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 OPENING BRIEF

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March 17, 2022

STATEMENT REGARDING ORAL ARGUMENT

The Court set oral argument for June 1, 2022.

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STATEMENT OF JURISDICTION

This case comes to the Court after the Court of Criminal Appeals issued a corrected writ of mandamus on October 4, 2021, ordering Montgomery Circuit Judge Greg Griffin to dismiss the State's indictment charging John Grant with capital murder. *See* CCA Order at 4. Jurisdiction was proper with that court because the Court of Criminal Appeals exercises "original jurisdiction in the issuance and determination of writs of … mandamus in relation to matters in which said court has appellate jurisdiction," Ala. Code § 12-3-11, and it has "exclusive appellate jurisdiction of … all felonies," *id.* § 12-3-9.

The State timely sought rehearing on October 18, 2021, *see* Ala. R. App. P. 21(e)(3), 40(c), which the Court of Criminal Appeals denied on December 17, 2021. The State timely petitioned this Court for a writ of certiorari on January 3, 2022, which this Court granted on February 17. *See* Ala. R. App. P. 39(c)(2), 26(a); Ala. Const. Art. VI, § 140.

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

This case is about the continued viability of the common law year-and-a-day rule. On September 25, 2017, John Grant shot a man named Earl Darl Mock. As a result, Mock was placed on life support. Fifteen months later, his life support was removed. Mock died within 12 hours, on the day after Christmas, 2018.[1] *See* Pet., Ex. 2 at 2; Ex. 3 at 3.[2]

On January 31, 2021, Grant was indicted for the capital murder of Mock. Pet., Ex. 1. The indictment reads:

> Count I: The Grand Jury of Montgomery County charge that, before the finding of this indictment, John Grant, Alias ... whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Earl Darl Mock by shooting him with a gun, fired or otherwise used within or from a vehicle, in violation of section 13A-005-040(A)(18) of the Code of Alabama, against the peace and dignity of the State of Alabama.

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[1] These are the dates Grant gave in his motion to dismiss the indictment, which the Court of Criminal Appeals accepted as true. *See* CCA Order at 1. The State agrees that these are the relevant dates.

[2] "Pet." refers to Grant's petition for writ of mandamus before the Court of Criminal Appeals. The attachments to the petition are not numbered, but for ease of reference will be referred to as exhibits with the following sequence: Ex. 1, Grant's Indictment; Ex. 2, Grant's Motion to Dismiss Indictment; Ex. 3, State's Response to Grant's Motion to Dismiss; Ex. 4, Grant's Reply in Support of Motion to Dismiss; Ex. 5, Order denying Grant's Motion to Dismiss.

Id. Consistent with Alabama law (though not the common law), the dates of Mock's shooting and his death were not included in the indictment. *See* Ala. Code § 15-8-30 ("It is not necessary to state the precise time at which [the] offense was committed in an indictment.").

On March 3, 2020, Grant moved to dismiss his indictment based on the common law year-and-a-day rule. *See* Pet., Ex. 2. He argued that because Mock died more than a year after he allegedly shot him, Mock's death "is conclusively presumed not to be murder" and "the State of Alabama is procedurally barred from" prosecuting Grant. Pet., Ex. 2. The State responded by noting that, for the 15 months he was on life support after Grant shot him in the face with a shotgun, Mock "had an absence of the majority of the right frontal, temporal, and parietal lobes of the brain" and was "maintained in multiple long-term care facilities until the equipment keeping him alive was unplugged around 12/26/18." Pet., Ex. 3. As far as the State knew, Mock "never left" the long-term care facilities and was "only alive through medical intervention" for the fifteen months after he was shot. *Id.* The State argued that it "should be allowed to put on evidence from medical records and testimony that a jury can make a fair decision of whether the victim could have died from his injuries without

medical intervention." *Id.* The circuit court denied Grant's motion on July 15, 2021. Pet., Ex. 5.

