IN THE

INDIANA COURT OF APPEALS

Cause No. 15A01-1110-CR-0050

DANIEL BREWINGTON,	)	
	)	Appeal from Dearborn County Superior Court II
Appellant,	)	
	)	Cause No. 15D02-1103-FD-0084
v.	)	
	)	The Honorable Brian Hill,
	)	Special Judge
STATE OF INDIANA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLANT

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INTRODUCTION

This is a case of first impression that requires the Court to reconcile the protections of the First Amendment and Article I, § 9 of the Indiana Constitution with Indiana's intimidation statute, Ind. Code § 35-45-2-1, in a prosecution that sought to punish a party for comments posted on a blog and other social media platforms.

This case arose from a difficult divorce proceeding and child custody contest. Daniel Brewington, who represented himself throughout most of the proceedings, became disillusioned with the legal process and the many barriers he faced pursuing joint custody of his two young children. No abuse, inappropriate lifestyle, or drug issues were raised in this case, nor do any exist. Yet his efforts to maintain an important and vital role in his children's lives were hindered by Dr. Edward Conner, the appointed evaluator, and Judge James Humphrey, who ultimately denied him any contact with his children in the final decree.

Brewington used the Internet and social media to criticize the legal system and the individual decision-makers who denied him any access to his children. Brewington also raised his concerns directly in correspondence with Dr. Connor and in filings with the court.

Aaron Negangard, the Dearborn County Prosecutor, took personal umbrage with Brewington exercising his First Amendment rights in these communications and silenced him by indicting Brewington with three misdemeanors and three felonies. Brewington should not be persecuted, much less prosecuted for exercising his First Amendment rights. Brewington trusts this Court to be fair and impartial and hopes that there will be a judgment entered in his favor or in the alternative a remand for a fair trial.

STATEMENT OF ISSUES FOR REVIEW

1. Did the trial court commit reversible error by failing to instruct the jury on the federal and state constitutional limitations on prosecutions for intimidation, and, if so,

   a. Was this fundamental error, or

   b. Did Brewington's trial counsel render ineffective assistance by failing to contemporaneously object?

2. Should the Court reverse Brewington's convictions for intimidation and attempted obstruction of justice because the State failed to produce sufficient evidence to sustain the burdens imposed by the First Amendment of the United States Constitution and Article I, § 9 of the Indiana Constitution?

3. Should the Court reverse Brewington's conviction for perjury because the State failed to produce sufficient evidence that Brewington's grand jury testimony was intentionally false?

4. Should the Court vacate Brewington's conviction for intimidation of Dr. Connor because the evidence the State offered to prove that charge was the exact same evidence used to prove the substantial step for the commission of attempted obstruction of justice, thereby exposing him to double jeopardy?

5. Should the Court reverse all of Brewington's convictions because the trial court improperly used an anonymous jury, admitted irrelevant and prejudicial evidence, and used prejudicial final jury instructions?

STATEMENT OF THE CASE

On March 2, 2011, Appellant-Defendant Daniel Brewington was indicted on six counts: (I) Intimidation, Class A Misdemeanor, Ind. Code § 35-45-2-1(a)(1); (II) Intimidation of a Judge, Class D Felony, Ind. Code § 35-45-2-1(a)(2)(b)(1); (III) Intimidation, Class A Misdemeanor, Ind. Code § 35-45-2-1(a)(1); (IV) Attempt to Commit Obstruction of Justice, Ind. Code § 35-44-3-4; (V) Perjury, Class D Felony, Ind. Code § 35-44-2-1(a)(1); and (VI) Unlawful Disclosure of Grand Jury Proceedings Ind. Code § 35-34-2-10. (App. 21-26). The indictments were filed in Dearborn Superior Court II on March 7, 2011 (App. 3). Brewington was tried before a jury from October 3 through 6, 2011. (App. 7-8). The jury convicted Brewington on Counts I-V, and acquitted Brewington on Count VI. (App. 33-34).

The Court sentenced Brewington on October 24, 2011. (App. 35-36). Brewington was given the following sentence:

- Count I: six months;
- Count II: two years, consecutive to Counts I, IV, and V;
- Count III: six months, concurrent to Count II;
- Count IV: two years, concurrent to Count I;
- Count V: one year, consecutive to Counts I, II, III, and IV;
- Costs in the amount of $165.00.

(App. 35-36). Brewington is currently incarcerated and serving his sentence at the Putnamville Correctional Facility.

Brewington timely filed his notice of appeal on October 24, 2011. (App. 8).

On January 24, 2012, Brewington filed a petition for bail pending appeal with the trial court, which was denied on February 2, 2012. (App. 9). On March 19, 2012, Brewington filed a

verified motion for bail pending appeal with this court.[1] The motion for bail pending appeal is still pending.

STATEMENT OF FACTS

A. Initial Divorce Proceedings.

Daniel and Melissa Brewington were married in August 2002. (Ex. 140 at 1). They had two children. (Ex. 140 at 1). The marriage failed, and Melissa filed for divorce in Ripley County on January 8, 2007, citing irretrievable breakdown in the marriage. (Ex. 140 at 1). Ripley Circuit Judge Carl Taul was initially assigned to the divorce. (Tr. 33-34). After Brewington filed a motion for change of judge, Dearborn Circuit Judge James Humphrey was appointed special judge on December 17, 2008. (Ex. 120).

Melissa was represented by Angela Loechel. (Tr. 31-32). Brewington was initially represented by counsel—first Amy Streator, then Thomas Blondell—but began representing himself in February 2008. (Tr. 36; Ex. 99 at 5).

Custody was contested. (Tr. 37). Brewington and Melissa, through their attorneys (Mr. Blondell for Brewington), agreed to appoint Dr. Edward J. Connor, Psy. D, to perform a custody evaluation. (Tr. 37; Ex. 104). Both parents sought temporary sole custody during proceedings. (Tr. 303). At the provisional hearing, Melissa was awarded temporary sole custody, and Brewington was given three days visitation per week while Melissa was at work. (Tr. 303-05).

Dr. Connor was a clinical psychologist, located in Erlanger, Kentucky. (Ex. 104). Dr. Connor's practice included performing child custody evaluations, including in Indiana. (Tr. 87).

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[1] Brewington submitted the motion for bail pending appeal on March 8, 2012, along with a motion for leave to file an oversized document. This Court granted the motion for leave to file the oversized document on March 19, 2012, at which time the clerk filed the motion for bail pending appeal.

When Dr. Connor was appointed in the Brewington case, he was licensed to practice in Kentucky, but not Indiana. (Tr. 87; Ex. 104). Dr. Connor testified that the Indiana psychology board had informed him that he could perform custody evaluations in Indiana, as long as he was not working in the state continuously and if people came to his office in Kentucky for the evaluations. (Tr. 87).

B. Dr. Connor's Custody Evaluation.

At the criminal trial, Dr. Connor testified about how he performs evaluations. He interviews both parents separately, gives the parents a number of psychological tests, observes the parents interacting with the children (separately), and conducts home visitations. (Tr. 87). Dr. Connor—along with his wife, a psychologist in his practice—completed the evaluation for the Brewingtons on August 29, 2007. (Tr. 90; Ex. 9). The evaluation was filed with the court on September 27, 2007. (Ex. 99 at 4).

Dr. Connor recommended that Melissa have sole legal custody of the children, and Brewington have standard/liberal visitation. (Tr. 90). Dr. Connor wrote in his report that Brewington and Melissa did not meet the criteria for joint custody because

> [t]heir psychometric profiles are quite different and clearly indicate that their relationship will continue to be fraught with agitation, disorganization, ineffective communication, and overreaction to minor details and perceived criticisms. ...
>
> Melissa has a history of obsessive-compulsive tendencies[.] ... Her perseveration on issues tends to cause her extreme anxiety and makes it very difficult for her to view Dan objectively. ... Dan clearly has extreme Attention Deficit Disorder.[2] ... His tendency to ramble and forget, as well as his impulsive and incoherent thought processes are concerning. These traits make it extremely challenging to effectively communicate with Dan.

[2] Brewington was diagnosed with ADD in 2000, and was prescribed Ritalin. (Tr. 294).

> Given Melissa's obsessive-compulsive and very focused tendencies and Dan's impulsive and erratic tendencies, the combination of the two character styles is simply disastrous for effective communication, which is an essential component of joint custody, shared parenting, and/or co-parenting. As such, we simply do not believe that Melissa and Dan meet the criteria for joint custody or shared parenting and that Melissa would be the more predictable and consistent primary care provider. Melissa has made rational and reasonable decisions for the children's well-being and care and will continue to do so without difficulty.
>
> Despite Dan and Melissa's differences, it is clear that the children are very attached to both parents. Both parents love their children dearly and it is unfortunate that they will not be able to co-parent the children; however, we believe that the recommendation is in the children's best interest. Dan can certainly provide childcare for the children but we believe that minimizing the amount of time he has with the children will in fact, sustain their existing bond. ...

(Ex. 9 at 29-31) (footnote added).

Dr. Connor recommended that Brewington continue to have visitation approximately three days a week. (Ex. 9 at 31).

