QUESTION PRESENTED

Did the Court of Appeals err in dismissing the Petitioner's appeal and denying the certificate of appealability where the record showed that the district court's assessment of the constitutional claims were wrong?

LIST OF PARTIES

Secretary, Florida Department of Corrections
c/o Robert J. Krauss
Chief-Assistant Attorney General
Florida Bar No. 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7900

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INDEX OF APPENDICES

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.
The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.
The Report and Recommendations of the United States Magistrate Judge appears at Appendix C to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided the instant case on August 1, 2011. No petition for rehearing was timely filed in the case.

The jurisdiction of this Court to review the Judgment of the Fourth Circuit is invoked under 28 U.S.C §1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the United States Constitution – Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A civil trial regarding a defaulted-upon promissory note was held in 2000. Judgment against Petitioner-Appellee was entered following trial.

Petitioner-Appellee William Smoak Fairey was indicted by the Horry County, South Carolina grand jury in June 2001 for obtaining goods/monies by false pretenses in a case arising out of the defaulted-upon promissory note.

Petitioner-Appellee was tried in his absence and without counsel before the Honorable John L. Breeden, Jr., and a jury on July 21, 2004.

Petitioner-Appellee was found guilty and Judge Breeden sealed his sentence. On October 21, 2004, petitioner appeared before Judge Breeden, who reconsidered his original sentence of eight years in prison, suspended to five years. Judge Breeden sentenced petitioner to eight years in prison, suspended to four years in prison and four years of probation.

Petitioner-Appellee filed a timely notice of appeal and, after the submission of briefs by both parties, the South Carolina Court of Appeals heard oral argument on March 7, 2007. The Court of Appeals issued a published opinion affirming petitioner's convictions on April 16, 2007. Appendix D.

Petitioner-Appellee filed a petition for rehearing on May 1, 2007, which was denied by the Court of Appeals on June 28, 2007.

Petitioner-Appellee filed a timely Motion for the Writ of Certiorari with the Supreme Court of South Carolina on August 28, 2007. The petition was denied in a one-page document on June 28, 2008.

Petitioner-Appellee filed a timely Petition for Writ of Habeas Corpus on March 11, 2009. The petition was filed in United States District Court in Tampa, Florida. District Judge Moody transferred the case to the Florence Division of the District of South Carolina.

The Magistrate Judge in the District of South Carolina filed a Report and Recommendation on August 2, 2010.

Petitioner-Appellee filed a timely Objection to the Report and Recommendation on August 19, 2010.

The District Court issued Summary Judgment for the Respondents-Appellants on September 13, 2010.

Petitioner-Appellee filed a timely Notice of Appeal to the Court of Appeals, Fourth Circuit on October 6, 2010. Petitioner-Appellee filed an Informal Brief to the Court of Appeals on February 28, 2011.

The Court of Appeals, Fourth Circuit dismissed the Appeal and denied a Certificate of Appealability on August 1, 2011.

Petitioner-Appellee now seeks writ of certiorari to review that decision.

REASONS FOR GRANTING THE PETITION

1. Review Is Warranted Because The Opinion of the Fourth Circuit Conflicts With An Opinion Of The Ninth Circuit.

The Court of Appeals held that the District Court's Order "is not appealable unless a circuit justice or judge issues a certificate of appealability". 28 U.S.C §2253. This is opposition to a decision of the Ninth Circuit Court of Appeals that states, "If no express request is made for a certificate of appealability, the notice of appeal shall be deemed to constitute a request for a certificate". U.S.v. Asrar. 116 F 3d. 1268.

On October 6, 2010, Petitioner-Appellee filed a timely Notice of Appeal with the District Court. The District Court forwarded the record to the Court of Appeals without any order denying the certificate of appealability. The certificate of appealability should, therefore, have been granted by default.

The Court of Appeals failed to recognize the Notice of Appeal, the District Court's failure to respond to the Notice of Appeal's request, and in doing so, held Petitioner-Appellee to a higher standard of conduct by denying the certificate.

2. Review Is Warranted Because The Opinion of the Fourth Circuit Is In Direct Opposition To Affirmations Contained In the Opinions Of This Court.

A) This Court has clearly established that a trial *in absentia* in so inherently prejudicial that it is permissible only when "denial of such confrontation

is necessary to further an important public policy, and only where the testimony's reliability is otherwise assured." Maryland v. Craig, 497 U.S. 836. The instant case involved no important public policy and evidence to the contrary has not be presented.

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

This Court has held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. Illinois V. Allen, 397 U.S. 337-338, 90 S.Ct. 1057. This Court, in Allen, also held that "...courts must indulge every reasonable presumption against the loss of constitutional rights," Johnson v. Zerbst, 304 U.S. 458, 464.

Allen thus requires a knowing, voluntary, and intelligent waiver of the constitutional right to be present at trial and to confront witnesses and that the loss of a defendant's constitutional rights must be reasonably and carefully applied and given every indulgence.

As the record will show, Petitioner-Appellee could never have waived these important rights because, as the record will also demonstrate, he was never given Notice of Trial.

B) It is asserted that Petitioner was properly tried without counsel. The United States Constitution guarantees that a person brought to trial must be afforded the right to assistance of counsel before he can be validly convicted and punished by imprisonment. U.S. Constitution,

Amendment VI, XIV; Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, L.Ed.2d 562. The United States Supreme Court held in United States v. Cronic, 466 U.S. 648, 654, 104 S. Ct. 2039, 2044 that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." Id.

The State argues that Petitioner waived his right to counsel. To effectuate a valid waiver of the right to counsel, the accused must be (1) advised of the right to counsel and (2) adequately warned of the dangers of self-representation. Faretta, supra. The trial judge failed to address the disadvantages of appearing pro se, as required by the second prong of Faretta, The record does not show that Petitioner was ever warned of the dangers of self-representation despite the trial court's numerous opportunities to do so. The judge's failure to warn obviates the need to consider an adequate warning as described in Faretta. Petitioner did not effectuate a knowing and voluntary waiver of his right to counsel as required by federal law.

CONCLUSION

For the reasons stated, Petitioner-Appellee prays that this Court grant the Petition for the Writ of Certiorari.

William Smoak Fairey, Jr.
Petitioner-Appellee *pro se*
5629 Boulder Boulevard
Sarasota, Florida 34233
941-685-7674

APPENDIX A

FILED: August 1, 2011

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10-7414

(4:09-cv-01610-RMG)

WILLIAM SMOAK FAIREY, Jr., a/k/a Doak Fairey
Petitioner - Appellant
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL, STATE OF SOUTH CAROLINA
Respondents - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10-7414

WILLIAM SMOAK FAIREY, Jr., a/k/a Doak Fairey,

Petitioner - Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;

ATTORNEY GENERAL, STATE OF SOUTH CAROLINA,

Respondents - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Richard Mark Gergel, District Judge.
(4:09-cv-01610-RMG)

Submitted: July 28, 2011 Decided: August 1, 2011

Before SHEDD, AGEE, and DIAZ, Circuit Judges.

Dismissed by unpublished per curiam opinion.

William Smoak Fairey, Appellant Pro Se.
Donald John Zeienka, Deputy Assistant Attorney General, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

William Smoak Fairey seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2254 (2006) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C.§ 2253 (c)(1)(A) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000); see Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. Slack, 529 U.S. at 484-85. We have independently reviewed the record and conclude that Fairey has not made the requisite showing.

Accordingly, we deny a certificate of appealability and dismiss the appeal. We also deny Fairey's motion to stay state court proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

WILLIAM SMOAK FAIREY, JR.

Petitioner,

v.

SECRETARY, FLORIDA DEPT OF CORRECTIONS, and ATTORNEY GENERAL OF SOUTH CAROLINA.

Respondents.

