

Case No.: 11-7185

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM SMOAK FAIREY, Jr.
a/k/a DOAK FAIREY,

Petitioner,

vs.

KENNETH S. TUCKER,

Secretary, Florida Department of Corrections, et al.,

Respondents.

RESPONDENT TUCKER'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

PAMELA JO BONDI
ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050

*ROBERT J. KRAUSS
Chief - Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar I.D. No. 0238538

PATRICIA A. MCCARTHY
Assistant Attorney General
Florida Bar I.D. No. 0331163

Concourse Center #4
3507 East Frontage Road, 2nd Floor
Tampa, Florida 33607
(813) 287-7900

ATTORNEY FOR RESPONDENT TUCKER

*Counsel of Record

QUESTION PRESENTED

WHETHER THE DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA LACKED IN PERSONAM JURISDICTION OVER THE SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS.
(restated)

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ON PETITION FOR WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS

OPINIONS BELOW

The order of the United States District Court for the Middle District of Florida, Tampa Division, transferring Petitioner Fairey's 28 U.S.C. § 2254 pro se petition for writ of habeas corpus to the United States District Court for the District of South Carolina, Florence Division, is contained in the appendix at A-1 to A-2. The dismissal in Fairey v. Sec'y, Fla. Dep't of Corr., Case no. 09-13304-H (11th Cir. Aug. 11, 2009) (unpublished), for lack of jurisdiction is contained in the appendix at B-1 to B-2.

The report and recommendation of the Magistrate Judge,

United States District Court for the District of South Carolina, in case no. 4:09-cv-1610-RMG in Fairey v. Sec'y, Fla. Dep't of Corr., 2010 WL 3699959, 1 (D.S.C. Aug. 2, 2010) (unpublished) is contained in the appendix at C-1 through C-12. The order adopting the report and recommendation in Fairey v. Sec'y, Fla. Dep't of Corr., 2010 WL 3699992 (D.S.C. Sept. 13, 2010) (unpublished), is contained in the appendix at D-1 through D-9. The unreported decision of the United States Court of Appeals for the Fourth Circuit in Fairey v. Sec'y, Fla. Dep't. of Corr., 441 Fed.Appx. 160 (4th Cir. 2011) (not selected for publication in Federal Reporter) is contained in the appendix at E-1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

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 accusations; 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.

A state prisoner may not appeal from a district court's final order in a habeas case "unless a circuit

justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). The statute governing appeals in habeas cases, 28 U.S.C. § 2253(c)(2), provides, in pertinent part:

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Petitioner, William Smoak Fairey, Jr., a/k/a Doak Fairey ("Fairey"), serving probation imposed in South Carolina, stands convicted of obtaining goods and monies under false pretenses. His judgment arises out of the Court of General Sessions, Horry County, South Carolina.

On January 26, 1998, Fairey was served with an arrest warrant for obtaining goods and monies under false pretenses and signed a bond sheet indicating he understood the trial would proceed in his absence should he fail to appear. The state dismissed the warrant on July 23, 1998. Fairey was indicted on June 23, 2001, for the same crime. In 2002, his counsel was permitted to withdraw, and the trial court directed that Fairey had the burden of keeping the court informed as to where notices, pleadings, and other papers may be served. Fairey failed to appear for trial and was tried by jury in absentia and without counsel on July 21, 2004, and found guilty as charged. Adjudicated guilty in accordance with the verdict, Fairey was sentenced to an eight-year prison sentence, suspended after five years, with the remaining period to be served on probation. On October 2, 2004, Fairey appeared before the trial judge, and his sentence was mitigated to the extent it was suspended after four

years in prison, with the balance to be served on probation.

Fairey's trial-based judgment was affirmed in a written decision on April 16, 2007. State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (S.C. Ct. App. 2007). After rehearing was denied, Fairey sought further review in the state's supreme court. After securing a response from the Office of the Attorney General of South Carolina, the South Carolina Supreme Court denied Fairey's petition for certiorari on June 26, 2008.

