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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**admission *pro hac vice* pending

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Introduction

Crystal Mason did not vote in in the November 2016 election; she submitted a provisional ballot that was not counted. In submitting that provisional ballot, Ms. Mason sought only to perform her civic duty as a citizen. She had no ties to any campaign or candidate and had nothing personal or pecuniary to gain from casting her ballot. She did, however, have everything to lose from being charged with the felony of "illegal voting." A mother of three and caretaker for her brother's four children, Ms. Mason was turning her life around by working and going to night school to become a licensed aesthetician. So it is easy to understand her testimony that she never would have submitted her provisional ballot had she known she was ineligible to vote—which is the *mens rea* standard required to be demonstrated beyond a reasonable doubt—and the State has offered no explanation or even a hypothesis as to why she would have done so.

In fact, the State's Response does not adequately contest any of the key deficiencies that require the reversal of Ms. Mason's conviction. The State's evidence is legally insufficient to support the three essential elements of the conviction for illegal voting: (1) the State's evidence is insufficient to prove that Ms. Mason *voted*, because an uncounted provisional ballot is not a "vote" under the Texas Election Code; (2) the State's evidence is also insufficient to prove that Ms. Mason was *ineligible* to vote because the conditions of her release from

federal prison do not amount to "supervision" as that term is used in Texas law; and (3) the State also failed to prove beyond a reasonable doubt that Ms. Mason *knew* she was ineligible to vote, because it relied on scant, speculative evidence in support of its circumstantial theory.

Ms. Mason's conviction should be overturned for other reasons as well. The State's interpretation of the term "supervision" is both incorrect under state law and unconstitutionally vague; as a result, it must be rejected. Furthermore, the trial court's ruling that Ms. Mason's actions amount to illegal voting conflicts with provisions of the Help America Vote Act (HAVA). Finally, the State fails to sufficiently refute that Ms. Mason's trial counsel provided inadequate assistance of counsel. None of these arguments have been waived, and each singularly requires the reversal of Ms. Mason's conviction.

Ms. Mason's conviction cannot be sustained in light of these errors.

Points of Error 1 and 2

I. The evidence is neither legally nor factually sufficient to sustain a conviction.

A. The evidence is legally insufficient to demonstrate that Ms. Mason voted.

The State does not dispute that Ms. Mason submitted only a *provisional* ballot, and that this provisional ballot was *not counted*. RR 2: 31-32, 38; RR 3: S-X 6 (Notice Documents). That is legally insufficient to support the element of

voting. As set forth in Appellant's Opening Brief, an uncounted provisional ballot does not constitute a "vote" as that term is used in the Texas Election Code. AOB 8-9.

Nevertheless, the State argues that submitting a provisional ballot that is not counted constitutes a vote—not based on any legal analysis, but instead simply because certain local election workers used the word "vote" in describing Ms. Mason's actions. SB 22-24. However, the opinion of fact witnesses about whether an uncounted provisional ballot constitutes a "vote" under the Texas Election Code is irrelevant. *Tha Dang Nguyen v. State*, 359 S.W.3d 636, 641 (Tex. Crim. App. 2012) ("Statutory interpretation is a question of law that we review de novo."); *City of Dallas v. Furrh*, 541 S.W.2d 271, 274 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.) ("A witness's opinion on an ultimate legal question is of no probative value."). At best, these witnesses provide cumulative evidence of the uncontested fact that Ms. Mason submitted a provisional ballot.

Lacking any relevant authority for the proposition that an uncounted provisional ballot constitutes a vote under the Texas Election Code, the State relies on a dictionary definition of vote as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." SB 24. The State argues that, under this definition, Ms. Mason "voted" within the meaning of Texas law because she expressed her preference on

a ballot. SB 22-24. But the State's cherry-picked definition still fails to answer the key question—whether a conditional expression of preference on a provisional ballot that is not officially recognized or tallied actually constitutes a "vote." Moreover, the State's interpretation would lead to the absurd result that a "vote" only needs to be marked on a ballot and that ballot need not even be cast or tallied. Such an unsupported interpretation would undermine the very significance of the act of voting.[1]

The State's interpretation should be rejected for two additional reasons:

First, the State's argument that an uncounted ballot constitutes a vote is fundamentally inconsistent with the remainder of the Texas Election Code. *Ex parte Keller*, 173 S.W.3d 492, 498 (Tex. Crim. App. 2005) ("Under the normal rules of statutory construction, there is a presumption of statutory consistency. That is, a word or phrase that is used within a single statute generally bears the same meaning throughout that statute . . . ."); *see also Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002) ("[C]ourts should not give an undefined statutory term a meaning out of harmony or inconsistent with other

[1] The State also argues that the Election Code does not contain a defense to prosecution for ballots that are not counted. SB 24. But this confuses the elements of the offense with defenses. Because voting is an element of the offense, the State bore the burden of showing that Ms. Mason voted. The Election Code need not contain a defense to prosecution because it already requires the State to show that defendants did in fact vote. *Alford v. State*, 806 S.W.2d 581, 585 (Tex. App.—Dallas 1991), *aff'd*, 866 S.W.2d 619 (Tex. Crim. App. 1993) (distinguishing elements of the offense from affirmative defenses).

provisions . . . . In ascertaining a term's meaning, courts look primarily to how that term is used throughout the statute as a whole.") (citations omitted).

Under the Texas Election Code, simply filling out a ballot—whether provisional or otherwise—does not, without more, constitute a vote. Various sections of the Election Code make clear that a ballot must be tallied to constitute a "vote." For instance, Section 2.001 of the Texas Election Code provides that "[e]xcept as otherwise provided by law, to be elected to a public office, a candidate must receive *more votes* than any other candidate for the office." TEX. ELEC. CODE § 2.001 (emphasis added); *id.* § 2.002(a) ("[I]n an election requiring a plurality vote, if two or more candidates for the same office tie for the number of votes required to be elected, a second election to fill the office shall be held."). Of course, uncounted ballots are by definition not tallied to determine who wins an election; therefore, only *counted* ballots are considered "votes" with respect to Section 2.001 of the Texas Election Code. Further, Texas law expressly categorizes provisional ballots that are not accepted as "Ballots Not Counted," as opposed to "votes." TEX. ELEC. CODE § 65.010; *see also* TEX. ELEC. CODE § 65.059 (with respect to "a person who casts a provisional ballot" requiring a system to "allow the person to determine whether the person's ballot was counted, and, if the person's *ballot was not accepted* . . . the reason why) (emphasis added);

RR 3: S-X 6 (notice to Ms. Mason that her "*ballot* . . . was rejected by the ballot board and was not counted.") (emphasis added).

Second, principles of statutory construction and constitutional avoidance also require the Court to reject the State's interpretation of the term "vote," as it would unconstitutionally conflict with federal law. As explained in Appellant's Opening Brief, interpreting Texas's illegal voting statute to equate an uncounted provisional ballot to a "vote" subject to criminal penalty, creates the risk of extreme criminal consequences for individuals who follow HAVA's procedures, but are ultimately incorrect about their eligibility. AOB 17-23. Such an overbroad definition of "vote" interferes with Congress's intent to ensure that individuals who *believe* they are eligible to vote are given a provisional ballot and not turned away from the polls—*even if their belief is ultimately incorrect* and their ballots are not counted. *Id*.; *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 572-73 (6th Cir. 2004) (holding that there is a private right of action to enforce the right to cast a provisional ballot under HAVA).

Such a reading of Texas's illegal voting statute would thus conflict with federal law and, under the Elections Clause of the U.S. Constitution, be pre-empted by HAVA. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013) ("[T]he power the Elections Clause confers is none other than the power to pre-empt . . . ."); *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 504 (Tex. 2008)

("[W]hen a state law conflicts with federal law, it is preempted and has no effect.") (citing *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) and *Mils v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005)).

Thus, to avoid a constitutional conflict, the Court should find that casting an uncounted provisional ballot as Ms. Mason did was not "voting." As the Supreme Court noted in *Nat'l Fed. of Ind. Business v. Sebelius*, "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." 567 U.S. 519, 562 (2012). *See generally* AOB 19–22.

Finally, the rule of lenity requires that any ambiguity with regard to the term "vote" must be resolved in favor of Ms. Mason. Even if this Court determines that it is ambiguous whether casting a provisional ballot that is not counted constitutes a "vote" under the Texas Election Code, because the term appears outside of the Penal Code, such an ambiguity must be resolved in favor of Ms. Mason. *See Delay v. State*, 465 S.W.3d 232, 251 (Tex. Crim. App. 2014) (analyzing terms found in Texas Election Code and holding that "in construing penal provisions that appear outside the Penal Code, we have recognized that the rule of lenity applies, requiring that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009) ("[C]riminal statutes outside the penal code must be construed strictly, with

any doubt resolved in favor of the accused.") (citation omitted). Resolving any ambiguity in favor of Ms. Mason means that uncounted provisional ballots do not constitute a "vote," and, therefore, Ms. Mason's conviction cannot be sustained.

