IN THE

INDIANA COURT OF APPEALS

Cause No. 15A01-1110-CR-00550

DANIEL BREWINGTON,	)
	) Appeal from Dearborn Superior Court II
Appellant,	)
	) Cause No. 15D02-1103-FD-00084
v.	)
	) The Honorable Brian D. Hill,
	) Special Judge
STATE OF INDIANA,	)
	)
Appellee.	)

APPELLANT'S VERIFIED MOTION FOR BAIL PENDING APPEAL

Appellant-Defendant, Daniel Brewington, by counsel, hereby moves pursuant to Ind. R. App. P. 39, and respectfully requests that the Court set reasonable bail and permit him to be released on bail pending the outcome of this appeal. In support of this motion, Defendant would show the Court as follows:

1. On October 6, 2011, judgment of conviction was entered against Defendant on five counts:
    a. Count I: Intimidation, Class A misdemeanor, Ind. Code § 35-45-2-1(a)(1);
    b. Count II: Intimidation of a Judge, Class D felony, Ind. Code § 35-45-2-1(a)(2)(b)(1);
    c. Count III: Intimidation, Class A misdemeanor, Ind. Code § 35-45-2-1(a)(1);
    d. Count IV: Attempt to Commit Obstruction of Justice, Class D felony, Ind. Code § 34-44-3-4; and

e. Count V: Perjury, Class D felony, Ind. Code § 35-44-2-1(a)(1).

2. On October 24, 2011, the trial court entered the following sentence:

   a. Count I: six (6) months, executed, in the Dearborn Co. Jail (with credit for 231 days of pre-sentence confinement plus 231 days of good time credit for a total of 462 days);

   b. Count II: two (2) years, executed, in the Indiana Dept. of Correction (consecutive to Counts I, IV, and V);

   c. Count III: six (6) months, executed, in the Dearborn Co. Jail (concurrent to Count II);

   d. Count IV: two (2) years, executed, in the Indiana Dept. of Correction (concurrent to Count I, with 231 days of pre-sentence confinement plus 231 days of good time credit);

   e. Count V: one (1) year, executed, in the Indiana Dept. of Correction (consecutive to Counts I, II, III, and IV).

3. Defendant was not convicted of a Class A felony or a felony for which the court may not suspend the sentence pursuant to Ind. Code § 35-50-2-2.

4. Defendant filed a petition for bail pending appeal with the trial court on January 24, 2012, which was denied on February 2, 2012.

5. Defendant has been incarcerated since March 11, 2011.

6. Defendant requests that the Court set a reasonable bond and allow Defendant to be released on bail pending the appeal of his convictions.

7. Defendant is willing to agree to reasonable conditions of release, including: (1) a no-contact order prohibiting Defendant from contacting, or directly or indirectly

communicating with James Humphrey, Heidi Humphrey, and Dr. Edward Connor, other than through counsel; (2) agreeing to refrain from posting any information on the Internet concerning his divorce proceedings or any of the previously listed individuals, during the pendency of this appeal and subsequent re-trial, if any; (3) monitoring and/or other forms of supervision; and (4) any other conditions reasonably related to this Court's authority to restrict Defendant's ability to harass or intimidate the previously listed individuals.

8. Defendant requests that this Court enter an order setting a reasonable appeal bond, not to exceed $50,000 surety bond, including any reasonable conditions of release.

ATTACHMENTS

1. Judgment;
2. Sentencing Order;
3. Trial court order denying petition for bail pending appeal;
4. Excerpts from Trial Transcript;
5. Selected Trial Exhibits;
6. Court's Final Jury Instructions (Excerpts);
7. Excerpts from Grand Jury Transcript;
8. Excerpts from Bond Reduction Hearing Transcript;
9. Hamilton County (Ohio) Justice Center Movement Log.

ARGUMENT

Ind. Code § 35-33-9-1 permits a convicted defendant to petition the trial court for bail pending appeal. In considering the petition, the court is to examine: (1) probability of reversible

error; (2) risk of flight; and (3) potential dangerousness of the defendant. *Tyson v. State*, 593 N.E.2d 175, 178 (Ind. 1992). On appeal, factor one is reviewed *de novo*, and factors two and three are reviewed for abuse of discretion. *Id.* at 179.

These factors weigh in favor of granting Brewington reasonable bail pending appeal of his convictions.

