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BEFORE THE SUPREME COURT OF SOUTH CAROLINA
Appellate Case No. 2016-002541

S.C. SUPREME COURT

State of South Carolina, and City of Columbia, SC

v.

Marie Assa'ad-Faltas, MD, MPH

**SUPPLEMENTAL Memorandum on the Necessity of: (1) Chief Justice Beatty's Participation
AND (2) Reinstatement and Grant of Certiorari in this Case.**

Justice Douglas' statement about federal district judges [...] in *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970), strikes me as being equally true of the Justices of this Court:

Judges are not fungible; they cover the constitutional spectrum [...]. [...] [L]aymen recognize this when they appraise the quality and image of the judiciary in their own community.

Since most Justices come to this bench no earlier than their middle years, [...] it would be [...] extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Justice Rehnquist denying recusal in *Laird v. Tatum*, 409 U.S. 824, 835-6 (1972)

I think being on circuit court in some ways dumbed me down[.]

Judge Lee to JMSC on 16 November 2016, Tr. p 110, lines 14-15

The suicide rate of lawyers is way too high.

Judge Goodstein to JMSC on 14 November 2016, Tr. p 136, lines 15-16

- A. You shouldn't perpetuate a wrong decision or a wrong series of decisions just because they're established [...] if the circumstances warrant where a series of cases can be reversed.
(By Mr. Safran) Q. How would you distinguish between the notion of judicial activism as opposed to simply entertaining a new or creative argument on a point of law or statute that may be countered by saying, we just never did it that way. We've never applied it that way in the past, even though the argument is legitimate.
- A. Well, [...] you certainly afford that person the right and the opportunity to make the argument they want to make. * * * * But if there are circumstances that warrant a different result, I don't think that would be judicial activism. I think that would be doing what a judge should do: Listening to the arguments, listening to a new slant, [...] and perhaps not totally modifying or changing the law.

Judge James at JMSC on 14 November 2016, Tr. pp 183, lines 5-10; 186, line 19 to 187, line 4; and 188, lines 12-18

This supplement advises of: (1) 17 January 2017 release of SC's JMSC's fall 2016 judicial screening transcripts; (2) 16 January 2017 decision of Egypt's Supreme Administrative Court that Tiran and Sanafir Islands are Egyptian Territory; and (3) 9 January 2017 oral argument before SCOTUS in *Nelson v. Colorado*, No. 15-1256, a case addressing, *as does the instant petition*, exonerated criminal defendants' rights.

This supplement shows that the petition here sought to be reinstated and granted presents questions and proposed solutions of such importance and depth as to intellectually and morally reward this Court and its incoming new member. The undeniably-talented and broadly-educated Marie Assa'ad-Faltas, MD, MPH asserts that her courage and rare successful self-defense against false criminal charges make her the best advocate this Court could ever hear on the relevant issues herein; and this Court should hear her *pro se*.

Dr. Assa'ad-Faltas' "new slant" is: (1) failure of the State to reimburse her defense expenses necessarily incurred against known-false criminal charges amounts to: (a) imposition of fines without a conviction; (b) taking of her property without due process of law; and/or (c) breach of the trust/contact of the Defense of Indigents Act; (2) **the State discriminates without rational basis between indigent defendants who accept appointed lawyer and those who choose to defend themselves pro se if the latter are denied reimbursement of such "tools of effective defense" as transcripts, experts, audio-visuals, private investigations of adverse witnesses, etc., which are routinely reimbursed for appointed counsel;** (3) prevailing *civil* defendants are doubly protected by SC's Civil Procedure Rule 11 and SC's Frivolous Claims Act. **For equal protection, SC must provide a trial-court-motion cost shifting device for the exonerated (i.e., prevailing) criminal defendant, indigent or not.** Lack of such avenue for the exonerated criminal defendant **discriminates without rational basis between two classes of prevailing defendants before SC's "one circuit court"**. Criminal defendants face the State, a much more powerful and potentially harmful adversary than any civil plaintiff can be. So, a trial-court-based cost-shifting avenue is more necessary for the prevailing criminal defendant who would otherwise flounder against sovereign immunity.