C. Brewington's Correspondence with Dr. Connor.

On February 19, 2008, Brewington gave Dr. Connor a packet of information highlighting numerous errors and oversights he identified in the evaluation. (Ex. 107). In response, Dr. Connor wrote a letter to Judge Taul allowing, with the judge's permission, the Brewingtons additional appointments to review any perceived errors, and to prepare an addendum to the evaluation. (Ex. 107). Dr. Connor offered the additional sessions at "significantly" reduced rates. (Ex. 107).

On February 28, 2008, the court granted Mr. Blondell's motion to withdraw his appearance, and Brewington represented himself from then on. (Ex. 99 at 5). Some time before March 28, 2008, Brewington began a series of correspondence with Dr. Connor requesting the release of Dr. Connor's entire case file (i.e., the tests, notes, etc., that the custody evaluation was

based on). (Ex. 26).[3] Brewington explained that he was requesting the release of the entire case file in order to address the numerous errors and oversights he found in the evaluation. (Ex. 28 at 10).

In these various letters, Brewington claimed that he was entitled to the entire case file under the terms of his contract with Dr. Connor, as well as under Kentucky law and applicable professional standards for psychologists. (Exs. 26, 55, 61). At some point (it is not included in the record), Dr. Connor stated that he would release the case file to Brewington if Brewington provided proof from the court of his pro se status. (Ex. 26). At some point (the record is unclear exactly when), Judge Taul informed Dr. Connor that Brewington had entered a pro se appearance. (Ex. 27). Dr. Connor still declined the request, citing Judge Taul's statement that "This Court has only ordered that Mr. Brewington have a copy of your evaluation, at this point." (Ex. 27). Brewington contended that Judge Taul's statement only meant that he had not yet been asked to rule on whether Brewington was entitled to the entire file. (Ex. 27).

Over the next several months, there followed a lengthy series of correspondence, mostly from Brewington to Dr. Connor, regarding the case file.[4] Brewington's letters became increasingly demanding and agitated, accusing Dr. Connor of varied misconduct.

First, Brewington claimed that Dr. Connor's failure to provide the case file was a breach of contract. (*E.g.*, Exs. 28, 31). Brewington also alleged that Dr. Connor committed ethical violations, including: providing an opinion about Brewington's ADHD without an adequate

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[3] Exhibit 26, a March 28 fax from Brewington, refers to earlier correspondence dating at least to March 6, 2008, but the earlier correspondence is not in the record.

[4] The letters from Brewington to Dr. Connor introduced into the record are Exhibits 26, 27, 28, 31, 34, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 59, and 61. The letter from Brewington to Dr. Connor's wife, Dr. Sarah Jones-Connor, introduced into the record is Exhibit 40. The letters from Dr. Connor to Brewington introduced into the record are Exhibits 29 and 33. The letter from Dr. Connor to Judge Taul introduced into the record is Exhibit 32.

understanding of that condition; falsely advertising his fees; misrepresenting Brewington's statements in correspondence with Judge Taul; refusing to correct mistakes in the evaluation; misrepresenting himself on either his C.V. or in his deposition; and making false public statements. (*E.g.*, Exs. 28, 36, 39, 42). Brewington accused Dr. Connor of committing malpractice, gross negligence, slander, and/or libel. (*E.g.*, Exs. 39, 42). Brewington accused Dr. Connor of practicing psychology in Indiana without a license, and of other unspecified criminal behavior. (*E.g.*, Exs. 34, 43, 48, 49, 51, 55). Brewington accused Dr. Connor of intentionally refusing to cooperate and attacking Brewington in retaliation for "trying to expose [Dr. Connor's] wrongdoing." (*E.g.*, Exs. 39, 51). Finally, Brewington accused Dr. Connor of intentionally delaying the resolution of the divorce proceedings, causing harm to Brewington's children. (*E.g.*, Exs. 59, 61).

Brewington told Dr. Connor that he would be held accountable for his misconduct. Brewington warned that he would file a breach of contract lawsuit, and drafted a proposed complaint. (Exs. 31, 39, 41). Brewington mentioned filing other lawsuits, including malpractice and other unspecified claims, and suing other people affiliated with Dr. Connor's practice. (Exs. 34, 39, 40, 42). Brewington stated that he would hold Dr. Connor accountable for criminal wrongdoing (Exs. 39, 48, 49, 55, 59); report him to the Kentucky Board of Psychology (Exs. 39, 48, 49); file a petition for contempt, (Ex. 45); and/or inform the public about Dr. Connor's wrongdoing (Exs. 59, 194). Brewington did not threaten violence, directly or indirectly, and expressly disclaimed any threat of violence. (Ex. 59).

Brewington made good on some of his stated intentions. While he did not file any lawsuits, he did file other complaints. He filed several motions to exclude Dr. Connor from the divorce proceedings. (*See* Exs. 99, 111, 133). He filed a complaint with the Kentucky Board of

Psychology. (Ex. 55). When that complaint was denied, he filed a complaint with the Kentucky Attorney General. (Ex. 60). He filed a Petition for Contempt Citation. (Ex. 116). He wrote letters to various law enforcement officers in Ripley and Dearborn Counties requesting criminal investigations of Dr. Connor for unlicensed practice, improper conduct (not releasing the case file and improper ex parte communication with a judge), and fraud. (Exs. 67. 87). And, as discussed below, Brewington made good on his promise to inform the public about Dr. Connor's perceived misdeeds.

D. Continuation and Disposition of the Divorce Proceedings

Brewington raised his concerns about Dr. Connor with Judge Humphrey, who had been assigned special judge after Judge Taul recused himself for having ex parte communication with Dr. Connor. (*See* Ex. 132).

Brewington made several unsuccessful attempts to compel the release of Dr. Connor's case file. (Ex. 99 at 10-11; Ex. 110; Ex. 116). Subsequently, Brewington filed motions in limine to prevent Dr. Connor from participating in the divorce proceedings, which were also denied. (Ex. 99 at 8, 12; Ex. 111; Ex. 206A; Ex. 209). When Judge Humphrey refused to take any action on his complaints against Dr. Connor, Brewington began lodging complaints about Judge Humphrey's conduct. Before the final hearing Brewington filed two motions for mistrial, citing Dr. Connor's misconduct. (Ex. 129, 139). The first motion asserted that Judge Humphrey was aware of Brewington's allegations concerning Dr. Connor, and therefore had a conflict of interest because Judge Humphrey often appointed Dr. Connor to conduct child custody evaluations. (Ex. 129). Both motions were denied, as was Brewington's motion to reconsider. (Ex. 99 at 16-18; Ex. 135).

Brewington also filed a motion for change of judge, citing alleged ex parte communication with Dr. Connor, and Judge Humphrey's knowledge of Dr. Connor's misconduct and unlicensed practice of psychology. (Ex. 132). This motion was denied. (Ex. 138). Brewington also attempted to withdraw his pro se appearance—claiming he was not capable of representing himself because of his ADHD—and to continue the final hearing, but these requests were also denied. (Ex. 99 at 15-17; Ex. 134; Ex. 208).

The final hearing was held on May 27, June 2, and June 3, 2009. (Ex. 140 at 1). Brewington continued to complain about Dr. Connor at the final hearing. (Tr. 224-25). Judge Humphrey testified at the criminal trial that Brewington complained about Dr. Connor so frequently that he threatened Brewington with contempt (though there was no hearing on the matter or finding of contempt). (Tr. 224, 237). Judge Humphrey testified that Brewington was loud and disrespectful in the courtroom and that he had a deputy sheriff stand behind Brewington during the hearing "because of [his] conduct." (Tr. 237-38). However, Judge Humphrey never identified any conduct of Brewington's that was violent or threatening. (*Id.*).

Brewington continued to see his children three days a week until August 17, 2009, when Judge Humphrey issued the Final Order dissolving the marriage. (Ex. 140). Judge Humphrey awarded Melissa sole legal custody, relying on Dr. Connor's conclusion that Brewington "could not communicate with mother with the skills necessary to conduct joint custody." (Ex. 140 at 2, 5). Judge Humphrey also denied Brewington any visitation. (Ex. 140 at 17). Specifically, Judge Humphrey ordered that Brewington was not entitled to visitation until he underwent a mental health evaluation by a court-approved provider. (Ex. 140 at 17). If the provider found that Brewington was not a danger to the children, Melissa or himself, Brewington would be entitled to supervised visitation for four hours per week, with Brewington paying all costs. (Ex. 140 at

17-18). After a period of supervised visitation, Brewington could petition the court for unsupervised visitation, if recommended by the supervisor. (Ex. 140 at 18). The final decree also divided the marital assets, and ordered Brewington to pay child support and some of Melissa's attorney fees and costs. (Ex. 140).

On August 20, 2009, Brewington filed a Motion to Clarify and to Reconsider, which was denied on August 25, 2009. (Ex. 99 at 19; Ex. 141). On August 24, 2009, Brewington filed a Motion to Grant Relief from Judgment and Order, which was denied on August 31, 2009. (Ex. 99 at 19; Ex. 142). Brewington appealed various aspects of the final decree, including the property distribution and the custody and visitation decisions. (Ex. 99 at 20). On July 20, 2010, the Court of Appeals affirmed Judge Humphrey's final decree. (Ex. 209). Brewington filed a petition for transfer, which was denied. (Tr. 57); *See Brewington v. Brewington*, 940 N.E.2d 832 (Ind. 2010).