I. Probability of Reversible Error.

A. Brewington's convictions on Counts I through IV violate the First Amendment.

Brewington's convictions for intimidation (Counts I-III) and attempt to commit obstruction of justice (Count IV) stem from statements that Brewington made in public forums that allegedly threatened Dr. Edward Connor, Judge James Humphrey, and Heidi Humphrey. These mostly consisted of Internet postings, but also included statements made in court filings and correspondence with the alleged victims. The evidence presented at trial by Dearborn County Prosecutor Aaron Negengard is insufficient to support these convictions.

"[I]n cases raising First Amendment issues ... an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984)). "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact[.]" *Bose Corp.*, 466 U.S at 501. In cases in which speech is alleged to be unprotected by the First Amendment, "Court[s] [have] regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any

unprotected category within acceptably narrow limits[.] ... Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served to sufficiently narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 505.

1. The State failed to prove that Brewington threatened violence.

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

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

The State failed to prove that Brewington's allegedly intimidating statements were true threats, as opposed to overheated rhetoric.[1] There was no evidence that Brewington intended to place any of the alleged victims in fear of bodily harm or death. *Black*, 538 U.S. at 360.

Brewington's convictions on these counts stem from his conduct during his divorce proceedings before Judge Humphrey, in which Brewington represented himself. The strongest evidence refuting these charges was Judge Humphrey's failure to attempt to control Brewington through the inherent powers of his court. If Brewington's conduct toward Dr. Connor was so intimidating that it constituted a true threat, Judge Humphrey could have ordered Brewington to stop, backed with the threat of contempt. But he did not. Dr. Connor could have sought a restraining order. But he did not. Brewington's ex-wife sought a restraining order to prohibit Brewington from posting information about the divorce proceedings on the Internet, which Judge Humphrey denied on First Amendment grounds. (Tr. Vol. I pp. 220-23). If Dr. Connor had sought a restraining order on the basis of true threats, the First Amendment would not have limited Judge Humphrey.

The State contended that Brewington was such a threat that it needed to step in and stop him using the harshest means possible. However, the alleged victims' failure to take any less drastic steps belies any contention that Brewington was an immediate threat. Instead of utilizing these other options, they were content to wait out the long process of a criminal investigation, grand jury proceedings, and criminal prosecution. Dr. Connor testified that he was concerned

[1] Count IV (attempt to commit obstruction of justice) relied on the exact same conduct as the charge for intimidation of Dr. Connor (Count I). The First Amendment requirements for both counts are therefore the same.

about Brewington's conduct at least as early as July 2008 (Tr. Vol. I pp. 115-16), but the grand jury proceedings did not begin until February 2011. This delay shows that they were not concerned about an immediate threat from Brewington, but rather wanted to punish him for not giving them the respect they felt they deserved. The First Amendment prohibits the State from criminalizing disrespect. *Watts*, 394 U.S. at 708; *Black*, 538 U.S at 358.

The State did present evidence that the alleged victims felt threatened, but this alone is insufficient. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 925 (1982) ("There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others.") Both the First Amendment and Ind. Code § 35-45-2-1 require that the State prove that Brewington intended his statements to be threatening. *Black*, 538 U.S at 360; Ind. Code § 34-45-2-1. There is no evidence that Brewington intended his statements to be threatening, rather than strident complaints about public officials.

Most of Brewington's allegedly threatening statements were essentially name-calling. Brewington called Dr. Connor (the custody evaluator) and Judge Humphrey "child abusers." Brewington used the term "child abuse" to refer to what he believed was the improper denial of his participation in his children's upbringing, which he thought would have detrimental effect on his children. In Brewington's mind, Dr. Connor's custody evaluation contained numerous errors and omissions. Dr. Connor refused to release his case file to Brewington, which Brewington believed he was entitled to, and which Brewington could use to challenge these errors. Judge Humphrey relied on the error-ridden evaluation to deny Brewington joint-custody and visitation.[2]

[2] Specifically, Judge Humphrey ruled that Brewington would not have visitation until he was evaluated and cleared by a court-approved psychiatrist, at which point he could have supervised visitation. (Tr. Ex. 140 pp. 17-19).

Brewington called them other names and used harsh language, but is not a threat of violence. The State also introduced evidence that Brewington explicitly threatened to file lawsuits, criminal complaints and complaints with professional boards—but again, these are not threats of violence.

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

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

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

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

The State also presented a statement on Brewington's blog that Dr. Connor "made me so mad I wanted to beat [him] senseless" and that Dr. Connor's custody evaluation "[made] me want to punch Dr. Custody Evaluation in the face." (Tr. Ex. 198). This is not a true threat—it is not an actual threat of violence. Brewington did not state that he actually intended to assault Dr. Connor, which the State is required to prove under the First Amendment. *Black*, 538 U.S. at 359-60.

