

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS) COURT OF COMMON PLEAS
) 99-CP-30-175

KIMMIE HEATON,)
) PLAINTIFF,)
 vs.) TRANSCRIPT OF RECORD
)
 STATE OF SOUTH CAROLINA,)
) DEFENDANT.)

March 16, 2000
 Laurens, South Carolina

B E F O R E:

THE HONORABLE J. DERHAM COLE, JUDGE

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

RICHARD TOWNSEND, ESQ.
 Attorney for the Plaintiff

HOWARD STEINBERG, ESQ.
 Attorney for the State

JOY HOLSTON
 Official Court Reporter

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I N D E X

(PW) - Denotes Plaintiff's Witness

(DW) - Denotes Defense Witness

WITNESSES

(PW) KIMMIE HEATON

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(SW) CHIP HOWE

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1 MR. STEINBERG: Your Honor, this is the
2 case of Kimmie Heaton. Your Honor, I am giving up the
3 Judge's packet. Your Honor just had the codefendant
4 case a little while ago. The applicant was indicted
5 for murder and possession of a weapon during the
6 commission of a violent crime. She pled guilty and
7 she knows the offenses. Counsel, correct me if I am
8 wrong. But she also pled guilty to conspiracy.

9 MR. TOWNSEND: Murder and possession.

10 MR. STEINBERG: Murder and possession.
11 She received a sentence of 50 years.

12 THE COURT: All right, Mr. Townsend,
13 you represent the applicant?

14 MR. TOWNSEND: Yes sir, Your Honor.

15 THE COURT: Are you ready to proceed?

16 MR. TOWNSEND: Yes, sir.

17 THE COURT: All right.

18 MR. TOWNSEND: I would like to call
19 Kimmie Heaton as the first witness.

20 KIMMIE HEATON, after being duly
21 sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. TOWNSEND:

24 Q. State your full name, please?

25 A. Kimmie Shipes Heaton.

1 Q. And how old are you, Kimmie?

2 A. 23.

3 Q. And you are currently incarcerated where?

4 A. At the Women's Center.

5 Q. And how long have you been there?

6 A. Two years.

7 Q. Okay. You were charged with conspiracy,
8 murder and possession of a weapon arising out of an
9 incident that occurred on April 17th, 1997, is that
10 correct?

11 A. Yes, sir.

12 Q. After you were arrested have you been
13 continuously incarcerated since that time?

14 A. Yes, sir.

15 Q. Who was appointed to represent you on your
16 charges?

17 A. Chip Howe.

18 Q. And will you tell the Court what contact you
19 had with Mr. Howe and what he did concerning your case
20 after he was appointed?

21 A. He would come to the county jail and see me
22 there and he contacted my parents several times.

23 Q. Do you recall how many occasions you might of
24 seen Mr. Howe before you wrote a letter to the Clerk
25 of Court?

1 A. No, sir.

2 Q. Do you have any estimate?

3 A. No, sir.

4 Q. Did you ask Mr. Howe to do certain things,
5 investigation, obtaining records for you?

6 A. Yes, sir.

7 Q. And did he obtain those records?

8 A. Not to my knowledge.

9 Q. And subsequently -- well, let me ask you this,
10 did you have a preliminary hearing?

11 A. No, sir.

12 Q. Was any rule filed or any discovery done in
13 your case that you know of?

14 A. Not that I am aware of.

15 Q. And at one point and time did you request
16 Mr. Howe to have another public offender appointed to
17 represent you?

18 A. Yes, sir.

19 Q. And what was his reply?

20 A. That he would not voluntarily request to be
21 taken off of the case, that I would have to take it up
22 with the Court.

23 Q. And did you attempt to take it up with the
24 Court?

25 A. Yes, sir.

1 Q. I will show you a letter, a certified copy of
2 a letter from the office of the Clerk of Court from
3 Laurens and ask you if this is a letter that you wrote
4 to the Court?

5 A. Yes, sir.

6 MR. TOWNSEND: We would offer this into
7 evidence.

8 MR. STEINBERG: No objection.

9 (WHEREUPON, Plaintiff's Exhibit No. 1
10 was admitted into evidence.)

11 Q. Did you hear any response from either the
12 Clerk of Court or a Judge or anyone from the Court
13 concerning your request for additional counsel?

14 A. No, sir.

15 Q. And, as I understand it, Mr. Howe continued to
16 represent you up through your plea which was given on
17 March 20th, 1998?

18 A. Yes, sir.

19 Q. Okay. And at that point and time, the records
20 that you had requested Mr. Howe to get earlier, had
21 they been obtained by March 20th?

22 A. No, sir.

23 Q. Would you tell the Court specifically the
24 records that you requested that he obtain?

25 A. The ones from -- that I had from mental

1 institutions, records and things of that nature.

2 Q. What prior mental institutions did you tell
3 Mr. Howe about?

4 A. Marshall Pickens, Hall Institute, Mental
5 Health.

6 Q. Now, how did it come about that you were
7 present in court on March 20th, 1998?

8 A. That was the day that I was suppose to go and
9 present my guilty plea. And they said it would be
10 deferred and I would go back for the Judge to
11 sentence.

12 Q. How far ahead of March 20th did you know that
13 you were coming up for a guilty plea?

14 A. Probably two days.

15 Q. Two days. Okay. Do you recall when you and
16 Mr. Howe had discussed your pleading guilty?

17 A. Pretty much from the beginning because of my
18 confession.

19 Q. Okay. Now, what would have been in the record
20 from Marshall Pickens and the other institutions that
21 you think would of assisted in your defense or
22 assisted in the sentencing phase of your proceeding?

23 A. Just things to show, records that would have
24 established that I had a lot of problems but none that
25 would have justified what I have done. But just that

1 it was a lot of problems with reality and a fantasy
2 world.

3 Q. Okay. Now, prior to your pleading on March
4 20th, 1998, besides the records not being there, did
5 you have any conversations with Mr. Howe concerning
6 the sentence that you could receive when you pled
7 guilty?

8 A. He told me that I could get 30 to life without
9 parole and it was left up to the Judge. But by
10 pleading guilty I would probably get a lessor amount
11 of time by saving the Court from going through a jury
12 and all of that stuff.

