

IN THE
INDIANA COURT OF APPEALS

Case No. 15A04-1712-PC-02889

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

PETITION FOR REHEARING

Daniel P. Brewington



Pro Se Filing Party

APPELLANT PETITION FOR REHEARING

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SUMMARY OF ARGUMENT

This Court should grant rehearing and reverse the post-conviction court's erroneous denial of Brewington's motion for summary judgment/disposition and grant summary judgment in favor of Brewington as even the State's Brief of Appellee acknowledges the Dearborn Superior Court II altered grand jury records in a conspiracy against Brewington. There is no sliding scale as to how much a trial court may privately assist the prosecution in a criminal trial. Any further attempts by this or any other Indiana court to ignore or excuse the altered grand jury records are only further attempts to ignore Brewington's rights under federal law.

ARGUMENTS

I. Summary Disposition is available to Brewington

In *Brewington v. State*, 15A04-1712-PC-2889, this Court reversed and remanded Brewington's post-conviction action back to the Dearborn Superior Court II without addressing Special Judge W. Gregory Coy's denial of Brewington's motion for summary judgment. (App. Vol. II 105-142). Judge Coy's reasoning in summarily dismissing Brewington's entire PCR action lacks any foundation in law.

The order stated:

“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).” (App. Vol. II 11)

The COA opinion in this case demonstrates the interchangeability of the

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terms “summary judgment” and “summary disposition.” In his Memorandum in support of his reply to the State’s Response to Petitioner’s Motion for Summary Judgment, Brewington even requested Judge Coy to consider the motion for summary judgment as a motion for summary disposition under P-C.R. 1(4)(g). Judge Coy ignored Brewington’s request and drew a non-existent distinction between summary judgment and summary disposition:

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 (App. Vol. II 11-12)

Assigning material facts to a specific pleading does not remove the material facts from the legal action. Judge Coy’s erroneous denial of Brewington’s motion for summary disposition is still reviewable by the Indiana Court of Appeals. The facts currently before the COA mandate the reversal of Brewington’s criminal convictions.

II. Prosecutor misconduct

The COA should not gloss over the egregious prosecutorial misconduct in Brewington’s case simply because former Dearborn County Prosecutor F. Aaron Negangard is now the Chief Deputy to Indiana Attorney General Curtis T. Hill.

“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 (App. Vol. IV 59)

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"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...But what he can't say, he's a child abuser because it's not true" Negangard's closing trial arguments Tr. 516 (App. Vol. IV 59)

"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 (App. Vol. IV 61)

Negangard made the above statements during closing arguments in Brewington's criminal trial. The above misconduct alone requires the reversal of Brewington's convictions. The statements also indicate what information the Dearborn Superior Court II omitted from the transcription of the grand jury. The COA must assume Negangard presented the same case before the grand jury as Negangard argued before the trial jury. As such, Negangard made Brewington the target of a grand jury investigation for violating the Indiana Rules of Professional Conduct because Brewington referred to court officials as "child abusers", and Negangard claimed indictments were necessary to stop Brewington from "perverting" the Indiana "system of justice." The adverse argument is that Negangard introduced new grounds for Brewington's criminal convictions during

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trial. Both scenarios require the reversal of Brewington's convictions. Any confusion as to what conduct Brewington was to defend was caused by the failure of the Dearborn Superior Court II to prepare an accurate transcription of the grand jury record. This is another of the many hurdles the State cannot overcome.

III. State's Appellee Brief proves future factfinding hearing is unnecessary

The State's argument that Judge Coy properly dismissed Brewington's PCR action under P-C.R. 1(4)(g), concedes that the State agrees no material issues of fact exist in Brewington's Verified Petition for Post-Conviction Relief and Brewington's Motion for Summary Judgment. On page 6 of the opinion in this case, this Court expressed the grounds for summary disposition under P-C.R. 1(4)(g):

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.