This statement must be read in the context of the whole blog post. Brewington's statement was hypothetical. He never stated that he actually wanted to punch Dr. Connor in the face. Rather, he stated that he should be able to vent his frustration with Dr. Connor's services without risking the loss of his children. (Tr. Ex. 198). Brewington drew an analogy to someone being upset with a plumber and ranting about the plumber on the Internet. Brewington noted that it was not fair to treat similar "rants" about service providers differently: "No one has ever lost the ability to see their own children because they wrote an angry review of a plumbing company. Why should someone's parenting abilities be questioned if they write an angry review of a custody evaluator? That's what happened to me; except I have never written about any thoughts of causing physical harm to anyone." (Tr. Ex. 198). Nothing about Brewington's statement suggests that he actually intended to assault Dr. Connor. It is clear that he was doing nothing more than venting his frustration.

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

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

The State also presented evidence that Brewington posted information on the Internet concerning where the alleged victims lived. Regarding Dr. Connor, Brewington wrote about Dr. Connor's mortgage with "Fifth Third Bank on his house in the Triple Crown subdivision in Union, Kentucky." (Tr. Ex. 199). Regarding James and Heidi Humphrey, Brewington posted a request that people who shared his concerns with Judge Humphrey's conduct send a letter to the "Dearborn County Advisor" to the Indiana Supreme Court "Ethics and Professionalism

Committee." (Tr. Vol. I 249). Brewington identified the advisor as Heidi Humphrey, and listed the Humphrey's home address (but did not identify her as Judge Humphrey's wife or that as their home address). (Tr. Vol. I 250). The State introduced three letters that individuals sent to Heidi Humphrey. (Tr. Ex. 71, 77, 87).

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

This Court has an obligation to review the record to determine if Brewington's statements were criminal, rather than protected speech, and may not rest on the jury's verdict. The record shows that the State did not meet its burden in showing beyond a reasonable doubt that Brewington made intentionally threatening statements to the alleged victims.

2. The State failed to prove that Brewington's statements illegally exposed Dr. Connor and Judge Humphrey to hatred, contempt, disgrace or ridicule or threatened their business reputations.

The State also alleged that Brewington intimidated Dr. Connor and Judge Humphrey because his statements—specifically statements that they were child abusers, criminals, evil men, and perverts—exposed them to hatred, contempt, disgrace or ridicule, and falsely harmed their business reputations. *See* Ind. Code § 35-45-2-1(c)(6) & (7). This contention is not sufficient under the First Amendment.

The State cannot punish an individual simply because the individual's speech causes someone to suffer hatred, contempt, disgrace, ridicule, or harm to his business reputation. *Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism,

vilification, and traduction,' it is flatly inconsistent with the First Amendment."). Rather, the State must prove that the speech falls under one of the long-recognized categories outside First Amendment protection, such as defamation. *U.S. v. Stevens*, 130 S.Ct. 1577, 1584-86 (2010).

Defamation in the constitutionally sanctionable sense requires more than proof that the statement caused some harm. The plaintiff (or state in a criminal prosecution) must prove that the statement is false. *Sullivan*, 376 U.S. 271. Furthermore, the plaintiff (or state) must prove some level of culpability with respect to the falsity of the statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). If the alleged victim is a public person or public official, that culpability is actual malice: that the statement was made "with knowledge of its falsity or with reckless disregard for the truth." *Id.* at 342. For a private person, the State may select a lesser standard. *Id.* at 347. However, even with a private person, actual malice must be proven to impose a penalty unless there is proof of actual injury. *Id.* at 349-50.

Ind. Code § 35-45-2-1 does not on its face require proof that the defamatory statement is false, and consequently does not define the level of culpability. Thus, in this case, the jury was not instructed that the State was required to prove falsity or culpability. (Final Instruction #1, #5). This warrants reversal on Counts I, II and IV (intimidation against Dr. Connor and Judge Humphrey and attempted obstruction of justice). We cannot be certain that the jury did not convict Brewington for making true statements that harmed their reputation, or that he made false statements without the required level of culpability. The risk that the jury convicted Brewington for statements protected by the First Amendment requires reversal. *Cf. Claiborne Hardware*, 458 U.S. at 931 (reversing substantial damages award when there were insufficient findings that the defendants' conduct was not protected speech: "To impose liability without a

finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights ... that are protected by the First Amendment").