13 Q. And did he inform you what portion of the
14 sentence that the Judge gave you that you would serve?

15 A. 85 percent.

16 Q. When you entered your plea on March 20th,
17 1998, let me back up. Strike that, please. When you
18 were before the Court on March 20th, 1998, did the
19 Court inform you that if you pled guilty how much of
20 your time given you, you would have to serve?

21 A. No, sir.

22 Q. And what did the Judge tell you during that
23 process when you were there?

24 A. That I would serve 85 percent of that time.
25 That I would be old when I got out provided that I

1 stay out of trouble. It would still stay at 85
2 percent because of my crime being violent.

3 Q. And that shows up on pages 4 and 5 of the
4 transcript of record of your guilty plea on March
5 20th, 1998?

6 A. Yes, sir.

7 Q. Okay. So, the Judge had reinforced what
8 Mr. Howe had told you, that you would get 85 percent?

9 A. Yes, sir.

10 Q. And that was at the very beginning of the
11 questions that the Judge asked you?

12 A. Yes, sir.

13 Q. Kimmie, at any time during that proceeding,
14 the Judge goes through a lot of questions about you,
15 what would occur if you pled guilty. Have you
16 examined this transcript and read over it yourself?

17 A. Yes, sir.

18 Q. Did the Judge ever ask you, how did you plead,
19 whether you plead guilty or not guilty?

20 A. Yes, sir.

21 Q. You think he did?

22 A. No.

23 Q. So, the entire time you were before the Court
24 on March 20th, you were asked all of the questions
25 about the results if you pled guilty or what you would

1 be giving up. But, there is no where in there that
2 you can find where the Court ever ask you to plead
3 guilty?

4 A. Just plain out asking me, no.

5 Q. Okay. Now, the record shows that Mr. Howe
6 asked the Court to defer sentencing when you were
7 before the Court on March 20th, 1998. What occurred
8 between March 20th and when you were finally sentenced
9 on May 6th, in so far as records being obtained that
10 you had requested before?

11 A. To my knowledge, nothing.

12 Q. Okay. And is that what was stated in the
13 record to the Judge by Mr. Howe, that he had not
14 obtained the records and had not had the examination
15 of you completed?

16 A. Yes, sir. That was the point of to defer me.

17 Q. And during that deferment did you go to
18 Dr. Morgan?

19 A. Yes, sir.

20 Q. And how many times do you recall, did you see
21 him?

22 A. One.

23 Q. Or meet with him?

24 A. One.

25 Q. And did you want Dr. Morgan to be present at

1 your sentencing?

2 A. I didn't know it was an option.

3 Q. Mr. Howe did not inform you that you could
4 request that he be there as a witness on your behalf?

5 A. No, sir.

6 Q. So, you were never given that decision to
7 make?

8 A. No, sir.

9 Q. To your knowledge, what, if anything was
10 presented to the Court concerning Dr. Morgan's
11 examination of you?

12 A. A summary of the report of his thoughts.

13 Q. I can't tell from reading the record, do you
14 recall independently from the record whether or not
15 the Judge ever reviewed Dr. Morgan's report?

16 A. It was stated that he was given a copy of that
17 paper a few minutes prior.

18 Q. Is this the report that was given by
19 Dr. Morgan?

20 A. Yes, sir.

21 MR. TOWNSEND: I would like to put this
22 into evidence, Your Honor.

23 MR. STEINBERG: No objection, Your
24 Honor.

25 (WHEREUPON, Plaintiff's Exhibit No. 2

1 was admitted into evidence.)

2 Q. And, again, at your sentencing on May 6th,
3 1998, did the Judge inform you again as to what
4 portion of the sentence he gave you you would have to
5 serve?

6 A. Yes, sir.

7 Q. And did he, in fact, use actual numbers of
8 years. For example, if you get in trouble and you
9 would stay there until you are 72 but if you are 65
10 you will get out in 65 if you don't?

11 A. Yes, sir.

12 Q. And had Mr. Howe ever told you that he had any
13 question about whether or not you would serve any more
14 than 85 percent or be eligible to serve 85 percent of
15 your sentence?

16 A. No, sir.

17 Q. And even after you were sentenced by the
18 Judge, did you meet with Mr. Howe here in the
19 courthouse?

20 A. Yes, sir.

21 Q. And did he tell you anything then about how
22 much time you would have to serve?

23 A. I asked him if it was a 85 percent deal and I
24 said, is everything out of his hands now. And he told
25 me, yes. And that I was on my way now.

1 Q. Have you subsequently found out from the
2 Department of Corrections that you are getting zero
3 good time and zero credit and zero everything?

4 A. Yes, sir.

5 Q. Are there any credits that you can work for or
6 anything that you can look forward to no matter how
7 good you are or what you do?

8 A. No, sir.

9 Q. But you have not been in any trouble?

10 A. No, sir.

11 Q. And you are currently employed where?

12 A. At the library at the Women's Center.

13 Q. And you work full-time in the library?

14 A. Yes, sir. And I take a computer class three
15 nights a week.

16 Q. Okay. You work in the daytime in the library
17 and at night?

18 A. Just daytime. We are open two nights a week
19 until 6:00 o'clock.

20 Q. And you work those days until you close?

21 A. Yes, sir.

22 Q. Now, Kimmie, how do you feel had Mr. Howe
23 obtained your mental health records previously, prior
24 to your plea, originally, and had Dr. Morgan been
25 present to present his findings to the Court, how do

1 you think that would have changed the outcome of your
2 case?

3 A. Because reading that paper you can interpret
4 it any kind of way but with him being there and
5 talking you could have got a whole different picture
6 of everything.

7 Q. Do you think your sentence would have been
8 changed because of that?

9 A. Possibly.

10 Q. And do you think from what the Judge said to
11 you there that the Judge intended for you to have a
12 sentence that would allow you to be out by age 65?

13 A. Yes, sir.

14 Q. Kimmie, you and I, the first we met down at
15 the Women's prison and I was appointed to represent
16 you, have discussed on more than one occasion the
17 consequences if the Judge grants your motion for a
18 retrial?

