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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-1560

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, Appellants,

v.

South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, Respondents.

APPELLANTS' PETITION FOR REHEARING

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SC Court of Appeals

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Appellants, South Carolina Public Interest Foundation and Edward D. Sloan, Jr., individually, and on behalf of all others similarly situated, hereby submit this **Petition for Rehearing**.

Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court. A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court.

SCACR 221 (a).

This Court issued an opinion in this matter March 4, 2015. *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, Appellate Case Number 2012-213599 (filed March 4, 2015) (herein: "Slip Opinion"). Appellants' Petition for Rehearing is based upon four grounds: (1) this Court mistakenly believed that Respondents¹ admitted that their conduct was wrongful; (2) Respondents have not admitted any wrongdoing; (3) taxpayer standing should be considered separately from public importance standing; and (4) the request for inspection of privately owned bridges came not from the City of Aiken, but from a private citizen.

I. THIS COURT MISTAKENLY BELIEVED THAT RESPONDENTS ADMITTED THAT THEIR CONDUCT WAS WRONGFUL.

Appellants respectfully suggest that this Court "misapprehended" Respondents' legal position on whether their conduct was wrongful. Throughout the opinion, this Court repeatedly stated that the Respondents had admitted that their conduct was wrongful, and/or unconstitutional.

A. This Court Mistakenly Believed That the Auditor Was an Agent of the Department.

This Court mistakenly believed that the findings of the Office of the Chief Internal Auditor were the same as admissions of the Respondent, the Department of Transportation. However, the

¹ Respondent Walsh, Deputy Secretary of Engineering resigned his office April 17, 2013

Office of the Chief Internal Auditor is **not** an official of the Department of Transportation, and Respondents **never** agreed with the findings of the Auditor.

First, the Auditor works for the Commission of the SCDOT, a separate entity, which is not the governing body of the SCDOT. The statute establishing the Office of the Chief Internal Auditor clarifies that the Auditor works for the commission, and not the Department.

(A) The **commission** must appoint a chief internal auditor The **commission** also must provide professional, administrative, technical and clerical personnel . . . for the chief internal auditor Except as otherwise provided, any employees hired pursuant to this section **shall serve at the pleasure of the commission**.

(B)(1) The chief internal auditor shall serve for a term of four years and **may be removed by the commission**. . . . The chief internal auditor must . . . possess any other experience **the commission may require**. . . . The **commission shall set the salary** for the chief internal auditor

(2) . . . The **department . . . must fully cooperate** with the chief internal auditor in the discharge of his duties

(3) The **commission is vested with the exclusive management and control** of the chief internal auditor.

(C) The department, at its own expense, must provide appropriate office space . . . for the chief internal auditor and his support staff.

S.C. Code Ann. § 57-1-360 (emphasis added). In many ways, the Chief Internal Auditor is adversarial to, and a watchdog over, the Respondent Department of Transportation.

Although the Chief Internal Auditor issued a report finding that the inspection of the bridges was unlawful and improper, the Respondents never accepted those opinions of the Auditor. Instead, throughout this litigation, the Department has maintained that the inspections of privately owned bridges were a proper and lawful exercise of its discretion.

Respondents, in their brief, concurred: “The Chief Internal Auditor is appointed by the Commission and is **not** an officer of the Department itself. S.C. Code Ann. § 57-1-360.” Brief of Respondent, p. 8 (emphasis added). The Respondents also admit that the Auditor and the bridge

inspectors “warned the Chief Engineer for Operations that the inspections were ‘wrong’.” Brief of Respondent, p. 9. But that warning did not change the Chief’s opinion, or his conduct.

B. This Court Made Several Rulings on the Misapprehension That the Opinion of the Auditor Was the Opinion of the Department.

This Court’s misapprehension of the adversarial relationship between the Auditor and the Department, and the conflicting opinions of the Auditor and the Department affected all the major parts of its ruling and opinion and caused the Court to reach multiple improper conclusions.

1. *This Court denied public importance standing to the Appellants based on its misapprehension.*

Because this Court believed that the Respondents had admitted the wrongdoing, and denied the Appellant’s public importance standing to address Respondents’ unconstitutional actions.

“The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of ‘future guidance’ that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance.” [*ATCS, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)]. “For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.” *Id.*

In this case, we find Appellants do not have standing based on public importance. **SCDOT has conducted its own audit and concluded its own actions were improper.** Thus, there is no ‘future guidance’ to be provided by this court.”