P-C.R. 1(4)(g) is unambiguous and makes no mention of a non-moving party being entitled to judgment under P-C.R. 1(4)(g). Even a reckless interpretation that a court may grant summary disposition to a non-moving party, dismissal under P-C.R. 1(4)(g) still carries the requirement that there be no "genuine issue of material fact." Deputy Creason argued the State agreed there were no genuine issues of material fact in Brewington's post-conviction claims because Creason argued "[s]ummary disposition under Rule 1(4)(g) was also appropriate" (Brief of Appellee, page 14). The Appellee Brief of the State agreed with Brewington's finding of

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material fact; the State simply argued Brewington was barred from receiving relief from those claims under P-C.R. 1(4)(f):

“The post-conviction court properly denied Brewington’s petition on the pleadings because his claims are procedurally barred or conclusively lack merit.” (Brief of Appellee, page 2)

Deputy Creason nestled the State’s procedural and merit contentions under the wing of the State’s argument that dismissal was appropriate under P-C.R. 1(4)(f). This Court properly noted Judge Coy’s order made no mention of P-C.R. 1(4)(f) and appropriately dismissed the State’s 4(f) waiver arguments. This Court has yet to address the key component of the State’s only remaining argument under P-C.R. 1(4)(g); Brewington’s uncontested material facts.

IV. Brewington’s claims survive waiver

Judge Coy provided the following for the summary dismissal of Brewington’s entire claim:

“There is no factual basis to support any of Brewington’s claims and/or allegations against the judges and attorneys involved in his case.”

The State’s Appellee brief disproves Judge Coy’s above claim. The State’s arguments in favor of summary dismissal under P-C.R. 1(4)(g) concede no issues of material fact exist in Brewington’s grounds for relief; the most significant ground being the material fact that the court staff of the Dearborn Superior Court II altered grand jury records to hinder Brewington’s trial defense. If this Court wishes to review Judge Coy’s order with any “presumption of validity,” it must assume that

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Brewington's claims face no procedural waiver. Brewington raised twenty grounds for relief in his PCR petition. If any of those grounds were barred by waiver, Judge Coy's order would have included those procedural waivers in the order summarily dismissing Brewington's PCR action. This Court cannot dismiss Judge Coy's order as being incompetent and then remand Brewington's PCR action back before an incompetent judge.

V. Remand is Prejudicial to Brewington

Judge Coy jumped through hoops to rationalize issuing an ex parte order summarily dismissing Brewington's entire post-conviction action. Judge Coy's conduct falls short of the level of competency the Indiana Court of Appeals requires of Brewington:

“As a preliminary matter, we note that Brewington has chosen to proceed pro se, both below and in this appeal. It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. *Lowrance v. State*, 64 N.E.3d 935, 938 (Ind. Ct. App. 2016). This means that they must follow our established rules of procedure and accept the consequences when they fail to do so. *Id.* It is not the court's role to become an ‘advocate for a party, or address arguments that are inappropriate or too poorly developed or expressed to be understood.’”

It should first be noted that Brewington served a 2.5-year prison sentence because Negangard argued Brewington had to “suffer the consequences” associated with being held “accountable like an attorney.” (App. Vol. IV 59). Brewington's equal protection under the fourteenth amendment is not waived by an alleged violation of the Indiana Rules of professional conduct. The record of this PCR action

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indicates that everyone *except* Brewington had difficulties following basic procedure and law. The COA opinion made no mention of Brewington's arguments being inappropriate nor poorly developed, yet this Court observed that Judge Coy's order failed to comply with fundamental procedural requirements. Whether a product of incompetence or malicious conduct, remanding this matter back before Judge Coy in the Dearborn Superior Court II prejudices Brewington because the best-case explanation for the procedural failures by Judge Coy and the Superior Court II is incompetence. Worst-case is that remand places Brewington before both a corrupt judge and trial court. Though Brewington is responsible for any consequences resulting from his own failure to follow established procedure or law, Brewington cannot endure the consequences stemming from the inability of Judge Coy and other Indiana officials to maintain the same level of legal competency that the COA requires of Brewington.

VI. The Dearborn Superior Court II altered the grand jury record

The facts of the altered grand jury records are as followed:

- A. On March 11, 2011 former Prosecutor Negangard praeciped 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." (See State's Praeipie, App. Vol. II 129)
- B. During a pretrial hearing on July 18, 2011, Chief Deputy Prosecutor Joeseeph Kisor told Brewington to rely on "a complete transcript of the grand jury

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proceedings” to determine which of Brewington’s actions formed the basis of the criminal indictments. (See transcript from July 18, 2011 hearing, App. Vol. II 135-136)

C. The grand jury transcript omitted, at least, any record of the proceedings occurring prior to witness testimony. (App. Vol. II 138-141)

In the absence of an order, directive, or rule stating otherwise, the court staff of the Superior Court II should have produced a complete transcription of the grand jury. I.C. § 35-34-2-3(d) required the Superior Court II to record the entire grand jury investigation:

“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. When ordered by the court, a transcript or a copy of the recording shall be prepared and supplied to the requesting party. If the transcript is supplied, it shall be at the cost of the party requesting it.”

