IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

Case No. 2D23-493
L.T. No. 22-CF-011041-A

NATHAN SHIRL HART,
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 a Final Order of the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough 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, he was a member of the Florida House of Representatives from 2010 to 2012. Senator Brandes now leads the Florida Policy Project, a nonprofit, bipartisan think tank that focuses on, among other things, criminal justice issues.

This case raises the issue of whether the Office of Statewide Prosecution (OSP) has authority to prosecute alleged voter-registration and voting crimes that occurred in a single judicial circuit. It is also about holding the State to its burden to show all elements of crimes, including mens rea, where ineligible voters

register or cast ballots without knowing that they do so unlawfully. Moreover, it raises issues about the State's apparent use of the OSP to circumvent the decisions of local state attorneys who have declined to bring these types of cases based upon the absence of criminal intent. *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 (DOS) 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 DOS's Division of Elections reviews few registrations, leaving potentially ineligible voters on the voter rolls for months—or

even years—after they receive voter-information cards. People with past convictions, on the other hand, have no accessible way to confirm their own eligibility. The State has also engaged in minimal outreach to educate the public about the voting eligibility of people with felony convictions, and the voter registration form does not say which convictions qualify for automatic restoration of voting rights under Amendment 4 and which ones require clemency. The State knows this; yet, it has been unwilling to show its citizens, like Appellant Nathan Shirl Hart, any grace for what appear to be honest mistakes.

This dynamic means that people with past convictions may register and vote based on an innocent, albeit mistaken, belief that they are eligible even when they are not. For this reason, some locally elected state attorneys have declined to prosecute cases like these because the evidence failed to show willful wrongdoing. This exercise of prosecutorial discretion makes good sense: Where a voter registers in good faith believing he or she is eligible, is given a voter-information card, and then never receives any notice from elections officials that he or she is ineligible, the State has provided the voter with every indication that he or she legally may vote. The State thus

cannot show that the voter *willfully* registered and voted despite *knowing* that he or she was ineligible. Indeed, here, there is no indication that Mr. Hart's decision to register or vote was based on anything but the mistaken belief that he was eligible to do so—and his concomitant desire to exercise his franchise as a Florida citizen.

The OSP, on the other hand, has taken a different approach from these state attorneys. Despite being authorized to prosecute only crimes occurring in, or affecting, multiple judicial circuits, and despite knowing that some state attorneys have declined to bring cases like these, not because of a lack of authority, but because of the widespread confusion caused by the State's neglect of its responsibilities, the OSP brought cases against Mr. Hart and 19 other people with disqualifying felonies, each of whom registered and voted in good faith *more than two years ago*. This effort by the State to arrogate to the OSP the authority—and discretion—of local state attorneys to address potential single-circuit voting crimes goes beyond the OSP's constitutional and statutory authorization.

Given the State's neglect of its responsibilities, voters with past convictions like Mr. Hart may never know that they cannot legally vote until facing criminal prosecution. And although the statutes that

create the criminal offenses of false affirmation in connection with an election and voting as an unqualified elector impose mens rea requirements, cases like this one show that people with past convictions may nonetheless be prosecuted and even convicted when they register to vote based on the mistaken belief that they are eligible to do so. In March of 2020, Mr. Hart was registered to vote by a canvasser who was outside of the Department of Motor Vehicles (DMV) with a get-out-the-vote booth. T-474-75. The canvasser asked Mr. Hart if he was registered, and Mr. Hart said he was not because he had previously been convicted of a felony. T-475. The canvasser told Mr. Hart—who had completed his probation sentence in 2019—that a new law allowed people with felony convictions to vote once they completed their sentence. T-476. The canvasser then told Mr. Hart he should register to vote, instructed him on how to complete the form, and then submitted it on his behalf. T-476, T-478–79, T-486. The canvasser explained that, if it turned out Mr. Hart were not eligible, the "worst case scenario" would be he "simply [would not] get a voter ID card." T-476. Based upon the comments of the canvasser, Mr. Hart believed that the State would check his eligibility and approve the registration only if he were

eligible. But the State did not review Mr. Hart's eligibility. Instead, it sent him a voter-information card, leading him to believe that he was eligible when he registered and voted in 2020. Until he was contacted by a Florida Department of Law Enforcement agent nearly two (2) years after he registered, Mr. Hart never received a letter or any other notification from elections officials that he was not actually eligible to vote. Mr. Hart testified that he did not know, and the canvasser did not inform him, that Amendment 4 did not apply to people convicted of felony sex offenses. T-523. The voter registration form also did not say that people with his type of conviction cannot register unless their voting rights have been restored by the State Clemency Board. R-547.

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 register and cast ballots, rather than prosecute individuals with past convictions who register and 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.

For these reasons, the Court should reverse the Circuit Court's denial of Appellant's motions to dismiss and the resulting conviction and sentence and remand to the trial court with instructions to dismiss.