Slip Opinion, p. 3 (emphasis added). In this Petition, Appellants will demonstrate that the underlined portion of the Court’s opinion is inaccurate. Because the SCDOT has **not** “concluded its own actions were improper,” there **is** a grave need for “‘future guidance’ to be provided by this court.”

2. *This Court denied the Appellants taxpayer standing based on its misapprehension.*

This Court ruled, “For the same reasons we find Appellants do not meet the public importance basis for standing, we find they do not have taxpayer standing.” Slip Opinion, p. 4. This Court also ruled,

Appellants do not have taxpayer standing here because there is not a public interest involved in preventing the unlawful expenditure of inspecting private bridges when **SCDOT has already determined its own policy prohibits the action.**

Slip Opinion, p. 4 (emphasis added).

This ruling contains two errors first, the Court relies on its misapprehension that the Respondents admitted their own conduct to be unlawful; and second, this Court erroneously ruled that the standards for taxpayer standing are the same as those for public importance standing, which Appellants will address below in Section III.

3. *This Court refused to apply the “capable of repetition yet evading review,” the first exception to the doctrine of mootness, based on its misapprehension.*

The first exception to the doctrine of mootness is when an issue is capable of repetition yet evading review. This Court’s mistaken belief that the Respondents had admitted wrongful conduct governed the Court’s finding that the issue was not capable of repetition yet evading review.

[W]e find the issue here is not capable of repetition yet evading review **because SCDOT has independently determined its policy does not permit the inspection of private bridges.** Accordingly, we find Appellants have failed to meet the first exception of mootness.

Slip Opinion, p. 6 (emphasis added). As Appellants will demonstrate below, the Respondents made no such independent determination, and indeed the Respondents have maintained the **opposite** contention throughout this litigation. The Department will continue doing as it has done, because it sees see nothing wrong with its conduct. Because

the Respondents believe they did nothing wrong, this issue (the expenditure of public funds to benefit private property) is capable of repetition yet evading review.

4. *This Court refused to apply the second exception to the doctrine of mootness, the public importance exception, based upon its misapprehension.*

This Court ruled that the public importance exception to the doctrine of mootness did not apply in this case.

Appellants next argue they meet the second exception to mootness because the matter is of great public importance and of manifest urgency. We again find the matter does not support public importance standing and is not of manifest urgency because **SCDOT has determined its own policy does not permit the action.**

Slip Opinion, p. 6 (emphasis added). Appellants will demonstrate below that the SCDOT has **not** “determined its own policy does not permit the action.” However, their actions **do** violate the South Carolina Constitution, and this **is** an issue of great public importance and manifest urgency. Appellants should be granted public importance standing to address violation of the Constitution.

5. *This Court refused to apply the third exception to the doctrine of mootness, whether a decision of this Court will “affect future events or have collateral consequences,” also based on its misapprehension.*

Like its previous decisions, this Court ruled that the third exception to the doctrine of mootness did not apply, and again based decision on the misapprehension of the Respondents’ legal position.

However, in the present case, **SCDOT has determined the inspection of private bridges is against its own policy.** Thus, we find the matter will neither “affect future events [n]or have collateral consequences.”

Slip Opinion, p. 6 (emphasis added). Again, as to the third exception, Appellants will demonstrate below that the SCDOT has **not** “determined the inspection of private bridges is against its own policy.” Therefore, the matter will “affect future events or have collateral

consequences.” Thus, the mistaken belief that the Respondents have admitted wrongdoing controls the entire opinion and decision of this Court.

II. RESPONDENTS HAVE NOT ADMITTED ANY WRONGDOING.

Throughout this litigation, the Respondents have maintained that their inspection of private bridges at public expense was perfectly legitimate and lawful. In the Circuit Court, Respondents argued in their Memorandum in Support of Defendant’s Return to Plaintiffs’ Motion for Summary Judgment and Defendant’s Cross Motion for Summary Judgment Motion for Summary Judgment that their conduct was **not improper**, but rather was within the bounds of the legitimate exercise of their discretionary authority to assist a municipality. They stated:

The Department’s position is that the city’s investigation of the bridges was a legitimate exercise of a municipality’s plenary police power to ensure the health, safety, and welfare of persons within its boundaries as well as its power to abate public nuisances; and that **SCDOT is authorized to assist local governments** in these activities within areas of its expertise under its primary enabling statute.

(R. p. 125).

Respondents also argued, “[T]he decision by Walsh to assist [the City] was well within the Department’s enumerated powers to assist other governmental entities in areas of its expertise.”