Dr. Assa'ad-Faltas urged several improvements in the law which were later effected; *e.g.*: (1) in her 6 February 2007 oral *pro se* argument (transcript previously attached), she urged that grant of a new criminal

trial based on after-discovered evidence should not be appealable. *State v. Smith*, 383 S.C. 159, 679 S.E.2d 176 (2009), agreed; (2) in 2010, she argued to SC Circuit Judges Cooper and Newman that prosecutorial control of the criminal docket is unconstitutional. *Langford* later agreed; and (3) in 2013, she told Columbia's Municipal Court and Richland County Circuit Court, in its appellate capacity, that "the last word" practice in SC criminal trial closing arguments is unfair. *State v. Beatty*, Opinion 27693, decided 29 December 2016, agreed. That representative sample should assure this Court of her seriousness and ability.

SCOTUS' questions in *Nelson*, sampled hereunder, show: (1) validity of the constitutional perspective of exonerated criminal defendant's rights which is also urged here and (2) most Justices' favoring a *quasi-ministerial*, self-executing law-suit-obviating device to refund the exonerated criminal defendant's money.

[page 35, lines 18-20] **JUSTICE GINSBURG:** We're not talking about compensation. We're talking about getting your money back.

[21-25] **GENERAL YARGER:** [T]hat's the question. Is this properly considered under State law or under the Constitution as substantive matter property of the criminal defendant or is it not?

[page 38, lines 4-13] **CHIEF JUSTICE ROBERTS:** But you keep talking about compensation. The issue is restitution. And under normal equitable principles of restitution, it, in fact, still is the property of the person from whom the money has been taken away. [... Y]our analysis has to be adjusted when you appreciate that it's not compensation. It's not sort of the normal State, give us some money. Under equitable principles, it's State, give me my money back.

[page 39, line 25 to page 40, line 6] **JUSTICE SOTOMAYOR:** How about we borrow from double jeopardy? Once the [...] judgment is void, you no longer have a basis to that property. It's theirs. They had --it was their money to begin with. The only basis you had to collect it or keep it was a constitutional conviction. Once it's voided, you have no basis to keep the money.

[page 47, lines 14-19] **CHIEF JUSTICE ROBERTS:** Why [...] isn't it a violation of the takings clause? * * * * * Private property shall not be taken without just compensation. Don't ask for any procedure or process. Just give me just compensation.

[page 51, lines 1-7] **JUSTICE KAGAN:** [I]f we were to look at this as this is not public property once the conviction is vacated, that instead it once again becomes [...] the acquitted defendant's property, [...] what kind of procedure would you have to set up to return the property[...]?

[8-17] **GENERAL YARGER:** Justice Kagan, I think it [...] would be fairly minimal. I think it would involve, perhaps, a motion filed in the district court. I think the only burden that could, perhaps, be placed on a criminal defendant would be proving the amounts that were, in fact, taken from the defendant, and [...] there could be, for example, time limits put in place. But if this truly is Petitioners' property, [...] they would have to be minimal requirements.

[18-19] **JUSTICE GINSBURG:** This is what they, they made a motion.

[20-24] **GENERAL YARGER:** [C]orrect. So it would be similar to the route that [...] they attempted to take, but the courts below held that they did not have authority [...] just for [...] the fees.

[25 to page 52, line 3] **CHIEF JUSTICE ROBERTS:** [Y]ou told me it was not their property. [B]ut even if it was, once it's in your treasury they can't get it back because of sovereign immunity.

[4-13] **GENERAL YARGER:** [I]f this is their property, if they have a present entitlement to it, it is their property, then due process requires them some procedure to get it back, and that's the question. Is this, as a matter of substantive law, their property or public funds as the Colorado Supreme Court held, and [...] there can only be a mechanism for compensation from public fund for those losses?

Nelson seeks ministerial-act refund of court costs paid, upon initial conviction, by one later-exonerated. Dr. Assa'ad-Faltas seeks such device for trial-acquitted defendant's defense expenses. The constitutional status of the cash in question and the feasibility of a *quasi-ministerial* remedy to refund it are the same in both cases. A state is undoubtedly constitutionally required to pay *from its own coffers* to defend all criminally-charged indigents, whether ultimately acquitted or not. If SC makes *pro se* indigents front their own defense expenses but refuses to refund them, SC violates the Taking Clause which this Court applied in *Ex parte Brown*, 393 S.C. 214, 711 S.E.2d 899 (2011), and which Chief Justice Roberts invoked in the *Nelson* questions, *supra*. Irrespective of *Nelson's* eventual result, the importance of the question (which made this Court accept *amici's* first-time arguments in *Ex parte Brown, supra*, and made SCOTUS grant *certiorari* in *Nelson, supra*) counsels the reinstatement and grant of the instant novel-question-posing petition.

