No. _____

IN THE SUPREME COURT OF ALABAMA

EX PARTE STATE OF ALABAMA

In re: STATE OF ALABAMA,

v.

JOHN GRANT.

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

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

STATE OF ALABAMA'S PETITION FOR WRIT OF CERTIORARI

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January 3, 2022

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PETITION FOR WRIT OF CERTIORARI

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, Mock's life support was removed. He died 12 hours later—on the day after Christmas, 2018.

Grant was indicted for the capital murder of Mock. But the jury never got to consider the evidence and determine whether Mock died as a result of Grant shooting him, or whether Mock would have died sooner but for the medical intervention that kept him alive those 15 months. That is because the Court of Criminal Appeals ordered the circuit court to dismiss Grant's indictment because Mock did not die within one year and a day of Grant shooting him. The Court of Criminal Appeals held that under the common law year-and-a-day rule, which this Court upheld in *Ex parte Key*, 890 So. 2d 1056 (Ala. 2003), "the State c[ould] prove no set of facts under which Grant can be convicted of capital murder." Order at 4.

The State respectfully requests that this Court grant certiorari to reconsider the continued viability of the year-and-a-day rule. *See* Ala. R. App. P. 39(a)(1)(E). The year-and-a-day rule may have made sense when

"13th century 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 v. Tennessee*, 532 U.S. 451, 463 (2001). But the rule makes less sense today, when—as in this case—it is easy to trace the events that led to Mock's untimely death. The Legislature thus understandably abrogated the rule when it reenacted the modern Criminal Code in 1977. This Court's decision in *Ex parte Key* holding otherwise should be overruled.

This petition provides a worthy vehicle to do that. The Court of Criminal Appeals issued its corrected writ of mandamus on October 4, 2021. *See* Ex. A. The State timely sought rehearing on October 18, 2021, and the court of appeals denied rehearing on December 17, 2021. *See* Ex. B; Ala. R. App. P. 21(e)(3), 40(c). This petition is timely because it is filed within the 14 days allotted by Rule 39(c)(2). *See also* Ala. R. App. P. 26(a).

GROUNDS FOR ISSUANCE OF THE WRIT

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

"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." *Rogers*, 532 U.S. at 453

(citations omitted). "It was 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).

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. While the Legislature did not explicitly say "the common law year-and-a-day rule is hereby abolished," the Legislature 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 rules 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 it had used the exact words the *Ex parte Key* Court was looking for.

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

By legislative directive, "[a]ll provisions" of the Criminal Code must 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." Ala. Code § 13A-1-6. 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).

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). And because the Legislature provided that the "common law of England" continued in force *except* when it was "inconsistent with the Constitution, laws and institutions of this state," Ala. Code § 1-3-1, the "legislature need not expressly state that the common law is abrogated when it passes a law incompatible with a common-law rule," *Borden v. Malone*, -- So. 3d --, No. 1190327, 2020 WL 6932738, at *17 (Ala. Nov. 25, 2020) (Mitchell, J., concurring in part and concurring in result). Rather, "the abrogation occurs by the very nature of the incompatibility." *Id.*

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 the Legislature enacted the modern burglary statute, it "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 (citation omitted). 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, while 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).

The same story applies to the Legislature's treatment of murder. "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). Importantly, the "dying within a year and a day" was an element of the crime. "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). The commentary to Alabama's 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 § 13-A-6-2.

The Legislature changed things. Under the modern criminal code, a person commits the crime of murder if, "[w]ith intent to cause the death of another person, he or she causes the death of that person or of another person." Ala. Code § 13A-6-2(a)(1). That's it. Time is no longer an element.

Indeed, in codifying the crime of murder, the Legislature intended to "clarify, simplify and justify working criteria for what constitutes murder." Commentary to Ala. Code § 13A-6-2. This entailed "[s]ignificant changes in the common law and previously existing Alabama law," *id.*—including the omission of time as an element. Thus, 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 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).

Moreover, Section 13A-2-5 of the Alabama Code defines the causation standard for criminal liability—a role formerly played (at least in part) by the year-and-a-day rule:

> (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).