(R. p. 128). Respondents concluded, “Here, the Department properly responded to a request from City of Aiken officials and representatives for assistance in an area of the Department’s expertise.

The City had authority to make the request and **the department had authority to respond to it**”

(R. p. 130) (emphasis added). Of course, it was not the **City** investigating the bridges, and it was not the **City** requesting assistance. (R., pp. 34-51).

Nevertheless, the Circuit Court seemed to agree with the Respondents. The Circuit Court ruled,

The Department’s position is that the city’s investigation of the bridges was a legitimate exercise of a municipality’s delegated police power to ensure the health,

safety, and welfare of persons within its boundaries as well as its power to abate public nuisances; and that **SCDOT is authorized to assist local governments** in these activities within areas of its expertise under its primary enabling statute. S.C. Code Ann. § 57-3-110(7) (Rev. 2006).

* * *

For the reasons stated below, **the Court agrees with defendants** that the case should be dismissed.

(R. pp. 2-3) (emphasis added).

Later, the Circuit Court described the Defendants' use of public money to inspect private bridges as one of the "**routine decisions** of the State Highway Engineer as to when and where to provide assistance to local governments in areas of the Department's particularized expertise." R., p. 5 (emphasis added). The Circuit Court accepted the argument of the Respondents and ruled, "In any event, I find that **the actions of the defendants were not *ultra vires* or unconstitutional** under those proscriptions against using public funds for private benefit but were with the delegated powers of both the Department and the City of Aiken" (R., p. 10) (emphasis added).

Finally, on appeal Respondents argued, "the actions of the State Highway Engineer were for a legitimate public purpose." Brief of Respondent, pp. 9-10. In the Conclusion of their brief, Respondents asserted, "The action taken by the Department was a legitimate exercise of the Department's delegated powers to respond to a request for assistance from a duly incorporated municipality seeking to perform legitimate duties under the police power to protect its citizens." Brief of Respondent, p. 10.

Respondents have never admitted the error of their unconstitutional conduct. The fundamental basis of the Court of Appeals' decision throughout its opinion was that the Department had acknowledged a violation of their own policy and therefore did not need any guidance. This mistaken belief is fundamentally at odds with the record and legal position consistently asserted by the Respondents, and adopted by the Circuit Court. Accordingly, Appellants should be granted

public importance and taxpayer standing. Furthermore, the three exceptions to the doctrine of mootness apply: (1) the issue is capable of repetition yet evading review; (2) the issue, a constitutional violation, is a matter of great public importance and manifest urgency; and (3) a decision in this case will “affect future events or have collateral consequences.”

III. TAXPAYER STANDING SHOULD BE ANALYZED SEPARATELY FROM PUBLIC IMPORTANCE STANDING.

In addition to denying the Appellants taxpayer standing based on its misapprehension of Respondent’s legal position, this Court also intertwined the rationales for **taxpayer** standing with **public importance** standing. This Court ruled, “For the **same reasons** we find Appellants do not meet the public importance basis for standing, we find they do not have taxpayer standing.” Slip Opinion, p. 4. Appellants respectfully suggest that the rationale for taxpayer standing is different from the rationale for public importance standing, and the denial of public importance standing does not mandate the denial of taxpayer standing. Taxpayer standing arises from unlawful **expenditures**; public importance standing arises from unlawful **acts**.

A. Taxpayer Standing Is Based on the Wrongful **Expenditure** of Public Funds to Which the Taxpayer Contributed.

South Carolina has long recognized a taxpayer’s standing to bring actions alleging an unconstitutional or *ultra vires* expenditure by public officials and to request injunctive relief against the unlawful expenditure. The Supreme Court recounted this long-standing right in *Myers v. Patterson*:

As a general rule, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948). An exception to this rule exists when the act sought to be enjoined is an unlawful diversion of public funds, such as the **expenditure of public funds** under an alleged **unconstitutional** statute. *Id.* at 22, 51 S.E.2d at 97. In such cases, a **taxpayer** who may be compelled to pay the assessment, or **who has contributed** to the sum jeopardized, is considered to have **sufficient interest to enjoin the illegal**

act. Id. See also Kirk v. Clark, 191 S.C. 205, 4 S.E.2d 13 (1939) (the principle is firmly settled in this State that **a taxpayer may maintain an action in equity**, on behalf of himself and all other taxpayers, **to restrain public officers from paying out public money for purposes unauthorized by law**). Because the plaintiffs have alleged that the **challenged expenditure of tax revenues violates the constitution**, we find that they have **standing** to bring this action and turn to the merits of their claim that the Legislature lacks authority to divert SHIMS tax revenue to a use different from that for which they were levied.

