IN THE

INDIANA SUPREME COURT

Cause No. 15S01-1405-CR309

DANIEL P. BREWINGTON Appellant (Defendant Below)	))	Appeal from the Dearborn Superior Court 2
	)	Cause No. 15D02-1103-FD-84
v.	)	
STATE OF INDIANA Appellee	))	Judge Hon. Brian Hill

PETITION FOR REHEARING

Daniel P. Brewington
Appellant, pro se
2529 Sheridan Drive
Norwood, Ohio 45212
(513) 383-3136
dbrewy@gmail.com

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SUMMARY

The Court should grant rehearing to address several errors and oversights in the majority opinion that led the Court to improperly adjudicate Brewington's claims. First, Brewington files his Motion for Judicial Disqualification of Justice Rush, given Justice Rush's horrific experience with a home invasion and the attempted murder of her husband. Interpretation of judicial security and judicial privacy are a component of this matter. Second, the Court's ruling has raised new structural errors that were not able to be addressed prior to the Court's ruling. Third, the Court erred in applying Jernigan to the current case, as the violation of Brewington's constitutional rights was not a procedural one, but a fundamental everyday right of a United States citizen. Finally, the Court's ruling is replete with factual inaccuracies and confusion of events in time; many of which are a product of the fouled trial process. As the Court did not officially rule that the criminalization of harsh criticism of public officials was unconstitutional or establish the parameters of determining "veiled threats" until May 1, 2014, Brewington has not been able to address the constitutional flaws littering the entire criminal proceedings until now. The Court's findings that circumstantial evidence obtained from the record can be used to determine the dangerousness of Brewington, in the absence of a professional psychological expert during trial, leaves this petition as the only remedy to address the new findings. Rehearing is necessary to address these concerns to protect Brewington's rights protected by the First, Second, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

REASONS TO GRANT REHEARING

I Recusal of Justice Rush is necessary.

Brewington has filed a Petition for Recusal requesting Justice Loretta Rush withdraw from any further participation in the current matter. After receiving the opinion authored by

Justice Rush in this matter, it came to Brewington's attention that Justice Rush was a victim of a crime involving a home invasion and the attempted murder of her husband by a former ward of the state, for whom Justice Rush formerly served as a GAL. *Swaynie v. State*, 762 N.E.2d 112 (Ind. 2002) (DICKSON, J., not participating.) Given the already difficult position of the Court to balance First Amendment protections of speech and the safety or reputations of Indiana judges, Justice Rush's "impartiality might reasonably be questioned" by any reasonable person. Ind. Judicial Canon 2.11(A). Justice Rush also served on the Juvenile Justice Improvement Committee with "victim" James Humphrey and Carl Taul at least between the years of 2008-2013. Justice Rush and Humphrey graduated together in 1983 from the Indiana University School of Law-Bloomington. The Court's reliance on a "reasonable person, *similarly situated*" test for fear, only further demonstrates the need for recusal. The "similarly situated" review is also erroneous as the Court should not accept a more stringent First Amendment review standard than a jury of peers.

II The Court's ruling raises Structural Error.

A) Brewington was convicted for engaging in constitutionally protected activity.

1) The Court ruled State's argument of criminal defamation did not pass constitutional constraints.

From the beginning of the grand jury process and criminal investigation before that, the focus of the prosecution had been on the notion that the State could criminally punish "false" opinions. The State's argument has centered on censoring Brewington. During Brewington's arraignment, Judge Sally Blankenship set Brewington's bond at $500,000 cash and $100,000 surety, despite having no criminal record. Deputy Prosecutor Joseph Kisor argued Brewington's writings "show an absolute disdain for the Court and for the prosecution."(Trans. Arr.29, 5-6)

The state failed to present any illegal act leading to the commission of the alleged crimes. (Judge Blankenship quickly recused herself stating it would be improper for any Dearborn County Judge to hear the matter. Despite Judge Blankenship's feelings of impropriety, Dearborn County Prosecutor continued to prosecute Brewington. Negangard made Brewington the target of a grand jury investigation on January 15, 2011; five days after Justice Shepard dismissed the complaint Brewington filed against Negangard with the State.) Throughout the trial, the State argued Indiana law prohibited lies in public speech. "These threats weren't just little opinions, little criticisms. You know maybe they were....But when you do this over and over and over again with only one purpose to harass and bring them to ridicule and put them in fear, that is not an appropriate exercise of speech. That's a crime. That's a bunch of crimes."(Trans .449, 22-23; 450, 2-6) This Court ruled Brewington's statements calling Humphrey and Edward Connor "child abusers" and "criminals" were "protected by the First Amendment because there is no proof of actual malice." *Brewington v. State*, 15S01-1405-CR-309. Less the understanding that Brewington did not commit "a bunch of crimes" Brewington probably would not have been indicted in the first place. Because Brewington was indicted and detained for constitutionally protected activity, the criminal process was fractured at the very foundation of its structure.

