No. 20-6094

IN THE
Supreme Court of the United States

SEAN ALONZO BUSH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the Florida Supreme Court violated the Due Process Clause when it reviewed the sufficiency of the evidence supporting Petitioner's conviction under its normal sufficiency standard rather than its now-discarded special standard of review for circumstantial-evidence cases.

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INTRODUCTION

Historically, many courts mistook circumstantial evidence as beneath direct evidence. Wary of this inferential proof, they adopted a special jury instruction and standard of review for cases built on circumstantial evidence alone. To convict in these cases, they said, the evidence must be "inconsistent with any reasonable hypothesis of innocence." *See Knight v. State*, 107 So. 3d 449, 457 (Fla. 5th DCA 2013). In Florida, courts called this the "special standard for circumstantial evidence cases." *See* Pet. App. 15.

But almost 70 years ago, this Court rejected that standard. *See Holland v. United States*, 348 U.S. 121, 139–40 (1954). It held that the special jury instruction is not just unnecessary alongside an instruction on reasonable doubt; it is "confusing and incorrect." *Id.* Not long after, the Court banished the special standard of review, adopting a uniform standard for reviewing the sufficiency of evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In the wake of these decisions, all federal courts and "the vast majority" of states abolished the special standard. *See* Pet. App. 15. And in 1981, Florida began to follow suit: It eliminated the special jury instruction, calling the instruction "unnecessary" when the trial court instructs the jury on reasonable doubt. *See In re Use by Trial Cts. of Standard Jury Instructions in Crim. Cases*, 431 So. 2d 594, 595 (Fla. 1981).

Even so, the special standard remained a vestige in Florida appellate law. "[I]nexplicably and without

analysis," Pet. App. 15, the Florida Supreme Court retained the special standard to review the sufficiency of evidence in circumstantial-evidence cases. As a result, Florida became "an extreme outlier," taking the "discordant" position that "the special standard should not be used to instruct the jury but should be used to judge the jury's verdict." *Id.*

In the decision below, the Florida Supreme Court finally abolished the special standard of appellate review. It then affirmed Petitioner's conviction for murdering his wife using its normal standard for reviewing the sufficiency of evidence. Only one Justice disagreed with the court's decision to join most jurisdictions in ousting the special standard, and even he agreed that the court should affirm Petitioner's conviction.

Petitioner now seeks a writ of certiorari. He asserts, for the first time, that applying Florida's normal sufficiency standard in his case violates the due process right to "fair warning" described in *Rogers v. Tennessee*, 532 U.S. 451 (2001). His petition, however, does not warrant review. It poses a question neither raised nor passed on below and presents no split of authority, no important issue, and at any rate, no due process violation. For any of these reasons, the Court should deny review.

STATEMENT

1. Petitioner separated from his wife, Nicole Bush, in 2009. Pet. App. 6. Two years later, she was murdered in her home: shot six times, stabbed four, and bludgeoned with a baseball bat. *Id.* at 5–8. An investigation identified Petitioner as her killer,

leading the State to try him for first-degree murder. *Id.* at 5.

The State used a host of circumstantial evidence to prove its case. *Id.* at 4–11, 16–17; *see* Fla. Standard Jury Instructions (Crim.) 7.2 & 7.3 (listing the elements of first-degree murder, which permit conviction when the jury finds that the defendant killed the victim with premeditation or while committing a felony). To start, Petitioner had a "dire financial status at the time of the murder." Pet. App. 10. He was behind on child support for four children, was constantly late on his rent, and had less than $300 in his bank. *Id.* But Petitioner had a way out: He was "the primary beneficiary" of Nicole's[1] "life insurance policy in the amount of $815,240." *Id.* Although Petitioner denied knowing about the policy before the murder, the evidence showed the opposite. *See id.* at 17. Two months after the murder, he called Nicole's life insurer "to verify that he was still the policy beneficiary." *Id.* at 10. And a few days later, he "submitted a claim for the policy proceeds." *Id.* at 17.

Petitioner also had access to Nicole's home and opportunity to enter undetected. He "knew the passcode to enter [Nicole's] garage, the whereabouts of the spare house key [in the garage], and how to operate the alarm panel." *Id.* at 16; *see also id.* at 6. This information was critical to the murder, as there were no "signs of forced entry." *Id.* at 16. Rather, the evidence suggested that someone opened the garage, used a key to enter the home, and disabled Nicole's alarm system. *See id.* at 5, 16. Along with this,

[1] For simplicity, the State will call the victim by her first name.

Petitioner knew that their "children and dog would not be home" during the murder: He had offered to keep them for a long weekend and drop the children off at school, "an arrangement . . . unusual for the Bush family." *Id.* at 16.