B. The evidence is legally insufficient to demonstrate that Ms. Mason was ineligible to vote.

The State has also failed to demonstrate another critical element of the offense—that Ms. Mason was in fact ineligible to vote on the basis of her specific post-release conditions. The State simply argues that because Ms. Mason had some conditions imposed upon release from federal custody, she was still on "supervision" as defined under the Texas Election Code, which would thereby make her unqualified to vote. Importantly, however, the term "supervision" is not defined under Texas law and must be construed narrowly for purposes of criminal liability. AOB 5-6. Properly construed, Ms. Mason's post-release conditions do not constitute "supervision," and therefore, Ms. Mason was not ineligible to vote.

Texas criminal law uses the term "supervision" primarily in determining whether to forgo a period of incarceration of a person and instead place them on a period of "community supervision." *See, e.g.*, TEX. CODE CRIM. PROC. art. 42A.551 (permitting a judge to "suspend the imposition of the sentence and place the defendant on community supervision"). As set forth in Appellant's Opening Brief, supervision is therefore to be understood as the equivalent of a form of probation. AOB 6-7 (citing *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.")). Here, in contrast, Ms. Mason's "federal supervised release" imposed some conditions only *after the completion of her term of incarceration*. AOB 6-7 (citing *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.'")). Because federal supervised release is not akin to probation, it does not amount to "supervision" under Texas law.

The State is therefore wrong to suggest that individuals subject to federal supervised release are "similarly situated" to those on "supervision" under Texas law. SB 20-21. The mere fact that the two terms use somewhat similar language does not provide a basis for criminal liability. In the correct context, the meaning of each is entirely different. Individuals under federal supervised release have completed the entire term of their incarceration; individuals under "supervision" have had a term of community supervision imposed *instead of* incarceration. Accordingly, Ms. Mason was not subject to "supervision" as that term is understood in Texas law.

In response, the State argues without any support that there is "no reason to believe that the Legislature intended the term 'supervision' . . . not to apply to persons under some form of supervision for a conviction . . . in federal court." SB

20. Ms. Mason's criminal conviction, however, cannot rest on what prosecutorial authorities "believe," but rather must be based on principles of statutory construction. Ultimately, the State provides no support for the proposition that the term "supervision" as used in the Election Code should be interpreted more broadly than the most equivalent term found in the Texas Penal Code.

Indeed, as discussed, given the ambiguity at issue with respect to a term that originates outside of the Penal Code, this Court must apply the rule of lenity, and resolve any ambiguity in favor of Ms. Mason. *Delay*, 465 S.W.3d at 251. And, contrary to the State's argument, the only "absurd result" would be the subjection of individuals to prosecution for illegal voting based on post-release conditions that do not clearly amount to "supervision" as that term is defined by statute.

Recognizing the lack of legal support for its interpretation of the term "supervision," the State relies on testimony from Ms. Mason, a lay person without any legal training, that if she had read the provisional ballot affidavit, she would not have voted. SB 19-20. However, that evidence is simply irrelevant: what Ms. Mason believes she would have done in this hypothetical situation or even how she interprets this provision has no bearing on whether she was ineligible to vote as a

matter of law. *Tha Dang Nguyen*, 359 S.W.3d at 641. Accordingly, the State failed to demonstrate that Ms. Mason was ineligible to vote.[2]

C. The evidence is legally insufficient to demonstrate that Ms. Mason knew she was ineligible to vote.

Even if, *arguendo*, this Court determines that Ms. Mason did "vote," and that federal supervised release is the same as "supervision," as set forth in the Appellant's Opening Brief, the evidence is still legally and factually insufficient to establish beyond a reasonable doubt the *mens rea* requirement of voting illegally—that Ms. Mason *knew* she was ineligible to vote when she cast her provisional ballot. AOB 10-14. The offense of illegal voting requires specifically that "the person *knows* the person is not eligible to vote." TEX. ELEC. CODE § 64.012(a)(1) (emphasis added). Accordingly, Texas law requires, and the State does not contest, that the State must prove beyond a reasonable doubt that Ms. Mason actually realized that the conditions of her post-release supervision rendered her

[2] Unable to overcome the fact that federal supervised release does not constitute "supervision" as a matter of Texas law, the State instead quibbles with Ms. Mason's description of the terms of her federal supervised release. SB 21. But the specific terms of Ms. Mason's federal supervised release are not relevant to whether, as a matter of law, federal supervised release constitutes supervision under the Texas Election Code. Even if they were, the State points to no evidence to demonstrate what those terms were at the time Ms. Mason attempted to cast her provisional ballot. The State relies on the testimony of Kenneth Mays, who supervised one of the officers who was in charge of Ms. Mason's federal supervised release. With respect to the relevant date, November 8, 2016, Mr. Mays testifies only that Ms. Mason was still on federal supervised release, but he does not elaborate on what that meant at that point, RR 2: 20-21. Otherwise, Mr. Mays's testimony is not specific to the time period at which Ms. Mason voted. RR 2: 15, 20. Thus, to the extent the precise terms of Ms. Mason's federal supervised release bear on whether she was under "supervision," the evidence is legally insufficient because the record is devoid of evidence as to what those terms were at the time Ms. Mason cast her ballot.

ineligible to vote, and nevertheless still voted illegally. The State has failed to meet this burden.