2) The Court using conclusions supported by Brewington v. Brewington, 930 N.E.2d 87 (Ind.App. 2010) (trans. denied) in determining Brewington's guilt places the Court in an adversarial role to defend the Court's decision to deny transfer in Brewington's divorce as a reason why Court is correct in affirming Brewington's convictions.

In Brewington v. State, 15S01-1405-CR-309, the Court failed to conduct a true de novo review of the record. The heart of this matter lies at the foundation of the First Amendment of the United States Constitution and the rights of citizens to criticize public officials.

Brewington's writings revolve around what Brewington's believes to be injustices in the Indiana Family Court System. The Court acknowledged the importance of *de novo* review in addressing the concerns of the Amici regarding protected speech but did not extend the same privilege to Brewington in the Court's *de novo* review of trial record. Rather than assume *arguendo* that judges and/or court officers were abusing their positions, this Court concluded Brewington's speech was false rather than placing the burden on the target to disprove the speaker. The Court regarded Humphrey and Connor's findings as fact and then further strengthened Humphrey's rulings by saying the Appellate Court affirmed Humphrey's decree, and "We" denied transfer. The Court used the psychological analysis from the targets of Brewington's critical speech as circumstantial evidence in determining what segments of Brewington's heightened rhetoric about targets Humphrey and Connor had constituted a crime. The Court acknowledged a "veiled" threat would be non-existent in the absence of fear of Brewington's mental health; as "diagnosed" by Humphrey and Connor. By not reviewing the record with the belief that Brewington's allegations could be true, by default this Court assumes an adversarial and prejudicial role against Brewington and not a role as an impartial judicial body; raising substantial due process issues. **NOTE:** a quick review of State's Tr Ex 67, Brewington's letter to Prosecutor Negangard dated May 2, 2009, demonstrates the importance of an independent review. The first exhibit of Brewington's complaint contains a letter from Connor, dated February 25, 2008, where Connor accuses Taul of ex parte communication. This letter appears in the criminal trial record on at least three occasions. This Court punishes Brewington for blogging about Taul's recusal while claiming that writing about Taul's recusal "had led the Doctor to the professional opinion that Defendant was 'potentially dangerous." This issue could

not be addressed prior to the Court including it as circumstantial evidence in determining veiled threats.

B) The State never provided Brewington with any examples of Brewington's conduct that constituted a threat of immediate harm to property or individual safety, a violation of the Sixth Amendment.

1) State failed to provide *any* examples of alleged illegal threats by Defendant throughout the entire pretrial process.

It is of the utmost importance to fair justice to understand Brewington never threatened Humphrey with arson, acts of pyromania, etc. The trial record clearly shows the prosecution never asserted the allegation. Humphrey never expressed any fear of such threat. The record is void of the word "arson" until it was first raised in the brief of the appellee. The State made no mention of threats during pre-trial hearings. It was impossible to prepare a defense against true threats, because the alleged "indirect" threats were not defined until this Court's opinion. If the State would have acknowledged that it was detaining and prosecuting Brewington for calling public officials "child abusers," Brewington would have had grounds for challenging his unconstitutional detention. It is virtually impossible to address the Court's finding that the State "overlooked" differentiating threats of physical harm and threats to reputation without leaving the criminal trial and revisiting the entire criminal process. The Court's "reasonable person in a 'similar circumstance'" veiled threat analysis, placed the burden on Brewington to preemptively base any potential trial strategy on speculation of what the Indiana Supreme Court would consider a hidden threat; and not a jury of his peers. The Court's *sua sponte* determination of what the Court deemed to be threats to personal safety combined with the Court's new finding of

"facts" leaves Brewington with only this Petition or the United States Supreme Court as means to challenge the new interpretation of threats.

2) Brewington was left to decide what conduct in 3.5 year time span constituted a threat of physical harm.

In the name of due process, it is the responsibility of the State to define true threats rather than flood the record with material so a higher Court can "cut and paste" quotes to construct what the Court deems a true threat to other judges outside the presence of a jury. If the responsibility falls on Brewington to determine which of his actions constitutes a crime or to seek a psychological evaluation to contest the claims, then Barrett's failure to object is clearly ineffective assistance of counsel and the error was plain, fundamental, gross, and/or structural. Failing to provide a defendant with an understanding of the charges against him cannot be invited error; especially while the Court alleges Brewington suffers from some psychological dysfunction. Neither the Trial Court nor Barrett did anything to address Brewington's multiple pleas to acquire an explanation of what actions of Brewington constituted a crime. On September 19, 2011, Judge Hill stated "I'm going to deny your motion for continuance... 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'll get started with the jury trial on October 3rd at 9:00 a.m."(transSept.19,11 81,4-12) Brewington addressed not knowing what actions constituted a crime on July 18, 2011, (Trans,13-22), September 19, 2011, (Ex Brew letter) and in Defendant's Motion to Dismiss, filed October 3, 2011. Judge Hill allowed Brewington fourteen days to review 2000 pages of evidence with Barrett; all while being incarcerated.

