NO.________

# In the Supreme Court of the United States

DANIEL BREWINGTON,
Petitioner,
v.

STATE OF INDIANA,
Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court of Indiana*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Indiana Supreme Court opinion, authored by Justice Loretta H. Rush, stated Petitioner's indictments of Intimidation of a Judge and Attempted Obstruction of Justice of a divorce proceeding, were based on unspecified general conduct over the course of 18-43 months; the prosecution made a "plainly impermissible" criminal defamation argument; the jury instructions on the First Amendment and Article I, Section 9 of the Indiana Constitution were "constitutionally incomplete" ; the State failed to make a distinction between threats to safety and threats to reputation, that it was "quite possible that the impermissible criminal-defamation theory formed at least part of the basis for the jury's guilty verdicts, and the general verdict cannot indicate otherwise," thus compelling the Court to find a "general-verdict error," while at no point claiming any error was harmless; however the Court denied Brewington relief by asserting the errors were not fundamental because the errors were invited by what the Court deemed to be Brewington's trial strategy. The Indiana Supreme Court deemed the following actions as trial strategy that invited the error; defendant exercising his Fifth Amendment Right not to testify, defense counsel's decision not to offer lesser harassment jury instructions, and defense counsel's attempt to "exploit the prosecutor's improper reliance on 'criminal defamation.'" All of the above arguments as why not to grant relief from the fundamental/plain errors to help protect and encourage the exercise of free speech were not raised by the State but were made sua sponte by the Indiana Supreme Court.

## THE QUESTIONS PRESENTED ARE:

Whether the Indiana Court's sua sponte application of the State's Invited Error Doctrine violates the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

Whether defense counsel performance met the standards required by *Strickland*.

Whether the entire criminal proceedings containing multiple fundamental errors rose to the level of manifest injustice, thus making a fair trial impossible.

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## PETITION FOR A WRIT OF CERTIORARI

Daniel Brewington respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court for the State of Indiana that violates the First, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and is contrary to this Court's decision in *Russell v. United States.*

### Opinions below

The Order denying Rehearing from the Supreme Court of Indiana, (App. A, *infra* app.1) was entered on May 1, 2014. The Indiana Supreme Court opinion in *Brewington v. State* was entered on May 1, 2014 (App. C, *infra* app.5)

### Jurisdiction

The decision of the Indiana Supreme Court was entered on May 1, 2014. On June 2, 2014 a timely Petition for Rehearing was filed with the Indiana Supreme Court. On June 4, 2014, a Motion for Disqualification of the Honorable Justice Loretta Rush was filed with the Indiana Supreme Court. On July 31, 2014 the Indiana Supreme Court denied Petition for Rehearing. On July 31, 2014 Justice Rush declined to recuse from case and Petition for Disqualification was subsequently denied. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### The First Amendment to the United States Constitution:

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 peaceably to assemble, and to petition the government for a redress of grievances.

### The Fifth Amendment to the United States Constitution:

No person…shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

### The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**The Fourteenth Amendment to the United States Constitution, Section 1:**

All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without Due Process of law; nor deny to any person within its jurisdiction the Equal Protection of the laws

## STATEMENT OF THE CASE

### Introduction

This case concerns what is arguably our nation's most coveted right; a citizen's right to harshly criticize public officials, including judicial officers. What separates this case from other First Amendment cases brought before this Court is the prosecution convened a grand jury without evidence of a threat. The prosecutor convened a grand jury to investigate what the prosecutor told a grand jury were "over the top", "unsubstantiated statements" about a local judge and court psychologist under the guise of criminal Intimidation. The Indiana Supreme Court found the prosecutor's "criminal defamation" argument was constitutionally impermissible yet the Court sifted through the trial record and defined what aspects of Petitioner's actions appeared to constitute "hidden" and "implied" threats and upheld Petitioner's convictions. The decision stripped the Petitioner of the right to a trial by jury and the ability to contest the new findings until now. Despite upholding Petitioner's convictions, the opinion of the Indiana Supreme Court stated the Petitioner's trial and conviction suffers from constitutional and structural errors, including unconstitutionally vague grand jury indictments, general verdict error, and prosecutorial misconduct. Even more astounding the Court acknowledges errors are not harmless. The Indiana Supreme Court wrote the Petitioner's intimidation of a judge, under I.C. 35-45-2-l(a)(2)(b)(l)(B)(ii) and attempted obstruction of justice of a divorce proceeding, under I.C. 35-44-3-4, indictments stemmed from unspecified general conduct over the course of an eighteen to forty-three

month period. The opinion also states the prosecution presented a "plainly impermissible" criminal defamation argument and the prosecution's failure to specify what conduct of the Petitioner's constituted threats to safety, coupled with what the Indiana Supreme Court deemed "constitutionally incomplete" jury instructions, led to a general-verdict error. The same "plainly impermissible" argument renders the grand jury indictments constitutionally defective as well. The Indiana Supreme Court complimented Petitioner for his understanding of First Amendment principles in his pro se motion to dismiss the case due to the defective indictments yet praised Petitioner's defense counsel for developing a trial strategy that made no attempt to ascertain what actions of the Petitioner during the course of a three and a half year time frame constituted criminal conduct. Despite the existing fundamental/structural errors[1] acknowledged in the opinion of the Indiana Supreme Court, the Indiana Court ruled Petitioner waived his rights to relief from these errors because Petitioner's counsel invited the error by implementing a strategy that was, what the Court deemed, a "deliberate, and eminently reasonable strategic, choice." Making this case even more abnormal is the specific illegal conduct of the Petitioner was not defined until the Indiana Supreme Court defined what conduct it deemed as

[1] "Like the federal 'plain error' doctrine, [Indiana's] 'fundamental error' rule sometimes affords relief to claimants who did not preserve an issue before the trial court and seek to raise it for the first time on appeal." *Smylie v. State*, 823 N.E.2d 679, 689 n. 16 (Ind.2005)

"hidden threats"; eliminating the ability to develop any plausible defense. The fact the opinion in *Brewington v. State* by the Indiana Supreme Court acknowledges the presence of fundamental error, while claiming the error was not harmless and affected the Petitioner's substantial rights, gives this Court the authority to review the Petitioner's claims as plain error[2] regardless of whether the issue was properly preserved during trial. One example of plain error is the Indiana Supreme Court's finding that Petitioner's indictments "do not allege any particular act or statement as constituting intimidation, instead alleging generally that his conduct as a whole" over a 18-43 month timeframe caused the criminal indictments. This cannot stand.

> "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point, and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before

[2] *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508, 61 USLW 4421 (1993)A court of appeals has discretion under Rule 52(b) to correct "plain errors or defects affecting substantial rights" that were forfeited because not timely raised in the district court, which it should exercise only if the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U.S. 157, 160 56 S.Ct. 391, 80 L.Ed. 555 (1936)

> now to condemn just such a practice in a quite different factual setting. *Cole v. Arkansas*, 333 U.S. 196, 201-202. And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed." *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

The vague general conduct indictments in the current case creates the problems expressed by the concerns of the High Court in *Russell*. It is crucial for the United States Supreme Court to understand the Petitioner made every effort to bring the constitutional errors to the attention to the trial judge and public defender, even going as far as filing pro se motions (App E[3], F, G, *infra,* app. 116, 121, and 138, respectively) prior to trial, calling for the dismissal of the indictments that were spurred by an unconstitutional criminal defamation grand jury investigation that issued non-specific "general

[3] Justice Rush wrote Plaintiff's pro-se Motion to Dismiss was filed long before trial, however the motion was filed the morning of October 3, 2011, the first day of Plaintiff's trial. Also filed at the same time were Plaintiff's Motion to Dismiss for Ineffective Assistance of Counsel, Motion to Disqualify F. Aaron Negangard and Appointment of a Special Prosecutor. All three were dismissed without hearing just prior to the start of Plaintiff's criminal trial on October 3, 2011

conduct" indictments, leading to general verdict convictions that were based at least partially on protected speech. The Petitioner should not be punished because neither his public defender nor the Indiana Courts took heed of the Petitioner's numerous verbal and written procedural and constitutional concerns that run consistent with the Constitution and this Court's rulings. The prosecution obtained a conviction against Petitioner by arguing an impermissible criminal defamation theory. The Indiana Court of Appeals upheld the convictions stating Petitioner engaged in *"non-violent" intimidation* (App D, *infra,* app. 96) and that even true statements may be criminal if they are in retaliation for a prior legal act and bring fear to the target of the speech. The Indiana Supreme Court, stated the Court of Appeals erred in its ruling, however upheld the convictions by determining Petitioner's general legal conduct over the course of forty-three months amounted to "hidden threats" of physical harm to Humphrey and Connor. Rather than grant relief for being subjected to an unconstitutional prosecution, The Indiana Supreme Court ignored the unconstitutional and malicious prosecution and reframed the criminal case against the Petitioner. The Indiana Supreme Court then assumed the role of a jury of Petitioner's peers in deciding the Petitioner was guilty of the newly framed criminal case, thus not only denying the Petitioner of the right to a trial by jury but altogether stripping the Petitioner of the ability to address the newly defined "hidden threats." Justice Scalia warns us of the dangers associated with judges assuming the role of jurors in *Neder v. United States 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35, 67 USLW 3682, 67 USLW 4404 (1999)*:

> "The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, the Constitution does not trust judges to make determinations of criminal guilt. Perhaps the Court is so enamored of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution."

This Court cannot allow judges to remove a panel of a defendant's peers in matters involving the First Amendment and assume the role of juries as the deciders of what is considered to be over-the-top rhetoric against judges. The current status of this case stifles speech in Indiana as citizens are unaware of how much legal speech and activity is allowed before it may be deemed illegal by a prosecutor or judge.

### A. Factual Background

This case arises out of Petitioner's general conduct[4] between August 1, 2007 and February 27, 2011 (as to

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[4] The Indiana Supreme Court stated "the grand jury's indictments against Defendant here do not allege any *particular* act or statement as constituting intimidation, instead alleging generally that his conduct as a whole [over the course of an eighteen to forty-three month period] was "intended to place

Dr. Edward J. Connor) and between August 1, 2009 and February 27, 2011 (as to Judge James D. Humphrey) In January 2007, Petitioner's wife filed for dissolution of marriage in Ripley County, Indiana. In June 2007, the parties underwent a custody evaluation performed by Dr. Edward J. Connor of Connor and Associates, PLLC in Erlanger, Kentucky, who issued his custody evaluation report on August 29, 2007.[5]

In early 2008, Petitioner began questioning the conduct of Connor in letters and legal pleadings. In the fall of 2008, Petitioner began sharing experiences in dealing with Connor on the internet. In December 2008, the original judge in Petitioner's divorce, Ripley Circuit Judge Carl H. Taul recused himself and Dearborn Circuit Judge James D. Humphrey[6] began to preside over the hearings. The final hearings on Petitioner's divorce took place on May 27, 2009 and June 2-3, 2009. On August 18, 2009, Humphrey issued

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[Humphrey and Connor] in fear of retaliation for a prior lawful act." (App C, *infra,* app. 51)

[5] The failure to specify the times and dates of alleged illegal conduct in the grand jury indictment further confuses the case as the Indiana Supreme Court cites some of Plaintiff's actions that occurred *after* Connor's testimony as evidence that Plaintiff attempted to prevent Connor from testifying.

[6] Indiana Supreme Court Justice Loretta H. Rush served on the Juvenile Justice Improvement Committee with both Humphrey and Taul from at least 2008-2014, even while Plaintiff's case was before Justice Rush and the Indiana Supreme Court.

his final order on dissolution and without warning, abruptly terminated all parenting time of Petitioner[7]. The findings of the Indiana Supreme Court and Indiana Court of Appeals are void of any allegations of child abuse, neglect, domestic violence, adultery, drug/alcohol abuse, social services, etc… At no point during the course of the civil divorce hearing or criminal trial has any party suggested Connor recommended Petitioner was a danger to children or should have any restrictions in parenting nor has any party pointed to a specific finding where Petitioner disagreed with Connor's finding that mother should be the primary custodial parent."

Following the filing of the final decree of dissolution, Petitioner continued to speak out about perceived problems in Humphrey's decree. Petitioner wrote a letter encouraging people to send any "questions or concerns" to Heidi Humphrey, who was listed as the Ethics and Professionalism Committee advisor located in Dearborn County on the website of the Indiana Supreme Court. Petitioner included a copy of the letter in a motion for relief, filed with the civil divorce court on August 24, 2009. On August 24, 2009, Angela G. Loechel, the divorce attorney of Petitioner's ex-wife, contacted Dearborn County Prosecutor F. Aaron Negangard and informed the

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[7] Humphrey ruled Plaintiff may be a potential danger to the children. (The Court of Appeals opinion stated Connor recommended liberal parenting time for Plaintiff.) The last day of the final hearing was June 3, 2009 yet Humphrey allowed the Plaintiff to continue to care for his children in the 2.5 months between final hearing and final decree.

prosecutor that she felt Petitioner's writings may contain veiled threats. Prosecutor Negangard, who also leads the federally funded Dearborn Special Crimes Unit, initiated an investigation of Petitioner. Humphrey continued to preside over Petitioner's civil case until June 9, 2010. At that time, Petitioner began to criticize Negangard as well; even filing a complaint against Negangard with the Indiana Supreme Court Disciplinary Commission. On January 10, 2011, the State dismissed Petitioner's complaint against Negangard. On January 15, 2011, Negangard made Petitioner the target of a grand jury investigation.

**B. Procedural Background**

On February 28, 2011, a grand jury convened to investigate Petitioner's "unsubstantiated statements" against Humphrey and Connor. Petitioner voluntarily appeared to testify on February 28, 2011. On March 2, 2011, prior to deliberations by the grand jury, Negangard stated the following (App H, *infra,* app. 142):

> "Okay we're on record. I want to present to the Grand Jury Exhibit 231 which is a summary of blog postings that he made of his blog in Dan's Adventures in Taking on the Family Court and what it is, is we highlighted where he said um, what we felt was over the top, um, unsubstantiated statements against either Dr. Conner or Judge Humphrey. This is not every, and as you can read, it's not every negative thing he said about Dr. Conner, but it's a step that we felt, myself and my staff, crossed the lines between freedom of speech

> and intimidation and harassment. Um, Grand Jury Exhibit 232 is a much smaller site that, Dan Helps Kids, that has a few things in there, um, you know, he says something in there like Judge Humphrey punished me for standing up to a man that hurts children and families for monetary gain, referring to Dr. Conner and uh, and that he called Judge Humphrey unethical, illegal, unjust, vindictive and that he abused my children. Um, again that's a summary in Grand Jury Exhibit 232 so that's for your review. At this time then we have no further evidence to present in the matter of Dan Brewington and would submit to you for your deliberations".

On March 7, 2011 a bench warrant was issued for Petitioner for the following indictments: Count I Intimidation, Class A Misdemeanor; Count II Intimidation of a Judge, Class D Felony; Count III Intimidation, Class A Misdemeanor; Attempt to Commit Obstruction of Justice, Class D Felony; Perjury, Class D Felony; and Unlawful Disclosure of Grand Jury Proceedings, Class B Misdemeanor[8]. Petitioner was arrested in Cincinnati, Ohio on March 7, 2011. Petitioner's Ohio attorney, Robert G. Kelly[9], worked with Dearborn County Prosecutor F. Aaron

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[8] The prosecution presented no evidence to support the indictment of releasing grand jury information

[9] Robert G. Kelly was not admitted to practice law in the state of Indiana and was unable to assist in protecting Plaintiff's rights.

Negangard and arranged for Petitioner to post bond in Ohio and voluntarily report to the Dearborn County Law Enforcement Center at 6 am EST on March 11, 2011. During Petitioner's arraignment hearing, Deputy Prosecutor Joseph Kisor requested a high bond because Petitioner's release could be detrimental to the State's case against the Petitioner. Kisor stated "I think it's clear um, that he intends to try this case on his blog and I think that not only could be detrimental to the State. It might even be detrimental to him. But in any event, it's not appropriate." Judge Sally Blankenship allowed Mr. Kelly to speak on Petitioner's behalf. Mr. Kelly first raised concerns about the vague indictments as he stated, "some of these charges that are alleged in the indictment, even reviewing them, you can't identify what, the actual facts, the dates, the times, any of these things occurred." Deputy Prosecutor Brian Johnson rebutted Mr. Kelly by arguing what he felt was the State's biggest concern regarding the Petitioner's release on bond, "The problem is, is that Mr. Brewington does not follow instructions that need to be followed. That is our big issue here.[10]" Judge Blankenship set Petitioner's bond at Five Hundred Thousand Dollars ($500,000) surety, and One Hundred Thousand

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[10] At no point during Arraignment hearing did the prosecution submit any evidence or examples of illegal conduct by Plaintiff. Plaintiff's bond was well over a half million dollars because Plaintiff did not follow directions or respect the office of Dearborn County Prosecutor F. Aaron Negangard who was responsible for initiating the malicious prosecution against the Plaintiff.

Dollars ($100,000) cash. Judge Blankenship's bond order, dated March 11, 2011 (App. J, *infra* app. 144), cited Humphrey's findings in Petitioner's divorce decree, filed August 18, 2009, and psychological testing from the custody evaluation performed by Connor dated, August 29, 2007, to support the necessity of Petitioner's high bond. March 17, 2011, Judge Blankenship recused herself from case stating "To avoid the appearance of bias or prejudice, no judicial officer in Dearborn County is able to hear this matter." On April 14, 2011, John A. Westhafer was appointed special judge in the case. On May 25, 2011, John Westhafer issues order recusing himself from case citing "a possible conflict of interest" due to his friendship with Humphrey. On June 1, 2011, Rush County Circuit Judge Brian D. Hill assumed jurisdiction of case. On June 17, 2011, Judge Hill held a hearing on the motion to withdraw of Petitioner's public defender, John Watson who cited the fact that he had multiple cases before Humphrey created the appearance of impropriety[11]. On June 20, 2011 Judge Hill appointed Rush County public defender Bryan E. Barrett[12] to serve as Petitioner's public defender.

Approximately two weeks after Barrett filed an appearance to represent Petitioner, on

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[11] Watson filed an appearance to represent Plaintiff on March 18, 2011. Watson waited over two months to file a motion to withdraw on May 23, 2011.

[12] At the time Barrett worked out of the Rush County Public Defender's Office, located in the Rush County Courthouse near Judge Brian Hill's chambers.

his own motion, Judge Hill set a trial date for August 16, 2011; less than a month away for. August 4, 2011, Barrett files motion to vacate bond reduction hearing because Barrett is out of town on a personal family matter. Motion states no bond reduction hearing is necessary because a trial had been set for August 16, 2011. On August 4, 2011, Judge Hill vacates bond reduction hearing and affirms trial date. August 9, 2011, State files motion for anonymous jury. August 10, 2011, less than a week before trial, State files motion to release grand jury exhibits. August 11, 2011, on its own motion, trial court vacated the trial set for August 16, 2011, stating, "The Court is aware of circumstances regarding defense counsel's family emergency for the past couple of weeks and finds it has been necessary for defense counsel to be away from his office and work for the better part of two weeks." On its own motion, the Court also set another bond hearing for Petitioner on August 17, 2011. The final pretrial hearing took place on September 19, 2011. The jury trial commenced on October 3, 2011 and was concluded on October 6, 2011, with the jury returning guilty verdicts on Counts I-V and a Not Guilty verdict on Count VI. On January 17, 2013, the Indiana Court of Appeals issued an opinion overturning Counts I and III, Intimidation of Dr. Connor and Heidi Humphrey. The intimidation of Connor was overturned as the State’s reliance on the same evidence as the Attempted Obstruction of Justice constituted Double Jeopardy and the Court of Appeals ruled listing the address of

Heidi Humphrey, an advisor to the Indiana Supreme Court Ethics and Professionalism Committee was not a crime.[13] The Court of Appeals ruled even true statements could constitute intimidation and found that Petitioner engaged in non-violent intimidation. On May 1, 2014, in an opinion authored by Justice Loretta H. Rush, the Indiana Supreme Court found the Court of Appeals erred in its finding regarding true statements but upheld Petitioner's intimidation convictions. What the Court of Appeals determined to be acts of non-violent intimidation, the Indiana Supreme Court ruled were hidden threats to the physical safety of the alleged victims. Following the Indiana Supreme Court's ruling, Petitioner filed a Petition for Rehearing and Motion for the Recusal of Justice Loretta H. Rush because she served on the Indiana Juvenile Justice Improvement Committee[14] with Humphrey and Taul for at least seven years and during the time she authored the opinion. The Indiana Supreme Court denied the Petitioner's motions on July 31, 2014

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[13] The Indiana Court of Appeals stated the Plaintiff's posting of Heidi Humphrey's address was not a crime so the Indiana Supreme Court took the evidence from the overturned conviction and applied it to support upholding a different conviction.

[14] Meeting minutes can be found on the webpage of the Indiana Juvenile Justice Improvement Committee the http://www.in.gov/judiciary/center/2382.htm.

## REASONS FOR GRANTING THE PETITION

### A. A Public Defender's failure to object to unconstitutional indictments and criminal trial and a Defendant exercising his Fifth Amendment right not to testify cannot invite error.

It is axiomatic that a party cannot invite an error that the party does not know exists. It is first important to note that the State never argued "Invited Error" in its brief to the Indiana Supreme Court. The Indiana Supreme Court argued sua sponte that the "all or nothing" trial strategy of Petitioner's public defender, Barrett, invited the error that waived Petitioner's ability to seek relief for the general verdict error. The High Court of Indiana argued Barrett's failure to object to the general verdict instructions was a conscience trial strategy. Indiana Supreme Court claims the following was part of defense counsel's strategy that invited the general verdict error:

> "Defendant here chose to withdraw a proposed final jury instruction on harassment[15] as a lesser included offense of intimidation… arguing instead that all his statements were intended only as protected opinions on an issue of public concern, or

[15] Plaintiff's counsel submitted and withdrew a proposed jury instruction for harassment, a crime in which Plaintiff was never charged.

> petitions for redress of grievances, and not to cause fear or for any other threatening purpose… In effect that approach sought to exploit the prosecutor's improper reliance on 'criminal defamation' to the defense's advantage—focusing the jury on the clearly protected aspects of Defendant's speech, and on that basis to find the ambiguous aspects of his conduct to be protected as well."

In the opinion of the Indiana Supreme Court, Justice Rush wrote:

> "The prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ('criminal defamation' without actual malice)."
>
> "Requesting instructions on actual malice would have called the State's attention to the distinction it repeatedly overlooked between threatening the targets' reputations under Indiana Code section 35-45-2-1(c)(6)–(7) and threatening their safety under subsections (c)(1)–(3). Defense counsel could reasonably have anticipated that an actual-malice challenge could lead the State either to withdraw (c)(6) and (7) from the instructions, or at least to draw sharper focus onto the statements and conduct that crossed the line and implied a true threat."

In *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1, 53 USLW 4159 (1985), Chief Justice Burger wrote,

> "Nearly a half century ago, this Court counselled prosecutors 'to refrain from improper methods calculated to produce a wrongful conviction. . . .'" *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court made clear, however, that the adversary system permits the prosecutor to 'prosecute with earnestness and vigor.' *Ibid*. In other words, 'while he may strike hard blows, he is not at liberty to strike foul ones.' *Ibid*."

The case at hand deals not with an improper comment or suggestion by a prosecutor; the Indiana Supreme Court stated the Dearborn County Prosecutor presented a "plainly impermissible" unconstitutional criminal argument to both a trial jury and grand jury. The Indiana Supreme Court also stated Barrett strategically declined to request jury instructions on "actual malice" because it may cause the prosecution, during the end of closing arguments, to define what part of Petitioner's conduct the prosecution believed constituted a crime; something the rules of trial procedure require the prosecution to do long before the trial even begins. Justice Rush further supported the Court's findings of invited error by stating Petitioner's decision to exercise his Fifth Amendment Right was consistent with the "all or nothing strategy" that waived the Petitioner's First Amendment Rights. There is little doubt the prosecution's blows were of the strategic foul persuasion as Deputy Prosecutor Kisor boasted during

closing arguments that the prosecution did not even highlight what he deemed were the "best" threats of the Petitioner. Kisor stated:

> "Craziness, dangerousness and then multiple times the threats to Dr. Connor — the game. It's only a game to one man — Dan Brewington. But when you tell me the game is over. We're not playing, we're taking off the gloves now, we may be, we're getting out the weapon ring, I don't know what we're going. The game is over? It ain't a game. Don't make it a game. Don't buy that it's a game because it's not. Those are threats and there's only a, there's a lot more threats. I probably haven't even highlighted the best ones [sic].[16]"

It is erroneous to suggest Barrett's trial strategy was a "deliberate and eminently reasonable strategic choice," as the most basic and fundamental action taken on behalf of Petitioner's defense was Petitioner's pro se motions to dismiss the charges. Justice Rush referred to Barrett's trial strategy as a "deliberate and eminently reasonable strategic choice" yet Rush praised Petitioner for demonstrating "significant sophistication about free-speech principles" in Petitioner's pro se motion. Petitioner's motion addressed the unconstitutional grand jury indictments stemming from the Prosecutor

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[16] Deputy Kisor's logic was nearly impossible to follow other than Kisor's admission that he did not highlight Plaintiff's "best" threats.

instructing the grand jury that it was unlawful to make "over-the-top" "unsubstantiated" statements about a judge. Unfortunately Petitioner's public defender, the trial judge, and the Indiana Court of Appeals lacked the insight or integrity to acknowledge Petitioner was indicted on unconstitutional grounds. When the case reached the Indiana Supreme Court, rather than overturn Petitioner's convictions that were based at least partially on an unconstitutional criminal prosecution, Justice Rush cited Petitioner's insight into First Amendment law prior to trial as a reason to *not* overturn the conviction. (App C, *infra,* app. 61) The Indiana Supreme Court went a step further in blaming the Petitioner for the general verdict error claiming the Petitioner's defense strategy sought to "exploit the prosecutor's improper reliance on 'criminal defamation' to the defense's advantage." Not only does Justice Rush suggest the Petitioner has a better understanding of First Amendment law than the Prosecutor, Justice Rush and the Indiana Supreme Court punish the Petitioner and denied Petitioner relief by claiming the Petitioner somehow unfairly tried to take advantage of Prosecutor Negangard's malicious prosecution of the Petitioner.