ORDER

This matter is before the court upon the Magistrate Judge's recommendation that the Respondent Attorney General of South Carolina's ("Respondent") Motion for Summary Judgment be granted. The Record contains a Report and Recommendation ("R&R") of a United States Magistrate Judge which was made in accordance with 28 U.S.C. §636(b)(1)(B). A dissatisfied party may object, in writing, to an R&R within fourteen days after being served with a copy of that report. 28 U.S.C. § 636(b)(l). Petitioner William Smoak Fairey, Jr. ("Petitioner" or "Fairey") filed timely objections to the R&R.

BACKGROUND

Although the Magistrate Judge's R&R contained a thorough recitation of the facts, the court will include them herein. Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on or about March 10, 2009. Respondent filed a Motion for Summary Judgment on September 30,2009, and Fairey filed a Response in Opposition on November 4, 2009. Magistrate Judge Thomas E. Rogers,III entered a Report and Recommendation on August 2, 2010, in which he recommended that Respondent's Motion for Summary Judgment be granted.[1]

As the Magistrate Judge noted. Petitioner currently resides in Florida and is serving a four-year term of probation as a result of a criminal conviction in the Court of General Sessions, Hony County, South Carolina. On January 26, 1998, Petitioner was served with an arrest warrant for obtaining goods and monies under false pretenses. (R. at 149.) This warrant was dismissed on July 23, 1998, see Record at 155, but Petitioner was later indicted by a grand jury for the same charge of obtaining goods and monies under false pretenses in June of 2001. (R. at 191.) Attorney Richard Weldon, who had begun representing Petitioner in January of 1998, filed a Motion to Be Relieved as Counsel on June 17, 2002.(See Docket Entry [3 9-13].) In his Affidavit in Support of Motion by Attorney for Permission to

[1]Petitioner filed a Motion to Stay on or about May 5, 2010, and a Motion to Expedite on or about June 11,2010, The R&R recommends that these motions be deemed moot, (R&R at 20.)

Withdraw, Mr. Weldon stated*, inter alia,*

> 3. The Defendant [Fairey] and the attorney substantially disagree on the fundamental representation and trial strategies of the case.
>
> 4. The client has failed substantially to fulfill an obligation to the lawyer regarding the lawyer's services and costs or payment thereof, and has been given reasonable warning that the lawyer will withdraw unless that obligation is fulfilled;
>
> 5. The Defendant [Fairey] desires to represent themselves [sic] pro se. (See Docket Entry [19-13].)

Petitioner signed this affidavit, indicating his consent to Attorney Weldon's withdrawal as counsel. (See Docket Entry [19-13].) The court entered a Consent Order Allowing for Withdrawal as Counsel on July 23, 2002; that Consent Order stated, in part,

> It is further ordered: (1) Doak Fairey has the burden of keeping the court informed as to where notices, pleadings, and other papers may be served..,.; (2) Doak Fairey has the obligation to hire other counsel if he elects to

> do so; (3) Doak Fairey has the obligation to prepare for hearings and trial....

(Docket Entry [19-13].)

Petitioner was tried in his absence and without

counsel on July 21, 2004, before the Honorable John. L. Breeden, Jr. (R. at 21 -103.) The jury found Petitioner guilty of obtaining goods or monies under false pretenses. (R. at 95.)

Petitioner then obtained new counsel. Attorney Gregory McCollum, and moved to vacate his sentence and for a new trial. (R. at 106.) The Petitioner appeared before Judge Breeden on October 21, 2004. (R. at 104.) Although Judge Breeden denied Petitioner's motion for a new trial. Judge Breeden reconsidered his original sentence (8 years, suspended to 5 years service and 4 years probation and restitution), and sentenced Petitioner to 8 years, suspended to 4 years and 4 years probation and restitution of $25,000 to the victim. (R. at 6, 147.)

Petitioner appealed his conviction and sentence, and on appeal, he was represented by Attorney Eleanor Duffy Cleary of the South Carolina Commission on Indigent Defense and Attorney C. Bradley Hutto of Orangeburg. (Docket Entry [19-1].) Petitioner's Final Brief was filed with the South Carolina Court of Appeals on October 18, 2006, in which Petitioner raised the following issues:

> I. The trial court erred in holding appellant's trial in his absence and the absence of an attorney to represent him where the state failed to show that he (1) received notice of the

> right to be present and (2) was warned the trial would proceed in his absence.
>
> II. The trial court erred in finding that appellant knowingly and intelligently waived his right to counsel where the record showed
>
> that he was never warned of the dangers of self-representation.
>
> III. The trial court erred in refusing to grant appellant's request for documents relating to the grand jury to prepare for his defense. (Final Brief of Appellant; see Docket Entry [19-1].)

The South Carolina Court of Appeals entered its opinion affirming Fairey's conviction on April 16,2007. See State y. Fairey. 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007). (See also Docket Entry [19-3],) Fairey filed a Petition for Rehearing on May 3,2007, but the South Carolina Court of Appeals issued an Order denying rehearing on June 28, 2007. (See Docket Entries [19-4] and [19-5].)

Fairey filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on August 28, 2007. (See Docket Entry [19-6].) In this petition, Fairey raised two issues;

> 1. Did the Court of Appeals err in holding that petitioner received notice of his right to be present and that his trial would proceed in his absence where the state failed to send notice to the last address provided by petitioner and he was not provided notice the trial would proceed in his absence?

> 2. Did the Court of Appeals err in holding that petitioner knowingly and intelligently waived his right to counsel where the record showed that he was never warned of the dangers of self-representation and where petitioner did not engage in dilatory conduct warranting a finding of waiver of counsel by conduct?

(See Docket Entry [19-6].)

The South Carolina Supreme Court entered its Order indicating that the petition for writ of certiorari was denied on June 26, 2008. (See Docket Entry [19-8].)

PETITIONER'S GROUNDS FOR RELIEF

Fairey lists two grounds for relief in his pro se Petition for Writ of Habeas Corpus;

GROUND ONE; Right to Be Present at Trial, Amendment VI, Constitution of the United States.

> Supporting facts: I was never given notice of trial. The Court and the State sent numerous documents and orders to me at my home in Florida, but, for reasons unknown, failed to send the most important document, the notice of trial, to me.
> The Court had issued an order in April 2003 stating that I "was to keep the Court and the State informed of any changes in his address." The order was mailed to me at 5629 Boulder Blvd, Sarasota, FL. I was arrested, for failure to appear, on October 4, 2004 at the same address, having never moved since the date of the Order.

The State claimed that they could not find me for trial even though numerous documents and orders had been sent and returned from my home in Florida.

I was not allowed to confront witnesses against me, I was not present for voir dire, opening statements, examination, cross-examination, closing arguments, jury instructions; none of the proceedings.

The State also admitted at trial that they did not send a Notice of Trial to my home in Florida.

GROUND TWO; Right to Counsel, Amendment VI & XIV, Constitution of the United States.

Supporting facts: My original attorney requested to be relieved as counsel in June 2002. In his Motion, he stated that we "disagreed on trial strategy" and that he "had not been paid for his services." I had never received a bill for service from him and have not received one as of the date of this petition. He did not warn me of the dangers of self-representation.

I proceeded pro se. Motions were made and hearings were held from 2002 through 2003. At no time did the court warn me of the dangers of self-representation.

I was tried and convicted without counsel.(Pet. at 6-8,)[2]

STANDARD OF REVIEW

J

A. Legal Standard for Summary Judgment

[2]Fairey asserted three grounds for relief in his Petition, but in an Order dated August 2, 2010, Magistrate Judge Rogers granted Petitioner's request that the Court only consider the first two grounds, given that the third ground has not been exhausted. {See Docket Entry [35]

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The judge is not to weigh the evidence but rather must determine if there is a genuine issue for trial. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242,249 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. *Perini Corp. v. Perini Constr., Inc.,* 915 F.2d 121,123-24(4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 82 v. Centra, Inc.,* 947 F.2d 115,119 (4th Cir. 1991). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Calrett*, 477 U.S. 317, 322 (1986), The "obligation of the nonmoving party 'is particularly strong when the nonmoving party bears the burden of proof.'" *Hughes v. Bedsole*, 48 F.3d 1376,13 81 (4th Cir. 1995) (quoting *Pachaly v. City of*

Lynchburg, 897 F.2d 723,725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Celotex,* 477 U.S. at 327.