In his concurrence in the Court of Criminal Appeals' decision in *Key v. State*, Judge Shaw, joined by 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 criminally liability." *Id.* at 1055; *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).

Further, 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 retain the common law year-and-a-day rule. *See People v. Stevenson*, 331 N.W.2d 143, 147 (Mich. 1982); *Brengard*, 191 N.E. at 852; Model Penal Code § 210.1 (cmt 4.); *Martin*, 732 S.W.2d at 745; *see also State v. Rogers*, 992 S.W.2d 393, 397 n.4 (Tenn. 1999), *aff'd*, 532 U.S. 451 (2001).

Faced with a similar history, the Oregon Court of Appeals recognized that the Oregon legislature abrogated the year-and-a-day rule in 1971 when it adopted the Oregon Criminal Code. *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.").

Notably, the State is not asking the Court to *judicially* abrogate the rule—to determine for itself that the year-and-a-day rule has outlived its usefulness. As this Court noted in *Ex parte Key*, whether to abrogate the common law on policy grounds is "a question most appropriately decided by the Legislature, not by the Court." 890 So. 2d at 1063; *see also Rogers*, 532 U.S. at 477 (Scalia, J., dissenting). But that's not the question the State seeks answered. Rather, the State seeks certiorari so the Court can consider with fresh eyes whether the *Legislature* abrogated the rule. The answer to that question is yes.

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). That is true even of decisions interpreting statutes. *See, e.g.*, *Hubbard v. United*

States, 514 U.S. 695 (1995). Rather, "[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 conflicts with the common law in this area.

Second, *Ex parte Key* has not become "fixed in the fabric of the law," 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.").

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 grant the petition and reconsider the viability of the year-and-a-day rule.

Respectfully submitted,

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JANUARY 3, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the word limitation set forth in Alabama Rule of Appellate Procedure 39(d). According to the word-count function of Microsoft Word, the petition contains 2923 words. I further certify that the petition 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 3rd day of January, 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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s/ Edmund G. LaCour Jr.
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No. _____

IN THE SUPREME COURT OF ALABAMA

EX PARTE STATE OF ALABAMA

In re: STATE OF ALABAMA,

v.

JOHN GRANT.

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

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

EXHIBITS TO STATE'S PETITION FOR WRIT OF CERTIORARI

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ALABAMA COURT OF CRIMINAL APPEALS

CR-20-0804

Ex parte John Grant

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. John Grant)

Montgomery Circuit Court No. CC-20-116

CORRECTED ORDER

John Grant filed this petition for a writ of mandamus requesting that this Court direct Judge Greg Griffin to set aside his order denying Grant's motion to dismiss his indictment for capital murder and to direct Judge Griffin to grant the same.

On January 31, 2021, Grant was indicted for the murder of Earl Darl Mock made capital because the murder was committed by shooting from inside a vehicle in violation of § 13A-5-40(a)(18), Ala. Code 1975. On March 3, 2021, Grant filed a motion to dismiss the indictment in which he argued that the indictment should be dismissed because the common-law year-and-a-day rule barred prosecution for murder in this case. "Pursuant to the common law rule, a defendant can be prosecuted for homicide only if the victim dies within one year and a day of the defendant's wrongful act." Woods v. State, 709 So. 2d 1340, 1346-47 n.3 (Ala. Crim. App. 1997). In his motion, Grant stated that the alleged shooting of Mock occurred on September 24, 2017, and that Mock died on December 26, 2018. Grant argued that pursuant to the year-and-a-day rule, Mock's death is conclusively presumed not to be murder. In support of his position, Grant cited Ex parte Key, 890 So. 2d 1056 (Ala. 2003).

On June 15, 2021, the State filed a response to Grant's motion to dismiss the indictment. In its response, the State indicated that the shooting had occurred on September 25, 2017, and that, after the shooting, Mock was placed on life support and housed in an assisted-living facility. Mock died on December 26, 2018, approximately 12 hours after being removed from life support. The State acknowledged Key, a decision in which the Alabama Supreme Court adhered to the common-law provision that a victim had to die within a year and a day from the date his injuries were caused for the defendant to be responsible for the victim's death. In Key, the Court refused to abrogate the provision, stating that it was the role of the Legislature, not the courts, to abolish the provision. However, the State argued against adherence to the common-law provision. Alternatively, the State argued that, even if the circuit court found that the provision should be followed, the State should be allowed to put on evidence for the jury to determine whether the victim could have died from his injuries without medical intervention. Grant filed a reply to the State's response on June 17, 2021. On July 15, 2021, following a hearing, Judge Griffin denied Grant's motion to dismiss the indictment.