C) The Court's findings that the Prosecution "repeatedly overlooked" the distinction between threats to reputation and threats to safety raises prosecutorial misconduct.

The Court stated the Prosecution "repeatedly overlooked" defining what speech constituted a threat to safety, thus raising prosecutorial misconduct. Prosecutor Negangard's (he is currently vice president of the Indiana Association of Prosecuting Attorneys) failure to provide Defendant the scope of the criminal actions constituting the indictment cannot be considered incidental. The Court raised the issue sua sponte in an effort to speculate how the State's constitutionally defective jury instructions were somehow invited by defense counsel. Rather than protecting Brewington's Sixth Amendment Right to charging information and a fair jury trial, the Court speculated the prosecution's "innocent" *non-action* somehow spurred Barrett's "strategic" *non-action* in *not* objecting to the general jury instructions, which somehow helped invite error. The Court's speculation cites no law or reasonable logic and only gives the appearance of advocacy against Brewington.

III The Supreme Court was erroneous in finding fundamental error was invited.

A) The Court's speculation on Barrett's trial strategy hinges on the Court's speculation of Barrett's speculation of the Prosecution's trial strategy.

The Court's reasoning in ruling that the fundamental error, in not protecting Brewington's right to fair and constitutionally protected jury instructions, was somehow invited defies logic. The Court reasoned defense counsel "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." It wasn't until this Court's ruling that there were any examples of threats, which were subjectively determined by a panel of Justices based on context the

Justices felt may be intimidating to a judge and court psychologist. The Court's logic serves to doom Brewington by encouraging prosecutors to *not* give defendants adequate charging information then correcting the prosecution prior to closing arguments. This places the defendant in peril as it requires the defendant to *not* give the appearance of trying to capitalize on "oversights" by the prosecution or risk waiving an otherwise appealable issue. The argument that withdrawing the proposed harassment jury instructions should fall on deaf ears as well. The argument would be more plausible if the lesser offense would be easier to obtain but harassment as defined by IC 35-45-10-2 does not include *permissible* contact and does not "include statutorily or constitutionally protected activity." At no point did any of the alleged victims tell Brewington not to contact them. Even if Barrett had not withdrawn the harassment instructions, the statutory and constitutional provisions were not included. If a jury would have found Brewington guilty of harassment, Barrett's failure to include the statutory and constitutional provisions may have waived the defendant's ability to appeal the matter.

B) Invited Error cannot be applied to cases where there is no crime.

The Court's reliance on U.S. v. Jernigan, 341 F.3d 1273 (11th Cir. 2003) to argue invited error can apply to constitutional protections is unfounded. Jernigan argued "that the district court erred by allowing the introduction of" a co-defendant's post-arrest statements to police officers implicating Jernigan; thus violating the Sixth Amendment's Confrontation Clause. The arrest statements came in the form of two recordings. The Eleventh Circuit rejected Jernigan's constitutional claims citing invited error because Jernigan had made an agreement with the US Attorney to admit recorded hearsay testimony. The Court based its assumption of Barrett's "strategy" on what Barrett's assumption of the trial strategy of a prosecutor, who failed to provide Brewington, the Court, or the jury with any distinction between threats to safety and

threats to reputation. Brewington's case does not deal with a constitutional trial rule, it deals with constitutionally protected activity. Brewington's acquittal would mean that no crime was committed. This doesn't take into account this case is one of first impression. The Court concluded that Barrett's "strategy" of waiving Brewington's constitutional right to a properly informed jury, in a criminal defamation trial, while rolling the dice on a "hunch" that the prosecutor would not address the issues during closing arguments, was not just adequate; it was "*a deliberate eminently reasonable strategic choice.*" [Emphasis]

C) The record of the case has created confusion for even this Court.

