ALAN WILSON
ATTORNEY GENERAL

January 13, 2012

The Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: William Smoak Fairey, Jr. vs. Kenneth S. Tucker, Secretary, Florida Department of Corrections, et. al.
No. 11-7185

Dear Mr. Suter:

Enclosed for filing please find the original and ten (10) copies of Respondent's Brief in Opposition, along with a Certificate of Service, in the above case.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/arb

Enclosures

cc: William Smoak Fairey, Jr.
The Honorable J. Gregory Hembree, 15th Circuit Solicitor
Sandi Wofford, Victim Services

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No. 11-7185

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2011

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

Petitioner,

vs.

KENNETH S. TUCKER, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.

Respondent.

BRIEF IN OPPOSITION OF RESPONDENT ATTORNEY GENERAL, STATE OF SOUTH CAROLINA

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PETITIONER'S QUESTION PRESENTED

1. 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?

RESPONDENT ATTORNEY GENERAL, STATE OF SOUTH CAROLINA'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should consider Petitioner's factually unsustainable argument that the Fourth Circuit held him to a "higher standard" in considering whether to grant a certificate of appealability based on the District Court's failure to consider whether to grant or deny the certificate when the District Court did consider whether a certificate was appropriate, and denied a certificate, prior the Fourth Circuit's review and denial?

2. Whether this Court should consider Petitioner's argument that the Fourth Circuit erred in allowing the District Court's order granting summary judgment to Respondent to stand where the District Judge, applying appropriate AEDPA deference, found Petitioner failed to show an unreasonable application of federal law or an unreasonable determination of facts in the state's denial of relief on Petitioner's challenge to his trial in absentia as the record fully and fairly reflects the State effected proper notice to the address provided by Petitioner?

3. Whether this Court should consider Petitioner's argument that the Fourth Circuit erred in allowing the District Court's order granting summary judgment to Respondent to stand where the District Judge, applying appropriate AEDPA deference, found Petitioner failed to show an unreasonable application of federal law or an unreasonable determination of facts in the state's denial of relief on Petitioner's challenge to the state court's finding of a valid waiver of the right to counsel where the record fully and fairly supports Petitioner willingly dismissed his retained counsel two years before the case went to trial, knowledgeably participated pro se in pre-trial motions, and failed to retain other private counsel though he was instructed he had the right to do so?

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The decision of the United States Court of Appeals for the Fourth Circuit was not selected for publication but may be found at 441 Fed. Appx. 160, 2011 WL 3268162 (4th Cir. 2011), and is attached as Appendix "A." The District Court's Order denying habeas relief is not published but may be found at 2010 WL 3699992 (D.S.C.), and is attached as Appendix "B." The Report and Recommendation of the Magistrate Judge is not published, but may be found at 2010 WL 3699959 (D.S.C.), and is attached as Appendix "C." The South Carolina Court of Appeals' opinion denying relief is reported as *State v. Fairey*, 374 S.C. 92, 646 S.E.2d 445 (S.C.Ct. App. 2007), and attached as Appendix "D."

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals under 28 U.S.C. § 1254(1), Petitioner having asserted below and asserting now the deprivation of rights secured by the United States Constitution. (Petition, p. 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends this case involves the Sixth Amendment to the United States Constitution, which provides that "... the accused shall enjoy the right to be confronted with the witnesses against him...," and the Fourteenth Amendment, which provides in part, that "[n]o person shall be held to answer for a capitol, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law...." U.S. Const. amends. VI and XIV. (Petition, p. 2).

Respondent Attorney General, State of South Carolina, contends the following statutory provisions are also involved:

A. 28 U.S.C. § 2253(c), which provides in pertinent part that:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .

B. 28 U.S.C. § 2254(d), which provides:

> 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 a State court proceeding.