As an initial matter, the State has offered no motive or explanation as to why Ms. Mason would have decided to vote if she knew that doing so would risk upending her life and the lives of her children. AOB 12-13. "[A]lthough a prosecutor ordinarily need not prove motive as an element of a crime, the absence of an apparent motive may make proof of the essential elements of a crime less persuasive." *Acevedo v. State*, 255 S.W.3d 162, 170 (Tex. App.—San Antonio 2008, pet. ref'd). There is no evidence as to why Ms. Mason would knowingly risk everything—her livelihood, her home, and her family—to vote in an election in which she had zero personal interest. As Ms. Mason testified, "Why 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." RR 2 126: 4-8.

Wholly ignoring the absence of a motive, the State's theory is that Ms. Mason must have known that she was ineligible to vote because she supposedly read and understood the provisional ballot affidavit, and nevertheless risked everything to cast that single provisional ballot. SB 22-24. The State relies on two

witnesses—neither of whom could establish that Ms. Mason did in fact read the portion of the provisional ballot setting forth the requirements for voting.

The State admits that its key witness, Election Judge Dietrich, "could not say with certainty that Appellant actually read [the provisional ballot affidavit]." SB 25; *see also* RR 2 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.").

The only other State witness on this point, Jarrod Streibich, testified about what he thought he saw when he glanced at Ms. Mason from several feet away while he was busy performing other work. SB 26; RR 2 102: 7-23. But there is a crucial difference in testimony in terms of which side of the ballot Ms. Mason actually read. Ms. Mason testified that she read the right-hand side of the ballot in order to fill out the driver's license information. RR 2 123:14-19 (Ms. Mason testifying that she was making sure everything she filled out matched her driver's license). That side does not contain the affidavit language on which the State relies. RR 2 122:13-22. A glance from five feet away is not sufficient evidence to prove beyond a reasonable doubt that Ms. Mason read the left-hand side of the ballot, which even Election Judge Dietrich, who testified that he was directly interacting with her, could not be certain of. RR 2 102:7-23.

The State argues that it is entitled to rely on circumstantial evidence to demonstrate Ms. Mason's mental state. SB 25. No one disputes that. But even

resolving all of the evidence in favor of sustaining the verdict, the evidence is still legally insufficient to show that Ms. Mason knew she was ineligible to vote. The State cannot pile uncertain testimony upon inferences, and then claim to have met their burden of proving an element of a crime beyond a reasonable doubt. AOB 12; *Stobaugh v. State*, 421 S.W.3d 787, 867 (Tex. App.—Fort Worth 2014, no pet.) ("[T]he jury could draw a conclusion . . . that [defendant] possessed the *mens rea* necessary for the offense of murder only through theorizing or guessing as to the meaning of these facts, which is speculation, and a conclusion reached by speculation will not support a finding beyond a reasonable doubt."); *Hacker v. State*, 389 S.W.3d 860, 873–74 (Tex. Crim. App. 2013) (rejecting sufficiency of evidence where it was merely "suspicion linked to other suspicion").

In a last-ditch effort to sustain Ms. Mason's conviction, the State asserts that ignorance of the law is not a defense to prosecution. SB 27. But the plain terms of the statute require the State to prove *as an element of the offense* that Ms. Mason voted when she *knew* she was ineligible. *Bryant v. State*, 643 S.W.2d 241, 243 (Tex. App.—Fort Worth 1982, no pet.) ("Under the penal code, the culpable mental state is expressly made, not a defense, but an element of the offense."); *Alford*, 806 S.W.2d at 585; *see also Rehaif v. United States*, 588 U. S. ____ (2019), No. 17-9560, 2019 WL 2552487, at *4 (U.S. June 21, 2019) ("[B]y specifying that a defendant may be convicted only if he "knowingly violates" §922(g), Congress

intended to require the Government to establish that the defendant knew he violated the material elements of §922(g).").

Indeed, in interpreting a similar *mens rea* requirement of the Election Code, the Texas Court of Criminal Appeals has made clear that subjective knowledge of a violation of the Election Code is a required part of the elements. In analyzing Section 253.003(a) of the Election Code that likewise includes a "knowing" *mens rea* element, the Texas Court of Criminal Appeals held that:

> [T]he State must also show that the actor was actually aware of the existence of the particular circumstance surrounding that conduct that renders it unlawful. Moreover, as written, Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, *but also of the fact that undertaking the conduct under those circumstances in fact constitutes a "violation of" the Election Code*.