Seven days later, Grant petitioned the Court of Criminal Appeals for a writ of mandamus ordering Judge Griffin to dismiss the indictment based on the year-and-a-day rule. Pet. at 8. In its response, the State argued that Grant failed to establish a right to mandamus because (1) he did not submit any evidentiary material with his petition other than the indictment and the parties' briefing; (2) he failed to present a cognizable ground for the pretrial dismissal of his indictment; and (3) he failed to demonstrate the lack of another adequate remedy. *See* State's CCA Resp.

On October 4, 2021, the Court of Criminal Appeals issued a corrected order granting Grant's petition and ordering Judge Griffin to dismiss the indictment. *See* CCA Order. Relying on this Court's decisions in *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003), and *Ex parte Jackson*, 614 So. 2d 405 (Ala. 1993), the Court of Criminal Appeals concluded that Grant "has a legal right to have the indictment against him dismissed" because, "[i]n light of the year-and-a-day common law provision, the State can prove no set of facts under which Grant can be convicted of capital murder." *Id.*

Following the denial of its rehearing petition, the State petitioned this Court for a writ of certiorari, which the Court granted.

STATEMENT OF THE ISSUE

Whether the Court should overrule *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003), and hold that the Legislature abrogated the common law year-and-a-rule when it enacted the comprehensive Criminal Code in 1977.

STATEMENT OF THE FACTS

The relevant facts are noted above in the Statement of the Case.

STANDARD OF REVIEW

"A decision of a court of appeals on an original petition for writ of mandamus or prohibition or other extraordinary writ (i.e., a decision on a petition filed in the court of appeals) may be reviewed de novo" by this Court. *Ex parte Sharp*, 893 So. 2d 571, 573 (Ala. 2003) (quoting Ala. R. App. P. 21(e)(1)). "Mandamus is an extraordinary remedy and will be issued only when there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'" *Id.* (quoting *Ex parte Alfab, Inc.*, 586 So. 2d 889, 891 (Ala. 1991)).

SUMMARY OF THE ARGUMENT

The year-and-a-day rule has been invoked as the basis of decision only once by this Court. In *Ex parte Key*, the Court held that "[b]ecause the Legislature has expressly adopted the common law as a 'rule of decision' in Alabama, and because the Legislature did not *expressly* abolish the year-and-a-day rule when it reenacted the Criminal Code, ... the year-and-a-day rule remains part of the common law of this State." 890 So. 2d at 1060-61 (emphasis added and footnote omitted) (quoting Ala. Code § 1-3-1). Respectfully, this was error. Though the Legislature did not explicitly say "the common law year-and-a-day rule is hereby abolished," it accomplished the same thing by enacting a Criminal Code that was plainly "inconsistent" with the rule. *See* Ala. Code § 1-3-1 (noting that "[t]he common law of England, *so far as it is not inconsistent with the Constitution, laws and institutions of this state*, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature" (emphasis added)). The Criminal Code makes the Legislature's intent just as clear, and just as unmistakable, as if the Legislature had used the exact words the *Key* Court was looking for. This Court

should overrule *Ex parte Key* and quash the writ of mandamus issued by the Court of Criminal Appeals.

ARGUMENT

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

In *Ex parte Key*, the Court applied the year-and-a-day rule to reverse Ralph Lynn Key's manslaughter conviction because the victim—Brian Rollo—did not succumb to his injuries until 18 months after Key struck him with his car. 890 So. 2d at 1057. The Court explained that "[t]he common-law year-and-a-day rule stipulates that 'a defendant can be prosecuted for homicide only if the victim dies within one year and a day of the defendant's wrongful act.'" *Id.* at 1057-58 (quoting *Woods v. State*, 709 So. 2d 1340, 1346-47 n.3 (Ala. Crim. App. 1997)). The questions for the Court were thus (1) whether the common law rule survived enactment of the Criminal Code in 1977, and (2) if so, whether the Court itself should abolish the rule.

To answer the first question, the Court looked to Section 1-3-1 of the Alabama Code, which provides:

> The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of

> decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature.

