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BRIEF OF APPELLANT BENJAMIN NEWMAN

20080136

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

SUPREME COURT #20080136
DISTRICT COURT # 05-K-1069

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DEC - 4 2008
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
PLAINTIFF / APPELLEE

VS.

BENJAMIN NEWMAN
DEFENDANT / APPELLANT

APPEAL ON ORDER DENYING POST-CONVICTION RELIEF

DISTRICT COURT OF BURLEIGH COUNTY
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE JUDGE SONNA ANDERSON

BENJAMIN NEWMAN
DEFENDANT: PRO-SE
P.O. BOX 5521
BISMARCK N. DAK 58506

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ORDER ON APPLICATION FOR POST-CONVICTION RELIEF

POST-CONVICTION DENIAL TRANSCRIPT

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LEGAL ASSISTANCE MANUAL
(L. POWELL BELANGER)

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INTRODUCTION STATEMENT

I HAD BROKEN-UP WITH GIRLFRIEND GAIL DELORME CHRISTMAS (2004) THERE HAD BEEN A RASH OF VANDALISM AT THE TIME AND HER CAR WINDOW WAS BROKEN. GAIL'S BROTHER, POLICE OFFICER GARY MALO POINTED AT ME. I WAS CHARGED AND RELEASED ON BOND. THIS INCIDENT ON RYAN DRIVE OCCURED, HE ONCE AGAIN POINTED AT ME. THE DAY OF MY ARREST MAY 29, 2005, I LEFT BISMARCK AROUND 5 IN THE AFTERNOON, WENT TO DENNIS ONEILS AT MENOKEN 12 MILES EAST. HAD A COUPLE BEERS, VISITED, AND LEFT. WENT TO TUMBLEWEED BAR AT LINCOLN, N.DAK. HAD COUPLE BEERS AND LEFT. WENT PAST FRIENDS HOUSE (BUTCH COUCH) LIVES SOUTH OF LINCOLN. IT WAS DARK OUT, AND NO LIGHTS AT HIS PLACE, SO drove down to DON CLOOTEN'S, HE SAID TO GO BECAUSE COPS were EVERYWHERE. DROVE ACROSS ROAD TO GEORGE FISCHER'S. COPS CAME AND GOT ME, I THOUGHT MY BOND HAD BEEN REVOKED FOR THE WINDOW BREAKING. THIS PLACE WAS 12 Miles SOUTH OF BISMARCK. THEY TOOK ME to HOSPITAL to CHECK HEAD WOUND, THEN TO DETENTION CENTER. NO PRELIMINARY HEARING, 15-16 MOS LATER (SEPTEMBER 2006) PARTIAL TRIAL, THEN PRISON.

ARGUMENT ISSUE

CYNTHIA FELAND

BURLEIGH COUNTY STATE'S ATTORNEY

SHE IS THE GRANDAUGHTER OF A FORMER LANDLADY OF MINE. I BELIEVE THIS TO HAVE BEEN A BIG CONFLICT OF INTEREST. I HAD ASKED FOR A CHANGE OF VENUE.

CASELAW - 9
ELEMENTS
CASE LAW - 20
DUE PROCESS VIOLATION
CASE LAW - 10 11 12 5 27
PROSECUTORIAL MISCONDUCT

ARGUMENT ISSUE

JUDGE SONNA ANDERSON

WHY JUDGE DID NOT INQUIRE AS TO WHAT THE MESSAGES THAT JUROR QUINN TRANSMITTED BY CELL PHONE OUT OF JURY BOX?

WHY WE WERE NOT ALLOWED TO BE PRESENT?

AND WHAT THE CONTENTS OF THOSE MESSAGES WERE?

HOW MUCH, DID IT TAINT THE JURY?

REF. PAGES - 9, 21, 11, 10, 13, 14, 15
SUPREME COURT APPEAL PAPERS

CASE LAW - 7 15 14 9

REVERSIBLE ERROR

ELEMENTS - 9

ARGUMENT ISSUE

JUROR WITH THE CELL PHONE

MY RIGHT TO BE PRESENT WAS WAIVED WHEN (JUROR QUINN) WAS QUESTIONED, LATER FOUND OUT JUDGE didn't QUESTION HER ABOUT CONTENTS OF MESSAGES SHE SENT OUT OF JURY BOX.