The Petitioner was also penalized for not testifying in defense of undefined legal conduct. The Indiana Supreme Court opinion arbitrarily determined what the Court believed were Petitioner's "motives" behind his decision not to testify and then used its proclamation to help rationalize invoking the invited error doctrine. This should entitle the Petitioner to relief under *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981):

"The freedom of a defendant in a criminal trial to remain silent 'unless he chooses to speak in the unfettered exercise of his own will' is guaranteed by the Fifth Amendment and made applicable to state criminal proceedings through the Fourteenth. *Malloy v. Hogan*, 378 U.S. at 8. And the Constitution further guarantees that no adverse inferences are to be drawn from the exercise of that privilege. *Griffin v. California*, 380 U.S. 609. Just as adverse comment on a defendant's silence 'cuts down on the privilege by making its assertion costly,' id. at 614, the failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege."

The Petitioner's argument may seem misguided in the application of *Carter* to the Indiana Supreme Court, however it was the Indiana Supreme Court that ruled the prosecution argued an impermissible criminal defamation theory and failed to make the distinction between threats to reputation and threats to safety. The Indiana Court then defined what it deemed "true threats," denied remanding the case based partially on the defendant's decision not to testify, then played the role of the jury and decided the threats constituted a violation of law; effectively stripping Petitioner's right to a trial by jury.

The decision also demonstrates how the Indiana Supreme Court was misguided in its "chicken or the egg" analysis of ineffective assistance of counsel and fundamental error and the Court's contention that the

two principles overlap. Justice Rush argued the following:

> "A 'finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have,' even without being spurred to action by a timely objection. *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). An error blatant enough to require a judge to take action sua sponte is necessarily blatant enough to draw any competent attorney's objection. But the reverse is also true: if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error."

The argument the Indiana Supreme Court tries to make to help justify not erring on the side of the First Amendment is irrelevant. The errors in the case were caused by the non-specific unconstitutional grand jury indictments triggered the fundamental error well before the trial even began, thus making the error impossible for the Petitioner to invite.

### B. A Public Defender's failure to move for the dismissal of the non-specific general conduct indictment and/or ascertain what actions brought forth Brewington's indictments does not meet the standards of effective counsel set forth by *24*.

The U.S. Supreme Court's recent ruling in *Hinton v. Alabama*, 13-6440 (2014), uses a straightforward

application of [the Court's] ineffective-assistance-of-counsel precedents, beginning with *Strickland v. Washington*. This Court wrote:

> "*Strickland* recognized that the Sixth Amendment's guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence' entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. Id., at 685-687. 'Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, supra, at 688, 694)".
>
> "The first prong-constitutional deficiency-is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla*, supra, at 366 (quoting *Strickland*, supra, at 688). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."

This Court needs to look no further than the Indiana Supreme Court opinion in *Brewington* for

evidence demonstrating how the performance of Petitioner's counsel fell far below the standards of *Strickland*. The Indiana Supreme Court stated,

"Like *Bachellar*, the grand jury's indictments against Defendant here do not allege any particular act or statement as constituting intimidation, instead alleging generally that his conduct as a whole 'between August 1, 2007 and February 27, 2011' (as to the Doctor) and 'between August 1, 2009 and February 27, 2011' (as to the Judge) was 'intended to place [them] in fear of retaliation for a prior lawful act.' App. 22, 24. Nothing on the face of the indictments, then, creates confusion between protected or unprotected acts as the basis for conviction."

Justice Rush's comparison to *Bachellar v. Maryland*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970) is misleading as although the charging information in Bachellar did not list specific actions leading to the indictment, the alleged illegal conduct occurred "between 3 and shortly after 5 o'clock on the afternoon of March 2, 1966, in front of a United States Army recruiting station located on a downtown Baltimore street." (quoting *Bachellar*, supra, at 565.) The non-specific charging information in Bachellar covers a timeframe of approximately two hours whereas the non-specific charging information in *Brewington* covers approximately one-thousand-three-hundred-six (1,306) days creates any confusion between protected or unprotected acts.

As mentioned earlier in the Petitioner's Writ, the Indiana Supreme Court praised the Petitioner for his significant sophistication about free speech principles;

a sophistication apparently not shared by Barrett, Prosecutor Negangard, Judge Hill, and the Indiana Court of Appeals as it was not until the case was before the Indiana Supreme Court that an Indiana judicial officer acknowledged the misconduct of the prosecutor. The Indiana Supreme Court's contention that Petitioner was afforded effective assistance of counsel is disingenuous as Barrett failed to challenge Prosecutor Negangard's "plainly impermissible" criminal defamation argument. Barrett failed to ascertain what general conduct of the Petitioner over the course of 3.5 years that the State alleged was criminal. It would be impossible for any lawyer to develop a sound legal strategy in Petitioner's trial as preparing for any amount of an unconstitutional prosecution takes from the allotted legal resources of a defendant. But Barrett was less than diligent in representing Petitioner because he failed to provide one of the most fundamental services to his client; file a motion to dismiss the indictments as they failed to give any indication of the nature of accusations against the Petitioner.

*In Russell*, this Court held, *United States v. Cruikshank*, 92 U.S. 542, 55. "An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.'" *United States v. Simmons*, 96 U.S. 360, 362. The failure of Petitioner's public defender to address the fundamental right to know the nature of the charges against him falls far short of the requirements of *Strickland*. But the problem is two-fold as Barrett's failure to ascertain the nature of the allegations against his client should be rendered

irrelevant in the face of Barrett's responsibility to move to dismiss the general indictments as required by *Russell*. This Court needs only to once again revisit the opinion of the Indiana Supreme Court to determine if the outcome would have been different if Barrett would have challenged the general verdict jury instructions. Justice Rush wrote, *Brewington*, like *Bachellar*, compelled the Indiana Supreme Court to find general verdict error however Brewington's trial strategy in not testifying and attempting to take advantage of the prosecutor's impermissible criminal defamation argument somehow waived that error. As the Indiana Supreme Court's decision relies on the "victims" for an assessment of the Petitioner's mental health in upholding the convictions, Barrett and the Courts failed to protect the Petitioner's right to a mental health evaluation. The level of representation is far from effective and the error is plain.

**C. III. The Indiana Supreme Court's opinion upholding Brewington's convictions while acknowledging the State's "impermissible" criminal defamation argument and Brewington's erroneous general verdict conviction, based on an unconstitutional grand jury process rises to the level of manifest injustice and constitutes a fundamental miscarriage of justice.**

The Petitioner is unable to find anywhere in the history of United States case law another example where any court has acknowledged that a prosecutor used an impermissible criminal defamation argument to seek grand jury indictments and criminal

convictions, in a case where the grand jury indictments covering a timeframe of eighteen to forty-three months made no specific reference to any specific act constituting illegal conduct where the jury returned a general verdict error; yet the court denied relief to the Defendant/Petitioner based on the Court's own speculative sua sponte argument regarding trial procedure. Since the issue of invited error negating normal relief stemming from an unconstitutional criminal defamation trial and general verdict error was first raised by the Indiana Supreme Court, the Petitioner and previous legal counsel were unable to address the issues prior to the case already passing through the Indiana Court System. This case bears no resemblance to the case cited by the Indiana Supreme Court to support the Court invoking the invited error doctrine. *United States v. Jernigan*, 341 F.3d 1273, 1289 (11th Cir. 2003) states, "[P]lain error review is unavailable in cases where a criminal defendant 'invites' the constitutional error of which he complains." There are two glaring differences distinguishing *Jernigan* from the current case. 1) The invited error in *Jernigan* involved an evidentiary matter where the U.S. Attorney and defense attorney listened to recorded evidence and agreed to play it before the jury. Prior to doing so, the trial court took the time to make sure both parties were aware of the content and were in agreement the evidence should be played for the jury. The defendant later appealed the conviction claiming the evidence was hearsay. The appellate court denied the appeal stating defendant invited the error. In the present case of *Brewington* the Indiana Supreme Court, in sua sponte fashion, denied relief under the invited error doctrine. The fact the Indiana Attorney General failed to make an

argument for invited error demonstrates the unlikelihood that defense counsel was even aware such error could be invited by an overall trial strategy combined with a defendant's decision to exercise his Fifth Amendment right. 2) In *Jernigan*, regardless of the constitutional error there was still a crime of being a felon in possession of a firearm. In *Brewington*, regardless of the constitutional error Petitioner was innocent of intimidation and attempted obstruction of justice because the Indiana Supreme Court ruled there was no way to determine if the jury based its verdict on constitutionally protected activity and well established case law from the U.S. Supreme Court mandates reversal.

The non-specific general conduct grand jury indictments based on what the Indiana Supreme Court called the Dearborn County Prosecutor's "plainly impermissible criminal defamation theory" worked a manifest injustice in this case as it fractured the criminal trial at its core; placing the Petitioner in a severe constitutional deficit which left the Petitioner scrambling at all stages of the criminal process. The best example of the fallout from the non-specific general indictment can be found in the portions of the Indiana Supreme Court decision addressing Petitioner's perjury conviction. The Indiana Supreme Court stated:

> "And the jury's perjury verdict implicitly recognized that intent, finding that Defendant lied to the grand jury about his true motives for posting the Judge's address." (App C, infra, app. 16)

Justice Rush later wrote the Petitioner's perjury conviction was based on a different premise:

> "And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife." (App C, infra, app. 34)

Justice Rush provided two interpretations of the Petitioner's perjury conviction, one of which to support the Indiana Supreme Court's analysis of circumstantial evidence to prove Petitioner intended to scare Judge Humphrey. Review of circumstantial evidence was necessary because the Indiana Supreme Court stated the Petitioner never made an overt threat to Judge Humphrey:

> "Since Defendant never stated an overt threat against the Judge, we begin by examining the circumstantial evidence to determine whether Defendant knew his actions would be understood as a threat. In that regard, we find Defendant's publication of the Judge's home address to be particularly telling—not least, because Defendant's perjury to the grand jury about his purpose in doing so implies that truthful testimony on that point would have been incriminating." (App C, infra, app. 33)

The fact there is uncertainty about the nature of something as basic as a perjury indictment and conviction even after passing through the entire Indiana Court System is concerning. Either the record

of the case is so confusing that Justice Rush became confused about the true nature of the indictment and conviction, or she altered the nature of the perjury conviction to help rationalize the argument of the Indiana Supreme Court that Petitioner intended to make Judge Humphrey feel threatened in the absence of an "overt threat." Either scenario is a manifest injustice that polluted the trial record and fouled the course of the Petitioner's case and appeal. Intent was a component of one interpretation of the perjury conviction and the Indiana Supreme Court used it to rationalize upholding the convictions. A specific indictment would have cured any problem before it occurred.

One needs only to review page 180 (App I, *infra*, app. 143) of the grand jury transcripts to see how even the Indiana Supreme Court could confuse the facts of the case, in light of the erratic bullying tactics of Prosecutor Negangard while questioning/interrogating the Petitioner:

> **Negangard:** You went and harassed Mary Beth Polluck. You tried to schedule to see her...
> **Dan:** Did I harass her?
> **Negangard:** Well you tried to schedule to see her. Correct?
> **Dan:** Did I harass her?
> **Negangard:** You tried to ...
> **Dan:** Did I harass her?
> **Negangard:** ...you tried to get in to see her.
> **Dan:** No, you're just making that up now. I didn't harass her.

**Negangard:** You tried to get in to see her. Didn't you?
**Dan:** Yell but that's different from harassing.
**Negangard:** No it's not different from harassing.
**Dan:** If I call a doctor to send a letter...
**Negangard:** Well I view that as harassing.
**Dan:** So I harassed Mary Jo Pollock because I sent her a letter?
**Negangard:** Yell because you didn't need to see her.
**Dan:** Okay so your information ...
**Negangard:** That's the whole point. You uh, I mean this is the whole problem. It is never your fault.

The manipulation of the grand jury process did not stop with the prosecutor. During his testimony before the grand jury, Judge James D. Humphrey had the following exchange with a juror:

**Juror:** It's more than just trying to smearing your reputation?

**Judge Humphrey:** Well you know, I guess we'll just have to let the record speak for itself on that but when you take that additional step, I guess the question that l would ask myself or anyone else is for what reason, for what benefit would my wife be involved in this? For what reason do I need to contact my children's schools to make sure that they're safe? What reason could anyone use to explain

> this type of conduct, these types of actions[17]? I understand we have a first amendment folks and that's reflected in some of my rulings I've made but is this conduct something that I consider appropriate? Does it go beyond? You bet it does. Yes sir.

Humphrey affirmatively defining law took any objectivity from the jury especially after Prosecutor Negangard's incorrect declarations of fabricated criminal defamation laws.

Another discovery not raised until the Indiana Supreme opinion was the finding of Petitioner's violent behavior toward the victims. Justice Rush wrote extensively about the violent courtroom behavior by Petitioner in Humphrey's Court, however the prosecution made no mention of violent behavior in trying to obtain a high bond as indicated by the bond order in the case, filed March 11, 2011 (App J, infra, app. 144)

The Indiana Supreme Court opinion raises concerns in its speculating on specific findings of the jury. Rush's opinion states:

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[17] Humphrey claimed he took measures to protect his family from Plaintiff's implied threats to personal safety, despite knowing Plaintiff had no criminal history Humphrey did not seek any protective/restraining orders. The indictment states the intimidation of Humphrey began around August 1, 2009 yet Humphrey continued to preside over Plaintiff's domestic case until June 9, 2010.

> "To the extent Defendant attempted to veil his threats behind self-serving disclaimers and supposed 'hypotheticals,' the victims saw through that pretext—as did the jury, and as do we."

As Justice Rush wrote the jury instructions were constitutionally incomplete and Prosecutor Negangard argued a plainly impermissible criminal defamation case before the jury, it would be impossible to determine what information formed the basis for the trial jury's guilty verdicts.

Throughout the course of the entire criminal proceedings every effort has been taken to *not* [emphasis added] protect the Constitutional rights of the Petitioner. The following exchange between Petitioner and Judge Hill took place at the beginning of Petitioner's trial:

**Judge Hill:** Let the record reflect that the State appears by Prosecuting Attorney, Aaron Negangard and the Defendant appears in person and by counsel, Bryan Barrett and this matter is scheduled for jury trial this morning and about twenty (20) or thirty (30) minutes ago I received a file marked Motion to Dismiss, Motion to Disqualify F. Aaron Negangard and appoint Special Prosecutor and Motion to Dismiss for Ineffective Assistive of Counsel. Those are pro se motions filed by the Defendant. Mr. Brewington, you have legal counsel and I'm not inclined to contemplate pro se motions. I guess, what's your uh, what are you going for here? You've got counsel to represent you to give you legal advice and make these filings. Are

you're uh, indicating to me that you're wanting to represent yourself or do you want to clarify that for me please?

**Dan:** No your honor. Uh, I just, Mr. Barrett hasn't met with me since July, I believe the 17th of this year. I don't have any idea of the direction of my case other than what was just explained to me just in the past few minutes before things got settled here. I still don't have some of the evidence. I don't have copies of the Grand Jury evidence. There's documents from Detective Kreinhop's investigation that are not included. There's transcripts that uh, that he said would be included in his investigation that were not included in discovery and I've never been able to obtain that information and Mr. Barrett has not communicated with me about that stuff and I just don't know the direction of my defense and he hasn't been able to meet with me, tell me anything, explain to me anything. I also do not have my medication. I take Ritalin for attention deficit disorder. It's been an issue of the defense. It's been brought up multiple times in the grand jury transcripts and without that I don't even have the ability to concentrate as hard. I have difficulties reading and that sort and Mr. Barrett waived my right to bring that up at trial as he made no objection to the motion in limine which I did not realize that a motion in limine had uh, was requesting the court to prohibit any discussion about medication that was given to me while I was incarcerated in DCLEC. So I have absolutely no idea what's going on in my case. I tried, everything that has been provided here except for the grand jury transcripts which I didn't even receive until Friday, October 23rd I believe or September 23rd.

**Judge Hill:** Okay, I've listened for about three (3) or four (4) minutes I think uh by filing this, tells me you don't want counsel. You're filing motions by yourself. So you're ready to go...

**Dan:** No, no, no, I want confident counsel. I want to know what's going on. I can't and even if I were to make a decision to do it on my own, I don't have, I haven't been given the medication that I need that is prescribed by a doctor to do this sort of stuff, I mean to read, to process, to question and everything like that. I just, I would have raised the issue earlier except Mr. Barrett at the September 19th hearing, said that he would be in to discuss the case with me and he never appeared. He said the same thing at the hearing before that. He said that he would be in to see me and he never appeared. He said over the phone that he would be in to see me when he had the chance and he never appeared. So I haven't had the opportunity to have effective counsel. It's not that I want to do it on my own. It was a last resort effort.

**Judge Hill**: Okay that was the answer to my question. Uh, Mr. Barrett, are you ready to proceed with this case today?

**Barrett:** Yes your honor.

The Petitioner made every effort to preserve his rights under the United States Constitution in a criminal action that was brought against Petitioner in retaliation for Petitioner's criticisms of court officials. The Petitioner files his pro se writ of certiorari after being subjected to outrageous bonds, denial of counsel,

and serving 2.5 years in prison because a prosecutor was able to obtain unconstitutional general conduct indictments and convictions by implementing a constitutionally invalid legal argument. The Indiana Supreme Court found that Petitioner's alleged psychological disturbance was circumstantial evidence toward the commission of a crime yet the trial judge and public defender who both work out of the Rush County, Indiana Courthouse, failed to provide Petitioner with any mental health treatment or psychological evaluations in preparation of an effective defense. As Justice Rush and the Indiana Supreme Court have already stated the Petitioner's guilty conviction is a general verdict error, it would be a miscarriage of justice not to reverse his convictions. The most telling evidence that the Petitioner's internet writings enjoy First Amendment protections is the fact that no court of law has attempted to force the Petitioner to remove what the Indiana Courts deem to be hidden threats of violence. Petitioner's experiences are still available at www.danhelpskids.com and www.danbrewington.blogspot.com. Not having the freedom to criticize the conduct of court officials or living in fear of criticizing the conduct described in this brief would be the ultimate injustice.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

Appendix A: Entry, the Supreme Court of Indiana
Order denying Recusal
(July 31, 2014) …………………………………… app. 1

Appendix B: Entry, the Supreme Court of Indiana
Order denying Rehearing
(July 31, 2014) …………………………………… app. 2

Appendix C: Decision, Supreme Court of Indiana
(May 1, 2014)……………………………………... app. 3

Appendix D: Decision, Indiana Court of Appeals
(January 17, 2014) ……………………………... app.66

Appendix E Motion to Dismiss,
Prosecutorial Misconduct
(October 3, 2011) ……………………………….app. 116

Appendix F: Motion to Dismiss,
Ineffective Assistance of Counsel
(October 3, 2011)………………………………..app. 121

Appendix G: Motion to Dismiss,
Ineffective Assistance of Counsel
(October 3, 2011). . . . . . . . . ……………………app. 138

Appendix H: Grand Jury Transcripts pg 338
Dearborn Prosecutor seeking indictment
for "unsubstantiated statements about Humphrey
(March 2, 2011)………………………………..…app.142

Appendix I: Grand Jury Transcripts pg 180
Dearborn Prosecutor bullying Petitioner
(February 28, 2011)……………….…………app.143

Appendix J: Order setting Bail
(March 11, 2011)…………………………………app. 144

Appendix K: Judgment of Conviction
(October 6, 2011)…………………………………app. 146

## APPENDIX A

### In the
### Indiana Supreme Court

| | | |
|---|---|---|
| Daniel BREWINGTON, | ) | |
| Appellant, | ) | |
| | ) | Cause No. |
| v. | ) | 15S01-1405-CR-309 |
| | ) | |
| STATE OF INDIANA, | ) | |
| Appellee . | ) | |

[Filed July 31, 2014]

### ORDER

Appellant, pro se, has petitioned the full Court for rehearing of its unanimous May 1, 2014 opinion affirming some of his convictions. Before me individually is Appellant's motion to recuse or disqualify myself from this Court's deliberations on rehearing.

Having carefully considered the Indiana Code of Judicial Conduct, including but not limited to Rules 1.1, 1.2, 2.4, and 2.11 and all the Judicial Canons in view of Appellant's motion, I respectfully find no basis to recuse or disqualify myself from this Court's further deliberations.

Appellant's Verified Motion for Recusal is therefore DENIED. The clerk is directed to send copies of this order to all counsel of record and to any unrepresented parties.

Done at Indianapolis, Indiana this 31th day of July, 2014.

/s/Loretta H. Rush
Loretta H. Rush
Associate Justice

## APPENDIX B

### In the
### Indiana Supreme Court

| | | |
|---|---|---|
| Daniel BREWINGTON, | ) | |
| Appellant, | ) | |
| | ) | Cause No. |
| v. | ) | 15S01-1405-CR-309 |
| | ) | |
| STATE OF INDIANA, | ) | |
| Appellee. | ) | |

[Filed July 31, 2014]

### ORDER

This matter has come before the Indiana Supreme Court on Appellant's Petition for Rehearing of our May 1, 2014 Opinion affirming some of his convictions. The Petition was filed pursuant to Appellate Rule 54.

In seeking rehearing, Defendant first requests that Justice Rush be disqualified from further proceedings in this case, and directs this request both to Justice Rush and to the full court. The Indiana Code of Judicial Conduct, Rule 2.11, provides that disqualification decisions are to be made by the individual Judge or Justice. Under the particular circumstances of this case, however, the full Court

expresses its unanimous concurrence with Justice Rush's decision declining to disqualify.

As to the remaining issues, the Court has reviewed its Opinion. Any Record on Appeal that was submitted has been made available to the Court for further review, along with all briefs filed in the Court of Appeals and Supreme Court and all the materials filed in connection with the Petition for Rehearing. Each participating member has voted on the Petition. Each participating member has had the opportunity to voice that Justice's views on the Petition to the other Justices.

Being duly advised, the Court now DENIES the Appellant's Petition for Rehearing. The clerk is directed to send copies of this order to all counsel of record and to any unrepresented parties.

Done at Indianapolis, Indiana this.31th day of July, 2014.

All Justices concur.

/s/Brent E. Dickson
Brent E. Dickson
Chief Justice

**APPENDIX C**

**IN THE INDIANA SUPREME COURT**

**No. 15S01-1405-CR-309**

**[Filed May 1, 2014]**

DANIEL BREWINGTON,

*Appellant (Defendant),*

V.

STATE OF INDIANA,

*Appellee (Petitioner).*

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*James Bopp, Jr. Justin L. McAdam*
*Terre Haute, Indiana*

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Appeal from the Dearborn Superior Court II, No. 15D02-1103-FD-84 The Honorable Brian Hill, Special Judge

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On Petition to Transfer from the Indiana Court of Appeals, No. 15A01-1110-CR-550

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**May 1, 2014**

**Rush, Justice.**

The United States and Indiana constitutions afford sweeping protections to speech about public officials or issues of public or general concern, even if the speech is intemperate or caustic. But there is no such protection for "true threats"—including veiled or implied threats, when the totality of the circumstances shows that they were intended to put the victims in fear for their safety. Fear for one's *reputation* is often the price of being a public figure, or of

involvement in public issues. But fear for one's *safety* is not.

Here, the Court of Appeals failed to distinguish between those two types of fear. Many of Defendant's statements, at least when viewed in isolation, threatened only to harm the victims' reputations—hyperbolically accusing them of "child abuse" and the like. To the extent those statements were aimed at a public official or involved an issue of public concern, they are subject to the steep constitutional "actual malice" standard for defamatory speech, and the Court of Appeals erred in relying on them to support Defendant's convictions for intimidating a judge and attempted obstruction of justice.

But Defendant's other statements and conduct, understood in their full context, clearly were meant to imply credible threats to the victims' *safety*. The "true threat" inquiry requires reference to all the contextual factors—one of which is the anger and obsessiveness demonstrated even by the protected portions of Defendant's speech. And Defendant had also demonstrated mental disturbance, volatility, violence, and genuine dangerousness directly to both of his victims during his years-long vendetta against them. In that context, Defendant's conduct, including showing his victims against a backdrop of obsessive and volatile behavior that he knew where they lived, was clearly intended to place them in fear—not fear of merely being ridiculed, but fear for their homes and safety, the essence of an unprotected "true threat." Causing that fear is unlawful in itself, and all the more damaging when, as here, it aims to interfere with these victims' lawful obligations of being a neutral

judicial officer or a truthful witness—both of which are at the core of our justice system.

And the failure of the jury instructions and general verdict to distinguish between protected speech and unprotected true threats did not prejudice Defendant's substantial rights here. To the contrary, we conclude that he deliberately invited that error, because requesting only broad-brush free-speech instructions enabled a broad-brush defense—emphasizing the protected, "political protest" aspects of his speech that threatened only the victims' *reputations*, while glossing over his statements and conduct that gave rise to more sinister implications for their *safety*. That approach was constitutionally imprecise, but pragmatically solid—and nothing suggests that counsel blundered into it by ignorance, rather than consciously choosing it as well-informed strategy. It was an invited error, not fundamental error or ineffective assistance of trial counsel.

