No. 02-18-00138-CR

COURT OF APPEALS
SECOND JUDICIAL DISTRICT OF TEXAS
FORT WORTH, TEXAS

CRYSTAL LA VON MASON-HOBBS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On appeal from the 432nd Judicial District Court of Tarrant County, Texas
Cause No. 1485710D
Judge Ruben Gonzalez, Jr., Presiding

BRIEF OF AMICI CURIAE THE LEAGUE OF WOMEN VOTERS OF TEXAS AND THE TEXAS STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) IN SUPPORT OF APPELLANT ON REMAND

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IDENTITY OF PARTIES AND COUNSEL

Amici Curiae adopts the list of parties and counsel in Appellant's Brief. Tex. R. App. P. 9.7. *Amici* further supplements as follows:

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The League of Women Voters of Texas is a non-partisan, volunteer organization committed to encouraging informed and active participation in government, working to increase understanding of major public policy issues, and influencing public policy through education and advocacy. The League of Women Voters of Texas is interested in the questions presented because this case involves important issues affecting participation in the voting process in Texas, including the criminal prosecution and conviction of members of the public who fill out provisional ballots in Texas believing that they are eligible to vote, but are mistaken.

The National Association for the Advancement of Colored People ("NAACP") is a non-profit civil rights organization founded in 1909. The NAACP's mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The first NAACP unit in Texas was founded in 1915. Part of the NAACP's core mission is to protect the right of citizens to vote. The Texas State Conference of the NAACP ("Texas NAACP") oversees more than 70 local branches and youth councils in Texas. Since its inception, the Texas NAACP has been fighting to ensure that every Texan has meaningful access to the American democratic system and that the voices of Texas voters are heard at the polls.

The *Amici* submit this brief in support of Appellant, because this Court's decision will affect the state and national discourse on the fundamental right to vote, and whether Texas prosecutors will continue to misapply Texas's illegal voting statute to prosecute and convict members of the public who fill out provisional ballots believing that they are able to vote, but are mistaken.

No fee has been paid or will be paid by the League of Women Voters of Texas, Texas NAACP, or by any of the parties for the preparation of this brief. Tex. R. App. P. 11. *Amici* counsel are providing their services pro bono.

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case by reference. Tex. R. App. P. 9.7.

ISSUES PRESENTED

Amici adopt Appellant's Issues Presented by reference. Tex. R. App. P. 9.7.

STATEMENT OF FACTS

Amici adopt Appellant's Statement of Facts by reference. Tex. R. App. P. 9.7.

SUMMARY OF THE ARGUMENT

The Court of Criminal Appeals has confirmed that, in order to meet the *mens rea* requirement of the Illegal Voting Statute (Texas Election Code Section 64.012(a)(1)), the defendant must have had "actual knowledge that it was a crime for her to vote while on supervised release." *Mason v. State*, No. PD-0881-20, 2022 WL 1499513, at *1 (Tex. Crim. App. May 11, 2022) [hereinafter "CCA Op."].

The Court's holding is in accordance with its prior precedent in *DeLay v. State*, 465 S.W.3d 232, 251–52 (Tex. Crim. App. 2014), which held that "knowingly" undertaking an act in violation of the Election Code means the actor must be aware not only of the circumstances that render her conduct unlawful but also of the fact that the conduct violates the Election Code. *Id.* at 250. The Court's holding is also consistent with the Texas Legislature's own explanation of the intent of the Illegal Voting Statute in House Resolution 123 (August 31, 2021). CCA Op. at *14–17. The Texas Legislature clarified that the Illegal Voting Statute should not be interpreted to apply to individuals who fill out provisional ballots without knowing that they are ineligible to vote. *Id.* In remarks on the floor of the Legislature, Representatives Dustin Burrows (R) and Representative John Turner (D) expressly clarified that Section 64.012 requires individuals to know they are

ineligible to vote to be convicted of a violation of the Illegal Voting Statute. *Id.* at *6–7. In separate remarks on May 30, 2021, Representative Briscoe Cain (R), the Chair of the Texas House Elections Committee, explained that the (then-proposed) new language in the Illegal Voting Statute is meant to "clarify what some courts and prosecutors have gotten wrong" about the Illegal Voting Statute—that:

> The crime of illegal voting is indeed **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,** that are **facilitated solely by being provided a provisional ballot** by a judge.[1]

But here—even after the Texas Legislature and the Court of Criminal Appeals have clarified that the Illegal Voting Statute requires the State to prove beyond a reasonable doubt that Ms. Mason knew that she was ineligible to vote at the time she filled out her provisional ballot—the State continues to argue that Ms. Mason's conviction should be upheld based solely on uncertain and speculative evidence and multiple "inferences" surrounding her completion of her provisional ballot. The State cannot seek to defend the unjust conviction of Ms. Mason based on stacked inferences that rest on impermissible speculation rather than facts established at trial.

The State's evidence regarding Ms. Mason's state of mind at the time of filling out her provisional ballot is based only on one witness's uncertain account that Ms.

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

Mason "paused and took some number of seconds to look over" the affidavit on the left-hand side of the ballot. Reporter's Record 2 ("RR2") at 67–71; 86:24–87:2; 102. The State's other witness, testifying that Ms. Mason traced her finger over some portion of the ballot envelope, offered no evidence that Ms. Mason read the affidavit on the relevant left-hand portion of the provisional ballot. *Id.* This uncertain and speculative evidence is insufficient to uphold Ms. Mason's wrongful conviction.

In order to maintain its conviction based solely on her act of filling out a provisional ballot, the State needed to present evidence at trial sufficient to show beyond a reasonable doubt (1) that Ms. Mason actually read the relevant (left-side) portion of the provisional ballot affidavit and actually understood that the left-side portion listed eligibility requirements for voting; (2) that—having established that she actually read the relevant portion of the ballot—Ms. Mason understood at the time of filling out the provisional ballot that being on federal supervised release was equivalent to "supervision"; and (3) that Ms. Mason therefore "actually realized" at the time of filling out her provisional ballot that she was ineligible to vote and submitted her provisional ballot anyway. The State was required to establish each of the above simultaneously and beyond a reasonable doubt—and the State's evidence is woefully lacking on all three points.

First, there is no clear evidence that Ms. Mason read the relevant (left-hand side) portion of the provisional ballot affidavit that the State alleges would have put

Ms. Mason on notice that she was ineligible to vote. The State relies on speculation to make its case on this point, *not* on facts or actual testimony by its two witnesses. The first witness, election judge Karl Dietrich, testified that he asked Ms. Mason to read the provisional ballot affidavit and that she "paused and took some number of seconds to look over" the affidavit, which provides no evidence that she actually read the relevant portion of the affidavit. RR2 at 67–71. Mr. Dietrich then went on to testify that he was not certain Ms. Mason had read the affidavit at all. *Id.* at 86:24–87:2 ("Q. I'm not picking on you. You cannot tell District Judge Gonzalez that [Ms. Mason], in fact, read the left-hand side of this ballot. You can't say that, can you? A. No."). The second witness, poll clerk Jarrod Streibich, testified only that he saw Ms. Mason trace her finger over some portion of the provisional ballot envelope while observing her from several feet away—he could not testify whether she read the left-side of the ballot containing the relevant portion of the affidavit. *See id.* at 102:18–20. As this Court observed in its prior opinion, Ms. Mason "was not certain and may not have read the warnings on the affidavit form." *Mason v. State*, 598 S.W.3d 755, 779–80 (Tex. App.—Fort Worth 2020, aff'd in part and remanded, No. PD-0881-20, 2022 WL 1499513 (Tex. Crim. App. May 11, 2022) [hereinafter "CoA Op."].