TRANSCRIPT REFERENCE PAGES - 43, 44, 45, 62

SUPREME COURT APPEAL PAPERS PAGES - 9, 10, 11, 17, 15, 13, 14

CASELAW 7 15 14 9

REVERSIBLE ERROR

ELEMENTS - 9

ARGUMENT ISSUE INEFFECTIVE ATTORNEY'S

ATTORNEYS, TOM GLASS, STEVE BAIABAN, TODD SCHWARZ, BENJAMIN PULKRABEK, ROBERT MARTIN. ALL WERE APPOINTED COUNSEL FOR ME. WHAT HAS BEEN ACCOMPLISHED? VERY INEFFECTIVE. I BELIEVE THEY'RE STRATEGY HAS BEEN TO KEEP ALL "REASONABLE DOUBT" SUPPRESSED. I HAD ASKED ATTORNEY'S TO SUBPOENA CERTAIN PEOPLE, THEY DIDN'T. FOUND OUT LATER DENNIS O'NEIL WAS IN HOSPITAL, MATT GIBNEY WAS AT N.D.S.P. ERROL HOWE WAS IN JAIL. NO ONE SHOWED FOR POST-CONVICTION HEARING. QUESTIONS TO ATTORNEY'S AT TRIAL WERE PUSHED AWAY AND DISCARDED.

MR. BAIABAN AND MR. GLASS WOULD SIGN THAT THEY WERE VISITING ME AT DETENTION CENTER BUT WERNT. MR. BAIABANS LIES AT SUPREME COURT DISCIPLINE BOARD WERE TWISTED.

HE'S THE ONE THAT TOLD ME "YOU PLEA TO ONE, THE REST GO AWAY". DETENTION OFFICERS TAMPERED WITH MY DISCOVERY

ARGUMENT ISSUE

INEFFECTIVE ATTORNEYS

AND OTHER PAPERS, ATTORNEYS WERE TOLD AND DID NOTHING. I BELIEVE THEY HELPED TO SUPPRESS ANYTHING THAT WAS IN MY DEFENSE. THERE ARE SO MANY ISSUES THAT RAISE A "REASONABLE DOUBT,"

HOW COULD ALL THOSE ATTORNEY'S, IN ALL THEIR WISDOM OVERLOOK THEM? UNLESS IT WAS INTENTIONAL!

CASE LAW - 9
ELEMENTS

CASE LAW - 1 25 28 30
RIGHT TO CALL WITNESSES

CASE LAW - 21
APPEAL MUST PRESENT EVERYTHING

CASE LAW - 27
FAILED TO CORRECT PERJURED TESTIMONY

ARGUMENT ISSUE

INEFFECTIVE ATTORNEYS

ON NOVEMBER 5, 2008 IN A HEARING AT THE BURLEIGH COUNTY COURTHOUSE, BENJAMIN PULKRABEK WAS DISMISSED AS COUNSEL FOR BENJAMIN NEWMAN.

AFTER HAVING BEEN ON THE CASE FOR MONTHS WITH 4 DAYS REMAINING FOR FILING MY BRIEF, WHICH I REQUESTED EXTENSION OF TIME, I BELIEVE HIS TACTIC OR STRATEGY WAS TO LET MY CASE GO DOWN THE DRAIN. I HAVE A FEELING EVERYONE WAS AWARE OF IT. THIS IS AN EXAMPLE OF THE PAST PERFORMANCE OF OTHER ATTORNEY'S ALSO.

CASE LAW - 9
ELEMENTS
CASE LAW - 21

ARGUMENT ISSUE

LEROY MCKELVY

STATE'S WITNESS, I HAVE TWO WITNESSE'S THAT SAY He's Not TELLING THE TruTH. THAT HE lied ON THE STAND.

HE WAS IN JAIL AT THE TIME HIMSELF FOR BURGLARY.

TRANSCRIPT PAGES - 20, 21

CASE LAW - (9)
ELEMENTS

CASE LAW - (10) (11) (12) (13) (5)
PROSECUTORIAL MISCONDUCT

CASE LAW - (27)
NEW TRIAL

ARGUMENT ISSUE

FIRE ACROSS THE STREET

DIRECTLY ACROSS FROM 306 RYAN DRIVE. IDENTICAL APT. HOUSE, SAME OWNER, HAD A FIRE IN SAME PLACE. IT WAS CONTAINED AFTER 2 APTS. BURNED. HAPPENED SHORT TIME BEFORE THIS INCIDENT.