We therefore grant transfer and affirm Defendant's convictions for intimidation of a judge and attempted obstruction of justice. On all other counts, we summarily affirm the Court of Appeals.

## Procedural History

In February 2011, a grand jury indicted Defendant Daniel Brewington on six charges. Four related to the Defendant's divorce case that had been finalized in

mid-2009[1]: a D-felony count of intimidating the trial judge, two A-misdemeanor counts of intimidation involving the judge's wife and a psychologist who was an expert witness in the divorce, and one D-felony count of attempted obstruction of justice relating to the psychologist. He was also indicted on a D-felony count of perjury relating to his grand-jury testimony, and a B-misdemeanor count of unlawful disclosure of grand jury proceedings. A jury acquitted Defendant of the unlawful disclosure charge but convicted on all other counts, and he appealed.

The Court of Appeals reversed both of the misdemeanor-level intimidation convictions. Brewington v. State, 981 N.E.2d 585, 596, 599 (Ind. Ct. App. 2013) (vacated by this opinion, see Ind. Appellate Rule 58(A)). As to the psychologist, the Court found a "reasonable possibility" that the jury used the same evidence to establish all the essential elements of both intimidation and attempted obstruction of justice, and therefore reversed the intimidation charge on double-jeopardy grounds. Id. at 595–96. It also found insufficient evidence of a threat to the judge's wife, since Defendant had not targeted her by a long-running or negative course of conduct as he had with the other two victims. See id. at 599. But it affirmed all three D-felony convictions. Id. at 610.

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[1] All aspects of Defendant's divorce decree were affirmed by per curiam decision of the Court of Appeals, and this Court declined review. Brewington v. Brewington, No. 69A05-0909-CV- 542 (Ind. Ct. App. July 20, 2010), trans. denied.

Defendant sought transfer, and we held oral argument on September 12, 2013 prior to deciding whether to accept transfer. We now grant transfer, concluding that the Court of Appeals erred in its free-speech analysis by failing to distinguish between Defendant's attacks on his victims' *reputations* that are protected by the stringent actual malice standard, and his true threats to their *safety* that receive no such protection. But we find ample evidence of true threats to support Defendant's convictions for intimidating the judge and his attempted obstruction of justice regarding the psychologist—and find that the general-verdict and instructional errors he complains of were invited error, not fundamental error or ineffective assistance of counsel. On all other counts, we summarily affirm the Court of Appeals. App. R. 58(A)(2).

## Standard of Review

Defendant's free-speech challenge to his convictions, at bottom, questions the sufficiency of the evidence. Ordinarily, we would review such an issue with great deference to the jury's verdict— considering only the evidence favorable to the conviction, and affirming unless no reasonable fact- finder could find the necessary elements to have been proven beyond reasonable doubt. E.g., Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007).

But here, as further discussed below, constitutional protection for Defendant's speech hinges on state-of-mind issues—particularly, whether he intended his communications as threats and whether his victims were reasonable in perceiving them as threats.

Deferential review of such questions creates an unacceptable risk of under-protecting speech. It is our constitutional duty, then, to "make an independent examination of the whole record, so as to assure ourselves that the [conviction] does not constitute a forbidden intrusion on the field of free expression." Journal- Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446, 455 (Ind. 1999) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)) (internal quotation marks omitted). This "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact," no matter whether the finder of fact was a judge or a jury. Bandido's, 712 N.E.2d at 455 (quotingBose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984)) (internal quotation marks omitted).

Here, we have independently reviewed the record *de novo*, and are convinced beyond reasonable doubt that Defendant fully intended to make "true threats" against his victims, and that his victims were reasonable to perceive them as threats in view of the context in which he made them. But because many of Defendant's statements, in isolation, were protected—and even his true threats were carefully veiled—we will discuss "all of the contextual factors" of his statements in considerable detail, see Virginia v. Black, 538 U.S. 343, 367 (2003), to identify how they took on their threatening implications.

## Background Facts

Defendant was a disgruntled divorce litigant dissatisfied with a child-custody evaluator's recommendation. He waged an obsessive years-long

campaign—including faxes (often several per day), repetitive *pro se* motions, and Internet posts—accusing the parties' child-custody evaluator, Dr. Edward Connor ("the Doctor"), and Judge James Humphrey ("the Judge"), of "unethical" and "criminal" conduct. The campaign began in 2007 when the Doctor concluded in his report that joint custody of the parties' children would be unworkable, and that Defendant's "degree of psychological disturbance is concerning and does not lend itself well to proper parenting." Ex. 9 at 28-29. Defendant believed he was entitled to a full copy of the Doctor's file to challenge his findings, e.g., Ex. 26, but the Doctor refused to provide it without a court order or the former wife's consent because the file would reveal her confidential mental health information, e.g., Ex. 123 at 7, 12 ("We cannot release a copy of the case file to you without Ms. Brewington's consent, as it contains confidential information about her as well as the children in addition to yourself"; "Without Ms. Brewington's consent or a Court order from Judge Taul, I am prohibited from releasing the confidential information contained within the file per state and HIPAA laws and regulations."). Defendant and the Doctor soon came to an impasse.

At that point, Defendant began to bombard the Doctor's office with letters and faxes, some- times multiple times per day, making threats of civil and criminal lawsuits and professional discipline, accompanied by repeated and pointed demands to withdraw as a witness in the case. E.g., Exs. 38– 39, 41, 43–44. Moreover, he accused the Doctor and Carl Taul, the original trial judge, of improper *ex parte* communications with each other, until Judge Taul eventually recused and appointed Judge Humphrey as

special judge. See Ex. 120 (Order Naming Special Judge). Defendant considered his campaign a success as to Judge Taul, referring to the recusal frequently in subsequent blog posts. Exs. 160, 162, 167, 171, 191, 194. But even though those actions had led the Doctor to the professional opinion that Defendant was "potentially dangerous," Tr. 131–32; Ex. 132 at 7, he remained in the case. The Doctor ultimately opined that Defendant is paranoid, manipulative, "manic-like," "unwilling to accept responsibility for his behavior," self-centered, unreceptive to criticism, and "has difficulty seeing an issue from another's perspective"—again, "a degree of psychological disturbance that . . . does not lend itself to proper parenting." Ex. 140 (Judgment and Final Order on Decree of Dissolution of Marriage ("Decree"), Finding 8(K)).

At the final hearing, Defendant's in-court behavior—including slamming piles of books, outbursts of angry yelling, and inappropriate laughing—confirmed those impressions. See Ex. 140 (Decree, Finding 8(K)). His behavior was so volatile that the court had a sheriff's deputy in the courtroom whenever he was present. Tr. 237–38. Evidence at the hearing established that Defendant had also "made a less than subtle attempt to intimidate" his wife's counsel, who co-owned a fire- arms training business with her husband, by calling their home to seek weapons training from the business while the divorce was pending, Ex. 140 (Decree, Finding 8(S))—even though the business was not actively advertised, and was located well over an hour's drive from Defendant's home, Tr. 69–70. Moreover, Defendant bought a .357 Magnum handgun shortly after his former wife filed

for divorce, but never returned it to her as the Decree required, Tr. 62, 325; Ex. 140 (Decree) at Conclusion 16 & Ex. D at 3—purportedly for concern about *her* mental stability, Ex. 148 at 8 (¶ 26). And Defendant posted online that the divorce case was "like playing with gas and fire, and anyone who has seen me with gas and fire know[s] that I am quite the accomplished pyromaniac," and that authorities "would have to kill [me] to stop [me]" from posting confidential divorce details online. Ex. 140 (Decree, Findings 8(N)–(O)).

Relying on the Doctor's testimony about Defendant's mental health and dangerousness, evidence of Defendant's attempts at intimidating witnesses and opposing counsel, and the court's own observation of Defendant's behavior, the court awarded child custody to his former wife. Id. (Decree, Finding 8(S) & Conclusion 3). It further ordered Defendant's parenting time suspended pending a mental-health evaluation "to determine if he is possibly a danger to the children, Wife, and/or to himself," followed by a schedule of supervised parenting time transitioning to unsupervised. Id. (Conclusion 4).

Defendant considered that ruling tantamount to termination of his parental rights. See, e.g., Ex. 142 at 2 (¶ 7) (characterizing decree as "terminating [Defendant's] parental rights"). But instead of taking the court-ordered steps to maintain his relationship with his children, he escalated his efforts at intimidating the Judge and the Doctor—efforts he was able to pursue full-time, since he was unemployed at all times during and after the divorce, supported by his

mother's provision of a rent-free house and $2,500 monthly assistance. See Ex. 140 (Decree, Finding 9(A)). First, Defendant used the Internet (and at least implied that he would use mass mailings) to publicize the Judge's home address, Exs. 142 (attachment to Motion for Relief from Judgment), 160—leading the Judge to install a home-security system, keep a firearm ready at home for the family's protection, notify his children's schools about Defendant's threats, and arrange police escorts for his wife's commute to work, Tr. 252, 255. Then, Defendant used an ongoing series of Web posts to demonstrate his ability to find and publicize personal information about the Doctor—including his home address, Ex. 199 (causing him to fear for his children's safety, Tr. 166–67); a private family photo of him dancing at a family member's wedding, Tr. 201, Ex. 201; and details about his brother and late father, Tr. 96– 97, Exs. 33, 193. He wrote in one post that the Doctor "may be a [p]ervert," Ex. 181; and in another supposedly hypothetical "Dr. Custody Evaluator" who "made me so mad I wanted to beat him/her senseless" and "punch Dr. Custody Evaluator in the face," Ex. 177. Then after that, Defendant showed up at an unrelated hearing where the Doctor was testifying, bragging afterward that his presence made the Doctor "a little nervous and from a psychological standpoint he probably should have been." Ex. 200. Indeed, Defendant's actions prompted the Doctor and his wife to show his picture to their children and co-workers and notify area law enforcement requesting additional protection, while keeping his threats secret from elderly family to avoid worrying them. Tr. 159–66, 203–04.

Any one of those statements in isolation might be no more than ambiguously threatening. But reading them as a whole within the totality of the circumstances shows that at least by the time he published the victims' addresses, (1) Defendant intended his long-running pattern of communications and conduct to be a credible implied threat to his victims' safety in retaliation for their lawful roles in his divorce case, and (2) his victims quite reasonably took his threats seriously. That is the essence of a constitutionally unprotected threat—one that Defendant strongly implied by the escalating tone and frequency and long-running duration of his diatribes (even the ones that in themselves were protected speech); his express recognition that his actions would be perceived as threatening; the victims' knowledge of his psychological disturbance and dangerousness; and their firsthand observation of his obsessive, volatile, and violent behavior. Within that context, Defendant telling his victims that he knew where they lived was clearly intended to make them justifiably feel unsafe even in their own homes. And the jury's perjury verdict implicitly recognized that intent, finding that Defendant lied to the grand jury about his true motives for posting the Judge's address. We will discuss the context of Defendant's statements in greater detail in connection with each victim.

## Discussion and Decision

### Intimidation and Free-Speech Limitations on "Threats" to Commit Defamation

The grand jury indicted Defendant for intimidating the Judge under Indiana Code section

35-45-2-1(a)(2) (2008), for "communicat[ing] a *threat* to" the Judge, with the intent to "place[ him] in fear of retaliation for [the] prior lawful act" of issuing the divorce decree.[2] App. 22 (emphasis added). Defendant's indictment for attempted obstruction of justice is also rooted in intimidation-specifically, alleging that he tried to "*intimidate* and/or harrass [*sic*]" the Doctor to prevent him from testifying in the divorce case.[3] App. 24 (emphasis added). Both charges therefore depend on a "threat" as defined by statute:

"Threat" means 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

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[2] The basic intimidation offense is a misdemeanor, but becomes a Class D felony if the threat is made against "a judge or bailiff of any court." I.C. § 35-45-2-1(b)(1)(B)(ii).

[3] Despite summarily affirming reversal of the conviction for intimidating the Doctor, intimidation remains central to our analysis because it was the means by which Defendant attempted to obstruct justice—hence the Court of Appeals' double-jeopardy reversal of that conviction

> legal claim or defense, except for a reasonable claim for witness fees or expenses;
> (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.

I.C. § 35-45-2-1(c).

But our inquiry cannot end with the statutory definition. As *amici* point out,[4] subpart (c)(6) parallels the classic common-law definition of defamation, and (c)(7) reflects a particular type of defamation. E.g., Armentrout v. Moranda, 8 Blackf. 426, 427 (Ind. 1847) ("A libel is said to be a malicious defamation expressed in printing or writing . . . , tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule."); Johnson v. Stebbins, 5 Ind. 364, 366–67 (1854) ("Any publication that tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contained charges of infamy or crime.") Subparts (c)(6) and (7), then, essentially criminalize defamation by including it in the definition of a punishable "threat." The same constitutional free-speech protections that apply in civil defamation cases therefore must also apply to prosecutions under (c)(6) and (7).

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[4] We thank all amici for their helpful briefs

The First Amendment aims to "ensure that debate on public issues remains 'uninhibited, robust, and wide-open.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (quoting New York Times, 376 U.S. at 270). "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office"—but "'[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.'" Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result) and Baumgartner v. United States, 322 665, 673–74 (1944)). "Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'" Falwell, 485 U.S. at 51 (quoting New York Times, 376 U.S. at 270). Even when those attacks are unfair, offensive, or ignorant, the First Amendment protects them so that legitimate debate will not be stifled.

Foremost among those protections is the "actual malice" standard (sometimes called "constitutional malice" to distinguish it from mere spitefulness) for speech about public officials. Fifty years ago, New York Times v. Sullivan held that a State may not punish "a defamatory falsehood relating to [a public official's] official conduct unless [the State] proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80 (so holding in civil defamation claim). "[S]uch a privilege is required by the First and Fourteenth Amendments." Id. at 283. In turn, "reckless disregard"

is not "measured by whether a reasonably prudent man would have published, or would have investigated before publishing," St. Amant v. Thompson, 390 U.S. 727, 731 (1968); but rather requires "that the defendant in fact entertained serious doubts as to the truth of his publication," id., or had a "high degree of awareness of their probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964)— even if the statements are made with ill will, id. at 78–79. Since a trial judge is clearly a public official, Defendant's statements about the Judge are subject to this very high standard as a matter of federal constitutional law.

**The Judge**

In his blog posts, Defendant's criticisms of the Judge were rather generalized—contending that the Judge "has abused my children" or otherwise done "mean things to my children and my family," Ex. 160; was guilty of "criminal conduct," Ex. 181; or was simply "crooked," Ex. 186, or "a nasty evil man," Ex. 183. But he also posted a copy of his August 24, 2009 "Motion to Grant Relief from Judgment and Order" online, see Ex. 142 at 9, in which he alleged that the Judge:

- "has a substantial conflict of interest as[ he] was aware that Dr. Connor was not licensed to practice psychology by the State of Indiana when [he] had appointed Dr. Connor to perform psychological services for an Indiana Court," Ex. 142 at 2 (¶ 6);

- "conducted himself in a willful, malicious, and premeditated manner in punishing the Respondent for attempting to protect the parties' minor children, the Counties of Ripley and Dearborn, and the States of Indiana and Kentucky from the actions of Dr. Edward J. Connor by terminating the Respondent's parental rights," id. (¶ 7);

- "robbed [Defendant's] parenting rights as revenge for fighting injustice," id. at 9;

- "caused irreparable damage to the Respondent's children in the Court mandated child abuse [*sic*]" by "illegally eliminating their father from their lives out of the Court's self-interest," id. at 9–10; and

- used "child abducting tactics" by issuing the divorce decree, id. at 10.

In the motion, Defendant also threatened to "fil[e] criminal complaints with the Sheriff's department and Prosecutor's office for child abuse," and to contact government officials, local churches and schools, social service agencies, and community organizations "in an attempt to contact other victims and to help bring public awareness to the atrocities that take place in the Ripley and Dearborn County Courts." Id. at 9. And he concluded the motion by seeking relief "due to fraud" by the Judge, the Doctor, and opposing parties and counsel—and echoing his previous efforts seeking

Judge Taul's recusal, he further demanded "the immediate resignation of Judge James D. Humphrey from the bench for the horrendous crimes committed against the Respondent and his children." Id. at 10.

If taken literally, those statements are defamatory *per se* because they impute judicial misconduct. Heeb v. Smith, 613 N.E.2d 416, 419 (Ind. Ct. App. 1993). Yet actual malice does not hinge on whether Defendant's claims are true or false, nor even whether they are objectively reasonable. Garrison, 379 U.S. at 79 ("The [actual malice] test . . . is not keyed to ordinary care . . . ."). Instead, it is a matter of his subjective sincerity—whether he "in fact entertained serious doubts as to the truth of" those statements, Thompson, 390 U.S. at 731, or had a "high degree of awareness of their probable falsity," Garrison, 379 U.S. at 74, even if he was motivated by ill will, id. at 78–79. Here, there is no evidence that Defendant ever subjectively entertained such doubts—nor is it likely that he ever would, since as the Doctor concluded and the divorce court found, Defendant is "self- centered" and "has difficulty seeing an issue from another's perspective." Ex. 140 (Decree, Finding 8(K)). Whether his beliefs were reasonable is irrelevant—without proof that he *actually* doubted his assertions about the Judge, the First Amendment forbids using those statements as a basis for civil or criminal liability.

A reasonable-person inquiry does matter on a more fundamental level, though—determining whether Defendant's assertions were defamatory in the first place. A statement is not defamatory unless it conveys a defamatory imputation *of fact*—and "loose, figurative, or hyperbolic language [may] negate the

impression that the writer was seriously maintaining" that his assertion is factual. Milkovich, 497 U.S. at 21. For example, a parody advertisement crudely portraying a prominent televangelist as having engaged in "a drunken incestuous rendezvous with his mother in an outhouse" is so obviously farfetched that no reasonable person could take it seriously as fact. See Falwell, 485 U.S. at 48, 57. But an editorial asserting that a local high school football coach "lied at [a] hearing after . . . having given his solemn oath to tell the truth" is not hyperbolic enough to negate a reasonable "connotation that petitioner committed perjury" because that contention is "sufficiently factual to be susceptible of being proved true or false," and thus defamatory. Milkovich, 497 U.S. at 5, 21 (alteration in original) (internal quotation marks omitted).

Here, though Defendant sincerely (albeit unreasonably) believed his statements were factual, we believe that in the context of a divorce decree, reasonable readers would understand "child abuse" or "abducting" as Defendant's exaggerated opinion of the decree's custody ruling—not factual assertions that the Judge actually beats or kidnaps children. And though it is a closer call, we doubt reasonable readers would take Defendant's claims of "revenge" or other improper motives for the ruling as much more than losing litigants' common lament that "the Judge was just out to get me." When a statement is reasonably susceptible of both defamatory and non-defamatory meanings, we leave that determination to the jury, Bandido's, 712 N.E.2d at 457—but under independent constitutional review in this criminal case, we must also be persuaded for ourselves that the evidence

proves Defendant's guilt beyond a reasonable doubt. And on this record, we cannot agree that Defendant's claims would reasonably be understood as assertions of fact, rather than mere hyperbolic opinion. Even apart from the failure to prove actual malice, Defendant's child-abuse and child-abducting claims may not form the basis of a conviction here.

None of this is a defense of Defendant's conduct. But free speech principles would be meaningless if they ceased to apply when a statement is ignorant, offensive, or unfair. Indeed, that is when the need for free-speech protection is at its greatest. The First Amendment is broad enough to protect "Priests Rape Boys" picket signs as protected political speech in connection with a funeral Mass for a fallen soldier. Snyder v. Phelps, U.S. , 131 S. Ct. 1207, 1213, 1216–17 (2011). And it is broad enough to protect the crude "outhouse rendezvous" parody in Falwell. 485 U.S. at 57. It is therefore certainly broad enough to protect Defendant's ill-informed—but by all indications, sincere—beliefs that the Judge's child-custody ruling constituted "child abuse" or "child abducting," and that the ruling was based on improper motives. The Court of Appeals erred in relying on Defendant's overheated rhetoric about "child abuse," or the falsity of that characterization, to affirm his conviction for intimidating a judge. Even if Defendant's "child abuse" and other statements about the Judge could be understood as assertions of fact, not hyperbole, they are protected by the First Amendment because there is no proof of actual malice.

**The Doctor**

The actual-malice standard at least arguably applies to Defendant's statements about the Doctor as well, though for different reasons. As with the Judge, Defendant's statements about the Doctor impute professional misconduct and are therefore defamatory *per se*. Henrichs v. Pivarnik, 588 N.E.2d 537, 542 (Ind. Ct. App. 1992). Defendant repeatedly used various websites to accuse the Doctor, more or less, of skewing his custody recommendation out of animus—of being "crooked," Ex. 186; having improper motives for remaining in the divorce case, see Ex. 191; committing "criminal conduct," Ex. 181; using children "as prostitutes for . . . financial gain," see Ex. 180; being a "child abuser" who "hurt[s] children," Ex. 179; "actively work[ing] to hurt children and parents," Ex. 166; and that the Doctor "won't quit. He wants to hurt me . . . because I continue to demonstrate that he doesn't follow the law," Ex. 191. And perhaps the harshest of all, he accused the Doctor of being a "pervert" and "using [custody] evaluations as a means to gain some kind of perverted sexual stimulation by asking the children's mothers explicit questions about their sex lives." Ex. 197.

But despite being defamatory, those statements may be protected by the actual-malice standard as a matter of Indiana law—even though the Doctor is not a public figure. We have extended the stringent New York Times standard to "defamation cases involving matters of public or general concern," even if the victim is a private figure. Bandido's, 712 N.E.2d at 449, 452 (citing Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976)). Determining whether a controversy is of public or general concern

is a question of law for the court. Bandido's, 712 N.E.2d at 452 n.7. Unlike the public-health restaurant inspections at issue in Bandido's, expert testimony primarily affects only the private litigants in a particular case, and is "public" only to the extent that the proceedings in that case were open to the public. Out of an abundance of caution, though, we will assume *arguendo* that if a psychologist actually were abusing his position of trust to give corrupt expert testimony or for personal gratification, it would be a matter of public or general concern. Under that assumption, the actual-malice standard would apply to protect Defendant's public or online comments about the Doctor, as well,[5] because there is no evidence that Defendant in fact subjectively doubted his accusations—regardless of whether an objectively reasonable person would have.

**Enforceability of the Intimidation Statute Generally**

As the discussion above illustrates, the "actual malice" standard is so steep that prose- cutions involving public figures or issues of public concern under Indiana Code section 35-45-2- 1(c)(6) or (7) are all but impossible. When a "threat" of ridicule or

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[5] The Court of Appeals also relied on the "frequency and tone" of those comments, as well as Defendant's long-running private barrage of faxes and letters to the Doctor as constituting a coercive level of harassment sufficient to find attempted obstruction of justice. We express no opinion on that issue because we find a "true threat" as discussed in Part II below

embarrassment is made against a public figure, New York Times applies as a matter of federal law—and if the speech implicates an issue of public concern, Bandido's applies as a matter of Indiana law. In either event, proof of "actual malice" is required for a conviction to survive constitutional scrutiny. Only where a purely- private figure is involved, *and* the alleged "threat" involves no colorable issue of public concern, may subparts (c)(6) and (7) be applied as written; and otherwise, the actual malice standard will preclude most prosecutions. As a result, the State will often be well-advised to avoid bringing charges under those subparts—or even including them in jury instructions, for reasons discussed in Part III.A below—when, as here, it could rely on other subparts that do not implicate actual malice.

**"True Threats," as Identified in Context, Are Not Protected Speech**

Not all forms of intimidation are limited by the actual-malice standard. To the contrary, "the First Amendment . . . permits a State to ban a 'true threat'"—that is, a "statement[] 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 (citing Watts v. United States, 394 U.S. 705, 708 (1969) (*per curiam*)). The "intent" that matters is not whether the speaker really means to carry out the threat, but only whether he intends it to "plac[e] the victim in fear of bodily harm or death." See Black at 359–60 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

The speaker's intent, then, is often the deciding factor between whether a communication is "constitutionally proscribable intimidation" or protected "core political speech," Black, 538 U.S. at 365. For example, in Watts, a young man told a small group at a political rally that he had received a draft card for service in the Vietnam War, but he would not report for his physical: "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. They are not going to make me kill my black brothers." 394 U.S. at 706 (internal quotation marks omitted). In response, the crowd laughed. Id. at 707. The Supreme Court reversed the speaker's conviction for "knowingly and willfully threaten[ing] the President," concluding his comments were only "political hyperbole," not a true threat. Id. at 706–08. Though the *per curiam* opinion does not offer a detailed rationale, the audience's laughter suggests that the statement in context was not meant to be taken seriously.

But Black expressly recognized the importance of *context* to distinguish a true threat from protected speech. There, the high Court recognized that cross-burning is often intended for the prohibited purpose of making its targets fear for their lives, Black, 538 U.S. at 357, but is sometimes "a symbol of group solidarity . . . directed at a group of like-minded believers"—in which context, it "would almost certainly be protected expression," id. at 365–66 (quoting R.A.V., 505 U.S. at 402 n.4). The Court therefore observed that a factfinder must consider "all of the contextual factors . . . to decide whether a particular cross burning is intended to intimidate." Id. at 367.