Id. at 1060 (quoting Ala. Code § 1-3-1). The Court interpreted this provision to mean that "the-year-and-a-day rule, which was a part of the common law of Alabama when the current Criminal Code was enacted in 1977, remains a part of that common law unless the Legislature has 'altered or repealed' it." *Id.* The Court then reasoned that the Legislature had not "altered or repealed" the rule because it had not done so expressly:

> [W]hen the Legislature reenacted the Criminal Code, it did not abolish the year-and-a-day rule. This holding is consistent with the principle that statutes in derogation or modification of the common law are strictly construed.... Such statutes are presumed not to alter the common law in any way not expressly declared.... Because the Legislature has expressly adopted the common law as a "rule of decision" in Alabama, and because the Legislature did not expressly abolish the year-and-a-day rule when it reenacted the Criminal Code, we hold that the year-and-a-day rule remains part of the common law of this State.

Id. at 1060-61 (citations, quotation marks, alterations, and footnotes omitted).

As for the second question—whether to judicially abolish the common law rule itself—the Court determined that, "[a]lthough the year-and-a-day rule may appear archaic, the decision how best to replace the

rule is a policy question best left in the capable hands of the Legislature." *Id.* at 1063.

The State takes no issue with the *Key* Court's answer to the second question. If the Legislature did not abrogate the year-and-a-day rule, it is not up to this Court to do so. *See Rogers v. Tennessee*, 532 U.S. 451, 477 (2001) (Scalia, J., dissenting). But there are serious problems with the Court's analysis of the first question, and those problems warrant correcting. Under traditional principles of statutory interpretation, it is evident that the Legislature *did* abrogate the year-and-a-day rule when it enacted the comprehensive Criminal Code in 1977.

A. The Legislature Abrogated the Year-and-a-Day Rule.

At the outset, the *Key* Court unduly narrowed its inquiry to whether the Legislature had *expressly* "altered or repealed" the year-and-a-day rule. By doing so, the Court ignored the Legislature's express directive providing another way the common law may be abrogated: when it is "inconsistent with the Constitution, laws and institutions of this state." Ala. Code § 1-3-1. The plain meaning of the text thus *required* the Court to look beyond express statements by the Legislature and determine

whether a common-law rule is "inconsistent" with a new law. The *Key* Court did not do this.

To be sure, this Court has often stated, as the *Key* Court did, that legislative abrogation of a common-law rule must be "express[]" and that "statutes in derogation or modification of the common law are strictly construed." *E.g.*, *W. Dauphin Ltd. P'ship v. Callon Offshore Prod., Inc.*, 725 So. 2d 944, 952 (Ala. 1998) (quoting *Arnold v. State*, 353 So. 2d 524, 526 (Ala. 1977)). But this background principle—a "stabilizing canon"[3]—cannot trump the plain meaning of the statutory text. As the Court has explained: "When determining the meaning of a statute, this Court 'looks to the plain meaning of the words as written by the legislature.'… Adhering to the plain meaning of a statute ensures that this Court complies with its constitutional mandate and discharges its duty of saying what the law is without overstepping its role and legislating from the bench." *Ex parte City of Millbrook*, 304 So. 3d 202, 204-05 (Ala. 2020) (quoting *DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 275 (Ala. 1998)). Applying the plain language of Section 1-3-1—including its

[3] *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012).

recognition that the common law may be legislatively altered by inconsistency—thus *fulfills* this Court's judicial duty rather than oversteps it, as the *Key* Court feared.

As for the *Key* Court's invocation of "strict" construction, this Court has rightly recognized that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." *Ex parte City of Millbrook*, 304 So. 3d at 205 (citation omitted). This textualist principle makes particular sense here because the rule requiring strict construction of statutes in derogation of common law "is a relic of the courts' historical hostility to the emergence of statutory law." Scalia & Garner, *supra*, at 318. "The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity" or "th[e] disposition is clear." *Id.* "This approach accounts for the commonsense conclusion that a legislature need not expressly state that the common law is abrogated when it passes a law incompatible with a common-law rule; the abrogation occurs by the very nature of the incompatibility. Thus, a legislature could 'clearly' abrogate the common law in other ways, including by unmistakable implication." *Borden v. Malone*, 327 So. 3d 1105, 1128 (Ala. 2020)

(Mitchell, J., concurring in part and concurring in result); *cf. United States v. Texas*, 507 U.S. 529, 534 (1993) (recognizing abrogation of common law "when a statutory purpose to the contrary is evident" or when the statute "'speak[s] directly' to the question addressed by the common law" (citations omitted)).