Next, Petitioner offered a series of shifting and mutually inconsistent alibis for his whereabouts during the murder. *See id.* at 5–9. At first, he claimed that he was home with his kids during the murder. *Id.* at 6. Then he said that he had left home around the time of the murder to check gas prices while his kids were getting dressed (although he bought no gas). *Id.* He eventually contradicted this story, admitting that he had not gone to check gas prices, but had tried to visit his friend, Brenda, whom he found was not home. *Id.* at 8. But although Brenda lived just ten minutes away, Petitioner claimed that he was gone for about two hours. *Id.* And when Nicole was murdered around 6 a.m., Petitioner's truck was missing from his driveway. *Id.*

Finally, the State offered forensic and other evidence that tied Petitioner to the murder weapon and placed him at the crime scene at the time of the murder. Petitioner's favorite boots matched five bloody boot prints found at the scene, and after the murder, Bush was never seen wearing them again. *Id.* at 9, 16. DNA testing also connected him to the bat used to beat Nicole to death—a bat he "claimed to have never touched"—and to the sofa crevice in which the bat was hidden. *Id.* at 17. Video evidence and testimony showed that Petitioner revisited the crime scene to check on the bat and other incriminating evidence that he had hidden away. *See id.* at 8–9, 16–

17. And forensic computer evidence showed that, months before the murder, Petitioner "began researching how to make silencers" for "the same caliber of weapon that the firearms examiner testified 'almost certainly' fired" in Nicole's home. *Id.* at 16. He even tried, unsuccessfully, to delete this computer evidence and "initially tried to avoid submitting his laptop for examination." *Id.*

Before deliberations, the trial court instructed the jury that it should return a guilty verdict if it found beyond a reasonable doubt that Petitioner committed each element of the crime. *See* Tr. R. at 3550–65. Following that instruction, the jury convicted Petitioner of first-degree murder. Pet. App. at 11. It unanimously recommended the death penalty. *Id.* at 4. The trial court agreed and entered that sentence. *Id.*

2. Petitioner appealed to the Florida Supreme Court. As relevant here, he argued that the State relied on only circumstantial evidence to prove his guilt. *Id.* at 15. He thus claimed that Florida's special standard of review for circumstantial-evidence cases applied and that the State's evidence was insufficient under that standard. *Id.*

The Florida Supreme Court affirmed. Although it agreed that the State had relied on only circumstantial evidence, it reasoned that Florida's continued use of the special standard of review was "inexplicabl[e]" and "discordant" given that Florida had eliminated its special jury instruction years before. *Id.* Because its inconsistent evidentiary standards "wholly defie[d] reason" and made Florida an "extreme outlier," the court joined the "vast

majority of" jurisdictions in abolishing the special standard of review. *Id.* at 15–16. It then held that Florida's normal sufficiency standard—under which a court asks whether "a rational trier of fact could have found the existence of the elements . . . beyond a reasonable doubt"—was the right standard for all criminal cases. *Id.* at 16. Applying that standard here, the court held that the State produced more than enough evidence to justify Petitioner's conviction. *Id.* at 16–17.

One Justice dissented from the court's decision to join most others in abolishing the special standard. *See id.* at 27–28 (Labarga, J., concurring in part and dissenting in part). Yet Justice Labarga recognized that, even under the special standard, there was enough evidence to support Petitioner's conviction. *See id.*

3. Petitioner filed a petition for a writ of certiorari in this Court. He now raises only a claim not raised below: that the Florida Supreme Court violated his due process right to fair warning when it reviewed his conviction using its normal sufficiency standard, rather than its now-defunct special standard of review for circumstantial-evidence cases.

REASONS FOR DENYING THE PETITION

I. The question presented was neither raised nor passed on below.

"[T]his is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). For that reason, this Court has "[w]ith 'very rare exceptions' . . . adhered to the rule in reviewing state court judgments under 28 U.S.C.

§ 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)). Indeed, it is "unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90 (quotation mark omitted). The Court thus "affords state courts an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes that could obviate any challenges to state action in federal court." *Id.* (quotation marks omitted).

Petitioner never argued to the Florida Supreme Court that applying Florida's normal sufficiency standard over the special standard of review would violate his due process right to fair warning. *See* Pet.'s Init. Br., *Bush v. Florida*, 2018 WL 4257076 (Fla. 2018); Pet.'s Reply Br., *Bush v. Florida*, 2018 WL 6590785 (Fla. 2018).[2] Nor did he raise the argument in a petition for rehearing, *see* Fla. R. App. P. 9.330, thus preventing the Florida Supreme Court from passing on his due process argument first.

Petitioner does not identify any "rare exceptions" to avoid the rule that this Court will not review an issue neither presented nor passed upon below. *See Adams*, 520 U.S. at 86. That is because none exists.

