

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

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|--------------------------|---|--------------------------------|
| MICHAEL BOOKER, #197624, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | CIVIL ACTION NO. 3:08cv583-WHA |
| |) | (WO) |
| GRANT CULLIVER, et al., |) | |
| |) | |
| Respondents. |) | |

ORDER

This case is before the court on the Recommendation of the Magistrate Judge (Doc. #18), entered on October 15, 2008, and Petitioner’s Objection (Doc. #19), filed on October 30, 2008.

Following an independent evaluation and *de novo* review of the entirety of this case, the court finds Petitioner’s Objection to be without merit, and it is hereby overruled.

The court agrees with the Magistrate Judge’s conclusion that Booker has the right under state law to raise his substantive incompetency claim in a Rule 32 petition. Although Booker argues that he did exhaust his mental incompetence claim by raising it in a Rule 32 petition, he presents additional arguments to this court in support of such claim which were not raised in the Rule 32 petition, and he also alleges the presence of evidence to support such claim which he did not previously present to the state court. Because of that, and as Booker has the right under state law to raise his substantive incompetency claim in a Rule 32 petition, this case is due to be dismissed without prejudice so that he can pursue this available state court remedy with respect to such claim.

To the extent that Booker argues that the court improperly deemed his sufficiency claim procedurally barred from review, this assertion is frivolous, as the Recommendation made no determination on the issues raised by Booker.

The court adopts the Recommendation of the Magistrate Judge, and it is hereby ORDERED that the petition for habeas corpus relief is DENIED, and the petition is DISMISSED without prejudice, to afford the Petitioner an opportunity to exhaust the available state court remedy.

DONE this 18th day of November, 2008.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
SENIOR UNITED STATES DISTRICT JUDGE