B. Magistrate Judge's R&R

This court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's R&R to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that R&R. 28 U.S.C. § 636(b)(l). After a review of the entire record, the R&R, and Petitioner's objections, the court finds that the Magistrate Judge fairly and accurately summarized the facts and applied the correct principles of law. Accordingly, the court adopts the R&R and fully incorporates it into this Order.

ANALYSIS

A. Section 2254 Petitions

With respect to those claims that were adjudicated by the state court on their merits, habeas relief is warranted only if adjudication of the petitioner's claims by the state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "[A] determination of a factual issue made by a State court shall be

presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(l).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court explained that § 2254(d)(l)*s "contrary to" and "unreasonable application" clauses have independent meaning. *Id*, at 404-05. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Id.* at 405-06. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the particular case. *Id.* at 407-08.

"The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). "The focus of the [unreasonable application] inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and ... an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002). A federal habeas court may not issue the writ under the “unreasonable application" clause "simply because that court concludes in its independent judgment that the relevant state-court

decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411.

B. Magistrate Judge's R&R

In his R&R, Magistrate Judge Rogers recommended granting Respondent's Motion for Summary Judgment. With respect to Ground One, trial in absentia. Magistrate Judge Rogers noted that the South Carolina Court of Appeals found that Fairey was properly noticed of the trial and that he would be tried in his absence if he did not appear when called for trial. (See R&R at -10-12.) The R&R further states,

> [T]he state court's findings in the present case are not contrary to, nor are they an unreasonable application of, the ruling in [Marvland v.]Craig[497 U.S. 836 (1990)],The factual determinations made by the state court, that Petitioner received notice of the trial and was warned that the trial would go forward in his absence if he failed to appear, are presumed to be correct. Petitioner has failed to show by clear and convincing evidence that the court's determination of facts was unreasonable in light of the evidence presented. Petitioner also fails to show that the state court findings were contrary to or resulted in an unreasonable application of the clearly established federal law that a defendant can be tried in his absence if he knowingly and intelligently waives his right to be present at trial.

N

(R&R at 14.) With respect to Ground Two, right to counsel. Magistrate Judge Rogers noted that the South Carolina Court of Appeals found Fairey waived his right to counsel. (See R&R at 16.) The R&R continues,

> The facts as determined by the trial court (and which Petitioner has failed to show by clear and convincing evidence to be unreasonable) reveal that Petitioner wished to proceed pro se and was aware of his obligations as a pro se litigant. In the order relieving Weldon as counsel, the court specifically informed Petitioner that he was responsible for notifying the court of his proper address for service of notices, pleadings, etc. and for preparing for hearings and trials. The trial court also found that Petitioner was familiar with the legal system and evidenced an understanding of the process by filing motions, arguing those motions in open court, and asking that notices be sent to him. The state court found that Petitioner's conduct evidenced a knowing and intelligent decision to proceed without counsel.
>
> Although the trial court did not specifically warn Petitioner of the dangers of self-representation in a formalistic manner, its finding that the his waiver of counsel was appropriate did not result in an unreasonable determination of facts in light of the evidence presented and is not contrary to, nor does it involve an objectively unreasonable application of, clearly established federal law.

(R&R at 19-20.)

C. Objections

Petitioner states that, "[i]n an attempt to give some structure to his objections," he has divided his objections into sections:

> **Section One**-An overview of constitutional errors raised. This overview tries to capture the central facts that the Magistrate Judge omitted from the Report. These omitted facts are critical to this Court's determination of the legal issues in this case that they relate to directly. The omitted facts are also crucial because of the Petitioner's central claims is that his constitutionally guaranteed right to due process was violated.
>
> **Section Two**-Objections to the Magistrate Judge's analysis of Ground One-Trial In Absentia.
>
> **Section Three**-Objections to the Magistrate Judge's analysis of Ground Two-Right to Counsel,
>
> **Section Four**-Objections to the recommendation of the Magistrate Judge that Summary Judgment be granted and the petition be dismissed.

(Objections at 2-3.)[3]

[3] In Section One, Petitioner makes no clear objections but instead discusses fundamental rights, the rational basis test,

and the strict scrutiny test. (See Objections at 3-5.) He does complain, however, about the fact that he was tried in absentia. (Objections at 5.) In Section Two, Petitioner continues to complain that he was tried in absentia. (Objections at 8.) Section Three appears to be a blend of objections to the analysis of Ground One and Ground Two-he asserts he had no notice he would be tried in absentia if he failed to appear and was not warned of the dangers of self-representation. (Objections at 9-11,) Finally, Section Four does not appear to contain a specific objection but instead asserts the Williams v. Taylor standard is met because "[t]he Confrontation Clause and the Due Process clause, both of which represent clearly established federal law, were simply ignored or, more importantly, purposefully violated in order to serve an unknown interest." (Objections at 11-12.) Accordingly, the Court will analyze Petitioner's objections together.

In Sections One through Three, Petitioner objects to the Magistrate Judge's determination that habeas relief is not warranted with respect to Petitioner's argument that he was deprived of his right to be present at trial. Petitioner appears to complain about the state court's determination that he was properly notified of the trial given that notice was not sent to him in Florida. (Objections at 6.) Petitioner states,

> There is no form or document or instrument that the petitioner was required to submit regarding his address, nor has the State defined a procedure for doing so. After notifying the court in a properly filed and executed Affidavit... and a properly filed and executed Motion . . . , the petitioner has shown, by clear and convincing evidence!,] that the information regarding his address was not only received by the court and the state, but that the information was processed by

> representatives of those entities and subsequently acted upon in a correct manner.

(Objections at 6.)

Petitioner seems to be arguing that the state court adjudication of his notice claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. (See Objections at 6-7.) However, the Court disagrees with Petitioner. The South Carolina Court of Appeals thoroughly analyzed this argument, noting that on August 22,2002, Fairey informed the solicitor of a change of address wherein Fairey stated,

> Pursuant to the Consent Order regarding "keeping the court informed as to where notices, pleadings, and other papers may be served," I am informing the court of my new address. All notices, pleadings and other papers should be delivered to:
>
> Doak Fairey
> 31545 Vaca Drive
> Castaic, California 91384
> This address change is valid immediately.
> So that I might adequately prepare for trial, please assure that any and all future correspondence is sent to this address.

State v. Fairey, 374 S.C. at 96-97, 646 S.E.2d at 447. The Court of Appeals continued, stating.

> On September 8, 2002, after being sent a subpoena to his former Florida address, Fairey

> informed the court and solicitor, once again, that the California address was the correct address to send all correspondence. This letter stated:
>
> Today, I received VIA FAX a copy of a subpoena relating to my case. This document was sent to my old address in Sarasota, Florida.
>
> In my previous correspondence (copy attached), I informed you and the court of my address change, I followed the procedure as spelled out in your correspondence of 7/30/02. You have chosen to ignore the Rule, and your own written procedure, and failed to properly
>
> send documents to me at my address. Please assure that all correspondence and information for trial is sent to my new address:
>
> Doak Fairey
> 31545 Vaca Drive
> Castaic, CA 91384

Id. at 97, 646 S,E.2d at 447.

