IN THE

INDIANA COURT OF APPEALS

Case No. 15A04-1712-PC-02889

DANIEL BREWINGTON, _____ Appellant,	)	Appeal from Dearborn County Superior Court II
v.	)	Case No. 15D02-1702-PC-0003
STATE OF INDIANA _____ Appellee.	)	Hon. W. Gregory Coy, Special Judge

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APPELLANT APPENDIX

Volume I of III

Pages 2 through 165

Daniel P. Brewington
[redacted]
Pro Se Filing Party

Form App. R. 10-1 Notice of Completion of Clerk's Record

FILED
JAN 03 2018
CLERK OF DEARBORN CIRCUIT COURT

IN THE
INDIANA [SUPREME COURT OR COURT OF APPEALS]

Case No.: 15A04-1712-PC-2889
[Insert Supreme Court or Court of Appeals number, if known]

DANIEL BREWINGTON, Appellant(s),	)	Appeal from the Dearborn Superior Court 2
vs.	)	Trial Court Case No: 15D02-1702-PC-000003
STATE OF INDIANA, Appellee(s).	)	The Honorable Gregory Coy, Special Judge Judge

NOTICE OF COMPLETION OF CLERK'S RECORD

Rick Probst, the Clerk of Dearborn Superior Court 2, hereby notifies the parties, pursuant to Appellate Rule 10(C), that the Clerk's Record in this case has been assembled and is complete. The Transcript is (circle one):

(a) Completed and filed with this clerk;

(b) Not yet completed;

(c) N/A (No Hearing)

Attached to this Notice of Completion is a certified and updated copy of the Chronological Case Summary.

Clerk

1-3-2018

Date issued
(*see* Ind. Appellate Rule 45(B)(1))

CERTIFICATE OF SERVICE

I certify that on January 03, 2018, I served a copy of this document upon the following person(s) by MAIL.

Office of the Attorney General
Indiana Gov. Center South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204

Daniel P Brewington
[redacted]

Clerk of the Appellate Courts
216 State House
200 West Washington Street
Indianapolis, IN 46204

Clerk

STATE OF INDIANA, DEARBORN COUNTY, SS:

I, Rick Probst, Clerk of the Dearborn Circuit Court of Dearborn County, Indiana, hereby certify that the above and foregoing is a full, true complete and correct copy of the Chronological Case Summary; State vs Brewington, Daniel; 15D02-1702-PC-0003.

IN ATTESTATION WHEREOF, I have hereunto set my hand and the seal of said Court at my office in the Court House, of Dearborn County, at Lawrenceburg, Indiana, this 3rd day of January , 2018

Clerk, Rick Probst

CHRONOLOGICAL CASE SUMMARY

CASE SUMMARY

CASE NO. 15D02-1702-PC-000003

Verified Petition For Post-Conviction Relief Re; Brewington

Location: **Dearborn Superior Court 2**
Filed on: **02/22/2017**
Legacy System Number: **D0217PC0003**

CASE INFORMATION

Statistical Closures
10/04/2017 Bench Disposition

Case Type: **PC - Post Conviction Relief Petition**

Case Status: **10/04/2017 Decided**

Case Flags: **Appeal Received**

CASE ASSIGNMENT

Current Case Assignment

Case Number	15D02-1702-PC-000003
Court	Dearborn Superior Court 2
Date Assigned	02/22/2017

PARTY INFORMATION

		Attorneys
Petitioner	**Brewington, Daniel P** [redacted]	
	State of Indiana Removed: 11/06/2017 Other	**Deddens, Lynn Marie** *Retained* 812-532-2095(W) *Courthouse* *215 West High Street* *Lawrenceburg, IN 47025* notices@dearbornohioprosecutor.com
Respondent	**State of Indiana**	**Deddens, Lynn Marie** *Retained* 812-532-2095(W) *Courthouse* *215 West High Street* *Lawrenceburg, IN 47025* notices@dearbornohioprosecutor.com

DATE	EVENTS & ORDERS OF THE COURT	INDEX
02/22/2017	Converted Event *VERIFIED PETITION FOR POST-CONVICTION RELIEF FILED BY DANIEL BREWINGTON; COPY OF PETITION GIVEN TO DEARBORN COUNTY PROSECUTORS OFFICE; MG (RJO? N) | JTS Minute Entry Date: 02/22/2017*	
03/03/2017	Converted Event *MOTION FOR CHANGE OF JUDGE. E (RJO? N) | JTS Minute Entry Date: 03/03/2017*	
03/09/2017	Converted Event *ORDER GRANTING MOTION FOR CHANGE OF VENUE FROM JUDGE SIGNED; CM (RJO? N) | JTS Minute Entry Date: 03/06/2017*	

Printed on 01/03/2018 at 3:00 PM

CASE SUMMARY

CASE NO. 15D02-1702-PC-000003

03/16/2017	Converted Event *Appointment of Special Judge filed by Rick Probst Clerk of Court ml CC:Judge Cleary; Prosecutor; Defendant Order Declining Appointment as Special Judge signed by Judge Cleary CC:Prosecutor; Petitioner (certified mail); DC Clerk (RJO? N) | JTS Minute Entry Date: 03/15/2017*
03/21/2017	Converted Event *APPOINTMENT OF SPECIAL JUDGE FILED BY CLERK. VZ CC: PROSECUTOR; PETITIONER; JUDGE COY (RJO? N) | JTS Minute Entry Date: 03/21/2017*
03/23/2017	Converted Event *STATE'S ANSWER FILED; CM (RJO? N) | JTS Minute Entry Date: 03/21/2017*
03/27/2017	Converted Event *CERTIFIED MAIL WAS RECEIVED FOR DANIEL BREWINGTON BY ? ON NO DATE; TR (RJO? N) | JTS Minute Entry Date: 03/27/2017*
03/29/2017	Converted Event *ACCEPTANCE OF APPOINTMENT SIGNED BY SPECIAL JUDGE, W. GREGORY COY; CM (RJO? N) | JTS Minute Entry Date: 03/27/2017*
03/31/2017	Converted Event *CERTIFIED MAIL WAS RECEIVED FOR DANIEL BREWINGTON BY NO SIGNATURE ON NO DATE; TR (RJO? N) | JTS Minute Entry Date: 03/31/2017*
04/03/2017	Converted Event *MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S VERIFIED PETITION FOR POST-CONVICTION RELIEF AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF FILED PRO SE BY D BREWINGTON. SENT COPIES BY REG MAIL TO SPECIAL JUDGE COY FOR REVIEW. VZ CC: PROSECUTOR; D BREWINGTON(IN RETURN ENVELOPES PROVIDED); SP JUDGE COY (RJO? N) | JTS Minute Entry Date: 04/03/2017*
05/03/2017	Converted Event *STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT;EM (RJO? N) | JTS Minute Entry Date: 05/03/2017*
05/12/2017	Converted Event *ORDER ON STATE'S MOTION FOR EXTENSION OF TIME;EM (RJO? N) | JTS Minute Entry Date: 05/12/2017*
05/31/2017	Converted Event *REQUEST FOR ORDER COMPELLING PRODUCTION OF GRAND JURY RECORD; EXHIBITS; CM (RJO? N) | JTS Minute Entry Date: 05/30/2017*
06/08/2017	Converted Event *STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT FILED; CM (RJO? N) | JTS Minute Entry Date: 06/08/2017*
06/09/2017	Converted Event *REQUEST FOR NAMES OF GRAND JURORS FILED BY PLAINTIFF; CM (RJO? N) | JTS Minute Entry Date: 06/08/2017*
06/20/2017	Converted Event *MOTION TO STRIKE FILED BY PETITIONER; CM (RJO? N) | JTS Minute Entry Date: 06/16/2017*
06/21/2017	Converted Event *PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT; CM (RJO? N) | JTS Minute Entry Date: 06/21/2017*
10/02/2017	Correspondence to/from Court Filed

CASE SUMMARY

CASE NO. 15D02-1702-PC-000003

	File Stamp: 10/02/2017 Filed By: Petitioner Brewington, Daniel P *Request for Ruling on Summary Disposition*
10/04/2017	Order Issued (Judicial Officer: Coy, W Gregory - SJ) Order Signed: 09/25/2017 *Order signed 9/25/17*
10/05/2017	Automated Paper Notice Issued to Parties *Order Issued ---- 10/4/2017 : Daniel P Brewington*
10/05/2017	Automated ENotice Issued to Parties *Order Issued ---- 10/4/2017 : Lynn Marie Deddens*
10/31/2017	Motion Filed File Stamp: 10/25/2017 Filed By: Petitioner Brewington, Daniel P *Motion to Correct Error filed/ Judge Coy received copy as well by Petitioner*
11/06/2017	Order Denying Motion to Correct Error Order Signed: 10/30/2017 *Order from Special Judge W. Gregory Coy. Mailed to all Parties.*
11/07/2017	Automated Paper Notice Issued to Parties *Order Denying Motion to Correct Error ---- 11/6/2017 : Daniel P Brewington*
11/07/2017	Automated ENotice Issued to Parties *Order Denying Motion to Correct Error ---- 11/6/2017 : Lynn Marie Deddens*
12/19/2017	Notice of Appeal Received File Stamp: 12/04/2017 Filed By: Petitioner Brewington, Daniel P *Notice of Appeal received by Court of Appeals*
01/03/2018	Response Filed File Stamp: 07/10/2017 Filed By: Respondent State of Indiana *States Response to Petitioners Motion to Strike. Was filed 7/10/17 but CCS entry did not transfer in conversion to Odyssey.*

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-003
	)	
Petitioner, pro se	)	
	)	
V.	)	
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	

FILED

FEB 22 2017

CLERK OF DEARBORN CIRCUIT COURT

VERIFIED PETITION FOR POST-CONVICTION RELIEF

COMES NOW the Petitioner Daniel P. Brewington ("Brewington"), pro-se, and in support of this VERIFIED PETITION FOR POST-CONVICTION RELIEF, pursuant to Indiana Post-Conviction Remedies Rule 1§3, states as follows:

1) Brewington presently resides at [redacted].

2) Brewington was sentenced in Dearborn County Superior Court II by Special Judge Brian Hill ("Hill"), of the Rush County Superior Court.

3) Brewington was sentenced for the following offenses under the Cause No. 15D02-1103-FD-0841:

A) Intimidation (Ind. Code 35-45-2-1(a)(1)) (hereinafter, "Count 1");

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[1] Hill allowed the trial jury to deliberate on Count 6, Releasing Grand Jury Information despite the prosecution's failure to present any evidence that Brewington released any grand jury information.

B) Intimidation of a Judge, (Dearborn County Circuit Judge James D. Humphrey (hereinafter "Humphrey")) (Ind. Code 35-45-2-1(a)(2)(b)(1)) (hereinafter, "Count 2");

C) Intimidation (Ind. Code 35-45-2-1(a)(1)) (hereinafter, "Count 3");

D) Attempt to Commit Obstruction of Justice (Ind. Code 35-44-3-4) (hereinafter, "Count 4");

E) Perjury (Ind. Code 35-44-2-1(a)(1)) (hereinafter, "Count 5").

4) Brewington was sentenced on October 24, 2011 to 5 years in the Indiana Department of Corrections. Brewington was released from Putnamville Correctional Facility on September 5, 2013.

5) Brewington was found guilty after a plea of not guilty.

6) Brewington, by counsel Rush County Chief Public Defender Bryan Barrett[2][3], filed a notice of appeal on October 24, 2011.

A) By appellate counsel Michael Sutherlin and Sam Adams, Brewington filed an appeal with the Indiana Court of Appeals and later a petition to transfer to the Indiana Supreme Court. Following the opinion in *Brewington v. State*, 7 N.E.3d 946 (2014), Brewington filed a pro se Petition for Rehearing in addition to

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[2] As of at least September 19, 2012, Barrett had been non-compliant for four (4) consecutive quarters as Rush County's only public defender.

[3] The Rush County Public Defender Office is roughly one hour, twenty minutes away from the Dearborn County Courthouse (per Google Maps).

Brewington's pro se Verified Motion for Judicial Disqualification of the Honorable Justice Loretta H. Rush[4] ("Rush").

B) On 1/17/2013, the Indiana Court of Appeals reversed Brewington's convictions on Count 1 and Count 3. On 5/01/2014 the Court granted transfer and affirmed Brewington's remaining convictions; rehearing denied on 7/31/2014. Also on 7/31/2014, Rush denied Motion for Recusal.

7) See ¶ 6 *supra*.

8) BREWINGTON FILES THIS PETITION FOR POST-CONVICTION RELIEF BASED ON THE FOLLOWING GROUNDS:

A) Dearborn Superior Court II altered grand jury transcripts thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

B) The Dearborn Superior Court II altered grand jury audio thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

C) Hill committed Judicial Misconduct by forcing Brewington to endure unconstitutional trial.

D) Brewington's indictments for intimidation violate Brewington's rights under the First Amendment of the United States Constitution.

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[4] It is noteworthy to mention Chief Justice Loretta H. Rush served on the Indiana Supreme Court Juvenile Justice Improvement Committee and attended meetings with victim Humphrey while Brewington's case was before the Indiana Supreme Court. In addition to serving on the Committee together for over eight years, Rush and Humphrey were members of the Indiana University Maurer School of Law graduating class of 1983.

E) The deprivation of charging information violates Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

F) Negangard sought convictions against Brewington for violating the Indiana Rules of Professional Conduct for Attorneys, thus violating Brewington's rights under the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

G) Negangard instructed the trial jury to convict Brewington for reasons other than Brewington's guilt thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

H) Negangard abused the grand jury and criminal process to retaliate against Brewington's internet writings thus violating Brewington's rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

I) Kisor argued Brewington's intent was not to threaten harm, thus violating Brewington's rights under the First, Sixth, and Fourteenth Amendments of the United States Constitution.

J) Kisor argued judges enjoy special protections from critical speech, thus violating Brewington's rights under the First, Sixth, and Fourteenth Amendments of the United States Constitution.

K) During trial, deputy prosecutor Kisor issued a warning that Brewington may have a gun in the courtroom and the jury should fear for their lives

thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

L) Brewington received no assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

i) Barrett refused to discuss the criminal case with Brewington prior to trial.

ii) Barrett refused to challenge the unconstitutional indictments.

iii) Barrett made no attempt to subject the prosecution's case to any adversarial testing.

iv) Barrett allowed a non-attorney to file motions on Brewington's behalf.

v) Barrett forced Brewington to waive Brewington's Fifth Amendment protection against self-incrimination.

vi) Barrett tried to waive appealable issues even after Brewington voiced objection.

vii) Barrett sacrificed Brewington's defense to assist a separate investigation of Brewington.

viii) Barrett took no measures to defend or protect Brewington's mental health.

M) Brewington was unable to testify in his own defense, thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

N) Brewington's perjury indictment was constitutionally vague, thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

O) Brewington was denied a trial before an impartial judge, thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

P) Brewington was denied appellate review before an impartial supreme court, thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the Unite States Constitution.

Q) Barrett, Hill, and Negangard tried to rush Brewington to trial without any specific charging information thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

R) Brewington received no assistance of counsel at bond reduction hearing thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

S) Dearborn County Officials obstructed Brewington's access to Ohio Attorney Robert G. Kelly thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

T) Brewington received ineffective assistance of appellate counsel thus violating Brewington's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

9) FACTS IN SUPPORT OF GROUNDS MENTIONED IN ¶ 8 *SUPRA*.

A) DEARBORN SUPERIOR COURT II ALTERED GRAND JURY TRANSCRIPTS, THUS VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

> "[W]hen the record reveals blatant violations of basic and elementary principles, and the harm or the potential for harm cannot be denied, we will review an issue which was not properly raised and preserved. *Webb v. State*, (1982) Ind., 437 N.E.2d 1330, 1332; *Nelson v. State*, (1980) Ind., 409 N.E.2d 637, 638. This case is one in which the error rises to what is known as fundamental error, one which, if not rectified, would deny the defendant fundamental due process. *Nelson v. State*, 409 N.E.2d at 638." *Smith v. State*, 459 N.E.2d 355 (1984).

Fundamental errors plague the record throughout Brewington's prosecution because Dearborn County Superior Court II altered records Brewington was instructed to rely on in order to prepare a defense. The Dearborn Superior Court II deprived Brewington of evidence/charging information when it arbitrarily omitted portions of the grand jury record from the transcripts. During a pretrial hearing on July 18, 2011, Chief Deputy Joeseph Kisor ("Kisor") instructed Brewington to rely on the entire transcription of the grand jury proceedings to determine which of Brewington's actions the State alleged to be unlawful. In a court filing dated 03/08/2011, Office of the Dearborn County Prosecutor F. Aaron Negangard ("Negangard") filed the State's Praecipe directing the Court Reporter of the Dearborn Superior Court II "to prepare and certify a full and complete transcript of the grand jury proceedings in this cause of action." On 6/15/2011, Barbara Ruwe ("Ruwe"), Chief Court Reporter for the Dearborn Superior Court II certified the transcription of the grand jury proceedings in Brewington's case to be "full, true, correct and complete." The transcripts, however, are not complete. Page one of the

grand jury transcripts begins with Negangard instructing the foreman of the grand jury to swear in the first witness rather than an introduction from Negangard and an explanation as to the nature of the grand jury investigation. Any preparation of an "abridged" version of an official record would first require an order from a court to do so, which is absent from the current case. Even if a court ordered the preparation of a shortened version of the official record of the grand jury, marked redactions and notations are required in place of omitted material and the page numbers would remain the same as the original record of the proceedings. Ruwe omitted portions of the grand jury proceedings from the official transcripts stripping Brewington of "a meaningful opportunity to present a complete defense." In *Wurster v. State*, the Indiana Supreme Court wrote:

> "Indiana Code § 35-34-1-7 provides that '[a]n indictment shall be dismissed upon motion when the grand jury proceeding which resulted in the indictment was conducted in violation of IC 35-34-2.' We agree that this does not require dismissal for immaterial irregularities. Here, however, because there are no transcripts of the conversations between the prosecutor and grand jurors, Turpin is foreclosed from establishing prejudice." Wurster v. State, 715 N.E.2d 341 (1999)

Ruwe omitted, at least, any instruction to the grand jury regarding the nature of the investigation thus depriving Brewington of Due Process protections guaranteed by the Sixth and Fourteenth Amendments. Not only was Ruwe and the Dearborn Superior Court II aware of the altered transcripts, Ruwe and the Dearborn Superior Court II altered the audio from the grand jury proceedings. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington

cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

B) THE DEARBORN SUPERIOR COURT II ALTERED GRAND JURY AUDIO THUS VIOLATING THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The Dearborn Superior Court II altered grand jury audio, thus obstructing Brewington's ability to challenge the official misconduct in this case. Hill and the Dearborn Superior Court II have obstructed the release of the grand jury audio for over five years. In orders dated 1/12/2012 and 1/24/2012 regarding two public record requests, Hill ordered the release of grand jury audio in Brewington. However, without warning, Hill issued the Court's AMENDED ORDER RELEASING AUDIO COPIES, filed 2/02/2012, finding the following,

1.) "Subsequent to the issuance of those two Orders, the Court has discovered that no audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011, and March 2, 2011 were admitted into evidence in this cause, therefore, these audio recordings are not a record in these proceedings."

2.) The Final Pretrial Conference/Bond Reduction Hearing which had originally been set on July 18, 2011 was continued on the State's Motion and no hearing took place on that date. If a telephonic conference with counsel was held on that date, it was merely an effort to reschedule and find an agreeable date and no recordings were made. Therefore, no audio recording exists for July 18, 2011.

3.) For the above stated reasons, the recipients' request for audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011 and March 2, 2011 and a Pretrial Hearing for July 18, 2011 are rendered moot because there are no such audio recordings

existing in this case."

Hill's order requires someone from Dearborn County contacting Hill in Rush County to argue against the release of the above-mentioned audio recordings as Hill serves as Superior Court Judge for Rush County, Indiana. The CCS entry dated 7/21/2011 of the case clearly states that final pretrial hearing took place on 7/18/2011 as the entry states who attended the hearing:

> "FINAL PRE-TRIAL HEARING; DEF W/ATTY B BARRETT; STATE BY J KISOR; COURT TO RESCHEDULE BOND REDUCTION HEARING TO AUGUST 3, 2011 AT 1: 30 PM; SPECIAL JUDGE HILL; COURT TO PREPARE ORDER"

Of significance is that it was during the 7/18/2011 hearing where Kisor informed Brewington a complete transcript of the grand jury proceedings was being prepared and that Brewington could rely on the transcript for specific indictment information. Hill also set 7/18/2011 as the original plea deadline despite the State's failure to provide Brewington with *ANY* examples of criminal activity for which Brewington was to defend. Hill only recalled the 7/18/2011 proceeding after being notified of Brewington's appellate counsel possessing affidavits from people who attended the 7/18/2011 hearing. Hill still refused to order the release of the grand jury audio by claiming the audio was not admitted into evidence. When Brewington requested the grand jury audio in January 2016, Hill issued an adversarial ruling specific to Brewington. In an order dated 2/4/2016, Hill stated:

> The Court declines to grant the request for audio recordings from the Grand Jury proceedings occurring on February 28, 2011, March 1, 2011, and March 2, 2011. Mr. Brewington has alleged that these audio recordings were admitted into evidence at his criminal trial, however, the Court finds that they were not, and there's been no sufficient reason

set forth which would necessitate the release of said audio recordings."

Hill's declaration that Brewington alleged the audio recordings of the grand jury proceedings were admitted to the trial record is patently false and there is no evidence to support such a claim. Brewington simply maintained the record of the grand jury proceedings was admitted during trial in the form of the written transcript the audio recordings are simply another means to record proceedings as is the use of stenography and shorthand; thus, the grand jury *record* was part of the record and subject to public viewing. As for Hill's contention that Brewington failed to provide a sufficient reason for the release, Hill's excuse was exclusive to Brewington and was not used to deny prior requests, from the public, seeking the same information. Nevertheless, providing a reason to release public records is not required per Indiana statues regarding the release of public records. When Brewington filed a complaint with the Indiana Public Access Counselor ("PAC"), the PAC issued an opinion in Brewington's favor. In an opinion dated April 14, 2016, the PAC found that the excuses provided by Judge Brian Hill, in orders dating back to January 2012, for not releasing the grand jury audio in Brewington's case were not valid exceptions under Indiana law. The opinion also indicated that Hill told the PAC that Hill would issue an order releasing the grand jury audio. In Hill's ORDER ON REQUEST FOR RELEASING AUDIO COPIES {AS TO GRAND JURY PROCEEDINGS OF FEBRUARY 28, 2011, MARCH 1, 2011, AND MARCH 2, 2011), filed 4/20/16, Hill offered a new excuse as to why not to release an official copy of the grand jury audio:

1. The Court Reporter is hereby ORDERED to prepare a compact disc of audio recordings of the Grand Jury proceedings regarding this matter conducted on February 28, 2011, March 1, 2011, and March 2, 2011.
2. It is the Court's understanding that the Grand Jury impaneled for this matter also heard evidence in four to five other Grand Jury proceedings during this time, often going back and forth between all of the cases. The audio recordings being released shall contain only the matter regarding Daniel Brewington and no other Grand Jury proceedings.

The release of the audio presents several problems. There is no question as to whether the Dearborn Superior Court II altered the grand jury audio because the audio contains less information than the transcription of the audio record. Also problematic is Hill's claim that "four to five" other grand jury proceedings were intertwined. This is false as the transcripts and audio are void of Negangard instructing the grand jury that the investigation was switching away from or returning to the investigation of Brewington. Regardless, if Ruwe or another employee of the Dearborn Superior Court II contacted Hill to make Hill aware of other grand jury investigations being intertwined with Brewington's, Hill's decision to release the grand jury audio is based on an ex parte argument that is contrary to Brewington's interests.

The release of the grand jury audio demonstrates the Dearborn Superior II Court staff converted the original file format of the grand jury audio and then proceeded to edit and rename audio files. Nevertheless, the audio is void of any true threat allegation by Negangard leaving Brewington without any opportunity to mount a defense against the "true threat" argument mentioned in *Brewington*. Either Ruwe omitted Negangard's true threat argument from the transcription of

the grand jury audio then later attempted to edit the audio to match the transcripts; *or* the State introduced a new ground for Brewington's conviction during trial. Either scenario constitutes fundamental error as both are due process violations stripping Brewington of any "meaningful opportunity to present a complete defense." *Kusch v. State*, 784 N.E.2d 905, 924-25 (Ind.2003) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

C) HILL COMMITTED JUDICIAL MISCONDUCT BY FORCING BREWINGTON TO ENDURE UNCONSTITUTIONAL TRIAL

In *Brewington v. State*, 7 N.E.3d 946 (2014), the findings by the Indiana Supreme Court demonstrate Hill forced Brewington to endure an unconstitutional criminal trial and incarceration, despite Hill being aware that Negangard argued unconstitutional grounds for Brewington's convictions. The following points are statements of fact, as alleged by the Indiana Supreme Court, that appear in the opinion of *Brewington*:

i) The Office of the Dearborn County Prosecutor argued the trial jury should convict Brewington under a "plainly impermissible" and unconstitutional "criminal defamation" ground. at 973

ii) The Dearborn County Prosecutor failed to distinguish the difference "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)." at 975

iii) The jury instructions and general verdict were "fundamentally erroneous." at 972

iv) Barrett's alleged trial strategy "was constitutionally imprecise, but pragmatically solid--and nothing suggests that counsel blundered into it by ignorance, rather than consciously choosing it as well-informed strategy. It was an invited error, not fundamental error or ineffective assistance of trial counsel." at 954

v) If not for Hill's understanding that Barrett employed a trial strategy consisting of NOT objecting to the fundamentally erroneous jury instructions in an effort to take advantage of the prosecution's unconstitutional criminal defamation prosecution, Brewington's guilty verdicts would have been overturned. at 974

In *Brewington v. State*, Justice Loretta H. Rush addressed the similarities between fundament error and ineffective assistance of counsel, while introducing a new legal interpretation of the two principles never before addressed by the Indiana Supreme Court:

> "But the two principles overlap in a second way we have not previously discussed--because deficient performance by counsel, which is the express premise of an ineffective-assistance claim, is also implicit in fundamental error. A 'finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have,' even without being spurred to action by a timely objection. *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012). An error blatant enough to require a judge to take action sua sponte is necessarily blatant enough to draw any competent attorney's objection. But the reverse is also true: if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error. And when a passive lack of objection (here, to the 'threat' instruction) is coupled with counsel's active requests (here, for other related instructions), it becomes a question of invited error."
>
> "And on that basis, we find invited error here." Id at 974

CRIMINAL DEFAMATION = PROSECUTORIAL MISCONDUCT

It should first be noted that any mention of "fundamental error" associated with the State's "plainly impermissible criminal defamation" ground for Brewington's prosecution should be deemed synonymous with malicious "prosecutorial misconduct." Negangard argued Brewington's right to criticize judges was stripped of First Amendment protections when Brewington acted as his own attorney in Brewington's divorce proceedings. Negangard knew the Indiana Supreme Court Disciplinary Commission investigates and enforces attorney discipline. Negangard was also fully aware that Brewington was not an Indiana attorney and that the Indiana Rules of Professional Conduct have no provisions that criminalize the criticizing of judges by Indiana attorneys.

FATAL CONSTITUTIONAL FLAWS IN JUSTICE RUSH'S RATIONALE

In authoring the opinion in Brewington, Rush acknowledged the existence of multiple fundamental errors in Brewington's trial that were caused by Negangard's "criminal defamation" argument. Rather than grant Brewington relief from the fundamental errors, Rush framed an invited error argument around a trial strategy theory, despite the trial record being void of Barrett's thoughts on trial strategy. Justice Rush then rationalized stripping Brewington's right to relief from fundamental error by speculating that Hill did not intervene into Negangard's unconstitutional trial because Hill somehow believed that Barrett's non-objection to the multiple fundamental errors was an attempt to take advantage of Negangard's unconstitutional prosecution against Brewington. For the record, Brewington does not entertain Rush's actions to be anything but egregious efforts to strip Brewington of constitutional freedoms in an attempt to protect the integrity of a fellow judge. Barrett did not have any plausible trial strategy because Barrett refused to ever meet with Brewington to investigate Brewington's case prior to trial. With that said, Brewington nor this Court need to consider the reasoning or logic behind Rush's contentions because Rush's alternative facts raised new constitutional errors not available to Brewington prior to the opinion in *Brewington*. For the purposes of this petition, Brewington assumes Rush's rationalizations, in denying Brewington relief from Negangard's unconstitutional prosecution, are based in reality. Brewington is not requesting this post-conviction court to overrule the opinion of the Indiana Supreme Court. This post-conviction court need only to review Rush's new finding of "facts" used in the Indiana Supreme Court's

rationalization of an invited error waiver. For Rush's invited error argument to be true, Rush's new findings require the following:

i) A "double assumption" by the Indiana Supreme Court regarding the mindsets of both Barrett and Hill because the trial record is void of Barrett's thoughts on trial strategy as well as Hill's thoughts on Barrett's thoughts on trial strategy.

ii) It would have been impossible for Hill to recognize that Barrett's trial strategy "sought to exploit the prosecutor's improper reliance on 'criminal defamation' to the defense's advantage," without Hill first having prior knowledge that Negangard's trial strategy consisted of telling a jury to convict Brewington for "criminal defamation."

iii) As the record is void of any thoughts relating to Barrett's trial strategy, Barrett and Hill had to discuss the prosecutorial misconduct and the alleged trial strategy off the record and outside the presence of the prosecution prior to trial.

iv) As the general indictments and record of the case prior to trial are void of any mention of specific criminal acts by Brewington, the only way Barrett could have known the prosecution was going to argue two separate grounds for Brewington's conviction was if the prosecution expressed its trial strategy to Barrett outside of the record. If, prior to trial, the prosecution told Barrett it planned to argue both a constitutional and unconstitutional ground for Brewington's convictions, then it would constitute both ineffective assistance of

counsel and fundamental error if Barrett failed to notify Brewington or the trial court that the Office of the Dearborn County Prosecutor was engaging in a conspiracy to deprive Brewington of civil rights.

v) If Negangard failed to tell Barrett about the prosecution's strategy to argue both a constitutionally permissible ground and a constitutionally impermissible ground for Brewington's prosecution, then it would have been impossible for Barrett to develop a trial strategy that sought to take advantage of the unconstitutional aspects of Negangard's prosecutorial arguments. It also demonstrates Negangard failed to provide Brewington with constitutionally sufficient indictment information required for Brewington's defense.

vi) Since Chief Justice Loretta H. Rush wrote about Hill's awareness of Barrett's trial strategy that sought to take advantage of Negangard's attempts to seek convictions against Brewington for criminal defamation; Barrett, Hill, and the Indiana Supreme Court knew Negangard sought and obtained indictments under the same argument, thus rendering Brewington's indictments unconstitutional. Indictments based on protected speech are fundamentally erroneous and such errors are impossible for Brewington to invite.

Brewington understands the absurdity of the above statements but the statements are firmly rooted in fact, or at least the facts as represented by Justice Loretta H. Rush and the Indiana Supreme Court. Rush had no evidence of anyone's thoughts on trial strategy because the record of the case is void of such. This opinion was not a product of haste as 232 days passed from the time of oral arguments to

the filing of the opinion in *Brewington v State*. Brewington's case spent a total of 403 days before the Indiana Supreme. Any question as to whether Hill was aware of Negangard's unconstitutional indictments and criminal arguments prior to trial, or if Rush fabricated the whole theory to justify denying relief from fundamental error, is inconsequential to Brewington because both scenarios constitute fundamental error. Brewington was unable to address Rush's new invited error claim prior to this post-conviction relief because the record is void of the thoughts of the parties involved in Brewington's case and Brewington is unable to read minds.[5] The two scenarios place this post-conviction court in a precarious situation because the new findings in the *Brewington* opinion forces this Court to decide whether Hill forced Brewington to participate in an unnecessary criminal trial, while knowing the prosecution obtained indictments by unconstitutional means; OR, that Chief Justice Loretta H. Rush invented the invited error waiver in order to rationalize stripping Brewington of constitutional safeguards. Either way constitutes fundamental error, thus requiring the vacating of Brewington's entire criminal case.

D) BREWINGTON'S INDICTMENTS FOR INTIMIDATION VIOLATE THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

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[5] In *Weedman v. State*, 21 N.E.3d 873 (2014), the Indiana Court of Appeals declined to employ the same speculative standard used in *Brewington* to waive relief from fundamental error. "Despite the language in Brewington, we believe such a 'strategy' argument is more properly addressed in the context of an ineffective assistance of trial counsel issue in post-conviction proceedings. We simply have no information regarding Weedman's trial counsel's thoughts on his strategy." at 895

As mentioned above, in *Brewington v. State*, the Indiana Supreme Court explained the prosecution argued two grounds for convictions of intimidation; an unconstitutional "criminal defamation" ground and a permissible true threat ground. The transcripts and audio from the grand jury investigation demonstrate Negangard only sought indictments against Brewington under an unconstitutional criminal defamation argument:

> "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." Trans 338
> "Over the top" and "Unsubstantiated statements" are not constitutional

grounds for convening a grand jury especially in the absence of any evidence that Brewington's opinions were unsubstantiated or false. As such, Negangard made Brewington a target of a grand jury investigation in retaliation for Brewington's free speech, just five days after the Indiana Supreme Court dismissed a complaint against Negangard that was filed by Brewington. Regardless of whether Brewington's statements were "over the top" or "unsubstantiated," the grand jury indictments are void of any "true threat" allegation mentioned in the *Brewington* opinion. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to

fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

E) THE DEPRIVATION OF CHARGING INFORMATION VIOLATES BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

As discussed above, Ruwe, Chief Court Reporter for the Dearborn Superior Court II, omitted portions of the grand jury transcripts and audio making it impossible for Brewington to subject the prosecution's case to any adversarial testing. The term "true threat" does not appear anywhere in the record prior to trial, making it impossible for Brewington to prepare a defense against such. Any contention Negangard did in fact argue a true threat ground for Brewington's indictments for intimidation requires acknowledging the fact employees within the Dearborn Superior Court II actively sabotaged Brewington's defense. As tampering with grand jury records with the intention to obstruct justice could not only cost Ruwe her job but also lead to criminal prosecution, the fact Ruwe did suggests that Negangard and Judge Hill were at least aware of Ruwe's illegal conduct, if not directly involved. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

F) NEGANGARD SOUGHT CONVICTIONS AGAINST BREWINGTON FOR VIOLATING THE INDIANA RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS, THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

During closing, Negangard argued the jury should return guilty verdicts because Brewington violated the Indiana Rules of Professional Conduct for attorneys despite Brewington not being an attorney:

> "As to Count II, Intimidation of a Judge, that is more serious because it involves a Judge but because it involves a Judge, we do need to look at the first amendment issues because you are allowed to criticize judges. Right? I mean, I'm not. Defense counsel's not because we are attorneys. But remember he says he's acting like an attorney so we should treat it as he's acting like an attorney. Well if he's acting like an attorney, then he needs to accountable like an attorney. He could hire his own attorney but he didn't. So you know and he has to suffer the consequences." –Trial trans page 515

It should be first noted that neither Hill nor Barrett stepped in to offer any objection to Negangard advising the trial jury that Brewington's self-representation in a divorce proceeding, waived Brewington's First Amendment protections and criminalized Brewington's speech critical of Judge Humphrey. Both Barrett and Hill were aware that the Indiana Supreme Court Disciplinary Commission[6] maintains jurisdiction over attorney discipline, not county prosecutors. Barrett, Hill, and Negangard were also aware the Rules of Professional Conduct did not grant the

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[6] Former Dearborn County Superior Court I Judge Michael Witte has served as the Executive Secretary of the Indiana Supreme Court Disciplinary Commission since 2010.

Indiana Supreme Court Disciplinary Commission the authority to prosecute attorneys for non-criminal violations of the Rules of Professional Conduct. In fact, paragraph [20] under Scope of the Rules of Professional Conduct gives warning of the Rules being misused as procedural weapons by antagonists:

> "[The Rules of Professional Conduct] are not designed to be a basis for civil liability, but these Rules may be used as non-conclusive evidence that a lawyer has breached a duty owed to a client. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule."

Negangard invoked the Rules of Professional Conduct as a procedural weapon against Brewington despite the Rules not having any jurisdiction over Brewington in any capacity. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. This issue rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

G) NEGANGARD INSTRUCTED THE TRIAL JURY TO CONVICT BREWINGTON FOR REASONS OTHER THAN BREWINGTON'S GUILT THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

"It is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than his guilt.' *Wisehart*, 693 N.E.2d at 59 (quoting *Maldonado v. State*, 265 Ind. 492, 500, 355 N.E.2d 843, 849 (1976))" *Coleman v. State*, 750 N.E.2d 370 (2001)

In addition to seeking convictions against Brewington for violating Rules of Professional Conduct for Indiana attorneys, Negangard requested the trial jury to return guilty verdicts for a number of reasons other than Brewington's guilt.

Negangard argued a conviction was necessary to protect the judicial system and the officials operating within the system.

> "This is an attempt to protect the people who serve us and the system they serve. That is why we're here today." -Negangard Tr. 507

Negangard even argued the failure to convict Brewington would cause our rule of law to fail and ultimately the United States of America.

> "He's held accountable by a verdict of guilty. That's how he's held accountable and that's what we're asking you to do. You cannot allow our system to be perverted that way. The rule of law will fail and ultimately our republic. I submit to you that that is not a result that we want to have happen. That is why we are here today." -Negangard Tr. 504-505

The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

H) NEGANGARD ABUSED THE GRAND JURY AND CRIMINAL PROCESS TO RETALIATE AGAINST BREWINGTON'S INTERNET WRITINGS THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIRST, FOURTH, FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Brewington realizes such a claim appears extremely subjective, however, this post-conviction court need only look at Negangard's closing arguments

> "That would become our system of justice if we accept the Defendant's premise that these are only opinions and he was only expressing his political thought. If we accept that premise, then that is the judicial system that we will have. That will be brought on by the invention of the internet. I submit to you that that is not a judicial system we want. That's what this case is about. It isn't about Judge Humphrey. It isn't about Dr. Connor. It is about our system of justice that was challenged by Dan Brewington and I submit to you that it is your duty, not to let him pervert it, not to let him take it away and it happens if he's not held accountable." Tr. 504-505

Negangard affirmatively states that Brewington's criminal proceedings were not about Judge Humphrey nor Dr. Connor. The obvious problem is Negangard's colloquy is another example of prosecutorial misconduct where Negangard sought convictions against Brewington for reasons other than Brewington's guilt. Negangard's outrageous claim also demonstrates neither Hill nor Barrett had any intention of protecting Brewington's constitutional rights to a fair trial. Most of all Negangard's statement has to be viewed as a statement of truth. Negangard's statement acknowledges Negangard used the federally funded Dearborn County Special Crime Unit to investigate Brewington's writings, made Brewington's writings a target of a grand jury investigation, and then prosecuted Brewington to

prevent people like Brewington from using the internet to "pervert" the Dearborn County Judicial System; a clear violation of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Further evidence of the prosecution's First Amendment retaliation can be gleaned from the transcripts of Brewington's arraignment on 3/11/2011. During Brewington's arraignment, the prosecution offered no evidence that Brewington was a physical danger to anyone. Kisor made the following arguments why Brewington's bond should be high or what restrictions should be placed on Brewington's speech:

> "[W]e are asking that the Court consider making conditions of his bond that he not access the internet, uh, or if the Court would believe that to be too broad, which I'm not sure the State would not concede that but if that were to be considered too broad, we would ask the Court to make a condition of bond that Mr. Brewington not continue to blog about the substance, uh, at least his version of the substance of the case that is here before this Court." Tr. 18-19
>
> "I personally reviewed a uh, blog this morning on the Dearborn County public forum at 8:02 this morning, uh, there was a blog post that says, 'if I am detained in Dearborn County jail because I do not receive a hearing or if Negangard gets a ridiculously high bond placed on me, Facebook users can get updates from my family and friends from my Facebook group, 'Help Dan Brewington see his girls.' I will have someone posting information on this case that Negangard tries to lock me up or in the case that Negangard tries to lock me up and throw away the keys. All are welcome to join. Thanks for the support.' So we're asking that that order be made no direct or indirect postings regarding this case." -Kisor Tr. 19
>
> "So 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" -Kisor Tr. 20
>
> "I'd like to show these exhibits to uh, have Mr. Brewington have an opportunity to review them but at this time I think the substance of them are that you will see, Mr. Brewington has disdain for any court; anybody that he sees as an enemy, including his own former attorneys,

> he will attack. He will attack them in his blog, he will attack them in himself and through other people and I don't think again, if that's the proper way for this case to proceed. So the State is asking to, your honor, admit State's Exhibits 1 through 5 in consideration of setting the bond and the conditions and again the State's request is for a high bond and with the prohibition that he not be permitted to use the internet." "Or discuss this case in any other form." -Kisor, Tr. 22

Deputy Prosecutor Brian Johnson explained that the big problem the Dearborn County Prosecutor's Office had was Brewington "does not follow instructions that need to be followed."

