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S.C. SUPREME COURT

BEFORE THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2016-002541

State of South Carolina, and City of Columbia, SC

v.

Marie Assa'ad-Faltas, MD, MPH

On Petition for a Writ of Certiorari

to Review SC's Court of Appeals' Dismissal of Appellate Case No. 2016 – 001730,

APPEAL from RICHLAND COUNTY Court of Common Pleas/Court of General Sessions
Alison Renée Lee, Circuit Court Judge
Circuit Court Case Nos. 2010-GS-40-11980 and 2010-GS-40-11987,
originated as City of Columbia Warrants Nos. K-613792 and K-613793 (all dismissed WITH prejudice)
AND K-613866 (City of Columbia, dismissed WITH prejudice)

Petitioner/Movant's Memorandum on the Necessity of Chief *Justice Beatty's Participation.*

> ***"Why?" asked Pilate. "What has He done wrong?" But they shouted all the louder, "Crucify Him!" When Pilate saw that he was accomplishing nothing, but that instead a riot was breaking out, he took water and washed his hands before the crowd. "I am innocent of this man's blood, he said. "You shall bear the responsibility." All the people answered, "His blood be on us and on our children!"*** *Matthew 27:23-25*

The oath of office taken, on 6 January 2017, by SC's Chief Justice Beatty does not let him to wash his hands off what has been, and continues to be, done to Marie Assa'ad-Faltas, MD, MPH since December 2009.

A judge has a duty to sit unless his recusal is necessary. Justices are not fungible. *Vide Cheney* v. *U.S. District Court,* 541 U.S. 913 (2004), (memorandum of Justice Scalia denying recusal) and cases cited therein.

While the present posture of this case is a motion to reinstate, it is a motion to reinstate a petition for *certiorari* presented when SC's Supreme Court currently has a vacant seat. Were Chief Justice Beatty to continue his non-participation, Dr. Assa'ad-Faltas would have to secure two votes out of three, a much higher burden than the two votes out of five any other petitioner would have to secure at any other time.

Nor was there ever a reason for Jurist Beatty to recuse himself from any matter concerning Dr. Assa'ad-Faltas, who had orally argued her case *pro se* before then-SC-Court-of-Appeals Judge Beatty on 6 February 2007 and WON a unanimous but unpublished decision No. 193 (26 April 2007). On 18 October 2007, SC's Supreme Court denied *certiorari* to Dr. Assa'ad-Faltas' opponent in that case. There was never a personal or business relationship between the jurist or any one related to him and the litigant or any one related to her. Nor was there ever a suggestion that Jurist Beatty's decision in favor of Dr. Assa'ad-Faltas was based on anything other than the merits of her case and the strength of her *pro se* arguments. Dr. Assa'ad-Faltas had properly obtained an audio recording of her 6 February 2007 oral argument and later transcribed it and submitted it to this Court in successful opposition to the City of Columbia's petition for a writ of *certiorari.* If anything, Jurist Beatty was *initially* skeptical of Dr. Assa'ad-Faltas' arguments and subjected her to strict questioning. Dr. Assa'ad-Faltas also played the audio tape over the phone to her mother and mailed her a copy. Dr. Assa'ad-Faltas' mother reported tears of pride and joy upon rehearing the tape because she felt confident that Jurist Beatty gave the City of Columbia's attorney no quarter. She was right.

Other live observers of that oral argument later told Dr. Assa'ad-Faltas that she handled it "with grace." In a later trial, also caused by the City of Columbia's use of false evidence against Dr. Assa'ad-Faltas, presiding Judge Newman complimented Dr. Assa'ad-Faltas' advocacy as "most pleasant and gracious" "not in any way offensive" and "not frivolous at all." Now-SC-Court-of-Appeals Chief Judge Lockemy had, in 2007, told Dr. Assa'ad-Faltas "I applaud you" after hearing her *pro se* advocacy in a civil case she brought and later settled. In 1994-1996, now-Senior U.S. District Judge J. F. Anderson told Dr. Assa'ad-Faltas several times on the record that she handles herself "better than half the lawyers" who advocate in Judge Anderson's court.

Judges Anderson, Lockemy and Newman attended Chief Justice Beatty's investiture ceremony and witnessed him take the oath to see that justice is done to every person in South Carolina. **Justice *is not* done to Dr. Assa'ad-Faltas when she continues to be denied the basic human right to speak for herself, a right she never abused; *and SC's Chief Justice Beatty took an oath to inter alia rectify that injustice.***

It matters not that the injustice was initiated by another SC Chief Justice and perpetuated by yet a third

Chief Justice. What matters is that now-SC-Chief-Justice Beatty may neither look away nor wash his hands off and yet be true to his oath. The hand-washing does not work for history.

Then-Associate-Justice Beatty recused himself in April 2013 after SC's Supreme Court received e-mailed plea for Dr. Assa'ad-Faltas' rescue from the ineffective and cruel Theodore N. Lupton, a forced lawyer who was then demanding that Dr. Assa'ad-Faltas appear in court or risk contempt when the fracture of her knee was such that any weight-bearing on it could result in *permanent* loss of her ability to walk normally.

