

On Petition for a Writ of *Certiorari* to RICHLAND COUNTY Court of Common Pleas
Jean Hoefer Toal, sitting as Circuit Judge on Circuit Court Case No. 2016-CP-40-01444

RECEIVED

Marie-Thérèse Assa'ad-Faltas, MD, MPH, Respondent,
v.
The State of South Carolina, Petitioner.

DEC 21 2018

Dr. Assa'ad-Faltas' Motion to Dismiss for the State's Failure to Plead a Petition

Without waiving her unappealability argument, Respondent shows that Rule 243(d), SCACR, (as amended effective 29 April 2009 and thus superseding the 15 July 2003 order of this Court) provides:

(d) Service and Filing of Petition and Appendix. Within thirty (30) days of receipt of the transcript, petitioner shall serve a copy of the Appendix and petition for writ of certiorari on opposing counsel and shall file with the Clerk of the Supreme Court an original plus six (6) copies of the petition, two (2) copies of the Appendix, and proof of service showing the Appendix and petition have been served. As provided by Rule 267(d), one copy of the Appendix filed with the Supreme Court shall be filed unbound.

Here, the transcript was delivered on 20 November 2018; but no petition or Appendix was filed or served by 20 December 2018. The State thus also disobeys this Court's specific 19 October 2018 ORDER in this case: **"The State shall proceed to serve and file the petition and appendix."** Nothing in this Court's 18 March 2009 Order (which eliminates *only* the requirement to show good cause *when seeking the first extension*) allows the State to double the Rule 243(d) for itself *without even seeking an extension*.

Further, the State's and the City of Columbia's conduct before the lower courts was very dilatory.

In October 2011, Applicant set a line of inverted plastic buckets to mark the south boundary of a vacant lot of land she co-owns with her mother. DHEC inspected the arrangement and found no hazard in it; yet, the City of Columbia got Applicant sentenced, on 25 April 2013, to thirty (30) days for that.

In February 2016, this Court equitably tolled Applicant's time and directed Richland County's Clerk to accept the relevant application. So was 2016-CP-40-01444 filed on 3 March 2016 and begun to be heard on 6 December 2016 but was adjourned with intent to resume promptly. The State interposed its offer to order transcript Part I, which delayed the resumption until 14 June 2017. Retired Chief Justice Toal granted PCR from the bench and requested a draft order from Applicant's then-counsel Leah Moody.

The State did not *then* order transcript Part II but engaged Ms. Moody in "several rounds of editing" only to refuse to stipulate to the draft she finalized. Retired Chief Justice Toal finally wrote and filed her own order on 14 June 2018. Only after its July 2018 appeal did the State order transcript Part II.

In another of Respondent's PCRs, 2017-CP-40-06831, which she, thank God, also won *twice*, the State promised to keep seeking reconsideration and appealing whenever Dr. Assa'ad-Faltas prevails: **"We are all destined to do this forever or else concede that the law does not apply to Applicant, or for that matter anybody else of sufficiently vexatious character."** State's Rule 59 motion, p 2.

This Court is reminded of its own *repeated* assurances in its "extreme" orders, from 8 April 2011 to 27 September 2017, restricting to various degrees Dr. Assa'ad-Faltas' right to *pro se* advocacy, that she *"is not precluded from addressing any grievances she may have in the courts of this state, assuming she is represented by counsel and such grievances are not frivolous."* She was "represented by counsel" when a "court of this state" found her "grievance" at having been unconstitutionally convicted and cruelly sentenced with ineffective counsel forced on her "not frivolous" and granted PCR. **She now asks this Court to apply its own ordinary long-published time requirements to the State**, which is wantonly using the word "vexatious" as a talisman to usurp all Dr. Assa'ad-Faltas' hard-won legal victories.

Without prompt dismissal, the State will obtain all its allowable extensions only because it can and only to ultimately fail to justify reversal of the grant of PCR. State lawyers, too, can be frivolous.

That is *reliably* predictable from the State's conduct in 2017-CP-40-06831 and in 2018-CP-40-01798.

In 2017-CP-40-06831, Circuit Judge Clifton Newman followed this Court's equitable tolling lead and allowed Dr. Assa'ad-Faltas to seek PCR from two 18 May 2011 contempt-of-court convictions after her timely motion to appoint counsel lay unheard for over **four years**. On 22-23 March 2018, Circuit Judge Goldsmith conducted a full evidentiary hearing and granted PCR. The State sought reconsideration which was granted only to the extent Judge Goldsmith vacated the PCR grant, recused himself, and remanded for the State to put any additional evidence it claimed it was prevented from presenting.

