No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SEAN BUSH – PETITIONER

VS

STATE OF FLORIDA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

FLORIDA SUPREME COURT

***CORRECTED***

# PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE**

QUESTION PRESENTED:

WHETHER THE FLORIDA SUPREME COURT DENIED THE PETITIONER DUE PROCESS WHEN IT ABANDONED A CENTURY OF PRECEDENT AND APPLIED A NEW AND LESS STRICT STANDARD TO REVIEW THE SUFFICIENCY OF THE EVIDENCE AGAINST HIM.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Page(s)

Cases

Statutes



Other Authorities

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RELATED CASES

The undersigned is aware of no pending cases directly related to this case.

## OPINION BELOW

The opinion of the Florida Supreme Court is reported at Bush v. State, 295 So. 3rd 179 (Fla. 2020).

## JURISDICTION

The Florida Supreme Court issued its judgment on May 14, 2020. This Court has extended the time for filing petitions for certiorari to 150 days for petitions due on or after March 19, 2020. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §1257(a).

## RELEVANT CONSTITUTIONAL PROVISIONS

Article I, Section 9 of the United States Constitution guarantees that "[n]o..ex post facto Law shall be passed."

Article I, Section 10 of the United States Constitution further specifies that "[n]o State shall…pass any…ex post facto Law."

Amendment XIV to the United States Constitution guarantees that "[n]o State shall…deprive any person of life, liberty, or property, without due process of law."

## INTRODUCTION

From 1925 to 2020, the Florida Supreme Court applied a consistent standard to review the sufficiency of evidence in cases where the State relied on purely circumstantial proof. In 2016, while a murder charge was pending in this case, the Florida Supreme Court reaffirmed its adherence to that standard in a 6-1 opinion. In this case, the decision whether to accept a plea offer to a life sentence, and counsels' myriad decisions in preparing the defense at trial, were all made in reliance on the historic standard. On direct appeal in this case, the Florida Supreme Court would overturn its earlier case law and apply a new and less searching standard when it reviewed the evidence against Petitioner. This Court holds that the protections guaranteed by the Ex Post Facto Clause limit the states' judiciaries as well as their legislatures, in that where - as here - due process of law is denied by applying a change of law, a resulting criminal conviction cannot stand.

## STATEMENT OF THE CASE

Sean Alonzo Bush was indicted for the murder of his estranged wife in 2011, and was also charged with the contemporaneous burglary of her home. The State of Florida sought the death penalty, but offered a plea bargain to a life sentence up until the eve of trial. The defense declined the offer, and the case went to a jury trial

in 2017. At trial, the State proved that Nicole Bush was stabbed, shot and beaten to death in her home; it further proved that the defendant had access to the home and had the opportunity, and a financial motive, to commit the charged offenses. The State's proof included the defendant's DNA on an item found at the scene which might have been used to batter the victim.

At the close of the State's case the defense argued that the State's proof was entirely circumstantial, to the extent it tended to show the identity of Nicole's assailant. The defense further argued, in accordance with then-existing Florida law, that the circumstantial evidence was not inconsistent with the reasonable hypothesis that someone else had entered the home and committed the murder. The State took the position that the DNA evidence was direct – not circumstantial - evidence of guilt, and the court agreed and denied judgment of acquittal. The jury found the defendant guilty as charged, and after a separate penalty proceeding he was sentenced to death for the murder and to life in prison for the burglary.

On direct appeal the defense again argued to the Florida Supreme Court – this time successfully - that this is entirely a circumstantial-evidence case. However, that court *sua sponte* abolished the sufficiency-of-the-evidence standard the Florida courts had used for a century in circumstantial-evidence cases, *i.e.*, whether the State's proof of guilt is inconsistent with a reasonable hypothesis of innocence. The court announced that in all criminal appeals, the Florida courts will now consider the proof in the light most favorable to the verdict, and determine whether the State adduced competent, substantial evidence sufficient to satisfy a

rational trier of fact as to each element of each charge. After applying that standard in this case, the court affirmed Petitioner's convictions and sentences.

## REASONS FOR GRANTING THE WRIT

I. Petitioner had no fair warning, when he declined the state's plea offer, that the courts would weigh the state's proof by a newly adopted standard. The parties should be returned to their previous position if the new standard is to be applied to his case, in order to satisfy the Due Process Clause.

A. This Court recognizes a right to "fair warning" of a judicial change in criminal law if that change is to be applied retroactively.