19 A. Yes.

20 Q. I just want to clear it on the record, do you
21 fully understand that if the Judge does grant you a
22 new trial, or grant your petition, a post conviction
23 relief, that the only relief that you can receive is
24 that you go back to ground zero and you could either
25 be tried or plead guilty before another Court or

1 another Judge?

2 A. Yes, sir.

3 Q. And do you fully understand that if that
4 occurred that you would be subject to a sentence that
5 could possibly be less than 50 years or that it could
6 possibly be more than 50 years?

7 A. Yes, sir.

8 Q. And do you understand that although I question
9 whether they could or not, the State has not waived
10 their right not to be able to notice you with a death
11 penalty?

12 A. Yes, sir.

13 Q. And having had a long period of time to
14 consider those are you asking this Court to grant you
15 your relief that you have requested in your PCR?

16 A. Yes, sir.

17 Q. Okay. Is it your opinion that if you were
18 sentenced again before a Judge and received
19 information from your psychiatrist to testify on your
20 behalf that you would be given less of a sentence than
21 50 years?

22 A. Yes, sir.

23 Q. When did you find out that what the Judge had
24 told you and what Mr. Howe had told you concerning the
25 85 percent or at least the Department of Corrections

1 said that is not correct?

2 A. When I got there they went through a process
3 with me to meet with a social worker and she gives you
4 your max out date. And my max out date was 50 years
5 to the day, it was April 13th, 2047. And she said
6 that I was not under the 85 percent law, in her paper
7 work I was at 100 percent.

8 Q. Okay. And her position is still the same as
9 of today?

10 A. Yes.

11 Q. Again, Kimmie, you have read through the
12 transcripts of both your guilty plea to the March
13 20th, 1998 appearance before the Court. You were
14 brought up to the Court -- was that the first time you
15 have been brought up here to the courtroom?

16 A. Yes, sir.

17 Q. And was that the first time that you had seen
18 your former husband's parents and family?

19 A. Yes, sir.

20 Q. And were you prior to this incident very close
21 to them?

22 A. Yes, sir.

23 Q. How did that affect you when you came up here
24 and saw them that day?

25 A. It hurt, the hurt that I caused them. I was

1 part of the family and I took away part of their
2 family and it just hurts to see the hurt that I caused
3 so many people.

4 Q. Okay. Were you on any medication on March
5 20th, 1998?

6 A. Yes, sir.

7 Q. What medication were you on?

8 A. Antidepressant from the Lauren's County Mental
9 Health.

10 Q. And do you recall what you were taking?

11 A. No.

12 Q. Kimmie, did you know what was going on and
13 what you were doing that day?

14 A. I knew I was there to tell them I was guilty.

15 Q. Did you have any discussion with Mr. Howe or
16 did he give you any instructions as to how you should
17 answer the questions that day, how you should handle
18 yourself before the Court?

19 A. They gave me a paper beforehand for me to sign
20 and broke everything down in layman's terms so I would
21 know what to say. He said when you get out there he
22 is going to use a lot of big words that you are not
23 going to understand.

24 Q. Who gave you a paper that broke it down in
25 layman's terms?

1 A. Chip Howe and some other guy, I don't know who
2 it was.

3 Q. Do you think it was someone from the
4 Solicitor's office?

5 A. Yes, sir.

6 Q. And did anyone go over that with you ahead of
7 time, is that what you are talking about?

8 A. They read me the questions and I just circled
9 yes and I signed my name at the bottom.

10 Q. And who told you just to say, yes sir, to the
11 questions?

12 A. Chip Howe.

13 Q. When the Court asked you whether or not you
14 were satisfied with Mr. Howe as your attorney, in the
15 transcript you answered, yes sir, is that correct?

16 A. Correct.

17 Q. Was that true?

18 A. No.

19 Q. And why were you answering all of the
20 questions, yes sir?

21 A. Because I didn't have a clue, I was focused on
22 everything that was going on around me instead of what
23 was going on in front of me.

24 Q. Okay. And that was five months after you had
25 requested that you be given a new public defender?

1 A. Yes, sir.

2 Q. Once you became incarcerated, have you become
3 stable on your medication that you are on now?

4 A. Yes, sir.

5 Q. And are you a different person as far as being
6 able to handle yourself today then when you were when
7 you were here in March of 1998?

8 A. Yes, sir. But as far as my emotional state,
9 being here and the family and everything it just
10 brings back a lot of hurt.

11 Q. Kimmie, you had mentioned to me that certain
12 things were not brought out at your guilty plea by
13 Mr. Howe, that you wanted the Court to know about?

14 A. Yes, sir.

15 Q. Would you tell the Court your feelings
16 concerning what he presented to the Court at your
17 guilty plea and at your sentencing hearing about you
18 and about the victim?

19 A. When the prosecutor got up there, he said a
20 lot of things. I feel like Chip should have at least
21 let the Judge or give the Judge some kind of
22 impression that I was a person even though I did a
23 really inhuman thing. That some how he could of let
24 them see that I wasn't just a murderer, that I was a
25 person too.

1 Q. Were you living in reality when the incident
2 occurred?

3 A. No.

4 Q. Did you have any conception that what you were
5 doing was wrong?

6 A. No.

7 Q. Prior to that time, even though you and your
8 husband had been separated on many occasions, did you
9 tell Mr. Howe about good things that you thought the
10 Court should know about you?

11 A. Yes.

12 Q. And did you tell him those on numerous
13 occasions?

14 A. Yes.

15 Q. Were you abused?

16 A. No.

17 Q. Not physically. How long had you been off of
18 your medication?

19 A. About three years.

20 Q. And how long were you in jail before you were
21 given any kind of medication?

22 A. Months.

23 Q. And was it the right kind of medication?

24 A. No, they changed it several times.

25 Q. Okay. In fact, when you got to the Women's

1 prison and they put you on correct medication, did
2 they tell you what was in error when you were given
3 that at the county jail?