Delay, 465 S.W.3d at 250 (emphasis added). The court proceeded to analyze the conduct at issue and held that the conduct could not be criminalized because "nothing in the record shows that anyone associated with the contributing corporations *actually realized* that to make a political contribution under these circumstances *would in fact* violate Section 253.003(a) (or any other provision) of the Texas Election Code." *Id.* at 252 (emphasis added).[3] The same construction of

[3] Texas courts have also required subjective awareness of wrongdoing when interpreting other statutes with similar *mens rea* requirements. For example, Texas's Abuse of Official Capacity statute makes it illegal for a public servant to intentionally or knowingly "(1) violate[] a law relating to the public servant's office or employment." TEX. PENAL CODE § 39.02(a)(1). Texas

the *mens rea* element applies here; therefore, the State bore the burden of showing that Ms. Mason *actually realized* that she was in fact ineligible to vote. *See also Rehaif*, 2019 WL 2552487, at *4 (U.S. June 21, 2019) (in a prosecution for possession of a firearm in violation of federal law, principles of statutory interpretation and general scienter requirements require that the government must prove both that the defendant knew he possessed a firearm *and that he knew he belonged to the relevant category of persons barred from possessing a firearm*); *Liparota v. United States*, 471 U.S. 419, 425 (1985) (holding that statute subjecting to fine and imprisonment "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" required government to show that defendant knew conduct was unauthorized by statute or regulations).

Finally, as discussed above, the State has failed to demonstrate that Ms. Mason was ineligible to vote, and, at worst, there is legal ambiguity about her eligibility. The State does not contest that given the legal ambiguity concerning Ms. Mason's own ineligibility to vote, it is impossible that Ms. Mason could have subjectively been aware that she was ineligible to vote. AOB at 10.

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courts have interpreted this language to require subjective knowledge that the defendant's act violated the law. *State v. Edmond*, 933 S.W.2d 120, 127 (Tex. Crim. App. 1996) ("In order to commit an offense under § 39.02(a)(1), a defendant must 'know' that his conduct which constitutes 'mistreatment' is unlawful."); *see also Prevo v. State*, 778 S.W.2d 520, 525 (Tex. App.—Corpus Christi 1989, pet. ref'd).

Accordingly, the evidence is legally insufficient to demonstrate that Ms. Mason subjectively knew she was ineligible to vote when she cast her provisional ballot.

Point of Error 3

II. The statute is unconstitutionally vague as applied to Ms. Mason.

Appellant's third point of error established that the illegal voting statute was unconstitutionally vague as applied to Ms. Mason. The test for an unconstitutionally vague law is whether it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). As set forth in Appellant's Opening Brief, application of the undefined term "supervision" to criminalize Ms. Mason's innocent conduct violates this precept. AOB 14-17.

The State does not assert that a person of average intelligence could ascertain whether their particular situation rose to a level of "supervision" that would render that person ineligible to vote. Thus, the law is unconstitutionally vague as applied to Ms. Mason. Instead, the State argues only that Ms. Mason waived this argument because it appeared only in her Amended Motion for a New Trial, which was untimely, and did not appear in her original Motion for New Trial. SB 29-30.

The State is wrong. In fact, Ms. Mason raised the ambiguity of the statute in her original Motion for New Trial, describing the law as "ambiguous and unsettled on the issue of Crystal Mason's ineligibility to vote." CR 45. That Motion laid out how the realities of Ms. Mason's release situation did not clearly constitute supervision under the Texas Election Code and the Texas Penal Code, and requested that the Court grant Ms. Mason a new trial. *Id.* It is for this reason that the State's interpretation of supervision is unconstitutionally vague. AOB 14-17. Accordingly, the State is incorrect that Ms. Mason has failed to preserve this issue for appeal. *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) ("[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it."); *Garcia v. State*, 02-17-00081-CR, 2018 WL 1095692, at *1 (Tex. App.—Fort Worth Mar. 1, 2018, no pet.) (not designated for publication) ("'Error preservation does not involve a hyper-technical or formalistic use of words or phrases; instead, "[s]traight forward communication in plain English" is sufficient.'") (citing *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009)).