REF PAGES TRANSCRIPT - 64, 65, 66

CASE LAW - 9
ELEMENTS

ARGUMENT ISSUE

GAIL DELORME'S STATEMENT

"BEN KNOWS, IF MY CAR ISN'T HOME IM NOT"
79 WHITE LINCOLN - HUGE CAR

TRANSCRIPT REFERENCE PAGES - 11, 12, 49, 51, 52, 64

CASE LAW - 9
ELEMENTS

CASE LAW - 1
RIGHT TO CALL WITNESSES

ARGUMENT ISSUE

DENNIS O'NEIL STATEMENT

PLACES ME AT MENOKEN 12 MILES EAST OF BISMARCK AT TIME OF FIRE INCIDENT.

TRANSCRIPT REFERENCE PAGES - 16, 64, 66
11, 12

CASE LAW - 9
ELEMENTS

CASE LAW - 1
RIGHT TO CALL WITNESSES

ARGUMENT ISSUE

FAMILIARARITY AT 306 RYAN DRIVE

HAVING CARED FOR GAIL DELORME'S FOLKS EVERY DAY FOR ABOUT 10 yrs. AT APT4, I BELIEVE SOME PEOPLE ASSUMED SHE AND I LIVED THERE.

I CARRIED ITEMS UP THE STAIRS FOR MS. LEWIS A COUPLE TIMES. SHE USED TO ASK ME IF THE MAILMAN HAD WENT AS MAILBOX WAS DOWN A FLIGHT OF STAIRS.

THE LADY THAT LIVED THERE BEFORE HER, EVELYN, 93yrs. old. I HELPED HER OUT TO CAR A FEW TIMES. EX-GOVERNOR LINK USED to PICK HER UP FOR CHURCH.

I HELD THE DOOR FOR MANY FOLKS, IT WAS VERY HEAVY.

TRANSCRIPT REFERENCE PAGES - 29

CASE LAW - (9)
ELEMENTS

ARGUMENT ISSUE

ERROL HOWE

ONE OF MY MAIN WITNESSES, I HAD BEEN WITH HIM THE AFTERNOON, THE DAY OF THE FIRE INCIDENT. HE HAD GOTTEN MY VEHICAL KEY BACK, FROM DENNIS BEGIAV AFTER I WAS IN JAIL.

ATTORNEY'S WE'RE told to SUBPOENA HIM MANY TIME'S BUT NEVER DID

HE WAS IN JAIL ON A D.U.I. CHARGE WHEN THEY SUPPOSEDLY COULD'NT LOCATE HIM.

TRANSCRIPT REFERENCE PAGES - 46, 47, 66

CASE LAW - 9
ELEMENTS

CASE LAW - 1
RIGHT TO CALL WITNESSES

ARGUMENT ISSUE

BRIDGETT LINDBERG

SHE WAS A DAUGHTER TO ONE OF THE INCIDENT VICTIMS. SHE WAS GOING TO TESTIFY THAT LEROY MCKELVY (STATES WITNESS) lied ON THE STAND. HE, ALSO WAS IN JAIL AT THE TIME.

REFERENCE PAGES — 24, 26, 48
TRANSCRIPT

CASE LAW - 9
ELEMENTS

CASE LAW - 1
RIGHT TO CALL WITNESSES

ARGUMENT ISSUE

DENNIS BEGIAV

A FRIEND I WAS WITH THE DAY OF THE FIRE INCIDENT. HE GAVE MY VEHICAL KEYS TO ERROL HOWE AFTER COPS HAD ME IN JAIL. HE PASSED AWAY BEFORE THE TRIAL.

HIS MOTHER LIVED CLOSE TO THE AREA OF THE FIRE INCIDENT.

REFERENCE TRANSCRIPT PAGES - 27, 28, 70

CASE LAW - 9
ELEMENTS

ARGUMENT ISSUE

MATT GIBNEY

I AM TRYING TO GET A DEPOSITION OF TESTIMONY FROM HIM, HE IS AT ONE OF THE TREATMENT UNITS IN THE N.D.S.P. SYSTEM. HE TOLD ME, LEROY MCKELVY TOLD HIM IN JAIL, IN BISMARCK THAT HE SAID WHAT THE STATE'S ATTORNEY TOLD HIM TO.

MCKELVY WAS IN JAIL FOR BURGLARY I HEARD. REFERENCE PAGE 20 TRANSCRIPT

CASE LAW - 9
ELEMENTS

CASE LAW - 1
RIGHT TO CALL WITNESSES

ARGUMENT ISSUE

ALLOCUTION

I WAS ON MEDICATION AT THE SENTENCING HEARING. WHEN THE JUDGE SAID I COULD TALK, I DIDN'T HAVE MY READING GLASSES FOR WHAT I HAD WRITTEN. IT WAS ASKED IF ANYONE HAD ANY I COULD USE AND NO ONE OFFERED.