On July 22, 2021, Grant filed the instant mandamus petition in which he seeks relief based upon the same argument made in his motion to dismiss the indictment.

In Key, the defendant had been indicted for murder and reckless murder. Key sought to dismiss the indictment based on the common-law year-and-a-day rule. The State moved the trial court to abrogate the rule and to allow it to proceed with the murder charges against Key. The circuit court denied Key's motion and granted the State's request to proceed on the murder charges. Key was subsequently convicted of manslaughter. On appeal, Key argued that because the Legislature did not expressly abolish the common-law rule when it reenacted the Criminal Code in 1977, that common-law rule remained viable in Alabama law. The Alabama Supreme Court agreed, stating:

"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."

Key, 890 So. 2d at 1060-61. In reversing Key's conviction, the Alabama Supreme Court acknowledged that other jurisdictions had abolished the rule but concluded that such a decision was appropriate for the Legislature.

This Court is bound by the decisions of the Alabama Supreme Court, and this Court is without authority to overrule the decisions of that Court. Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007). See also § 12-3-16, Ala. Code 1975. Pursuant to the Alabama Supreme Court's holding in Key, unless the Legislature abolishes the common-law year-a-day rule, the rule remains law. To date, the Legislature has not abolished the rule.

> "[Our appellate courts have] consistently held that the writ of mandamus is an extraordinary and drastic writ and that a party seeking such a writ must meet certain criteria. We will issue the writ of mandamus only when (1) the petitioner has a clear legal right to the relief sought; (2) the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked. Ex parte Mercury Fin. Corp., 715 So. 2d 196, 198 (Ala. 1997). Because mandamus is an extraordinary remedy, the standard by which this Court reviews a petition for the writ of mandamus is to determine whether the trial court has clearly abused its discretion. See Ex parte Rudolph, 515 So. 2d 704, 706 (Ala. 1987)."

Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000).

Mandamus may issue to compel the exercise of discretion by an

inferior court; however, it may not be used to control or revise the exercise of that discretion except in a case of abuse. Ex parte Edgar, 543 So.2d at 684 (citing Ex parte Smith, 533 So.2d 533 (Ala. 1988)). "Mandamus is an extraordinary remedy, but is appropriate in exceptional circumstances which amount to judicial usurpation of power." Ex parte Nice, 407 So.2d 874, 877 (Ala. 1981). Mandamus is not to be used as a substitute for an appeal, but mandamus can be used to prevent a gross disruption of the administration of criminal justice. Id.

In 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. Therefore, he has a legal right to have the indictment against him dismissed. It is not within the authority or discretion of the trial court to deny Grant's motion to dismiss the indictment. See Ex parte Jackson, 614 So. 2d 405 (Ala. 1993) (because the doctrine of transferred intent would not elevate to capital murder the killing of a person outside a vehicle when the defendant had intent to kill someone in the vehicle, the Alabama Supreme Court directed the circuit court to grant the defendant's motion to dismiss the capital murder indictment when the State could prove no set of facts under which Jackson could be convicted of capital murder). Thus, Grant is entitled to the relief for which he has petitioned.

Accordingly, a writ of mandamus shall issue to Judge Griffin, directing him to dismiss the indictment charging Grant with capital murder under § 13A-5-40(a)(18), Ala. Code 1975.

PETITION GRANTED; WRIT ISSUED.

Windom, P.J., and Kellum, McCool, Cole, and Minor, JJ., concur.

Done this 4th day of October, 2021.

