NO. PD-0300-24

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

CRYSTAL MASON,
Appellant,
V.

STATE OF TEXAS,
Appellee.

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

Trial Court Cause No. 1485710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

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ORAL ARGUMENT NOT GRANTED

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The court of appeals correctly applied the legal sufficiency standard of review and concluded that the scant and inconclusive evidence in this case is not sufficient to prove beyond a reasonable doubt that Ms. Mason knew she was ineligible to vote because she was on federal supervised release. Its decision should be affirmed.

The State offers testimony from two poll workers to show that Ms. Mason read the relevant left-side statements of the provisional ballot affidavit but their testimony is too uncertain and vague to do so. Regardless, such testimony does not show Ms. Mason actually realized she was ineligible from those statements, which do not even specify that they establish voter eligibility. The only other evidence the State offers is Ms. Mason's testimony about her current understanding of the left-side statements, after she was charged with illegal voting and sat through extensive trial discussion of them. But Ms. Mason's 2018 understanding cannot establish her 2016 *mens rea*.

That's it. That's all the evidence the State has to offer. It has no evidence that Ms. Mason knew she was ineligible prior to arriving at the polling place, no evidence of a motive to knowingly vote illegally, and no evidence of suspicious behavior. In fact, there is undisputed contrary evidence on each of those points. Crediting the State's arguments here would impose liability based on, at worst, negligence—which this Court expressly forbade—and would abdicate the important function of legal

sufficiency review to ensure the evidence can rationally support a conviction beyond a reasonable doubt.

STATEMENT OF THE CASE

On March 28, 2018, a trial judge convicted 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.*

On March 19, 2020, the Second Court of Appeals affirmed Ms. Mason's conviction. *Mason v. State*, 598 S.W.3d 755 (Tex. App—Fort Worth 2020) (*Mason I*).

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 remanding and holding that the Second Court of Appeals erred by "failing to require proof that the Appellant had actual knowledge that it was a crime for her to vote while on supervised release." *Mason v. State,* 663 S.W.3d 621, 624 (Tex. Crim. App. 2022) (*Mason II*).

On March 28, 2024, the Second Court of Appeals held that the evidence was legally insufficient to show that Ms. Mason knew she was ineligible to vote; it therefore overturned the trial court's judgment and rendered a judgment of acquittal,

Mason v. State, 687 S.W.3d 772, 785 (Tex. App. – Fort Worth 2024) (*Mason III*). On August 21, 2024, this Court granted the State's petition for discretionary review.

ISSUE PRESENTED

This Court granted review on the following issue:

Did the appellate court misapply the legal sufficiency standard of review by:

- crediting Appellant's self-serving testimony which the trial court reasonably could have disregarded;
- and/or resolving an ambiguity in Appellant's testimony in Appellant's favor
- and/or reweighing evidence in favor of the defense;
- and/or ignoring evidence that supported the verdict;
- and/or applying sufficiency analyses long rejected by this Court;
- and/or failing to view the evidence in the light most favorable to the verdict.

STATEMENT OF FACTS

Prior to Election Day 2016:

In 2011, Ms. Mason pled guilty to federal tax charges. *Mason II,* 663 S.W.3d at 624. She was sentenced to 5 years in federal prison. *Id*.

In 2013, while Ms. Mason was incarcerated in federal prison, the Tarrant County Elections Administration sent a notice to Ms. Mason's residential address that her registration status was being examined on the basis that she was convicted of a felony. Reporter's Record Volume 3 ("RR3") at 38 (Ex. 6). It contained an instruction to "reply within 30 days" with information documenting her

qualifications to remain registered in the county. *Id*. The administration subsequently sent a second document to her residential address, stating that her voter registration status was cancelled "due to failure to respond" to the prior notice. RR3 at 36 (Ex. 6). Neither document discusses whether an individual is eligible to vote after they are incarcerated but while they are on federal supervised release. There is also no evidence that Ms. Mason received or read either document, both of which were sent to her residential address during the time that she was incarcerated in federal prison. *Mason I*, 598 S.W.3d at 765 ("It is undisputed that the TCEA mailed both notices to the Rendon address while Mason was serving her sixty-month term of imprisonment in federal custody."); Reporter's Record Volume 2 ("RR2") at 33:21-24.

In 2015, Ms. Mason fully completed her term of imprisonment. Initially, she served a period of reentry in a halfway house. *Mason I*, 598 S.W.3d at 765-66. In August of 2016, she was allowed to return home. *Id.* At that time, her "federal supervised release" officially began. RR2 at 18:25-20:8.

There is no evidence in the record that Ms. Mason was ever informed that, after completing her term of imprisonment, the State of Texas would continue to consider her ineligible to vote until she had completed her federal supervised release.

Even though the terms of Ms. Mason's federal supervised release were specific and detailed, including eleven specific conditions and sixteen standard

conditions,[1] they do not mention voting, much less whether Ms. Mason may vote while on federal supervised release. RR3 at 5-7 (Ex.1).

Further, "[h]er federal probation officer, to whom she reported for supervised release, confirmed that **he had not told Mason she was ineligible to vote** and, to his knowledge, no one in that department had told her she was ineligible to vote." *Mason III*, 687 S.W.3d at 781 (emphasis added).

There is also no evidence in the record that Ms. Mason had any motivation, whether personal or pecuniary, to vote in the election had she known she was ineligible to vote. As the court below found, "[t]he evidence does not show that she voted for any fraudulent purpose." *Mason I*, 598 S.W.3d at 779.

On the contrary, there was testimony that a charge of illegal voting would have destroyed her newly rebuilt life. After years away, Ms. Mason had just returned home. RR2 at 19:7-17. 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 114:4-9, 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

[1] For instance, the conditions inform Ms. Mason that she "shall not possess a firearm" and that she shall not work in the business of tax preparation without prior approval. RR3 at Ex.1.

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

Id. at 126:3-8; *see also id.* 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.").

Election Day 2016:

In November 2016, at the urging of her mother, Crystal Mason went to vote at her regular polling place. RR2 at 116:2-11. At the time, Ms. Mason was still on federal supervised release.

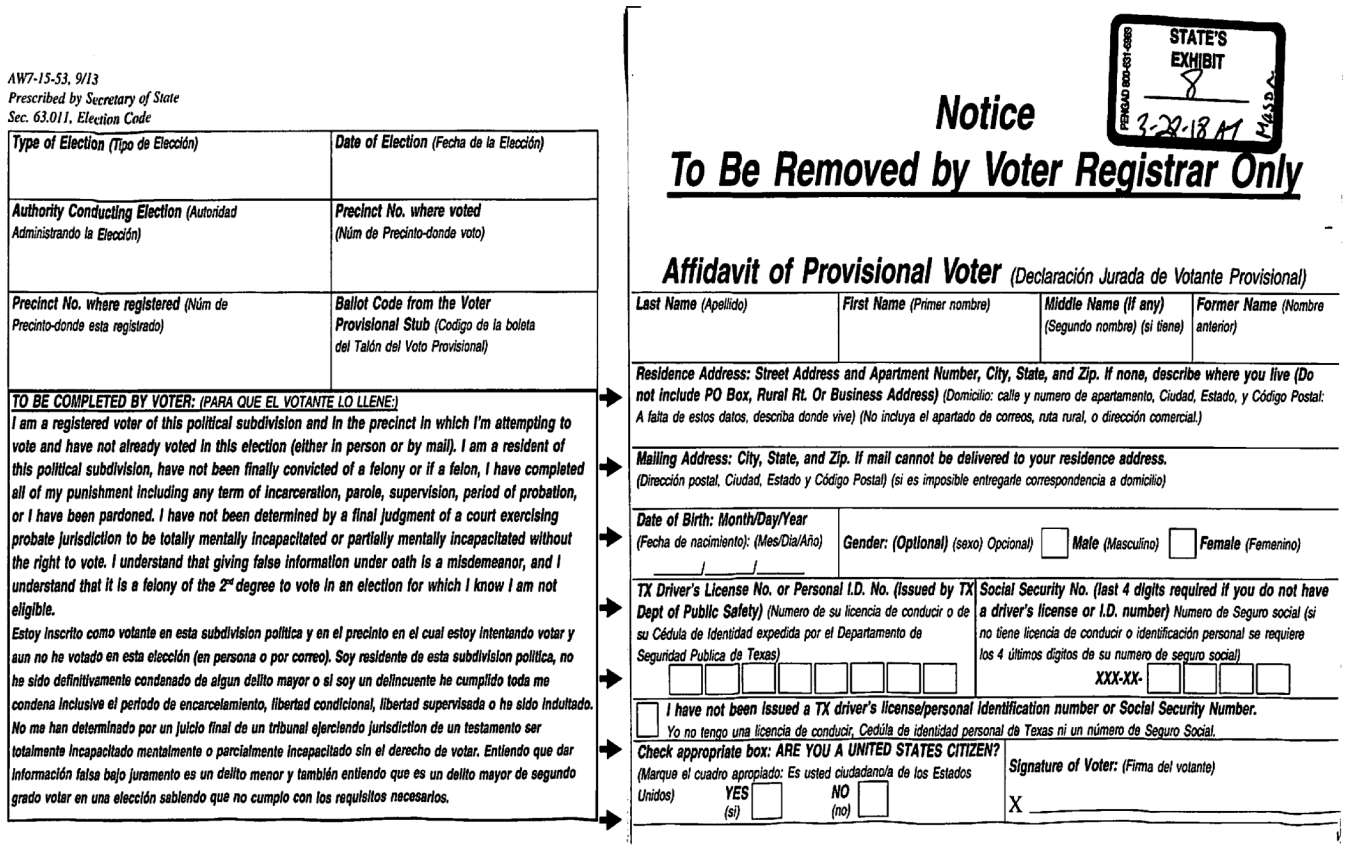
The worker who checked the voter-registration roll at Ms. Mason's regular polling place could not find her name after looking under both her maiden and married names. *Id.* at 60:3-13. Because they could not find her name, "[election] workers offered to let her complete a provisional ballot" pursuant to the Help America Vote Act, "which [Ms. Mason] agreed to do." *Mason II*, 663 S.W.3d at 625.

