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**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEALS CASE NO.2017-AP-1906-CR**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Vs.

MICHAEL A. NIEMAN,

Defendant-Appellant,

ON APPEAL OF DECISION AND ORDER ENTERED ON 4/3/2017 IN THE
CIRCUIT COURT OF CLARK COUNTY WISCONSIN
HONORABLE JON M. COUNSELL PERSIDING

BRIEF OF DEFENDANT-APPELLANT

Michael A. Nieman
DOC No. 378700
Oakhill Correctional Institution
P.O. Box 938

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ISSUES TO BE PRESENTED

1. **WAS THERE EXCULPATORY EVIDENCE WITHHELD IN SIMULTANEOUS PROCEEDINGS WHICH TOOK PLACE IN WOOD COUNTY RESULTING IN A BRADY VIOLATION/PLAIN ERROR/FALSE CRIMINAL RECORD FOR WHICH NIEMAN WAS SENTENCED UNDER? YES**
2. **DID NIEMAN SUFFER FROM INEFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE ORIGINAL DEFENSE LEVEL AS WELL AS THE APPELLATE LEVEL, AND DID NIEMAN'S CASE INVOLVE PLAIN ERROR WHICH WAS OVERLOOKED AND LATER CORRECTED? YES**
3. **WAS NIEMAN'S VERY SERIOUS MEDICAL CONDITIONS OVERLOOKED BY THE COURT WHEN DETERMINING THE AMOUNT OF RESTITUTION? YES**
4. **WAS IT AN ABUSE OF DISCRETION FOR THE COURT TO ORDER RESTITUTION FOR A VICTIM WHO HAD ALREADY RECEIVED DAMAGES IN THE FORM OF A CIVIL JUDGMENT MAKING THE MATERIAL IN QUESTION WORTH IN ESSENCE OVER \$25,000.00? YES**
5. **WAS NIEMAN OFFERING SUBSTANTIAL ASSISTANCE TO LAW ENFORCEMENT FOR WHICH SHOULD HAVE BEEN VIEWED AS A NEW FACTOR AND PRESENTED TO THE COURT BUT WAS NOT PRESENTED PROPERLY? YES.**

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Nieman Defendant-Appellant pro-se does not feel that oral arguments are necessary in Appeals case. No. 2017-1906-CR, publication would not be necessary as well.

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INTRODUCTION

Michael A. Nieman, who for further reference shall be referred to as "Nieman", appeals Clark County case No. 2015-CF-93. This case went to post-conviction proceedings in the form a 974.06 motion to modify sentence on 04/03/17 and was denied the removal of restitution and reduction of probation term of one year.

The criminal complaint arises from a defunct agreement which Nieman entered into with Haas Transport, Inc. between May 14th, 2014, and May 19th of 2014. This agreement was for the disposal of large pieces of scrap iron which are used in rock crushers and has a mineral which is known as Manganese within it. A substance which once is introduced to steel makes it extremely unique and hard. Manganese can only be diluted and not abstracted from steel once introduced, therefore it limits its sale ability immensely.

Nieman fully believes that had he been present at the civil hearings which were used as a basis as the criminal complaint, Nieman would not have been held liable criminally. Nieman contends that he certainly was not living at 2203A Dixon Street in Stevens Point, WI where there was an enormous amount of attempts made to contact him regarding both his criminal matter and his civil matter and none at his actual residence.

Aside from the fact that Nieman had already been held liable in the form of a civil judgment, he was also sentenced under a false criminal record due to exculpatory evidence being withheld (*Brady v. Maryland*, 373 U.S. 83, [Headnote 1 PG. 86, 87, Headnote 2 PG. 87, 88]) in a separate legal proceeding in which was taking place prior to this criminal complaint even being filed. This false criminal record carried over to Clark County and was used in the determination

of sentencing. The only thing the District Court had to use for sentencing was Nieman's criminal record as there was not a PSI done in this case. Nieman contends that his probation was wrongfully revoked and that the matter is in and has been in overlooked "Plain Error" (*U.S. v. Olano*, 507 U.S. 725, 732) (*U.S. v. Young*, 470 U.S. 1, 15, 84 L. Ed. 2d 1, 105 S. Ct. 1038).

Nieman feels sincerely that he would have been able to avoid criminal prosecution for these matters had he not acquired a DUI in Wood County. What plays a role in the background of those matters is that a report was made to the Wood County Sheriff's Department in regards to this matter just prior to Nieman's DUI, and Nieman was never notified by the department or by his probation agent. Please see Appendix exhibit labeled "Wood County Police Report".

The motion for which Nieman was contemplating was supposed to be a sealed post-conviction motion between Wood and Clark Counties. Nieman was indeed providing substantial assistance to the Plymouth, WI Police Department, as well as a leading investigator with The Department of Criminal Investigations Fire Marshalls Office, in regards to large scale arson cases within the State of Wisconsin prior to his conviction in Clark county case No. 2015-CF-93. This was not investigated properly by Defense or Appellate counsel to determine its legitimacy; therefore proper motions were not filed on Nieman's behalf in Clark or Wood Counties. Nieman's claim can be validated in Appendix entry labeled "03/23/17 Assistance Claim Transcript" which took place within his Wood County Motion hearing.

Discretion was not used when determining Nieman's ability to pay restitution versus the condition of his health. This can certainly be viewed in medical reports produced within the Appendix. (Please see Appendix entry labeled "Medical Reports")

It is for these reasons and that Nieman asks that The Court grant his motion for sentence modification for a reduction of probation by one year for Nieman's substantial assistance and for the elimination of restitution for proper exercise of discretion concerning Nieman's ability to pay restitution and for the fact that Nieman has a civil judgment on the matter owed to Haas Corporation which is well over what the actual value of the material taken from Haas.

Nieman agrees that he owes Haas and is willing to make payment against the civil judgment as was the agreement which he entered into. Nieman also filed a motion for post-conviction contesting the sufficiency of evidence although whether or not Nieman was adequately represented at any phase in these proceedings is certainly the question. Nieman requests that this appeal be presented under seal.

STATEMENT OF THE CASE

On 02/22/2016, Nieman was convicted of two counts of Theft-False Representation, in violation of 943.20(1)(d), both misdemeanor class A crimes (**R; 13**). These convictions were the result of a complaint that was filed (**R. 1**) on 08/03/15 while Nieman had been incarcerated for a DUI which took place in Wood County (Wood County case No. 2015-CF-176) also leading to the revocation of his probation (Wood County case No. 2007-CF-511). Nieman had been incarcerated for approximately two and a half months prior to the criminal complaint being filed in Clark County.

The complaint arises from a defunct agreement which Nieman entered into with Haas Transport, Inc. between May 14th, 2014, and May 19th of 2014. This agreement was for the disposal of large pieces of scrap iron which are used in rock crushers and has a mineral which is known as Manganese within it. A substance which once is introduced to steel makes it hard.

In civil proceedings for which Nieman was not present, and for which the basis of the criminal proceedings are founded, and are not found within the record, it was determined that Nieman was not representing "Demolitions Plus" (his father's company) between 05/14/14 and 05/19/14 although Nieman had worked for and represented "Demolitions Plus" in numerous capacities for a couple decades in the past.

Nieman contends that the trucking and loading for which he paid for in full was to be offset on the value of said Manganese Steel. Nieman did indeed pay for said trucking and

loading in full in the rough amount of \$7,200.00 USD. Nieman's contentions were not heard and therefore do not appear within the record.

There was a police report made to Wood County Police Department on 05/05/14 by Haas Transport which was not followed up on and Nieman was not contacted. This as well does not appear in the record but was printed out for the Court. Please see Appendix labeled "Wood County Police Report".

Nieman was then involved in a single vehicle, single occupant rollover in which case he was the driver and suffered severe injuries and was charged with a DUI as a result. This took place on 05/18/15. Nieman has been incarcerated ever since.

Nieman pleaded guilty to both of the charges **(R. 8, 9, 10, 11, 12, 13,)** pursuant to a plea agreement which did not contain the restitution. The Honorable Judge Jon Counsel used his discretion when applying restitution.

Nieman then filed for post-conviction relief **(R. 14)** and was appointed Megan Sanders Drazen to represent him on his appellate issues. Nieman's motion for post -conviction was filed on 01/24/17 **(R. 26)** and the order denying the removal of restitution was entered on the same day of the evidentiary hearing **(R. 31)**.

Nieman appeals both the denial of the removal of restitution as well as the removal of 1 year of his probation due to his substantial assistance claim which is valid and should have been presented to the court by his Defense and Appellate counsel. No evidentiary hearing was made on the merits of that claim.

STATEMENT OF THE FACTS

The facts to this case are quite simple. Nieman admits that he owes Haas Transport and is willing to pay and that fact has always remained (R. 11, 12, 13). Nieman and Haas entered a business venture which was for the removal of large pieces of scrap called Manganese steel. This took place over the period of a week and the hauling for which happened between 05/14/14, and 05/19/14. Nieman agreed to pay Philip Haas the price of the material, less the loading and hauling, as Nieman was required to do all of his own loading. Nieman never contested the civil matters. Philip Haas was minus workers due to a fatal accident the week of the operation, requiring Nieman to have extra workers.

Nieman was injured in the form of a broken L3 and L4 vertebrae of his back resulting from a fall which he took from a piece of equipment in 2014. This greatly affected the operations of not only Nieman's business which he had just begun to run, but also his everyday life.

Nieman was not living at the address where he was attempted to be contacted at by officials and therefore proper contact was not made when he was attempted to be contacted for either the civil matter which Nieman contends was the most significant factor in the determination of his criminal proceedings as he was essentially blind-sided by the events once incarcerated for a DUI (R. 1, 2, 7, 9). It is Nieman's belief that once he was incarcerated there was a change in the demeanor of the parties involved.

The amount claimed to be owed is ridiculously over exaggerated due to the lack of offset which was supposed to have taken place for the amount paid by Nieman for trucking. This was

never contested due Nieman's lack of information provided to him, and his inability to be present at the civil proceedings (**SEE ADDRESS INFO R.1, 2, 7, and 9**).

Nieman had the full understanding that throughout all the delays his appellate counsel took in presenting his post-conviction motion that he would have a jointly sealed motion due in large part to his substantial assistance claim which never was presented at all to the Circuit Court.

It is Nieman's FULL INTENT to rectify the matter properly with Haas monetarily through a civil process as it was initially sought out to be and not held in a criminal manner one and a half years after a civil judgment had been entered.

Further attention should be made and a strong look made into the Appellate counsel's motion to withdraw (**R. 34**), please see also Appendix exhibit labeled "Withdrawal Motion", as there was never a hearing to determine whether or not Megan sanders Drazen had addressed all the issues within Nieman's appeal Nieman asserts that there was. Nieman makes reference to letters which were sent to and from Appellate counsel regarding the issues for post-conviction as the basis for the extensions that were given to Nieman's filing (**R. 18, 20, 22, 24, 27, 29, and 32**). Copies of the letters mentioned are located within the appendix along with proof of Nieman's SERIOUS medical conditions.

ARGUMENTS

Brady Violation/Exculpatory Evidence

Nieman's first and foremost assertion is that the probation for which he had revoked simultaneously to the prosecution of this matter (Wood County case No. 2007-CF-511), was expired and that the plea agreement for which he entered into for that matter was withheld from the court upon his sentencing. This would have indeed made Nieman eligible for release (*Wis. Stat. § 969.01*) prior to the criminal complaint being filed in this matter (*Brady v. Maryland*, 373 U.S. 83, [Headnote 1 PG. 86, 87, Headnote 2 PG. 87, 88] (*U.S. v. Olano*, 507 U.S. 725, 732) (*U.S. v. Young*, 470 U.S. 1, 15, 84 L. Ed. 2d 1, 105 S. Ct. 1038). See Appendix exhibit labeled "Plea and Consolidation Agreement"

Nieman's plea agreement was that he was to receive "Full Credit Towards Time Served as a Condition of Probation" (*State v. Naydihor*, 2004 WI 43, PG. 11, 270 Wis. 2d 585, 678 N.W. 2d 220) (*State v. Gray*, 225 Wis. 2d 39 [Headnote 7, PG. 53-61]) (*State v. Pierce*, 117 Wis. 2d 83, [Emphasis on Headnote 7]) (*State v. Dean*, 111 Wis. 2d 361 [Headnotes 1-8]) (*Morrissey v. Brewer*, 408 U.S. 471).

Next looking at the ORIGINAL Oral Pronouncement of Judgment, Nieman was awarded time served on his six month sentence at the day of sentencing or when "Oral

Pronouncement of Judgment” took place, 04/11/13 (*State v. Perry, 136 Wis. 2d 92*). Nieman then finished off the remainder of his one year sentence of his CODITIONAL JAIL TIME. Nieman served these jail terms consecutively, and was released from jail on 06/06/2013 with time served on ALL of his conditional jail time. This had completed eighteen (18) months of Nieman’s probation (*Wis. Stat. § 973.09 (4) (a)*) (*State v. Perry, 136 Wis. 2d 92*). Nieman’s plea agreement was a result of substantial assistance that he provided for years and it was within the courts discretion to credit him for confinement both in and out of state as well for AODA treatment he received.

Although, with or without good time, with or without the full 6 months being credited, Nieman should have been discharged from probation well before the incident which resulted in case No. 2015-CF-93 took place, or at least before court proceedings began, all credit was for time served as a condition of a term of probation (*State v. Pierce, 117 Wis. 2d 83, [Emphasis on Headnote 7]*)(*State v. Dean, 111 Wis. 2d 361 [Headnotes 1-8]*) (*State v. Johnson, 2005 WI App 202*) (*State v. Gruetzmacher, 2004 WI 55*) (*State v. Gray, 225 Wis. 2d 39 [Headnote 7 PG. 53-61]*) (*State v. Fearing, 2000 WI App 229; 239 Wis. 2d 105*). Again Nieman relies heavily on the Court of Appeals to review this agreement for accuracy and understanding. If Nieman’s credit were to be listed as “PRE-Sentence” credit then Nieman’s probation should be just that, his only sentence (*Bartone v. United States, 375 U.S. 52*) (*Morrissey v. Brewer, 408 U.S. 471*) (*State v. Perry, 136 Wis. 2d 92*).

There was never an extension filed to extend Nieman’s probation nor was there a valid reason to do so, (*State v. Olson, 222 Wis. 2d 283*) (*Huggett v. State, 83 Wis. 2d 790 [Headnote 11]*) (*State v. Lohmeier, 2000 Wisc, App.*) In either event, Nieman should have indeed been

eligible for release (**R. 5**) (*Wis. Stat. § 969.01*). The Circuit Court (Honorable Judge Brazeau) has directed these issues to the Court of Appeals for review.

Ineffective Assistance of Counsel

Without question for Appellate Counsel to not raise the issue of Nieman's serious health issues as a factor to reduce the amount of restitution shows blatant unpreparedness and neglect. Nieman suffers and had been suffering from chronic fractures to his L3 and L4 vertebrae, severe spinal stenosis throughout his lower back partnered with crushed disks, encroachment upon the spinal cord in his neck coupled with severe spurring and stenosis in his neck as well. These injuries were made known to Megan Sanders Drazen and she was aware that Nieman was undergoing serious medical procedures. At the evidentiary hearing on 04/03/17, attorney Megan Drazen Sanders did not mention any factor when asked by the Court why restitution should not be ordered other than to make the claim of Nieman's indigence.

To add into the matter, she never investigated properly into Nieman's claim of substantial assistance to law enforcement which weighs greatly towards the ineffective assistance claim (*U.S. v. Witherspoon*, 231 F.3d 923 [Headnote 4, 5, 6,]) (*USCS Const. Amend. 6*) (*Patrasso v. Nelson*, 121 F. 3d 297) (*State v. Jorgensen*, 2008 WI 60). For a great deal of time she led Nieman to believe that she was going to be filing a joint "sealed" motion with Nieman's appellate counsel from his Wood County matter.

Defense and Appellate counsel also failed to investigate Nieman's criminal record prior to his sentencing and evidentiary hearing (*Strickland v. Washington*, 466 U.S. 668). Nieman did not have a PSI ordered in this case therefore a large part of the Courts discretion was placed on

the findings in Nieman's past criminal record. Nieman wasn't afforded the right to be heard with regards to withdraw of appellate counsel was allowed, as there was still appealable issues which should have been brought before the Circuit Court (*State v. Batista*, 171 Wis. 2d 690) (*State v. Batista*, 1992 Wisc. App.) (*State v. Macemon*, 113 Wis. 2d 662, 668, 335 N.W.2d 402 [1983]). Plainly put Nieman had a case that was in "Plain Error" due to Nieman being sentenced on a COMPLETELY DISMISSED case in Wood County, (*U.S. v. Olano*, 507 U.S. 725, 732) (*U.S. v. Young*, 470 U.S. 1, 15, 84 L. Ed. 2d 1, 105 S. Ct. 1038) (*Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674[1984]) (*State v. Jorgensen*, 2008 WI 60) and this error should have been recognized at a reasonable time by the Appellate counsel. Please see Appendix entry labeled "Plea Agreement". Using these factors in the determinations of whether or not Nieman was to obtain health care along with serious consecutive credit issues, make his revocation of his 2007-CF-511 case a relevant factor (*State v. Norton*, 2001 WI App 245).

Overlooked Serious Medical Conditions

At the time Nieman was charged he was incarcerated for DUI after a single vehicle, single occupant rollover crash, for which he sustained numerous life threatening and permanent injuries. These injuries were overlooked by The Clark County Court (*Estelle v. Gamble*, 429 U.S. 97) (*Farmer v. Brennan*, 511 U.S. 825) (*Greeno v. Daley*, 414 F.3d 645) (*State v. Thiel*,

2003 WI 111 [Headnote 11, 13]), and never argued by the Defense or Appellate counsel Courts (*Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674[1984]) (R. 10).