4 MR. STEINBERG: Your Honor, I would
5 have to object to heresy.

6 THE COURT: Sustained.

7 Q. What medication were you taking in the jail
8 here?

9 A. I was just taking an antidepressant.

10 Q. And what are you taking now?

11 A. I am taking an antidepressant and a psychotic
12 and anxiety.

13 Q. Okay. Kimmie, is there anything else that --
14 this is your day in court, that you asked Mr. Howe to
15 do that he didn't do or any other way that I haven't
16 asked you about that you think he was ineffective in
17 representing you?

18 A. No.

19 Q. Is there anything else that you want to tell
20 the Court?

21 A. I know that I am sorry. I am not a school
22 girl anymore and can't participate, I am sorry for
23 taking somebody's life and he didn't deserve that.
24 And I know that.

25 Q. And you confess and pled guilty before this

1 Court?

2 A. Yes.

3 Q. But you feel like that even with that that you
4 are entitled to have the Court fully informed as to
5 your mental condition and your state at the time the
6 crime was committed?

7 A. Yes.

8 Q. And you feel like you are entitled to at least
9 fairly to be told the consequences of your guilty
10 plea?

11 A. Yes.

12 Q. Did you have any independent way, other than
13 what Mr. Howe, your attorney told you and what the
14 sentencing Judge told you to know that you were being
15 informed, apparently, incorrectly concerning the 85
16 percent of the sentence?

17 A. I had never been in any trouble before so I
18 didn't know anything about the law. So, I took
19 everything he said.

20 MR. TOWNSEND: That is all the
21 questions that I have, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. STEINBERG:

24 Q. Ms. Heaton, you say you were not earning any
25 credits, whatsoever?

1 A. Correct.

2 Q. Have you ever seen a copy of your sentence
3 sheet since you have been in prison?

4 A. I have seen a copy one time.

5 Q. Are you aware that as of May 4th of last year
6 you earned up to 173 earned credits?

7 A. Under the 85 percent law the credits do not
8 count, the computer still takes the tally over because
9 of my job.

10 Q. And that is your testimony?

11 A. Yes.

12 Q. Have you had an opportunity to review your
13 transcripts?

14 A. Yes.

15 Q. Since you have been incarcerated?

16 A. Yes, sir.

17 Q. When you came into the courtroom on March 20th
18 of 1998, why did you show up here to this courtroom?

19 A. To plead guilty.

20 Q. Had you already made a decision to plead
21 guilty?

22 A. Yes.

23 Q. And what sentence had your attorney told you
24 you were facing?

25 A. From 30 to life without parole.

1 Q. And correct me if I am wrong, did your
2 attorney give you three options, one was life without
3 parole, the other being life and eligibility for
4 parole after 30 years and the third sentence of 30
5 years or some other higher number?

6 A. 30 years with life without parole, after that
7 I was zoning out.

8 Q. Did you ever tell the Court or your attorney
9 you were zoning out?

10 A. No, sir.

11 Q. You said that you don't think the Judge ever
12 asked you whether you were pleading guilty, is that
13 correct?

14 A. Right.

15 MR. STEINBERG: And, Your Honor, I will
16 point to the March, 1998 transcript, it is on page 3.

17 Q. In April of last year David Heaton was killed
18 and you were a participant in that and now you are
19 pleading guilty for murdering David Heaton, is that
20 your understanding, how did you answer on page 3, line
21 25?

22 A. Yes, sir.

23 Q. And, so, in fact, didn't you plead guilty to
24 this offense?

25 A. Yes.

1 Q. Did you have any doubt that you were pleading
2 guilty, did you think you were doing something besides
3 pleading guilty?

4 A. No.

5 Q. On page 4 the Judge informed and you can read
6 over your copy on page 4. Starting on about line 13,
7 the Judge went over the penalty with you. Do you
8 recall all of that?

9 A. Yes, sir.

10 Q. Did the Judge promise you that you would
11 receive any of those sentences?

12 A. No, sir.

13 Q. Did your attorney promise you that you would
14 receive any of those sentences?

15 A. No, sir.

16 Q. Isn't it true that this was what is up under a
17 straight up plea, you could have received any of those
18 sentences?

19 A. Yes, sir.

20 Q. Isn't it true that the first that you received
21 information that you might be released of an 85
22 percent sentence was when the Judge informed you of
23 that, I believe it might be on page 5, is that true?

24 A. Yes.

25 Q. When did you first receive information of this

1 85 percent parole eligibility?

2 A. Chip and I discussed it because we had talked
3 about, if I got anything less than life, would I serve
4 all of it. How does that kind of thing work. And he
5 said with my crime being violent and the year that it
6 was in, because the 85 percent law had already been
7 passed, that I would serve 85 percent of it provided
8 that I stay out of trouble.

9 Q. And he told you that prior to your guilty
10 plea?

11 A. Yes.

12 Q. Now, your testimony today is that you would
13 not have pled guilty if you knew you could of received
14 as low as 30 years but you would only plead guilty if
15 you knew you were eligible for the 85 percent
16 eligibility?

17 A. No. I still would have pled guilty regardless
18 because I am not going to say I didn't do it when I
19 know that I did. But it just might of went
20 differently if they would have known more facts.

21 Q. So, you would have pled guilty but you still
22 wanted the Judge to know additional facts about you?

23 A. Correct.

24 Q. And you would still enter this plea agreement
25 today knowing all of this?

1 A. Yes, sir.

2 Q. Okay.

3 MR. STEINBERG: Your Honor, I am
4 referring to page 15, line 14 for this next question.

5 Q. The Judge asked you whether you had been --
6 this is on line 11, whether you had been coerced or
7 intimidated or threatened. Isn't it true that you
8 were not coerced and did this voluntarily?

9 A. I felt like I had no choice. Like they said,
10 you could do it this way and come out better for you.

11 Q. Did you ever tell the Judge this information?

12 A. No, sir.

13 Q. And you testify today that you were taking
14 medication, is that correct?

15 A. Yes, sir.

16 Q. And did you tell him, no, you were not?

17 A. I told him, no, I was not.

18 Q. And today you say that you were taking
19 antidepressants?

20 A. Correct.

21 Q. Which answer was correct?

22 A. The one that I was on medication. It should
23 be in the county file.

24 Q. Why didn't you tell the Judge this, didn't you
25 think it was important?

1 A. Because I was partially listening to what he
2 was saying. As I said earlier, I was focused on what
3 was going on around me instead of what was going on in
4 front of me.

