IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13525-C

MICHEL CHERFRERE,

Petitioner-Appellant,

versus

SECRETARY MARK INCH,
Secretary,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Michel Cherfrere, a Florida prisoner serving a life sentence for attempted first-degree murder, aggravated child abuse, and child abuse, filed a *pro se* 28 U.S.C. § 2254 petition, raising nine ineffective-assistance-of-trial-counsel claims and one cumulative-error claim. The district court denied the petition and a COA. Cherfrere appealed and has filed a motion for COA, in which he argues, for the first time, that the trial court violated his right to self-representation under *Faretta v. California*, 422 U.S. 806, 834-36 (1975) (holding that a defendant in a state criminal trial has a constitutional right to self-representation).[1]

[1] This claim is the only one presented in Cherfrere's COA motion. Although he raised ten claims in his § 2254 petition, he has abandoned all of them by failing to raise them in his COA motion. *See Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353-54 (11th Cir. 2010) (this Court "will not entertain the possibility of granting a certificate of appealability" where the petitioner

In his COA motion, Cherfrere argues, for the first time, that the state court violated his right to self-representation under *Faretta* by granting him the right to proceed *pro se* and then rescinding that right and appointing the same counsel, whom he previously had asked to be dismissed from the case. Cherfrere, however, waived his *Faretta* claim by not presenting it first to the district court. *See Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1193 (11th Cir. 2009) (stating that this Court does not consider arguments or issues raised for the first time on appeal). Cherfrere was aware of the Supreme Court's decision in *Faretta* long before he filed the instant petition, as he cited it several times in his motions to discharge counsel in his trial proceeding, but failed to offer any reasons to justify raising it for the first time in this appeal.

Accordingly, Cherfrere's COA motion is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

"does not provide facts, legal arguments, or citations of authority that explain why he is entitled to a certificate . . .").

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MICHEL CHERFRERE,

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SECRETARY MARK INCH,
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Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Michel Cherfrere has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 11, 2021, order denying a certificate of appealability in his appeal of the district court's denial of his *pro se* petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Upon review, Cherfrere's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICHEL CHERFRERE,

Petitioner,

vs.

MARK INCH, SEC'Y, D.O.C.,

Respondent.
_____/

CASE NO. 20-60988-CIV-DIMITROULEAS

FINAL JUDGEMENT AND ORDER DENYING HABEAS PETITION; WITHDRAWING REFERENCE

THIS CAUSE is before the Court on Petitioner Cherfrere's May 14, 2020 Petition for Writ of Habeas Corpus [DE-1]. The Court has considered the State's July 20, 2020 Response [DE-9] and Appendices [DE-10,11], and Cherfrere's August 25, 2020 Reply [DE-15] and finds as follows:

1. On November 17, 2008, Cherfrere was charged by Information with Attempted First Degree Murder of his wife, Attempted First Degree Murder of his step-daughter, Aggravated Child Abuse and Child Abuse. [DE-10-1, pp. 5-7]. The crimes occurred on October 13, 2008. The case proceeded to trial on two occasions, but mistrials were granted.

2. On August 12, 2011, Cherfrere was found to be mentally incompetent[1] [DE-10-1, pp. 9-12]. On November 1, 2011, Cherfrere was found to be competent to proceed to trial. [DE-10-1, p. 14].

3. On July 11, 2011, a refiled Information dropped the Attempted First Degree Murder charged against his daughter but amended the Attempted First Degree Murder against his wife

[1] Cherfrere refused on two occasions to meet with one of the two appointed doctors. [DE-11-1, p. 2].

to have been done by repeatedly stabling her and/or by driving a motor vehicle into the driver's side of her motor vehicle. [DE-10-1, pp. 16-17].