Second, this Court's 2020 opinion is the first and only decisional authority in Texas that has provided any notice that being on "federal supervised release" is

equivalent to being on "supervision" within the meaning of the provisional ballot affidavit. Thus, this Court's 2020 decision (nearly three and a half years after Ms. Mason filled out her provisional ballot in 2016) could not have provided Ms. Mason any notice of her ineligibility to vote at the time.

Third, the State has pointed to zero evidence that Ms. Mason actually understood at the time of filling out her provisional ballot that she was ineligible to vote. The State points to Ms. Mason's responses to the prosecutor's questions at trial nearly two years after the events in question—after she had been arrested, charged, and put on trial for Illegal Voting—whether "[i]t's safe to say that anyone reading this language would know, [i]f I'm a felon or if I'm a felon who has not concluded my sentence being on supervised release—[] it's clear I'm not eligible to vote?" *See* State's Brief on Remand at 27. Ms. Mason's answer in the affirmative proves nothing about Ms. Mason's state of mind when filling out her provisional ballot nearly two years earlier in 2016. Indeed, this Court itself stated in its prior opinion that "Mason may not have known with certainty that being on supervised released as part of her federal conviction made her ineligible to vote under Texas law or that so voting is a crime." CoA Op., 779–80. Without such proof beyond a reasonable doubt, the evidence is insufficient to sustain Ms. Mason's conviction.

The State's arguments rest on misapplying the Court of Criminal Appeals' precedent regarding the legal sufficiency standard, and its attempt to stack inferences

upon speculative (and equally inferential and uncertain) witness testimony, is equally misguided. No rational factfinder could make the asserted inferences based on mere speculation. *See, e.g.*, *Stobaugh v. State*, 421 S.W.3d 787 (Tex. App.—Fort Worth 2014, pet. ref'd). It is equally irrational to find that the State has proven the *mens rea* required by the Illegal Voting Statute where it is clear that Ms. Mason had "nothing to gain" by casting a provisional ballot in the 2016 election—as she had no motive to vote "knowing" she was ineligible, in stark contrast to prior convictions under the Illegal Voting Statute.[2]

The State's continued effort to maintain Ms. Mason's conviction, based on Ms. Mason's honest mistake regarding her ineligibility and her filling out of a provisional ballot, is particularly unwarranted and abusive, and has deleterious effects on the democratic process. By punishing Ms. Mason's honest attempt to participate in democracy after she repaid her debt to society for an earlier crime, this conviction (if upheld) tells all Texans that merely attempting to re-engage with the democratic system could put them behind bars if they are mistaken about their eligibility.

[2] *See Jenkins v. State*, 468 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd) (ten voters conspired to fraudulently register to vote using the address of a Marriott Inn to seize power over utility district); *Medrano v. State*, 421 S.W.3d 869, 873 (Tex. App.—Dallas 2014, pet. ref'd) (candidate for office enticed family members to falsify addresses to vote in his election and in doing so managed to win election).

ARGUMENT

I. The Illegal Voting Statute Does Not Criminalize Attempting to Vote (or Voting) While Ineligible Where There Is No Clear Evidence of "Actual Knowledge" of Ineligibility.

The Court of Criminal Appeals held that a provisional ballot affidavit is legally insufficient to prove the *mens rea* requirement that Ms. Mason "had actual knowledge that it was a crime for her to vote while on supervised release," CCA Op. at *1, because the plain language of Texas Election Code § 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit." *Id.* at *6. Applying its previous holding in *DeLay*, the Court held that "the State was required to prove not only [that Ms. Mason] knew she was on supervised release but also that she '*actually realized*' that 'these circumstances . . . in fact' rendered her ineligible to vote." CCA Op. at *8 (emphasis in original) (citing *DeLay v. State*, 465 S.W.3d 232, 252 (Tex. Crim. App. 2014)).

Notwithstanding those binding interpretations of the statute's plain language, the State continues to attempt to shoehorn a conviction against Ms. Mason, still based entirely on her provisional ballot affidavit. The only difference this time is that the State's theory is based on (1) speculation that Ms. Mason actually read the left-hand side of the provisional ballot affidavit at the time she completed the provisional ballot, and (2) a false inference that she fully understood (*i.e.*, "actually realized") that she was ineligible to vote based only on (allegedly) reading the left-

hand side of the affidavit at the time she filled out her provisional ballot. In turn, the State's false inference that Ms. Mason "actually realized" she was ineligible to vote at the time of filling out her provisional ballot is based only on her testimony—nearly two years later and with the benefit of being informed of her apparent crime—that a person reading the affidavit would understand that being on supervised release made them ineligible to vote.

This Court should review the legislative intent of the Election Code writ large and the Illegal Voting Statute, and re-examine *DeLay*, both of which demonstrate that Ms. Mason's conviction should be overturned.

A. The Legislative Intent of the Re-codified Election Code and Section 64.012 Confirm That Actual Knowledge of Voter Ineligibility Requires More than a Provisional Ballot Affidavit.

At base, the current Election Code, including Section 64.012, is meant to promote, not hinder, voter participation. It follows directly from the intent of the statutory framework that the Court of Criminal Appeals required proof that Ms. Mason had actual knowledge of her ineligibility to vote.

Consider the legislative history of SB 616—the 1985 bill re-codifying the Election Code into its current structure that instituted the proscription against illegal voting in Section 64.012(a)(1). The drafters of SB 616 made clear that the Election Code was intentionally drafted to be interpreted by its plain-language meaning. In explaining the purpose of SB 616, Senator Chet Edwards, the author of the bill,

described the previous Texas election laws as a "maze of confusing language, of inconsistencies and gaps and duplications."[3] Accordingly, SB 616 was meant to make Texas's "election law [] **understandable to the average citizen**"[4]—an impossible-to-achieve goal if the statute penalizes an average citizen for making a good faith effort to vote.

