

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Richland County

G. Thomas Cooper, Circuit Court Judge

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**RECEIVED**

OCT 29 2013

**S.C. Supreme Court**

LOUIS GAINNEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000535

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APPENDIX

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PW - L. GAINNEY - DIRECT

- 1 A And —
- 2 Q In what way did it help?
- 3 A Things started coming back. Things started  
4 coming back.
- 5 Q Were you able to think more clearly?
- 6 A Right.
- 7 Q Okay. And you were not on that medication on the  
8 night of March 31st, correct?
- 9 A No, sir.
- 10 Q All right. What else did you want your lawyers  
11 to do for you in your defense that they did not do?
- 12 A I had several witnesses that when that lady said  
13 that I didn't love Didi, that I was a control, a  
14 control person, say I — and I didn't have no  
15 warning of their to tell them that that wasn't true.  
16 It was just my word. It wasn't the words of other  
17 people that could testify that that wasn't true.
- 18 Q And when you say "that lady," do you recall, was  
19 that Jeanna Richardson?
- 20 A It was, it was.
- 21 Q Jeanna —
- 22 A Didi and — Didi and the prosecutor.
- 23 Q Okay, I understand. Is that Ms. Weis or  
24 Ms. McDuffy, do you recall?
- 25 A I don't know which one of them.

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1 Q But generally, did you think that you were  
2 portrayed to the jury as someone that did not like

3 —

4 A Exactly.

5 Q —did not like Miss Montgomery?

6 A Exactly.

7 Q Was that the truth?

8 A Exactly. And the girl, the other girl who  
9 testified, she never, she never been to my house. I  
10 didn't even know that my fiance and this girl had a  
11 relationship like that —

12 Q Okay.

13 A —because we never visit.

14 MR. BELDING: Beg the Court's indulgence  
15 one moment. I just want to make sure.

16 BY MR. BELDING:

17 Q In your — Mr. Gainney, in your petition you also  
18 allege that the fact you had to go to trial in front  
19 of 12 people, the jury, you didn't know if shackles  
20 on prejudiced your case?

21 A Yes, sir.

22 Q Okay. Tell us what that did in your opinion, not  
23 your opinion, but how did that make you feel in  
24 front of the jury?

25 A Like a, like a criminal, like a person that had

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1 to be contained because he would hurt anybody in the  
2 courtroom.

3 Q Did -- and I believe in the transcript I read  
4 that they tried to maybe cover your leggings and  
5 stuff at some point; is that true?

6 A Mr. Cooper told me to sit there and don't make  
7 no, get no gestures, and don't move, and don't make  
8 the jury feel uncomfortable.

9 Q Okay. Did you only have on the leg irons?

10 A No, I -- everything I got on now.

11 Q You got handcuffs too?

12 A Yes, sir.

13 Q So did you try to keep your hands down under the  
14 table so the jury wouldn't see them?

15 A Yes, sir.

16 Q Not make any jingling noises?

17 A Well, you couldn't help it; I couldn't help it.

18 Q Okay. Did that -- were you able to write or take  
19 notes?

20 A No, sir.

21 Q Okay. Can you write?

22 A Yes, sir.

23 Q Okay. Did that -- how did that prejudice you in  
24 front of the jury?

25 A It kept me from being who I am. I'm not a

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1 psych— a maniac. I mean, I couldn't, I felt like I  
2 couldn't defend myself, I'm defenseless. I mean, I  
3 couldn't not only -- I tried to take, write a few  
4 notes and I believe that's when the people seen my  
5 handcuffs because my lawyer told me to keep my hand  
6 down and keep still.

7 Q Okay. And on the handwritten page 11 of your  
8 application you state that your lawyer's failure to  
9 object that the jurors member saw the defendant  
10 shackles so prejudiced the defendant to receive a  
11 fair trial. I'm reading that exactly but  
12 essentially you think that you feel that prejudiced  
13 you --

14 A I do.

15 Q ---in front of that jury?

16 A Yes, sir.

17 Q All right. Mr. Gainney, we got another witness to  
18 call, but this is your day in court in front of  
19 Judge Cooper. Is there anything else you'd like to  
20 tell him about your post-conviction relief  
21 application that he believes this Court needs to  
22 know?

23 A Yes, sir. I was -- I was down in the holding  
24 cell, and while I was in the holding cell Mr. Cooper  
25 and Mr. O'Neil came down to see me. And they said

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1 they had spoken to my sister, and I found out later  
2 on that my sister didn't know anything about what  
3 they had asked me to do. And they said, Mr. Gainney,  
4 if you think the jury gonna believe that you stabbed  
5 Deirdre with a fingernail file, you better re-think  
6 your story because that don't sound right, it don't,  
7 we don't think that's gonna help you. And —

8 Q Were they both saying this or was this one or the  
9 other? Do you remember which one said it?

10 A Mr. O'Neil was the one that was telling me that.

11 Q Okay.

12 A And he said he know my sister and they spoke with  
13 my sister about this and they — she wanted, he  
14 wanted her to get me to change my mind about saying  
15 that that happened with her fingernail file. Well,  
16 by me believing in my attorneys I did change that  
17 story and I said that I don't remember stabbing Didi  
18 with that fingernail file, but I do remember and I  
19 thought I was hitting her. I didn't think that it  
20 was right, but I'm doing what my attorneys think  
21 would be in my best interest, but that wasn't true.  
22 I — I don't remember just hitting her. I remember  
23 taking that screwdriver, that fingernail file from  
24 her and we scuffling.

25 Q Okay. Mr. Gainney, so is what you've told the

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1 Court under oath today actually what happened?

2 A That's the true and nothing but the truth so help  
3 me God.

4 Q Anything else you'd like to tell, Judge Cooper?

5 A I'm sorry that I had to put myself in the  
6 position to cause you guys to have to sit here and  
7 determine whether or not I need to be home or in  
8 prison for the rest of my life. When I met Didi,  
9 Deirdre, what really brought us together is that  
10 she was a resident at the Salvation Army and she had  
11 a family member that brought her kids up there the  
12 day before Thanksgiving and put their stuff out and  
13 put them out on the side of the road and they didn't  
14 have no place to go. And she couldn't stay because  
15 she had to be with her kids, and they didn't have no  
16 place for no kids to go. They called several  
17 places. The city police tried to get her in some  
18 shelter place for women and the kids, and they  
19 couldn't find anybody. And I called my brother and  
20 I told him to bring me some money because I was  
21 going to put her in a room that night. Well, I put  
22 her in a room that night and she didn't want me to  
23 leave because she didn't know anybody from Columbia.  
24 So I slept on the floor and her and the kids slept  
25 in a bed. And we did that for about three days and

## PW - L. GAINNEY - CROSS

1 then we just -- after my brother would come and get  
2 me and I would go to work and he was given me some  
3 of that 150-dollars every other day so they can eat  
4 and they can be comfortable, I'm in -- I was in love  
5 with Deirdre without a doubt. I was even willing to  
6 sacrifice the embarrassment because I was in love  
7 with her. I tried to do the best I can to help. I  
8 don't want to spend the rest of my life in prison, I  
9 really don't. And I'd like to ask you guys to have  
10 mercy on me for making a bad decision in my life.

11 Q Okay. All right, Mr. Gainney, that's well said.  
12 Thank you very much.

13 MR. BELDING: No further questions, Your  
14 Honor.

15 THE COURT: Mr. Corney.

16 (Witness stands up.)

17 THE COURT: No, sir, I mean, not quite  
18 through.

19 **CROSS-EXAMINATION**

20 BY MR. CORNEY:

21 Q Mr. Gainney, you testified at trial, correct?

22 A Excuse me, sir?

23 Q You testified at the trial in your defense,  
24 correct?

25 A Yes, sir.

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1 Q You took a oath before you went up and sat on  
2 that stand that day —

3 A Yes, sir.

4 Q —to tell the truth —

5 A Yes, sir.

6 Q —and the whole truth, nothing but the truth?

7 A Yes, sir.

8 Q You took that same oath today when you took the  
9 stand; didn't you?

10 A Yes, sir.

11 Q And you're saying now you lied during your trial  
12 testimony, correct?

13 A No, I didn't lie.

14 Q You didn't say a word about this nail file, did  
15 you, anywhere in your testimony?

16 A No, sir.

17 Q So you just withheld the truth is what you did?

18 A No, I just did what my lawyers asked me to do.

19 Q Which would have been lie essentially. I mean,  
20 you're saying now that it was a nail file. That day  
21 you said you didn't remember what happened.

22 A They told me they had my best interest at heart,  
23 and that's what they wanted me to do and that's what  
24 I did.

25 Q Okay. There's no question that the victim in

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1 this case, your fiance as you allege, was found  
2 inside the house, her intestines pulled out of her  
3 stomach. I mean, when EMS arrived there her  
4 intestines were literally pulled outside her  
5 stomach, correct?

6 A. They weren't -- not when I left.

7 Q I'm saying the testimony at trial showed up there  
8 when EMS arrive there had she literally had her  
9 intestines pulled out from her stomach?

10 A That's what in that, my file.

11 Q Pretty gruesome crime, right?

12 A That's what they had in my file.

13 Q And her intestines were pulled out by a nail  
14 file; is that your testimony today?

15 A If they was pulled out --

16 Q A stab wound with a nail file?

17 A If they was pulled out, not unless something else  
18 happened after I left, I don't know. But they  
19 wasn't out when I left and that was the only weapon  
20 that was there.

21 Q All right. There's no question that, I mean,  
22 that you grabbed her by the arm, walked her around  
23 the side of the house, she's screaming. You're the  
24 only person on the side of the house on the side of  
25 the house her, next door neighbor runs out, she's on

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1 the ground with her intestines pulled out, correct?

2 And that's all the testimony that's presented at  
3 trial; wasn't it?

4 A I wasn't there when they got there. I didn't see  
5 any intestines, and I didn't even see her on the  
6 ground. All I seen was two guys coming off the  
7 porch. I didn't even see a lady. And you said  
8 there was a lady that said when she got around there  
9 she seen the intestines on the ground?

10 Q I just wanted your answer that there's no  
11 question you were the one on the side of the house  
12 with her, the only one on the side of the house with  
13 her when she's screaming for help and there's  
14 testimony at trial when the neighbor ran around,  
15 Didi the neighbor, ran around. She's on the ground  
16 with her intestines pulled out and you were the only  
17 one that had been there, correct?

18 A That's what she said.

19 Q Okay. And you said -- I think in your trial  
20 testimony you said that you remembered hitting her,  
21 you just didn't remember that you were stabbing her?