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[2] Petitioner cited the Due Process Clause in his initial brief, but only to argue that the State's alleged failure to produce sufficient evidence violated the Due Process Clause's mandate that the State prove guilt beyond a reasonable doubt. *See* Pet.'s Init. Br., *Bush v. Florida*, 2018 WL 4257076, at *46 (Fla. 2018).

Petitioner chose to seek relief immediately in this Court rather than seek relief in the Florida Supreme Court. Yet the lower court has "an undeniable interest in having the opportunity to determine in the first instance" whether applying the normal sufficiency standard in Petitioner's case violates his right to fair warning. *See id.* at 90. Had Petitioner raised that claim in the Florida Supreme Court, the court could have explained its rationale for applying the normal sufficiency standard in his case, including that its normal sufficiency standard is not materially different from the special standard of review. *See infra* Part IV.1. Or it could have clarified that its decision was a long time coming in Florida, making it far from an "unexpected and indefensible" change. *See Rogers*, 532 U.S. at 462; *infra* Part IV.3. And "even if the state court's construction of [Florida law] would not obviate the due process challenge, it would undoubtedly aid [this Court's] understanding of [Florida law] as a predicate to [its] assessment of" whether reviewing Petitioner's conviction under Florida's normal sufficiency standard violates the right to fair warning. *See Adams*, 520 U.S. at 91.

Because Petitioner failed to raise his due process claim before the Florida Supreme Court, and because that court did not pass upon the question presented, this Court should refuse initial review.

II. The lower courts are not split on the question presented.

Petitioner does not claim that the lower courts are split on whether it violates due process to apply a normal sufficiency standard in a case in which a court eliminates the special standard of review. And indeed,

they are not split. Petitioner thus tries to argue that there is "widespread disagreement over how to apply the 'indefensibility' aspect" of the due process test described in *Rogers*. *See* Pet. 14. But the lower courts are not split on that issue either.

1. The few courts that have addressed this issue have uniformly held that applying the normal sufficiency standard after abolishing the special standard does not violate due process (or the Ex Post Facto Clause). *See, e.g.*, *State v. Nash*, 339 S.W.3d 500, 509–10 (Mo. 2011); *Freeman v. Johnson*, 248 F.3d 1143, 2001 WL 184858, at *1–2 (5th Cir. 2001) (unpublished). And courts have held that refusing to provide the special jury instruction post-abolishment does not violate these doctrines either. *See, e.g.*, *Brown v. Dormire*, No. 4:04CV00579, 2007 WL 2434055, at *19 (E.D. Mo. Aug. 22, 2007); *Rios v. Scott*, 36 F.3d 90, 1994 WL 523804, at *4 (5th Cir. 1994) (unpublished); *Davidson v. State*, 737 S.W.2d 942, 947 (Tex. App. 1987).

Though these courts use different language, they rely on the same principle: Applying the normal sufficiency standard over the special standard does not alter the defendant's criminal liability or the quantum of proof needed to convict, and thus does not violate due process or the Ex Post Facto Clause. *See, e.g.*, *Nash*, 339 S.W.3d at 509 (no due process violation because "this Court's appellate review of the evidence through the lens of the present sufficiency of the evidence standards versus the circumstantial evidence rule does not alter what was required 'in order to convict' Nash for Judy's murder"); *Freeman*, 2001 WL 184858, at *1–2 (no Ex Post Facto violation

after abandoning "the reasonable hypothesis analytical construct during appellate review" because the change "in no way affected the degree of proof requisite for a jury to convict"). And courts use the same logic when ruling that trial courts need not provide the special jury instruction post-abolishment. *Brown*, 2007 WL 2434055, at *19 (no due process violation because "[t]he change in Missouri law with respect to the circumstantial evidence instruction did not alter the definition of the crimes for which Petitioner was convicted, nor increase the penalty for those crimes"); *Rios*, 1994 WL 523804, at *4 (no due process violation because the change "did not alter the quantum of proof necessary to convict a criminal defendant"); *Davidson*, 737 S.W.2d at 947 (no Ex Post Facto violation because the change "did not subject appellant to retroactive criminal prosecution and it did not create a potentially more onerous punishment").

Since the lower courts are not split on this issue, it does not warrant the Court's review.

2. Because Petitioner did not raise his due process claim before the Florida Supreme Court, the lower court did not conduct a due process analysis. Thus, Petitioner cannot argue that the lower court split from others in applying this Court's due process precedent. He instead argues generally that there is "widespread disagreement" among courts over how to apply *Rogers*'s unexpected and indefensible test. *See* Pet. 14. Under that test, a court violates a petitioner's due process right to "fair warning" when it alters the definition of criminal conduct in a way that is "unexpected and indefensible by reference to the law

which had been expressed prior to the conduct in issue." *See Rogers*, 532 U.S. at 457–60, 462. Petitioner claims that courts have split on whether a change must be both unexpected *and* indefensible to violate due process. *See* Pet. 12–14.