Lupton ultimately caused Dr. Assa'ad-Faltas' false conviction of a misdemeanor; but SC's Supreme Court's belated June 2013 order gave Dr. Assa'ad-Faltas a right to file *pro se* motion to relieve her counsel. Justice Beatty had no more reason for recusal than any other justice who received that e-mail.

It is true that Dr. Assa'ad-Faltas shared with Justice Beatty an e-mail from Lupton that was falsely critical of then-SC-Circuit Judge Beatty's actions in the late 1990s. But it is also true that 13 of SC's 16 circuit solicitors wrote a letter falsely critical of Justice Beatty, who did not recuse himself from their cases.

Dr. Assa'ad-Faltas shares information about Egypt, the Coptic Orthodox Church, and cultural facts in and out of court; she also disseminates her anti-smoking, pro-breast-feeding, pro-solar energy, and pacifist advocacy to everyone who might benefit from them. The only remotely personal question Dr. Assa'ad-Faltas ever asked Justice Beatty was whether His Honor was a smoker; and that was in the context of Dr. Assa'ad-Faltas' reporting that she had once "confiscated" Retired Chief Justice Finney's lighter to delay him from smoking and had asked Judge Newman to "work on" Judge Manning to make him quit smoking.

None of that is reason for recusal. Indeed, the non-smoker Chief Justice Beatty may have a duty parallel to "lawyers helping lawyers" for judges to help judges quit smoking. **Irrespective of a duty for the health of judges, SC's Chief Justice certainly has a duty to keep SC's courts clean from subornation of perjury.**

No punishment whatsoever was meted to any of Dr. Assa'ad-Faltas' false accusers, including prosecutors who demonstrably suborned perjury against her; but she continues in effect to be fined (in the form of the huge still-unrefunded defense expenses she incurred) for "crimes" of which she was exonerated.

Dr. Assa'ad-Faltas' motion to reinstate her petition for a writ of *certiari* is of great public importance, and of specially affinity to Jurist Beatty's long and laudable efforts to curb prosecutorial abuses, not only because she asserts the novel but cogent argument that the State's failure to reimburse the exonerate criminal defendant's defense expenses amounts to a criminal fine without a conviction, but also because she advocates the novel solution of importing Civil Rule 11 to the criminal context and empowering SC's circuit judges sitting in General Sessions to *sua sponte*, or at the exonerated defendant's request, shift the defense costs to the Prosecution in the egregious cases where prosecution was demonstrably malicious.

The imposition of Rule 11 sanctions on prosecutors will curb their abuses and, in the long run, result in fiscal and judicial economy. **These ideas certainly deserve the Chief Justice's attention.**

WHEREFORE, Chief Justice Beatty should either resume participation in Dr. Assa'ad-Faltas' cases or ensure that her cases before this Court are heard by a full complement of five Justices or Acting Justices and that her cases are not decided by staff with the perfunctory signatures of jurists.

Submitted with renewed hope and served on SC's Attorney General by hand-delivery on 11 January 2017, all God so willing.

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[minute 00:00] **The courtroom officer:** Be upstanding before the Court!

[minute 00:08] **The Honorable Judge Anderson:** Thank you. Please be seated. Ms. Clerk, you're recognized.

[minute 00:15] **The Clerk:** Case Number 14567, *City of CoIumbia versus Maria-Teresa* [sic] *Assa'ad-Faltas.*

[minute 00:20] **The Honorable Judge Anderson:** Ms. Faltas, you're recognized.

[minute 00:27] **Appellant *pro se*:** Good afternoon, Your Honors. And may it please the Court, I am Dr. Marie-Therese Assa'ad-Faltas, the very grateful appellant *pro se* before this Court.

Initially, I was the defendant and later the movant before the City of Columbia Municipal Court, which sat in the person of the Honorable Steven Dennis both for the bench trial on April 1st, 2002, and the after-discovered evidence hearing on May 23, 2005.

Judge Dennis issued his ruling on July 26. It was filed July 28, 2005, setting my conviction aside based on after-discovered evidence---

[minute 01:20] **The Honorable judge Beatty:** Actually he gave you a new trial; he didn't set the conviction aside. Did he?

[minute 01:25] **Appellant *pro se*:** Actually yes, Your Honor, he did set the conviction---

[minute 01:27] **The Honorable judge Beatty:** Are you suggesting that you were acquitted then?

[minute 01:29] **Appellant *pro se*:** *I think it is functionally, in this case, constitutionally equivalent to an acquittal.* And I---

[minute 01:38] **The Honorable judge Beatty:** What's your authority for that?

[minute 01:40] **Appellant *pro se*:** Two, two very clear statements from the U.S. Supreme Court.