When Judge Gravely reheard the matter on 10 August 2018, **the State did not present any additional evidence** but argued for summary judgment which Judge Gravely denied to the State in his admirable, heroic, and compassionate 27 November 2018 ORDER, granting PCR anew on three separate grounds.

The State still sought reconsideration under a frivolous idea (posited without support in law or policy) that Applicant was not entitled to *appointment* of counsel therefore her volunteer counsel need not have been effective. That counsel's prejudicial ineffectiveness, independently found by two unbiased circuit judges, **does not deter the State from doing "this forever."** State's Rule 59 motion there, *supra*, at p 2.

And 2018-CP-40-01798 was, on 1 June 2018, scheduled by Circuit Judge Hood to be heard by Circuit Judge Jocelyn Newman on 7 December 2018. But, on 30 October 2018, the State *falsely* claimed that Dr. Assa'ad-Faltas' slot must be diverted to an older case which had been set for a 10 September 2018 PCR term cancelled due to Hurricane Florence. *Dr. Assa'ad-Faltas responded that PCRs are scheduled by order of their readiness for trial, not their date of filing. But Circuit Judge Hood asked her to choose between being heard in Kershaw (whereto she cannot reliably travel) or in Richland by a judge who may have a conflict.* When Dr. Assa'ad-Faltas tried to explain the difficulty of those choices, Judge Hood transferred his administrative duties over Dr. Assa'ad-Faltas' cases to Judge Clifton Newman. **As the attached table shows, of the 32 PCR cases scheduled for the 3-7 December 2018 term, sixteen (16) were continued and five (5) were withdrawn.** Of the remaining eleven (11) eight (8) were denied and three are pending. **That proves: (a)** the State scheduled sixteen not-ready cases to crowd Dr. Faltas out; and **(b)** Dr. Faltas' PCRs are meritorious. Even if the other applicants' three PCRs of that typical week were ultimately granted, it would be only a general 3/16 success rate while Dr. Assa'ad-Faltas is 2/2 so far.

This is e-mail chain documents the State's bad faith thwarting of the restoration of 2018-CP-40-01798 to the 7 December 2018 am slot **even after** the not-really-ready Bethea case was independently continued:

Subject: Re: [FWD: This is to memorialize a phone conversation I just had with Mr. Thomas.]

From: Megan Jameson <MJameson@scag.gov>

Date: Tue, November 13, 2018 11:32 am

To: "ctruluck@trulucklawfirm.com" <ctruluck@trulucklawfirm.com>

Cc: Lindsey McCallister <LMcCallister@scag.gov>, "rhoodlc@sccourts.org" <rhoodlc@sccourts.org>, "tommy@paroleme.com" <tommy@paroleme.com>

Chris,

I am counsel of record for Shawn Bethea, which is a State Grand Jury PCR that has been pending for substantially longer than your case. My witness, Representative Seth Rose, has already confirmed his availability and we have been working to get this matter scheduled for a while, particularly because it will take half a day. I will contact Tommy to discuss this directly, but the State is not inclined to consent to a continuance of an older matter in order to put a much more recent case on the roster, particularly when Tommy has not indicated he is unavailable or any necessary reason for a continuance. This matter was set on the roster by the Chief Administrative Judge, Judge Hood. I have copied his clerk on this email.

Sincerely, [/] Megan Jameson

ctruluck@trulucklawfirm.com [/] Tue 2018-11-13, 1:17 PM

You: Lindsey McCallister; Megan Jameson; Clifton Newman; Marie Assa'ad-Faltas; tommy@paroleme.com

Lindsey,

I've just spoken with Tommy Thomas who represents Shawn Bethea on a PCR currently scheduled to go on December 7th and he has confirmed that he would be perfectly fine with his PCR being continued and Dr. Faltas' scheduled in lieu of. Please let me know if this is a workable solution to have Dr. Faltas matter scheduled.

Sincerely,

Chris S. Truluck, Esq.

1720 Main Street, Suite 104

Columbia, SC 29201

Phone: 803-556-7285

Fax: 843-620-0502

TruluckLawFirm.com

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----- Original Message -----

Subject: This is to memorialize a phone conversation I just had with Mr. Thomas.

