APPENDIX A

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-16-0708 Marion Circuit Court CC-92-130.61

David Lee Roberts v. State of Alabama

On Return to Remand[1]

BURKE, Judge.

David Lee Roberts appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief, in which he challenged his two convictions of capital murder in connection with the death of Annetra Jones and his resulting sentence to death.

[1]This cause was originally remanded, pursuant to 10(g), Ala. R. App. P., to the circuit court for clarification regarding the timing of its order granting Roberts's petition to proceed in forma pauperis.

This Court has previously detailed the procedural history and facts of this case, as follows:

> "In December 1992, Roberts was convicted of two counts of capital murder in connection with the death of Annetra Jones. The murder was made capital (1) because it was committed during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975, and (2) because it was committed during the course of an arson, see § 13A-5-40(a)(9), Ala. Code 1975. By a vote of 7-5, the jury recommended that Roberts be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Roberts to death. On appeal, this Court affirmed Roberts's convictions, but remanded the cause for another sentencing hearing before the trial court, holding that the court had erred in refusing to permit Roberts to present mitigation evidence.[Because the jury had recommended a sentence of life imprisonment without the possibility of parole, this Court held that a new penalty-phase trial before a jury was not necessary.]1 See Roberts v. State, 735 So. 2d 1244 (Ala. Crim. App. 1998). The trial court conducted a second sentencing hearing and, after reweighing the aggravating and mitigating circumstances, again overrode the jury's recommendation and sentenced Roberts to death. On return to remand, this Court found no plain error during the penalty phase of the trial or the sentencing hearing before the trial court, but remanded the cause a second time for the trial court to correct its sentencing order. See Roberts, supra (opinion on return to remand). The trial court complied with this Court's instructions and, on second return to remand, this Court affirmed Roberts's death sentence. See Roberts, supra (opinion on second return to remand). The Alabama Supreme Court also affirmed Roberts's convictions and sentence, see Ex parte Roberts, 735 So. 2d 1270 (Ala. 1999), and the United States Supreme Court denied certiorari review, see Roberts v. Alabama, 5[2]8 U.S. 939 (1999). This Court issued a certificate of judgment on June 2, 1999. In Roberts, supra, this Court summarized the facts of

the crime as follows:

> "'Briefly stated, the evidence at trial tended to show the following. Roberts had been a houseguest of Wendell Satterfield. On April 22, 1992, Satterfield's girlfriend, Annetra Jones, was sleeping on a couch in Satterfield's den. Roberts left his job and went to Satterfield's residence around noon on that day. He packed his belongings, stole money from the victim's wallet, and shot her three times in the head with a .22 caliber rifle while she slept. Jones died within seconds. Roberts poured flammable liquid on her body and on the floor in the den, then set fire to a piece of paper he had placed under the couch. In the bedroom in which Roberts had stayed, which was in the basement of Satterfield's house, Roberts set another fire, causing major damage to the room and sending smoke throughout the house. Roberts left the house, taking with him a variety of items, such as the murder weapon and other guns. He hid this evidence, but later led the police to the hiding place.
>
> "'Law enforcement authorities questioned Roberts and he gave several statements. He admitted shooting Jones and setting Satterfield's house on fire. In his last statement, Roberts said that he had set the house on fire to get back at Satterfield for threatening his parents; he said that he did not know that Jones would be at the house and he did not know why he shot her.'

"735 So. 2d at 1249."

Roberts v. State, (No. CR-01-1818), 910 So. 2d 831 (Ala. Crim. App. 2004)(table).

On October 4, 2000, Roberts filed his first Rule 32 petition, in which he raised several claims of ineffective assistance of counsel. The circuit court denied his petition on March 11, 2002. This Court affirmed the circuit court's denial of his first Rule 32 petition on March 19, 2004. Id.