Section 64.012 is no exception to that general intent, and the Texas Legislature has made that clear. In 2021, the Legislature added new language to Section 64.012, codified in Subsection (c), which states that a person "may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 unless corroborated by other evidence that the person knowingly committed the offense." Tex. Elec. Code § 64.012(c). In this case, the Court of Criminal Appeals relied explicitly on that amendment and related statements from the Legislature to determine the Legislature's intent regarding the Illegal Voting Statute, CCA Op. at *6–9, as it had done in previous cases.[5]

For instance, Representative Briscoe Cain explained during the Legislature's 87th general session why the change was necessary:

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[3] Debate on Tex. S.B. 616 on the Floor of the Senate, 69th Leg., R.S., Tape 0075 Side 1 at 23:40–55 (April 24, 1985) (https://tsl.access.preservica.com/uncategorized/IO_2823d532-a1d1-4835-8242-d4cec44430fc).

[4] *Id.* at 25:07–16 (emphasis added).

[5] *See, e.g., Garrett v. State*, 377 S.W.3d 697, 707–08 (Tex. Crim. App. 2012) (considering later amendments, and related legislative observations, to a statute for purposes of determining legislative intent).

> 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.[6]

Moreover, in discussing HR 123 that same year, which directly addressed the interpretation of Section 64.012(a)(1), members of the Legislature made clear that the legislative intent of Section 64.012(a)(1) was not to punish "a person's honest mistake in voting when they genuinely believe they were eligible to do so."[7] Indeed, referencing Ms. Mason's case, Representative Dustin Burrows, the Republican sponsor of the Resolution, explained that "I would not have known that being on

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

[7] H.J. of Tex., 87th Leg., 2nd C.S. 321 (2021), https://journals.house.texas.gov/HJRNL/872/PDF/87C2DAY06FINAL.PDF (Representative John Turner, with Representative Dustin Burrows in agreement).

supervised release would have made you ineligible. That is a high bar to impute on somebody to put them away for five years."[8] Further, regarding the required *mens rea* of the Illegal Voting Statute, Representative Burrows concluded that an amendment to clarify the statute may not really be necessary "because the law as written, if interpreted correctly, should have already provided for [an actual knowledge requirement]."[9] Thus, even the Resolution itself was said to be merely "reiterating and restating what is the current law."[10] HR 123 reaffirmed that "no Texan should be prosecuted for the offense of illegal voting if the person voted or attempted to vote based on a mistaken, honest belief that the person was in fact eligible to vote."[11] HR 123 was adopted with overwhelming support, with 119 Yeas, 4 Nays, and 1 Present, not voting.[12]

These clear statements of legislative purpose signify that the original and continuing legislative intent of Section 64.012(a)(1) is not only to require a culpable state of mind (i.e., knowledge and actual realization of ineligibility) to convict for illegal voting, but also to require more than a provisional ballot affidavit to evince that culpability.

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 322 (Representative Burrows).

[11] Tex. H.R. 123, 87th Leg., 2nd C.S. (2021) (https://capitol.texas.gov/tlodocs/872/billtext/pdf/HR00123F.pdf#navpanes=0).

[12] H.J. of Tex., 87th Leg., 2nd C.S. 322 (2021).

B. The Court of Criminal Appeals' Discussion of *DeLay v. State* Removes Any Doubt That the State Must Prove That Ms. Mason "Actually Realized" That She Was Ineligible to Vote at the Time She Filled Out Her Provisional Ballot.

Even if this Court were uncertain about the correct interpretation and application of the Illegal Voting Statute after reviewing the Legislature's clear pronouncements of intent, the Court of Criminal Appeals' decision in *DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014), and its further discussion of *DeLay* when examining Ms. Mason's own case, underscore the fact that the State cannot maintain a conviction based solely on its allegations regarding Ms. Mason's filling out or alleged reading of the provisional ballot affidavit.

In *DeLay*, like in Ms. Mason's case, the Court of Criminal Appeals was tasked with interpreting a provision of the Election Code. There, the question was whether a violation of Texas Election Code § 253.003(a), which criminalized "knowingly mak[ing] a political contribution in violation of [the Election Code]," required the actor to simply "knowingly" make a political contribution—or instead additionally required the actor to do so knowing that the conduct violated the Election Code. *DeLay*, 465 S.W.3d at 250. The Court concluded that the higher knowledge threshold applies, holding that "the State must [] show that the actor was actually aware of the existence of the particular circumstance surrounding that conduct that renders it unlawful." *Id.* Going further, the Court held that "knowingly" undertaking an action "in violation of the Election Code" means "that the actor [is] aware, not

just of the particular circumstances that render his otherwise innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances, constitutes a 'violation of' the Election Code" at the time the offense was committed. *Id*.

Analogous to the situation here, the *DeLay* court therefore had to decide whether reading certain materials (i.e., political fundraising literature) had made the actors (i.e., corporate donors) actually aware that their conduct (i.e., donations) was unlawful and violated the Election Code. Despite acknowledging that, based on the fundraising literature, these corporate donors "may have had enough information . . . that they were, or ought to have been, aware of a substantial and unjustifiable risk that their corporate contributions would violate the Texas Election Code," the Court concluded that there was no evidence that the donors "actually realized" that their contributions violated the Election Code. *Id.* at 252. That is because "neither recklessness nor negligence serves to establish an offense under" a statute requiring an actual knowledge *mens rea*. *Id*.

So, too, here. Following *DeLay*, the Court of Criminal Appeals concluded that Ms. Mason can only be found guilty "if she knew she was ineligible to vote in addition to knowing that she had not completed her sentence." CCA Op. at 6. As in *DeLay*, the Court made explicit that the plain language of the Illegal Voting Statute did not create "a sort of negligence scheme wherein a person can be guilty

because she fails to take reasonable care to ensure that she is eligible to vote." *Id*. Thus, any argument presented by the State that Ms. Mason should have known she was ineligible to vote based on the circumstances—or that she should have recognized that the words "probation" or "supervision" in the provisional ballot affidavit is equivalent to "federal supervised release" (as discussed below in Section II.B, *infra*)—is inapposite to her actual knowledge at the time.[13] A few cherry-picked lines of uncertain, speculative, and after-the-fact testimony cannot bear the weight of the actual knowledge burden.

II. The State's Strained Reading of the Facts Is Still Insufficient to Show That Ms. Mason "Actually Realized" That She Was Ineligible to Vote at the Time She Filled Out the Provisional Ballot.

A. The State Concedes That a Provisional Ballot Affidavit Alone Is Insufficient, Yet Still Bases Its Arguments on Witness Evidence Relating Only to Ms. Mason's Filling Out of the Provisional Ballot.

The Court of Criminal Appeals established that "merely signing an affidavit is not, alone, sufficient evidence to secure a conviction for illegal voting; there must be other evidence to corroborate that the defendant knew she was ineligible to vote." CCA Op. at *4. In its Brief on Remand, the State admits that "a signed Provisional Voter Affidavit, standing alone, is not to be considered legally sufficient evidence to show that a defendant knew she was ineligible to vote." State's Brief, p. 19. Yet

[13] Although not made explicit by the Court's opinion, consistent with *DeLay*, even recklessness—or an awareness of a substantial risk of ineligibility—would not be enough to convict a person under the Illegal Voting Statute.

the State still relies only on uncertain and speculative evidence based solely on the election workers' furnishing of a provisional ballot to Ms. Mason and their observations regarding Ms. Mason's filling out of the provisional ballot affidavit, which amount to mere speculation and doom its attempt to sustain Ms. Mason's conviction.