He had been suffering from broken vertebrae within his back and as a result from his accident now suffers from chronic fractures of his L3 and L4 vertebrae, severe spinal stenosis throughout his lower back partnered with crushed disks, encroachment upon the spinal cord in his neck coupled with severe spurring and stenosis in his neck as well. Shared with this are tarses to his ligamentum flavum and severe headaches from the neck injuries.

Nieman also suffered severe injuries to his elbow for which required surgical debreament and severe injuries to his head. Hematomas on his lungs, possible broken pelvic, and several small lacerations. Nieman was thrown from the vehicle at 65 miles per hour. All of these injuries were present throughout Nieman's court proceedings. This most definitely plays a large role in Nieman's ability to pay the entire amount of restitution and should have been raised by Defense and Appellate counsel although they were unknowingly overlooked by all parties (*State v. Harbor*, 2011 WI 28) (*Rosado v. State*, 70 Wis. 2d 280).

Plea Agreements

It was not listed in Nieman's plea agreement that he be ordered to pay restitution (*Puckett v. United States*, 556 U.S. 129) (*State v. Handley*, 173 Wis. 2d 838) (*Santobello v. New*

York, 404 U.S. 257) (R. 11), in fact it was determined that Nieman was to make payments against a civil judgment which was ordered in case No.2014-CV-142 Clark County.

No payments were ever made from Demolitions Plus to Haas in the matter so the actual victim in the case suffered no material losses and the victim in the civil matter will receive monetary damages in, and through routes were established prior to the implication of criminal proceedings.

Although it may not be unauthorized for the court to order the payment of restitution it certainly comes to "Shock the Conscious" of a large majority of the scrap iron world that in essence these pieces of steel that are manufactured at an increased level of hardness and immense size for the work they do. And which require loading of substantial size and cost, would in essence be worth over \$25,000.00 in restitution and civil judgment combined. It's impractical (R. 13) (*McLeary v. State, 49 Wis. 2d 263*) (*State v. Handley, 173 Wis. 2d 838*), Nieman makes reference to the Appendix listed as 04/03/17 "Motion Transcript", with regards to the Courts and Megan Sanders Drazen's references to the restitution.

Substantial Assistance

Nieman did indeed provide substantial assistance to authorities prior to and throughout his incarceration. This would include times prior to, during, and after the court proceedings in State v. Nieman 2015-CF-93 Clark County (*State v. Boyden 2012 WI App 38, PG. 5, 340 Wis. 2d 155, 814 N.w.2d 505*) (*State v. Doe, 2005 WI App 68*).

Nieman was contemplating a joint, sealed, motion which was discussed on several occasions with attorney Megan Sanders Drazen. A letter is being included to show some of the extent of that content (*Strickland v. Washington, 466 U.S. 668*) because Nieman did suffer ineffective assistance of counsel in these regards. Nieman's substantial assistance can be validated in proceeding within Wood County and of course the matter was never brought before the Courts (*Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674[1984]*) (R. 10). These matters continue to be a factor to date (*State v. Boyden 2012 WI App 38, PG. 5, 340 Wis. 2d 155, 814 N.w.2d 505*) (*State v. Doe, 2005 WI App 68*) (*State v. Macemon, 113 Wis. 2d 662, 668, 335 N.W.2d 402 [1983]*). It is mainly for these reasons along with Nieman's health conditions that he wishes to have these Appellate matters fully sealed (*State v. Gilmore, 201 Wis. 2d 820, 833 549 N.W.2d 401 [1996]*). Please see Appendix exhibit labeled 03/23/17 "Assistance Claim Transcript". Thank You.

CONCLUSION

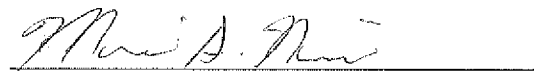
Nieman respectfully asks that the court relieve the amount of restitution as it was part of the plea agreement in the case and not of reason when looking at Nieman's unfortunate health condition. Nieman will do everything in his power to pay off the civil judgment in the matter although there is discrepancy which does not show the actual injured party or victim and the amount owed to each per say.

Nieman's substantial assistance claim is extensive and should attest to the unique undertaking of these circumstances, as Nieman has never had a criminal violation for theft or the like. Nieman has great remorse for his actions and as stated wishes to rectify these matters in the most reasonable fashion. Much of Nieman's "New Factors" were not brought to the courts attention and Nieman's health was most certainly overlooked. Nieman respectfully asks that the Court reduce Nieman's probation by one year.

Thank you for your time and consideration.

Dated this 7th day of March 2019

Sincerely,

A handwritten signature in cursive script, appearing to read "Michael A. Nieman", is written over a horizontal line.

Michael A. Nieman