Mary B. Windom

MARY B. WINDOM, PRESIDING JUDGE

cc: Hon. Greg Griffin, Judge
Hon. Gina Jobe Ishman, Circuit Clerk
Jennifer M. Holton, Attorney
Hon. Daryl Bailey, District Attorney
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COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Exhibit B

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December 17, 2021

CR-20-0804

Ex parte John Grant (In re: State of Alabama v. John Grant) (Montgomery Circuit Court: CC20-116)

NOTICE

You are hereby notified that on December 17, 2021, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled (Special Writing).

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Gina Jobe Ishman, Circuit Clerk
Jennifer M. Holton, Attorney
Hon. Greg Griffin, Circuit Judge
Cameron G. Ball, Asst. Attorney General
Hon. Daryl Bailey, District Attorney

REL: December 17. 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-20-0804

Ex parte John Grant

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. John Grant)

Montgomery Circuit Court No. CC-20-116

On Application for Rehearing

PER CURIAM.

APPLICATION FOR REHEARING OVERRULED.

Windom, P.J., and Kellum, McCool, and Cole, JJ., concur. Minor, J., concurs specially, with opinion.

MINOR, Judge, concurring specially.

A Montgomery grand jury indicted John Grant for the murder of Earl Darl Mock, made capital because Grant allegedly shot Mock from inside a vehicle. See § 13A-5-40(a)(18), Ala. Code 1975. Grant moved to dismiss the indictment based on the "year-and-a-day rule" because Mock died more than 15 months after he was shot. The circuit court denied the motion, and Grant petitioned this Court for a writ of mandamus directing the Montgomery Circuit Court to set aside its order denying the motion to dismiss and to enter a new order granting that motion. This Court, bound by the Alabama Supreme Court's decision in Ex parte Key, 890 So. 2d 1056 (Ala. 2003), granted Grant's petition for a writ of mandamus and issued the writ by order on October 1, 2021.

The State of Alabama has applied for rehearing. Although nothing in the State's rehearing application or supporting brief convinces me that this Court's original decision overlooked or misapprehended any point of law or facts, see Rule 40(b), Ala. R. App. P., I write separately to note, as the State recognizes, that in 2003 the Alabama Supreme Court in Ex parte Key rejected the State's arguments (1) that the legislature, by

enacting the Alabama Criminal Code, abolished the common-law year-and-a-day rule and (2) that, even if the legislature did not, the Alabama Supreme Court should do so. I also write separately to emphasize that, as the Alabama Supreme Court stated over 18 years ago, the legislature, and not the judiciary, is the appropriate branch of government to modify or abolish the year-and-a-day rule.

> "The year-and-a-day rule is deeply rooted in the common law. Its lineage is generally traced to the thirteenth century where the rule was originally utilized as a statute of limitations governing the time in which an individual might initiate a private action for murder known as 'appeal of death.' See, e.g., United States v. Jackson, 528 A.2d 1211, 1214 (D.C. 1987); Commonwealth v. Lewis, 381 Mass. 411, 409 N.E.2d 771, 773 (1980); People v. Stevenson, 416 Mich. 383, 331 N.W.2d 143, 145 (1982); State v. Vance, 328 N.C. 613, 403 S.E.2d 495, 497 (1991); Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501, 503 (1960); State v. Pine, 524 A.2d 1104, 1105 (R.I. 1987); Comment, Taming a Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder, 59 U. Chi. L. Rev. 1337, 1338 (1992). The 'appeal of death' was a private and vindictive action instituted by an interested party and derived from the Germanic custom of 'weregild,' or compensation for death. Id. 'Appeal of death' actions became obsolete and were abolished in 1819. Lewis, 409 N.E.2d at 772. By the eighteenth century, however, the year-and-a-day rule had been extended to the law governing public prosecutions so that a homicide prosecution could not be brought unless the victim died within a year and one day of the injury. Jackson, 528 A.2d at 1214; Lewis, 409 N.E.2d at 772.

> "Though the rule began in England, its applicability to criminal prosecutions in this country was acknowledged by the United States Supreme Court in 1894 as follows:
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> > " 'In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter...." And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.'
>
> "Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230, 239, 14 S. Ct. 579, 581, 38 L. Ed. 422 (1894) (citations omitted) (civil wrongful death action)."