E. Brewington's Internet Sites.

During the divorce proceedings, Brewington created two Internet sites. The first was "www.DanHelpsKids.com" (hereinafter "website"), where Brewington posted information on various topics relating to his divorce case. Portions of the website were introduced at trial. (Exs. 161, 162, 163, and 164). The record does not show when Brewington started this website. The second Internet site was "Dan's Adventures in Taking on the Family Courts" (hereinafter "blog"). (*E.g.,* Ex. 191). Brewington's blog was updated more frequently and discussed developments as they occurred. Brewington created the blog on or before February 25, 2009 (the earliest post in the record). (Ex. 191).

The main theme of both sites is that the family court system is dysfunctional, and that his case demonstrates how it treats some people unfairly. The main issue Brewington raised was the

failures surrounding Dr. Connor's custody evaluation: that it contained numerous errors and omissions, that Brewington was unable to obtain the case file to challenge the evaluation, and that Judge Humphrey retaliated against him when he challenged Dr. Connor. (*See, e.g.,* Exs. 161, 179, 190, 191, and 188).

Brewington explained why he created the blog:

> I was a fairly ordinary guy two years ago; wife, 2 beautiful daughters, a house, dogs, etc ... until I received divorce papers. There wasn't any adultery, abuse, or drug or alcohol abuse; she just wanted out. I don't want to elaborate on the situation because unfortunately divorce has become part of everyday life. I'm here is [*sic*] to tell the shocking stories revolving around a self-represented father who is taking on the Family Court System with a whole new strategy. ...

(Ex. 191).

Some time after the final decree, Brewington wrote another statement of purpose on the blog:

> I was involved in a divorce and child custody proceedings that lasted over two and a half years. My main objective was to ensure that my children have the ability to grow up spending equal time with both parents. I stood up to a crooked custody evaluator and was punished for it. I lost all parenting time with my 3 and 5 year old girls. No accusations of abuse, no adultery, no drug or alcohol abuse, no social services, no police reports. Judge James Humphrey waited 2.5 months after the final hearing to terminate my parenting time. Prior to August 18, 2009, I cared for the girls nearly half of the time and they had never been away from their dad for more than 4 days. Now I have no contact. I have designed this blog to help inform people about the dangers of the family court system and the "professionals" who are involved.

(Ex. 198).

The State introduced dozens of Brewington's posts to his blog, dating from February 25, 2009, through February 17, 2011.[5] Brewington continued his criticisms of both Dr. Connor and

[5] The blog posts were introduced as Exhibits 160, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 187, 188, 190, 191, 192, 193, 195, 197, 198, 199, 200, and 201. Some posts were included in multiple exhibits.

Judge Humphrey on both sites, often using more caustic language than in his correspondence or court filings.

For example, shortly after the final decree was issued, Brewington wrote on a theme that would continue throughout his postings. Regarding the custody and visitation decisions, Brewington wrote:

> I am posting this information to inform people of the horrors of the family court and trying to bring public scrutiny on Judge James Humphrey, Dr. Edward J. Connor Psy. D., and some of the other professionals working with the family court system. ... Reducing the amount of time children have with a parent is emotionally trying. Eliminating the children's right to see a perfectly capable parent is child abuse. I want people to understand how Judge James Humphrey has abused my children.

(Ex. 160). Brewington repeated similar accusations in other posts. (*E.g.*, Exs. 168, 170, 171).

In discussing why he believed the family court system was broken, Brewington continued his accusations that Dr. Connor and Judge Humphrey engaged in unethical or illegal conduct. For example,

> My efforts have helped to bring attention to the broken domestic courts in Dearborn County, Indiana and have shed light on the criminal actions of Dr. Edward J Connor. Greater Cincinnati Lawyer/[] radio personality Eric Deters recently publicized the unethical and perverted actions of psychologist Dr. Edward J. Connor on his radio show. ... Public awareness is the only way to combat this kind of corruption.

(Ex. 171). Brewington also wrote, "Judge Humphrey punished my children because I challenged Judge Humphrey's unethical evaluator." (Ex. 176).

Before the final decree issued, Brewington wrote,

> If Judge Humphrey says that I am competent to represent myself, then he will have to answer to why he protected Dr. Connor for so long. If he even rules on the [Motion to Withdraw Appearance], it will be on public record that Judge Humphrey is aware that Dr. Connor is a liar. If you combine that with the fact that Judge Humphrey just found out that the psychologist he regularly appoints as a professional expert was not licensed to practice psychology in the State of Indiana until July 8, 2008, Judge Humphrey could be subject to disciplinary action.

(Ex.188). (*See also* Ex. 169).

Brewington's posts sometimes devolved to what was essentially name-calling. He called Judge Humphrey "a vindictive spineless coward" (Ex. 176), and a "[vile] and despicable man" (Ex. 171). He wrote a post on his blog titled, "Dr. Edward J. Connor may be a pervert", and opined that Dr. Connor may be a pervert because, he was told, Dr. Connor asks sexually explicit questions of women, but not men. (Ex. 197). Brewington continued:

> If Dr. Connor does conduct evaluations with women this way, he is nothing more than a sexual predator. Dr. Connor abuses his power and punishes people who question him and the worst abuse of power is submitting people to uncomfortable sexual questions in a vulnerable environment. If the questions are necessary to determine the safety of the children, why doesn't Dr. Connor ask men about the sexual activities of the mothers? Maybe because it isn't as sexy.

(Ex. 197).

Brewington wrote some posts mentioning where Dr. Connor and Judge Humphrey lived. Brewington wrote about Dr. Connor's mortgage with "Fifth Third Bank on his house in the Triple Crown subdivision in Union, Kentucky." (Ex. 199). In one of the posts criticizing Judge Humphrey's conduct, Brewington posted a request that people who shared his concerns send a letter to the "Dearborn County Advisor" to the Indiana Supreme Court "Ethics and Professionalism Committee." (Ex. 160). Brewington identified the advisor as "Heidi Humphrey" and listed an address. (Ex. 160). Brewington did not identify Heidi Humphrey as Judge Humphrey's wife, nor did he identify the address as their home address (though it was). (Ex. 160). Three individuals wrote letters to Heidi Humphrey. (Exs. 71, 77, 87).

Brewington did not make threats of violence on his Internet sites. He disclaimed any intention to do so. "I have never written about any thoughts of causing physical harm to anyone." (Ex. 198) "Judge Humphrey ruled that [my Internet] writings were not harmful to the children. If

I made any threats, I would have been arrested immediately." (Ex. 167). "Fortunately for Dr. Connor, I do not fit into the demographic that would want to cause physical harm to someone who lied to hurt their children." (Ex. 200).

F. Brewington's Prosecution.

At some point during the divorce proceedings, Melissa's attorney, learned about Brewington's Internet sites. (Tr. 57). Ms. Loechel testified that she contacted the Dearborn County Prosecutor's office because she had concerns about Brewington's blog posts. (Tr. 64). Ms. Loechel testified that she was specifically concerned about Brewington "saying some pretty, you know, inflammatory stuff like you know, calling Judge Humphrey a child abuser" and the posts directing people to write letters to Heidi Humphrey. (Tr. 65).

In August 2009, the prosecutor asked Michael Kreinhop, then a detective with the Dearborn County Sheriff Department Special Crimes Unit to investigate Brewington's Internet postings. (Tr. 340-41).[6] As part of this investigation, Kreinhop viewed Brewington's Internet sites, and interviewed Judge Humphrey, Ms. Loechel, Melissa Brewington, Dr. Connor, and Brewington. (Tr. 342). Kreinhop testified that during the three-month investigation, there were no reports of any acts of violence by Brewington, nor were there reports of seeing Brewington near the Humphreys' home, Dr. Connor's home, or Heidi Humphrey's workplace. (Tr. 410, 417-18).

At the insistence of Dearborn County Prosecutor Aaron Negangard, the grand jury investigated. Brewington testified before the grand jury. (Tr. 345). Brewington stated that when he posted the request for people to contact Heidi Humphrey on his blog, he did not know

[6] Kreinhop was elected Dearborn County Sheriff in 2010, and took office January 2011.

whether she was Judge Humphrey's wife. (Tr. 346-47, 421-22). The grand jury returned six indictments: three counts of intimidation (one each for intimidation against Dr. Connor, Judge Humphrey, and Heidi Humphrey), one count of attempt to commit obstruction of justice, and one count of unlawful disclosure of grand jury proceedings.

Brewington was tried in Dearborn County from October 3 through 6, 2011, before Special Judge Brian Hill. At trial, Brewington's counsel did not call a single witness or offer a single exhibit. The jury acquitted Brewington of unlawful disclosure of grand jury proceedings, but convicted him on the remaining counts. Brewington was sentenced on October 24, 2011.

SUMMARY OF ARGUMENT

Brewington's convictions on Counts I-IV (three counts of intimidation and one count of attempted obstruction of justice), must be overturned for two reasons. First, the jury instructions failed to define the limitations on prosecutions for these charges imposed by the First Amendment and Article I, § 9 of the Indiana Constitution. Although Brewington's trial counsel did not contemporaneously object to these instructions, this failure should be excused. These instructions either constituted fundamental error, or the failure to object constituted ineffective assistance of counsel.