Petitioner identifies no split. As cases cited in the Petition recognize, a judicial change must be both unexpected and indefensible to violate due process. *See, e.g.*, *id.* at 12–13 (citing *State v. Davlin*, 639 N.W.2d 631 (Neb. 2002); *Evans v. Ray*, 390 F.3d 1247 (10th Cir. 2004); *Commonwealth v. Springfield Terminal Ry. Co.*, 951 N.E.2d 696 (Mass. App. 2011); *United States v. Lata*, 415 F.3d 107 (1st Cir. 2005)).

Petitioner also claims that some courts, applying *Rogers*, do not use the "unexpected and indefensible" test, but a more general foreseeability test. *See id.* at 13–14 (citing *Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020); *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015); *State v. Plastow*, 873 N.W.2d 222 (S.D. 2015); *People v. LaRosa*, 293 P.3d 567 (Colo. 2013)). Yet these cases do not veer from *Rogers*. Rather, they recognize that *Rogers* turns on "core due process concepts of notice, foreseeability, and, in particular, the right to fair warning." *See* 532 U.S. at 459. Because these principles are closely intertwined, these courts use the term "foreseeability," but apply *Rogers* all the same. *See, e.g.*, *Karem*, 960 F.3d at 666–67 (holding that revoking a press pass violated due process because the White House had never published a set of rules governing press conduct and had never revoked a press pass before, and because the press correspondent's actions were not egregious enough to justify suspending the pass without notice); *Wyndham*

Worldwide, 799 F.3d at 255–57 (noting that Wyndham likely had fair notice that its conduct constituted an unfair practice under a statute because the court's application of that term to Wyndham's conduct was reasonable); *Plastow*, 873 N.W.2d at 230–31 (recognizing that the changed rule was still used in other contexts, making "retroactive application . . . unexpected and indefensible"); *LaRosa*, 293 P.3d at 578–79 (holding that the changed rule was "still followed in many state jurisdictions" in which courts had "reject[ed] similar arguments to those [the court had] found persuasive," and thus the defendant did not have "fair warning"). So Petitioner is mistaken; none of these courts have split on how to apply *Rogers*.

III. The question presented is not important enough to merit this Court's review.

Petitioner does not explain why this issue is important enough to warrant review. Nor could he. The issue is unlikely to arise in other jurisdictions, and it is not even dispositive in Petitioner's appeal.

1. The special standard of review is a relic in American law. This Court rejected the special jury instruction almost 70 years ago. *See Holland*, 348 U.S. at 139–40. And then it adopted a uniform standard for sufficiency review, blinking the special standard of review out of existence in federal court. *See Jackson*, 443 U.S. at 319, 326.

Following this Court's lead, every federal circuit has since jettisoned the special standard of review.[3]

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[3] *United States v. Gabriner*, 571 F.2d 48, 50 (1st Cir. 1978); *United States v. Elsbery*, 602 F.2d 1054, 1057 (2d Cir. 1979);

So have at least 43 other states and the District of Columbia.[4] And of the few states that have retained

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United States v. Hamilton, 457 F.2d 95, 98 (3d Cir. 1972); *United States v. Chappell*, 353 F.2d 83, 84 (4th Cir. 1965); *United States v. Bell*, 678 F.2d 547, 549 n.3 (5th Cir. 1982); *United States v. Conti*, 339 F.2d 10, 12–13 (6th Cir. 1964); *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1261 (7th Cir. 1975); *United States v. Francisco*, 410 F.2d 1283, 1286 (8th Cir. 1969); *United States v. Nevils*, 598 F.3d 1158, 1164–65 (9th Cir. 2010); *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989); *United States v. Davis*, 562 F.2d 681, 683–84 (D.C. Cir. 1977).