Even though Petitioner twice informed the state court that his proper address was in California, he argued he had no notice of the trial because such

notice was not sent to his address in Florida. The Court of Appeals of South Carolina noted that on March 10, 2003, Fairey moved to quash the indictment, and in that Motion to Quash, he listed two addresses: the same California address, as well as a Florida address, which was denoted as a "temporary address." Id, at 97, 646 S.E.2d at 447. During the March 24, 2003 hearing on this motion, Fairey made a Motion to Dismiss and afterwards filed the motion to dismiss with the court; this Motion to Dismiss listed a Florida address. *Id.* at 97-98, 646 S.E.2d at 447,

In addressing his argument that the trial court erred in having the trial in his absence, the Court of Appeals stated, "Although the Sixth Amendment of the Constitution guarantees the right of an accused to be present at every stage of his trial, this right

may be waived." *Id.* at 99, 646 S.E.2d at 448. The Court of Appeals noted that the subpoena for trial was sent to Fairey at both the California address as well as the North Myrtle Beach address listed in the reinstated bond. *Id.* at 100, 646 S.E.2d at 449. Addressing Fairey's argument that the subpoena should have been sent to Florida, the Court of Appeals stated,

> [T]he record indicates that Fairey's permanent address for service of notice was his California address, whereas the Florida address was only a "temporary address" used by Fairey during a period in 2003.

On July 23, 2002. when the court granted Fairey's counsel's motion to withdraw, the court warned Fairey that he had "the burden of keeping the court informed as to where notices, pleadings and other papers may be served." At that time it was noted that service of notice would be sent to Fairey at his home address in Sarasota, Florida. However, in the August 22 letter Fairey informed the solicitor of a change of address, listing his California address. And again, in the September 8 letter Fairey informed the court and solicitor that the California address was the correct address to send all correspondence.

Fairey never sent a letter to the court or solicitor to inform them of a change of address from the California address to the Florida address as he did in his August 22 and September 8 letters. Thus, the last official,

permanent address provided to the court and solicitor by Fairey was his California address. Merely because Fairey listed a "temporary address" on his motion to quash and motion to dismiss over a year prior to his trial does not notify the court and solicitor of a change of address so as to direct where all notices, pleadings and other papers may be served. Therefore, notice of Fairey's trial was properly sent to California, and as such, Fairey was placed on notice of his right to be present at his July 2004 trial.

*Id.*at l01,646 S.E.2dat449.

The Court agrees with the Magistrate Judge's assessment of Ground One of the § 2254 petition. As the Supreme Court stated in *Faretta v. California*, 422 U.S. 806 (1975),

> Th[e] Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.

Faretta, 422 U.S. at 819 n.l5; see also *United States v. Rolle*, 204 F.3d 133, 136 (4th Cir. 2000). The accused's right to be present at his or her trial, however, is a right that can be waived. *United States v. Camacho*, 955 F.2d 950, 953 (4th Cir. 1992) ("A

defendant may waive his constitutional right to be present at his own trial." (citing *Taylor v. United States,* 414 U.S. 17 (1973))); *United States v.Peterson*, 524 F.2d 167, 183-84 (4th Cir. 1975); see also *State v. Patterson*, 367 S.C. 219, 229, 625 S.E.2d 239, 244 (Ct. App. 2006) (noting that Rule 16 of the South Carolina Rules of Criminal Procedure permitted a waiver of the right to be present in certain circumstances).

In addressing Fairey's argument on appeal, the South Carolina Court of Appeals concluded that notice of Fairey's trial was properly sent to California

and that Fairey was put on notice that he would be tried in his absence if he did not appear for trial. *Fairey*, 374 S.C. at 101-03, 646 S.E.2d at 449-50. This determination was not contrary to or an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States, nor has Fairey shown the state court's determination of the facts was unreasonable in light of the evidence presented in state court. Accordingly, Fairey is not entitled to relief pursuant to Ground One of his § 2254 petition.

In Section Three of his Objections, Petitioner asserts that the state court "at no time made any attempt to warn ... [him] of the dangers of self-representation despite numerous opportunities, both written and oral, to do so." (Objections at 9-10.) Petitioner asserts "the warnings were never 'rigorously conveyed'" as required by *lowa v. Tovar*, 541 U.S. 77 (2004),

As Magistrate Judge Rogers noted, although the Sixth Amendment guarantees a right to counsel, that right can be waived. See *Faretta*, 422 U.S. at 836 ("In forcing *Faretta* ... to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense."). The South Carolina Court of Appeals upheld the lower court's determination that Fairey waived his right to counsel. In addressing Fairey's arguments, the South Carolina Court of Appeals noted that the bond sheet signed by Fairey contained a section entitled "ACKNOWLEDGMENT BY DEFENDANT" stating, "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the

court, the trial will proceed in my absence." *Fairey*, 374 S.C. at 102,646 S,E.2d at 449-50, The court also noted that Fairey, by his conduct, had waived his right to counsel:

> From the date the court granted Weldon's motion to be relieved, Fairey was aware of his duties and obligation as a pro se litigant and was alternatively instructed to hire counsel. Fairey failed to hire another attorney and proceeded to represent himself. Fairey was aware of his obligations and seemed knowledgeable about the legal system, as he maintained contact with the court and solicitor, made two requests to produce to the solicitor and filed various pro se motions. Further, his statements and conduct during proceedings reflected a familiarity with the workings of the legal system and the options legally available to him. Based on Fairey's actions, we find Fairey engaged in deliberate and dilatory conduct sufficient to waive his right to counsel.

Id. at 105-06. 646 S.E.2d at 451-52.

Although Petitioner asserts *Tovar* entitles him to relief on his § 2254 petition, this Court disagrees. Tovar concerned "the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation." *Tovar*, 541 U.S. at 81.

The question presented was as follows:

> Beyond affording the defendant an opportunity to consult with counsel prior to entry of a plea and to be assisted by counsel at the plea hearing, must the court, specifically: (I) advise the defendant that waiving the assistance of counsel in deciding whether to plead guilty entails the risk that a viable defense will be overlooked; and (2) admonish the defendant that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty?

Id. The Court held that "neither warning is mandated by the Sixth Amendment." *Id.* The Court stated, "The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* Nothing in *Tovar* warrants the relief demanded by Petitioner.

The Court has carefully reviewed the entire record, the R&R, and Petitioner's objections. The state court's decision was not contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States, nor has Petitioner shown that the state court's determination of the facts was unreasonable in light of the evidence presented in

state court. See 28 U.S.C. § 2254. Accordingly, none of Petitioner's objections have merit.

CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that Respondent's Motion for Summary Judgment is **GRANTED**. It is further **ORDERED** that all other pending motions are deemed moot.

AND IT IS SO ORDERED.

/s/ Richard M. Gergel

The Honorable Richard Mark Gergel

United States District Judge

Charleston, South Carolina

September 13, 2010

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this Order within 30 days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Civil Action No.: 4:09-cv-1610-SB-TER

WILLIAM SMOAK FAIREY, JR.,

Petitioner,

-vs-

SECRETARY, FLORIDA DEPT OF CORRECTIONS, and ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner currently resides in Sarasota, Florida and is serving a four year term of probation as a result of a criminal conviction in the Court of General Sessions, Horry County, South Carolina.

Petitioner, appearing pro se, filed his Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [1] on March 11, 2009, in the Middle District of Florida. The action was transferred to this Court on June 18, 2009. Respondents filed a Motion for Summary Judgment (Document # 21) on September 30,2009, along with a Return and supporting Memorandum. The undersigned issued an order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the motion for summary judgment procedure and the possible consequences if he failed to file a response. Petitioner filed a Response (Document # 26) in opposition to the Motion for Summary Judgment on November 4, 2009. On May 5, 2010, Petitioner filed a Motion to Stay State Court Proceedings (Document # 27) pursuant to 28 U.S.C. § 2251(a)(l) and, later, a Motion to Expedite (Document # 28) the Motion to Stay State Court Proceedings.

II. PROCEDURAL HISTORY

The procedural history as set out by the respondent has not been seriously disputed by the petitioner. Therefore, the undisputed procedural history as stated by the respondent is set forth herein.