22 A That's the statement that I was told to make by  
23 my attorneys.

24 Q All right. That was the statement that your  
25 attorneys told you to say?

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1 A Yes, sir.

2 Q Okay. Your attorneys weren't going to jail at  
3 the end of this thing, were they?

4 A No, they wasn't.

5 Q It wasn't their life on the line, was it?

6 A They was defending me.

7 Q Okay.

8 A They had me thinking they had my best interest at  
9 heart, sir.

10 Q You're the one doing life without parole because  
11 you were convicted of this, —

12 A Yes, sir.

13 Q —nor Mr. Cooper or Mr. O'Neil.

14 A That's why the truth is being told now.

15 Q Okay, I just want to make that clear. Now you  
16 said you had some witnesses that you wished would  
17 have been called at trial?

18 A Yes, sir.

19 Q I think you said some family members. You named  
20 some people from the Salvation Army. None of those  
21 people were at your house the night of the incident,  
22 were they?

23 A No, they was — yes, my brother was. I called my  
24 brother to come and pick me, but he just didn't get  
25 there in time for this.

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1 Q Okay. So he wasn't there when this actually  
2 occurred?

3 A No, sir.

4 Q Okay. So he wouldn't have anything to add about  
5 how this went down? He wasn't even there. Anything  
6 he has to say is second hand, right?

7 A He can testify that I wanted him to come pick me  
8 up because he was with another guy.

9 Q All right. You said, I think, in your testimony  
10 to Mr. Belding a minute ago you said you were try --  
11 that you had left the hospital because you thought  
12 that guard that you told your name to was calling  
13 the police, correct?

14 A I -- when he never did come back I felt like  
15 something was wrong, bad, and I wanted to leave.

16 Q Okay. In your trial testimony you said you  
17 weren't trying to leave the hospital; didn't you say  
18 that?

19 A I wasn't trying to?

20 Q Yeah, you said you were out there smoking a  
21 cigarette. You weren't trying to leave, right?

22 A No, I was out there smoking a cigarette when they  
23 came and arrested me.

24 Q So were you trying to leave or not trying to  
25 leave? In your testimony to Mr. Belding a minute

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1 ago was that you left because you were scared he was  
2 calling the police?

3 A When you just heard me said that when I felt like  
4 something was wrong I wanted to get out of there,  
5 that's when I went to proceed to smoke the  
6 cigarette. I wasn't trying to leave the hospital.  
7 I wanted to leave out of that room that I was in to  
8 smoke the cigarette when I was arrested.

9 Q And that was just before you took off running  
10 through the parking lot and got tackled by the  
11 hospital security guards, correct?

12 A When they tried to arrest me and I didn't know  
13 what they was trying to arrest me for, there wasn't  
14 any resisting.

15 Q All right. So you're not contesting that you ran  
16 from them through the parking lot and they tackled  
17 you to put, to detain you?

18 A I was already in the parking lot when they  
19 arrested me.

20 Q Okay.

21 A They arrested me in the parking lot.

22 Q All right. I think the testimony was that  
23 there's a hospital guard who's a former NFL football  
24 player that literally chased you down, tackled you  
25 in the parking lot?

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1 A He's the one that arrested me.

2 Q And you gave a fake name to the hospital security  
3 guard, right?

4 A No, sir.

5 Q You didn't give them your brother's name?

6 A No, sir.

7 Q Is that not what the testimony reflected at trial  
8 that you gave them your brother's name?

9 A No, sir.

10 Q Okay.

11 A That's -- that was a statement that was made at  
12 my trial that wasn't true. If I'm Louis Gainey and  
13 I'm going to see about her, that was my fiance, why  
14 would I be someone that I'm not. It don't make  
15 sense. They know who I am.

16 Q And your other allegation you brought today is  
17 that you thought the shackles were prejudicial to  
18 your case, correct?

19 A Yes, sir.

20 Q Mr. Cooper and Mr. O'Neil objected to that at the  
21 very start of trial; didn't they?

22 A What you mean they objected?

23 Q Didn't they object to the Court, ask him to have  
24 the shackles removed at the very start of the trial?

25 And I can pass you up a copy of the transcript for

## FW - L. GAINNEY - CROSS

1 you to look at it if you want to.

2 A If you saying they did then they did. I mean,  
3 what, that...

4 Q All right. I'm just talking about on page 12 and  
5 I can hand you a copy of this transcript and I  
6 direct the Court's attention there. That Mr. Cooper  
7 and Mr. O'Neil both asked the court to have the  
8 shackles removed at the very start of trial; didn't  
9 they?

10 A I can't recall that, I mean —

11 Q Do you recall them doing —

12 A I'm not saying they didn't. I'm not going to say  
13 they didn't, but I can't remember because there was  
14 so much being said past me in court to I don't even  
15 know to — I can't remember everything that was  
16 said. I can't remember the rules and the  
17 regulations of what you supposed to be and how you  
18 supposed to be in court. All I'm doing is what I'm  
19 told to.

20 Q All right. Right before you took the witness  
21 stand to testify in your defense Mr. Cooper and Mr.  
22 O'Neil again objected to you having shackles on,  
23 didn't they? Page 28 in the transcript is where I  
24 direct Court's attention to. Didn't they bring up  
25 again they didn't want you in shackles in front of

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1 the jury?

2 A They probably did. I mean, I can't recall; but  
3 if they did that was good, but I still had them on.

4 Q If they did then they did their job. I mean,  
5 they asked the Court to do it and the Court said no,  
6 right?

7 A I don't remember the Court saying anything. I  
8 don't even recall them asking; but if you say it's  
9 in there it's there. That's not my argument.

10 Q You took the witness stand before the jury came  
11 in the courtroom; didn't you? You were already up  
12 on the witness stand when the jury came in?

13 A I went — I was in and out of the courtroom  
14 several different times.

15 Q Okay.

16 A So what time are we talking?

17 Q I'm talking about right before you took the  
18 witness stand where you testified at trial, before  
19 the jury came in the judge allowed you to get up on  
20 the one stand before they ever came in so they never  
21 saw you in shackles. You were already sitting  
22 behind that booth right there when they came in?

23 A Is that the time they had to leave out for me to  
24 take the stand?

25 Q That's what I'm talking about, right. It's in

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1 the transcript you get up on the stand and sit there  
2 and then the jury comes in afterwards, correct?

3 A That could be correct.

4 Q So the jury never saw your shackles. I mean,  
5 you're already behind that booth by the time they  
6 came in?

7 A They couldn't see — I'm sitting right there  
8 beside where you at, and they right there where  
9 these people at. They can see me from there. I  
10 didn't say they seen me getting up on the stand. I  
11 said they seen me sitting over there around that  
12 desk with the shackles on.

13 Q All right. I just want to be real clear about  
14 this. Your testimony at trial is that you didn't  
15 remember what happened. You remember hitting her;  
16 you never remembered stabbing her. That was your  
17 testimony at trial.

18 A That statement was a statement that my attorneys  
19 asked me to say. I remember on the side of that  
20 apartment when I had her by her hand asking her to  
21 come on home and she refused, and we had a scuffle  
22 and she called for James and both of them came off  
23 the porch. And I remember leaving after the  
24 scuffle.

25 Q All right, I'm not asking you about that. I'm

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1 asking about your testimony at trial. You testified  
2 you remembered hitting her, didn't remember anything  
3 other than that. You said you thought you were just  
4 hitting her at that point in time, right?

5 A That's the statement my attorneys asked me.

6 Q That was the testimony you gave. That's all I'm  
7 asking you. That's the testimony in the transcript;  
8 that's the testimony you gave?

9 A That's the statement that my attorneys asked me  
10 to make, yes, sir.

11 Q Okay. And you never said even the word  
12 fingernail file even one time in your testimony, did  
13 you, not one time?

14 A Because my attorneys asked me not to.

15 Q As a matter of fact, on redirect I think you  
16 exact — your exact testimony on redirect  
17 examination was you didn't remember what happened.  
18 I think that's specifically what you said, I don't  
19 remember, I don't recall that at all. Over and over  
20 again that's what you said, correct?

21 A At that particular time of the crime I was — I  
22 was so out of it I don't even re— it's not much  
23 that I do remember.

24 Q Okay. But your testimony here today you said on  
25 direct to Mr. Belding, he asked you do you remember

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1 that night, you said I remember that entire time  
2 start to finish?

3 A Yes, sir. I -- yes, sir.

4 Q All right, a little different than what you  
5 testified at trial?

6 A You talking about, you talking about 7, 4, 5  
7 years, --

8 Q So you remember now--

9 A --right --

10 Q Your testimony is you remember now four or five  
11 years later --

12 A No, my testimony --

13 Q --better than you did at trial?

14 A My testimony now, sir, that after reading my from  
15 time to times and after talking to my attorney and  
16 after listening to the guidance that I had from the  
17 attorneys that was representing me, yes.

18 Q All right. And there's testimony from -- beg the  
19 Court's indulgence. Let's see, Officer Cato or  
20 Catoe, at the trial that when he showed up at the  
21 scene the victim told him you had stabbed her with a  
22 screwdriver, correct?

23 A Said that I was hold with a screwdriver?

24 Q All right. That's what Officer Cato testified at  
25 the trial. He came up to the victim, the victim

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1 told him Louis Gainney stabbed you with a  
2 screwdriver. Wasn't that the testimony at trial?  
3 A That's, I mean, it was so much said I can't —  
4 don't ask me to say yes that's what he said and I  
5 don't recall. All I know is that it was never a  
6 screwdriver and I didn't have a screwdriver. I  
7 don't know where the screwdriver come in to play,  
8 and I don't even know how it come about. So did he  
9 say he seen a screwdriver? Did he said he received  
10 a screwdriver? Did he say that someone witnessed a  
11 screwdriver, or he just said there was a  
12 screwdriver? I mean, there was never a screwdriver.  
13 Where's the screwdriver coming from?

14 MR. CORNEY: I'm — if I may approach the  
15 witness, Your Honor, just very briefly. And I hate  
16 to belabor the point, but if I may approach him with  
17 a copy of the transcript.

18 THE COURT: Go ahead.

19 BY MR. CORNEY:

20 Q I'm just asking you what the trial testimony was.  
21 I'm gonna lay this right in front of you, have you  
22 look at page 161 right here. Just read these lines  
23 for me, line, starting at line 2.

24 A "I also was questioning back and forth who did  
25 this to you." Who was that saying that?

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1 Q That's Officer Cato. If you will just keep  
2 reading down for me.

3 A "I also was questioning back and forth who did  
4 this to you. What" — oh, he talking to — he  
5 talking to Deirdre?