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, 61:22-62:11; *see also id.* at 42:8-12 ("No voter is turned away for voting, so if they don't have proper identification, if

they're not on the poll list, if they're not at the correct polling location, they would be offered a provisional ballot and then later determine if the ballot would count.").

The provisional ballot affidavit contains two parts. The left side 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 49 (Ex.8). The form does not specify that some of these statements establish whether a person is eligible to vote. *Mason III,* 687 S.W.3d at 778 ("[I]t does not expressly inform the provisional voter that if any of these affirmations is untrue, the signatory is ineligible by law to cast the provisional ballot."). The statements do not exactly track the eligibility requirements to vote under Texas law. As relevant here, they state: "I have completed all of my **punishment** including any term of incarceration, parole, supervision, period of probation, or I have been pardoned." *Id.* (emphasis added). Texas law provides that an individual is not eligible to vote if they have a final felony conviction and 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 § 11.002(a)(4)(A) (emphasis added). None of the statements reference federal supervised release. There is nothing for the voter to fill out on the left side, and there is no signature line on the left side of the form. *Id.*

A continuous series of arrows points the provisional voter to the right side of the form. On that side, under a large-font header "Affidavit of Provisional Voter," there are numerous blank fields for the voter to fill out their personal information (including name, address, date of birth, driver's license number, and social security number). *Id.* There is also a box where the individual has to check whether or not they are a United States citizen. There is no corresponding box with respect to felony status or post-imprisonment conditions following a felony release. At the bottom of the right 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 cumplio con los requisitos necesarios.

STATE'S EXHIBIT 8 3-28-18 MASD

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 digitos 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.

The testimony is not disputed that Ms. Mason meticulously entered her identifying information on the right side of the provisional ballot affidavit. RR2 at 68:1-3, 125:12-20, 159:23-25. She then signed the right side below the information she filled out, which did not contain any prompts to include anything about her postconviction status. RR3 at Ex.9. Karl Dietrich, the election judge, testified that he had Ms. Mason affirm that "all the information you provided is accurate." RR2 at 71:24-25. It is undisputed that Ms. Mason accurately provided all of the information requested of her on the form. RR2 at 71:9-11, 84:18-21. There is no evidence that Ms. Mason behaved covertly or furtively while filling out the provisional ballot affidavit and submitting it.

Ms. Mason testified that she did not read the left side of the provisional ballot affidavit. RR2 at 122:13-22, 125:12-20. The State's primary witness, Dietrich, testified that he was certain that Ms. Mason read and filled out the right-hand side of the provisional ballot affidavit, but that, while he believed Ms. Mason read the left side, he could not be certain of it. *Compare* RR2 at 71:9-11 ("[S]he certainly read the right part, and she filled it out since she put the right information in the boxes.") *with* RR2 at 71:7 (with respect to the left side: "I cannot say with certainty that she read it"). When asked directly whether he was certain, Dietrich admitted that he was not:

[Trial Counsel]: 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?**

[Dietrich]: **No**.

RR2 at 86:24-87:2 (emphasis added).

The State's only other witness with respect to whether Ms. Mason read the left-side statements, election assistant Jarrod Streibich, testified that during a particularly busy moment while he was checking other voters in, and when Ms. Mason was sitting at a separate table from him several feet away, he saw her carefully reviewing the form. RR2 at 101:15-102:23. His testimony was silent as to whether Ms. Mason reviewed the left side of the form. There is no evidence that Streibich could distinguish between the two sides of the affidavit from his distanced vantage point. His testimony is consistent with Ms. Mason's and Dietrich's testimony that Ms. Mason carefully reviewed the right-hand side of the affidavit.

After filling out the right side of the provisional ballot affidavit, Ms. Mason submitted a provisional ballot. RR2 at 123:23-124:15; Tex. Elec. Code § 64.008(b). Election officers subsequently determined she was not eligible to vote, resulting in the rejection of her provisional ballot. RR3 at 30 (Ex.6). Ms. Mason's ballot was never counted. *Id.*

SUMMARY OF ARGUMENT

The court of appeals correctly applied the legal sufficiency standard of review and found the evidence insufficient to sustain Ms. Mason's conviction for illegal voting. In *Mason II*, this Court 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." *Mason II,* 63 S.W.3d at 632 (emphasis in the original). 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." *Id.* at 629.

The appellate court did not, as the State suggests, inappropriately usurp the role of the trier of fact. Rather it determined, correctly, that no rational trier of fact could have found beyond a reasonable doubt that Ms. Mason "actually realized" she was ineligible to vote. Although the State points to certain supposed errors in the court of appeals' analysis (most of which simply mischaracterize the opinion below[2]), at its core, the State's argument is that the evidence was sufficient to show

[2] For instance, the State argues at multiple points that the court of appeals incorrectly credited Ms. Mason's testimony that she did not read the left side of the provisional ballot affidavit. State's Br. at 21; *id.* at 22-23. But the court of appeals explicitly did not do so: "the trial judge as factfinder was entitled to disbelieve all of Mason's testimony, in particular her testimony that she did not read the left-side affidavit language and that she did not know she was ineligible to vote." *Mason III*, 687 S.W.3d at 783.

that Ms. Mason actually realized that being on federal supervised release meant she was ineligible to vote when she submitted her provisional ballot in 2016. The State is wrong: the evidence was legally insufficient, and the court of appeals' decision should be affirmed.

The evidence in this case is severely lacking. There is no evidence that Ms. Mason knew she was ineligible to vote prior to arriving at the polling place; the evidence is that the supervised release office **did not tell** Ms. Mason that being on federal supervised release rendered her ineligible to vote. There is no evidence that Ms. Mason had any motive, personal or pecuniary, to commit a felony by voting had she actually realized her ineligibility to vote while at the polling place; the only on-point evidence in the record shows that Ms. Mason had compelling reasons **not** to knowingly cast an illegal ballot. Further, there is no evidence of furtive or covert acts that would indicate that Ms. Mason knew she had done something wrong. In fact, the evidence is that Ms. Mason correctly entered all of her identifying information on the very document that the State claims made her actually realize she was ineligible.

Facing this dearth of evidence, the State has relied on the theory that Ms. Mason realized her ineligibility at the polling place. More specifically, the State's theory contends that after she arrived at the polling place and was offered the opportunity to submit a provisional ballot by the election clerk, Ms. Mason then read

the left-side statements of the provisional ballot affidavit; that upon reading those statements, she actually realized 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 correctly filled out her identifying information on the right side of the form and then submitted her provisional ballot.