From: Marie Faltas <Marie_Faltas@hotmail.com>

Date: Tue, November 13, 2018 9:56 am

To: Marie Assa'ad-Faltas <marieassaadfaltas@gmail.com>, "ctruluck@trulucklawfirm.com" <ctruluck@trulucklawfirm.com>, "tommy@paroleme.com" <tommy@paroleme.com>

Mr. Thomas kindly advised me that, if the AG would be agreeable to try my PCR case in the morning of Friday, 7 December 2018, Mr. Thomas would have no objection to the PCR case of his client, Shawn Bethea, being continued to the next PCR term.

If Mr. Truluck would confirm that conversation and inform the AG's office, I would greatly appreciate it.

Thanks to all and God bless all./Marie

On 30 November 2018, Judge Clifton Newman set 2018-CP-40-01798 to be heard at the end of Judge McLeod, IV's Common Pleas/Non-Jury 10-14 December 2018 term in Richland. The State sought and obtained a continuance because SCAAG McCallister "had not been consulted," thus betraying a pre-*State v. Langford*, 400 SC 421, 735 S.E.2d 471 (2012), mentality. **The evidence remains unheard despite Dr. Assa'ad-Faltas' and her standby counsel's securing the presence of seven witnesses on 17 December 2018.**

The State's manipulation of the PCR docket to Dr. Assa'ad-Faltas' damage gives her **moral authority** to ask this Court to extend *Langford* to PCRs. Under separation-of-powers principles, the Judiciary (assisted by *quasi-judicial* clerks), not the Executive, controls the court docket, be it civil, criminal, **or hybrid**.

Wade v. State, 348 S.C. 255, 264, 559 S.E.2d 843, (2002), quoted the U.S. Court of Appeals for the Fourth Circuit's *Smith v. Angelone*, 111 F.3d 1126 (1997), with approval:

"[H]abeas corpus cases are, in effect, hybrid actions whose nature is not adequately captured by the phrase 'civil action'; they are independent civil dispositions of completed criminal proceedings. The 'civil' label is attached to habeas proceedings in order to distinguish them from 'criminal' proceedings, which are intended to punish and require various constitutional guarantees." *Smith*, 111 F.3d at 1130 (quoting *Santana*, 98 F.3d at 754-55).

This Court thus: (1) joined the view of PCRs as civil supplemental proceedings to criminal proceedings; and (2) should *ipso facto* extend *Langford* to PCRs and restore the PCR docket to the judiciary.

Also, *Hiott v. State*, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007), **reversed**, 381 S.C. 622, 674 S.E.2d 491 (S Ct. 2009), **applies SC's Rules of Civil Procedure to PCR with exceptions dictated by the Act and/or by public policy**. The public policy underlying Rule 11 and the Canon of professional conduct **apply a fortiori to the SGAAGs in PCR proceedings, where the State is most powerful and the PCR**

applicants are most vulnerable to the State's lawyers' misconduct. Exempting PCR *applicants* from Rule 11 while imposing it on SCAAGs *seems* asymmetric. **But everything in criminal proceedings is asymmetric**; from the burden of proof to Prosecution's inability to appeal an acquittal while a convict is constitutionally guaranteed a fair appeal. **Conversely, the disproportion between the State's resources and those of the typical criminal defendant is stark.** In PCR proceedings, the asymmetry of resources is augmented by the applicant being more likely to be incarcerated than the typical pre-trial criminal defendant and thus without access to the record or to investigations. Therefore, the same asymmetry of the right to appeal in criminal cases should be extended *against the State* in PCR cases.

Even in strict *symmetry*, **a judicial system that:** (a) dismissed as untimely a PCR application timely but mistakenly sent to Appellate Defense and delivered to the clerk of court a day late; *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008); (b) holds that mailing does not constitute filing of a PCR application for statute of limitations purposes; *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001); **and (c) adhered to Gary in *Mose v. State*, 420 SC 500, 510, 803 SE2d 718, (2017), ("Our decision in no way eliminates the rule created in *Gary* or absolves inmates from complying with the one-year statute of limitations. In fact, we expressly decline to adopt a rule that automatically deems a PCR application 'filed' on the date an applicant claims it was delivered to prison authorities."); must be even-handed and dismiss the State's appeals whenever the State is delinquent in filing.**

WHEREFORE, the State's appeal should be dismissed because: (1) the State failed to file the petition for *certiorari* and appendix when due under SCACR, (2) the State's conduct toward *this* Applicant's meritorious PCRs has been dilatory and oppressive, (3) the State clearly intends delay for its own sake, and (4) **even-handedness requires holding the powerful, well-resourced state lawyers to the same punctuality to which poor under-educated prisoners are held.** Otherwise, this Court should take Appellate Defense's failure to zealously advocate against the State's appeal as proof that Appellate Defense's conflict with Applicant prevents adequate representation of her. Appellate Defense should be relieved and this Respondent should be allowed to advocate *pro se*.