On January 11, 2017, Roberts filed the instant petition, his second, in which he alleged that the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ___, 136 S. Ct. 616 (2016), rendered his death sentence unconstitutional. Specifically, Roberts argued in his petition that the trial court, not the jury, made the findings required to sentence him to death. On February 17, 2017, the State filed a motion to dismiss Roberts's petition. The State argued that Roberts's petition was procedurally barred as successive by Rule 32.2(b), Ala. R. Crim. P., time-barred by Rule 32.2(c), and precluded by Rule 32.2(a)(4) because Roberts raised a challenge to Alabama's sentencing scheme on direct appeal. The State also alleged that Robert's petition should be dismissed because Hurst does not apply retroactively to cases on post-conviction review. The State further argued that Roberts's claim was meritless because he was convicted of capital murder during a robbery and "the corresponding robbery-murder aggravating circumstance was proven beyond a reasonable doubt by the jury's guilt-phase verdict." (C. 41.) The circuit court ultimately dismissed Roberts's petition on February 27, 2017, without holding an evidentiary hearing. This appeal follows.

Generally, "[t]he standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'" Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996)(internal citations omitted). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). Additionally, in Ex parte Hinton, 172 So. 3d 348, 353 (Ala. 2012), the Alabama Supreme Court held that, when a

circuit court's decision in a Rule 32 petition is based solely on the "'cold trial record,'" it is "in no better position than ... an appellate court to make the determination it made." Therefore, in that situation, the reviewing court should apply a de novo standard of review. Id. The judge who presided over Roberts's Rule 32 proceedings was not the judge who presided over Roberts's trial and there was no evidentiary hearing held. Accordingly, we review Roberts's issues de novo.

We note that "'even though this petition challenges a capital conviction and a death sentence, there is no plain-error review on an appeal from the denial of a Rule 32 petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003), quoting Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000). "'In addition, "[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed."'" Burgess v. State, 962 So. 2d 272, 277 (Ala. Crim. App. 2005), quoting Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995), quoting in turn State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

I.

On appeal, Roberts reasserts his claim that his death sentence was unconstitutional pursuant to the United States Supreme Court's decision in Hurst, and that Hurst applies retroactively to his case. Roberts maintains that his argument is not procedurally barred because it is a jurisdictional claim and there is good cause that exists as to why this claim could not have been raised earlier.

In Ex parte Bohannon, [Ms. 1150640, September 30, 2016] ___ So. 3d ___, ___ (Ala. 2016), the Alabama Supreme Court explained that

> "[i]n 2000, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United

> States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a 'jury determination of any fact on which the legislature conditions an increase in their maximum punishment.' 536 U.S. at 589, 122 S.Ct. 2428. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S.Ct. 2428. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence."

In Hurst, the United States Supreme Court held Florida's capital-sentencing scheme unconstitutional because, at the time Hurst was decided,[2] Florida law allowed a trial judge alone to make the findings necessary to make a defendant eligible for the death penalty. ___ U.S. ___, 136 S.Ct. at 622-24. In Bohannon, supra, the Alabama Supreme Court held that Alabama's capital-sentencing scheme is constitutional in light of Hurst. In Bohannon, supra, the Court held:

> "Our reading of Apprendi[v. New Jersey, 530 U.S. 466 (2000)], Ring[v. Arizona, 536 U.S. 584 (2002)], and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S. Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating

[2]Florida amended its capital-sentencing scheme after Hurst was decided.

> factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty — the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment."

___ So. 3d at ___. Therefore, to the extent Roberts claims that Alabama's capital-sentencing scheme is facially unconstitutional under Hurst, that argument is foreclosed by Bohannon. See also Ex parte State (In re Billups), [Ms. CR-15-0619, June 17, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016)("Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst, and the circuit court erred in holding otherwise....").