[4] **Alaska**: *Des Jardins v. State*, 551 P.2d 181 (Alaska 1976); *State v. McDonald*, 872 P.2d 627 (Alaska Ct. App. 1994); **Arizona**: *State v. Nash*, 694 P.2d 222 (Ariz. 1985); **California**: *People v. Miller*, 790 P.2d 1289 (Cal. 1990); **Colorado**: *People v. Bennett*, 515 P.2d 466 (Colo. 1973); **Connecticut**: *State v. Farnum*, 878 A.2d 1095 (Conn. 2005); **Delaware**: *Hoey v. State*, 689 A.2d 1177 (Del. 1997); **District of Columbia**: *Jones v. United States*, 477 A.2d 231 (D.C. 1984); **Hawai'i**: *State v. Smith*, 621 P.2d 343 (Haw. 1980); **Idaho**: *State v. Ponthier*, 449 P.2d 364 (Idaho 1969); **Illinois**: *People v. Pollock*, 780 N.E.2d 669 (Ill. 2002); **Indiana**: *Craig v. State*, 730 N.E.2d 1262 (Ind. 2000); **Iowa**: *State v. Radeke*, 444 N.W.2d 476 (Iowa 1989); **Kansas**: *State v. Morton*, 638 P.2d 928 (Kan. 1982); **Kentucky**: *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); **Maine**: *State v. Anderson*, 434 A.2d 6 (Me. 1981); **Maryland**: *Beattie v. State*, 88 A.3d 906 (Md. Ct. Spec. App. 2014); **Massachusetts**: *Commonwealth v. Roman*, 694 N.E.2d 860 (Mass. 1998); **Michigan**: *People v. Hardiman*, 646 N.W.2d 158 (Mich. 2002); **Missouri**: *State v. Grim*, 854 S.W.2d 403 (Mo. 1993); **Montana**: *State v. Rosling*, 180 P.3d 1102 (Mont. 2008); **Nebraska**: *State v. Pierce*, 537 N.W.2d 323 (Neb. 1995); **Nevada**: *Koza v. State*, 681 P.2d 44 (Nev. 1984); **New Hampshire**: *State v. Sanborn*, 130 A.3d 563 (N.H. 2015); **New Jersey**: *State v. Mayberry*, 245 A.2d 481 (N.J. 1968); **New Mexico**: *State v. Garcia*, 384 P.3d 1076 (N.M. 2016); **New York**: *People v. Williams*, 644 N.E.2d 1367 (N.Y. 1994); **North Carolina**: *State v. Haselden*, 577 S.E.2d 594 (N.C. 2003); **North**

the special standard of review, just one has mirrored Florida's prior posture in doing so despite having eliminated the special jury instruction.[5]

Since "the vast majority of" jurisdictions abolished this standard long ago, and since Florida was an "extreme outlier" even among the few jurisdictions that retained the special standard of review, Pet. App. 15 (majority opinion), this issue will seldom arise in the future.

2. This issue is not even dispositive in Petitioner's appeal. Were the Court to reverse and remand, the

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Dakota: *State v. Treis*, 597 N.W.2d 664 (N.D. 1999); **Ohio**: *State v. Jenks*, 574 N.E.2d 492 (Ohio 1991); **Oklahoma**: *Easlick v. State*, 90 P.3d 556 (Okla. Crim. App. 2004); **Oregon**: *State v. Hall*, 966 P.2d 208 (Or. 1998); **Pennsylvania**: *Commonwealth v. Robertson-Dewar*, 829 A.2d 1207 (Pa. Super. Ct. 2003); *Commonwealth v. Newsome*, 787 A.2d 1045 (Pa. Super. Ct. 2001); **Rhode Island**: *State v. Kaba*, 798 A.2d 383 (R.I. 2002); **South Carolina**: *State v. Pearson*, 783 S.E.2d 802 (S.C. 2016); **South Dakota**: *State v. Miller*, 851 N.W.2d 703 (S.D. 2014); **Tennessee**: *State v. Sisk*, 343 S.W.3d 60 (Tenn. 2011); **Texas**: *King v. State*, 895 S.W.2d 701 (Tex. Crim. App. 1995); **Utah**: *State v. Nielsen*, 326 P.3d 645 (Utah 2014); **Vermont**: *State v. Couture*, 734 A.2d 524 (Vt. 1999); **Virginia**: *Commonwealth v. Moseley*, 799 S.E.2d 683 (Va. 2017) (construing the special standard of review to be merely a different way to review whether the state presented enough evidence to convict beyond a reasonable doubt); **Washington**: *State v. Delmarter*, 618 P.2d 99 (Wash. 1980); **West Virginia**: *State v. Guthrie*, 461 S.E.2d 163 (W. Va. 1995); **Wisconsin**: *State v. Smith*, 817 N.W.2d 410 (Wis. 2012); **Wyoming**: *Anderson v. State*, 216 P.3d 1143 (Wyo. 2009).

[5] **Minnesota**: *Compare State v. Turnipseed*, 297 N.W.2d 308, 312–13 (Minn. 1980) (finding the special jury instruction unnecessary), *with State v. Miller*, 488 N.W.2d 235, 240 (Minn. 1992) ("A jury conviction based on circumstantial evidence warrants a higher [rational hypothesis] standard of review.").

Florida Supreme Court would affirm Petitioner's conviction under even the special standard of review.