Additionally, Dr. Assa'ad-Faltas makes this important and sincere personal statement:

Nine years ago, *to the day*, then-SC-Chief Justice Toal gave me for Christmas the gift of homelessness and humiliation. I saw them as efforts to intimidate me into pleading guilty to false harassment charges that everyone knew were brought to give my opponents unfair advantage in civil litigation. Thank God, I showed all concerned a Coptic Orthodox Christian's true metal. When Retired Chief Justice Toal sat on my PCR case, it started badly but ended with two Catholic school girls living up to what nuns had taught them. To her later grant of relief for me, as to two other jurists who had once been extremely unfair to me but later reconsidered, I reacted *initially internally*, "They are only cleaning up part of the mess they caused for me." But I remembered that Heavens rejoice for the return of the lost sheep more than for the 99 who never strayed. **May this Court, this Christmas, return to the fold of gentle justice.** May this Court finally own the fact that all my misery for nine years, and whatever judicial resources this Court claims to have spent on my cases, would have been saved (along with double-digit trials and supplemental proceedings) if this Court had only considered what I then asked: the constitutionality *vel non* of SC's harassment/stalking statute – still an open question in this state.

Submitted on 21 December 2018 and served on SC's Attorney General by hand-delivery to his office and on Mr. Dudek at his office at 1331 Lady Street, Columbia, SC 29201, all God so willing.


Marie-Thérèse Assa'ad-Faltas, MD, MPH, Respondent *pro se* for purposes of this submission
P.O. Box 9115, Columbia, SC 29290

Phone: (803) 783-4536 e-mail: Marie.Faltas@hotmail.com

POST-CONVICTION RELIEF HEARINGS, FIFTH JUDICIAL CIRCUIT, THE HONORABLE JOCELYN NEWMAN, PRESIDING JUDGE, RICHLAND COUNTY COURTHOUSE

Page 1 of 5, Monday, December 3, 2018

CONTINUED 09:30 AM 295408 Michael Orlando Brown 2016-CP-40-4677 Leah B. Moody, Lindsey A. McCallister, Anastasia Walker,
Alicia Dyar Goode, Luck Campbell Hubbird, Meghan Walker
CONTINUED 09:30 AM 310529 Anthony M. Porterfield 2017-CP-40-7564 Leah B. Moody, Lindsey A. McCallister, Anastasia Walker, Robert Bank
DENIED 09:30 AM 371594 Demichael Sheavon Razor 2017-CP-40-3776 Jonathan D. Waller, Lindsey A. McCallister, Tracy Pinnock, Anastasia Walker
STAYED then CONTINUED 09:30 AM 359201 Vincent Phillip Nelson Jr. 2014-CP-40-7441 Jonathan D. Waller, Lindsey A. McCallister, Tara Shurling
DENIED 09:30 AM 365746 Shiquan Tyon Cwiklinski 2017-CP-40-1585 Dayne C. Phillips, Lindsey A. McCallister, Anastasia Walker
CONTINUED 01:30 PM 282336 Steven Bosnell Gillian 2015-CP-40-3331 Leah B. Moody, Lindsey A. McCallister, Sheila Mims
CONTINUED TO DATE CERTAIN 01:30 PM 226843 Yusuf Karim Aquil 2016-CP-40-1661 Aimee J. Zmroczek, Lindsey A. McCallister, Neal Michael Lourie
DENIED 01:30 PM John Julian Tomsic III 2017-CP-40-0342 James R. Snell, Jr. Lindsey A. McCallister, Carl Grant
CONTINUED, Discovery motion GRANTED 01:30 PM 329390 Michael D. Thomas 2017-CP-40-0943 Jonathan D. Waller, Lindsey A. McCallister, Robert Bank