B. The State's Remaining Evidence Is Questionable, Uncertain, and Insufficient to Support a Conviction for Illegal Voting.

The State cannot establish, based on its "remaining evidence," that Ms. Mason knew she was ineligible to vote.[14] In reviewing the record for legal sufficiency, the appellate court must view all of the evidence in the light most favorable to the verdict, but the State must still meet its evidentiary burden. *Winfrey v. State*, 323 S.W.3d 875, 878 (Tex. Crim. App. 2010). While the appellate court may defer to the factfinder's proper role in resolving conflicts in favor of the verdict, it should do so only "as long as it is rational." *Herrera v. State*, 526 S.W.3d 800, 808 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). In criminal cases, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 808 (emphasis added); *see*

[14] *Amici* adopt Appellant's arguments concerning the applicable standards of review and preservation of error. Tex. R. App. P. 9.7. The legal sufficiency standard necessarily involves issues of statutory construction that present questions of law reviewable *de novo*. *Tex. DOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *State v. Haltom Med. Inv'rs, L.L.C.*, 153 S.W.3d 664, 668 (Tex. App.—Fort Worth 2004, no pet.).

Jackson v. Virginia, 443 U.S. 307, 319 (1979).[15] This means that the factfinder "need[s] to reach a subjective state of near certitude" regarding the essential elements of the offense (including *mens rea*). *Jackson*, 443 U.S. at 315. While the State argues that inferences may be used to meet its evidentiary burden of proof beyond a reasonable doubt, a conviction cannot be sustained based on mere speculation or factually unsupported inferences or presumptions, but rather must be based on actual facts and evidence. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007); *Stobaugh v. State*, 421 S.W.3d 787, 861 (Tex. App.—Fort Worth 2014, pet. ref'd).[16]

Texas courts have not shied away from overturning convictions because the government's case could do no more than raise a strong suspicion. For example, in *Winfrey*, a case involving a murder conviction based on dog-scent evidence, the appellate court overturned the conviction because the record established, at best,

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[15] Texas courts have made clear that the distinction between the highest burden of proof, and other lower standards, are of great importance in legal sufficiency cases. *See Jackson v. Virginia*, 443 U.S. 307, 315 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("Applying [the standard of preponderance of the evidence], the judge was satisfied that the juvenile was "guilty," but he noted that the result might well have been different under a standard of proof beyond a reasonable doubt," discussing *In re Winship*, 397 U.S. 358 (1970) (internal citation omitted)). Evidence that raises only a "strong suspicion of appellant's guilt" is not enough. *See Winfrey v. State*, 323 S.W.3d 875, 885 (Tex. Crim. App. 2010); *see also Urbano v State*, 837 S.W.2d 114, 116 (Tex. Crim. App. 1992) ("[i]f the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient [to convict].").

[16] The Court of Criminal Appeals has taken time to caution against an improper application of the *Jackson* standard, stating that "it is vital that courts of appeals understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption." *Hooper v. State*, 214 S.W.3d at 16.

"merely" a strong suspicion of guilt, rather than establishing guilt beyond a reasonable doubt. *See Winfrey v. State*, 323 S.W.3d 875, 882 (Tex. Crim. App. 2010). Even after viewing the evidence in the light most favorable to the verdict, the *Winfrey* court concluded that the evidence was legally insufficient because the government's evidence was simply not enough to meet its high burden. *Id*.

Likewise, in *Stobaugh*, this Court overturned a murder conviction where the evidence on record was insufficient for any rational juror to infer that the State met its burden to prove the essential elements of the offense of murder. *Stobaugh*, 421 S.W.3d at 863. There, the court found that the defendant "possessed a possible motive and definite opportunity" to commit the offense of murder, that the defendant "lied about certain events," and that his conduct was "suspicious." *Id.* But the court concluded that "the cumulative force of the facts in the record [did not] support a deduction by any rational finder of fact" that the defendant "intentionally or knowingly caused" the decedent's death through any specific act. *Id.* Specifically regarding the *mens rea* element of the offense, the court concluded:

> [T]he circumstantial evidence, even if it supports an inference that [the defendant] did something to [the decedent] and that [the decedent] died as a result of that something, nonetheless wholly fails to provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* [the defendant] possessed when he did that something to [the decedent] was the *mens rea* for murder, as opposed to some other *mens rea*, such as the *mens rea* for manslaughter.

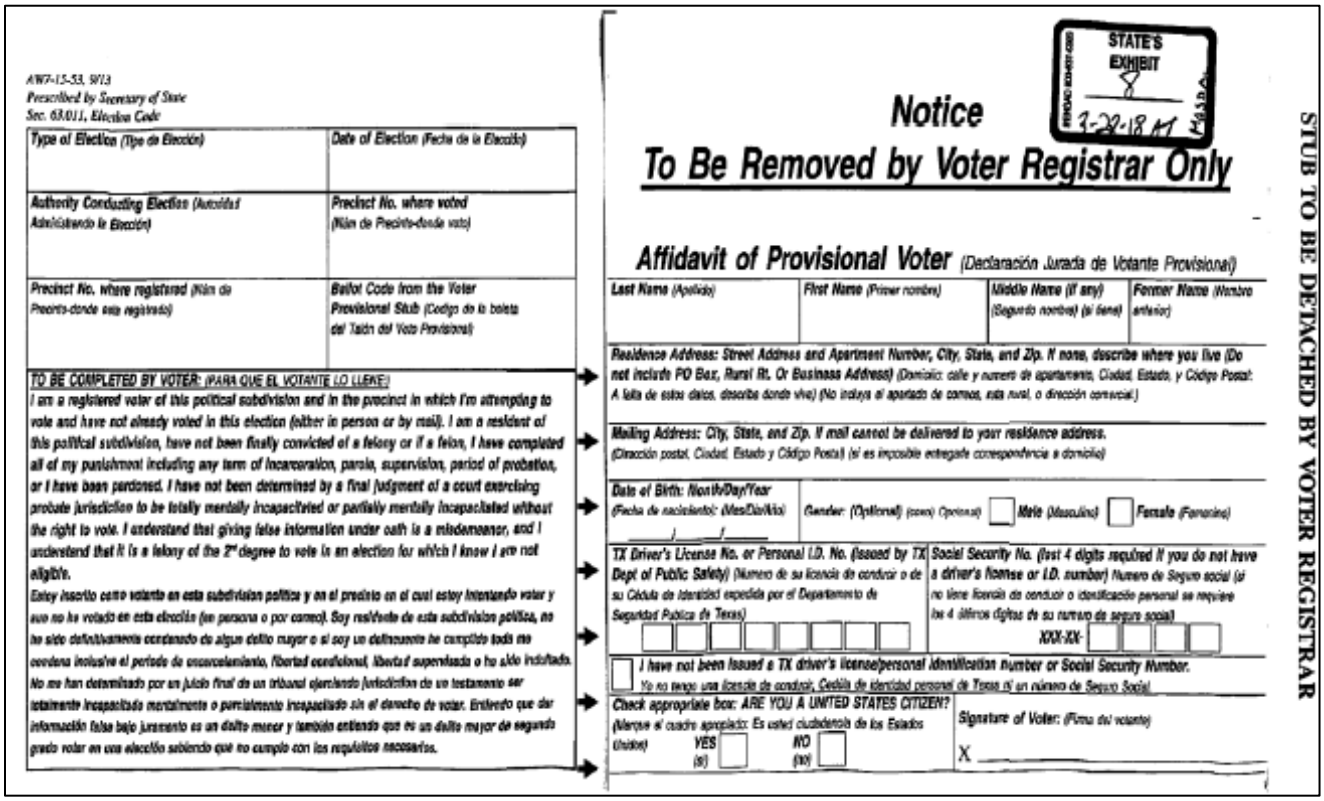
Id. at 868. This Court therefore concluded that the jury's conviction based on a finding that the defendant "intentionally or knowingly caused [the decedent's] death is based on speculation and cannot support a finding of guilt beyond a reasonable doubt." *Id*. (citing *Winfrey v. State*, 393 S.W.3d at 771).