Both before and after Black, courts have emphasized that assessing true threats is highly dependent on context. As the Seventh Circuit has long recognized, "Written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published." United States v. Prochaska, 222 F.2d 1, 2 (7th Cir. 1955); accord, e.g., United States v. Turner, 720 F.3d 411, 426 (2d Cir. 2013), cert. pending (approving of jury instruction including identical language). Particularly with implied threats, then, juries are not bound to "rigid adherence to the literal meaning of a communication" while turning a blind eye "to its reasonable connotations derived from its ambience"—because doing so "would render [prohibitions on threats] powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat." United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994) (citing Prochaska, 222 F.2d at 2). Nor are juries "preclude[d from] finding . . . a threat any time the defendant can conjure up some conceivable alternative explanation for his words." United States v. Shoulberg, 895 F.2d 882, 885 (2d Cir. 1990). The true meaning of a facially ambiguous threat is for a jury to decide, as long as the State presents "sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient *familiar with the context* of the [statement] would interpret it as a threat." Malik, 16 F.3d at 50 (emphasis added).

Similarly, we rely here on the full context of Defendant's statements and conduct to determine

whether they were merely political hyperbole or actually intended as true threats. Because threats, particularly veiled threats, are heavily dependent on "all of the contextual factors," Black, 538 U.S. at 367, we doubt any rigid formula can fully capture the distinction between protected speech and unprotected threats. Some courts apply a purely objective test, inquiring only whether in context, "the recipient could reasonably have regarded the defendant's statement as a threat"—reasoning that a "threat is not a state of mind in the threatener; it is an appearance to the victim." United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990) (internal quotation marks and citation omitted); accord, e.g., Turner, 720 F.3d at 420 ("This Circuit's test for . . . a true threat is an objective one— namely, whether an ordinary, reasonable recipient who is familiar with the context of the communication would interpret it as a threat of injury.") (internal quotation marks and substitution omitted).

But Defendant asks us to also consider whether he *intended* to put his targets in fear for their safety. We believe his suggestion is consistent with Black's focus on "whether a particular [communication] is *intended* to intimidate," 538 U.S. at 345 (emphasis added)—and consistent with "our strong commitment to protecting the freedom of speech and expression" as a matter of Indiana law, even beyond what the First Amendment requires. Bandido's, 712 N.E.2d at 451–54 (adopting actual malice standard for defamation claims brought by private figures relating to issues of public concern, exceeding First Amendment protections); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("[S]o long as they do not impose

liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."). We therefore hold that "true threats" under Indiana law depend on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target. We conclude there is ample evidence on both points as to both victims.

**Evidence of Defendant's Intent to Threaten**

We begin by looking to evidence of Defendant's intent to threaten the Judge—whether his statements were meant to be threatening, not just innocently misunderstood, as gleaned from "all of the contextual factors." Black, 538 U.S. at 367. Such a *mens rea* determination "is almost inevitably, absent a defendant's confession or admission, a matter of circumstantial proof." Hampton v. State, 961 N.E.2d 480, 487 (Ind. 2012). But even in cases that implicate free-speech protection, we trust juries to make such inferential decisions—for example, "[i]f a statement is susceptible to both defamatory and non-defamatory meanings, the matter of interpretation should be left to the jury." Bandido's, 712 N.E.2d at 457. The jury plays a similar role in considering "all of the contextual factors" under Black to interpret whether an alleged veiled threat was actually intended as a "true threat"—subject, of course, to our duty of "independent and searching review of the record," id. at 454–55 (citing New York Times, 376 U.S. at 285), to ensure

that free-speech protections are not obscured by deference to the jury.

Our independent review begins with whether the speaker knew the statements at issue were likely to be perceived as threatening. Because of the inferential nature of circumstantial evidence, that *mens rea* question will often depend on whether a reasonable person would recognize the statements' threatening potential. That inquiry also recognizes the inherent fact-sensitivity of implied threats—where even a single detail can transform otherwise protected speech into an unprotected threat. For example, a detailed and gruesome "fantasy" posted online about raping and murdering a young woman would generally be protected speech—but when the story (and the victim it describes) is named after a female classmate of the author, it may become a "true threat" against her. Jennifer Rothman, Freedom of Speech and True Threats, 25 Harv. J.L. & Pub. Pol'y 283, 351–52 (2001) (citing United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997)). Regardless of whether the author "purposefully intended to intimidate his classmate, he would certainly have known that if she read the story she would be intimidated by it, given its gruesome and explicit nature," and "because [he] posted the story on a public website and used his classmate's name as the title, . . . the victim would [likely] receive the threat." Id. at 352. Again, we must leave room for a jury to use its reasonable judgment about "all of the contextual factors." See Black, 538 U.S. at 367. And here, the context shows that Defendant not only knew that his victims would be placed in fear, but purposefully intended that result—indeed, as discussed below, he directly admitted both points.

*The Judge*

Since Defendant never stated an overt threat against the Judge, we begin by examining the circumstantial evidence to determine whether Defendant knew his actions would be understood as a threat. In that regard, we find Defendant's publication of the Judge's home address to be particularly telling—not least, because Defendant's perjury to the grand jury about his purpose in doing so implies that truthful testimony on that point would have been incriminating. And even apart from his perjury, the context strongly suggests that Defendant could only have intended the address as a hint to the Judge that Defendant's campaign would not stop with mere criticism, but would instead jeopardize his family's safety in their own home. That context includes, but is not limited to, Defendant's concern that a perceived adversary knew where his mother lived, his volatile courtroom conduct, and his recognition that his targets had already become genuinely concerned by his behavior.

At the outset, we observe that Defendant's pretext for directing ethics complaints about the Judge to "the Ethics & Professionalism Committee Advisor located in Dearborn County, Indiana," but at her (and thus, the Judge's) otherwise-unpublished home address, is utterly implausible. Exs. 142, 160. Defendant had no difficulty directing his complaints to appropriate authorities—for example, his voluminous and repeated complaints about the Doctor to the Kentucky Board of Psychiatry. E.g., Exs. 54, 60. It is highly unlikely, then, that he would overlook the conspicuous links on the

Indiana Judiciary website for filing judicial ethics complaints, yet through sheer inadvertence find a title once held by the Judge's wife and connect it to a residential address in a small Indiana town. Compare Tr. 275–77 (witness demonstration of judiciary website) with Tr. 405–08 (witness demonstrating county assessor website). And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife, and that her address was his address.

Indeed, Defendant himself recognized the threatening potential of a perceived adversary knowing a loved one's address. Just two months after publicizing the Judge's address, Defendant wrote a letter to various law enforcement officials in which he expressed concern that a police detective knew where Defendant's mother lived:

> I was disturbed to get a voice message on October 8, 2009, from someone alleging [*sic*] to be a detective from the Dearborn County Special Crimes Unit. . . . The message said someone filed a com- plaint. . . . The man would not tell me who made the complaint or any details of the complaint; he just wanted to meet me. Even more disturbing, he indicated that he knew that my mother lived in Cincinnati; [*sic*] which is distressing given the level of judicial vindictiveness coming out of Judge Humphrey's courtroom.

Ex. 89 at 6. If Defendant found it threatening that a law-enforcement officer knew his mother's address, he surely recognized that the family of a public figure who had sentenced (and before that, prosecuted) violent criminals would be no less concerned by an angry, vindictive person knowing and broadcasting *their* address. Several cases, too, have recognized that publishing a victim's address (whether work or home) can often have threatening implications. E.g., Turner, 720 F.3d at 422–23 (finding true threat based in part on blogger's publication of Seventh Circuit Judges' office addresses, and threat to publish their home addresses); United States v. Pacione, 950 F.2d 1348 (7th Cir. 1991) (finding true threat based in part upon defendant "asking for [IRS officer's] boss' home address," and telling officer that "he knew where she lived and her home phone number"). See also Shoulberg, 895 F.2d at 885–86 (asking for potential witness's address, coupled with expression of hope that witness was not cooperating with law enforcement, established an attempted threat, even if neither fact individually would have sufficed).

The facts and circumstances known to Defendant at the time he made his threats further imply that he knew his communications would be threatening. He knew the Judge considered him dangerous—not only from the findings in the divorce decree about his psychological disturbance and "playing with gas and fire," but also from the Judge's admonitions to Defendant about his violent and volatile courtroom behavior that resulted in a sheriff's deputy being stationed behind Defendant throughout the final hearing. Defendant also knew that his similar course of conduct against the Doctor had, as discussed

below, caused the Doctor to seek "protection" from the court against Defendant's behavior, Ex. 67 at 3–4, and to conclude that Defendant was "potentially dangerous," Ex. 132 at 7. Indeed, Defendant's "Motion to Clarify and to Reconsider" recognized that his "outbursts . . . were arguably extreme and/or unwarranted"—though he deflected responsibility by blaming his behavior on his "inability to legally inspect and cross-examine [*sic*] the information behind" the Doctor's conclusions. Ex. 141 at 3. Then just four days later, Defendant filed his "Motion for Relief from Judgment and Order" reciting the Judge's home address and posted it online to publicize it under the obvious pretext of encouraging judicial-ethics complaints. Under the circumstances known to Defendant, there is no reasonable doubt that he knew his statements were threatening. Ex. 160.

But for all the strength of that circumstantial evidence, the strongest evidence here is direct: that Defendant declared—indeed, emphasized—his threatening intent in a letter to the children's treating therapist that he attached to his reply in support of the "Motion for Relief from Judgment":

> I have always said that I would hold everyone accountable for any unethical and/or illegal conduct in matters dealing with my children. *Some would argue that this appears threatening. I would argue that it is a promise.* People have accused me of trying to intimidate psychologists, lawyers, and judges. . . . If I have done anything wrong, I would suggest that these people contact the

> proper authorities and file charges or retain an attorney and sue me.

Ex. 148 at Ex. A at 5 (emphasis added.) Even if "it's not a threat, it's a promise" might otherwise be mere schoolyard bravado, it was legitimately menacing in view of his then-recent violent and uncontrolled courtroom behavior, diagnosis of psychological disturbance and dangerousness, veiled references to arson and skill in the use of firearms, and long-running expressions of hostility towards the Judge—all of which the Judge was well aware of through the divorce proceedings.

In sum, Defendant's reason for publicizing the Judge's address was clearly pretextual; he implicitly recognized that broadcasting the Judge's address was threatening by declaring concern on his mother's behalf about a far less public disclosure; and he directly acknowledged that his statements could readily be perceived as threatening. And he did all these things shortly after demonstrating violent and uncontrolled behavior in the courtroom, knowing that the Judge had already perceived him to be dangerous and unstable. We are persuaded beyond any reasonable doubt that Defendant was well aware of—and indeed, fully intended—the threatening implications of his communications and actions towards the Judge.

*The Doctor*

Defendant's own words also provide insight into his *mens rea* in threatening the Doctor— in fact, he directly expressed his intent, or at least strongly

implied it, on several occasions. In September 2008, the Doctor asked the trial court for "some protection" from Defendant because the tone of his frequent faxes (often multiple times per day) was becoming more repetitive, aggressive, and provocative—citing Defendant's statement that "the game is over[,] Dr. Connor" as "rather threatening." Ex. 67. Defendant responded by taunting the Doctor for seeking unspecified "protection" from the divorce court instead of a restraining order, Ex. 51, then repeating the "game is over" threat a couple of months later, couched in a self-serving "Legal Disclaimer":

> I'd say the game is over but you may send it to the Court complaining about me threatening you. Heck with it, the game is over Dr. Connor. **[Legal Disclaimer: this is not to be perceived as any threat to Dr. Connor no matter how hard he tries to use psychological jargon or "interpretation" in an effort to make him appear to be a victim in this matter. . . .]** The game is over because you have done your best to try to stomp me out and I am standing tall. . . .
>
> The game IS over Dr. Connor. Don't bother running to another court looking for pity. . . .

Ex. 59 (square brackets and boldface original).

About a month after that purported "disclaimer," Defendant largely ceased communicating to the Doctor directly and instead shifted his focus to using websites he created to publicize his complaints about

the Doctor. In one of his early posts, he again implicitly acknowledged that his behavior had been threatening—and that his goal was indeed to obstruct justice by discouraging the Doctor's testimony: "Ask yourself why [the Doctor] is working so hard to stay involved in this case. *He could have easily said that he felt threatened by me* so he was withdrawing from the case." Ex. 191 (emphasis added.) For the next several months, Defendant posted frequently, see generally Exs. 188 & 190–91, accusing the Doctor of various wrongdoing and including a warning that "[t]his is not going to end well," Ex. 188. (Those Internet posts became an issue in the divorce case, Exs. 127–29 (various pre-hearing motions), 140 (Decree, Finding 8(N)), and the Doctor was aware of them, see Tr. 93–98, 137–38, 150–58.)

Defendant's threats did not subside even after the final divorce decree was issued, detailing Defendant's pattern of intimidation toward the Doctor (and others involved in the divorce) and restricting parenting time because of the safety concerns it raised. To the contrary, he doubled-down on that behavior, escalating his rhetoric into increasingly personal attacks—accusing the Doctor of being a "[p]ervert" and "sexual predator," Ex. 181, daring him to "[c]owboy up" and "[q]uit hiding," Ex. 182. Those writings culminated in a reference to physical violence against the Doctor, veiled in a comparison to likely reactions to a hypothetical angry review of a plumber:

> "That lousy son of a bi#$h, Dr. Custody Evaluator, lied in his report. He made me so mad I wanted to beat him/her senseless. The dirty piece of S*@T would not honor his/her

> contract . . . . Every time I think about the evaluation report . . . it makes me want to punch Dr. Custody Evaluator in the face."
>
> Rather than say, "There's no way I would use Dr. Custody Evaluator", [sic] the social worker, psychologist, and/or judge may begin to think that the person who wrote the review is a danger to their own children . . . .
>
> No one has ever lost the ability to see their own children because they wrote an angry review of a plumbing company. Why should some- one'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 someone.

Ex. 177 at 2–3. Then about a month later, Defendant demonstrated his knowledge of the Doctor's home address in a post identifying the bank holding the Doctor's home mortgage, the name of his subdivision, and the street name (conspicuously emphasized within a play on words). Ex. 199 at 1–2. The post continued, "There are some nice houses on his street. I have family that lives a couple streets over from Dr. Connor. I wonder if I should warn my family's neighborhood about the troubles within the family court system?" Id. at 1. And several months after that, Defendant demonstrated his ability to find the Doctor away from either his office or his home, by appearing at an unrelated hearing in which the Doctor was testifying—announcing on his blog that his presence had made the Doctor "a little nervous" because "[a]s a

psychologist, he probably believes that *aggression or violence* would be a common reaction for parents who had their children ripped from them without any warning or justifiable reason." Ex. 200 (emphasis added).

The context of Defendant's identification of the Doctor's home address, much like the Judge's, supplies a clear threatening implication for statements that would otherwise be far more ambiguous. Defendant knew that his obsessive and harassing conduct leading up to the final hearing had already intimidated the Doctor to the point of seeking "protection" from the trial court; and that the Doctor had reached the professional conclusion that Defendant had "a degree of psychological disturbance that is concerning." His subsequent conduct towards the Doctor served only to amplify the behavior that led to those conclusions. Even if all the rest of Defendant's statements were only ambiguously threatening—his self-serving attempt to "disclaim" threatening intent, his express recognition that the Doctor "could have easily said that he felt threatened" by his conduct, and his escalating rhetoric into descriptions of "beating senseless" a supposedly hypothetical custody evaluator—they clearly formed part of a complete threat when Defendant announced that he knew where the Doctor lived. That threat then became even more forceful when Defendant followed the Doctor to an unrelated hearing knowing it would make him "a little nervous." Taken in full context, we are convinced beyond a reasonable doubt that Defendant not just knew, but fully intended, that he would make the

Doctor fear being attacked in his own home—a classic true threat.

**B. Reasonable Perception of Threats Under Similar Circumstances**

Besides the speaker's intent to threaten, the other necessary element of a "true threat" is whether the communications at issue would be likely to cause a reasonable person, similarly situated to the victims, to fear for the safety of themselves or someone close to them. Making that determination from the perspective of an objectively reasonable person ensures that harsh, but otherwise protected, speech will not become punishable merely by being directed towards a hypersensitive or unreasonably fragile target. Yet particularly when the alleged threats are only implied, as here, the inquiry must also account for what a reasonable person would perceive *if similarly situated* to the victim—since the particular facts and circumstances known to each victim are the very facts from which threatening implications are generally drawn. So in effect, what is often called a "reasonable listener" test is best understood, at least in the context of implied threats, as a "reasonable victim" test—whether it was *objectively* reasonable for the victim to fear for their safety.

*1. The Judge*

An objectively reasonable person in the Judge's situation would recognize Defendant's statements as threatening, and the Judge was amply reasonable to perceive them as such. First, reasonable people would take into account their own knowledge about the

person making threats against them to determine whether they should take the threats seriously. And in doing so, they would reasonably consider how Defendant's rhetoric had escalated: When relatively mild criticism and relatively straightforward motions failed to accomplish his goals, he progressed into angry (albeit protected) hyperbole about "child abuse" and judicial corruption; then into ominous invective about being an "accomplished pyromaniac" for whom the divorce and custody dispute was like "gas and fire," Ex. 140 (Decree, Finding 8(O)); then into increasingly irrational, paranoid, and personal accusations of corruption, mail fraud, and RICO conspiracies by anyone he perceived as an adversary, e.g., Ex. 208; then to declaring himself a "martyr," Ex. 148 at Ex. A at 4, and a victim of "horrendous crimes," Ex. 142 at 10; and repeatedly vowing to "hold accountable" his perceived adversaries, e.g., Exs. 67, 148 at 10, 160 at 8, 181 at 2. Defendant's long-running angry criticism, even the portion that is protected speech, remains relevant as part of that larger contextual consideration— both as part of the pattern of escalation, and because reasonable people necessarily take an ambiguous threat more seriously when it comes from someone who holds a longstanding grudge.

Reasonable people in the Judge's situation would also view Defendant's erratic, volatile, and violent courtroom behavior—"yell[ing] out things," "thr[owing] his papers" and shouting "I demand justice in this courtroom," and "laughing inappropriately," Tr. 319—as part of that pattern of escalation. As the Judge described that behavior:

> I've never seen anything quite like it in all my years of practice and as a Judge. It was . . . constant rehashing of this almost obsession with Dr. Connor . . . , I recall specifically at the end of that hearing, I had to threaten Mr. Brewington with contempt of court because of him slamming things on the table . . . .

Tr. 224. Indeed, the Judge "threatened [Defendant] with contempt multiple times and . . . had a police officer in the courtroom behind him during the entire proceedings"—the first time he had ever felt such precautions necessary in a divorce final hearing. Tr. 237–38. And reasonable people would, just as the Judge did, consider Defendant's demonstrated obsessiveness as part of the context of his increasingly hostile and menacing words and actions—and would consider the Doctor's professional opinion that Defendant "is potentially dangerous given his profile and behavior thus far," Ex. 132 at 7—as evidence that the threat of violence was serious.

In sum, a reasonable person similarly situated to the Judge would be wary of Defendant's demonstrated obsessiveness, mental disturbance, and instability; his veiled references to pyro- mania and weapons training; his pattern of escalating rhetoric and increasingly personal attacks; and his volatile and violent in-court behavior. And any lingering doubt as to whether the threat was worth taking seriously was erased when Defendant publicized the Judge's home address. In the context of his other behavior, that additional step completed a true threat by implying to any objectively reasonable person that Defendant

intended to menace the Judge not just in the courtroom, but in his living room as well. That perception is further borne out by the Judge's subjective reaction—having an old firearm repaired to have at the ready, installing a home security system, requesting additional police patrols in his neighborhood, notifying security at his son's college, and arranging police escorts for his wife's commute to work. Tr. 252–55. Those are not the actions of a person who merely fears being exposed to criticism or ridicule; they are the actions of a person who fears for his family's physical safety—and in view of what the Judge knew about Defendant, we find his fear was objectively reasonable. Defendant's actions toward the Judge therefore constituted a "true threat" beyond the scope of free-speech protection.

*The Doctor*

Likewise, a reasonable person similarly situated to the Doctor would also be amply justified in perceiving Defendant's behavior as a threat to physical safety. Defendant exhibited an even longer- running campaign of obsessive and escalating behavior towards the Doctor than towards the Judge. Even his initial, seemingly innocent requests for a copy of the Doctor's file were preceded by a threatening anonymous letter that is highly consistent with Defendant's writing style. Ex. 33. When those requests failed to accomplish Defendant's goal, he quickly escalated first to threats (sometimes several per day) of pursuing professional discipline, of civil contempt and lawsuits against the Doc- tor, of lawsuits against the Doctor's business partners and employees, and of criminal prosecution. See generally Exs. 38–42, 44–45, 48–51. When those

efforts also proved fruitless, Defendant began obsessively gathering and publishing personal information about the Doctor—his father, Ex. 193; his civic pursuits, Exs. 179, 197; his involvement in other cases, Ex. 169; and eventually even a private family photo, Tr. 201, Ex. 201—and sustained that campaign for several years. Despite their disconcerting extent and duration, those acts standing alone might arguably constitute no more than "criminal defamation" protected as free speech under Bandido's absent a showing of actual malice.

But reasonable people in the Doctor's situation would not view those acts in a vacuum. Just as with the Judge, Defendant's statements—even the ones that were protected speech—demon- strate an anger and obsessiveness that bears on how seriously a reasonable person would take an otherwise ambiguous threat. Reasonable people would consider that anger and obsession in light of the psychometric test results indicating that Defendant suffers "a degree of psychological disturbance that is concerning," Ex. 9 at 28—thus implying in turn that Defendant is unstable and dangerous. Therefore, as with the Judge, what might otherwise have been merely distasteful, hyperbolic criticism took on genuinely threatening implications when Defendant announced that he knew where the Doctor lived, Ex. 199 at 1–2—and even more so when, a few months later, Defendant followed the Doctor to another hearing in an unrelated case, Ex. 200; and still more so when a few months after that, Defendant publicized a private family photo of the Doctor, Ex. 201. Those additional steps would imply to any reasonable person that Defendant was not merely angry, and not merely threatening to

expose what he perceived as corruption or cronyism—but rather, that he intended to make the Doctor fear for his physical safety wherever he went, whether at his office, in the witness stand, or at his home. In fact, that was exactly how the Doctor explained his fear, testifying that "with nothing else around [the statements] . . . I would maybe see it differently[,] but it's the accumulation of these types of comments and events" that he, "as a person who deals with aggressive people, . . . found . . . to be disturbing." Tr. 189–90. And consistent with that reasonable perception, the Doctor's family sought additional police patrols and discussed Defendant's threats with their children and co-workers—while keeping those threats secret from elderly family members who would be worried. Tr. 159–66, 203–04. Their reactions are precisely what we would expect of objectively reasonable people under similar circumstances—that, faced with statements and conduct Defendant intended to be threatening, they did in fact feel threatened and fearful for their family's safety. That is the essence of a "true threat" to which the United States and Indiana Constitutions accord no free-speech protection.

**General Verdict, Free Speech, and Invited Error**

Defendant next argues that even if some of his speech was constitutionally unprotected, the jury instructions and general verdict were fundamentally erroneous (or constituted ineffective assistance of counsel) because they permitted the jury to convict him based in whole or in part on the constitutionally protected portions of his statements. He is correct

that the instructions were erroneous and created a general-verdict error—but he affirmatively invited those errors as part of a perfectly reasonable trial strategy. When an error is invited for such legitimate reasons, it is neither fundamental error nor ineffective assistance of counsel.

**General Verdicts and Free Speech Generally**

Defendant argues that because the State's arguments relied at least in part on protected speech, his convictions must be reversed because it is impossible to tell whether the jury relied on the protected or unprotected aspects of his speech—in other words, to tell whether he was convicted of true threats or mere "criminal defamation." Defendant bases this "general verdict" argument on Street v. New York, in which the defendant was charged under a statute that made it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act any flag of the United States." 394 U.S. 576, 577–78 (1969) (internal substitutions omitted). The defendant's charging information was based upon both burning a flag (which the Court assumed without deciding to be unprotected[6]), and a protected statement he made while doing so: that he "did willfully and unlawfully

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[6] Not until twenty years later did the Court recognize flag-burning as protected expressive conduct. Texas v. Johnson, 491 U.S. 397 (1989) (striking down state flag-desecration statute). See also United States v. Eichman, 496 U.S. 310 (1990) (striking down federal Flag Burning Act).

set fire to an American Flag and shout, 'If they did that to Meredith[7], [w]e don't need an American Flag.'" Id. at 579. Relying on Stromberg v. California, 283 U.S. 359 (1931), the Supreme Court concluded the statute "was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." Id. at 581, 585–89. The Court held:

> [W]hen a single-count indictment charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as "intertwined" and have rested the conviction on both together. Street, 394 U.S. at 588.

The Court rejected the State's argument that the protected speech was used only for the permissible purpose of proving the defendant's intent in burning the flag, because "[t]he State never announced that it was relying exclusively upon the burning" and the trial judge "never indicated during the [bench] trial that he regarded appellant's words as relating solely to intent." Id. at 589–90. (Nor was the speaker's intent really in controversy; he did not claim, for

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[7] The defendant felt the government had done too little to protect civil rights leader James Meredith, who had been assassinated earlier that day. Street, 394 U.S. at 578–79.

example, that he burned the flag because it was worn and required disposal.) The Court therefore reversed the conviction, because "[i]n the face of an information explicitly setting forth appellant's words as an element of his alleged crime, and . . . a statute making it an offense to speak words of that sort," the record was "insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that [he] was convicted for both his words and his deed." Id. at 590.