To support that theory, the State relies on: (a) uncertain and vague testimony from two witnesses about Ms. Mason reading the provisional ballot affidavit, and (b) Ms. Mason's own testimony that she did not read the left-side statements, but, by the time of her trial testimony, understood them to mean she was ineligible to vote. By their own admission, that is all the evidence the State has to sustain Ms. Mason's conviction. State's Br. at 24-25 ("[E]vidence from Dietrich and Streibich combined with Appellant's own testimony is sufficient evidence for the trial court to rationally find that Appellant read and understood the affidavit on the day she voted."). This evidence is patently insufficient to prove beyond a reasonable doubt that Ms. Mason "actually realized" she was ineligible to vote because she was on federal supervised release.

First, the State's evidence is insufficient to show that Ms. Mason read the left-side statements. The State's main witness, Dietrich, explicitly testified that he was

not certain if she actually read them. The only other witness on this point, Streibich, did not testify about the left side of the form.

Second, even if the evidence was sufficient to show Ms. Mason did read the left-side statements, there is no evidence to show that she then actually 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 become aware of a risk about their voting ineligibility, but it does not show that Ms. Mason subjectively understood that documentation to mean she was ineligible to vote. This Court has squarely held that the applicable *mens rea* 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." *Mason II*, 663 S.W.3d at 629. Further, in *Delay v. State*, this Court 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.*

Even more glaring here, the left side of the provisional ballot affidavit "does not expressly inform the provisional voter that if any of these affirmations is untrue, the signatory is ineligible by law to cast the provisional ballot." *Mason III*, 687

S.W.3d at 778. The statements also do not track Texas eligibility criteria in crucial ways—most notably by using the word "punishment" instead of the statutory term "sentence." Federal supervised release is understood not to be punitive in nature. And with respect to Ms. Mason's specific circumstance, the left-side statements do not discuss federal supervised release.

Further, contrary to the State's argument, the court of appeals correctly determined that Ms. Mason's testimony about her 2018 understanding of the left side of the provisional ballot affidavit could not meet the State's burden to show that, in 2016, Ms. Mason knew she was ineligible to vote. It is foundational law that the State must show the relevant *mens rea* at the time of the act. Ms. Mason's 2018 understanding of the left side of the provisional ballot affidavit, after having been charged with illegal voting and sitting through a trial in which the meaning of the left side was extensively discussed, does not show her actual realization of ineligibility in 2016 when she submitted her provisional ballot. The State's argument also impermissibly takes Ms. Mason's testimony out of context. Ms. Mason testified that she did not read the left side in 2016, but that if she had, based on her understanding of it in 2018, she would not have voted. Even under the deferential legal sufficiency review, that testimony cannot be decontextualized to mean that "[s]he admitted, in short, that upon reading it, she understood it." State's Br. at 20.

There are two legal sufficiency arguments that the court of appeals did not reach that each independently justifies affirming the court of appeals' decision.

First, the State's evidence is patently insufficient under this Court's holding in *Mason II*, that 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit." 663 S.W.3d at 629. When the State's irrelevant red herrings are put aside, the only evidence about Ms. Mason's knowledge comes from the provisional ballot affidavit—uncertain testimony that she read the left side and Ms. Mason's testimony about her 2018 understanding of the left-side statements. This Court has rejected relying solely on the provisional ballot affidavit to meet the State's *mens rea* burden.

Second, Ms. Mason could not have "actually realized" that she was ineligible to vote because there was no decisional authority that being on "federal supervised release" rendered her ineligible to vote at the time Ms. Mason submitted her provisional ballot in 2016. In *Delay*, this Court held 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. 465 S.W.3d at 247-48 (emphasis added). The court of appeals in *Mason I* was the first to make the determination that being on "federal supervised release" rendered an individual

ineligible to vote under the Texas Election Code. Lacking such guidance, Ms. Mason could not have "actually realized" that she was ineligible to vote as a matter of law.

To the extent that this Court holds that the court of appeals must be reversed under traditional legal sufficiency principles, the proper remedy would be to remand the case for a new trial. This case presents unique circumstances where, after a bench trial, this Court clarified the appropriate standard for *mens rea* and the trial judge did not have the benefit of that clarification. It is impossible to know whether the trial judge would have rendered the same verdict under this Court's guidance from *Mason II*, and due process demands that Ms. Mason be judged under a correct interpretation of the law.

Finally, the court of appeals did not address Ms. Mason's second point of error with respect to ineffective assistance of counsel, and, if this Court does not affirm, the case should be remanded to address that issue.

ARGUMENT

I. The court of appeals correctly determined that the evidence was not legally sufficient to uphold Ms. Mason's conviction.

A. The legal sufficiency standard of review is not a rubber stamp of the verdict.

The court of appeals correctly set forth and applied the legal sufficiency standard of review and "view[ed] all the evidence in the light most favorable to the verdict to determine whether any rational factfinder could have found the crime's

essential elements beyond a reasonable doubt." *Mason III*, 687 S.W.3d at 774 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The legal sufficiency standard's deference to the fact finder is balanced with the court's duty to "ensure the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). A "'mere modicum' of evidence" is "not sufficient to rationally support a conviction beyond a reasonable doubt," which is why the question in a legal sufficiency review is not whether there was "**any** evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." *Baltimore v. State*, 689 S.W.3d 331, 340 (Tex. Crim. App. 2024). Even "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Winfrey v. State*, 393 S.W.3d 763, 769 (Tex. Crim. App. 2013).

In a legal sufficiency review, circumstantial evidence must still point to guilt beyond a reasonable doubt for each element of the offense. "[C]ircumstantial evidence of mens rea is subject to the same sufficiency standard as other evidence." *Mason III*, 687 S.W.3d at 783 (citing *Laster v. State*, 275 S.W.3d 512, 521 (Tex. Crim. App. 2009)). The fact finder is "not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions," *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007), "because doing so is not

sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Merritt v. State*, 368 S.W.3d 516, 525–26 (Tex. Crim. App. 2012).

Furthermore, to "prevail under the combined and cumulative force of all of the evidence," the State cannot rely on circumstantial evidence that does not in fact "establish" the prohibited elements of the offense. *Hacker v. State*, 389 S.W.3d 860, 873 (Tex. Crim. App. 2013).[3] Even when circumstantial evidence raises suspicions, a narrative built through a chain of circumstantial evidence is still insufficient because a "suspicion linked to other suspicion" fails to meet the legal sufficiency standard of review. *Id.* at 873-74.

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[3] The cases relied on by the State for the uncontroversial proposition that courts may rely on circumstantial evidence actually demonstrate the yawning gap between legally sufficient evidence and the evidence here. In *Nisbett v. State*, 552 S.W.3d 244 (Tex. Crim. App. 2018), there was evidence that the defendant had choked the victim prior to her murder, had multiple motives to commit the murder, had "specifically indicated a desire to murder [the victim], especially if she tried to leave him," and had engaged in extensive efforts to cover up the death of the victim. *Id.* at 267-68. In *Hammack v. State*, 622 S.W.3d 910 (Tex. Crim. App. 2021), there was evidence that multiple people verbally told the appellant about the specific terms of a child custody order and the appellant then exhibited signs of furtive behavior including trying to hide the child. *Id.* at 917–18. In *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004), the circumstantial evidence included that the defendant had a "strong motive" to murder his wife in order to carry on with his affair and inherit a substantial amount of money, that the defendant attempted to conceal incriminating evidence and made inconsistent statements to the police. No such evidence of motive and covert acts exists here.

This Court has also held that "unsupported opinions do not always satisfy the beyond a reasonable doubt standard by themselves." *Baltimore*, 689 S.W.3d at 344. Testimony involving opinions or hypotheses without a factual basis amounts to an "unsupported inference or presumption" that does not establish guilt beyond a reasonable doubt. *Id.* This Court has also repeatedly found evidence not directly proving the fact at issue to be insufficient to establish a person's guilt beyond a reasonable doubt. *Edwards v. State,* 666 S.W.3d 571, 576 (Tex. Crim. App. 2023) (holding that the State's testimony evidence that an infant was "small for her age, excessively fussy and clingy" was insufficient to demonstrate that the mother's ingestion of cocaine while breastfeeding caused the infant to suffer from any kind of mental harm).