There are also other legislative directives that aid the Court's interpretative role in this case. In Section 13A-1-6, the Legislature provided a "general rule of construction" for the Criminal Code: "All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in Section 13A-1-3." Section 13A-1-3, in turn, provides that "[t]he general purposes" of the Code include "proscrib[ing] conduct that unjustifiably and inexcusably causes or threatens substantial harm," "defin[ing] the act or omission and the accompanying mental state that constitute each offense," and "insur[ing] the public safety by preventing the commission of offenses." Ala. Code § 13A-1-3(1), (3), (5).

Moreover, because "[n]o act or omission is a crime unless made so by [the Criminal Code]," *id.* § 13A-1-4, the Legislature found it "unnecessary under a comprehensive Criminal Code" to include "an explicit

provision to abolish common law crimes," Commentary to Ala. Code § 13A-1-4. It likewise left behind "the common law rule that penal laws are to be strictly construed" because, as the commentary explains, "when the legislature has assumed responsibility for a comprehensive, integrated Criminal Code, it is not appropriate for the courts to presume that only the least possible alteration of a body of nonstatutory law was intended." Commentary to Ala. Code § 13A-1-6 (quotation marks and citation omitted). Rather, the Legislature advised courts to use "common sense in construing laws as saying what they obviously mean." *Id.* (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1928)).

As always, then, the work here is to "begin with the text." *Blankenship v. Kennedy*, 320 So. 3d 565, 567 (Ala. 2020). Had the *Key* Court done that, it would have discovered that the Legislature fundamentally altered the common law elements of murder and implemented a new, modified "but for" causation standard. Because the year-and-a-day rule was a definitional element of homicide at common law, these changes conflicted with the common law to such an extent that the old rule gave way—it was "inconsistent" with the law the Legislature enacted. No longer was time an element of homicide that had to be included in the

indictment, as the year-and-a-day rule mandated. And no longer was time part of the causation analysis, as the year-and-a-day rule required. Rather, as other jurisdictions with similar provisions have concluded, the enactment of the Criminal Code occupied the field to such an extent that the common law year-and-a-day rule was legislatively abrogated, expressly or not.

1. The Legislature's Enactment of the Criminal Code Fundamentally Altered the Elements of Murder, Including the Year-and-a-Day Rule.

Begin with the relevant statutory provisions. Section 13A-6-1 of the Alabama Code defines "homicide": "A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of another person." Murder is then defined in Section 13A-6-2:

> (a) A person commits the crime of murder if he or she does any of the following:
>
> > (1) With intent to cause the death of another person, he or she causes the death of that person or of another person.
> >
> > (2) Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person.

> (3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, aggravated child abuse under Section 26-15-3.1, or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.
>
> (4) He or she commits the crime of arson and a qualified governmental or volunteer firefighter or other public safety officer dies while performing his or her duty resulting from the arson.

Ala. Code § 13A-6-2; *see also* Ala. Code § 13A-6-3 ("A person commits the crime of manslaughter if: (1) He recklessly causes the death of another person, or (2) He causes the death of another person under circumstances that would constitute murder under Section 13A-6-2; except, that he causes the death due to a sudden heat of passion caused by provocation recognized by law, and before a reasonable time for the passion to cool and for reason to reassert itself."). The Legislature also specified that when charging a defendant with murder, "[i]t is not necessary to state the precise time at which [the] offense was committed in an indictment; but it may be alleged to have been committed on any day before the

finding of the indictment, or generally before the finding of the indictment, unless time is a material ingredient of the offense." Ala. Code § 15-8-30.

Now compare these elements to what the common law required. "At common law the crime of murder was variously stated as the killing of a human being with malice aforethought, *he dying within a year and a day of the act*." *Johnson v. State*, 169 So. 2d 773, 776 (Ala. Ct. App. 1964) (emphasis added); *see also Rogers*, 532 U.S. at 453 ("At common law, the year and a day rule provided that no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act." (citations omitted)). It was also necessary "that it should appear [on the face of the indictment] that the death transpired within a year and a day after the stroke, and the place of death equally with that of the stroke had to be stated, to show jurisdiction in the court." *Ball v. United States*, 140 U.S. 118, 133 (1891). If the indictment did not "allege that the victim died within a year and a day of the assault"—even if the indictment was issued less than a year after the alleged murder, as was the case in *Ball*—the indictment was considered "fatally deficient." *Illinois v. Somerville*, 410 U.S. 458, 467 (1973).