Is that it's not the form of the judge's action, and that's from *United States versus Martin Linen Company,* but the court looks to whether the judge made a factual finding, correct or not, as to the elements of guilt, or one or more of the elements of guilt or innocence of, of the defendant. And in this case, the judge specifically found, at least in two or three areas in his order, that it is physically impossible, he used the word "impossible," for that for which I was tried to have been true, based on the after-discovered evidence. So, that is a factual finding.

And the Double Jeopardy Clause is not premised on infallibility of the fact finder.

Once a fact is found favorable to the defendant, then it is functionally, constitutionally equivalent to an acquittal. The other---

[minute 03:05] **The Honorable Judge Anderson:** There may be some disputation as to whether that was a factual finding by the judge because he didn't have the right to make factual findings in terms of a motion tor a new trial based on after-discovered evidence. He needed to identify evidence, not make factual findings, in terms of his particular role at that time.

What I would like to ask you in terms of his function at that time: He was looking at the after-discovered evidence, because that was the gist and gravamen of your motion: after-discovered evidence. "I need a new trial based on after-discovered evidence."

In the photograph, when you first had the photograph at the first trial, there is a proposition of law known as "due diligence." Did you exercise due diligence at that time by pointing out to the judge "well, I need more time to deal with this photograph" or was, was the point in regard to the photograph not obvious at that time so that you really could not even determine the need to ask for more time?

[minute 04:31] **Appellant *pro se*:** Actually, Your Honor asked me several questions.

[minute 04:34] **The Honorable Judge Anderson:** I did.

[minute 04:35] **Appellant *pro se*:** And if I may answer all of them, not in the order of importance, but in the order Your Honor posed them.

Yes, I think the new-trial-motion judge is required to make issues related to guilt or innocence because one of the elements he is supposed to look at is whether the new evidence will make a different outcome likely. Put in other words, is that, if in the first trial the defendant was convicted, does the new evidence make it likely that in a new trial the defendant will be acquitted?

So, not only did he have the right to make that finding; that was his duty. The second---

[minute 05:23] **The Honorable Judge Anderson:** Well, let's, let's go back to that point again now. The two cases. Let's just stick with *State versus Caskey,* which is a State Supreme Court case. It gives these five elements; and in it, the defendant must show that the evidence: (1) would likely change the result if a new trial was granted.

That does not mean the judge is then making factual findings.

The judge is identifying evidence that is being presented within the ambit and aegis of the motion for new trial based on after-discovered evidence. Identifying that evidence, I think, is more correct in terms of saying the judge is finding facts at the time.

[minute 06:05] **Appellant *pro se*:** Respectfully, Your Honor, as a threshold matter, the judge needs to make a factual ruling whether the after-discovered evidence is true or not. And if he does find it is true, then he goes on to find whether it will make a different outcome likely.

So, he is required to find as a threshold matter whether the after-discovered evidence is true. And that is a factual finding, because, if the after-discovered evidence is not true, which happens in a lot of recantation cases that the judge finds as a threshold matter the recantation affidavit is not credible, he doesn't need to go any further than that.

So, yes, once again, not only did he have a right to make the factual finding, but he had a duty to make it because that is the threshold element.

[minute 07:11] **The Honorable Judge Beatty:** Ms. Faltas?

[minute 07:13] **Appellant *pro se*:** Yes, Your Honor.

[minute 07:15] **The Honorable Judge Beatty:** Let me ask you. I am going to ask maybe a series of questions; and they are not difficult to answer. And hopefully they will not be confusing.

In fact, I'll just make a statement. No. Now, you do understand that your trial was held, right? And you were convicted at the trial itself. Is that correct?

[minute 07:29] **Appellant *pro se*:** Well, yes, Your Honor.

[minute 07:31] **The Honorable Judge Beatty:** All right now. The trial was concluded. You had been convicted. That was over and done with. Right? Then you filed the motion for a new trial based on after-discovered evidence.

Do you, are you following me now? That is procedurally what happened. Is that correct?

[minute 07:48] **Appellant *pro se*:** But I also had in the meanwhile filed a lot of motions---

[minute 07:54] **The Honorable Judge Beatty:** Well, but let's talk about the one we're dealing with here. We're dealing with the granting of a new trial based on the after-discovered evidence; and that's what's being appealed here. Now, when that motion is granted, that is not a new trial; that's saying "you can have a new trial."

So, the judge could not have found you not guilty at that hearing. Do you understand that?

[minute 08:04] **Appellant pro *se*:** And here is, this relates to something that I have preserved below and I have tried to preserve before this Court and before the State Supreme Court, which is: it is unconstitutional. Rule 29(b) is unconstitutional in two respects. Number 1: It violates the Sixth Amendment in that it prohibits the hearing of new evidence during pendency of a direct appeal.

Number 2: It does not empower the trial judge, if the after-discovered evidence makes the like, makes guilt impossible, it does not empower the trial judge to enter an acquittal. And that is unconstitutional also on Sixth Amendment grounds and on due process grounds because somebody should not be held to answer to a charge with, without oath or affirmation.