Roberts maintains that because that the trial court, not the jury, made the findings required to sentence him to death, and because Hurst applies retroactively to his case, his death sentence must be reversed. However, in Lee v. State, {Ms. CR-15-1415, February 10, 2017] ___ So. 3d ___, ___ (Ala. Crim. App. 2017), this Court recently addressed the issue of whether Hurst applies retroactively, finding the following:

> "It is well settled that a new case applying an old rule will not operate to exempt a petitioner from the application of the procedural bars established in Rule 32.2, Ala. R. Crim. P. Clemons v. State, 123 So. 3d 1, 12 (Ala. Crim. App. 2012) ('Because the Supreme Court did not establish new law ... but rather applied law that was established long before Clemons's trial and before his first Rule 32 petition, Clemons's claim was procedurally barred because he could have raised it at trial, on appeal, Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P., or in his first Rule 32 proceedings, 32.2(b), Ala. R. Crim. P.'); Fitts v. Eberlin, 626 F. Supp. 2d 724, 733 (N.D. Ohio 2009)('Given that no new rule exists that applies to [the petitioner's] case,

[his] plea for equitable tolling ... must fail.').

"Here, the parties agree that the Supreme Court did not establish a new rule in Hurst; rather, '"[t]he Court in Hurst did nothing more than apply its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme."' (Lee's brief, at 18 (quoting State v. Billups, [Ms. CR-15-0619, June 17, 2016] --- So. 3d ----, ---- (Ala. Crim. App. 2016)). Both this Court and the Alabama Supreme Court have recognized that Hurst merely applied the rule established in Apprendi and Ring to new facts: the State of Florida's death-penalty scheme. See State v. Billups, --- So. 3d at ---- ; Phillips v. State, [Ms. CR-12-0197, Oct. 21, 2016] --- So. 3d ----, ---- (Ala. Crim. App. 2016); Ex parte Bohannon, --- So. 3d at ---- ('Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible.'). Because the decision in Hurst did not create a new rule, Lee's Ring/Hurst claim was subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P. Clemons, 123 So.3d at 12....

"....

"....

"Further, even if the Hurst decision did announce a new rule, the circuit court correctly dismissed Lee's petition because that rule would not apply retroactively and, thus, would not be applicable in Lee's postconviction proceedings. In Reeves v. State, [Ms. CR-13-1504, June 10, 2016] --- So. 3d ----, ---- (Ala. Crim. App. 2016), this Court explained:

> "'The United States Supreme Court's opinion in Hurst was based solely on its previous opinion in Ring, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision

> was announced. See Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson, supra, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here.'"

___ So. 3d at ___.

In the present case, Roberts's case became final in 1999, which was several years before Ring was decided and approximately 17 years before the opinion in Hurst was released. Therefore, Hurst is not applicable in this case.

Roberts also alleges that his Hurst claim is a jurisdictional claim that is not subject to the procedural bars contained in Rule 32.2, Ala. R. Crim. P. However, this Court has also recently stated that "the Court's decision in Hurst, which merely applied its decision in Ring to a new set of facts, does not implicate the circuit court's jurisdiction and thus does not excuse the application of the procedural bars contained in Rule 32.2, Ala. R. Crim. P." Lee, ___ So. 3d at ___. Accordingly, Roberts's claim is not jurisdictional and is subject to the procedural bars of Rule 32.2. Here, this Court issued a certificate of judgment in Roberts's case on June 2, 1999. The instant petition, Roberts's second, was not filed until January 11, 2017. Because Roberts's petition was filed well after the applicable two-year limitations period in Rule 32.2(c),[3] Ala. R. Crim. P., this claim was time-barred.

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[3]On August 1, 2002, Rule 32.2(c), Ala. R. Crim. P., was amended to shorten the limitations period to one year where the time for appeal expires on or after August 1, 2002. A

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Therefore, the circuit court's summary dismissal of Roberts's claim was proper.

II.

Additionally, Roberts claims that the circuit court's order dismissing his petition did not reflect its independent and impartial findings and conclusions because the court adopted the State's proposed order verbatim.

In support of his argument, Roberts cites to Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), among other cases. As Roberts correctly indicates, the Alabama Supreme Court in Ex parte Ingram addressed this issue and noted that where the circuit court adopts, as its own, the proposed order of the prevailing party, the "order and the findings and conclusions in such order" should be those of the trial court. 51 So. 3d at 1124. The Alabama Supreme Court also stated the following in Ingram:

> "[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure

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petitioner has one year from August 1, 2002, where the time for appeal falls between August 1, 2001, and July 31, 2002. Where the time for appeal falls before August 1, 2001, the limitations period remains two years.

as any other order of the trial court. In Dobyne v. State, 805 So. 2d 733, 741 (Ala. Crim. App. 2000), the Court of Criminal Appeals stated:

> "'"'While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.'"'
>
> "805 So. 2d at 741 (quoting other cases; emphasis added)."