5 Q. Now, the Judge, this was after he talked about
6 the 85 percent, Judge, I will read this statement to
7 you. Page 15, line 14. Has anybody promised you
8 anything or given you any assurances as to the type of
9 sentence you would receive other than what I told you
10 what the law is. The bottom line is the best you can
11 possibly get is a 30 year sentence, the maximum would
12 be life. Has anybody told you anything differently
13 than that. How did you answer on line 21?

14 A. No, sir.

15 Q. Why didn't you use that opportunity to tell
16 the Judge that your attorney had told you that you
17 would be released after serving 85 percent of your
18 sentence?

19 A. I was not in the mind of fighting or arguing
20 with myself. I left that up to my attorney.

21 Q. Well, the Judge was asking you questions?

22 A. I really don't know.

23 Q. You don't think the appropriate time to tell
24 the Judge this was back in 1998?

25 A. Yes, sir. I was not strong enough to stand up

1 to the Judge.

2 Q. Well, stand up, the Judge was asking you
3 questions. He wanted your answers. Why would you not
4 be telling the truth?

5 A. I don't know.

6 MR. STEINBERG: I beg the Court's
7 indulgence very briefly.

8 Q. You claim that your attorney had not discussed
9 mitigating factors with the Judge concerning your
10 psychiatric?

11 A. The factors, some of them he did.

12 Q. This letter that you introduced from
13 Dr. Morgan, that was May 5th, 1998, correct?

14 A. Yes, sir.

15 Q. Isn't it true that your trial was the next day
16 on May 6th, 1998?

17 A. Yes, sir.

18 Q. Do you recall if your attorney had gone over
19 what the Judge -- your history of mental illness
20 including the Heaton family history, do you remember
21 that, it is on page 28, if you have any questions
22 about that. Going on to page 29, do you remember when
23 he talked about how he had a forensic psychiatrist,
24 Dr. Morgan examining you and looking at extensive
25 mental health records, do you remember that?

1 A. Yes.

2 Q. And do you remember when your attorney had
3 said that he found that you were competent, she
4 certainly was competent in his own words, do you
5 remember that. Isn't it true that your attorney had
6 gone through great debt about your background?

7 A. If my attorney did he didn't bring it to my
8 attention.

9 Q. Didn't he bring it to the Judge's attention?

10 A. Not that I am aware of.

11 Q. How would you describe this statement to the
12 Judge on page 27, 28 and leading on to 30, I think.
13 In fact, on page 31, he starts talking about how you
14 went to Marshall Pickens which I believe is a mental
15 hospital in Greenville and that you spent two months
16 at the Hall Institute when you were younger. Do you
17 remember all of this?

18 A. Yes, he told the Judge that is where I went
19 and stayed. He didn't say the debt of it or any of
20 the details about it.

21 Q. And didn't he go on to page 32 and 33, talking
22 about how you should look at it. Isn't it true that
23 you understood the consequences of your plea?

24 A. Yes.

25 Q. You did know the consequences of your plea?

1 A. Yes.

2 Q. Do you have any expert witnesses or any other
3 additional evidence besides what you have already
4 given to the Court to show that you had some
5 mitigating circumstances or that you were unable to
6 understand your plea. Do you have any evidence of
7 your medication at the time affecting your plea?

8 A. None except what would be at the Lauren's
9 County mental health.

10 Q. And, again, you say you are not denying that
11 you did commit these crimes, you just wanted
12 additional mitigation?

13 A. Correct.

14 Q. And you would still have pled guilty on
15 everything?

16 A. Yes, sir.

17 Q. You would have pled guilty regardless if you
18 have received information today, you were going to
19 replead guilty and if there is no 85 percent law, you
20 are still planning on pleading guilty?

21 A. Yes.

22 Q. Thank you, that is all the questions that I
23 have.

24 REDIRECT EXAMINATION

25 BY MR. TOWNSEND:

1 Q. Kimmie, your understanding from the Department
2 of Corrections, as to you not being eligible for any
3 good time, is there any possibility that you will be
4 released at age 65 as the Judge stated he
5 anticipated?

6 A. No, sir.

7 Q. When you were answering the questions that the
8 Judge asked you, on March 20th, 1998, the hearing that
9 you had up here, you answered, yes sir, to all of
10 those questions, were those based upon the
11 instructions that you said you were previously given?

12 A. Yes, sir. My life was the last thing on my
13 mind.

14 Q. Okay. That's all the questions that I have.

15 MR. STEINBERG: Nothing from the State,
16 Your Honor.

17 THE COURT: All right, any other
18 witnesses on behalf of the applicant?

19 MR. TOWNSEND: None, Your Honor.

20 MR. STEINBERG: Your Honor, the State
21 would call Mr. Chip Howe.

22 CHIP HOWE, after being duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. HOWE:

1 Q. Good morning, Mr. Howe.

2 A. Yes, sir.

3 Q. Have you been present for all of the testimony
4 in this PCR hearing?

5 A. I have.

6 Q. Have you had an opportunity to review your
7 notes and your file in this case?

8 A. I have.

9 Q. As far as giving out parole eligibility, do
10 you have a general policy as to whether you give out
11 parole eligibility?

12 A. General policy is that if I know for sure I
13 will tell them. I don't recall specifically. I am
14 not going to dispute what Kimmie said about parole
15 eligibility in this case. In fact, I still believe
16 that she is eligible for 85 percent based upon my
17 reading of the statute and I think the Department of
18 Corrections is wrong. And it is not the first time
19 that I have disagreed with their interpretation of
20 when she is eligible.

21 Q. And do you recall simply informing her that
22 she would be eligible under the 85 percent law?

23 A. Again, I don't recall specifically but I am
24 not going to dispute what she says about that. I am
25 sure she has probably -- she is indicating that she

1 has a pretty clear memory of all of what happened. I
2 am not going to dispute that. Again, I believe she is
3 eligible after 85 percent just as Judge Kinard felt.
4 Again, I went back and reread the statue again today.

