

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JOHN HARRY STEELE, AIS 284155, :
Petitioner, :
vs. : **Civil Action No. 16-0006-KD-C**
WILLIE THOMAS, :
Respondent.

ORDER

This action is before the Court on the Report and Recommendation of the Magistrate Judge and the objection filed by Petitioner John Harry Steele (docs. 11, 12).

Petitioner's claim that his counsel was ineffective for failing to file a motion to have the issue of immunity from prosecution (based on the allegation of self-defense) determined pre-trial, may have some merit. However, the Magistrate Judge correctly determined that the issue was procedurally defaulted because the Petitioner failed to raise it before the Alabama Supreme Court.

The Court notes that the Alabama Court of Criminal Appeals addressed the issue on the merits when deciding Petitioner's Rule 32 petition and stated: "Steele did not show that he would have been granted a pre-trial determination of immunity or that such a hearing is even required under §13A-3-23(d), Ala. Code 1975." (Doc. 7-13, Exhibit L.) After this opinion was issued, the Alabama Court of Criminal Appeals decided "that a defendant asserting immunity based on self-defense under § 13A-3-23(d), Ala. Code 1975, is entitled to an opportunity to prove that claim by a preponderance of the evidence at a pretrial hearing before the court." *Harrison v. State*, 2015 WL 9263815, at *4 (Ala. Crim. App. Dec. 18, 2015). Recently, the Alabama

Supreme Court agreed, stating that a defendant has "a clear legal right" to prove self-defense at a pre-trial hearing "before she is required to stand trial". *Ex parte Watters*, 2016 WL 6135232, at *5 (Ala. Oct. 21, 2016).

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) and dated October 19, 2016, is ADOPTED as the opinion of this Court.

Accordingly, it is **ORDERED** that this petition for writ of habeas corpus be **DENIED** and that this action be **DISMISSED**. It is further **ORDERED** that Petitioner is not entitled to a Certificate of Appealability and therefore, he is not entitled to appeal *in forma pauperis*.

DONE this 22nd day of November 2016.

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE