No. 1210198

IN THE SUPREME COURT OF ALABAMA

EX PARTE STATE OF ALABAMA

In re: STATE OF ALABAMA,

v.

JOHN GRANT.

On Writ of Mandamus to the Circuit Court of
Montgomery County
(CC-20-116)

On Writ of Certiorari to the
Alabama Court of Criminal Appeals
(CR-20-0804)

STATE OF ALABAMA'S REPLY BRIEF

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
(334) 353-8400 (facsimile)
Edmund.LaCour@AlabamaAG.gov

May 10, 2022

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

Cameron G. Ball
Assistant Attorney General

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SUMMARY OF ARGUMENT

Grant's response brief does not engage with the State's opening brief. Even though the question before the Court is whether it should overrule *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003), and hold that the Legislature abrogated the common law year-and-a-day rule when it enacted the comprehensive Criminal Code in 1977, Grant makes little attempt to explain why he thinks *Ex parte Key* was correctly decided—only that it *was* decided. *See* Resp. i. Nor does he respond meaningfully to the State's argument that the *Legislature* abrogated the year-and-a-day rule—only that the abrogation was not "express" and that the *Court* did not "abolish the common law bar to prosecution." Resp. 5-6. This ignores entirely the State's arguments. *See* Op. Br. 6-26.

Grant does make one argument warranting a short reply. He points to bills the Legislature considered this past session that would have expressly abolished the year-and-a-day rule. Resp. 6. To Grant, the Legislature's failure to enact these bills shows that the Legislature "agree[s]" that the year-and-a-day rule is "the law in the State of Alabama." *Id.* In fact, all it shows is that the Legislature is aware of this Court's decision in *Ex parte Key*—not that it agrees with it. That the Legislature

considered bills responding to the decision by making clear—again—that the year-and-a-day rule is abrogated thus has no bearing on the question before the Court: whether *Ex parte Key* was correctly decided to begin with.

ARGUMENT

This Court Should Overrule *Ex Parte Key* Because The Legislature Abrogated The Common Law Year-And-A-Day Rule.

As Grant points out, this past term the Legislature considered, but did not pass, a bill that would have prospectively abrogated the year-and-a-day rule. The House of Representatives passed House Bill 260 on March 1, 2022, but the bill died in the Senate when it did not receive a floor vote before the session ended.[1] Grant interprets these events as (1) showing that the Legislature "agree[s] that the year and a day rule i[s] the law in the State of Alabama," and (2) confirming that any decision to abrogate the rule rests with the Legislature, not this Court. Resp. 6.

In reality, the introduction of House Bill 260 has no bearing on the question before the Court: whether *Ex parte Key* should be overruled. For one, any implicit suggestion that the Court should wait and see if the bill

[1] *See* Alabama Senate Bill 286 (2022 Reg. Sess.), LegiScan, https://legiscan.com/AL/bill/SB286/2022 (last visited May 3, 2022).

passes in a future legislative session ignores the Court's "constitutional duty to decide questions that are properly before [it]." *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204, 213 n.10 (Ala. 2005).

More to the meat of things, Grant's suggestion that the Court should look to bills proposed in the 2022 legislative session to determine whether the Legislature abrogated the year-and-a-day rule in 1977 when it acted the Criminal Code is—to put it mildly—"problematic." *Ex parte Ankrom*, 152 So. 3d 397, 416 (Ala. 2013). As this Court has recognized:

> "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' [Legislature]. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. [Legislative] inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"

Id. (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). Simply put, that the Legislature responded to *Ex parte Key* by proposing a bill that would have explicitly abrogated the year-and-a-day rule does not mean that the Legislature agreed that it hadn't already

abolished the rule. Instead, all it shows is that the Legislature is aware of the Court's decision.

Likewise, that the Legislature has not already responded to *Ex parte Key* does not mean that it has acquiesced to or somehow adopted the decision as its own. While "[t]he legislature, of course, is free to amend a statute to incorporate a judicial construction," "its failure to do so does not mean it has so acted and does not prohibit the Court from correcting its own error." *Ex parte Christopher*, 145 So. 3d 60, 69 n.4 (Ala. 2013). As the Court has explained, "[t]he argument for ratification by silence, though logically dubious, ultimately fails because of its unconstitutionality": "The assertion that the legislature has adopted a judicial interpretation by failing explicitly to reject it creates a method of amending a statute the Alabama Constitution does not permit." *Id.* at 69 (footnote omitted). The Court continued:

> "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). It is equally emphatically not the province of the judicial department to declare the law and then to assume that declaration automatically becomes a legislative pronouncement in the face of ensuing legislative silence. The alchemy of the acquiescence doctrine has

> no power to transmute the base metal of an unwarranted judicial construction into the pure gold of legislative enactment.

Id. at 70.

In sum, the Legislature's action, or inaction, does not change the question before this Court: Should *Ex parte Key* be overruled? For the reasons explained in the State's opening brief, the answer to that question is "yes."

Finally, while Grant notes that the bill the Legislature considered would have abrogated the year-and-a-day rule only prospectively, Resp. i, 3, he does not argue that retroactive application would violate his due process rights. He has thus waived the argument, which is meritless in any event. "[R]etroactive application of judgments is overwhelmingly the normal practice." *Griffin v. Unocal Corp.*, 990 So. 2d 291, 312 (Ala. 2008). And while the Due Process Clause "protects 'against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law,'" *State v. Kelley*, 190 So. 3d 37, 42 n.1 (Ala. 2014) (quoting *Rogers v. Tennessee*, 532 U.S. 51, 462 (2001)), the Court has rightly recognized that simply overruling prior precedent does not make application of the new rule "vindictive, arbitrary, unjustified, or unpredictable," *id.* And notably, in *Rogers* the U.S. Supreme

Court determined that *judicial* abrogation of the year-and-a-day rule may be applied retroactively without offending due process, 532 U.S. at 466-67, so there is little reason to think that belatedly recognizing *legislative* abrogation would offend it. For all the reasons given in the State's opening brief, such a recognition is in fact compelled by the statutory language and structure.

CONCLUSION

The Court should overrule *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003), and quash the writ of mandamus issued by the Court of Criminal Appeals.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

A. Barrett Bowdre
Deputy Solicitor General

Cameron G. Ball
Assistant Attorney General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130

Telephone: 334-242-7300
Fax: 334-242-2848
Edmund.LaCour@AlabamaAG.gov
Barrett.Bowdre@AlabamaAG.gov
Cameron.Ball@AlabamaAG.gov

MAY 10, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limitation set forth in Alabama Rule of Appellate Procedure 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 1124 words from the Summary of Argument through the Conclusion. I further certify that the brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared using Century Schoolbook 14-point font. *See* Ala. R. App. P. 32(d)

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2022, I filed the foregoing with the Clerk of the Court using the electronic filing system and served a copy on all counsel to this proceeding by email:

Jennifer M. Holton
2508 Highland Ave., Ste. C.
Montgomery, AL 36107
jholtonattorney@gmail.com

Michael "Guy" Holton
95 Chickasaw Court
Wetumpka, AL 36092
gholtonattorney@gmail.com

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

ADDRESS OF COUNSEL:
STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
Telephone: 334-242-7300
Fax: 334-242-2848
Edmund.LaCour@AlabamaAG.gov