5 Q. When the applicant went to plead guilty, did
6 you ever have any doubts of her competency?

7 A. No.

8 Q. Were you aware of Dr. Morgan's letter dated
9 May 5th of 1998?

10 A. Yes. Actually I secured Dr. Morgan, of
11 course, had to get a court order to do it and had
12 secured him and had been in the process of gathering
13 records from Newberry School District, Laurens County
14 School District 56, Marshall Pickens, the other places
15 so that Dr. Morgan, he needs all of that before he can
16 really meet with his patient and all the background
17 and all of that was presented to him. I have got a
18 stack of stuff here that I think he got and had the
19 opportunity to go over because he is the expert, not
20 me, on all of that before he issued his letter stating
21 his opinion.

22 Q. And have you come across any information prior
23 to the plea or subsequent to the plea that the
24 applicant was not competent to go forward?

25 A. No, sir. She was -- in fact, on both

1 occasions because she entered a plea at one time and
2 then, of course, we deferred sentencing. Her demeanor
3 was very similar to the way it was at the beginning of
4 this testimony today. She was upset and that is
5 understandable under the circumstances. I didn't see
6 any indication that she was not understanding what was
7 going on. In my discussions with her before this
8 including the very first time that I talked with her,
9 I didn't have any indication that she didn't
10 understand what was going on and understanding and
11 appreciate the consequences of what she was getting
12 into. In fact, I recall one very first time that I
13 talked with her she was concerned and asked me what
14 the potential sentences and what were the alternatives
15 and that seemed to be something that she was obviously
16 concerned about throughout.

17 Q. In the May 1998 transcript, that would be the
18 sentencing hearing, on page 33 towards the very
19 bottom, you informed the Court that your client knew
20 what the potential sentences were. She knew very well
21 what the potential sentences were. Why did you tell
22 the Judge how much she knew about the potential
23 sentences?

24 A. Well, that is something that you discuss with
25 anybody, who you represent and particularly when it is

1 not a negotiated plea or a recommendation when you
2 stand them straight up in front of the Court they need
3 to know what they are facing. And we knew in this
4 case she was facing no less than 30 and anything from
5 30 all the way up until life, life meaning, life until
6 death.

7 Q. Did the applicant -- you said there was no
8 negotiation or no recommendation in this case?

9 A. No, sir.

10 Q. Did you leave the applicant to believe that
11 she would receive any particular sentence?

12 A. No, sir. We were hoping for the best, I had
13 made efforts with the prosecution to attempt to
14 negotiate something. The family was not a mind to do
15 that. They had an attorney, I contacted him on
16 several occasions hoping that he would set up meetings
17 with the family. The Solicitor's office was not in
18 the mind to negotiate. In fact, we had our hopes at
19 one time, the codefendant, Cathcart, who I think ya'll
20 just heard that one. That if he were going to go to
21 trial I was even telling the Solicitor's my client
22 will testify to the truth about what happened, if
23 ya'll need that to prosecute him. We were trying
24 everything we could to try to negotiate something but
25 we weren't in a position to negotiate unfortunately.

1 Q. That is all the questions that I have.

2 CROSS-EXAMINATION

3 BY MR. TOWNSEND:

4 Q. Mr. Howe, you say it is still your opinion
5 that the 85 percent rule should apply to Kimmie's
6 case?

7 A. Yes, sir. It is not the first time, again,
8 that I have disagreed with the Department of
9 Corrections and sometimes it takes a PCR to have that
10 issue ruled on. I agree with Judge Kinard.

11 Q. And when you say you reviewed the statute, was
12 it 16-320 that you reviewed?

13 A. Yes, sir.

14 Q. And you don't, as I understand, that you don't
15 deny that you told Kimmie about the 85 percent rule
16 prior to her original guilty plea?

17 A. I am not going to dispute anything that she
18 says about that. You know, one way or the other, I
19 was more concerned, to be honest with you, at that
20 point and time, one of the things we were concerned
21 about was years. We knew she was going to get at
22 least 30 and I was trying to do as much damage
23 control. Quite honestly, I was fearful even though we
24 had a Judge that I thought was an appropriate Judge to
25 hear this thing. I was very concerned that the family

1 would get what they were asking for which was life
2 until death. And I was concerned about that and this
3 plea that was tendered was in my judgment the best to
4 keep that from happening. I was hopeful for the best
5 we could come up with. If we came up with 30 that
6 would have been great under the circumstances. I am
7 disappointed in 50.

8 Q. Was it your opinion that the Judge thought he
9 was giving her an opportunity if she was a good
10 prisoner to be released by age 65?

11 A. That is what the Judge said. I heard what he
12 said. The Department of Corrections has their own
13 opinion and I have seen it on everything from all
14 kinds of offenses.

15 Q. You did not read Dr. Morgan's letter to the
16 Court?

17 A. I handed it to the Court and handed a copy up
18 to the Court. And I really think Judge Kinard, in my
19 experience in dealing with Judge Kinard, he is a very
20 able and experienced Judge and he could do a quick
21 read on anything. And Judge Kinard, in my opinion,
22 took into consideration her entire history as well as
23 her mental illness. I think he did, in my opinion, he
24 did. And that was one of the factors in my opinion
25 that kept him from doing what others in this case

1 wanted and that was for her to get life until death.

2 Q. I know what your opinion is but do you know as
3 a fact that the Judge read this that was handed up to
4 him?

5 A. I believe that he did.

6 Q. Do you know that?

7 A. Well, it was presented to him, he was looking
8 at it. That's all that I know.

9 Q. Well, of course, with your opinion being that
10 the 85 percent rule did apply, you made no objection
11 when Judge Kinard told her the 85 percent rule?

12 A. I didn't make any objection. He is the Judge
13 and unless I know something for sure and there is
14 proper ground to object, I am not going to object to
15 something like that. And the Solicitor's office
16 didn't object either.

17 Q. Mr. Howe, Ms. Heaton testified that she had
18 requested you to obtain her medical records prior to
19 the plea on March 20th, does your file reflect when
20 you did obtain those?

