

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Richland County  
Knox McMahon, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
MAY 15 2013  
S.C. Supreme Court

KEITH SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2012-213330  
\_\_\_\_\_

MOTION FOR APPOINTMENT  
OF OUTSIDE COUNSEL  
\_\_\_\_\_

Undersigned counsel respectfully moves this Court to appoint outside counsel to represent Petitioner in his appeal of his post-conviction relief matter. Representation of Petitioner presents a conflict of interest among the attorneys within the Office of Appellate Defense (hereinafter "Office") due to the Office's employment of LaNelle Durant who represented Petitioner at his trial and undersigned counsel who has been appointed to represent Petitioner in his appeal.

## **Relevant facts**

On March 20, 2006, Petitioner was tried before the Honorable James Johnson in Richland County on the charge of murder. At the time, Ms. Durant was an employee of the Richland County Public Defender Office and represented Petitioner on the charge. Exhibit #1 (Trial transcript page 1). He was found guilty after a five-day trial. Judge Johnson sentenced Petitioner to forty years' imprisonment. Exhibit #2 (sentence sheet). On March 21, 2011, Petitioner filed an application for post-conviction relief (PCR). In the application, he claimed Ms. Durant was ineffective. On August 14, 2012, his application proceeded to an evidentiary hearing before the Honorable R. Knox McMahan. He was represented by Tynika Claxton and Charlie Johnson. Ms. Durant was called as a witness by the state and testified regarding her performance. Exhibit #3 (PCR transcript pages 1 & 2). By order dated October 18, 2012, Judge McMahan denied Petitioner relief from his conviction. The order specifically referred to the following allegations of ineffective assistance of counsel in its headings: (1) inability to put forth a complete defense; (2) defective indictment (prosecutorial misconduct); (3) failure to object to testimony on Petitioner's invocation of constitutional rights; (4) failure to timely object to introduction of ammunition later removed from evidence; (5) failure to object to improper vouching and pitting of witnesses in closing; and (6) failure to object to improper jury charge on inference of malice.

Petitioner filed a notice of appeal. Due to his indigent status, the Office was appointed to represent him. Upon receipt of the file, undersigned counsel reviewed the materials and discovered Ms. Durant's representation of Petitioner at the trial level and direct appeal level, the claims alleging ineffective assistance concerning Ms. Durant's representation, Ms. Durant's testimony in the PCR hearing, and the PCR court's denial of relief to Petitioner. Based upon the discovery of Ms. Durant's involvement, undersigned counsel wrote a letter to Petitioner on March 28, 2013 advising

him of the potential conflict and requesting a signed waiver of the conflict. Petitioner has not responded to the request.

The petition for writ of certiorari is currently due on May 20, 2013, and has not been extended by any orders from this Court. The motion is made at this time to not cause any undue delay in the timely disposition of Petitioner's matter. Undersigned counsel has collected the documents necessary to prepare the appendix and will furnish those to outside counsel if this Court grants the motion.

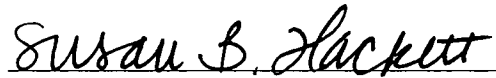
### **Law and Analysis**

Undersigned counsel respectfully requests the appointment of outside counsel for Petitioner in light of the conflict of interest presented by the representation of Petitioner and the Office's employment of Ms. Durant and undersigned counsel. Rule 1.7(a)(2) of the Rules of Professional Conduct explains that a lawyer has a concurrent conflict of interest "if ... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities ... by a personal interest of the lawyer." Rule 1.7(a)(2), RPC, Rule 407, SCACR. Due to the employment of Ms. Durant and undersigned counsel by the Office, a current conflict of interest exists among the attorneys in the Office of Appellate Defense. Additionally, undersigned counsel is concerned that representation of Petitioner by the Office may result in a Sixth Amendment conflict of interest in light of the claims of ineffective assistance presented to the lower court. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free counsel. Mickens v. Taylor, 535 U.S. 162, 168 (2002); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

**Conclusion**

Undersigned counsel respectfully requests the appointment of outside counsel to represent Petitioner in his appeal of the PCR court's order denying him relief. Undersigned counsel requests this Court hold the timelines for filing in abeyance pending a decision on this motion.

Respectfully submitted,



Susan B. Hackett  
Appellate Defender

Attorney for Petitioner

This 15<sup>th</sup> day of May, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Horry County

Knox McMahon, Circuit Court Judge

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KEITH SIMS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

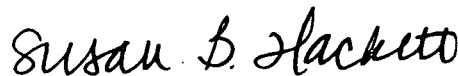
RESPONDENT.

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Motion for Appointment of Outside Counsel in the above referenced case has been served upon opposing counsel, Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Keith Sims #314569 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 15<sup>th</sup> day of May, 2013.