Regardless, this Court should not adopt an unconstitutional interpretation of the statute. The parties have set forth two plausible interpretations of the term

"supervision." Ms. Mason's interpretation corresponds to its close analogue in the Texas Penal Code, the narrow term "community supervision"—and it draws a bright line that excludes her situation. The State's interpretation, by contrast, is undefined and unbound to any other term in either the Texas Election Code or the Texas Penal Code, and the State does not contest that such an interpretation is unconstitutionally vague. In the criminal context, this Court must adopt the narrow, constitutional interpretation of "supervision." "If a constitutional interpretation is possible, then we interpret the statute in the way that upholds its constitutional validity." *Toledo v. State*, 519 S.W.3d 273, 279 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Alobaidi v. State*, 433 S.W.2d 440, 442 (Tex. Crim. App. 1968) ("A statute susceptible of more than one construction will be so interpreted . . . so that it will be constitutional."). Accordingly, even if this Court determines that Ms. Mason waived the issue of whether the illegal voting statute was unconstitutionally vague as applied to her, it should still adopt the constitutional interpretation of the statute and find that the evidence was legally insufficient to show Ms. Mason was under "supervision."

Point of Error 4

III. The Federal Help America Vote Act preempts the State's interpretation of the Election Code.

Appellant's Opening Brief established that construing the Election Code to criminalize casting a provisional ballot by individuals, such as Ms. Mason, who

believe they are eligible to vote would conflict with HAVA, enacted pursuant Congress's powers under the Elections Clause, and thus be preempted. AOB 17-23. In its Opposition Brief, the State argues mainly that this Court should reject Ms. Mason's preemption claims because they have not been properly preserved. SB 32.

However, Ms. Mason is not barred from raising her preemption claims for the first time on appeal, because these claims implicate the authority of the trial court itself. Under Texas criminal law, there are certain "absolute requirements and prohibitions" with respect to criminal trials that cannot be waived or forfeited and can therefore be raised at any time. *Marin v. State*, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993). The argument that Ms. Mason's conviction conflicts with and is preempted by federal law falls into the category of arguments that cannot be waived or forfeited. *Gutierrez v. State*, 380 S.W.3d 167, 176-77 (Tex. Crim. App. 2012) (holding that defendant did not waive preemption argument and could bring argument for the first time on appeal because trial court "clearly lacked the authority to order the appellant to leave the country in derogation of the federal preemption over matters involving deportation"); *see also Donovan v. State*, 508 S.W.3d 351, 357 (Tex. App.—Fort Worth 2014), *aff'd*, PD-0474-14, 2015 WL 4040599 (Tex. Crim. App. July 1, 2015) (distinguishing facts before it from *Gutierrez* because "the conditions that the trial court imposed in this case do not

rise to the level of being an 'intolerable' invasion of federal prerogative in violation of the Supremacy Clause as was the case in *Gutierrez*").

As in *Gutierrez*, the trial court here also lacked the authority to find Ms. Mason guilty of illegal voting, because doing so impermissibly conflicts with rights granted by federal law under HAVA, the process outlined by HAVA that states must follow, and Congress's "full purposes and objectives" in passing HAVA. 52 U.S.C. § 21082(a); *Gutierrez*, 380 S.W.3d at 174; *Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 14; *BIC Pen Corp.*, 251 S.W.3d at 504. Accordingly, Appellant's HAVA argument cannot be waived or forfeited, and can be raised at any time.

The State confines its substantive discussion of Ms. Mason's preemption claims to a single footnote. SB 34 n.8. There, the State responds generally to Ms. Mason's preemption claims by arguing that HAVA does not "exempt from criminal responsibility persons such as Appellant who affirm their eligibility to vote *when they know* they are not eligible due to a felony conviction and continuing supervision." *Id*. (emphasis added).

But "the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, *pending determination of that eligibility*." *Sandusky Cty. Democratic Party*, 387 F.3d at 576 (emphasis added); *see* AOB 17-23. HAVA is designed to permit people who are *unsure* of

their eligibility to cast a ballot that will be counted only if that person is later determined, in fact, to be eligible. And here, Ms. Mason believed she was eligible to vote. *See supra* Section I(C). HAVA was designed precisely to permit people in situations like hers to cast a ballot, and under these circumstances, the only repercussions Ms. Mason should have faced were (1) being found ineligible to vote under state law, and (2) having her vote not count. *Sandusky Cty. Democratic Party*, 387 F.3d at 576; AOB 21. Instead, the State interpreted the illegal voting statute as permitting it to prosecute her for actions authorized under HAVA, an interpretation that, if correct, is preempted. AOB 17-23; Section I(A), *supra*.

Point of Error 5

IV. Ms. Mason received ineffective assistance of counsel.

A. Ms. Mason's ineffective assistance claims have not been waived.

On this appeal, Ms. Mason raised several claims of ineffective assistance of counsel that were not raised in her original motion for a new trial. The State does not dispute the merits of these claims—effectively conceding that Ms. Mason's trial counsel was ineffective—and argues only that those claims are untimely and thus cannot form the basis for appellate review. The State is wrong. While Texas Rule of Appellate Procedure 33.1(a) generally requires that a complaint be presented to the trial court "by a timely request, objection, or motion" as a prerequisite to presenting the complaint for appellate review, this is not the case for

claims of ineffective assistance of counsel, which are exempt from the general rule of procedural default. *Robinson v. State*, 16 S.W.3d 808, 810-13 (Tex. Crim. App. 2000); *see also Cavitt v. State*, 507 S.W.3d 235, 254 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) ("It is well settled that ineffective assistance of counsel may be raised without the necessity of a motion for new trial."). This is especially true where, as here, the defendant did not have a meaningful or realistic opportunity to raise these claims in her original motion for a new trial. *See Robinson*, 16 S.W.3d at 810.