STATEMENT OF THE CASE

A. Procedural History.

Petitioner is presently on probation in Florida pursuant to his South Carolina conviction for obtaining goods and monies under false pretenses. Petitioner was tried in his absence and without counsel on July 21, 2004. The jury convicted as charged and his sentence was sealed until Petitioner was apprehended and brought to court on

October 21, 2004. Petitioner was then represented by counsel. The trial judge opened his sealed sentence which was originally set at eight years, suspended to five with restitution. Counsel moved for a new trial arguing lack of notice and lack of trial counsel, and also for reconsideration of the sentence. The trial judge denied the motion for a new trial finding Petitioner waived his right to be present, and also waived his right to counsel. The trial judge then reconsidered the sentence and imposed a sentence of eight years, suspended to four years with four years probation and restitution. Petitioner appealed.

Petitioner, represented by counsel, raised the following claims:

1. 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.

2. 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.

3. The trial court erred in refusing to grant appellant's request for documents to the grand jury to prepare for his defense.

On April 16, 2007, the South Carolina Court of Appeals entered a published opinion affirming the conviction. After the denial of a petition for rehearing, Petitioner, again represented by counsel, filed a petition for writ of certiorari in the Supreme Court of South Carolina and raised the following issues:

1. Did the Court of Appeals err in holding that petitioner received notice of his right to be present and 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?

The Supreme Court of South Carolina denied the Petition on June 26, 2008. Under state law, Petitioner could not raise the issues again in a state collateral process, thus, these issues were exhausted and ripe for presentation and consideration in a federal habeas action.

Petitioner filed a petition for writ of habeas corpus in the Middle District of Florida on March 11, 2009, challenging his South Carolina conviction. Petitioner raised the following grounds[1] for relief:

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

Ground two: Right to Counsel, Amendment VI and XIV, Constitution of the United States.

The action was transferred to the District of South Carolina on June 18, 2009. On September 30, 2009, the Respondent, Attorney General, State of South Carolina, made a return to the petition and moved for summary judgment. On August 2, 2010, the Magistrate issued a Report and Recommendation finding Petitioner failed to show an unreasonable application of law to facts supporting by the record, and recommended Respondent's motion for summary judgment be granted. On September 14, 2010, the

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[1] Petitioner raised a third ground, ineffective assistance of appellate counsel, which he later moved to withdraw. The Magistrate granted the motion to amend to withdraw the allegation prior to the Report and Recommendation. (Appendix C, Report and Recommendation, p. 4 n. 2).

District Court, over Petitioner's objections, agreed and granted Respondent's motion. Petitioner appealed.

On October 12, 2010, the Fourth Circuit entered an order remanding the matter to the District Court for a ruling on the certificate as required by Rule 11, Rules Governing Section 2254 Cases in the United States District Courts. On October 21, 2010, the District Court denied a certificate. Petitioner filed an informal opening brief on March 9, 2011. The Fourth Circuit issued an unpublished per curiam opinion on August 1, 2011, denying a certificate of appealability.

B. Statement of Facts.

The South Carolina Court of Appeals set out the basic facts supporting the conviction as follows:

> In June 1997, Fairey contracted with Scott Rudisill, a small business owner, to develop and install a computer system for Rudisil's business and personal records. On July 7, 1997, Fairey approached Rudisill for a $25,000 loan. Fairey told Rudisill that he was offered a job with the White House as a liaison to President Bill Clinton, but he had to overnight $25,000 to secure the position. Fairey explained that the money would be immediately refunded once he began his new position and promised to immediately return the money to Rudisill. Rudisill agreed to loan the money and had Fairey sign a promissory note for $25,000 with interest on unpaid principal, at a rate of ten percent. The note indicated all monies were to be paid on October 7, 1997. Before October 7, Rudisill called Fairey a couple times regarding the money; each time Fairey indicated that he would have no problems repaying the loan. However, Fairey did not repay Rudisill on October 7, and when Rudisill contacted Fairey, he said that he would deposit the money in Rudisill's account but never did.

State v. Fairey, 374 S.C. 92, 95-96, 646 S.E.2d 445, 446 (S.C.Ct.App. 2007).