> "Your honor, the only, the only concern would be um, it was stated explicitly to Mr. Brewington in the grand jury proceedings that he was not to put anything on his blog concerning anything that happened in the grand jury and he proceeded to go and whether he put on his blog information, you know, regarding the proceedings and whether people, people would not know whether that occurred or not. The problem is, is that Mr. Brewington does not follow instructions that need to be followed. That is our big issue here." -Johnson, Tr. 29

Probably the most shocking thing Kisor said during Brewington's arraignment was when Kisor invited Dearborn Superior Court II Judge Sally McLaughlin (formerly Blankenship) to peruse the internet on her own and conduct the Court's own investigation of Brewington's internet writings:

> "You can go to that blog. I went to it this morning, um, but I think if you follow that through and I don't know if the Court really wants to do that or not but if you do, the postings he has, to me, show an absolute disdain for the Court and for the prosecution and certainly that's okay with the first amendment as long as it doesn't affect with everybody, affect everybody's right to a fair trial and that's why we've asked for those conditions your honor." -Kisor, Tr. 29

Despite Brewington reporting voluntarily to Dearborn Count officials and a lack of any evidence that Brewington presented a danger to anyone, McLaughlin (Blankenship) set Brewington's bond at $500,000 surety and $100,000 cash and

then quickly recused herself from the case on the Court's own motion. McLaughlin also required a condition of bond to be Brewington was not allowed to blog about the nature of the criminal proceedings, while allowing the prosecution to freely address the public about the matter. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

I) KISOR ARGUED BREWINGTON'S INTENT WAS NOT TO THREATEN PHYSICAL HARM, THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

During closing arguments, Kisor argues the intent of Brewington's writings was NOT to threaten illegal harm:

> "Subsection C6, this is the one that if you had a paint brush, it would be all over the ceiling. It would be all over the windows, the floor, this podium, my face. This is the one he just could not stop doing — exposing the people that he was threatening through the hatred and contempt and disgrace and ridicule. That was his whole intent. That's his only intent." Tr. 455-456

If taken at face value, Kisor acknowledges Brewington's prosecution was unconstitutional because criminal defamation is not a constitutionally permissible ground for Brewington's conviction. Any other interpretation of Kisor's statement

acknowledges that Kisor made conflicting arguments to confuse the trial jury and the record of the case. The opinion in *Brewington* reinforces this notion as Rush wrote:

> "Specifically, the prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ('criminal defamation' without actual malice). See Tr. 455-56" *Brewington* at 973

Kisor mentioned the above two grounds for Brewington's convictions but argued the only intent of Brewington's writings was constitutionally protected criminal defamation. Brewington need not speculate the damage inflicted by the prosecution's conflicting arguments because the inconsistencies confused even the Indiana Supreme Court. The opinion in *Brewington* stated Brewington's intent was to cause fear, when Kisor argued the opposite. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

J) KISOR ARGUED JUDGES ENJOY SPECIAL PROTECTIONS FROM CRITICAL SPEECH, THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Brewington's convictions violate the equal protection clause under the laws as guaranteed by the Fourteenth Amendment to the U.S. Constitution and article 1, Sec. 23 of the Indiana Constitution because Kisor argued judges enjoy special protections of law:

> "Now it's one thing, you know, look, Mr. Negangard, and there's some evidence here that there's been some things toward him and toward our office and whatever. That's, you know, we're big boys. You know, we're combatants, we're adversaries. We expect to be, take a few on the chin. But a Judge, he's not an advocate for anybody. He serves you. He doesn't deserve to be threatened"

Though Kisor's ongoing ramblings appear to be nothing more than disingenuous attempts at portraying Humphrey as a helpless victim, Kisor's statements require a more in depth analysis to demonstrate fundamental error. Kisor is prohibited from arguing that judges enjoy special protections against conduct that regular U.S. citizens must endure, because Kisor's contention is a farce. The obvious due process violation is Kisor lying to the trial jury to influence unconstitutional convictions. A second constitutional problem exists in Kisor alleging that Brewington committed a crime against Negangard and/or officials in the Office of the Dearborn County Prosecutor. A third constitutional error rests in the fact Kisor informed the trial jury that Brewington committed another crime unrelated to the criminal proceedings before them. Brewington's criminal actions, as alleged, are crimes regardless of whom the actions are against. If Kisor's statement is true, Negangard, as a "victim" of Brewington's criminal activity had a responsibility to seek a special prosecutor or at least disclose the potential conflict. The above is a blatant violation of basic and elementary principles in violation of

the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

K) DURING TRIAL, DEPUTY PROSECUTOR KISOR ISSUED A WARNING THAT BREWINGTON MAY HAVE A GUN IN THE COURTROOM AND THE JURY SHOULD FEAR FOR THEIR LIVES THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

> "Would you be afraid if you knew right now, based on what you've seen and what you've heard, the distorted thinking, the almost maniacal attacks that he will go, the steps he will go to, to attack people. Would you be afraid if you knew and I hope to God he doesn't but if he had a .357 in his pocket right now, would you be in a little bit of fear? Man, I would." Tr. 451

The above statement by Deputy Prosecutor Joeseph Kisor epitomizes the egregious nature of Dearborn County's malicious prosecution of Brewington. Apart from the obvious prosecutorial misconduct in trying to convince a trial jury that Brewington could at any moment kill the jury members with a .357 Magnum, that Kisor said Brewington may possess at the defense table, Kisor knew it was impossible for Brewington to have smuggled a gun into the courtroom. Brewington had been escorted directly to the courthouse from the Dearborn County Law Enforcement Center where Brewington had been detained for over seven months.

Unfortunately, no one instructed the trial jury Brewington presented no immediate danger. Once again Hill and Barrett remained silent.

Making matters even worse is the fact the prosecution successfully petitioned the trial court for an anonymous jury. While the jurors might not have known the cause of the anonymous jury, Kisor's allegation that Brewington presented a risk of murdering someone in the courtroom during trial would likely lead jurors to believe the purpose of the anonymous jury was to protect the jurors' immediate safety. Fundamental error exists in both the actions of the prosecution and the non-actions of Barrett and Hill. Barrett and Hill's pattern of refusing to object to numerous examples of prosecutorial misconduct suggests extreme incompetence or a substantial bias against Brewington. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

L) BREWINGTON RECEIVED NO ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

In *Jenkins v. State*, 41 N.E.3d 306 (2015), the Indiana Supreme Court offered the following discussion regarding *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984):

> "In *Cronic*, the United States Supreme Court held that there are three scenarios in which the defendant need not satisfy the Strickland test, because prejudice is presumed: (1) where there is a complete denial of counsel; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is asked to provide assistance in circumstances where competent counsel likely could not. *Cronic*, 466 U.S. at 659-60.
>
> The *Cronic* Court further explained that 'only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial.' Id. at 662. United States Supreme Court Justice Powell explained that, under the circumstances described in the third situation, 'the defendant is in effect deprived of counsel altogether, and thereby deprived of any meaningful opportunity to subject the State's evidence to adversarial testing.' *Kimmelman v. Morrison*, 477 U.S. 365, 395 n.2, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (Powell, J., concurring)."

Even a competent attorney would have been unable to subject Negangard's case to any adversarial testing, because Negangard argued during trial that the criminal proceedings were not about Dr. Connor and Judge Humphrey. Negangard argued the purpose of the proceedings was to protect the Dearborn County Court System from being perverted by the Internet. Despite the fact Negangard affirmatively stated the already unconstitutional grand jury investigation for criminal defamation was just a façade to protect the integrity of the court system, Barrett made no attempt to have the indictments dismissed or guilty verdicts set aside. Barrett failed to object to any of the prosecution's outrageous conduct because Barrett never had any intention of providing Brewington with any legal assistance because Barrett never met with Brewington prior to trial to discuss the case with Brewington.

i) BARRETT REFUSED TO DISCUSS THE CRIMINAL CASE WITH BREWINGTON PRIOR TO TRIAL

Barrett filed an appearance to represent Brewington on July 18, 2011. Barrett's only meeting with Brewington occurred prior to the pretrial hearing on July 18, 2011, where Barrett acknowledged he was unaware of what conduct the State alleged to be unlawful. Barrett never met with Brewington again outside of a court room setting. Barrett refused to speak with Brewington about Brewington's case on the phone as well. No discussion of defense strategy, nature of indictments, evidence, witnesses, events of the alleged crimes, etc. Nothing.

ii) BARRETT REFUSED TO CHALLENGE THE UNCONSTITUTIONAL INDICTMENTS

> "[T]he prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible (" criminal defamation" without actual malice). See Tr. 455-56" *Brewington v. State*, 7 N.E.3d at 973

Despite the contention of the Indiana Supreme Court that the prosecution argued two grounds for Brewington's convictions, the grand jury transcripts demonstrate Negangard argued only one ground for Brewington's indictments; Brewington's "over the top" and "unsubstantiated statements" about officials within the Dearborn County Court. Barrett failed to challenge the unconstitutional "criminal defamation" indictments. There is no question the error was fundamental as any challenge would have led the trial court to dismiss the indictments.

iii) BARRETT MADE NO ATTEMPT TO SUBJECT THE PROSECUTION'S CASE TO ANY ADVERSARIAL TESTING

Barrett did not receive a copy of the grand jury transcripts until after the final pretrial hearing September 19, 2011 (Tr. 66-67). Brewington did not receive a copy of the grand jury transcripts until receiving the transcripts in the Dearborn County Law Enforcement Center via USPS on September 24, 2011. Barrett failed to meet with Brewington prior to the first day of Brewington's trial, October 3, 2011. Barrett refused to discuss the grand jury transcripts, which formed the basis of the general indictments and the State's case against Brewington.

> "Allegations that counsel failed adequately to consult with the appellant or failed to investigate issues and interview witnesses do not amount to ineffective assistance absent a showing of what additional information may have been garnered from further consultation or investigation and how that additional information would have aided in the preparation of the case. *Brown v. State*, 691 N.E.2d 438, 446-47 (Ind.1998)" *Coleman v. State*, 694 N.E.2d 269 (1998)

In representing Brewington, Barrett made no attempt to consult with Brewington or investigate any matter relating to Brewington's case because Barrett refused to speak with Brewington about Brewington's criminal proceedings prior to trial. Barrett did not review any specific indictment information or evidence with Brewington. Barrett did not gather or present any evidence. Barrett did not contact or present any witnesses. Barrett did not release any discovery of potential evidence or witnesses. The decision in *Brewington* further alleges Barrett's "trial strategy" invited the fundamental error in Brewington's trial despite the fact Barrett never developed a trial strategy.[7] Barrett's hypothetical trial strategy, as alleged by the

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[7] The trial record is void of any information regarding Barrett's thoughts on trial strategy. Barrett had no trial strategy because Barrett never investigated Brewington's case.

Indiana Supreme Court, still requires Brewington's convictions to be vacated. As Negangard failed to introduce a true threat ground for Brewington's indictments during the grand jury investigation, any alleged trial strategy was unnecessary because the grand jury investigation and indictments were unconstitutional. Barrett refused to object to the constitutionally impermissible "criminal defamation" argument that formed the basis of the grand jury indictments and forced Brewington to remain incarcerated and undergo an unnecessary trial. Brewington could never subject Negangard's "case" to any adversarial testing because Negangard disclosed during trial that Brewington's prosecution was not about Humphrey or Connor but an attempt to protect the judicial system from Brewington and the Internet. Brewington filed a pro se motion challenging the constitutionality of Negangard's criminal defamation argument but Hill would not consider it because Brewington had representation.

iv) BARRETT ALLOWED A NON-ATTORNEY TO FILE MOTIONS ON BREWINGTON'S BEHALF

At minimum, Barrett's assistant, non-attorney Kerr, filed a Motion to Vacate Hearing on Brewington's behalf. Kerr filed the motion while signing Barrett's name and affixing the initials "JK" next to the signature. The CCS shows the motion filed on August 4, 2011.

v) BARRETT FORCED BREWINGTON TO WAIVE FIFTH AMENDMENT PROTECTION AGAINST SELF-INCRIMINATION.

Barrett's persistence in not objecting to the anonymous jury gives rise to Brewington's Cronic claim. The record demonstrates Barrett failed to discuss the State's motion for confidentiality of juror's names and identities with Brewington despite the motion being filed over a month earlier. The record also demonstrates Barrett forcing Brewington to answer Hill's questions on law because Barrett refused to object. Not only was Brewington stripped of legal representation in addressing the matter, Barrett and Hill forced Brewington to explain any objections to the motion despite being represented by counsel; thus subjecting Brewington to potential self-incrimination.

vi) BARRETT TRIED TO WAIVE APPEALABLE ISSUES EVEN AFTER BREWINGTON VOICED OBJECTION

During the September 19, 2011 hearing, Hill asked if there was any response from the defendant regarding the State's motion for confidentiality of juror's names and identities, filed August 9, 2011. Barrett's response appears in the transcripts as follows:

> "I don't object as long as we uh, or if something should come up during the process. I'm sorry? (Mr. Brewington conversing with Mr. Barrett) I do not object. My client does object apparently your honor." Tr. 67

Hill responded:

"And what's the nature of your objection Mr. Brewington?"

Barrett failed to object to the confidentiality of jurors' names and remained adamant about not representing Brewington's interest in objection to the State's motion. Barrett's decision was not part of a defense strategy because Barrett still

had no idea what actions of Brewington's Barrett was required to defend because during the same hearing Hill said there was a discussion in chambers about getting Barrett a copy of the grand jury transcripts. As such, the only explanation for Barrett remaining defiant in not objecting on Brewington's behalf is that Barrett took an adversarial position against Brewington. Barrett's adversarial role offers insight into why Barrett failed to object to egregious conduct by the prosecution like Kisor instructing the trial jury that the possibility exists that Brewington may murder someone in the courtroom, with a .357 Magnum handgun, during the criminal trial.

vii) BARRETT SACRIFICED BREWINGTON'S DEFENSE TO ASSIST A SEPARATE INVESTIGATION OF BREWINGTON

Barrett changed his line of questioning during trial cross-examination of Sheriff Michael Kreinhop to prevent Brewington from knowing there was another pending investigation of Brewington. This investigation entailed Dearborn County law enforcement placing a recording device on Brewington's cell mate in an attempt to obtain incriminating evidence against Brewington. During a meeting at the bench, Negangard stated:

> "I think the question would be better worded to the time frame and would probably be a good idea that Mr. Brewington not be specifically advised about that." Tr. 419

Barrett cooperated with Dearborn County officials in an ongoing investigation of Brewington at the same time Barrett was representing Brewington. Hill allowed Barrett to continue representing Brewington, while Barrett assisted

Dearborn County Law Enforcement with a separate investigation of Brewington. Hill made no attempt to prevent Negangard and Barrett from withholding potential evidence from Brewington. Brewington was never questioned about the matter and no charges were ever filed.

viii) BARRETT TOOK NO MEASURES TO DEFEND OR PROTECT BREWINGTON'S MENTAL HEALTH.

The Indiana Supreme Court cited "the victims' knowledge of [Brewington's] psychological disturbance and dangerousness" as a component in determining when Brewington's protected speech crossed over to an implied threat. Barrett refused to seek Brewington's mental health records or have Brewington evaluated. The only "professional" finding that Brewington was potentially dangerous came from Dr. Connor, who was a victim in Brewington's criminal defamation trial. Rush wrote Brewington's numerous writings alleging ex parte communication between Connor and Ripley Circuit Judge Carl H. Taul, the original judge in Brewington's divorce, "had led the Doctor to the professional opinion that Defendant was 'potentially dangerous,' Tr. 131-32". *Brewington* at 956. If Barrett would have made any effort to acquaint himself with Brewington's case, Barrett would have not only known that the ex parte communication occurred, but Barrett would have known evidence of the ex parte communication existed in State's Exhibit 123. State's Exhibit 123, which was referenced by Rush in *Brewington* at 956, includes a letter from Connor dated February 25, 2008. Connor's letter stated:

> "With this letter please be advised that Hon. Judge Carl Taul contacted me on 2/22/08 to convey his agreement for the review of the above-

captioned case."

No such communication appears in the record of Brewington's divorce proceedings and Brewington was not a party to the communication. Even though Connor's letter regarding the ex parte communication was an attachment of State's Exhibit 123, during closing arguments Kisor went above and beyond to explain how Brewington lied about the ex parte communication to make Brewington appear untrustworthy, obsessive, and dangerous.

> "I would call it obsessing. Any way you call it, it's dangerous. [Brewington] lied and he lied and he lied and he lied. [Brewington] called Dr. Connor a pervert, a crooked psychologist, a child abuser. [Brewington] said [Connor] was dangerous. [Brewington] said he made ex-parte communications with the Judge and just on that one alone, the Court of Appeals says, Dan, you lied. Okay, all of these complaints, there were no ex-parte, there was no improper actions between him and any judge. [Brewington] called Ed Connor a liar. [Brewington] called him unethical

Not only did Kisor ignore Connor's admission of ex parte communication, the opinion in *Brewington v. Brewington*, 930 N.E.2d 87 (2010) makes no finding of fact regarding whether the ex parte communication occurred; implicating Kisor in another gross example of prosecutorial misconduct. Addressing the issue would have demonstrated Brewington's allegations were not false and would have eviscerated any potential danger argument because Brewington's allegations of ex parte between Connor and Taul[8] were true. There was no objection from Barrett.

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[8] It is worthy to note for the record that Judge Carl H. Taul also served with Humphrey and Rush on the Indiana Supreme Court Juvenile Justice Committee for several years and, like Humphrey, attended meetings with Rush while Brewington's case sat before the Indiana Supreme Court.

Barrett let Kisor run wild with accounts of false Appellate Court findings, fictitious citations of law, and allegations of potential gun violence by Brewington in the courtroom. Not only did Barrett fail to object, in following Kisor's closing arguments, Barrett stated "I agree with much of what Mr. Kisor said and I applaud his sincerity." Tr. 484. Barrett's complete failure to provide Brewington with any meaningful legal assistance is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

M) BREWINGTON WAS UNABLE TO TESTIFY IN HIS OWN DEFENSE THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Brewington was unable to testify in his own defense because Barrett had no understanding of Brewington's reasoning behind his writings or the facts of Brewington's case. Barrett gathered no evidence to support Brewington's defense. Barrett did not contact witnesses. Barrett did not conduct depositions. Barrett did not review all the State's evidence. Brewington taking the stand with Barrett as a public defender would have been akin to a sheep wandering to slaughter. Barrett failed to provide Brewington with any insight into the criminal trial process, not to

mention the procedures associated with taking the stand in Brewington's defense. Barrett failed to address the matter with Brewington until the last day of the State's case against Brewington. Even then Barrett told Brewington that Brewington would have to decide if Brewington wanted to take the stand without any prior explanation of the procedures for direct and cross-examination of a defendant. The Indiana Supreme Court stated Brewington's decision not to testify was consistent with Barrett's "all or nothing" trial strategy when Barrett's trial strategy consisted of "nothing;" which is exactly why Brewington was afraid to testify. Brewington's only defense at trial would have been Brewington's own accounts of events. Barrett offered no discovery prior to trial, further demonstrating that Barrett's only trial strategy consisted of showing up to Brewington's jury trial with "appropriate" amount of binders and paperwork necessary to give the appearance that Brewington had legal representation. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

N) BREWINGTON'S PERJURY INDICTMENT WAS CONSTITUTIONALLY VAGUE, THUS VIOLATING BREWINGTON'S RIGHTS

UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The opinion in *Brewington* solidifies the fact that the prosecution failed to provide Brewington a clear understanding of which of Brewington's statements were responsible for Count 5 because even the Indiana Supreme Court was confused as to what formed the basis of Brewington's conviction for perjury. The Indiana Supreme Court stated the trial jury's guilty verdict for perjury rested on three different alleged statements:

> "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." *Brewington*, at 958
>
> "Defendant's perjury to the grand jury about his purpose in doing so implies that truthful testimony on that point would have been incriminating." *Brewington*, at 965
>
> "And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife, and that her address was his address." *Brewington*, at 966

During closing arguments, Barrett acknowledged that he was uncertain as to which of Brewington's statements the State alleged to be responsible for the perjury indictment:

> "Count V is perjury alleging that Mr. Brewington who voluntarily testified before the Grand Jury perjured himself, lied, under oath and as near as I can tell what they're referring to is the address issue with the Humphrey's." Tr 498-99
>
> "But apparently their contention is that he lied about how whether he knew that Mrs. Humphrey, Heidi Humphrey, was Judge Humphrey's wife as near as I can tell." Tr. 499

Barrett's statement, "As near as I can tell," demonstrates the State failed to provide constitutionally sufficient indictment information and that Barrett failed to challenge the unconstitutionally vague indictment. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

O) BREWINGTON WAS DENIED A TRIAL BEFORE AN IMPARTIAL JUDGE, THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

> "Bias and prejudice places a defendant in jeopardy 'only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding.' Id. Adverse rulings are not sufficient to show bias or prejudice on the part of the judge. *Flowers v. State*, 738 N.E.2d 1051, 1060 n. 4 (Ind.2000), reh'g denied." *Tharpe v. State*, 955 N.E.2d 836 (2011)

There may be no other examples in modern law where a judge has completely ignored a defendant's pleas for charging information, evidence, and counsel. A simple review of the Chronological Case Summary demonstrates Hill never had any intention of allowing Brewington to have a fair trial. On June 17, 2011, Hill set the final pre-trial hearing and plea deadline for July 18, 2011, knowing Brewington did not have legal counsel because it was during the June 17, 2011 hearing that Hill

granted a motion to withdraw filed by Brewington's first public defender. Hill refused to explain charging information to Brewington. Hill never made any attempt to ensure Brewington had the appropriate evidence. Hill refused to address any of the issues alleged by Brewington on the record. Since Barrett refused to communicate with Brewington, prepare a defense, or challenge the unconstitutional indictments, Brewington filed three pro se motions just prior to the beginning of the jury trial on October 3, 2011. Brewington filed his Motion to Dismiss, Motion to Disqualify F. Aaron Negangard and appoint Special Prosecutor, and Motion to Dismiss for Ineffective Assistive of Counsel. Brewington's filings, among other things, explained how Brewington had yet to receive any assistance from counsel and Brewington still did not know what actions the state alleged to be in violation of Indiana law. Brewington's motions explained how the State and/or Barrett failed to provide Brewington with all the State's evidence. During the opening moments of trial, Brewington reiterated all his concerns to Hill. Tr. 3-5. Hill's remedy to Brewington's last minute filings, concerning issues like Brewington not understanding the indictments against him, was to bait Brewington into self-representation. Hill's response to Brewington's filings was as follows:

> "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..."

In Seniours v. State, the Indiana Court of Appeals addressed voluntary waiver of trial counsel:

> "[T]he trial court should inquire into the educational background of the defendant, the defendant's familiarity with legal procedures and rules of evidence, and additionally, into the defendant's mental capacity if

> there is any question as to the defendant's mental state." Seniours v. State, 634 N.E.2d 803 (5 Dist. 1994)

Accepting Hill's invitation to represent himself would have raised questions about Brewington's mental state as only a person of diminished capacity would act as his own lawyer without copies of the State's evidence and an understanding of charging information. Hill's reasoning left Brewington with quite a conundrum. The only way Hill would address Brewington's pro se motions regarding Barrett's failure to provide Brewington with any legal assistance was if Brewington waived his right to legal counsel.

Hill's adversarial demeanor towards Brewington is further demonstrated by Hill's statements during the final pretrial hearing on September 19, 2011, regarding Brewington's request to continue the October 3, 2011 jury trial. Hill stated:

> "I mean, I thought you had an issue last time because your trial date kept getting continued for these reasons and you were ready to get it started."

There is no record of Brewington expressing any "issues" regarding his trial being continued. Brewington never spoke with Barrett about continuing the original trial set for August 16, 2011 because Barrett was out of town dealing with a family matter. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

P) BREWINGTON WAS DENIED APPELLATE REVIEW BEFORE AN IMPARTIAL SUPREME COURT, THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

> "[Brewington's] decision not to testify, thus letting the case hinge solely on the sufficiency of the State's proof, was also consistent with an 'all or nothing' defense rather than the actual-malice defense he now says he should have had." *Brewington* v. State, 7 N.E.3d at 978

The above is not an adverse ruling against Brewington. Rush's statement is an unsupported adverse opinion regarding Brewington's reasoning in not testifying in his own defense. Rush used the opinion to further rationalize the Supreme Court's invited error argument that waived Brewington's relief from fundamental error. The record is void of any evidence to support Rush's speculation as to why Brewington decided not to testify. Rush cherry-picked excerpts from the record of Brewington's case to give Rush's invited error waiver argument a false sense of legitimacy.

> "Defendant demonstrated significant sophistication about free-speech principles long before trial in a motion to dismiss these charges, Supp. App. 1-4, and confirmed it by his post-verdict, pre-sentencing blog posts, Sent. Ex. 1 at 2-3." Brewington v. State, 7 N.E.3d at 978

The motion that allegedly demonstrated Brewington's "significant sophistication about free-speech principles" was filed the morning of Brewington's trial as indicated by the clerk's file stamp, record of the chronological case summary, and trial transcripts. Hill began to address the filing of Brewington's motion exactly forty-nine (49) words into Brewington's trial.

"We are here in case number 15D02-1103-FD-84, the State of Indiana

> vs. Daniel Brewington. 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." Tr. 3. (Page 1 of the trial transcripts consist of the title page. Page 2 consists only of appearance information for the parties. Hill began addressing Brewington's motion on Line 9 appearing on Page 3 of the 531-page trial transcript.)

It is impossible for Brewington to have shown significant sophistication about free speech principles in a motion filed "long before trial" because the only motions challenging the State's case were filed the day of trial. Other relevant facts glossed over by Rush regarding Brewington's motion to dismiss are as followed:

i) As indicated by Hill's opening statements in trial, Brewington filed two motions to dismiss in addition to one motion to disqualify the prosecution.

ii) Brewington's motions explain why Brewington filed the motions on his own behalf. Brewington filed the motions because Barrett refused to meet with Brewington prior to trial and Brewington had no idea about the direction of Brewington's defense. All of this was detailed in Brewington's Motion to Dismiss for Ineffective Assistance of Counsel.

iii) Hill denied Brewington's motions, including Motion to Dismiss for Ineffective Assistance of Counsel, stating Brewington had legal representation. Hill placed the burden on Brewington to have Barrett file the Motion to Dismiss for Ineffective Assistance of Counsel, when it was Barrett who refused to meet

with Brewington in the first place. The trial record is void of Hill ever questioning Barrett about Brewington's claims.

iv) Brewington's motions detail how Brewington did not have access to evidence, any specific charging information, or legal assistance prior to trial.

Justice Loretta H. Rush followed in the footsteps of Hill and refused to address the purpose of Brewington's three motions prior to trial. Rush carefully plucked information from Brewington's motions to build a case that Barrett's trial strategy somehow stripped Brewington of the right to relief from fundamental error, while ignoring Brewington's motions that thoroughly explain how Barrett refused to allow Brewington to play any role in the preparation of Brewington's own defense. Rush's argument for denying Brewington relief from numerous fundamental errors in Brewington's case are not premised on interpretations of fact and law. Rush constructed her own facts, premised on Rush's ability to read the minds of Barrett and Hill, and then Rush proceeded to introduce a new interpretation of the relationship between fundamental error and ineffective assistance of counsel and argued that relationship somehow waived Brewington's right to relief from fundamental error. Rush waived Brewington's right to relief while ignoring the cause of the fundamental error; the fact Dearborn County Prosecutor F. Aaron Negangard sought indictments and convictions against Brewington under an unconstitutional criminal defamation theory. The fact that Rush did not verbalize her intentions in meticulously crafting the trial strategy/invited error waiver, while glossing over Negangard's trial strategy consisting of prosecuting Brewington for a

non-crime, does not reduce the significance of the bias or partiality demonstrated by Rush in this case.

Q) BARRETT, HILL, AND NEGANGARD TRIED TO RUSH BREWINGTON TO TRIAL WITHOUT ANY SPECIFIC CHARGING INFORMATION THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION[9]

During the final pretrial hearing on September 19, 2011, Hill asked for the State's position on Brewington's pro se request to continue the jury trial. Negangard's response was as follows:

> "Your honor, um, the issue before was that the jury trial was being continued because Mr. Barrett hadn't had time to prepare a defense because he had only been on the case a month and he was dealing with some very important family issues. It is my understanding that the Defendant objected to any continuance at that time, um, and in the interest of fairness and ensuring that Mr. Brewington got a defense, um, a fair defense, the Court continued this based on an emergency, found there was an emergency and then continued the jury trial to this setting....Now in October, now in September where we are two (2) weeks from the jury trial, now [Brewington's] um mad that his attorney hasn't talked to him enough as far as I can tell....He's comfortable in August going forward with the trial even though his defense attorney hasn't had an opportunity to review one document or anything else."

Both Negangard and Hill alleged that Brewington objected to continuing the original jury trial, despite there being no record of such, and then relied on that

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[9] The prosecution instructed Brewington to rely on the grand jury transcripts for a pseudo-bill of particulars, however, Hill did not order the release of the transcripts until after the originally scheduled jury trial.

contention as an excuse not to grant Brewington's request to continue the October 3, 2011 trial date. Negangard and Hill knew Barrett's family emergency had little to do with Barrett's failure to review any documents because Negangard did not file the State's MOTION TO RELEASE GRAND JURY EXHIBITS until Thursday August 11, 2011, just five days prior to the original trial scheduled for August 16, 2011. The grand jury exhibits included the grand jury transcripts, which the prosecution claimed to contain an explanation of the non-specific general indictments. Hill's ORDER TO RELEASE GRAND JURY EXHIBITS was not filed until August 23, 2011; seven days AFTER Brewington's original trial date. Hill and Negangard attacked Brewington by claiming Brewington was adamantly against continuing the August 16, 2011 trial when it was Negangard and Hill that obstructed Brewington's access to evidence and indictment information. During the hearing on September 19, 2011, Hill acknowledged Barrett still had not reviewed any specific indictment information in Brewington's case despite Brewington's trial being two weeks away yet Hill still denied Brewington's request to continue the October 3, 2011 trial. Hill punished Brewington when it was Hill and Negangard who were responsible for delaying Brewington's access to critical documents. If not for Barrett's family emergency, Brewington would have likely faced a criminal trial without any charging information. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The

above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

R) BREWINGTON RECEIVED NO ASSISTANCE OF COUNSEL AT BOND REDUCTION HEARING THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

As discussed previously, Negangard said Barrett had yet to "review one document or anything else" prior to the original scheduled trial date of August 16, 2011. Any specific indictment information within the grand jury transcripts was not released by Hill until August 23, 2011. Even though no one outside of the Dearborn County Prosecutor's Office had any understanding as to what actions led to Brewington's indictments and detention, Hill still forced Brewington to face a bond reduction hearing on August 17, 2011. Barrett had no understanding which of Brewington's actions the state alleged to be unlawful nor did Barrett have any understanding of Brewington's case, resulting in a complete denial of counsel. During the hearing the State still failed to give any indication to Brewington what conduct was responsible for Brewington's indictments and confinement. Hill refused to lower Brewington's $500,000 surety/$100,000 cash bond knowing Brewington received no assistance of counsel. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The

above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

S) DEARBORN COUNTY OFFICIALS OBSTRUCTED BREWINGTON'S ACCESS TO OHIO ATTORNEY ROBERT G. KELLY THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Following Brewington's arrest in Cincinnati, Ohio relating to the indictments in this case, Ohio attorney Robert G. Kelly ("Kelly") arranged for Brewington to bond out of the Hamilton County Justice Center on 3/09/2011 and voluntarily report to Dearborn County officials on 3/11/2011. During Brewington's arraignment on 3/11/2011, McLaughlin permitted Mr. Kelly to speak, where Kelly stated he "anticipate[d] filing the necessary paperwork with Indiana to get appointed to appear on his behalf pro bono to assist whoever the court appointed counsel is." Tr. 25 Kelly also expressed concerns about the vague indictments stating "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." Tr. 27 Kelly informed the court Kelly would be filing a petition in federal court regarding the charges against Brewington. Tr. 27 Dearborn County officials promptly barred Kelly and Brewington from any attorney/client visits. The only thing gained in not allowing Brewington and Kelly to have attorney/client visits in a confidential setting is Dearborn County had the ability to record conversation by forcing Brewington and Kelly to discuss confidential matters via the phones in the

Dearborn County Law Enforcement Center or during non-contact visits. It was not until Kelly became admitted to practice in the Southern District Court of Indiana that Dearborn County Officials were forced to allow Brewington to have attorney visits with Kelly. The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

T) BREWINGTON RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL THUS VIOLATING BREWINGTON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Prior to the filing of Brewington's appeal, Brewington met or spoke with appellate attorney Michael Sutherlin on several occasions. Brewington's mother, Sue Brewington, and Brewington's Ohio attorney, Robert G. Kelly, also met or spoke with Sutherlin on several occasions. Sutherlin was aware Barrett refused to discuss the case with Brewington prior to trial. Sutherlin knew that Brewington did not understand the charges against him prior to trial. Sutherlin knew Barrett refused to provide some evidence to Brewington. Sutherlin was informed of the three motions Brewington filed prior to trial to preserve issues ignored by Barrett. Sutherlin had a copy of the incomplete grand jury transcripts showing witness

testimony as the beginning of the proceedings. Sutherlin knew the Office of the Dearborn County Prosecutor sought indictments for constitutionally impermissible criminal defamation. Sutherlin also knew that Hill refused to ensure Brewington had an explanation of the vague criminal indictments while also refusing to provide Brewington with legal counsel willing to prepare any defense. Sutherlin's appellate performance passes the two-part test described in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is no strategy in pursuing a First Amendment argument when Brewington's convictions required reversal due to the denial of charging information, evidence and legal counsel prior to trial. The same is true in not challenging the fact the Dearborn County Superior Court II altered grand jury transcripts to the State's advantage.

Sutherlin refused to raise the issue regarding Barrett's failure to develop any trial strategy. By refusing to meet with Brewington to discuss any details of Brewington's case prior to trial, it was impossible to defend Brewington's speech because Barrett had no understanding of Brewington's intentions, timeframes, or context behind Brewington's speech. Raising the issues would have resulted in the reversal of Brewington's convictions by the Indiana Supreme Court because the Indiana Supreme Court claimed Barrett's trial strategy is what waived Brewington's right to relief from fundamental errors in Brewington's trial. Sutherlin was erroneous in even filing a direct appeal because any post-conviction court would have vacated Brewington's verdicts. The Seventh Circuit recently

emphasized the elementary principle should deeply refrain from raising ineffective assistance of counsel on direct appeal:

> "Like the Texas bar in *Trevino*, the Indiana criminal defense bar 'has taken this strong judicial advice seriously.' See *Trevino*, 133 S.Ct. at 1920. In its annual training, amicus Indiana Public Defender Council 'consistently advises against appellate counsel presenting ineffective assistance claims on direct appeal.' When a public defender handling a direct appeal asked the Council if she should raise a claim for ineffective assistance of trial counsel in the direct appeal, the responses were best summarized by one that began, 'NOOOOOOH!' Amicus Br. of Ind. Pub. Def. at 21a." *Brown v. Brown*, 16-1014, (February 1, 2017)

The only rationale in not filing a petition to stay direct appeal and pursuing post-conviction relief is the belief that Hill, as the post-conviction judge, would refuse to withdraw and would continue to preside over Brewington's proceedings while further ignoring Brewington's rights to evidence, charging information, and trial counsel. This was the reasoning Sutherlin gave for not pursuing post-conviction relief.

The above is a blatant violation of basic and elementary principles in violation of the Constitution of the United States, and the harm suffered by Brewington cannot be denied thus allowing the review of the issue(s) regardless of whether the issue was properly raised and preserved. The above rises to fundamental error and denies Brewington fundamental due process if not rectified. (See Smith v. State, 459 N.E.2d 355 (1984).)

CONCLUSION

Brewington's case has the makings of a Netflix documentary as Public Defender Bryan Barrett, Judge Brian Hill, the Indiana Court of Appeals and the

Indiana Supreme Court turned a blind eye to the fact Dearborn County Prosecutor F. Aaron Negangard and his office initiated a grand jury investigation of Brewington under an unconstitutional "criminal defamation" premise. Negangard worked with the staff of the Dearborn Superior Court II, Judge Hill and Brewington's public defender, Bryan Barrett, to ensure that Brewington had no opportunity to mount any kind of defense. Negangard convened a grand jury seeking indictments against protected speech then introduced a new criminal argument during trial, or in the alternative, Negangard argued different grounds for Brewington's indictments and then instructed Court Reporter Barbara Ruwe to omit the different grounds from the transcription, stripping Brewington of any opportunity to mount a defense. The facts as presented above demonstrate a conspiracy against Brewington's civil rights to a degree that extinguished any glimmer of constitutional legitimacy throughout the course of the grand jury investigation, Brewington's criminal proceedings, as well as Brewington's appeals.

10) Prior to this petition, Brewington:

A) HAS NOT filed any petition for post-conviction relief pursuant to Rule PC 1 or PC 2.

B) HAS filed a petition in federal court.

C) HAS filed a Petition for Writ of Certiorari with the United States Supreme Court.

D) HAS filed petitions to both Indiana Court of Appeals and Indiana Supreme Court.

11) In re: to above (10), list with respect to each petition, motion, or application:

A) ACTION AND SPECIFIC NATURE:

i) *Daniel P. Brewington vs. Sheriff Michael Kreinhop*; Habeas Corpus 1:11-cv-1086-twp-mjd, supplement filed 09/16/2011. (See *Appendix i* for specific elements argued.)

ii) Appeal to the Indiana Court of Appeals, *Brewington v. State* No. 15A01-1110-CR-550 (See *Appendix ii* for specific elements argued.)

iii) Petition to transfer to the Indiana Supreme Court, *Brewington v. State* No. No. 15S01-1405-CR-309 (See *Appendix iii* for specific elements argued.)

iv) Petition for writ of certiorari to the United States Supreme Court. No. 14-505. (See *Appendix iv* for specific elements argued.)

B) NAME AND LOCATION OF COURT PETITIONED

i) United States District Court Southern District of Indiana, Birch Bayh Federal Building & U.S. Courthouse, 46 East Ohio Street, Indianapolis, IN 46204.

ii) Indiana Court of Appeals, 115 W Washington St # 1080, Indianapolis, IN 46204.

iii) Indiana Supreme Court, 315 Indiana State House, 200 W. Washington Street, Indianapolis, IN 46204.

iv) Supreme Court of the United States, 1 First Street, NE, Washington, DC 20543

C) DISPOSITION OF THE ACTION AND DATE OF DISPOSITION

i) Entry Discussing Amended Petition for Writ of Habeas Corpus, filed: 10/14/2011The Southern District Court wrote, "Because the petitioner is not entitled to the relief he seeks at this time and in this forum, the action is dismissed. The dismissal shall be without prejudice."

ii) The Court of Appeals issued a ruling on January 17, 2013. The Court vacated Count I, intimidation of Dr. Connor, and Count III, intimidation of Heidi Humphrey. The Court affirmed Counts II, IV, and V.

iii) The Indiana Supreme Court accepted transfer and issued an opinion on May 1, 2014. (See *Appendix iii* for disposition.)

iv) The United States Supreme Court denied transfer on January 15, 2015

D) CITATIONS OF ANY WRITTEN OPINIONS OR ORDERS ENTERED PURSUANT TO EACH DISPOSITION

i) N/A

ii) *Brewington v. State*, 981 N.E.2d 585 (2013)

iii) *Brewington v. State*, 7 N.E.3d 946 (2014)

iv) *Brewington v. Indiana*, 135 S.Ct. 970, __ U.S. __, 190 L.Ed.2d 834, 83 U.S.L.W. 3579 (2015)

12) NO. Though some issues addressed in (8) may appear similar to those raised in previous petitions and appeals, all the issues were raised after:

A) Brewington discovered that the Dearborn Superior Court II altered grand jury transcripts and audio;

B) Brewington discovered Negangard made Brewington a target of an unconstitutional grand jury proceeding;

C) Brewington discovered public defender Bryan Barrett altered a line of questioning during trial in order to assist law enforcement in another investigation of Brewington;

D) Brewington discovered Negangard tried to prosecute Brewington for violating the Indiana Rules of Professional Conduct;

E) Brewington discovered that Hill forced Brewington to endure an unconstitutional trial.

13) N/A.

14) Were you represented by an attorney at any time during:

A) Preliminary hearing – YES

B) .Arraignment – NO

C) Trial – YES, but the attorney failed to prepare any defense prior to trial

D) Sentencing – YES

E) Appeal – YES

F) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? – YES

15) If answered "yes to (14), list:

A) Names and addresses of each representing attorney:

i) Robert G. Kelly, 4353 Montgomery Rd, Norwood, OH 45212

ii) John Watson, 201 S Meridian St, Sunman, IN 47041

iii) Bryan Barrett, Rush County Courthouse, 101 East Second Street, Room 315, Rushville Indiana 46173

iv) Michael Sutherlin, 1027 N Alabama St, Indianapolis, IN 46202

B) The proceedings at which each such attorney provided representation:

i) Filed Habeas Corpus

ii) Served as Brewington's public defender in Brewington's criminal case for approximately two months before withdrawing.

iii) Brewington's second public defender. Barrett only appeared during hearings and never met with Brewington outside of a courtroom setting to discuss or share information about Brewington's criminal case.

iv) Represented Brewington in appeals to the Indiana Court of Appeals and the Indiana Supreme Court.

C) Robert Kelly volunteered his legal services. Both Watson and Barrett were Court appointed. Sutherlin was a hired attorney.

16) Brewington completed his 2.5 year prison sentence on September 5, 2013.

17) No attorney has been retained for this proceeding.

18) Brewington is not currently incarcerated and is not eligible for representation by a public defender.

Daniel P. Brewington, pro se

Appendix i

BREWINGTON ARGUED HIS DENTENION VIOLATED:

Brewington's First Amendment Right to Speech.

Brewington's arrest resulted from Brewington's public writings criticizing officials operating within the Dearborn County Court System. The State alleged Brewington's "criminal" writings occurred over the period of forty-one (41) months. At the time of the filing of the Habeas Corpus and supplement, the State failed to provide Brewington with any statement it considered to be a threat to personal safety.

Brewington's right to assistance of counsel

Brewington was refused a public defender at arraignment. No public defender met with Brewington in preparation for trial. Seven days prior to trial, there were still no witnesses subpoenaed, no one had been deposed, no experts had been obtained, and Brewington was denied the ability to review any discovery provided by the prosecutor with Brewington's attorney

Brewington's liberty without due process as he was not permitted to defend public postings during the grand jury proceedings

At the date of habeas filing and supplement, the only mention of Brewington's writings that caused any alleged fear was mentioned in the Dearborn County Special Crimes Unit report dated October 30, 2009. The Dearborn County Special Crimes Unit report alleged that on August 24, 2009, Humphrey claimed

Brewington's comments caused Humphrey to fear for the personal safety of his entire family but made no mention of whether fear was a personal fear of Brewington or fear of public outrage. However, despite the alleged fear about the safety of his family, Humphrey continued to rule on petitions and set and vacate hearings in Brewington's child custody proceedings until, on or about, June 9, 2010. Dearborn County Prosecutor F. Aaron Negangard did not make Brewington the target of a grand jury investigation until February 15, 2011, just five days after the State of Indiana dismissed a complaint Brewington filed against Negangard. Brewington had no idea what statements required defending because there was no specific claim or example of a threat to personal safety.

Brewington's rights guaranteed by the constitution

Judge Sally McLaughlin set Brewington's bond at $500,000 surety and $100,000 cash in the complete absence of any evidence that a crime had been committed, then appointed Brewington's first public defender then recused herself citing a conflict. No victim, nor any other official made any attempt to take action against Brewington until Negangard made Brewington a target of a grand jury investigation on February 15, 2011. No party sought any protective measures against Brewington until the State sought protective orders to protect the alleged victims from Brewington on March 11, 2011; after Brewington's arrest. Even if Brewington could have posted the $500,000 surety and $100,000 cash bond, McLaughlin imposed a restriction that Brewington could not post anything about

the case on the internet, while leaving the prosecutor's office with the freedom to publicly express its own views and opinions on the case.

Appendix ii

ISSUES RAISED ON APPEAL

AS TO COUNTS I-VI

i) Constitutional Limitations on Intimidation Prosecutions.

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

iii) Constitutional Limitations on Intimidation Prosecutions.

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

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

AS TO COUNT V

i) There was insufficient evidence for Brewington's perjury conviction.

CONVICTIONS UNDER COUNTS I AND IV VIOLATE DOUBLE JEOPARDY

i) The substantial step supporting Count IV was intimidating and/or harassing Dr. Connor. Brewington's conviction for both counts violates the Double Jeopardy Clause of the Indiana Constitution.

OTHER TRIAL ERRORS

i) The Use of an Anonymous Jury Was Improper

ii) The custody evaluation and final decree should have been excluded

iii) Constitutional Limitations on Intimidation Prosecutions.

iv) Trial counsel's failure to object to the above was ineffective assistance of counsel.

Appendix iii

SPECIFIC NATURE PETITION TO TRANSFER

i) Whether Indiana Code § 35-45-2-1(a)(2), which defines criminal intimidation to include harsh criticism of a prior lawful act, must be interpreted narrowly to avoid criminalizing speech protected by the First Amendment,

ii) Whether convictions for intimidation and attempted obstruction of justice must be reversed under Street v. New York, 394 U.S. 576 (1969), when (1) the indictments charged conduct that is protected under the First Amendment as well as conduct that is potentially unprotected; and (2) the jury returned general verdicts.

iii) Whether Article I, § 9 of the Indiana Constitution, as interpreted in Price v. State, 622 N.E.2d 954 (Ind. 1993), limits prosecutions for crimes other than disorderly conduct, including intimidation and obstruction of justice.

iv) Whether a grand jury witness may be convicted for perjury for a statement that was (1) not false; and (2) cut short by the prosecutor before the witness could fully explain his answer.