The possibility of being convicted based on protected speech "intertwined" with unprotected conduct makes this case arguably similar to Street. But procedurally, a closer analogy is to Bachellar v. Maryland, 397 U.S. 564 (1970), involving Vietnam War protestors charged with disorderly conduct. Unlike Street, the charging information in Bachellar raised no general-verdict problem, because it alleged no specific facts, but only recited the statutory definition of the offense: "acting in a disorderly manner to the disturbance of the public peace, upon any public street." 397 U.S. at 564. Instead, the general-verdict problem arose from jury instructions that authorized conviction for *either* "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area," *or* for "refusal to obey a policeman's command to move on when not to do so may endanger the public peace," id. at 565—the former being protected expression, the latter being unprotected. There was conflicting evidence at trial about whether the protestors had obstructed the sidewalk by sitting or lying down and then refused police orders to move, or whether police had thrown the protestors onto the sidewalk and then held them

down while arresting them. Id. at 568. The Supreme Court reversed the protestors' convictions because in light of the conflicting evidence and the jury instructions, the general verdict raised a possibility that the convictions may have rested on an unconstitutional basis:

> On this record, if the jury believed the State's evidence, petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. . . . [But] it is equally likely that the verdict resulted "merely because [petitioners' opinions were] themselves offensive to some of their hearers."

Id. at 571 (quoting Street, 394 U.S. at 592).

Like Bachellar, the grand jury's indictments against Defendant here do not allege any *particular* act or statement as constituting intimidation, instead alleging generally that his conduct as a whole "between August 1, 2007 and February 27, 2011" (as to the Doctor) and "between August 1, 2009 and February 27, 2011" (as to the Judge) was "intended to place[ them] in fear of retaliation for a prior lawful act." App. 22, 24. Nothing on the face of the indictments, then, creates confusion between protected or unprotected acts as the basis for conviction. Instead, like Bachellar, any confusion arises only because of how the case was argued and how the jury was instructed. Specifically, the

prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ("criminal defamation" without actual malice). See Tr. 455–56. Then, the jury was instructed on all eight alternative forms of "threat" under Indiana Code section 35-45-2-1(c), App. 16, without any instruction that for these particular victims, threats of "criminal defamation" under (c)(6) and (7) also require "actual malice." That makes it quite possible that the impermissible criminal-defamation theory formed at least part of the basis for the jury's guilty verdicts, and the general verdict cannot indicate otherwise. Accordingly, Bachellar compels us to find a general-verdict error here—but as discussed below, Defendant invited that error as part of a reasonable defense strategy, and therefore may not raise it as grounds for relief.

**Invited Error and Fundamental Error**

As Defendant recognizes, his trial counsel did not object to the general verdict forms, nor seek jury instructions on the "actual malice" standard. Instead, he simply asked for the jury to be instructed on the *verbatim* text of the First Amendment and Article I, Section 9 of the Indiana Constitution. Failure to timely raise issues at trial ordinarily forfeits them for appeal, Jewell v. State, 887 N.E.2d 939, 940 n.1 (Ind. 2008). Defendant therefore seeks to avoid waiver by arguing that those failures constituted either fundamental error or ineffective assistance of counsel—but instead, we find invited error, which precludes relief on either theory.

In this context, fundamental error and ineffective assistance are closely related. "While we frame the standard for ineffective assistance of counsel and fundamental error in somewhat different terms[,] . . . they will invariably operate to produce the same result where the procedural posture of the claim is caused by counsel's failure to object at trial." McCorker v. State, 797 N.E.2d 257, 262– 63 (Ind. 2003) (footnote omitted). As we have previously recognized, "fundamental error requires a showing of at least as much prejudice to the defendant as a claim of ineffective assistance of counsel," and so "finding that [a d]efendant was not denied the effective assistance of counsel also establishes that the alleged error was not so prejudicial as to constitute fundamental error." Culver v. State, 727 N.E.2d 1062, 1070 & n.7 (Ind. 2000) (citing Rouster v. State, 705 N.E.2d 999, 1008 n.8 (Ind. 1999), reh'g denied).

But the two principles overlap in a second way we have not previously discussed—because deficient performance by counsel, which is the *express* premise of an ineffective-assistance claim, is also *implicit* in fundamental error. A "finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have," even without being spurred to action by a timely objection. Whiting v. State, 969 N.E.2d 24, 34 (Ind. 2012). An error blatant enough to require a judge to take action *sua sponte* is necessarily blatant enough to draw any competent attorney's objection. But the reverse is also true: if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error. And when a passive lack of objection (here, to the "threat"

instruction) is coupled with counsel's active requests (here, for other related instructions), it becomes a question of invited error.

And on that basis, we find invited error here. The fundamental error doctrine is rooted in waiver, as "an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of an issue on appeal." Jewell, 887 N.E.2d at 940 n.1. It allows us to nevertheless address "an error that ma[de] a fair trial impossible or constitute[d a] clearly blatant violation[] of basic and elementary principles of due process presenting an undeniable and substantial potential for harm," Clark v. State, 915 N.E.2d 126, 131 (Ind. 2009)—that is, under "egregious circumstances," Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010). By contrast, the "doctrine of invited error is grounded in estoppel," and forbids a party to "take advantage of an error that [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct." Wright v. State, 828 N.E.2d 904, 907 (Ind. 2005). At bottom, then, fundamental error gives us leeway to mitigate the consequences of counsel's oversights, but invited error precludes relief from counsel's strategic decisions gone awry.

Here, counsel's lack of objection to the general verdict appears to have been part of a conscious "all or nothing" strategy. One common example of such a defense arises in murder cases, when a defendant chooses not to have the jury instructed on the lesser included offense of voluntary manslaughter, so that any shortfall in the State's proof of *mens rea* will result in complete acquittal, rather than merely a lesser

conviction. E.g., Conner v. State, 711 N.E.2d 1238, 1250 (Ind. 1999) (defense counsel could have reasonably decided to seek acquittal based on the State's failure to prove intentional murder instead of arguing for the lesser offense of voluntary manslaughter). In a similar vein, Defendant here chose to withdraw a proposed final jury instruction on harassment as a lesser included offense of intimidation, Tr. 441; 2d Supp. App. at 18, arguing instead that *all* his statements were intended only as protected opinions on an issue of public concern, or petitions for redress of grievances, and not to cause fear or for any other threatening purpose, Tr. 488–89. In effect, that approach sought to exploit the prosecutor's improper reliance on "criminal defamation" to the defense's advantage—focusing the jury on the clearly protected aspects of Defendant's speech, and on that basis to find the ambiguous aspects of his conduct to be protected as well.

Instructing the jury on the text of the federal and state constitutional free-speech protections, but not actual malice, appears to have been a strategic calculation to that end—not an ignorant blunder. Counsel obviously recognized the free-speech implications of this case, and asked for the jury to be instructed *verbatim* on the language of the First Amendment and Article I, Section 9 of the Indiana Constitution, both of which were given without objection. App. 14–15, Tr. 439–40. Reciting those provisions, without discussing the additional protections of the actual malice standard, yields a decidedly broad-brush view of free-speech principles—but his free-speech defense strategy depended on that broad brush. Requesting instructions

on actual malice would have called the State's attention to the distinction it repeatedly overlooked between threatening the targets' *reputations* under Indiana Code section 35-45-2-1(c)(6)–(7) and threatening their *safety* under subsections (c)(1)–(3). Defense counsel could reasonably have anticipated that an actual-malice challenge could lead the State either to withdraw (c)(6) and (7) from the instructions, or at least to draw sharper focus onto the statements and conduct that crossed the line and implied a true threat. And because true threats have *no* free-speech protection, Defendant's free-speech defense would then have been all but eviscerated.

By contrast, relying on broad-brush free-speech instructions and a general verdict allowed Defendant to draw attention to his protected opinions without having to justify (or even mention) his threatening statements and course of conduct. Indeed, the theme throughout his closing argument was that his speech was *all* protected political opinion, with no proof that he intended any of it to be threatening:

> Good morning ladies and gentlemen. This is a criminal case. This is not a case about whether you approve[] of Dan Brewington. It's not a case about whether Dan Brewington was a good father. It's not a case about whether he should have had or should not have had joint custody. This is a case about the State of Indiana charging Dan Brewington with four (4) crimes because he expressed opinions. The crux of this case, ladies and gentlemen[,] is not whether you agree with those opinions, even if you like

them[. T]he issue is, why did Mr. Brewington express these opinions[?] * * *

This is a great country and it's a great country because we can criticize the government. What the State has done here, ladies and gentlemen . . . , is melt all these things together where Dan Brewington was attempting to be an attorney and attempting to express his frustration, his anger, his upset about a decision in a court that he did not agree with. That's what he was doing in his pleas. . . .

It's not unethical for the public to criticize a judge. * * *

[T]he Court will instruct you that . . . the [F]irst [A]mendment to the United States Constitution reads . . . : Congress shall make no law respecting an establishment of religion or prohibiting the free exercise there of [*sic*] or abridging the freedom of speech or of the press or the right of the people to peaceably assemble and to petition the govern- ment for a redress of their grievances. Think about what's contained in th[ose] three sentences. How do we look at speech in this country? We look at it in the same way as we look at religion. . . . [Y]ou know the part of this thing, this amendment, is [a] right that people don't talk about but it's probably the most important—is to petition the government for redress. It can be argued[,] ladies and gentlemen

. . . [,] that many, many, many, all of Mr. Brewington's blogs were petitions to the government, petitions to the people . . . .* * *

[I]f you want as many people to know it and change opinions hope- fully, I guess that's the reason people blog, the[n] you're going to disseminate out in the [I]nternet. This is a case where Mr. Brewington has strong political views and those political views are the family court system stinks. He doesn't agree with them. . . . It is criticism of the government. Appropriate? Nice? No. We're all adults. . . . What did they call the last Republican vice-presidential nominee, Sarah Palin—the things that were said? This is the society that we live in whether we like it or not and criminalizing it is not going to do anything but make us all less free. * * *

[S]ome people would say restricting and not allowing parents to see their children is child abuse. Now is that an unreasonable position? It depends on the circumstances[,] I would guess. Is it a criminal position? I don't think so. And I think if you think about it and . . . separate your distaste for the words you will realize that they haven't proven what his intent was. * * *

This case comes down to Mr. Brewington's intent and whether that intent was to retaliate with regards to Counts I through IV; it's that simple . . . .

Tr. 481–82, 484–85, 488–89, 490–93, 498. By contrast, only once in passing did defense counsel mention how or why Defendant found and published the Judge's home address—and even then, only in the context of perjury, not intimidation. Tr. 499–500. And he never mentioned Defendant's statements about the Doctor's address, neighborhood, mortgage, or Defendant's nearby family members at all. Emphasizing Defendant's protected speech about the family court system while downplaying the threatening aspects of his communications and conduct was objectively reasonable, precisely because so much of Defendant's speech was protected, at least when viewed in a vacuum. But that approach depended on the same constitutional imprecision Defendant now complains of.

Were it not for that apparent strategy, Defendant's arguments would be well taken. As discussed above, the First Amendment and the Indiana Constitution demand a showing of actual malice before the State may impinge on assertions of fact—even false ones—about public figures or issues of public concern; and rhetorically hyperbolic expressions of opinion are always protected, because they can *only* reasonably be understood as assertions of opinion, not of fact. But even constitutional errors may be invited. E.g., United States v. Jernigan, 341 F.3d 1273, 1289 (11th Cir. 2003) ("[P]lain error review is unavailable in cases where a criminal defendant 'invites' the constitutional error of which he complains."). And though it was constitutionally incomplete to instruct the jury on the First Amendment and Article I, Section 9 of our state Constitution without also instructing it on actual malice, glossing over those distinctions was

essential to Defendant's defense. His general-verdict and instructional complaints were therefore invited error, not fundamental error. Wilson v. Lindler, 995 F.2d 1256, 1265 & n.7 (4th Cir. 1993) (Widener, J. dissenting) (any "fatal variance" between charging information and jury instructions was invited by counsel's strategy, and not grounds for reversal), opinion adopted by majority in Wilson v. Lindler, 8 F.3d 173 (4th Cir. 1993) (en banc) (per curiam), cert. denied, 510 U.S. 1131 (1994).

**Ineffective Assistance of Counsel**

For essentially the same reason, we find no ineffective assistance of counsel, either. Showing that counsel's performance was deficient requires proof "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and that the deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984). That determination requires us to make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"—and thus, to "indulge a strong presumption . . . that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id.

Even if a decision is hypothetically a reasonable strategic choice, it may nevertheless consti- tute ineffective assistance if the purported choice is actually "made due to unacceptable ignorance of the law or some other egregious failure rising to the level of deficient attorney performance." Woods v. State, 701 N.E.2d 1208, 1212 (Ind. 1998) (citing Kimmelman v. Morrison, 477 U.S. 365, 383–87 (1986)). But when the challenged tactic is hypothetically reasonable, as it is here for the reasons discussed above, overcoming the presumption of competent representation by showing an actual blunder is Defendant's burden. Id., 701 N.E.2d at 1212 & n.5. That burden, in turn, magnifies the risk of raising an ineffective-assistance claim on direct appeal—because counsel's reasoning may not be "apparent from the trial record," making it "necessary for an additional record to be developed to show the reason for an act or omission that appears in the trial record." Id. at 1212–13. Raising ineffectiveness on direct appeal without the benefit of an additional post-conviction record is permissible, but the issue becomes *res judicata* and therefore unavailable for collateral review. Jewell, 887 N.E.2d at 941–42.

Here, there is no evidence that counsel's approach was borne of ignorance instead of strategy, and the record in fact strongly suggests the contrary. First, as discussed above, counsel's closing argument amounts to an entirely reasonable "all or nothing" strategy to deflect the jury's scrutiny from Defendant's culpable statements and conduct to the large number of otherwise-protected opinions he expressed. Second, Defendant demonstrated significant sophistication about free-speech principles long before trial in a

motion to dismiss these charges, Supp. App. 1–4, and confirmed it by his post-verdict, pre-sentencing blog posts, Sent. Ex. 1 at 2–3. Yet he nevertheless agreed under oath (in connection with waiving his right to testify) that even though he and trial counsel "to put it charitably, . . . had a bit of a rocky relationship at times," it was "better now," Tr. 432–33, and he was voluntarily choosing not to testify, Tr. 433–34. His decision not to testify, thus letting the case hinge solely on the sufficiency of the State's proof, was also consistent with an "all or nothing" defense rather than the actual-malice defense he now says he should have had. Since counsel's approach to jury instructions was "within the wide range of reasonable professional assistance" when considered in the abstract, see Strickland, 466 U.S. at 689, and nothing in the record suggests that his approach was actually the product of ignorance, Defendant has not overcome the presumption of competent representation.

Our analysis of that issue does not change merely because counsel's strategy resulted in constitutionally incomplete jury instructions. The reasonableness of a trial strategy is not measured by its doctrinal cogency—even on matters of constitutional law—but by its likelihood of actually obtaining an acquittal for the particular defendant, in the context of the particular case. As this case illustrates, an effective defense may in fact depend on a pragmatic decision to blur constitutional principles. When counsel reasonably believes that *not* giving certain instructions will best-serve a defendant's real-world interests, we should not insist on giving them anyway for the sake of letter- perfect statements of abstract doctrine. We therefore will not grant relief from

what by all indications was a deliberate and eminently reasonable strategic choice.

## Conclusion

It is every American's constitutional right to criticize, even ridicule, judges and other participants in the judicial system—and those targets must bear that burden as the price of free public discourse. But that right does not permit threats against the safety and security of any American, even public officials, regardless of whether those threats are accompanied by some protected criticism. Defendant's true threats against the Judge and the Doctor therefore find no refuge in free speech protections. To the contrary, they undermine the core values of judicial neutrality and truthful witness testimony on which every aggrieved citizen depends.

There would be no doubt about that conclusion if Defendant, all in a single episode, had violently shouted and slammed piles of books in the courtroom, shaken his fist at the Judge and the Doctor, and told them, "You crooked child abusers! I'm a pyromaniac, I have guns and know how to use them, I'd like to beat you senseless, I know where you live, and I'm going to hold you accountable!" Under those circumstances, it would be obvious that Defendant was making an unprotected "true threat" against the victims, even if the phrase "crooked child abusers" was protected speech. Defendant's threats neither lose force, nor gain protection, merely because he built them up over the course of a years-long campaign of harassment. In fact, they may be even *more* insidious because they show a persistent, single-minded obsession, not just an

isolated outburst or mere venting. To the extent Defendant attempted to veil his threats behind self-serving disclaimers and supposed "hypotheticals," the victims saw through that pretext—as did the jury, and as do we. Accordingly, even though many of Defendant's statements in isolation are protected speech and would make application of Indiana Code section 35-45-2-1(c)(6) and (7) unconstitutional, they form part of the context in which his other statements and conduct become an unprotected "true threat" that may properly be prosecuted under Indiana Code section 35-45-2-1(c)(1)–(3).

And under the circumstances of this case, we find neither fundamental error nor ineffective assistance of counsel in allowing Defendant to be convicted under general verdicts that failed to distinguish between protected "criminal defamation" and unprotected "true threats." Even though that distinction is a matter of constitutional significance, its absence did not deprive Defendant of due process or make a fair trial impossible. To the contrary, it was precisely what enabled his reasonable defense strategy of emphasizing the substantial portion of his statements that the jury would likely recognize as harsh but protected "protest speech," while glossing over his other statements and conduct that had legitimately threatening implications. Our principal concern is not whether that strategy promoted careful constitutional doctrine (which it did not), but rather whether it afforded Defendant a reasonably effective defense to his particular case (which it did).

We therefore grant transfer and affirm Defendant's convictions for intimidating the Judge

and obstruction of justice as to the Doctor, finding the evidence sufficient to support those convictions under Indiana Code section 35-45-2-1(c)(1)–(3) without implicating constitutional freespeech protections. As to reversing Defendant's intimidation convictions involving the Doctor and the Judge's wife, and affirming his perjury conviction, we summarily affirm the Court of Appeals.

Dickson, C.J., and Rucker, David, and Massa, JJ., concur.

**APPENDIX D**

IN THE COURT OF APPEALS OF INDIANA

DANIEL BREWINGTON, )
)
Appellant-Defendant, )
)
vs. ) No. 15A01-1110-CR-550
)
STATE OF INDIANA, )
)
Appellee-Petitioner. )

APPEAL FROM THE DEARBORN SUPERIOR COURT

The Honorable Brian D. Hill, Special Judge Cause No. 15D02-1103-FD-84

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**January 17, 2013**

**OPINION - FOR PUBLICATION**

**DARDEN, Senior Judge**

SUMMARY

Daniel Brewington appeals his convictions for three counts of intimidation, two as Class A misdemeanors and one as a Class D felony, Ind. Code § 35-45-2-1 (2006); one count of attempted obstruction of justice, a Class D felony, Ind. Code §§ 35-44.1-2-2 (2012),[1] 35-41-5-1 (1977); and one count of perjury, a Class D felony, Ind. Code § 35-44.1-2-1 (2012).[2] We affirm in part, reverse in part, and remand with instructions.[3]

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[1] At the time Brewington committed this offense, the crime of obstruction of justice was codified at Indiana Code section 35-44-3-4. The 2012 recodification did not alter the terms of the statute.

[2] At the time Brewington committed this offense, the crime of perjury was codified at Indiana Code section 35-44-2-1. The 2012 recodification did not materially alter the terms of the statute.

[3] We held oral argument on November 21, 2012 in the Court of Appeals courtroom in Indianapolis, Indiana. We thank the parties for their helpful presentations.

## ISSUES

Brewington raises five issues, which we expand and restate as:

I. Whether the court abused its discretion by impaneling an anonymous jury.

II. Whether the court erred by admitting a custody evaluation and a divorce decree into evidence.

III. Whether one of Brewington's convictions for intimidation and his conviction for attempted obstruction of justice violate the Indiana Constitution's double jeopardy clause.

IV. Whether the evidence is sufficient to sustain Brewington's convictions.

V. Whether the court's final jury instructions were erroneous.

VI. Whether Brewington received ineffective assistance of trial counsel.[4]

## FACTS AND PROCEDURAL HISTORY

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[4] Brewington also argues in his reply brief for the first time that he was unable to effectively assist in his defense at trial due to mental incapacity. A reply brief may not present new theories of appeal. Ward v. State, 567 N.E.2d 85, 85 (Ind. 1991).

This case arises out of a civil dissolution matter; it is thus necessary to set forth the circumstances of that matter in some detail. Brewington and Melissa Brewington ("Melissa") were married in 2002 and had two children. On January 8, 2007, Melissa filed a petition in the Ripley Circuit Court to dissolve her marriage with Brewington. The Honorable Carl H. Taul was the original judge in the case.

The parties could not agree on custody of the children, so Melissa and Brewington (who was at that time represented by counsel) agreed to a custody evaluation and further agreed that Dr. Edward Connor ("Dr. Connor"), a clinical psychologist based in Kentucky, would perform the evaluation. On or about September 7, 2007, Dr. Connor and Dr. Sara Jones-Connor ("Dr. Jones-Connor"), who is Dr. Connor's wife and one of his professional partners, filed their custody evaluation with the court under seal. In the evaluation, the doctors determined that joint physical custody would not work because Melissa and Brewington had difficulty communicating effectively with each other. Instead, they recommended that Melissa "be the sole custodian and primary residential parent," with Brewington receiving liberal visitation. State's Ex. 9, p. 30.[5]

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[5] The transcript consists of two pretrial hearings, the trial, and a sentencing hearing. Except where otherwise specified, this opinion cites to the trial transcript and to exhibits that were tendered at trial.

Soon after Dr. Connor and Dr. Jones-Connor filed the evaluation, Brewington informed Dr. Connor that he objected to the observations and conclusions stated therein. Dr. Connor offered to meet with Brewington again to consider additional information and perhaps submit an addendum to the evaluation, but Brewington rejected his offer. Instead, Brewington subjected Dr. Connor to a torrent of abusive letters demanding that Dr. Connor release his entire file to him, withdraw the evaluation, and withdraw from the case. These letters are discussed in more detail below. Brewington accused Dr. Connor of "dishonest, malicious, and criminal behavior," as noted in State's Exhibit 39, and "unethical and criminal practices," as noted in State's Exhibit 51.

Brewington also filed a complaint against Dr. Connor with the Kentucky Board of Psychology, but after receiving a response from Dr. Connor, the Board determined that the complaint did not merit further action. In addition, Brewington started a blog and repeatedly posted negative comments about Dr. Connor. Brewington also posted complaints about Dr. Connor on other websites. On MerchantCircle.com's website, which provides evaluations of local businesses in the community, Brewington described Dr. Connor as "a very dangerous man who abuses his power." State's Ex. 53.

In the meantime, Brewington, now proceeding pro se, filed a motion for change of judge on December 5, 2008. On December 18, 2008, Judge James D. Humphrey of Dearborn County was appointed special judge. On May 27, 2009, Judge Humphrey commenced a three-day final hearing. On August 17, 2009, he

entered a judgment and final order, granting sole legal and physical custody of the children to Melissa. Based upon the evidence, Judge Humphrey found Brewington "to be irrational, dangerous and in need of significant counseling." State's Ex. 140, p. 8. As a result, Judge Humphrey concluded that Brewington would not be permitted visitation with the children until he submitted to an evaluation by a court-approved mental health care provider to determine whether he was a danger "to the children, [Melissa] and/or to himself." *Id.* at p. 17. Judge Humphrey determined that if the evaluation demonstrated that Brewington posed no danger, then he could request supervised visitation, and if supervised visitation went well, then he could request unsupervised visitation.

On August 24, 2009, Brewington filed a motion for relief from judgment, asserting that Dr. Connor and Judges Taul and Humphrey had "conspired to obstruct [his] access to evidence," State's Ex. 142, p. 1, and that Judge Humphrey had "conducted himself in a willful, malicious, and premeditated manner" and had "caused irreparable damage to [the children] in [that] the Court mandated child abuse," *id.* at 9. He further asserted that he would be "posting this pleading and . . . letter" to his websites and

"w[ould] be disturbing [sic] the information to the public through many avenues."[30] *Id.*

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[30] Judge Humphrey denied Brewington's motion for relief from judgment, so Brewington obtained counsel and appealed. A panel of this Court affirmed Judge Humphrey's divorce decree in

Brewington attached as an exhibit to his motion a lengthy letter, wherein he asked of all readers: "Please copy this letter and send the letter along with your own personal comments and opinions to the Ethics & Professionalism Committee Advisor located in Dearborn County." State's Ex. 142, attachment, p. 6. Brewington then posted the name of Heidi Humphrey, who is Judge Humphrey's wife, and the Humphreys' home address, although he did not identify Mrs. Humphrey as the judge's wife or the address as their residence. Mrs. Humphrey had previously served as an advisor on the Indiana Supreme Court's Judicial Ethics and Professionalism Committee, but that committee does not receive or investigate complaints about judicial performance. Furthermore, the committee's website did not post Mrs. Humphrey's home address, nor did it suggest or encourage the public to contact individual committee members with concerns about specific cases. The Humphreys received several letters complaining about Brewington's case at home.

After the divorce, and for a period of approximately eighteen months, Brewington continued to send Dr. Connor vitriolic letters and to publicly accuse Dr. Connor of criminal behavior. For example, on January 20, 2010, Brewington posted on his blog that Dr. Connor was "using [custody] evaluations as a means to gain some kind of perverted sexual stimulation."

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an unpublished per curiam decision. Brewington v. Brewington, No. 69A05-0909-CV-542 (Ind. Ct. App. July 20, 2010), trans. denied.

State's Ex. 197. Throughout 2010, Brewington posted at least fifteen articles discussing Dr. Connor. In addition, Brewington posted at least nine articles discussing Judge Humphrey, in which he described the judge as "corrupt," State's Ex. 160, and accused him of engaging in "unethical/illegal behavior," State's Ex. 170. He also repeatedly referred to the judge as a child abuser.