Like in *Winfrey* and *Stobaugh*, the State's scant evidence here falls far short of the required showing, even in the light most favorable to the verdict. By its own admission, the State's only "evidence of Appellant's knowledge [] consisted of 1) the affidavit; 2) Appellant's signature on the affidavit; 3) the . . . testimony of two eyewitnesses . . . that Appellant read the affidavit; and 4) the . . . testimony of Appellant . . . that she understood the affidavit to mean that she was ineligible to vote and would commit a felony by doing so" at trial (as opposed to at the time of filling out the provisional ballot). *See* State's Brief on Remand at 27. It is now clearly established that the affidavit and Ms. Mason's signature thereon are not enough to secure a conviction for illegal voting. The remaining evidence is utterly insufficient to uphold Ms. Mason's conviction.

First, the State cannot establish (based on the evidence in the record) that Ms. Mason actually read the left-hand portion of the provisional ballot affidavit. The State introduced the testimony of election judge Karl Dietrich and poll clerk Jarrod Streibich to establish that Ms. Mason read the provisional ballot affidavit. But this evidence, which the State acknowledges is circumstantial, suggests only that Ms.

Mason may have read some portion of the provisional ballot affidavit (not necessarily the relevant left-hand portion). *See* State's Brief on Remand at 21. Indeed, Mr. Dietrich testified that he asked Ms. Mason to read the provisional ballot affidavit and that she "paused and took some number of seconds to look over" the affidavit. RR2 at 67–71. But the State acknowledges that Mr. Dietrich was unable to say with certainty whether Ms. Mason read the affidavit, let alone the left-hand side of the affidavit. State's Brief on Remand at 21; RR2 at 86:24–87:2 (Mr. Dietrich's testimony that he is uncertain of whether Ms. Mason read the affidavit at all). Mr. Streibich's testimony provides no additional support. Mr. Streibich testified only that he saw Ms. Mason trace her finger over some portion of the provisional ballot envelope while observing her from several feet away—and importantly, his testimony provides no support that Ms. Mason read the left-hand side of the affidavit. RR2:102. Furthermore, Mr. Streibich testified that the polling place was particularly busy at the time of this supposed observation. RR2 at 101:24–102:2. Neither witness could affirmatively testify that Ms. Mason read the left-hand side portion of the affidavit which the State contends would have provided notice to Ms. Mason that she was ineligible to vote. This omission is key, because if one actually examines the provisional ballot affidavit (excerpted below), it is littered with text and instructions, such that no reasonable factfinder could find that Ms.

Mason actually read the left-hand side portion of the provisional ballot based on the State's evidence:



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 vota)
Precinct No. where registered (Núm de Precinto donde está registrado)	Ballot Code from the Voter Provisional Stub (Código de la boleta del Talón del Voto Provisional)

STATE'S EXHIBIT 8 2-22-18 AT

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)

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 subdivisión política 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 subdivisión política, no he sido definitivamente condenado de algún delito mayor o si soy un delincuente he cumplido todo mi condena incluyendo el periodo de encarcelamiento, libertad condicional, libertad supervisada o he sido indultado. No me han determinado por un juicio final de un tribunal ejerciendo jurisdicción 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 sabiendo entiendo que es un delito mayor de segundo grado votar en una elección sabiendo que no cumplo con los requisitos necesarios.

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 número 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/Día/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) (Número de su licencia de conducir o de su Cédula de identidad expedida por el Departamento de Seguridad Pública de Texas)

Social Security No. (last 4 digits required if you do not have a driver's license or I.D. number) Número de Seguro social (si no tiene licencia de conducir o identificación personal se requiere los 4 últimos dígitos de su número 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, Cedula 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 de los Estados Unidos) YES (sí) ☐ NO (no) ☐

Signature of Voter: (Firma del votante) X _____

STUB TO BE DETACHED BY VOTER REGISTRAR

See Reporter's Record 3 ("RR3") at Ex. 8. As in *Stobaugh*, "the cumulative force of the facts in the record [do not] support a deduction by any rational finder of fact" that Ms. Mason actually read the left-hand side portion of the provisional ballot. Without evidence showing that Ms. Mason read the relevant portion of the provisional ballot, the State's evidence is mere speculation, and cannot meet its burden to show that Ms. Mason knew she was ineligible to vote.

Not only is the testimony of Mr. Dietrich and Mr. Streibich uncertain, it is also contradictory. Mr. Dietrich testified that Ms. Mason arrived at the polling place at

2:30 pm, and that the polling place was "calm" and "not rushed at all" when Ms. Mason submitted her provisional ballot. RR2 at 85:5–12; 72:24–25. Furthermore, Mr. Dietrich testified that he moved Ms. Mason "away from the actual voter line" and to a "back table" to submit her provisional ballot. RR2 at 73:21–25; RR2 at 85:1–4; *see also* RR3 at Ex. 10 (map of voting location). In direct contrast, Mr. Streibich testified that Ms. Mason came in and submitted her provisional ballot "around quarter after 4:00," when the polling place was "particularly busy" and he was handling several voting lines at once. RR2 at 101:24–102:2. Mr. Streibich also testified that he sat at a table located where the voters entered the polling place, and that Ms. Mason sat 4 to 5 feet away from him "directly to [his] right," nearer to the voting line. RR2 at 101:19–23; 101:10–18; RR3 at Ex. 10; 102:7–17. The State's key witness testimony is completely at odds here, and this inconsistent evidence is not enough to uphold a finding that Ms. Mason read the relevant left-hand portion of the provisional ballot at the polling place.