Sovereigns prosecute crime to ensure public safety and tranquility. *In reality*, criminal fines are a major revenue source for government. The innocent criminal defendant should not be conscripted to serve in a government's gamble to convict her and or be made an unwilling and un-repaid financier of such gamble. Modern criminal prosecutions are, in some sense, a commercial enterprise which must repay the loans it takes *with compound interest* and also pay fines for trespassing onto the forbidden land of the innocent.

Importing Civil Rule 11 into criminal trials: (1) solves the sovereign immunity problem; (2) assists the sovereign in controlling its own agents in that rogue prosecutors who bring known false criminal charges would be *personally* monetarily penalized by their sovereign's judge; and (3) quiets the "avalanche of lawsuits by emotional defendants" fear which supports prosecutorial immunity in that the sanctions would be imposed, not by a disgruntled criminal defendant, but by a righteously-indignant detached judge.

Because Dr. Assa'ad-Faltas' case is at the intersection of three circles, she recaps what she seeks.

1. All indigent *pro se* criminal defendants, whether ultimately acquitted or not, should be reimbursed for all defense expense categories for which an appointed attorney would be reimbursed, always subject to the approval of the trial judge or another judge before or after the fact. Here, Judge Lee expressly found Dr. Assa'ad-Faltas' claimed expenses "helpful or necessary for trial" but erroneously held that the Defense of Indigents Act does not cover any *pro se* expenses other than expert witnesses.
2. All exonerated criminal defendants, whether indigent or not, should be reimbursed for their defense expenses upon motion to the original trial court within a set time from the ultimate exoneration.
3. And all criminal defendants with *prima facie* evidence that the criminal charges were brought with prior knowledge, or maintained after discovery, of their falsity by the Prosecution should be granted a Rule 11-type hearing upon exoneration, on motion by the trial court, by the defense, or by a witness. Rule 11-type sanctions, where found appropriate, should be levied on the person/office of the offending prosecutor(s), and his agents, with no recoupment from the State's *general* coffers, and be of such amount as to make the victimized defendant whole in all respects. And since the U.S. Supreme Court unanimously held in ***Virginia Office For Protection And Advocacy v. Stewart, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et al***, 131 S.Ct. 1632 (2011), that the *Ex parte Young* Doctrine allows one state agency to sue another, the Rule-11 type sanctions could, in appropriate cases, be awarded in part to the relevant public defender or SC's Office of Indigent Defense.

Modernizing SC's Rules of Criminal Procedure is constitutionally entrusted to this Court and now necessitated by SC's lack of a Colorado's Exoneration-Act-type law adopted by many states. SC cannot conceivably be immune from the false-conviction/false-incarceration national epidemic. Where there is disease, there should be remedy. And as the very purpose of penal statutes prosecutors enforce is to deter crime, court-designed-and-enforced punishment of rogue prosecutors will presumably deter rogue prosecutions and effect future judicial and fiscal economy and increase public confidence in the criminal justice system.

With rampant offenses against truth, exonerations after LWPOP/capital sentences went from hundreds to thousands and such phrases as "post-truth world," "alternative facts" abound To paraphrase an inaugural address, this American butchering of the truth stops here, now, and under Chief Justice Beatty.

Lessons from Sinai, the Red Sea, and Tiran and Sanafir Islands

Dr. Assa'ad-Faltas sees her Egyptian and Coptic heritage and her intellect and education through "from her to whom much is given, much is expected" and offers them in confidence and love, not arrogance. St. Peter preached that Moses was raised "in all the wisdom of the Egyptians." *Exodus* 18:13-26 reports that Jethro taught Moses the necessary judicial hierarchy. *Judges* 4-5 report on Deborah, the first female judge.