51 So. 3d at 1122. In Ingram, the circuit court's order stated that "'this Court presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing.'" 51 So. 3d at 1123 (emphasis omitted). However, the Alabama Supreme Court noted that the judge who presided over Ingram's Rule 32 petition was not the same judge who presided over his trial. Therefore, the court found that

> "the patently erroneous nature of the statements regarding the trial judge's 'personal knowledge' and observations of Ingram's capital-murder trial undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order reflects the findings and conclusions of that judge."

Ingram, 51 So. 3d at 1125. In the present case, the circuit court's order does not contain such "patently erroneous" errors like the order in Ingram.

Additionally, Roberts relies on Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___, ___ (Ala. 2011).

> "In Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___ (Ala. 2011), the circuit court adopted verbatim as its order the State's answer to Willie Earl Scott's Rule 32 petition. The Alabama

Supreme Court stated:

> '"[A]n answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts."'
>
> "Ex parte Scott, ___ So. 3d at ___. The Court then held that '"[t]he trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in Ex parte Ingram that the findings and conclusions in a court's order must be those of the court itself. Ex parte Scott, ___ So. 3d at ___."

Reeves v. State, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016).

We have reviewed the State's proposed order and the circuit court's order dismissing Roberts's petition, and have found none of the "adversarial zeal" that was described in Scott. In his brief on appeal, although Roberts attempts to identify certain phrases in the circuit court's order that he believes contain such adversarial zeal, he failed to identify any portions that specifically indicate the court's order was not a reflection of the independent and impartial findings or conclusions of the court. Even if the court's order contains the same generic phrase or typographical errors found in the State's proposed order, we do not consider the use of the same generic phrase or a few typographical errors alone to be sufficient evidence that the trial court's order was not a product of the trial court's independent judgment. See Scott, ___ So. 3d at ____. Accordingly, because the record in this case does not clearly establish that the court's order dismissing Roberts's petition was anything other than the court's own independent judgment, Roberts's claim is without merit.

Moreover, even if the circuit court's adoption of the State's proposed order was done in error, any error would be

harmless beyond a reasonable double. See Rule 45, Ala. R. App. P. In Lee v. State, this Court held that because Lee's claim in his Rule 32 petition was procedurally barred under Rule 32.2, Ala. R. Crim. P., any error by the court's adoption of the State's proposed order in Lee's case was harmless. ___ So. 3d at ___ (citing Jenkins v. State, 105 So. 3d 1234, 1242 (Ala. Crim. App. 2011)). Therefore, Roberts is not entitled to any relief on this issue.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

January 12, 2018

CR-16-0708 **Death Penalty**

David Lee Roberts v. State of Alabama (Appeal from Marion Circuit Court: CC92-130.61)

NOTICE

You are hereby notified that on January 12, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Talmage Lee Carter, Circuit Judge
Hon. Denise Mixon, Circuit Clerk
J Mitch Mcguire, Attorney
Stephen Matthew Frisby, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

April 20, 2018

1170356

Ex parte David Lee Roberts. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: David Lee Roberts v. State of Alabama) (Marion Circuit Court: CC-92-130.61; Criminal Appeals : CR-16-0708).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 20, 2018:

Writ Denied. No Opinion. Mendheim, J. -

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 20th day of April, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

July 19, 2018

Ms. Leslie S. Smith
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104

Re: David Lee Roberts
v. Alabama
Application No. 18A37

Dear Ms. Smith:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on July 19, 2018, extended the time to and including August 28, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob C. Travers
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Ms. Leslie S. Smith
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, AL 36104

Clerk
Court of Criminal Appeals of Alabama
300 Dexter Avenue
Montgomery, AL 36104