Brewington will likely prevail in proving reversible error on these charges. The jury was permitted to convict Brewington without finding that his statements were intentionally false, which allowed his conviction for statements protected by the First Amendment.

B. There was insufficient evidence to support Brewington's conviction on Count V.

In Count V, Brewington was convicted of perjury. Brewington's allegedly perjured statements were made during his grand jury testimony. Brewington was asked a series of questions about Internet postings wherein he urged readers to write letters concerning Judge Humphrey's handling of his divorce case to Heidi Humphrey—identified as an "Ethics and Professionalism advisor" to the Indiana Supreme Court "Ethics and Professionalism Committee—and listed her home address. Brewington testified that he found all of this information on the Internet: Heidi Humphrey was listed as an ethics and professionalism advisor for Dearborn County on the website for the Indiana Supreme Court, and her address was listed on the Dearborn County tax assessor website. Brewington testified that the Dearborn County tax assessor website also listed James Humphrey at that address. (Grand Jury Tr. 163-66).

Brewington was asked whether he knew that the address he posted was Judge Humphrey's home address and whether Heidi was his wife. Brewington testified that he was not certain, but that it was a possibility. The following colloquy was held:

> Mr. Negangard: It said James Humphrey who happens to be the name of your judge and you're under oath and you're actually

expecting this Grand Jury to believe that you didn't know that that was his wife?

Dan: Oh, it very well could be a possibility. I'm not from Dearborn County. I don't know but the thing is ...

Brewington was then interrupted and not allowed to elaborate further. (Grand Jury Tr. 166).

At trial, the Dearborn County Sheriff demonstrated a search of the Dearborn County tax assessor website, showing that a search for "Heidi Humphrey" yielded no results, and a search for "Humphrey" yielded three results, including an address for Heidi and James Humphrey (the only James among the results). (Tr. Vol. II pp. 405-08). No further evidence was presented concerning Brewington's knowledge of Judge Humphrey's marital status at the time of his grand jury testimony.

This evidence was insufficient to prove beyond a reasonable doubt that Brewington intentionally lied. Brewington testified that he was not certain that Heidi Humphrey was Judge Humphrey's wife. Sheriff Kreinhop's testimony did not refute that. Brewington never testified that he doubted that Heidi was Judge Humphrey's wife, or even that he suspected she was not. He only testified that he was not certain. There was no evidence that the Dearborn County tax assessor website listed their marital status. Nor was there evidence that the website stated that the James Humphrey listed was Judge James Humphrey. Brewington's grand jury testimony was the only evidence of what was listed on the website at the time he visited, and he did not testify that it listed Heidi Humphrey as Judge Humphrey's wife.

Moreover, affirming this conviction would condone the prosecutor's improper conduct at the grand jury. As shown in the above-quoted testimony, Brewington attempted to explain his answer further, but Mr. Negangard cut him off. Brewington was not allowed to further explain

himself or qualify his response in any way. Mr. Negangard controlled the testimony at the grand jury proceedings. He should not be permitted to extract a statement without context and then use it to prosecute the witness for perjury. The purpose of the grand jury is to seek the truth. It is not a "gotcha" game. Mr. Negangard's tactics left Brewington's testimony incomplete, and not necessarily what Brewington intended to say.[3] The State should not be able to prosecute Brewington on the basis of his incomplete response when the State was responsible for it being incomplete.

Brewington testified that he was not certain that Heidi Humphrey was married to Judge Humphrey. There is simply no evidence showing that this was a knowingly false statement. This conviction will therefore likely be overturned on appeal.

II. Risk of Flight and Dangerousness.

A. The trial court's findings on these factors were an abuse of discretion.

In denying Brewington's petition for appeal bond, the trial court made the following finding: "As to the Defendant's contentions regarding his risk of flight and dangerousness, the Defendant is serving an executed sentence for his convictions, and the Court does not **FIND** these arguments to be particularly persuasive or relevant under the circumstances."

Thus, the trial court found that Brewington did not demonstrate that he was not dangerous or a flight risk because he was serving his sentence. This would mean that no defendant who has begun serving his sentence is entitled to bail pending appeal. This is inconsistent with Ind. Code § 35-39-9-5(c), which clearly allows a defendant to be released on bail pending appeal *after* the sentence has begun.

[3] The fact that Brewington could have testified at trial is of no import. Brewington should not have been required to prove at trial what he would have said if he had not been cut off.