[1]This habeas corpus case was automatically referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(l)(B) and Local Rule 73.02, DSC. Because this is a dispositive motion, this report and recommendation is entered for review by the district judge.

On January 26, 1998, Petitioner was served with an arrest warrant for obtaining goods and monies under false pretenses. R. 149. The warrant was dismissed on July 23,1998. R. 155. On June 23, 2001, Petitioner was indicted by a grand jury for the same charge of obtaining goods and monies under false pretenses. R. 191. Petitioner was represented by Richard Weldon.

On July 23, 2002, the trial judge granted Weldon's motion to withdraw as counsel.

Petitioner was tried in his absence and without counsel on July 21, 2004 before the Honorable John L. Breeden, Jr. and a jury. R. 21-95. He was found guilty and his sentence was sealed. R. 95, 190.

Subsequently, Petitioner retained new counsel, Gregory McCollum, Esquire, and moved to vacate his sentence and for a new trial. R. 106. On October 21,2004, the Petitioner appeared before Judge Breeden, who denied his motion for a new trial, but reconsidered his original sentence of 8 years, suspended to 5 years and restitution. Judge Breeden sentenced the Petitioner to 8 years, suspended to 4 years and 4 years probation and restitution of $25,000 to the victim. R. 147.

Petitioner appealed his conviction and sentence. On appeal, he was represented by Eleanor Duffy Cleary, Esquire, of the S.C. Commission on Indigent Defense and C. Bradley Hutto, Esquire. On October 18, 2006, a Final Brief of Appellant was filed in the South Carolina Court of Appeals in which Petitioner asserted the following issues:

> I. The trial court erred in holding appellant's trial in his absence and the absence of an attorney to represent him where the state failed to show that he (1) received notice of the right to be present and (2) warned the trial would proceed in his absence.
>
> II.The trial court erred in finding that appellant knowingly and intelligently waived his right to counsel where the record showed that he was never warned of the dangers of self-representation.
>
> III. The trial court erred in refusing to grant appellant's request for documents relating to the grand jury to prepare for his defense. State v. Fairey, Final Brief of Appellant, p. 3.

The Respondent, represented by Assistant Attorney General N. Mark Rapoport made their Final Brief of Respondent on September 6, 2006. On April 16, 2007, the South Carolina Court of Appeals entered its opinion affirming the conviction, State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (S.C. Ct. App. April 16, 2007).

Petitioner made a Petition for Rehearing on May 1, 2007. On June 28, 2007, the Court of Appeals issued its Order denying rehearing. State v. Fairey, Order Denying Petition for Rehearing, (S.C. Ct. App. June 28, 2007).

On August 28, 2007, the Petitioner filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. In this petition, Petitioner asserted two issues:

> I. Did the Court of Appeals err in holding the petitioner received notice of the right to be present and that his trial would proceed in his absence where the state failed to send notice to the last address provided by petitioner and he was not provided notice the trial would proceed in his absence?
>
> II. Did the Court of Appeals err in holding that Petitioner knowingly and intelligently waived the right to counsel where the record showed that he was never warned of the dangers of self-representation and where petitioner did not engage in dilatory conduct warranting a finding of waiver of counsel by conduct?

State v. Fairey, Petition for Writ of Certiorari, S.C. S.Ct., p. 3. Respondent made a Return to the petition on October 27,2007. On June 26,2008, the South Carolina Supreme Court entered its Order that the petition for writ of certiorari was denied. Order, June 26, 2008. On June 27, 2008, the remittitur letter was sent from the South Carolina Court of Appeals.

III. GROUNDS FOR RELIEF[2]

Petitioner raises the following grounds for relief in his pro se Petition for Writ of Habeas Corpus:

[2]Petitioner asserted three grounds for relief in his Petition but later moved to amend the Petition to remove the third ground, ineffective assistance of appellate counsel, because the ground has not been exhausted. The court has entered a separate order herewith granting Petitioner's Motion to Amend (Document # 25).

GROUND ONE: Right to Be Present at Trial, Amendment VI, Constitution of the United States.

SUPPORTING FACTS: I was never given notice of trial. The Court and the State sent numerous documents and orders to me at my home in Florida, but for reasons unknown, failed to send the most important document, the notice of trial, to me. The court had issued an Order in April 2003 stating that I "was to keep the Court and the State informed of any changes in his address." This order was mailed to me at 5629 Boulder Blvd, Sarasota, Florida. I was arrested for failure to appear, on October 4, 2004 at the same address, having never moved, since the date of the Order.

The State claimed that they could not find me for trial even though numerous documents and orders had been sent and returned to my home in Florida.

I was not allowed to confront witnesses against me. I was not present for voir dire, opening statements, examination, cross-examination, closing arguments, jury instructions; none of the proceedings.

The State also admitted at trial that they did not send a Notice of Trial to my home in Florida.

GROUND TWO: Right to Counsel, Amendment VI and XIV, Constitution of the United States.

SUPPORTING FACTS: My original attorney

requested to be relieved as counsel in June 2002. In his motion, he stated that we "disagreed on trial strategy" and that he "had not been paid for his services." I never received a bill for service from him and have not received one as of the date of this petition. He did not warn me of the dangers of self-representation. I proceeded pro se. Motions were made and hearings were held from 2002 through 2003. At no time did the court warn . I was tried and convicted without counsel.

IV. SUMMARY JUDGMENT

The federal court is charged with liberally construing the complaints filed by pro se litigants, to allow them to fully develop potentially meritorious cases. See Cruz v. Beto, 405 U.S. 319 (1972); Haines v. Kemer, 404 U.S. 519 (1972). The court's function, however, is not to decide issues of fact, but to decide whether there is an issue of fact to be tried. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, Weller v. Dep't of Social Servs., 901 F.2d 387 (4th Cir. 1990), nor can the court assume the existence of a genuine issue of material fact where none exists. If none can be shown, the motion should be granted. Fed. R. Civ. P. 56(c).

The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), FRCP; Celotex Corp. v.

Catrett. 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp.. 12 F.3d 1310, 1316 (4th Cir. 1993).

Rule 56(e) provides, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial." See also Celotex, 477 U.S. at 324 (Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves). To raise a genuine issue of material fact, a party may not rest upon the mere allegations or denials of his pleadings. Rather, the party must present evidence supporting his or her position through "depositions, answers to interrogatories, and admissions on file, together with ... affidavits, if any." Id.at 322. See also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994); Orsi v. Kickwood. 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

V. STANDARD OF REVIEW

Petitioner brings his claims pursuant to 28 U.S.C. § 2254(d), as amended. Lindh v. Murphy,117 S. Ct. 2059 (1997); Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998). That statute reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an

> unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

To a large extent, the amendment of § 2254 shifts the focus of habeas review to the state court application of Supreme Court law. See O'Brienv. DuBois, 145 F.3d 16 (1st Cir. 1998) ("the AEDPA amendments to section 2254 exalt the role that a state court's decision plays in a habeas proceeding by specifically directing the habeas court to make the state court decision the cynosure of federal review."). Further, the facts determined by the state court to which this standard is applied are presumed to be correct unless rebutted by the Petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(l).

The United States Supreme Court has addressed procedure under § 2254(d). See Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000). In considering a state court's interpretation of federal law, this court must separately analyze the "contrary to" and "unreasonable application" phrases of § 2254(d)(1). Ultimately, a federal habeas court must determine whether "the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. As "a determination of a factual issue made by a State court shall be presumed to be correct," a Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(l). With respect to reviewing the state court's application of federal law, " '[a] federal habeas court may grant the writ if the state court identifies the

correct governing principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' " Humphries v. Ozmint, 397 F.3d 206, 216 (4th Cir.2005) (quoting Williams v. Taylor, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Further, "an 'unreasonable application of federal law is different from an incorrect application of federal law,' because an incorrect application of federal law is not, in all instances, objectively unreasonable."]d_ "Thus, to grant [a] habeas petition, [the court] must conclude that the state court's adjudication of his claims was not only incorrect, but that it was objectively unreasonable." McHone v. Polk, 392 F.3d 691,719 (4th Cir.2004).