Thus, this Court has made clear that the legal sufficiency standard of review is more than a rubber stamp of the verdict and that evidence must be carefully considered to determine whether it can sustain the trial court's conviction, even when viewing that evidence in a light most favorable to the verdict.

B. The applicable law and *Mason II*.

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." Eligibility is established by Sections 11.001 and 11.002 of the Texas Election Code. On appeal, the court of appeals 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." *Mason I*, 598 S.W.3d at 770.This Court rejected that 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." *Mason II,* 63 S.W.3d at 629.

In this case, the State charged that Ms. Mason was ineligible to vote because she was on federal supervised release following a felony conviction. Accordingly, this Court held that 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." *Id.* at 631-32 (emphasis in the original).

This Court further explained 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 629. Moreover, "[t]he statute does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit. This reading is consistent not only with *Delay* but also with the Legislature's intent." *Id.*

C. The Second Court of Appeals correctly applied the legal sufficiency standard of review to conclude that the evidence was insufficient to show Ms. Mason "actually realized" she was ineligible to vote.

Ms. Mason testified that she did not know she was ineligible to vote and that she never would have cast a provisional ballot had she known. She was in the process of putting her life back together. RR2 at 146:12-21. It is undisputed she had just returned to her home, RR2 at 18:25-20:8, and Ms. Mason testified that intentionally committing a felony would rip her apart from her family. RR2 at 126:3-8, 146:6-11.

Although the Court was free to disregard Ms. Mason's testimony, the State offered very little to fill in the gaps. There is no evidence that Ms. Mason had any reason to vote if she knew she was ineligible to vote. There is no evidence that she had any personal or pecuniary interest in the election. *Acevedo v. State*, 255 S.W.3d 162, 170 (Tex. App.—San Antonio 2008, pet. ref'd) ("[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."); *cf. Nisbett v. State*, 552 S.W.3d 244, 265 (Tex. Crim. App. 2018) ("While motive is not by itself enough to establish guilt of a crime, it is a significant circumstance indicating guilt.").

Nor is there any evidence that Ms. Mason tried to conceal her identity or otherwise took actions indicating that she knew that she was doing something wrong. Indeed, the evidence is that Ms. Mason meticulously filled out all her correct

identifying information on the provisional ballot affidavit—the very form the State claims made her realize she was ineligible. RR2 at 71:9-11, 159:23-25.[4]

Lacking evidence (circumstantial or otherwise) to show Ms. Mason actually realized she was ineligible to vote, the State relies on the theory that Ms. Mason actually realized her ineligibility to vote when she was at the polling place and given her provisional ballot affidavit. This would require a fact finder to conclude, based on legally sufficient evidence, that Ms. Mason read the small, dense statements on the left side of the provisional ballot affidavit; that Ms. Mason actually realized that she was ineligible to vote from those statements even though they do not identify themselves as setting forth eligibility criteria and do not discuss federal supervised release; that, in the face of her supposed "actual realization" of ineligibility and with no motive to do so, Ms. Mason then carefully and correctly filled out the personal identifying information on the right side of the provisional ballot affidavit and submitted her provisional ballot.

[4] These facts also distinguish this case from the typical illegal voting case where the defendant has a personal interest in the outcome of the election and conceals their activity in suspicious ways. *See e.g., Medrano v. State*, 421 S.W.3d 869, 874-75 (Tex. App.—Dallas 2014, pet. ref'd) (a voter testified that "she was not a resident of the precinct in which appellant [her uncle] ran for JP, and she knew that to vote in the election, she had to lie on her voter registration"); *Jenkins v. State*, 468 S.W.3d 656, 661 (Tex. App.—Houston [14th Dist.] 2015, pet. granted) (defendant lied about his residence to vote on an issue of interest to him).

No rational trier of fact could draw these conclusions beyond a reasonable doubt based on the record evidence.

1. The evidence is insufficient to show that Ms. Mason read the relevant part of the provisional ballot affidavit.

There is a crucial difference in this case between the left side of the affidavit and the right side of the affidavit. The left side of the provisional ballot affidavit contains information that the election worker fills out, followed by small, dense print in English and Spanish, which contains the series of statements relied upon by the State. RR3 at 49 (Ex.8). There is nothing for the individual to fill out on the left side of the form and no signature line.

There are seven arrows pointing the individual to the right side of the form. On the right side of the form, under a large font header "Affidavit of Provisional Voter," there are numerous fields for individuals to fill out their personal information. *Id.* The individual must also check a box indicating they are a citizen. There is no similar box with respect to felony convictions or post-imprisonment supervision. The individual also must sign the right side of the form in the far-right bottom corner. There is no language connecting the signature to the statements on the left side.

The evidence is uncontested that Ms. Mason filled out the personal information on the right side of the form accurately and that she signed the right side of the form. *See* RR2 at 71:9-11; *id.* at 159:23-25 (Mason testimony: "Only thing I

know is I wanted to make sure, like she said, everything matched, everything matched on my ID.").

Ms. Mason denied having read the left side of the form. RR2 at 122:17-22, 159:3-161:1. The State claims that the court of appeals erred by impermissibly crediting this testimony. State's Br. at 20-21.[5] But that misreads the lower court's opinion, which explicitly stated that "the trial judge as factfinder was entitled to disbelieve all of Mason's testimony, in particular her testimony that she did not read the left-side affidavit language and that she did not know she was ineligible to vote." *Mason III*, 687 S.W.3d at 783.

[5] The State also faults the court of appeals for "re-weighing the evidence" with respect to Ms. Mason's non-prosecution for submitting a provisional ballot in 2004. State's Br. at 22. The court of appeals did not "re-weigh" this evidence, but simply noted that the reasonable inference of this evidence from twelve years before Ms. Mason submitted her provisional ballot in 2016 was that the usual consequence for having a provisional ballot rejected is to become registered to vote in the future, and that it therefore did not show Ms. Mason's knowledge of her ineligibility in 2016. *Mason III*, 687 S.W.3d at 784-5. Regardless, the State does not contend that the 2004 provisional ballot actually is evidence of Ms. Mason's 2016 *mens rea.* State's Br. at 17-18. Finally, HAVA contemplates that individuals will submit provisional ballots when they believe they are registered but that they will turn out to be wrong. Texas law provides that many of these individuals will then be registered to vote. Tex. Elec. Code § 65.056 (a). This happens tens of thousands of times per general election in Texas. Appellant's Brief to Court of Criminal Appeals in *Mason II* at 42. For the State to describe this common occurrence as "a non-prosecution for illegally casting a provisional ballot while ineligible to vote in 2004," underscores that using the illegal voting statute to target mistaken provisional voters threatens countless innocent voters and the entire provisional voting system.

But the lower court also correctly noted that "finding Mason to be not credible—and disbelieving her protestation of actual knowledge—does not suffice as proof of guilt." *Id.* "This Court has held that a factfinder may not find facts necessary to establishing an element of a criminal offense purely on the basis of its disbelief of the accused's contrary assertions." *Gold v. State,* 736 S.W.2d 685, 689 (Tex. Crim. App. 1987)*, disapproved of on other grounds by Torres v. State*, 785 S.W.2d 824 (Tex. Crim. App. 1989) (citing *Wright v. State*, 603 S.W.2d 838, 840 (Tex. Crim. App. [Panel Op.] 1979) (op. on reh'g)).

The only evidence specific to whether Ms. Mason read the left side of the affidavit was explicitly uncertain and nowhere near the threshold of establishing guilt beyond a reasonable doubt. Karl Dietrich testified that he thought Ms. Mason read the left side but could not say so with certainty. 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."). Dietrich even contrasted his lack of certainty about the left side of the affidavit with his certainty that Ms. Mason read the right side. *Compare* RR2 at 71:7 ("I cannot say with certainty that she read it") *with* RR2 at 71:9-11 ("And she certainly read the right part, and she filled it out since she put the right information in the boxes."). The State has also repeatedly conceded that their primary witness was not certain whether Ms. Mason read the left side of the affidavit. State's Brief on the Merits to the Court of Appeals in *Mason I* at 25

("Dietrich could not say with certainty that Appellant actually read [the left side]."); State's Brief to the Court of Criminal Appeals in *Mason II* at 28 (similar).