The South Carolina Court of Appeals also set out the relevant facts for both

Petitioner's challenge to his warning and notice for a trial in absentia and his challenge to the waiver of his right counsel as follows:

> On January 26, 1998, Fairey was served with an arrest warrant for obtaining goods and monies under false pretenses. Following Fairey's arrest, Fairey signed a bond sheet, wherein under the heading, "Acknowledgment By Defendant," it indicated he understood a trial would proceed in his absence if he failed to appear. On July 23, 1998, notice was sent to Fairey's attorney, Richard Weldon, that the charge against Fairey had been dismissed.
>
> On June 23, 2001, Fairey was indicted by a grand jury for the same charge of obtaining goods and monies under false pretenses. In June 2002, Weldon made a motion to be relieved as counsel for Fairey. Weldon cited substantial disagreement with Fairey regarding trial strategy, Fairey's failure to pay Weldon for his services, and Fairey's desire to proceed *pro se* as reasons for withdrawal. Weldon additionally stated Fairey was given reasonable warning of Weldon's intent to withdraw if Fairey did not pay Weldon for his services. On July 23, 2002, the trial judge granted Weldon's motion to withdraw as counsel. The order stated, "[i]t appears to the court that there is just cause for granting the motion and that Doak Fairey consents to the requested withdrawal as signified by the signature of Doak Fairey on the attached consent form." Also in the order, Fairey was instructed that he needed to keep the court informed as to where papers should be served, had the obligation to retain counsel if he desired, and had the responsibility to prepare for trial.
>
> On August 22, 2002, Fairey informed the solicitor of a change of address:
>
> > 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.

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

On March 10, 2003, Fairey made a motion to quash the indictment. In his motion to quash, Fairey listed his addresses as:

31545 Vaca Drive	5629 Boulder Blvd
Castaic, CA 91384	Sarasota, FL 34233
941-284-5896	(temporary address)

The motion was signed, "Defendant pro se." (emphasis in original)....

A hearing on the motion to quash was held on March 24, 2003. Fairey appeared at the hearing without counsel and proceeded to represent himself. ... During the hearing Fairey made a motion to dismiss and afterward filed the motion to dismiss with the court, indicating Fairey as a *pro se* defendant and listing a Florida address.

On March 31, 2003, the judge denied Fairey's motion ... [and] also reinstated Fairey's previous bond. The order notified Fairey: "[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 court order was sent to Fairey at the temporary Florida address provided in the motion to quash.
>
> The solicitor's office subpoenaed Fairey to appear in the Conway Judicial Building from July 9 through 23, 2004. The subpoena, dated June 21, 2004, listed Fairey's California address and a Myrtle Beach address. The case was called on July 21, 2004, but Fairey did not appear. At the hearing, the administrative assistant for the solicitor's office testified the subpoena was sent to: (1) the California address because it was the last official address provided by Fairey in his August 22 and September 8 letters; and (2) the Myrtle Beach address because it was the address provided in Fairey's original bond form. After the solicitor presented evidence that Fairey received notice of the date and time of his trial, the court found that the solicitor made an adequate showing Fairey received notice and the trial proceeded in Fairey's absence.

Id, 646 S.E.2d at 446-48.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court should deny certiorari primarily because Petitioner's argument is factually unsustainable both in his procedural premise for the certificate of appealability issue and his argument in support of error in treatment of the individual grounds raised in the District Court. First, Petitioner incorrectly advises the Court that the District Court did not consider whether to grant a certificate of appealability. The District Court did consider, and subsequently denied, a certificate. Second, the state court gave a detailed factual basis, well supported by the record, to reject both Petitioner's challenge to his trial in absentia and his waiver of his right to counsel issues. Petitioner complained that the facts of record did not support he was properly noticed nor did the facts support a waiver of his right to counsel in the absence of specific warnings on the danger and disadvantages of self-representation. After a

detailed review of the record, both the Magistrate Judge and the District Court Judge, found Petitioner failed to show an unreasonable application of federal law or an unreasonable determination of facts. Further, the District Court Judge and the Fourth Circuit found a Certificate of Appealability was not warranted. The petition should be denied.