Neither the State nor any Indiana court will address why the record of the grand jury investigation of Brewington is incomplete. The Superior Court II became an advocate for the State when the Superior Court II omitted Negangard’s opening statements to the grand jury from the record of the investigation; thus, depriving Brewington of indictment information that the State claimed was vital to Brewington’s defense.

VII. Indiana provides no venue for Brewington to seek relief

P-C.R. 1(4)(b) states, “No change of venue from the county shall be granted.” Brewington’s case cannot be remanded back to the Dearborn Superior Court II

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when even the State concedes the Dearborn Superior Court II altered the record of the grand jury in a conspiracy to withhold information vital to Brewington's defense.

VIII. Judge Coy's ruling rises to the level of official misconduct

Judge Coy's order granting summary disposition to the State shares similarities with the ex parte order discussed in *In re Spencer*, 798 N.E.2d 175, (2003)

“Respondent violated the provisions of Canon 3(B)(2) that prohibit a judge from being swayed by partisan interests or public clamor. Respondent's issuance of the ‘Order Appointing Special Prosecutor’ in an immediate and ex parte manner, coupled with his knowledge of the existing public controversy concerning the Doe incident and his subsequent delivery of the order to the Anderson Herald-Bulletin, establish he failed to discharge his adjudicative responsibilities without consideration for that public clamor or controversy.”

Judge Coy's summary dismissal of Brewington's entire post-conviction action was an ex parte order granting summary disposition in favor of the State under P-C.R. 1(4)(g). Prior to this appeal, the State made no request for summary disposition because the State argued a genuine issue of material fact precluded summary disposition from being awarded to either party.¹ The CCS shows the last filing regarding Brewington's request for summary judgment was Brewington's Reply to State's Response to Petitioner's Motion for Summary Judgment and

¹ The Office of the Attorney General made the opposite argument on appeal.

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supporting Memorandum, filed June 21, 2017. Approximately 96 days later, on September 25, 2017 Judge Coy issued an ex parte order summarily dismissing Brewington's entire action without a hearing. Absent a hearing, the only way Judge Coy could determine Brewington's claims lacked "factual basis" was for Judge Coy to conduct an ex parte investigation. Judge Coy became an adversarial party when he sought out reasons to dismiss Brewington's post-conviction action. This Court cannot assume Judge Coy's actions were random acts of incompetence that coincidentally all favored dismissing Brewington's PCR action in favor of the State.

IX. The COA cannot choose arguments most beneficial to State

The State made opposing arguments regarding material facts. The Office of the Dearborn County Prosecutor argued summary judgment/disposition was not available due to the existence of genuine issues of material fact. On appeal, the Indiana Attorney General did a 180° and argued summary disposition was available claiming there were no genuine issues of material fact. Brewington could have been held liable for perjury for making the same conflicting statements. As Creason argued Judge Coy properly dismissed Brewington's post-conviction action under P-C.R. 1(4)(g), the State agrees with the fact that the Dearborn Superior Court II manipulated the record of the grand jury proceeding as part of a conspiracy against Brewington. Remand overlooks the fact that the Superior Court II altered court records in a conspiracy to assist Negangard obtain convictions. Remand also serves as a consolation gift to the State for its failed appellate strategy, allowing the State

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to reintroduce genuine issues of material fact. The COA should not reward the State nor the Dearborn Superior Court II for their misconduct. Brewington cannot waive his right to relief from a conspiracy involving the trial court. Placing Brewington before Judge Coy in the courtroom of the Dearborn Superior Court II only places Brewington at risk for additional retaliation.