21 A. Some of them I started getting as early as
22 1997 and others it took more effort to get them.
23 Marshall Pickens, for instance, would not comply to a
24 subpoena and I had to get the public defender's office
25 in Greenville to help me with that. Some were before,

1 even before the plea, because some of what I call
2 medical records also included the school records from
3 Newberry and Laurens District 56. Some were obtained
4 before, some I probably was not able to obtain until
5 after. I am still not even sure from memory exactly
6 when Dr. Morgan saw her. I know there was an order of
7 transportation for him to see her back in 1997.

8 Q. In this letter he says examination here on
9 December 12th of 1997. Does that fit with your
10 recollection?

11 A. Yes, sir. Which was before the plea. I
12 thought that is when it took place. I thought I
13 understood her to say that the examination didn't take
14 place until afterwards. I didn't think that was
15 correct but that letter would be accurate. Because I
16 know I got an order of transportation that I am
17 looking here that says December 12, 1997.

18 Q. And is it your recollection that she was only
19 examined that one time?

20 A. By Dr. Morgan, yes.

21 Q. And do you know of any reason why, if she was
22 examined in December of '97, you did not have the
23 report or obtained the report prior to March 20th.
24 Was that because of the lack of records?

25 A. Probably because of the lack of the records

1 and others is under the reciprocal rules of discovery.
2 I have to get it to them, if it is in writing.

3 Q. Did you do discovery in this case?

4 A. Yes, sir.

5 Q. You did?

6 A. Yes, sir. There was a motion, a combination
7 of motions under Rule 5 and Brady that was filed in
8 the case. Yes, sir. And I got statements from
9 witnesses, the SLED file, I think you got a chance to
10 look at it, this stack of stuff here.

11 Q. So, it was a tactical move not to obtain the
12 report?

13 A. Right. If it is in writing I believe I am
14 obligated under the rules to turn it over to them.
15 That is what we defense lawyers do sometimes.

16 Q. Was there anything in Dr. Morgan's report that
17 would of hurt Kimmie if the State had of gotten it
18 ahead of time?

19 A. Well, they could have called in their own
20 person. The Court may of granted them an examination.
21 And I am sure they would have found somebody that
22 would of disagreed with some of his facts.

23 Q. And you don't think it would have made any
24 difference in your plea negotiations had they seen it
25 in December of '97?

1 A. I think the family was aware of her situation.
2 She had come to live with them even before she got
3 married, when she really didn't have, at that point
4 and time anywhere for sure to go. They were very
5 aware of her condition.

6 Q. That is all the questions that I have.

7 MR. STEINBERG: Your Honor, no further
8 questions for Mr. Howe. We ask that he be excused if
9 he wishes to.

10 THE COURT: You may be.

11 MR. STEINBERG: Your Honor, the rest of
12 the State's case, the information has already been
13 admitted at the Clerk of Court's records, Your Honor.
14 A copy of the information, the psychiatric requests,
15 that all is court records. I also would point that
16 the applicant has signed, and Your Honor does have a
17 copy of it, if Your Honor doesn't, please inform me,
18 of the applicant's, I would say her answers to all of
19 the questions imposed by the Solicitor. I thought
20 this was from the public defender's office but this is
21 a copy of -- this is what I am talking about. It
22 shows that the applicant did certainly know what she
23 was doing. She knew that she was facing life plus 10
24 years, the maximum sentence. I am not going into any
25 more of this. Your Honor can read through, she is

1 pleading guilty freely and voluntarily. We will have
2 some brief closing remarks following counsel.

3 MR. TOWNSEND: Your Honor, just
4 briefly, Ms. Heaton brought this petition for post
5 conviction relief for two reasons. Number one, she
6 felt like and I think the reading of the record shows
7 that her history of mental illness and her actual
8 mental state at the time the crime was committed and
9 at the time of the plea was not sufficiently presented
10 to the Court to give the Court all of the evidence as
11 for litigation that the Court needed. She also feels
12 that she, the entire time was told that she would be
13 subject to the 85 percent rule as far as the service
14 of her time. And she was informed in open court by
15 the Judge in addition to the information that she had
16 received from her attorney when the guilty plea was
17 entered on March 20th, 1998. Thereafter she returned
18 to the Court having had that information furnished to
19 her ahead and completed the sentencing in May of 1998.
20 I am not sure, Your Honor may be what the
21 interpretation was, 16-320 is, but I would, of course,
22 call the Court's attention to it. It clearly says
23 when someone receives the minimum sentence that they
24 would not be entitled to any work credits, education
25 credits, good credits or other credits. They would

1 plea colloquy both refute that. Of course, also Mr.
2 Howe's testimony was that she was lucid and she
3 understood what she was doing. On the issue of
4 whether she was satisfied with her attorney and a lot
5 of the more minor issues of the plea where she said,
6 for example, she wanted a new attorney and she may
7 well had may wanted a new attorney, however when she
8 entered the guilty plea she has waived all of these
9 rights in her plea. And the plea speaks for itself.
10 On the issue of the applicant's actual sentence, what
11 she was informed of. Your Honor, this is another case
12 where the applicant's own testimony, the applicant
13 would of had to show on PCR that she would not of pled
14 guilty but for erroneous advice. That is a rule. Of
15 course, her own testimony, she said twice, she was
16 going to plead guilty no matter what. Her testimony
17 today that she received erroneous information not only
18 after she entered her guilty plea, that is while she
19 was pleading guilty in front of Judge Kinard, that she
20 received this erroneous information from Mr. Howe.
21 Mr. Howe was asked two or three times and he said, I
22 neither admit or deny, I don't refute her statement
23 nor do I accept her statement. He doesn't have a
24 recollection of it. So, all you would be basing her
25 decision on would be the applicant's testimony and I

1 reduce the mandatory minimum term of the imprisonment
2 of 30 years. Ms. Heaton having full knowledge of what
3 could have occurred to her which could be worse than
4 what she has got now. She thinks that she is entitled
5 to have this Court grant her relief that she requested
6 in her PCR to allow her to again pursue her mental
7 condition and the psychiatric testimony that she could
8 obtain and offer to the Court. Having the proper
9 records and the proper access to psychiatric
10 evaluation and that she be given the opportunity while
11 she is now on correct medication and in touch with
12 reality, that she appears to be now and she was not at
13 the time to make a decision as to her plea trial on
14 what decision she might make under those
15 circumstances. And that in the event it wasn't that
16 she would be entitled to have her mental condition
17 fully explored in the record. That is her position.