The Red Sea bifurcates into Suez Gulf and Aqaba Gulf, the latter begins at Tiran Strait with its two small uninhabited Tiran and Sanafir islands. For unclear reasons, Saudi Arabia suddenly clamored for those Islands; and President Sisi tried to oblige. Circa 163 Egyptian Moslem and Christian men and women sued to stop the treaty; and countless others unearthed documents proving the islands are Egyptian Territory.

The Cabinet sought to bypass the courts by referring the treaty to Parliament for ratification; but on 16 January 2017, in a 59-page opinion where the music of the words is surpassed only by the exquisite legal analysis, Egypt's Supreme Administrative Court found the islands Egyptian and, since Item 151 of Egypt's

Constitution forbids any treaty surrendering Egyptian land, the treaty is not a sovereign presidential act immune from judicial review but a nullity under the Constitution. The Court also enjoined Parliament from considering the treaty because it violates the constitutional provision prohibiting surrender of land. The judgment requires the Egyptian government to pay the cost of the litigation to the 163 plaintiffs.

That restored the Egyptian people's confidence in the integrity and independence of their judiciary and allows the undersigned to argue by analogy that a State's bringing known false criminal charges against one of its inhabitants is an act devoid of sovereignty and not immune from costs, moral or monetary.

Lessons from Digitalis, Quinidine, and small insects and animals

A statement very disdainful of physicians attributed to now-Chief-Justice Beatty is hopefully misquoted or, if believed when spoken, open for reconsideration. The Basic Sciences of Human Biology should be integral to the education of all adults. As a beginning medical student in 1971, the undersigned had such love of Biochemistry that she learned the curriculum on her own at the beginning of the two academic years allocated for Basic Sciences, spent her academic-excellence stipend on more specialized textbooks for in-home reading, and stopped attending formal Biochemistry lectures (because she had already taught herself the material) to the chagrin of her father whom she consoled thus: I owe you results, not attendance.

Where do plants get iron from, how and why? What are the compounds emetic in large doses but life-saving in smaller doses doing in and for the plants? The answer to the latter question obtained in the 1971 Biochemistry phase provides a relevant lesson here. Plants need insects for pollination. For that job insects need to be lightweight and small. They could be wiped out by large predator *but for the emetic compounds* in the plants which get on the pollinating insects and cause the predators to spit them out alive. Nature has likewise created emetic feelings of guilt, shame and regret to protect the weak from the oppressor.

The politically-weak Marie Assa'ad-Faltas has a strong coating which makes those who harm her harm themselves. Supposedly smart lawyers do not understand how and why oppression harms the oppressor. Hence, as SC-Supreme-Court-Candidate Goodstein testified: "The suicide rate of lawyers is way too high."

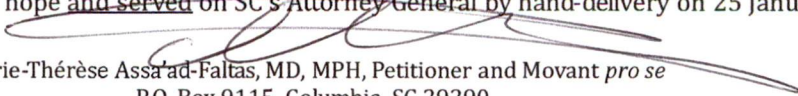
"I owe you results, not attendance." Dr. Assa'ad-Faltas joyfully reminded her father when she earned her class' Highest Honor in Biochemistry in June 1973. So, does this Court owe South Carolina full employment of criminal defense lawyers or drastic reduction of crime rates and rehabilitation of all criminals?

If this Court's *raison d'être* is full criminal-defense-lawyer employment, the system is perfect as the number of wrong convictions and PCR cases attests to the ineffectiveness, even incompetence, of many criminal defense lawyers, which creates employment for another layer of PCR lawyers, and a third layer of lawyers alleging ineffectiveness of the first PCR lawyer and a corresponding number of government and judicial staff lawyers opposing or assisting in adjudication of self-multiplying cases. But in such self-serving system devoid of a higher moral purpose, "the suicide rate of lawyers is way too high." The imposition on Dr. Assa'ad-Faltas of a bizarre requirement that she be represented by a lawyer where similarly-situated others are allowed to advocate *pro se* can only be explained by the judicial system's self-serving purpose.

If this Court exists to establish justice and reduce crime, it should begin by deterring the crimes of perjury and subornation of perjury among its own officers. This Court should not "dumb itself down" with intelligence-insulting explanations for some of its orders. As Candidate James testified, what is wrong should not be allowed to continue just because it once began. And Chief Justice Beatty should apply his experience and observations of prosecutorial abuses to create new remedies and case law to be emulated by others.

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 25 January 2017, all God so willing.


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