Now, the purpose of the oath or affirmation isn't just that it be utter, uttered; but the person taking it without mental reservation tell and it's three prongs. And they aren't alternate. It's tell the truth, the whole truth, and nothing but the truth.

So, and, and I know that Your Honor asked me. Well, that is all the power that he had; and that's why it was styled "motion for a new trial."

But in the federal system, the equivalent Rule 33 of the Rules of Criminal Procedure provides that if a judge had held a bench trial, and then hears a motion for after-discovered evidence and decides to grant the new trial, he may go on and take further evidence and decide the issue of guilt or innocence then, because---

[minute 10:28] **The Honorable Judge Beatty:** Well, in effect, he has actually conducted the new trial that he's granted you if he does that.

[minute 10:34] **Appellant *pro se*:** Your Honor, sometime. Yes, I would say that, in effect, yes; but we don't need---

[minute 10:40] **The Honorable Judge Beatty:** But that's not what happened in this case.

[minute 10:42] **Appellant *pro se*:** Well, yes, Your Honor, he, because his. It's very simple. I wasn't being tried before the Consultus of the Vatican for sainthood and it trying to decide whether I ever committed any offense in any part of the world---

[minute 11:01] **The Honorable Judge Beatty:** Ms. Faltas, your time is about running out. I wanted to ask you one other question: whether or not the evidence that you put forward was untruthful? And truthfully was it really after-discovered evidence? We're talking about a photograph that you had access to. And the only new thing that I've seen in the record is that you had it blown up and you deduced some other evidence from the expanded picture.

[minute 11:28] **Appellant *pro se*:** Actually, and I'm glad Your Honor asked me that question because that was a question that the Honorable Judge Anderson asked me and I didn't get around to answering it.

And the fact is no, no, no.

Not only did I not have it before trial, I did not even have it during trial. I did not even have it after trial until a judge [sic] by the Honorable Judge Huff allowed me to make a photocopy of it. *And, and this is not only a red herring by the Prosecution, it is straight falsification of the record.*

Specifically on, on March 14th 2002, she wrote to my then-counsel that there, the items are not there; there is a photograph of it. He immediately faxed her, and that's on record page 39, saying "I need to see that photograph ASAP." She essentially faxes him back a one-sentence letter saying essentially "Go to hell. I'm not going to show you the photograph; and do whatever you want." So, what else? And in---

[minute 12:51] **The Honorable Judge Beatty:** What page of the record is that on?

[minute 12:53] **Appellant *pro se*:** Page 39 Your Honor; and this is very important and it was attempted. The, the exchanges are on page 39 and 40. And that's from, from the trial record. And then also, during the after-discovered evidence hearing, Mr. Briggs came and testified.

(Advocate chokes and coughs.) Excuse me.

And I specifically asked him to test, asked him: "Short of breaking into Ms. Thye's office to get that photograph before the trial, was there anything else you could have done?" And he said "I was relying on the discovery process."

Besides, prior to that, there were 10 specific requests for production [sic]. Additionally,---

[minute 13:48] **The Honorable Judge Anderson:** Ms. Faltas, your time is up. Now, we need to let her talk then you can reply. Well give you time in reply.

[minute 13:51] **Appellant *pro se*:** Thank you, Your Honor.

[minute 13:52] **The Honorable Judge Anderson:** All right.

[minute 13:53] **Appellant *pro se*:** May I, may I, however, pick up that thought when---

[minute 14:00] **The Honorable Judge Anderson:** Yes, ma'am.

[minute 14:01] **Appellant *pro se*:** Thank you very much.

[minute 14:02] **The Honorable Judge Anderson**: All light, Counsel. you're recognized.

[minute 14:04] **Counsel for the City**: Thank you, Your Honor. Good afternoon. May I please the Court.

My name is Dana Thye and I represent the City of Columbia in this matter.

This case was decided correctly, first at the trial and on direct appeal, where a panel of this Court affirmed the conviction, and most recently by the Circuit Court in reversing the grant of a new trial. There was simply no manifest injustice done here despite Dr. Faltas' contentions.

[minute 14:29] **The Honorable Judge Beatty:** Was she or was she not denied the photograph that is the basis of the new trial motion?

[minute 14:32] **Counsel for the City:** She had the photograph on the morning of trial, yes, Your Honor.

[minute 14:36] **The Honorable Judge Beatty:** On the morning of trial; but they had requested it sometime before then. Didn't they?

[minute 14:39] **Counsel for the City:** They had requested it. That's correct There was no --

[minute 14:40] **The Honorable Judge Beatty:** It was not given to them.

[minute 14:42] **Counsel for the City:** There was nothing filed but they had requested it in writing. I informed that the Wal-Mart representatives bad the photograph and they'd be bringing it to the trial. I then invited them to make whatever motions they needed to make --

[minute 14:52] **The Honorable Judge Beatty:** Actually, your letter doesn't say all that. It just says you (reading from the Record on Appeal) "intend to call the case for trial on" your "next term. You're welcome to make pre-trial motions as you deem necessary."