I.

Petitioner's assertion that the District Court failed to rule on whether he was entitled to a certificate of appealability is contradicted by the record. Thus, Petitioner's factual predicate for the vague argument that the Fourth Circuit, as a result of the District Court's failure to rule, held him to a "higher standard" on appeal is wholly without support.

Petitioner asserts in the petition for writ of certiorari:

> On October 6, 2010, Petitioner... 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 response to the Notice of Appeal's request, and in doing so, held Petitioner ... to a higher standard of conduct by denying the certificate.

(Petition, p. 5).

Petitioner's argument rests on a misrepresentation of fact and a misunderstanding of law.

The essential facts are these: The District Court actually did consider whether to grant a certificate, not due to the filing of the notice, but on remand from the Fourth

Circuit. There is no factual basis for a "default," and no possibility of concomitant harm. Further, Petitioner's argument appears to rely upon old rules not applicable to his case, directing district court action upon the filing of the notice of appeal. Further, Petitioner offers a theory of jurisdiction by default as a result of non-action on the notice that lacks any connection to precedent. For these reasons, which are discussed more fully in the following paragraphs, Petitioner's argument lacks merit.

Pursuant to revised Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, a district court is required to either issue or deny a certificate at the entry of the final order denying relief. Prior to the adoption of this rule, effective December 1, 2009, the district court ruling was prompted by the filing of a notice of appeal. See Rule 22(b), Fed. Rule App. Proc. (1998). If the district court denied a certificate, the habeas petitioner could request the Court of Appeals issue the certificate. Id. In the absence of an express request to the circuit court, the notice of appeal was treated by the circuit court as a request to consider a certificate of appealability. Rule 22 (b)(2), Fed. Rule App. Proc. (1998). Rule 22 was amended, effective December 1, 2009, to include the revised Habeas Corpus Rule 11 required determination be forwarded to the Court of Appeals upon filing of a notice of appeal. Rule 22 (b)(1), Fed. Rule App. Proc. (2009) The provision that in the absence of a separate request for a certificate to the Circuit Court the notice will be treated as a request to the Circuit Court remains the same. Rule 22 (b)(2), Fed. Rule App. Proc.

The District Court's order was entered on September 13, 2010. (Appendix B, District Court Order). Habeas Corpus Rule 11, effective December 1, 2009, applied.

However, the District Court did not address the certificate of appealability. Petitioner filed a "Notice of Appeal" on October 8, 2010.

On October 12, 2010, the Fourth Circuit entered an order remanding the matter to the District Court for a ruling on the certificate as required by Habeas Corpus Rule 11. (Appendix E). On October 21, 2010, the District Court denied a certificate finding "the legal standard for a certificate of appealability has not been met." (Appendix F). Petitioner filed an informal opening brief on March 9, 2011. The Fourth Circuit issued an unpublished per curiam opinion on August 1, 2011, denying a certificate of appealability under the appropriate precedent, citing *Slack v. McDaniel*, 529 U.S. 473 (2000);[2] *Miller-El v. Cockrell*, 537 U.S. 322 (2003); and 28 U.S.C. § 2253 (c). (Appendix A).

Petitioner presents a mesh of several arguments that challenge the Fourth Circuit's decision denying a certificate of appealability. None have merit.

First, Petitioner asserts that the Fourth Circuit opinion "conflicts" with *United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997). That case has no applicability for the following multiple reasons: 1) the case involves applicability of circuit procedure to cases filed under Section 2255, not Section 2254; 2) the case pre-dates present Habeas Corpus Rule 11 and amended Rule 22 (b), Fed. Rule App. Proc., which are applicable here in regard to the action by the District Court; 3) the case does not address the

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[2] "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

failure to the district court to act (as Petitioner alleges) or the resulting impact the failure to act has on the subsequent circuit court appeal; 4) the case is a Ninth Circuit case not binding in the Fourth Circuit; 5) the case breaks no new ground in the treatment of the notice of appeal as was binding and applicable under Rule 22(b), Fed. Rule App. Proc.; and, 6) breaks no new ground in interpreting the rule as allowing a district judge to issue a certificate.[3] Petitioner fails to show any type of split in circuit precedent, or any support for his argument.

