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COURT OF CRIMINAL APPEALS
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**NO. PD-0881-20**

**IN THE COURT OF CRIMINAL APPEALS**
**OF THE STATE OF TEXAS**

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COURT OF CRIMINAL APPEALS
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**CRYSTAL MASON,**
**Appellant,**
**V.**

**STATE OF TEXAS,**
**Appellee.**

From the Second Court of Appeals,
Cause No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

# APPELLANT'S SUPPLEMENTAL BRIEF

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**CRYSTAL MASON,**
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## APPELLANT'S SUPPLEMENTAL BRIEF

Appellant files this supplemental brief to alert the Court to recent state legislative authority that further supports a reversal of her conviction and a judgment of acquittal.

First, Senate Bill 1 ("SB 1"), which went into effect on December 2, 2021, clarifies that submitting a provisional ballot is not sufficient evidence to demonstrate that an individual knew they were ineligible to vote. This clarification of the law undermines the State's theory that Ms. Mason knew she was ineligible to vote. The relevant provision of SB 1 is expressly retroactive and applies to Ms. Mason's case. It alone compels reversal of Ms. Mason's conviction.

Second, House Resolution 123 ("HR 123"), an overwhelmingly bipartisan resolution passed by the Texas House of Representatives, supports Ms. Mason's position that the law means what it says and that individuals must actually know they are ineligible to vote to be convicted under Section 64.012(a)(1).

### I. SB 1's retroactive change to Section 64.012 of the Texas Election Code confirms that Ms. Mason's conviction cannot be upheld.

SB 1 is a repudiation of Ms. Mason's conviction and five-year sentence of incarceration. SB 1's retroactive statutory change to the Illegal Voting statute further establishes that Ms. Mason's submission of a provisional ballot affidavit is not sufficient to demonstrate that she actually knew she was ineligible to vote. State's

Brief on the Merits at 27-31.

Ms. Mason was convicted of Illegal Voting under Section 64.012(a)(1) based on her submission of a provisional ballot that was rejected and never counted. The State argues that even if the court of appeals was wrong that Ms. Mason's conviction can be upheld solely on the basis that she knew she was on federal supervised release, the evidence "support[s] an inference" that she actually knew she was ineligible to vote because she submitted a signed provisional ballot affidavit. State's Brief on the Merits at 28; *id.* at 28-30. As Ms. Mason has previously briefed, her submission of a provisional ballot affidavit is not sufficient to demonstrate that Ms. Mason knew she was ineligible to vote, Appellant's Reply Brief at 15-16, and, regardless, there is not sufficient evidence to support the idea that Ms. Mason read the provisional ballot affidavit and subsequently realized she was ineligible to vote, *id.* at 17-18.

The inadequacy of the State's argument is now written into law. Section 9.03(c) of SB 1 amended Section 64.012 of the Texas Election Code to make clear that submitting a provisional ballot does not demonstrate that a person knows that they are ineligible to vote as required by the statute. Section 64.012(c) specifies that a person "may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 unless corroborated by other evidence that the person knowingly committed the offense." Section 9.03 of SB 1,

87th Leg., 2nd C.S. (2021).

The legislative history of Section 64.012(c) confirms that it was designed to prevent convictions—both prospectively and retroactively—like the one at issue here that are based on the submission of a provisional ballot. Texas legislators explained that Section 64.012(c) was added to ensure that individuals who made innocent mistakes about their eligibility when filling out and submitting a provisional ballot could not be prosecuted on the basis that they filled out the provisional ballot affidavit:

> Subsection (c) was intentionally and specifically added to clarify what some courts and local prosecutors have gotten wrong. **The crime of illegal voting is intended to target those individuals who intentionally try to commit fraud in our elections by voting when they know they are not eligible to vote. It is not intended to target people who make innocent mistakes about their eligibility and that are facilitated solely by being provided a provisional ballot by a judge**, since federal law requires judges to give someone who isn't registered and requests to vote a ballot. To this end, **this provision in the conference committee report says that filling out a provisional ballot affidavit is not enough to show that a person knew they were ineligible to vote**. For the purpose of legislative intent, this does not actually change existing law, but rather it makes crystal clear that under current law, when an individual fills out a provisional ballot like tens of thousands of Texans do every year, the mere fact that they filled out and signed a provisional ballot affidavit is not enough to show that an ineligible voter knew they were ineligible to vote or that their signature on it is enough. That has always been the case. **Again, no one should be prosecuted solely on the basis of filling out a provisional ballot affidavit**.
>
> ***
>
> [T]hese provisions strike a balance between allowing the prosecution of people that intentionally vote illegally while **ensuring that people**

> **who in good faith cast a provisional ballot but turn out to be mistaken cannot and should not be prosecuted. Such a prosecution, should one occur in the future or have occurred in the past, would, in my opinion, be a grave error**.