ARGUMENT

I. The OSP's Pursuit of Mr. Hart And Similar Individuals Is An Abuse of Power.

A. The OSP does not have authority to prosecute single-circuit voting crimes like those alleged here.

The OSP's prosecutions of Mr. Hart and similarly situated individuals are unlawful because the OSP has far exceeded its specific, limited authority to prosecute crimes that occur in, or affect, multiple judicial circuits. Mr. Hart both registered and voted while allegedly ineligible in just one judicial circuit—as did those other individuals.

The OSP "is a creature of the Florida Constitution and of specific Florida Statutes," which define and circumscribe its authority. *Winter v. State*, 781 So. 2d 1111, 1113 (Fla. 1st DCA 2001), as clarified (Mar. 27, 2001). The constitutional provision governing the OSP's jurisdiction provides "concurrent jurisdiction with … state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or

when any such offense is affecting or has affected *two or more judicial circuits* as provided by general law." Art. IV, § 4(b), Fla. Const. (emphases added). The OSP's statutory authorization similarly limits its authority to multi-circuit crimes. At the time the OSP charged Mr. Hart, the office was allowed to "[i]nvestigate and prosecute" voter-registration and voting-related crimes where the offense in question "is occurring, or has occurred, in *two or more judicial circuits* as part of a related transaction, or when any such offense is connected with an organized criminal conspiracy *affecting two or more judicial circuits*." § 16.56(1)(a)13., Fla. Stat. (2022) (emphases added).

Here, the OSP's prosecution of Mr. Hart exceeded its authority because all of his alleged misconduct occurred in only one circuit. As the parties stipulated, "[a]t no point in the registration nor voting process did the Defendant physically enter the Second Judicial Circuit nor did he himself mail or electronically transfer anything to the Second Judicial Circuit." R. 51. The Circuit Court also stated that "it is uncontested that [Mr. Hart] did not perform any actions outside of those he performed in Hillsborough County." R. 137. Furthermore, "[t]he acts charged in the State's Information does [sic] not involve a criminal conspiracy." *Id.* Therefore, Mr. Hart's charges are not related

to two or more judicial circuits, and the OSP lacked jurisdiction to prosecute him. Accordingly, the Circuit Court erred in denying Appellant's motions to dismiss.

That the OSP lacked the authority to prosecute Mr. Hart under the plain terms of its statutory and constitutional authorizations is confirmed by case law. In *State v. Suggs*, No. 22-008080CF10A (Fla. 17th Cir. Ct. May 19, 2023), for example, the circuit court dismissed the OSP's charges against another voter with a felony conviction who was charged with the same voting crimes as Mr. Hart. In so holding, the court ruled that the OSP lacked authority to prosecute the defendant because his alleged crimes only occurred in one circuit. *See also State v. Wood*, No. 13–2022-CF-015009–0001-XX (11th Fla. Cir. Ct. Oct. 21, 2022); *State v. Miller*, No. F22-015012 (Fla. 11th Cir. Ct. Dec. 7, 2022); *State v. Hubbard*, No. 22-8077CF10A (Fla. 17th Cir. Ct. Dec. 23, 2022); *State v. Washington*, No. 2022-CF-009611-A-O (Fla. 9th Cir. Ct. Feb. 13, 2023). Similarly, in *Carbajal v. State*, 75 So. 3d 258 (Fla. 2011), the Florida Supreme Court held that "Carbajal is correct that if his criminal activity in Florida actually occurred *in only Lee County, Florida*, the OSP was not authorized to prosecute charges arising from that conduct." *Id.* at 262 (emphasis

added). *See also, e.g., Scott v. State*, 102 So. 3d 676, 677 (Fla. 5th DCA 2012) (statute requires a showing of "criminal activity in two or more judicial circuits"); *Winter*, 781 So. 2d at 1116-17 ("declin[ing] to give [the OSP's jurisdiction] the expansive reading advanced by the State"; instead requiring criminal conspiracy with "some clear proof of an actual impact in other judicial circuits").

B. The OSP abused its prosecutorial discretion by charging Mr. Hart in the absence of the required mens rea.

Jurisdictional issues aside, the OSP's prosecution of Mr. Hart, in the absence of the required mens rea, was also an abuse of prosecutorial discretion. 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. (2022) ("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 ….") (emphasis added). Likewise, Section 104.15, which covers voting when ineligible, has both a willfulness *and* a knowledge requirement. *See* § 104.15, Fla. Stat. (2022) ("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 to register and "willfully" cast a ballot "knowing" they were ineligible to do so.

Given this clear statutory language, it is unsurprising that courts also have held, in cases involving people with felony convictions who mistakenly register and vote because they were confused or misled about their eligibility, 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 OSP's charges against another voter with a felony conviction who was charged with the same voting crimes as Mr. Hart. 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").