This finding is an abuse of discretion. "An abuse of discretion may occur if ... the trial court has misinterpreted the law." *McCullough v. Airbold Ladder Co.*, 605 N.E.2d 175, 180 (Ind. 1993). The trial court's finding relied entirely on Brewington's current incarceration. The trial court did not find that Brewington actually was a flight risk or dangerous. Because the trial court relied on a misinterpretation of the law, its findings are not entitled to deference and this Court should make an independent determination of these elements.

B. Brewington is not a flight risk.

Brewington regularly appeared before the trial court for proceedings in this matter. Brewington appeared voluntarily before the grand jury when it was investigating this matter.

Brewington cooperated fully when the warrant was issued for his arrest. Brewington did not know about the warrant until it was served on him at his home on March 7, 2011. When the Norwood (Ohio) police served the arrest warrant, he surrendered voluntarily, and did not attempt to resist or flee. In fact, after the officers informed Brewington about the warrant, they sent him into his house alone to retrieve a jacket before taking him to the jail. On March 9, 2011, Brewington was released from the Hamilton County (Ohio) Jail on $1000 bond, and agreed to waive extradition to Indiana. By agreement with the Dearborn County Prosecutor (Negangard), Brewington surrendered himself in Dearborn County on the morning of March 11, 2011.

Brewington has a strong interest in pursuing this appeal, as he believes that he was prosecuted for exercising his First Amendment rights. Obtaining a reversal of his convictions is necessary to vindicate his constitutional rights.

A reasonable appeal bond, not exceeding $50,000 surety bond, will be sufficient to ensure Brewington's presence for any future proceedings, or, if his appeal is unsuccessful, the

resumption of his incarceration. Additionally, Brewington is willing to agree to monitoring or other supervision during his release on bail.

C. Brewington is not dangerous.

There is no credible evidence that Brewington is dangerous. Brewington has no history of violence. The evidence adduced at Brewington's trial failed to show that Brewington's statements were "true threats." Rather, all of his speech was protected by the First Amendment. If the First Amendment prohibits conviction and punishment for this speech, it follows that this speech cannot be the basis for depriving him of liberty by incarcerating him pending appeal. Brewington has shown that these convictions will likely be reversed on appeal because none of Brewington's speech or conduct contained a threat of violence.

When the trial court denied Brewington's request for bond reduction prior to trial, it relied in part on an allegation that Brewington "may have contemplated violence towards at least one alleged victim in this case." Evidence obtained following the bond reduction hearing shows that this allegation was not credible.

This allegation came from another inmate at the Hamilton County (Ohio) jail named Keith Jones, who has a significant criminal record, including convictions for state and federal offenses. Jones alleged that on March 9, 2011, while Brewington was incarcerated in Hamilton County, Brewington told him that he wanted to hire someone to commit a drive-by shooting at Judge Humphrey's house. Jones alleged that he gave Brewington two phone numbers to contact. The Dearborn County Sheriff's Department, accompanied by an ATF agent, interviewed Jones, a recording of which was introduced at Brewington's bond reduction hearing. (Bond Reduction Hearing Tr. 22-26)

Jones's allegations are not credible. Jones alleged he and Brewington spoke while they were awaiting video arraignment on March 9. Jail movement logs show that Brewington, but not Jones, was taken for a video arraignment at 9:00 a.m. on March 9. (Tab 9). The movement logs only show Brewington leaving his cell-block one other time that day—when he was released at approximately 4:25 p.m. Jones's movement logs only show him leaving his cell-block for one event that day—he was taken to Intake from approximately 3:17 p.m. until approximately 3:58 p.m. The movement logs show that Brewington was in his cell-block at this time. They could not have had this alleged conversation.

The investigation into this allegation shows that it was not credible. The police called the person that Jones allegedly referred Brewington to, who claimed never to have heard of Brewington. No charges were filed, either in Hamilton County (Ohio), Dearborn County, or by the federal government. Brewington was never questioned about these allegations. Brewington's telephone calls at the Dearborn County Jail were monitored, and nothing along these lines was captured in any of his conversations. (Bond Reduction Hearing Tr. 33).

This evidence shows that Brewington never attempted to assassinate Judge Humphrey. This allegation should not be considered by this Court.[4] There is no evidence that Brewington is dangerous. Therefore, he should be allowed reasonable bail pending appeal.

[4] The trial court's order denying Brewington's petition for appeal bond suggests that it did not rely on this evidence.

CONCLUSION

For these reasons, Brewington's Petition for Bail Pending Appeal should be granted. Brewington respectfully requests that this Court enter an order setting a reasonable appeal bond, not to exceed $50,000 surety bond, including any reasonable conditions of release.