H.J. of Tex., 87th Leg., R.S. S210 (2021), https://journals.house.texas.gov/HJRNL/87R/PDF/87RDAY60SUPPLEMENT.PDF (emphasis added). [1]

Accordingly, it is clear that Section 64.012(c) was added to ensure that simply "filling out" and submitting a provisional ballot is not enough to trigger a conviction for Illegal Voting when people believe they are eligible to vote. Because the State's evidence for Ms. Mason's actual knowledge of ineligibility centers on her filling out and submitting the provisional ballot affidavit, it is not sufficient to meet the *mens rea* standard. The State may argue that its evidence concerns reading and not signing the provisional ballot. However, the above-quoted legislative history makes clear

[1] Section 64.012(c) was initially added to the Legislature's omnibus elections bill, Senate Bill 7 ("SB 7"), during the regular session of the 87th Legislature. Section 9.03 of Tex. S.B. 7, 87th Leg., R.S. (2021), https://lrl.texas.gov/scanned/87ccrs/sb0007.pdf#navpanes=0. However, that bill did not pass. Governor Abbott subsequently called special sessions instructing the legislature to, amongst other things, pass a bill similar to the one that did not pass in the regular session. Tex. Gov. Proclamation Calling an Extraordinary Session to Commence on July 8th, 78th Leg. (Jul. 7, 2021), https://lrl.texas.gov/scanned/specialSessions/87-1proc.pdf; Tex. Gov. Proclamation Calling an Extraordinary Session to Commence on August 7th, 78th Leg. (Aug. 4, 2021), https://lrl.texas.gov/scanned/specialSessions/87-2proc.pdf. SB 1 eventually passed during the Second Called Special Session with the identical addition of section 64.012(c) that was included in Senate Bill 7.

that Section 64.012(c) is intended to clarify that the steps taken to merely "fill out" a provisional ballot are insufficient to meet the *mens rea* standard.

Critically, the Legislature determined that this provision should apply retroactively to all individuals who have not been finally convicted of an offense.[2] *See generally Vandyke v. State*, 538 S.W.3d 561, 579 (Tex. Crim. App. 2017). In fact, it is the only provision of SB 1 that the Legislature determined should be applied retroactively,[3] and, to counsel's knowledge, Ms. Mason is the only individual with a non-final conviction under Section 64.012 based on the submission of a provisional ballot.

Accordingly, Section 64.012(c) confirms that Ms. Mason's conviction should be reversed in favor of a judgment of acquittal. At the very least, given the reliance of the State on Ms. Mason's having filled out the provisional ballot affidavit, Ms. Mason's case should be remanded back to the trial court for a new trial.

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[2] Section 9.04 of SB 1 reads: "The change in law made by this article in adding Section 64.012(c), Election Code, applies to an offense committed **before**, on, or after the effective date of this Act, except that a final conviction for an offense under that section that exists on the effective date of this Act remains unaffected by this article." Section 9.04 of SB 1 (emphasis added). This provision clearly applies to Ms. Mason whose conviction is currently on appeal before this Court. *See Fletcher v. State*, 214 S.W.3d 5, 6 (Tex. Crim. App. 2007) citing *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986) ("The law is settled that a conviction from which an appeal has been taken is not considered to be a final conviction…").

[3] All other changes in law made by SB 1 "apply only to an offense committed on or after the effective date of this Act." Section 10.03(a) of SB 1, 87th Leg., 2nd C.S. (2021).

Finally, it is worth noting that prospectively, SB 1 reduces the applicable punishment for a violation of Section 64.012(a)(1) from a second-degree felony to a Class A misdemeanor. Section 9.03(b) of SB 1, 87th Leg., 2nd C.S. (2021). Although this provision is not explicitly retroactive to Ms. Mason, this change underscores the injustice in Ms. Mason's conviction and five-year sentence especially considering the underlying facts as previously presented to this Court.

## II. The Bipartisan House Resolution 123 Supports Ms. Mason's Argument That Section 64.012(a)(1) Requires Actual Knowledge of Ineligibility.

On August 31, 2021, the Texas House of Representatives passed a House Resolution affirming Ms. Mason's interpretation that Section 64.012(a)(1) of the Texas Election Code requires people to actually know they are ineligible to vote to be convicted of Illegal Voting, and therefore rejecting the court of appeals' view that the "[t]he fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution." Op.770.