DISPOSITION OF CASE

i) The Indiana Supreme Court stated prosecution argued a constitutionally impermissible "criminal defamation" ground for Brewington's conviction.

ii) The Indiana Supreme Court wrote the State repeatedly failed to distinguish the difference "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)."

iii) The Indiana Supreme Court found the jury instructions and general verdict were fundamentally erroneous

iv) The Indiana Supreme Court stated Hill failed to take any measures to prevent the above errors.

v) The Indiana Supreme Court upheld Brewington's convictions claiming Barrett's "constitutionally imprecise" trial strategy either invited the fundamental errors or sought to take advantage of the unconstitutional aspects of the State's case against Brewington, thus waiving Brewington's right to relief.

vi) The Indiana Supreme Court found Hill's non-intervention in protecting Brewington from fundamental error to be a conscience decision by Hill not to intervene. Justice Loretta Rush wrote that Hill did not intervene to correct the unconstitutional flaws plaguing Brewington's trial. Rush claimed Hill secretly realized that Barrett employed a strategy that neither objected to the unconstitutional jury instructions nor objected to Negangard's failure to define the nature of Brewington's crime. Rush ruled Hill's knowledge of Barrett's "constitutionally imprecise" strategy also waived Brewington's right to relieve from Negangard's unconstitutional criminal defamation argument.

vii) For the record of this petition for post-conviction relief, Brewington is oblivious as to how Rush and the Indiana Supreme Court were aware of any strategy by Barrett because Barrett never met with Brewington to investigate the case or explain trial strategy to Brewington. Equally puzzling is how Rush determined Hill's thoughts on Barrett's thoughts on trial strategy because there is no record of Hill's or Barrett's thoughts on Barrett's trial strategy. Brewington was unable to address any of these issues prior to the ruling of the Indiana Supreme Court because Rush was the first party to raise the new issues.

Appendix iv

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

against granting Brewington relief from the fundamental/plain errors were not raised by the State but were made sua sponte by the Indiana Supreme Court.

State of Ohio)
) SS
County of Delaware)

I, Dan Brewington, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that the matters and allegations therein set forth are true.

Signature of Affiant

Subscribed and sworn to before me this 21 day of February, 2017.

[redacted]

NOTARY PUBLIC
FOR THE
STATE OF OHIO
My Commission Expires
January 20, 2020

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15002-1702-PC-003
	)	
Petitioner,	)	FILED
	)	
V.	)	MAR 03 2017
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	CLERK OF DEARBORN CIRCUIT COURT

MOTION FOR CHANGE OF JUDGE

COMES NOW the Petitioner Daniel P. Brewington ("Brewington"), pro-se, and in support of this MOTION FOR CHANGE OF JUDGE, pursuant to Indiana Post-Conviction Rule 1(4)(b), [5], as Judge Brian Hill ("Hill")[1] demonstrated both personal bias and prejudice against Brewington and in support of Brewington states as follows:

> "Under Post-Conviction Rule a 'petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner.' The rule 'requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.' State ex rel. *Whitehead v. Madison County Cir. Ct.*, 626 N.E.2d 802, 803 (Ind.1993)." *Lambert v. State*, 743 N.E.2d 719 (2001)

HILL IS DEFENDANT IN APRA LAWSUIT FILED BY BREWINGTON

Brewington named Hill as a defendant in a pending lawsuit seeking public records from the Dearborn Superior Court II. The Office of the Indiana Public

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[1] Hill serves as Rush Superior Court Judge, Rush County, Indiana.

Access Counselor issued an opinion stating Hill's reasoning in denying public access to the audio from Brewington's grand jury investigation fell short of the exceptions allowed by Indiana Statute. The Dearborn Superior Court II has yet to release a complete copy of the audio record from the grand jury investigation of Brewington.

HILL'S PREJUDICE AGAINST BREWINGTON IN DENIAL OF APRA REQUEST

In early 2012, Hill granted two separate public requests for the audio record from the grand jury investigation of Brewington and then, without warning, quickly issued an order rendering the requests "moot." In an order dated February 2, 2012, Hill stated:

> "Subsequent to the issuance of those two Orders, the Court has discovered that no audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011, and March 2, 2011 were admitted into evidence in this cause, therefore, these audio recordings are not a record in these proceedings."

Hill proceeded to state:

> "the recipients' request for audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011 and March 2, 2011...are rendered moot because there are no such audio recordings existing in this case."

Hill offered a different reasoning in denying Brewington's January 29, 2016 request for the same records. In an order dated February 4, 2016, Hill wrote:

> "The Court declines to grant the request for audio recordings from the Grand Jury proceeding occurring on February 28, 2011, March 1, 2011, and March 2, 2011. Mr. Brewington has alleged that these audio recordings were admitted into evidence at his criminal trial, however, the Court finds that they were not, and there's been no sufficient reason set forth which would necessitate the release of said audio recordings."

It should first be noted that Hill's claim that Brewington alleged the "audio recordings were admitted into evidence at his criminal trial" is patently false. There is no such documentation to support such a claim. As for Brewington's failure to provide "sufficient reason" which would necessitate the release of the grand jury audio, Indiana statute does not require the public to provide a state agency with a reason for the release of public records. Hill placed the burden of this extra requirement on Brewington and not on prior requests for records. When Brewington challenged Hill's reasoning in Brewington's complaint to the Office of the Indiana Public Access Counselor, Hill stated:

> "I am aware that the statute allows the judge who presided over the criminal trial to make decisions as to the release of grand jury information related to the criminal charges, however, I did not feel it was appropriate in this case."

Hill acknowledges that Hill's own prior reasoning for denying access to the grand jury audio were excuses to obstruct access to public records. Hill's finding that the release of the grand jury audio was not appropriate in Brewington's case is problematic because it demonstrates Hill's bias against Brewington. Hill did not apply his "appropriateness test" to prior requests for the records. Though requiring the public to provide a reason as to why a state agency should release public records is not required by Indiana Statute, Hill still did not hold a hearing or allow Brewington to present an argument as to why releasing the audio to Brewington would be "appropriate."

HILL DENIED BREWINGTON'S RIGHT TO FAIR TRIAL

"The law presumes that a judge is unbiased and unprejudiced. In re

> *Edwards*, 694 N.E.2d 701, 711 (Ind.1998); *Smith v. State*, 535 N.E.2d 1155, 1157 (Ind.1989). Our Judicial Code provides that when a judge's impartiality might be reasonably questioned because of personal bias against a defendant or counsel, a judge is to recuse himself. Ind. Judicial Conduct Canon 3(E)(1)(a); accord Edwards, 694 N.E.2d at 710. The test for determining whether a judge should recuse himself or herself under Judicial Canon 3(E)(1) is whether 'an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality.' *Edwards*, 694 N.E.2d at 711." *Timberlake v. State*, 753 N.E.2d 591 (2001)

Hill refused to address Brewington's numerous complaints regarding not having any assistance of counsel, not having specific charging information, and Brewington's right to evidence. Hill's personal or professional motives behind his actions are unclear but Hill's actions in depriving Brewington of basic constitutional rights clearly demonstrate Hill's bias against Brewington. Hill made a conscience decision to force Brewington to trial without charging information, evidence, and assistance of counsel. As such, Hill made a conscience decision to assist the State's prosecution of Brewington.

DENIAL OF COUNSEL

Throughout Brewington's criminal proceedings, Hill refused to address Brewington's complaints about not having any access to counsel with Brewington's public defender, Bryan Barrett ("Barrett")[2]. There is no evidence in the record to dispute this claim.

DENIAL OF CHARGING INFORMATION

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[2] Barrett is Chief Public Defender for Rush County, Indiana. Hill's courtroom and office as well as Barrett's office are in the Rush County Courthouse. Hill was aware of Barrett's refusal to provide Brewington with any legal assistance prior to trial but did nothing to protect Brewington's right to counsel.

As early as Brewington's March 11, 2011 arraignment hearing, Brewington expressed concern about a lack of information from the State informing Brewington which of Brewington's actions were responsible for the indictments. During the July 18, 2011, pretrial hearing, Barrett admitted both Brewington and Barrett were unaware of what conduct the State alleged to be unlawful. Tr. 20-20. During the final pretrial hearing on September 19, 2011, Brewington reiterated, "I have absolutely no explanation of the alleged crimes leading to the charges against me including dates, specific incidents, etc." Tr. 72. At the beginning of Brewington's October 3, 2011, jury trial, Brewington stated, "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." Tr. 3-4. At no point, did Hill ask Brewington what parts of the indictments Brewington did not understand. At no point, did Hill address the matter with Barrett. At no point on record was Brewington provided an explanation of charges.

DENIAL OF EVIDENCE

During the opening minutes of Brewington's trial, Brewington stated:

> "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."

Hill took no measures to investigate any of Brewington's concerns. Brewington never received access to the evidence.

HILL FORCED BREWINGTON TO REPRESENT HIMSELF ON MATTERS

During the final pretrial hearing on September 19, 2011, Hill forced Brewington to explain Brewington's objections to the State's motion for an anonymous jury when Barrett refused to object. Hill never confronted Barrett about Barrett's refusal to object and preserve an appealable issue. Not only did Hill deny Brewington the assistance of counsel on the matter, Hill also jeopardized Brewington's 5th amendment right against self-incrimination.

HILL PLAYED AN ADVERSARIAL ROLE AGAINST BREWINGTON

During Brewington's final pretrial hearing on September 19, 2011, Brewington asked Hill to continue the trial scheduled for October 3, 2011 because Barrett refused to discuss the criminal case with Brewington, Brewington had yet to receive any specific charging information, and Brewington had not been provided with much of the State's evidence. Hill's response was as followed:

> "I thought when we were here last you were complaining the trial hadn't happened yet." Tr. 76

The record of Brewington's criminal proceedings are void of Brewington complaining about the trial not occurring.

HILL LIED TO BREWINGTON ABOUT ENTERTAINING MOTION FOR SPECIAL PROSECUTOR

Brewington raised the issue of appointing a special prosecutor during a pre-trial hearing on June 17, 2011 following the recusal/withdrawal of three officials in Brewington's case. In an order dated March 17, 2011, Judge Sally (Blankenship) McLaughlin disqualified herself from Brewington's case stating:

> "To avoid the appearance of bias or prejudice, no judicial officer in Dearborn County is able to hear this matter." -REQUEST FOR APPOINTMENT OF SPECIAL JUDGE BY THE INDIANA SUPREME COURT, filed March 17, 2011.[3]

Falling in between McLaughlin and the appointment of Hill was the appointment of Special Judge John A. Westhafer. In a letter to Chief Justice Randall T. Shepard, dated May 2, 2011, Westhafer stated he had known Humphrey "for 25 years and consider[ed] him to be a good friend." On May 25, 2011, Westhafer recused himself from Brewington's case citing a possible conflict. During a pre-trial hearing on June 17, 2011, Hill granted a motion to withdraw filed by Brewington's first public defender, John Watson. Despite representing Brewington for over two months, Watson filed a MOTION TO WITHDRAW, dated May 23, 2011, stating:

> "That Counsel has multiple cases in Judge Humphrey's court and accepts conflict public defender cased for Judge Humphrey, who is a victim in this case.
>
> Counsel feels that this situation at minimum creates an appearance of impropriety."

It was during the June 17, 2011 hearing that Brewington addressed the appearance of impropriety regarding the Office of the Dearborn County Prosecutor. Dearborn County Prosecutor F. Aaron Negangard obtained indictments against Brewington after Negangard made Brewington the target of a grand jury investigation claiming Brewington made "over the top" and "unsubstantiated

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[3] McLaughlin's recusal came just six days McLaughlin set Brewington's bond at $500,000 surety and $100,000 cash. Despite the absence of any criminal history by Brewington, McLaughlin set the outrageous bond claiming Brewington had a "history of not following Court orders and a general disdain for the authority of the Court and the legal system."

statements" about Judge Humphrey [GJ Tr. 338], while Negangard actively served as the Dearborn County Prosecutor and prosecuted cases before Dearborn Circuit Judge James D. Humphrey. During the pretrial hearing, Brewington stated:

> [M]y concern at this point is that there's going to be more conflicts in this case... [Judge Blankenship] recused herself because she stated that no Dearborn County judicial officer could hear it. Judge Westhafer recused himself because he...had a personal relationship with Judge Humphrey and then Mr. Watson is suggesting his withdrawal because of similar uh, uh, conflicts and I just had to bring into question the Dearborn County prosecutor's office, uh, having the same conflict...Negangard has a political relationship, uh, has a professional, professional relationship as he hears cases in this courtroom or he tries cases in this courtroom in front of Judge Humphrey."

Hill provided Brewington with the following response:

> "Well I'm not going to hear a request on that. If that's the case, we have to get an out of county Judge for every criminal filing in the filing[sic]." "So if you have something like that you want to put that in writing and back that up with some case law, then I would be willing to hear that at a later date."

Following the June 17, 2011 hearing, Hill appointed Barrett to represent Brewington. Barrett refused to meet with Brewington to discuss Brewington's criminal case before trial. Hill ignored Brewington's numerous pleas to appoint counsel willing to provide any legal assistance to Brewington prior to trial. After Barrett refused meet with Brewington, share evidence with Brewington or challenge the unconstitutional indictments, Brewington filed three pro se motions at the beginning of trial on October 3, 2011, which included Brewington's MOTION TO DISQUALIFY F. AARON NEGANGARD AND APPOINTMENT OF SPECIAL PROSECUTOR. Though instructing Brewington to file a motion regarding a special

prosecutor, Hill refused to consider any of Brewington's motions. Hill's response to Brewington's motions was as followed:

> "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?" Tr. 3

Brewington responded,

> "No your honor. Uh, I just, Mr. Barrett hasn't met with me since July, I believe the 17th of this year... 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...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...I have absolutely no idea what's going on in my case." Tr. 4

Hill interpreted Brewington pleas for evidence, charging information, ADHD medication, and legal counsel as a request by Brewington to represent himself in the matter. Hill gave the following response to Brewington's pleas for help:

> 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... Tr. 5

Brewington responded:

> "No, no, no, I want [competent] 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." Tr. 5

Hill gave only the following reply to Brewington's numerous pleas:

> "Okay that was the answer to my question. Uh, Mr. Barrett, are you ready to proceed with this case today?"

Bryan Barrett replied "Yes your honor" and Barrett, Prosecutor Negangard, and Judge Hill, proceeded with a criminal trial, while ignoring the fact Barrett never had any intention to subject the prosecution's case against Brewington to any adversarial testing.

HILL ENHANCED SENTENCING DUE TO BREWINGTON'S REQUESTS FOR CONSTITUTIONAL RIGHTS

> "[W]hat makes it even more crazy to me in this whole thing is almost every, every time that you get the opportunity to do, uh, make a statement or, or just the volumes of evidence that was presented at the, uh, the trial, I guess I've never seen anyone better at manipulating or turning the facts around to make yourself out to be the victim. And, I guess that just makes the, the certain things of the case even more egregious." -Judge Hill, Brewington Sentencing Hearing, September 24, 2011 Tr. 81

Brewington did not testify in his own trial thus leaving out any opportunity for Brewington to respond to the prosecution's case against Brewington. Brewington's only statements prior to trial were pleas to Hill for charging information, evidence, and assistance of counsel, which Hill refused to address. Hill accused Brewington of "manipulating facts" and cited "volumes of evidence that was presented at the, uh, the trial" despite the fact Hill refused to protect Brewington's ability to review all the State's "volumes of evidence."

CONCLUSION

In arguing his motives for withdrawing as Brewington's first public defender, John Watson stated:

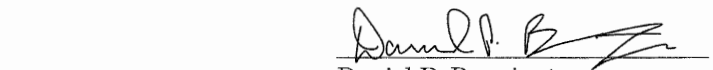
> "It seems to me that to properly defend [Brewington] it would be necessary to take Judge Humphrey's deposition and that of his wife as well who is listed as a witness in this cause."

Barrett never attempted to take any depositions. Barrett never collected any evidence or subpoenaed any witnesses for trial. Barrett refused to challenge Negangard's outrageous claim that the Indiana Rules of Professional Conduct criminalized Brewington's normally protected speech. Tr. 515. Barrett did absolutely nothing to prepare a defense for Brewington's trial and Hill not only looked the other way, Hill told Brewington Hill had "never seen anyone better at manipulating or turning the facts around to make yourself out to be the victim." This is simply Hill's attempt at manipulating the record. Hill's manipulation continued in obstructing the release of grand jury audio. Rather than address Hill's varying excuses in denying APRA requests for grand jury audio, excuses the PAC found to fall short of any statutory exceptions under Indiana law, Hill created a set of "alternative facts" to cast doubt on Brewington's character, while questioning Brewington intentions in requesting the grand jury audio. Hill ignored the fact that Barbara Ruwe, Court Reporter for the Dearborn Superior Court II, varied from the State's Praecipe directing the court reporter to "prepare and certify a full and complete transcript of the grand jury proceedings in this cause of action" and prepared an "abridged" version of the grand jury transcripts for no apparent reason. Rather than acknowledge Ruwe obstructed Brewington's right to charging

information and evidence in a criminal trial, Hill issued an order giving Ruwe the latitude to arbitrarily alter the names and format of audio files from the grand jury proceedings at Ruwe's discretion. Brewington understands that Hill currently possesses the jurisdiction to rule on this motion. Though some of the above allegations Brewington may appear extreme, Brewington's assertions are grounded in fact and Brewington bears the burden of raising these matters now in the case that Hill would make to further attempts to obstruct Brewington's fundamental rights, thus forcing the matter to a federal court.

WHEREFORE, for the above reasons and others mentioned in Brewington's VERIFIED PETITION FOR POST-CONVICTION RELIEF, Brewington requests that Special Judge Brian Hill recuse himself from matters pertaining to Cause No. 15D02-1103-FD-084 and Brewington's VERIFIED PETITION FOR POST-CONVICTION RELIEF, Cause No. 15002-1702-PC-003, and to award Brewington any other appropriate relief.

Respectfully submitted,



Daniel P. Brewington
Plaintiff, pro se

State of Ohio)
) SS
County of Delaware)

I, Daniel Brewington, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing motion; that I know the contents thereof; that it includes grounds for the recusal of Judge Brian Hill in this motion; and that the matters and allegations therein set forth are true.

Signature of Affiant

Subscribed and sworn to before me this 1st day of March, 2017.

[redacted]

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, first-class postage prepaid, on March 1, 2017.

Brian D. Hill, Judge
Judge, Rush Superior Court
101 East Second Street, 3rd Floor
Rushville, IN 46173
(765) 932-3520

Office of the Dearborn County Prosecutor
Dearborn Superior Court II
215 W High St
Lawrenceburg, IN 47025

Daniel P. Brewington
Plaintiff, pro se

STATE OF INDIANA

COUNTY OF DEARBORN

DEARBORN SUPERIOR COURT II

CAUSE NO. 15D02-1702-PC-0003

DANIEL BREWINGTON,
Plaintiff

vs

STATE OF INDIANA,
Defendant

ORDER GRANTING MOTION FOR CHANGE OF VENUE FROM JUDGE

Comes now the Court on Petitioner's Motion for Change of Judge and **FINDS** that Petitioner's Motion shall be granted. Pursuant to Indiana Trial Rule 79(D), the parties may agree to an eligible Special Judge and shall have seven (7) days from the date of this order is noted in the Chronological Case Summary, to reduce any agreement to writing, and file the same with the Court. If no such agreement is filed with the Court within seven (7) days, the Dearborn Court Clerk is directed to select a Special Judge Pursuant to Indiana Trial Rule 79(H) and Dearborn Local Rule AR-8.

ALL OF WHICH IS ORDERED this 6th day of March, 2017.

BRIAN D. HILL, Special Judge
Dearborn Superior Court II

Distribution:
Dearborn Superior Court Clerk
Honorable Brian D. Hill
Attorney for Plaintiff/Plaintiff
Attorney for Defendant/Defendant

STATE OF INDIANA)
) SS:
COUNTY OF DEARBORN)
)
DANIEL P. BREWINGTON)

v.

STATE OF INDIANA)

DEARBORN SUPERIOR COURT II

GENERAL TERM 2017

15D02-1702-PC-003

FILED

MAR 21 2017

CLERK OF DEARBORN CIRCUIT COURT

STATE'S ANSWER

Comes now the State of Indiana by Andrew A. Krumwied, Deputy Prosecuting Attorney for the Seventh Judicial Circuit, and for State's Answer to Defendant's Petition for Post-Conviction Relief filed in this cause, states as follows:

1. It is without sufficient information to admit or deny paragraphs 1 AND 3 through 18, and therefore enters a general denial.
2. It admits the allegations contained in paragraph 2.
3. Further, as to any allegation included in the Petition not covered by paragraphs 1 and 2, *supra*, it enters a general denial, or any other pleading that State, through the Prosecutor's Office in Lawrenceburg has not received.
4. The State is also without sufficient information to admit or deny any allegations contained within Petitioner's attached appendices, labeled Appendix i through Appendix iv, and therefore enters a general denial.
5. State also raises the affirmative defenses of laches, waiver, *res judicata*, estoppel, time limitations of TR 60, failure to lodge a direct appeal, and failure to state a claim upon which relief can be granted.

WHEREFORE, the State of Indiana requests the Court to deny Defendant's Petition for Post-Conviction Relief, and for all other relief just and proper in the premises.

Respectfully submitted,

Andrew A. Krumwied
Deputy Prosecutor
Seventh Judicial Circuit
215 West High Street
Lawrenceburg, IN 47025
Tel. (812) 537-8777
ISB# 32654-45

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Answer was served upon Petitioner, at [redacted], via regular mail on the date of filing.

Andrew A. Krumwied

LYNN DEDDENS
Prosecuting Attorney

Seventh Judicial Circuit
Dearborn and Ohio Counties
Courthouse
215 West High Street
Lawrenceburg, IN 47025

OH 452
23 MAR 17
FRI 24

Daniel P. Brewington
8894 Glassford Ct. N
Dublin, OH 43017

43017-833894

Appellant App. 97

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
	)	
Petitioner,	)	
	)	
V.	)	
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	

FILED

APR 03 2017

CLERK OF DEARBORN CIRCUIT COURT

MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S VERIFIED PETITION FOR POST-CONVICTION RELIEF

Petitioner, Daniel Brewington ("Brewington"), pursuant to Indiana Rules of Trial Procedure 56, files this Motion for Summary Judgment and attached Memorandum in Support and states the following:

1) Brewington's Motion for Summary Judgment makes a prima facie showing that record of the grand jury proceedings was altered upon direction of Dearborn County Prosecutor F. Aaron Negangard[1] to deprive Brewington of a fair trial; thus, entitling Brewington to judgment as a matter of law.

2) Any potential defense, appeal, objection, waiver, etc., by Brewington was premised on Negangard's impermissible criminal defamation argument and not the

[1] Negangard now serves as Chief Deputy to Indiana Attorney General Curtis Hill.

"true threat" argument Negangard instructed court reporters to omit from the record of the grand jury transcripts.[2]

A) Negangard switched "playbooks" on Brewington, prohibiting Brewington's ability to mount a defense against Negangard's "real" case, while forcing Brewington to focus on the "plainly impermissible" criminal defamation prosecution.

3) All Affirmative Defenses made by the Prosecution Fail

4) Negangard broke the law by, under color of law, making Brewington the target of a grand jury investigation in retaliation for constitutionally protected activity; or Negangard broke the law by arguing a constitutionally permissible ground for Brewington's indictments then instructed the court reporter for the Dearborn Superior Court II to omit the permissible ground from the record of the grand jury in order to deny Brewington the opportunity to prepare a defense.

5) A simple prima facie review of the "invited error" finding in *Brewington v. State*, 7 N.E.3d 946 (2014), requires the reversal of Brewington's intimidation convictions.

6) Brewington's convictions arising from the unconstitutional indictments are "blatant violations of basic and elementary principles, and the harm or the potential

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[2] Brewington's Verified Petition for Post-Conviction Relief explains Brewington's defense counsel failed to prepare any defense for Brewington's trial because defense counsel refused to ever discuss the case with Brewington prior to trial. Brewington raised the matter on several occasions but Special Judge Brian Hill refused to investigate any of Brewington's claims.

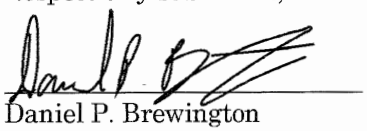
for harm cannot be denied" and are reviewable by this Court. *Smith v. State*, 459 N.E.2d 355 (1984).

7) The other grounds raised in Brewington's VERIFIED PETITION FOR POST-CONVICTION RELIEF are no less egregious but the topic of the abuse of grand jury records and the grand jury process is self-evident upon prima facia review. Brewington raises the issues in his MOTION FOR SUMMARY JUDGMENT to avoid wasting the time and resources of the Special Judge in the case and to finally allow Brewington to resume a normal life following former Dearborn County Prosecutor F. Aaron Negangard's malicious prosecution.

8) The controversy created by the altered grand jury record places unbelievable hardships on Brewington. These hardships are in addition to the emotional and financial tolls already endured by Brewington because of the unconstitutional trial and Brewington's 2.5-year incarceration.

WHEREFORE, for the reasons set forth in this MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PETITIONER and attached MEMORANDUM IN SUPPORT, Brewington requests that this Court grant Brewington's Motion for Summary Judgment by vacating Brewington's convictions in Cause No. 15D02-1103-FD-00084, and/or order the Court Reporter of the Dearborn Superior Court II to prepare an official and unedited copy of the grand jury audio from the grand jury investigation of Daniel Brewington so Brewington can make a greater showing of fraud, and to award Brewington any other appropriate relief.

Respectfully submitted,



Daniel P. Brewington
Plaintiff, pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, first-class postage prepaid, on March 31, 2017.

Brian D. Hill, Judge
Judge, Rush Superior Court
101 East Second Street, 3rd Floor
Rushville, IN 46173
(765) 932-3520

Sally A. McLaughlin, Judge
Judge, Dearborn Superior Court II
215 W High St
2nd Floor
Lawrenceburg, IN 47025
(812) 537-8800

Barbara Ruwe, Chief Court Reporter
Dearborn Superior Court II
215 W High St
2nd Floor
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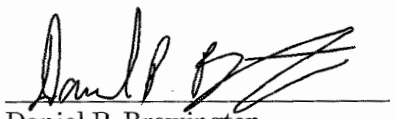
(812) 537-8800

Indiana Attorney General Curtis Hill
Deputy Joshua R. Lowry
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 233-6215



Daniel P. Brewington
Plaintiff, pro se

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
COUNTY OF DEARBORN	)	GENERAL TERM 2017
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
Petitioner,	)	
V.	)	
STATE OF INDIANA	)	
Respondent.	)	

FILED
APR 03 2017
CLERK OF DEARBORN CIRCUIT COURT

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PETITIONER'S VERIFIED PETITION FOR POST-CONVICTION RELIEF

Plaintiff, Daniel Brewington ("Brewington"), pursuant to Indiana Rules of Trial Procedure 56, files this memorandum in Support of Plaintiff's Motion for Summary Judgment and in support states the following:

1) In Reed v. Reid, 980 N.E.2d 277 (2012) The Indiana Supreme Court explained the moving party in a motion for summary judgment "'bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.' Gill v. Evansville Sheet Metal Works, Inc., 970 N.E.2d 633, 637 (Ind.2012)."

A) The following is FACT:

i) The Office of the Dearborn County Prosecutor misled Brewington about the nature of the indictments and withheld indictment and charging

information and evidence depriving Brewington any opportunity to subject the State's case to any adversarial testing.

ii) On March 7, 2011, Dearborn County Prosecutor F. Aaron Negangard filed the State's Praecipe requesting the Court Reporter of the Dearborn Superior Court II to prepare a complete transcript from the grand jury proceedings occurring on February 28,2011, March 1, 2011, and March 2, 2011. See Praecipe attached hereto as "Exhibit A".

iii) Chief Court Reporter Barbara Ruwe certified the grand jury transcripts as being "complete." See "Exhibit B".

iv) During the pretrial hearing on July 18, 2011, Deputy Prosecutor Joeseph Kisor explained the State's case against Brewington was based on the "complete" transcription of the grand jury proceedings in question. See transcript from July 18, 2011 hearing, attached as "Exhibit C".

v) Page one from the transcription of the grand jury proceedings begins at witness testimony. See "Exhibit D". (for the Court's convenience, a copy of the 340-page transcript can be viewed at http://www.dadsfamilycourtexperience.com/Grand_Jury_Transcript.pdf)

vi) There were no orders or petitions directing Ruwe to transcribe select portions of the official record of the grand jury proceedings.

vii) "Indiana Code § 35-34-1-7 provides that '[a]n indictment shall be dismissed upon motion when the grand jury proceeding which resulted in the

indictment was conducted in violation of IC 35-34-2.'" *Wurster v. State*, 715 N.E.2d 341 (1999).

viii) Brewington's case differs from *Wurster* in the fact that the State instructed Brewington to build a defense from the transcription of the grand jury proceedings and then omitted portions of the proceedings without telling Brewington.

B) The grand jury transcripts are void of the following

i) Any record of the grand jury investigation prior to witness testimony.

ii) Negangard making any mention of a "true threat" ground or instruction for Brewington's indictment.

iii) Negangard providing a reading of the subsections in the intimidation statute or any instruction of what sections of the intimidation statute applied to Brewington's case.

iv) Any specific instruction from Negangard of what actions were alleged to be in violation of Indiana law.

v) Any explanation of what statement the State alleged to constitute perjury.

C) Dearborn County Prosecutor F. Aaron Negangard deprived Brewington of indictment information and evidence by doing at least one of the following:

i) Instructing the court reporter to only record select portions of the grand jury proceedings; or,

ii) Instructing court reporter Barbara Ruwe to deviate from the State's Praecipe, filed by Negangard on March 7, 2011, and only transcribe select portions of the grand jury audio.

2) Any potential defense, appeal, objection, waiver, etc., by Brewington was premised on Negangard's impermissible criminal defamation argument and not the "true threat" argument that Negangard instructed court reporters to omit from the record of the grand jury transcripts.[1]

A) Negangard switched "playbooks" on Brewington, prohibiting Brewington's ability to mount a defense against Negangard's "real" case, while forcing Brewington to focus on the "plainly impermissible" criminal defamation prosecution.

3) All Affirmative Defenses of the Prosecution Fail

A) Res Judicata

> "If an issue was known and available but not raised on direct appeal, it is waived. *Rouster*, 705 N.E.2d at 1003. If it was raised on appeal, but decided adversely, it is res judicata. Id. (citing *Lowery v. State*, 640 N.E.2d 1031, 1037 (Ind.1994))." *Stevens v. State*, 770 N.E.2d 739 (2002)

i) All prior appealable issues in Brewington's case are refreshed for the purposes of this Post-Conviction action because all prior arguments by Brewington did not take into account the indictment information Negangard withheld from Brewington.

---

[1] Brewington's Verified Petition for Post-Conviction Relief explains Brewington's defense counsel failed to prepare any defense for Brewington's trial because defense counsel refused to ever discuss the case with Brewington prior to trial. Brewington raised the matter on several occasions but Special Judge Brian Hill refused to investigate any of Brewington's claims.

ii) Res judicata does not bar Brewington's constitutional claim regarding the incomplete grand jury transcript. The error was neither harmless nor unintentional. The damage inflicted to Brewington is best demonstrated in the opinion in *Brewington*, where Justice Loretta Rush wrote:

> "Instead, like *Bachellar*, any confusion arises only because of how the case was argued and how the jury was instructed. Specifically, the prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ('criminal defamation' without actual malice). See Tr. 455-56. Then, the jury was instructed on all eight alternative forms of 'threat' under Indiana Code section 35-45-2-1(c), App. 16, without any instruction that for these particular victims, threats of 'criminal defamation' under (c)(6) and (7) also require 'actual malice' That makes it quite possible that the impermissible criminal-defamation theory formed at least part of the basis for the jury's guilty verdicts, and the general verdict cannot indicate otherwise." *Brewington v. State*, 7 N.E.3d at 962

iii) It was impossible for Brewington to mount a defense against the permissible "true threat" ground because the grand jury transcripts make no mention of a "true threat" ground in either the plain reading of the statute or the brief instructions from Negangard near the end of the grand jury proceedings.

iv) Placing the burden on Brewington to object to the prosecution introducing a new ground for Brewington's convictions near the end of trial overlooks the fact that Brewington was left unable to defend the "true threat" ground that the prosecution waited until the end of trial to introduce.

v) As such, a res judicata defense only prevails under the contention that the Dearborn County Prosecutor believes Brewington waived the issue because Brewington failed to object to Negangard withholding evidence and indictment

information, while the State waited until the closing moments of trial to introduce a new ground for Brewington's conviction.

B) Laches Defense:

> "For laches to apply, the State must prove by a preponderance of the evidence that the petitioner unreasonably delayed in seeking relief and that the State is prejudiced by the delay. For post-conviction laches purposes, prejudice exists when the unreasonable delay operates to materially diminish a reasonable likelihood of successful re-prosecution." *Tuck v. State*, 79A02-1511-PC-2032

i) Laches obviously fails as a defense because the re-prosecution of Brewington's case would rest on the prosecution effectively having to say, "Okay, the prosecution agrees that it will provide Defendant with all of the charging information *this time*." Any retrial of Brewington would also constitute double jeopardy because the State could not rely on the same evidence for the failed criminal defamation indictment to retry Brewington under a new true threat premise.

C) Estoppel

i) The two-step analysis explained in *Reid v. State* demonstrates that the Estoppel defense asserted by the Dearborn County Prosecutor is not only invalid, but requires this Post-Conviction Court to vacate Brewington's convictions:

> "Further, in order to apply the doctrine of collateral estoppel, the court must engage in a two-step analysis. We must first determine what the first judgment decided, and then examine how that determination bears on the second case. Segovia, 666 N.E.2d at 107. Determining what the first judgment decided involves an examination of the record of the prior proceedings including the pleadings, evidence, charge and any other relevant matters. Id. The court must then decide whether a reasonable

> jury could have based its verdict upon any factor other than the factor of which the defendant seeks to foreclose consideration. Id. If the jury could have based its decision on another factor, then collateral estoppel does not bar relitigation. Id." *Reid v. State*, 719 N.E.2d at 457

ii) Page 338 of the abridged version of the grand jury transcripts prepared by Ruwe contains Negangard's only instruction to the grand jury as to the nature of the investigation and why Brewington's actions were unlawful. Negangard failed to make any argument that Brewington's conduct amounted to "true threats" nor did Negangard give any "true threat" instruction. Negangard only provided the following instruction:

> 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 Emily 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"

iii) Negangard proceeded to give a general reading of the intimidation indictments without any mention of subsections (c)(1) - (8), which define threats under the intimidation statute.

iv) In *Brewington v. State*, 7 N.E.3d 946 (2014), authored by Loretta H. Rush, the Indiana Supreme Court stated:

> "Nothing on the face of the indictments, then, creates confusion between protected or unprotected acts as the basis for conviction. Instead, like Bachellar, any confusion arises only because of how the case was argued and how the jury was instructed. Specifically, the prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ('criminal defamation' without actual malice). See Tr. 455-56."

v) Brewington was unable to waive or challenge a "true threat" ground because Negangard never presented a "true threat" ground for Brewington's indictments during the grand jury proceedings.

vi) For the Dearborn County Prosecutor to argue that Brewington waived the ability to raise the "true threat" ground through Post-Conviction Relief, the Prosecutor would have to produce a record of the grand jury proceeding that was previously omitted from the original transcripts or concede that Brewington's intimidation convictions rested on a prosecutorial ground not presented to the grand jury.

D) Time Limitations of TR 60

i) Any alleged time limitations of TR 60 do not apply in the current case.

ii) The Office of the Dearborn County Prosecutor and the Dearborn Superior Court II at some point came to an agreement to withhold portions of the grand jury proceedings from Brewington; thus, withholding charging information and evidence.

iii) If the Dearborn County Prosecutor maintains the grand jury transcripts are an accurate representation of the audio from the grand jury proceedings, then the Dearborn Superior Court II and former Dearborn County

Prosecutor F. Aaron Negangard failed to record the entire grand jury investigation as required by law and Brewington's convictions should be vacated.

E) Failure to Lodge a Direct Appeal; Waiver

i) Further arguments by the Dearborn County Prosecutor that Brewington is barred from seeking Post-Conviction Relief due to failure to lodge a direct appeal or any other waiver must be disregarded because Brewington cannot appeal or object to prosecutorial arguments unlawfully withheld from Brewington.

ii) Negangard and the court reporter from the Dearborn Superior Court II omitted the "true threat" ground for Brewington's indictment from either the audio of the grand jury proceedings or the transcription of the audio. To argue otherwise requires acknowledging that the current Chief Deputy Attorney General for the State of Indiana convened a grand jury, under color of law, and prosecuted Brewington for constitutionally protected activity.

4) One way or the other, Negangard Broke the Law

A) If Negangard failed to present a constitutional ground for Brewington's indictments:

i) Negangard made Brewington a target of a grand jury investigation in retaliation for Brewington's protected speech.

B) If Negangard presented a constitutionally permissible "true threat" ground for Brewington's indictments:

i) Negangard instructed the court reporter to not record the grand jury proceedings where Negangard introduced the "true threat" ground, or

ii) Negangard instructed court reporter Barbara Ruwe not to include the "true threat" ground from the transcription of the audio.

iii) Both scenarios are examples of conspiracies to deprive Brewington of liberties protected by the Constitution of the United States.

5) A prima facie review of the "invited error" finding in *Brewington* alone, requires the reversal of Brewington's intimidation convictions. Chief Justice Loretta H. Rush made the following arguments for invited error waiver in the opinion of the Indiana Supreme Court:

> "[Brewington] is correct that the instructions were erroneous and created a general-verdict error--but he affirmatively invited those errors as part of a perfectly reasonable trial strategy. When an error is invited for such legitimate reasons, it is neither fundamental error nor ineffective assistance of counsel." *Brewington v. State*, 7 N.E.3d at 972

> "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" *Brewington v. State*, 7 N.E.3d at 975

> "Emphasizing Defendant's protected speech about the family court system while downplaying the threatening aspects of his communications and conduct was objectively reasonable, precisely because so much of Defendant's speech was protected, at least when viewed in a vacuum. But that approach depended on the same constitutional imprecision Defendant now complains of. Were it not for that apparent strategy, Defendant's arguments would be well taken." *Brewington v. State*, 7 N.E.3d at 976-77

A) This Post-Conviction Court should take note that the trial record is absolutely void of Brewington's public defender's thoughts on a trial strategy. With

that said, Brewington's convictions require reversal because regardless of Rush's baseless opinions on trial strategy, Brewington could not invite the errors associated with the unconstitutional grand jury indictments.

i) Negangard provided the grand jury with only one ground for Brewington's intimidation indictments: "criminal defamation".

ii) The grand jury transcripts are void of a "true threat" instruction mentioned in the opinion written by Justice Rush.

iii) Thus, Rush's perception of Barrett's trial strategy becomes impossible as well as Brewington's ability to invite the fundamental errors, because the grand jury transcripts demonstrate that Negangard only provided one ground for Brewington's intimidation indictments; criminal defamation.

B) Rush's findings require the reversal of Brewington's indictments under *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984).

i) Even assuming Rush could read the mind of Brewington's public defender, Bryan Barrett ("Barret") and determine Barrett's strategy, Brewington's convictions require reversal under *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984).

ii) Since the grand jury transcripts are void of any mention of a "true threat" ground for Brewington's indictments, Barrett's trial strategy, as perceived by Rush, would require Barrett to have prepared a defense strategy against a prosecutorial argument that was not raised until the end of trial.

iii) Rush's contention requires Barrett to have devised a trial strategy against an allegation not made by the State, which is not only incompetent, but delusional.

iv) If Barrett's strategy was not formed out of delusions, Barrett's "strategy" in not challenging the unconstitutional indictments and forcing Brewington to undergo an unnecessary trial can only be viewed as a strategy to sabotage Brewington's case.

6) *Smith v. State*, 459 N.E.2d 355 (1984).

> "[W]hen the record reveals blatant violations of basic and elementary principles, and the harm or the potential for harm cannot be denied, we will review an issue which was not properly raised and preserved. *Webb v. State*, (1982) Ind., 437 N.E.2d 1330, 1332; *Nelson v. State*, (1980) Ind., 409 N.E.2d 637, 638. This case is one in which the error rises to what is known as fundamental error, one which, if not rectified, would deny the defendant fundamental due process. *Nelson v. State*, 409 N.E.2d at 638." *Smith v. State*, 459 N.E.2d 355 (1984).

A) It cannot be overstated enough that Negangard either convened a grand jury seeking indictments against Brewington's protected speech, or Negangard obtained indictments under a "true threat" ground while omitting the "true threat" ground from the record of the grand jury proceedings. Negangard forced Brewington to trial without providing Brewington the ability to prepare a defense against the constitutionally permissible "true threat" ground.

B) The official record of the grand jury proceedings CANNOT begin with the foreman swearing in a witness, yet Negangard had the proceedings recorded or transcribed in this manner to prohibit Brewington from understanding the prosecution's case against him.

C) It goes without saying that the above actions are some of the most egregious examples of fundamental error and due process violations possible. If Negangard never argued a "true threat" ground for Brewington's indictments for intimidation, then Negangard sent Brewington to prison for a non-crime and neither Barrett nor Judge Brian Hill did anything to protect Brewington's rights.

D) If the Office of the Dearborn County Prosecutor wishes to contest Brewington's MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PETITIONER, Brewington requests this Court compel the Court Reporter of the Dearborn Superior Court II to release the entire unaltered audio from the grand jury investigation of Daniel Brewington so Brewington can determine whether the Court Reporter failed to record the grand jury proceedings in its entirety or if Barbara Ruwe omitted portions of the grand jury proceedings from the transcription of the audio.

7) The other grounds raised in Brewington's VERIFIED PETITION FOR POST-CONVICTION RELIEF are no less egregious but the topic of the abuse of grand jury records and the grand jury process is self-evident upon prima facia review. Brewington raises the issues in his MOTION FOR SUMMARY JUDGMENT to avoid wasting the time and resources of the Special Judge in this case and to finally allow Brewington to resume a normal life following former Dearborn County Prosecutor F. Aaron Negangard's malicious prosecution.

8) The controversy created by the altered grand jury record places unbelievable hardships on Brewington. These hardships are in addition to the emotional and

financial tolls already endured by Brewington because of the unconstitutional trial and Brewington's 2.5-year incarceration.

A) Brewington has been saddled with the burden of researching statutes, case law, civil procedures, and drafting legal petitions because Brewington cannot afford legal representation in the matter.

B) Even if Brewington could afford legal representation, the facts surrounding the incomplete grand jury record requires an attorney to lodge accusations of unethical/illegal conduct between the Dearborn Superior Court II and former Dearborn County Prosecutor, F. Aaron Negangard, who is now Chief Deputy to Indiana Attorney General Curtis Hill.