[minute 14:58] **Counsel for the City:** It was the preceding letter when I told them that the photograph, that there were not actually the folders. They wanted to see the actual folders. I told them the folders didn't exist; it was just the photograph.

[minute 15:06] **The Honorable Judge Beatty:** Well, let me ask you. The photograph, after she got it and used it at the pre-trial, well, excuse me, at the new-trial motion, digitally, I guess, enlarged the photograph and discovered certain things in that photograph. Would you consider that to be after-acquired evidence or not?

[minute 15:20] **Counsel for the City:** *No, Your Honor, I wouldn't consider that. I would consider it after-created.*

[minute 15:24] **The Honorable Judge Beatty:** It's not newly-discovered at all?

[minute 15:26] **Counsel for the City:** The magnification certainly was. I mean, she didn't. The magnification was after the trial. That much is, is true. The photograph itself and the opportunity to do that magnification, she had it at trial and could have made any request to have more time---

[minute 15:39] **The Honorable Judge Beatty:** How, how could she have done that at trial if you did not produce the photograph until the morning of the trial?

[minute 15:44] **Counsel for the City:** She had it the morning of the trial. It came ---

[minute 15:47] **The Honorable Judge Huff:** Are you saying she should have made a motion for continuance based upon the just-recently received photograph and you would have had no objection?

[minute 15:52] **Counsel for the City:** I would have had no objection; it was never made. The motion was never made. I invited them to make any number of motions.

All of the items of production that she indicated, certainly, weren't in our custody or able to get. We needed to have taken those up if necessary. If she had made the motion and the court would have entertained it, she could have had any amount of time she needed to make this photographic manipulation or magnification of the Polaroid.

[minute 16:11] **The Honorable Judge Anderson:** Counsel, I have some concernment about the findings by the municipal judge at the motion for a new trial based on after-discovered evidence.

There is some very serious allegations in regard to the ruling by the municipal judge concerning the New Item stickers; whether the UPC Codes Code in place during this year, 2002, or what the differences between the folders were based on the angled or rounded edges, the clasp.

Whether this photograph is in fact a fabrication is of major concerment to me.

Now, if there is some difficulty in regard to that photograph, I for one would vote for a new trial because I am not going to sit here and let some kind of activity occur in regard to evidence

that is presented at trial. Now, can you explain to me this difficulty between the 2002-copyrighted new-item stickers as juxtaposed to the ones that were in place at the time this event occurred so as to eliminate the idea notion that there was some activity within that photograph that is rising to the level of the kind of exhibit that simply cannot be accepted by the Court.

[minute 18:00] **Counsel for the City:** Certainly, I'll certainly try. It's my understanding from Dr. Faltas' argument that the Polaroid photograph, when magnified to such a degree, you can discern the "New Item!" tag in, in some of the pixilated images of this, this photograph, the Polaroid. She then analogizes that to a new tag item [sic] that she brought in the day of the after-discovered evidence. It had a 2002 copyright date on it.

She argued and contended that, because the one in the picture looked like the one that was a 2002 copyright, that it must have been taken in 2002. But that doesn't answer whether or not the new tag item [sic] sticker from 2001 looks similar to that. These photographic manipulations are suspect at best. You're taking, you're talking about a Polaroid that doesn't contain a negative, blowing it up several times and taking a pixilated image, trying to clean that up to discern distinctions or similarities between that item and something else.

[minute 19:01] **The Honorable Judge Beatty:** But you would agree that they look very similar. Don't you?

[minute 19:02] **Counsel for the City:** *Oh, they look similar. I don't know that they wouldn't look similar to the 2001.*

[minute 19:04] **The Honorable Judge Beatty:** Now, what about her argument about the UPC Codes? Each item in the store has an individual distinct code. And the codes that she checked out with her receipt indicated, I believe, clear folders. The folders in the picture, and that's the only evidence that you all have because you got rid of the picture, of the folders themselves, were colored, folders. Now, doesn't that strike you as being odd?

[minute 19:28] **Counsel for the City:** Well, it strikes me as being odd; but I don't know that it couldn't be explained by the Wal-Mart folks. And that's one of the issues here that we have with this after-discovered evidence trial [sic].

[minute 19:33] **The Honorable Judge Beatty:** If she went to the register with, and was, and purchased, clear folders, and the UPC Codes indicated they're clear folders; yet, you put forth the photograph saying that she was trying to steal colored folders.

[minute 19:53] **Counsel for the City:** That she was attempting to remove labels from color folders and attach them to something else. Now there's, there is no argument that she walked out of the store [sic] with two items yet removed, that there are five folders in the picture removing several labels trying to get one that peeled off correctly at the time.