6 Q If you'd just continue to read that for me I'll  
7 question you about it in just a minute.

8 A "I also was questioning back and forth who did  
9 this to you, what did they do it with? She told me  
10 it was a screwdriver."

11 Q All right. And a little bit further down he said  
12 he didn't have the name Gainey. He had the name  
13 Louis Gainer is what he's written down.

14 A "The subject's name that I came up with that  
15 night was Louis Gainer for nes— which is what's in  
16 my report. I did not have the Gainey name, but  
17 things were very hectic —

18 Q Okay.

19 A —at the time."

20 Q That's fine. I just wanted to you read up until  
21 there. All right, I'm gonna direct you to one  
22 other, one or two other portions just very quickly  
23 just to make sure we've got this — this is the  
24 testimony of the next door neighbor Didi, and I just  
25 want you to start at line 1 right there and read

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1 down to line 3 for me.

2 MR. BELDING: Excuse me, Rob, what page  
3 are you on?

4 MR. CORNEY: This is on page 147 of the  
5 transcript.

6 THE WITNESS: "Me and I was like, oh, my  
7 God, he did this? She was like, yeah, Louis stabbed  
8 me with a screwdriver."

9 BY MR. CORNEY:

10 Q All right, that's good. That's all I wanted you  
11 to read right there. I mean, is this starting to  
12 bring back a little bit of your recollection of the  
13 testimony produced at trial?

14 A Yeah, that's what she said.

15 Q And then on page 109 I'm gonna get you to read  
16 one more part. This is from the victim's testimony.  
17 I want you to read starting at line 1 if you would  
18 just read straight down to line 6 for me?

19 A "You laid on the ground holding your intestines.  
20 He was still swinging at me with — did you see what  
21 he had? I can't remember. I thought I remembered a  
22 screwdriver, but I can't be sure."

23 Q Okay. So that's starting to bring back your  
24 memory. There's a fair amount of testimony from a  
25 couple of people that the victim at the time said it

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1 was a screwdriver that she was getting stabbed with  
2 by you, correct?

3 A So now what you're asking me now is that the  
4 neighbor said that she seen me swinging and she seen  
5 what she thought was a screwdriver?

6 Q Mr. Gainney, all I'm asking you is that's what the  
7 testimony reflects at trial. I'm not asking you to  
8 explain it. That's what the testimony said at  
9 trial; isn't it?

10 A I mean, that's what you -- that's what I just  
11 read.

12 Q Okay. And that's not -- a fingernail file is not  
13 once mentioned in this whole entire transcript, is  
14 it?

15 A And so it's not a screwdriver.

16 Q All right.

17 MR. CORNEY: No further questions, Your  
18 Honor. Thank you.

19 THE COURT: Redirect?

20 MR. BELDING: No redirect. Thank you,  
21 Your Honor.

22 THE COURT: Now you can come down,  
23 Mr. Gainney.

24 MR. BELDING: I'd like to call Mr. Gregory  
25 Gainney to the stand.

## PW - L. GAINNEY - CROSS

1 THE BAILIFF: Place your left hand on the  
2 Bible. Raise your right hand.

3 WHEREUPON,

4 GREGORY IGNACIUS GAINNEY,  
5 having been duly sworn by the Court, testified as  
6 follows:

7 THE COURT: Have a seat in the witness  
8 box, state your full name.

9 THE WITNESS: My name is Gregory Ignacius  
10 Gainney.

11 MR. BELDING: If it please the Court.

12 DIRECT EXAMINATION

13 BY MR. BELDING:

14 Q Mr. Gainney, what are — how are you employed?

15 A I'm retired. I'm retired, air force.

16 Q All right. How long in the air force?

17 A I done 21 years and then I went into  
18 hotel/restaurant manager.

19 Q Okay.

20 A But now I do nothing; I'm a disabled veteran.

21 Q And are you the brother of Louis Gainney, Jr.?

22 A Yes, I am.

23 Q Older or younger?

24 A A lot younger.

25 Q A lot younger?

## FW - G. GAINNEY - DIRECT

1 A Yeah.

2 Q Now were you living in Columbia in March of 2007?

3 A Yes, I was.

4 Q Okay, all right. How often did you get to see  
5 your brother Louis?

6 A Well, I saw him quite often. Most of the time we  
7 went over to mother's house on Sundays, weekends,  
8 things of that sort, uh-huh.

9 Q Okay. Do you know whether or not your brother  
10 was working, your brother Louis, was working with  
11 your brother Jimmy?

12 A Yes, he -- my brother Jimmy owns Gainney's roofing  
13 and remodeling where they remodel -- I hate to say  
14 rundown -- delapidated houses, and they do the tile,  
15 the bathroom, but then basically and bring them back  
16 up. And my brother was working for him as a tile,  
17 master tile layer.

18 Q Okay.

19 A And my brother Louis was working for my brother  
20 Jimmy, uh-huh.

21 Q And I understand. At the time this incident of  
22 March of 2007 do you know that Louis was in fact,  
23 still working with your brother Jimmy?

24 A Yes. He was working with my brother Jimmy; but  
25 he also had a primary job with the Dollar Store

PW - G. GAINNEY - DIRECT

1 place, uh-huh.

2 Q Do you know how long he had that job?

3 A Oh, I think maybe 6, 7 months. I'm just  
4 assuming. That's just ball park, uh-huh.

5 Q And to your knowledge did he still work at  
6 Midlands Tec?

7 A Yeah, he used to work a swing shift. I've taken  
8 him to work several times. In fact, I would have to  
9 go down and pick up his kids because they would be  
10 in school, Hans (ph) Middle School over there. I  
11 think it's Hans Middle School so I would go over to  
12 school and pick the kids up, drop him off at work,  
13 and then take he and the kids back home to their  
14 house. They didn't have a car.

15 Q Okay. Now did you actually attend the trial of  
16 this case?

17 A Yes, I did for two days, but then I took ill. I  
18 have a lung disease and sometimes I — immune  
19 deficiency disease, sometimes I got to stay home?

20 Q Okay. Which days did you miss?

21 A You know what, I think it was the last day.

22 Q Have you talked to your brother Louis's lawyers,  
23 either Mr. O'Neil or Mr. Cooper, about being a  
24 witness in this case?

25 A In this case?

FW - G. GAINNEY - DIRECT

1 Q Did either Mr. —  
2 A No. No.  
3 Q Of his lawyers?  
4 A No, I've never been approached.  
5 Q Call you?  
6 A Never been approached about any kind of witness.  
7 Q Did you ever have occasion to observe your  
8 brother Louis with Ms. Montgomery?  
9 A Numerous occasions, uh-huh.  
10 Q Over what kind of period of time?  
11 A Well, in 2006 I was in — I had got out the  
12 hospital, and I think — I'm only thinking probably  
13 right around October of 2006 when my brother was  
14 getting ready to start moving. They were living in  
15 the Salvation Army probably for rehab or whatever  
16 that was. But I think it was around October they  
17 was getting ready to get this house down off of 301  
18 South Bull so they needed to use my truck and my  
19 trailer to move. So we done a lot of moving from  
20 going to Salvation Army stores and thrift stores and  
21 things of that sort. So we invited Didi over to  
22 dinner. My wife and I had her over for dinner.  
23 That was the initial meeting. But other than that I  
24 would be down to his house probably about twice a  
25 week, you know, if they need to go grocery store or

PW - G. GAINNEY - DIRECT

1 take the kids to the doctor. We're a pretty close  
2 nit family.

3 Q When you observed your brother Louis with  
4 Ms. Montgomery can you describe how they got along?

5 A Quite well. I mean, I never saw any arguing,  
6 debating, anything like that. I saw a typical  
7 relationship, you know. You know, when you give  
8 looks at each other and you learn to shut up. You  
9 know, typical real relationship. It wasn't nothing,  
10 you know, violence or nothing like that if that's  
11 what was going on. I never seen any of that. I  
12 never witnessed that.

13 Q Did you ever see anything that you would  
14 interpret as Mr. Louis Gainney hating Ms. Montgomery?

15 A Oh, god, no, no. If anything, I thought my  
16 brother was too smitten by her. To be quite honest  
17 I thought he was too smitten by her. Maybe that  
18 would be because that's my older brother and I -- my  
19 protectiveness. But I just felt like, you know,  
20 guy, just, you taking on a lot because he took and  
21 her, three kids, trying to find a place for them to  
22 live. I just felt like he was taking on more than  
23 he should have to me, you know, but he was in love  
24 with her.

25 Q And on the night of March 31st, 2007, you were

## PW - G. GAINNEY - DIRECT

1 not at 301 South Bull when this incident happened,  
2 were you?

3 A No, I was out in my property in the country.

4 Q Okay. Were you the brother that was called to  
5 the scene?

6 A No, that was my brother Jimmy Gainney, the roofing  
7 contractor.

8 Q Thank you. I appreciate your coming today.  
9 Please answer any questions Mr. Corney may have.

10 A Okay.

11 MR. CORNEY: No questions for this  
12 witness, Your Honor.

13 THE WITNESS: I was enjoying myself.

14 THE COURT: Thank you very much.

15 THE WITNESS: Thank you very much.

16 THE COURT: Mr. Belding.

17 MR. CORNEY: May it please the Court, I'd  
18 like to call Mr. James Cooper to the stand.

19 THE COURT: Come around Mr. Cooper.

20 WHEREUPON,

21 **JAMES DAVID COOPER,**

22 having been duly sworn by the Court, testified as  
23 follows:

24 THE COURT: Have a seat in the witness  
25 box. State your full name for the record.

PW - J. COOPER - DIRECT

1 (No response.)

2 THE COURT: You may proceed.

3 **DIRECT EXAMINATION**

4 BY MR. BELDING:

5 Q Mr. Cooper, where are you employed?

6 A My name is James Daniel Cooper. I'm employed at  
7 the Richland County Public Defender's Office.

8 Q How long have you been there?

9 A I have been there since 2007.

10 Q Okay. Was one of your cases the case of State  
11 versus Louis Gainey, Jr.?

12 A Yes, sir, it was.

13 Q All right. How long before the trial —

14 A Uh-huh.

15 Q —did you have this case assigned to you?

16 A From reviewing my notes I became his counsel in  
17 late 2008, I think early 2009. I worked a little  
18 bit with Ms. Carolyn Gripp which she was his  
19 counsel; but I really became involved, I think, late  
20 that year, beginning of next year..

21 Q Okay. So that was some months before the trial  
22 actually took place?

23 A Yes, sir.

24 Q Okay. How many times did you see Mr. Gainey out  
25 at the detention center?

PW - J. COOPER - DIRECT

1 A My notes reflect four or five.

2 Q Okay. And how long did those meetings last  
3 approximately?

4 A Like Mr. Gainey said, some of them lasted 15 to  
5 20 minutes. As the trial approached, as he said  
6 they got longer because we were -- well, the trial  
7 was getting closer so the meetings got longer.