A grand jury investigation began in Dearborn County on February 28, 2011. Brewington testified before the grand jury and asserted that he did not know Mrs. Humphrey was Judge Humphrey's wife. On March 7, 2011, the grand jury returned a six-count indictment. The indictment charged Brewington with one count of intimidation as a Class A misdemeanor in relation to Dr. Connor ("Count I"); one count of intimidation as a Class D felony in relation to Judge Humphrey ("Count II"); a second count of intimidation as a Class A misdemeanor in relation to Mrs. Humphrey ("Count III"); one count of attempted obstruction of justice as a Class D felony in relation to Dr. Connor ("Count IV"); one count of perjury as a Class D felony for falsely stating during grand jury proceedings that he did not know that Mrs. Humphrey was Judge Humphrey's wife ("Count V"); and one count of unlawful disclosure of grand jury proceedings as a Class B misdemeanor (" Count VI").

Prior to trial, the State filed a Motion for Confidentiality of Jurors' Names and Identities. Brewington did not file a response, nor did his attorney object at trial. The trial court granted the State's motion and impaneled an anonymous jury. On October 6, 2011, the jury convicted Brewington of every charge except Count VI. On October 24, 2011,

the trial court sentenced Brewington to one year for Count I, two years for Count II, six months for Count III, two years for Count IV, and one year for Count V. The court ordered Brewington to serve Counts II and III concurrently and Counts I and IV concurrently, to be served consecutively with the other counts, for an aggregate term of five years. This appeal followed.

## DISCUSSION AND DECISION[31]

### I. ANONYMOUS JURY

Brewington contends that the trial court erred by granting the State's request for an anonymous jury. An anonymous jury is one in which certain identifying information, particularly jurors' names and addresses, is withheld from the public as well as from the parties. *Major v. State*, 873 N.E.2d 1120, 1125 (Ind. Ct. App. 2007), *trans. denied*. An anonymous jury may implicate "a defendant's Fifth Amendment right to a presumption of innocence" because it raises a concern in jurors that the defendant is a dangerous person. *Id.* at 1126. Furthermore, impaneling an anonymous jury may interfere with a defendant's Sixth Amendment right to trial by an impartial jury by depriving the

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[31] The State filed a Notice of Additional Authority shortly before oral argument. Brewington filed an objection, noting that the cases cited by the State in the Notice were issued well before this appeal began and that the Notice otherwise failed to comply with the requirements for such notices under Indiana Appellate Rule 48.

defendant of information that may be useful during jury selection. *Id.*

Nevertheless, a trial court may impanel an anonymous jury if it: (a) concludes that there is a strong reason to believe the jury needs protection, and (b) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected. *Id.* at 1126-27. The trial court may consider several factors, including: (1) the defendant's involvement in organized crime, (2) his participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the severity of the punishment that the defendant would face if convicted, and (5) whether publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment. *See id.* at 1127. We review the trial court's decision to impanel an anonymous jury for an abuse of discretion. *Id.*

In ruling on the State's motion at a pretrial hearing, the trial court told Brewington:

> [B]ased on the evidence that was presented at the bond reduction hearing that some of your, and call them alleged or whatever, I think that the State has made a prima facie case at least that there's been a history of disclosing private information. I don't know if there would be information to say that you were a physical risk to their safety but I think the privacy issue is definitely a concern based on the evidence that has been previously

> submitted and for that reason the confidentiality of juror[s'] names and identities is going to be granted.

Final Pre-Trial Hearing Tr. p. 68. The trial court further stated that it would consider revealing a juror's identity during trial if Brewington showed good cause for such disclosure.

We note that the State attached a copy of the opinion in *Major* to its Motion for Confidentiality of Jurors' Names and Identities, so the trial court was made aware of that authority. Furthermore, at the pretrial hearing on the State's motion, the trial court noted that pursuant to "Jury Rule #10," the court was obligated to maintain the confidentiality of information relating to a juror or a prospective juror "to an extent consistent with the Constitutional statutory rights of the parties." *Id.* at 67. Thus, the trial court was aware that it was obligated to balance Brewington's constitutional rights against the need to shield the jury from undue harassment.

Regarding the evidence supporting the State's motion, the trial court noted that it had reviewed the evidence from the bond hearing. At the bond reduction hearing, the State submitted copies of Brewington's numerous harshly-worded internet posts about Dr. Connor and Judge Humphrey. In those posts, Brewington repeatedly insulted and belittled Dr. Connor and Judge Humphrey, accusing them of criminal behavior and professional misconduct. He also made comments about the neighborhood in which Dr. Connor lived, posted a picture of Dr. Connor dancing at a relative's wedding, and published Judge

Humphrey's home address, although he did not identify it as such. Based upon this evidence, the trial court appropriately considered the very real prospect that Brewington would publish jurors' personal information and expose them to ridicule, intimidation, and/or harassment if the outcome of the trial was unfavorable to him. Furthermore, the trial court left open the possibility of disclosing jurors' information if necessary for a fair trial. We conclude that the trial court correctly balanced the needs of effective trial administration and court security against Brewington's constitutional rights. The trial court did not abuse its discretion.

## II. ADMISSION OF CUSTODY EVALUATION AND DIVORCE DECREE

Brewington argues that the trial court erred by admitting Dr. Connor's custody evaluation and Judge Humphrey's divorce decree because he believes those documents were "extremely unfairly prejudicial and contained inadmissible information." Appellant's Br. p. 44. However, he acknowledges that he did not object at trial to those documents based on the grounds he wishes to raise on appeal. Furthermore, invited error, if any, is not grounds for relief. Therefore, his claims of evidentiary error have not been preserved for appellate review. *See Pattison v. State*, 958 N.E.2d 11, 20 (Ind. Ct. App. 2012) ("[F]ailure to object at trial results in waiver of the issue on appeal."), *trans. denied*. However, we will address the admission of

these documents below in the context of Brewington's claim of ineffective assistance of trial counsel.[32]

INDIANA DOUBLE JEOPARDY CLAUSE

Brewington argues that his convictions for Count I, criminal intimidation of Dr. Connor, and Count IV, attempted obstruction of justice, violate article I, section 14 of the Indiana Constitution, also known as the double jeopardy clause, which provides, "No person shall be put in jeopardy twice for the same offense."[33] In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), our Supreme Court held that two or more offenses are the "same offense" in violation of the double jeopardy clause if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

Brewington's argument rests on the actual evidence portion of the standard set forth in *Richardson*. When we look to the actual evidence presented at trial, we will reverse a conviction if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second

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[32] Brewington does not argue that the admission of those documents was fundamentally erroneous.

[33] Brewington does not present a claim under the Double Jeopardy Clause of the United States Constitution

challenged offense." *Johnson v. State*, 749 N.E.2d 1103, 1108 (Ind. 2001) (quoting *Richardson*, 717 N.E.2d at 53). In determining what facts were used to support each conviction, we consider the evidence, charging instrument, final jury instructions, and arguments of counsel. *Cole v. State*, 967 N.E.2d 1044, 1051 (Ind. Ct. App. 2012).

Here, in the indictment the grand jury alleged that Brewington committed intimidation "on or about or between August 1, 2007, and February 27, 2011," by communicating a threat to Dr. Connor with the intent that Dr. Connor be placed in fear of retaliation for issuing his custodial evaluation. Appellant's App. p. 21. The indictment further alleged that Brewington committed attempted obstruction of justice "on or about or between August 1, 2007, and August 1, 2009," by "intimidat[ing] or harass[ing]" Dr. Connor. *Id.* at 24. The trial court incorporated the grand jury indictment into its final jury instructions. Thus, the jury was instructed that Brewington's conduct of harassing Dr. Connor, which was alleged to have occurred during overlapping periods of time, could support both convictions.

Furthermore, based upon our review of the record, the same evidence was provided at trial to support the charge of intimidating Dr. Connor and the charge of attempted obstruction of justice arising out of Brewington's harassment of Dr. Connor. The State presented to the jury a large amount of Brewington's faxed letters to Dr. Connor and internet postings about Dr. Connor, all of which supported the State's contentions that Brewington threatened Dr. Connor in retaliation for Dr. Connor's unfavorable custody

evaluation and that Brewington harassed Dr. Connor in an attempt to coerce him to withdraw his custody evaluation and remove himself from the case.

Finally, we turn to the arguments counsel presented to the jury. When discussing the intimidation charge, the prosecutor told the jury,

> [Brewington] tried to keep Ed Connor from coming in and sitting in that witness chair and testifying as the independent custody evaluator that [sic] he had been hired by Dan Brewington's lawyer and his wife's lawyer to do. He tried to do that but he wasn't successful. His lack of success has nothing to do with his excess of guilt. That's intimidation.

Tr. p. 454. Turning to the charge of attempted obstruction of justice, the prosecutor said to the jury:

> [I]f you attempt to do something, that's a crime. Again, just because you're not successful doesn't mean that you didn't commit a criminal act. And it's with an attempt to obstruct justice for only one reason – because Dr. Ed Connor wouldn't let this man bully him. I mean he agreed to the custody evaluation. Once it's filed, that's when the game started to get off . . . .

*Id.* at 476. Next, the prosecutor said that Brewington was guilty of attempted obstruction of justice because he tried "to keep Dr. Connor from sitting in that witness chair in the divorce proceeding." *Id.* at 478. The prosecutor advised the

jury that it should consider Brewington's conduct starting on "April the 1st of 2008" as the evidence that supports the charge of attempted obstruction of justice, *id.* at 477, but the prosecutor also discussed documents Brewington issued after that date in support of the charge of intimidating Dr. Connor. Additionally, the prosecutor generally argued that "all these faxes and other means that [Brewington] used to threaten and threaten and bully and bully" is evidence of a substantial step in attempting to commit obstruction of justice. *Id.* at 478. Thus, the prosecution asked the jury to consider essentially the very same acts by Brewington in support of the charges of intimidation of Dr. Connor and attempted obstruction of justice.

Based upon our review of the charging document, the evidence submitted at trial, the arguments of counsel, and the jury instructions, we conclude that there is a reasonable possibility that the evidentiary facts used by the jury to establish all of the essential elements of intimidation of Dr. Connor may also have been used to establish all of the essential elements of attempted obstruction of justice. *See Guffey v. State*, 717 N.E.2d 103, 107 (Ind. 1999) (determining that convictions for conspiracy to commit armed robbery and aiding in the commission of armed robbery violated the Indiana Constitution's double jeopardy clause because the jury instructions directed the jury to consider the same evidentiary facts to support both convictions). Consequently, both convictions cannot stand. When two convictions contravene double jeopardy principles, "we vacate the conviction with less severe penal consequences." *See Richardson*, 717

N.E.2d at 55. Thus, Brewington's conviction for Count I, intimidation of Dr. Connor, must be vacated.[34]

SUFFICIENCY OF THE EVIDENCE

Brewington argues that there is insufficient evidence to sustain his convictions for intimidation of Judge Humphrey, intimidation of Mrs. Humphrey, attempted obstruction of justice, and perjury.[35]

A. STANDARD OF REVIEW

When an appellant challenges the sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses, and we affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Joslyn v. State*, 942 N.E.2d 809, 811 (Ind. 2011).

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[34] Vacatur of the intimidation conviction involving Dr. Connor does not affect Brewington's aggregate sentence because the trial court directed that his sentence for that conviction would be served concurrently with his sentence for attempted obstruction of justice, which is to be served consecutively to his convictions for intimidating Judge Humphrey and for perjury.

[35] Brewington further argues that there is insufficient evidence to sustain his conviction for intimidation of Dr. Connor, but we need not address this argument because we have determined that his conviction must be vacated due to a violation of the Indiana double jeopardy clause.

## C. INTIMIDATION OF JUDGE HUMPHREY AND MRS. HUMPHREY

In order to convict Brewington of both charges of intimidation, the State was required to prove beyond a reasonable doubt for each charge that: (1) Brewington (2) communicated to another person (3) a threat (4) with the intent (5) that the other person be placed in fear of retaliation for a prior lawful act. Ind. Code § 35-45-2-1. The offense is usually a Class A misdemeanor but becomes a Class D felony if the intended recipient of the threat is a judicial officer. *Id.* The General Assembly has defined a "threat" as:

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;c
(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 or expenses;
(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.

Ind. Code § 35-45-2-1(c). Whether conduct amounts to a threat is an objective question of fact for the jury to decide. *Owens v. State*, 659 N.E.2d 466, 474 (Ind. 1995).

We begin with Brewington's conviction for intimidating Judge Humphrey. At trial, the State alleged that Brewington communicated a threat to Judge Humphrey, with the intent of placing him in fear of retaliation for issuing the divorce decree in this case. Furthermore, the State argued that Brewington issued several different types of threats, as defined by Indiana Code section 35-45-2-1(b), to the judge. We focus our analysis on whether Brewington threatened Judge Humphrey by expressing an intent to expose him "to hatred, contempt, disgrace, or ridicule." Ind. Code § 35-45-2-1(c)(6).

Brewington argues that for purposes of the First Amendment, the State's theory that he threatened to expose Judge Humphrey to hatred, contempt, disgrace, or ridicule is, in essence, a claim of "criminal defamation." Appellant's Br. p. 33. Brewington further argues that because the State's theory of liability is, in his opinion, defamation, then the elements of civil defamation apply and the State was obligated to prove that any statements Brewington made to or about Judge Humphrey were knowingly false. If his statements were not knowingly false, he reasons, then they deserve constitutional protection because he was commenting upon the work product of a public official, and he believes he cannot be held criminally liable for those statements.

As an analogy, the offense of intimidation in Indiana shares common language with past statutes outlawing blackmail. *See Meek v. State*, 205 Ind. 102, 185 N.E. 899, 900 (1933) (quoting a statute defining blackmail, in relevant part, as "accusing or threatening to accuse[ ] any person of any crime punishable by law, or of any immoral conduct which, if true, would tend to degrade and disgrace such person, or in any way subject him to the ridicule or contempt of society"). While the purpose of the tort of civil defamation is to protect individuals from reputational attacks, *Melton v. Ousley*, 925 N.E.2d 430, 437 (Ind. Ct. App. 2010), the crime of intimidation is more than mere criminalization of the publication of disgraceful details about the victim's conduct. Additionally, the crime consists of threatening the victim with the intention of placing the victim in fear for a prior lawful act. The truthfulness of the threatened disclosure is not necessarily relevant to prosecution because the harm, placing a victim in fear, occurs whether the publicized conduct is true or false. *See Kessler v. State*, 50 Ind. 229, 233 (1875) (determining in a prosecution for blackmail, where Kessler threatened to disclose that the victim had a mistress, that the State did not need to allege that Kessler's claim was false).

We find guidance in *People v. Hubble*, 401 N.E.2d 1282, 1283 (Ill. App. Ct. 1980). In that case, Hubble was charged with intimidation because he told his ex-wife that if she testified against him in an upcoming criminal case, he would bring charges against her for trespass, forgery, and violation of his parental visitation rights. On appeal, Hubble argued that he had a good-faith belief that his ex-wife had committed

those crimes, and he had a right to threaten such action without violating the intimidation statute. The Appellate Court of Illinois disagreed, noting that the offense is, in essence, "the exercise of an improper influence." *Id.* at 1285. The court further observed, "No public policy is served by allowing accusations to be made, even against the guilty, for the sole purpose of extortion." *Id.* Consequently, "it is immaterial whether the facts threatened to be disclosed are true or not." *Id.*

In this action, as noted, the State alleged that Brewington's actions were committed with the intent of placing Judge Humphrey in fear by threatening him in retaliation for issuing the divorce decree, and that he intended to threaten by exposing the judge to hatred, contempt, disgrace, or ridicule. In keeping with our longstanding precedent and the persuasive holding in *Hubble*, we conclude that it is irrelevant whether the conduct Brewington intended to disclose to the public actually occurred or was an outright fabrication. Consequently, we reject Brewington's claim that principles of civil defamation law must be incorporated into Indiana Code section 35-45-2-1(c)(6), and the State was not required to provide evidence that Brewington's public statements about Judge Humphrey were knowingly false.

Even if the State was required to prove that Brewington knew his internet postings and other communications about Judge Humphrey were false, there is ample evidence of Brewington's knowledge. His public comments went well beyond hyperbole and were capable of being proven true or false. Over the course of at least a year, Brewington repeatedly called

Judge Humphrey a "child abuser." State's Ex. 170; *see also* State's Ex. 162 ("Judge Humphrey's actions constitute child abuse"), State's Ex. 168 ("abuser of children"), State's Ex. 173 (Judge Humphrey "abuse[s] children who are part of the family court system"). Brewington also called Judge Humphrey "corrupt," State's Ex. 160, and accused him of engaging in "unethical/illegal behavior." State's Ex. 170.

Brewington argues he was merely stating his opinion that, in constraining his right to see his children, Judge Humphrey was essentially committing child abuse. However, it is clear from the divorce decree that Judge Humphrey, in the exercise of lawful judicial discretion and out of concern over Brewington's history of "irrational behavior," State's Ex. 140, p. 8, imposed reasonable visitation restrictions upon Brewington out of a desire to protect the children's well-being. Only by willfully misinterpreting the terms of the divorce decree in bad faith could one argue that Judge Humphrey's conduct constituted an intentional act to harm Brewington's children. Thus, even if the State was required to prove that Brewington knew his public statements about Judge Humphrey were false, there was ample evidence from which the jury could have concluded that Brewington accused Judge Humphrey of child abuse and professional misconduct while knowing that the accusations were false.

Brewington argued at oral argument that Indiana Code section 35-45-2-1 violates the First Amendment by failing to include a requirement that a person who threatens to expose a victim to hatred, contempt, disgrace, or ridicule must know that his statements

about the victim are false. Without the element of knowing falsity, Brewington claims, the statute is unconstitutionally overbroad because it can punish reasonable criticism of government officials. A party challenging the constitutionality of a statute bears the burden of proof, and all doubts are resolved against that party. *Akers v. State*, 963 N.E.2d 615, 617 (Ind. Ct. App. 2012), *trans. denied*. A statute is presumed constitutional until the party challenging its constitutionality clearly overcomes the presumption by a contrary showing. *Id.*

Under federal overbreadth analysis, we must determine whether the statute substantially prohibits activities protected by the First Amendment. *Jackson v. State*, 634 N.E.2d 532, 536 (Ind. Ct. App. 1994). The First Amendment protects the right of citizens to criticize government decisions with which they disagree, and that right cannot be taken lightly. However, the conduct that is criminalized here, communicating a threat to a victim to place the victim in fear of retaliation for a prior lawful act, necessarily falls outside the realm of protected criticism of government decisions due to the requirement of criminal intent. That is, the statute alleges, and the State must prove, that the defendant intended to place the victim in fear by a threat. Such conduct is of no value to public discourse and is, in fact, harmful to the administration of justice when the victim is a judicial officer. We cannot conclude that Indiana Code section 35-45-2-1 substantially prohibits activities protected by the First Amendment, and Brewington's claim fails. *See id.* (determining that the Indiana Gang Statute was not constitutionally overbroad because it required that the defendant

actively participate in a group with knowledge of the group's criminal activities and have a specific intent to further the group's criminal conduct). Consequently, we affirm Brewington's conviction for intimidation of Judge Humphrey.

Next, we turn to Brewington's conviction of intimidation of Mrs. Humphrey. As noted above, the State must establish that Brewington intended to place her in fear for her commission of a prior legal act. Ind. Code § 35-45-2-1. Brewington argues that his act of posting Mrs. Humphrey's address on the internet and inviting the public to send comments to her about his divorce case did not constitute a threat as defined by statute. We agree. Brewington did not identify Mrs. Humphrey as Judge Humphrey's wife or identify the address as her home in his internet postings and letters. Furthermore, he did not describe her in a negative light or encourage anyone to do anything other than write letters to her, as a purported public official, about his divorce case. Although we do not condone Brewington's unjustifiable and bad faith attempt to drag Mrs. Humphrey into his divorce litigation, his actions in relation to Mrs. Humphrey do not meet the definition of a threat for purposes of the intimidation statute. *See Jackson v. State*, 570 N.E.2d 1344, 1347 (Ind. Ct. App. 1991) (finding insufficient evidence of a threat where Jackson, acting as a messenger, asked a judge to dismiss a criminal case against a friend in exchange for the friend's dismissal of his civil lawsuit against

the judge), *trans. denied*. This conviction must be vacated.[36]

D. ATTEMPTED OBSTRUCTION OF JUSTICE

In order to obtain a conviction for attempted obstruction of justice, the State was required to prove beyond a reasonable doubt that Brewington: (1) knowingly or intentionally (2) with the specific intent to commit obstruction of justice (3) engaged in conduct that constituted a substantial step toward (4) inducing by threat, coercion, or false statement (5) Dr. Connor, a witness in an official proceeding or investigation, (6) to withhold or unreasonably delay in producing information, a document, or a thing. *See* Ind. Code §§ 35-44.1-2-2 (formerly codified as Ind. Code § 35-44-3-4), 35-41-5-1.

In the context of obstruction of justice, coercion is defined as some form of undue pressure or influence exerted on the will or choice of another. *Brown v. State*, 859 N.E.2d 1269, 1271 (Ind. Ct. App. 2007), *trans. denied*. Forms of pressure or influence include, but are not limited to, intimidation, physical force, threats, and harassment. *Id.* Whatever the form of

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[36] Vacatur of the intimidation conviction involving Mrs. Humphrey does not affect Brewington's aggregate sentence because the trial court directed that his sentence for that conviction would be served concurrently with his sentence for intimidation of Judge Humphrey, which is to be served consecutively to Brewington's convictions for attempted obstruction of justice and for perjury.

pressure or influence, there should be a consequence for failure to comply; otherwise the statement is not coercive, but is merely a request. *Id.*

Brewington argues that his conviction is barred by the First Amendment to the United States Constitution. Specifically, he says that his communications to and/or about Dr. Connor were constitutionally protected unless the State proved that they amounted to a "true threat[ ]" of violence against Dr. Connor, and there is no evidence of such a true threat. Appellant's Br. p. 30. We disagree that the First Amendment bars this conviction, because a defendant need not threaten violence to commit the crime of obstructing justice. *See Sheppard v. State*, 484 N.E.2d 984, 989 (Ind. Ct. App. 1985) ("[I]f the defendant were charged with making repeated, harassing contacts with the witness with such intent [to coerce], the threshold of pressure might be reached."), *trans. denied*. If there is sufficient evidence of non-violent coercion to satisfy the statutory requirements, we need not consider whether there is evidence of a true threat of violence.

In this case, Dr. Connor and Dr. Jones-Connor submitted their custody evaluation on August 29, 2007, and Judge Humphrey issued the divorce decree on August 17, 2009. We therefore consider the evidence from between those two dates to determine whether the jury properly found that Brewington coerced Dr. Connor in regard to his participation in the divorce case. When Brewington told Dr. Connor that he disagreed with the conclusions and recommendations in the evaluation, Dr. Connor offered to meet with him and consider any additional

information. Brewington rejected Dr. Connor's offer and instead chose to send a large volume of angry letters to Dr. Connor's office. As an example, on March 28, 2008, Brewington faxed Dr. Connor a letter demanding the release of Dr. Connor's full case file and advised him to "contact an attorney." State's Ex. 27. On April 1, 2008, Brewington faxed Dr. Connor another letter in which he accused Dr. Connor of "knowingly and willingly breaching the contract" governing his services as custodial evaluator. State's Ex. 31. On the same day, he faxed Dr. Connor another letter captioned "Dr. Connor's unethical behavior." State's Ex. 34. In the letter, Brewington told Dr. Connor he had "been in contact with other parents who have similar complaints" about Dr. Connor. *Id.* He also told Dr. Connor, **"IF YOU CONTINUE TO CONDUCT YOURSELF IN AN [sic] MALICIOUSLY UNETHICAL AND POSSIBLY ILLEGAL MANNER, I WOULD SUGGEST YOU PULL THE REPORT AND GET AN ATTORNEY."** *Id.* (bold and capitalizations in original). On April 2, Brewington sent another fax to Dr. Connor directing him to "fax Judge Taul a letter apologizing for misrepresenting and your inappropriate conduct or feel free to contact the Kentucky Board of Examiners of Psychology and make them aware of your actions." State's Ex. 36.

Next, on July 30, 2008, Brewington warned Dr. Connor in a letter that if he refused to produce a full copy of the case file, that "would force me to file a lawsuit against you, Dr. Sara Jones-Connor, Connor and Associates PLLC, and other people and/or employees affiliated with Connor and Associates for, at the least, breach of contract. I would be conducting

all of the depositions and discoveries." State's Ex. 39. Brewington characterized Dr. Connor's conduct as "criminal behavior" and "gross retaliatory behavior against me for trying to expose your wrong doing." *Id.* He further advised Dr. Connor to "place his malpractice liability insurance carrier on notice" and that he would file "formal complaints with the Kentucky Board of Examiners of Psychology, the American Psychological Association, the Indiana State Psychology Board and the Professional Academy of Custody Evaluators (PACE) as well as notify the Attorneys General in the respective states." *Id.* Brewington also made reference to a deposition in which Dr. Connor had testified in 2004, implying that Dr. Connor's sworn testimony about his professional education conflicted with his curriculum vitae. Finally, Brewington advised Dr. Connor, "Please don't assume that you nor any persons or employees affiliated with Connor and Associates, PLLC have immunity from civil or criminal liability as the rules and statutes don't apply when gross negligence is a factor." *Id.*

Brewington continued his stream of letters to Dr. Connor. In a letter dated August 4, 2008, he asked Dr. Connor for "the names of your office staff as they could potentially be named as defendants for legal action." State's Ex. 40. In another fax dated the same day, Brewington advised Dr. Connor to "pull your report" or release the case file by the end of the day, or he would "file a lawsuit for breach of contract where you will be left to explain your actions to a judge, possibly [a] jury." State's Ex. 41. Brewington stated he would "begin subpoenas and depositions immediately." *Id.* In a third fax sent on the same day, Brewington again

accused Dr. Connor of "illegal and unethical practices" and stated that he had "until the end of the day to pull the report." State's Ex. 42. He further asserted that because "the situation has elevated from a breach of contract to gross negligence, malpractice, slander and/or libel," he would add Dr. Connor's professional partner, Dr. Deters, and Dr. Connor's office employee, Ms. Davis, to the lawsuit. *Id.*

Next, in a faxed letter dated September 3, 2008, Brewington asked Dr. Connor to send him a copy of an "office policy statement" that Brewington had signed. State's Ex. 48.Brewington told Dr. Connor that if he refused to cooperate, Brewington would "assume you have terminated your services as a licensed psychologist with me and will take the appropriate measures to withdraw from the case." *Id.* If Dr. Connor failed to provide the statement or refused to withdraw, Brewington asserted that such conduct would "add to your numerous violations and infractions of Indiana and Kentucky Law, psychology board of the respective states, as well as the APA." *Id.*

In a September 5, 2008 faxed letter, Brewington, after receiving a court order again denying his request for a copy of Dr. Connor's file, directed Dr. Connor to release the entire case file and threatened to again "file a petition for contempt" if he did not comply. State's Ex. 49. He further stated, "The game is over Dr. Connor." *Id.* Next, on October 9, 2008, Brewington sent Dr. Connor a copy of another motion he had filed with the trial court demanding the release of Dr. Connor's entire file. In the motion, he again accused Dr. Connor of "unethical and criminal practices." State's Ex. 51. On December 5, 2008, Brewington

instructed Dr. Connor to release all raw test data regarding Melissa or himself, saying "[t]his is not up for debate" and failure to comply would be "a willful illegal act on your part." State's Ex. 55. On December 8, 2008, Brewington again faxed Dr. Connor a request for his case file.