Such explicitly uncertain testimony about the crucial side of the affidavit is insufficient to sustain the State's burden of proving the required elements beyond a reasonable doubt. In *Flores v. State*, this Court found that explicitly uncertain testimony cannot sustain a finding beyond a reasonable doubt—even where the witness "feels like" it was true. 155 S.W.2d 932, 933 (Tex. Crim. App. 1941). There, the Court examined the sufficiency of evidence to sustain a charge of theft of livestock, specifically a sheep. When asked if a sheep was his, the witness stated, "I feel like it was" and noted that the sheep returned to him was the same type of sheep he had lost. This Court rejected the sufficiency of this testimony because the evidence made it "obvious … that he was uncertain as to whether or not the sheep in question really belonged to him," noting that because there was no other evidence supporting finding that he was the sheep's owner, "we admit that we are at a loss to understand how the jury could find beyond any reasonable doubt that the animal in question belonged to Mr. Williams, the alleged owner." *Id.; see also Redwine v. State,* 305 S.W.3d 360, 361-2 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd)

(noting that uncertain testimony cannot be "translated into belief beyond a reasonable doubt").[6]

The State argues that Dietrich's testimony is supported by a separate witness, the election assistant Streibich.[7] Streibich's testimony directly contradicts Dietrich's on numerous points.[8] And, on the crucial point of whether Ms. Mason read the left

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[6] *See also United States v. Johnson*, 427 F.2d 957, 961 (5th Cir. 1970); *Roberts v. State*, 377 S.W.2d 656, 658 (Tex. Crim. App. 1964).

[7] With respect to whether Ms. Mason read the left-side statements, the court of appeals (though not the State) also referenced Ms. Mason's testimony at trial regarding a news article. *Mason III*, 687 S.W.3d at 780-81. The article itself and much of the testimony was subject to sustained objections. RR2 at 137:22-24. The admitted testimony from Ms. Mason is consistent with her overall testimony that she read the right side where she put her information but did not read the left side.

> Q. And so you told Deanna Boyd that you -- again, this is yes or no -- that you had skimmed through the form, correct?
> A. I don't recall saying that, but I'm sure I did. I had to scan through it, sir. I put my information on it. So we -- we would say yes.
> Q. No -- skim through the affidavit language?
> A. I didn't know.
> Q. Yes or no?
> A. No, I didn't, not at all.

RR2 at 136:9-21. While the trial judge was free to not believe Ms. Mason, such a lack of belief does not suffice as evidence that Ms. Mason read the left-side statements.

[8] 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, 85:1-4; *see*

side of the affidavit, his testimony is silent. Streibich testified only that he saw Ms. Mason carefully 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 carefully read the right side of the affidavit. That side does not contain the statements on which the State relies. RR2 at 122:13-22. Streibich does not speak to the main point of dispute—whether Ms. Mason read the left side in addition to the right. There is also no testimony that would establish that he could differentiate what side Ms. Mason was reviewing from his distanced vantage point.

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. *Hacker*, 389 S.W.3d at 873-74 (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion").

The cases the State cites are not to the contrary, as none of them concern a situation where the witness testifying is explicitly uncertain about whether the defendant read the document in question. Further, in each of them, witnesses testified

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generally RR3 at 49 (Ex. 10) (map of voting location). Streibich testified that he was sitting at a table where voters would come in and meet with him to check for their names, RR2 at 101:10-18; RR3 at 53 (Ex. 10), and 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, 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.

that they read the relevant information **aloud to the defendant**. *Chivers v. State*, 481 S.W.2d 125, 127 (Tex. Crim. App. 1972) (officer testified that he read the statement to the defendant, and witness testified about seeing the officer read it); *Wilkins v. State*, 960 S.W.2d 429, 432 (Tex. App.—Eastland 1998, pet. ref'd) (defendant was given Miranda warning four times, including the officer orally informing the defendant).[9] In contrast, here Ms. Mason's supervised release officer testified that Ms. Mason was **not told** that she could not vote while on federal supervised release, RR2 at 20:9-17, and the election workers did not read the provisional ballot affidavit aloud to Ms. Mason.

The State also appears to suggest that Ms. Mason can be charged with having read the left-side statements based on her signature on the right side of the affidavit. State's Br. at 19. The State relies on *Moore v. Moore* for this proposition, but that case is specific to civil theories of contract interpretation. 383 S.W.3d 190, 196-97 (Tex. App.—Dallas 2012, pet. denied). Further, the signature line on the right side does not specify that it serves as an affirmation of the left-side statements or

[9] *See also Gutierrez v. State*, 502 S.W.2d 746, 747 (Tex. Crim. App. 1973) (officer testified that he read the Miranda warnings to the defendant twice and that defendant told him he understood the warnings); *Varnes v. State*, 63 S.W.3d 824, 831-32 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (a parole officer testified that she read aloud to the defendant all of the terms of his parole and sex offender registration requirements, including the terms at issue, and a separate witness testified he saw the parole officer read that information aloud).

reference them at all. Regardless, as discussed below, this Court has held that Ms. Mason's knowledge cannot be presumed from the affidavit. See *infra* Section II.A.

Finally, the State asserts that the appellate court erred by failing to credit the testimony of Dietrich and Streibich. State's Br. at 24. But, if anything, the court of appeals unduly credited that testimony. As the State concedes, the court of appeals found the evidence sufficient to show that Ms. Mason read the left side of the affidavit. State's Br. at 22 n.5 ("The appellate court seems to concede that sufficient evidence establishes that she read the affidavit on the day she voted."); *Mason III*, 687 S.W.3d at 783 (noting that "Mason appeared to have read the left-side affidavit language"). Thus, contrary to the State's argument, the court of appeals viewed the evidence in the light most favorable to the verdict—in this instance too much so. For the reasons noted above, the uncertain and nonspecific evidence offered by the State is insufficient to show Ms. Mason read the left side of the ballot. Even though the court of appeals erred in concluding Ms. Mason read that left side, as explained below, it correctly concluded that reading the left-side statements is "not sufficient proof" to establish the requisite *mens rea*. *Mason III,* 687 S.W.3d at 783.

2. There is no evidence to show Ms. Mason actually realized she was ineligible to vote.

a) The court of appeals correctly held that evidence that Ms. Mason read the left side of the provisional ballot affidavit does not show she "actually realized" that she was ineligible to vote.

Even if the evidence did establish that Ms. Mason read the left side of the affidavit, there is no record evidence that, upon reading that left side, Ms. Mason "actually realized" that she was ineligible to vote.

First, as a legal matter, the State cannot rely on a theory that Ms. Mason "should have realized" she was ineligible to vote. At best, the State's evidence shows that there was documentation available to Ms. Mason from which a person hypothetically might have been aware of a risk regarding their eligibility to vote. But this Court's clear precedent establishes that such evidence is insufficient to demonstrate an "actual realization" that Ms. Mason was ineligible to vote. As this Court held in *Mason II*, the "knowledge requirement" is not a "negligence scheme." *Mason II*, 663 S.W.3d at 629.

The State's argument also conflicts with this Court's ruling in *Delay v. State.* There, this Court concluded that "neither recklessness nor negligence" was sufficient to demonstrate "knowledge of actual unlawfulness." *Delay*, 465 S.W.3d at 252. In *Delay*, 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.*

Similarly, Ms. Mason has resolutely denied having knowledge of her ineligibility to vote, RR2 at 124:16-126:8, and the State has produced no evidence to show that Ms. Mason began behaving covertly when she supposedly realized she was ineligible in order to submit her provisional ballot.[10] In fact, the evidence is that

[10] In a dissent to *Mason II*, Judge Slaughter noted that the trial judge could have "reasonably inferred that by telling the poll worker that she had lived at the same address since 2008—without revealing that she had not lived there during the years she was incarcerated—Mason was trying to conceal the fact that she was a convicted felon." *Mason II*, 663 S.W.3d at 644-45. It is worth noting that this event occurs before the State contends Ms. Mason realized she was ineligible to vote—*i.e.*, before Ms. Mason is given the provisional ballot affidavit. Regardless, when read in full, it is clear that Ms. Mason is responding to a question of whether she is at the right location. RR2 at 119:11-15 ("So if you at the right location. I said, Well, I've been living here -- this is my address. I pay my taxes to Mansfield. This is my home. I've been here since '08."); *id.* at 119:20-120:1 ("And he said that's -- if you're at the right location, your vote will count; if you're not, it won't. . . . I said, Okay, because I know this is where I stay."). In that context, Ms. Mason's answer was not suspicious; in fact, it was accurate. Under Texas law, for individuals who are in a penal

Ms. Mason correctly and meticulously wrote down and submitted all of her identifying information at the very moment the State contends she was realizing her ineligibility. RR2 at 71:9-11, 84:18-21.