Second, Petitioner alleges the Notice of Appeal should have prompted action from the District Court, and, in the absence of that action, allows for a grant of a certificate by "default." Unsurprisingly, Petitioner does not suggest a legal basis for this assertion of "default." The granting of a certificate is a jurisdictional requirement. *Gonzalez. v. Thaler*, 10-895 (U.S.Sup.Ct. decided January 10, 2012)(slip op., at p. 7). The filing of the notice is a jurisdictional step to request a certificate of appealability from a circuit court of appeals judge. *See Smith v. Barry*, 502 U.S. 244, 245 (1992) ("Rule 3 of the Federal Rules of Appellate Procedure conditions federal appellate jurisdiction on the filing of a timely notice of appeal"). The notice does not ensure an appeal as a matter of right. *See* 28 U.S.C. § 2253 (c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - - (A) the final order in a habeas corpus proceeding in which the

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[3] In fact, this Court, in just this term noted: "The courts of appeal uniformly interpret 'circuit justice or judge' to encompass district judges." *Gonzalez. v. Thaler*, 10-895 (U.S.Sup.Ct. decided January 10, 2012)(slip op., at p. 8 n. 5).

detention complained of arises out to process issued by a State court..."); Rule 22 (b)(1) ("the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability"); 16A Fed. Proc., L. Ed. § 41:570 (Dec. 2011) ("The fact that a certificate of appealability is issued does not give the court of appeals jurisdiction where no timely notice of appeal was filed."). At any rate, Habeas Corpus Rule 11 prompted the action of the District Court. The District Court complied, on remand from the Fourth Circuit. There is no factual basis for a "default" theory, and no legal support for jurisdiction by default.

Third, Petitioner alleges the Fourth Circuit "failed to recognize the Notice of Appeal, the District Court's failure to respond" and as a result, "held Petitioner... to a higher standard of conduct by denying the certificate." (Petition, p. 5). Again, Petitioner does not suggest a legal basis for this assertion of "a higher standard of conduct...." The record shows that the District Court and the Fourth Circuit both were properly guided by the correct precedent. Both courts referred to, and relied upon, 28 U.S.C. § 2253 (c)(1), which provides that a certificate may issue by a "circuit justice or judge" upon a "substantial showing of the denial of a constitutional right."

There is no error for this Court to correct.

II.

Petitioner's assertion he was improperly tried in his absence based on lack of notice is soundly rebutted by the record that well demonstrates the state court decision denying relief rested upon the factual finding that the State effected proper notice and such finding was fully and fairly supported. Further, Petitioner failed to show an unreasonable application of federal law.

Petitioner asserts that federal law requires a knowing, voluntary and intelligent waiver or his right to be present at trial, and relies upon *Maryland v. Craig*, 497 U.S. 836 (1990). (Petition, pp. 5-6). Petitioner asserts that he did not waive his right to be present as he was not given notice of trial. (Petition, p. 6).

Petitioner does not contest that the District Court applied the correct standard of review. Petitioner simply asserts the facts do not support that he was given notice of trial.[4] (Petition, p. 6).

The South Carolina Court of Appeals found:

> 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

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[4] Petitioner also alleged in the District Court that he was not given a warning that his trial would proceed in his absence if he failed to appear. Petitioner appears to have abandoned that allegation here. At any rate, the record supports that he was so noticed by express warning on his bond, as signed and initialed by him. (See Appendix B, District Court Order, p. 13; Appendix H, executed "Bail Proceeding Form I," p. 2). (*See also State v. Fairey*, 374 S.C. at 101-03, 646 S.E.2d at 449-50).

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. at 100-101, 646 S.E.2d at 449.