VI. ANALYSIS

A. Ground One-Trial in Absentia

Petitioner argues that he was deprived of his right to be present at trial by holding the trial on his charge of obtaining goods and monies under false pretenses in his absence. He asserts that he was not given notice of the trial and he was not warned that the trial could proceed in his absence.

Based on the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment, a defendant has a constitutional "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." United States v. Rolle, 204 F.3d 133, 136 (4th Cir.2000) (quoting Faretta v. California, 422 U.S. 806,819 n. 15,95 S.Ct. 2525,45 L.Ed.2d 562 (1975)). However, the right to be present at one's own

trial is waivable under both the Federal and State Constitutions. See Taylor v. United States, 414 U.S. 17, 19-20, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973); Illinois v. Alien, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Snvder v. Massachusetts, 291 U.S. 97,106,54 S.Ct. 330,78 L.Ed. 674 (1934) (Cardozo, J.), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).; Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912); State v. Bell, 293 S.C. 391, 360 S.E.2d 706, 711 (1987); Ellis v. State, 267 S.C. 257, 227 S.E.2d 304, 305 (1976). A knowing and voluntary waiver of the right to be present at trial is

sufficient for a constitutionally valid trial in absentia. Taylor, 414 U.S. at 19-20. Rule 16 of the South Carolina Rules of Criminal Procedure provides:

> Except in cases wherein capital punishment is a permissible sentence, a person indicted for misdemeanors and/or felonies may voluntarily waive his right to be present and may be tried in his absence upon a finding by the court that such person has received notice of his right to be present and that a warning was given that the trial would proceed in his absence upon failure to attend the court. Rule 16, SCRCrimP; see State v. Jackson, 288 S.C. 94, 341 S.E.2d375,375 (1986) (holding before an accused can be tried in absentia the court must "make findings of fact regarding (1) whether the appellant had received notice of her right to be present, and (2) whether the appellant had been warned that the trial

would proceed in her absence upon a failure to attend court").

The record reveals that Petitioner was served with an arrest warrant for obtaining goods by false pretenses, on January 16, 1998. R. 149. Petitioner then signed a bond sheet, wherein under the heading "ACKNOWLEDGMENT BY DEFENDANT," the bond sheet indicates that he understood the trial would proceed in his absence if he failed to appear. It states: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." R. 150-51. Petitioner was represented by counsel. The State subsequently dismissed the warrant on July 23, 1998. R. 155. Petitioner was later directly indicted for the same crime, on June 26, 2001. R. 191-92.

On July 23, 2002, the Court granted defense counsel's motion to withdraw, and ordered that "Fairey has the burden of keeping the court informed as to where notices, pleadings, and other papers may be served." The Court noted that service of notice would be sent to Petitioner at his address in Sarasota, Florida. The Court further ordered that it was Petitioner's obligation to retain counsel, and to prepare for hearings and trial. R. 165.

On September 8, 2002, Petitioner informed the Court that all future correspondence should be sent to him at his address at "31545 Vaca Drive," in "Castaic, California." R. 152-53. Petitioner also informed the Solicitor of the change of address in a letter dated August 22, 2002. R. 154. In early March, 2003,

Petitioner filed a Motion to Quash Indictment and listed both the California address and a Sarasota, Florida address, which he designated as his "temporary address." R. 156-57. In an Affidavit accompanying the Motion to Quash Indictment, Petitioner averred, "[b]eginning February 23,1 have been living temporarily in Sarasota Florida, awaiting my next assignment." R. 159.

Petitioner's previous bond was reinstated in the March 31, 2003, written Order, which also denied his motion to quash the indictment. R. 161. The Order notified Petitioner: "[t]he defendant is required to appear at the call of his case by the State and shall keep the Court and the State advised of any changes in his address."

The State subsequently subpoenaed Petitioner to appear in court on July 9 through July 23, 2004. R. 188-89. Notice was sent to Petitioner at both the California address he forwarded to the solicitor's office in the August 22 and September 8, 2002, letters, and the North Myrtle Beach address provided in the reinstated bond. R. 26-28. Petitioner failed to appear in court when his name was called. R. 29-30. The trial judge made the determination on the record that: (1) the State made an adequate showing that Petitioner was placed on notice of the date and time of his trial; (2) failure of Petitioner to appear was willful; and (3) Petitioner had "notice that he had a right to be present and that if he wasn't present he would be tried in his absence."

The Court of Appeals affirmed Petitioner's conviction and sentence. The court first found that Petitioner

was properly noticed of the trial:

> "Notice of the term of court for which the trial is set constitutes sufficient notice to enable a criminal defendant to make an effective waiver of his right to bepresent." City of Aiken v. Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct.App.2006). However, if the record does not reveal that the defendant was afforded notice of his trial, the resulting conviction in absentia cannot stand. State v. Jackson. 290 S.C. 435, 436, 351 S.E.2d 167, 167 (1986).
>
> In the present case, the solicitor subpoenaed Fairey to appear in court from July 9 through July 23, 2004. Notice was sent to Fairey at both the California address he forwarded to the solicitor's office in the August 22 and September 8 letters and the North Myrtle Beach address provided in the reinstated bond. Fairey failed to appear in court when his name was called. The judge heard the solicitor on notice to Fairey and made a determination on the record that: (1) the State made an adequate showing that the defendant was placed on notice of the date and time of his trial; (2) failure of the defendant to appear was willful; and (3) the defendant had "notice that he had a right to be present and that if he wasn't present he would be tried in his absence."
>
> Fairey argues that since the solicitor "inexplicably" did not send notice of his trial to Florida, but rather to California, Fairey did not receive notice of his right to be present.

Fairey further bolsters his argument claiming that because the solicitor "had been sending legal mail to [Fairey] in Florida since the March 2003 hearing," the solicitor should have sent notice of his trial to his Florida address. However, the record indicates that Fairey's permanent address for service of notice was his California address, whereas the Florida address was only a "temporary address" used by Fairey during a period in 2003.
On July 23, 2002, when the court granted Fairey's counsel's motion to withdraw, the court warned Fairey that he had "the burden of keeping the court informed as to where notices, pleadings and other papers may be served." At that time it was noted that service of notice would be sent to Fairey at his home address in Sarasota, Florida. However, in the August 22 letter Fairey informed the solicitor of a change of address, listing his California address. And again, in the September 8 letter Fairey informed the court and solicitor that the California address was the correct address to send all correspondence.

Fairey never sent a letter to the court or solicitor to inform them of a change of address from the California address to the Florida address as he did in his August 22 and September 8 letters. Thus, the last official, permanent address provided to the court and solicitor by Fairey was his California address. Merely because Fairey listed a "temporary address" on his motion to quash and motion to dismiss over a year prior to his trial does not

> notify the court and solicitor of a change of address so as to direct where all notices, pleadings and other papers may be served. Therefore, notice of Fairey's trial was properly sent to California, and as such, Fairey was placed on notice of his right to be present at his July 2004 trial.

State v. Fairey, 374 S.C. 92, 100-01, 646 S.E.2d 445, 448-49.

The court also found that Petitioner was on notice that he would be tried in his absence if he did not appear when called for trial:

> Further, Fairey contends he was not warned his trial would proceed in his absence. A bond form that provides notice that a defendant can be tried in absentia may serve as the requisite notice. City of Aiken v. Koontz, 368 S.C. 542, 548, 629 S.E.2d 686, 689-90 (2006); State v. Goode, 299 S.C. 479, 385 S.E.2d 844 (1989).
>
> In Aiken v. Koontz the defendant was arrested for driving with a suspended license, and when he posted bond the day after his arrest, he was provided an order specifying methods and conditions of release. 368 S.C. at 547-48,629 S.E.2d at 689.
>
> The defendant also signed a form entitled, "Acknowledgement by Defendant," which read "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." Id, at

548,629 S.E.2d at 689. Thus, this court held that Koontz was warned a failure to appear would result in a trial in his absence and that he understood the warning and obligation by signing the "Acknowledgement." Id.