The defense, when it charted its course in this matter and ultimately rejected the State's offer of life in prison, did so in reliance on the standard historically applied by the Florida courts in circumstantial evidence cases. Applying a new standard to affirm Petitioner's convictions is inconsistent with the principles applied in Rogers v. Tennessee, 532 U.S. 451 (2001), Carmell v. Texas, 529 U.S. 513 (2000), Marks v. United States, 430 U.S. 188 (1977), and Bouie v City of Columbia, 378 U.S. 347 (1964).

In both Bouie and Marks, this Court held that when judicial action expands the substantive reach of a criminal statute, that judicial action must, in fairness, be applied prospectively only. In 1960, Simon Bouie refused to leave a segregated South Carolina lunch counter despite the proprietor's closing the area after he entered it. Mr. Bouie was successfully prosecuted on the theory – thitherto unknown in that state – that "remaining in" closed premises, as well as "entering" closed premises, comprises a trespass. This Court held that the principles protected by the Ex Post Facto clause of the federal Constitution apply to the courts of the

states as well: "[i]f a state legislature is barred by the Ex Post Facto Clause from passing…a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie, 378 U.S. at 353. This Court went on to quote a 1960 treatise: "the required criminal law must have existed when the conduct in issue occurred…[if it is] unexpected and indefensible by the law which had been expressed prior to the conduct in issue," a judicial construction of a statute may not be given retroactive effect. Id. at 354. This Court reversed Bouie's trespass conviction because he had no notice it could result from his conduct.

In 1973, Stanley Marks was facing charges of transporting obscene material in interstate commerce when this Court changed the parameters of First Amendment protection vis-à-vis obscenity. Marks v. United States, 430 U.S. 188 (1977), *citing* Miller v. California, 413 U.S. 15 (1973).The standard announced in Miller allowed prosecutors to "cas[t] a significantly wider net" than previously permitted. *See* id. at 189-91. Marks argued, unsuccessfully, that his jury should be instructed in accordance with the standard abolished in Miller. Id. at 190-91. This Court, citing Bouie, reversed and remanded for a new trial to be held using the former jury instructions; its holding was that Marks, who was "engaged in the dicey business of marketing films subject to possible challenge, had no fair warning that th[ose] products might be subjected to the new standards." Id. at 195.

In short, Article I, Section 10 of the federal Constitution prohibits the states from applying ex post facto laws, and caselaw applying the federal Due Process

Clause erects the same prohibition against state judicial action. In Bouie this Court noted the thematic connection between the prohibition of liability ex post facto and the doctrine of vagueness, citing Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1951) and Amsterdam, Note, 109 U. Pa. L. Rev. 67, 73-74, n.34 (1960). Bouie at 353. It is true that one of the traditional concerns of both the Ex Post Facto Clause and the void-for-vagueness precept – the danger of punishing an individual for acts which he had no notice would be criminal – is inapplicable here. But that is not the only concern of either doctrine. *See* Miller v. Florida, 482 U.S. 423, 429-30 (1987); Peugh v. United States, 569 U.S. 530, 544 (2013). Both doctrines also stand to protect against malleable legal rules which "inject into the governmental wheel so much free play that in the practical course of its operation it is likely to function erratically – responsive to whim or discrimination." Amsterdam, *supra*, at 90. It is a commonplace of ex post facto history that the prohibition was a response to punishments exacted in England when one warring faction succeeded another and proceeded to despoil the losers. *See* Calder v. Bull, 3 U.S. 386 (1798) (opinion of Justice Chase). Protection against retroactive punishment resulting from regime change was very much in the mind of the framers when they included two ex post facto clauses in the federal Constitution. *See* Cummings v. Missouri, 71 U.S. 277, 322 (1866).

"So much importance did the convention attach to [the precept that 'no State shall pass any ex post facto Law], that it is found twice in the Constitution – first as a restraint upon the power of the general government, and afterwards as a

limitation on the legislative power of the states." Kring v. Missouri, 107 U.S. 221, 227 (1883). In Calder, Justice Chase explained that the reason the ex post facto clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation. No lesser restraint is imposed upon state judicial action by the ex post facto component of the federally protected right to due process of law. Bouie; Marks.