The Magistrate acknowledged that "factual determinations by the state court, that Petitioner received notice of the trial and was warned the trial would go forward in his absence if he failed to appear, are presumed correct." (Appendix C, Report and Recommendation, p. 14). This is proper under 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct."). The Magistrate concluded that Petitioner failed to show the factual determinations were unreasonable, which is the correct inquiry under 28 U.S.C. § 2254 (d)(2)(relief "shall not be granted... unless the adjudication of the 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."); and also that Petitioner failed to rebut the presumption, again, a proper inquiry under 28 U.S.C. § 2254(e)(1) ("The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). (Appendix C, Report and Recommendation, p. 14).

The District Court agreed with the Magistrate, finding that the state court "thoroughly analyzed this argument." (Appendix B, District Court Order, p. 10). The District Court found that the state court relied upon the fact that notice was sent to Petitioner's California address as well as a local address. (Appendix B, District Court Order, p. 11). The District Court specifically referenced the state court's acknowledgment of Petitioner's letters that expressly noticed the State that the California address should be used. (Appendix B, District Court Order, pp. 10-11). (See also Appendix I, August 22, 2002 Letter; Appendix J, September 8, 2002 Letter). Petitioner did not, in the state court of appeals, or in the District Court, contest the fact that State sent notice to the California address; rather, Petitioner maintained a Florida address should be used. The District Court rejected the argument that would rest on a factual basis in direct conflict with Petitioner's own directive to the State court concerning notice. (See Appendix B, District Court Order, p. 11, "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 District Court cited the fact finding by the state court that included finding Petitioner never sent a letter to formally change his address for notice from the

California to the Florida – an address that was noted as "temporary" – and also considered its conclusion that the State properly effected notice by sending same to the California address. (Appendix B, District Court Order, pp. 11-12). (See also Appendix M, Subpoena (July 2004 trial)).

The District Court resolved that federal case law provides that a constitutional right to be present at trial may be waived.[5] (Appendix B, District Court Order, p. 12). As to the issue presented, the District Court found:

> ... 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. ... 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...

(Appendix B, District Court Order, p. 13).

The record well supports the District Court's determination. Petitioner is not entitled to any relief.

III.

Petitioner's assertion that the record fails to support a valid waiver of the right to counsel is in conflict with the record which demonstrates the state court decision was factually well supported and reasonable. Further, Petitioner failed to show an unreasonable application of federal law.

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[5] The Magistrate rejected Petitioner's allegation that the state court ruling was contrary to *Maryland v. Craig* as *Craig* resolved an issue on whether a child victim testifying at trial could be shielded from seeing the defendant, not the absence of a defendant. (Appendix C, Report and Recommendation, pp. 13-14).

Petitioner asserts that federal law requires that a defendant be advised of his right to counsel and warned of the dangers of self-representation before a valid waiver of the right to counsel may be made, and relies upon *Faretta v. California*, 422 U.S. 806 (1975). (Petition, p. 7). Petitioner alleges that the record does not show a voluntary waiver because the trial judge did not warn of the dangers of self-representation. (Petition, p. 7).

In denying the Motion for New Trial based on an alleged defect in notice and an invalid waiver of the right to counsel, the trial judge found:

> Well, suffice it to say in this case that I made a finding at the trial that the was placed on notice of his trial date to be in court. That he was adequately notified. He was not here and we proceeded with the trial. He did not have an attorney. He had been acting as his attorney for some time, making rather 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. ...

(Appendix G, Motion for New Trial Transcript, p. 30).

Petitioner expressed at the hearing that he was well educated, with a "Master's degree plus 25 hours," (Attachment G, Motion for New Trial Transcript, p. 39); and that he was working in California and staying there during his employment, (Attachment G, Motion for New Trial Transcript, p. 34). Further, Petitioner acknowledged that he was in contact with the trial judge's law clerk during the lengthy pre-trial period, though he did not recall the clerk advising that Petitioner "needed a lawyer" at least not "exactly using those words." (Attachment G, Motion for New Trial

Transcript, pp. 26-27). The trial judge concluded:

> Well, I don't know that we did everything we could have possibly done to advise him to seek counsel. We didn't send him certified letters to every address we ever had. We didn't do that. But I think we adequately placed him on notice and through his actions he waived his right to counsel ... in a knowing and formal fashion.