HR 123 establishes the will of the Texas House of Representatives that "[c]ases of genuine mistake, where the person votes or attempts to vote under the honest belief that the person is eligible to vote, should not establish the required element of knowledge of one's own eligibility." Tex. H.R. Res. 123, 87th Leg. 2nd

C.S. (Burrows Resolution).[4] Accordingly, "no Texan should be prosecuted for the offense of illegal voting if the person voted or attempted to vote based on a mistaken, honest belief that the person was in fact eligible to vote." *Id.*

The Resolution passed with overwhelming bipartisan support, with a record vote of 119 yeas, 4 nays, and 1 present, not voting. H.J. of Tex., 87th Leg., 2nd C.S. 322 (2021).[5]

The Legislative Record on HR 123 makes clear that it was intended to express the House's view that the court of appeals' interpretation of Section 64.012(a)(1)'s *mens rea* requirement was incorrect. Representative Burrows, the Republican sponsor of the bill, stated that House Resolution was intended to address the "problem . . . that some, in very few cases, interpreted this differently and basically made this a strict liability standard where people who did not know they were ineligible are prosecuted, convicted, and put in jail for up to five years." *Id.* at 320-21.

Representative Turner then asked Representative Burrows about the case before this Court, and the following colloquy occurred:

> J. TURNER: You heard my reference a few moments ago to the case of Crystal Mason. And would you agree with me, Representative, that five years in prison is a serious deprivation of a person's liberty?

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[4] *Available at* https://capitol.texas.gov/tlodocs/872/billtext/pdf/HR00123F.pdf#navpanes=0.
[5] *Available at* https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY06FINAL.PDF#page=8.

> BURROWS: I could not imagine.
>
> J. TURNER: And it seems to have been acknowledged that she did not realize that she was ineligible to vote. But her conviction has currently been upheld, although it's still on appeal, because that statute has been interpreted to say that all that was necessary was for her to know that she was on supervised release even though she didn't realize that fact made her ineligible. Have I summarized that matter correctly to your knowledge?
>
> BURROWS: My understanding is the same as yours. And as you said earlier, I would not have known that being on supervised release would have made you ineligible. That is a high bar to impute on somebody to put them away for five years.
>
> J. TURNER: I know her case is now on appeal. And of course, we have separate branches of government and it's not our role here in the legislature to tell any other branch of government what to do or how to rule in a case. But it seems to me that it is appropriate, given the fact that we adopted and then accepted the removal of the Cain amendment, to explain ourselves to some degree and express the sense of the house about the issue it dealt with. Do you agree that that's appropriate here?
>
> BURROWS: I think it is, and I think that we are reiterating and restating what is the current law. Obviously, the courts are about to decide what it is, but my interpretation of current law is you have to have a mens rea element. As we said, this is not a strict liability-type of issue. So I believe this resolution actually conforms with what the current law is today…which is why this body has adopted it several times.

*Id.* at 321-322.

Accordingly, it is abundantly clear, that HR 123 represents the view of an entire body of the Texas Legislature[6] that the court of appeals' determination that

[6] A provision codifying this sentiment into law was passed by the House but not accepted by the Senate. Regardless of any potential disagreement some Senators

individuals can be prosecuted under Section 64.012(a)(1) even when they do not actually know they are ineligible to vote is incorrect. Although this Resolution is not binding on this Court, it is persuasive authority that further supports the arguments Ms. Mason has already made for reversal of the opinion below. It also provides context for the retroactive change to Section 64.012 that is binding on Ms. Mason's case as discussed in the previous section.

## PRAYER

Ms. Mason prays that the Court reverse the decision of the court of appeals, reverse her conviction, and order a judgment of acquittal.

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may have had with the House's view, the fact that a nearly unanimous House agreed with Ms. Mason's interpretation of the *mens rea* requirement for 64.012(a)(1) demonstrates, at the very least, that there is ambiguity regarding the *mens rea* standard. Such ambiguity must be resolved in favor of Ms. Mason pursuant to the Rule of Lenity. *See Delay v. State*, 465 S.W.3d 232, 251 (applying Rule of Lenity to culpable mental state arising outside of the penal code); Appellant's Brief on the Merits at 46.

Respectfully submitted,

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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 Supplemental Brief, exclusive of matters designated for omission, is 2360 words as counted by Microsoft Word Software.

*/s/ Thomas Buser-Clancy*
Thomas Buser-Clancy

## CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Supplemental Brief has been served on counsel of record and the State Prosecuting Attorney via e-service on December 3, 2021.

*/s/ Thomas Buser-Clancy*
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