And that's the problem with this after-discovered evidence being considered a new trial and an acquittal: is that some three years after the case, the procedures---

[minute 20:10] **The Honorable Judge Beatty:** But how do you try and explain the UPC Codes? I mean that's the problem I'm having. If each item has a specific code, whether it's color wise or otherwise. Even different color items had a different code. She checks out with a UPC Code for two clear folders. Yet, the ones you're saying she tried to take the stickers off of are colored folders. And yet, if she had taken those stickers off of the colored folders and used those to purchase the clear folders, wouldn't her receipt show she bought colored folders?

[minute 20:40] **Counsel for the City:** I see where you're coming from, Your Honor. And I don't know---

[minute 20:44] **The Honorable judge Beatty:** But her receipt shows she bought clear folders.

[minute 20:48] **Counsel for the City:** *The receipt has two of the same items, of clear folders.* And that's the problem again with this after-discovered evidence hearing being considered an acquittal and all of that.

We still have to get past all of this, the *Caskey* criteria: discovered since the trial; could not have been discovered prior to the trial; and is it merely cumulative or impeachment evidence?

Again, the purpose behind this Polaroid photo and the magnifications; this isn't a Polaroid photograph of her actually taking the items. It's of the items themselves, which is cumulative in nature to the eye-witness testimony of the folks. The sole purpose for introducing---

[minute 21:22] **The Honorable Judge Anderson:** Well, this eyewitness testimony of these folks was directed toward the photograph. They were contending that the photograph was in essence backing them up and buttressing their testimony. Didn't they contend that at trial?

[minute 21:38] **Counsel for the City:** They contended that it contained all of the photos, or all of the folders that they saw her peel the labels off of and the folders that they took, that they saw her take out of the store [sic].

[minute 21:46] **The Honorable Judge Anderson:** So, what's cumulative about a photograph that is almost the quiddity of the trial? All this evidence is being directed to the photograph: "We can show you. This is exactly what happened."

[minute 21:57] **Counsel for the City:** Well, all the evidence wasn't directed to the photograph. Both of the folks testified at trial about what they saw, about following her around the store, the fact that she removed labels from folders, there's no dispute about that.

Dr. Faltas' testimony indicated she was removing labels. She asked the court to believe it was because there was an error. She knew that they weren't valued right; and so, she was helping Wal-Mart out by making the correction.

They testified to all of this and they merely used the photograph to illustrate the types of folders and the folders. And they said "These are the folders that she was, that we picked up off the stationery shelves that she was removing the labels from. And these are the folders that we saw her walk out of the store [sic] with." So, it was, was cumulative to their eyewitness testimony and also cumulative to a police officer who arrived to transport her that said "I saw everything there. I saw the folders, and binders and the photograph."

So there was a photograph in existence on the day that she was, that she was arrested.

So, it is cumulative; and the sole purpose is to impeach the veracity of these witnesses, to say that it didn't happen the way they said it happened and it didn't happen the time of date.

That was some of, a point that she brought out at trial herself. I would point out to the Court that she had the receipt in evidence, on page 320 of the Record on Appeal, she entered that receipt into evidence. She had that on the day of the trial. She brought it with her as a matter of fact. She testified the binders in the fold, in the photo were not the ones she took.

She had that before the trial court. She made that point before the trial court. That this is---

[minute 23:19] **The Honorable Judge Beatty:** *What about the, the manual, Wal-Mart's manual about their products with, that contained the explanation about the UPC Codes?* She did not have those. Did she?

[minute 23:29] **Counsel for the City:** No, she didn't.

[minute 23:29] **The Honorable Judge Beatty:** *They were not even available to her at that point in time.* In fact, she was told it didn't even exist at that point in time, wasn't she? The manual did not exist?

[minute 23:29] **Counsel for the City:** The manual? Or is the Court referring to the manifest? On direct appeal, there was an issue about a manifest; and it was determined that there was no error.

[minute 23:42] **The Honorable Judge Beatty:** No. That was an evidence manifest, I do believe, that---

[minute 23:49] **Counsel for the City:** That was an evidence manifest.

[minute 23:50] **The Honorable Judge Beatty:** --that supposedly did not exist; and then it showed up. No. I'm talking about the Loss Prevention Manual that talked about all these things and that supposedly did not exist at the time of the trial but was available when, at the motion.

[minute 24:02] **Counsel for the City:** I'm not sure that it didn't exist at the time of the trial. I think Dr. Faltas perhaps didn't request it or, I mean it was, it's a Loss Prevention Manual. It wasn't encompassed in, in that. I don't, I don't read the record as saying it was not in existence at that time.

[minute 24:10] **The Honorable Judge Beatty:** Oh, it was in existence. It was not available to her.

[minute 24:12] **Counsel for the City:** To her; and her counsel certainly could have brought it up in any motion pretrial. Again, this is, it's impeachment evidence. It could have been discovered prior to the trial. It was certainly, some of it was certainly discovered at the trial. And so, this does not rise to a level indicated in the *Caskey* criteria or any of that.

[minute 24:39] **The Honorable Judge Anderson:** All right, Counsel. Your time is up. I am going to give you two minutes to sum up since she had run a little over her time.