Id. 315 S.C. 248, 251, 433 S.E.2d 841, 843 (1993) (emphasis added).

The Supreme Court also acknowledged this right of taxpayer standing in *Ladson Road*.

Generally, “a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained.” *Sloan v. Wilkins*, 362 S.C. 430, 436, 608 S.E.2d 579, 582-83 (2005). **Nonetheless, “[a] taxpayer’s standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina,”** *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000), and **indeed has been repeatedly recognized as to Sloan himself.** See, e.g., *id.*; *Sloan v. Department of Transp.*, 365 S.C. at 304, 618 S.E.2d at 878-79; *Greenville County I*, 356 S.C. at 548, 590 S.E.2d at 347.

* * *

Likewise, in this case, **Sloan has standing because he has alleged** a misuse of the statutory emergency procurement provision and therefore **an unlawful expenditure by public officials.**

Sloan v. Dept. of Transportation, 379 S.C. 160, 169-171, 666 S.E.2d 236, 241 (2008) (emphasis added).

The most extensive discussion of this issue is by the Court of Appeals in *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), a decision which the Supreme Court discussed at some length in *Ladson Road*.

We find *Sloan v. School Dist. of Greenville County* is particularly instructive on this issue. In that case, the School District procured construction contracts in February 1998 for three middle schools pursuant to its own procurement code’s emergency exception to the competitive sealed bid procedure. The District justified the need for the emergency procurement because it wanted the construction of the schools completed before school started in August 1999. **The Court of Appeals**

found Sloan had standing, stating as follows: “the public interest involved is the prevention of the **unlawful expenditure** of money raised by taxation. **Public policy demands** a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. **Taxpayers must have some mechanism of enforcing the law.**” *Id.* at 523, 537 S.E.2d at 303 (citation, quotation marks, and alteration omitted).

Sloan v. Dept. of Transportation, 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008) (emphasis added).

In this case, the Appellants contributed to the funds at issue, just as they contributed to the funds at issue in *Sloan v. Dept. of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008) (*Ladson Road*), and in *Sloan v. Dept. of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (*Ravenel Bridge*), both cases against the Department of Transportation. Accordingly, Appellants should be granted taxpayer standing because they contributed to the funds at issue, which Respondents wrongfully spent for the benefit of private property.

B. Public Importance Standing Is Based on the Public Importance of Contesting Unlawful Actions of Public Officials.

Unlike taxpayer standing, public importance standing is based on the public importance of the issues. Allegations of unconstitutional or *ultra vires* acts by public officials create issues of great public importance and support public importance standing.

The Court of Appeals addressed an expenditure in violation of the Procurement Code of the School District of Greenville County. An unlawful expenditure (supporting taxpayer standing) can also be unlawful act (supporting public importance standing). This Court found **both** taxpayer standing and public importance standing, and it addressed the interplay of the two kinds of standing.

Our decision to allow Sloan to proceed with this suit does not rest entirely on his *status as a taxpayer* of Greenville County. Recently, in *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), the Supreme Court held “a court may confer standing upon a party *when an issue is of such public importance as to require its resolution for future guidance.*” *Id.* at 531, 511 S.E.2d at 75. In *Baird*, the Appellants alleged Charleston County committed an *ultra vires* act by *exceeding its statutory authority* to issue hospital bonds. The Court explained the

case impacted a profound public interest—the public health and welfare—and stated *the citizens of Charleston County* “*have a significant interest in ensuring that their county acts within the legal parameters established by the legislature for funding hospital development.*” *Id.* Accordingly, the Supreme Court held the Appellants had standing to proceed. *Id.* at 531, 511 S.E.2d at 75-76.

In this case, the *public interest involved is the prevention of the unlawful expenditure of money raised by taxation.* “Public policy demands a system of *checks and balances* whereby taxpayers can hold public officials accountable for their acts.... Taxpayers must have *some mechanism of enforcing the law.*” *Eastern Missouri Laborers Dist. Council*, 781 S.W.2d at 47.

Sloan v. School District of Greenville County, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (2000) (emphasis added).

Taxpayer standing and the public importance standing are distinct concepts and should be analyzed individually. The Appellants respectfully suggest that the Court erred in considering the two concepts to be intertwined, or interdependent. Appellants further respectfully suggest that this Court mistakenly believed that its refusal to grant Appellants public importance standing also mandated the denial of taxpayer standing.