Second, even if this Court were to accept that Ms. Mason actually read the relevant left-hand side portion of the provisional ballot, no rational factfinder could conclude beyond a reasonable doubt, based on the record evidence, that Ms. Mason knew that she was ineligible as a result of reading it. The State argues that Ms. Mason's testimony at trial, long after the events in question, established beyond a reasonable doubt that she understood the affidavit to mean (at the time of allegedly

reading it, two years earlier) that she was ineligible to vote and would commit a felony by doing so. *See* State's Brief on Remand at 27. The state mischaracterizes Ms. Mason's testimony. The Prosecutor asked Ms. Mason whether "[i]t's safe to say that anyone reading this language would know, [i]f I'm a felon or if I'm a felon who has not concluded my sentence being on supervised release – [] it's clear I'm not eligible to vote?" Ms. Mason answered in the affirmative. The State's attempt to retroactively apply Ms. Mason's supposed knowledge of a generic person's understanding at the time of the trial to her own understanding the day she filled out a provisional ballot years earlier, upsets the most basic, fundamental principles of criminal law. In assessing mental culpability, the Court must look back to what a particular person knew at the time they acted, and it is irrelevant what Ms. Mason might be able to understand years later, especially after having her liberty taken away because she chose to cast a provisional ballot. Ms. Mason's statement at trial proves nothing about Ms. Mason's state of mind when filling out her provisional ballot nearly two years earlier in 2016.

As in *Stobaugh*, where the State "wholly fail[ed] to provide the [factfinder] with any facts" regarding the defendant's state of mind "from which [it] could . . . reasonably infer that the *mens rea* [the defendant] possessed" was the *mens rea* required by the offense, here the State has provided no facts that Ms. Mason actually knew on November 8, 2016 that she was ineligible to vote. *See Stobaugh*, 421

S.W.3d at 863, 868; *see also Winfrey*, 393 S.W.3d at 771. Accordingly, the State's evidence is insufficient to maintain a conviction for Illegal Voting, and Ms. Mason's conviction should be overturned.

C. Ms. Mason Could Not Have Known She Was Ineligible To Vote at the Relevant Time, Because the Illegality of Voting While on Federal Supervised Release Had Not Been Established by Any Court When She Submitted Her Provisional Ballot.

When Ms. Mason cast her provisional ballot on November 8, 2016, there was no authority establishing the illegality of casting a provisional ballot while on federal supervised release. It was not until March 19, 2020, when this Court held that it is illegal to vote while on federal supervised release, that any court or other authority ruled that being on "federal supervised release" was equivalent to being on "supervision" within the meaning of the Illegal Voting Statute or the provisional ballot affidavit. CoA Op. at 773. Indeed, this Court acknowledged that "Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law or that so voting is a crime." CoA Op. at 779. It is now well established that illegality hinges upon whether Ms. Mason "actually realized" that being on federal supervised release rendered her ineligible to vote. CCA Op. at *8. Because Ms. Mason could not have known that filling out a provisional ballot while on federal supervised release was illegal in November 2016 even if she had read the left-hand side portion of the provisional ballot, her conviction must be overturned.

In *DeLay*, the Court of Criminal Appeals held that "in 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 . . . criminal activity." *DeLay*, 465 S.W.3d at 247–48. *DeLay* applies here. This Court's decision against Ms. Mason in 2020 was the first authority holding that being on "federal supervised release" renders an individual ineligible to vote under Texas law. Thus, it cannot be reasonably concluded that Ms. Mason was aware that her conduct was illegal.

Furthermore, neither the provisional ballot itself or the relevant state statutes would have provided Ms. Mason the requisite knowledge required to violate Tex. Elec. Code § 64.012(a)(1). Ms. Mason's provisional ballot featured an affidavit portion containing a series of affirmations, including the statement that "I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and ... have not been finally convicted of a felony, or if a felon, I have completed all of my punishment including any period of incarceration, parole, supervision, period of probation or I have been pardoned." RR3 at Ex. 8 (emphasis added). Relatedly, Texas Election Code Section 11.002(4) states that a person is qualified to vote under Section 11.002(4) if she "has not been finally convicted of a felony or, if so convicted, has: (A) fully discharged the person's sentence, including

any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court; or (B) been pardoned or otherwise released from the resulting disability to vote." Tex. Elec. Code § 11.002(4) (emphasis added). But as this Court has already established, "[t]he term 'supervision' as used in Section 11.002(a)(4)(A) is not defined in the Election Code." CoA Op. at 771. Instead, the Texas Code of Criminal Procedure uses the term "community supervision."[17] And the Court of Criminal Appeals has consistently applied its "convention of using the terms 'community supervision' and 'probation' interchangeably," but did not separately define "supervision" or "federal supervised release." *See Shortt v. State*, 539 S.W.3d 321, 322 n.1 (Tex. Crim. App. 2018); *Speth v. State*, 6 S.W.3d 530, 532 n.3 (Tex. Crim. App. 1999)).

When Ms. Mason received the provisional ballot affidavit, she was not on "community supervision" or probation as the term is used in Texas criminal law — she was on federal supervised release, which the Fifth Circuit has already established is wholly separate. *See 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.'"). Thus,

[17] *See, e.g.*, Tex. Crim. Proc. Code § 42A.551 ("[O]n conviction of a state jail felony under [a list of criminal procedural code sections], Health and Safety Code, that is punished under Section 12.35(a), Penal Code, the judge shall suspend the imposition of the sentence and place the defendant on community supervision.").

neither the provisional ballot affidavit nor the applicable statutes and cases could arguably have provided notice—or have given rise to even speculation of actual knowledge—to Ms. Mason that her federal supervised release status would render her ineligible to vote.

III. Overenforcement of Illegal Voting Laws Stretches the Illegal Voting Statute Beyond Its Text and Intended Scope.

A. Ms. Mason's Case Represents a Stark Deviation from Past Prosecutions under the Illegal Voting Statute.

In accordance with the plain language of the Illegal Voting Statute, past prosecutions and convictions under this statute consist of cases where the defendants flagrantly abused the voting system to influence the outcome of an election. The case against Ms. Mason represents a stark deviation from past practice and an abuse of prosecutorial discretion in its demand that the courts infer Ms. Mason's intent to vote illegally from the mere fact that she filled out a provisional ballot and that witnesses think that she may have read some part of the provisional ballot affidavit.

The legislature recognized the downsides of overcriminalization of election activity by adding a strict *mens rea* requirement to the Illegal Voting Statute. The State, in turn, has generally brought cases only against perpetrators whose actions were intentional and malicious, not mistaken. The reported cases involving Section 64.012(a) principally cover individuals whose activity is clearly intended to game

the election system by using illegal votes to tilt the outcome of an election to serve their own interests. Ms. Mason's case bears no resemblance to theirs.