8 Q Did the State offer you any plea? Was there any  
9 plea offer made in this case?

10 A No, he was served with LWOP so at that point  
11 everything was off the table.

12 Q So it was going to trial no matter what?

13 A Yes, sir.

14 Q All right. Did you have a chance to discuss with  
15 Mr. Gainey what his defense was going to be?

16 A We did.

17 Q Did you talk to -- when did you learn that he had  
18 a potential mental health history?

19 A I knew that from speaking with Ms. Gripp before I  
20 officially took over as his counsel because he  
21 had -- he underwent an evaluation by Doctor Crawford  
22 so I knew --

23 Q Pamela Crawford?

24 A Yes. So I knew that there had been discussions  
25 about his mental health.

PW - J. COOPER - DIRECT

1 Q That took place prior to your representation?

2 A Yes, sir.

3 Q Okay. And did you understand he had been found  
4 competent to stand trial?

5 A I did, yes, sir.

6 Q All right. Did you talk with Mr. Gainey about  
7 whether or not a second opinion should be sought as  
8 to his competency?

9 A I don't really recall whether I talked to him  
10 about a second opinion, but I don't — I didn't  
11 think one was necessary at the time.

12 Q Okay. And just so I understand what caused you  
13 to believe that a second opinion was not necessary?

14 A Well, I reviewed what Doctor Crawford had to say.  
15 I remember I talked to Carolyn, Ms. Gripp about it.  
16 And I didn't think that from what, from looking at  
17 her opinion — and I think actually did talk to  
18 her — from looking at her opinion, speaking to her  
19 about her opinion and my own observations of him, I  
20 didn't see any opinion to change.

21 Q Okay. Have you ever seen any diagnosis of  
22 Mr. Gainey that would have indicated that he would  
23 not have been competent to stand trial?

24 A I have not.

25 Q Okay. Do you know what kind of a mental health

PW - J. COOPER - DIRECT

1 diagnosis he had or may have had?

2 A Well, from reviewing the file I think he —

3 Doctor Crawford reported that he had a history of

4 substance abuse and stress disorder I think. I

5 think those were the two things she pointed out, but

6 she pointed out in her report that she did not think

7 that affected his competency so. She was the doctor

8 so that's why I — what I went with.

9 Q And so essentially from a non-rural purpose he

10 was competent to assist in his defense?

11 A I believe, I believe so, yes, sir.

12 Q Okay. Did Mr. Gainey provide you with witnesses

13 that that might be of assistance in his defense?

14 A He talked about calling members of his family,

15 and we did discuss that. And as Mr. Gainey said in

16 his own testimony, I didn't think it would be

17 productive. That wasn't — it was not my advice to

18 him and intending on calling his witnesses would be

19 productive itself.

20 Q Okay. Now would that — would you determine that

21 a trial strategy decision?

22 A Yes, sir.

23 Q Do you recall that near the end the judge went

24 over the malice instruction that —

25 A I do.

PW - J. COOPER - DIRECT

1 Q ---associated with assault and battery with  
2 intent to kill?

3 A Uh-huh.

4 Q And there was some work done on that. I think  
5 you objected to the malice instruction and it was  
6 defined in fact -- I believe the jury actually sent  
7 a note and asked they be re-charged on that; isn't  
8 that your recollection?

9 A Yes, sir. I believe it was a confusing ordeal.  
10 They -- we did object to it. They did send notes  
11 back about it.

12 Q Okay. Interestingly, a month after this trial,  
13 the Court of Appeals issued an opinion in the  
14 Belcher case. Are you familiar with that?

15 A I am, yes, sir.

16 Q And briefly what did that case say?

17 A Well, basically the jury pre-Belcher -- and this  
18 is my understanding without the case in front of me.  
19 Pre-Belcher, the jury was allowed to infer malice  
20 specifically I think from the -- in that case the  
21 presence of the deadly weapon. And the court  
22 basically said, look, that's in the province of the  
23 jury, you can't -- you instruct them to infer an  
24 element. So, and that's one of the problems that I  
25 had with ABWIK in there beginning was the idea that

PW - J. COOPER - DIRECT

1 you can -- just general intent existed; but anyway,  
2 that came out after this case.

3 Q Okay, did you have any knowledge at the time of  
4 this trial that that ruling was imminent?

5 A No, sir.

6 Q Okay. Did you discuss with Mr. Gainey whether or  
7 not testimony as his family members about the  
8 relationship between Louis and the victim Ms.  
9 Montgomery --

10 A Uh-huh.

11 Q --might be beneficial in terms of malice?

12 A We did.

13 Q Almost?

14 A We talked about that a lot because from the very  
15 beginning he wanted to talk -- he always -- every  
16 meeting he always talked about how much he loved  
17 her; and honestly I didn't think that was gonna be  
18 an issue. I didn't think any of those twelve people  
19 were going to walk out of that room think that he  
20 didn't love her. To me that was the clearest part  
21 of his testimony. What I was afraid of is engaging  
22 in a -- is making the jury upset by having him  
23 perceive that I was engaging in victim bashing. I  
24 didn't want to call witnesses to come and report,  
25 talk about when how they thought she was a cheater,

PW - J. COOPER - DIRECT

1 how they thought she was, you know, some kind of  
2 whore or something. I didn't want that to happen at  
3 all. Not that they would -- I didn't know that they  
4 would say and use those words, but I didn't want  
5 them to perceive that 'cause I didn't want them to  
6 think we were attacking her. So I didn't think that  
7 Mr. Gainey's love for Ms. Montgomery was ever, would  
8 ever be a question in their minds.

9 Q Okay. This was not evidence at trial. Had you  
10 been made aware of some things about the victim's  
11 history that might have been, like you said, victim  
12 bashing in other words, that she'd had previous,  
13 made previous similar allegations against prior  
14 boyfriends or husbands and things like that?

15 A Uh-huh. What's the question?

16 Q I'm sorry, did you know that she had previous  
17 relationships where she claimed alleged criminal  
18 domestic violence against previous boyfriends?

19 A I think I recall Louis telling me about that I  
20 think. I don't recall anything specific, but I  
21 think I recall him telling me about that.

22 Q Okay. I just want to make sure I understand.  
23 Was it your conscious decision to not go down that  
24 road as a trial strategy decision because you didn't  
25 want to victim bash?

PW - J. COOPER - DIRECT

1 A I did not want to do down that road. And another  
2 reason was because when Louis would talk about that  
3 he would get visibly upset and I didn't want the  
4 jury to perceive his anger, you know. I mean, when  
5 you're defending a violent crime the last thing you  
6 want is for the jury to see your guy get angry and  
7 so I wanted to stay away from that.

8 Q Okay. Did you -- now you heard Mr. Gainey's  
9 testimony earlier. Do you recall having a  
10 discussion down in the holding area here in the  
11 courthouse with Mr. O'Neil about what Mr. Gainey's  
12 testimony should be?

13 A Yes, and what I recall -- and I'm doing my best  
14 and I don't remember -- I don't remember it word for  
15 word. I recall that Mr. O'Neil and I had a problem  
16 with his testimony because it was so unclear when  
17 you reached that point on the events. I feel like  
18 when we were practicing his testimony sometimes he  
19 would include details and then sometimes he would  
20 leave them out. Sometimes he would talk about  
21 blacking out. I think what my point to him was,  
22 which may have been misunderstood, but as I recall  
23 my point to him was you've got to be clearer than  
24 that, the way it's coming out now it doesn't sound  
25 good. I don't recall specifically telling him to

PW - J. COOPER - DIRECT

1 say specific things; I don't remember doing that.

2 But I do remember us going down there and we had a  
3 problem with when you get to that area of your  
4 testimony it becomes quite unclear and that might  
5 not go over well with the jury.

6 Q Okay. No weapon was ever introduced at the  
7 trial, was it?

8 A Correct.

9 Q Okay. And Mr. Gainey said that he was concerned  
10 you hadn't done any pretrial investigation about the  
11 wounds on the victims. Did you talk to anyone about  
12 whether or not such ones could be made by a screw  
13 driver?

14 A Well, we talked to the — during the trial I  
15 think Mr. O'Neil examined the doctor, the surgeon,  
16 and I don't recall the specific questions that he  
17 asked. But I remember talking to Louis about it and  
18 saying, you know, like you said, at that point they  
19 had already — they actually think they actually  
20 extended the cut to actually, you know, put her back  
21 together and then sewed her back up. So whatever  
22 the way it happened then actually looked worse. So  
23 that's what I remember. Do I remember calling a  
24 doctor ahead of time? And no, I don't recall that.

25 Q Okay. Did you know of any other witnesses that

PW - J. COOPER - DIRECT

1 you could have called on Mr. Gainey's behalf?

2 A Not that I wanted to. Not for my — not for the  
3 defense that we decided to present.

4 Q Okay, and I just want — that's the last point I  
5 want to get to. The defense that you decided to  
6 present, how was that strategy arrived at? Who made  
7 that decision on how the defense would be presented?

8 A Over time, as I know with Mr. Gainey, talked to  
9 Mr. O'Neil about the case. We discussed the fact  
10 that — well, basically we have these discussions  
11 about different witnesses and so forth and the  
12 chronology of what happened. And by the end of it,  
13 by the end of our discussions and by the time of his  
14 testimony we reached the decision that the jury was  
15 probably going to believe that Mr. Gainey had that  
16 assaulted this lady in some form. So it became my  
17 decision to try to save him from life without parole  
18 I wanted the jury to convict him of ABHAN rather  
19 than ABWIK because I thought that they were gonna  
20 believe that an assault did occur. And I — and  
21 part of that was deciding against doing a case about  
22 what kind of person Ms. Montgomery was so...

23 Q Okay.

24 A That was the basic strategy.

25 Q Well, the testimony from the very beginning has

PW - J. COOPER - DIRECT

1 been that he grabbed her, pulled her, and take her  
2 home?

3 A Yes, sir.

4 Q So there was a touching that may have been  
5 unwanted. There was an assault, possibly a battery,  
6 just from that; wasn't there?

7 A Yes, sir.

8 Q Was there ever any discussion of any kind of  
9 self-defense defense?

10 A We talked about it from the very beginning; but I  
11 didn't think it was viable based on just the  
12 circumstances surrounding what everybody would say  
13 happened, his physical stature, just the whole  
14 thing. I thought, I mean, normally in presenting  
15 defenses I like to go one way, okay, and tell the  
16 jury something, you know, stick with it. And I  
17 thought we need to go with the idea that, yes Mr.  
18 Gainey is guilty of an assault, but it certainly  
19 wasn't an assault with intent to kill, and that's  
20 what we ended up doing.