IV. THE REQUEST FOR INSPECTION CAME NOT FROM THE CITY OF AIKEN, BUT FROM A PRIVATE CITIZEN.

Appellants contended that a private citizen, Reggie Ebner, who claimed to be a licensed engineer in the state of Texas, who lived in the private gated community, and who happened to be a member of the Aiken City Council requested that the SCDOT inspect privately owned, privately constructed, privately maintained bridges in a private, gated community. The City of Aiken had refused to assist Ebner in his dispute with the owners and managers of the private gated community. The City told Ebner that he would have to deal with the developers and managers, and not the City of Aiken. Ebner then invoked the help of his State representative and State senator, who passed along his request for assistance to the Department of Transportation. (R. pp. 34-51). Appellants contend that the record is clear that the request did not come from the City of

Aiken, but at an absolute minimum, the documentary record submitted to the Circuit Court presents a genuine issue of material fact, and precludes summary judgment.

This Court ruled that it did not have to reach the issue of who issued the request for inspection of private bridges because of its disposition of the standing and mootness issues (Slip opinion, p. 7). However, as demonstrated herein, this Court misapprehended the legal position of the Department and should have ruled for Appellants on standing and mootness. Appellants respectfully suggest that the issue of whether the request came from the City of Aiken or from a private citizen, and the issue of whether respondents engaged in unconstitutional expenditure of public funds for private purposes preclude summary judgment for the Respondents, and require a remand for a trial on the merits of the Constitutional violation.

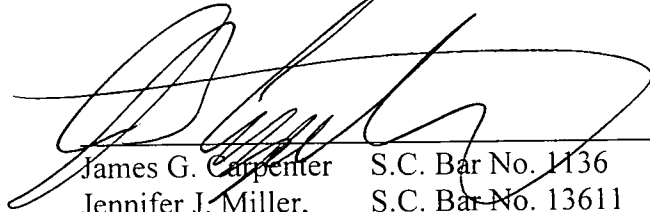
CONCLUSION

Because this Court mistakenly believed that the Respondents had admitted their conduct to be unlawful, this Court found no reason to rule on the unconstitutionality of the use of public funds to inspect privately constructed, privately owned, and privately maintained bridges in a private gated community. Respondents have not admitted their unconstitutional conduct, but rather, they have consistently maintained that their unconstitutional behavior was perfectly lawful and legitimate. The request for inspection services came from a private citizen in a private dispute with the managers of a private gated community.

WHEREFORE, Appellants pray the Court to:

1. rehear this action,
2. review the record,
3. withdraw its judgment and opinion,
4. reverse the judgment of the Circuit Court,
5. rule for the Appellants on issues of standing and mootness, and
6. remand for trial on the merits of the alleged constitutional violation.

Respectfully submitted,
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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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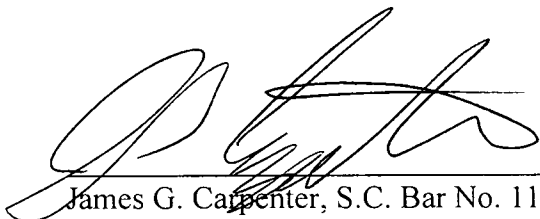
v.

South Carolina Department of Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering, Respondents.

PROOF OF SERVICE

The undersigned attorney hereby certifies that he served a copy of Appellant's Petition for Rehearing counsel for the Respondents by US Mail, postage prepaid this Friday, March 13, 2015, addressed as follows:

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March 13, 2015

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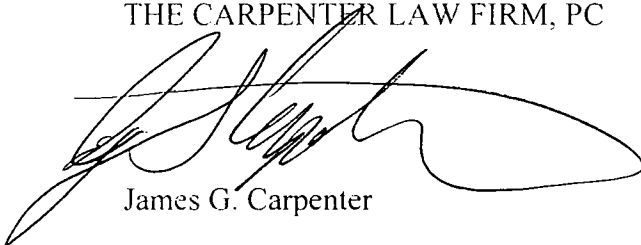
Re: *South Carolina Public Interest Foundation et al. v. South Carolina Department of
Transportation, and John V. Walsh, Deputy Secretary of Transportation for Engineering*
Civil Action No. 2012-CP-40-1560;
Appellate Case No. 2012-213599

Dear Ms. Kitchings:

I enclose an original and six copies of a Petition for Rehearing, and a proof of service, with a filing fee.

If you need anything else, please telephone me.

Sincerely yours,
THE CARPENTER LAW FIRM, PC



James G. Carpenter

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SC Court of Appeals

Enclosures

cc w/enclosure: Beecham O. Brooker, Jr.