In Carmell v. Texas, directly applying the Ex Post Facto Clause, this Court held that the Texas court system had inappropriately applied a new statute in Carmell's pending sexual battery case. A statute in effect at the time of the charged incidents required the State to prove, in such cases, either that the allegation was corroborated or else that the prosecutrix raised an outcry near the time of the incident, but provided an exception for any prosecutrix younger than fourteen at the time of the incident. The new statute extended the exception to cases involving a prosecutrix younger than eighteen; the change was dispositive of charges pending against Carmell. The Texas courts applied the new statute, and affirmed his convictions on the ground that the new statute "does not increase the punishment nor change the elements of the offense that the State must prove. It merely 'removes existing restrictions upon the competency of certain classes of persons as witnesses.'" 529 U.S. at 520. This Court, reversing, noted that the prohibition on ex post facto laws historically precluded the government from altering the legal rules of evidence in such a manner that the courts may receive less, or different, testimony in order to convict the offender. Id. at 522. This Court held that the Texas

statute at issue "unquestionably" is a law of that type, id. at 530, and that "[a] law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense…or lowering the burden of proof." Id. at 532.

Rogers v. Tennessee, 532 U.S. 451 (2001), issued the following Term. In Rogers, a fatal stabbing case, the victim lingered for over a year. Rogers was convicted of second-degree murder; he argued on appeal that his conviction had to be reduced to reflect a non-murder charge because of the time lapse, under the common-law "year and a day" rule, which had been referenced, but never applied, in Tennessee's caselaw. The Tennessee Supreme Court proceeded to abrogate the common-law rule, rejecting Rogers's argument that Bouie precluded applying the change in law to him. The Tennessee court's rationale was that the "unexpected and indefensible" judicial conduct proscribed by Bouie had not been shown.

This Court affirmed, on the grounds that the "year-and-a-day rule" has been widely discarded, and was never actually applied in Tennessee; therefore the change in law was neither unexpected nor indefensible. The Court reasoned that the Due Process Clause does not incorporate every aspect of the Ex Post Facto clause "jot for jot," since some incremental change in caselaw is both expected and desired. 532 U.S. at 459. But Rogers in no way purports to limit the reach of Bouie in cases where a change of law was in fact unforeseeable, and where in fact unfairness results from applying the change retroactively. 532 U.S. at 456-57; *see*

*also* id. at 469, 478 (Scalia, J., dissenting). Here, an unforeseeable change in law has left intact a murder conviction that resulted in a death sentence.

B. The change in law applied retroactively in this case is of a kind that triggers the right to "fair warning."

Rogers v. Tennessee is distinguishable here, in that the change in Florida law applied in this case represented an abrupt turnaround from established practice. The Florida Supreme Court applied its special standard for circumstantial cases from 1925 to 2020. In Hall v. State, 90 Fla. 719, 107 So. 246 (Fla. 1925), the supreme court held that

> [t]he rule seems to be that when circumstantial evidence is relied on for conviction the circumstances, when taken together, must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of and be consistent with guilt. They must be inconsistent with innocence.

107 So. at 247. *Accord* State v. Law, 559 So. 2d 187 (Fla. 1989), and Mayo v. State, 71 So. 2d 899 (Fla. 1954). While in 2013 an intermediate court questioned the continued usefulness of the special standard, *see* Knight v. State, 107 So. 3rd 449 (Fla. 5th DCA 2013), on reviewing that case the Florida Supreme Court rejected the suggestion by a 6-1 margin. Knight v. State, 186 So. 3rd 1005 (Fla. 2016). That court's reversal of course four years later in this case can be characterized as lowering the State's burden of proof, or lowering the quantum of evidence necessary

to convict. Both are prohibited by the Ex Post Facto Clause, as this Court held in Carmell v. Texas.

Carmell has been relied on not only in the Ex Post Facto context, but also where a judicial change to a common-law rule was applied to cases in progress, giving rise to a due process issue. In State v. Jones, 216 A. 3rd 907 (Md. 2019), the Court of Appeals of Maryland abandoned a common-law rule which had required criminal accomplices' testimony to be corroborated. That court declined to apply the rule to the case before it, citing Carmell for the "quantum of evidence" rule, and further noting that

> [a]pplying the new rule here would also be unfair to Respondent for another reason. We safely can assume that counsel prepared Respondent's defense in reliance on the then-applicable accomplice corroboration rule. At trial, the defense focused exclusively on the lack of independent evidence corroborating the accomplices' testimony. Had defense counsel known then that the rule might change post hoc, a different course, including the possibility of a plea bargain, likely would have been charted.