The year-and-a-day rule was thus no matter of procedure, but formed an element of murder and homicide. "Killing [was] not common-law murder unless the victim die[d] within a year and a day" because, "[a]ccording to common-law definition, time is one of the elements." *People v. Brengard*, 191 N.E. 850, 853 (N.Y. 1934). In other words, murder was not murder unless the time element was met. The commentary to Alabama's statutory murder provision recognized this: "The traditional common law definition of murder was stated by Coke in the seventeenth century as: 'When a man of sound memory and of the age of discretion unlawfully kills any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied by the law, the death taking place within a year and a day.'" Commentary to Ala. Code § 13A-6-2.[4]

The Legislature changed things when it abolished common law offenses and set forth the elements of murder by statute. *See* Ala. Code § 13A-1-4 ("No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance."). True, as the

[4] As explained more below, this entire quotation, the introduction as well as the embedded quotation of Coke, appears verbatim in Comment 1 to Section 210.2 of the Model Penal Code.

commentary states, at times "modern crimes [may] involve common law definitions" (which "definitions usually will be stated in the Criminal Code," the commentary adds). Commentary to Ala. Code § 13A-1-4. But that recognition is wholly different from stating that the crime itself—its elements—continues to be defined by a common law rule rather than statute. And it is certainly different from what the *Key* Court concluded: that the elements of murder can be pieced together from an amalgamation of statutory text and an undefined subset of common law elements left unreferenced by the Legislature. That cannot be what the Legislature intended when it set out to "clarify, simplify and justify working criteria for what constitutes murder" by defining, by statute, *all* the elements of the crime. *See* Commentary, Ala. Code § 13A-6-2. No, by "unmistakable implication," *Ware v. Timmons*, 954 So. 2d 545, 556 (Ala. 2006) (citation omitted), time is no longer an element of murder in Alabama.

Importantly, this is not a new way of doing statutory interpretation. Both this Court and the Court of Criminal Appeals have recognized—though not in these exact words—that the Legislature abrogated *by implication* other common law crimes as well. Take burglary, for instance. At common law, burglary "required a breaking and entering of the

dwelling of another in the nighttime with the intent to commit a felony." *Davis v. State*, 737 So. 2d 480, 482 (Ala. 1999) (citation omitted). But when "Alabama adopted its current burglary statute, as part of the Criminal Code ... the legislature expanded the crime of burglary beyond its common-law boundaries, by eliminating most of the common-law requirements." *Id.* This Court explained:

> The requirement of a "breaking" was one requirement deleted. The State is no longer required to prove that the defendant broke and entered the premises. Instead, the strictures of that element have been replaced with the general requirement of a trespass on premises through an unlawful entry or an unlawful remaining.

Id. at 482-83 (citing *Perry v. State*, 407 So. 2d 183 (Ala. Crim. App. 1981)). The Legislature also omitted the common law requirement that the intrusion occur at nighttime. *See* Commentary to Ala. Code §§ 13A-7-5 through 13A-7-7 ("This section rejects the statutory element of a nocturnal intrusion, former § 13-2-40, and recognizes the inherent danger to human life, regardless of the time of day or night, when occurring under the life endangering circumstances enumerated."). With these changes, the Legislature clearly abrogated the common law—even though the Legislature never said, "We hereby abrogate the common law of burglary."