In January 1998, Fairey signed a bond sheet wherein under the heading, "ACKNOWLEDGEMENT BY DEFENDANT," it reads: "I understand and have been informed that I have a right and obligation to be present at trial and should I fail to attend the court, the trial will proceed in my absence." As in Koontz, Fairey's signature on the "Acknowledgement" served as a warning that he would be tried in his absence, and therefore, Fairey understood such warning.

Relying on State v. Goode, Fairey contends because the indictment[3], for which the bond was signed, was dismissed, it was thereby extinguished and could not serve as notice to appear. In State v. Goode the defendant was arrested for breaking into a motor vehicle and released on bond. 299 S.C. at 480, 385 S.E.2d at 845. He signed a bond form that provided him notice that his trial would proceed in his absence if he failed to appear. Id_ He failed to appear and a bench warrant was issued. He was subsequently indicted for both breaking into a motor vehicle and grand larceny and

[3]This court notes that the original charging document was not an indictment but a warrant.

> was tried in his absence for both charges. Id_ at 481, 385 S.E.2d at 845. The Supreme Court held that Goode did not have adequate notice that he would be tried for the newly indicted crime, grand larceny, in his absence since the crime was not listed on the bond signed by Goode. Id, at 842-43, 385 S.E.2d at 846. However, because Goode signed the bond form related to the charge of breaking into a vehicle the court held that he had notice he would be tried for that crime in his absence.

Id_ at 842, 385 S.E.2d at 846.

> While Fairey's original indictment[4] was dismissed, he was directly indicted for the same crime on June 26, 2001, and the 1998 bond was reinstated on July 23, 2002 by court order. Therefore, the 1998 bond was in effect and thereby served as notice to Fairey that he would be tried in his absence.

Id, at 101-03, 646 S.E.2d at 449-50.

In his Response to the Motion for Summary Judgment, Petitioner argues that he received court notices and orders at the Florida address during 2003. The court of appeals addresses this argument and states that Petitioner never sent a letter to the court or the solicitor to inform them of a change of address from the California address to the Florida address as his did in his August 22, 2002, and September 8, 2002, letters to the court and the

[4] Again, the original charging document was a warrant, not an indictment.

solicitor. The court of appeals found that "merely because Fairey listed a 'temporary' address on his motion to quash and motion to dismiss over a year prior to his trial does not notify the court and solicitor of a change of address so as to direct where all notices, pleadings, and other papers may be served." Id at 101, 646 S.E.2d at 449. Petitioner argues that the state court's findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. He points to Maryland v. Craig, 497 U.S. 836 (1990), in which the Supreme Court addresses a Maryland statute that, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. Although Craig addresses the Confrontation Clause of the Sixth Amendment, it does not specifically address the right to be present at trial. The Court's holding, "that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation," Craig, 497 U.S. at 857, is not relevant to the issues present in this case. Thus, the state court's findings in the present case are not contrary to, nor are they an unreasonable

application of, the ruling in Craig. The factual determinations made by the state court, that Petitioner received notice of the trial and was warned that the trial would go forward in his absence if he failed to appear, are presumed to be correct. Petitioner has failed to show by clear and convincing evidence that the court's determination of facts was unreasonable in light of the evidence presented. Petitioner also fails to show that the state court findings were contrary to or resulted in an unreasonable application of the clearly established federal law that a defendant can be tried in his absence if he knowingly and intelligently waives his right to be present at trial. Thus, this court cannot not find in favor of Petitioner on Ground One and it is recommended that summary judgment be granted on this issue.

B. Ground Two-Right to Counsel

Petitioner next argues that he was denied his right to counsel when his retained counsel was relieved and Petitioner was never warned, by either counsel or the trial court, of the dangers of self-representation. The Sixth Amendment guarantees a right to counsel and to competent representation by counsel. E.g., McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Gideon v.Wainwright, 372 U.S. 335, 83 S.Ct. 792,9 L.Ed.2d 799 (1963). Concurrent with the right to the assistance of counsel is the right to self-representation after a knowing and intelligent waiver of the right to counsel. E.g., Faretta v. California. 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In Faretta, the Court explained, "in order to represent himself, the accused must knowingly

and intelligently forgo those relinquished benefits [obtained from the right to counsel]." Faretta, 422 U.S. at 835 (internal quotation marks omitted). In addition, "[the defendant] should be made aware of the dangers and disadvantages of self representation, so the record will establish that he knows what he is doing and his choice is made with eyes open." Id_ (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942)). These warnings "of the pitfalls of proceeding to trial without counsel... must be rigorously conveyed." Iowa v. Tovar, 541 U.S. 77, 88-89, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004).

The record reveals that Petitioner retained Richard Weldon as private counsel in January of 1998 to represent him in the criminal charges at issue here. R. 163. It appears that, at some point in his representation, Petitioner had a disagreement with Weldon as to fundamental representation and trial strategies, and he failed to pay Weldon for his services even after a "reasonable warning" that Weldon would withdraw as counsel. R. 163. On June 17, 2002, Weldon filed a Motion to be Relieved as Counsel. R. 162. Weldon also filed an affidavit along with the Motion to be Relieved, in which he averred, among other things, that Petitioner wished to proceed pro se. R. 163. Petitioner signed the affidavit, indicating his consent to Weldon being relieved as counsel. R. 164. The trial court entered an Order on July 23, 2002, relieving Weldon as counsel and notifying Petitioner that he has (1) the duty to keep the court informed of the proper address for service of notices, pleadings and other papers (2) the obligation to hire other counsel if he elects to do so,

and (3) the obligation to prepare for hearings and trial. R. 165. Petitioner maintained contact with the court and the solicitor by notifying them of his change of address information, making discovery requests and filing a Motion to Quash Indictment and Motion to Dismiss.

Subsequent to his conviction, Petitioner retained new counsel and filed a motion to vacate sentence and for a new trial. In denying the motion for a new trial, the trial judge affirmatively found:

> [Fairey] had been acting as his attorney for some time, making erudite motions and other things. It's not like we had some ignorant person here that didn't know anything, we had a very intelligent person here acting as his own attorney. And asking that notices be sent to him and not his attorney. To be sent to him. He knew he was acting as his attorney. And I find that he adequately and legally waived his right to counsel and waived his right to be present at trial. And I deny your motion.

R.133.

The court of appeals affirmed the trial court's finding that Petitioner waived his right to counsel:

> Fairey also argues the trial judge erred in denying his motion for a new trial because he was denied the right to counsel. We disagree.
>
> "The Sixth Amendment guarantees criminal defendants a right to counsel." State v. Gill. 355 S.C. 234, 243, 584 S.E.2d 432, 437

(Ct.App.2003) (citations omitted). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, this right may be waived. State v. Gill, 355 S.C. at 243, 584 S.E.2d at 437. This court has explained that "a defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255,262, 584 S.E.2d 131, 134 (Ct.App.2003).

In this case we confine our analysis to the question of whether Fairey waived this right by his conduct. A defendant may waive his right to counsel through his conduct. Id at 263, 584 S.E.2d at 135 (citations omitted). and dilatory conduct on behalf of a defendant can suffice to waive the right to counsel. State v. Pride, 372 S.C. 443, 641 S.E.2d 921 (2007) (Shearouse Adv. Sh. No. 7 at 69); see also State v. Jacobs, 271 S.C. 126, 128, 245 S.E.2d 606, 608 (1978) (holding a waiver of the right to counsel can be inferred from a defendant's actions).