The special standard of review instructs that "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Id.*

Petitioner's proffered "hypothesis of innocence" was that "another individual—possibly the Enrique who had a long phone conversation with Nicole the evening before her death—was the guilty party." *See* Pet.'s Init. Br., *Bush v. Florida*, 2018 WL 4257076, at *46 (Fla. 2018). He argued that this hypothesis "was not unreasonable in light of the dearth of evidence placing [Petitioner] at the scene at the relevant time." *Id.*

Petitioner is incorrect. At the gate, Petitioner explicitly disclaimed the theory that Enrique committed the murder in his closing argument. *See* Tr. 8/1/2017 at 1674. And at any rate, a wealth of circumstantial evidence made this barebones hypothesis unreasonable. *See supra* Statement. The evidence showed that he had motive: He was deeply in debt and knew that he was the beneficiary of Nicole's $800,000 life-insurance policy. *See id.* at 3. It showed that he had opportunity: He had access to the home, had ensured that his kids would be away, had no alibi, and gave inconsistent statements about his whereabouts. *See id.* at 3–4. And, among other highly suspicious circumstances, the evidence showed that he had handled the murder weapon, was present at the crime scene at the time of the murder, and had

untruthfully denied or otherwise sought to conceal such incriminating evidence. *See id.* at 4–5. His blood-covered boot prints spattered the floor; his DNA was on one of the murder weapons and was in the sofa crevice where the weapon was concealed; he returned to the crime scene to check on hidden, incriminating evidence; and he researched how to build a silencer for the gun that likely killed Nicole. *See id.*

As the Florida Supreme Court explained, such evidence was more than sufficient to allow a rational trier of fact to find, beyond a reasonable doubt, that Petitioner was guilty of first-degree murder. *See* Pet. App. 17; Fla. Standard Jury Instructions (Crim.) 7.2 & 7.3. And any jury that so found would also have found that Petitioner's hypothesis of innocence was unreasonable. Accordingly, the only Florida Supreme Court Justice to dissent from repudiating the special standard concluded that the court should affirm Petitioner's conviction under the special standard of appellate review. *See* Pet. App. 28 (Labarga, J., concurring in part and dissenting in part) ("In the present case, the evidence relied on to convict Bush satisfies the more exacting standard of review and is inconsistent with Bush's hypothesis of innocence that someone else committed the murder. Thus, I concur in the result.").

In short, "if [the special] standard were applied . . . Bush's conviction for first-degree murder would be affirmed." *Id.* at 27. As a result, the answer to Petitioner's question presented would not even affect the outcome of his own case. Still less does Petitioner establish that his claim raises an issue sufficiently important to warrant this Court's review.

IV. The Florida Supreme Court did not violate Petitioner's due process right to fair warning.

Petitioner claims that the lower court's decision to apply its normal sufficiency standard in his case violated his right to fair warning because it lowered the "quantum of evidence" needed to convict. Pet. 10–11. Petitioner is wrong for four reasons.

1. To start, the decision below did not lower the quantum of evidence needed to convict Petitioner. The standard at Petitioner's trial was evidence beyond a reasonable doubt. *See, e.g.*, Fla. Standard Jury Instructions (Crim.) 7.2 & 7.3. The special standard never heightened this evidentiary burden on appeal, and the normal sufficiency standard never lowered it. To the contrary, these standards are just semantically distinct ways to consider the same question: whether the State produced enough evidence to convict beyond a reasonable doubt.

The special standard's history in Florida at the trial level makes this clear. Nearly 40 years ago, the Florida Supreme Court held that "instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary." *Standard Jury Instructions in Crim. Cases*, 431 So. 2d at 595. Two years later, it noted that when the trial court instructs the jury on reasonable doubt, "a separate instruction solely on circumstantial evidence would be duplicative." *Williams v. State*, 437 So. 2d 133, 136 (Fla. 1983); *see also Floyd v. State*, 850 So. 2d 383, 400 (Fla. 2002) (same); *Branch v. State*, 685 So. 2d 1250, 1253 (Fla. 1996) (same). In other words, Florida has long recognized that the special

jury instruction—which is virtually identical to the special standard of review—does not change the level of proof needed to convict. It is simply a different way to explain reasonable doubt in circumstantial-evidence cases.[6]

Like the special jury instruction, the special standard of review is also redundant. Again, under the special standard, "a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." *Knight v. State*, 186 So. 3d 1005, 1009 (Fla. 2016) (alterations accepted). By contrast, Florida's normal sufficiency standard asks whether "a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." Pet. App. 16 (majority opinion). Inspected side-by-side, both standards review for the same level of proof. For if a reasonable hypothesis of innocence exists, the court could not hold that the jury had enough evidence to convict beyond a reasonable doubt. Put another way, if a reasonable hypothesis of innocence exists, a reasonable doubt of guilt exists. *See, e.g.*, *Barshop v. United States*, 191 F.2d 286, 292 (5th Cir. 1951) ("We cannot conceive how the jury could have disbelieved these defenses beyond a reasonable doubt and could