So too with robbery. "At common law, the elements of robbery were: (1) felonious intent; (2) putting in fear of force, as a means of effectuating intent; and (3) by that means, taking and carrying away property of another from his person or presence." *Smith v. State*, 446 So. 2d 68, 71-72 (Ala. Crim. App. 1984). Here again, though the Legislature did not explicitly state its intent to abrogate the common law, it nevertheless "altered the common law definition" of robbery when it enacted the robbery statutes:

> The robbery statutes contained in the criminal code do not contain the "taking and carrying away" language which comprised part of the common law crime of robbery. Although the common law of England was adopted by this State, the Code of Alabama states that it shall remain in force "except as from time to time it may be altered or repealed by the legislature." The criminal code definition of robbery has thus altered the common law definition. When robbery was made a statutory offense, the test for the sufficiency of a robbery indictment was changed.

Id. at 72 (citations omitted).

These examples show that, just as the Legislature omitted the common law requirements of "breaking" and "nighttime" from the statutory elements of burglary, and "taking and carrying away" from the statutory elements of robbery, so did the Legislature omit the common law year-and-a-day rule from the elements of murder. The *Key* Court erred by

reimposing the common law timing element that the Legislature had done away with.

The New York Court of Appeals reasoned just along these lines when it recognized that the New York legislature abrogated the common law rule:

> Since the crime of murder as defined with exactitude in the Penal Law does not include any limitation as to time, for a court to introduce a limitation would result in a plain defiance of section 21 of this act, which directs that it be construed according to the fair import of its terms.

Brengard, 191 N.E. at 853 (cleaned up and citation omitted).

So did the Supreme Court of Iowa: "Significantly, neither the Revised Code of 1860 nor any subsequent Code has included this temporal element in the definition of murder. When a new law does not contain language included in a previous version, a change in the law is presumed." *State v. Ruesga*, 619 N.W.2d 377, 381 (Iowa 2000).

And the Louisiana Court of Appeals: "Although the 1950 comment to La. R.S. 14:29 clearly states that it 'expressly retained' the common law 'year and a day' rule, the rule was subsequently deleted from the statute in 1978. Thus, the subsequent revisions to Louisiana's statutory

criminal law abrogated the 'year and a day' rule." *State v. Fortenberry*, 197 So. 3d 786, 790-91 (La. Ct. App. 2016) (footnote omitted).

And the Supreme Court of Connecticut: "[T]he adoption of the comprehensive penal code in 1969 abrogated the common law and set out substantive crimes and defenses in great detail." *Valeriano v. Bronson*, 546 A.2d 1380, 1388 (Conn. 1988).

So should this Court. The *Key* Court erred by treating the year-and-a-day rule as a procedural mechanism still lurking in the common law background or, worse, as an element of murder left unreferenced by the statutory text. This Court should correct that error and hold that the Legislature abrogated the year-and-a-day rule when it adopted the comprehensive Criminal Code and defined the elements of murder and other homicides by statute.

2. The Legislature's Modified "But For" Causation Standard Abrogated the Year-and-a-Day Rule.

The Legislature's modified "but for" causation standard also abrogated the year-and-a-day rule, leaving no gaps to be filled by the common law rule. *Cf. Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (recognizing that, "because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to

supplement maritime statues" or "fill[] a gap left by Congress' silence"). The year-and-a-day rule "is generally believed to date back to the 13th century," when "medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death." *Rogers*, 532 U.S. at 463.

The Legislature changed this standard when it adopted a modified "but for" causation test:

> (a) A person is criminally liable if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient.

Ala. Code § 13A-2-5(a). The commentary to the statutory change explains: "Rules governing causation were not covered by Alabama statutes and only sporadically in the cases. There has been difficulty in formulating such rules because of the varying factual situations encountered in which two or more factors were the 'cause' of the result, especially homicide." Commentary to Ala. Code § 13A-2-5.

In his concurrence in the Court of Criminal Appeals' decision in *Key v. State*, then-Judge Shaw, joined by then-Judges Wise and Cobb, found this provision to be dispositive of the Legislature's intent to abrogate the

year-and-a-day rule: "I believe that the Legislature intended to supersede the year-and-a-day rule by the enactment of a specific definition of causation in the Criminal Code." 890 So. 2d 1043, 1056 (Ala. Crim. App. 2002) (Shaw, J., concurring in part, dissenting in part as to rationale, and concurring in result), *aff'd in part, rev'd in part sub nom. Ex parte Key*, 890 So. 2d 1056 (Ala. 2003). As Judge Shaw explained, in enacting the new causation standard, "the Legislature specifically adopted a modified 'but for' test of causation—a test that takes into consideration concurrent causes and that does not refer to any time limitations with respect to the imposition of criminal liability." *Id.* at 1055. "[B]y adopting such a specific definition of causation as part of a comprehensive criminal code, the Legislature intended to supersede application of the common law rule." *Id.*