I COULDN'T HEAR WHAT MY ATTORNEY TOM GLASS SAID. HE MUMBLED MY STATEMENT.

REFERENCE

CASE LAW - (22) (23) - ALLOCUTION

REVERSIBLE ERROR

CASE LAW - (24)

SENTENCING

TRIAL COURT ERROR

CASE LAW - (9)

ELEMENTS

OFFICER GARY MALO - BISMARCK POLICE DEPT.

BROTHER TO GAIL DELORME. I FEEL HE HAS MADE EVERYTHING CONCERNED WITH THIS CASE VERY PREJUDICIAL AGAINST ME. HE HAS A WORKING RELATIONSHIP WITH THE STATE'S ATTORNEY. I BELIEVE HE INSTIGATED THE PROTECTION ORDER AGAINST ME. AND WHEN THIS INCIDENT HAPPENED, HE AGAIN I'M SURE POINTED AT ME. WHEN FIRE ACROSS THE STREET FROM 306 RYAN DR. HAPPENED, HE WAS THE FIRST PERSON GAIL AND I CALLED. THIS HAPPENED SHORT TIME BEFORE THIS INCIDENT. COUPLE OF DAYS BEFORE CHRISTMAS 2004, GARY WALKED INTO MY HOUSE AND THREATENED ME. HE ABUSED HIS AUTHORITIE RIGHT IN FRONT OF GUESTS. I HAD TO GO SEE HIS SUPERVISOR AT THE TIME, CAPT. RALPH MONDER TO KEEP HIM FROM HARRASING ME.

HE STILL, SITS BEHIND ME AT EVERY COURT PROCEEDING THAT I HAVE.

CASE LAW - (9)
ELEMENTS
CASE LAW - (21)
MUST PRESENT EVERYTHING

CASE LAW

BROOKS VS. ANDOLINA 826 F 2d 1266 (3rd CIR 1987)
(1) (RIGHT TO CALL WITNESSES) (DUE PROCESS)

US VS. AGURS, 427 US 97 49 L.ED.2d 342 96 S.CT. 2392 (1976) (DISCOVERY)
(2)

TONEY V. GAMMON 79 F. 3d 693 8th Cir. (1996)
(SUPPRESSED EVIDENCE) (DISCOVERY)
(3)

WHITE V. RAGEN 324 U.S. 760, 89 L.ED. 1348
(4) 65 S.CT. 978 1945 (PERJURED TESTIMONY)

U.S. V. SMITH 77 F 3d 511 (D.C. CIR 1996)
(PROSECUTORIAL MISCONDUCT)
(5)

U.S. V. LANGFORD, 946 F. 2d 798 (11th Cir. 1991)
(6) (PROSECUTORIAL MISCONDUCT)

MACK VS. STEWART 137 F. 3d 630 (9th Cir. 1997)
(JURY)
(7)

ANDERS VS. CALIFORNIA 386 U.S. 738 87 S.CT. 1396 18 L.ED. 2d 493 (1967) (NOTHING IS FRIVOLOUS)
(8)

U.S. VS. GAUDIN 515 U.S. 506 132 L.ED. 2d 444 115 S.CT. 2310 (1995)
(ELEMENTS)
(9)

CASE LAW

NAPUE V. ILLINOIS 360 U.S. 264, 2 L.ED. 2d 1217, 79 S CT. 1173 (1959)
(10) (PROSECUTORIAL MISCONDUCT)

U.S. V. BOOTHE, 994 F. 2d 63 (2ND CIR. 1993)
(PROSECUTORIAL MISCONDUCT)
(11)

U.S. V. COFFIE 80 F. 3d 514 (D.C. CIR. 1996)
(PROSECUTORIAL MISCONDUCT)
(12)

U.S. V. THOMAS 987 F. 2d 1298 (7TH CIR. 1993)
(PROSECUTORIAL MISCONDUCT)
(13)

U.S. V. NICHOLS 937 F 2d 1257 7 CIR. 1991
(14) (PLAIN ERROR)

U.S. V. BECKNER 69 F. 3d 1290 (5TH CIR. 1995)
(15) (JURY)

U.S. V. JEFFERS 520 F 2d 1256, 1263 (7TH CIR. 1975)
(16) (UNDIVIDED LOYALTIES)