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Susan B. Hackett  
Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me  
this 15<sup>th</sup> day of May, 2013.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013

# **EXHIBIT #1**

ORIGINAL

STATE OF SOUTH CAROLINA ) COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND ) 2004-GS-40-1037

State of South Carolina )

vs. )

TRANSCRIPT OF RECORD

(Trial)

Keith A. Sims, )

Defendant. )

March 20, 21, 22, 23, 24, 2006  
Columbia, South Carolina

BEFORE:

THE HONORABLE JAMES JOHNSON, JUDGE; and a jury.

APPEARANCES:

JOHN MEADORS, DEPUTY ASSISTANT SOLICITOR  
WILL BRYANT, ASSISTANT SOLICITOR  
Attorneys for the State

LANELLE DURANT, DEPUTY PUBLIC DEFENDER  
STACY OWINGS, DEPUTY PUBLIC DEFENDER  
Attorneys for the Defendant

JENNY H. WILLIAMS  
Official Circuit Court Reporter  
(803) 576-1743

# **EXHIBIT #2**

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland  
STATE VS  
Keith A. Sims

INDICTMENT/CASE#: 1037  
A/W# DP 04081

AKA: \_\_\_\_\_  
Race: B Sex: M Age: 27  
DOB: \_\_\_\_\_ SS#: \_\_\_\_\_  
Address: 11301 Monticello Rd.  
City, State, Zip: WILKESBORO, S.C. 29180  
DL# \_\_\_\_\_ SID# \_\_\_\_\_

Date of Offense: 12-31-03  
S.C. Code §: 16-3-10  
CDR Code #: 0 1 1 1 1 6

CASE RESTORED  
SENTENCE  
 PLEA  TRIAL

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: 1037

in violation of § \_\_\_\_\_ of the S.C. Code of Laws, bearing CDR Cod # \_\_\_\_\_  
 NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  17-25-45

The charge is:  As Indicted,  Lesser Included Offense,  Defendant Waives Presentment to Grand Jury.  
The plea is:  Without Negotiations or Recommendation,  Negotiated Sentence,  Recommendation by the State.

ATTEST  
[Signature] Solicitor Keith A. Sims Defendant Rafaelle C. DeLeon Attorney for Defendant

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 90 days/months/years or  under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_ plus costs and assessments as applicable; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or  CONSECUTIVE to sentence on: \_\_\_\_\_  
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

RESTITUTION  Heard  Waived  Ordered  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_  
Payment Terms: \_\_\_\_\_  
 set by SCDPPPS

SPECIAL CONDITIONS:

PTUP \_\_\_\_\_ days/hours Public Service Employment  
Obtain GED  
Attend Voc. Rehab. or Job Corp.  
May serve W/E beginning \_\_\_\_\_  
Substance Abuse Counseling \_\_\_\_\_  
Random Drug/Alcohol Testing \_\_\_\_\_  
-me may be pd. in equal, consecutive weekly/monthly  
pmts of \$ \_\_\_\_\_ beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund  
Other: \_\_\_\_\_

Recipient:		
*Fine		\$
\$14-1-206 (Assessments 107.5%)		\$
\$14-1-211(A)(1)(Conv. Surcharge)	\$100	\$
\$14-1-211(A)(2)(DUI Surcharge)	\$100	\$
\$56-5-2995 (DUI Assessment)	\$12	\$
§ 35-13 (Public Def Prob)	\$500	\$
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$
\$50-21-114(BUI Breath Test Fee)	\$50	\$
\$56-5-2942(J) (Vehicle Assessment)	\$40/lea	\$
3% to County (if paid in installments)		\$ 3.75
TOTAL		\$ 128.75

Appointed PD or appointed other counsel, §35.13 TP  
Requires \$500 be paid to Clerk during probation.

Barbara A. Smith  
Clerk of Court Deputy Clerk  
J. Williams  
Court Reporter

PRESIDING JUDGE [Signature]  
Judge Civil  
Sentence Date: 5-24-04

CERTIFIED TRUE COPY  
ORIGINAL FILED  
C.C.C.P.&G.S.  
RICHLAND COUNTY  
SOUTH CAROLINA  
SCCA/217 (7/2003)

White Clerk Green Corrections Cyan Probation Pink Defendant

# **EXHIBIT #3**

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2011-CP-40-1881
	)	
KEITH A. SIMS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
	)	

August 14, 2012  
Columbia, South Carolina

B E F O R E:

THE HONORABLE R. KNOX MCMAHON, Judge

A P P E A R A N C E S:

TYNIKA CLAXTON, Esquire  
CHARLIE JOHNSON, Esquire  
Attorneys for the Plaintiff

ROB CORNEY, Esquire  
Office of the Attorney General  
Attorney for the Defendant

KRYSTAL J. SMITH  
Court Reporter

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# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

May 15, 2013

**RECEIVED**

MAY 15 2013

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, S.C. 29211

Re: Keith Sims v. State of South Carolina

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion for Appointment of Outside Counsel in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

SBH/eab

Enclosure

cc: Megan Harrigan, Esquire