Here, Ms. Mason did not learn of trial counsel's actual conflict of interest and his basis for not seeking recusal of the trial judge until the motion for new trial hearing. AOB 26, 28-29. Thus, there was simply no meaningful opportunity for her current counsel to raise these issues in a timely motion for a new trial. In addition, Ms. Mason was convicted and sentenced on March 28, 2018, and her current counsel was not retained until April 19, 2018. Thus, the time requirements for filing and presenting a motion for new trial and amended motion for new trial, along with the fact that the transcribed record was not complete until May 21, 2018—24 days *after* the deadline to file an amended motion for a new trial—made it impossible for Ms. Mason's current counsel to timely and adequately present all ineffective assistance of counsel claims to the trial court. *See Robinson*, 16 S.W.3d at 811; *see also Randle v. State*, 847 S.W.2d 576, 580 (Tex. Crim. App. 1993)

("Many times it is in the review of the record by the appellate attorney that errors of an ineffective assistance of counsel nature are discovered.").

As such, all of the claims raised by Ms. Mason as to the ineffective assistance of her prior counsel must be considered by this Court.

B. The State has no answer to the ineffectiveness arguments that Ms. Mason raises on appeal.

The State does not contest the merits of any of the three claims of ineffectiveness of counsel that were raised for the first time on appeal—which each require the reversal of her conviction. First, the State does not respond to Ms. Mason's argument that her trial counsel provided ineffective assistance by failing to file a motion to quash the indictment. As set forth in Appellant's Opening Brief, Ms. Mason's indictment misstated the statutory language regarding when a person is ineligible to vote following a felony conviction. AOB 24-25. The Texas Election Code indicates that a person is ineligible to vote if they have not "fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of *probation ordered by any court*." TEX. ELEC. CODE § 11.02(a)(4)(A) (emphasis added). Accordingly, the modifier "ordered by any court" applies only to a period of probation and not to the entire statute. However, the indictment in this case alleged that "Defendant had not been fully discharged from her sentence for the felony including *any court ordered* term of parole, supervision, and probation." By moving the statutory language referring

to "any court" to modify the entire statute, the State erroneously broadened the statute. It is objectively unreasonable not to check to make sure the indictment correctly states the law. This misstatement prejudiced Ms. Mason because, as described above, a crucial issue in this case is whether certain conditions of release ordered by a federal court constitute "supervision" as defined under Texas law. The State's decision to include the language "ordered by any court" as a modifier to supervision (and counsel's failure to object to that erroneous revision) prejudiced Ms. Mason's ability to argue that her conditions of release did not meet the statutory definition.

Second, the State fails to contest that Ms. Mason's trial counsel rendered ineffective assistance in failing to request a directed verdict based on the legal insufficiency of the evidence. As established above, at trial the State proved only that Ms. Mason had cast a provisional ballot that was not counted. Accordingly, the State failed to prove that Ms. Mason voted—which was the sole charge against her. Ms. Mason's trial counsel's sole focus on the element of intent was objectively unreasonable and clearly prejudicial where the State failed to prove the other elements of the charged crime.

Third, the State fails to contest that trial counsel had an irreconcilable conflict of interest with respect to Ms. Mason's representation. To prevail on an ineffective assistance claim based on a conflict of interest, Ms. Mason must show

that her "trial counsel had an actual conflict of interest, and that the conflict actually colored counsel's actions during trial." *Acosta v. State*, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). Here, Ms. Mason's trial counsel was also her lawyer in her prior federal conviction, and he had an interest in defending the adequacy of his representation of Ms. Mason in that prior case—including the adequacy of his advice as to the collateral consequences of her prior conviction—which conflicted with his ability to zealously represent Ms. Mason in this case.