Indeed, the United States Court of Appeals for the Eleventh Circuit, in upholding the constitutionality of SB 7066, specifically noted the scienter requirements in Section 104.011(1) and Section 104.15 require prosecutors to show that the defendant knew they were ineligible but registered or voted anyway. *Jones v. Governor of Florida*, 975 F.3d 1016, 1048 (11th Cir. 2020).

Here, notwithstanding the clear statutory language of Florida's Election Code, the jury returned a verdict finding Mr. Hart guilty of one of the two charges brought by the OSP—i.e., Count I, "False Affirmation in Connection with Election."[1] *See* R. 129. Yet, there is no way for the State to possibly demonstrate that Mr. Hart registered to vote with the required scienter because the evidence indicates that he honestly (and understandably) believed he was eligible to vote, including because he was sent a Voter Information Card. *See* R. 128. Indeed, Mr. Hart testified that he did not know, and the canvasser did not inform him, that Amendment 4 did not apply to people

[1] At the same time, the jury returned a Verdict finding Mr. Hart Not Guilty of "Count II, Voting By Unqualified Elector." (R. 129)

convicted of felony sex offenses. T-523. Mr. Hart's voter registration form did not indicate that people with his type of conviction cannot register unless their voting rights have been restored by the State Clemency Board. R-547. Instead, the form contained three (3) statements regarding eligibility from which Mr. Hart could select: (1) He could affirm has "never been convicted of a felony"; (2) He could affirm he has been convicted of a felony but his voting rights were restored by the Board of Executive Clemency; or (3) He could affirm that he has been convicted of a felony but his voting rights were restored "pursuant to Section 4, Article 6 of the State Constitution upon the completion of all terms of my sentence, including parole or probation." *Id.*

Because he had been convicted of a felony, Mr. Hart did not check the first box. T-478. Further, he did not check the second box because he did not know what the Board of Executive Clemency was. T-478. Instead, based upon the canvasser's guidance, Mr. Hart—who had completed his probation sentence in 2019—selected the third box, which asked him to affirm his "voting rights have been restored pursuant to Section 4, Article 6 of the State Constitution upon the completion of all terms of my sentence, including parole or

probation." T-479, T-526. Mr. Hart believed his answer was true because of the explanation he got from the canvasser. T-479. Had he known that he did not qualify, Mr. Hart testified that he would not have registered to vote in the first place. T-501.

Under these facts, Mr. Hart's 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*, 975 F.3d at 1098 (Jordan, J., dissenting) (citation omitted). Notably, the *Jones* majority thought it "strain[ed] credulity" that such a prosecution might ever happen. *Id.* at 1048. But these are the precise circumstances under which Mr. Hart has been convicted. Prosecuting someone when it is evident that he or she lacks the requisite scienter is a clear abuse of prosecutorial discretion.

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 Supreme 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 and the voter registration form did not say that clemency is the only way for a person with Mr. Hart's type of conviction to regain their voting rights.

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 OSP's decision to prosecute Mr. Hart, in the face of objective circumstances that would cause any reasonable person to honestly believe in his or her eligibility to register, was an egregious abuse of prosecutorial discretion and should not be countenanced.

C. The OSP abused its power by ignoring the decisions of local state attorneys' offices.

Finally, even if OSP had authority to prosecute these cases, and even if there were any evidence of Mr. Hart's mens rea—neither of which is the case—the State's use of the OSP to prosecute here would nonetheless be an abuse of power because it is inconsistent with the decisions of local state attorneys. Indeed, Governor DeSantis, when he announced the arrest of Mr. Hart and the 19 other voters with felony convictions who allegedly voted while ineligible in 2020, admitted that the OSP was prosecuting these cases because "some prosecutors [] have been loath to take these cases." First Coast News, *Watch Live: Governor DeSantis Press Conference*, YouTube (Aug. 18, 2022), https://www.youtube.com/watch?v=s8gUxqClFR0 at 1:06:12-1:06:17. Unlike the appointed OSP, local state attorneys are elected and thus answerable to voters for the decisions they make regarding what cases to bring and how to prioritize them. And notably, some state attorneys have brought these types of cases, while others—given the lack of criminal intent—have declined to do so. Nor can the OSP claim that these cases involve complex, multi-circuit organized criminal activity that are beyond the capacity of local state attorneys—the original reason for creating the OSP.

See generally R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla. St. U. L. Rev. 653 (1985). Rather, these cases—to the extent they are worth prosecuting at all—properly belong within the jurisdiction of state attorneys, to prosecute, or decline to prosecute, as appropriate.

CONCLUSION

The Court should reverse the Circuit Court's denial of Appellant's motions to dismiss and the resulting conviction and sentence and remand to the trial court with instructions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 18, 2024, 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*, Due Process Institute and Jeff Brandes, hereby certify 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 3,651 words.

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