

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT**

Case No. 1D23-1473
L.T. No. 22-CF-924

JOHN BOYD RIVERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**BRIEF OF DUE PROCESS INSTITUTE AND FORMER
FLORIDA STATE SENATOR JEFF BRANDES AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

On Appeal from the Circuit Court of the
Eighth Judicial Circuit in and for Alachua County

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INTEREST OF AMICI CURIAE

Due Process Institute is a non-partisan, non-profit organization devoted to honoring, preserving, and restoring principles of fairness in the criminal legal system. The right to vote is essential to the functioning of our democracy and therefore restoring the right to vote to those with past convictions is a core mission of Due Process Institute.

Jeff Brandes is a former Florida State Senator who represented Florida's 24th Senate District from 2012 to 2022. He was one of the architects of Senate Bill 7066, legislation enacted by the Florida Legislature in 2019 to implement Amendment 4. Prior to that, Senator Brandes was a member of the Florida House of Representatives from 2010 to 2012. He now leads the Florida Policy Project, a nonprofit, bipartisan think tank that focuses on, among other things, criminal justice issues.

This case raises issues about the State's decision to prosecute individuals with past convictions for what appear to be honest mistakes about their eligibility to vote, rather than to fulfill its obligations to ensure that only eligible voters are permitted to cast a ballot in the first place. It is also about holding the State to its burden

to show all elements of a crime, including mens rea, where ineligible voters register or cast a ballot without knowing that they do so unlawfully. *Amici Curiae* have a significant interest in the resolution of these issues due to their commitment to fairness in the criminal legal system and to advocating for, protecting, and preserving the right to vote for eligible voters with past convictions.

SUMMARY OF ARGUMENT

In 2018, Florida voters approved Amendment 4, restoring voting rights to most people who had been convicted of felony offenses and completed their sentences. The next year, the Legislature passed Senate Bill 7066 (SB 7066) to implement Amendment 4. As part of SB 7066, the law provided for those who make honest mistakes about their eligibility to be granted some grace by the State. The law also imposed clear obligations on the Department of State to determine voter eligibility and remove ineligible voters from the rolls in a timely fashion. Florida has dedicated few resources to that effort; instead, the Department of State's Division of Elections reviews few registrations, leaving potentially ineligible voters on the voter rolls for months—or even years—after they receive a voter-information card. Voters with past convictions, on the other hand, have no accessible way to confirm their own eligibility. The State knows this, yet it has been unwilling to show its citizens like Appellant John Boyd Rivers any grace for what appear to be honest mistakes.

This dynamic means that voters with past convictions may vote based on an innocent, albeit mistaken, belief that they are eligible to vote even when they are not. And although the statutes that create

the criminal offenses of false registration and voting when ineligible impose mens rea requirements, cases like this one show that voters with past convictions may nonetheless be prosecuted and even convicted when they vote based on the mistaken belief that they are eligible to do so. In February 2020, Mr. Rivers was registered to vote while he was detained at the Alachua County Jail. He filled out and submitted his registration with a representative of the Alachua County Supervisor of Elections, who erroneously told him that he was eligible. Mr. Rivers believed that the representative would check his eligibility and turn in the registration only if Mr. Rivers was eligible. In April 2020, Mr. Rivers pled guilty to another crime, but he believed that adjudication was withheld on that plea and did not know that he was ineligible to cast a ballot because of it. The State did not review his eligibility—after Mr. Rivers’ conviction or at any other time before the election—and Mr. Rivers voted in 2020. Until he was contacted by a Florida Department of Law Enforcement agent nearly a year after he voted, Mr. Rivers never received a letter or any other notification that he was not actually eligible to vote.

Cases like this one show the core unfairness in the State’s approach to prosecuting people with convictions for what appear to

be honest mistakes about their eligibility. The State gave every indication that Mr. Rivers could vote—he was told by a representative of the Alachua Supervisor of Elections that he was eligible, he was provided a voter-information card, and he was permitted to cast a ballot—only to prosecute him when he actually voted based on the mistaken belief he was eligible to do so. Given the State’s neglect of its responsibilities, voters with past convictions like Mr. Rivers may never know that they cannot legally vote until facing criminal prosecution for having cast a ballot.

This system represents an abuse of the State’s power that is deeply unfair. The State should focus its resources on its obligations to ensure that only eligible voters may cast ballots, rather than prosecuting individuals with past convictions who vote under an honest, but mistaken belief that they are eligible to do so. Otherwise, prosecuting these voters punishes them for their good-faith reliance on the government’s assurances regarding their eligibility, which the law does not permit.

ARGUMENT

I. The State’s Decision to Prosecute, Despite Its Failure to Verify Eligibility and Remove Ineligible Voters From The Rolls in a Timely Fashion, Violates Due Process.