Fairey filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Middle District of Florida, Tampa Division, in which he named the "Director" of the Florida Department of Corrections as a respondent. The action was transferred to the United States District Court for the District of South Carolina, Florence Division. Following denial of Fairey's motion for reconsideration of the transfer order, he sought a certificate of appealability, and the Eleventh Circuit Court of Appeals, sua sponte, dismissed Fairey's appeal for lack of jurisdiction. Fairey v. Sec'y, Fla. Dep't of Corr., case no. 09-13304-H (11th Cir. Aug. 11, 2009) (unpublished). Fairey's pro se motion for reconsideration was denied.

After securing a response from the South Carolina Attorney General's Office, the Magistrate Judge in case no. 4:09-CV-1610-SB-TER issued a report recommending denial of Fairey's petition

Fairey v. Sec'y, Fla. Dep't of Corr., 2010 WL 3699959 1 (D. S.C. Aug. 2, 2010) (unpublished). The report was adopted by the District Court for the District of South Carolina. Fairey v. Sec'y, Fla. Dep't of Corr., 2010 WL 3699992 (D.S.C. Sept. 13, 2010) (unpublished).

The district court (on remand) entered an order denying a certificate of appealability, after which the Fourth Circuit denied a certificate of appealability and dismissed Fairey's appeal in case no. 10-7414. Fairey v. Sec'y, Fla. Dep't. of Corr., 441 Fed.Appx. 160 (4th Cir. 2011) (not selected for publication in the Federal Reporter). Fairey now seeks review of that order with regard to his grounds asserting that he was deprived of his right to be present at trial with counsel.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED TO REVIEW THE FOURTH CIRCUIT COURT OF APPEALS' DENIAL OF A CERTIFICATE OF APPEALABILITY WITH RESPECT TO THE SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS BECAUSE THE DISTRICT DID NOT HAVE IN PERSONAM JURISDICTION OVER THE SECRETARY.

Petitioner Fairey seeks this Court's review of the Fourth Circuit Court of Appeals' decision denying a certificate of appealability ("COA"). There is no basis for granting certiorari review of this case with respect to the Secretary of the Florida Department of Corrections ("Secretary"), over whom the district court did not have personal jurisdiction. Because the probation Fairey serves in Florida was imposed in South Carolina, the Secretary is not a proper respondent in Fairey's 28 U.S.C. § 2254 attack on his South Carolina criminal judgment.

Section 2254(a) permits a federal court to entertain only those applications alleging that a person is in state custody "in violation of the Constitution or laws or treaties of the United States." The petitioner must be "in custody" under the challenged conviction or sentence at the time the habeas petition is filed. See Maleng v. Cook, 490 U.S. 488, 490-91, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989).

Fairey is serving probation in Florida on a criminal judgment imposed in South Carolina under the interstate compact for the supervision of adult offenders. See § 949.07 to § 949.09, Florida Statutes, and S.C. Code § 2421-1100 et seq. Fairey was under supervision at the time he filed his federal habeas attack. Accordingly, Fairey meets the statutory custody requirement. See 28 U.S.C. § 2241(c)(3); cf., Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 489, 93 S.Ct. 1123, 1126 (1973) ("Since the Alabama warden acts here as the agent of the Commonwealth of Kentucky in holding the petitioner pursuant to the Kentucky detainer, we have no difficulty concluding that petitioner is 'in custody' for purposes of 28 U.S.C. s 2241(c)(3)."); see also Duvallon v. Florida, 691 F.2d 483, 485 (11th Cir. 1982) (in the context of habeas proceedings, the "in custody" requirement may also be met where a petitioner is on probation, parole or bail, citing Hensley v. Municipal Court, 411 U.S. 345, 349, 93 S.Ct. 1571, 1573, 36 L.Ed.2d 294 (1973); Jones v. Cunningham, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963)).

The Secretary, however, is not properly named as a respondent in Fairey's 28 U.S.C. § 2254 proceeding. The proper respondent to a habeas corpus petition challenging the validity of continued, physical confinement is generally the person

having day-to-day control over the petitioner. See Rumsfeld v. Padilla, 542 U.S. 426, 434-35, 124 S.Ct. 2711, 2717-18, 159 L.Ed.2d 513 (2004). A petitioner on probation at the time he files his 28 U.S.C. 2254 petition, although meeting the custody requirement, is not in physical confinement. The "identification of the party exercising legal control ... comes into play when there is no immediate physical custodian with respect to the challenged 'custody.'" Id. at 439.

