

IN THE  
INDIANA COURT OF APPEALS

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Cause No. 15A01-1110-CR-00550

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DANIEL BREWINGTON,

Appellant,

v.

STATE OF INDIANA,

Appellee.

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) Appeal from Dearborn Superior Court II

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) Cause No. 15D02-1103-FD-00084

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) The Honorable Brian D. Hill,

) Special Judge

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**APPELLANT DANIEL BREWINGTON'S MOTION FOR ORAL ARGUMENT**

Appellant, Daniel Brewington, by counsel, respectfully requests this Court to permit oral argument in this case and in support of this request, would offer the following reasons:

1. Brewington was convicted on five counts stemming from his conduct while representing himself during his divorce proceedings. Brewington was convicted of three counts of intimidation (one of which was a felony for intimidation of a judge), Ind. Code § 35-45-2-1; one count of attempted obstruction of justice, Ind. Code § 35-44-3-4; and one count of perjury, Ind. Code § 35-44-2-1.
2. Brewington's convictions for intimidation and attempted obstruction of justice were based on his speech: specifically, Brewington's correspondence with the custody evaluator in his divorce and Brewington's writings on his Internet sites. In briefing before this Court, the State has urged the Court to affirm Brewington's convictions based

primarily on his statements posted on the Internet. These posts largely consisted of Brewington expressing anger and frustration at what he perceived to be unfair treatment by the family court system, specifically, the conduct of the judge and the child custody evaluator, and his request to his readers to write letters complaining about the judge's conduct. Brewington's complaints grew heated and were sometimes uncivil. Apparently, the State believed that his complaints went too far and stepped in to prosecute him.

3. This case presents a matter of first impression under Indiana law, namely, how to reconcile the crimes of intimidation and obstruction of justice with the First Amendment, as applied to communications on the Internet and social media platforms. Conversations that were formerly conducted by telephone, letter, or face-to-face at the dinner table or over beers with a friend are now frequently conducted on Facebook, blogs, twitter, and discussion forums, often where the whole world can read them.
4. This raises important questions that courts will have to address in the coming years: How does the First Amendment apply in these changing media landscapes? What role does the State play in policing online speech when someone complains that a writer's posts are annoying, insulting, rude, or unfair?
5. There is 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." *Sullivan*, 376 U.S. at 270. "[S]peech may not be prohibited because it concerns subjects offending our sensibilities." *Ashcroft*, 535 U.S. at 245.
6. Amnesty International requests its worldwide members to write letters to foreign governments who hold "prisoners of conscience." It has no control over the letters that

are written, but it suggests that they be respectful. Similarly, Brewington wrote posts on a blog criticizing various judicial decisions and various individuals, who held his fate and his ability to visit his children in their hands, and invited the public to write letters. What personal matter is more deserving of First Amendment protection than a court's decision regarding a parent's relationship with his or her children?

7. Courts must step in and stringently guard the boundaries between protected speech and criminal conduct, and critically review the State's attempts to punish the latter to ensure the former is unharmed. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17, 931 (1982); *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).
8. In this case, Brewington was prosecuted and convicted for his speech complaining about what he perceived to be unfair treatment by the family court system. Brewington believed his relationship with his children was at stake, and believed that the judge and custody evaluator in his divorce kept putting up barriers preventing him from vindicating his rights. Brewington was prosecuted because the State believed that Brewington's complaints went too far. *See* Tr. 508 ("What the evidence showed, he could have said [Judge Humphrey's] a bad judge, he's not fair, I don't like him, don't vote for him. ... There wasn't anything in here that contributed to political discourse. They were the rantings of someone who would not take no for an answer."); State's Response at 25 ("None of these postings resemble a typical editorial page. They are ad hominem attacks,

and in some cases, too brutal for civil, political discourse.”). This raises significant First Amendment concerns.

9. When a case raises a First Amendment issue, “an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 16 (1990) (quoting *Bose Corp.*, 466 U.S. at 499). See *Journal-Gazette Co. Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 454-56 (Ind. 1999) (holding that his requirement is binding on Indiana Appellate Courts).
10. Oral argument would help this Court to better understand the evidence and legal issues in this case, allowing it to perform its constitutional duty to review the basis of Brewington’s convictions and ensure that the line between protected speech and criminal conduct remains in place.

As Internet communications, including Facebook and Twitter, have now become major forms of communication, it behooves the Courts to stay abreast and, in fact, assist in defining the parameters under the First Amendment of what is protected speech. State criminal statutes and discretionary prosecutorial decisions must not interfere with, impede, or chill First Amendment speech no matter how impolite or uncivil.

In this case, the Court will be asked to decide a legal matter of first impression against the backdrop of these issues. Brewington therefore requests oral argument so that the parties can address and answer any questions necessary to the Court’s decision.

WHEREFORE, Appellant Daniel Brewington respectfully requests that the Court set this matter for oral argument.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following counsel of record *via* first class U.S. Mail, postage pre-paid this 23rd day of July, 2012:

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