Second, these convictions were not supported by sufficient evidence. Under binding United States Supreme Court precedent, this Court has an obligation to review the First Amendment issues independently, with no deference to the jury's findings. The State did not prove beyond a reasonable doubt that Brewington committed intimidation or attempted obstruction of justice.

The Court should reverse Brewington's conviction on Count V (perjury). The State failed to prove beyond a reasonable doubt that Brewington's testimony at the grand jury was intentionally false.

The Court should vacate Brewington's conviction on Count I (intimidation of Dr. Connor) because convictions on both this Count and Count IV (attempt to commit obstruction of justice) violate the Double Jeopardy Clause of the Indiana Constitution. Specifically, the State presented the same evidence to prove Count I as it used to prove the substantial step for Count IV. Therefore, there is a reasonable probability that the jury convicted Brewington twice for the same conduct.

Finally, the Court should reverse Brewington's convictions based on a number of other errors that denied Brewington a fair trial. First, the trial court improperly granted the State's motion for an anonymous jury, without making a finding that there was a strong reason to believe the jury needed protection. Second, the trial court improperly admitted two irrelevant, prejudicial exhibits. Third, the final instructions, which included verbatim repetitions of the grand jury indictments, contained prejudicial language that suggested Brewington's guilt. Each of these three errors implied that Brewington was dangerous and/or unreliable. This was prejudicial because it signaled to the jury that Brewington was more likely to have committed the crimes with which he was charged: intimidation, attempted obstruction of justice, and perjury. This denied Brewington a fair trial, and requires reversal.

ARGUMENT

I. Counts I-IV

Brewington's convictions on Counts I-IV, three counts of intimidation and one of attempted obstruction of justice, must be overturned for two reasons. First, the jury instructions failed to define essential elements of these charges; specifically, the instructions did not inform the jury of the specific First Amendment limitations on these charges, or the limitations under the Indiana Constitution. Second, there was insufficient evidence to support these convictions. Brewington's convictions must be overturned, and this Court should enter a verdict of acquittal.[7]

A. Constitutional Limitations on Intimidation Prosecutions.

The crime of "Intimidation" is found in Ind. Code § 35-45-2-1. This section provides (in relevant part) that it is a Class A misdemeanor to "communicate[] a threat to another person, with the intent ... that the person be placed in fear of retaliation for a prior lawful act[.]" Ind. Code § 35-45-2-1(a). The crime is a Class D felony if the person threatened is a judge. *Id.* § 35-45-2-1(b)(1)(ii).

The State advanced two theories for why Brewington's statements, correspondence, and Internet postings were threatening. First, his statements "express[ed] ... an intention to ... unlawfully injure the person threatened or another person[.]" *Id.* § 35-45-2-1(c)(1). Second, his statements "express[ed] ... an intention to ... expose the person threatened to hatred, contempt,

[7] The charge of attempted obstruction of justice (Count IV) relied on the exact same conduct as the charge for intimidating Dr. Connor (Count I). See *infra* pp. 22-25 for a reproduction of the indictments and jury instructions. Because the charges rely on the same conduct, the constitutional requirements for both are the same, and they will be treated as a single charge of intimidation in this Brief.

disgrace, or ridicule; [or] ... falsely harm the business reputation of the person threatened." *Id.* § 35-45-2-1(c)(6)-(7). The second theory is essentially criminal defamation.

Brewington's convictions for intimidation must be reversed because the trial court did not properly instruct the jury on the First Amendment or Article I, § 9 limitations, allowing the jury to convict Brewington for protected speech.

1. The First Amendment limitations on prosecution for threats of violence.

The State must meet a high burden to convict someone for making statements threatening violence. "[Statutes] such as [these], which make[] criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. U.S.*, 394 U.S. 705, 707 (1969). The First Amendment requires that the State prove that Brewington's statements were "true threats." *Id.* at 708; *Virginia v. Black*, 538 U.S. 343, 359 (2003). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. A true threat must be distinguished from political hyperbole or other heightened rhetoric. The First Amendment recognizes a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). "The language of the

public arena, like the language used in labor disputes, ... is often vituperative, abusive, and inexact." *Id.* (internal citations omitted).

2. The First Amendment limitations on prosecution for criminal defamation.

The State cannot punish an individual simply because the individual's speech causes someone to suffer hatred, contempt, disgrace, ridicule, or harm to his business reputation. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 921 (1982) ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."). Rather, the State must prove that the speech falls under one of the long-recognized categories outside First Amendment protection, such as defamation. *U.S. v. Stevens*, 130 S.Ct. 1577, 1584-86 (2010).

Defamation in the constitutionally sanctionable sense requires the State to prove that the defendant's statement is false. *Sullivan*, 376 U.S. 271. Furthermore, the State must prove some minimum level of culpability with respect to the falsity of the statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). If the alleged victim is a public person or public official, the minimum culpability is actual malice: that the statement was made "with knowledge of its falsity or with reckless disregard for the truth." *Id.* at 342. For a private person, the State may select a lesser standard. *Id.* at 347. Of course, a state can choose a higher standard.

Indiana Code § 35-45-2-1(c) does not on its face require proof that the defamatory statement is false, and consequently does not define the level of culpability. Therefore, courts must interpret the statute to require such proof to avoid finding it unconstitutional. *Price v. State*, 622 N.E.2d 954, 963 (Ind. 1993) ("If an act admits of two reasonable interpretations, one of

which is constitutional and the other not, we will choose the path which permits upholding the act."). Under Ind. Code § 35-45-2-1(c), the level of culpability is intentional falsehood, regardless of the alleged victim's status. Unless a statute provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct. Ind. Code § 35-41-2-2(d). Section 35-45-2-1(c) requires intentional conduct (e.g., that the threat communicates *intent* to expose the person threatened to hatred, contempt, disgrace, or ridicule). Therefore, the State is required to prove that the defendant's statements were intentionally false.

3. Limitations in the Indiana Constitution.

Article I, § 9 of the Indiana Constitution protects the right to free expression. A person claiming that state action infringes this right must prove (1) that the state action restricted his opportunity to engage in expressive activity, and (2) that the State could not reasonably conclude that the expression was an abuse of the right to speak. *Whittington v. State,* 669 N.E.2d 1363, 1367-69 (Ind. 1996). An abuse of the right to speak is "any expressive activity that 'injures the retained rights of individuals or undermines the State's efforts to facilitate their enjoyment.'" *Id.* at 1368 (quoting *Price*, 622 N.E.2d at 959). If the speech is "political"—that is, "if its point is to comment on government action, whether applauding an old policy or proposing a new one, or opposing a candidate for office or criticizing the conduct of an official acting under color of law"—the expression cannot constitute an abuse "unless it 'inflicts upon determinable parties harm of a gravity analogous to that required under tort law.'" *Id.* at 1369-70 (quoting *Price*, 622 N.E.2d at 964). When political speech is at issue, the State must prove that the prosecution does not materially burden the speaker's opportunity to engage in political expression. *Id.* at 1369.

B. The Trial Court's Final Instructions Failed to Define These Constitutional Limitations.

The trial court's final instructions failed to include any useful explanation of the constitutional limitations on prosecutions for intimidation.

Final Instruction No. 1 read as follows:

> This is a criminal case brought by the State against Daniel Brewington. The State of Indiana, by grand jury, has indicted the defendant with Count I, Intimidation, a Class "A" Misdemeanor, Count II, Intimidation of a Judge, a Class "D" Felony, Count III, Intimidation, a Class "A" Misdemeanor, Count IV, Attempt to Commit Obstruction of Justice, a Class "D" Felony. ...[8]
>
> **COUNT I**
> **INTIMIDATION A CLASS "A MISDEMEANOR**
>
> The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007 and February 27, 2011, Daniel Brewington did communicate a threat to another person, to wit: Dr. Edward Connor, with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act, to-wit: issuing a custodial evaluation regarding Daniel Brewington's children. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2) and constitutes a Class "A" Misdemeanor.
>
> To convict Defendant of Count I, Intimidation, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant;
> 2. communicated a threat to Dr. Edward Connor;
> 3. with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation, a Class "A" Misdemeanor, charged in Count I.

[8] Brewington is not challenging the instructions on Counts V (Perjury) or VI (Unlawful Disclosure of Grand Jury Proceedings), so they will not be reproduced.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation, a Class "A" Misdemeanor, charged in Count I.

COUNT II
INTIMIDATION OF A JUDGE, A CLASS "D" FELONY

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2009 and February 27, 2011, Daniel Brewington did communicate a threat to another person, to wit: Dearborn-Ohio County Circuit Court Judge, James D. Humphrey, with the intent that James D. Humphrey be placed in fear of retaliation for a prior lawful act, to-wit: issuing an Order regarding the dissolution of marriage between Daniel Brewington and Melissa Brewington, and James D. Humphrey is the Judge of Dearborn and Ohio County Circuit Court. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2)(b)(1)(B)(ii) and constitutes a Class "D" Felony.