In *Jenkins v. State* and several related cases (hereinafter "the *Jenkins* cases"), ten voters, led by James Allen Jenkins, conspired to fraudulently vote in an election for the Board of Directors of the Woodlands Road Utility District No. 1 (hereinafter "the RUD") with the goal of electing their chosen representatives to the board and seizing power in the RUD. *Jenkins v. State*, 468 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd).[18] The *Jenkins* defendants, a group of politically active residents of Montgomery County, met to discuss the RUD, concocted a plan to bend it to their will, and came up with a scheme to claim residency at a Marriott Inn located within the RUD for the sole purpose of voting in its election. *Jenkins*, 468 S.W.3d at 659-660. The group reviewed copies of an advisory opinion by the Secretary of State, which included the Texas Election Code statute defining "residence" as "one's home and fixed place habitation to which one intends to return after any temporary absence," and circulated maps of the RUD. *Id.* (quoting Tex. Elec. Code § 1.015). Armed with this information, ten individuals changed their official residences from their longtime homes outside the RUD to a

[18] In addition to *Jenkins*, the *Jenkins* Cases also include *Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192, at *1 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd);); *Doyle v. State*, No. 09-14-00458-CR, 2016 WL 908299, at *1 (Tex. App.—Beaumont 2016, pet. ref'd);); *Cook v.* State, No. 09-14-00461-CR, 2015 WL 7300664, at *1 (Tex. App.—Beaumont 2015, pet. ref'd);).

Marriott Inn located within the RUD. *Id.* at 660. When the RUD learned of ten new voter registrations at one hotel, they contacted the relevant DA's office, which sent a letter to all registered voters in the RUD, including the ten *Jenkins* conspirators, notifying them that the DA's office had received "an official complaint alleging fraudulent voter registrations within the RUD." *Id.* at 661. The letter outlined the law governing voter registration and the criminal penalties associated with illegal voting, including "the text of section 64.012 of the Texas Election Code." *Id.* Despite this warning, Jenkins and his co-conspirators proceeded to vote in the RUD election and succeeded in electing Jenkins's hand-chosen candidates, thereby taking control of the RUD Board. *Id.*

Similarly, in *Medrano v. State*, Carlos Medrano won his election for Dallas County Justice of the Peace after enticing several members of his family to either fraudulently vote in his election or to lie about the scheme to cover it up. *Medrano v. State*, 421 S.W.3d 869, 873 (Tex. App.—Dallas 2014, pet. ref'd). Medrano filled out a new registration for his niece, Veronica, and asked her to sign it at a family Christmas party. *Id.* at 874. The voter registration form listed another uncle's home—in Dallas—as Veronica's residence, even though she actually lived with her parents outside of Dallas and was thus ineligible to vote in Medrano's election. *Id.* Veronica signed the registration form and Medrano later led her to a polling location to cast her vote for him. *Id.*

In *Medrano* and in the *Jenkins* Cases, the defendants engaged in criminal conspiracies to abuse the voting system for personal gain—to seize power in small districts where a small number of voters could easily sway the outcome or to pad their own election results.[19] The State is right to hold such bad actors accountable. But unlike in the *Jenkins* Cases, Ms. Mason was not involved in any planned scheme to rig the vote and take control of a small local district. And unlike in *Medrano*, Ms. Mason herself had nothing to gain from the outcome of the election; neither she, nor any family member were on the ballot. Ms. Mason simply wished to do her civic duty, unaware that she was ineligible to do so. Even from a cursory examination of the *Jenkins* Cases and *Medrano*, Ms. Mason's act of filling out a provisional ballot and two witnesses testifying that she appeared to read the provisional ballot affidavit bears no resemblance to the criminal conspiracies at issue in the *Jenkins* Cases and *Medrano*.[20] The State's insistence on prosecuting Ms. Mason with no evidence of

[19] While these cases were brought before the Court of Criminal Appeals clarified the *mens rea* standard, there is no doubt that similar cases of obvious malfeasance would be found to violate the statute today.

[20] Even in the rare case where the State has brought an illegal voting case lacking indicia of fraud or manipulation, the defendant's knowledge of his or her ineligibility to vote was well supported, instead of reliant on speculation. *See, e.g.*, *Ortega v. State*, No. 02-17-00039-CR, 2018 WL 6113166, at *1 (Tex. App.—Fort Worth 2018, no pet.) . In *Ortega*, Ms. Ortega received a written notice and verbal explanation of her ineligibility to vote prior to her attempts to vote illegally. *Id.* Ms. Ortega also "admitted that she indicated she was a citizen on the forms . . . so that she could vote." *Id.* at *2. Here, in contrast, Ms. Mason made no admission regarding her intent and only learned of her ineligibility when the state brought charges against her. It should also be noted that *Ortega* was brought before the Court of Criminal Appeals and the Legislature clarified the *mens rea* standard ("actual knowledge") applicable in illegal voting cases.

malfeasance is thus a stark departure from its past practice and, as explained above, a deviation from the text and intent of the Illegal Voting Statute.

B. The State Morphs the Provisional Ballot System from a Method to Increase Voter Participation into a Scheme to Encourage Prospective Voter Criminalization.

By its very nature, the provisional ballot system enumerated by the Election Code in Section 63.011 (the "Provisional Ballot Statute") was enacted as a way to allow increased voter participation in Texas elections. The State distorts that purpose by weaponizing the provisional ballot to criminalize the actions of well-meaning and honest citizens that fill out a provisional ballot with a mistaken belief that they are eligible to vote.

Beyond just allowing duly-registered voters who do not show up on a precinct's list of registered voters to cast a ballot, a provisional ballot also acts as a way to register those who are incorrect about their registration status. Section 63.011(b-1) states that "[t]he [provisional ballot] affidavit form may include space for disclosure of any necessary information to enable the person to register to vote." Tex. Elec. Code § 63.011(b-1). This subsection, enacted in 2003,[21] makes it easier for people to register and vote. Under this section, the provisional ballot of any

[21] When this subsection was enacted in 2003, the quoted language was initially rolled into Section 63.011(b). Acts of 2003, 78th Leg., R.S., ch. 1315, § 28, 2013 Tex. Gen. Laws 4825–26 (https://lrl.texas.gov/scanned/sessionLaws/78-0/HB_1549_CH_1315.pdf, at PDF p. 7–8). It was later broken out into its own subsection, i.e., (b-1). For ease of understanding, the subsection will be referred to as (b-1) when referenced in this brief.

provisional voter, even those who turn out to be unregistered, "contains the elements of a voter registration application so that in any event the voter would be registered for future elections."[22]

The intent and operation of this subsection was further explained by Ann McGeehan, the then-Director of Elections for the Secretary of State, during a May 17, 2004 hearing in front of the Senate Committee on State Affairs regarding implementation of provisional voting. There, Ms. McGeehan testified that: "The way our rules work, anyone that voted a provisional ballot was required basically to fill out a new voter registration application . . . that provisional ballot affidavit operates as a voter registration card so they'll be registered for the next election."[23] This process remains in place today.[24]

Based on the language of the affidavit itself, the State's "crime by affidavit" approach runs head first into that process. The first words in the admonishments on

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[22] Senate Committee on State Affairs, Interim Report to the 79th Legislature, 78th Leg., R.S. (Dec. 1, 2004), at 23 (https://lrl.texas.gov/scanned/interim/78/St29a.pdf, at PDF p. 44).