21 Q So if you — so your strategy was if we could  
22 convince them to come back with an ABHAN which is a  
23 misdemeanor, correct —

24 A Yes, sir, it was. Yes, sir.

25 Q —common law, then it would not be a third

PW - J. COOPER - DIRECT

1 felony so he would get life without parole?

2 A It would keep him out of LWOP, yes, sir.

3 Q Thank you.

4 MR. BELDING: No further questions, Your  
5 Honor.

6 THE COURT: Mr. Corney.

7 MR. CORNEY: I'll be brief.

8 **CROSS-EXAMINATION**

9 BY MR. CORNEY:

10 Q Mr. Cooper, did you ever have any concerns with  
11 his competency when having these pretrial  
12 discussions with him?

13 A I did not.

14 Q Okay. So your testimony today is that he was  
15 able to participate in your discussions and  
16 comprehend your discussions?

17 A He was.

18 Q Okay. At some point in time, I believe it was  
19 May 30th of 2007, you were served with the State's  
20 notice of intention to seek life without parole?

21 A That sounds right.

22 Q Okay. So it was a couple of months prior to the  
23 trial, correct?

24 A I don't know which attorney was served with it,  
25 but that sounds right.

## PW - J. COOPER - CROSS

1 Q Mr. Gainey was aware that he'd be facing life  
2 without parole if convicted at trial?

3 A Yes.

4 Q And it was your testimony there were no other  
5 plea offers so he didn't have much of a choice other  
6 than to plead guilty and get life without parole, or  
7 go to trial and face life without parole?

8 A After that, after they served that, that was it.

9 Q Okay. Based on the discovery and the testimony  
10 that came out at trial there's no real question as  
11 to the fact that Mr. Gainey walked around the side  
12 of the house with the victim, correct?

13 A I don't believe there is.

14 Q Okay. And that she was screaming a moment after  
15 that and the neighbor ran over there when he found  
16 her on the ground, correct?

17 A Yes, sir.

18 Q Now much of a -- not too much that he could pick  
19 apart that there was some assault that occurred,  
20 correct?

21 A No, sir.

22 Q And she at that point in time had pretty severe  
23 injuries; would you agree with that?

24 A Yes, sir.

25 Q I believe her testimony was that her intestines

EW - J. COOPER - CROSS

1 were pulled out from within her stomach, correct,  
2 and —

3 A That was the testimony.

4 Q —pulled out?

5 A Yes.

6 Q Along those lines I believe you testified a  
7 minute ago as to the cuts, the incisions that were  
8 made by the surgeon may have made the wounds look a  
9 little bit longer than what actually occurred to  
10 her. That was — the pictures of those were  
11 something you objected to at trial?

12 A Yes, sir.

13 Q Okay. And you were able to cross-examine the  
14 surgeon or Mr. O'Neil may have done it, to  
15 cross-examine the surgeon to bring that out. Those  
16 cuts may have looked longer in the pictures because  
17 of the incisions, correct?

18 A I'm certain that I think Mr. O'Neil did that.  
19 I'm sure he did.

20 Q Okay. The victim in this case testified,  
21 correct?

22 A Yes.

23 Q And she was able to identify Mr. Gainey as the  
24 person that had done this to her, correct?

25 A Yes.

PW - J. COOPER - CROSS

1 Q And it was her testimony he had done it, and she  
2 believed it was a screwdriver and other witnesses  
3 testified that she had said in the moment that it  
4 was a screwdriver, correct?

5 A Yes.

6 Q Did you ever hear about this theory about her  
7 having a nail file on the porch and using that  
8 against him in any way?

9 A I think that Mr. Gainey did mention a nail file.  
10 I think at some point, yes, he did mention a nail  
11 file.

12 Q Did you ever advise him not to testify at that  
13 trial and say don't mention a nail file.

14 A I don't think I ever said — I don't recall  
15 clearly, okay, exactly what that discussion was and  
16 I want to be as exact about this as I can. I just  
17 remember the main problem I had was whether he said  
18 nail file, no nail file, blackout, no blackout, he  
19 had to be — I wasn't happy with how clear he was  
20 being. I remember feeling like he was going back  
21 and forth between details and no details, and my  
22 concern was that you've got to be clearer than that  
23 with a jury. I thought that was a bad part of his  
24 testimony, and that's what I intended to get across  
25 to him. I certainly wouldn't instruct him to lie in

PW - J. COOPER - CROSS

1 any way; but I thought — I remember thinking that  
2 we've got, you know, Louis, we've got to clear up  
3 that part. And that's my recollection.

4 Q Okay. So his — essentially what he had told you  
5 along the way it sounds like wasn't ever quite very  
6 clear. He never gave you one distinct story and  
7 stuck with that. It kind of sounds like sometimes  
8 he said he blacked out and sometimes he said other  
9 things, correct?

10 A I remember being concerned about that prior to  
11 his testimony; and I think from my memory that's  
12 what I intended to get across to him was that, you  
13 know, you've got to clear that part up.

14 Q And would you say it's fair, a fair statement to  
15 say the majority of the trial defense was gonna have  
16 to be mitigating his actions for the most part? He  
17 wasn't going to be arguing that he didn't do it.  
18 That wasn't the trial strategy at the getgo, rather  
19 than mitigating how this occurred, correct?

20 A I mean, my strategy was to give the jury a  
21 comeback believing this was an assault and not an  
22 assault with an intent to kill, keep him out of  
23 life. That was basically the mission.

24 Q Okay. And would you agree that her, her injuries  
25 were as the surgeon testified, were potentially

EW - J. COOPER - CROSS

1 fatal. I mean, they were pretty serious injuries,  
2 is that correct?

3 A I — based on his testimony I'd have to believe  
4 that, yeah.

5 Q And I just want to make sure — I don't want to  
6 re-hash this too much, but just — your testimony is  
7 that based on your meetings with Mr. Gainey your  
8 interaction with him you didn't see the need to have  
9 him evaluated a second time, correct?

10 A I did not.

11 Q As far as the shackles, that was something you  
12 objected to at trial; do you recall that?

13 A Yes, sir, we did.

14 Q And that was something you objected to at the  
15 very outset of the trial, correct?

16 A Yes, sir.

17 Q And then you re-raised that motion just before  
18 Mr. Gainey took the stand?

19 A I just looked at it in the transcript, yes, sir,  
20 we did.

21 Q And that was obviously to avoid the jury seeing  
22 the shackles that were on there at that point in  
23 time?

24 A Yes. You know, most times the judges won't let  
25 you do it. They defer to security or they say, you

EW - J. COOPER - CROSS

1 know, we'll have him sit up here before the jury  
2 comes in. I never like that but that's what they  
3 want to do so.

4 Q Right. And that was what happened in this case.  
5 He took the stand and —

6 A Yes, sir.

7 Q —out of the presence of the jury? I want to  
8 ask you about — I think you were asked a moment  
9 about inference, permissible inference of malice,  
10 and how that applies to Belcher. And I know that  
11 you don't have the case right in front of you, but  
12 is it your reading of Belcher and what you can  
13 understand from that, that that only applies in  
14 situations where there's some evidence to mitigate  
15 the actions of the defendant?

16 A That sounds familiar.

17 Q And such a self-defense case, something along  
18 those lines, where heat of passion is self-defense.  
19 Those are the only times that Belcher would apply,  
20 correct?

21 A I think that is part of Belcher, but I can't— I  
22 don't have it right in front of me. I just — what  
23 I got out of it was that the main part was that the,  
24 you know, the idea, not just in cases like this but  
25 the idea that any inference should ever lie outside

PW - J. COOPER - CROSS

1 the province of the jury but. I trust you if that's  
2 what it says, but I can't recall it specifically.

3 Q The permissible inference on malice is still  
4 allowed in certain situations, I mean, in your  
5 experience as a public defender?

6 A I think it is, yes.

7 Q Okay. And at the time, just to be clear, at the  
8 time of this case Belcher wasn't decided, correct?

9 A That's right.

10 Q Beg the Court's indulgence just one moment, Your  
11 Honor. Just to make it very clear and on the record  
12 and just to make sure I've got, Mr. Cooper, is it  
13 your testimony today that you wouldn't tell a client  
14 how to testify on the stand essentially? You would  
15 tell them ---

16 A I tell clients thens look you know, a demeanor to  
17 effect or, you know, don't lose your temper, things  
18 like that. But I've never instructed somebody to  
19 tell a lie; I just wouldn't do that. Of course, I  
20 tell them things like don't argue with the  
21 solicitor, you know, keep you answer short, things  
22 like that, be clear in your testimony. I -- yes, I  
23 talk to them about those things, but, I don't -- I  
24 never would tell somebody to tell a lie.

25 Q Okay. And there was a -- there was an officer

PW - J. COOPER - CROSS

1 that saw Mr. Gainey run behind his car directly out  
2 of the bushes from where this incident occurred,  
3 correct?

4 A I think so.

5 Q Okay. And at trial he was able to, I guess not  
6 identify but say that at least Mr. Gainey fit the  
7 description of the person he saw run by his car at  
8 the scene, correct?

9 A I think that's correct.

10 MR. CORNEY: I believe that's all the  
11 questions I have, Your Honor. Thank you very much.

12 THE COURT: Redirect?

13 MR. BELDING: No redirect, Your Honor.

14 THE COURT: You may come down. Thank you  
15 very much.

16 THE WITNESS: Thank you.

17 MR. BELDING: Your Honor, I'd also like to  
18 call Mr. Deon O'Neil.

19 THE COURT: Come around, Mr. O'Neil.

20 WHEREUPON,

21 **DEON O'NEIL,**

22 having been duly sworn by the Court, testified as  
23 follows:

24 THE COURT: Have a seat in the witness  
25 box. State your full name for the record.

PW - J. COOPER - CROSS

1 THE WITNESS: Deon O'Neil.

2 MR. BELDING: May it please the Court.

3 DIRECT EXAMINATION

4 BY MR. BELDING:

5 Q Is your full name Ernest Deon O'Neil?

6 A Yes, sir.

7 Q And where are you employed at this time?

8 A I'm currently a solo practitioner.

9 Q Did you at some point work for the Richland  
10 County Public Defender's Office?

11 A I did.

12 Q How long were you with them?

13 A From November 2006 until July of 2010.

14 Q All right. Now since July 2010 have you been on  
15 your own?

16 A Yeah, I've been in private practice?

17 Q Do you do primarily criminal defense?

18 A Criminal defense, family law, personal injury.

19 Q Okay. You recall the case Louis Gainey, Jr.?

20 A I do.

21 Q Were you essentially second chair on that trial?

22 A I was.

23 Q Okay. Mr. — was Mr. Cooper the primary lead  
24 counsel?

25 A He was.

PW - D. O'NEIL - DIRECT

1 Q Okay. How long were you involved, do you recall?

2 A I think I actually might have been involved  
3 before Mr. Cooper was involved when Ms. Gripp was  
4 involved. Ms. Gripp was primary counsel. She has  
5 asked me to be second chair. Then Ms. Gripp left  
6 our office and then the case was assigned to Mr.  
7 Cooper.