To convict the Defendant of County II, Intimidation of a Judge, a Class "D" Felony, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. communicated a threat to James D. Humphrey
3. with the intent that James D. Humphrey be placed in fear of retaliation for a prior lawful act; and
4. James D. Humphrey was a judge of any court.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation of a Judge, a Class "D" Felony, charged in Count II.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation of a Judge, a Class "D" Felony, charged in Count II.

COUNT III
INTIMIDATION, A CLASS "A" MISDEMEANOR

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2009 and February 27, 2011, Daniel Brewington did communicate a threat to another

person, to wit: Heidi Humphrey, with the intent that Heidi Humphrey be placed in fear of retaliation for a prior lawful act, to-wit: that her spouse, Judge James D. Humphrey, issued an Order regarding the dissolution of marriage between Daniel Brewington and Melissa Brewington. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2) and constitutes a Class "A" Misdemeanor.

To convict Defendant of Count III, Intimidation, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. communicated a threat to Heidi Humphrey;
3. with the intent that Heidi Humphrey Connor be placed in fear of retaliation for a prior lawful act.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Intimidation, a Class "A" Misdemeanor, charged in Count III.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Intimidation, a Class "A" Misdemeanor, charged in Count III.

COUNT IV
ATTEMPT TO COMMIT OBSTRUCTION OF JUSTICE
A CLASS "D" FELONY

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women, legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007 and February 27, 2011, Daniel Brewington, acting with the culpability for the crime of Obstruction of Justice, did engage in conduct that constituted a substantial step toward the commission of the crime of Obstruction of Justice, to-wit: did intimidate and/or harass Dr. Edward Connor, who was a witness in an official proceeding. All of which is contrary to the form of the statute made and provided by I.C. 35-44-3-7 and constitutes a Class "D" Felony.

To convict the Defendant of Attempted Obstruction of Justice, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant;
2. acting with the culpability required to commit the crime of Obstruction of Justice, which is defined as:

    a. The Defendant;

b. Knowingly or intentionally;
c. Induced by threat, coercion or false statement;
d. A witness or an informant in an official proceeding or investigation, to withhold or unreasonably delay in producing any information, document or thing.

3. did intimidate and/or harass Dr. Edward Connor, who was a witness in an official proceeding;

4. which was conduct constituting a substantial step toward the commission of the crime of Obstruction of Justice.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of the crime of Attempted Obstruction of Justice, a Class "D" Felony, charged in Count IV.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Attempted Obstruction of Justice, a Class "D" Felony, charged in Count IV.

[...]

Final Instruction No. 2 read:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the government for a redress of grievance.

Final Instruction No. 3 read:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, or any subject whatever: but for the abuse of that right, every person shall be responsible.

Final Instruction No. 5 read:

The term 'threat' is defined by law as meaning an expression, by words or action, of an intention to:

1. unlawfully injure the person threatened or another person, or damage property;
2. unlawfully subject a person to physical confinement or restraint;

3. commit a crime;
4. unlawfully withhold official action, or cause such withholding;
5. unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees;
6. expose the person threatened to hatred, contempt, disgrace, or ridicule;
7. falsely harm the credit or business reputation of the person threatened; or
8. cause the evacuation of a dwelling, a building, another structure, or a vehicle.

Final Instruction No. 6 read:

The term official proceeding is defined by law as meaning a proceeding held or that may be held before a legislative, judicial, administrative, or other agency or before an official authorized to take evidence under oath, including a referee, hearing examiner, commissioner, notary, or other person taking evidence in connection with a proceeding.

None of these instructions include the First Amendment or Article I, § 9 limitations outlined above. This requires reversal. "[I]t is bedrock law that a defendant in a criminal case is entitled to have the jury instructed on all of the elements of the charged offense[.]" *Thomas v. State*, 827 N.E.2d 1131, 1134 (Ind. 2005) (citing *In re Winship*, 397 U.S. 358, 373-74 (1979)). This right is especially important in cases implicating First Amendment speech, for as the Supreme Court has noted, "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984).

The jury must be properly instructed on constitutional limitations on the State's power to punish speech. It is reversible error to punish speech without adequate findings that the speech was unprotected by the First Amendment. *Claiborne Hardware*, 458 U.S. at 931 (reversing substantial damages award when there were insufficient findings that the defendants' conduct

was not protected speech: "To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights ... that are protected by the First Amendment.").

Because the jury in this case was not properly instructed, there is a very real risk that it convicted Brewington for protected speech. The jury was instructed that it could convict Brewington by finding that he threatened to expose the alleged victims to "hatred, contempt, disgrace, or ridicule," with "the intent that [they] be placed in fear of retaliation for a prior lawful act." *See* Final Instruction Nos. 1, 5. Under the First Amendment, Brewington can expose anyone he wishes to "hatred, contempt, disgrace, or ridicule" for any reason, so long as his statements are not intentionally false. Because the jury was not instructed on this requirement, he may have been convicted without the State proving this.

Additionally, with respect to the statements that allegedly threatened violence, the jury was not instructed on the nature of threats which are punishable ("true threats") and statements that are protected speech (e.g., "unpleasantly sharp attacks no government and public officials", etc.). *Watts*, 394 U.S. at 708.

Finally, with respect to the Indiana Constitution, the jury was not instructed on the doctrine of political speech, and therefore was not instructed as to the State's heightened burden to punish such speech.

The only instructions the jury received on the constitutional provisions were verbatim repetitions of the First Amendment and Article I, § 9. A lay jury could not possibly divine these very specific standards from the bare text of these provisions. Proper instructions on the specific requirements were necessary to protect Brewington's constitutional rights.

The trial court declined to give more specific (but still inadequate) instructions requested by Brewington, concluding that it would be sufficient for counsel to outline the specific constitutional principles in closing arguments. (Tr. 443-44). This approach was insufficient. First, it failed to apprise the jury that the State was specifically required to prove these constitutional elements. *Cf. Claiborne Hardware*, 458 U.S. at 931. Second, arguments of counsel do not carry the same authority as instructions from the judge. *See* Final Instruction No. 7 ("The instructions of the court are your best source in determining the law.") (App. 18). Third, the jury was given the court's instructions during deliberations—see Final Instruction No. 27 (App. 19)—but did not have closing arguments available.

Fourth, any statement of the law in a closing argument is likely to be incomplete. Legal arguments in final summations are not as carefully crafted as jury instructions. In this case, counsel was not told that they were responsible for instructing the jury on the constitutional issues until right before closing arguments. There was not sufficient time to prepare an argument that included these explanations for the jury.

Fifth, this approach makes it difficult to ensure the law is properly explained to the jury. There is an obvious incentive for each side to argue the law in a favorable light. Or the attorneys might not argue the law correctly, intentionally or not. If one side explains the law incorrectly, it becomes a "he said, she said," without a definitive ruling from the judge. When there is such a disagreement, it is the judge's role to evaluate the arguments and rule definitively.

In this case, the State made at least three incorrect statements of the law in its closing argument. First, the State argued that the constitutional limitations that apply to the counts of intimidation did not apply to the count for attempted obstruction of justice. (Tr. 521-22). Second, the State misstated the "fighting words" doctrine, which it contended exempted Brewington's

speech from First Amendment protection. (Tr. 506-07). *Compare* Tr. 506 (quoting *Giles v. State*, 531 N.E.2d 220 (Ind. Ct. App. 1988)) *with Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Chaplinsky v. New Hamphsire*, 315 U.S. 568, 574 (1942)).[9] Third, the State argued that lies are not protected speech. (Tr. 505). The Supreme Court has never held that lies are not protected by the First Amendment; rather, there must be some "additional elements that serve to narrow the speech that may be punished." *U.S. v. Alvarez*, 617 U.S. 1198, 1200 (9th Cir. 2010).[10] The Court has held that some lies must be protected under the First Amendment: "[E]rroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Sullivan*, 376 U.S. at 271-72.

The failure to instruct the jury on the applicable constitutional requirements created a significant risk that Brewington was convicted for constitutionally protected speech. The Court should therefore reverse Brewington's convictions, and, for reasons elaborated more fully in § I.D *infra*, enter a verdict of acquittal. If not, the Court should at least remand for a new trial that ensures Brewington's constitutional rights are adequately protected.

C. The Court Should Reverse Brewington's Convictions Due to Erroneous Instructions Despite Trial Counsel's Insufficient Contemporaneous Objections.

With one exception, Brewington's trial counsel failed to object to the final instructions or to offer instructions that explained the constitutional limitations. Brewington's trial counsel

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[9] Not only was the State's description of the "fighting words" doctrine wrong, but the State did not raise this argument until rebuttal. Thus, Brewington had no opportunity to respond.