Judge Coy's conduct is extremely rare if not unprecedented. This Court's own statistics further suggests Judge Coy's order was an effort to coverup official misconduct. Statistics from the annual reports of the Indiana Court of Appeals show between the years 2007-2017, only 7 of 1472 post-conviction cases disposed of by this Court ended in remand, and at least one of the seven cases (*Humphrey v. State*, 73 N.E.3d 677, (2017)) was remanded back for reasons other than a "factfinding hearing." This Court's own yearly reports suggest that at least 99.6% of the rulings by other post-conviction courts do not make the same combination of errors as Judge Coy's order summarily dismissing Brewington's case. Just as this Court reminded Brewington that it was not the role of the COA to advocate for any shortcomings relating to Brewington's inexperience in law, Brewington reminds this Court that is not the role of the COA to become an advocate for the inappropriate or poorly developed arguments of the State and/or post-conviction court. Any attempt to rationalize the misconduct is simply an excuse not to address it.

X. Federal Constitutional rights trump waiver

Though the focus of this Petition for Rehearing revolves around the

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incomplete grand jury record, there are still nineteen (19) other grounds raised in Brewington's petition for post-conviction relief. The State's P-C.R. 1(4)(g) argument recognizes that the State concedes to the material facts of Brewington's remaining nineteen grounds as well. This Court need to look no further than the altered grand jury record. The Indiana Rules of Judicial Conduct prohibit this Court from ruling Brewington could waive his right *NOT* to be the target of a conspiracy to alter grand jury records by an Indiana trial court. Sabotaging a defendant's right to a fair trial violates both state and federal constitutions not to mention state and federal law. To date, it is still impossible for Brewington to raise all claims for relief because Brewington is still unsure as to the extent of information that the Dearborn Superior Court II withheld from Brewington.

XI. The COA cannot relieve the State from the error Creason invited

A motion for judgment on the pleadings under T.R. 12(C) is similar to dismissal under T.R. 56 and P-C.R. 1(4)(g). T.R. 12(C) states in part:

“If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

Brewington directs this Court to *Saylor v. State*, 81 N.E.3d 228, (2017) for guidance:

“[w]hen we consider a motion for judgment on the pleadings, we deem the moving party to have admitted all facts well-pleaded and the untruth of [its] own allegations

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that have been denied.” *Midwest Psychological Center, Inc. v. Ind. Dept. of Admin.*, 959 N.E.2d 896, 902 (Ind.Ct.App. 2011) (internal quotations and citations omitted), trans. denied.

Though the issue before the *Saylor* court was judgment on the pleadings under T.R. 12(C), *Saylor* demonstrates the liability a moving party assumes when requesting summary judgment because the moving party is forced to admit or deny the facts and allegations of the legal proceeding. This Court cannot allow the State to reap the benefits of P-C.R. 1(4)(g) as a non-moving party, while allowing the State to escape the requirement to have “admitted all facts well-pleaded and the untruth of [its] own allegations that have been denied.” On page 2 of the Brief of Appellee, Deputy Creason lists four of the twenty claims raised in Brewington’s Verified Petition for Post Conviction Relief, one of which being:

“trial court staff allegedly manipulated the record of the grand jury proceeding as part of a conspiracy against [Brewington].”

Creason’s use of the word “allegedly” in describing Brewington’s finding of material fact does not relieve the State’s concession to Brewington’s finding of material facts. The material fact requirement is not removed from Creason’s P-C.R. 1(4)(g) argument simply because the non-moving State failed in its attempt to take advantage of a bad ruling. Creason could have argued Brewington’s claims were preposterous and unsubstantiated, but it would have raised an issue of material fact and required the immediate reversal of the favorable ruling to the State. Creason employed an appellate strategy seeking to take advantage of Judge Coy’s

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erroneous judgment. Remanding this action back for further factfinding hearings rewards the State for the error it tried to invite. It cannot be overstated how the State's Appellee Brief argued no genuine issues of material fact exist, so this Court must treat all of Brewington's allegations of fact as being true. There is no sliding scale as to how much a trial court may privately assist the prosecution in a criminal trial. Any ruling that the aforementioned conduct could somehow be subject to procedural waiver would violate Canon 2(A) of the Indiana Judicial Code of Conduct; "(requiring a judge to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary)." Public confidence in the integrity and impartiality of the judiciary would immediately erode if the Indiana Court of Appeals set an arbitrary deadline for people seeking relief from Indiana trial courts altering grand jury records.