Page 2 of 5 Tuesday, December 4, 2018

CONTINUED 09:30 AM 363340 Faasiu Toese 2015-CP-40-7115 Jonathan D. Waller, Lindsey A. McCallister, Jennifer Davis
WITHDRAWN 09:30 AM 366098 Christopher A. Watson 2016-CP-40-2452 Jonathan D. Waller, Lindsey A. McCallister, Lucas Hawks
DENIED 09:30 AM 369163 Richard B. Mock Jr. 2016-CP-40-7261 Jonathan D. Waller, Lindsey A. McCallister, Tracy Pinnock
CONTINUED 09:30 AM 367470 Tirrell Ramar Boyd 2016-CP-40-4421 Leah B. Moody, Lindsey A. McCallister, W. Barney Giese, Justin Martin Kata
CONTINUED, Motion to relieve counsel DENIED 09:30 AM 342415 John Ferguson 2017-CP-40-5843 Leah B. Moody, Lindsey A. McCallister, Tracy Pinnock
TAKEN UNDER ADVISEMENT 01:30 PM 099356 Christopher Broadnax 2017-CP-40-0045 Jonathan D. Waller, Kelly Oppenheimer, James May,
Charles William Cochran LaNelle Cantey DuRant

Page 3 of 5 Wednesday, December 5, 2018

CONTINUED 09:30 AM 209002 Michael Gerald Simpson 2016-CP-28-0607 Kristy Goldberg, Lindsey A. McCallister, Jason Kirincich
DENIED 09:30 AM 366010 Gary Wayne Thomas 2017-CP-40-0046 Leah B. Moody, Lindsey A. McCallister, Tracy Pinnock
DISMISSED 09:30 AM Cedric Bouvoir Chick 2017-CP-40-4897 Leah B. Moody, Lindsey A. McCallister, George McElveen
WITHDRAWN 09:30 AM 284694 C.D. Cash 2017-CP-40-1541 Jonathan D. Waller, Lindsey A. McCallister, Carl Grant
DENIED 01:30 PM 302355 Gerry Brent James 2017-CP-40-3819 Jonathan D. Waller, Lindsey A. McCallister, Tivis Sutherland
CONTINUED 01:30 PM 283119 Venable Deon Mitchell 2017-CP-40-4953 Leah B. Moody, Lindsey A. McCallister, Rhodes Bailey
CONTINUED 01:30 PM 365143 Maurice Jaquwan Miller 2017-CP-40-5555 Leah B. Moody, Lindsey A. McCallister, Megan Eigenbrot
WITHDRAWN 01:30 PM 351672 William Roland Jackson Jr. 2017-CP-40-5844 Leah B. Moody, Lindsey A. McCallister, Arthur Aiken

Page 4 of 5 Thursday, December 6, 2018

CONTIUED 09:30 AM 328345 Christopher R. Whitehead 2016-CP-28-0162 Reginald I. Lloyd, Megan H. Jameson, Lindsey A. McCallister, Neil Riley, LaNelle Cantey DuRant David Reuwer John Meadors

CONTINUED 01:30 PM 310134 Ernest Maurice Allen 2017-CP-28-0904 Kristy Goldberg, Lindsey A. McCallister, Jason Kirincich, Jarrett Bouchette

CONTINUED 01:30 PM 359058 Maurice A. Roberts 2017-CP-40-4450 Jonathan D. Waller, Lindsey A. McCallister, Tivis Sutherland, Robert Dudek

WITHDRAWN 01:30 PM 369301 Maurice Goins 2017-CP-40-4592 Jonathan D. Waller, Lindsey A. McCallister, Jonathan Comish

WITHDRAWN 01:30 PM 370586 Richard Ray Shaver 2017-CP-40-5792 Jonathan D. Waller, Lindsey A. McCallister, Michael McMullen

Dismissed, 19 December 2018 01:30 PM 362455 Saquan Kyon Richardson 2017-CP-40-7002, Jonathan D. Waller, Lindsey A. McCallister, Tracy Pinnock

Page 5 of 5 Friday, December 7, 2018

CONTINUED 09:30 AM 338877 Shawn Bethea 2016-CP-40-3525 Tommy A. Thomas, Megan H. Jameson, Seth Rose

PENDING 01:30 PM 343463 Anthony Hackshaw 2015-CP-40-5695 Tricia A. Blanchette, Lindsey A. McCallister, MOTION ONLY

PENDING 01:30 PM 300135 Fred Jack Sanders 2017-CP-40-4517, Tricia A. Blanchette, Lindsey A. McCallister, Lucas Hawks, John Christopher Shipman

TOTAL SCHEDULED: 32

CONTINUED: 16

WITHDRAWN: 5

DENIED/DISMISSED: 8

PENDING: 3