U.S. VS. ELLISON 798 F. 2d 1102 (7TH CIR. 1986)
(17) (UNDIVIDED LOYALTIES)

US VS. RODRIGUEZ 982 F. 2d 474 11TH CIR. 1993
(CONFLICT OF INTEREST)
(18)

CASE LAW

HAINES VS KERNER 404 U.S. 519, 30 L. ED. 2652 92 S. Ct. 594 (1972) (PRO SE;)

(19)

BANKS V. U.S. 920 F. SUPP. 688 (E.D. VA. 1996)
(SUPPRESSED EVIDENCE)

(20)

O'SULLIVAN VS. BOERCKEL 526 U.S. 838 144 L. ED. 2d (1999) (MUST PRESENT EVERYTHING) (APPEAL) (HABEAS CORPUS UPDATE)

(21)

U.S. VS. CARPER, 24 F. 3d 1157 9th CIR. 1994
(ALLOCUTION)

(22)

U.S. VS. DEALBA PAGAN 33 F. 3d 125 1st CIR 1994
(ALLOCUTION)

(23)

U.S. VS. MYERS 150 F. 3d 459 (5th Cir. 1998)
(SENTENCING)

(24)

CASE LAW

HARRIS VS. REED 894 F.2d 871 (7 CIR. 1990)
(25) (WITNESS)

GIDEON V. WAINWRIGHT 372 U.S. 335, 835 CT. 792, 9 L.ED. 2d 799, 93 ALR 2d 733 (1963)
(26) (WITNESS)

DEMARCO VS U.S. 928 F2d 1074 11TH CIR. 1991
(27) (Failed to correct PERJURED TESTIMONY)

DAVIS VS. ALASKA 415 US 308 39 L.ED. 2d 347, 945. CT. 1105 1974
(28) (INEFFECTIVE COUNSEL)

CAMERON VS. LEFEVRE 887 F SUPP. 425 EDNY (1995)
(29) (TRANSCRIPTS)

EVITTS VS. LUCEY 469 U.S. 387, 83 L.ED. 2d 821 1055 CT. 830 1985
(30) (INEFFECTIVE COUNSEL)

CONCLUSION

THE ISSUES I HAVE BROUGHT UP WERE ALL AVAILABLE AT MY TRIAL AND HEARINGS, THEY WERE NOT PRESENTED TO THE JURY. MY ATTORNEY'S STRATEGY AND IT'S OBVIOUS EVERYWHERE, WAS TO COVER UP AND SUPPRESS ANY "REASONABLE DOUBT."

AFTER YOU HAVE SEEN THIS MATERIAL, I'M SURE YOU WILL AGREE. MINOR ISSUES SUCH AS GAIL BREAKING HER OWN PROTECTION ORDER, FLASHOVER-MIMICS CERTAIN TYPES OF FIRE. NO CAN FOUND? NO GAS ON MY CLOTHES. MANY ISSUES NOT BROUGHT UP. NO STAND-BY COUNSEL, AND THIS LAW LIBRARY OFFERS ONLY MINUMUM ASSISTANCE.

THIS BRIEF IS FULL OF "REASONABLE DOUBTS"; NOTHING MADE UP, ALL VERIFIABLE FACTS. LOT'S OF ERRORS, BIG MISCARRIAGE OF JUSTICE BECAUSE OF EXCLUSION OF EVIDENCE. I ASK FOR DISMISSAL OF ALL CHARGES.

CONSTITUTIONAL RIGHTS VIOLATIONS

6TH AMENDMENT - AS DEFENSE FOR MYSELF PRO-SE, I WAS ALLOWED MINIMAL USE OF THE LAW LIBRARY AND FOR THE MOST PART, ACCESS TO COURT PROCEEDING'S INFORMATION. DENIED WITNESSES, MY LEGAL ASSISTANCE, HAS BEEN A LEGAL MANUAL.

14TH AMENDMENT - I HAVE BEEN DENIED "DUE PROCESS" SINCE THE BEGINING OF THIS CASE.

1ST AMENDMENT - I HAVE WRITTEN AND SENT NUMEROUS LETTERS TO THE BISMARCK TRIBUNE, FROM JAIL AND FROM HERE. SOME LADY NAMED VIRGINA CAME TO THE JAIL, BUT SHE didn't PRINT MY STORY. THEY ARE ONE-SIDED FOR THE MOST PART.

BENJAMIN NEWMAN
PRO-SE