[10] The Supreme Court granted *certiorari* in *Alvarez*. 132 U.S. 457 (2011). Oral argument was held on February 22, 2012. Early in the argument, Justice Kennedy cast significant doubt on the government's assertion that there is no First Amendment value in a knowingly false statement: "[This Court] has said it often but always in context where it is well understood that speech can injure. ... You think there's no value to falsity. But I—I simply can't find that in our cases, and I—I think it's a sweeping proposition to say that there's no value to falsity." Oral Argument, *U.S. v. Alvarez*, Case No. 11-210 p. 5 line 8-16 (February 22, 2012).

offered one instruction on Article I, § 9. Defendant's Proposed Final Instruction No. 5, based on *Whittington*, 699 N.E.2d at 1367, read:

> You, as the trier of fact, are to decide whether the statements the accused is accused of saying fall under the protections of Art. I, Sec. 9 of the Indiana Constitution, which states:
>
> [Omitted]
>
> This requires a two step process. You must first decide whether a state action has, in the concrete circumstances of the case, restricted the accused's opportunity to engage in expressive activity. Second, if it has, you must decide whether the restricted activity constitutes an "abuse" of the right to speak under the Indiana Constitution. You must first determine whether the State's action in the case restricted the accused's opportunity to engage in expressive activity. Under the Indiana Constitution, expressive conduct is to be given a broad interpretation. It extends to any subject whatever, and reaches every conceivable mode of expression. Expressive activity is restricted when the State imposes a direct and significant burden on the person's opportunity to speak their mind, in whatever manner the speaker deems appropriate.

(App. 38).

The State objected to this instruction:

> Your honor again, [Whittington] versus state is a case dealing with the first amendment process. We don't believe that 5 is really an accurate statement of that case. Um, there's a lot more to that process than indicated in an instruction and as such we don't think it will be helpful to the jury but more confusion. We have no objection to the Defense making arguments along the lines of what's stated in [Whittington] but we believe this instruction would be inappropriate under those circumstances.

(Tr. 442-43).

Brewington's counsel responded:

> Judge, with regard to Defendant's proposed 5, I believe it is correct statement of the law in the State of Indiana and it is obviously cited from the [Whittington] case before the Indiana Supreme Court in 1996 and ... I guess I would argue that the current status and the most recent (indiscernible) interpretation that our Court or Supreme Court has given. Um, I believe it would be helpful for the jury.

(Tr. 443).

To the dismay of Brewington, the trial court declined to give this instruction, even though it conceded that it accurately stated the law, and instead relied on counsel to explain this constitutional principle in closing argument. (Tr. 443-44). This was insufficient. Trial counsel made a contemporaneous objection and offered an appropriate instruction explaining the constitutional requirements. This decision requires reversal, even without the other instructional errors which were not objected to. *Thomas*, 827 N.E.2d at 1134.

While Defendant's Proposed Final Instruction No. 5 was an accurate statement of the law, it was incomplete as to the requirements of Article I, § 9. Moreover, it did not include the requirements under the First Amendment. Trial counsel did not otherwise object to any of the court's other final instructions. The Court should nevertheless reverse Brewington's convictions on Counts I-IV. First, giving these instructions was fundamental error. Second, the failure to contemporaneously object constituted ineffective assistance of counsel.

1. The instructions were fundamental error.

If a party does not offer a contemporaneous objection to an instruction, the error is waived on appeal unless it is "fundamental error." *Lacy v. State*, 438 N.E.2d 968, 970-71 (Ind. 1982). "The 'fundamental error' rule ... applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). The failure to include the constitutional elements for intimidation prosecutions met these requirements for fundamental error.

These omissions violated basic constitutional principles. It is well settled that, in addition to the statutory elements of the crime, the State is required to prove that the conduct was not

protected speech. For statements that allegedly threaten violence, the State must prove that the statements were true threats, as opposed to political hyperbole or other heightened rhetoric. *Watts*, 394 U.S. at 708. For allegedly defamatory statements, the State must prove that Brewington's statements were false, and that Brewington intended to make false statements. *Gertz*, 418 U.S. at 342, 347 (State must prove culpability with respect to falsity of allegedly defamatory statement); Ind. Code § 35-4-2-2 (if one level of culpability required for an element of offense, it is required for every element); Ind. Code § 35-45-2-1 (requiring intentional conduct). With respect to both theories, Brewington's statements are protected if they are expressive (on any subject), and are not an abuse of the right to speak; and if the statements are political speech, that the state must prove resulting harm equivalent to a tort. *Whittington*, 669 N.E.2d 1367-70. Judge Humphrey and Heidi Humphrey, as an advisor to the Ethics and Professionalism Committee for the Indiana Supreme Court, were public officials.

The potential for harm was great. The erroneous instructions permitted the jury to convict Brewington for constitutionally protected speech. Both the U.S. and Indiana Constitutions cherish free expression and give it robust support. *Bose Corporation*, 466 U.S. at 503-04 (noting the importance of free expression to individual liberty and "to the common quest for truth and the vitality of society as a whole"); *Price*, 622 N.E.2d 961-63 (holding that political speech is a core constitutional value entitled to heightened protection).

The failure to properly instruct the jury denied Brewington fundamental due process. "[I]t is bedrock law that a defendant in a criminal case is entitled to have the jury instructed on all of the elements of the charged offense[.]" *Thomas*, 827 N.E.2d at 1134 (citing *Winship*, 397 U.S. at 373-74).

In *Lacy*, the Indiana Supreme Court addressed a claim of fundamental error for failure to instruct the jury on the elements of armed robbery. 438 N.E.2d at 970. The trial court gave a preliminary instruction listing the elements, but omitted them in the final instructions. *Id.* The defendant did not object to the final instructions. *Id.* The court held that there was no fundamental error because the essential elements were included in the preliminary instructions. *Id.* at 971. However, the court stated that it would have been fundamental error if no instruction on the elements had been given. *Id.*

Lacy discussed *Screws v. U.S.*, 325 U.S. 91 (1945). *Screws* involved an appeal from a conviction for depriving another of constitutional rights while acting under color of law. 325 U.S. at 92. The Supreme Court construed the statute to require proof that the defendant had the specific intent of depriving the victim of a constitutional right that had been previously recognized. *Id.* at 104. The trial court did not instruct the jury on the specific intent requirement, and the defendants did not object. *Id.* at 106-07. The Supreme Court excused the failure to object because the failure to instruct the jury on an essential element of the charge was fundamental error. *Id.*

Lacy distinguished *Screws* because Lacy's jury was instructed on the essential elements, albeit not in the final instructions. *Lacy*, 438 N.E.2d at 971. However, *Lacy* recognized that *Screws*—which is binding precedent—holds that it is fundamental error to completely fail to instruct the jury on the essential elements of the offense. *Id.*

In this case, the trial court's failure to instruct the jury on the constitutional elements of the intimidation charges—the "true threat" requirement, the intentional falsity requirement, and the Article I, § 9 requirements—was fundamental error. Unlike in *Lacy*, the instructions were not given elsewhere. Therefore, like in *Screws*, this requires reversal.

2. Trial counsel's failure to object to the court's instructions and offer appropriate instructions constituted ineffective assistance of counsel.

Even if the erroneous instructions were not fundamental error, Brewington's convictions should be reversed because he received ineffective assistance of counsel.

There is a two-part test to determine if a defendant received ineffective assistance of counsel: "First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have 'counsel' guaranteed by the Sixth Amendment. ... Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Taylor v. State*, 922 N.E.2d 710, 716 (Ind. Ct. App. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). Claims of ineffective assistance of counsel are generally raised on a collateral attack, but when the issues can be evaluated on the face of the trial record—such as failure to tender or object to an instruction or to inadmissible evidence—they may be raised on direct appeal. *Woods v. State*, 701 N.E.2d 1208, 1211 (Ind. 1998). In order to establish ineffective assistance for failure to offer or object to an instruction, the defendant must show that he would have been entitled to the proposed instruction or that an objection to the improper instruction would have been sustained. *Potter v. State*, 684 N.E.2d 1127, 1132-35 (Ind. 1997).

Brewington's trial counsel's failure to offer instructions that adequately explain the constitutional requirements and to object to the trial court's insufficient instructions meets these requirements.

Both this Court and the Indiana Supreme Court have held that failure to object to an improper instruction on the elements of criminal charges and failure to offer proper instructions constitutes ineffective assistance. In *Palmer v. State*, 573 N.E.2d 880 (Ind. 1991), the supreme

court reversed the trial court's denial of post-conviction relief based on trial counsel's failure to object to an erroneous voluntary manslaughter instruction. "We agree ... that Palmer's counsel's failure to object to and appeal from this incorrect instruction rendered their assistance ineffective. Palmer was entitled to have the jury instructed on such an essential rule of law." *Palmer*, 573 N.E.2d at 880.

In *Walker v. State*, 779 N.E.2d 1158 (Ind. Ct. App. 2002), this Court reversed the denial of post-conviction relief when trial counsel failed to object to an instruction that erroneously explained the level of intent required for accomplice liability for attempted murder. 779 N.E.2d at 1159. On first prong. this Court found that an objection definitely would have been sustained, because the Fourteenth Amendment requires that the State prove every element of a criminal offense beyond a reasonable doubt. *Id.* at 1161. The court also noted that our supreme court has held that "[f]ailure to object to the incorrect instruction cannot be attributable to trial tactics." *Id.* (quoting *Perez v. State*, 748 N.E.2d 853 (Ind. 2001)). On the second prong, this Court found that the defendant proved prejudice because "had the jury been told that it was not required to presume Walker had the same intent as Wrencher [the accomplice who pulled the trigger], there exists a reasonable probability that Walker might not have been convicted of the crime charged." *Id.* at 1161-62.