According to his testimony, trial counsel believed that, while serving as Ms. Mason's attorney for her prior conviction, he had properly advised her that her felony conviction would affect her ability to vote.[4] Trial counsel's knowledge of his actions directly conflicts with Ms. Mason's defense, which hinges on her testimony that, in fact, she did not know that she was ineligible to vote. *See* AOB 28-30. Trial counsel therefore had an irreconcilable conflict between his interests in having adequately represented Ms. Mason in her federal trial by fully informing her of all of the consequences of a felony conviction, and adequately representing her in the case below by convincingly presenting a defense that Ms. Mason was unaware of the alleged consequences of her felony conviction. *Acosta*, 233 S.W.3d at 355 ("'[A]n "actual conflict of interest" exists if counsel is required to

[4] Ms. Mason disputes that her trial counsel told her this, and, regardless, there was no such evidence before the trial court that could have informed its legally insufficient determination that Ms. Mason knew she was ineligible to vote at the time she was subject to federal supervised release. *See also* Supp. RR 2 23:3-9 ("I didn't specifically tell her anything about voting rights during her supervised release period, no.").

make a choice between advancing his client's interest in a fair trial or advancing other interests (*perhaps counsel's own*) to the detriment of his client's interest.'") (emphasis added) (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997)).

Trial counsel's assertion that he informed Ms. Mason that she was ineligible to vote—and his interest in representing that he had adequately informed her of the consequences of her previous conviction—impermissibly colored his ability to provide effective representation to Ms. Mason in this case. Most obviously, he inexplicably failed to call critical fact witnesses who would have corroborated Ms. Mason's belief that she was in fact eligible to vote, and failed to challenge the biases of those who claimed that Ms. Mason knew that she was ineligible to vote. *See* AOB 26-27. Moreover, trial counsel also inexplicably failed to challenge whether Ms. Mason was in fact ineligible, *i.e.*, whether the conditions of Ms. Mason's federal release constitute "supervision." By failing to hold the government to its burden of proof on these points, trial counsel became a silent witness for the state—an untenable and hopelessly conflicted position for the attorney for the defendant, and one that, given the State's failure of proof on these points, was plainly prejudicial.

C. The failure to present evidence of Ms. Mason's lack of knowledge and intent and explore the bias of the State's key witness was objectively unreasonable and prejudicial.

The State incorrectly argues that trial counsel's failure to present the testimony of Ms. Mason's mother or niece and failure to explore the bias of Mr. Diedrich do not amount to ineffective assistance of counsel because such evidence would have been cumulative and was not prejudicial. In particular, the State ignores that Ms. Mason's credibility concerning whether she knew she was ineligible was the central issue in the defense advanced by trial counsel, as well as a viable defense that trial counsel failed to advance regarding whether Ms. Mason knew that being on supervised release constitutes "supervision." *See State v. Thomas*, 768 S.W.2d 335, 336-37 (Tex. App.—Houston [14th Dist.] 1989, no pet.) ("An attorney has a professional duty to present all available testimony and other evidence to support the defense of his client.").

Under such circumstances, neither the contemporaneous accounts of Ms. Mason's niece and mother regarding Ms. Mason's state of mind both before and after going to the polls nor any testing of Mr. Diedrich's bias or memory of the events, *see* AOB 26-27, was cumulative. Their testimony would have provided evidence that was otherwise completely absent, namely corroborating evidence of Ms. Mason's version of events, including what she knew or could have known; or in the case of Mr. Diedrich, evidence that his testimony may not have been reliable due to his bias. For instance, Ms. Mason's niece 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 52 (emphasis added). This testimony would have contradicted the State's illogical theory that Ms. Mason realized she was ineligible to vote at the polling place and, despite that knowledge and with no personal or pecuniary interest in the election, decided to cast a provisional ballot. Additionally, Ms. Mason's mother would have testified that she was the person who encouraged Ms. Mason to go vote and that she does not think Ms. Mason would have voted if she thought she was ineligible. CR 53. Given that the trial hinged largely on credibility determinations, the failure to call other witnesses who would have corroborated Ms. Mason's testimony is plainly ineffective assistance. *See In re I.R.*, 124 S.W.3d 294, 299-300 (Tex. App.—El Paso 2003, no pet.) (finding ineffective assistance of counsel when a key corroborating witness was not interviewed or called); *Thomas*, 768 S.W.2d at 336 (upholding trial court's finding of ineffective assistance of counsel where witnesses who would have corroborated defendant's testimony were not called as witnesses in case where credibility of defendant and his version of events was central issue). The failure to present this evidence given the he said/she said nature of the prosecution's case and the chosen defense was undoubtedly prejudicial.

Conclusion and Prayer

For the foregoing reasons and those expressed in her opening brief, Ms. Mason respectfully requests that this Court reverse the judgment of the trial court

and order a judgment of acquittal, or, in the alternative, reverse the conviction and remand to the trial court for a new trial.

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 Reply Brief, exclusive of the matters designated for omission, is 7,461 words as counted by Microsoft Word Software.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Reply Brief has been served on Appellee's counsel of record via e-service on this the 1st day of July, 2019.

/s/ Thomas Buser-Clancy
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