[minute 24:49] **Counsel for the City:** Thank you. I appreciate that, Your Honor.

She argued three issues in her brief, all of which should be resolved in the City's favor. That there is, her first issue: there is no authority for us to appeal this. I think the Court has correctly honed in on that: that there is very much a distinction between an argument related to the insufficiency of evidence, finding that the, the government's case should not have proceeded to trial versus a weight of the evidence type of analysis.

This is clearly a weight of the evidence type of analysis; and therefore appealable.

And in anyway, what the Court [sic] seeks to gain here is a reinstatement of the conviction, not a retrial. So, the Double Jeopardy Clause doesn't bar this particular Appeal.

The procedural handling of the Circuit Court was completely within their purview. There is a Code section that determines the municipal court appealability. It's completely within the Circuit Court's purview to, to handle it as such and do it on the briefs.

And furthermore, the Sixth Amendment of the United States Constitution guarantees a fair trial, not a perfect one, but a fair one. She had every opportunity to, below to present this evidence and in fact did present several of, of items of this piece of evidence.

Because she now simply says "I have more ways to illustrate my point" doesn't rise to the level that, that we submit is necessary to gain a trial on after-discovered evidence.

So, we would ask the Court to affirm the Circuit Court. Thank you.

[minute 25:58] **The Honorable Judge Anderson:** Ms. Faltas, reply.

[minute 26:02] **Appellant *pro se*:** *Thank you, Your Honors, and I do very much appreciate the questions you asked.*

But this illustrates why this shouldn't be appealable: Your Honors are trying to compress within 25 minutes what's Judge Dennis took five hours to look at, in addition to his, to his having been the one who tried the case to begin with. So that's.

The second thing is the issue of appealability is very alive and very important. Only yesterday, a, a colleague panel of this Court said: "While there are lingering questions regarding its appealability, the issue ...." And that is on the case of *The State versus Franklin Arthur, Arthur Franklin Smith,* which is a published opinion issued yesterday.

Now, if Your Honors go back, on the record pages 32, I believe, there was, there were 10 specific Requests for Disclosure. And they, they specifically asked for all their procedures and how do they handle evidence and all of that. So, yes, it was asked. She chose not to give anything.

And yes, there was a pretrial motion. But we were entitled to the full measure of relief: not a continuance but dismissal. And the motion for dismissal encompassed everything include, which was specifically the State's, the Prosecution's failure to give the evidence which was specifically, I mean there was; it's in writing; it's specific; it's 10 items; it was timely, way ahead of trial.

The, the second thing is that, again, there is falsification of the record. There were three motions for continuances made; and they were all denied. And I refer them to, in my brief.

The most important thing is that the Polaroid didn't mean anything until a witness took the stand and testified this is what the Polaroid is. And if Your Honors look back at the Record, on page 17, that was initially what Judge, Circuit Judge Barber affirmed, saying it's, "it's okay that they destroyed the folders and binders since the Polaroid says that these are the exact ones."

So, the Polaroid wasn't illustrative; it was the *corpus delecti* according to the Prosecution. And upon magnification, there is no *delecti* in the *corpus.*

So, it is impossible for me to have been convicted.

Additionally, the State, the Prosecution keeps saying "evidence this and evidence that; testimony this and testimony that." Perjury is not testimony. The difference between testimony and a report is that it be given under oath or affirmation, not just uttered, but something without mental reservation. And the three prongs of, of the oath is "the truth, the whole truth, and nothing but the truth." If somebody, a potential witness were to say: "I swear or affirm to give you a little bit of the truth, to suppress that part of the truth which doesn't help my story, and to fabricate things that will fill in the rest of what I suppressed," this person would not have been put on the stand at all, if he refuses to take the oath which is the three items.

Now, it's not the uttering. Since we know, or at least the trial judge found that that picture was fabricated, then those people came with a predetermined mental reservation to take the oath, to utter it while intending to violate it. So, they did not take the oath. Whatever they said is on the record is not testimony because it was not under---

And I'm sorry this may sound a bit convoluted; but it really isn't. The purpose of the oath is to ensure that anyone allowed to testify would respect the three prongs of the oath and --

[minute 30:50] **The Honorable Judge Anderson:** The word "oath" came from the Roman law. The Latin word is "*ius iurandum.*" And the oath came from that origin; and we have used it historically. I don't think we need any kind of instruction on the oath. We understand that.

[minute 31:05] **Appellant *pro se:*** No, I'm sorry. I don't mean that. *I meant, I meant the, what the witness promised to do and the trial judge found did not do that.* So, my contention is that that's not a witness at all.

The other very important part of, really, falsification of the record and I'm really disappointed and I think this Court should take this seriously that an off, which I am not an officer of the court even though---

The Prosecution tried to do this three times. First, before Judge Dennis, and at that time I objected. She claimed that the police officers testified that they saw the picture.

That is simply not true. They did not see the picture, they did not identify the picture. One recollected vaguely seeing "pictures" in the plural. But he never identified it, never took custody of it, never anything. And in fact, I, part of my.