4. On April 3, 2012, Cherfrere complained about the ineffectiveness of his counsel. [DE-10-1, p. 21]. That request was denied on April 9, 2012. [DE-10-1, p. 24]. On April 18, 2012, Cherfrere requested self-representation. [DE-10-1, pp. 26-27]. That request was denied on April 30, 2012. [DE-10-1, p. 29]. Cherfrere again requested self-representation on May 24, 2012. [DE-10-1, pp. 31-32]. That request was denied on June 11, 2012. [DE-10-1, pp. 37-39]. Finally, self-representation was granted on June 27, 2012. [DE-10-1, p. 41]. On August 6, 2012, Cherfrere requested that stand by counsel be dismissed. [DE-10-1, pp. 43-44]. That request was denied on August 20, 2012. [DE-10-1, p. 46]. Another *Farretta* hearing was held on November 5, 2012. [DE-10-1, p. 48]. On February 4, 2013, Cherfrere again requested that stand by counsel, Anne Lemaster, be dismissed. [DE-10-1, pp. 50-51]. On February 8, 2013, the request was denied, as withdrawn. [DE-10-1, p. 53]. On March 11, 2013, Cherfrere again requested that Anne Lemaster be dismissed as stand by counsel. [DE-10-1, p. 55-56]. On March 21, 2013, the Court granted the motion to discharge Ms. Lemester, [DE-10-1, p. 65], found Cherfrere to be competent [DE-10-1, p. 61], and conducted another *Faretta* hearing. [DE-10-1, p. 63]; [DE-11-1, pp. 22-37]. Another *Faretta* hearing was held on April 25, 2013. [DE-10-1, p. 67]. On May 1, 2013, Patrick Curry was appointed as counsel. [DE-10-1, pp. 71-72]. Another *Faretta* hearing was conducted on June 18, 2013; Patrick Curry was appointed as stand by counsel. Cherfrere was warned that a continuance was not likely to be granted if he changed his mind again. [DE-10-1, p. 74].

5. On June 27, 2013, Cherfrere filed a *pro se* Demand for Speedy Trial [DE-10-1, pp. 76-77].

6. On August 19, 2013, the morning of the trial, the Court conducted another full *Faretta* hearing [DE-11-3, pp. 9-23] and found Cherfrere competent [DE-11-3, p. 23]. Cherfrere selected[2] the jury [DE-11-3, pp. 162-208]; on August 20, 2013, Curry, at Cherfrere's request, then took over the trial [DE-11-3, pp. 230-231].

7. On August 27, 2013, Cherfrere was convicted on all three (3) counts. [DE-10-1, pp. 109-111].

8. On October 9, 2013, Cherfrere was sentenced to Life in Prison. [DE-10-1, pp. 116-124].

9. Almost six years later, on July 17, 2019[3], the Fourth District Court of Appeal affirmed. [DE-10-1, pp. 279-285]. *Cherfrere v. State*, 277 So. 3d 611 (Fla. 4th DCA 2019). Mandate issued on August 16, 2019. [DE-10-1, p. 287].

10. On August 20, 2019, Cherfrere filed a Motion for Post Conviction Relief. [DE-10-2, pp. 2-28]. The Court denied relief on September 23, 2019. [DE-10-2, pp. 57-61]. The Fourth District Court of Appeal affirmed on February 27, 2020. [DE-10-2, p. 95]. *Cherfrere v. State*, 292 So. 3d 747 (Fla. 4th DCA 2020). Rehearing was denied on April 6, 2020. [DE-10-2, p. 102]. Mandate issued on April 24, 2020. [DE-10-2, p. 104].

11. In this timely habeas petition, Cherfrere complains that he received ineffective assistance of counsel:

A. Failing to object to Detective Tarok's hearsay testimony and failing to request

[2] Several times during voir dire, Cherfrere rejected the Court's offer to confer with Mr. Curry. [DE-11-3, pp. 195, 198].

[3] Cherfrere's retained counsel had major problems with the appellate court, including his filing an *Anders* brief. The problems, along with Cherfrere's actions, delayed the completion of the appeal. Eventually, appointed counsel was given to Cherfrere, and the appellate court filed a bar grievance against counsel. On February 18, 2020 Referee Judge Alan Fine recommended a thirty (30) day suspension. The appeal of that grievance decision is currently pending before the Florida Supreme Court [SC19-792].

a *Richardson*[4] hearing.