C) A recent email from Brewington's former appellate attorney, "civil rights attorney" Michael Sutherlin, of Michael K. Sutherlin & Associates, demonstrates the difficulties in finding an attorney willing to directly address prosecutorial misconduct on this level and the tremendous unchecked power wielded by Indiana prosecutors. Email attached hereto as "Exhibit E".

i) Following the filing of Brewington's Verified Petition for Post-Conviction Relief, on February 24, 2017, at 10:41 AM, Brewington emailed Sutherlin the following:

> "Mr. Sutherlin,
>
> The following link includes a copy of the petition for post-conviction relief I filed this week. I wanted you to be aware as it includes a claim of ineffective assistance of appellate counsel
>
> http://danbrewington.blogspot.com/2017/02/brewington-takes-new-legal-action-in.html?m=1

Dan Brewington"

ii) Sutherlin's response was as followed:

"DAN, I hope you have a life outside of the running fight with Negangard. Please send me your PCR, I didn't want to review your website to find it.

Michael Sutherlin"

iii) As Brewington made no mention of Negangard in Brewington's email, Sutherlin's reference to "running fight with Negangard" had to be in reference to Brewington's blog post containing the link to Brewington's Verified Petition for Post-Conviction Relief. Brewington's blog, dated February 24, 2017, stated the following:

Brewington takes new Legal Action in light of Altered Grand Jury Records

The State of Indiana prosecuted me for criminal defamation of court officials. I was given a $600,000 bond, denied charging information, denied evidence, and denied the ability to consult legal counsel prior to trial. The Indiana Supreme Court upheld my convictions based on a hidden threat argument never made by the prosecution. Several years later, I discovered that Barbara Ruwe, Chief Court Reporter for the Dearborn County (IN) Superior Court II, altered grand jury transcripts to assist Dearborn County Prosecutor F. Aaron Negangard in his unconstitutional prosecution against me. (Negangard is now the Chief Deputy Attorney General under Indiana Attorney General Curtis Hill.) When the Indiana Office of the Public Access Counselor deemed the grand jury audio in my case to be a releasable public record, the Dearborn Superior Court II modified the grand jury audio to ALMOST match the transcripts but came up a little short. In modifying the audio, the "official" copy of the audio does not contain the same amount of information as the transcription of the same audio. Page one of the grand jury transcripts is void of any instruction from the prosecutor and begins with witness testimony. This gave Negangard the freedom to request indictments for any alleged conduct regardless of truth, because Negangard knew such instruction would be omitted from the official record. As such, I have refiled my public records lawsuit seeking grand

jury audio and I have filed a motion for Post-Conviction Relief to have my convictions thrown out.

D) During Brewington's appeal, Sutherlin echoed the same sentiments expressed to Brewington's by Brewington's appointed public defender, Bryan Barrett. Both Sutherlin and Barrett explained to Brewington, "An Indiana prosecutor can indict a ham sandwich."

E) The acceptance of prosecutorial misconduct in Indiana is at an alarming level when even a civil rights attorney like Michael Sutherlin characterizes Brewington as being irrational for choosing to continue Brewington's "running fight with Negangard." An explanation of the "fight" Sutherlin refers to is as follows:

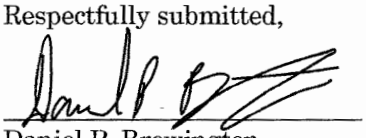
i) Negangard's fight with Brewington consists of making Brewington's protected speech the target of a grand jury investigation, conspiring with court employees to alter grand jury records to withhold indictment information and evidence, with the intent to assist Negangard in securing convictions against Brewington's protected speech.

ii) Brewington's "fight" with Negangard consists of repairing the damage inflicted by Negangard through Post-Conviction Relief, because Brewington refuses to accept the notion that Brewington is just another ham sandwich.

WHEREFORE, for the reasons set forth in this MEMORANDUM and in Brewington's MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF, Brewington requests that this Court grant Brewington's Motion for Summary Judgment by vacating Brewington's convictions in Cause No. 15D02-1103-FD-00084, and/or order the Court Reporter of the Dearborn Superior Court II to

prepare an official and unedited copy of the grand jury audio from the grand jury investigation of Daniel Brewington, and award Brewington any other appropriate relief.

Respectfully submitted,



Daniel P. Brewington
Plaintiff, pro se

State of Ohio)
) SS
County of Delaware)

I, Daniel Brewington, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; and that the matters and allegations therein set forth are true.

Signature of Affiant

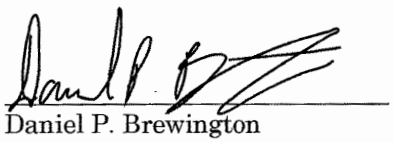
Subscribed and sworn to before me this 31st day of March, 2017.

[redacted]

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon the parties listed below, by United States mail, first-class postage prepaid, on March 31, 2017.

Office of the Dearborn County Prosecutor
215 W. High St.
Lawrenceburg, Indiana 47025



Daniel P. Brewington
Plaintiff, pro se

EXHIBIT A

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	) SS:	
COUNTY OF OHIO	)	GENERAL TERM, 2011
STATE OF INDIANA	)	
	)	
V.	)	
	)	
DANIEL BREWINGTON	)	CAUSE NO. 15D02-1103-FD-084

FILED
MAR 07 2011
CLERK OF DEARBORN CIRCUIT COU

PRAECIPE

Comes now the State of Indiana by F. Aaron Negangard, Prosecuting Attorney for the Seventh Judicial Circuit, and praecipes the Court Reporter of the Dearborn Superior Court II to prepare and certify a full and complete transcript of the grand jury proceedings in this cause of action.

F. Aaron Negangard
Prosecuting Attorney
Seventh Judicial Circuit
Dearborn County Courthouse
215 West High Street
Lawrenceburg, IN 47025
TX (812) 537-8884
ISB #18809-53

15D02-1103-FD-00084, 1 Pgs
03/07/2011 Id: 0000162788
PRAECIPE

EXHIBIT B

STATE OF INDIANA

COUNTY OF DEARBORN

Grand Jury
Daniel Brewington

IN THE DEARBORN SUPERIOR II COURT

REPORTER'S CERTIFICATE

I, Barbara Ruwe, Reporter of the Dearborn Superior Court II, Dearborn County, State of Indiana, do hereby certify that I am the court reporter of said Court, duly appointed and sworn to report the evidence of causes tried therein.

That upon the hearings of the grand jury in this cause, I transcribed all of the statements of the witnesses given during the hearings.

I further certify that the foregoing transcript, as prepared, is full, true, correct and complete.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my Seal this 15 day of June, 2011.

Barbara Ruwe

Barbara Ruwe
Dearborn Superior Court II
Dearborn County, Indiana

EXHIBIT C

APPEARANCES

ON BEHALF OF THE STATE:

BRIAN JOHNSON
DEPUTY PROSECUTING ATTORNEY
AND
JOSEPH KISOR
CHIEF DEPUTY PROSECUTING ATTORNEY
215 WEST HIGH STREET
LAWRENCEBURG, IN 47025

ON BEHALF OF THE DEFENDANT:

BRYAN BARRETT
RUSH COUNTY PUBLIC DEFENDER'S OFFICE
101 EAST SECOND STREET, ROOM 315
RUSHVILLE, IN 46173

DANIEL BREWINGTON – HEARING ON JULY 18, 2011

COURT: We're here in Case No. 15D02-1103-FD-84, State of Indiana versus Daniel Brewington. Let the record reflect that the State appears by Deputy Prosecuting Attorney, Mr. Kisor, and the Defendant appears in person and by counsel, Bryan Barrett. This matter is set today for a pre-trial conference and a bond reduction hearing, however the State had file a Motion to Continue that bond reduction hearing due to the fact that a material witness for that hearing would be unavailable on today's date and while I have not signed that in writing, I have indicated telephonically both to the prosecutor's office and to defense counsel, I would be granting that motion as to the bond reduction hearing and perhaps maybe get a solid date scheduled on today's date for that and also it was indicated to me that the parties wish to have this pre-trial conference. Right now we have a jury trial setting of August 16th, to commence that trial at 8:30 a.m. on that morning. Are there any specific issues that the State wishes to address today, Mr. Kisor?

MR. KISOR: No your honor.

COURT: And Mr. Barrett anything aside from scheduling that bond reduction hearing?

MR. BARRETT: Um, well I'm still trying to get discovery. I've been through some this morning with Mr. Brewington and I will get that from Mr. Watson I guess as soon as possible Judge but at this point, no. When is the Court looking at the bond hearing?

COURT: Well I just grabbed a few dates on my calendar at home before I left. If we wanted it earlier, we can get on the phone with my office and see. That first week of August, there's August 1st, I have the whole afternoon and August 3rd and August 5th, all those afternoon dates. I don't know if those may work with counsel and we don't have to have an answer right here, if we want to.

MR. BARRETT: The 1st, the 3rd, and the 5th? Is that what you said?

COURT: Yes, all in the p.m. Maybe counsel and I can discuss that after the hearing and see and make any of those a solid date.

MR. KISOR: That would work, what I would like to do, if we can have an opportunity to talk to the witness who is unavailable today to make sure with that much notice that whatever date we set, we would not miss the position of not having him here for that next hearing.

COURT: Would that be possible to do this afternoon?

MR. KISOR: I believe I could reach him by cell phone. I would

		hope.
MR. BARRETT:		I know I have a jury trial in Franklin County that's currently set on the 1st. I've moved to continue that but I don't know if that's been granted or not. As far as I know the 3rd or the 5th would be fine, Judge.
COURT:		Okay.
MR. BARRETT:		Obviously my client is eager to have that hearing as quickly as possible.
COURT:		I understand that.
MR. BARRETT:		And I think that probably has a lot to do with whether or not…
COURT:		Well and that's why, I was hoping to do this on the same time…
MR. BARRETT:		…exactly…
COURT:		…but it's not going to happen but I thought maybe that would have some bearing on your position as far as the jury trial. As far as the discovery and everything goes…
MR. BARRETT:		I don't have any reason to believe I can't get it from Mr. Watson. Obviously Mr. Brewington has a substantial amount here himself but I don't, he's obviously in custody so I don't actually have access to that on a regular basis.
MR. KISOR:		Your honor, we would be happy to provide a duplicate copy if you want to stop down in the

		office, I'm sure we could get this, whatever we've got, we could either reprint it or if there's something we could put on a disk for you, we would be glad to...
MR. BARRETT:		Okay.
MR. KISOR:		The paralegal is down there that would be able to do that and I could go down with you.
MR. BARRETT:		Okay.
COURT:		So aside from getting that scheduled maybe we can deal with some of the discovery after this hearing.
MR. BARRETT:		Can I have just a minute Judge? I'm sorry.
COURT:		Sure, go ahead.
MR. BARRETT:		The inquiry that my client is making and obviously I'm at some disadvantage Judge as what specific, the informations in the indictments, the information and indictments are pretty general, I guess and they cover broad periods of time and I'm just obviously wondering what the specific things the government is saying that my client did that constituted intimidation and the various other offenses but obviously that's a discovery issue and probably for another hearing.
COURT:		Okay.
MR. BARRETT:		And obviously that was kind of the purpose of the bond hearing as well was those can certainly be

		used for that purpose as well.
COURT:		Well maybe I'm presuming wrong, I would anticipate the State's going to be putting on some specific evidence at that, for purposes of the bond hearing.
MR. KISOR:		Uh, possibly, although there were some other matters unrelated to the indictments that were pertinent to the issue of bond, some subsequent matters.
COURT:		Okay, I understand but I presume we'll hear…
MR. KISOR:		Yes, I mean, if particularly the Court would make that request. There is a, as far as I know, a complete transcript of the grand jury proceedings.
MR. BARRETT:		I do have that.
MR. KISOR:		So I mean that would be what the grand jury determined.
MR. BARRETT:		I have not had an opportunity to go over that with Mr. Brewington, but that's generally the information that you're relying upon?
MR. KISOR:		Yes.
MR. BARRETT:		Okay.
MR. KISOR:		And I would be glad to talk to you more specifically more about that.
COURT:		Anything else that needs to be addressed on the record at this time, Mr. Barrett?

1	MR. BARRETT:	No Judge, we would request that the trial date be
2		left at this point in time.
3	COURT:	Okay, I'll leave that jury trial setting on and we will
4		discuss matters, I'll allow the parties to make some
5		phone calls and maybe contact that witness and see
6		if we can be back here on the 3rd or the 5th of
7		August, sometime in one of those afternoons. That
8		will be all for this hearing for today.
9	MR. BARRETT:	Thank you, your honor.
10	MR. KISOR:	Thank you, your honor.

EXHIBIT D

TRANSCRIPT OF GRAND JURY PROCEEDINGS

DANIEL BREWINGTON

FEBRUARY 28, 2011,
MARCH 1, 2011,
MARCH 2, 2011

PAGES 1 - 250

Barbara Ruwe
Official Court Reporter
Dearborn Superior Court II

APPEARANCES

ON BEHALF OF THE STATE:

AARON NEGANGARD

PROSECUTING ATTORNEY

215 WEST HIGH STREET

LAWRENCEBURG, IN 47025

TABLE OF CONTENTS

MR. NEGANGARD: Alright, we would call our first witness, Michael Kreinhop. Would you swear in the witness?

FOREMAN: Yes. Do you solemnly swear or affirm that the testimony you are about to give in the matter now under consideration by the grand jury will be the truth, the whole truth and nothing but the truth? And do you further solemnly swear or affirm that you will not divulge any portion of your testimony before this grand jury except when legally called upon to do so?

MR. KREINHOP: I do.

MR. NEGANGARD: Um, please state your name for the record.

MR. KREINHOP: Michael Kreinhop. Kreinhop is spelled K-R-E-I-N-H-O-P.

MR. NEGANGARD: And if you could briefly give your background and training in law enforcement.

MR. KREINHOP: I've been a police officer and I'm in my thirty-eighth (38th) year as a police officer and currently hold the position of Sheriff of Dearborn County. Prior to that I am retired from the Indiana State Police with thirty-four (34) years of service and I also worked in the Special Crimes Unit for one (1) year and also I was Chief Deputy for Dearborn County Sheriff's Department for one (1) year prior

EXHIBIT E

From: Michael Sutherlin
To: Dan Brewington
Subject: Re: Appearance being withdrawn
Date: Friday, February 24, 2017 10:48:58 AM

DAN, I hope you have a life outside of the running fight with Negangard. Please send me your PCR, I didn't want to review your website to find it.
Michael Sutherlin

On Fri, Feb 24, 2017 at 10:41 AM, Dan Brewington <contactdanbrewington@gmail.com> wrote:

Mr. Sutherlin,

The following link includes a copy of the petition for post-conviction relief I filed this week. I wanted you to be aware as it includes a claim of ineffective assistance of appellate counsel

http://danbrewington.blogspot.com/2017/02/brewington-takes-new-legal-action-in.html?m=1

Dan Brewington

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." - John Adams

On May 26, 2014, at 1:56 PM, Michael Sutherlin <msutherlin@gmail.com> wrote:

> Dear Dan and Sue,
> I will be withdrawing my appearance in the criminal appeal still before the Indiana Supreme Court as well as my appearance in the family court matter. I understood from our last phone conversation
> that I was fired. I had hoped for a better result from the Supreme Court and I do understand your unfavorable opinion of the Indiana court system. Good luck in all that you undertake. I will keep your file materials, and will return them to you if you desire. But they are too bulky to mail. Michael
> --
> Michael K. Sutherlin & Associates, PC
> P.O. Box 441095
> Indianapolis, IN 46244-1095
> 317-634-6313
> 317-631-8818 (fax)
> msutherlin@gmail.com
>
> This electronic mail transmission and any attachments are confidential and may be privileged.
> They should be read or retained only by the intended recipient. If you have received this
> transmission in error, please notify the sender immediately and delete the transmission from
> your system.

STATE OF INDIANA	)	DEARBORN SUPERIOR COURT II
	) SS:	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	
v.		
		15C01-1702-PC-003
STATE OF INDIANA	)	

STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Comes now the State of Indiana for the Seventh Judicial Circuit, by Andrew A. Krumwied, Deputy Prosecuting Attorney, as Respondent, and hereby requests the Court to grant a 30-day extension of time to respond to Petitioner's Motion for Summary Judgment, and in support of said request states as follows

1. Petitioner filed his seventy-two page Verified Petition for Post-Conviction Relief on February 22, 2017.
2. The State of Indiana filed an Answer to that Petition on March 21, 2017.
3. Petitioner next filed a nineteen-page Motion for Summary Judgment and Memorandum in Support on April 3, 2017.
4. Petitioner's original Petition includes nineteen separate alleged grounds for relief.

Therefore, based upon the volume of allegations contained in both the Petition and Motion for Summary Judgment, the State now requests an additional 30 days to respond to Petitioner's Motion and provide the necessary accompanying affidavits in support thereof.

Respectfully submitted,

Andrew A. Krumwied 32654-45
Deputy Prosecuting Attorney
7th Judicial Circuit
215 W. High St.
Lawrenceburg, IN 47025

Certificate of Service

I hereby certify that a copy of the foregoing Motion was served upon the Petitioner at [redacted] via regular mail on the date of filing.

Andrew A. Krumwied

STATE OF INDIANA)
) SS:
COUNTY OF DEARBORN)
)
DANIEL P. BREWINGTON)

DEARBORN SUPERIOR COURT II
GENERAL TERM 2017

FILED
MAY 12 2017
CLERK OF DEARBORN CIRCUIT COURT

v.

15D01-1702-PC-003

STATE OF INDIANA)

ORDER ON STATE'S MOTION FOR EXTENSION OF TIME

Comes now the State of Indiana by Andrew A. Krumwied, Deputy Prosecuting Attorney for the Seventh Judicial District, having filed its Motion for Extension of Time, which Motion is on file with the Clerk and a part of the Clerk's record.

The Court, having examined said Motion and being duly and sufficiently advised in the premises, finds said Motion is well taken and should be granted

IT IS THEREFORE CONSIDRERED, ORDERED, AND ADJUDGED by the Court that said Motion for Extension of Time is granted, and the State shall have until the 8 day of June, 2017 at 3:00 P.M. to file its response to Petitioner's Motion for Summary Judgment.

W. Gregory Coy, Special Judge
Dearborn Superior Court II

cc: Prosecutor
Petitioner

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
COUNTY OF DEARBORN	)	GENERAL TERM 2017
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
Petitioner,	)	FILED
V.	)	MAY 30 2017
STATE OF INDIANA	)	CLERK OF DEARBORN CIRCUIT COURT
Respondent.	)	

REQUEST FOR ORDER COMPELLING PRODUCTION OF GRAND JURY RECORD

Petitioner, Daniel Brewington ("Brewington"), files this REQUEST FOR ORDER COMPELLING PRODUCTION OF GRAND JURY RECORD and states the following:

In the case that this Court should not grant Brewington's Motion for Summary Judgment, the complete release of the grand jury record is necessary if Brewington bears the burden to demonstrate the degree of fundamental error associated with the court staff of the Dearborn Superior Court II assisting the Office of the Dearborn County Prosecutor in obstructing Brewington's access to indictment information prior to trial.

RECENT HISTORY OF THIS CASE

1) On March 31, 2017, Brewington filed his Motion for Summary Judgment demonstrating that the record of the grand jury proceedings was altered; thus,

depriving Brewington the ability to subject the prosecution's case to any meaningful adversarial testing and entitling Brewington to judgment as a matter of law.

2) On May 3, 2017, the Office of the Dearborn County Prosecutor filed the STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT.

3) On May 12, 2017, this Court granted the State's motion and gave the State until 3pm on June 8, 2017 to file a response.

FACTS OF THE CASE

4) On March 7, 2011, Dearborn County Prosecutor F. Aaron Negangard[1] filed the State's PRAECIPE directing the Court Reporter of the Dearborn Superior Court II "to prepare and certify *a full and complete*" [emphasis added] transcript from the grand jury proceedings occurring on February 28, 2011, March 1, 2011, and March 2, 2011. [See attached "EXHIBIT A"]

5) During a pretrial hearing on July 18, 2011, when questioned about the State's vague indictments, Deputy Prosecutor Joeseph Kisor instructed Brewington's public defender to rely on the complete transcription of the grand jury proceedings for an understanding of the State's case against Brewington. [See pages no. 20-21 of transcript attached as "EXHIBIT B"]

6) Brewington encourages this Court to take special notice of page no. 17 of EXHIBIT B and pages 4-8 from the Chronological Case Summary ("CCS") in this

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[1] Negangard currently serves as Chief Deputy to Indiana Attorney General Curtis Hill.

case to see how Judge Brian Hill[2] ("Hill") played an active role in denying Brewington's ability to obtain charging information prior to trial. [CCS attached as "EXHIBIT C"] A history of the events surrounding the grand jury transcript is as followed:

6/1/11 - Hill assumes jurisdiction of Brewington's criminal case.
6/3/11 - Hill sets hearing for 6/17/11 on public defender's motion to withdraw.
6/17/11 - Hill sets case for jury trial on 8/16/11.
7/18/11 - Bryan Barrett[3] files appearance as Brewington's new public defender.
7/18/11 - Barrett said he nor Brewington understood the nature of the indictments.
7/18/11 - Kisor instructs Barrett to rely on "complete" transcript of grand jury.[4]
7/21/11 - Hill sets Bond Reduction hearing for 8/3/11
8/4/11 - Motion to vacate 8/3/11 bond reduction hearing[5]
8/4/11 - Order vacating 8/3/11 bond reduction hearing.
8/4/11 - Hill signs Voir Dire Order on Hill's own motion.
8/11/11 - State files Motion to Release Grand Jury Exhibits.
8/16/16 - Original date of Brewington's jury trial.
8/17/11 - Order Vacating 8/16/11 Jury Trial filed on the court's own motion.
8/23/11 - Order to Release Grand Jury Exhibits (signed 8/17/11)

7) Immediately after assuming jurisdiction of the case, Hill scheduled Brewington's jury trial approximately two months after the hearing on the Motion to Withdraw filed by Brewington's first public defender and less than one month after Brewington's second public defender filed an appearance. Hill observed Deputy Kisor instructing Barrett to rely on a complete transcription of the grand jury proceedings for an explanation of the general indictments. Despite vacating the

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[2] Brian Hill serves as Superior Court Judge in Rush County, Indiana.
[3] Hill appointed Barrett who is the Chief Public Defender in Rush County, IN.
[4] During the hearing on 7/18/11, Barrett claimed to be in possession of the grand jury transcript despite not being release by the Court. If Barrett did possess the transcript at that time, Hill knew Barrett withheld charging information from Brewington from 7/18/11 until less than two weeks before the trial on 10/3/11.
[5] Certificate of Service states a copy was provided to prosecutor on 8/3/11.

hearing scheduled for 8/3/11 due to Barrett's personal matters[6], Hill still filed Voir Dire Order knowing Barrett had absolutely no idea about the State's case against Brewington because Hill did not release the grand jury records until Negangard admitted them during Brewington's bond reduction hearing on 8/17/11. If not for Barrett's family emergency, Hill would have allowed Brewington to face a jury trial knowing neither Barrett nor Brewington had access to the indictment information allegedly contained in the grand jury transcript. Barrett's lack of objection to the trial being scheduled prior to the State releasing the grand jury transcript/indictment information serves as an early indicator that Barrett never intended to provide Brewington with competent legal representation. Hill denied Brewington's request for a lower bond knowing Brewington and Barrett still had no idea why Brewington had been detained since 3/11/11.[7] The transcripts from the final pretrial hearing on 9/19/11 show Hill acknowledging that neither Barrett nor Brewington had yet to receive the grand jury transcripts. The transcripts from the 9/19/11 hearing also show Negangard making the following statement about Barrett's representation:

> "Now in October, now in September where we are two (2) weeks from the jury trial, now he's um mad that his attorney hasn't talked to him enough as far as I can tell." Tr. 78 at 6-9

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[6] Barrett's mother passed around that period of time.

[7] The record of Brewington's 8/17/11 bond reduction hearing is void of any mention of Brewington's actions related to the indictments.

The CCS shows three pro se filings made by Brewington on the first day of trial, 10/3/11: Motion to Dismiss for Ineffective Assistance of Counsel, Motion to Disqualify F. Aaron Negangard and Appointment of a Special Prosecutor, and Motion to Dismiss. Brewington's pro se motions challenged, among many things, the fact that Barrett never met with Brewington to ask about, review, or explain the criminal case to Brewington, while Barrett denied Brewington any opportunity to participate in the preparation of Brewington's own defense. Hill's reasoning for denying Brewington's pro se motions was that Brewington had legal representation; the same representation Negangard acknowledged had yet to meet with Brewington just two weeks prior.

8) The record of Brewington's criminal case is void of any order or directive instructing the court reporter to deviate from the State's PRAECIPE.

9) It was well after Brewington's release from prison when Brewington discovered the grand jury transcript was incomplete.

10) Chief Court Reporter Barbara Ruwe omitted portions of the grand jury proceedings from the transcription of the grand jury audio, yet still certified the transcript as being "full, true, correct and complete."

11) The transcription of the grand jury record in the investigation of Brewington is void of any record of the proceedings occurring prior to witness testimony. [Digital copy of grand jury transcript attached hereto as "EXHIBIT D."]

12) It was the latter part of 2016 when Brewington discovered that the Dearborn Superior Court II altered the audio of the grand jury record.

13) The audio record of the grand jury investigation of Brewington is incomplete as the audio is also void of any record of the proceedings prior to witness testimony. [Exact copy of Grand Jury audio provided to Brewington attached as "EXHIBIT E."]

14) IC 35-34-2-3(d) mandates that "the evidence and proceedings shall be recorded in the same manner as evidence and proceedings are recorded in the court that impaneled the grand jury."

15) In comparing the file structure of official audio in proceedings in the Dearborn Superior Court II, the court staff converted the format of the audio files in Brewington's grand jury record from Waveform Audio File format (.wav) to a Windows Media Audio format (.wma) in addition to modifying file names. [See comparison of audio files in Dearborn Superior Court II attached as "EXHIBIT F."]

16) The grand jury audio contains *less* content than that of what was supposed to be a "full, true, correct and complete" transcription of that same audio. [Examples of missing attached hereto as "EXHIBIT G."]

17) In *Brewington v State*, the Indiana Supreme Court wrote:

> Specifically, the prosecutor argued two grounds for Defendant's convictions, one entirely permissible (true threat) and one plainly impermissible ("criminal defamation" without actual malice). See Tr. 455-56. Then, the jury was instructed on all eight alternative forms of "threat" under Indiana Code section 35-45-2-1(c), App. 16, without any instruction that for these particular victims, threats of "criminal defamation" under (c)(6) and (7) also require "actual malice." *Brewington v. State*, 7 N.E.3d at 973

18) Court Reporter Ruwe omitted the "entirely permissible (true threat)" ground from the grand jury transcript in addition to "all eight alternative forms of "threat"

under Indiana Code section 35-45-2-1(c)" that Negangard provided to the grand jury.

19) Ruwe omitted Negangard's instruction to the grand jury indicating which of Brewington's statements constituted perjury and Negangard's instruction to the grand jury indicating what grand jury information Brewington allegedly leaked.

20) Ruwe's transcription included only Negangard's "plainly impermissible ('criminal defamation' without actual malice)" instruction to the grand jury.

21) Ruwe's transcription is void of Negangard providing any explanation as to how any of Brewington's actions violated Indiana law.

CONCLUSION

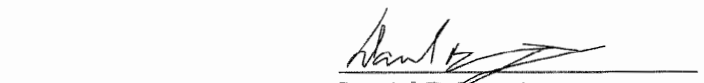
The opinion in *Brewington v. State* argued former Dearborn County Prosecutor F. Aaron Negangard provided both a permissible "true threat" ground and an impermissible "criminal defamation" ground for Brewington's convictions of intimidation/attempted obstruction of justice, but the record of the grand jury is void of a constitutionally permissible "true threat" instruction. As the record of the grand jury currently stands, Negangard convened the grand jury in the absence of a crime. The format and names of the audio files representing the grand jury have been edited and the audio contains less content than the transcription. Any attempt by Judge Sally McLaughlin to defend her staff at the Dearborn Superior Court II should fall on deaf ears because McLaughlin's staff did not "prepare and certify *a full and complete*" transcription of the grand jury proceedings as directed by the State's Praecipe and then McLaughlin's staff altered the grand jury audio several

years later, which fails to match the transcription. As such, Brewington would request that Honorable Special Judge Coy include Brewington in any communications with Dearborn Superior Court II Judge Sally McLaughlin, the court staff of the Dearborn Superior Court II, and/or the Office of the Dearborn County Prosecutor in any matter regarding the record of this case. The facts of this case are clear; the prosecution instructed Brewington to rely on a *full and complete* [emphasis added] transcription of the grand jury proceedings to prepare a defense for trial and the staff of the Dearborn Superior Court II failed to prepare such and Negangard provided Brewington with an incomplete transcription of the grand jury record, which was void of Negangard providing any constitutionally permissible ground for Brewington's indictments. Any claim by the State that Brewington's right to indictment information was waived by Barrett's non-objection requires immediate reversal of Brewington's convictions under *Cronic*. The deprivation of Brewington's "meaningful opportunity to subject the State's evidence to adversarial testing," *Ward v. State*, 969 N.E.2d 46 (2012), was a direct result of Barrett's non-objection to the prosecution's non-disclosure of indictment information, which made it impossible for Barrett to subject the State's case to the "adversarial testing" required under *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984). Though the Indiana Supreme Court denied Brewington relief from Negangard's criminal defamation instruction by claiming Barrett invited the "error" by strategically not challenging Negangard's unconstitutional criminal defamation ground for Brewington's conviction, Barrett cannot invite the error associated with

Negangard failing to provide a constitutional ground for Brewington's indictments and/or any errors associated with the court staff omitting such ground from the transcription of the grand jury proceedings. Reversal of Brewington's convictions does not prejudice the State. Any claim of a potential retrial would entail the prosecution having to provide Brewington with the constitutionally permissible indictment information that the the court staff of the Dearborn Superior Court II omitted from the record of the grand jury, which Brewington is currently seeking in filing this request. If the above is insufficient reason to vacate Brewington's convictions, then it is necessary for Brewington to obtain a full and complete copy of the grand jury audio in order to demonstrate the extent of how much indictment information the State withheld from Brewington.

WHEREFORE, for the reasons set forth in this REQUEST FOR ORDER COMPELLING PRODUCTION OF GRAND JURY RECORD, Brewington requests that this Court grant Brewington's Motion for Summary Judgment by vacating Brewington's convictions in Cause No. 15D02-1103-FD-00084, and/or order the Court Reporter of the Dearborn Superior Court II to prepare an unedited and complete copy of the grand jury audio from the grand jury investigation of Daniel Brewington so Brewington can make a greater showing of misconduct by Negangard and the court staff, and award Brewington any appropriate relief.

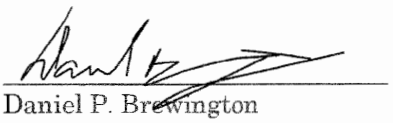
Respectfully submitted,



Daniel P. Brewington
Plaintiff, pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, prepaid, on May 27, 2017.



Daniel P. Brewington
Plaintiff, pro se

Dearborn County Prosecutor Lynn Deddens
7th Judicial Circuit
215 W. High St.
Lawrenceburg, IN 47025

EXHIBIT A

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	) SS:	
COUNTY OF OHIO	)	GENERAL TERM, 2011
STATE OF INDIANA	)	
	)	
V.	)	
	)	
DANIEL BREWINGTON	)	CAUSE NO. 15D02-1103-FD-084

FILED
MAR 07 2011
CLERK OF DEARBORN CIRCUIT COU

PRAECIPE

Comes now the State of Indiana by F. Aaron Negangard, Prosecuting Attorney for the Seventh Judicial Circuit, and praecipes the Court Reporter of the Dearborn Superior Court II to prepare and certify a full and complete transcript of the grand jury proceedings in this cause of action.

F. Aaron Negangard
Prosecuting Attorney
Seventh Judicial Circuit
Dearborn County Courthouse
215 West High Street
Lawrenceburg, IN 47025
TX (812) 537-8884
ISB #18809-53

15D02-1103-FD-00084, 1 Pgs
03/07/2011 Id: 0000162788
PRAECIPE

EXHIBIT B

APPEARANCES

ON BEHALF OF THE STATE:

BRIAN JOHNSON
DEPUTY PROSECUTING ATTORNEY
AND
JOSEPH KISOR
CHIEF DEPUTY PROSECUTING ATTORNEY
215 WEST HIGH STREET
LAWRENCEBURG, IN 47025

ON BEHALF OF THE DEFENDANT:

BRYAN BARRETT
RUSH COUNTY PUBLIC DEFENDER'S OFFICE
101 EAST SECOND STREET, ROOM 315
RUSHVILLE, IN 46173

DANIEL BREWINGTON – HEARING ON JULY 18, 2011

COURT: We're here in Case No. 15D02-1103-FD-84, State of Indiana versus Daniel Brewington. Let the record reflect that the State appears by Deputy Prosecuting Attorney, Mr. Kisor, and the Defendant appears in person and by counsel, Bryan Barrett. This matter is set today for a pre-trial conference and a bond reduction hearing, however the State had file a Motion to Continue that bond reduction hearing due to the fact that a material witness for that hearing would be unavailable on today's date and while I have not signed that in writing, I have indicated telephonically both to the prosecutor's office and to defense counsel, I would be granting that motion as to the bond reduction hearing and perhaps maybe get a solid date scheduled on today's date for that and also it was indicated to me that the parties wish to have this pre-trial conference. Right now we have a jury trial setting of August 16th, to commence that trial at 8:30 a.m. on that morning. Are there any specific issues that the State wishes to address today, Mr. Kisor?

MR. KISOR: No your honor.

COURT: And Mr. Barrett anything aside from scheduling that bond reduction hearing?

MR. BARRETT: Um, well I'm still trying to get discovery. I've been through some this morning with Mr. Brewington and I will get that from Mr. Watson I guess as soon as possible Judge but at this point, no. When is the Court looking at the bond hearing?

COURT: Well I just grabbed a few dates on my calendar at home before I left. If we wanted it earlier, we can get on the phone with my office and see. That first week of August, there's August 1st, I have the whole afternoon and August 3rd and August 5th, all those afternoon dates. I don't know if those may work with counsel and we don't have to have an answer right here, if we want to.

MR. BARRETT: The 1st, the 3rd, and the 5th? Is that what you said?

COURT: Yes, all in the p.m. Maybe counsel and I can discuss that after the hearing and see and make any of those a solid date.

MR. KISOR: That would work, what I would like to do, if we can have an opportunity to talk to the witness who is unavailable today to make sure with that much notice that whatever date we set, we would not miss the position of not having him here for that next hearing.

COURT: Would that be possible to do this afternoon?

MR. KISOR: I believe I could reach him by cell phone. I would

		hope.
MR. BARRETT:		I know I have a jury trial in Franklin County that's currently set on the 1st. I've moved to continue that but I don't know if that's been granted or not. As far as I know the 3rd or the 5th would be fine, Judge.
COURT:		Okay.
MR. BARRETT:		Obviously my client is eager to have that hearing as quickly as possible.
COURT:		I understand that.
MR. BARRETT:		And I think that probably has a lot to do with whether or not…
COURT:		Well and that's why, I was hoping to do this on the same time…
MR. BARRETT:		…exactly…
COURT:		…but it's not going to happen but I thought maybe that would have some bearing on your position as far as the jury trial. As far as the discovery and everything goes…
MR. BARRETT:		I don't have any reason to believe I can't get it from Mr. Watson. Obviously Mr. Brewington has a substantial amount here himself but I don't, he's obviously in custody so I don't actually have access to that on a regular basis.
MR. KISOR:		Your honor, we would be happy to provide a duplicate copy if you want to stop down in the

		office, I'm sure we could get this, whatever we've got, we could either reprint it or if there's something we could put on a disk for you, we would be glad to…
MR. BARRETT:		Okay.
MR. KISOR:		The paralegal is down there that would be able to do that and I could go down with you.
MR. BARRETT:		Okay.
COURT:		So aside from getting that scheduled maybe we can deal with some of the discovery after this hearing.
MR. BARRETT:		Can I have just a minute Judge? I'm sorry.
COURT:		Sure, go ahead.
MR. BARRETT:		The inquiry that my client is making and obviously I'm at some disadvantage Judge as what specific, the informations in the indictments, the information and indictments are pretty general, I guess and they cover broad periods of time and I'm just obviously wondering what the specific things the government is saying that my client did that constituted intimidation and the various other offenses but obviously that's a discovery issue and probably for another hearing.
COURT:		Okay.
MR. BARRETT:		And obviously that was kind of the purpose of the bond hearing as well was those can certainly be

		used for that purpose as well.
COURT:		Well maybe I'm presuming wrong, I would anticipate the State's going to be putting on some specific evidence at that, for purposes of the bond hearing.
MR. KISOR:		Uh, possibly, although there were some other matters unrelated to the indictments that were pertinent to the issue of bond, some subsequent matters.
COURT:		Okay, I understand but I presume we'll hear…
MR. KISOR:		Yes, I mean, if particularly the Court would make that request. There is a, as far as I know, a complete transcript of the grand jury proceedings.
MR. BARRETT:		I do have that.
MR. KISOR:		So I mean that would be what the grand jury determined.
MR. BARRETT:		I have not had an opportunity to go over that with Mr. Brewington, but that's generally the information that you're relying upon?
MR. KISOR:		Yes.
MR. BARRETT:		Okay.
MR. KISOR:		And I would be glad to talk to you more specifically more about that.
COURT:		Anything else that needs to be addressed on the record at this time, Mr. Barrett?

1	MR. BARRETT:	No Judge, we would request that the trial date be
2		left at this point in time.
3	COURT:	Okay, I'll leave that jury trial setting on and we will
4		discuss matters, I'll allow the parties to make some
5		phone calls and maybe contact that witness and see
6		if we can be back here on the 3rd or the 5th of
7		August, sometime in one of those afternoons. That
8		will be all for this hearing for today.
9	MR. BARRETT:	Thank you, your honor.
10	MR. KISOR:	Thank you, your honor.