Brewington received some of Dr. Connor's notes, and on January 22, 2009, he sent him another letter demanding additional data, stating again "the game is over Dr. Connor." State's Ex. 159. He again advised that he would ask Dr. Connor to submit to a deposition or courtroom testimony to address "page by page if necessary, ALL of my writings" so that Dr. Connor could explain his conclusions in the custody evaluation. *Id.*

In a February 17, 2009 letter to Dr. Connor, Brewington again demanded a copy of his case file. Brewington told Dr. Connor that if he did not provide a copy of his file "immediately," Brewington would contact the Board and the governor of Kentucky, among others, about the situation. State's Ex. 61. As Brewington promised, he wrote a letter to the Board's counsel, a Kentucky deputy attorney general, on February 19, 2009. In the letter, Brewington again accused Dr. Connor of attempting to cover up "negligent and/or malicious conduct." State's Ex. 60. He further asserted that he intended to file a federal lawsuit against Dr. Connor.

In addition to this lengthy stream of letters and complaints accusing Dr. Connor of criminal conduct and professional wrongdoing, Brewington posted information on the internet describing Dr. Connor in

a harshly negative light. On the website MerchantCircle.com, which provides reviews of local businesses, he accused Dr. Connor of being "a very dangerous man who abuses his power." State's Ex. 53. In a March 29, 2009 posting on his own website, Brewington asserted that he searched for Dr. Connor on the website Google "almost every day." State's Ex. 191. He further stated that Dr. Connor "wants to hurt [him]" and did not care about his children's welfare. *Id.* In the same posting Brewington stated Dr. Connor "could have easily said that he felt threatened by me so he was withdrawing from the case." *Id.*

The jury could have reasonably found from this evidence that after Dr. Connor issued what Brewington perceived to be an unfavorable custody evaluation, Brewington undertook a campaign of harassment and non-violent intimidation to coerce Dr. Connor into altering or withdrawing the evaluation and withdrawing from the case as a witness. In both frequency and tone, Brewington's letters went far beyond what was reasonably necessary to litigate his divorce case or to express displeasure with the evaluation. Threats to sue Dr. Connor, to report him to numerous professional societies and associations, including disciplinary authorities, to report him for alleged criminal behavior, and to subject him to lengthy, harassing depositions could constitute undue coercion. Thus, there is sufficient evidence of non-violent threats or undue coercion to satisfy that element of the offense of attempted obstruction of justice, and we find no grounds for reversal.

## D. PERJURY

In order to obtain a conviction for perjury, the State was required to prove beyond a reasonable doubt that Brewington: (1) made a false, material statement (2) under oath or affirmation (3) knowing the statement to be false or not believing it to be true. Ind. Code § 35-44.1-2-1 (formerly codified as Ind. Code § 35-44-2-1). It is well-settled that confusion or inconsistency alone is not enough to prove perjury. *Daniels v. State*, 658 N.E.2d 121, 123 (Ind. Ct. App. 1995).

The State contended that Brewington lied under oath during grand jury proceedings because he falsely denied knowing that Mrs. Humphrey was married to Judge Humphrey. Brewington argues there is no evidence to establish that he knew Mrs. Humphrey was Judge Humphrey's wife. We disagree. Brewington admitted to the grand jury that he found the Humphreys' address on the Dearborn County Assessor's website. It was established at trial that he could not have found Mrs. Humphrey on that particular website by searching for her individually. Instead, Brewington had to search for "Humphrey" as a last name, which would have revealed that Mrs. Humphrey owned property with James Humphrey. The jury could have reasonably inferred from this evidence that Brewington knew or reasonably deduced that Mrs. Humphrey was Judge Humphrey's spouse.

In addition, Brewington discovered that Mrs. Humphrey had been an advisor to the Supreme Court's Judicial Ethics and Professionalism Committee through the committee's website. However, that website does not provide a forum for

complaints about judicial officers or address judicial disciplinary proceedings. Instead, it provides "judicial perspective on ethical issues and to address judicial wellness and judicial families." Tr. p. 357. Furthermore, the committee's website does not provide addresses for its members or encourage the public to contact individual members with issues. The jury could have reasonably concluded that Brewington knew that it was improper to refer to Mrs. Humphrey as an "advisor;" and, to list her personal address as a place to send complaints about the judiciary, but he published her title anyway because he knew that she was Judge Humphrey's wife and wanted the Humphreys to receive such complaints at their home while maintaining a veneer of deniability. This evidence is sufficient to establish that Brewington knew that Mrs. Humphrey was married to Judge Humphrey. There is thus no basis to reverse the jury's verdict on this conviction.

## V. JURY INSTRUCTIONS

### A. INSTRUCTIONS ON THE ELEMENTS OF THE OFFENSES

Brewington challenges the trial court's Final Jury Instructions 1, 2, 3, and 5, claiming that they are legally incorrect because they failed to explain to the jury how to apply principles of free speech to the conduct that led to the charges of intimidating Judge Humphrey, attempted obstruction of justice, and

perjury.13[37] However, it was Brewington who tendered to the court the language that the court accepted and issued to the jury as Final Instructions 2 and 3. *See* Appellant's Supp. App. pp. 4, 6; Appellant's App. pp. 14-15. Brewington thus invited any error arising out of those two instructions, and we will not consider his challenge to them. *See Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (determining that the State could not challenge the merger of two convictions on appeal because it had suggested the merger at trial).

As for Final Instructions 1 and 5, Brewington concedes that he did not object to them at trial. Failure to object to a jury instruction at trial results in waiver of the issue on appeal. *Clay v. State*, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). However, Brewington argues that these instructions are so flawed that they amount to fundamental error. A litigant may avoid waiver by demonstrating that an instruction constitutes fundamental error. *Id.* Fundamental error is a substantial, blatant violation of due process. *Id.* To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible.[38] *Id.*

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37 We have determined that Brewington's convictions for intimidating Dr. Connor and Mrs. Humphrey must be vacated, so we do not address those convictions further.

38 Brewington also argues that Final Instruction 1 is erroneous because it contains "misleading and prejudicial" language. Appellant's Br. p. 49. He did not object to the instruction at trial, and he does not contend that the language in question renders the instruction fundamentally erroneous.

The trial court's Final Instruction 1 is lengthy because it sets forth the elements of each offense. The instruction begins:

> 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, Count V, Perjury, a Class "D" Felony, and Count VI, Unlawful Disclosure of Grand Jury Proceedings, a Class "B" Misdemeanor.

Appellant's App. p. 10. The instruction goes on to repeat the allegations of the grand jury indictment and state the elements of each charged offense.

The trial court's Final Instruction 5 provides as follows:

> 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;

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Instead, he raises this argument in the context of his claim of ineffective assistance of counsel, which we address below.

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 or expenses;
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.

Appellant's App. p. 16.This Instruction closely tracks the language of Indiana Code section 35-45-2-1(c).

Brewington argues that under the First Amendment, the jury should have been instructed that they had to determine that Brewington's posts about Dr. Connor and Judge Humphrey constituted a "true threat" before subjecting him to criminal liability for intimidation or attempted obstruction of justice. Appellant's Br. p. 20. A statement qualifies as a true threat, unprotected by the First Amendment, if it is a serious expression of an intent to commit an unlawful act against a particular individual or group of individuals. *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008).

Here, Final Instruction 5 told the jury that a threat included, among other definitions, expression of an intent to "unlawfully injure the person threatened or another person." Appellant's App. p. 16. This

Instruction adequately informed the jury that, to the extent that its decision to convict Brewington of intimidation or attempted obstruction of justice rested upon threats of violence, it had to determine that his threats were genuine, specific expressions of an intent to subject a person to damages or harm. Consequently, we find no fundamental error.

Next, Brewington repeats his argument set forth above that the State's theory that he had committed intimidation against Judge Humphrey by threatening to expose the judge to hatred, contempt, disgrace, or ridicule is essentially criminal defamation.

Consequently, he reasons, the jury should have been instructed that the State was required to prove that Brewington's statements were knowingly false. We have already determined that in a prosecution for intimidation, the truth or falsity of the threat is irrelevant because a threat to disclose true information can place a victim in fear as easily as the disclosure of lies. *See* Section IV.B above. Consequently, we cannot conclude that failure to instruct the jury on civil defamation principles amounts to fundamental error.

### A. BREWINGTON'S PROPOSED INSTRUCTION

Brewington contends that the trial court erred by rejecting his proposed Instruction 5 regarding article I, section 9 of the Indiana Constitution because the other instructions, as a whole, otherwise do not adequately explain how to apply the principles of free expression stated in section 9 to his conduct. We

review a trial court's decision on instructing a jury for an abuse of discretion. *Short v. State*, 962 N.E.2d 146, 150 (Ind. Ct. App. 2012). When evaluating a trial court's rejection of tendered instructions, we look to: (1) whether the tendered instructions correctly state the law (2) whether there is evidence in the record to support giving the instruction, and (3) whether the substance of the proffered instruction is covered by other instructions.[39] *Id.* For claims that different instructions should have been tendered by trial counsel, we will not reverse unless the court would have been compelled by law to give the instruction. *Baer v. State*, 942 N.E.2d 80, 96-97 (Ind. 2011).

Brewington's proposed Instruction 5 provides as follows:

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:

> **Section 9**. No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever, but for the abuse of that right, every person shall be responsible.

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[39] Brewington did not include in his Appellant's Appendix a complete set of the trial court's final jury instructions, and the Transcript omits the trial court's reading of the instructions to the jury.

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 States's [sic] action in this 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 most appropriate.

Appellant's App. p. 38.

This proposed Instruction consists of passages taken from our Supreme Court's decision in *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996). It is well established that use of certain language in appellate opinions does not necessarily make it proper language for instructions to a jury. *See Ludy v. State*, 784 N.E.2d 459, 462 (Ind. 2003). In any event, in *Whittington* and its progeny our Supreme Court applied article I, section 9 in the context of the crime of disorderly conduct. Brewington does not cite to any cases applying the *Whittington* analysis to the offenses of intimidation and obstruction of justice, and we have not found any. We cannot say that our Supreme Court would apply the balancing of interests discussed in

*Whittington* in the same way for criminal offenses other than disorderly conduct. Consequently, the trial court was not compelled by law to give Brewington's proposed tendered instruction to the jury, and we find no abuse of discretion in the giving of the trial court's Final Instruction 3 in this case.

## VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Brewington contends that his trial counsel performed deficiently in many respects and prejudiced his defense. To establish a claim of ineffective assistance of trial counsel, a defendant must demonstrate that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). To establish the first element, 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 the "counsel" guaranteed by the Sixth Amendment. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). To establish the second element, 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. *Id.* Counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). If we can resolve an ineffective assistance claim on the question of prejudice, we need not address whether counsel's performance was deficient. *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2009).

### A. ADMISSION OF CUSTODY EVALUATION AND DIVORCE DECREE

Brewington claims his trial counsel should have objected on multiple grounds to the admission of Dr. Connor's custody evaluation and Judge Humphrey's divorce decree into evidence. At trial, counsel objected to the divorce decree on grounds of relevance only, and he raised no objection to the custody evaluation. Brewington argues that if his trial counsel had raised other objections that are discussed below, the objections would have been granted and these documents would have been excluded or heavily redacted.

Brewington first argues that the documents were unfairly prejudicial because they both asserted that Brewington was psychologically disturbed and had committed acts of violence and intimidation against Melissa in the past. Indiana Evidence Rule 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." The balancing of the probative value against the danger of unfair prejudice must be determined with reference to the issue to be proved by the evidence. *Brim v. State*, 624 N.E.2d 27, 35 (Ind. Ct. App. 1993), *trans. denied*.

Here, the custody evaluation and the divorce decree were relevant because these documents were the basis for the criminal charges and were admissible for the purpose of establishing Brewington's motive.

Furthermore, many of Brewington's letters and internet postings were admitted as exhibits at trial without objection, and they referred to or quoted the terms of the evaluation and the divorce decree, so admission of those documents was necessary to assist the jury in understanding the basis of Brewington's letters and posts. In addition, at trial both Dr. Connor and Melissa testified as to Brewington's mental state and aggressive behavior, providing evidence of Brewington's potential dangerousness. Although the documents were lengthy, the statements about which Brewington now objects were only small portions of both documents. Consequently, we cannot conclude that if Brewington's counsel had objected to those documents, pursuant to Indiana Evidence Rule 403, the objections would have been sustained. *See Wrinkles v. State*, 749 N.E.2d 1179, 1196-97 (Ind. 2001) (determining that counsel was not ineffective for failing to object to evidence that Wrinkles had behaved aggressively toward his wife in the past because the evidence was relevant to prove motive and there was other damaging evidence against Wrinkles).

Next, Brewington argues that the divorce decree improperly contained Judge Humphrey's opinion on Brewington's criminal guilt. Indiana Evidence Rule 704 states, in relevant part: "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."

In the divorce decree, Judge Humphrey noted, "The record of this case shows that [Brewington] has attempted to intimidate the Court, Court staff,

[Melissa], Dr. Connor, and anyone else taking a position contrary to his own." State's Ex. 140, p. 8. This statement does not necessarily indicate that Judge Humphrey believed that Brewington had committed the crime of intimidation, with which he had yet to be charged in any event. To the contrary, Judge Humphrey's statement, in context of the divorce decree's discussion of Brewington's conduct during the case, was a generic reference to Brewington's behavior and failure to control himself during the divorce proceedings rather than a statement of criminal guilt, and did not violate Rule 704. Even if the statement amounted to an opinion that reflected upon the possibility of Brewington's criminal liability, however, in the context of the entire record, the effect of that one statement was minimal. *See Curtis v. State*, 905 N.E.2d 410, 416 (Ind. Ct. App. 2009) (determining that a doctor's brief answer vouching for a witness, in the context of the record, did not prejudice Curtis' defense), *trans. denied*.

Next, Brewington argues that his counsel should have objected to the custody evaluation and the divorce decree because they both contained statements of expert opinion by Dr. Connor regarding Brewington's mental health, but he believes no foundation had been laid for those opinions. Pursuant to Indiana Evidence Rule 702, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Here, to the extent that Dr. Connor's statements about Brewington's mental health in the evaluation and the decree can be considered statements of expert opinion, we conclude that the State provided a sufficient foundation establishing Dr. Connor's knowledge, experience, training, and education. Dr. Connor testified about his educational background, his professional licensing, his lengthy work experience, specifically focusing on mental health evaluations, and his personal observations of Brewington. This evidence established his status as an expert. *See Bennett v. Richmond*, 960 N.E.2d 782, 789 (Ind. 2012) (determining that a psychologist was established as an expert witness by testifying about his education and professional experience).

Finally, Brewington argues that his attorney should have objected to the admission of the custody evaluation because it contained hearsay statements. Brewington fails to cite any authority to support this argument, so the matter is waived. *See Mallory v. State*, 954 N.E.2d 933, 936 (Ind. Ct. App. 2011) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."). Waiver notwithstanding, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Ind. Evidence Rule 801(c). Hearsay evidence is not admissible except as provided by law or the Indiana Rules of Evidence. Ind. Evidence Rule 802.

Here, the custody evaluation refers to statements by Melissa, her parents, and her sister about Brewington's mental health and behavior toward Melissa. Those statements in the evaluation are

hearsay, and they do not appear to fall under any of the exceptions provided in the Indiana Rules of Evidence. The State argues that the custody evaluation was not admitted for the truth of the matter asserted, but rather was used solely to illustrate motive. We cannot agree, because the record fails to reflect that the evaluation was admitted solely for that limited purpose and that the jury was instructed to consider the evaluation only for that limited purpose.

Nevertheless, errors in the admission of evidence, including hearsay, are to be disregarded as harmless unless they affect the substantial rights of a party. *Sparkman v. State*, 722 N.E.2d 1259, 1263 (Ind. Ct. App. 2000). To determine whether the defendant's substantial rights were prejudiced, we must assess the probable impact of the improperly admitted evidence upon the jury. *Id.* In this case, the statements in the custody evaluation paint Brewington in a poor light. However, given that the custody evaluation was only one of well over a hundred exhibits admitted at trial through the testimony of eight different witnesses, including the testimony of Dr. Connor and his observations, as well those of Melissa, and many of those exhibits also depicted Brewington as an aggressive, angry individual, we cannot conclude that the admission of the evaluation alone affected Brewington's substantial rights. Consequently, admission of the evaluation was harmless error at best, and Brewington was not prejudiced by his counsel's failure to object.

To establish ineffective assistance for counsel's failure to object, a petitioner must show that the trial

court would have sustained the objection had it been made and that the petitioner was prejudiced by the failure to object. *Taylor v. State*, 929 N.E.2d 912, 918 (Ind. Ct. App. 2010), *trans. denied*. Brewington has not established that the trial court would have granted the objections discussed above or that he was prejudiced by counsel's failure to object. Consequently, this aspect of his claim of ineffective assistance of counsel fails.

### B. JURY INSTRUCTION – DISCUSSION OF GRAND JURY PROCEEDINGS

Brewington contends that his counsel should have objected to Final Instruction 1 because it contained misleading and prejudicial language. Specifically, he claims the Instruction repeats the grand jury indictment verbatim for each charge, including repeatedly describing the grand jury members as "good and lawful men and women." Appellant's App. p. 10. Furthermore, he believes the Instruction indicates that the grand jury had already found him guilty of each charge, which misled the trial jury and prejudiced it against him. He asserts that if his counsel had objected, the trial court would have been required to sustain the objection due to that instruction's unduly prejudicial language.

The manner of instructing a jury is left to the sound discretion of the trial court. *Patton v. State*, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). A ruling on jury instructions will not be reversed unless the error is such that the charge to the jury misstates the law or otherwise misleads the jury. *Id.* Jury instructions must be considered as a whole. *Id.*

In this case, Final Instruction 1 explained to the jury the elements of each charged offense and stated that the State bears the burden of proving the elements of each offense beyond a reasonable doubt. Furthermore, the instruction stated for each offense that the jury should find the defendant not guilty if the State failed to prove each element. We conclude that Final Instruction 1 adequately informed the jury that the duty of determining guilt rested in its hands and that it was not bound by the grand jury's indictment. Thus, the Instruction was not erroneous, and we cannot say that if counsel had objected, the objection would have been sustained. Consequently, counsel's failure to object did not constitute deficient performance.

### C. JURY INSTRUCTIONS – FREEDOM OF EXPRESSION

Brewington argues that his trial counsel should have objected to Final Instructions 1, 2, 3, and 5, citing the First Amendment and article I, section 9 of the Indiana Constitution, raising several specific points. First, he argues that his counsel should have argued that, to the extent the charges of intimidating Judge Humphrey or attempted obstruction of justice involving Dr. Connor relied on threats of violence, the jury was obligated to find that Brewington made "true threats" that were unprotected by the First Amendment. As we noted above, the trial court's Final Instruction 5 told the jury that a threat included, among other definitions, expression of an intent to "unlawfully injure the person threatened or another person, or damage property . . . [or] unlawfully subject

a person to physical confinement or restraint." Appellant's App. p. 16. Thus, the jury was adequately instructed that any threats of physical harm by Brewington had to go beyond mere idle words and must have constituted a genuine threat to commit violently criminal acts punishable by law. The Instruction was sufficient, and any objection on this point would not have been sustained.

Next, Brewington argues that his counsel should have objected to Final Instructions 1, 2, 3, and 5 on grounds that, with respect to the intimidation charge involving Judge Humphrey, any threat Brewington made to expose the judge to hatred, contempt, disgrace, or ridicule must have been based on knowingly false information. Otherwise, Brewington reasons, the jury risked punishing Brewington for true speech protected by the First Amendment. We have already determined that the truth or falsity of a threat is not relevant to a claim for intimidation. This is so because the harm caused by the crime, placing someone in fear of retaliation for a prior lawful act, occurs even if the information to be publicized is true. *See* Section IV.B above. Consequently, principles of civil defamation are not relevant here. If Brewington's trial counsel had objected on this point, the objection would not have been sustained, so counsel's performance was not deficient.

Finally, Brewington argues that his counsel should have provided a more complete proposed instruction based on article I, section 9 of the Indiana Constitution. As is noted above, Brewington tendered a proposed instruction that quoted section 9 and

provided quotations from a case, *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996). The trial court rejected that particular proposed instruction but accepted another proposed instruction from Brewington that consisted of the text of section 9. Brewington argues that his public comments about Dr. Connor and Judge Humphrey constituted protected political speech on their government action; specifically since Dr. Connor and Judge Humphrey's participated in his divorce case, and his counsel should have tendered an instruction that informed the jury about the higher standard of protection that article I, section 9 provides to political speech.

We have already determined that the trial court was not obligated to give an instruction applying the discussion in *Whittington* and its progeny to this case. Counsel's performance cannot be deemed deficient for failing to tender an instruction that the court would not have been obligated to give. Consequently, we find no reversible error.

## CONCLUSION

For the reasons stated above, Brewington's convictions and sentences for Count I, intimidation of Dr. Connor, and Count III, intimidation of Heidi Humphrey, must be vacated. We reverse those convictions and remand with instructions to vacate those convictions. Vacatur does not alter Brewington's aggregate sentence. The trial court's judgment is in all other respects affirmed.

Affirmed in part, reversed in part, and remanded with instructions.

BAKER, J., and RILEY, J., concur.

## APPENDIX E

STATE OF INDIANA

DEARBORN SUPERIOR COURT II

COUNTY OF DEARBORN

GENERAL TERM 2011

CAUSE NO. 15D02-11O3-FD-084

STATE OF INDIANA

V

DANIEL BREWINGTON )

## MOTION TO DISMISS

Daniel Brewington moves the Court to dismiss all pending charges against the Defendant as the result of prosecutorial misconduct during the grand jury process.

The Defendant requests the Court to dismiss the charges against the Defendant as the degree of misconduct by the Prosecutor is government misconduct and the indictment of the Defendant is without cause and contrary to law.

The Prosecutor during the conduct of the grand jury process advised the Grand Jurors what the Prosecutor and his staff believed crossed the lines between freedom of speech and intimidation and harassment" Page 338, Grand Jury Transcript.

Harassment is defined as "conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes." IC J5-45-10-2 Intimidation occurs only when a threat is communicated to another person and there is no evidence in the grand jury proceedings the Defendant communicated any threats to another individual.

Harassment does not include statutorily or constitutionally protected activity." The Defendant's blogs in the within matter are no more than comment. The Prosecutor advised the Grand Jurors the Defendant's comments were "over the top, um, unsubstantiated statements against either Dr. Conner or Judge Humphrey" The Prosecutor advised the Grand Jurors that unsubstantiated statements as determined by the Prosecutor and his staff are not constitutionally protected speech. The U.S. Supreme Court determined "The First Amendment, however, embodies 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N. Y. Times Co. v. Sullivan, 376 U.S. at 270, 84 S.Ct. 710. To require a critic of the government to verify and guarantee the truth of all facts would lead to self- censorship, thereby dampening the vigor and limiting the variety of public debate, which is

inconsistent with the First Amendment. id The Prosecutor provided the Grand Jurors with the incorrect law on the issue of harassment and the constitutionally protected right of the Defendant to make the comments presented.

The issue is not whether the blogs of the Defendant are over the top" or "unsubstantiated statements." The issue is whether the speech of the Defendant is constitutionally protected and it is. The instruction provided to the Grand Jurors by the Prosecutor was incorrect and contrary to law. The fact the Defendant made a negative comment about Connor, Humphrey, the Prosecutor, or anyone else does not affect the Defendant's constitutional right of free speech.

The postings by the Defendant cannot be considered anything other than free speech. The posting of Heidi Humphrey's address on the Defendant's blog is not in violation of any law. The address is accessible as the result of her role on the Ethics and Professionalism Committee of the Indiana Supreme Court. The address of Heidi Humphrey can be gleamed from the Tax Assessor's office, the petitions of Judge Humphrey to run for office, the campaign finance reports of Judge Humphrey, and probably multiple other sites the Defendant has not investigated at the present time. There is no law prohibiting the disclosure of an elected officials address. If the concern of the public official is so great there are a number of precautions to be taken including but not limited to resignation from office. The alternative of prosecuting someone who searches public records is hardly the solution for a timid public servant who cannot stand the heat in the kitchen and refuses to leave.

