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

Daniel P. Brewington
2529 Sheridan Drive
Norwood, Ohio 45212
(513) 383-3136 mobile
contactdanbrewington@gmail.com
Petitioner, Pro se

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.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

STATUTES

OTHER AUTHORITIES

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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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

---

[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:

---

[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,

Daniel Brewington
Petitioner pro se
2529 Sheridan Drive
Norwood, Ohio 45212
513-383-3136
contactdanbrewington@gmail.com