(Attachment G, Motion for New Trial Transcript, p. 31).

The South Carolina Court of Appeals found a waiver by conduct:

> ...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 105-106, 646 S.E.2d at 451-52.

The Magistrate rejected Petitioner's argument that there could be no valid waiver in the absence of a formal warning. (Appendix C, Report and Recommendation, p. 19). The Magistrate noted long-standing precedent from this Court contrary to Petitioner's position:

> 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...

(Appendix C, Report and Recommendation, p. 19, *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The state record shows that Petitioner had initially retained counsel, Weldon. Weldon moved to be relieved as counsel of record, and Petitioner signed the motion in consent. The motion included the assertion that Petitioner wished to proceed pro se. (Appendix K, Motion and Affidavit).

The Magistrate reasoned:

> 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.

(Appendix C, Report and Recommendation, pp. 19-20).

The Magistrate acknowledged, as did the state court, that there was no formal warning. (Appendix C, Report and Recommendation, p. 20). However, the Magistrate also found that the record fully and fairly supports the finding of a waiver was not objectively unreasonable. Id.

The District Court accepted the Magistrate's reasoning, and rejected Petitioner's insistence that a formal warning was required. (Appendix B, District Court Order, p. 14).

Petitioner asserts here that the state court conclusion reflects an unreasonable application of law as *Faretta* mandates that a formal warning on the disadvantages of self-representation must occurred. (Petition, p. 7). However, as noted, the Magistrate recognized long standing, and well acknowledged, precedent of this Court that the whole of the record may support such a waiver. *Johnson v. Zerbst, supra. See also Iowa v. Tovar*, 541 U.S. 77, 88 (2004) ("We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our

decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding"); *United States v. Alden*, 527 F.3d 653, 660-61 (7th Cir. 2008) (noting that the record may be consulted to determine whether a waiver was knowing and intelligent); *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988) ("in the majority of the circuits, including the Fourth Circuit, 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."); *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) ("a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity in every case if the record shows that the defendant had this required knowledge from other sources"). Moreover, it should not be lost in the record that Petitioner's waiver was made *after consultation with retained counsel* at an *early stage* of the proceeding. *See Tovar*, 541 U.S. at 89 ("at earlier stages of the criminal process, a less searching or formal colloquy may suffice"). Nor should it be lost that Petitioner represented himself pre-trial and offered detailed, cogent, though unsuccessful, arguments. *See Ferguson v. Bruton*, 217 F.3d 983, 985 (8th Cir. 2000)(considering petitioner's performance at trial "active and articulate at trial, raising detailed objections and extensively examining witnesses" in light of absence of adequate trial court caution). Lastly, a waiver by conduct specifically based on the failure to obtain retained counsel after given ample opportunity to do so has been upheld. *See, for example, United States v. Weninger*, 624 F.2d 163, 167 (10th

Cir. 1980)(upholding waiver noting "record and surrounding circumstances sufficiently demonstrate that Weninger had a reasonable opportunity to retain counsel"). Using the right to self-representation as a sword for an obstructionist's purpose is a valid fact to consider in finding waiver. *Faretta*, 422 U.S. at 834 n. 46 ("The right of self-representation is not a license to abuse the dignity of the courtroom."); *United States v. Murphy*, 469 F.3d 1130, 1135 (7th Cir. 2006) ("While the Sixth Amendment guarantees that an accused has the right to counsel, and counsel free of charge if indigent, a defendant 'may not use this right to play a "cat and mouse" game with the court, or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel.'"); *King v. Bobby*, 433 F.3d 483, 492 (6th Cir. 2006) ("by rejecting all of his options except self-representation, King necessarily chose self-representation. The court instructed him that his only choices were to have Mgbaraho continue to represent him, hire another attorney to represent him, or represent himself. Having rejected Mgbaraho and not hiring another attorney, King chose to represent himself.").