And my after-discovered evidence isn't limited to those two points.

Neither is Judge Dennis' order limited to the two points about the date and the UPC Code. He, in three place, he said "along with other evidence" "together with other evidence." These were the two he found most helpful. In fact, I could dispense with one of those two and still win because there were several, seven other proofs within the photograph.

Now, the jeopardy attaches as soon as witness is sworn in a bench trial. And once the, the witness was sworn and identified the photograph under oath, a continuance was tantamount to a motion for dismissal, which is, we had asked for a motion of, for dismissal before the trial began. So, that motion was made.

It was not possible to take the photograph and magnify it before any witness said what that is, because it, we didn't know what they were going to say about it: whether they were going to say "these are the actual items" "these ace something else that we were taking while passing the time." There was no identification of it. But once a witness---

[minute 33:32] **The Honorable Judge Anderson:** Ms. Faltas, your time Is up. I'm going to give you two minutes to sum up.

[minute 33:42] **Appellant *pro se:*** Yes, Your Honors. Additionally, the, the City is now taking a different position before what, different from what it put in judge, Circuit Judge Cooper's mouth because Your Honors need to remember that, first of all, judge Cooper had no right to re-examine the facts, not only under the Sixth Amendment, but also under---

The idea isn't if somebody can sit and fantasize possible explanations. The issue is whether there was enough evidence for Judge, Municipal Judge Dennis to make the ruling that he did, even if

And in fact, in a Freudian slip they said: "it is possible, equally likely that something else." Well, if it is equally likely, if there are two possible inferences, then once the fact-finder chooses one

of them, no appellate body has the right just because it is higher in, in the hierarchy to say "No, I, I would have chosen a different inference and you're wrong."

And Your Honors, here, are not - it's very important, Circuit Judge Cooper was not the trial judge. Your Honors are sitting basically in the same position that the U.S. Supreme court sat in when it examined the Fourth Circuit U.S. Court of Appeals' reversal of trial judge McMillan in *Anderson versus City of Bessemer City.*

In that case, the trial judge had found there was discrimination and found for the plaintiff. The Fourth Circuit reversed because it would have drawn a different inference from the facts; and the U.S. Supreme Court unanimously said NO. An appellate body doesn't have that right, so long as there were, there is evidence in the record from which the trial judge could have drawn the inferences, even though the appellate body might have drawn a different inference had it sat in the place of the trial judge. It doesn't work like that. It's the fact-finder.

And, and, and specifically, not only that. The very short letter which is the only, only one of two letter in Judge Cooper's own words, he says: "The evidence in my opinion" "the new trial evidence doesn't merit reversal of the conviction." Well, that's a way he's weighing it and saying "that's not important enough." But that wasn't even for him to do. The weight of the evidence, what to attach, is for the fact finder; and there was only one fact-finder in this case, both at the bench trial and at the after-discovered evidence hearing; and that is Municipal Judge Dennis.

Your Honors, the question of appealability; and I'm sorry that we had to focus on the facts because the, this happened in 2001. This is 2007. Six years.

If the average life expectancy is now about 72 years, I have spent about one twelfth of my life under the shadow of a conviction for something I did not do. And Justice O'Connor had written, and recently the U.S. Supreme Court quoted her, "it is constitutionally impermissible."

That was a death penalty case; but really life is made of time lived.

And the, the Constitution, the Sixth Amendment prevents that someone would live under the shadow of an accusation of something they didn't do. That's why we need speedy trials. Now, it *a fortiori* prevents someone from living under a conviction that was found to have been procured by fraud. If the Constitution doesn't protect the innocent from being convicted based on fraud, then it doesn't do anything at all.

And the other thing I wanted to say, if it pleases the Court, is that the, Judge Cooper's handling of the matter was very bizarre. He didn't hold. Not only did he not hold a merits hearing, he requested both parties to file by the same date blindly briefs; and did not even let me even reply to the City's brief. Well, "Respondent" is someone who responds. Before Judge Cooper, I was the respondent. He didn't let me respond. It's as if in a trial some---

And he did re-examine the facts, which the U.S. Supreme Court in *Kepner* said that the examination of the facts even by an appellate body, is like a second trial and therefore barred by the Double Jeopardy Clause.

But the bizarre way in which Judge Cooper handled the matter itself would, would warrant reversal of Judge Cooper. He said "On October 10th, both the City and Dr. Faltas will file their briefs."

So, it's as if in a trial the, there was kept two juries in two separate rooms; and the Prosecution was told to present its case in one room and the defendant was told to prevent, to present her defense in a separate room without even seeing what the Prosecution was doing.

The---

[minute 39:32] **The Honorable Judge Anderson:** Thank you, Ms. Faltas. Thank you very much.

[minute 39:52] **Appellant *pro se:*** Thank you very much, Your Honors, for the opportunity to be heard.

[minute 40:02] **The courtroom officer:** Be upstanding before the Court!