EXHIBIT C

CHRONOLOGICAL CASE SUMMARY
CRIMINAL DOCKET, DEARBORN SUPERIOR COURT 2

FOR CAUSE NO: 15D02-1103-FD-00084
STATE VS BREWINGTON, DANIEL
JUDGE BRIAN D HILL

ACTION: CLASS D FELONY DATE FILED: 03/07/2011
CRIG FILE DT: 03/07/2011

APPLICATION FOR REDUCTION OF BAIL FILED BY DEF; BR

MIN Date: 05/13/2011 Notice: N RJO: N

MOTION FOR DISCOVERY AND REQUEST FOR RULE 404 AND 405 EVIDENCE FILED BY DEF; BR

MIN Date: 05/23/2011 Notice: N RJO: N

DISCOVERY ANSWER FILED; CK

MIN Date: 05/23/2011 Notice: N RJO: N

DISCOVERY ANSWER FILED BY DEF; BR

MIN Date: 05/23/2011 Notice: N RJO: N

MOTION TO WITHDRAW FILED BY J WATSON; BR

MIN Date: 05/25/2011 Notice: N RJO: N

ORDER OF RECUSAL SIGNED BY SPECIAL JUDGE WESTHAFER;BR

MIN Date: 06/01/2011 Notice: N RJO: N

QUALIFICATION BY SPECIAL JUDGE SIGNED;SPECIAL JUDGE BRIAN HILL.MB

MIN Date: 06/01/2011 Notice: N RJO: N

ORDER SETTING HEARING FOR JUNE 17, 2011 AT 1:30 P.M.;ORDER SIGNED BY SPECIAL JUDGE B.HILL.MB

MIN Date: 06/03/2011 Notice: N RJO: N

ORDER APPOINTING SPECIAL JUDGE BRIAN HILL; BR

MIN Date: 06/17/2011 Notice: N RJO: N

PRE-TRIAL ORDER SIGNED;

CHRONOLOGICAL CASE SUMMARY
CRIMINAL DOCKET, DEARBORN SUPERIOR COURT 2

FOR CAUSE NO: 15D02-1103-FD-00084
STATE VS BREWINGTON, DANIEL
JUDGE BRIAN D HILL

ACTION: CLASS D FELONY DATE FILED: 03/07/2011
ORIG FILE DT: 03/07/2011

BOND REDUCTION HEARING; 7/18/11; 1:30 PM;
FINAL PRE-TRIAL 7/18/11 @ 1:30 PM; PLEA DEADLINE 7/18/11;
JURY TRIAL 8/16/11 @ 8:30 AM;
BR

MIN Date: 06/17/2011 Notice: N RJO: N

ORDER TO PRODUCE EVIDENCE SIGNED;
ORDER ON WITHDRAW SIGNED; BR

MIN Date: 06/20/2011 Notice: N RJO: N

ORDER ON DEFENDANT'S REQUEST FOR APPOINTMENT OF PUBLIC DEFENDER SIGNED BY SPECIAL JUDGE B.HILL.MB

MIN Date: 06/28/2011 Notice: N RJO: N

MOTION TO CONTINUE BOND REDUCTION HEARING FILED BY STATE; BR

MIN Date: 06/29/2011 Notice: N RJO: N

SUPPLEMENTAL DISCOVERY ANSWER FILED BY State.kb

MIN Date: 07/18/2011 Notice: N RJO: N

APPEARANCE FORM FILED BY BRYAN BARRETT;;
;BR

MIN Date: 07/18/2011 Notice: N RJO: N

FINAL PRE-TRIAL HEARING; DEF W/ATTY B BARRETT; STATE BY J KISOR; COURT TO RESCHEDULE BOND REDUCTION HEARING TO AUGUST 3, 2011 AT 1:30 PM; SPECIAL JUDGE HILL; COURT TO PREPARE ORDER; BR

MIN Date: 07/21/2011 Notice: N RJO: N

ORDER TO CONTINUE FILED; BOND REDUCTION HEARING RE-SET FOR AUGUST 3, 2011 AT 1:30 PM; CK

MIN Date: 08/04/2011 Notice: N RJO: N

CHRONOLOGICAL CASE SUMMARY
CRIMINAL DOCKET, DEARBORN SUPERIOR COURT 2

FOR CAUSE NO: 15D02-1103-FD-00084
STATE VS BREWINGTON, DANIEL
JUDGE BRIAN D HILL

ACTION: CLASS D FELONY DATE FILED: 03/07/2011
ORIG FILE DT: 03/07/2011

VOIR DIRE ORDER SIGNED BY SPECIAL JUDGE HILL; BR

MIN Date: 08/04/2011 Notice: N RJO: N

MOTION TO VACATE HEARING FILED BY DEFENDANT; BR

MIN Date: 08/04/2011 Notice: N RJO: N

ORDER VACATING HEARING SIGNED; BR

MIN Date: 08/09/2011 Notice: N RJO: N

MOTION FOR CONFIDENTIALITY OF JUROR'S NAMES AND IDENTIFIES FILED BY STATE; BR

MIN Date: 08/10/2011 Notice: N RJO: N

MOTION TO RELEASE GRAND JURY EXHIBITS FILED BY STATE; BR

MIN Date: 08/11/2011 Notice: N RJO: N

ORDER VACATING JURY TRIAL SIGNED; BR

MIN Date: 08/17/2011 Notice: N RJO: N

HEARING ON BOND REDUCTION; DEF W/ATTY B BARRETT; STATE BY A NEGANGARD; SPECIAL JUDGE HILL; WITNESSES SWORN; EVIDENCE HEARD; EXHIBITS 1 THROUGH 8 ADMITTED; COURT TAKES UNDER ADVISEMENT; BR

MIN Date: 08/23/2011 Notice: N RJO: N

ORDER TO RELEASE GRAND JURY EXHIBITS FILED; CK

MIN Date: 08/23/2011 Notice: N RJO: N

ORDER DENYING BOND REDUCTION FILED; CK

MIN Date: 08/26/2011 Notice: N RJO: N

ORDER SETTING TRIAL SIGNED; BR

CHRONOLOGICAL CASE SUMMARY
CRIMINAL DOCKET, DEARBORN SUPERIOR COURT 2

FOR CAUSE NO: 15D02-1103-FD-00084
STATE VS BREWINGTON, DANIEL
JUDGE BRIAN D HILL

ACTION: CLASS D FELONY DATE FILED: 03/07/2011
ORIG FILE DT: 03/07/2011

MIN Date: 09/06/2011 Notice: N RJO: N

MOTION IN LIMINE FILED BY DEF; BR

MIN Date: 09/19/2011 Notice: N RJO: N

MOTION IN LIMINE FILED BY STATE; BR

MIN Date: 09/19/2011 Notice: N RJO: N

FINAL PRE-TRIAL HEARING HELD; BR

MIN Date: 09/26/2011 Notice: N RJO: N

SUPPLEMENTAL DISCOVERY ANSWER FILED BY STATE;

MIN Date: 09/30/2011 Notice: N RJO: N

SUPPLEMENTAL DISCOVERY ANSWER FILED BY STATE.CM

MIN Date: 09/30/2011 Notice: N RJO: N

SUPPLEMENTAL DISCOVERY ANSWER FILED BY STATE.CM

MIN Date: 10/03/2011 Notice: N RJO: N

MOTION TO DISMISS FOR INEFFECTIVE ASSISTANCE OF COUNSEL FILED BY DEF PRO SE; BR

MIN Date: 10/03/2011 Notice: N RJO: N

MOTION TO DISQUALIFY F. AARON NEGANGARD AND APPOINTMENT OF A SPECIAL PROSECUTOR FILED BY DEF PRO SE; BR

MIN Date: 10/03/2011 Notice: N RJO: N

MOTION TO DISMISS FILED BY DEF PRO SE; BR

MIN Date: 10/03/2011 Notice: N RJO: N

CHRONOLOGICAL CASE SUMMARY
CRIMINAL DOCKET, DEARBORN SUPERIOR COURT 2

FOR CAUSE NO: 15D02-1103-FD-00084
STATE VS BREWINGTON, DANIEL
JUDGE BRIAN D HILL

ACTION: CLASS D FELONY DATE FILED: 03/07/2011
ORIG FILE DT: 03/07/2011

HEARING HELD ON DEFENDANT'S PRO SE MOTIONS; DEF IN PERSON AND W/COUNSEL; STATE BY A NEGANGARD/J KISOR; COURT DENIES ALL MOTIONS FILED BY DEF PRO SE; BR

MIN Date: 10/03/2011 Notice: N RJO: N

JURY TRIAL - DAY 1

MIN Date: 10/03/2011 Notice: N RJO: N

COURT'S PRELIMINARY INSTRUCTIONS; BR

MIN Date: 10/03/2011 Notice: N RJO: N

ORDER DENYING DEFENDANT'S PRO SE MOTIONS; BR

MIN Date: 10/03/2011 Notice: N RJO: N

JURY ENTRY - OCTOBER 3, 2011; BR

MIN Date: 10/03/2011 Notice: N RJO: N

RECORD OF CHALLENGES SIGNED; BR

MIN Date: 10/04/2011 Notice: N RJO: N

JURY ENTRY - OCTOBER 4, 2011; BR

MIN Date: 10/04/2011 Notice: N RJO: N

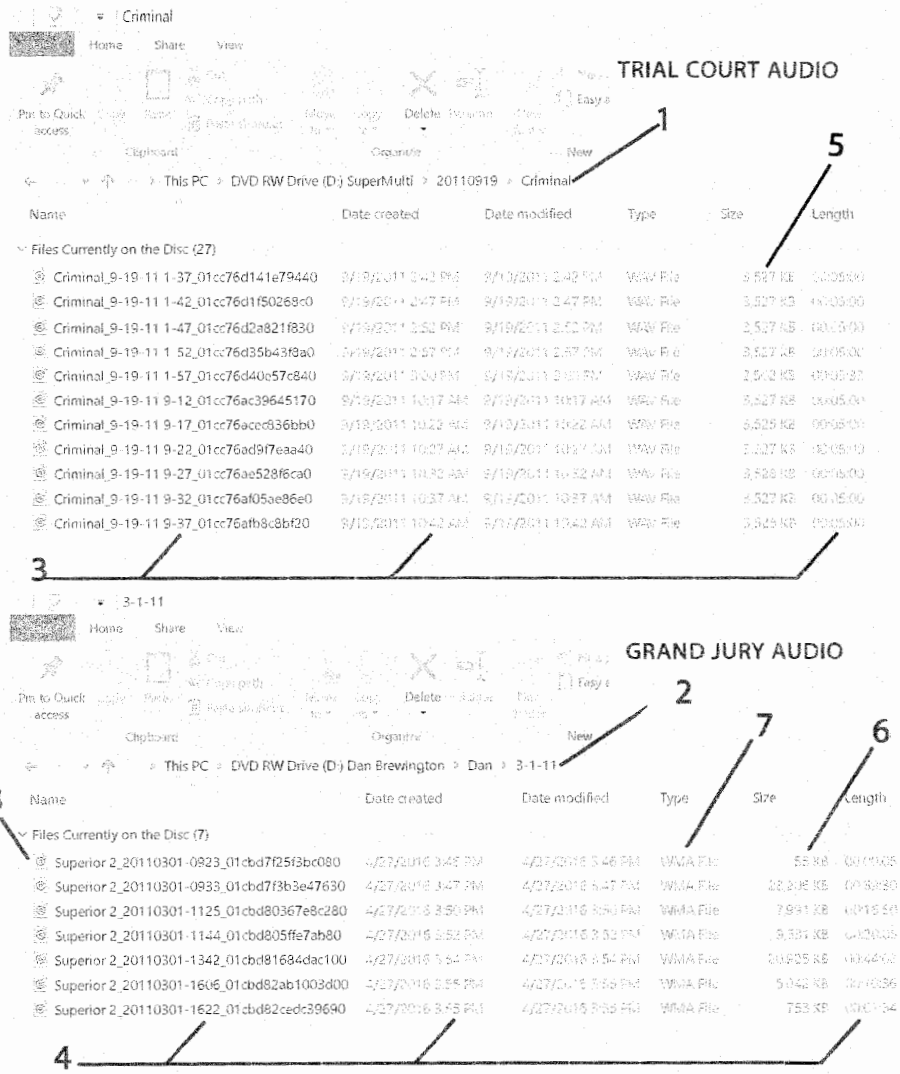
ORDER GRANTING MOTIONS IN LIMINE; BR

MIN Date: 10/05/2011 Notice: N RJO: N

JURY ENTRY - OCTOBER 5, 2011; BR

MIN Date: 10/06/2011 Notice: N RJO: N

EXHIBIT F



1) FILE NAMING STRUCTURE INCLUDES DATE AND NATURE OF PROCEEDINGS.
2) FILE NAMING STRUCTURE INCLUDES BREWINGTON'S NAME AND DATE OF 3/1/2011 PROCEEDINGS. ALSO INCLUDES A SUBFOLDER SIMPLY NAMED "DAN."
3) DATE AND TIME CREATED CORRESPONDS W/FILE NAME. 9-37 = 9:37AM (LESS DAYLIGHT SAVINGS) DATE CREATED EQUALS THE LENGTH OF AUDIO FILE + TIME WHEN AUDIO FILE WAS NAMED.
4) DATE CREATED/MODIFIED IS OVER FIVE YEARS AFTER GRAND JURY INVESTIGATION TOOK PLACE. AUDIO LENGTHS DO NOT CORRESPOND WITH FILE NAMES.
5) AUDIO FILE SIZES AND LENGTHS ARE UNIFORM AND DO NOT EXCEED 5 MINUTES.
6) AUDIO FILES SIZES AND LENGTHS VARY.
7) DEFENDANTS CHANGED FILE FORMAT OF GRAND JURY AUDIO.
8) FILE CONTAINS NO AUDIBLE DIALOGUE.

EXHIBIT G

EXAMPLES OF ALTERED GRAND JURY AUDIO

Supporting evidence for the following examples are found within the alleged transcription of the grand jury investigation of Daniel Brewington (EXHIBIT A), and the audio of the grand jury investigation of Daniel Brewington (EXHIBIT B).

I. GRAND JURY AUDIO FAILS TO MATCH WHAT COURT REPORTER RUWE ALLEGED TO BE A CERTIFIED TRANSCRIPTION OF THE SAME AUDIO

- Page 16 of the grand jury transcripts state the following:

19 MR. NEGANGARD: We'll get to that later.

20 MR. KREINHOP: Okay.

21 MR. NEGANGARD: We're back on record to so that we're addressing

22 the handgun issue.

The above exchange allegedly occurred on February 28, 2011 and appears at 0:21:36 of the audio file named [JUVENILEWS]20110228-1055_01 cbd736060e5700 within "EXHIBIT B." The audio offers a different depiction of events. Instead of transcribed account of Negangard stating "We'll get to that later," the grand jury audio provides a different account:

"We'll get, we can ge...." [audio file abruptly ends.]

Negangard failed to complete his statement. There was no "Okay" from Kreinhop. The name of the first audio file includes the numbers "20110228-1055" which translates to February, 28 2011 at 10:55 a.m. This is when the audio began. The duration of the audio file, which has obviously been cut short, is 0:21:38 (h/mm/ss). Adding the duration of the audio to the time at which the audio file began indicates the earliest the altered audio could end is 11:16:38 a.m. The name of the next audio file suggests Negangard came back on record at 11:22 a.m. As such, five minutes of the proceedings are missing.

- Page 67 of the grand jury transcripts states the following:

9 MR. NEGANGARD: Thank you. 116 is the Court of Appeals decision

10 regarding the decision of Judge Humphrey. I want

11 to break for lunch at this point. I would call Dr.

12 Edward Conner to the stand. Please swear the

13 witness in.

In the above example occurring on February 28, 2011, the audio file [JUVENILEWS]20110228-1259_01 cbd7475c37c600, which is only eleven seconds long and falls between files [JUVENILEWS]_20110228-1147 01 cbd73d41605400 and [JUVENILEWS]20110228-1431 01 cbd7542147f620. The conflict lies in the middle file. The eleven-second file contains Negangard's statement:

> *"116 is the Court of Appeals decision regarding the decision of Judge Humphrey. I want to break for lunch..."*

The audio does not include *"at this point,"* which is included in the transcript.

- Page 340, line 24 of the grand jury transcripts states the following:

24 MR. NEGANGARD: That's with regard to Dan Brewington.

The above is the final statement appearing in the transcription of Brewington's grand jury proceedings, which occurred on March 2, 2011. The audio, however, does not contain the same information. The audio in file Superior 2_20110302-1054_01cbd8c834bc3700 portrays Negangard stating:

> *"That's with regard t-"*

The audio cuts of Negangard's statement mid-word. The above half-sentence is the last audio appearing in the record of Brewington's grand jury investigation.

II. GRAND JURY AUDIO SKIPS TIME

- Page 336 of the grand jury transcript contains the following statements from Negangard:

> 23 MR. NEGANGARD: I don't have any further questions at this time.
>
> 24 Okay one of the Grand Jurors has a question for
>
> 25 Sheriff Kreinhop.

The above consists of two separate audio files, "Superior 2_20110301-1606_01cbd82ab1003d00" with a duration of 0:10:36 and "Superior 2_20110301-1622_01cbd82cedc39690" which only lasted 0:01:34. The first file consists of Kreinhop's final testimony ending with Negangard stating "I don't have any further questions." Roughly 16 seconds of ambient noise continues after Negangard's statement. A couple seconds into the second audio file, Negangard states "Okay one of the Grand Jurors has a question for Sheriff Kreinhop." Taking into consideration of the duration of the files indicated by their respective names, five minutes of the grand jury proceedings were removed.

III. AUDIO FILES LACKING DIALOGUE

- One audio file contains no dialogue.

The audio file titled Superior 2_20110301-0923_01cbd7f25f3bc080 appears at the beginning of the grand jury audio that allegedly occurred on March 1, 2011. The 5-second audio lacks any dialogue yet is somehow part of the record of the grand jury investigation of Brewington.

IN THE

INDIANA COURT OF APPEALS

Case No. 15A04-1712-PC-02889

DANIEL BREWINGTON, _____ Appellant,	)	Appeal from Dearborn County Superior Court II
v.	)	Case No. 15D02-1702-PC-0003
STATE OF INDIANA _____ Appellee.	)	Hon. W. Gregory Coy, Special Judge

---

APPELLANT APPENDIX

Volume II of III

Pages 166 through 224

Daniel P. Brewington
[redacted]
Pro Se Filing Party

STATE OF INDIANA	)	DEARBORN SUPERIOR COURT II
	) SS:	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	
v.		
		15D02-1702-PC-003
STATE OF INDIANA	)	

STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Comes now the State of Indiana by Andrew A. Krumwied, Deputy Prosecuting Attorney for the Seventh Judicial Circuit, and respectfully requests the Court deny Petitioner's Motion for Summary Judgment. In support of said request, the State of Indiana presents the attached Memorandum of Law.

Respectfully submitted,

Andrew A. Krumwied
Deputy Prosecutor
Seventh Judicial Circuit
215 West High Street
Lawrenceburg, IN 47025
Tel. (812) 537-8777
ISB# 32654-45

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Response was served upon Petitioner, at [redacted], via regular mail on the date of filing.

Andrew A. Krumwied

State's Memorandum of Law in Support of State's Response to Petitioner Motion for Summary Judgment

Procedural History

For the purposes of this memorandum and to better understand Petitioner's Motion for Summary Judgment and Petition for Post-Conviction Relief, that State feels a brief recitation of relevant procedural history is necessary.

Petitioner (hereinafter "Petitioner" or "Brewington") was indicted on March 7, 2011 by a Grand Jury in the Dearborn Superior Court II with three (3) counts of Intimidation, one (1) count of Attempt to Commit Obstruction of Justice, one (1) count of Perjury, and one (1) count of Unlawful Disclosure of Grand Jury Proceedings. Dearborn Superior Court II held an Initial Hearing in this matter on March 11, 2011. Judge Sally Blankenship disqualified herself from presiding in this matter on the basis that one of the victim's in this matter, Judge James D. Humphrey, was the sitting judge of Dearborn Circuit Court.

The Indiana Supreme Court initially appointed Judge John A. Westhafer as Special Judge pursuant to Ind. Criminal Rule 13(E) on April 14, 2011. Judge Westhafer reported an unknown conflict necessitating his recusal to the Indiana Supreme Court after his appointment, and the Court appointed Judge Brian Hill on May 27, 2011.

Petitioner was appointed Bryan Barrett as counsel on June 20, 2011 after prior counsel, John Watson, had withdrawn from representation to remedy a conflict on the basis that he was an attorney under contract as a public defender in the Dearborn Circuit Court as hired by the victim Judge Humphrey. This case was initially set for jury trial on August 16, 2011. Judge Hill, sua sponte, vacated the August 16, 2011 jury trial date on the basis that Mr. Barrett had a family

emergency that would render him unable to be prepared for trial by August 16, 2011, and reset the matter for jury trial starting on October 3, 2011.

Petitioner was convicted on Counts I-V on October 6, 2011. Petitioner was acquitted at trial of Count VI. Petitioner was sentenced by Judge Hill to an aggregate term of five (5) years executed on October 24, 2011. Petitioner timely filed his Notice of Appeal on the same date. The Court appointed appellate counsel on November 1, 2011. Privately retained appellate counsel, Michael Sutherlin, entered his appearance in the appeal on this matter on January 18, 2012.

On January 17, 2013, the Indiana Court of Appeals issued its ruling which vacated Petitioner's convictions with respects to Counts I and III, Intimidation as Class A Misdemeanors, but affirmed the conviction in all other respects. The Court entered an order vacating those convictions on January 29, 2013. See attached Exhibit A. The Indiana Supreme Court heard oral arguments regarding this case on both November 21, 2012 and September 12, 2013. The Indiana Supreme Court granted the Brewington's Petition for Transfer on May 1, 2014 and issued a unanimous decision affirming Brewington's convictions of Intimidation as indicted in Count II, Attempted Obstruction of Justice in Count IV, and Perjury in Count V. See attached Exhibit B.

Brewington filed a pro se Petition for Rehearing on June 2, 2014. Brewington also filed a pro se Petition for Judicial Disqualification of Justice Rush on June 4, 2014. The Court denied Brewington's Petition for Rehearing and certified the opinion on July 31, 2014. Justice Rush denied Brewington's Petition for Judicial Disqualification on the same date.

Brewington then filed a pro se Petition for Writ of Certiorari in the Supreme Court of the United States on October 29, 2014. The Supreme Court of the United States denied

Brewington's Petition for Writ of Certiorari on January 12, 2015. Brewington then filed a pro se Petition for Rehearing, which was denied by the Supreme Court of the United States on March 2, 2015.

Brewington filed his Verified Petition for Post-Conviction Relief in this matter on February 22, 2017, and timely filed a Motion for Change of Judge on March 3, 2017 on the basis that Judge Hill is currently a party to a separate lawsuit filed by Brewington in Dearborn County Superior Court I. The State filed its Answer to Brewington's Petition on March 21, 2017 entering a general denial to all material allegations. Petitioner then filed his Motion for Summary Judgment pursuant to Ind. R. Trial P. 56 on April 3, 2017.

Argument

Brewington Incorrectly Moves for Summary Judgment Under Indiana R. Trial P. 56

Brewington states in his Motion for Summary Judgment that he so moves under Indiana R. Trial P. 56. Rule 56(c) requires, in part, that a party opposing a motion made under the rule "shall designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." Ind. Rule Trial P. 56(c). This provision effectively requires the non-moving party to establish a material issue of fact as to every issue or allegation raised by the moving party. Aside from the fact that Brewington fails to address even the majority of the twenty grounds he alleges entitle him to relief in his Verified Petition for Post-Conviction Relief, which the State contends itself precludes Brewington from relief under Rule 56, the greater issue is that Ind. R. Trial P. 56 does not apply in Post-Conviction Relief proceedings.

Ind. R. P. Post-Conviction Remedies 1(b) states in its entirety that:

> This remedy is not a substitute for a direct appeal from the conviction and/or the sentence and all available steps including those under P.C. 2 should be taken to perfect such an appeal. *Except as otherwise provided in this rule, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence and it shall be used exclusively in place of them.*

Emphasis added. In addition to Rule 1(b), Ind. R. P. Post-Conviction Remedies 4(g) grants the court the ability to grants motions for summary disposition when requested by either party. Rule 4(g) states in its entirety that:

> The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. *If an issue of material fact is raised*, then the court shall hold an evidentiary hearing as soon as reasonably possible.
>
> Emphasis added.

As is made clear by the Indiana Rules of Procedure for Post-Conviction Remedies, Rule 4(g), rather than Indiana Rule of Trial Procedure 56, controls in this matter. Similarly, a plain text reading of Rule 4(g) shows that the State need only raise an issue of material fact to defeat Brewington's Motion for Summary Judgment.

Multiple Issues of Material Fact Exist In Regards to Brewington's Verified Petition for Post-Conviction Relief

Among Brewington's twenty alleged grounds for relief is that his indictment for Intimidation violated his First Amendment right to Freedom of Speech. This contention, however, is barred under the doctrine of *res judicata* as the Indiana Supreme Court has already ruled explicitly on the merits of Brewington's First Amendment claims. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014). "Res judicata mandates that when an appellate court decides a legal issue, both the trial court and the court on appeal are bound by that determination in any subsequent appeal involving the same case and relatively similar facts." *Saunders v. State,* 794 N.E.2d 523, 527

(Ind.Ct.App. 2003) (*citing Badger v. State*, 754 N.E.2d 930, 935 (Ind.Ct.App. 2001)). Because the Indiana Supreme Court unanimously held that there was sufficient evidence to prove that there the crime of Intimidation beyond a reasonable doubt without running afoul of the First Amendment, the indictment is therefore permissible as an indictment requires merely the finding of probable cause by the grand jury. Based upon the *Brewington* decision, any First Amendment claim is barred under *res judicata.*

Brewington also claims that because there is no explicit mention of "true threat" in the transcript or audio recordings of the grand jury proceedings, that the grand jury proceedings were therefore constitutionally defective. The State would first assert that the precise procedures of grand juries in Indiana are not dictated by either the United States Constitution nor the Indiana Constitution. Rather, Indiana Code 35-34-2 lays out the procedures for grand jury proceedings within the jurisdiction of the State of Indiana.

Brewington's claim rests entirely on the premise that without an explicit statement or argument that Brewington's actions constituted a "true threat" he could not have prepared a defense, and that he is therefore entitled to relief. This argument is without merit. Brewington now seeks to argue that he was indicted only for intimidation on the basis of "criminal defamation". However, the transcript and audio of the grand jury proceedings are also void of any such explicit reference to "criminal defamation". Indiana Code 35-34-2-12(a) requires that before deliberation the prosecuting attorney state on the record "(1) Identify each target of the grand jury proceeding; and (2) Identify each offense that each target is alleged to have committed."

Mr. Negangard, Prosecuting Attorney for the Seventh Judicial Circuit clearly met this requirement. On Page 339 of the grand jury transcript at lines 11-22, Mr. Negangard states:

> Count II, an indictment for Intimidation of a Judge which would read on, about or between August 1, 2009 and February 27, 2011, Daniel Brewington did communicate a threat to another person to wit: Dearborn-Ohio County Circuit Court Judge James D. Humphrey with intent that James D.

Humphrey be placed in fear of retaliation for prior lawful act to-wit: issuing an order regarding the dissolution of marriage between Daniel Brewington and Melissa Brewington, and James D. Humphrey is the judge of the Dearborn-Ohio County Circuit Court.

Moreover, the indictment returned conforms substantially to the requirements of I.C. 35-34-1-2. In addition, I.C. 35-45-2-1(b)(1)(B)(ii) and I.C. 35-45-2-1(a)(1), as it was in effect in 2009, 2010, and 2011 state the elements of the crime of Intimidation. I.C. 35-45-2-1(c), is a definition clause for the word "threat" as the Indiana General Assembly intended it within the meaning of the first two subsections of the statute. There is no requirement, whether statutory or otherwise, for the State to include in either indictment or information precisely which definition of the "threat" is applicable. On the contrary, the very purpose of the grand jury is to hear evidence and determine based upon that evidence whether they believe probable cause exists to indict the target for the crime alleged. Judge Humphrey testified, in direct response to a question by a juror as to the threatening nature of Brewington's actions, beyond those of defamation. Gr. Jury Tr. 330-331. And the transcript of witness testimony from other witnesses as well as evidence of Brewington's writings as entered into evidence are replete with instances of what could reasonably be interpreted by the grand jurors as "true threats". See Exhibit C.

Even if Brewington had a legitimate claim to defective indictment, no motion to dismiss under I.C. 35-34-1-4 was never made prior to trial, and is therefore waived. I.C. 35-34-1-4(a) specifically states that upon motion of defendant the court may dismiss an indictment or information upon certain statutory grounds. In particular, I.C. 35-34-1-4(a)(1), (3), (4), and (5) must be raised in a motion to dismiss "no later than: (1) Twenty (20) days if the defendant is charged with a felony; or (2) Ten (10) days if the defendant is charged only with one or more misdemeanors; prior to the omnibus date." I.C. 35-34-1-4(b)(1)&(2). Brewington now tries to raise these explicit grounds not only after the omnibus date (which was fixed at his initial hearing

as April 26, 2011) but after a jury trial, numerous appeals, and over six years' time. See Exhibits D and E. In addition, while Brewington arguably raised I.C. 35-14-1-4(a)(11) in his pro se Motion to Dismiss filed with the court on the date his trial commenced (October 3, 2011), no grounds raised in his motion entitled him to dismissal as a matter of law, and the Court had discretion based upon the language of the statute to deny said motion, which he did.

Brewington also alleges that he was denied a charging information in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitutions. While this is the specific allegation alleged in Paragraph 8(Q) found on page 6 of his Petition, as well as being restated on page 50 of the Petition, Brewington does not effectively address how he was denied a charging information, and no such requirement for a charging information exists when he was indicted by a grand jury of Dearborn County.

Brewington claims in Paragraph 8(R) as well as Paragraph 9(R) of his Petition that he "received **no assistance** of counsel" at his bond reduction hearing. Petition 52. Emphasis added. Aside from the fact that there is no cognizable legal standard of "no assistance", this claim is a gross exaggeration on its face as he does not deny that he was represented at that hearing, and that his attorney did in fact participate in the hearing. To say that he received "no assistance" is nothing more than an attempt to shade the proceedings in a light as egregiously favorable as possible to Brewington, and denies easily ascertained facts. See Exhibit F. In addition, his entire argument on this ground is that his attorney didn't understand what actions were alleged to have committed is immaterial to a bond reduction hearing anyway. As is clearly established in I.C. 35-33-8-3.2(a) (2011), the two considerations to be made by the court in determining admission to bail are "to assure the defendant's appearance at any stage of the legal proceedings, or, upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to

another person or the community, to assure the public's physical safety." Judge Hill clearly acted within the terms of the statute, and the testimony contained in the grand jury transcript is more than enough to find that Brewington did in fact pose a threat to physical safety of another person considering he was indicted for multiple counts of intimidation against members of the community.

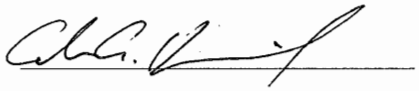
Finally, the State wishes to address the claim raised in Brewington's Motion for Summary Judgment in Paragraph 2(A) that "Negangard switched playbooks on Brewington". This claim is, to put it bluntly, nonsensical. Even if one is to assume that Brewington's baseless assertion that the grand jury transcripts were altered or otherwise incomplete, the evidence contained therein is more than enough for even a layperson to discern a "true threat". In addition, Brewington's notion that the State has ever been required to provide a playbook to the defense, aside from the constitutionally and statutorily mandated indictment, information, and discovery, is an affront unto the adversarial justice system upon which common law nations have built their laws upon for centuries. There's no evidence that any of these requirements were not met. And while Brewington may think it unfair that the State could advance multiple theories of the crime at trial, there is in fact no such prohibition, and it is common place for litigants in the criminal justice system to do so.

Conclusion

While the State of Indiana, for the sake of judicial economy and efficiency, did not address every specific ground alleged and raised by Brewington in either his Petition or Motion for Summary Judgment, the State reserves the right to address these issues at an evidentiary hearing on the matter. It is plain to see from the evidence provided that issues of material fact

exist which necessitate a hearing on Brewington's Petition, and that Brewington's Motion for Summary Judgment therefore fails. Similarly, because this Motion is required to be made under Ind. R. P. Post-Conviction Remedies 4(g) as opposed to Ind. R. Trial P. 56, the State must only show, and has raised, an issue of material fact. That State respectfully requests that the Court deny Petitioner's Motion for Summary Judgment, and set this matter for an evidentiary hearing.

Respectfully submitted,



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Seventh Judicial Circuit
ISB # 32654-45

STATE OF INDIANA ORN SUPERIOR COURT II

COUNTY OF DEARBORN CAUSE NO. 15D02-1103-FD-084

STATE OF INDIANA,
Plaintiff

vs

DANIEL BREWINGTON,
Defendant

FILED
JAN 29 2013
CLERK OF DEARBORN CIRCUIT COURT

ORDER VACATING THE CONVICTIONS AND SENTENCES FOR COUNT I, INTIMIDATION, AS A CLASS "A" MISDEMEANOR, AND COUNT III, INTIMIDATION, AS A CLASS "A" MISDEMEANOR

COMES NOW THE COURT pursuant to the published opinion of the Indiana Court of Appeals filed on January 17, 2013 and **FINDS** that the Defendant's convictions for Count I, Intimidation, and Count III, Intimidation, as Class "A" Misdemeanors were reversed with instructions to have those convictions vacated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the convictions and sentences for Count I, Intimidation as a Class "A" Misdemeanor, and Count III, Intimidation as a Class "A" Misdemeanor, should be and are hereby **VACATED**.

Vacatur does not alter the Defendant's aggregate sentence in this cause.

ALL OF WHICH IS ORDERED this 29th day of January, 2013.

BRIAN D. HILL, Special Judge
Dearborn Superior Court II

Distribution:
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In the Indiana Supreme Court

No. 15S01-1405-CR-309

DANIEL BREWINGTON,

Appellant (Defendant),

v.

STATE OF INDIANA,

Appellee (Plaintiff).

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

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

May 1, 2014

Rush, Justice.

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

Fear for one's *reputation* is often the price of being a public figure, or of involvement in public issues. But fear for one's *safety* is not.

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

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

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

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

Procedural History

In February 2011, a grand jury indicted Defendant Daniel Brewington on six charges. Four related to the Defendant's divorce case that had been finalized in mid-2009[1]: a D-felony count of intimidating the trial judge, two A-misdemeanor counts of intimidation involving the judge's wife and a psychologist who was an expert witness in the divorce, and one D-felony count of attempted obstruction of justice relating to the psychologist. He was also indicted on a D-felony count of perjury relating to his grand-jury testimony, and a B-misdemeanor count of unlawful disclosure of grand jury proceedings. A jury acquitted Defendant of the unlawful disclosure charge but convicted on all other counts, and he appealed.

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

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

---

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

Standard of Review

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

But here, as further discussed below, constitutional protection for Defendant's speech hinges on state-of-mind issues—particularly, whether he intended his communications as threats and whether his victims were reasonable in perceiving them as threats. Deferential review of such questions creates an unacceptable risk of under-protecting speech. It is our constitutional duty, then, to "make an independent examination of the whole record, so as to assure ourselves that the [conviction] does not constitute a forbidden intrusion on the field of free expression." Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446, 455 (Ind. 1999) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)) (internal quotation marks omitted). This "rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact," no matter whether the finder of fact was a judge or a jury. Bandido's, 712 N.E.2d at 455 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984)) (internal quotation marks omitted).

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

Background Facts

Defendant was a disgruntled divorce litigant dissatisfied with a child-custody evaluator's recommendation. He waged an obsessive years-long campaign—including faxes (often several per day), repetitive *pro se* motions, and Internet posts—accusing the parties' child-custody evaluator, Dr. Edward Connor ("the Doctor"), and Judge James Humphrey ("the Judge"), of "unethical" and

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

At that point, Defendant began to bombard the Doctor's office with letters and faxes, sometimes multiple times per day, making threats of civil and criminal lawsuits and professional discipline, accompanied by repeated and pointed demands to withdraw as a witness in the case. E.g., Exs. 38–39, 41, 43–44. Moreover, he accused the Doctor and Carl Taul, the original trial judge, of improper *ex parte* communications with each other, until Judge Taul eventually recused and appointed Judge Humphrey as special judge. See Ex. 120 (Order Naming Special Judge). Defendant considered his campaign a success as to Judge Taul, referring to the recusal frequently in subsequent blog posts. Exs. 160, 162, 167, 171, 191, 194. But even though those actions had led the Doctor to the professional opinion that Defendant was "potentially dangerous," Tr. 131–32; Ex. 132 at 7, he remained in the case. The Doctor ultimately opined that Defendant is paranoid, manipulative, "manic-like," "unwilling to accept responsibility for his behavior," self-centered, unreceptive to criticism, and "has difficulty seeing an issue from another's perspective"—again, "a degree of psychological disturbance that . . . does not lend itself to proper parenting." Ex. 140 (Judgment and Final Order on Decree of Dissolution of Marriage ("Decree"), Finding 8(K)).

At the final hearing, Defendant's in-court behavior—including slamming piles of books, outbursts of angry yelling, and inappropriate laughing—confirmed those impressions. See Ex. 140 (Decree, Finding 8(K)). His behavior was so volatile that the court had a sheriff's deputy in the courtroom whenever he was present. Tr. 237–38. Evidence at the hearing established that Defendant had also "made a less than subtle attempt to intimidate" his wife's counsel, who co-owned a firearms training business with her husband, by calling their home to seek weapons training from the

business while the divorce was pending, Ex. 140 (Decree, Finding 8(S))—even though the business was not actively advertised, and was located well over an hour's drive from Defendant's home, Tr. 69–70. Moreover, Defendant bought a .357 Magnum handgun shortly after his former wife filed for divorce, but never returned it to her as the Decree required, Tr. 62, 325; Ex. 140 (Decree) at Conclusion 16 & Ex. D at 3—purportedly for concern about *her* mental stability, Ex. 148 at 8 (¶ 26). And Defendant posted online that the divorce case was "like playing with gas and fire, and anyone who has seen me with gas and fire know[s] that I am quite the accomplished pyromaniac," and that authorities "would have to kill [me] to stop [me]" from posting confidential divorce details online. Ex. 140 (Decree, Findings 8(N)–(O)).

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

Defendant considered that ruling tantamount to termination of his parental rights. See, e.g., Ex. 142 at 2 (¶ 7) (characterizing decree as "terminating [Defendant's] parental rights"). But instead of taking the court-ordered steps to maintain his relationship with his children, he escalated his efforts at intimidating the Judge and the Doctor—efforts he was able to pursue full-time, since he was unemployed at all times during and after the divorce, supported by his mother's provision of a rent-free house and $2,500 monthly assistance. See Ex. 140 (Decree, Finding 9(A)). First, Defendant used the Internet (and at least implied that he would use mass mailings) to publicize the Judge's home address, Exs. 142 (attachment to Motion for Relief from Judgment), 160—leading the Judge to install a home-security system, keep a firearm ready at home for the family's protection, notify his children's schools about Defendant's threats, and arrange police escorts for his wife's commute to work, Tr. 252, 255. Then, Defendant used an ongoing series of Web posts to demonstrate his ability to find and publicize personal information about the Doctor—including his home address, Ex. 199 (causing him to fear for his children's safety, Tr. 166–67); a private family photo of him dancing at a family member's wedding, Tr. 201, Ex. 201; and details about his brother and late father, Tr. 96–97, Exs. 33, 193. He wrote in one post that the Doctor "may be a [p]ervert," Ex. 181; and in another

about a supposedly hypothetical "Dr. Custody Evaluator" who "made me so mad I wanted to beat him/her senseless" and "punch Dr. Custody Evaluator in the face," Ex. 177. Then after that, Defendant showed up at an unrelated hearing where the Doctor was testifying, bragging afterward that his presence made the Doctor "a little nervous and from a psychological standpoint he probably should have been." Ex. 200. Indeed, Defendant's actions prompted the Doctor and his wife to show his picture to their children and co-workers and notify area law enforcement requesting additional protection, while keeping his threats secret from elderly family to avoid worrying them. Tr. 159–66, 203–04.

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

Discussion and Decision

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

The grand jury indicted Defendant for intimidating the Judge under Indiana Code section 35-45-2-1(a)(2) (2008), for "communicat[ing] a *threat* to" the Judge, with the intent to "place[him] in fear of retaliation for [the] prior lawful act" of issuing the divorce decree.[2] App. 22 (emphasis added). Defendant's indictment for attempted obstruction of justice is also rooted in intimidation—

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

specifically, alleging that he tried to "*intimidate* and/or harrass [*sic*]" the Doctor to prevent him from testifying in the divorce case.[3] App. 24 (emphasis added). Both charges therefore depend on a "threat" as defined by statute:

> "Threat" means an expression, by words or action, of an intention to:
>
> (1) unlawfully injure the person threatened or another person, or damage property;
>
> (2) unlawfully subject a person to physical confinement or restraint;
>
> (3) commit a crime;
>
> (4) unlawfully withhold official action, or cause such withholding;
>
> (5) unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;
>
> (6) expose the person threatened to hatred, contempt, disgrace, or ridicule;
>
> (7) falsely harm the credit or business reputation of the person threatened; or
>
> (8) cause the evacuation of a dwelling, a building, another structure, or a vehicle.

I.C. § 35-45-2-1(c).

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

---

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

[4] We thank all *amici* for their helpful briefs.

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

Foremost among those protections is the "actual malice" standard (sometimes called "constitutional malice" to distinguish it from mere spitefulness) for speech about public officials. Fifty years ago, New York Times v. Sullivan held that a State may not punish "a defamatory falsehood relating to [a public official's] official conduct unless [the State] proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80 (so holding in civil defamation claim). "[S]uch a privilege is required by the First and Fourteenth Amendments." Id. at 283. In turn, "reckless disregard" is not "measured by whether a reasonably prudent man would have published, or would have investigated before publishing," St. Amant v. Thompson, 390 U.S. 727, 731 (1968); but rather requires "that the defendant in fact entertained serious doubts as to the truth of his publication," id., or had a "high degree of awareness of their probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964)—even if the statements are made with ill will, id. at 78–79. Since a trial judge is clearly a public official, Defendant's statements about the Judge are subject to this very high standard as a matter of federal constitutional law.

A. The Judge

In his blog posts, Defendant's criticisms of the Judge were rather generalized—contending that the Judge "has abused my children" or otherwise done "mean things to my children and my family," Ex. 160; was guilty of "criminal conduct," Ex. 181; or was simply "crooked," Ex. 186, or

"a nasty evil man," Ex. 183. But he also posted a copy of his August 24, 2009 "Motion to Grant Relief from Judgment and Order" online, see Ex. 142 at 9, in which he alleged that the Judge:

- "has a substantial conflict of interest as[he] was aware that Dr. Connor was not licensed to practice psychology by the State of Indiana when [he] had appointed Dr. Connor to perform psychological services for an Indiana Court," Ex. 142 at 2 (¶ 6);
- "conducted himself in a willful, malicious, and premeditated manner in punishing the Respondent for attempting to protect the parties' minor children, the Counties of Ripley and Dearborn, and the States of Indiana and Kentucky from the actions of Dr. Edward J. Connor by terminating the Respondent's parental rights," id. (¶ 7);
- "robbed [Defendant's] parenting rights as revenge for fighting injustice," id. at 9;
- "caused irreparable damage to the Respondent's children in the Court mandated child abuse [*sic*]" by "illegally eliminating their father from their lives out of the Court's self-interest," id. at 9–10; and
- used "child abducting tactics" by issuing the divorce decree, id. at 10.

In the motion, Defendant also threatened to "fil[e] criminal complaints with the Sheriff's department and Prosecutor's office for child abuse," and to contact government officials, local churches and schools, social service agencies, and community organizations "in an attempt to contact other victims and to help bring public awareness to the atrocities that take place in the Ripley and Dearborn County Courts." Id. at 9. And he concluded the motion by seeking relief "due to fraud" by the Judge, the Doctor, and opposing parties and counsel—and echoing his previous efforts seeking Judge Taul's recusal, he further demanded "the immediate resignation of Judge James D. Humphrey from the bench for the horrendous crimes committed against the Respondent and his children." Id. at 10.

If taken literally, those statements are defamatory *per se* because they impute judicial misconduct. Heeb v. Smith, 613 N.E.2d 416, 419 (Ind. Ct. App. 1993). Yet actual malice does not hinge on whether Defendant's claims are true or false, nor even whether they are objectively reasonable. Garrison, 379 U.S. at 79 ("The [actual malice] test . . . is not keyed to ordinary care . . . ."). Instead, it is a matter of his subjective sincerity—whether he "in fact entertained serious doubts as to the truth

of' those statements, Thompson, 390 U.S. at 731, or had a "high degree of awareness of their probable falsity," Garrison, 379 U.S. at 74, even if he was motivated by ill will, id. at 78–79. Here, there is no evidence that Defendant ever subjectively entertained such doubts—nor is it likely that he ever would, since as the Doctor concluded and the divorce court found, Defendant is "self-centered" and "has difficulty seeing an issue from another's perspective." Ex. 140 (Decree, Finding 8(K)). Whether his beliefs were reasonable is irrelevant—without proof that he *actually* doubted his assertions about the Judge, the First Amendment forbids using those statements as a basis for civil or criminal liability.

A reasonable-person inquiry does matter on a more fundamental level, though—determining whether Defendant's assertions were defamatory in the first place. A statement is not defamatory unless it conveys a defamatory imputation *of fact*—and "loose, figurative, or hyperbolic language [may] negate the impression that the writer was seriously maintaining" that his assertion is factual. Milkovich, 497 U.S. at 21. For example, a parody advertisement crudely portraying a prominent televangelist as having engaged in "a drunken incestuous rendezvous with his mother in an outhouse" is so obviously farfetched that no reasonable person could take it seriously as fact. See Falwell, 485 U.S. at 48, 57. But an editorial asserting that a local high school football coach "lied at [a] hearing after . . . having given his solemn oath to tell the truth" is not hyperbolic enough to negate a reasonable "connotation that petitioner committed perjury" because that contention is "sufficiently factual to be susceptible of being proved true or false," and thus defamatory. Milkovich, 497 U.S. at 5, 21 (alteration in original) (internal quotation marks omitted).

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

hyperbolic opinion. Even apart from the failure to prove actual malice, Defendant's child-abuse and child-abducting claims may not form the basis of a conviction here.

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

B. The Doctor

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

But despite being defamatory, those statements may be protected by the actual-malice standard as a matter of Indiana law—even though the Doctor is not a public figure. We have extended

the stringent New York Times standard to "defamation cases involving matters of public or general concern," even if the victim is a private figure. Bandido's, 712 N.E.2d at 449, 452 (citing Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976)). Determining whether a controversy is of public or general concern is a question of law for the court. Bandido's, 712 N.E.2d at 452 n.7. Unlike the public-health restaurant inspections at issue in Bandido's, expert testimony primarily affects only the private litigants in a particular case, and is "public" only to the extent that the proceedings in that case were open to the public. Out of an abundance of caution, though, we will assume *arguendo* that if a psychologist actually were abusing his position of trust to give corrupt expert testimony or for personal gratification, it would be a matter of public or general concern. Under that assumption, the actual-malice standard would apply to protect Defendant's public or online comments about the Doctor, as well,[5] because there is no evidence that Defendant in fact subjectively doubted his accusations—regardless of whether an objectively reasonable person would have.

C. Enforceability of the Intimidation Statute Generally

As the discussion above illustrates, the "actual malice" standard is so steep that prosecutions involving public figures or issues of public concern under Indiana Code section 35-45-2-1(c)(6) or (7) are all but impossible. When a "threat" of ridicule or embarrassment is made against a public figure, New York Times applies as a matter of federal law—and if the speech implicates an issue of public concern, Bandido's applies as a matter of Indiana law. In either event, proof of "actual malice" is required for a conviction to survive constitutional scrutiny. Only where a purely-private figure is involved, *and* the alleged "threat" involves no colorable issue of public concern, may subparts (c)(6) and (7) be applied as written; and otherwise, the actual malice standard will preclude most prosecutions. As a result, the State will often be well-advised to avoid bringing charges under those subparts—or even including them in jury instructions, for reasons discussed in Part III.A below—when, as here, it could rely on other subparts that do not implicate actual malice.