Just as the documentation and resources available to the corporate executive defendants and their attorneys in *Delay* did not prove they had the requisite *mens rea*, *Delay*, 465 S.W.3d at 252, so too here, the State cannot rely on a contention that Ms. Mason read the provisional ballot affidavit as proof that she actually realized she was ineligible to vote.

Second, the language of the provisional ballot affidavit is not sufficient to establish Ms. Mason's actual realization of ineligibility. The impropriety of assuming that Ms. Mason must have realized her ineligibility if she read the left side of the provisional ballot affidavit is especially clear because the provisional ballot affidavit does not explicitly warn Ms. Mason of her ineligibility. Contrary to the State's assertion, the provisional ballot affidavit **does not** "admonish[] that persons convicted of a felony, including persons still serving any term of incarceration, parole, supervision, or period of probation are not eligible to vote." State's Br. at 18. At no point does the left side state that the first-person statements it sets forth are eligibility criteria for voting. As the court of appeals found: "Significantly, although

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institution, their voting address remains the home residential address that they plan to return to. Tex. Elec. Code § 1.015(e).

this language requires the provisional voter to affirm that he or she is not a felon—or if a felon that he or she has either (a) completed all of the imposed punishment or (b) been pardoned—it does not expressly inform the provisional voter that if any of these affirmations is untrue, the signatory is ineligible by law to cast the provisional ballot." *Mason III*, 687 S.W.3d at 778.

The affidavit also departs from Texas's statutory eligibility criteria in a significant way. The text of the provisional ballot affidavit states "I have completed all of my **punishment**" and describes "punishment" as "any term of incarceration, parole, supervision, [or] period of probation." RR3 at 49 (Ex.8) (emphasis added). In contrast, Texas law states that an individual is not eligible to vote if they have a final felony conviction and 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 § 11.002(a)(4)(A) (emphasis added).

This is a distinction with a difference. Federal supervised release is not punitive in nature. As the Fifth Circuit has recognized, "[r]ather than being punitive, supervised release is intended to facilitate 'the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct.'" *United States v. Jeanes*, 150 F3.d 483, 485 (5th Cir. 1998) (citation omitted); *see United States v. Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended

supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."). Thus, Ms. Mason's federal supervised release did not clearly fit into the category of "punishment" described in the affidavit.

What's more, the provisional ballot affidavit also does not mention Ms. Mason's specific condition—federal supervised release. Although the affidavit speaks to "supervision," the legal authority that existed at the time drew a distinction between Texas criminal law's understanding of supervision and federal supervised release. In Texas law, supervision has been consistently understood to be equivalent to probation. *Speth v. State*, 6 S.W.3d 530, 532 n.3 (Tex. Crim. App. 1999) (en banc) ("We use the terms probation and community supervision interchangeably in this opinion."); 43A Tex. Prac., Criminal Practice And Procedure § 47:1 (3d ed.) ("The words [probation and community supervision] mean the same thing; they are used interchangeably in practice and in this treatise."). In contrast, federal supervised release is not equivalent to 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.'") (citation omitted).[11]

[11] As set forth below, the fact that no decisional authority existed at the time Ms. Mason submitted her provisional ballot also means that Ms. Mason could not have known that she was ineligible to vote. *See infra* Section II.B.

In sum, the left-side statements of the provisional ballot affidavit did not expressly admonish Ms. Mason that she was ineligible to vote, and, the State's implication that Ms. Mason **should have** realized her ineligibility from the left-side statements is plainly insufficient to carry its burden to show Ms. Mason actually realized that she was ineligible under this Court's controlling decisions rejecting such a negligence theory in *Mason II* and *Delay*.

b) Ms. Mason's trial testimony does not show her mens rea in November of 2016 at the time of the actus reus.

The crux of the State's brief is its assertion that Ms. Mason admitted that she understood the provisional ballot affidavit to mean she was ineligible to vote when she submitted her provisional ballot in 2016, and that it was error for the court of appeals to disregard this testimony. State's Br. at 20 ("She admitted, in short, that upon reading it, she understood it."). But Ms. Mason never made that admission. Ms. Mason testified unequivocally that she did not read the left side of the provisional ballot affidavit and that she would not have voted if she knew she was ineligible. RR2 at 122:17-22. She also agreed to questioning that she "now" (as in, at the time of her cross-examination during her 2018 trial) understood the left side admonishments to set forth eligibility criteria and that someone who was on federal supervised release was ineligible to vote. RR2 at 129:6-7, 144:13-25.

The court of appeals held that Ms. "Mason's apparent agreement with the prosecutor is not enough to show that she actually knew that her circumstances **when**

voting in 2016 made her ineligible to vote." *Mason III*, 687 S.W.3d at 785 (emphasis added). The court of appeals was correct in its application of the sufficiency standard and in its conclusion.

The State's argument that this testimony is legally sufficient to prove that Ms. Mason actually realized that being on federal supervised release rendered her ineligible to vote in 2016 is flawed for at least three reasons: (1) it impermissibly takes Ms. Mason's statements out of context in a manner no rational juror could do; (2) Ms. Mason's testimony about her 2018 understanding does not show her *mens rea* at the time of the *actus reus*; and (3) at most, the State's interpretation of Ms. Mason's testimony would go to a negligence theory of liability that this Court has rejected.

First, the State's reading of Ms. Mason's testimony impermissibly takes it out of context. Ms. Mason's 2018 testimony is clear that she did not read the left statements. When asked "[d]id you read this warning, notice, admonishment, about if you're a convicted felon, you can't vote?" she answered "I didn't, sir." RR2 at 122:19-22. She further testified that she would not have jeopardized her freedom if she knew she could not vote. RR2: 126:1-8, 152:3-6.

With respect to her testimony about the left side of the provisional ballot affidavit, it is clear in context that Ms. Mason was speaking to her current

understanding of those provisions—after being charged with illegal voting and having heard extensive testimony concerning them.

When questioning Ms. Mason about the left side of the affidavit, the prosecutor noted that it had already been discussed that day "in great detail." RR2 at 128:6-20. He then asked, "And you understand the importance of these admonishments. This essentially lays out the requirements for eligibility to vote in an election here in the state of Texas. Do you understand?" Ms. Mason responded "I understand it **now**, yes, sir." RR2 at 129:2-7 (emphasis added).[12]

She was later asked additional questions about the language of the provisional ballot affidavit in the present tense about her understanding of the language at trial:

> Q. Finally, you've **now** had a chance to read the affidavit language, correct?
>
> A. I have. Yes, sir, I have.
>
> Q. And you see in there it says, I understand this is a felony of the second degree to vote in an election which I know I'm not eligible. You did see it says that on the affidavit?
>
> A. Yes, I see it. I seen it.

[12] As noted above, the affidavit does not in fact specify that it lays out eligibility requirements nor does it mirror Texas's eligibility statute.

Q. To anyone who would have read it, it'd be clear this is a felony, correct?

A. If -- yes. **If it was read**, yes, it would have been very clear.

RR2 at 150:18-151:4 (emphasis added).

Sandwiched between those questions about her contemporaneous understanding of the provisional ballot affidavit at trial was a question about whether she would "admit that the language within State's Exhibit No. 8 and State's Exhibit No.9…[is] clear," to which Ms. Mason responded in the affirmative. RR2 at 144:13-25. She also answered in the affirmative when asked whether it was "safe to say that anyone reading this language would know, if I'm a felon or I'm a felon who has not concluded my sentence being on supervised release…it's clear I'm not eligible to vote." RR2 at 144:13-25.[13]

The State argues that the court of appeals erred because it inferred from this testimony that Ms. Mason "read but did not understand the affidavit." State's Br. 22-23 (emphasis omitted). But that is not what the court of appeals said. The court of appeals correctly determined that the rational interpretation of Ms. Mason's testimony was that she did not read the provisional ballot affidavit in 2016, but that her present-day understanding (at the time of her cross-examination) was that it

[13] It is worth noting that the State's question does not track the language of the left side of the provisional ballot affidavit, instead inserting the term "sentence," whereas the affidavit uses the term "punishment."

applied to her situation. Even the State agrees that this is the correct reading of the testimony: "[A] more rational interpretation of her self-serving testimony 'I understand it now,' was that it was a mere repetition of her consistent trial testimony that she did not read the affidavit on the day she voted." *Id.* at 23.