According to Rule 2(a) of the Rules Governing § 2254 Cases, if a petitioner is "currently in custody under a state court judgment, the petition must name as respondent the state officer who has custody." The Advisory Committee Notes regarding this Rule state that if a petitioner is on probation or parole at the time of filing, then the respondent shall be the probation or parole officer supervising the petitioner and the official in charge of the parole or probation agency, or the state correctional agency. Id. at Subdivision (b)(2). In the case of an interstate transfer of probation, such as in *Fairey's* case, however, a district court in the district of the sending state has no jurisdiction over a correctional officer in the receiving state.

District courts can grant habeas corpus relief only "within their respective jurisdictions." 28 U.S.C. § 2241(a). This

requires that a district court have jurisdiction over the petitioner's custodian. Rumsfeld v. Padilla, 542 U.S. 426, 442, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004); Braden, 410 U.S. at 495, 93 S.Ct. 1123. Because Fairey challenged his judgment rendered in South Carolina, the United States District Court for the District of South Carolina clearly had jurisdiction to consider his request for habeas relief and to reach South Carolina officials by service of process. See Braden, 410 U.S. at 495, 93 S.Ct. 1123 ("So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' ... even if the prisoner himself is confined outside the court's territorial jurisdiction"). Said district court, however, lacked in personam jurisdiction over the Secretary of the Florida Department of Corrections. Cf., Rumsfeld, 542 U.S. at 445, 124 S.Ct. at 2723 (" . . . Braden in no way authorizes district courts to employ long-arm statutes to gain jurisdiction over custodians who are outside of their territorial jurisdiction).

An official in South Carolina having responsibility for Fairey's supervision under the interstate compact has the ability to produce Fairey in the district court presiding over Fairey's habeas attack. Moreover, the Secretary still would have to look to South Carolina to effectuate Fairey's

termination from his supervision. Under the circumstances present here, an appropriate official in South Carolina as the transferring state is the respondent necessary to adjudicate Fairey's petition and not the Secretary of the Florida Department of Corrections.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Fairey does not assert any of these considerations are applicable in this case with specific regard to the Secretary. As no compelling reason for review has been offered under Rule 10, Fairey's request for certiorari review must be rejected with respect to the Secretary.

WHEREFORE, the instant petition should be denied.

Respectfully submitted,

Pamela Jo Bondi
ATTORNEY GENERAL

Robert J. Krauss
Chief-Assistant Attorney General
Florida Bar No. 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone (813)287-7900
Fax (813)281-5500

Patricia A. McCarthy
Assistant Attorney General
Florida Bar No. 0331163
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone (813)287-7900
Fax (813)281-5500

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Regular Mail to William Smoak Fairey, Jr., pro se, 5629 Boulder Boulevard, Sarasota, Florida 34233, and to Donald J. Zelenka, Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211-1549.

COUNSEL FOR RESPONDENT

Case No.: 11-7185

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AFFIDAVIT OF MAILING OPPOSITION TO CERTIORARI

Robert J. Krauss, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States. On January 13, 2012, at approximately 5:00 p.m., I deposited at the United States Post Office a package addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing one original and ten copies of the response in opposition to petition for certiorari in the above entitled case.

ROBERT J. KRAUSS
Chief - Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone (813)287-7900
Fax (813)281-5500

Sworn & Subscribed before me,

NOTARY PUBLIC, State of Florida

(commission expiration)
Personally Known by me _____
Produced Identification _____
(check one)

Type of Identification Produced:

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- Ex. B: Fairey v. Sec'y, Fla. Dep't of Corr.,
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- Ex. C: Fairey v. Sec'y, Fla. Dep't of Corr.,
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- Ex. E: Fairey v. Sec'y, Fla. Dep't. of Corr.,
441 Fed.Appx. 160 (4th Cir. 2011). E-1