8 Q Okay. Did Mr. Cooper at that time in September  
9 of 2009 have more experience than you did or more  
10 time at the Public Defender's Office?

11 A I think Mr. Cooper started six months after I  
12 did.

13 Q Okay.

14 A So we —

15 Q I'm sorry?

16 A He was saw six months later than I did.

17 Q Why — is there any reason that you can, that  
18 relevant as to why you would be second chair instead  
19 of lead counsel?

20 A It had more to do with Ms. Gripp's cases being  
21 reassigned to Mr. Cooper. It just happened to be  
22 that Ms. Gripp's cases got reassigned to Mr. Cooper,  
23 and I was already kind of associated with the case  
24 and Ms. Cooper just kept me on as second seat.

25 Q And I think we can just cut right through a

PW - D. O'NEIL - DIRECT

1 couple of quick things, Mr. O'Neil. Have you  
2 heard -- did you hear the testimony this morning of  
3 Mr. Gainey?

4 A Most of it. I stepped out for a few minutes.

5 Q Okay. And did you hear the testimony of  
6 Mr. Cooper, the lead counsel?

7 A I did.

8 Q Okay. Is there any thing in Mr. Cooper's  
9 testimony that you disagree with or that you recall  
10 differently?

11 A No.

12 Q Okay. Let me ask you, when I first met  
13 Mr. Gainey I'll just represent to you that he told  
14 me that he thought you were the one that told him  
15 that the story he was telling wouldn't work. Do you  
16 recall meeting with him downstairs in the holding  
17 area here at the courthouse and talking with him  
18 about his testimony?

19 A I do.

20 Q Okay. Do you recall what you said to him about  
21 what he needed to say?

22 A I don't recall my precise words. I recall the  
23 gist of what I was trying to relate to Mr. Gainey  
24 was that his version of what happened that night  
25 probably would not be believed by the jury.

PW - D. O'NEIL - DIRECT

1 Q Okay. When you met with Mr. Gainey at the  
2 detention center did he tell you that the — and  
3 I'll put quotes on it, "weapon was a nail file"?

4 A His story when I talked to him was always the  
5 same, that all he remembered was that him having,  
6 him having a nail file in his hand and then once  
7 this altercation between him and the victim occurred  
8 he blacked out, he didn't remember what happened:

9 Q Okay. And I suppose it doesn't make much sense  
10 for people to just walk around and happen to have a  
11 screwdriver with them, does it?

12 A That's correct.

13 Q Okay. So the fact that she may have had a nail  
14 file on and he end up getting a hold of that in the  
15 course of an altercation actually makes some sense;  
16 doesn't it?

17 A That part of the story was not what I was telling  
18 Mr. Gainey didn't make sense.

19 Q Okay.

20 A What I was telling Mr. Gainey didn't make sense  
21 is that there's no way the wounds victim had in this  
22 case was caused by a nail file. That's the point I  
23 was trying to get across to him, that nothing — the  
24 wounds that she had, the injuries she had in this  
25 case could not have been caused by a nail file.

PW - D. O'NEIL - DIRECT

1 That's the point -- when I told him that didn't make  
2 sense that's what I was -- that's the part I was  
3 saying didn't make sense. That's what I was telling  
4 him. And the whole blacking out part didn't make  
5 sense either.

6 Q Okay. Now you and Mr. Cooper were Mr. Gainey's  
7 attorneys, correct?

8 A Correct.

9 Q He trusted you and your advice; didn't he?

10 A Correct.

11 Q Is it possible that he misinterpreted what your  
12 advice was when you said that's not believable?

13 A It's possible. I've had -- I always have what I  
14 term a come to Jesus talking to my client. I don't  
15 call my clients a liar. I don't detect their  
16 version of what happened. My job with them is to  
17 tell them whether or not I think the case that they  
18 want to present to a jury is gonna be believed or  
19 ultimately will be winnable from their perspective.  
20 And that's the kind -- that's the point I was trying  
21 to relate to Mr. Gainey. Now I can't testify to how  
22 he took what I told him. I can guarantee you that I  
23 never told Mr. Gainey you can't say this, or I never  
24 said you're not allowed to say that. I would have  
25 told him I didn't think the jury was gonna believe

PW - D. O'NEIL - DIRECT

1 what he was saying.

2 Q Did you actually provide him with testimony to  
3 say?

4 A No.

5 Q Okay. Were you all discussing this with  
6 Mr. Gainey with view toward deciding whether he  
7 should take the stand at all?

8 A Yes. And the way conversations came up when we  
9 talked to Mr. Gainey, we explained to him he was  
10 charged with assault and battery with intent to  
11 kill. If we could convince the jury that this  
12 happened in a heat of passion and there wasn't any  
13 malice, then maybe we could convince the jury that  
14 it was ABHAN. But there was no way for us to  
15 convince the jury there was a ABHAN if he couldn't  
16 remember what happened. He needed to remember what  
17 happened in order to convince the jury that, look, I  
18 didn't mean to kill this lady, I got upset here as  
19 to what was going on and this happened quickly  
20 before I even think about it. That's what we were  
21 trying to relate to Mr. Gainey.

22 Q Okay. Thank you. I appreciate you staying here  
23 today.

24 MR. BELDING: No further questions, Your  
25 Honor.

PW - D. O'NEIL - DIRECT

1 THE COURT: Mr. Corney.

2 MR. CORNEY: Very briefly, Your Honor.

3 **CROSS-EXAMINATION**

4 BY MR. CORNEY:

5 Q Mr. O'Neil, there's testimony provided by the  
6 State's witnesses that Mr. Gainey kept his tool box  
7 essentially under his kitchen sink, correct?

8 A Correct.

9 Q And he had been in the house directly before he  
10 came out to confront the victim in this case,  
11 correct?

12 A If I remember correct, yes.

13 Q So the fact there may have been a screwdriver  
14 isn't that farfetched, correct? I mean, that's just  
15 not unbelievable there's no tools in the house at  
16 all, anything along those lines?

17 A There was evidence in the record that the jury  
18 could have inferred that he had a screwdriver.

19 Q Exactly my point is that what I'm getting to,  
20 it's not that farfetched, I mean, it's what the  
21 State's witnesses testified to and it was a  
22 potential believable testimony the State — the jury  
23 could have inferred, correct?

24 A Correct.

25 Q Okay. And would you agree with the testimony

PW - D. O'NEIL - CROSS

1 Mr. Cooper gave a moment ago that the only real  
2 defense was to mitigate this in this case based on  
3 the evidence and timeline pointed out, correct?

4 A When me and Mr. Cooper discussed strategy it was  
5 our goal to try to only get Louis convicted of  
6 assault and battery with intent to kill which was a  
7 ten year misdemeanor and would not dispose him to  
8 life without parole. We didn't feel as though a not  
9 guilty verdict on any, on all charges, was a viable  
10 possibility.

11 Q Would you agree then that in your meetings with  
12 Mr. Gainey that he was able to participate and  
13 comprehend your conversations?

14 A Yes, sir.

15 Q Did you have any questions about his competency  
16 at any point?

17 A No.

18 Q Did you feel any need to have him evaluated a  
19 second time?

20 A No.

21 Q Okay.

22 MR. CORNEY: I think that's all the  
23 questions I have, Your Honor. Thank you.

24 THE COURT: Any redirect?

25 MR. BELDING: No redirect.

## PW - D. O'NEIL - CROSS

1 THE COURT: Mr. O'Neil, what was the  
2 State's position with regard to the life without  
3 parole? In other words, were no offers for a plea  
4 ever negotiated or discussed.

5 THE WITNESS: Not that I remember. I  
6 guess if it would have been discussed it would have  
7 been discussed with Mr. Cooper, but I don't remember  
8 any offers being made to Mr. Gainey.

9 THE COURT: Just flat out LWOP?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Thank you very  
12 much. You may come down.

13 Mr. Belding?

14 MR. BELDING: Thank you, Your Honor. We  
15 have — that would be the Applicant's case. I did,  
16 following up on your question to Mr. O'Neil, that's  
17 why I asked Mr. Cooper, as I understand his  
18 testimony that once they issued the LWOP notice that  
19 there would — I think he testified there were  
20 other, no other plea negotiations in the case which  
21 is something that I was interested in myself. But  
22 based on the evidence before the Court we would move  
23 for post-conviction relief and remand this case to  
24 the Court of General Sessions in the Fifth Circuit.

25 THE COURT: All right. Mr. Comey?

1           MR. CORNEY: No witnesses on behalf of the  
2 State, Your Honor, just to put that on the record.  
3 The State would just ask the Applicant's case be  
4 denied based on credible evidence before this Court.  
5 Mr. Gainey got up there and readily admitted that he  
6 denied -- that he lied during his trial testimony.  
7 He didn't say one word about a fingernail file his  
8 entire time up there. He said he blacked out and  
9 didn't remember anything. He's in here today to  
10 tell a whole new story. I just ask the Court to  
11 look at the record and based on credible testimony  
12 to deny the application of post-conviction relief.