State v. Rogers, 992 S.W.2d 393, 396 (Tenn. 1999), aff'd, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

A majority of this Court in Key v. State, 890 So. 2d 1043 (Ala. Crim. App. 2002), aff'd in part, rev'd in part, 890 So. 2d 1056 (Ala. 2003), in a separate opinion written by Judge Shaw, found persuasive the State's argument "that, by enacting the Alabama Criminal Code, the Legislature intended to supersede the common-law year-and-a-day rule." 890 So. 2d at 1053 (Shaw, J., concurring in part and dissenting in part as to the rationale and concurring in the result). Judge Shaw reasoned:

"Section 1-3-1, Ala. Code 1975, 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.'

"(Emphasis added.)

"Pursuant to its constitutional authority to define criminal offenses and to fix the punishment for crime, the Alabama Legislature enacted the Alabama Criminal Code, which took effect January 1, 1980. The stated purpose of the Criminal Code was '[t]o provide an entirely new criminal code for the State of Alabama; defining offenses, fixing punishment; repealing numerous specific code sections and statutes that conflict herewith as well as all other laws that conflict with this act.' Ala. Acts 1977, Act No. 607. See also § 13A-1-3, Ala. Code 1975; and § 13A-1-6, Ala. Code 1975, which states: '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-1-4, Ala. Code 1975, provides:

> " 'No act or omission is a crime unless made so by this title or by other applicable statute or lawful ordinance.'

"The Commentary to § 13A-1-4 states, in part:

> " 'The original draft of this section included an explicit provision to abolish common law crimes, which is a feature of most modern criminal codes; but the Advisory Committee considered such provision impolitic and also, unnecessary under a comprehensive Criminal Code, so it was deleted. To the extent that modern crimes involve common law definitions, such definitions usually will be stated in the Criminal Code. To the extent that they require alteration, most, again, will be effected by the Criminal Code. Common law jurisdiction cannot be exercised as to purely statutory offenses, nor in cases of common law offenses for which punishment is prescribed by statute. Tucker v. State, 42 Ala. App. 477, 168 So. 2d 258 (1964). Thus, § 1-3-1, which continues in force the common law "except as from time to time it may be altered or repealed by the legislature," remains intact, although its future field of operation may be reduced.'

"(Emphasis added.)

"Section 13A-1-7(a), Ala. Code 1975, states in part:

> " 'The provisions of this title shall govern the construction of and punishment for any offense defined in this title and committed after 12:01 A.M. January 1, 1980, as well as the

> construction and application of any defense to a prosecution for such an offense.'

"The Commentary to § 13A-1-7 notes that '[a]fter the effective date of the Criminal Code, it will control the criminal law, both in the Criminal Code itself and in other provisions that define criminal offenses.'

"Section 13A-6-2(2), Ala. Code 1975, one of the statutes under which the appellant in the present case was convicted, provides:

> " 'Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person.'

"(Emphasis added.) Section 13A-2-5, Ala. Code 1975, entitled 'Causal relationship between conduct and results; relationship to mental culpability,' states:

> " '(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.
>
> " '(b) A person is nevertheless criminally liable for causing a result if the only difference between what actually occurred and what he intended, contemplated or risked is that:

> " '(1) A different person or property was injured, harmed or affected; or
>
> " '(2) A less serious or less extensive injury or harm occurred.
>
> " '(c) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.'

"(Emphasis added.) The Commentary to § 13A-2-5 notes:

> " '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.
>
> " 'Following the lead of other modern criminal codes, this section is a modified "but for" test, with an express exclusion of those situations in which the concurrent cause was clearly sufficient to produce the result and the defendant's conduct clearly insufficient. Cf. Proposed New Federal Criminal Code § 305, Proposed Revision Texas Penal Code § 6.04, Michigan Revised Criminal Code § 320, New Jersey Penal Code § 2C:2-3, Model Penal Code § 2.03. If the actual result is not within the contemplation of the actor, or within the area of risk of which he should have been aware, he is not deemed to have "caused" the result. But if the

> difference is only one concerning which person or what property would be affected by defendant's act, or one of the degree of harm which would result, he is still held to have "caused" the result.
>
> " 'While this section may not be useful in all cases where causation must be explained, it is intended as an aid to clarification whenever it does apply. It is important to note that "but for" is a minimal requirement as there may be additional causal requirements imposed by the section defining the offense. Moreover, merely establishing causation does not necessarily establish criminality. The prosecution must still prove whatever particular mental culpability is required under the section under which the prosecution is brought.'

