to an attorney's client. *Shelton v. State*, 841 S.W.2d 526, 527 (Tex. App.—Fort Worth 1992). In particular, when counsel fails to "advance the one defense apparently available" to their client, the attorney's assistance is "ineffective if not incompetent." *Id.*

Ms. Mason's counsel did not present a single witness in Ms. Mason's defense, except the defendant herself. Trial counsel had available to him numerous witnesses that would have provided additional supporting and beneficial testimony to establish that Ms. Mason did not know that she was ineligible to vote.

Ms. Mason's trial counsel failed to call Ms. Mason's niece, Joeanna Jones, to testify. Ms. Jones accompanied Ms. Mason to the polling station where she turned in the provisional ballot affidavit at issue. Reporter's Record Supplement Volume 2 ("RR.Supp.2") at 19:12–21; CR at 51-52. Ms. Jones was available and would have testified as to Ms. Mason's state of mind and her intent at the time of the alleged crime. *Id.* Specifically, Ms. Jones would have testified that "neither on the way to the polling place nor on the way back did my Aunt express any concern about whether she was actually eligible to vote." CR at 52. Ms. Jones' testimony is critical because it would have contradicted the State's illogical theory that Ms. Mason realized she was ineligible to vote at the polling place and then submitted a provisional ballot in spite of that knowledge and in spite of the risks involved to her newly rebuilt life. Ms. Jones would have testified that Ms. Mason expressed no concerns about her eligibility **even after** she turned in the provisional ballot affidavit and submitted the provisional ballot itself.

Further, Ms. Mason's counsel failed to call Ms. Mason's mother and daughter to testify, both of whom he had interviewed and who were available to testify at her trial. Ms. Mason's mother's testimony would have greatly benefited Ms. Mason's defense. Ms. Mason's mother would have testified that she was the person who encouraged Ms. Mason to go vote, confirming Ms. Mason's testimony, and that she does not think Ms. Mason would have voted if she thought she was ineligible. CR at

53. Ms. Mason's counsel acknowledged that he spoke with Ms. Mason's mother and daughter and that both "represented to [him] that [Ms. Mason] believed — she honestly believed she could vote." RR.Supp.2 at 19:12–18.

Trial counsel did not justify his failure to call available witnesses based on a strategic decision; rather, he opined that other witnesses weren't "necessary" beyond Ms. Mason. RR.Supp.2 at 21:1-7; 20:8–9. However, because Ms. Mason's testimony was disputed on this crucial issue, trial counsel was deficient in failing to call corroborating witnesses beyond the defendant herself. *In re I.R.*, 124 S.W.3d 294, 299 (Tex. App.—El Paso 2003, no pet.) (failure to call witnesses is especially deficient when it is "not a strategic or tactical decision by counsel").

Courts, including the Court of Criminal Appeals and this Court, have found counsel to be ineffective where, as here, the core issue at trial hinges on disputed testimony and defense counsel fails to call corroborating witnesses, relying solely or primarily on the interested defendant instead. *See Thomas*, 768 S.W.2d at 336-37 (upholding trial court's finding of ineffective assistance of counsel where witnesses who would have corroborated defendant's testimony were not called in case where credibility of defendant and his version of events was central issue); *Butler v. State*, 716 S.W.2d 48, 54–56 (Tex. Crim. App. 1986) (en banc) (finding ineffective assistance of counsel where trial counsel failed to call witnesses to corroborate defendant's testimony and relied only on testimony from the defendant himself and

one other witness); *see also In re I.R.*, 124 S.W.3d at 299-300 (finding ineffective assistance of counsel where a key corroborating witness was not interviewed or called to corroborate defendant's alibi, even though defendant testified as to his own alibi); *Shelton v. State*, 841 S.W.2d 526, 527 (Tex. App.—Fort Worth 1992) (remanding case for a new trial after finding that counsel's failure to present available testimony in support of client's alibi defense constituted deficient defense and resulted in prejudice); *Everage v. State*, 893 S.W.2d 219, 222 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (failure to call witness who would have corroborated defense constituted ineffective assistance).[10]

The failure to call witnesses in Ms. Mason's defense clearly impacted the result of her trial, falling below an objective standard of professional competence and "undermin[ing] confidence in the outcome." *Strickland*, 466 U.S. at 694. But for her trial counsel's unprofessional failure to present vital witnesses in her defense, the result of Ms. Mason's trial likely would have been different.

CONCLUSION

This Court should reverse the judgment of the trial court and order a judgment of acquittal. In the alternative, the Court should remand this case back to the trial court for a new trial.

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[10] As demonstrated by the cases cited above, courts have repeatedly found that testimony that corroborates disputed testimony from the defendant on a key issue is not cumulative. *See, e.g.*, *In re I.R.*, 124 S.W.3d at 300-301; *Jones v. State*, 711 S.W.2d 35, 37 n.5 (Tex. Crim. App. 1986) (en banc).

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in Appellant's Brief on Remand, exclusive of the matters designated for omission, is 7,075 words as counted by Microsoft Word Software.

/s/ Thomas Buser-Clancy
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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Motion has been served on counsel of record and the State Prosecuting Attorney via e-service on 10/14/2022.

/s/ Thomas Buser-Clancy
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