Jones, 216 A. 3rd at 921. Here this Court can be sure that both counsel and client prepared to test the State's proof with Florida's traditional sufficiency-of-evidence standard firmly in mind. Here as in the Maryland case, the "quantum of evidence" aspect of Ex Post Facto protection should have precluded applying the change of law to a capital case that had been litigated for six years at the time it came before the appellate court. However, the appellate court failed to exercise appropriate restraint when it applied its new standard to a case where the reliance interest is clear and

the stakes could not be greater. This Court should grant its writ of certiorari for that reason.

## II. Rogers v. Tennessee has been widely misapplied. This Court should clarify that the law does not require, as a predicate for arguing that a judicial change in law should be applied prospectively only, that the change be both unexpected and "indefensible."

As noted, this Court in Bouie stated that "the required criminal law must have existed when the conduct in issue occurred…[if it is] unexpected and indefensible by the law which had been expressed prior to the conduct in issue," a judicial construction of a statute may not be given retroactive effect. 378 U.S. at 354. As further noted, in Rogers, in affirming the petitioner's conviction, this Court stated that the Tennessee courts' abolition of the "year and a day" rule "was not unexpected and indefensible." 532 U.S. at 462. Justice Scalia, joined by Justices Thomas, Breyer, and Stevens, dissented in Rogers. Per those Justices the majority of this Court "wrenched entirely out of context" the term "indefensible," creating the "fallacy…that 'expected or defensible' 'abolition' of prior law [by the courts] was approved by Bouie. It was not." 532 U.S. at 469-70, 479-80 (Scalia, J., dissenting).

The dissenting Justices in Rogers predicted that the majority opinion would produce incorrect results "by according… conclusive effect to…'defensibility.'" Id. at 480. That prediction was correct. The Supreme Court of Nebraska holds that a retroactive judicial change of law must be "indefensible," meaning "incapable of being justified or excused," to trigger a due process argument. State v. Davlin, 639 N.W. 2d 631, 640-41 (Neb. 2002). *Accord* Commonwealth v. Springfield Terminal Ry. Co., 951 N.E. 2d 696 n.19 (Mass App. Ct. 2011) ("Today's decision is anything

but unexpected. Moreover, given…ample sound legal and policy reasons…[today's decision] is far from indefensible.") Decisions from the federal Circuits similarly accord conclusive effect to defensibility. *See* Evans v. Ray, 390 F. 3rd 1247, 1254 (10th Cir. 2004) (change in law was "neither unexpected nor indefensible, let alone unexpected and indefensible.") *See also* United States v. Lata, 415 F. 3rd 107, 111 (1st Cir. 2005) (assuming that this Court would hardly call its own decision in United States v. Booker, 125 S. Ct 738 (2005), "indefensible.")

As the Circuit Court noted in Lata, "unexpected and indefensible" "is an imprecise formula, as the conflicting opinions in Rogers readily show." 415 F. 3rd at 111. Before the opinions in Rogers issued, the courts construed Bouie and Marks as applying to cases where a judicial change in penal law was not reasonably foreseeable. *See* United States v. Qualls, 172 F. 3rd 1136 n.1 (9th Cir. 1999); *accord* id. at 1139 (Hawkins, J., concurring); Devine v. New Mexico Department of Corrections, 866 F. 2d 339, 345 (10th Cir. 1989) (inmate had inadequate notice, when he entered his plea, how long his sentence would run). Some twenty-first century courts have concluded that the "unexpected and indefensible" test still questions only whether the change in law at issue was reasonably foreseeable. *E.g.,* Karem v. Trump, 960 F. 3rd 656, 666-67 (D.C. Cir. 2020) (journalist did not have adequate notice his White House "hard pass" would be revoked); F.T.C. v., Wyndham Worldwide Corp., 799 F. 3rd 236, 250 (3rd Cir. 2015) (hotel chain had adequate notice it was required to take affirmative steps to protect its patrons' identity information). *Accord* State v. Plastow, 873 N.W. 2d 222 (S.D. 2015) and

People v LaRosa, 293 P. 3rd 567, 578-79 (Colo. 2013) (judicial decisions in defendants' cases to abandon corpus delicti rule did not give defendants fair warning). This Court should grant its writ of certiorari in this case in order to resolve the widespread disagreement over how to apply the "indefensibility" aspect of Rogers v. Tennessee in a manner that effectuates the original intent of the Ex Post Facto proscription.

## CONCLUSION

The petition for a writ of certiorari should be granted, and the parties should be returned to their pretrial positions.

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