In *Taylor*, this Court reversed the denial of post-conviction relief due to trial counsel's failure to object to an erroneous felony murder instruction that did not list the elements of the underlying felony. *Taylor*, 922 N.E.2d at 711-12. This Court found counsel's performance constitutionally defective even though counsel decided not to challenge the State's allegation of robbery for strategic reasons. *Id.* at 718. In fact, Taylor's trial counsel admitted that this was an oversight, not a matter of trial tactics. *Id.*

This Court also found that the error was prejudicial: "It was Taylor's right to have the jury instructed on the elements of the felony underlying the felony murder allegation. ... [This] failure 'left [the jurors] to fend for themselves and cobble together whatever robbery elements they could. As a result, Taylor was denied fundamental due process.'" *Id.* at 718 (internal citations omitted). "[H]aving never been instructed on any of the elements of robbery, it is impossible to say whether the jury would have found Taylor guilty of robbery. A jury cannot be asked to find guilt without an instruction on the elements of the crime." *Id.* at 719. "Harmless-error analysis has no place where, as here, an essential instruction on the underlying offense is missing entirely." *Id.* This Court found that the error likely contributed to the verdict, because it is impossible to guess what a properly instructed jury might have decided. *Id.*

In this case, Brewington's trial counsel's failure to object fell below reasonable standards. Had counsel objected to the instructions and offered instructions that accurately described the constitutional limitations, the trial court would have been required to sustain the objection and give the proffered instructions. And if the trial court had rejected the request, it would have been reversible error. *Thomas*, 827 N.E.2d at1134. As in the cases cited above, the failure to object to incorrect instructions cannot be attributed to trial tactics. *Walker*, 779 N.E.2d at 1161.

This is especially so in this case, where one of trial counsel's principle defenses was that Brewington's statements were protected speech. In his opening statement, counsel stated, "[T]he things that he wrote are political opinions. There are plenty of people in this world that don't like the way custody decisions are made in this country, in this state, that criticize it all the time. There are plenty of people in this world who don't think our criminal justice system operates properly and criticize it all the time." (Tr. 28). Counsel argued in closing, "[I]f we only defend those we believe [are] correct about everything when they want to express their opinions, we've

lost. We're done." (Tr. 484). "This case, ladies and gentlemen, is about free speech[.] ... It is a very dangerous thing ... for the government to be able to criminalize speech." (Tr. 486). After reading the text of the First Amendment, counsel continued: "[P]art of this [] amendment, ... is the right to petition the government for redress. It can be argued ... that many, many, many of Mr. Brewington's blogs were petitions to the government, petitions to the people and saying the name of it—Dan's adventures in taking on family court[]." (Tr. 488-89).

It is inconceivable that counsel's failure to object to the improper instructions, which completely failed to elaborate on the constitutional limitations placed on the intimidation statute was a trial tactic, especially because free speech was central to his trial strategy.

Additionally, trial counsel misstated the First Amendment limitations. For example, he stated Brewington could be guilty of intimidation if his intention in making these statements was to "retaliate for a prior lawful act." (Tr. 482). The First Amendment requires more than that the speaker intended to retaliate for a prior lawful act. The State must prove that the statement was either a true threat of violence or defamatory, as defined by the case law. *See supra* pp. 19-21.

Failing to object to the erroneous instructions and submit proper instructions, and misleading the jury about the constitutional requirements was constitutionally deficient. This deficient performance was prejudicial. Similar to *Taylor*, where the jury was not instructed on the elements of the felony underlying the felony murder charge, Brewington's jury was not instructed on the constitutional limitations underlying the intimidation charges. Just as the jury in *Taylor* was left to guess the elements of robbery, the jury here was left to guess the constitutional elements. There is no way to know whether a properly instructed jury would have found that Brewington's statements were constitutionally protected, or whether the speech was criminal. *See Taylor*, 922 N.E.2d at 719-20. Thus, Brewington has shown the requisite prejudice.

Brewington's convictions on Counts I-IV should be reversed because the jury was not properly instructed on the constitutional limitations on intimidation charges. Moreover, for the reasons discussed in the following section, this Court should enter a judgment of acquittal.

D. There Was Insufficient Evidence to Support the Convictions on Counts I-IV.

Brewington's convictions on Counts I-IV should also be reversed because there was insufficient evidence to prove that his speech was not protected by the First Amendment. Appellate courts must review these issues independently, with no deference to the jury verdict. The State failed to prove beyond a reasonable doubt that Brewington's statements were true threats or defamatory. Brewington's convictions should be reversed, and this Court should enter judgment of acquittal.

1. Standard of review.

This Court generally reviews claims of insufficient evidence under a deferential standard. *Boggs v. State*, 928 N.E.2d 855, 864 (Ind. Ct. App. 2010). However, when the case raises a First Amendment issue, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (quoting *Bose Corp.*, 466 U.S. at 499). *See Journal-Gazette Co. Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 454-56 (Ind. 1999) (holding that this requirement is binding on Indiana appellate courts). This requirement applies when the case raises any First Amendment issue, not just whether allegedly defamatory statements were made with actual malice. *See Bose Corp.*, 466

U.S. at 505-07 (citing cases applying independent review to issues involving "fighting words", "inciting or producing imminent lawless action", obscenity, and child pornography).

The requirement of independent review is necessary because

> the jury's application of [First Amendment standards] is unlikely to be neutral with respect to the content of the speech and holds a real danger of becoming an instrument for the suppression of those vehement, caustic, and sometimes unpleasantly sharp attacks ... which must be protected if the guarantees of the First And Fourteenth Amendments are to prevail.

Id. at 510 (internal citations omitted).

"The question whether the evidence in the record in a [First Amendment] case [meets the constitutional standards of proof] required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Id.* at 511. This is true independent review; no deference is given to the jury's findings. *Id.* at 506-07.

2. The State did not prove that Brewington intended to threaten violence.

The State was required to prove beyond a reasonable doubt that Brewington's statements were "true threats." *Watts*, 394 U.S. at 708. This means that the State was required to prove that Brewington intended his statements and conduct to "place[] the victim[s] in fear of bodily harm or death." *Black*, 538 U.S. at 360. The State failed to meet this burden.

There was conflicting evidence as to whether the alleged victims even felt that Brewington was threatening violence. The alleged victims testified at trial that they felt threatened. (Tr. 166-67, 257, 283, 286). However, their conduct prior to Brewington's arrest belied that contention. None of the alleged victims took any steps to stop Brewington. Judge Humphrey did not attempt to control Brewington through the inherent powers of his court. If Brewington's conduct toward Dr. Connor was so intimidating that it constituted a true threat,

Judge Humphrey could have ordered Brewington to stop, backed with the power of contempt. But he did not. Dr. Connor could have sought a restraining order, but he did not. Brewington's ex-wife did seek a restraining order to prohibit Brewington from posting information about the divorce proceedings on the Internet, which Judge Humphrey denied on First Amendment grounds. (Tr. 220-23; Exs. 127, 130). If Dr. Connor had sought a restraining order on the basis of true threats, the First Amendment would not have limited Judge Humphrey.

Despite this, the State contended that Brewington was such a threat that it needed to step in and stop him using the harshest means possible. However, the alleged victims' failure to take any less drastic steps shows Brewington was not an immediate threat. Instead, they were content to wait out the long process of an investigation, grand jury proceedings, and prosecution. Dr. Connor testified that he was concerned about Brewington's conduct at least as early as July 2008 (Tr. 115-16), but the grand jury proceedings did not begin until February 2011. This delay shows that the alleged victims were not concerned about an immediate threat from Brewington, but rather wanted to punish him for not giving them the respect they felt they deserved. The First Amendment prohibits the State from criminalizing disrespect. *Watts*, 394 U.S. at 708; *Black*, 538 U.S at 358. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not with perfect good taste, on all public institutions." *Bridges v. California*, 314 U.S. 252, 270 (1941).

Even assuming the alleged victims felt threatened, this alone is insufficient to carry the State's burden. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 925 (1982) ("There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others."). Both

the First Amendment and Ind. Code § 35-45-2-1 require that the State prove that Brewington intended his statements to be threatening. *Black*, 538 U.S at 360; Ind. Code § 34-45-2-1. There is no evidence that Brewington intended his statements to be threatening, rather than strident complaints about public officials and the functioning of the family court system.

Most of Brewington's allegedly threatening statements were essentially name-calling, such as calling Dr. Connor and Judge Humphrey "child abusers", "evil", "crooked", etc. This sort of name-calling and harsh language is not a threat of violence. The State also introduced evidence that Brewington explicitly threatened to file lawsuits, criminal complaints, and complaints with professional boards—but again, no threats of violence.

The State introduced evidence of statements and conduct that it contended were threatening, but viewed in context, these statements and conduct were not "true threats."

The State introduced a comment from Brewington's Facebook page, in which he stated, regarding the divorce proceedings, "This is like playing with gas and fire, and anyone who has seen me with gas and fire know that I am quite the pyromaniac." (Ex. 140 p. 7). This is not a threat to commit arson. Rather, it was a metaphor—that Brewington intended to zealously pursue his position in the divorce proceedings.

Watts involved a similar expression. Watts was convicted for stating, at an anti-Vietnam demonstration, "now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706. The Supreme Court reversed his conviction, finding that this was not a true threat: "We agree with the petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the

statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.*

Similarly here, Brewington's statement that this is "like playing with fire and gasoline" was not a threat. He used the phrase metaphorically. Taken in context, especially considering the forum, this is nothing but an inartful metaphor.