So it did. *See also Martin v. State*, 732 S.W.2d 743, 745 (Tex. Ct. App. 1987) (holding that "the Legislature did away with the year and a day rule when" it enacted a but-for causation standard for criminal liability), *vacated on other grounds*, 760 S.W.2d 662 (Tex. Crim. App. 1988). If preserved, the year-and-a-day rule would require a court to add language to the statute to make clear that the but-for causation standard applies in the homicide context only if the victim dies within a year and

a day of being harmed by the defendant. The Legislature included no such requirement in the law it passed. Again, the *Key* Court erred by imposing a legislative gloss that altered the statute rather than applying the standard the Legislature enacted.[5]

3. Comparison to Other States With Similar Provisions Confirms That the Legislature Abrogated the Year-and-a-Day Rule.

Alabama's murder statute "incorporates features from Michigan Revised Criminal Code §§ 2005, 2006, New York Revised Penal Law § 125.25, Model Penal Code § 210.2, Proposed New Federal Criminal Code § 1601, Proposed Revision Texas Penal Code § 19.02, and Colorado Criminal Code § 40-3-102." Commentary to Ala. Code § 13A-6-2. None of those provisions retained the year-and-a-day rule. *See People v.*

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[5] Similarly, in Sections 13A-3-1 through Section 13A-3-31 of the Alabama Code, the Legislature expressly codified all recognized defenses to criminal liability based upon one's responsibility, justification, and excuse. To hold as the *Key* Court did that a defendant can produce evidence regarding the dates of injury and death and thereby avoid prosecution or conviction is to recognize a defense to criminal homicide that the Legislature did not. *See Valeriano*, 546 A.2d at 1389 ("[G]iven the sweeping overhaul of the criminal law wrought by the penal code in 1969, it is wholly illogical that such a defense [as the year-and-a-day rule] not be specifically included in the code or this chapter which is rife with 'defenses.' Particularly is this so where the crime of homicide is involved.").

Stevenson, 331 N.W.2d 143, 147 (Mich. 1982); *Brengard*, 191 N.E. at 852; Model Penal Code § 210.1, comment 4; *Martin*, 732 S.W.2d at 745.

Faced with a similar history, the Oregon Court of Appeals recognized that the Oregon legislature abrogated the year-and-a-day rule when it adopted the Oregon Criminal Code in 1971. *See State v. Hudson*, 642 P.2d 331, 332-33 (Or. Ct. App. 1982). The court explained that the Oregon legislature "did not derive its provisions concerning homicide from the common law but, rather, from the Model Penal Code and from New York law," which "were based upon an assumption that the year and a day rule was no longer applicable." *Id.* As a result, the court "appl[ied] the doctrine that in borrowing a statute from another state the legislature is presumed to adopt the interpretation of that statute reached by the courts of the other state," and thus held "that the year and a day rule is no longer applicable in Oregon." *Id.* at 333 (cleaned up and citations omitted).

This Court should recognize the same. *See also State v. Cross*, 401 S.E.2d 510, 511 (Ga. 1991) ("Because the year-and-a-day rule was not included as part of what was intended to be a comprehensive criminal code, we conclude the adoption of the criminal code in 1968 ended the

viability of the year-and-a-day rule in this state."). Like Oregon, Alabama also derived its homicide statutes "from the Model Penal Code." *Weaver v. State*, 591 So. 2d 535, 546 (Ala. Crim. App. 1991). The homicide provisions are nearly identical. *Compare* Ala. Code § 13A-6-1(a)(2) ("A person commits criminal homicide if he intentionally, knowingly, recklessly or with criminal negligence causes the death of another person."), *with* Model Penal Code § 210.1(1) ("A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being."). The two "but for" causation standards are also fundamentally similar, with the exception that Alabama's includes a provision concerning concurrent causes and the Model Penal Code provides that "[c]onduct is the cause of a result when ... the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense". *Compare* Ala. Code § 13A-2-5(a), *with* Model Penal Code § 2.03. It is notable, then, that a comment to the Model Penal Code's homicide provision explains that its causation standard "renders unnecessary the ancient requirement that death of another take place within a year and a day of the actor's conduct." Model Penal Code § 210.1, comment 4(a).