18 THE COURT: All right, Mr. Steinberg.

19 MR. STEINBERG: Your Honor, the issue
20 about the psychiatric ability, mental history and the
21 competence. The applicant has a duty on a PCR in the
22 case of Geena (phonetic) versus State, which I will
23 hand up a copy to Your Honor. She had not provided
24 evidence today that she was not competent. Both her
25 signed statement that Judge Kinard requires as well as

1 am not trying to derate the young lady. Her testimony
2 is obviously self serving. She has an interest and it
3 appears, may well be manufactured, Your Honor, you
4 have to look at her credibility on that. Another
5 issue and Your Honor, if you have not had an
6 opportunity to review the Hunter case, when we had the
7 Cathcart decision, the Cathcart case rather. I am
8 going to hand a copy of Hunter versus State at 316,
9 S.C. 105. This, again, is the same portion that I
10 pointed to last time. The Hunter holding is that
11 simply because you receive erroneous information, it
12 doesn't mean that you are entitled to all of a
13 reversal. Here the evidence is that the applicant
14 admitted that she was going to plead guilty,
15 regardless. She received a minimum or a medium
16 sentence. She didn't get life or life without parole.
17 She received 50 years. And you can read Hunter,
18 Hunter would preclude an argument today that she is
19 allowed to come back and say something different. Her
20 own testimony is that she was going to plead guilty
21 regardless. She has already said she is not relying
22 on this. All the indications and the testimony from
23 both witnesses today that it is a straight up plea, no
24 reliance. And, Your Honor, there is another case I
25 would like to hand up to Your Honor. Had I known what

1 the applicant's testimony was going to be toady I
2 would of had additional copies for Your Honor and for
3 counsel. But this is the case of Whetsell versus
4 State. Whetsell is at 277, S.E., 2nd, 891, it is a
5 1981 decision. I have outlined the relevant portions
6 and basically it says if there were errors done at
7 trial, the state has made at a trial, at a guilty
8 plea. You don't get to go back and overturn the
9 guilty plea. If the applicant pleads guilty and later
10 on on PCR or any post conviction setting admits her
11 guilt. Again, had I known what the applicant's
12 testimony was going to be I would of had additional
13 copies. The relevant portions are outlined. I will
14 be very candid with this Court, Whetsell had the
15 limited in subsequent cases. It was limited by
16 Craddock versus State at 327, S.C. 303, a 1997 case.
17 Whetsell's case is where the applicant had relied on
18 inaccurate information. For example, in Craddock, in
19 this case the petitioner alleged that counsel was
20 ineffective rendering his guilty plea invalid and
21 promising a 25 year sentence. The petitioner
22 testified that although he was guilty of the crimes
23 charged he would not have pled guilty if not for
24 counsel's promise. In this case, there is no promise,
25 there was misinformation about a promise. And she has

1 already said she was not going to rely on it. And
2 again, this is the case of Craddock versus State. The
3 relevant portion is highlighted and again I will be
4 candid. There is another more recent case that is on
5 this point. I don't have a copy of it. It overrules
6 Whetsell's applicability to capital cases where the
7 death penalty is in effect and that was the case where
8 the death penalty was about to be imposed. It is my
9 understanding that Whetsell is still good law in cases
10 such as this. And so under any of those grounds,
11 under Hunter, under Whetsell, those grounds are
12 independent of each other. And that would preclude
13 the applicant from receiving a new trial.

14 THE COURT: Any reply, Mr. Townsend?

15 MR. TOWNSEND: Two things, briefly,
16 Your Honor. As I recall there was a question that was
17 asked of the applicant, is whether or not she would
18 plead guilty and her answer was, she would. If not to
19 what degree she would plead guilty, as to what degree
20 of the crime charged might be applicable in her proper
21 psychological history had been explored and made
22 available prior to the decision to plead guilty. If
23 you recall, Your Honor, she had pled guilty on March
24 20th, 1998. And the record did not come in until one
25 day prior to the guilty plea. The second thing is, as

1 far as the case is as to the guilty plea, clearing any
2 objection as to ineffective assistance of counsel, I
3 think those cases require that number one, it being
4 intelligently entered and number two that it be not a
5 person that is competent and is one of the issues that
6 we have before Your Honor today, whether or not she
7 was competent to enter a plea and to make decisions at
8 that time. Thank you.

9 MR. STEINBERG: Your Honor, I would add
10 that for the questions, if you want a copy of the
11 Geena versus State and I can make a copy of it and get
12 it to you if you require it.

13 THE COURT: Well, I will consider it if
14 you would like for me to. Anything further?

15 MR. TOWNSEND: Nothing further from the
16 applicant, Your Honor.

17 THE COURT: I will take the matter
18 under advisement and issue an order shortly.

19 (WHEREUPON, the proceedings were
20 concluded.)

21

22

23

24

25

BARBARA T. WASSON

STATE OF SOUTH CAROLINA)
)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
2000 JUN 28 A 9 22

Kimmie Shipes Heaton, #249607)
)
Applicant,)

LAURENS COUNTY
CLERK OF COURT

vs.)

ORDER
99-CP-30-175

State of South Carolina,)
)
Respondent.)

A TRUE COPY OF ORIGINAL
Barbara T. Wasson

BARBARA T. WASSON
Laurens County CACP & GS

This matter comes before the Court by way of an application for post-conviction relief filed March 29, 1999. An evidentiary hearing into the matter was convened on March 16, 2000 at the Laurens County Courthouse. Applicant was present at the hearing and was represented by Richard Townsend, Esquire. The Respondent was represented by Howard L. Steinberg, Assistant Attorney General for the State of the South Carolina.

At the evidentiary hearing held in this matter, Applicant testified on her own behalf. Testifying on behalf of the State was Claude H. Howe, Esq., Applicant's trial counsel. This Court also had before it a copy of the transcripts of both the plea and sentencing proceedings, the records of the County Clerk of Court and Applicant's records from the South Carolina Department of

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