Voters like Mr. Rivers may, in good faith, believe they are eligible to vote based on the State’s conduct in registering them and permitting them to cast a ballot—even where they actually are ineligible. Indeed, Florida law *requires* the State to ensure voter eligibility. But the State does not fulfill these obligations, and its failures have become even more glaring in the face of changing eligibility requirements since Amendment 4 and SB 7066. Prosecuting voters who mistakenly vote because they relied on the State’s assurances that they were eligible to do so violates fundamental precepts of due process, and the courts should reject cases like this one on that basis.

A. The Department of State Must Determine Voter Eligibility and Supervisors of Elections Must Notify and Remove Ineligible Voters from the Rolls.

Florida law entrusts the Department of State’s Division of Elections with the authority and obligation to “protect the integrity of the electoral process by ensuring the maintenance of accurate and current voter registration records.” § 98.075(1), Fla. Stat. (2022). By

statute, the Department “shall identify” voters who may be ineligible due to disqualifying felony convictions “by comparing information received from, but not limited to, a clerk of the circuit court, the Board of Executive Clemency, the Department of Corrections, the Department of Law Enforcement, or a United States Attorney’s Office” to “make an initial determination as to whether the information is credible and reliable.” § 98.075(5)(a), Fla. Stat. (2022).

The statute also provides a detailed process by which the local supervisor of elections must notify a voter identified by the Department as potentially ineligible and, if appropriate, remove that voter from the rolls. § 98.075(7), Fla. Stat. (2022). These systems appropriately place the onus on the State itself to determine who is eligible to vote—and to ensure that those who are not eligible to vote are precluded from doing so.

B. The State Has Shirked Its Responsibilities to Ensure Only Eligible Voters Cast Ballots.

Despite these clear statutory directives, the State is apparently doing little to check whether registered voters are ineligible and if so to remove them from the rolls. In the sixteen months after voters approved Amendment 4, the Department identified over 85,000

pending registrations for people with past convictions in need of screening. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1026 (11th Cir. 2020). But months later—and less than two months before the 2020 election—“Florida ha[d] yet to complete its screening of *any* of the registrations.” *Id.* (emphasis added). Thus, the State allowed 85,000 potentially ineligible voters to remain on the rolls, despite the fact that the State itself had determined that there was some question as to those voters’ eligibility. *Id.* Indeed, because Mr. Rivers registered in February 2020, his registration likely was among this group. In 2020, a federal court found that this screening process could take until 2026 at the earliest to complete because the Division of Elections’ caseworkers could only process an average of 57 registrations per day. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1228 (N.D. Fla. 2020), *reversed and vacated sub nom, Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

In fact, Florida has actually taken steps that *decrease* its ability to ensure that ineligible voters are prevented from voting, further demonstrating its failure to live up to its statutory obligations. Florida used to participate in a multi-state, nonpartisan partnership called the Electronic Registration Information Center (ERIC). ERIC

enables participating states to use and share government data to check their voter rolls to ensure eligibility. See Miles Parks, *3 more Republican states announce they're leaving a key voting data partnership*, NPR (Mar. 6, 2023), available at <https://tinyurl.com/yrxd9374>. But in March 2023, Florida withdrew from ERIC. *Id.* It thus gave up access to a significant resource—relied upon now by 25 states—that exists precisely to assist states ensure that ineligible voters cannot vote. See Miles Parks, *Republican states swore off a voting tool. Now they're scrambling to recreate it*, NPR (Oct. 20, 2023), available at <https://tinyurl.com/ynpmv86f>. While the ERIC system would not directly address Florida's concern about people ineligible to vote due to felony sentences, the State's withdrawal from this resource shows just how misplaced are its priorities for election integrity.

The State's carelessness in fulfilling its statutory duties extends even to ineligible voters with felony convictions whom the State *has already prosecuted*. Indeed, at least one of these voters remained on the rolls for almost three months after her arrest—and at least one was issued a new voter-information card almost a month after he was arrested. See Lawrence Mower, *DeSantis' voter fraud suspect was*

issued new voter ID, TAMPA BAY TIMES (Nov. 7, 2022), *available at* <https://tinyurl.com/4m5pj8sa>. By not focusing its attention on removing ineligible voters from the rolls, the State causes a dynamic by which voters who rely on the State's eligibility determination do so at their peril—risking an unfair prosecution like that at issue here.