B. Failing to raise an abandonment defense.

C. Failing to request a re-evaluation of competency.

D. Failing to object to the alternative Attempted First-Degree Murder allegations.

E. Failing to be ready for trial.

F. Failing to request a continuance.

G. Failing to secure an accident reconstruction expert.

H. Opened the door to injunction, negating his self-defense; no evidence on knife.

I. Raising an invalid defense: Voluntary Intoxication.

J. Cumulative error.

12. Cherfrere continuously complained about both appointed counsel and appointed stand-by counsel. He continuously sought self-representation. Judge Cohen exhaustively warned him of the difficulties in representing himself. Judge Cohen told him that he would not be able to later appeal (complain) about counsel since it was a problem of his own making. Cherfrere ignored those warnings and proceeded at his own peril. He now wants to complain about Mr. Curry's performance when he fired him and only asked for him to rejoin as counsel after Cherfrere's poor performance picking a jury. First, Cherfrere complains about counsel's failure to object to Detective Torok's hearsay testimony and counsel's failure to request a *Richardson* hearing. Torok testified about a "rather higher rate of speed" [DE-11-3, p. 503]. After one more question, Curry asked that the jury be excused. He indicated that he was the sixth lawyer in the case and that he thought there was a discovery violation because speed and

[4] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

accident investigation had not been produced. [DE-11-3, p. 506]. The request for a mistrial was denied. Torok's testimony about speed was vague at best. Since a motion for mistrial was properly denied, no harm can be shown. Had the objection been granted, the requested remedy would have been a mistrial, and that was denied. In effect, Curry's objection amounted to a request for a *Richardson* hearing (discovery violation under state law). Cherfrere's actions caused Curry to do the best he could on short notice. Cherfrere should not be heard to complain now about the performance of stand-by counsel, who became trial counsel again during the trial. Any error was harmless beyond a reasonable doubt.

13. Second, Cherfrere complains that counsel should have raised an abandonment defense. Cherfrere testified that he accidentally ran into his wife's car [DE-11-3, pp. 634, 649, 661]; he testified that he never stabbed his wife [DE-11-3, pp. 644, 670-672]. According to his testimony, he did not attempt to kill his wife; here, there was no attempt to abandon. According to the state's witnesses, the attempt went beyond mere preparation. There was no basis for an abandonment instruction or defense. It is hard to see how one can abandon an attempt to murder after the stabbing began.

14. Third, Cherfrere contends that counsel should have requested a re-evaluation of his competency to stand trial. Cherfrere was found competent on the morning of trial. [DE-11-3, p. 23]. There is no showing that a request for a competency evaluation mid-trial would have affected the outcome of this case. *Wood v. Quarterman,* 491 F. 3d 196, 204 (5th Cir. 2007) *cert. denied,* 552 U.S. 1151 (2008). This Court is familiar with Mr. Curry's criminal defense work for over forty (40) years, and his experience is entitled to some deference. *Lawrence v. Sec'y, D.O.C.,* 700 F. 3d 464, 477-478 (11th Cir. 2012) *cert. denied,* 569 U.S. 926 (2013).

15. Fourth, Cherfrere complains about counsel's failure to object to the alternate means of committing Attempted First-Degree Murder. No prejudice can be shown as the Florida appellate court found no error, fundamental or otherwise, in the application of Rule 3.140(k)(5), Fla. R. Crim. Proc. *Cherfrere,* 277 So. 3d at 615.

16. Fifth, Cherfrere contends that trial counsel was not ready for trial. However, Cherefrere understood that stand-by counsel would not be doing any work on the case. [DE-11-1, p.19]. He understood that if he changed his mind during the trial, which he had done in the past, resulting in a mistrial, that the lawyer would not be fully prepared. [DE-11-1, p. 20]. Moreover, since it would be a problem of his own making, it would not be a ground for an appeal. [DE-11-1, p. 21]. Curry did the best he could with the cards dealt to him by Cherfrere.

17. Sixth, Cherfrere contends trial counsel should have asked for a continuance. It would have been denied, as the Court previously warned Cherfrere. At the point that Curry resumed representation, jeopardy had attached; a mistrial would have had to be granted. It is highly unlikely that Judge Cohen would have granted another mistrial because of Cherfrere's actions. No prejudice has been shown.

18. Seventh, Cherfrere complains about trial counsel's failure to secure an accident reconstruction expert. This speculative complaint does not warrant any relief. Cherfrere has proffered no evidence of what expert would have testified or what the expert would have said. *U.S. v. Frausto,* 754 F. 3d 640, 644 (8th Cir. 2014); *Babick v. Berghuis,* 620 F. 3d 571, 577 (6th Cir. 2010) *cert. denied,* 563 U.S. 946 (2011). Moreover, it is hard to understand how that expert could have given favorable testimony about the twelve stab wounds.