"Based on my examination of the Criminal Code, I can find no provision expressly altering or repealing the year-and-a-day rule. On the other hand, I can find no indication that the Legislature intended to retain the year-and-a-day rule as part of its definition of causation in homicide cases. To the contrary, it is significant, I think, that 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. I find persuasive the State's argument that, by 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."

890 So. 2d at 1053-55 (Shaw, J., concurring in part and dissenting in part as to the rationale and concurring in the result). The Alabama Supreme Court rejected Judge Shaw's reasoning on this point, however:

> "We agree with Presiding Judge McMillan that when the Legislature reenacted the Criminal Code, it did not abolish the year-and-a-day rule. This holding is consistent with the principle that ' "[s]tatutes 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." ' West 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) (emphasis omitted)). See, e.g., Ex parte Parish, 808 So. 2d 30, 33 (Ala. 2001) ('Nothing in § 30-2-8.1, Ala. Code 1975, indicates the Legislature intended to abrogate the common-law rule of abatement. "If the legislature had intended to so act, that body would have made its intention evident and unmistakable." ' (quoting Holmes v. Sanders, 729 So. 2d 314, 316-17 (Ala. 1999))). 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."

Ex parte Key, 890 So. 2d at 1060-61 (Ala. 2003) (footnotes omitted).

In Key, this Court unanimously tried to abolish the year-and-a-day rule. In the main opinion, written by Presiding Judge McMillan, this Court reasoned:

> "In the context of common-law doctrines such as the year-and-a-day rule, there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. 'Such judicial acts, whether they may be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements.' Rogers v. Tennessee, 532 U.S. 451, 461, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). See also Dupuis v. Hand, 814 S.W.2d 340, 345 (Tenn. 1991) (This Court has ' "not hesitated to abolish obsolete common-law doctrines," ' and we have recognized that ' "we have a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured" ' the common-law rule. (Quoting Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1991).) This Court is in agreement with the decisions of other jurisdictions that have judicially abrogated the year-and-a-day rule on grounds that it is an outdated relic of the common law. In deciding to abolish the common-law rule based on changed circumstances, including advancements in scientific and medical knowledge, general logic, and experience, we take note that the appellant, in brief, has failed to provide this Court with any sound reasons for retaining the rule, other than it is supported by current Alabama caselaw. That argument does not provide sufficient justification for adherence to a rule that has completely outlived its intended purpose."

Key, 890 So. 2d at 1050.

The Alabama Supreme Court, however, reversed this Court's holding on that point:

"Merely abolishing the year-and-a-day rule, however, may serve only to replace one source of error with another.

> " 'If a murder charge can be brought two years after a blow has been struck, will there ever be a time when the Court may declare that the bridge between the blow and death has now been irreparably broken? May the Commonwealth indict a man for murder when the death occurs ten years after the blow has fallen? Twenty years? ... I don't doubt that an expert of some kind can be found to testify that a slap in the face was the cause of a death fifteen years later.
>
> " 'If there is one thing which the criminal law must be, if it is to be recognized as just, it must be specific and definitive.'

"State v. Minster, 302 Md. 240, 243-44, 486 A.2d 1197, 1198-99 (1985) (quoting Commonwealth v. Ladd, 402 Pa. 164, 199-200, 166 A.2d 501, 519-20 (1960) (Musmanno, J., dissenting)).

"The Supreme Court of Maryland, when confronted with the question whether it should abolish the year-and-a-day rule, observed that it had five alternatives: (1) retain the rule; (2) modify the rule and follow, for example, California in applying a three-years-and-a-day rule; (3) extend the rule to any length of time it chose—2, 5, or 10 years, or some other length of time; (4) change the rule from an irrebuttable presumption to a rebuttable presumption; or (5) simply abolish the rule. Minster, 302 Md. at 245, 486 A.2d at 1199. The Supreme Court of Maryland chose the first alternative and declined to abrogate the year-and-a-day rule because it found that

> " 'there is a great difference of opinion surrounding the appropriate length of the period after which prosecution is barred and some doubt whether the rule should exist at all. Consequently, we believe it is the legislature which should mandate any change in the rule .... The legislature may hold hearings on this matter; [it] can listen to the testimony of medical experts; and [it] may determine the viability of this rule in modern times.'

"Minster, 302 Md. at 245-46, 486 A.2d at 1199-1200.

"We agree with the Supreme Court of Maryland that this is a question most appropriately decided by the Legislature, not by the Court. See, e.g., Golden v. McCurry, 392 So. 2d 815, 817 (Ala. 1981) ('After due and deliberate consideration, we hold that, even though this Court has the inherent power to change the common law rule of contributory negligence, it should, as a matter of policy, leave any change of the doctrine of contributory negligence to the legislature.'). While judicial abrogation of the year-and-a-day-rule might qualify as 'a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense,' Rogers v. Tennessee, 532 U.S. 451, 467, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), it might also qualify as an instance in which 'common-law judging became lawmaking.' Rogers, 532 U.S. at 477, 121 S. Ct. 1693 (Scalia, J., dissenting) (emphasis omitted).

> " 'There are occasions when courts must correct or ignore or supply obvious inadvertences in order to give a law the effect which was plainly intended by the legislature, but we do not subscribe to the doctrine that the judiciary can or should usurp the

> legislative function in a republican form of government.'
>
> "Swartz v. United States Steel Corp., 293 Ala. 439, 454, 304 So. 2d 881, 895 (1974) (Merrill, J., dissenting). Although 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, which has the tools and the special competency to make such prospective general rules."

890 So. 2d at 1062-63 (footnotes omitted).

As Chief Justice John Marshall explained: "It is emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 5 U.S. 137, 178 (1803). Although the decision in Ex parte Key has been criticized as a "missed opportunity,"[1] it remains

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[1]See, e.g., Neil M.B. Rowe, The Year-And-A-Day Rule: A Common Law Rule Vestige That Has Outlived Its Purpose, 8 T.G.J.L.R. 1, 15 (2004) ("In Ex parte Key, The Alabama Supreme Court passed upon a prime opportunity to bring Alabama law into conformity with the changes that have transpired in the 750 years since the development of the year-and-a-day rule and to join the overwhelming majority of its sister-states that have rejected the anachronistic vestige of the common law. In adhering to the rule, the Supreme Court claimed to be reaffirming its commitment to stare decisis avoiding what it views to be an infringement on the province of the legislative branch. As a policy matter, the court's decision was misguided. Its claim to judicial restraint is inconsistent when viewed in contrast to some of its other decisions. And its claimed restraint is excessive when viewed in the light of its earlier pronouncements and the approach other courts have taken to the nature

controlling authority, which this Court cannot change or disregard. And because the legislature has not abrogated or modified the year-and-a-day rule in the almost two decades that have passed since the Alabama Supreme Court decided Ex parte Key, it seems unlikely that the Alabama Supreme Court will reconsider its decision. Cf. Neal v. United States, 516 U.S. 284, 295 (1996) ("Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to stare decisis in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation.' Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S. Ct. 2061, 2070, 52 L. Ed. 2d 707 (1977)."); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455-56 (2015) ("Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.' Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L.

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of common law decision-making.").

Ed. 815 (1932) (dissenting opinion). ... What is more, stare decisis carries enhanced force when a decision ... interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).").

As a member of the judicial branch, I am constitutionally limited in my ability to comment on the legislature's choice of policy in that regard. But as this case shows, the year-and-a-day rule remains alive, and, if the legislature wants that rule changed, it must be the one to do so. See, e.g., Fla. Stat. § 782.035 ("The common-law rule of evidence applicable to homicide prosecutions known as the "year-and-a-day rule," which provides a conclusive presumption that an injury is not the cause of death or that whether it is the cause cannot be discerned if the interval between the infliction of the injury and the victim's death exceeds a year and a day, is hereby abrogated and does not apply in this state.").