In support of his argument, Fairey relies on our decision in Thompson. However, neither Thompson nor our more recent case of State v. Roberson, 371 S.C. 334, 638 S.E.2d 93 (Ct.App.2006) requires reversal of Fairey's conviction and sentence. Rather, we are guided by this court's recent decision in State v. Pride.

As discussed in Pride, there is a crucial difference between the facts in Pride's and Fairey's cases and those of Thompson and Roberson.

In Pride, the defendant was indicted for possession of crack cocaine with intent to distribute (PWID) and PWID within proximity of a school. On the first day of the term of court for which Pride was originally scheduled to go to trial, a public defender, William All, was appointed to represent Pride. On that same day Pride was also represented by a private attorney, Fletcher Smith. Smith subsequently withdrew as counsel and All was appointed. Pride failed to appear for two scheduled appointments with All. All sent letters to Pride indicating the date of trial and that he could not adequately represent Pride without speaking to him. Pride scheduled another appointment, which he again failed to for and offered no explanation. Eventually when Pride and All met, Pride indicated Smith was again representing him. However, when All contacted Smith's office, the administrative assistant indicated that Smith did not represent Pride. On the morning of the trial Pride did not appear, and Smith's office informed the solicitor that Smith did not represent Pride. The solicitor moved to have Pride tried in absentia, and All was relieved as counsel. The judge specifically found Pride waived his right to counsel by conduct and Pride was then tried and convicted for the drug offenses. When Pride eventually appeared before the judge for sentencing, All

appeared at the hearing and indicated he could "perfect an appeal for [Pride] if he wants to raise the issue of whether or not he shouldn't have been tried in his absence." The judge imposed his sentencing.

On appeal, Pride argued the circuit court erred in relieving All as his counsel and proceeding with the trial in his absence, contending that his conduct was insufficient to establish that he waived his right to counsel. This court acknowledged the significance of Thompson and Roberson as it applied to Pride's case but found a "crucial difference" between the facts in his case and those of Thompson and Roberson. The defendants in both Thompson and Roberson were not represented by counsel until the sentencing hearing. This court concluded if it were to find the defendants in Thompson and Roberson waived their right to counsel it would be based solely on their failure to appear for trial. On the other hand. Pride not only failed to appear for trial, but he was afforded a public defender whom he failed to cooperate with prior to his trial. He was also given additional time to prepare for the trial, failed to appear for his scheduled appointments with the public defender and failed to offer any assistance in preparation for his defense. Further, he gave assurances to the public defender, up to the day before his trial, that a private attorney would represent him, yet was aware that this private attorney was relieved as counsel. Based on Pride's actions, this court found that it was not only

Pride's failure to appear for trial but also "Pride's deliberate and dilatory conduct [which were] sufficient to waive his right to counsel." State v. Pride. 372 S.C. 443, 641 S.E.2d 921 (2007) (Shearouse Adv. Sh. No. 7 at 69).

In this case, just as in Pride, Fairey was originally represented by counsel, and it was because of his own conduct and failure to cooperate with his counsel that he failed to be represented at the time of his trial. Fairey hired private counsel, Weldon, and had ample opportunities to meet with him and discuss the case. At some point in his representation, Fairey had a disagreement with Weldon as to the fundamental representation and trial strategies and failed to pay Weldon for his services even after a "reasonable warning" that Weldon would withdraw. Finally, Fairey desired to represent himself pro se and signed a consent form agreeing to relieve Weldon.

From the date the court granted Weldon's motion to be relieved, Fairey was aware of his duties and obligation as a pro se litigant and was alternatively instructed to hire counsel. Fairey failed to hire another attorney and proceeded to represent himself. Fairey was aware of his obligations and seemed knowledgeable about the legal system, as he maintained contact with the court and solicitor, made two requests to produce to the solicitor and filed various pro se motions. Further, his statements and conduct during proceedings reflected a familiarity with the

workings of the legal system and the options legally available to him. The circuit court found:

> [Fairey] had been acting as his attorney for some time, making erudite motions and other things. It's not like we had some ignorant person here that didn't know anything, we had a very intelligent person here acting as his own attorney. And asking that notices be sent to him and not his attorney. To be sent to him. He knew he was acting as his attorney.

Yet, during that period, Fairey also engaged in delay tactics. He moved throughout the country, making service and notice difficult for the solicitor. In the instances the solicitor was able to track Fairey's whereabouts and serve notice, Fairey made motions to continue, based on the inconvenience of appearing in South Carolina on the noticed dates. The solicitor agreed to Fairey's motions and continuances were granted. When the solicitor sent Fairey a certified copy of his indictment, a consent order for a personal recognizance bond and an acknowledgement for the receipt of the indictment, Fairey failed to sign and return any of the items. Fairey's tactics further delayed the case and required the aforementioned items be addressed at a later hearing in March 2003. Based on Fairey's actions, we find Fairey engaged in deliberate

and dilatory conduct sufficient to waive his right to counsel.

State v. Fairey. 374 S.C. at 103-06, 646 S.E.2d at 450-52.[5]

Petitioner appears to argue that the court's finding that he waived his right to counsel through deliberate and dilatory conduct is contrary to, or involves an unreasonable application of Faretta, in which the Supreme Court of the United States found that defendants proceeding pro se must be made aware of the dangers and disadvantages of self-representation. The undersigned disagrees. The Fourth Circuit has declined to define a precise procedure or litany a trial court must undertake in determining whether waiver of counsel is appropriate. See U.S. v. Singleton, 107 F.3d 1091, 1097 -98 (4th Cir. 1997). Rather, it agrees with the majority of circuits that "the trial judge is merely required to determine the sufficiency of the waiver from the record as a whole rather than from a formalistic, deliberate, and searching inquiry." United States v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988). The importance of informing the defendant of the dangers and disadvantages of self-representation is to insure that the defendant "knows what he is doing and his choice is made with eyes wide open." Faretta, 422 U.S. at 835 (citing

[5]After it's reliance on Pride in Fairey, the court of appeals subsequently withdrew its opinion in Pride.

Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst. 304 U.S. 458, 464 (1938).
The facts as determined by the trial court (and which Petitioner has failed to show by clear and convincing evidence to be unreasonable) reveal that Petitioner wished to proceed pro se and was aware of his obligations as a pro se litigant. In the order relieving Weldon as counsel, the court specifically informed Petitioner that he was responsible for notifying the court of his proper address for service of notices, pleadings, etc. and for preparing for hearings and trials. The trial court also found that Petitioner was familiar with the legal system and evidenced an understanding of the process by filing motions, arguing those motions in open court, and asking that notices be sent to him. The state court found that Petitioner's conduct evidenced a knowing and intelligent decision to proceed without counsel.

Although the trial court did not specifically warn Petitioner of the dangers of self-representation in a formalistic manner, its finding that the his waiver of counsel was appropriate did not result in an unreasonable determination of facts in light of the evidence presented and is not contrary to, nor does it involve an objectively unreasonable application of, clearly established federal law. An unreasonable application of federal law is different from an incorrect application of federal law. Demonstrating

that a state court's decision is unreasonable requires overcoming "a substantially higher threshold" than simply demonstrating error. Schriro v. Landigran, 550 U.S. 465, 473, 127 S.Ct, 1933, 167 L.Ed.2d 836 (2007) (citing Williams v. Tavlor, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Based upon this court's limited scope of review under § 2254, Petitioner's second ground for habeas relief is without merit. Thus, it is recommended that summary judgment be granted on this issue.

VIII. CONCLUSION

For the reasons set forth above, it is recommended that Respondents' Motion for Summary Judgment (Document # 21) be granted. It is further recommended that all other pending motions are moot.

s/Thomas E. Rogers, III

Thomas E. Rogers, III
United States Magistrate Judge

August 2, 2010
Florence, South Carolina

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