Of course, this history does not change the text of the statutes the Legislature enacted, which remains the primary indicator of the Legislature's intent. But it can confirm it; absent an explicit indication in the text that the new meaning has broken from the old, the presumption is that a word "obviously transplanted from another legal source ... brings the old soil with it." *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) (citation omitted). Here, that "old soil" includes the Model Penal Code provisions and commentary from which the Legislature "derived" its homicide statutes. *Weaver*, 591 So. 2d at 546. As other States have recognized, when the Legislature enacted the Criminal Code in 1977, it abrogated the year-and-a-day rule, just as the Model Penal Code had done. Again, the *Key* Court erred by holding otherwise.

B. Stare Decisis Does Not Mandate Retaining Bad Law.

"Stare decisis is not an inexorable command." *Ex parte Capstone Bldg. Corp.*, 96 So. 3d 77, 89 n.8 (Ala. 2012) (citation omitted); *Huskey v. Smith*, 265 So. 2d 596, 597 (Ala. 1972) ("*Stare decisis* is a salutary doctrine. But blind adherence to a precedent no longer supported by contemporary knowledge or precedent is not required."); *Ex parte Nice*, 407 So. 2d 874, 883 (Ala. 1981) (Jones, J., dissenting) ("*Stare decisis* is a golden

rule, not an iron rule."). That is true even of decisions interpreting statutes. *See, e.g.*, *Hubbard v. United States*, 514 U.S. 695 (1995); *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) ("If a prior decision demonstrably erred in interpreting [a statute or other source of law],... judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error."). "A court may overrule precedent after reviewing the plausibility of the existing interpretation of a statute, the extent to which that interpretation has been fixed in the fabric of the law, and the strength of arguments for changing the interpretation." *Ex parte Capstone Bldg. Corp.*, 96 So. 3d at 89 n.8 (citation omitted).

Stare decisis does not counsel in favor of keeping the erroneous rule of *Ex parte Key*. First, that decision was "seriously flawed," *Hubbard*, 514 U.S. at 703, because it failed to recognize that the Legislature can abrogate the common law without explicitly saying so. As explained above, the Legislature *did* abrogate the common law by enacting a comprehensive criminal code that conflicted with the common law in this area.

Second, *Ex parte Key* has not become "fixed in the fabric of the law," *Ex parte Capstone Bldg. Corp.*, 96 So. 3d at 89 n.8 (citation omitted), nor

created strong reliance interests in the 18 years since its release, *cf. Hubbard*, 514 U.S. at 714. By the very nature of the rule, criminals cannot very well rely on it, while all it does for victims and their families is create injustice and perverse results. *See Stevenson*, 331 N.W.2d at 146 ("The availability of modern life-sustaining equipment and procedures, raises the specter of the choice between terminating life-support systems or allowing the defendant to escape a murder charge." (citation omitted)); *accord Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

Third, "the strength of arguments for changing the interpretation," *Ex parte Capstone Bldg. Corp.*, 96 So. 3d at 89 n.8 (citation omitted), warrant a fresh look at and application of the text the Legislature enacted. That text does not preserve the year-and-a-day rule. Instead, it fundamentally altered the elements of murder and other homicides and instituted a new "but for" causation standard. Because neither change is consistent with the year-and-a-day rule, *see* Ala. Code § 1-3-1, it would be improper to read additional language into the text. Yet that is just what the *Key* Court did. Overruling *Ex parte Key* would thus serve

"coherence and stability in the law," *Hubbard*, 514 U.S. at 715, by allowing Alabamians to rely on the Code itself, which already defines murder and causation without reference to the rule.

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.

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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 6124 words from the Statement of the Case 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)

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CERTIFICATE OF SERVICE

I certify that on this 17th day of March, 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:

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