XII. Brewington received no assistance of counsel under *United States v. Cronin*, 104 S.Ct. 2039, 466 U.S. 648, 80 L.Ed.2d 657 (1984)

Prior courts refuse to address Brewington's claims of having no assistance of counsel in preparing for trial. In the opening moments of Brewington's criminal trial, Brewington stood before the trial court and stated he had no understanding what actions Brewington was required to defend because Brewington's public defender refused to allow Brewington to play any role in the preparation of Brewington's own defense. The trial judge, Brewington's public defender, and Negangard all remained silent. The trial judge rushed Brewington to trial without

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any understanding of what actions he was required to defend. The State's Appellee Brief concedes to Brewington's *Cronic* claim so no further debate is necessary and reversal of Brewington's convictions is required.

XIII. Supreme Court ruling in *Brewington* requires reversal of Brewington's convictions

The error of Judge W. Gregory Coy's denial of Brewington's motion for summary disposition/judgment is best demonstrated when examining the basis for Brewington's single perjury conviction. A review of the opinion in *Brewington v. State*, 7 N.E.3d 946, (2014) requires the reversal of not only Brewington's perjury conviction, but *all* of Brewington's convictions. The *Brewington* opinion demonstrates the uncertainty of the Indiana Supreme Court as to why Brewington was indicted and convicted for perjury. The Supreme Court alleged three different statements formed the basis for Brewington's single perjury indictment:

"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

"...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." *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

Brewington was only indicted on one count of perjury. Either Brewington's

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perjury indictment failed to state what actions Brewington was required to defend, or the Indiana Supreme Court manufactured false accounts of the perjury indictment to justify upholding Brewington's other convictions. Either contention requires the reversal of Brewington's perjury conviction. Closer analysis requires the reversal of all Brewington's convictions. One of the Supreme Court's conflicting accounts of the perjury violation alleged Brewington lied to the grand jury about a *fact*, while the other two statements alleged that Brewington lied about the *purpose* or *intent* of Brewington's actions. As the Supreme Court displayed confusion as to why the trial jury convicted Brewington, it is impossible to determine whether the Supreme Court relied on an improper finding by the trial jury to affirm Brewington's convictions. This confusion could have only been caused by insufficient indictment information, a probable side effect of the Dearborn Superior Court II manipulating grand jury records. If the Indiana Supreme Court was unable to determine the nature of the perjury indictment, then it was impossible for Brewington or the trial jury to have known as well. Any argument to the contrary requires an allegation of malicious conduct by the Supreme Court. A general denial of Brewington's Petition for Rehearing only excuses the misconduct.

CONCLUSION

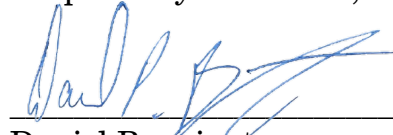
"Brewington alleges that various parties involved in his prosecution acted conspiratorially, that is, they acted together to alter grand jury transcripts; that the special judge and the prosecutors committed various acts of misconduct; that he was denied effective assistance of

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counsel, that the trial judge was not impartial, and that his appellate counsel was also ineffective.”

The above appears in Judge Coy’s ex parte order summarily dismissing Brewington’s entire petition. Judge Coy apparently took offense to Brewington’s allegations of misconduct, even knowing the allegations to be true. If there was evidence to dispute Brewington’s allegations, it would have been unnecessary for Judge Coy to completely abandoned the procedural requirements associated with the summary dismissal of a pending legal action. The State’s admission of a trial court participating in a conspiracy against Brewington’s civil rights should suffice for the reversal of all Brewington’s convictions. The State concedes no issues of material fact exist making remand for a factfinding hearing unnecessary.

Respectfully submitted,



Daniel Brewington
Appellant pro se

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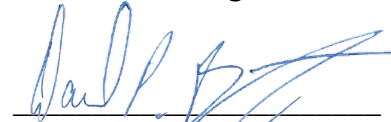
WORD COUNT CERTIFICATE

Appellant certifies that this brief, including footnotes, does not exceed, the following number of words:

Appellant's Reply Brief:

4,200 words

Daniel Brewington



Appellant pro se


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CERTIFICATE OF SERVICE

I certify that on July 23, 2018, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS).

I also certify that on July 23, 2018, the foregoing document was served upon the following person via IEFS:

Stephen R. Creason, Deputy Indiana Attorney General
steve.creason@atg.in.gov



Daniel Brewington
Appellant, pro se