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[6] Other jurisdictions agree. *See, e.g.*, *State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980) ("In regard to the propriety of the so-called 'reasonable alternative hypothesis' jury instruction, any controversy over its use constitutes nothing more than a tempest in a teapot. The prosecution's burden of proof in any criminal case, whether the evidence be direct or circumstantial, or a combination of both, is that of beyond a reasonable doubt. The use of the reasonable alternative hypothesis instruction is merely one way of expressing that necessary burden of proof[.]" (footnote omitted)).

still have believed that a reasonable hypothesis of innocence existed[.]"). The decision below recognized this, noting that the Florida Supreme Court had "sometimes explained the special standard for circumstantial cases in such a way as to indicate that it is ultimately a mechanism for determining whether the evidence constitutes a competent, substantial basis for the verdict." Pet. App. 29. At bottom, then, the special standard "add[ed] nothing—except confusion—to the analysis," *Knight*, 107 So. 3d at 460, which is why the lower court joined most others in abolishing it. *See supra* Part III.1.

To be sure, some Florida jurists have called the special standard a "heightened standard." *See, e.g.*, Pet. App. 28 (Labarga, J., concurring in part and dissenting in part) (dissenting from the majority's decision to discard the "heightened standard of review in wholly circumstantial evidence cases"); *Pena v. State*, 298 So. 3d 1224, 1228 (Fla. 3d DCA 2020) (calling the special standard a "heightened standard of review"). But these opinions do not grapple with the mechanics of the special standard or its connection to the normal sufficiency standard. On the other hand, courts that have studied this issue correctly conclude that the special standard is "mostly a semantic distinction." *See, e.g.*, *Knight*, 107 So. 3d at 469 (Torpy, J., concurring). Thus, applying the normal sufficiency standard in Petitioner's case did not lessen the evidence needed to convict.

2. Even if applying the normal sufficiency standard changed the level of proof needed to convict, Petitioner's claim still fails, as changes to evidentiary burdens do not implicate the due process right to fair

warning. No doubt, due process affords defendants a "right to fair warning that certain conduct will give rise to criminal penalties." *See Rogers*, 532 U.S. at 459 (quotation mark omitted) & 457–60; *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court."). But changes to evidentiary burdens do not alter what "conduct will give rise to criminal penalties," *see Rogers*, 532 U.S. at 459 & 457–60; they merely change the degree of proof needed to impose those penalties. Both before and after an evidentiary-burden change, the defendant has fair warning of exactly what conduct the law proscribes. *Rogers* requires nothing more. *See id.*[7]

Of course, laws that belatedly "reduc[e] the quantum of evidence" needed to convict can violate the Ex Post Facto Clause. *Carmell v. Texas*, 529 U.S. 513, 532–33 (2000). But Petitioner has not raised an Ex Post Facto Clause claim; he has raised a Due Process Clause claim. Indeed, he challenges a *judicial* change, and the Due Process Clause—not the Ex Post Facto Clause—applies to judicial action. *Rogers*, 532 U.S. at 460. And although the Due Process Clause and the Ex Post Facto Clause "safeguard common interests" in

[7] Other due process interests—like the interest in ensuring the correctness of a conviction—prevent courts from straying below the reasonable-doubt standard. *See In re Winship*, 397 U.S. 358, 361–64 (1970). But these interests do not help Petitioner; they do not drive his due process claim. Petitioner's claim stems from the distinct due process right to fair warning, *see Rogers*, 532 U.S. at 462, and that due process right concerns only the interest in knowing what conduct is criminal. *See id.* at 457–60.

"notice and fair warning," *id.*, the Due Process Clause does not "incorporate jot-for-jot . . . . the *ex post facto* categories set out in *Calder* [*v. Bull*]." *Id.* at 459. It incorporates only "the more basic and general principle of fair warning" that "certain conduct will give rise to criminal penalties." *See id.* at 457–60.[8]

The history behind the fair-warning principle also confirms its limitations. The principle stems from the "void for vagueness" doctrine. *See id.* at 457; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning."). That doctrine prohibits criminal laws that "fail[] to give ordinary people fair notice of the conduct [they] punish[.]" *Johnson v. United States*, 576 U.S. 591, 595 (2015). Key, then, to vagueness (and its successor, fair warning) is the concern that people will not know that their conduct is criminal. Changes