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

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

Not all forms of intimidation are limited by the actual-malice standard. To the contrary, "the First Amendment . . . permits a State to ban a 'true threat'"—that is, a "statement[] where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969) (*per curiam*)). The "intent" that matters is not whether the speaker really means to carry out the threat, but only whether he intends it to "plac[e] the victim in fear of bodily harm or death." See Black at 359–60 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

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

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

Both before and after Black, courts have emphasized that assessing true threats is highly dependent on context. As the Seventh Circuit has long recognized, "Written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published." United States v. Prochaska, 222 F.2d 1, 2 (7th Cir. 1955); accord, e.g., United States v. Turner, 720 F.3d 411, 426 (2d Cir. 2013), cert.

pending (approving of jury instruction including identical language). Particularly with implied threats, then, juries are not bound to "rigid adherence to the literal meaning of a communication" while turning a blind eye "to its reasonable connotations derived from its ambience"—because doing so "would render [prohibitions on threats] powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat." United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994) (citing Prochaska, 222 F.2d at 2). Nor are juries "preclude[d from] finding . . . a threat any time the defendant can conjure up some conceivable alternative explanation for his words." United States v. Shoulberg, 895 F.2d 882, 885 (2d Cir. 1990). The true meaning of a facially ambiguous threat is for a jury to decide, as long as the State presents "sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient *familiar with the context* of the [statement] would interpret it as a threat." Malik, 16 F.3d at 50 (emphasis added).

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

But Defendant asks us to also consider whether he *intended* to put his targets in fear for their safety. We believe his suggestion is consistent with Black's focus on "whether a particular [communication] is *intended* to intimidate," 538 U.S. at 345 (emphasis added)—and consistent with "our strong commitment to protecting the freedom of speech and expression" as a matter of Indiana law, even beyond what the First Amendment requires. Bandido's, 712 N.E.2d at 451–54 (adopting actual malice standard for defamation claims brought by private figures relating to issues of public concern, exceeding First Amendment protections); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) ("[S]o long as they do not impose liability without fault, the States may define for

themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."). We therefore hold that "true threats" under Indiana law depend on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target. We conclude there is ample evidence on both points as to both victims.

A. Evidence of Defendant's Intent to Threaten

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

Our independent review begins with whether the speaker knew the statements at issue were likely to be perceived as threatening. Because of the inferential nature of circumstantial evidence, that *mens rea* question will often depend on whether a reasonable person would recognize the statements' threatening potential. That inquiry also recognizes the inherent fact-sensitivity of implied threats—where even a single detail can transform otherwise protected speech into an unprotected threat. For example, a detailed and gruesome "fantasy" posted online about raping and murdering a young woman would generally be protected speech—but when the story (and the victim it describes) is named after a female classmate of the author, it may become a "true threat" against her. Jennifer E. Rothman, Freedom of Speech and True Threats, 25 Harv. J.L. & Pub. Pol'y 283, 351–52 (2001) (citing United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997)). Regardless of whether the author "purposefully intended to intimidate his classmate, he would certainly have known that if she read

the story she would be intimidated by it, given its gruesome and explicit nature," and "because [he] posted the story on a public website and used his classmate's name as the title, . . . the victim would [likely] receive the threat." Id. at 352. Again, we must leave room for a jury to use its reasonable judgment about "all of the contextual factors." See Black, 538 U.S. at 367. And here, the context shows that Defendant not only knew that his victims would be placed in fear, but purposefully intended that result—indeed, as discussed below, he directly admitted both points.

1. The Judge

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

At the outset, we observe that Defendant's pretext for directing ethics complaints about the Judge to "the Ethics & Professionalism Committee Advisor located in Dearborn County, Indiana," but at her (and thus, the Judge's) otherwise-unpublished home address, is utterly implausible. Exs. 142, 160. Defendant had no difficulty directing his complaints to appropriate authorities—for example, his voluminous and repeated complaints about the Doctor to the Kentucky Board of Psychiatry. E.g., Exs. 54, 60. It is highly unlikely, then, that he would overlook the conspicuous links on the Indiana Judiciary website for filing judicial ethics complaints, yet through sheer inadvertence find a title once held by the Judge's wife and connect it to a residential address in a small Indiana town. Compare Tr. 275–77 (witness demonstration of judiciary website) with Tr. 405–08 (witness demonstrating county assessor website). And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife, and that her address was his address.

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

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

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

The facts and circumstances known to Defendant at the time he made his threats further imply that he knew his communications would be threatening. He knew the Judge considered him dangerous—not only from the findings in the divorce decree about his psychological disturbance and "playing with gas and fire," but also from the Judge's admonitions to Defendant about his violent and volatile courtroom behavior that resulted in a sheriff's deputy being stationed behind Defendant throughout the final hearing. Defendant also knew that his similar course of conduct against the Doctor had, as discussed below, caused the Doctor to seek "protection" from the court against Defendant's behavior, Ex. 67 at 3–4, and to conclude that Defendant was "potentially

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

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

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

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

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

2. The Doctor

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

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

Ex. 59 (square brackets and boldface original).

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

Defendant's threats did not subside even after the final divorce decree was issued, detailing Defendant's pattern of intimidation toward the Doctor (and others involved in the divorce) and

restricting parenting time because of the safety concerns it raised. To the contrary, he doubled-down on that behavior, escalating his rhetoric into increasingly personal attacks—accusing the Doctor of being a "[p]ervert" and "sexual predator," Ex. 181, daring him to "[c]owboy up" and "[q]uit hiding," Ex. 182. Those writings culminated in a reference to physical violence against the Doctor, veiled in a comparison to likely reactions to a hypothetical angry review of a plumber:

> *"That lousy son of a bi#$h, Dr. Custody Evaluator, lied in his report. He made me so mad I wanted to beat him/her senseless. The dirty piece of S*@T would not honor his/her contract . . . . Every time I think about the evaluation report . . . it makes me want to punch Dr. Custody Evaluator in the face."*
>
> Rather than say, "There's no way I would use Dr. Custody Evaluator", [*sic*] the social worker, psychologist, and/or judge may begin to think that the person who wrote the review is a danger to their own children . . . .
>
> No one has ever lost the ability to see their own children because they wrote an angry review of a plumbing company. Why should 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 someone.

Ex. 177 at 2–3. Then about a month later, Defendant demonstrated his knowledge of the Doctor's home address in a post identifying the bank holding the Doctor's home mortgage, the name of his subdivision, and the street name (conspicuously emphasized within a play on words). Ex. 199 at 1–2. The post continued, "There are some nice houses on his street. I have family that lives a couple streets over from Dr. Connor. I wonder if I should warn my family's neighborhood about the troubles within the family court system?" Id. at 1. And several months after that, Defendant demonstrated his ability to find the Doctor away from either his office or his home, by appearing at an unrelated hearing in which the Doctor was testifying—announcing on his blog that his presence had made the Doctor "a little nervous" because "[a]s a psychologist, he probably believes that *aggression or violence* would be a common reaction for parents who had their children ripped from them without any warning or justifiable reason." Ex. 200 (emphasis added).

The context of Defendant's identification of the Doctor's home address, much like the Judge's, supplies a clear threatening implication for statements that would otherwise be far more ambiguous. Defendant knew that his obsessive and harassing conduct leading up to the final hearing had already intimidated the Doctor to the point of seeking "protection" from the trial court;

and that the Doctor had reached the professional conclusion that Defendant had "a degree of psychological disturbance that is concerning." His subsequent conduct towards the Doctor served only to amplify the behavior that led to those conclusions. Even if all the rest of Defendant's statements were only ambiguously threatening—his self-serving attempt to "disclaim" threatening intent, his express recognition that the Doctor "could have easily said that he felt threatened" by his conduct, and his escalating rhetoric into descriptions of "beating senseless" a supposedly hypothetical custody evaluator—they clearly formed part of a complete threat when Defendant announced that he knew where the Doctor lived. That threat then became even more forceful when Defendant followed the Doctor to an unrelated hearing knowing it would make him "a little nervous." Taken in full context, we are convinced beyond a reasonable doubt that Defendant not just knew, but fully intended, that he would make the Doctor fear being attacked in his own home—a classic true threat.

B. Reasonable Perception of Threats Under Similar Circumstances

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

1. The Judge

An objectively reasonable person in the Judge's situation would recognize Defendant's statements as threatening, and the Judge was amply reasonable to perceive them as such. First, reasonable people would take into account their own knowledge about the person making threats against them to determine whether they should take the threats seriously. And in doing so, they would reasonably consider how Defendant's rhetoric had escalated: When relatively mild criticism

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

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

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

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

In sum, a reasonable person similarly situated to the Judge would be wary of Defendant's demonstrated obsessiveness, mental disturbance, and instability; his veiled references to pyromania and weapons training; his pattern of escalating rhetoric and increasingly personal attacks; and his volatile and violent in-court behavior. And any lingering doubt as to whether the threat was

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

2. The Doctor

Likewise, a reasonable person similarly situated to the Doctor would also be amply justified in perceiving Defendant's behavior as a threat to physical safety. Defendant exhibited an even longer-running campaign of obsessive and escalating behavior towards the Doctor than towards the Judge. Even his initial, seemingly innocent requests for a copy of the Doctor's file were preceded by a threatening anonymous letter that is highly consistent with Defendant's writing style. Ex. 33. When those requests failed to accomplish Defendant's goal, he quickly escalated first to threats (sometimes several per day) of pursuing professional discipline, of civil contempt and lawsuits against the Doctor, of lawsuits against the Doctor's business partners and employees, and of criminal prosecution. See generally Exs. 38–42, 44–45, 48–51. When those efforts also proved fruitless, Defendant began obsessively gathering and publishing personal information about the Doctor—his father, Ex. 193; his civic pursuits, Exs. 179, 197; his involvement in other cases, Ex. 169; and eventually even a private family photo, Tr. 201, Ex. 201—and sustained that campaign for several years. Despite their disconcerting extent and duration, those acts standing alone might arguably constitute no more than "criminal defamation" protected as free speech under Bandido's absent a showing of actual malice.

But reasonable people in the Doctor's situation would not view those acts in a vacuum. Just as with the Judge, Defendant's statements—even the ones that were protected speech—demonstrate an anger and obsessiveness that bears on how seriously a reasonable person would take an otherwise ambiguous threat. Reasonable people would consider that anger and obsession in light of the psychometric test results indicating that Defendant suffers "a degree of psychological disturbance

that is concerning," Ex. 9 at 28—thus implying in turn that Defendant is unstable and dangerous. Therefore, as with the Judge, what might otherwise have been merely distasteful, hyperbolic criticism took on genuinely threatening implications when Defendant announced that he knew where the Doctor lived, Ex. 199 at 1–2—and even more so when, a few months later, Defendant followed the Doctor to another hearing in an unrelated case, Ex. 200; and still more so when a few months after that, Defendant publicized a private family photo of the Doctor, Ex. 201. Those additional steps would imply to any reasonable person that Defendant was not merely angry, and not merely threatening to expose what he perceived as corruption or cronyism—but rather, that he intended to make the Doctor fear for his physical safety wherever he went, whether at his office, in the witness stand, or at his home. In fact, that was exactly how the Doctor explained his fear, testifying that "with nothing else around [the statements] . . . I would maybe see it differently[,] but it's the accumulation of these types of comments and events" that he, "as a person who deals with aggressive people, . . . found . . . to be disturbing." Tr. 189–90. And consistent with that reasonable perception, the Doctor's family sought additional police patrols and discussed Defendant's threats with their children and co-workers—while keeping those threats secret from elderly family members who would be worried. Tr. 159–66, 203–04. Their reactions are precisely what we would expect of objectively reasonable people under similar circumstances—that, faced with statements and conduct Defendant intended to be threatening, they did in fact feel threatened and fearful for their family's safety. That is the essence of a "true threat" to which the United States and Indiana Constitutions accord no free-speech protection.

III. General Verdict, Free Speech, and Invited Error

Defendant next argues that even if some of his speech was constitutionally unprotected, the jury instructions and general verdict were fundamentally erroneous (or constituted ineffective assistance of counsel) because they permitted the jury to convict him based in whole or in part on the constitutionally protected portions of his statements. He is correct that the instructions were erroneous and created a general-verdict error—but he affirmatively invited those errors as part of a perfectly reasonable trial strategy. When an error is invited for such legitimate reasons, it is neither fundamental error nor ineffective assistance of counsel.

A. General Verdicts and Free Speech Generally

Defendant argues that because the State's arguments relied at least in part on protected speech, his convictions must be reversed because it is impossible to tell whether the jury relied on

the protected or unprotected aspects of his speech—in other words, to tell whether he was convicted of true threats or mere "criminal defamation." Defendant bases this "general verdict" argument on Street v. New York, in which the defendant was charged under a statute that made it a misdemeanor "publicly to mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act any flag of the United States." 394 U.S. 576, 577–78 (1969) (internal substitutions omitted). The defendant's charging information was based upon both burning a flag (which the Court assumed without deciding to be unprotected[6]), and a protected statement he made while doing so: that he "did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith[7], [w]e don't need an American Flag.'" Id. at 579. Relying on Stromberg v. California, 283 U.S. 359 (1931), the Supreme Court concluded the statute "was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." Id. at 581, 585–89. The Court held:

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

Street, 394 U.S. at 588.

The Court rejected the State's argument that the protected speech was used only for the permissible purpose of proving the defendant's intent in burning the flag, because "[t]he State never announced that it was relying exclusively upon the burning" and the trial judge "never indicated during the [bench] trial that he regarded appellant's words as relating solely to intent." Id. at 589–90. (Nor was the speaker's intent really in controversy; he did not claim, for example, that he burned the flag because it was worn and required disposal.) The Court therefore reversed the conviction, because "[i]n the face of an information explicitly setting forth appellant's words as an element of his alleged crime, and . . . a statute making it an offense to speak words of that

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

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

sort," the record was "insufficient to eliminate the possibility either that appellant's words were the sole basis of his conviction or that [he] was convicted for both his words and his deed." Id. at 590.

The possibility of being convicted based on protected speech "intertwined" with unprotected conduct makes this case arguably similar to Street. But procedurally, a closer analogy is to Bachellar v. Maryland, 397 U.S. 564 (1970), involving Vietnam War protestors charged with disorderly conduct. Unlike Street, the charging information in Bachellar raised no general-verdict problem, because it alleged no specific facts, but only recited the statutory definition of the offense: "acting in a disorderly manner to the disturbance of the public peace, upon any public street." 397 U.S. at 564. Instead, the general-verdict problem arose from jury instructions that authorized conviction for *either* "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area," *or* for "refusal to obey a policeman's command to move on when not to do so may endanger the public peace," id. at 565—the former being protected expression, the latter being unprotected. There was conflicting evidence at trial about whether the protestors had obstructed the sidewalk by sitting or lying down and then refused police orders to move, or whether police had thrown the protestors onto the sidewalk and then held them down while arresting them. Id. at 568. The Supreme Court reversed the protestors' convictions because in light of the conflicting evidence and the jury instructions, the general verdict raised a possibility that the convictions may have rested on an unconstitutional basis:

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

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

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

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

B. Invited Error and Fundamental Error

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

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

But the two principles overlap in a second way we have not previously discussed—because deficient performance by counsel, which is the *express* premise of an ineffective-assistance claim,

is also *implicit* in fundamental error. A "finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have," even without being spurred to action by a timely objection. Whiting v. State, 969 N.E.2d 24, 34 (Ind. 2012). An error blatant enough to require a judge to take action *sua sponte* is necessarily blatant enough to draw any competent attorney's objection. But the reverse is also true: if the judge could recognize a viable reason why an effective attorney might not object, the error is not blatant enough to constitute fundamental error. And when a passive lack of objection (here, to the "threat" instruction) is coupled with counsel's active requests (here, for other related instructions), it becomes a question of invited error.

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

Here, counsel's lack of objection to the general verdict appears to have been part of a conscious "all or nothing" strategy. One common example of such a defense arises in murder cases, when a defendant chooses not to have the jury instructed on the lesser included offense of voluntary manslaughter, so that any shortfall in the State's proof of *mens rea* will result in complete acquittal, rather than merely a lesser conviction. E.g., Conner v. State, 711 N.E.2d 1238, 1250 (Ind. 1999) (defense counsel could have reasonably decided to seek acquittal based on the State's failure to prove intentional murder instead of arguing for the lesser offense of voluntary manslaughter). In a similar vein, Defendant here chose to withdraw a proposed final jury instruction on harassment as a lesser included offense of intimidation, Tr. 441; 2d Supp. App. at 18, arguing instead that *all* his statements were intended only as protected opinions on an issue of public concern, or petitions for redress of grievances, and not to cause fear or for any other threatening purpose, Tr. 488–89. In

effect, that approach sought to exploit the prosecutor's improper reliance on "criminal defamation" to the defense's advantage—focusing the jury on the clearly protected aspects of Defendant's speech, and on that basis to find the ambiguous aspects of his conduct to be protected as well.

Instructing the jury on the text of the federal and state constitutional free-speech protections, but not actual malice, appears to have been a strategic calculation to that end—not an ignorant blunder. Counsel obviously recognized the free-speech implications of this case, and asked for the jury to be instructed *verbatim* on the language of the First Amendment and Article I, Section 9 of the Indiana Constitution, both of which were given without objection. App. 14–15, Tr. 439–40. Reciting those provisions, without discussing the additional protections of the actual malice standard, yields a decidedly broad-brush view of free-speech principles—but his free-speech defense strategy depended on that broad brush. Requesting instructions on actual malice would have called the State's attention to the distinction it repeatedly overlooked between threatening the targets' *reputations* under Indiana Code section 35-45-2-1(c)(6)–(7) and threatening their *safety* under subsections (c)(1)–(3). Defense counsel could reasonably have anticipated that an actual-malice challenge could lead the State either to withdraw (c)(6) and (7) from the instructions, or at least to draw sharper focus onto the statements and conduct that crossed the line and implied a true threat. And because true threats have *no* free-speech protection, Defendant's free-speech defense would then have been all but eviscerated.

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

> Good morning ladies and gentlemen. This is a criminal case. This is not a case about whether you approve[] of Dan Brewington. It's not a case about whether Dan Brewington was a good father. It's not a case about whether he should have had or should not have had joint custody. This is a case about the State of Indiana charging Dan Brewington with four (4) crimes because he expressed opinions. The crux of this case, ladies and gentlemen[,] is not whether you agree with those opinions, even if you like them[. T]he issue is, why did Mr. Brewington express these opinions[?] * * *
>
> This is a great country and it's a great country because we can criticize the government. What the State has done here, ladies and

> gentlemen . . . , is melt all these things together where Dan Brewington was attempting to be an attorney and attempting to express his frustration, his anger, his upset about a decision in a court that he did not agree with. That's what he was doing in his pleas. . . . It's not unethical for the public to criticize a judge. * * *
>
> [T]he Court will instruct you that . . . the [F]irst [A]mendment to the United States Constitution reads . . . : Congress shall make no law respecting an establishment of religion or prohibiting the free exercise there of [*sic*] or abridging the freedom of speech or of the press or the right of the people to peaceably assemble and to petition the government for a redress of their grievances. Think about what's contained in th[ose] three sentences. How do we look at speech in this country? We look at it in the same way as we look at religion. . . . [Y]ou know the part of this thing, this amendment, is [a] right that people don't talk about but it's probably the most important—is to petition the government for redress. It can be argued[,] ladies and gentlemen . . . [,] that many, many, many, all of Mr. Brewington's blogs were petitions to the government, petitions to the people . . . .* * *
>
> [I]f you want as many people to know it and change opinions hopefully, I guess that's the reason people blog, the[n] you're going to disseminate out in the [I]nternet. This is a case where Mr. Brewington has strong political views and those political views are the family court system stinks. He doesn't agree with them. . . . It is criticism of the government. Appropriate? Nice? No. We're all adults. . . . What did they call the last Republican vice-presidential nominee, Sarah Palin—the things that were said? This is the society that we live in whether we like it or not and criminalizing it is not going to do anything but make us all less free. * * *
>
> [S]ome people would say restricting and not allowing parents to see their children is child abuse. Now is that an unreasonable position? It depends on the circumstances[,] I would guess. Is it a criminal position? I don't think so. And I think if you think about it and . . . separate your distaste for the words you will realize that they haven't proven what his intent was. * * *
>
> This case comes down to Mr. Brewington's intent and whether that intent was to retaliate with regards to Counts I through IV; it's that simple . . . .

Tr. 481–82, 484–85, 488–89, 490–93, 498. By contrast, only once in passing did defense counsel mention how or why Defendant found and published the Judge's home address—and even then, only in the context of perjury, not intimidation. Tr. 499–500. And he never mentioned Defendant's statements about the Doctor's address, neighborhood, mortgage, or Defendant's nearby family

members at all. Emphasizing Defendant's protected speech about the family court system while downplaying the threatening aspects of his communications and conduct was objectively reasonable, precisely because so much of Defendant's speech was protected, at least when viewed in a vacuum. But that approach depended on the same constitutional imprecision Defendant now complains of.

Were it not for that apparent strategy, Defendant's arguments would be well taken. As discussed above, the First Amendment and the Indiana Constitution demand a showing of actual malice before the State may impinge on assertions of fact—even false ones—about public figures or issues of public concern; and rhetorically hyperbolic expressions of opinion are always protected, because they can *only* reasonably be understood as assertions of opinion, not of fact. But even constitutional errors may be invited. E.g., United States v. Jernigan, 341 F.3d 1273, 1289 (11th Cir. 2003) ("[P]lain error review is unavailable in cases where a criminal defendant 'invites' the constitutional error of which he complains."). And though it was constitutionally incomplete to instruct the jury on the First Amendment and Article I, Section 9 of our state Constitution without also instructing it on actual malice, glossing over those distinctions was essential to Defendant's defense. His general-verdict and instructional complaints were therefore invited error, not fundamental error. Wilson v. Lindler, 995 F.2d 1256, 1265 & n.7 (4th Cir. 1993) (Widener, J. dissenting) (any "fatal variance" between charging information and jury instructions was invited by counsel's strategy, and not grounds for reversal), opinion adopted by majority in Wilson v. Lindler, 8 F.3d 173 (4th Cir. 1993) (en banc) (per curiam), cert. denied, 510 U.S. 1131 (1994).

C. Ineffective Assistance of Counsel

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

assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id.

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

Here, there is no evidence that counsel's approach was borne of ignorance instead of strategy, and the record in fact strongly suggests the contrary. First, as discussed above, counsel's closing argument amounts to an entirely reasonable "all or nothing" strategy to deflect the jury's scrutiny from Defendant's culpable statements and conduct to the large number of otherwise-protected opinions he expressed. Second, Defendant demonstrated significant sophistication about free-speech principles long before trial in a motion to dismiss these charges, Supp. App. 1–4, and confirmed it by his post-verdict, pre-sentencing blog posts, Sent. Ex. 1 at 2–3. Yet he nevertheless agreed under oath (in connection with waiving his right to testify) that even though he and trial counsel "to put it charitably, . . . had a bit of a rocky relationship at times," it was "better now," Tr. 432–33, and he was voluntarily choosing not to testify, Tr. 433–34. His decision not to testify, thus letting the case hinge solely on the sufficiency of the State's proof, was also consistent with an "all or nothing" defense rather than the actual-malice defense he now says he should have had. Since counsel's approach to jury instructions was "within the wide range of reasonable professional assistance" when considered in the abstract, see Strickland, 466 U.S. at 689, and nothing in the record suggests that his approach was actually the product of ignorance, Defendant has not overcome the presumption of competent representation.

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

Conclusion

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

There would be no doubt about that conclusion if Defendant, all in a single episode, had violently shouted and slammed piles of books in the courtroom, shaken his fist at the Judge and the Doctor, and told them, "You crooked child abusers! I'm a pyromaniac, I have guns and know how to use them, I'd like to beat you senseless, I know where you live, and I'm going to hold you accountable!" Under those circumstances, it would be obvious that Defendant was making an unprotected "true threat" against the victims, even if the phrase "crooked child abusers" was protected speech. Defendant's threats neither lose force, nor gain protection, merely because he built them up over the course of a years-long campaign of harassment. In fact, they may be even *more* insidious because they show a persistent, single-minded obsession, not just an isolated outburst or mere venting. To the extent Defendant attempted to veil his threats behind self-serving disclaimers and supposed "hypotheticals," the victims saw through that pretext—as did the jury, and as do we. Accordingly, even though many of Defendant's statements in isolation are protected speech and would make application of Indiana Code section 35-45-2-1(c)(6) and (7) unconstitutional, they form part of the

context in which his other statements and conduct become an unprotected "true threat" that may properly be prosecuted under Indiana Code section 35-45-2-1(c)(1)–(3).

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

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

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

FILED

MAR 07 2011

CLERK OF DEARBORN

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

STATE OF INDIANA

CAUSE NO. 15D02-1103-FD-84

VS

DANIEL BREWINGTON

A True Bill

COUNT I: INDICTMENT FOR INTIMIDATION
I.C. 35-45-2-1(a)(2), a Class A Misdemeanor

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007, and February 27, 2011, Daniel Brewington did communicate a threat to another person, to-wit: Dr. Edward Connor, with the intent that Dr. Edward Connor be placed in fear of retaliation for a prior lawful act, to-wit: issuing a custodial evaluation regarding Daniel Brewington's children. All of which is contrary to the form of the statute made and provided by I.C. 35-45-2-1(a)(2), a Class A Misdemeanor, and against the peace and dignity of the State of Indiana.

Foremar

Approved:

F. Aaron Negangard, ISB #18809-53
Prosecuting Attorney

Phillip D. Weaver

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

FILED
MAR 07 2011
CLERK OF DEARBORN CIRCUIT COURT

STATE OF INDIANA

CAUSE NO. 15D02-1103-FD-84

VS

DANIEL BREWINGTON

A True Bill

COUNT II: INDICTMENT FOR INTIMIDATION OF A JUDGE
I.C. 35-45-2-1(a)(2)(b)(1)(B)(ii), a Class D Felony

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

Foreman

Approved:

F. Aaron Negangard, ISB #18909-53
Prosecuting Attorney

Phillip D. Weaver

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

FILED

MAR 07 2011

Phillip D. Weaver
CLERK OF DEARBORN CIRCUIT COURT

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

STATE OF INDIANA

VS

DANIEL BREWINGTON

CAUSE NO. 15D02-1103-FD-84

A True Bill

COUNT III: INDICTMENT FOR INTIMIDATION
I.C. 35-45-2-1(a)(2), a Class A Misdemeanor

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

Foreman

Approved:

F. Aaron Negangard, ISB #18809-53
Prosecuting Attorney

Phillip D. Weaver

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

FILED

MAR 07 2011

Phillip D. Weaver
CLERK OF DEARBORN CIRCUIT COURT

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

STATE OF INDIANA

CAUSE NO. 15D02-1103-FD-84

VS

DANIEL BREWINGTON

A True Bill

COUNT IV: ATTEMPT TO COMMIT OBSTRUCTION OF JUSTICE
I.C. 35-44-3-4, a Class D Felony

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about or between August 1, 2007, and August 1, 2009, Daniel Brewington, acting with the culpability for the crime of Obstruction of Justice, did engage in conduct that constituted a substantial step toward the commission of the crime of Obstruction of Justice, to-wit: did intimidate and/or harrass Dr. Edward Connor, who was a witness in an official proceeding. All of which is contrary to the form of the statute made and provided by I.C. 35-44-3-4, a Class D Felony, and against the peace and dignity of the State of Indiana.

Foreman

Approved:

F. Aaron Negangard, ISB #18809-53
Prosecuting Attorney

Phillip D. Weaver

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

FILED

MAR 07 2011

CLERK OF DEARBORN

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

STATE OF INDIANA

VS

DANIEL BREWINGTON

CAUSE NO. 15D02-1103-FD-84

A True Bill

COUNT V: PERJURY
I.C. 35-44-2-1, a Class D Felony

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about February 28, 2011, Daniel Brewington did make a false, material statement under oath or affirmation knowing the statement to be false or not believing it to be true. All of which is contrary to the form of the statute made and provided by I.C. 35-44-2-1, a Class D Felony, and against the peace and dignity of the State of Indiana.

Foreman

Approved:

F. Aaron Negangard, ISB #18809-53
Prosecuting Attorney

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

FILED

MAR 07 2011

Phillip D. Weaver
CLERK OF DEARBORN CIRCUIT COURT

IN THE SUPERIOR COURT II
COUNTY OF DEARBORN
STATE OF INDIANA

STATE OF INDIANA

VS

DANIEL BREWINGTON

CAUSE NO. 15D02-1103-FD-84

A True Bill

COUNT VI: UNLAWFUL DISCLOSURE OF GRAND JURY PROCEEDINGS
I.C. 35-34-2-10, a Class B Misdemeanor

The Grand Jurors of Dearborn County, State of Indiana, good and lawful men and women and legally impaneled, charged and sworn to inquire into felonies and misdemeanors in the name of and by the authority of the State of Indiana, on their oaths or affirmations, do present that on or about February 28, 2011, Daniel Brewington did knowingly disclose information from Grand jury proceedings in violation of I.C. 35-34-2-10. All of which is contrary to the form of the statute made and provided by I.C. 35-34-2-10, a Class A Misdemeanor, and against the peace and dignity of the State of Indiana.

Foreman

Approved:

F. Aaron Negangard, ISB#18809-53
Prosecuting Attorney

Phillip D. Weaver

Phillip Weaver, Clerk

Recorded this 2nd day of March, 2011.

STATE OF INDIANA)
)SS:
COUNTY OF DEARBORN)

STATE OF INDIANA)
)
VS.)
Daniel Brewington)

FILED IN THE DEARBORN SUPERIOR COURT II

MAR 11 2011

CAUSE NO. 15D02-1103-FD-084

CLERK OF DEARBORN CIRCUIT COURT

INITIAL HEARING ORDER

The Defendant appears in person for an Initial Hearing and the State appeared by Chief **Deputy Prosecuting Attorney,** J. Kiser & B. Johnson

And the Court, having advised the Defendant of the nature and penalties of the charges filed and the legal and Constitutional rights of the Defendant, entered a preliminary plea of not guilty on behalf of the Defendant and on inquiry finds the Defendant:

____ has retained counsel or is in the process of obtaining counsel.
____ has waived his right to counsel after a full advisement of Constitutional rights.
✓ has requested a public defender and the Court made a preliminary finding of indigency and appoints To Be Determined as Public Defender and the Defendant may be ordered to pay all or part of the costs to be determined at a later hearing.
____ has requested a Public Defender and the Court has initially denied the request and will review the request on motion of the Defendant.

The Court, having considered the evidence presented of the Defendant's likelihood to appear at future hearings and any evidence of danger to community, now sets the bond and the Defendant shall:

____ continue release from custody on the previously posted bond.
____ be remanded to the custody of the Dearborn County Sheriff and shall be entitled to be released from custody upon the posting of a bond in the amount of $_____ surety bond and $_____ cash bond.
____ be released from custody on a written promise to appear.
✓ be remanded to the custody of the Dearborn County Sheriff while bond is taken under advisement for 8 .

All bonds shall be posted in the name of the Defendant and all bonds are considered a personal asset of the Defendant and are to be available for payment of Court costs, fines, restitution and necessary costs.

The following are ordered as conditions of pre-trial release and failure to abide by these conditions can result in forfeiture of bond and arrest. The Defendant shall:

✓ maintain contact with his/her attorney if represented by counsel.
✓ notify the Court in writing of any change of address within 48 hours.
✓ not commit any criminal offenses.
✓ appear at all hearings scheduled by the Court unless otherwise ordered by the Court.
✓ have no direct or indirect contact with Dr. E. Conner & Judge James Humphrey & family
____ not operate a motor vehicle.
____ be placed on pre-trial release to be supervised by Probation (see Exhibit A).
____ Other: _____.

✓ **The Court sets the matter herein for omnibus and Pre-Trial Hearing at** 1:30 **a.m./(p.m.) on the** 26 **day of** April **, 20**11**.**

____ **The Court sets the matter herein for Bench Trial, or in the alternative a Pre-Trial Hearing, at _____ a.m./p.m. on the _____ day of _____, 20___.**

____ **The Court sets this matter herein for Fact Finding Hearing at _____a.m./p.m. on the _____ day of _____, 20___.**

ALL OF WHICH IS ORDERED THIS 11 **DAY OF** March **, 20**11**.**

SALLY A. BLANKENSHIP, JUDGE
DEARBORN SUPERIOR COURT II

cc: Prosecutor
Sheriff
Defendant/Attorney

15D02-1103-FD-00084, 1 Pgs
03/11/2011 Id: 0000164210
initial hearing ord 2

FILED

STATE OF INDIANA) IN THE DEARBORN SUPERIOR COURT II
)
COUNTY OF DEARBORN) 3
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) GENERAL TERM 2011
STATE OF INDIANA)
CLERK OF DEARBORN CIRCUIT COURT
V.)
)
DANIEL BREWINGTON) CAUSE NO. 15D02-1103-FD-084

MOTION TO DISMISS

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

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

The Prosecutor during the conduct of the grand jury process advised the Grand Jurors what the Prosecutor and his staff believed "crossed the lines between freedom of speech and intimidation and harassment." Page 338, Grand Jury Transcript. Harassment is defined as "conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes." IC 35-45-10-2. Intimidation occurs only when a threat is communicated to another person and there is no evidence in the grand jury proceedings the Defendant communicated any threats to another individual.

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

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

The postings by the Defendant cannot be considered anything other than free speech. The posting of Heidi Humphrey's address on the Defendant's blog is not in violation of any law. The address is accessible as the result of her role on the Ethics and Professionalism Committee of the

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

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

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

Daniel Brewington
301 W. High Street
Lawrenceburg, Indiana 47025
No telephone number
Inmate DCLEC

CERTIFICATE OF SERVICE

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

Daniel Brewington

STATE OF INDIANA

COUNTY OF DEARBORN

STATE OF INDIANA,
Plaintiff

vs

DANIEL BREWINGTON,
Defendant

DEARBORN SUPERIOR COURT II

CAUSE NO. 15D02-1103-FD-084

FILED

AUG 23 2011

CLERK OF DEARBORN CIRCUIT COURT

ORDER DENYING BOND REDUCTION

Comes now the State appearing by Prosecuting Attorney, Aaron Negangard and the Defendant appearing in person and by counsel, Bryan E. Barrett, on Defendant's Application for Reduction of Bail. A hearing was conducted on this matter on the 17th day of August, 2011. Evidence was presented and argument was made.

And the Court having heard the evidence and being duly advised in the premises now **FINDS** and **ORDERS** as follows:

1. State presented evidence that Defendant has a history of refusing to follow Court Orders and distain for the authority of the Court. The State also presented evidence that since his arrest, the Defendant may have contemplated violence towards at least one alleged victim in this case.

2. The Court concurs with all of the findings set forth in the original Order Setting Bail of March 11, 2011 issued by the Honorable Sally A. Blankenship.

3. Defendant's Application for Reduction of Bail is hereby **DENIED** and Bond remains set at $500,000.00 Surety and $100,000.00 cash bond with all other conditions of bond remain in full force and effect.

15D02-1103-FD-00084, 2 Pgs
08/23/2011 Id: 0000200022
ORDER DENYING BOND REDUCTION

The posting of cash bail is subject to the following conditions:

(1) The bail shall be posted in the name of the Defendant;

(2) The bail shall be considered a personal asset of the Defendant;

(3) The bail shall also be available for payment of Court costs, fines, restitution, and necessary attorney fees should a finding of guilt be made;

(4) Bail is subject to revocation and the Defendant shall be re-arrested upon failure to appear in Court when ordered or a commission of a criminal act before the time of trial, or violation of any other conditions of bail.

ALL OF WHICH IS ORDERED this 18th day of August, 2011.

BRIAN D. HILL, Special Judge
Dearborn Superior Court II

Distribution:
Aaron Negangard
Bryan E. Barrett

IN THE

INDIANA COURT OF APPEALS

Case No. 15A04-1712-PC-02889

DANIEL BREWINGTON, _____ Appellant,	)	Appeal from Dearborn County Superior Court II
v.	)	Case No. 15D02-1702-PC-0003
STATE OF INDIANA _____ Appellee.	)	Hon. W. Gregory Coy, Special Judge

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APPELLANT APPENDIX

Volume III of III

Pages 225 through 307

Daniel P. Brewington
[redacted]
Pro Se Filing Party

DANIEL BREWINGTON	)	IN THE SUPERIOR COURT II
	)	
PETITIONER,	)	DEARBORN COUNTY, INDIANA
	)	
v.	) SS:	
	)	
STATE OF INDIANA	)	CAUSE NO. 15D02-1702-PC-0003
	)	
RESPONDANT.	)	
	)	

FILED
JUN 08 2017
CLERK OF DEARBORN CIRCUIT COURT

REQUEST FOR NAMES OF GRAND JURORS

Plaintiff, Daniel Brewington ("Brewington"), respectfully submits this REQUEST FOR NAMES OF GRAND JURORS, because the Dearborn Superior Court II has just revealed that the court failed to record and/or the Superior Court II destroyed portions of the official audio record of the grand jury investigation of Daniel Brewington and in support, Brewington states as follows:

1) Brewington has a pending lawsuit per the Access to Public Records Act ("APRA") where Brewington named Rush Superior Judge Brian Hill and the Dearborn Superior Court II/Sally McLaughlin as Defendants.

2) On May 30, 2017, Defendants filed their REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT. [Attached as "EXHIBIT A"]

3) Defendants' REPLY states:

> The simple truth is audio cannot be produced that does not exist. Brewington has received the transcripts and the audio related to his grand jury proceedings. While Brewington makes many arguments as to why he believes there must be more audio recordings of the grand jury proceeding into his criminal investigation, these arguments do not change the fact that more there are no additional audio recordings. What is contained in the recording is contained in the recording, no matter how many times Brewington claims there should be more.

4) Though Judge Hill and the Dearborn Superior Court II under McLaughlin fail to state who is responsible for the incomplete record, the fact remains that both the written and audible record of Brewington's grand jury proceedings are void of any constitutional ground or instruction for Brewington's indictments.

5) In the case that this Court does not grant Brewington relief on the face of the incomplete grand jury record, it will be necessary for Brewington to obtain the names of grand jurors so Brewington may attempt to reconstruct the record of the grand jury investigation.

6) Release of grand jurors' names is necessary to determine if former Prosecutor Negangard provided the grand jury with a constitutional ground for Brewington's indictments and the Superior Court II failed to record such instruction, or if Negangard obtained indictments against Brewington without providing any constitutional ground for convening the grand jury.

7) Brewington was unable to raise the issue prior to now because it was just within the past week that the Dearborn Superior Court II told Brewington about the incomplete record.

8) Brewington attaches his RESPONSE TO DEFENDANTS' REPY, filed in the APRA lawsuit. [Attached AS EXHIBIT B]

CONCLUSION

In a legal document filed by the Indiana Attorney General, on behalf of Defendants Judge Brian Hill and the Dearborn Superior Court II/Judge Sally McLaughlin, the Defendants claim the record of the grand jury in the investigation

of Daniel Brewington lacks any constitutional instruction or ground for returning indictments against Brewington. The missing record in Brewington's grand jury proceedings indicates that former Dearborn County Prosecutor F. Aaron Negangard failed to provide a constitutional ground/instruction for Brewington's indictments, or the Dearborn Superior Court II destroyed the records containing such instruction. Regardless of which scenario transpired, the Dearborn Superior Court II and the Dearborn County Prosecutor forced Brewington to endure a criminal trial lacking any constitutional basis or the parties forced Brewington to face a criminal trial knowing the Dearborn Superior Court II omitted specific indictment information that was supposed to be included in the record of the grand jury. Regardless of the scenario, both the Dearborn Superior Court II and the Office of the Dearborn County Prosecutor were fully aware that the Prosecutor's Office tricked Brewington into relying on the "complete" record of the grand jury proceedings while providing Brewington with an altered version of the record. Neither the Dearborn Superior Court II nor the Dearborn County Prosecutor did anything to protect Brewington's constitutional rights despite knowing the record to be incomplete. Dearborn County Prosecutor Lynn Deddens continues to delay Brewington's ability to seek relief knowing it was her office that took advantage of the incomplete grand jury record, while withholding specific indictment information and evidence from Brewington. In the STATE'S ANSWERS, filed March 21, 2017, the Prosecutor had the audacity to argue "time limitations of TR 60" precluded Brewington from seeking relief. If Prosecutor Deddens is not on the side of

admitting that it was the Prosecution that failed to provide any constitutional grounds for Brewington's indictment, Deddens tried to have Brewington's petition for Post-Conviction Relief dismissed knowing that the Dearborn Superior Court II destroyed the record of the proceedings containing any constitutional ground for Brewington's indictments.

WHEREFORE, for the reasons set forth in Brewington's REQUEST FOR NAMES OF GRAND JURORS; in the case this Court denies Summary Judgment and places the burden on Brewington to prove whether the prosecution failed to provide any constitutional ground or instruction for Brewington's indictments, or whether the Dearborn Superior Court II failed to record such ground or instruction, Brewington requests this Court to order the release of the names of grand jurors so Brewington may have the opportunity to reconstruct the record of the grand jury to determine who is responsible for Brewington's unconstitutional trial; Award Brewington any attorneys' fees and costs in bringing this action; and Award Brewington any other appropriate relief.

Respectfully Submitted,

Daniel Brewington
Plaintiff, Pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, priority postage prepaid, on June 5, 2017.

Lynn Deddens, Prosecutor
Dearborn County Prosecutor
215 W High St
Lawrenceburg, IN 47025

Daniel P. Brewington

Plaintiff, pro se

EXHIBIT A

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT
	) SS:	
COUNTY OF DEARBORN	)	CAUSE NO. 15D01-1702-PL-00013

DANIEL BREWINGTON,	)
	)
Plaintiff,	)
	)
v.	)
	)
DEARBORN SUPERIOR COURT II, JUDGE SALLY MCLAUGHLIN, JUDGE BRIAN HILL, COURT REPORTER BARBARA RUWE	)
	)
Defendants.	

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants, Dearborn Superior Court II, Judge Sally McLaughlin, and Judge Brian Hill, by counsel, respectfully submit this reply in support of their Cross-Motion for Summary Judgment. Defendants continue to rely upon their response in opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment. Defendants re-emphasize that under no circumstances should Brewington be entitled to the audio recordings of other grand jury proceedings involving criminal investigations into other people.

In his response, Brewington attempts to use this lawsuit to litigate numerous claims against numerous officials. However, this lawsuit only pertains to his APRA request. The simple truth is audio cannot be produced that does not exist. Brewington has received the transcripts and the audio related to his grand jury proceedings. While Brewington makes many arguments as to why he believes there must be more audio recordings of the grand jury proceeding into his criminal investigation, these arguments do not change the fact that more there are no additional audio

recordings. What is contained in the recording is contained in the recording, no matter how many times Brewington claims there should be more.

WHEREFORE, Defendants respectfully request that the Court grant summary judgment in their favor and that the Court deny Plaintiff's request for summary judgment, and all other relief deemed just and proper by the Court.

Respectfully submitted,

CURTIS T. HILL, JR.
Attorney General of Indiana
Attorney No. 32676-29

By: _____
Joshua R. Lowry
Deputy Attorney General
Attorney No. 32676-29

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, first-class postage prepaid, on May 30, 2017:

Daniel P. Brewington
8894 Glassford Ct. N
Dublin, OH 43017

Joshua R. Lowry
Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 233-6215
Facsimile: (317) 232-7979
E-mail: Joshua.Lowry@atg.in.gov

EXHIBIT B

DANIEL BREWINGTON,	)	IN THE SUPERIOR COURT I
Plaintiff,	)	
v.	)	DEARBORN COUNTY, INDIANA
DEARBORN SUPERIOR COURT II/	)	
JUDGE SALLY MCLAUGHLIN,	)SS:	
JUDGE BRIAN HILL,	)	
COURT REPORTER BARBARA	)	CAUSE NO 15D01-1702-PL-00013
RUWE	)	
Defendants.		