Instead, the presumption the State seeks to draw from Ms. Mason's testimony is irrational and therefore impermissible. The State argues the court below erred because it should have interpreted this 2018 testimony to mean that Ms. Mason did read the affidavit in 2016 and did understand it to mean she was ineligible. State's Br. at 22-23. This turns principles of review on its head. Ms. Mason testified that she did not read the left side of the provisional ballot affidavit, but if she had, she never would have submitted her provisional ballot. No rational trier of fact could extrapolate from Ms. Mason's 2018 testimony that she did in fact read the left side statements and understood them to mean she was ineligible but submitted her provisional ballot anyway.

As the Texas Supreme Court has explained:

> [E]vidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did. If a witness's statement "I did not do that" is contrary to the jury's verdict, a reviewing court may need to disregard the whole statement, but cannot rewrite it by disregarding the middle word alone.

City of Keller v. Wilson, 168 S.W.3d 802, 812 (Tex. 2005).

This Court recently came to a similar conclusion in *Delarosa v. State*, 677 S.W.3d 668 (Tex. Crim. App. 2023), *reh'g denied* (Dec. 20, 2023): "Appellant's denial of any sexual contact does not support an inference of non-consensual, sexual contact. It would be anomalous to find evidence of a crime in a defendant's testimony that he committed no crime." *Id.* at 676

Of course, as *Keller* notes, the trial court was free to not believe Ms. Mason's testimony that she didn't read the left-side statements, and the court of appeals correctly did not credit it, but a reviewing court cannot slice and dice Ms. Mason's testimony to conclude that she testified she read and understood the provisional ballot affidavit in 2016 when she clearly did not say that.

Second, Ms. Mason's testimony fails to connect the *mens rea* to the *actus reus.* The court of appeals' treatment of this testimony was also correct because it speaks to Ms. Mason's understanding of the provisional ballot affidavit in 2018, a year and a half after the *actus reas*. Ms. Mason's 2018 understanding, after having been charged and sitting through trial, "is not enough to show that she actually knew that her circumstances **when voting in 2016** made her ineligible to vote." *Mason III*, 687 S.W.3d at 785 (emphasis added).

It is a bedrock principle of criminal law that a person's culpable mental state must accompany the relevant *actus reus*. *Cook v. State,* 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (noting the "basic and fundamental concept of criminal law, that

in order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*); *Hawkins v. State*, 29 S.W.2d 384, 385 (1930) ("The evidence may abundantly show that appellant abandoned an intent to kill, if any he ever had, but the real question is whether or not he had such intent at the time he was making the alleged assault.").

Where an actor develops the requisite *mens rea* **after the actus reus**, that is not sufficient to establish guilt. Alexander F. Sarch, *Knowledge, Recklessness and the Connection Required Between Actus Reus and Mens Rea*, 120 Penn St. L. Rev. 1, 7 (2015) (it is "uncontroversial" in criminal law that "one cannot be guilty of a crime if one only acquires the mens rea *after* performing the required actus reus"); Wayne R. LaFave, 1 SUBST. Crim. L. § 6.3(a) (3d ed.) (2023) (in cases where "the bad state of mind follows the physical conduct," it is "obvious that the subsequent mental state is in no sense legally related to the prior acts or omissions of the defendant").

Thus, the State's reliance on Ms. Mason's 2018 understanding of the provisional ballot affidavit is insufficient to establish that she had the culpable mental state in 2016. This is especially so where the significant events of being charged with illegal voting and sitting through testimony on the provisional ballot affidavit are likely to alter her understanding of it.

The Sixth Circuit case *United States v. McDougald*, 990 F.2d 259 (6th Cir. 1993), is instructive. In *McDougald*, the court found the evidence insufficient to establish "knowledge" that his purchase of the car was part of an alleged money laundering scheme where the government relied heavily on a defendant's false trial testimony which occurred considerably after the fact and after the defendant had already been criminally charged. *Id.* at 262-63. The Sixth Circuit reasoned:

> [The defendant's] false testimony at trial obviously came long after he discovered that the government thought his role in the purchase of the Beretta was criminal. In short, [the defendant] lied about his role in the purchase of the Beretta only after he was put on notice that he had done something wrong. This evidence is irrelevant to his state of mind on June 4, when he purchased the car.

Id.

Accordingly, the Sixth Circuit held that the defendant's testimony at trial did "not tend to establish guilty knowledge at the time of the automobile purchase" when the government has the burden of establishing that the defendant's "guilty knowledge" of the purchase "concurred with the purchase itself." *Id*.

Similarly here, Ms. Mason's illegal voting charges put her on notice that the State considered her ineligible to vote because she was on federal supervised release. Ms. Mason sat through a trial where her provisional ballot affidavit was discussed at length, including the prosecutor's opening statement that "And at that time she's given this Provisional Affidavit, and within that affidavit, it specifically lays out, again, the requirements of eligibility, including, quote, 'I am a felon; I'm not a felon;

If I am a felon, I've completed all of my supervision, probation, term of imprisonment.'"[14] RR2 at 12:6-11; *see, e.g.*, *id.* at 44:5-15. After all of that, her testimony about her then-current (*i.e.* 2018) understanding of the meaning of the left side of the form cannot establish beyond a reasonable doubt her *mens rea* a year and a half prior when she submitted the provisional ballot.

Third, if anything, the State's interpretation of Ms. Mason's testimony would speak to a negligence standard. Ms. Mason did not testify that she understood that she was ineligible to vote in 2016. Instead, Ms. Mason agreed with the prosecutor that, based on her 2018 understanding, "[i]t's safe to say that anyone reading" the left side of the provisional ballot affidavit would understand it to establish eligibility standards. RR2 at 144:13-25. But, at most, this testimony goes to a "reasonable person" standard about what a person should understand from the (misquoted) left side. As noted above, this Court has rejected such a negligence theory of liability. *Mason II*, 663 S.W.3d at 629; *see also Delay*, 465 S.W.3d at 252 (even "substantial and unjustifiable risk" does not show actual knowledge). Thus, Ms. Mason's testimony speaks to her 2018 belief about what a person should understand from the affidavit. It does not establish that in 2016 she "actually realized" that she was ineligible to vote.

[14] This misquotes both the provisional ballot affidavit and the statute.

II. The court of appeals' legal sufficiency decision can be affirmed for two independent reasons.

The court of appeals did not reach two additional arguments that Ms. Mason raised below to show that the evidence was insufficient as a matter of law. Each argument is independently sufficient for this Court to affirm the court of appeals, or, alternatively, to remand to the court of appeals for consideration as a matter of first impression.

A. The State's *mens rea* theory impermissibly rests on the provisional ballot affidavit.

In *Mason II,* this 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." *Mason II, 663* S.W.3d at 629 (emphasis added).

Indeed, relying on a provisional ballot affidavit would run afoul of Section 64.012(c) of the Texas Election Code, 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. As this Court noted, "[t]he amendment clarifies that a provisional ballot affidavit alone is insufficient evidence that the person knowingly committed the offense. Corroboration by other evidence is required for conviction." *Mason II*, 663 S.W.3d at 627.

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 merely 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).

Here, the State asks this Court to do exactly what this Court and the legislature have said is impermissible. The State has no evidence outside of the provisional ballot affidavit that relates to Ms. Mason's knowledge that being on federal supervised release rendered her ineligible to vote. The State offers only witness testimony about her reading the affidavit and her testimony surrounding the affidavit. As the court of appeals found "[i]n the end, the State's primary evidence was that Mason read the words on the affidavit." *Mason III*, 687 S.W.3d at 785.

The State's concluding remarks in its brief also make this clear:

> Considered together and viewed in the light most favorable to the verdict, evidence from Dietrich and Streibich [that Ms. Mason read the provisional ballot affidavit] combined with Appellant's own testimony [about the provisional ballot affidavit] is sufficient evidence for the trial court to rationally find that Appellant read and understood the affidavit on the day she voted.