19. Eighth, Cherfrere complains that trial counsel opened the door to evidence of a Domestic Violence Injunction, thereby harming his self-defense position. The injunction was

inextricably intertwined with the facts of this case and would have been admissible in the state's case in chief or to impeach[5] Cherfrere's testimony. Moreover, Curry's anticipating[6] the testimony and mentioning the restraining order in his opening statement [DE-11-3, p. 243] did not prejudice Cherfrere, rather it allowed the defense to highlight the revenge motive attached to it. [DE-11-3, pp. 763-764]. Curry cannot be faulted for using that trial strategy. Finally, the evidence of guilt was overwhelming, even absent any evidence on the knife.

20. Ninth, Cherfrere complains that trial counsel raised an invalid defense: voluntarily intoxication. Unlike the now suggested abandonment defense, at least there was some testimony from Cherfrere that he drank alcohol during the incident [DE-11-3, p. 648]. Alcohol and medicine were found in the truck. Here, Curry was stuck with a difficult client who had insisted on representing himself because he believed lawyers would not help him. Cherfrere had already clumsily bungled voir dire, and he had committed to a theory of self defense. However, his later testimony did not support that defense or any other defense. It was shown that the victim had ample motives to lie, but not to self-inflict serious wounds to get revenge. That's a hard defense to sell. Curry did the best he could with the cards that Cherfrere dealt him. The trial court repeatedly attempted to dissuade Cherfrere from representing himself. Cherfrere made a bad decision, but it was his voluntary decision. Curry tried to get an instruction on a voluntary intoxication defense; that attempt failed. Cherfrere can show no prejudice, as Curry did not mention intoxication as a defense in either his opening statement [DE-11-3, pp. 242-246] or closing argument [DE-11-3, pp. 749-776]. Cherfrere put himself into this predicament and wants

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[5] *See, Holladay v. Haley,* 209 F. 3d 1243, 1253 n. 6 (11th Cir.) *cert. denied,* 531 U.S. 1017 (2000).

[6] *See, Coble v. Quarterman,* 449 F. 3d 430, 439 (5th Cir. 2007); *Hooks v. Workman,* 606 F. 3d 715, 726 (10th Cir. 2010); *Awkal v. Mitchell,* 613 F. 3d 629, 640 (6th Cir. 2010) *cert. denied,* 562 U.S. 1183 (2011).

to blame Curry for not doing what he did not have a chance to do, due to Cherfrere's decisions to represent himself.

21. Tenth, Cherfrere complains about cumulative error. No error has been shown to accumulate. *Morris v. Sec'y, D.O.C.*, 677 F. 3d 1117, 1132 (11th Cir. 2012).

Wherefore, Cherfrere's habeas petition [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot.

The Reference to Magistrate [DE-2] is Withdrawn.

The Clerk shall mail a copy of this order to Mr. Cherfrere.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31st day of August, 2020.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Michel Cherfrere, #I40676
c/o Wakulla Corr. Inst.
110 Melaleuca Drive
Crawfordsville, FL 32327

Marc B. Hernandez, AAG

Honorable Lisette M. Reid, US Magistrate Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MICHEL CHERFRERE,

Petitioner,

vs.

MARK INCH, SEC'Y, D.O.C.,

Respondent.

CASE NO. 20-60988-CIV-DIMITROULEAS

FINAL JUDGMENT FOR RESPONDENT, ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon the Final Judgment and Order Denying Habeas Petition, signed on July 31, 2020. Accordingly, pursuant to Rule 58(a), Fed. R. Civ. Proc. and Rule 11(a), Section 2254 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondent, against the Petitioner, Michel Cherfrere.

2. On consideration of a Certificate of Appealability, the Court will deny such Certificate as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. This Court notes that pursuant to Rule 22(b)(1), Fed. Rules App. Proc. Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.

3. The Clerk shall close this case and deny any pending motions as Moot. The Clerk shall mail a copy of this order to Petitioner

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31st day of August, 2020.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Michel Cherfrere # I40676
c/o Wakulla C. I.
110 Melaleuca Dr.
Crawfordville, FL. 32327

Mark B. Hernandez, AAG

Hon. Lisette M. Reid, U.S. Mag. Judge

Additional material from this filing is available in the Clerk's Office.