RESPONSE TO DEFENDANTS' REPLY DATED 05/30/17

Plaintiff, Daniel Brewington ("Brewington"), RESPONSE TO DEFENDANTS' REPLY DATED 05/30/17 and states the following:

On May 30, 2017, Defendants, by the Office of Indiana Attorney General Curtis T. Hill Jr, filed their REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT where the Defendants argue no additional audio of Brewington's grand jury exist other than what the Dearborn Superior Court II already provided to Brewington. The Defendants contend there is no audio of Negangard introducing the Brewington investigation to the grand jury or any evidence that Negangard provided a constitutional instruction for Brewington's indictment.

DEFENDANTS' ARGUMENT DEFIES LOGIC

"In his response, Brewington attempts to use this lawsuit to litigate numerous claims against numerous officials." Rather than speculate on Brewington's motives in bringing this action, Defendants should concentrate on their own actions.

Defendants could have avoided this action years ago, by coming forward with their latest claim of the incomplete grand jury record, which would have rendered the grand jury indictments against Brewington unconstitutional. Doing so would have saved Brewington from serving an unnecessary 2.5-year prison sentence in addition to the extraordinary expense associated with the appealing the case to the Indiana Court of Appeals, Indiana Supreme Court, and the Supreme Court of the United States of America. Defendants dodged releasing the grand jury audio for several years until an opinion by the Public Access Counselor, dated April 14, 2016, stated the audio was a releasable public record. It took the filing of Brewington's APRA lawsuit to finally force the Defendants to admit that the record of the grand jury was incomplete. The Defendants, through the Indiana Attorney General, try to portray Brewington's persistence in obtaining grand jury records as being frivolous or petty, despite the incomplete record being the fault of Defendants and Chief Deputy Attorney General F. Aaron Negangard. If the Defendants stand by their claim that no other audio exists, there is absolutely no question that that the record of the grand jury investigation conducted by Chief Deputy Attorney General F. Aaron Negangard is void of any constitutionally sufficient instruction for Brewington's indictments. As Defendants nor the Office of the Attorney General have taken any measures to protect the public from such conduct, legal procedures through the APRA are the only avenues in which the public can protect itself from such abuses.

DEFENDANTS SEEK RELIEF CITING OWN MISCONDUCT

I.C. § 35-34-2-3(d) requires courts to "record evidence and proceedings from a grand jury investigation in the same manner as evidence and proceedings are recorded in the court that impaneled the grand jury." The Defendants failed to do so. Brewington believes the Defendants omitted portions of the grand jury record from the audio released to Brewington. As the audio contains less information than the transcription of the audio[1], it appears Defendants omitted portions of the grand jury record from the transcription to assist Negangard withhold indictment information from Brewington, and then Defendants later attempted to modify the audio to match the transcripts. Defendants argue this is not true, and simply claim there is no audio containing any instructions or constitutional ground for Brewington's indictments prior to a general reading of statutes in the closing moments of the three-day grand jury investigation. Defendants' argument for summary judgment relies on the notion that Defendants knew all along that the grand jury was incomplete, while also asserting that it was neither the Defendants' fault, nor was it the Defendants' responsibility to inform Brewington of the incomplete record prior to Brewington's trial.

DEFENDANTS HAVE NO CREDIBILITY

Defendants claim that the record of the 2011 grand jury proceedings is incomplete, however, the Defendants nor the Dearborn County Prosecutor bothered to tell Brewington until now. Defendants allege they have nothing to hide but do not

[1] A point Defendants refuse to address despite the transcript being certified as "full, true, correct, and complete."

want Brewington to have access to the official audio because Defendants claim it contains the audio of "four to five" other grand jury proceedings unrelated to Brewington's. Defendants argument might have greater standing if Defendants had not already "lost" records of prior proceedings. Brewington invites this Court to review Brewington's original complaint in this action to see that the Defendants have a history of "losing" records. In an order filed January 12, 2012, Defendant Hill ordered the Court Reporter to "prepare compact disc audio recordings or the following requested hearings." Included in the list of hearings were "Grand Jury proceedings of February 28, 2011, March 1, 2011 and March 2, 2011" and "Pretrial Hearing of July 18, 2011." On January 24, Hill issued another order to prepare the records for another request. In an order dated February 2, 2012 Hill stated the following:

1. Subsequent to the issuance of those two Orders, the Court has discovered that no audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011, and March 2, 2011 were admitted into evidence in this cause, therefore, these audio recordings are not a record in these proceedings.

2. The Final Pretrial Conference/Bond Reduction Hearing which had originally been set on July 18, 2011 was continued on the State's Motion and no hearing took place on that date. If a telephonic conference with counsel was held on that date, it was merely an effort to reschedule and find an agreeable date and no recordings were made. Therefore, no audio recording exists for July 18, 2011.

3. For the above state reasons, the recipients' request for audio recordings of the Grand Jury Proceedings for February 28, 2011, March 1, 2011 and March 2, 2011 and a Pretrial Hearing for July 18, 2011 are rendered moot because there are no such audio recordings existing in this case.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, first-class postage prepaid, on June 5, 2017.

Brian D. Hill, Judge
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Rushville, IN 46173
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Sally A. McLaughlin, Judge
Judge, Dearborn Superior Court II
215 W High St
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Daniel P. Brewington
Plaintiff, pro se

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
	)	
Petitioner,	)	
	)	
V.	)	
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	

FILED

JUN 21 2017

CLERK OF DEARBORN CIRCUIT COURT

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Comes now the Petitioner, Daniel Brewington ("Brewington"), in his reply to the State's Response to Petitioner's Motion for Summary Judgment and respectfully requests Honorable Special Judge Coy to grant summary judgment in favor of Petitioner as the State's response only serves to support Brewington's request for Summary Judgment. In support of said reply, Brewington presents the attached Memorandum of Law.

Respectfully submitted,

Daniel P. Brewington
Plaintiff, pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, first-class postage prepaid, on June 19, 2017.

Dearborn County Prosecutor
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Daniel P. Brewington
Plaintiff, pro se

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
	)	
Petitioner,	)	
	)	
V.	)	
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Brewington first notes that he accidently cited Summary Judgment under Indiana R. Trial P 56 rather than request the appropriate relief for Summary Disposition under Ind. R. P. 4(g). Brewington would request that the Honorable Special Judge Coy excuse the oversight and treat Brewington's original filing for Summary Judgment as the appropriate Summary Disposition.

This filing would have been more prompt but Brewington did not receive a copy of the State's Response in the mail until nearly a week after it was filed.

NO GENUINE ISSUE OF MATERIAL FACT TO DISPUTE THAT BREWINGTON'S TRIAL WAS UNCONSTITUTIONAL

In case the State tries to confuse matters, this section of Brewington's Reply does not deal with the unconstitutionality of Brewington's trial as it relates to Brewington's speech. This section explains how Honorable Special Judge Coy should vacate Brewington's convictions on the face of this Reply because

Brewington was denied the most fundamental procedural protections guaranteed by both the Indiana and United States Constitutions. In the opening moments of Brewington's criminal trial on October 3, 2011, Brewington filed three pro se motions: Motion to Dismiss, Motion to Disqualify F. Aaron Negangard, and appoint Special Prosecutor, and Motion to Dismiss for Ineffective Assistance of Counsel. Special Judge Brian Hill took the filings as an indication Brewington wished to represent himself. The following are portions of Brewington's communication with Judge Hill [Trial Tr. 3-5]:

> 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... 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... 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.

After Brewington explained that Brewington did not have access to all the evidence, his public defender refused to meet with him to discuss the case, that Brewington had difficulties reading and concentrating because he did not have his proper

medication for ADHD, and not having any idea of what was going on with Brewington's case, Hill stated:

> 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... [Trial Tr. 5]

Brewington further explained

> No, no, no, I want [competent] 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 responded as followed:

> Okay that was the answer to my question. Uh, Mr.Barrett, are you ready to proceed with this case today? [Trial Tr. 6]

Brewington's pro se motions explained Brewington had no understanding of the nature of the criminal trial that was about to begin because Brewington claimed Barrett refused to provide Brewington with any legal assistance other than appearing for an obligatory appearance at hearings. Hill denied those motions because Brewington had representation. In *Ellerman v. State*, 786 N.E.2d 788 (2003), the Court held:

> In Leonard v. State, 579 N.E.2d 1294 (Ind.1991), our supreme court indicated that the "guidelines" set out in Dowell do not "constitute a rigid mandate setting forth specific inquiries that a trial court is required to make before determining whether a defendant's waiver of

> right to counsel is knowing, intelligent, and voluntary." Id. at 1296. The Indiana Supreme Court recently reiterated its rejection of a rigid test in this regard when it stated, "There are no prescribed "talking points" the court is required to include in its advisement to the defendant; it need only come to a considered determination that the defendant is making a voluntary, knowing, and intelligent waiver." *Poynter v. State*, 749 N.E.2d at 1126. Nevertheless, courts are to make the determination "with the awareness that the law indulges every reasonable presumption against a waiver of this fundamental right." Id. Therefore, the law on this point requires that the advisement to a defendant seeking self-representation be such that he is made "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Osborne v. State*, 754 N.E.2d 916, 920-21 (Ind.2001) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). Finally, the court should not grant a request for self-representation unless it is satisfied that the defendant has the mental capacity to understand the proceedings. *Osborne v. State*, 754 N.E.2d 916.

Accepting Judge Hill's invitation to Brewington to act as his own attorney would have required Brewington's sentences to be vacated because Brewington made it clear to Hill that Brewington never had any understanding of the State's case against him. Unless the State wishes to argue that Hill's actions were born out of incompetence, Hill's actions consciously deprived Brewington of a fair trial, while trying to bait Brewington into representing himself. The face of the record requires this Court to vacate Brewington's convictions as any evidentiary hearing on the matter will only prove Brewington's trial lacked fundamental constitutional protections guaranteed by federal law. Brewington took every action imaginable to inform the Court that Barrett refused to meet with Brewington or offer Brewington any legal assistance in understanding the nature of the State's case against Brewington. Brewington made a timely pro se objection of a complete lack of

representation prior to trial. The State and the Court had every opportunity to question Barrett about Brewington's allegations but refused to do so. Even though the State already took advantage of Brewington's lack of representation and understanding of the case, the State still has no means to dispute Brewington's claim if it wanted. Attorney/client privilege bars the State from calling Barrett to testify to the contrary. As early as Brewington's arraignment on March 11, 2011, the State alleged Brewington suffered from a "psychological disturbance" that formed the basis of the victims' alleged fear of Brewington. The State cannot turn around now and argue that the "psychological disturbance" that led to the perception of Brewington's "dangerousness" did not affect Brewington's ability to understand the nature of the charges and criminal proceedings in the absence of assistance of counsel prior to trial. Even a hypothetical argument of providing a venue for Special Judge Hill to testify on the issue would lead to Brewington's convictions being vacated. Hill ignored Brewington's constitutional concerns. Only ignorance, personal bias, or the reliance on an ex parte judicial investigation can explain Hill's refusal to address Brewington's concerns on record; all of which require the reversal of Brewington's convictions. Any argument other than judicial ignorance requires the understanding that Hill took an adversarial role against Brewington prior to Brewington's trial. The entire record of Brewington's criminal proceedings is void of any evidence refuting Brewington's claims, thus requiring Hill to engage in an off-record investigation in a search to find a reason to deny Brewington's requests for competent counsel, evidence, and charging information,

which Hill apparently did. During the September 19, 2011, final pretrial hearing, Hill denied Brewington's request to continue the jury trial scheduled for October 3, 2011 because Hill claimed Brewington was "affirmatively pushing for trial" in August, despite there being no record of Brewington making any such argument. Negangard went on to accuse Brewington of sabotaging Brewington's own trial:

> Your honor, um, the issue before was that the jury trial was being continued because Mr. Barrett hadn't had time to prepare a defense because he had only been on the case a month and he was dealing with some very important family issues. It is my understanding that the Defendant objected to any continuance at that time, um, and in the interest of fairness and ensuring that Mr. Brewington got a defense, um, a fair defense, the Court continued this based on an emergency, found there was an emergency and then continued the jury trial to this setting. Defense wasn't concerned; I just don't know that Mr. Brewington is being honest with the Court. He wasn't concerned in August of this month that his attorney had not had time to prepare a defense. Now in October, now in September where we are two (2) weeks from the jury trial, now he's um mad that his attorney hasn't talked to him enough as far as I can tell... However, you know, whatever the Court deems appropriate to address these issues raised by the Defendant, but I also want to put on the record that Mr. Brewington's integrity is at issue here and I don't see that you know, just based on the inconsistencies of what he had been complaining to the Court before to and then now he's complaining, it seems to me that the motivation is more about um, complaining and seeing any way to keep this case from a resolution than really getting a resolution, almost like he's trying to sabotage his own case. He's comfortable in August going forward with the trial even though his defense attorney hasn't had an opportunity to review one document or anything else based on a family emergency and then now today um, he wants more time for his defense attorney to talk and meet with him.

Negangard and Hill withheld indictment information from Brewington by failing to provide Brewington with a copy of the grand jury transcript until after the September 19, 2011 hearing, over a month after the original trial was set to occur. Despite there being no record of Brewington making any objection to continuing the

original trial scheduled for August 16, 2011, Negangard accused Brewington of trying to sabotage Brewington's own case then two weeks later, Hill tried to force Brewington into self-representation. Negangard and Hill conspired to make it appear that Brewington was pushing for trial in August 2011 when there is absolutely no record of such. In the absence of a record of Brewington pushing for trial in August 2011, Negangard and Hill's corroborating story can only be viewed as a conspiracy to stack the record to hurt Brewington's ability to appeal the matter. The lack of objection from Barrett calls into question Barrett's knowledge of the activity as well.

Brewington wants to make it clear that he is not arguing the effectiveness of Barrett's trial strategy because Barrett had no trial strategy. It was impossible for Barrett to develop any strategy because Barrett refused to meet with Brewington to determine Brewington's account of the events. Any alleged strategy was based entirely on the State's allegations regardless of whether they were true or false. Given the nature of the record, any strategy by Barrett was likely adversarial to Brewington's own interests. Setting the matter for additional hearings only provides the State with the opportunity to challenge the issue that the State sought to take advantage of during trial.

NO GENUINE ISSUE OF MATERIAL FACT TO DISPUTE THAT INDICTMENTS ARE UNCONSTITUTIONAL

In the State's attempt to present the appearance of an issue of material fact to curb Brewington's request for Summary Judgment, Prosecutor Krumwied strikes

at the State's own argument. First Brewington points out the requirements of constitutionally sufficient indictment information as explained by the Supreme Court of the United States of America. ("SCOTUS") In *United States v. Resendiz-Ponce*, 127 S.Ct. 782, 549 U.S. 102, 166 L.Ed.2d 591 (2007), SCOTUS held:

> In *Hamling*, we identified two constitutional requirements for an indictment: "first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." 418 U.S., at 117, 94 S.Ct. 2887.

The State's contention fails simply because any plea agreement would have been based on constitutionally protected activity. The State confuses issues in arguing that former Dearborn County Prosecutor F. Aaron Negangard "clearly met" the requirements set forth by Indiana Code 35-34-2-12(a) that requires the prosecuting attorney, prior to grand jury deliberations, to state on record "(1) Identify each target of the grand jury proceeding; and (2) Identify each offense that each target is alleged to have committed." Even contending that Negangard may have met the requirements set forth by IC 35-34-2-12(a) for instructing a grand jury, the minimal requirements of IC 35-34-2-12(a) fail to meet the constitutional requirements for indictment information set forth by federal law and SCOTUS. The fact that the State instructed Brewington to rely on the grand jury transcripts for specific indictment information does not lesson the State's constitutional burden to provide sufficient indictment information that meets the constitutional requirements of federal law.

Krumwied reinforces the unconstitutionality of the indictment information by claiming, "the evidence contained therein is more than enough for even a layperson to discern a 'true threat.'" At first glance, the prosecution's argument may appear that a layperson could piece together activity appearing to meet the definition of a "true threat," but a layperson would only know to look for a "true threat" if the layperson was *instructed* to look for such. A layperson would also be unable to determine the existence of "veiled threats" without an instruction for the "contextual factors" that turned protected speech into those "veiled threats." Negangard failed to give the grand jury or Brewington instruction on either; leaving Brewington unable to prepare a defense against such. It was not until the opinion in *Brewington v. State*, 7 N.E.3d 946 (2014) before Brewington became aware of the veiled threats allegation as it applied to the contextual factors surrounding the case. In *Brewington*, (current) Chief Justice Loretta Rush wrote:

> But because many of Defendant's statements, in isolation, were protected--and even his true threats were carefully veiled--we will discuss "all of the contextual factors" of his statements in considerable detail, see *Virginia v. Black*, 538 U.S. 343, 367, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), to identify how they took on their threatening implications. *Brewington v. State*, 7 N.E.3d at 955

Without an instruction on the "contextual factors" and examples demonstrating at what point Brewington's protected speech became "carefully veiled" threats, Brewington was unable to prepare a defense against such. Brewington has every right to maintain and believe his innocence. Krumwied's argument for constitutionally sufficient indictment information requires the prosecution to take a "you know what you did" mentality. As Brewington never intended for any

comments or conduct to be interpreted as threats to property or physical harm, absent any specific examples or instructions, Brewington had no ability to determine which of his constitutionally protected statements were considered "veiled threats" to cause physical harm, thus making it impossible to mount a defense against such.

The indisputable constitutional flaws do not end there. Pages five and six of the State's memorandum include Negangard's reading of Count II for Brewington's indictment for Intimidation of a Judge. Negangard failed to specify which of the eight subsections of the intimidation apply to Brewington, leaving Brewington with the task of guessing which of the eight subsections that the grand jurors may have applied to Brewington's indictment. Krumwied attempts to defend Negangard's failure to provide the grand jury with a "true threat" instruction by claiming "the transcript and audio of the grand jury proceedings are also void of any such explicit reference to 'criminal defamation.'" Though the term "criminal defamation" does not appear in the record of the grand jury, the only instance appearing in the record of the grand jury of where Negangard specifically explains how Brewington's actions violate Indiana law, is what an attorney or layperson would normally deem to be criminal defamation:

> 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...

Probably the best argument for Summary Judgment in favor of Brewington is Prosecutor Krumwied's request for an evidentiary hearing so Brewington and the State can submit evidence, call witnesses, and present arguments over what indictment information Brewington should have relied upon to build a defense for a trial that occurred in 2011. Any argument that Brewington received constitutionally sufficient charging information requires the notion that Brewington should have ignored Negangard's only direct explanation of the alleged criminal activity where Negangard informed the grand jurors that Brewington's "over the top" and "unsubstantiated statements" violated Indiana law. Such a contention would require Brewington to thoroughly scour the 340-page record of the grand jury proceedings, without the assistance of legal counsel, in search of any examples of Brewington's normally protected statements that become veiled threats when viewed in light of "all of the contextual factors" that Negangard also failed to provide the grand jury. In the State's conclusion, Krumwied dedicates a portion of the State's response to attack Brewington in defense of Chief Deputy Attorney General F. Aaron Negangard. Krumwied stated the following,

> Finally, the State wishes to address the claim raised in Brewington's

> Motion for Summary Judgment in Paragraph 2(A) that "Negangard switched playbooks on Brewington". This claim is, to put it bluntly, nonsensical.

Brewington's claim is anything but nonsensical. Out of eight different subsections of Indiana's intimidation statute, the only conduct specifically referenced by Negangard in direct communication with the grand jury clearly fell into the category of constitutionally impermissible threats to reputations under Indiana Code section 35-45-2-1(c)(6)-(7). What always seems to get lost in the shuffle is the fact that Negangard argued the unconstitutional threats to reputation without bearing any responsibility for the argument the Indiana Supreme Court deemed "plainly impermissible." As such, Negangard knew the argument to be plainly impermissible when Negangard presented it to the grand jury just prior to concluding the grand jury investigation. If Krumwied asserts that Negangard's purpose in convening a grand jury was to investigate "true threats" existing in Brewington's speech, the only reason for Negangard presenting the plainly impermissible criminal defamation argument was to trick Brewington into preparing the wrong defense and then "switched playbooks" to a true threat prosecutorial argument during trial. But even this argument fails because the prosecution clearly stated the only intent of Brewington's writings was to expose the alleged victims to "hatred and contempt and disgrace and ridicule." It is important to note that the defense of Negangard by the Office of the Dearborn County Prosecutor raises other serious concerns. A concession of wrong-doing in Brewington's trial by the Dearborn County Prosecutor essentially incriminates the

second highest attorney in the State of Indiana in, at least, substantial unethical conduct as a result of Negangard naming Brewington as a target of an unconstitutional grand jury investigation. No matter how hard the State argues, it cannot dispute that during Brewington's trial, the State argued the "only intent" of Brewington's speech gave Brewington's speech constitutional protections.

During closing arguments in trial, Chief Deputy Prosecutor Joeseph Kisor argued the only intent of Brewington's writings fell under subsection c(6) of the intimidation statute:

> Subsection C6, this is the one that if you had a paint brush, it would be all over the ceiling. It would be all over the windows, the floor, this podium, my face. This is the one he just could not stop doing — exposing the people that he was threatening through the hatred and contempt and disgrace and ridicule. That was his whole intent. That's his only intent. [Trial Tr. 455-456]

The Indiana Supreme Court ruled the prosecution's threats to reputation argument under IC 34-45-2-1(c)(6)-(7) was "plainly impermissible." This point alone requires the reversal of Brewington's convictions reversal because the intent that Kisor argued to have formed the basis of the State's case against Brewington enjoyed constitutional protections. As Kisor affirmatively stated that the only intent of Brewington's writings was constitutionally protected, there would be no way for Brewington to know which of his writings were intended to be construed as veiled or implied true threats because Brewington never *intended* for the statements to be perceived as veiled or implied true threats. At this point, the arguments made by Krumwied spiral out of control because the State cannot argue that Brewington's "only intent" falls under the constitutionally protected threats to reputation, while

trying to argue another intent. "Only intent" leaves no more of Brewington's intent left for the State to assign to other prosecutorial theories. Proving otherwise requires an evidentiary hearing that would give Kisor the opportunity to testify that he was lying to the trial jury about Brewington's only intent falling under the constitutionally permissible subsection c(6) of the intimidation statute. Negangard reaffirmed the unconstitutional grand jury indictments telling the jury that the State met its burden in the State's criminal defamation case against Brewington:

> We have absolutely met our burden in this case. But let's look back at this, should have pursued it civilly. This is not criminal. The State has passed a law that under these specific circumstances you cannot go this far. You all said you agreed with that law. We're asking you to enforce that law. Under these specific circumstances where there was retaliation for a prior lawful act and the threat was to expose the person to contempt hatred, disgrace or ridicule. [Trial Tr.

Negangard affirmatively proclaimed that the State's case against Brewington was based on unconstitutional criminal defamation. Negangard makes no mention of a "true threat" burden. Unless the State wishes to argue that Negangard failed to present the above argument to the grand jury, Negangard confirmed that Negangard made Brewington the target of an unconstitutional grand jury investigation for criminal defamation. Furthermore, Negangard takes malicious prosecution to an entirely new level. Negangard not only initiated a criminal action against Brewington to shield Judge Humphrey and Dr. Connor from the burden of taking civil action against Brewington, but Negangard suggested that neither Humphrey nor Connor had a say in whether Negangard pursued a criminal action

on their behalf. As such, Negangard assumed the role of deciding whether Brewington's speech about Humphrey and Connor was true or false:

> Now as a practical matter, I mean, Judge Humphrey and Dr. Connor aren't interested in engaging Dan Brewington. They just want to be left alone. Judge Humphrey and Dr. Connor aren't interested in a pay date, they just want justice. They don't get to decide whether a criminal remedy. If they want a civil remedy, they're allowed to pursue it. But let's look from a practical matter as why they would want to do that... Were you really expecting Judge Humphrey, are we going to say not here, not here, we don't want your justice? You spend thousands of dollars of your own money which you'll never recover to get a piece of paper that says he owes you money. What's that worth? That's not accountability. Accountability, they're not going to do that because all they want is to be left alone. [Trial Tr.

Negangard and Kisor left no stone unturned in reiterating that Brewington's only intent was to expose the alleged victims to contempt hatred, disgrace or ridicule, while Negangard claimed the State had "absolutely" met its burden in the case in demonstrating Brewington was guilty of "criminal defamation."

Quite possibly the only thing worse than making Brewington the target of an unconstitutional grand jury investigation for violating section c(6) of the intimidation statute, is the fact Negangard made Brewington the target of a grand jury investigation for criminal defamation without any evidence that Brewington's speech in the year leading to the grand jury investigation was either offensive, defamatory, or intimidating to the alleged victims. Sheriff Michael Kreinhop testified he began the investigation of Brewington on August 24, 2009 [Trial Tr. 341] and the investigation ended after "about three (3) months." [Trial Tr. 410]. Kreinhop also testified Kreinhop was the only officer involved in the Brewington investigation. [Trial Tr. 408] Negangard made Brewington the target of a grand

jury investigation on February 15, 2011. As there is no investigatory record or evidence of contact between law enforcement and the alleged victims in the time between Kreinhop's 2009 investigation and the convening of the grand jury, any finding that Brewington's speech was defamatory or offensive was based on Negangard's own perception of Brewington's writings stemming from Negangard's own investigation. The fact that Negangard failed to contact the alleged victims about Brewington's writings in the time between the conclusion of Kreinhop's 2009 investigation and the 2011 grand jury investigation only reinforces that the State's sole argument was that Brewington's writings were threats to reputation and not veiled threats to personal safety. From a procedural standpoint, Negangard's actions violate Brewington Sixth Amendment right to confrontation. Negangard served as the sole investigator of Brewington's case for the entire year of 2010. It does not matter if Negangard felt the investigation of Brewington's 2010 writings constituted threats to reputation, true threats, or even bank fraud, because the Sixth Amendment protects Brewington's right to confront any witness or investigator participating in whatever crime Negangard was allegedly investigating in 2010. Negangard withheld the fact that he served as the only investigator on the case; thus, denying Brewington's Sixth Amendment right to confront Negangard. Of utmost importance is the fact that there is no evidence that Negangard knew if the alleged victims were even aware of Brewington's writings in 2010. In the absence of any contact with the alleged victims, it was impossible for Negangard to know if the alleged victims even viewed Brewington's writings in 2010. If the State wishes to

argue Negangard had private meetings with the alleged victims, Brewington was entitled to any evidence that the alleged victims provided to Negangard proving Brewington's writings were defamatory and any relating investigatory reports. Regardless, at the end of the day Negangard's criminal defamation investigation is still unconstitutional.

The State took offense to Brewington's metaphorical use of "switching playbooks" in describing how Negangard argued different grounds for Brewington's convictions during trial than what Negangard presented to the grand jury. The State argued Brewington's statement was a representation of a belief that the State was required to provide Brewington with an entire defense strategy, which of course is a misinterpretation by the prosecution. In applying a more literal sense of the word "playbook," as used in a sport such as football, Brewington already had a general idea of the State's "playbook," which consisted of punishing Brewington's speech at any cost. The State's "everything but the kitchen sink" strategy served to confuse indictment information, prosecutorial arguments, defense strategies, and appellate issues. Even the matter as simple as perjury caused confusion for the Indiana Supreme Court. In upholding Brewington's single conviction for perjury, Justice Loretta Rush wrote:

> 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. *Id.*at 958
>
> And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife, and that her address was his address. *Id.* at 966

The above two statements represent two entirely different contentions. The first alleges Brewington lied about intent, while the second statement claims Brewington lied about feigning ignorance. If Justice Loretta H. Rush, who currently serves as Chief Justice of the Indiana Supreme Court was confused about which statement led to Brewington's perjury indictment and subsequent conviction, there was no way Brewington could have known what statement he was required to defend.

Much of the confusion regarding the nature of Brewington's indictments is a product of Negangard's ever-changing arguments for Brewington's convictions. Negangard introduced another implausible ground for Brewington's conviction during closing arguments when Negangard instructed the trial jury to return a guilty verdict for Intimidation of a Judge by claiming Brewington violated the Indiana Rules of Professional Conduct:

> As to Count II, Intimidation of a Judge, that is more serious because it involves a Judge but because it involves a Judge, we do need to look at the first amendment issues because you are allowed to criticize judges. Right? I mean, I'm not. Defense counsel's not because we are attorneys. But remember he says he's acting like an attorney so we should treat it as he's acting like an attorney. Well if he's acting like an attorney, then he needs to accountable like an attorney. He could hire his own attorney but he didn't. So you know and he has to suffer the consequences. [Trial Tr. 515]

This is problematic for several reasons; the first being Negangard failed to present the argument to the grand jury, nor did Negangard offer any evidence to support how the State concluded that Brewington was, in fact, able to hire an attorney to represent Brewington in a civil divorce proceeding. Negangard also failed to provide any statute under Indiana law explaining how self-representation in civil

proceedings removes free speech protections. Unless the State is willing to admit that Indiana Supreme Court Disciplinary Commission vests authority in county prosecutors to prosecute non-attorneys for violating rules of professional conduct, Negangard made up the absurd argument in calling for Brewington's conviction for reasons other than alleged guilt. The most concerning aspect of Negangard's statement is the fact that neither Hill nor Barrett objected to Negangard seeking convictions against Brewington for violating non-criminal rules governing the practice of law in the State of Indiana. Negangard then went on to explain, without objections, that Brewington's case was not about the victims. Negangard argued convictions against Brewington were necessary to protect the judicial system and to prevent the fall of the United States of America.

> I want you to imagine a system of justice where witnesses can be subject to someone who has the time and resources, who doesn't have to work and they can be subject to daily attacks, daily threats, exposing them to disgrace, contempt, ridicule, hatred and they can't be held accountable. I want you to imagine a world where witnesses cannot take the stand for fear of retaliation that someone will spend their time attacking them, tracking down pictures of them from somewhere in the internet and posting them and making fun of them and not be held accountable, because our judicial system would fail. It would belong to the strong. It would belong to people like Dan Brewington...That would become our system of justice if we accept the Defendant's premise that these are only opinions and he was only expressing his political thought. If we accept that premise, then that is the judicial system that we will have. That will be brought on by the invention of the internet. I submit to you that that is not a judicial system we want. That's what this case is about. It isn't about Judge Humphrey. It isn't about Dr. Connor. It is about our system of justice that was challenged by Dan Brewington and I submit to you that it is your duty, not to let him pervert it, not to let him take it away and it happens if he's not held accountable. He's held accountable by a verdict of guilty. That's how he's held accountable and that's what we're asking you to do. You cannot allow our system to be perverted that way. The rule of law will fail and ultimately our republic.

> I submit to you that that is not a result that we want to have happen. That is why we are here today. [Trial Tr. 504-505]

Analysis of Negangard's claim demonstrates the egregious prosecutorial misconduct by Negangard. Negangard strategically failed to present the above argument to the grand jury so Brewington was unable to build a defense against Negangard's allegation that Brewington's speech about Humphrey and Connor could lead to the fall of the United States of America. Negangard could not present the argument to the grand jury because the grand jury would have returned a "no bill" for Brewington's indictments. As the Prosecution currently claims Negangard provided no instruction, introduction, or explanation of Brewington's case before presenting witnesses and evidence in the grand jury investigation, the above argument would have caused Negangard's grand jury presentation to fail miserably. Any grand jury testimony or evidence regarding allegations of damages that Brewington inflicted on Humphrey or Connor would have become moot as soon as Negangard told the grand jurors, "That's what this case is about. It isn't about Judge Humphrey. It isn't about Dr. Connor." If Negangard instructed the grand jury that the investigation of Brewington's writings was not about Humphrey and Connor, then the grand jury would have been unable to return indictments for Brewington's writings. Of course, if the State would like to argue against the above contentions, the only other explanation as to why Negangard would argue that Brewington's speech about Humphrey and Connor could lead to the fall of the United States of America is Negangard committed an act of misconduct by

requesting the trial jury to return guilty verdicts for reasons other than Brewington's guilt. In *Ryan v. State*, 992 N.E.2d 776 (2013) the Court held:

> "[I]t is misconduct for a prosecutor to request the jury to convict a defendant for any reason other than his guilt or to phrase final argument in a manner calculated to inflame the passions or prejudice of the jury." Neville, 976 N.E.2d at 1264 (citation and quotation marks omitted). *Id.* at 787

Not only did Negangard confuse the record, but Negangard seemed to confuse himself. At times, it became difficult to understand what Negangard was talking about. During closing arguments, Negangard offered the following in explaining the fear incurred by the alleged victims was a result of fighting words, not threats of violence:

> That's the law and you can't go so far as to lie. He just didn't say he's a bad judge, he's not a fair judge, he didn't listen to me. That's fine. He could have even called him a son-of-a-bitch if he wanted, alright? That's probably okay. Not smart but probably okay. Not smart when you got cases in front of him. But he can say that. But what he can't say, he's a child abuser because it's not true and it's a fighting word and it's designed to get a, invoke a response, it's designed to get people mad at him" [Trial Tr. 515]

Negangard failed to present a "fighting word" argument to the grand jury or provide any explanation of which of Brewington's statements rose to the level of fighting words so Brewington was unable to mount a defense against such.

THE GRAND JURY RECORD IS INCOMPLETE

In *Wurster v. State*, 715 N.E.2d 341 (1999), the Indiana Supreme Court wrote:

> As the Court of Appeals correctly observed, "[o]nly in cases in which there is such 'flagrant imposition of the grand jurors' will or independent judgment' will the court find a violation of due process." *Wurster*, 708

N.E.2d at 592 (quoting *Averhart v. State*, 470 N.E.2d 666, 679 (Ind.1984))

There may never be a clearer violation of due process in a grand jury proceeding than the case at hand. Not only did Negangard seek indictments under an unconstitutional criminal defamation premise but Negangard specifically told the grand jurors that Brewington's speech crossed the lines of free speech and intimidation and harassment because Negangard said so. [Grand Jury Tr. 338]. At that point, the grand jury lost all independence a "no bill" would require the grand jury disregarding the Negangard's contention of the law. Brewington requests that Honorable Special Judge Coy ask the Dearborn County Prosecutor to answer to why the grand jury record begins at witness testimony and fails to include any introduction to the case. The prosecution can continue with the ridiculous contention that the grand jury proceedings in the investigation of Daniel Brewington begin at witness testimony but the fact remains that parts of the record were not recorded or the record has been altered because the audio does not match the transcript. There is only one explanation appearing in the record of the grand jury of how Brewington's actions applied to the intimidation indictments and it was Negangard's instruction that Brewington's statements were "over the top" and "unsubstantiated statements" about Humphrey and Connor. The prosecution cannot argue Brewington was supposed to overlook Negangard's "criminal defamation" explanation because it was plainly unconstitutional, while placing the burden on Brewington to search the record of the 340-page grand jury transcript to find examples of veiled threats that Negangard conveniently failed to mention when

Negangard argued the unconstitutional "criminal defamation" ground for Brewington's indictments. The record of the final pretrial hearing on September 19, 2011 demonstrates Brewington still did not have a copy of the transcripts that the State forced Brewington to rely upon to build a defense against the State's case. [Tr. 66] Later in the hearing, Hill refused to refuse Brewington's request to continue the October 3, 2011 trial. Hill stated:

> Based on what's happened so far since I've been involved in this case, I'm going to deny your motion for continuance. We've got two (2) weeks until trial. Based on my understanding of things, there isn't anything that the State's going to offer that's not going to be available to you by the end of this afternoon. So you've got two (2) weeks to confer with counsel and we' II get started with the jury trial on October 3rd at 9:00 a.m. [Tr. 81]

Judge Hill gave Brewington two weeks to try to read the 340-page grand jury transcript and guess what actions Brewington was required to defend before Brewington could begin to prepare a defense. Though seemingly unconscionable, this was a gift from Hill, because Hill originally tried to force Brewington to trial on August 16, 2011, over a month before Brewington was provided the indictment information contained within the grand jury transcript. Never mind the fact that Brewington had been incarcerated in the Dearborn County Law Enforcement Center on a $500,000 surety/$100,000 cash bond since his arraignment on March 11, 2011. Dearborn County held Brewington for nearly 200 days before allowing Brewington to review what actions the State alleged to be unlawful. Now the State is arguing that some of the allegations were unconstitutional, yet the State still believes that the less-than two weeks Brewington had to prepare for trial was more

than enough time to differentiate the unconstitutional indictment information from the hidden constitutional indictment information and to build a defense against such.

CONCLUSION

The Office of Dearborn County Prosecutor Lynn Deddens claims it did not address every specific ground alleged and raised by Brewington "for the sake of judicial economy and efficiency." If the office of Prosecutor Deddens truly had any concern or respect for "judicial economy and efficiency," it would stop trying to protect the actions of Chief Deputy Attorney General F. Aaron Negangard and just concede the misconduct. The Dearborn County Prosecutor attempts to portray Brewington's PCR as an attempt to relitigate previous First Amendment claims, while ignoring the fact the State provided no specificity to which of Brewington's statements were illegal or at what point they became illegal until the Indiana Supreme Court defined the criminal conduct in *Brewington v. State.* Any finding of alleged strategy by Barrett or charging information mentioned by the Indiana Supreme Court is moot because Brewington did not understand such prior to trial. Brewington requests that the Honorable Special Judge Coy see Brewington's case for what it is; a First Amendment witch hunt. The Office of the Dearborn County Prosecutor has dumbed down the Constitution of the United States to the point where Krumwied is trying to convince this Court that Brewington's indictment information is constitutionally sufficient. Krumwied explained "all" Brewington needed to do to build a defense against the State's case was to overlook the plainly

unconstitutional argument made by Negangard and then infer what statements might be criminal just in case Negangard was just lying to the grand jury about the investigation being about Brewington's "over the top" and "unsubstantiated statements" about Dearborn County Court officials. Of course, Brewington and the grand jury had no idea that Negangard brought a prosecution against Brewington for violating the Indiana Rules of Professional Conduct, or because Brewington was a threat to the United States of America. These are the issues Dearborn County Prosecutor Lynn Deddens and her staff refuse to address and it is not out of "judicial economy and efficiency." Krumwied belittles Brewington for lacking a proficient understanding of legal procedure and terminology and then takes the position that the prosecution and this Court should not be troubled with Brewington's claims that the Prosecution refuses to address. It truly shocks the conscious to think that a defendant at onset of a criminal trial could state in open court that he had no understanding of the case against him, had not received evidence against him, and that his public defender refused to meet with him or allow the defendant to play any role in preparing his own defense. Far more shocking is the fact that Rush Superior Court Judge Brian Hill, Rush County Chief Public Defender Bryan Barrett, and (current) Chief Deputy Indiana Attorney General F. Aaron Negangard sat silent in the Dearborn County Courthouse, while Brewington made these claims. The only thing an evidentiary hearing will produce is whether the procedural constitutional deficiencies in Brewington's trial were a result of cumulative ignorance and/or planned conspiracy by the three. Absent from

any law in the United States of America is the ability to waive the right from relief from being convicted of non-existent crimes where the Judge, Prosecutor, and/or Public Defender in the case engaged in conspiracy to deny a defendant a constitutional trial.

WHEREFORE, for the reasons set forth in Brewington's Reply to State's Response to Petitioner's Motion for Summary Judgment and attached Memorandum, Brewington requests that this Court grant Brewington's Motion for Summary Judgment by vacating Brewington's convictions in Cause No. 15D02-1103-FD-00084, and to award Brewington any other appropriate relief.

Respectfully submitted,

Daniel P. Brewington
Plaintiff, pro se

DANIEL BREWINGTON PETITIONER,	)	IN THE SUPERIOR COURT II DEARBORN COUNTY, INDIANA
v.	)	SS:
STATE OF INDIANA RESPONDANT.	)	CAUSE NO. 15D02-1702-PC-0003

FILED
OCT 02 2017
CLERK OF DEARBORN CIRCUIT COURT

REQUEST FOR RULING ON SUMMARY DISPOSITION

Plaintiff, Daniel Brewington ("Brewington"), respectfully requests this Court to issue a ruling on Brewington's Motion for Summary Judgment/Disposition[1], dated March 31, 2017 and in support, Brewington states as follows:

THE STATE CAN'T SAY WHY IT CONVENED GRAND JURY

Summary Disposition is necessary because the State cannot tell this Post-Conviction Court why former Dearborn County Prosecutor F. Aaron Negangard[2] made Brewington a target of a grand jury investigation because the record of the grand jury is incomplete. There is no record to explain why Negangard convened the grand jury. Whether the Dearborn Superior Court II failed to record the entire

[1] Brewington's June 19, 2017 response to the State's response to Brewington's original Motion for Summary Judgment addresses how Brewington incorrectly requested Summary Judgment under Indiana R. Trial P 56 rather than request the appropriate relief for Summary Disposition under Ind. R. P. 4(g).

[2] F. Aaron Negangard now serves as Chief Deputy to Indiana Attorney General Curtis Hill.

grand jury investigation of Daniel Brewington as required by Indiana law; and/or, the Dearborn Superior Court II, under Sally McLaughlin, modified the record of the grand jury proceedings to the benefit of the Dearborn County Prosecutor is irrelevant. No amount of spinning by the Dearborn County Prosecutor can change the state of these facts. The State's attempts to circumnavigate these facts are disingenuous at best. Any record of the grand jury investigation of Brewington occurring prior to witness testimony has likely been erased. The State created this problem when it proceeded to trial knowing that the Dearborn Superior Court II knew the record to be incomplete. Now the Office of the Dearborn County Prosecutor is trying to convince this Court to grant the State a reprieve from the State's own unconstitutional conduct. The State got its hand stuck in the proverbial cookie jar in this matter and the State's Response to Brewington's Motion for Summary [Disposition], filed June 6, 2017 only serves to support the State's misconduct.

State's Own Motion Supports Summary Disposition in Favor of Brewington

The State contends that multiple issues of material fact exist in Brewington's Verified Petition for Post-Conviction Relief. The State argues:

> "Among Brewington's twenty alleged grounds for relief is that his indictment for Intimidation violated his First Amendment right to Freedom of Speech. This contention, however, is barred under the doctrine of res judicata as the Indiana Supreme Court has already ruled explicitly on the merits of Brewington's First Amendment claims. Brewington v. State, 7 N.E.3d 946 (Ind. 2014)."

The State created the issues of material fact several years ago when former Dearborn County Prosecutor F. Aaron Negangard failed to make a record of why he made Brewington the target of a grand jury investigation. Deputy Prosecutor Andrew Krumwied stated:

> "Brewington now seeks to argue that he was indicted only for intimidation on the basis of 'criminal defamation.'"