13           THE COURT: All right.

14           MR. CORNEY: Thank you very much.

15           THE COURT: I'll review the record, let  
16 you know. Let me get proposed orders within 15  
17 days.

18           MR. CORNEY: Yes, sir, Your Honor. Thank  
19 you very much.

20           MR. BELDING: I'm sorry, you want proposed  
21 orders?

22           THE COURT: Yes, sir. Thank you very  
23 much.

24  
25           \* \* \* END OF REQUESTED TRANSCRIPT OF RECORD \* \* \*

1           C E R T I F I C A T E   O F   R E P O R T E R  
2  
34       STATE OF SOUTH CAROLINA )  
5       COUNTY OF FLORENCE       )6  
7                   I, FRANCES BAKIS-RAY, Registered  
8       Professional Reporter (RPR), court reporter for the  
9       State of South Carolina, Twelfth Judicial Circuit,  
10      do hereby certify that the foregoing proceeding was  
11      transcribed for Elizabeth Harris through  
12      computer-aided transcription; that the foregoing  
13      transcript contains a true record of the proceedings  
14      to the best of my ability.15                   I further certify that I am neither  
16      counsel for, nor related to nor employed by any of  
17      the parties connected to the action, nor am I  
18      financially interested in the action.19                   Witness my hand at Florence, South  
20      Carolina, this 17th day of June, 2013.21  
22                   *Frances B Ray*  
23                   \_\_\_\_\_  
24      FRANCES BAKIS-RAY, RPR  
25

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4004670

Louis #185519 Gainey Jr

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

2013 MAR 11 AM 10:21  
JEANETTE W. MCBRIDE  
RICHLAND COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: \_\_\_\_\_

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code \_\_\_\_\_ Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 11 March 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Louis #185519 Gainey Jr

David Edward Belding

Robert Daniel Corney

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court \_\_\_\_\_

*Jeanette W McBride*

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

Louis Gainey, #185519,

2012-CP-40-04670

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

JEANETTE W. McBRIDE  
C.C.P. & C.S.  
2013 MAR -8 PM 3:18  
RICHLAND COUNTY  
FILED

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed July 6, 2012. An evidentiary hearing into the matter was convened on Tuesday, January 15, 2013, at the Richland County Courthouse. Applicant was present at the hearing with counsel, David Belding, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying was Applicant's former trial attorneys, Deon O'Neil, Esquire, and James "Jay" Cooper, Esquire. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the October 2007 term of the Richland County Grand Jury for Assault and Battery with Intent to Kill (2007-GS-40-03131). He was represented by Richland County Assistant Public Defenders Deon O'Neil, Esquire, and James "Jay" Cooper,

Equire, on the charges. On September 1, 2009, Applicant proceeded to jury trial before the Honorable L. Casey Manning, where was found guilty as indicted and sentenced to life imprisonment without the possibility of parole pursuant to S.C. Code § 17-25-45.

A notice of appeal was filed and an Anders brief was submitted on Applicant's behalf by Kat Hudgins, Esquire, of the South Carolina Office of Appellate Defense. By order filed February 1, 2012, the South Carolina Court of Appeals granted appellate counsel's request to be relieved and the appeal was dismissed. Applicant's subsequent Petition for Writ of Certiorari to the South Carolina Supreme Court was denied on June 1, 2012. The remittitur was issued June 26, 2012.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

Trial counsel prejudice defendant failure request for a second mental examination opinion to deter if the defendant was incompetency to stand trial Violation both Amendment 8 14th Amendment Due Process of Law.

Trial counsel prejudice the defendant by failing to object to the defendant been seen in front of the jury member eyes with shackles on in the witness stand so prejudice to a fair trial by the member of jury.

OR 2

Trial counsel prejudice defendant  
for failing to prepare and to  
conduct a proper pre-trial in-  
vestigation.

counsel prejudice applicant failure to  
object to state closing when solicitor  
stated you see how large the slab  
wound was.

Trial counsel prejudice the applicant  
failing to object to the malice charge.  
Violation 6th amendment.

counsel prejudice the applicant failure  
to object when the first officer at  
the scene stated that I ran by his  
car so fast.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

*Q* # 4

*Failure to Have Second Mental Evaluation Conducted*

Applicant first contends counsel was ineffective for failing to have him mentally evaluated prior to the start of his trial.

Applicant testified at the PCR hearing he suffers from Post-Traumatic Stress Disorder ("PTSD") and is currently on "anti-psychotic" medication at the Department of Corrections for schizophrenia. He noted he was not on that medication at the time of trial. Applicant stated a lady came by the jail from "a private place" once prior to his trial to speak with him about his mental health issues, but ultimately said nothing was wrong with Applicant. Applicant said he asked counsel to get a second evaluation done, but counsel did not do so. Applicant noted he was in a psychiatric ward once prior in 1983 for roughly thirty (30) days and said he had discussed this with counsel in their pretrial meetings.

James "Jay" Cooper, Esquire, (hereafter "Cooper") testified he took over representation of Applicant in late 2008 or early 2009 from former assistant public defender Carolyn Gripp, whom had originally represented Applicant. He said he met with Applicant four or five times at the jail prior to trial, with each meeting lasting at least fifteen to twenty minutes and some lasting much longer. Cooper said he was aware of Applicant's mental health history prior to taking over the case as he had discussed it in depth with Gripp before the case was transferred to him. Cooper stated Applicant underwent a mental evaluation by Dr. Crawford prior to Cooper taking over the case, from which Applicant was found competent to stand trial.

Cooper went on to say he did not recall ever discussing having a second evaluation conducted with Applicant, and plainly testified he did not believe one was necessary based upon his review of Dr. Crawford's evaluation report and Cooper's personal interaction with Applicant. He also noted he never had any concerns with Applicant's ability to comprehend and participate

in their discussions, nor did he ever have a concern with Applicant's competency. Cooper noted Applicant did have a history of substance abuse and distress disorders, but had no history of anything that would affect his competency to stand trial.

Thereafter, Applicant's second-chair attorney, Deon O'Neil, Esquire, (hereafter "O'Neil") testified as well. Like Cooper, O'Neil testified he never had any concerns with Applicant's ability to comprehend and/or participate in their pretrial discussions about the charges Applicant was facing, and he did not believe a second mental evaluation was necessary on Applicant.

This Court finds this allegation of ineffectiveness to be wholly without merit. O'Neil and Cooper (collectively referred to as "counsel") reasonably relied on their perceptions and interactions with Applicant during the several months prior to trial to decide a second mental evaluation was not necessary. See e.g. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (finding counsel's performance not outside the range of reasonable professional assistance in failing to seek psychiatric evaluation of client where counsel reasonably relied on his own perceptions). Counsel's testimony as to his perception that Applicant had no difficulty comprehending and participating in the discussions is credible. Applicant's testimony to the contrary is not credible. Accordingly, this Court finds counsel was not deficient in his performance in opting not to have Applicant evaluated a second time.

Further, Applicant has failed to establish the required resulting prejudice. Applicant did not produce the results of a second evaluation, or the testimony of a medical expert, nor any other evidence to show that had a second evaluation been sought, the results would have differed from those given by Dr. Crawford in the first evaluation. "Under the second prong of Strickland, the petitioner need only demonstrate a 'reasonable probability' that he was either insane at the

time of the [incident] or incompetent at the time of [trial]." *Id.* at 234. Applicant has set forth no evidence to prove either. Therefore, Applicant has not met his burden in proving there is a "reasonable likelihood" the outcome would have differed had Applicant requested a second evaluation. Accordingly, this allegation is wholly without merit and the request for relief therefrom must be denied.

*Failure to Object to Shackles*

Applicant next contends counsel was ineffective for failing to object to the use of shackles during the course of the trial in front of the jury. Applicant testified he believed the restraints prejudiced him in front of the jury as they "kept [him] from being who [he is]" and prevented him from writing or taking notes during trial. Applicant noted he felt he couldn't defend himself at trial while in the restraints.

This Court finds this allegation to be without merit as well. The record reflects counsel, on more than one occasion during the course of the trial, objected to the restraints and the possible prejudice that could result from the jury seeing Applicant in such restraints. At the start of trial, counsel requested to have the metal shackles replaced with plastic restraints to avoid any noise as he "[knew] security want[ed] [Applicant] shackled". (Trial Tr. p. 12, l. 5). The judge, deferring to security personnel in the courtroom, ultimately concluded the jury could not see the shackles and denied the request. After the state rested its case in chief and before the defense called Applicant to the stand, counsel requested outside the presence of the jury that Applicant be allowed to take the stand before the jury entered the courtroom to continue to block the shackles from their sight. (Trial Tr. p. 286, ll. 19 - 23). The trial judge granted the request and Applicant took the witness stand prior to the jury's entry to the courtroom, thereby avoiding the jury seeing

the leg restraints. Based on the record, it is clear counsel undertook diligent and objectively reasonable precautions to avoid the jury ever seeing that Applicant was wearing shackles.

Ultimately, the trial judge ruled that the shackles were necessary for courtroom safety and allowed certain precautions to avoid the jury seeing them. "Whether a defendant is restrained during trial is within the trial judge's discretion." State v. Tucker, 320 S.C. 206, 209, 464 S.E.2d 105, 107 (also finding trial court not in error in requiring defendant to wear restraints when court took precautions to minimize any prejudice that may be caused by the defendant being shackled). It is clear the judge and security personnel agreed there was a need for Applicant to remain in his restraints during the course of the trial, but undertook all requested precautions to avoid any improper inferences by the jury. Applicant has failed to show the restraints were ever seen by the jury or otherwise resulted in prejudice to his case. Accordingly, this allegation is denied.

#### *Failure to Investigate*

Applicant alleges counsel was ineffective for failing to properly investigate his case prior to proceeding to trial in the matter. Specifically, Applicant contends counsel failed to interview several witnesses who could have testified on his behalf at trial, as well as failed to conduct a sufficient pretrial investigation to challenge the state's theory that Applicant intentionally stabbed victim with a screwdriver.

Applicant testified he knew the victim about one (1) year and was eventually engaged to be married to her after being in a relationship for a while and living together. Applicant testified he remembered the entire incident on the night in question "from beginning to end" and stated it all began with him getting off of work and visiting his sister with victim. Upon returning home, Applicant stated he noticed a truck parked at the side of his house that belonged to a man he had previously had an altercation with. Victim went over to the neighbor's house where that man

was, where she sat on the porch filing her fingernails. Applicant stated he went over to tell victim to come home, at which time she embarrassed him by telling the others on the porch Applicant accused her of cheating on him. Applicant went on to say he grabbed victim on the side of the house as she walked away, at which time she pulled out the fingernail file and "tried to resist" him. Applicant said they "got into a scuffle" during which she hit him several times and he hit her in return several times. Applicant noted he took the fingernail file from victim and hit her with it several times. Applicant said when the fight was over, he noticed the nail file was bent out of shape so he ran away from the scene "to protect himself". He contended there was never a screwdriver involved in the altercation, and said no screwdriver (or nail file) was ever produced as the weapon at trial.

Applicant testified he loved victim and he never had any intention of hurting her during the altercation, but it all happened "spur of the moment". Applicant stated he "wanted to go home" with victim "that night", and reiterated he had no hatred for victim when the incident occurred. Applicant conceded he had testified at trial he did not recall the incident as he had "blacked out", as well as that his PCR application reflects the same loss of memory about the fight. However, Applicant alleged, things "started coming back" to him after he was placed on medication at the Department of Corrections. Applicant said he changed his story during his testimony at trial to say he did not remember anything because counsel told him before the start of trial the jury wouldn't believe his "nail file story". Applicant acknowledged he was under oath to tell the truth when he took the stand at trial and that the testimony he gave was not the same as what he was testifying to under oath at the PCR hearing.