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[8] Petitioner notes that the Court of Appeals of Maryland has nevertheless applied *Carmell* to judicial action through the Due Process Clause. *See* Pet. 11 (citing *State v. Jones*, 216 A.3d 907 (Md. 2019). But it seems that the Maryland court, in doing so, overlooked *Rogers*'s instruction that the Due Process Clause does not incorporate the Ex Post Facto Clause. There the court abrogated an accomplice-corroboration rule. It then had to decide whether to still apply the rule to the defendant's case. The court first noted that *Carmell* held that applying a similar witness-corroboration-rule change would violate the Ex Post Facto Clause, as it would "lower[] 'the quantum of evidence'" needed to convict. *Jones*, 216 A.3d at 921. But despite recognizing that the Ex Post Facto Clause does not apply to courts, the Maryland court still held that "the general principles enunciated" in *Carmell* applied. *See id.* That approach—which effectively superimposes the Ex Post Facto Clause's limitations onto the Due Process Clause—"circumvent[s]" the Ex Post Facto Clause's "clear constitutional text," which applies only to legislatures. *See Rogers*, 532 U.S. at 460.

to the quantum of proof needed to convict, however, do not trigger this concern; before and after a burden change, the same conduct remains illegal. The only change is how much the State needs to prove to impose a criminal penalty. That change does not implicate *Rogers*'s right to fair warning.

Because the due process right to fair warning does not involve the kind of change that Petitioner claims occurred below, *Marks v. United States*, 430 U.S. 188 (1977), and *Bouie* do not apply. In *Marks*, this Court found a due process violation when a new ruling interpreted federal obscenity law so that the law criminalized more conduct than it did before. So too in *Bouie*, when the South Carolina Supreme Court expanded a criminal trespass statute to reach new conduct. Neither case involved an alleged change to an evidentiary burden.

3. Even if the decision below changed an evidentiary burden, and even if judicial changes to evidentiary burdens could implicate the due process right to fair warning, Petitioner's fair-warning claim would still fail. To establish a fair-warning violation, Petitioner must also show that the change was an "unexpected and indefensible" development. *Rogers*, 532 U.S. at 462. He cannot do so. For one thing, Petitioner barely discusses whether the change was unexpected and indefensible; he simply attacks the unexpected and indefensible standard in general. *See* Pet. 10–14. But even if he had addressed the test head on, he still could not meet his burden.

In *Rogers*, the Court explained that whether a change is unexpected and indefensible turns on whether there are good reasons for the changed law,

see id. at 463; how other jurisdictions have handled the changed law, *see id.* at 462–63; and how entrenched the changed law was in the relevant jurisdiction, *see id.* at 464–65. Each factor shows that adopting the normal sufficiency standard in circumstantial-evidence cases was not an unexpected and indefensible change.

First, the Florida Supreme Court had good reason to abolish the special standard of review. That standard was merely a different way to assure the court that there was enough evidence to convict beyond a reasonable doubt. *See supra* Part IV.1. It "add[ed] nothing—except confusion—to the analysis." *Knight*, 107 So. 3d at 460.

Next, other jurisdictions have resoundingly rejected the special standard. Given the Florida Supreme Court's previous decision to eliminate the standard in the trial court, its "inexplicabl[e]" decision to continue using that standard for appellate purposes, Pet. App. 15 (majority opinion), and its resulting status as an "extreme outlier," *id.,* the lower court made an altogether predictable—and long overdue—change when it formally abolished Florida's special standard of appellate review and brought that standard in line with the instruction that has long been given to juries.

Finally, the special standard of review held "only the most tenuous foothold" in Florida, *see Rogers*, 532 U.S. at 464, as Florida jurists had long criticized the standard and the Florida Supreme Court had repeatedly narrowed its scope. *See supra* Part IV.1; *Standard Jury Instructions in Crim. Cases*, 431 So. 2d at 595; *Knight*, 186 So. 3d at 1010–12 (limiting the

special standard to cases that rest only on circumstantial evidence); *id.* at 1013 (Canady, J., concurring in result) ("It is a striking and inexplicable anomaly that we have rejected the reasonable-hypothesis-of-innocence jury instruction but have nonetheless retained the special standard of review."). All this made clear that the special standard of review was not long for Florida law.

4. In a final bid to obtain review, Petitioner asks this Court to "clarify that the law does not require" that a judicial change "be both unexpected and 'indefensible.'" Pet. 12. The Court should decline this invitation to rewrite *Rogers*. As Justice O'Connor explained, the "unexpected and indefensible" test properly squares the "substantial leeway" courts need "to bring the common law in conformity with logic and common sense" with "the due process concern [of] fundamental fairness and protect[ing] against vindictive or arbitrary judicial lawmaking." *Rogers*, 532 U.S. at 461–62. At any rate, this case is a poor vehicle for considering that question because the formal change to Florida's appellate standard of review was neither unexpected nor indefensible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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