This is where the State's hand gets caught. Neither Brewington nor the current Dearborn County Prosecutor, Lynn Deddens, can affirmatively state upon what grounds the grand jury returned indictments for intimidation. The grand jury indictment could rest exclusively on unconstitutional grounds and Brewington has no ability to contest otherwise. A defense was never presented during Brewington's trial for two reasons: 1) Brewington's public defender, Bryan Barrett had no understanding of the case because he refused to meet with Brewington to discuss the nature of the case, and; 2) The only instruction Negangard provided to the grand jury was when Negangard explained Brewington's communications were "over the top, um, unsubstantiated statements" about the alleged victims that "crossed the lines between freedom of speech and intimidation and harassment." [Tr. 338] Deputy Krumwied now tries to argue something the State cannot; that the grand jury returned indictments against Brewington for communicating "true threats." The Indiana Supreme Court ruled Brewington's "true threats" did not enjoy First Amendment protections. Brewington never argued such at trial because Brewington believed he was on trial for making "unsubstantiated statements." The

State now argues the grand jury transcript and audio are void of both "true threats" and "criminal defamation." As such, the State argues Brewington errored in assuming criminal defamation formed the basis of the State's intimidation indictments. The State's argument is even less black and white than it appears. The term "criminal defamation" was not used in Brewington's case until after Brewington's trial. The State argues that Brewington not only had to guess which of the eight (8) definitions of "threat" under the intimidation statute applied to Brewington, while also placing the burden on Brewington to ignore Negangard's unconstitutional instruction that Brewington's "unsubstantiated statements" crossed the lines of free speech and intimidation and harassment.[3]

Unsatisfactory Indictments

Brewington's convictions require reversal because the incomplete record prohibits Brewington from contesting the State's argument that the indictments are constitutionally sufficient. Assuming arguendo that the State's intimidation indictments were constitutionally adequate, Negangard intentionally misled the grand jury and Brewington by claiming Brewington's "unsubstantiated statements" violated Indiana law. The State finds its hand in the cookie jar again because the State cannot burden Brewington with the responsibility of knowing that making

[3] To Brewington's knowledge, Negangard never presented a harassment ground for Brewington's conviction; however, in the absence of a complete grand jury record, it is impossible to confirm or deny.

"unsubstantiated statements" was not an actual crime without holding Negangard to at least the same legal standard. Any contention that Brewington was smart enough to know the "unsubstantiated statements" argument was plainly unconstitutional requires the understanding that Negangard also knew the argument to be unconstitutional when Negangard intentionally misled the grand jury and Brewington to place Brewington in grave peril. Negangard would have gotten away with this if Brewington would not have obtained the audio after Brewington's release from prison. The Office of Dearborn County Prosecutor actively avoids this issue because it potentially involves criminal conduct. Put simply, if the incomplete grand record is not a product of innocent incompetence, then this is a conspiracy to deprive Brewington of civil rights. It is of utmost importance to note that "innocent incompetence" must encompass more than just a court reporter failing to hit the "record" button. On March 8, 2011, the State filed its Praecipe directing the court reporter of the Dearborn Superior Court II to prepare a transcription of the grand jury record. On June 15, 2011, Official Court Reporter Barbara Ruwe signed the transcription of the proceedings and stated, "I further certify that the foregoing transcript, as prepared, is full, true, correct and complete." Ruwe made no mention the grand jury audio was incomplete. At no point did Negangard make any mention of the grand jury record being incomplete.

The State tries to argue something it cannot: that the grand jury returned indictments against Brewington for communicating "true threats." Without a record

of the grand jury proceedings prior to witness testimony, the State cannot affirmatively say whether Negangard instructed the grand jury to return indictments against Brewington for "true threats," or "criminal defamation," or any other fictional crime. Even more, the State cannot now contest the State's own arguments of Brewington's intent:

> "Subsection C6, this is the one that if you had a paint brush, it would be all over the ceiling. It would be all over the windows, the floor, this podium, my face. This is the one he just could not stop doing — exposing the people that he was threatening through the hatred and contempt and disgrace and ridicule. That was his whole intent. That's his only intent." - Chief Deputy Kisor Trial Tr. 455-456"

During trial, the State successfully argued that Brewington's *whole and only* [emphasis added] intent was to expose people to "hatred and contempt and disgrace and ridicule." Subsection C6 of the intimidation statute is essentially criminal defamation. Now the State claims Brewington errored in assuming the grand jury indictments were based on the same argument the State made during trial. Full responsibility for any confusion of the indictment information falls on the shoulders of the State. There are very few checks on the powers of prosecutors. The court in *Wurster v. State*, 715 N.E.2d 341, (1999) emphasized that the importance of how keeping a record of the grand jury proceeding was intended to serve as one of the few checks on prosecutorial abuses:

> "The legislature's requirement that a record be kept of grand jury proceedings can only be designed to serve as an important check on the potential of prosecutorial abuse of the grand jury process." *Id.* at 347

This case is unprecedented. If this Court should see the need for a hearing on the matter, this Court should prevent the State from continuing to ignore the elephant in the room and compel the Dearborn County Prosecutor and the court staff of Dearborn Superior Court II to explain why the grand jury record is not complete. If the State wishes to shift blame, then that blames falls squarely on the shoulders of Brewington's public defender Bryan Barrett because Barrett if there was any confusion as to the indictment information, Barrett failed to take any measures to determine or investigate what actions of Brewington's Barrett was appointed to defend; requiring reversal under *United States v. Cronic*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657, (1984).

Nobody Knows What Brewington Was Required to Defend

In addition to not being able to define which of Brewington's actions were responsible for the intimidation indictments, the prosecution also failed to specify which statement was responsible for Brewington's perjury indictment. During closing arguments, Bryan Barrett stated:

> Count V is perjury alleging that Mr. Brewington who voluntarily testified before the Grand Jury perjured himself, lied, under oath and as near as I can tell what they're referring to is the address issue with the Humphrey's. [Tr. 498-499]

"As near as I can tell..." Barrett openly admitted during closing arguments that he was unable to subject the State's case to any adversarial testing because Barrett had no idea what Brewington allegedly did. Barrett's assistance was not

ineffective; it was non-existent. Even the Indiana Supreme Court was confused as to which of Brewington's statements constituted perjury because the opinion in *Brewington* cited two different statements as being responsible for Brewington's single perjury indictment/conviction:

> "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." *Id.* at 958

> "And again, the jury apparently reached the same conclusion, convicting Defendant of perjury for feigning ignorance in his grand-jury testimony of whether Heidi Humphrey was the Judge's wife, and that her address was his address." *Id.* at 966

Brewington should not be held to a higher standard than the Indiana Supreme Court. If the Indiana Supreme Court was unable to discern what statement was responsible for Brewington's sole perjury indictment and conviction, Brewington had no ability to determine what statement required defending, thus requiring the reversal of Brewington's perjury conviction.

Quite possibly the greatest prosecutorial abuse is demonstrated by Brewington's indictment for releasing grand jury information, in which Brewington was found not guilty. Brewington was unable to mount a defense against the indictment because the State offered no evidence that Brewington violated the law. During trial Negangard stated:

> "And there's a Grand Jury charge, it's a B Misdemeanor, it's not of any significance of any kind. We'll talk about that at the end but that's now why we're here today." Tr. 25

> "Count VI - that's not why we're here today. You know, the Grand Jury indicted him on that, he clearly, you know, I submit to you that they were offended by the fact that we went over and over, you're not to post anything about the Grand Jury and then sure enough he did the very next day. But that's not why we're here today. I don't really care about that charge. I think, you know, you guys decide whether you think he violated it, look through Exhibit 10 and see whether he crossed the line. That is not why we're here today ladies and gentlemen — not at all. Do not get hung up on that one." Tr. 524

There is no "crossing the line" in releasing grand jury information. Information is either released or it is not. Negangard obtained an indictment without any evidence of a crime and Barrett went to trial without contesting the indictment. Just as he did with Brewington's intimidation and perjury indictments, Barrett blindly walked into Brewington's trial without any investigation into the indictment for releasing grand jury information. The reason Barrett refused to allow Brewington to participate in the preparation of Brewington's own defense is because Barrett never attempted to prepare one.

The Trial Court and Prosecution Ignored Brewington's Pleas for Legal Counsel

Brewington first implores this Court to review Brewington's opening comments prior to Brewington's trial on October 3, 2011. Bryan Barrett refused to speak with Brewington about the criminal indictments prior to trial, forcing Brewington to file pro se motions in the hope of preserving issues. Rather than investigate the matter, Judge Brian Hill stated:

> "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?" Tr. 3

The State remained silent on the matter, taking full advantage of a defendant that had been deprived of any assistance of legal counsel outside of the courtroom. This has been a toxic issue that the State and prior Courts have continued to ignore. Despite Brewington's ongoing pleas to Judge Hill for legal assistance, Hill continued to pressure Brewington into waiving Brewington's constitutional right to counsel (Tr. 5-6):

COURT: 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...

MR. BREWINGTON: No, no, no, I want [competent] 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.

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

Hill proceeded to trial without questioning Barrett about Brewington's claims. The opening moments of Brewington's trial defy logic. If Brewington's jury

trial would have instead been a hearing on a plea arraignment between Brewington and the State, Judge Hill would have assumed the responsibility to inquire whether Brewington understood the nature of the indictments against him. If Brewington sought to waive defense counsel and represent himself, Hill would have also been saddled with the responsibility to advise Brewington on the dangers of self-representation, while also properly determining whether Brewington's "waiver was knowing, intelligent, and voluntary. *Greer v. State*, 690 N.E.2d 1214, 1216 (Ind.Ct.App.1998)" *Jones v. State*, 783 N.E.2d 1132, (2003). Both Indiana and Federal Courts have held "[t]he right to counsel can be waived only by a knowing, voluntary, and intelligent waiver." Id. (citing *Jones v. State*, 783 N.E.2d 1132, 1138 n. 2 (2003)) *Hawkins v. State*, 970 N.E.2d 762, (2012). This Court need only to review the facts of Brewington's case as demonstrated in the opening moments of Brewington's trial. Though this Court can find guidance on waiver of counsel in *Redington v. State*, 678 N.E.2d 114, (1997), Redington also helps steer this Court in the direction of the facts in Brewington's case:

> "Turning to the facts of this case, we conclude that Redington was fully informed of his right to counsel before he pled guilty and that he voluntarily, knowingly and intelligently waived that right. At the guilty plea hearing, the following dialogue among the trial court, Redington, Justice (Redington's co-defendant) and Redington's parents, Mr. and Mrs. Justice, took place." Id at 119

The "facts" of the case, as referred to by the Indiana Court of Appeals in *Redington*, are simply statements gleaned from the record of the transcripts. The facts of Brewington's case are just as evident. At the beginning of Brewington's

trial, Brewington stated Brewington's public defender Bryan Barrett refused to discuss the case with Brewington or allow Brewington to play any role in preparing his own defense. Brewington stated he was unaware of any defense. Brewington stated Barrett refused to provide Brewington with all the State's evidence against Brewington. Brewington said he was prohibited from taking his medication for ADHD as prescribed by his doctor. Neither Hill nor the prosecution contested Brewington's claims or even suggested Brewington was exaggerating. There is no evidence to suggest Brewington's claims are exaggerated or false. Any past or future arguments that Brewington knew or should have known what actions the State required Brewington to defend during trial are irrelevant. The facts as reflected in the record of Brewington's case are clear; Brewington was prohibited from participating in his own defense because Brewington's public defender, Bryan Barrett, refused to meet with Brewington prior to trial, thus depriving Brewington of the ability to play any role in the preparation of Brewington's own defense. In *Faretta v. California*, 95 S.Ct. 2525, 422 U.S. 806, 45 L.Ed.2d 562, (1975) the Supreme Court of the United States of America stated:

> "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment."

Brewington's convictions are unconstitutional because Brewington was denied any assistance of counsel in preparing for trial. Though Barrett appeared at hearings, Barrett never had any comprehension of Brewington's case because Barrett refused

to meet with Brewington. Barrett never sought Brewington's input on the context of any of Brewington's actions and Brewington made this clear to the trial court. Even the most incompetent judge would investigate a defendant's claim of receiving no legal assistance prior to trial. An allegation of not allowing a client to participate in the client's own defense would also draw a rebuttal from the defendant's public defender, but Barrett offered no comments. Only malicious intent would explain how a trial judge could "interpret" a defendant's pleas for indictment information, evidence, mental health treatment, and legal counsel as a request to waive the assistance of counsel and pursue self-representation; especially as the prosecution and the public defender remain silent.

State Acknowledges no Assistance of Counsel

The State's Exhibit E, is a copy of Brewington's pro se filing of a Motion to Dismiss. Here, at minimum, the State concedes the absence of legal counsel forced Brewington to file last minute pro se motions to protect his rights. In its response to Brewington's Motion for Summary Disposition, the State argued:

> "Brewington arguably raised I.C. 35-34-1-4(a)(11) in his pro se Motion to Dismiss filed with the court on the date his trial commenced (October 3, 2011), no grounds raised in his motion entitled him to dismissal as a matter of law, and the Court had discretion based upon the language of the statute to deny said motion, which he did."

Brewington's rights would have been waived if Brewington had not raised the issues himself. Brewington contested Negangard's unconstitutional criminal defamation argument (aka "unsubstantiated statements") because Barrett refused

to do so. It is worthy to note that the State incorrectly inferred the Court's denial of Brewington's motion had any foundation in law. The only reasoning Judge Hill provided for denying Brewington's pro se motions can be gleaned from the trial transcripts:

> [A]bout 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."

As explained in Brewington's Motion to Dismiss for Ineffective Assistance of Counsel, Brewington's public defender Bryan Barrett refused to contact or meet with Brewington to discuss the nature of Brewington's defense. Of utmost importance is the fact Brewington's pro se motions were a last-minute effort to raise constitutional issues in the absence of any legal counsel. Hill denied Brewington's motions because Brewington had legal counsel. The only way Hill would consider Brewington's pro se motions, which included the Motion to Dismiss for Ineffective Assistance of Counsel, is if Barrett filed the motions attacking himself or if Brewington waived the right to counsel so Hill would accept the pro se motions. Either way, the State concedes Brewington filed the motions but continues to remain silent in its hopes of continuing to capitalize on Brewington non-existent legal representation. The case of *Avery v. Alabama* directly addresses the appointment of "sham counsel":

> But the denial of opportunity for appointed counsel to confer, to consult with the accused, and to prepare his defense could convert the appointment of counsel into a sham, and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment. *Avery v. Alabama*, 60 S.Ct. 321, 308 U.S. 444, 84. 377, (1940)

Fact: The Grand Jury Record is Incomplete

The incomplete grand jury record requires the reversal of Brewington's convictions under *Wurster v. State*, 715 N.E.2d 341, (1999). The State's response makes the following argument:

> "Even if one is to assume that Brewington's baseless assertion that the grand jury transcripts were altered or otherwise incomplete, the evidence contained therein is more than enough for even a layperson to discern a 'true threat'."

The State understands Brewington's assertion is anything but baseless. The grand jury proceedings begin at witness testimony. At minimum, the prosecution's opening statements and instructions were omitted from the record. This would also include any instruction as to the nature of the investigation of Brewington. This is not harmless error as the prosecution instructed Brewington to rely on the transcripts for specific charging information; a fact the State does not contest. For the State to ask this Court to believe the State's assertion that the record of Brewington's grand jury proceeding is complete is as absurd as requesting the Indiana Court of Appeals to believe it is possible for a trial record to be complete despite being void of opening arguments or instructions.

The State Alleges Misconduct by Former Prosecutor Negangard

The only instruction Negangard provided to the grand jury was that Brewington's communications consisted of "over the top" and "unsubstantiated statements" about the alleged victims. [Tr. 338] The contention that it was possible for even "a layperson to discern a 'true threat'" in the grand jury record, as suggested in the State's response to Brewington motion for summary disposition, the layperson would still have to look past Negangard's erroneous instruction that Brewington's "unsubstantiated statements" "crossed the lines between freedom of speech and intimidation and harassment." If the State contends "even a layperson" would know "unsubstantiated statements" are not unlawful, then the State acknowledges that Negangard intentionally misled the grand jury by seeking indictments against Brewington's "unsubstantiated statements" against Indiana Court officials[4]. The State cannot place a higher burden of legal understanding on a layperson defendant than what it places in the current Chief Deputy Attorney General. Even more, as the State argues Brewington should have known not to build a defense against Negangard's unconstitutional "criminal defamation," then Judge Hill and Bryan Barrett also would have known the Negangard's argument to be unconstitutional but did nothing to protect Brewington's rights. If the State

[4] The record of the case is void of any evidence or attempt to disprove Brewington's opinions. Negangard convened a grand jury to investigate Brewington's speech about other individuals because Negangard believed the speech to be false.

wishes to argue the purpose of the grand jury proceeding was to indict Brewington for "true threats" and not threats to reputation or "criminal defamation," former Dearborn County Prosecutor F. Aaron Negangard made the unconstitutional criminal defamation argument during closing arguments with the intention of placing Brewington in grave peril.

> "That's the law and you can't go so far as to lie. [Brewington] just didn't say he's a bad judge, he's not a fair judge, he didn't listen to me. That's fine. He could have even called him a son-of-a-bitch if he wanted, alright? That's probably okay. Not smart but probably okay. Not smart when you got cases in front of him. But he can say that. But what he can't say, he's a child abuser because it's not true" -Negangard's closing trial arguments Tr. 516

This fails to consider that Negangard instructed the grand jury to return indictments claiming, "[Brewington] has to suffer the consequences" like an attorney because Brewington represented himself in Brewington's own divorce:

> "But remember he says he's acting like an attorney so we should treat it as he's acting like an attorney. Well if he's acting like an attorney, then he needs to accountable like an attorney. He could hire his own attorney but he didn't. So you know and he has to suffer the consequences." Tr. 515

As an explanation regarding the nature of the grand jury proceedings is void from the transcript, the State cannot argue Negangard's purpose in initiating the grand jury investigation nor can the State argue that the grand jury indictments were not based entirely on constitutionally protected activity. There is no way to determine if Negangard instructed the grand jury to return indictments against Brewington for violating the Indiana Rules of Professional Conduct for attorneys as

Negangard did during trial. The State placed Brewington in a position of grave peril when the State saddled Brewington with the burden of having to guess which actions Brewington was required to defend, while at the same time ignoring the unconstitutional grounds Negangard argued for Brewington's indictments. The State's response alleges Negangard offered both a constitutional and unconstitutional ground for Brewington's indictments, while Negangard and/or the Dearborn Superior Court II opted not to record the entire grand jury proceedings as required by law.

CONCLUSION

This is not a John Grisham novel. This criminal case has done immeasurable harm to Brewington's life. From the beginning of Brewington's criminal proceedings, the State demonstrated how the entire action was simply a means to silence and punish Brewington for criticizing officials operating within the Dearborn County Court System. This is best demonstrated by the arguments of Chief Deputy Prosecutor Joeseph Kisor during Brewington's arraignment on March 11, 2011:

> "[W]e is asking that the Court consider making conditions of [Brewington's] bond that he not access the internet, uh, or if the Court would believe that to be too broad, which I'm not sure the State would not concede that but if that were to be considered too broad, we would ask the Court to make a condition of bond that Mr. Brewington not continue to blog about the substance, uh, at least his version of the substance of the case that is here before this Court." Tr. 19

Kisor later clarified the State's concerns regarding Brewington blogging during the criminal proceedings:

> "So 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"

Deputy Kisor clearly explained that the Office of the Dearborn County Prosecutor had an interest in censoring Brewington. Kisor tried to claim the censorship was somehow a means to protect Brewington's right to a fair trial, despite the prosecution remaining silent at the beginning of trial when Brewington informed Judge Hill that Brewington had not received any assistance in preparing for trial. Kisor and the Office of the Dearborn County Prosecutor were never concerned about the alleged victims. Kisor was only concerned about Brewington sharing Brewington's own "version of the substance of the case." Brewington's trial was never about the alleged victims in the case and Negangard explicitly stated such during closing arguments:

> "That's what this case is about. It isn't about Judge Humphrey. It isn't about Dr. Connor. It is about our system of justice that was challenged by Dan Brewington and I submit to you that it is your duty, not to let him pervert it, not to let him take it away and it happens if he's not held accountable. He's held accountable by a verdict of guilty. That's how he's held accountable and that's what we're asking you to do. You cannot allow our system to be perverted that way. The rule of law will fail and ultimately our republic. I submit to you that that is not a result that we want to have happen. That is why we are here today." Tr. 504-505

Brewington's criminal proceedings were never about threats to reputation or safety, because Negangard explicitly said so. Negangard sought and obtained

indictments against Brewington under the pretense of intimidation because Negangard argued convictions for intimidation were necessary to prevent Brewington from perverting our system of justice and to hold Brewington accountable like an attorney. These are simply the facts of this case. The State cannot merely retract Negangard's statements. In an act of inane arrogance, Negangard openly admitted that the State of Indiana sought convictions against Brewington to prevent the fall of the rule of law and ultimately the United States of America. Brewington could not invite this error. Brewington could not defend himself against such. Negangard's statement serves as a confession that Brewington's criminal proceedings were beyond unconstitutional, while Judge Hill and Bryan Barrett allowed Negangard to seek convictions against Brewington for perverting the judicial system. Brewington was held on a $500,000 surety/$100,000 cash bond. Brewington was denied access to legal counsel. Brewington was denied the right to an impartial judge. Brewington was denied access to evidence and indictment information. The Dearborn Superior Court II excluded portions of the grand jury proceedings occurring prior to witness testimony. There is no contesting the fact that Negangard affirmatively stated that Negangard sought indictments and criminal convictions against Brewington, under the pretense of intimidation laws, for the "greater good" of protecting the integrity of the judicial system. These are the facts of the case as explained by former Dearborn County Prosecutor F. Aaron Negangard that appear on pages 504-505 of the official transcripts in Brewington's criminal trial. Brewington is not twisting facts. These are facts of the

case as alleged by Negangard, the man who currently serves as Chief Deputy to Indiana Attorney General Curtis Hill.

If this Court should deem this action to be more appropriate for a federal jurisdiction due to reluctance in dealing with abuses by high ranking Indiana officials, Brewington requests the Court to issue an order consistent with such a concern.

WHEREFORE, Brewington requests this Court to grant Summary Disposition in Brewington's favor and vacate Brewington's convictions, or in the alternative, set the matter for hearing; Award Brewington any attorneys' fees and costs in bringing this action; and Award Brewington any other appropriate relief.

Respectfully Submitted,

Daniel Brewington
Plaintiff, Pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, priority postage prepaid, on September 23, 2017.

Lynn Deddens, Prosecutor
Dearborn County Prosecutor
215 W High St
Lawrenceburg, IN 47025

Daniel P. Brewington
Plaintiff, pro se

NOTICE

Dearborn Superior Court 2
215 West High Street
Lawrenceburg Indiana 47025

Verified Petition For Post-Conviction Relief Re; Brewington 15D02-1702-PC-000003

To: Daniel P Brewington
[redacted]

EVENTS

Entry Date	File Stamped / Order Signed	Event and Comments
10/04/2017	09/25/2017	Order Issued Order signed 9/25/17

To view the document, type the link below in a web browser:
https://publicaccess.courts.in.gov/TrialCourt/Document?id=6916b8dc-2890-4e34-8aca-ebaa1b5dabf3

OTHER PARTY - NOTICED	OTHER PARTY - ENOTICED
N/A	Lynn Marie Deddens (Attorney)

If this notice contains a link and you need a physical copy of the document, please contact the Clerk or Court.

IN THE DEARBORN SUPERIOR COURT II

STATE OF INDIANA

DANIEL BREWINGTON, Petitioner, v. STATE OF INDIANA, Respondent.	CAUSE NO. 15D02-1702-PC-0003

ORDER

This cause comes before the Court on the "Verified Petition for Post-Conviction Relief" filed by the Petitioner, Daniel Brewington. Brewington has filed for summary judgment; the Court finds as follows:

1. Petitioner (hereafter "Brewington") filed his Verified Petition for Post-Conviction Relief on February 22, 2017.
2. The State of Indiana (hereafter "State") filed its answer on March 21, 2017.
3. Brewington filed his "Motion for Summary Judgment" and "Memorandum in Support of Motion for Summary Judgment" on April 3, 2017.
4. The State then filed its "State's Response to Petitioner's Motion for Summary Judgment" on June 8, 2017.
5. Brewington filed his "Motion to Strike" on or about June 14, 2017.
6. Brewington then filed "Petitioner's Reply to State's Response to Petitioner's Motion for Summary Judgment" and supporting "Memorandum" on or about June 19, 2017.
7. Brewington was convicted of Intimidation (3 counts); Attempt to Commit Obstruction of Justice; and Perjury; he was sentenced to five years in the Indiana Department of Corrections.

8. On appeal, the Indiana Court of Appeals reversed two of the convictions. *Brewington v. State*, 981 N.E.2d 585 (Ind.Ct.App. 2013).

9. The Indiana Supreme Court accepted transfer and affirmed the convictions for Intimidating the Judge and Obstruction of Justice on other grounds, and affirmed the Court of Appeals on the other charges. *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014).

10. Brewington was released from imprisonment September 5, 2013.

11. Brewington bases his petition on the grounds listed in paragraphs A through T listed on pages 3 through 6 of his petition.

12. Pursuant to Indiana Rule PC 1 Sec. 4(g), this court may grant a motion by either party for summary disposition of the petition when it appears form the pleadings and answers that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

13. Brewington alleges that various parties involved in his prosecution acted conspiratorially, that is, they acted together to alter grand jury transcripts; that the special judge and the prosecutors committed various acts of misconduct; that he was denied effective assistance of counsel, that the trial judge was not impartial, and that his appellate counsel was also ineffective.

14. The State argues that summary judgment is not available in a post conviction relief claim; this court agrees, but does find that summary disposition is still available pursuant to Indiana Rule PC 1 Sec. 4(g).

15. Therefore the court finds that the issue of whether there is a genuine issue of material fact relative to a summary judgment finding as sought by Brewington is

moot, but that summary disposition can still be entered.

16. There is no factual basis to support any of Brewington's claims and/or allegations against the judges and attorneys involved in his case.

17. There is no need for a hearing.

18. Even though the State did not move for summary judgment, based on the undersigned judge's reading of the pleadings and the appellate cases mentioned above, judgment should be entered without a hearing.

19. Brewington's petition should be denied.

IT IS THEREFORE ORDERED:

1. Brewington's "Motion to Strike" is denied.

2. Brewington's "Motion for Summary Judgment" is denied.

3. Brewington's "Verified Petition for Post-Conviction Relief" is denied.

Dated: September 25, 2017

W. Gregory Coy, Special Judge
Dearborn Superior Court No. 2

cc: Daniel Brewington
Prosecutor
Dearborn Superior Court Clerk

STATE OF INDIANA	)	IN THE DEARBORN SUPERIOR COURT II
	)	
COUNTY OF DEARBORN	)	GENERAL TERM 2017
	)	
DANIEL P. BREWINGTON	)	CAUSE NO. 15D02-1702-PC-0003
	)	
Petitioner,	)	
	)	
V.	)	
	)	
STATE OF INDIANA	)	
	)	
Respondent.	)	

FILED

OCT 25 2017

CLERK OF DEARBORN CIRCUIT COURT

MOTION TO CORRECT ERROR

Petitioner, Daniel Brewington ("Brewington"), files this MOTION TO CORRECT ERROR as the Court's ORDER, dated September 25, 2017, is contrary to Indiana law and in support states as follows:

The Court's Order[1] runs contrary to the Indiana Rules of Trial Procedure, the rules governing Indiana Post-Conviction Relief, and the constitutions of Indiana and the United States of American. Honorable Special Judge W. Gregory Coy denied Brewington's Motion for Summary Judgment claiming Summary Judgment was not available in post-conviction proceedings. Judge Coy then granted Summary Judgment in favor of the State on the Court's own motion.

SUMMARY "JUDGMENT" AND "DISPOSITION" ARE THE SAME

[1] Judge Coy signed the Court's Order on Monday, September 25, 2017. The Dearborn Superior Court II waited until Friday, October 5, 2017 before mailing a copy of the order to Brewington. Brewington did not receive the Order until Monday, October 9, 2016. A copy of the postmarked envelope and a notice of entry attached hereto.

In *State v. Gonzalez-Vazquez*, 984 N.E.2d 704, (2013), the court wrote:

> "The summary judgment procedure that is available under Indiana Post-Conviction Rule 1(4)(g) is the same as under Trial Rule 56(C)." Under both rules, summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. (citing Ind. Post-Conviction Rule 1(4)(g); Ind. Trial Rule 56(C))."

In a literal sense, Indiana Courts have found that Summary Judgment and Summary Disposition in post-conviction relief proceedings are equivalent to comparing "tomato" and "tomotto." Special Judge W. Gregory Coy drew a non-existent distinction between Summary Judgment (Ind. Trial Rule 56(C)) and Summary Disposition (Ind. Post-Conviction Rule 1(4)(g)). Judge Coy wrote the following:

> "The State argues that summary judgment is not available in a post conviction relief claim; this court agrees, but does find that summary disposition is still available pursuant to Indiana Rule PC 1 Sec. 4(9)."

Judge Coy denied Brewington's Motion for Summary Judgment despite Summary Judgment being treated the same as Summary Disposition under Indiana Post-Conviction Rule 1(4)(g). Judge Coy then awarded Summary Judgment in favor of the State; raising several conflicts under Indiana law. A plain reading of Rule 1(4)(g) states:

> "The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible"

SUMMARY JUDGMENT UNAVAILABLE TO THE STATE

Brewington's case is similar to that described in *Osmanov v. State*, 40 N.E.3d 904, (2015):

> "Because neither party filed a motion for summary disposition or submitted any sort of evidence, the post-conviction court's summary denial would not have been based on Indiana Post-Conviction Rule 1(4)(g)."

As in *Osmanov*, the basis of the Court's dismissal of Brewington's post-conviction action cannot lie within Ind. PC Rule 1(4)(g). The State never filed a motion for Motion for Summary Judgment/Disposition[2][3]. If the Court contends that Brewington's original request for Summary Judgment under TR. 56 was not a valid request for relief, then no party petitioned this Court for Summary Judgment/Disposition under Rule 1(4)(g). Moreover, the State argued Summary Judgment was unavailable because "multiple issues of material fact" existed in the case. In *Denney v. State*, 773 N.E.2d 300, (2002), the Indiana Court of Appeals wrote:

> "[W]e may not interpret a statute that is clear and unambiguous on its face. *Schafer v. Sellersburg Town Council*, 714 N.E.2d 212, 215 (Ind.Ct.App.1999), trans. denied, 726 N.E.2d 312. Rather, the words of the statute are to be given their plain, ordinary and usual meaning

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[2] The State's Response to Brewington's Motion for Summary Judgment acknowledged the State treated the Brewington's request for Summary Judgment under TR. 56 as a request for Summary Disposition under Rule 1(4)(g).

[3] To eliminate confusion, as Indiana Courts have found Summary Judgment and Summary Disposition to be interchangeable under Ind. PC R. 1(4)(g), this Motion will default to the use of Summary "Judgment."

Rule 1(4)(g) required Judge Coy to "hold an evidentiary hearing as soon as reasonably possible." Judge Coy claimed an evidentiary hearing was not necessary because Judge Coy assigned the State's "issues of material fact" argument to Brewington's Motion for Summary Judgment, thus rendering the issues of material fact "moot."

> "Therefore the court finds that the issue of whether there is a genuine issue of material fact relative to a summary judgment finding as sought by Brewington is moot, but that summary disposition can still be entered."

> "Even though the State did not move for summary judgment, based on the undersigned judge's reading of the pleadings and the appellate cases mentioned above, judgment should be entered without a hearing."

The State could not move for Summary Judgment because the State argued the need for additional information and the existence of issues of material fact triggered an evidentiary hearing under Rule 1(4)(g).

JUDICAL BIAS

The Court's Order demonstrates a bias in favor of the State. Judge Coy stated judgment should be entered in favor of the State without a hearing "even though the State did not move for summary judgment." The Court ruled Summary Judgment was not procedurally available to Brewington. The Court may not arbitrarily deny one party an avenue for relief set forth by the Indiana Rules of Court. Judge Coy assumed an adversarial role in arbitrarily dismissing Brewington's claims, many of which were uncontested by the State. As Judge Coy rendered the State's material fact argument moot, the record lacks any adverse

argument to dispute Brewington's assessment of the facts in the case. This Court cannot simply "moot" and "unmoot" the State's "issues of material fact" argument when advantageous to the State. Issues of material fact either exist or they do not. This Court cannot rely on the information within the State's "issues of material fact" argument to dismiss Brewington's Verified Petition for Post-Conviction Relief and then ignore the State's arguments when they conflict with the Court's ability to issue a sua sponte order granting Summary Judgment to the State under Rule 1(4)(g).

BREWINGTON BURDEN OF PROOF CONTRARY TO INDIANA LAW

Brewington raised twenty (20) claims in his Verified Petition for Post-Conviction Relief and also filed two motions seeking evidence to support some of those claims. The STATE'S ANSWERS to Brewington's petition provide as follows:

> "It is without sufficient information to admit or deny paragraphs 1 AND 3 through 18, and therefore enters a general denial"
>
> "The State is also without sufficient information to admit or deny any allegations contained within Petitioner's attached appendices, labeled Appendix i through Appendix iv, and therefore enters a general denial."

In the State's response to Brewington's Motion for Summary Judgment, the State wrote:

> "While the State of Indiana, for the sake of judicial economy and efficiency, did not address every specific ground alleged and raised by Brewington in either his Petition or Motion for Summary Judgment, the State reserves the right to address these issues at an evidentiary hearing on the matter."

Absent a Motion for Summary Judgment from the State, Brewington had no way of knowing that the Court would prematurely shut the door on Brewington's post-conviction relief claim, making it impossible for Brewington to obtain and/or present all the evidence in the case. The Chronological Case Summary in this action demonstrates Brewington filed the following motions seeking evidence: Request for Order Compelling Production of Grand Jury Record, filed 05/31/2017; and, Request for Names of Grand Jurors, filed 06/08/2017. Judge Coy neither ruled on, nor made any mention of Brewington's petitions, making it impossible for Brewington to obtain evidence. The Court's order violates Brewington's rights to due process. Brewington had no way of knowing Judge Coy would issue a sua sponte order granting Summary Judgment to the State when the State argued an evidentiary hearing was necessary. Despite Brewington being stripped of the opportunity to obtain and present evidence, some of Brewington's arguments need no additional facts to require reversal.

1) Brewington's claims of Ineffective Assistance Survive Summary Dismissal

The Court's Order stated:

> "There is no factual basis to support any of Brewington's claims and/or allegations against the judges and attorneys involved in his case."

Brewington's claims of ineffective assistance of counsel withstand summary dismissal because Brewington's petition argued that Brewington receive no assistance of counsel in preparing for trial.

In, *Allen v. State*, 791 N.E.2d 748, (2003), the Court of Appeals wrote:

> "We have previously considered whether a petitioner's claim of ineffective assistance of counsel could survive dismissal on the pleadings. There, we held that whether counsel provided effective assistance is an evidentiary question. *Clayton*, 673 N.E.2d at 786. 'As such, resolution of the issue revolves around the particular facts of each case.' Id. Consequently, when a petitioner alleges ineffective assistance of counsel, and the facts pled raise an issue of possible merit, the petition should not be summarily dismissed." Id.

Brewington's petition also argued appellate counsel, Michael Sutherlin, refused to raise Brewington's claims that Barrett refused to meet with or speak to Brewington outside of the courtroom prior to trial. The Indiana Supreme Court claimed the trial strategy of Brewington's public defender, Bryan Barrett, waived Brewington's right to relief from the unconstitutional aspects of the prosecution's criminal defamation argument and relief from the general verdict error. If Sutherlin would have raised Barrett's refusal to meet with Brewington prior to trial, which prohibited Barrett from subjecting the State's case to any adversarial testing, Brewington's convictions would have been overturned.

2) The Record of the Grand Jury Investigation is Incomplete.

The Office of the Dearborn County Prosecutor instructed Brewington to rely on a complete transcription of the grand jury proceedings to build a defense against the non-specific general indictments. The transcription of the grand jury investigation omitted all content of the grand jury proceedings prior to witness testimony. In 2016, Brewington discovered that the audio of grand jury proceedings contained less information than the transcription of audio. The State withheld indictment information and evidence when it failed to provide Brewington with a record of the complete grand jury investigation. Brewington's convictions require

reversal regardless of whether the grand jury record was altered or not properly recorded.

3) Trial Judge Brian Hill Ignored Brewington's Claims of No Assistance of Counsel

The record of the case is replete with examples of Brewington expressing both written and verbal concerns of how Barrett refused to meet with, or speak to Brewington about the criminal case outside the courtroom prior to trial. The record also demonstrates how Brewington made several attempts to notify the Court about Brewington being unaware of which actions the State alleged to be unlawful. Neither Hill nor the State made any inquiries as to whether Brewington's claims were true. The State sought to take advantage of Brewington's inability to prepare a defense, which should result in the State's waiver of the issue and Summary Judgment should be granted in Brewington's favor.

4) The record of Brewington's Criminal Trial Demonstrates Prosecutorial Misconduct

The refusal of the Indiana Courts to address the prosecutorial misconduct in this case is in many ways like corporate America turning a blind eye to sexual assault in the workplace. The post-conviction Court refused to acknowledge Brewington's specific claims of misconduct committed by former Dearborn County

Prosecutor F. Aaron Negangard[4]. In *Maldonado v. State*, 265 Ind. 492, 355 N.E.2d 843, (1976), the Court held:

> "It is misconduct for a prosecutor to request a jury to convict a defendant for any reason other than his guilt. ABA Standards for Criminal Justice, The Prosecution Function § 5.8(d) at 40. (Approved Draft 1971); 75 Am.Jur.2d Trial § 225 at 306 (1974). In *Warner v. State*, supra, we held that it was improper for a prosecutor [265 Ind. 501] to imply that the jury should convict the defendant to avert 'tyranny.' In *Clark v. State*, (1976) Ind., 348 N.E.2d 27, we disapproved the prosecutor's argument that the jury should disregard defense evidence in order not to 'set a precedent' which would cause 'the end of criminal convictions.'" 348 N.E.2d at 35."

The facts within the record plainly demonstrate the Office of the Dearborn County Prosecutor engaged in misconduct. A review of Negangard's statements during closing arguments reveal various instances of misconduct as Negangard argued guilty verdicts were necessary to prevent Brewington from perverting "our system of justice" and to hold Brewington "accountable like an attorney." Negangard told the jury if Brewington was not convicted, "the rule of law will fail and ultimately our republic." These are acts rising to the level of fundamental error; acts that the State also refused to address. The Court's finding that Brewington's claims are unsupported by fact is incorrect. The record of Brewington's jury trial establishes that Negangard argued the State acted against Brewington in retaliation for Brewington's challenges to "our system of justice":

> "I submit to you that that is not a judicial system we want. That's what this case is about. It isn't about Judge Humphrey. It isn't about Dr. Connor. It is about our system of justice that was challenged by Dan Brewington and I submit to you that it is your duty, not to let him

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[4] Negangard currently serves as Chief Deputy to Indiana Attorney General Curtis Hill.

> pervert it, not to let him take it away and it happens if he's not held accountable. He's held accountable by a verdict of guilty. That's how he's held accountable and that's what we're asking you to do." -Negangard Tr. 504-505

Negangard affirmatively said the criminal trial was not about the alleged victims. Negangard said the case was "about our system of justice that was challenged by Dan Brewington." Negangard sought indictments and convictions against Brewington for challenging "our system of justice" under the pretense of Indiana intimidation laws. Another example of misconduct is as follows:

> "You cannot allow our system to be perverted that way. The rule of law will fail and ultimately our republic. I submit to you that that is not a result that we want to have happen. That is why we are here today." - Negangard Tr. 505

In the above, Negangard argued guilty verdicts were necessary to prevent Brewington from causing the fall of the rule of law, which would lead to the collapse of the United States of America. Negangard even argued convictions were necessary because Brewington violated the Indiana Code of Professional Conduct for attorneys:

> "As to Count II, Intimidation of a Judge, that is more serious because it involves a Judge but because it involves a Judge, we do need to look at the first amendment issues because you are allowed to criticize judges. Right? I mean, I'm not. Defense counsel's not because we are attorneys. But remember he says he's acting like an attorney so we should treat it as he's acting like an attorney. Well if he's acting like an attorney, then he needs to accountable like an attorney. He could hire his own attorney but he didn't. So you know and he has to suffer the consequences." - Negangard Tr. 515

Aside from professional regulations set forth by the Indiana Rules of Professional conduct, there are no statutes or laws limiting speech towards judges.

Negangard argued Brewington's self-representation in a divorce proceeding transformed Brewington's negative comments about judges into a criminal act.

These are all examples of prosecutorial misconduct that were dismissed by Judge Coy in the absence of any hearings or adverse arguments. Like an "inconvenient" allegation of sexual assault against a high-level executive, the Court quietly swept Negangard's misconduct under the rug.

COURT FAILED TO MAKE ANY FINDING OF FACT PER IND. PC R. (5)

Ind. PC R. (5) states:

> "The court shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held."

Judge Coy offered the following explanation for dismissing all twenty (20) claims raised in Brewington's Verified Petition for Post-Conviction Relief:

> "There is no factual basis to support any of Brewington's claims or allegations against the judges and attorneys involved in his case."

At no point did the Court or the State allege that Brewington's claims lacked merit. The State's material fact argument was rendered moot. The only conclusion of law provided by the Court was Judge Coy's incorrect finding that Summary Judgment and Summary Disposition were not are the same under the Ind. PC R. (4)(g).

CONCLUSION

The Court's denial of Brewington's Motion for Summary Judgment runs contrary to Indiana law and both the Constitutions of Indiana and the United

States of America. This action arose out of a decision by current Chief Deputy Attorney General F. Aaron Negangard to indict and convict Brewington for "challenging our system of law." Brewington is entitled to relief from Negangard's actions and the fundamental errors that plagued Brewington's unconstitutional grand jury investigation and criminal trial.

WHEREFORE, for the reasons set forth in this MOTION TO CORRECT ERROR, Brewington respectfully requests this Court to correct error and vacate the Court's September 25, 2017 order and issue an order granting Summary Judgment in favor of Brewington vacating Brewington's convictions, and all appropriate relief necessary.

Respectfully submitted,

Daniel P. Brewington
Plaintiff, pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon parties and counsel of record listed below, by United States mail, prepaid, on October 25, 2017.

Daniel P. Brewington
Plaintiff, pro se

Dearborn County Prosecutor Lynn Deddens
7th Judicial Circuit
215 W. High St.
Lawrenceburg, IN 47025

NOTICE

Dearborn Superior Court 2
215 West High Street
Lawrenceburg Indiana 47025

Verified Petition For Post-Conviction Relief Re; Brewington 15D02-1702-PC-000003

To: Daniel P Brewington
[redacted]

EVENTS

Entry Date	File Stamped / Order Signed	Event and Comments
10/04/2017	09/25/2017	Order Issued Order signed 9/25/17

To view the document, type the link below in a web browser:
https://publicaccess.courts.in.gov/TrialCourt/Document?id=6916b8dc-2890-4e34-8aca-ebaa1b5dabf3

OTHER PARTY - NOTICED	OTHER PARTY - ENOTICED
N/A	Lynn Marie Deddens (Attorney)

If this notice contains a link and you need a physical copy of the document, please contact the Clerk or Court.

DEARBORN SUPERIOR COURT II
Sally A. McLaughlin, Judge

Courthouse
215 West High Street
Lawrenceburg, IN 47025

IN THE DEARBORN SUPERIOR COURT II

STATE OF INDIANA

DANIEL BREWINGTON, Petitioner, v. STATE OF INDIANA, Respondent.	CAUSE NO. 15D02-1702-PC-0003

ORDER

This cause comes before the Court on the "Motion to Correct Error" filed by the Petitioner, Daniel Brewington. The Court finds that the motion should be denied.

IT IS THEREFOR ORDERED that the Defendant's "Motion to Correct Error" is denied.

Dated: October 30, 2017

W. Gregory Coy, Special Judge
Dearborn Superior Court No. 2

cc: Daniel Brewington
Dearborn Co. Prosecutor
Dearborn Superior Court Clerk