The State also discussed a blog post which it characterized as an expression from Brewington that Dr. Connor "made me so mad I wanted to beat [him] senseless" and that Dr. Connor's custody evaluation "[made] me want to punch Dr. Custody Evaluation in the face." (Ex. 198). This is not a fair or accurate characterization of Brewington's post. The whole post must be read in context.

This post was a response to several of Brewington's readers who expressed concern that Brewington's criticisms of Dr. Connor could hurt Brewington's efforts to gain custody. Brewington did not state that Dr. Connor made him so mad he wanted to punch Dr. Connor in the face. He said he had never actually written anything like that. Rather, Brewington explained that *if* he wanted to vent his frustration about Dr. Connor's services in that manner, he should be able to without risking the loss of his children. He drew an analogy to someone being upset with a plumber he hired and writing a similar rant about the plumber on the Internet. (Ex. 198). Brewington noted that it was not fair to treat similar "rants" about service providers differently: "No one has ever lost the ability to see their own children because they wrote an angry review of a plumbing company. Why should someone's parenting abilities be questioned if they write an angry review of a custody evaluator? That's what happened to me; except I have never written about any thoughts of causing physical harm to anyone." (Ex. 198). Nothing about Brewington's statement suggests that he actually intended to assault Dr. Connor. It is clear that he was doing

nothing more than venting his frustration. Even had he stated that Dr. Connor made him so angry that he wanted to punch him in the face, this would not be a true threat of violence, because it does not articulate an actual threat to assault Dr. Connor, which the State would be required to prove under the First Amendment. *Black*, 538 U.S. at 359-60.

The State also introduced a letter that Brewington sent to Dr. Connor in which he wrote: "The game is over Dr. Connor." (Ex. 49). This was not a threat of violence. This letter requested that Dr. Connor release his entire case file. Brewington only proposed filing a petition for contempt against Dr. Connor. "The game is over" cannot be read as anything other than a threat that there would be *legal* consequences if Dr. Connor did not release the case file.

The State introduced a blog post in which Brewington discussed watching Dr. Connor testify in a different case in Kentucky. (Ex. 200). Brewington described Dr. Connor as "surprised" to see Brewington there, and "a little nervous." However, Brewington explicitly stated that he was not there to threaten or intimidate Dr. Connor, and that he "would not want to cause physical harm" to Dr. Connor. Rather, he stated that he was there "taking a legal approach to getting a better perspective of how Dr. Connor operates in other situations." (Ex. 200). At the time of the hearing in Kentucky, Brewington's case was still on appeal. His petition for transfer was pending. *See Brewington v. Brewington*, 940 N.E.2d 832 (Ind. 2010) (petition for transfer denied December 16, 2010). Had Brewington's appeal been successful, he would have had another opportunity to challenge Dr. Connor's evaluation in a subsequent hearing. The hearing he attended involved issues similar to Brewington's divorce. In both cases, Dr. Connor found that joint custody was not recommended because the parents had difficulty communicating, but Dr. Connor treated that father quite differently from Brewington. (Ex. 200). There is nothing wrong with watching an expert witness testify in another case to prepare your own case,

something lawyers do frequently. Brewington stated his explicit intention, and it was not to threaten or intimidate Dr. Connor.

The State also presented evidence that Brewington posted information on the Internet concerning where the alleged victims lived. Regarding Dr. Connor, Brewington wrote about Dr. Connor's mortgage with "Fifth Third Bank on his house in the Triple Crown subdivision in Union, Kentucky." (Ex. 199). Regarding James and Heidi Humphrey, Brewington posted a request that people who shared his concerns with Judge Humphrey's conduct send a letter to the "Dearborn County Advisor" to the Indiana Supreme Court "Ethics and Professionalism Committee." (Tr. 249). Brewington identified the advisor as Heidi Humphrey, and listed the Humphrey's home address (but did not identify her as Judge Humphrey's wife or that as their home address). (Tr. 250). The State introduced three letters that individuals sent to Heidi Humphrey. (Exs. 71, 77, 87).

The State did not present any evidence that these Internet postings were intended as threats of violence. It was not sufficient for the State to show that the individuals may have felt threatened. The State's burden was to prove that Brewington intended to threaten violence.

3. The State did not prove that Brewington's statements were defamatory.

In order to convict Brewington under Ind. Code § 35-45-2-1(c)(6) & (7) (for exposing the alleged victims to hatred, contempt, disgrace or ridicule, or falsely harming their business reputations), the State was required to prove that Brewington's statements were intentionally false. The State did not meet that burden.

Many of Brewington's statements could not be defamatory because they did not make falsifiable claims. "Under the First Amendment, there is no such thing as a false idea." *Gertz*,

418 U.S. at 339. This does not mean that all statements phrased as opinions are protected by the First Amendment. Rather, this means that "statements ... must be provable as false before there can be liability under state defamation law[.]" *Milkovich*, 497 U.S. at 19. If a statement implies a fact or facts, it can be falsifiable, and subject to liability. *Id.* at 18-19. "Thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable." *Id.* at 20.

The Court must discard all of Brewington's statements that do not make falsifiable claims. Brewington's statements that Dr. Connor and Judge Humphrey are "evil" must be disregarded. How could the State prove that these statements were false? There is no objective "good" against which to judge them, so there is no way to prove whether Brewington was lying. Similarly, Brewington's statement that Dr. Connor is a "pervert" must be discarded. The State could not prove that Brewington falsely called Dr. Connor a pervert because there are no objective sexual mores against which to judge Dr. Connor.[11]

Brewington's statements that Dr. Connor and Judge Humphrey were "child abusers" cannot subject him to liability. These statements were hyperbole. Brewington explained that Dr. Connor and Judge Humphrey were responsible for him losing contact with his children, which caused the children harm. Thus, Dr. Connor and Judge Humphrey were "child abusers." This may not be the most civil way to criticize their actions, but it is protected by the First Amendment. No one could reasonably read these statements as allegations that Dr. Connor and Judge Humphrey actually physically, sexually, or otherwise abused children. This is akin to

[11] The State could have challenged the facts underlying this allegation: that Dr. Connor asked women, but not men, detailed and explicit sexual questions. (Ex.197). This falsifiable claim was unchallenged. The conclusion that this made Dr. Connor a pervert is not falsifiable.

Vietnam War protesters calling Presidents Johnson and Nixon "baby killers." No one reasonably took that to mean the President murdered children. Similarly, in *Letter Carriers v. Austin*, the Supreme Court held that a union newsletter calling a scab a "traitor" was not defamatory; the term was "mere rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." 418 U.S. 264, 285-86 (1974). For the same reason, Brewington calling them "crooked", "corrupt", and "dangerous" is also protected speech.

Finally, Brewington's statements that Dr. Connor and Judge Humphrey were "criminals" were not intentionally false. Brewington accused Dr. Connor of being a criminal because (1) Dr. Connor refused to release the case file, which Brewington believed he was entitled to under the terms of their contract and Kentucky and Indiana law (*E.g.*, Exs. 61, 67, 179); (2) Dr. Connor made misrepresentations to the court (*E.g.*, Ex. 192); and (3) Dr. Connor was not licensed to practice in Indiana at the time he performed the evaluation. (*E.g.*, Ex. 67). Brewington called Judge Humphrey a criminal because Judge Humphrey was aware of Dr. Connor's misdeeds and refused to do anything about it. (*E.g.*, Ex. 188).

Brewington may have been wrong that this was criminal behavior, but he was not intentionally lying. Brewington's belief was honest and in good faith. This is why Brewington filed so many motions to have Dr. Connor removed from the case, why Brewington sent so many letters to Dr. Connor demanding release of the file, and why Brewington made so many complaints to authorities in Kentucky and Indiana. (*See supra* pp. 8-9 and evidence cited therein). Brewington's relentlessness demonstrates his good faith belief that the conduct of Dr. Connor and Judge Humphrey was criminal, even if it was mistaken.

The State did not present sufficient evidence that Brewington made any intentionally false statements.

The State did not meet its constitutional burden in proving that Brewington's statements were intimidating. Brewington's statements were neither "true threats" nor intentionally false. The Court should therefore reverse Brewington's convictions on Counts I through IV. Furthermore, because this Court is exercising its independent review, there is no need to have the jury reconsider these issues under the proper standard. Rather, the Court should enter a verdict of acquittal.

II. Count V

In Count V, Brewington was convicted of perjury. Brewington's allegedly perjured statements were made during his grand jury testimony. Brewington was asked a series of questions his requests for readers to write letters concerning Judge Humphrey's handling of his divorce case to Heidi Humphrey—identified as an "Ethics and Professionalism advisor" to the Indiana Supreme Court "Ethics and Professionalism Committee"—and listed her home address (but did not identify it as her home address). The perjury charge specifically related to his statement that he was not sure whether Heidi Humphrey was Judge Humphrey's wife when he first posted the request.

There was insufficient evidence for this conviction. This Court has stated the standard of review as follows:

> When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. We do not reweigh the evidence or assess witness credibility. We consider conflicting evidence most favorably to the trial court's ruling. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Boggs, 928 N.E.2d at 864 (internal citations omitted).