Finally, there is no way to determine if the Defendant's statements are unsubstantiated concerning Connor as the Defendant has not had the ability to review the Custody Evaluation file to determine if what is contained in the report is substantiated by Connor's report. The purported victims could have avoided the entire process by simply providing the Custody Evaluation file to the Defendant who was appearing pro se. Even Connor stated in the Grand Jury it would be okay to provide the Custody Evaluation file to an attorney but not the Defendant who was appearing pro se. Grand Jury Transcript, p. 82. Unfortunately, Connor refused to provide the Custody Evaluation file to the Defendant's divorce attorney or counsel for the Defendant in Ohio. Connor, without the Defendant's authorization or knowledge, provided the Grand Jury with the Defendant's file without a special order from the Court. Connor refused to answer subpoenas issued by at least one other Court and refused to provide the case file while voluntarily surrendering it to the Grand Jury without benefit of a court order.

Defendant requests the Court to dismiss the charges against the Defendant.

<u>/s/Daniel Brewington</u>
Daniel Brewington
301 W. High Street
Lawrenceburg. Indiana 47025
No telephone number
lnmate DCLEC

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was hand delivered to upon all parties or counsel of record including F. Aaron Negangard, Prosecuting Attorney, Dearborn County Courthouse, Lawrenceburg, Indiana 47025 this 3 day October, 2011.

/s/Daniel Brewington
Daniel Brewington

## APPENDIX F

STATE OF INDIANA

DEARBORN SUPERIOR COURT II

COUNTY OF DEARBORN

GENERAL TERM 2011

CAUSE NO. 15D02-11O3-FD-084

STATE OF INDIANA

V

DANIEL BREWINGTON )

MOTION TO DISMISS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Daniel Brewington moves the Court to dismiss all pending charges against the Defendant for denial of counsel and denial of his right to speedy trial in this matter.

### A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are reviewed under a two-part test: ( 1) a demonstration that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and (2) a showing that the deficient performance resulted in prejudice. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing

Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

### (1) A DEMONSTRATION THAT COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS BASED ON PREVAILING PROFESSIONAL NORMS

The Defendant had two public defenders assigned to represent the Defendant in this matter. The first public defender assigned by Judge Blankenship was John Watson. The second public defender assigned by Judge Hill was Bryan Barrett. The legal services provided by the public defenders fell below an objective standard of reasonableness based on the following:

### a. Indiana Rules of Professional Conduct-Rule 1.1

"Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." During the period of representation by Watson and Barrett the Defendant has not had any discussion with either Watson or Barrett concerning the matters before the Court in any detail, neither Watson nor Barrett have provided the Defendant with any information concerning factual or legal elements

of the charges asserted against the Defendant, or provided the Defendant with the methods or procedures to be used in the defense of the charges.

The Defendant is indigent and entitled to competent handling of the charges asserted against him. The public defenders assigned to the Defendant's case have not inquired of the Defendant concerning any facts related to the charges, have not inquired of the Defendant the witnesses necessary for trial to testify on behalf of the Defendant, or discuss with the Defendant the expert witnesses necessary for the trial of this matter. Attached are communications from the Defendant's family to Barrett concerning documents or witnesses for the trial. The Defendant has been denied effective assistance of counsel as neither Watson nor Barrett have demonstrated a knowledge of the basic requirements of the Indiana Rules of Professional Conduct as the Defendant has not received the benefit of the public defenders demonstrating the ability of the public defenders to handle the Defendant's case as neither Watson nor Barrett have inquired of the Defendant the factual issues regarding the charges or explained to the Defendant the legal elements of the charges against the Defendant.

**b. Indiana Rules of Professional Conduct-Rule 1.2**

"A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the

representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." During the period of representation neither Watson nor Barren have conferred with the Defendant concerning the objectives of representation or the means by which the objectives of representation are to be pursued. The Defendant has not been contacted by Barrett since July 2011 and Barrett has failed to discuss the case with the Defendant The Defendant has been unable to "impliedly" authorize Barrett to do anything as there is no contact between the Defendant and Barrett . Further, motions filed by the Prosecutor are approved or unopposed by Barrett without consultation with the Defendant.

### c. Indiana Rules of Professional Conduct- Rule 1.3

"A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor . A lawyer must also act with commitment and dedication to the interests of the client" Neither Watson nor Barrett have consulted with the Defendant concerning hearings held by the Court, discussed the Defendant's rights in the Court, or otherwise communicated with the Defendant . The Defendant, although persistent concerning his desire to understand the charges asserted against the Defendant and the evidence to be utilized at the trial, has not received

the benefit of counsel at any time to review any document (only the grand jury transcript) provided by Barrett . The Defendant received the grand ju ry transcript less than seven days prior to trial in the mail from Barrett. The public defenders have not reviewed one document with the Defendant at any time while the Defendant has been incarcerated for the past six months.

**d. Indiana Rules of Professional Conduct-Rule 1.4**

"A lawyer shall :

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule I .0(e), is required by these Rules

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule I .2(c).

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Neither Watson nor Barrett informed the Defendant of the purpose of court hearings, consulted

with the Defendant concerning what the client's objectives were in the litigation much less how the court hearings would accomplish the client's objectives, failed to consult with the client concerning how the client's objectives would be accomplished as the attorneys never determined what the client's objectives were, failed to keep the Defendant informed of the status of the matter or requests to take action on behalf of the Defendant, and failed to comply with reasonable requests for information, such as discovery provided by the Prosecutor, subpoena witnesses, or communicate with me. Further the attorneys failed to consult with the Defendant or explain anything to the Defendant to make informed decisions regarding representation of the Defendant. Finally, Barrett refused to accept telephone calls from the Defendant and failed to visit the Defendant after repeated promises to visit the Defendant at the Dearborn County Law Enforcement Center. Barrett advised the Defendant he was not permitted to contact Barrett's office after Barrett refused to communicate with the Defendant or answer the Defendant's phone calls.

**e. Rule 1.6. Confidentiality of Information**

"A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order."

Barrett revealed to the Court information concerning the Defendant's desire to maintain the Defendant's right to a speedy trial. The Defendant has been incarcerated for in excess of six months with no assistance from counsel assigned to represent the Defendant. The Defendant never communicated to the Court at any time the Defendant's desire not to waive the Defendant's right to speedy trial but the Court, after the Defendant made a request for a continuance, stated the Defendant desired a speedy trial, "was adamantly opposed to a continuance," and the continuance would be denied. The information concerning the Defendant desiring a speedy trial was

only communicated to the Defendant's counsel. The communication to the Court of the Defendant's desire for a speedy trial by Defendant's attorney without consultation or approval by the Defendant breaches the confidentiality requirements between the lawyer and a client. The breach is even more horrendous when the attorney does not disclose the necessity to disclose the information to the Court to the Defendant. The obvious lack of communication with the Defendant is problematic, but the communication with the Court in a manner to jeopardize the Defendant's right to speedy trial and effective representation, is more egregious.

**f. Rule 1.14. Client with Diminished Capacity**

"When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.

The allegations asserted in the grand jury transcript refer to the Defendant's paranoia and ADHD repeatedly throughout the grand jury transcript. The Defendant has not been interviewed by a psychologist or psychiatrist at any time during the period of the Defendant's incarceration. The Defendant has available professional witnesses to address the claims contained in the grand jury transcript concerning the treatment of the Defendant's ADHD and address the paranoia issue. The attorneys assigned to the Defendant took no action to consult with healthcare professionals concerning the Defendant's physical or mental condition, do not understand or are indifferent to the need for the Defendant's medication to assist in the defense of the charges, and failed to consult with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The public defender's investigator upon being informed the Dearborn County Sheriff required an order from the Court to permit the Defendant to appear in street clothes at trial, advised the Defendant's mother the individual the Defendant

spoke to at the jail was imaginary or the individual with the Dearborn County Sheriff's office did not know what he/she was talking about. The Defendant repeatedly attempted to communicate with the public defender concerning the issue of appearing in street clothes at trial and the public defended did nothing to file a motion with the Court as required in the jail handbook.

**g. Rule 1.16. Declining or Terminating Representation**

"Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged .

The public defenders assigned to the Defendant's case have taken actions or failed to act in accordance with the Rules of Professional Conduct as the public defenders have failed to interview one character witness, no mental health professionals who have treated the Defendant, failed to assess the necessity of medication necessary for the Defendant to assist in the Defendant's trial, or take appropriate action to investigate allegations by the Prosecutor concerning representations at the most recent bond hearing.

**h. Rule 3.3.Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false tatement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Amended Sep. 30, 2004, effective Jan. 1, 2005.

The Prosecutor has introduced evidence in this matter the Prosecutor knows to be false or failed to

verify the accuracy of the representations/evidence presented to the Court. Once the evidence was presented to the Court, and after the Prosecutor knew or should have known the information to be false, the Prosecutor has failed to take any action to correct the false evidence submitted to the Court. Further, the Defendant has been unable to have assigned counsel bring this matter to the attention of the Court either as a result of the Defendant's counsel to investigate the false evidence or complete indifference to the representations made by the Prosecutor concerning the bond set in this matter. The evidence concerning the “drive by" solicitation is factually inaccurate as proven by the records of the Hamilton County, Ohio, Justice Center. The Defendant was never in the presence or even in the same building as the individual who provided information to Shane McHenry concerning the alleged "drive by." The Defendant attempted to have the public defender investigate the matter and the public defender has not responded to any inquiries.

Further, the Defendant is even more alarmed that information demonstrating the allegations by the Prosecutor and McHenry are false, and nothing is done by the Court, the public defender, or the Prosecutor to correct the false statements.

**i. Rule 3.4.Fairness to Opposing Party and Counsel**

..A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The Defendant acquired information the evidence presented by the Prosecutor concerning the drive by" hit is false, the information was false at the time

presented, and due to the lack of diligence of the Prosecutor and the investigator, the information was presented as truthful, when the Prosecutor and investigator knew or should have known the testimony was false. The Court set bond or refused to reduce bond based on the false information supplied by the Prosecutor and the investigator.

### j. Rule 3.8.Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. The Prosecutor has pursued the prosecution of the Defendant when any reasonable person in a similar position knows or should know the information presented to the grand jury is false or not relevant to the charges asserted against the Defendant.

A review of the grand jury transcript makes reference to guns/firearms approximately 63 times.

There is nothing on the Defendant's blog urging anyone to take up guns/firearms against anyone. The Prosecutor mentions murder approximately 19 times during the grand jury transcript and there is nothing contained in any of the blog postings referring to murder at any time. The Prosecutor makes reference to mental illness/ADD approximately 35 times during the grand jury transcript and the Defendant is denied his medication for ADHD, the public defender has not conferred with any health care professionals concerning the matter, the public defender refuses to obtain the case file from Connor to verify any of the information presented by Connor at the grand jury to use for impeachment; and the Prosecutor refers to rape, murder, and mental illness approximately 20 times in the grand jury transcript. The Prosecutor bootstraps the foregoing allegations to obtain an indictment against the Defendant in violation of law.

**k. Ineffective Assistance of Counsel-hearings**

The Defendant has advised Barrett of witnesses necessary for the hearing and Barrett has not subpoenaed any character witnesses, not interviewed the Defendant's health care providers, or otherwise investigated this case. Further, Barrett has not reviewed with the Defendant the request from the Prosecutor for a motion in limine or the request for an anonymous jury at any time. Barrett has not obtained transcripts of the hearings to determine what occurred at the arraignment or otherwise moved to dismiss or suppress any statements by the Defendant at any time, including the interview of the Defendant in Ohio when Sheriff Kreinhop, then with SCU and under the

direction of Prosecutor Negangard, interviewed the Defendant after Kreinhop was informed by the Defendant's Ohio counsel the Defendant was not to be interviewed.

**2. A SHOWING THAT THE DEFICIENT PERFORMANCE RESULTED IN PREJUDICE**

The Defendant has no witnesses, no review of the discovery with the Defendant's counsel, and no communication with Defendant's counsel concerning the case in more than two months and the trial date is October 3, 2011. The Defendant states no reasonable interpretation of the foregoing could be considered an adequate performance.

The Court selected the public defenders assigned to the Defendant. . The person who selected the attorney will have to suffer the consequences of choosing counsel unwisely. Indiana Court Times, 4/13/2011. The blame is not on the Defendant.

If the Court or the Prosecutor desires to raise the issue of the blogsite postings, the Court and the Prosecutor should look at the dates of the postings to determine when the postings were made and how much time passed for either Watson or Barrett to take some action on behalf of the Defendant.

**3. MOTION TO DISMISS**

The Defendant moves the Court for an order of dismissal as the actions of the Prosecutor in securing the indictment, the actions of Judge Blankenship in the handling of the arraignment and the setting of an exorbitant bond, the false testimony of McHenry and

the presentation of the false testimony by the Prosecutor, the assignment of two public defenders who did nothing to represent the Defendant, and the failure of the Court to appoint effective counsel to assist the Defendant requires dismissal of the charges against the Defendant. The Defendant has been incarcerated for more than six months and the Defendant's right to a speedy trial have been eviscerated by the actions of ineffective counsel, the Prosecutor, and the assignment of counsel by the Court.

The Court has appointed two public defenders to represent the Defendant and the Defendant has been woefully served by the counsel appointed. The public defenders took no action to dismiss the indictment where _ the grand jury was overreached and deceived in a significant manner by the Prosecutor. The review of the transcript demonstrates the Prosecutor permitted the witnesses to elicit or testify concerning matters not within the realm of experience of the witnesses and deliberately misled the grand jury to indict the Defendant as the only means to take away the Defendant's right to carry or possess a firearm. Further, the Prosecutor permitted the witnesses to delineate what they perceived or thought were the parameters of a citizen's First Amendment right when none of the witnesses had knowledge of same or, if it is argued that Judge Humphrey was knowledgeable of the First Amendment, Judge Humphrey's interpretation of the First Amendment has no basis in law or fact.

The Court, the Prosecutor, and the witnesses maybe upset with the Defendant's postings, but the avenue to resolve their differences is not through a flawed grand jury process utilized by an overzealous

Prosecutor who has no concern for the constitutional rights of Americans. The Prosecutor went forward when at least two other police agencies determined the postings were not criminal.

/s/Daniel Brewington
Daniel Brewington
301 W. High Street
Lawrenceburg. Indiana 47025
No telephone number
lnmate DCLEC

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was hand delivered to upon all parties or counsel of record including F. Aaron Negangard, Prosecuting Attorney, Dearborn County Courthouse, Lawrenceburg, Indiana 47025 this 3 day October, 2011.

/s/Daniel Brewington
Daniel Brewington

## APPENDIX G

STATE OF INDIANA

DEARBORN SUPERIOR COURT II

COUNTY OF DEARBORN

GENERAL TERM 2011

CAUSE NO. 15D02-11O3-FD-084

STATE OF INDIANA

V

DANIEL BREWINGTON)

### MOTION TO DISQUALIFY F. AARON NEGANGARD AND APPOINTMENT OF A SPECIAL PROSECUTOR

Daniel Brewington moves the Court to disqualify F. Aaron Negangard as the Prosecutor in the within cause and request the appointment of a special prosecutor.

The Defendant moves the Court for an order dismissing Prosecutor Negangard for prosecutorial misconduct during the grand jury process and as the result of the Court's order granting the Defendant's first public defender's request to withdraw as counsel.

The Defendant's first public defender requested permission to withdraw as counsel for the Defendant as "counsel has multiple cases in Judge Humphrey's court" and "Counsel feels that this situation at

minimum creates an appearance of impropriety. "The Court granted the Defendant's first public defender's motion to withdraw. The Defendant moves the Court to disqualify Prosecutor Negangard on the same grounds as the Court found appropriate for the Defendant's first public defender, i.e., “this situation at minimum creates an appearance of impropriety." Prosecutor Negangard has more cases pending before Judge Humphrey than the Defendant's first public defender. If the appearance of impropriety is so great or minimal for the Defendant's first public defender to withdraw, Prosecutor Negangard is faced with the same appearance of impropriety.

IC § 33-39-1-6 (a)(2) (2) permits a circuit or superior court judge “to appoint a special prosecutor if: (A) a person files a verified petition requesting the appointment of a special prosecutor; and (B) the court, after: (i) notice is given to the prosecuting attorney; and (ii) an evidentiary hearing is conducted at which the prosecuting attorney is given an opportunity to be heard; finds by clear and convincing evidence that the appointment is necessary to avoid an actual conflict of interest or there is probable cause to believe that the prosecutor has committed a crime." The Defendant requests the Court to appoint a special prosecutor as the result of Prosecutor Negangard's use at the recent motion to reduce bond of evidence or testimony of a witness Prosecutor Negangard did not investigate or in the alternative introduced into evidence knowing the information was false. The Defendant has documentary evidence the Defendant was never in the presence of the jail house snitch. Prosecutor Negangard introduced statements from the jail house snitch this Court used to continue the astronomical bond for the Defendant. The information submitted to

the Court concerning the jail house snitch was false and the Prosecutor has done nothing to bring to the attention of the Court the Prosecutor's use of the false evidence.

IC § 35-44-1-2 states "A public servant who knowingly or intentionally: (1) commits an offense in the performance of the public servant's official duties. IC § 35-44-3-4 states "A person who withholds or unreasonably delays in producing any testimony, information, document, or thing commits an offense. The information submitted by Prosecutor Negangard concerning the jail house snitch was false and it is absolutely false based on the records of the Hamilton County, Ohio, Justice Center. The issue before the Court is what, if anything, the Prosecutor or the prosecution's witness did to verify the information provided concerning the jail house snitch. The Defendant was the victim of a prosecution witness assigned by the Special Crimes Unit under the control of Prosecutor Negangard.

The Defendant was able to obtain documentation the testimony of Shane McHenry at the Defendant's hearing to reduce bond was false. An "investigator" with the Special Crimes Unit should be able to obtain the same information the Defendant was able to obtain. The Prosecutor's sole interest was to keep the bond as high as possible to vindicate the Prosecutor's witch hunt concerning the Defendant's blog posts. The Prosecutor represented to the Court the information from the jail house snitch was accurate when the Prosecutor either did not know whether it was truthful or not or failed to thoroughly investigate the matter prior to the Prosecutor introducing the evidence. What is more alarming is the Prosecutor did

nothing once it was obvious the testimony from McHenry was not truthful.

The Defendant requests the Court to dismiss the charges against the Defendant or in the alternative to appoint a special prosecutor not connected with the parties or this case.

/s/Daniel Brewington
Daniel Brewington
301 W. High Street
Lawrenceburg. Indiana 47025
No telephone number
lnmate DCLEC

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was hand delivered to upon all parties or counsel of record including F. Aaron Negangard, Prosecuting Attorney, Dearborn County Courthouse, Lawrenceburg, Indiana 47025 this 3 day October, 2011.

/s/Daniel Brewington
Daniel Brewington

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**APPENDIX H**
**Grand Jury Transcripts March 2, 2011**
**Page 338**

4.**MR. NEGANGARD** Okay we're on record. I want to present to the
5 Grand Jury Exhibit 231 which is a summary of blog
6 postings that he made of his blog in Dan's
7 Adventures in Taking on the Family Court and what
8 it is, is we highlighted where he said um, what we
9 felt was over the top, um, unsubstantiated
10 statements against either Dr. Conner or Judge
11 Humphrey. This is not every, and as you can read,
12 it's not every negative thing he said about Dr.
13 Conner, but it's a step that we felt, myself and my
14 staff, crossed the lines between freedom of speech
15 and intimidation and harassment. Um, Grand Jury
16 Exhibit 232 is a much smaller site that, Dan Helps
17 Kids, that has a few things in there, urn, you know,
18 he says something in there like Judge Humphrey
19 punished me for standing up to a man that hurts
20 children and families for monetary gain, referring to
21 Dr. Conner and uh, and that he called Judge
22 Humphrey unethical, illegal, unjust, vindictive and
23 that he abused my children. Um, again that's a
24 summary in Grand Jury Exhibit 232 so that's for
25 your review. At this time then we have no further

## APPENDIX I
## Grand Jury Transcripts February 28, 2011
## Page 180

**5 Negangard:** You went and harassed Mary Beth
**6** Polluck. You tried to schedule to see her...
**7 Dan:** Did I harass her?
**8 Negangard:** Well you tried to schedule to see her. Correct?
**9 Dan:** Did I harass her?
**10 Negangard:** You tried to ...
**11 Dan:** Did I harass her?
**12 Negangard:** ...you tried to get in to see her.
**13 Dan:** No, you're just making that up now. I didn't
**14** harass her.
**15 Negangard:** You tried to get in to see her. Didn't you?
**16 Dan:** Yell but that's different from harassing.
**17 Negangard:** No it's not different from harassing.
**18 Dan:** If I call a doctor to send a letter...
**19 Negangard:** Well I view that as harassing.
**20 Dan:** So I harassed Mary Jo Pollock because I sent
**21** her a letter?
**22 Negangard:** Yell because you didn't need to see her.
**23 Dan:** Okay so your information ...
**24 Negangard:** That's the whole point. You uh, I
**25** mean this is the whole problem. It is never your fault.

**APPENDIX J**

STATE OF INDIANA

DEARBORN SUPERIOR COURT II

COUNTY OF DEARBORN

GENERAL TERM 2011

CAUSE NO. 15D02-11O3-FD-084

STATE OF INDIANA

V

DANIEL BREWINGTON)

**ORDER SETTING BAIL**

The Court finds the nature of the indictments brought by the Grand Jury which include three(3) counts of Intimidation, Perjury, and Attempt to Commit Obstruction of Justice are such that there exists a threat to community and/or individual safety.

The State provided evidence that the Defendant has a history of not following Court orders and a general disdain for the authority of the Court and the legal system.

Further the Court of Appeals decision in Daniel Brewington vs. Melissa Brewington issued July 20, 2010, presented into evidence by the State of Indiana affirmed the Trial Court's decision in the matter and

noted that the findings of the Trial Court were each supported by the record and included that the psychiatric test results of Daniel Brewington indicate that the has a "degree of disturbance that is concerning and does not lend itself to proper parenting" and that evaluation stated that Daniel Brewington's writings are similar to those of who have committed crimes against their families and that Daniel Brewington had in the past shoved his wife and blocked her car to prevent her from leaving and had admitted to posting on the face book, in the dissolution proceedings, that "this is like playing with gas and fire, and anyone who has seen me with gas and fire know that I am quite the accomplished pyromaniac" and based on these findings and the evidence presented, the Court finds that the Defendant poses a significant risk to community safety and is unlikely to follow the conditions of bond as to the no contact orders and sets the bond in an amount of a $500,000 SURETY AND $I00,000 CASH BOND and all other conditions of bond to remain in full force and effect.
The posting of cash bail is subject to the following conditions:

1.) The bail shall be posted in the name of the defendant;
2.) The bail shall be considered a personal asset of the defendant; and
3.) The bail shall be available for payment of court costs, fines, restitution, and necessary attorney fees should a finding of guilt be made.
4.) Bail is subject to revocation and the defendant shall be rearrested upon failure to appear in court when ordered or commission of a criminal act before the time of trial, or violation of any other conditions of bail

So ORDERED this March 11, 2011, at Lawrenceburg, Indiana.

/s/Sally A. Blankenship
Sally A. Blankenship, Judge
DEARBORN SUPERIOR COURT II

## APPENDIX K

STATE OF INDIANA

DEARBORN SUPERIOR COURT II

COUNTY OF DEARBORN

GENERAL TERM 2011

CAUSE NO. 15D02-11O3-FD-084

STATE OF INDIANA

V

DANIEL BREWINGTON)

## JUDGMENT OF CONVICTION

This matter having come to trial on the 3rd day of October, 2011, and the jury having deliberated and returned a verdict of guilty on the 6th day of October, 2011, on Count I Intimidation, a Class A Misdemeanor in violation of Indiana Code 35-45-2-1(a)(1); Count II, Intimidation of a Judge, a Class D Felony, in violation of Indiana Code 35-45-2-1(a)(2)(b)(1), Count Ill, Intimidation, a Class A Misdemeanor, in violation of Indiana Code 35-45-2-1(a)(1), Count IV, Attempt to Commit Obstruction of Justice, a Class D Felony, in violation of Indiana Code 35-44-3-4 and Count V, Perjury, a Class D Felony, in violation of Indiana Code

35-44-2-1(a)(1), the COURT NOW ENTERS JUDGMENT OF CONVICTION FOR:

COUNT I, INTIMIDATION, A CLASS A MISDEMEANOR, IN VIOLATION OF INDIANA CODE, 35-45-2-1(a)(1);

COUNT II, INTIMIDATION OF A JUDGE, A CLASS D FELONY, IN VIOLATION OF INDIANA CODE 35-45-2-1(a)(2)(b)(1);

COUNT Ill, INTIMIDATION, A CLASS A MISDEMEANOR, IN VIOLATION OF INDIANA CODE 35-45-2-1(a)(1),

COUNT IV, ATTEMPT TO COMMIT OBSTRUCTION OF JUSTICE, A CLASS D FELO Y, IN VIOLATION OF INDIANA CODE 35-44-3-4 AND

COUNT V, PERJURY, A CLASS D FELONY, IN VIOLATION OF INDIANA CODE 35-44-2-1(a)(1)
cc:

So ORDERED this h day of OCTOBER. 2011, at Lawrenceburg, Indiana.

/s/Brian Hill
BRIAN HILL, SPECIAL JUDGE
DEARBORN SUPERIOR II

cc: Prosecutor
Barrett, Attorney for Defendant
Defendant
Probation