State's Br. at 24-25.[15]

[15] On page 17, the State provides a list of evidence that it asserts without explanation goes to Ms. Mason's *mens rea*, but this list only confirms that the State's theory must rely on the provisional ballot affidavit. Outside of the discussed testimony concerning the provisional ballot affidavit, the State's other evidence is both innocuous and irrelevant. For instance, the State lists as evidence, "[o]n November 8, 2016, Appellant went to her precinct to vote in the general election," and "Streibich and Dietrich could not find Appellant's name in the registered voter book." State's Br. at 18. The only evidence listed that doesn't relate to Election Day

Further, as the court of appeals acknowledged, upholding Ms. Mason's conviction based on the above evidence would subject all provisional voters who turn out to be incorrect about their eligibility to potential criminal prosecution. The court of appeals noted that **"**[i]f the mere reading of a provisional ballot affidavit ... can show actual knowledge of voter ineligibility, anyone who reads and signs the affidavit—but is not in fact registered to vote (notwithstanding any good faith mistake in registration status)—is guilty of violating the criminal statute." *Mason III*, 687 S.W.3d at 784 n.11 (citing amicus brief of The League of Women Voters of Texas and The Texas State Conference of The National Association for the Advancement of Colored People). This would subject tens of thousands of people who made innocent mistakes to criminal prosecution.

The State's theory that a person's mere submission of a provisional ballot affidavit is enough to prove that they had sufficient *mens rea* to commit the offense if they were ineligible to vote also conflicts with the Help America Vote Act ("HAVA"), 52 U.S.C. § 21082 which grants individuals who declare and affirm they

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in 2016 concerns two pieces of mail sent to Ms. Mason's residential address in 2013, State's Brief at 17; however, as noted above, *see supra* Statement of Facts, these were sent to a home address inaccessible to Ms. Mason when she was incarcerated in federal prison. *Mason I*, 598 S.W.3d at 765; RR3.38 (Ex. 7); RR3.36 (Ex. 6). There is no evidence Ms. Mason received much less read these documents. Regardless, neither mailing would have alerted her about her voting status three years later because none of them discussed voting qualifications following incarceration at all, much less instructed her that being on federal supervised release after she completed her full term of incarceration would render her ineligible to vote.

are eligible to vote the right to cast a provisional ballot even if those individuals turn out to be incorrect about their eligibility.[16]

No matter how many different ways the State slices it, its theory requires the Court to infer Ms. Mason's knowledge solely from the provisional ballot affidavit. Therefore, it runs contrary to this Court's holding in *Mason II* and must be rejected.

B. Under this Court's precedent, the lack of decisional authority establishing that federal supervised release rendered Ms. Mason ineligible to vote, means that it was not possible to demonstrate that Ms. Mason actually realized she was ineligible in 2016.

The court of appeals' opinion can be affirmed for the separate reason that, at the time Ms. Mason submitted her provisional ballot, there was no decisional authority holding that being on "federal supervised release" renders an individual ineligible to vote under Texas law. Under binding authority from this Court, the lack of such decisional authority means that Ms. Mason could not have "actually realized" she was ineligible to vote when she submitted her provisional ballot. *Mason II*, 663 S.W.3d at 632.

In *Delay*, this 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*

[16] Ms. Mason recognizes that this Court rejected a similar argument related to HAVA in *Mason II*, but includes it here again to preserve the issue out of an abundance of caution.

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 Code § 34.02. This Court 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.

This Court held that, regardless of the evidence presented, the State could not meet its *mens rea* burden 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 [the 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." *Delay*, 465 S.W.3d at 247-48.[17]

Just as the sophisticated actors armed with attorneys in *Delay* could not "know" that their scheme was illegal prior to any "decisional law or other authority" to that effect, so too here, the State cannot demonstrate that Ms. Mason, a lay person, actually realized that she was ineligible to vote when there existed no decisional

[17] *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("If 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.").

authority analyzing the interaction of Texas state voting law with federal post-imprisonment supervisory requirements at the time.

No such decisional authority existed in 2016 when Ms. Mason submitted her provisional ballot because the court of appeals below was the first to examine the interaction between federal post-confinement terms of release and Texas state law concerning eligibility and determine that being on federal supervised release rendered an individual ineligible to vote. *Mason I*, 598 S.W.3d at 771-73.

Prior to that decision, there was no decisional authority that would have so informed Ms. Mason. In *Mason I*, the court of appeals 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, as noted above, in Texas law, supervision has been consistently understood to be equivalent to probation. *See supra* I.C.2.a; *Speth*, 6 S.W.3d at 532 n.3. In contrast, federal supervised release is **not** equivalent to probation. *Ferguson*, 369 F.3d at 849 n.5.

The lack of decisional authority that existed in 2016 to inform Ms. Mason of her ineligibility is compounded by the fact the provisional ballot affidavit substitutes the term "punishment" for the term "sentence" as used in the Texas Election Code. *Compare* RR3 at Ex.8, *with* Tex. Elec. Code § 11.002(a)(4)(A). As explained above, federal supervised release is generally not understood to be punitive in nature. *See supra* I.C.2.a.

Thus, far from informing her of her ineligibility, the decisional authority that existed at the time Ms. Mason submitted her provisional ballot would have indicated that Ms. Mason's circumstance of being on federal supervised release may not have fit into the enumerated ineligibility categories under state law.

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 informed her of it. RR2 at 20:9-17; RR3 at 5-7 (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 established 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)[18]; *see also Mason II*, 663 S.W.3d at 631.

The court of appeals' opinion in *Mason I* is the first legal authority holding that being on federal supervised release renders an individual ineligible to vote under Texas law. At the time Ms. Mason submitted her provisional ballot, she lacked such

[18] *Available at* https://journals.house.texas.gov/hjrnl/872/pdf/87C2DAY06FINAL.PDF#page=7.

guidance. Under *Delay*'s clear precedent, the lack of decisional authority means that Ms. Mason could not have actually realized that she was ineligible to vote.

III. Although the court of appeals correctly applied this Court's precedent on legal sufficiency review, if this Court determines otherwise, it should order a new trial.

For all the reasons noted above, this Court should affirm the court of appeals' verdict under its traditional legal sufficiency analysis. However, if this Court were to determine that traditional sufficiency analysis cannot justify an acquittal, this Court should remand this case for a new trial. This case presents unique circumstances where legal sufficiency review is being conducted of a trial record established where the trier of fact was the trial judge, and that judge did not have the benefit of the subsequent clarifying legal authority regarding a required element of the crime.

Here, this Court in *Mason II* clarified both that Ms. Mason must have actually realized that she was ineligible to vote because she was on federal supervised release and that negligence is not sufficient to meet that burden. *Mason II,* 63 S.W.3d at 629. The trial judge did not have the benefit of this Court's opinion when rendering the verdict. For instance, at trial, the Court asked Ms. Mason a series of questions indicating that she should have perhaps been more careful and inquired about her eligibility status and should have read the provisional ballot affidavit. RR2 at 156:6-

159:6; *see also* RR2 at 129:24-133:2 (prosecutor's line of questioning indicating Ms. Mason should have inquired more about her eligibility status on release from prison).

Given the uncertainties created by the proposition of analyzing a trial record under a newly clarified *mens rea* standard, if this Court does not affirm Ms. Mason's acquittal, it should, at the very least, remand the case back for a new trial. Indeed, a failure to ensure that a defendant is convicted under the correct understanding of the law would raise serious due process concerns under the Fifth and Fourteenth Amendments. *Cf. Hutch v. State,* 922 S.W.2d 166, 174 (Tex. Crim. App.,1996) (holding that "[a] defendant is entitled to be convicted upon a correct statement of the law" and remanding to trial court a case where a jury charge misstates the law); *Green v. State,* 893 S.W.2d 536, 539 (Tex. Crim. App. 1995) (en banc) (where court finds evidence was sufficient to sustain verdict but part of that evidence includes unconstitutional presumption, the correct remedy is to remand back for a new trial).

IV. Ms. Mason has a point of error remaining.

The court of appeals did not reach Ms. Mason's point of error with respect to ineffective assistance of counsel. Even if this Court finds the evidence legally sufficient to sustain Ms. Mason's verdict—which, for all of the reasons stated above, this Court should not—this Court should remand back to the court of appeals for consideration of that remaining point of error.

CONCLUSION

For the foregoing reasons, Ms. Mason requests that the Court affirm the court of appeals' decision.

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 Brief on the Merits, exclusive of the matters designated for omission, is 13,799 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 Brief will be served on counsel of record via e-service on October 29, 2024.

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