Also called at the hearing by Applicant was Gregory Gainey, Applicant's younger brother (hereafter "Gainey"). Gainey testified he was never approached by counsel prior to trial

about testifying for Applicant, but that he would have testified had counsel asked him to. Gainey said he had the opportunity to observe Applicant and victim's relationship many times and said they "got along well" and had a "typical relationship". Gainey noted he sometimes believed Applicant may have been "too smitten" with victim. He readily admitted he had no personal knowledge of the incident from which these charges stem and was not at the scene when the incident occurred.

Cooper testified he did recall Applicant providing the names of several family members whom Cooper considered calling as witnesses at trial, but said he ultimately did not call them as he did not believe their testimony would be "productive" to the case as none of them could offer any testimony about the incident itself. He explicitly noted it was his particular trial strategy not to call those or any other witnesses. Cooper said he wanted to be careful about what he introduced at trial as he did not want the jury to think he was "victim bashing", but noted there was no doubt Applicant loved victim very much. Counsel said that much was clear throughout the course of the trial and he did not think that would ever be questioned at trial.

Regarding Applicant's trial testimony, Cooper said Applicant was never clear with him as to what his story would be on the witness stand, so he discussed his concern in that regard with Applicant in the holding cell at the courthouse prior to trial. Cooper noted he did *not* ever tell Applicant what to testify to on the stand besides telling the truth, but did tell Applicant he had to be "more clear" in his testimony as his recitation of the night to counsel was confusing and implausible. Cooper stated he could not recall whether Applicant ever mentioned the so-called "fingernail file" theory to him pretrial, but may have. Cooper also agreed the wounds victim suffered were severe and certainly life threatening based on the surgeon's trial testimony.

O'Neil testified thereafter regarding his pretrial discussions with Applicant in which he told Applicant his "fingemail file" theory would probably not be believed by the jury as the wounds inflicted were far too severe to have been caused by a file. O'Neil noted Applicant always maintained in their discussions he had "blacked out" during the incident and did not remember what happened. O'Neil went on to say he never told Applicant what to testify to or *not* testify to, nor did he insinuate in any way Applicant should do anything but tell the truth in his testimony. On cross-examination, O'Neil recalled Applicant kept his tools under the sink in the kitchen where he had been just prior to the incident, so it was not a farfetched theory he committed the stabbing with a screwdriver.

After a thorough review of the record and testimony presented at the PCR hearing, this Court finds Applicant has failed to prove counsel was ineffective in this regard. First, this Court finds the testimonies of Cooper and O'Neil (collectively "counsel") to be **credible**, while conversely finding Applicant's testimony, especially related to his recollection of the incident, to be **not credible**.

With regards to the failure to investigate and/or call witnesses claim, Applicant has failed to prove counsel was objectively unreasonable in his investigation and/or tactics at trial in that regard. In fact, counsel's credible testimony was he specifically made the strategic choice not to call the witnesses at trial that Applicant had provided as he did not think it would be advantageous to Applicant's defense. See Underwood v. State, 309 S.C. 560, 563, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective."). Further, Applicant failed to produce the testimony of any witnesses, other than his brother, to carry his burden in proving resulting prejudice from that alleged deficiency. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998)



(finding a PCR applicant must produce the testimony of a witness to establish prejudice from their failure to testify at trial). Additionally, this Court finds the testimony of Applicant's brother, Gainey, to have been wholly unremarkable and of little value to Applicant's defense as he had no knowledge of the incident and merely served as a character witness. Accordingly, Applicant has not carried his burden in this regard.

As to Applicant's claim that counsel failed to properly investigate the underlying facts of the case to challenge the state's theory, this Court likewise finds that allegation to be without merit. This Court would reiterate the previous credibility finding as to Applicant's rendition of the incident. Applicant's story has changed numerous times and Applicant all-but admitted he lied under oath in that regard, either at trial or during his PCR testimony. This Court finds Applicant's rendition of fact to be **wholly not credible**. The evidence set forth in the record from trial is clear in showing the wounds inflicted to victim's body were horrific and not the product of a nail file, as he now alleges. Further, the trial record is *completely* void of *any* mention of a nail file by any witness presented at trial, including Applicant's own testimony. Therefore, Applicant has failed to prove counsel was deficient in his performance for failing to conduct some further investigation.

The instrument actually used to inflict the injuries to victim is of little consequence to the ultimate analysis by this Court, especially in light of Applicant's trial testimony witnessed by the jury that he "blacked out" and did not recall what actually occurred. Applicant seems to allege his unwavering love for victim changes the analysis of his guilt to Assault and Battery with Intent to Kill ("ABIK") based upon a lack of express malice. "ABIK is defined as an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Wilds, 355 S.C. 269, 275, 584 S.E.2d 138, 141 (Ct. App. 2003). "Implied



malice is when the circumstances demonstrate... 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.' *Id.* at 275 - 276. "Although malice must be aforethought; there is no requirement that it must exist for any appreciable length of time before the commission of the act" and "[i]t may be conceivable at the very moment the assault occurs." *Id.* at 277.

It is clear Applicant's stabbing of victim repeatedly with such extreme force that she was disemboweled would reasonably lead to a strong likelihood of death. The trauma center surgeon testified at trial that victim's injuries were in fact life-threatening. Therefore, it was reasonable for the jury to infer implied malice existed, regardless of Applicant's contention that he "didn't intend to hurt" victim. Additionally, because Applicant's case was heard prior to the October 12, 2009, decision in Belcher<sup>1</sup>, the jury was permitted to draw an inference of malice simply from Applicant's alleged use of a deadly weapon, which the testimony pointed to being a screwdriver. Accordingly, this allegation is without merit as any further investigation Applicant alleges ~~counsel should have done into his rendition of the incident would not have created a "reasonable probability" of a different outcome at trial.~~

*Failure to Object Jury Charge on Permissible Inference of Malice*

Finally, Applicant contends counsel was ineffective for failing to object to the trial judge's jury instruction on the permissible inference of malice from the use of a deadly weapon. This Court finds this contention to be erroneous and improperly raised in the current action.

The case of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), was decided by the South Carolina Supreme Court on October 12, 2009, roughly one full month after Applicant was convicted of the current charges. Belcher "represents a clear break from our modern precedent"

<sup>1</sup> State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

*OR* 13

approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant's case was, at the time of his trial, the sanctioned charge on the law. Because the Belcher decision posed a clear break from long-established precedent and was not decided until *after* Applicant's conviction, counsel was not objectively unreasonable in failing to pose an objection to the charge given. Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial) (overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Further, the South Carolina Supreme Court expressly noted in the opinion that the "ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810. Accordingly, this issue is not proper grounds for relief through this PCR action. It is therefore denied and dismissed.

~~Having found the allegations raised by Applicant at the PCR hearing to be wholly~~ without merit, this Court finds the current application for post-conviction relief must be denied and dismissed with prejudice.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is

602-14

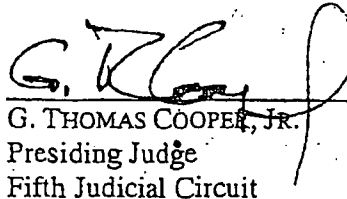
a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR ~~counsel must serve and file a Notice of Appeal on the Applicant's behalf.~~ Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of March, 2013.

  
 G. THOMAS COOPER, JR.  
 Presiding Judge  
 Fifth Judicial Circuit

Columbia, South Carolina.

WITNESSES

(S) McCracken GPD

DOCKET NO. 2007-GS-40-3131

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

October TERM 2007

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THE STATE

VS.

LOUIS GAINNEY

I, the undersigned, being duly sworn, do hereby certify that the defendant herein has been advised of his legal rights, and he hereby waives presentation to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

K196497

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

OCT 18 2007

VERDICT

Indictment for  
ASSAULT AND BATTERY  
WITH INTENT TO KILL

SC Code: 16-3-620

CDR Code: 0014

Class FEL-C(W)

Foreperson of Petit Jury

Date:



STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland  
STATE

INDICTMENT/CASE#: 2007 -GS- 40 - 3131

vs. Louis Lainez

AW#: K196497

AKA: \_\_\_\_\_  
Race: Black Sex: Male Age: \_\_\_\_\_

Date of Offense: 3-31-07

DOB: \_\_\_\_\_ SS#: \_\_\_\_\_

S.C. Code §: 16-3-620

Address: \_\_\_\_\_

CDR Code #: 0014

City, State, Zip: \_\_\_\_\_

SENTENCE SHEET

DL# \_\_\_\_\_ SID# \_\_\_\_\_

In disposition of the said indictment comes now the Defendant who was  CONVICTED OF or  PLEADS TO: Assault & Battery with Intent to Kill

in violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0014

NON-VIOLENT  VIOLENT  SERIOUS  MOST SERIOUS  Mandatory GPS  §17-25-45  
(CSC w/minor 1<sup>st</sup> or Lewd Act)

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

ATTEST: Heather S. Weir 16700 Solicitor SC Bar # \_\_\_\_\_ Kevin Yun Defendant Attorney for Defendant SC Bar # \_\_\_\_\_

WHEREFORE, the Defendant is committed to the  State Department of Corrections,  County Detention Center, for a determinate term of 180 days/months/years or  under the Juvenile 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.  
 The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:  
 RESTITUTION:  Deferred  Def. Waives Hearing  Ordered PTUP \_\_\_\_\_  
Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_ days/hours Public Service Employment

Payment Terms: \_\_\_\_\_ Obtain GED   
 set by SCDPPPS \_\_\_\_\_ Attend Voc. Rehab. or Job Corp. \_\_\_\_\_

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	\$ _____
§56-1-289 (DUI Breath Test)	\$500	\$ _____
§35.13 (Public Def/Prob)	\$25	\$ _____
§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/ea	\$ _____
3% to County (if paid in installments)	\$	\$ _____
§90.11 TP (SCCJA Surcharge)	\$5	\$ _____
TOTAL	\$	\$ _____

Jeanette McBride Clerk of Court Deputy Clerk  
Holmes Court Reporter

Random Drug/Alcohol Testing   
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ \_\_\_\_\_ Beginning \_\_\_\_\_  
\$ \_\_\_\_\_ paid to Public Defender Fund  
Other: \_\_\_\_\_ \$25 \$ \_\_\_\_\_

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

Judge Code: 2061  
Sentence Date: 9-3-09