C. Voters with Past Convictions Like Mr. Rivers Lack Access to the State's Information Regarding Eligibility.

Unlike the State, which has the obligation and access to the necessary information to determine voter eligibility, voters with past convictions have no ready way to determine their own eligibility. In Florida, voter eligibility after a felony conviction depends on the crime of conviction, the court of conviction, and the terms of the voter's sentence. See Florida Division of Elections, *Constitutional Amendment 4/Felon Voting Rights* (Oct. 14, 2020), *available at* <https://tinyurl.com/y6d3c9et>. Yet there is no statewide database that would permit would-be voters with felony convictions to determine whether they are eligible. Douglas Soule, *As DeSantis and lawmakers make it easier to prosecute election crimes, advocates question their priorities*, TALLAHASSEE DEMOCRAT (Feb. 23, 2023), *available at* <https://tinyurl.com/4adr3ja4>. Commentators have

described the system as difficult if not impossible for people with past convictions to navigate without a lawyer—and challenging even for lawyers themselves. *Id.* The average voter may well be deterred from voting, rather than jump through the hoops necessary to attempt to confirm eligibility.

This system—made worse by the State’s neglect of its responsibilities—can hardly be considered fair. “Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach.” *United States v. Laub*, 385 U.S. 475, 487 (1967). Where the government has provided such assurances, allowing prosecution afterwards would “sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.” *Raley v. Ohio*, 360 U.S. 423, 437-38 (1959) (due process prohibits conviction for invoking a privilege where government statements assured defendants that they may use it, and “behavior toward [another individual] obviously gave the same impression”). *See also United States v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) (“entrapment

by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official”).

It is entirely reasonable for voters to assume that Florida’s actions—providing voter-information cards, failing to check eligibility in a timely fashion despite systems purportedly designed to do so, and actively permitting ineligible voters to remain on the rolls for years and cast ballots—qualify as the State’s assurance that the voters legally may vote, even if that is not correct. These assurances set up ineligible voters for criminal prosecution when they cast their ballot, even though they have no reason to know it is unlawful for them to do so. Allowing prosecutions in these circumstances violates fundamental principles of fairness and due process.

The State is best positioned—and legally required—to determine eligibility, and it should focus its resources on those efforts instead of prosecuting unwittingly ineligible voters like Mr. Rivers.

II. Florida Cannot Prosecute Cases Where an Ineligible Voter Lacks the Requisite Mens Rea.

Mr. Rivers’ case exemplifies the unfairness of prosecuting voters who register or cast a ballot without knowing they are ineligible to do so. Both the law governing voter registrations and the law governing

voting make mens rea an essential element of proving an offense. Section 104.011(1), which governs ineligible registrations, has an explicit willfulness requirement. See § 104.011(1), Fla. Stat. (2019) (“A person who *willfully* swears or affirms falsely to any oath ... in connection with or arising out of voting or elections commits a felony of the third degree”) (emphases added). Likewise, Section 104.15, which covers voting when ineligible, has both a willfulness *and* a knowledge requirement. See § 104.15, Fla. Stat. (2023) (“Unqualified electors *willfully* voting.— Whoever, *knowing* he or she is not a qualified elector, *willfully* votes at any election is guilty of a felony of the third degree”) (emphases added)). In other words, to convict a voter under these statutes, the State must prove that the voter “willfully” misrepresented their eligibility when they registered and cast a ballot “knowing” it was illegal.

Given this clear statutory language, it is unsurprising that Florida courts also have held, in cases involving people with felony convictions who allegedly registered and voted while ineligible, that there is a mens rea requirement for prosecution under these statutes. In the Order of Dismissal, *State v. Suggs*, No. 22-008080CF10A (Fla. 17th Cir. Ct. May 19, 2023), for example, the circuit court dismissed

the Office of Statewide Prosecution (OSP)’s charges against another voter with a felony conviction who was charged with the same voting crimes as Mr. Rivers. The court ruled that the OSP lacked authority to prosecute the defendant there because his alleged crimes only occurred in one circuit—an issue not presented in this case, which was brought by the local prosecutor. But in so holding, the court observed that, “Given the statutory authority vested in the Supervisor of Elections and the Secretary of State to be final arbiters of Defendant’s eligibility to register and vote, *no prosecuting authority will ever be able to meet the scienter requirement under the statutes*” *Id.* at 3 (emphasis added) (noting that “even if this action were brought by the State Attorney for the 17th Judicial Circuit it is fatally flawed and must be dismissed”); *see also Corrales v. State*, 84 So. 3d 406, 408 (Fla. 1st DCA 2012) (“The willfulness requirement assures that ‘no one will be convicted of a crime because of a mistake or because he does something innocently, not realizing what he was doing.’”) (quoting *United States v. Hall*, 346 F.2d 875, 879 (2d Cir. 1965)).