[23] Hearings on Implementation of Tex. H.B. 1549 Before the Senate Committee on State Affairs, 78th Leg., 4th C.S., Tape 1440 Side 1 at 5:18–35 (May 17, 2004) (https://tsl.access.preservica.com/uncategorized/IO_3c73f262-9eeb-40f7-881a-c1a8cb6c1530). Indeed, this method of registration through provisional voting appears to be how Ms. Mason first became a registered voter, without issue. CCA Op. at *1 (noting her registration through a 2004 provisional ballot).

[24] Limited Ballots and Provisional Voting Which and When? 2022 Election Law Seminar for County Election Officials, Texas Secretary of State Elections Division, at 17 (Sept. 28, 2022) (https://www.sos.texas.gov/elections/forms/limited-ballots-and-provisional-voting-august-2022%20(4).pdf) ("By casting a provisional ballot -- even if it's not accepted for counting -- the person will become a registered voter.").

the left-hand portion of the provisional ballot affidavit read: "I am a registered voter of this political subdivision . . . ." Appellant's Brief on Remand at 5. These words track the language of the statute itself.[25] If the mere reading of a provisional ballot affidavit (and speculation by two witnesses about the act of reading the provisional ballot) 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.

But that cannot be. The stated intent of the Legislature was to use those mistaken affidavits to register the individual to vote, not prosecute them for it.[26] The State's assurance that they will only criminalize those who read and understand the affidavit does nothing to change that discord. Here, the State is willing to pursue and maintain a felony conviction against Ms. Mason based on a single piece of her after-the-fact testimony at trial regarding a hypothetical individual's understanding of the affidavit—not even her own understanding at the time of the alleged offense. That puts any person who fills out a provisional ballot and mistakenly affirms they are eligible on the affidavit at risk of prosecution—despite the long tradition of registering those persons for the next election.

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[25] *See* Tex. Elec. Code § 63.011(a)(1) (requiring a provisional ballot affidavit to state that the provisional voter "is a registered voter in the precinct in which the person seeks to vote").

[26] *See DeLay*, 465 S.W.3d at 250 (concluding that, as a matter of statutory construction, "several statutes relating to one subject are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions").

To illustrate, the State can always argue that a person who makes a mistake about eligibility "knows" they are ineligible because all provisional voters are told that they do not appear on the registered voter list. Is that evidence sufficient to convict? Under the State's theory, it could pursue future convictions on mere speculation about a prospective voter's "actual knowledge" of ineligibility to vote, based on the rote admonishments made by poll workers. The State's view on the low bar of evidence required to convict demonstrates that future prosecutions under the Illegal Voting Statute may lead to abhorrent and "absurd consequence[s]."[27]

The State's arbitrary enforcement raises another issue with its skewed interpretation of the Illegal Voting Statute: Ms. Mason's right to fair warning. It is a long-held tenet of criminal law that "a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie v. Columbia,* 378 U.S. 347, 350–51 (1964); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Cuellar v. State*, 70 S.W.3d 815, 822 (Tex. Crim. App. 2002) ("A person is entitled to be informed of what the law commands or forbids."). "[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion" of statutory text. *Bouie,* 378 U.S. at 352. Here, it

[27] *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (citing *Faulk v. State*, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980)). This is also a useful illustration of why the State's arguments contravene the Court of Criminal Appeals' findings in *DeLay* and the appeal of this case that a knowledge *mens rea* requires more than negligence.

was only in March 2020 that this Court evaluated for the first time whether it is illegal to vote in Texas while on federal supervised release. Prior to that, neither the provisional ballot language nor the applicable state statutes were "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.* at 351. Thus, Ms. Mason could not foresee in 2016 that this Court would interpret Tex. Elec. Code § 64.012 to criminalize her actions.

The loss of liberty due to a lack of fair warning is unjust, and the following two principles must apply for Ms. Mason, just as they should for all citizens:

1. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

2. Second, because of the seriousness of criminal penalties (especially incarceration), and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.

See United States v. Bass, 404 U.S. 336, 348 (1971). On review, this Court should hold that the State's evidence is plainly insufficient to prove that—even if it were established that Ms. Mason read the left-hand side portion of the provisional ballot (and it was not)—Ms. Mason received fair warning that being on federal supervised release was equivalent to "supervision," and therefore knew beyond a reasonable doubt that she was ineligible to vote at the time of filling out the provisional ballot.

The absurd consequence of the State's construction of the Illegal Voting Statute affirms that the Legislature could not have intended the provisional ballot affidavit to serve as a vehicle to convict individuals who are mistaken about their voter eligibility, like Ms. Mason, under Section 64.012(a)(1). This legislative schematic demonstrates that the provisional voting system is meant to help those who may be mistaken about their eligibility to vote and, in fact, to encourage them to vote in the future; it is not meant as a "gotcha" statute to stifle and criminalize participation in elections by well-meaning citizens.

C. Overenforcement by the State Needlessly Risks Chilling the Participation of Eligible Voters.

When the State moves beyond intentionally wrongful election manipulation and seeks to punish harshly the simple act of filling out a provisional ballot while ineligible, regardless of knowledge and intent, it undermines the orderly administration of elections for all eligible voters. By punishing honest attempts to participate in democracy, the State tells all Texans with prior convictions that merely attempting to engage with the democratic system could put them behind bars.

The Legislature recognized the risk of overenforcement and added a *mens rea* requirement to Section 64.012(a). The Court of Criminal Appeals properly interpreted that requirement to make voting illegal only where the voter subjectively knew that voting would be illegal. Proper construction of the Illegal Voting Statute will not limit the State's ability to go after those who seek to abuse and manipulate

the electoral system, nor will it limit the State's ability to sanction those who actually know that voting would be illegal, yet seek to vote anyway. But proper construction of the Illegal Voting statute does not allow the State to use flimsy, internally inconsistent, and speculative witness testimony to punish a Texas citizen for making an honest mistake about her ineligibility to vote.

The evidence here is insufficient to show that Ms. Mason knew that voting would be illegal, and the record is devoid of evidence of the intent that characterizes past targets of prosecution under the same statute. A ruling in favor of Ms. Mason is not only legally required, but would also respect the will of the Legislature and help restore voters' faith in the electoral process.

CONCLUSION AND PRAYER

The League of Women Voters of Texas and Texas NAACP pray that this Court reverse the judgment of the trial court and order a judgment of acquittal as to Ms. Mason's conviction for illegal voting. In the alternative, this Court should reverse the conviction and remand to the trial court for a new trial.

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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 this *Amicus* Brief in Support of Appellant, exclusive of the matters designated for omission, is 9,877 words as counted by Microsoft Word Software.

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Motion has been served on counsel of record and the State Prosecuting Attorney via e-service on February 15, 2023.

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