At any rate, a formalistic approach is not mandated by this Court's precedent. *Tovar, supra. See also Dallio v. Spitzer*, 343 F.3d 553, 564 -65 (2nd Cir. 2003) ("Because neither *Faretta*'s holding nor its *dictum* clearly establishes that explicit warnings about the dangers and disadvantages of self-representation are a minimum constitutional prerequisite to every valid waiver of the right to counsel, and because there is no other

challenge raised to Dallio's knowing and intelligent waiver of this right, we conclude that the state court's rejection of Dallio's waiver claim was neither contrary to nor an unreasonable application of clearly established federal law and therefore he is not entitled to habeas relief."). Petitioner fails to show an unreasonable application of federal law.

In sum, factually, the record shows, without doubt, that Petitioner understood his right to counsel, had consulted with counsel, and made the informed decision to represent himself long without any stress or pressure of impending trial.[6] Because Petitioner cannot show this Court's precedent mandates a specific form of advice or detection of voluntariness, nothing in this record demonstrates an unreasonable application of federal precedent to these facts.

The record well supports the District Court's determination.

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[6] Respondent notes that the record shows that Petitioner did not argue at the motion for a new trial that he would have had counsel had he received a detailed exchange with the trial judge on the dangers of self-representation, rather, he argued:

> ... I would have loved to have been here for trial. I truly would have. I was looking forward to trial in every step of the way. And I think that had I been here at trial - - had I been properly notified that there was a trial that the verdict of the court probably would have been different because I would have had the opportunity to ask these questions of [victim] and of the investigator and the people involved in the case...

(Appendix G, Motion for New Trial Transcript, p. 40).

Consequently, Petitioner's argument here truly is little more than an attempt to obtain a new trial to again represent himself. Not only has a ritualistic exchange been rejected, Petitioner's argument now shows the reality of the danger of required form – a trap of technicality that fails to offer unquestionable assurance of fairness and informed waiver.

CONCLUSION

Respondent, the Attorney General, State of South Carolina, requests this Court deny the Petition for Writ of Certiorari for the reasons set forth above.

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January 13, 2012
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APPENDIX

A *Fairey v. Secretary, Florida Dept. of Corrections*, 441 Fed.Appx. 160, 161 (4th Cir. 2011)

B *Fairey v. Secretary, Florida Dep't of Corrections*, C.A. No. 4:09-cv-1610-RMG (D.S.C. 2010)(District Court Order granting Respondent's Motion for Summary Judgment);

C *Fairey v. Secretary, Florida Dep't of Corrections*, C.A. No. 4:09-cv-1610-RMG (D.S.C. 2010)(Magistrate's Report and Recommendation);

D *State v. Fairey*, Opinion No. 4233 (S.C.Ct.App. filed April 16, 2007);

E The Fourth Circuit's Order remanding for a ruling on COA;

F The District Court's Order denying a certificate of appealability;

G Portion of Motion for New Trial Transcript: pp. 26-31; p. 34; pp. 39-40;

H Bond Document labeled "Bail Proceeding Form I";

I August 22, 2002 Letter re Notice of Address;

J September 8, 2002 Letter re Notice of Address;

K Notice of Motion and Motion to be Relieved as Counsel with Affidavit in Support of Motion by Attorney for Permission to Withdraw;

L Consent Order Allowing for Withdrawal as Counsel;

M Subpoena (July 2004 trial).

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Assistant Deputy Attorney General, hereby certify that the ***Brief in Opposition*** by Respondent Attorney General, State of South Carolina, in ***William Smoak Fairey, Jr., aka Doak Fairey (Petition) v. Kenneth S. Tucker, Secretary, Florida Department of Corrections, et. al., No. 11-7185***, has been served on Petitioner, William S. Fairey, Jr., 5629 Boulder Boulevard, Sarasota, Florida 34233, by depositing two (2) copies of the brief in the United States mail, first class, postage prepaid this 13th day of January, 2012.

DONALD J. ZELENKA