Indeed, the United States Court of Appeals for the Eleventh Circuit, in upholding the constitutionality of the Senate Bill 7066,

specifically noted the scienter requirements in Section 104.011(1) and Section 104.15 and explained that, as a result, “no felon who honestly believes he has completed the terms of his sentence commits a crime by registering and voting.” *Jones v. Governor of Fla.*, 975 F.3d at 1048; *see also id.* at 1047 (“The challenged laws are not vague. Felons and law enforcement can discern from the relevant statutes exactly what conduct is prohibited: a felon may not vote or register to vote if he *knows* that he has failed to complete all terms of his criminal sentence. This clear standard, which includes a scienter requirement, provides fair notice to prospective voters and ‘limit[s] prosecutorial discretion.’”).

Mr. Rivers’ case shows the problems with prosecutions under these statutes where the person voting was not aware of his or her ineligibility. Mr. Rivers registered to vote when TJ Pyche, a representative of the Alachua County Supervisor of Elections visited the jail to register people to vote. Tr. 195. Pyche told Mr. Rivers that he could register and vote as long as he had never been convicted of murder or a felony sex offense, which he had not. Tr. 195-96. Mr. Rivers believed that Pyche would check his eligibility and turn in the registration only if Mr. Rivers was approved. Tr. 198-99. Mr. Rivers

later received a voter-information card in the mail, and he never received a letter or any other notification that he was not actually eligible to vote. Tr. 201.

In 2020, Mr. Rivers pled guilty to another crime, but he believed that adjudication was withheld on that plea. Tr. 214-15. He did not realize that he was ineligible to have his adjudication on that crime withheld, and he was not aware that being on community control for his 2020 plea disqualified him from voting. Tr. 221. The State did not notify him that he was not eligible to cast a ballot, nor did it remove him from the voter rolls—indeed, there is no indication that the State even reviewed his eligibility until after the election had passed. Mr. Rivers did not learn that he was not eligible to vote until 2021, after he voted in the 2020 general election. *Id.*

Under these facts, Mr. Rivers’ conviction raises the precise concerns raised by the dissenters in *Jones*—namely, that “a ‘wrong guess’ [would] result[] in ‘severe consequences’: the wrongful denial of the right to vote, or an arrest for a voting violation.” *Jones v. Governor of Fla.*, 975 F.3d at 1098 (Jordan, J., dissenting) (citation omitted). Notably, the *Jones* majority thought it “strain[ed] credulity” that such a prosecution might happen. *Id.* at 1048. But these are

the precise circumstances under which Mr. Rivers has been convicted.

Lambert v. California, 355 U.S. 225 (1957), a U.S. Supreme Court case that discussed a scienter requirement in another context, is also informative here. In *Lambert*, a Los Angeles municipal ordinance required persons previously convicted of a felony to register with the chief of police within five days of entering Los Angeles. 355 U.S. at 226-27. Because there was no notice of the duty to register, the Court found that the ordinance did not satisfy due process. *Id.* at 229. The Court noted that “ignorance of the law” is ordinarily no excuse, but held that in the circumstances of that case the lack of clear notice violated due process. *Id.* at 228 (citation omitted). The Court explained that, “[a]s Holmes wrote in *The Common Law*, ‘A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.’” *Id.* at 229 (citation omitted). Thus, “[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.” *Id.* at 229-30. Precisely the same reasoning applies here—where the voting

eligibility of people with felony convictions significantly changed in recent years; the rules governing voter eligibility are confusing even to those with a law degree; and the State itself issued Mr. Rivers a voter-information card and allowed him to vote, despite his ineligibility.

Rehaif v. United States, 588 U.S. ---, 139 S. Ct. 2191 (2019), is also informative. In that case, the U.S. Supreme Court held that a federal sentencing statute, 18 U.S.C. § 924(a)(2), which authorizes imprisonment for up to ten years if a person “knowingly” violates a separate statutory provision listing nine categories of individuals who cannot lawfully possess firearms—including people with felony convictions and undocumented immigrants who are “illegally or unlawfully in the United States,” 18 U.S.C. § 922(g)—requires the individual to know *not only* that he possessed a firearm, but *also* that he had the relevant status when he possessed the firearm. 139 S. Ct. at 2192. As the Court explained, to convict a defendant under the statute the Government “must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.” *Id.* at 2194. This is because “[s]cienter requirements ... ‘separate those who understand the wrongful nature

of their act from those who do not.” *Id.* at 2196 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72-73 n.3 (1994)).

The State’s decision to prosecute Mr. Rivers, in the face of objective circumstances that would cause any reasonable person to honestly believe in his or her eligibility to register and vote—including being provided a voter-information card by the State—was an egregious abuse of prosecutorial discretion, and should not be countenanced.

CONCLUSION

The decision of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2023, a true and correct copy of the foregoing will be furnished via the Florida Court's E-Filing Portal to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045, 9.210, and 9.370, Amici Curiae, the Due Process Institute, hereby certifies that the foregoing brief complies with the applicable font and word count requirements. It was prepared in 14-point Bookman Old Style font, and it contains 3,611 words.

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