It is understandable how the record of this case could be confusing as it took two years and input from a politically diverse group of amici to reach the conclusion that it was not unlawful to call a judge a child abuser. The Court upheld Brewington's convictions stating "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." The Court somehow overlooked how the State and Connor argued Brewington's intent was not to threaten safety but to harm reputation. During closing arguments, Deputy Prosecutor Joseph Kisor claimed "Subsection C6" was 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." (Trans 455,25; 456, 1-4) Kisor even claimed Brewington's actions were threatening to judges but not prosecutors. Kisor stated, "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." Trans470,3-7) What

is not threatening to a prosecutor is not threatening to a judge; however, if the conduct *is* threatening to a prosecutor, Kisor claimed Brewington committed a crime against Prosecutor Negangard, the lead prosecutor in Brewington's criminal trial. As for Connor's assessment of Brewington's "intent," Connor testified, "For four years you have made it your job to obsess over me, with the internet, with the intent of damaging my professional reputation, and practice." (trans.Oct.24,11,6,12-14)

D) Perjury conviction must be overturned or remanded.

The Court's confusion in upholding Brewington's perjury conviction requires, at minimum, remand back to trial. The Court's handling of the perjury raises two major concerns. First, the evidence and trial record was so fractured, even the Indiana Supreme Court could not decipher the nature of Brewington's perjury charge. The second concern is how the Court reworded the nature of the perjury conviction to justify upholding Brewington's other convictions. The Court stated, "And the jury's perjury verdict implicitly recognized that intent, finding that Defendant lied to the grand jury about his true motives for posting the Judge's address" and "[W]e 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." Brewington's perjury conviction stemmed from his partial grand jury testimony where Brewington stated the following about Brewington's knowledge of James and Heidi Humphrey's marital status, "it very well could be a possibility. I'm not from Dearborn County. I don't know but the thing is..." and then was cut off by Negangard. GJ tran 166 ln 17-18. The State failed to provide any evidence to demonstrate that Brewington could definitively say he was certain James Humphrey and Heidi Humphrey were married. Brewington could have been tried and convicted of perjury

if he would have testified he was certain beyond any reasonable doubt that James and Heidi Humphrey were husband and wife just because their names appeared on the same tax record on the website of the Dearborn County Tax Assessor. Short of a statement saying otherwise, there is no way to definitively prove Brewington lied about his knowledge of the Humphreys' marital status. Forcing a defendant to testify in trial to clarify a partial answer, caused by a prosecutor, deprives the defendant of the Fifth Amendment prohibition against required self-incrimination. As for Heidi Humphrey, the website of this Court listed Heidi Humphrey as a public official with the Ethics and Professionalism Committee, which provides insight to this Court and the public on different judicial issues and the prosecution in the case demonstrated during trial that her address was public record. At no point did Brewington tell people it was the home address for James Humphrey or even Heidi Humphrey for that matter.

E) Brewington is not violent or dangerous.

Because the State failed to present an expert to evaluate Brewington, Brewington was unable to address the recent finding of the Court regarding Brewington's mental health. It is irresponsible for the State to allow a victim of harsh public criticisms to advise a criminal court on the mental state of the speaker. The Court stated, "Defendant had also demonstrated... violence, and genuine dangerousness *directly* to both of his victims during his years-long vendetta against them." During trial, Sheriff Kreinhop testified his investigation made no finding that Brewington committed any acts of violence against public officials. Tran 410 18-21. Connor did not believe Brewington was a danger to society because Connor recommended Brewington have "liberal" unsupervised parenting time. (decree) Humphrey did not believe Brewington posed an immediate danger because Humphrey allowed Brewington continue to care for his daughters three days a week in the 2.5 months between the final hearing and the divorce

decree. There were no reports of domestic violence, no restraining orders; not even an attempt to modify custody during the 2.5 year divorce. Brewington did not know Humphrey feared Brewington because it would be an ethical violation if Humphrey remained on Brewington's case while fearing for his life. Failure to withdraw demonstrates a lack of real fear. The 3.5 year timeframe on indictment, with no evidence of violence, demonstrates Brewington is not violent.

There is no record of Brewington's throwing of books nor violent behavior during the final hearing of Brewington's divorce. Brewington has never been held in contempt. The Court's use of legal gun ownership as circumstantial evidence to link defendant to criminal activity is a violation of Second and Fourteenth Amendments. There is no evidence Brewington made any illegal or threatening references to gun use. No one raised concerns of Brewington's other firearms appearing in the divorce decree, just a .357 Magnum. A dangerous person with a gun is dangerous with any firearm.

F) The Court lost its way in making an argument against Brewington for obstruction of justice.

The Court relied heavily on Connor's "perception" of Brewington's level of "dangerousness" based upon Brewington's criticisms of Connor. During trial, Connor mentioned being very concerned with Brewington's pyromaniac analogy. Connor testified he saw the comment on "the same web-site where [Brewington] was posting about all this information about me and the divorce issues and everything." Connor then stated, "I knew that I needed to pay attention, not only to for myself but for my family, my children, the office, our house. To make this type of comment, I wasn't sure this was a threat or just an attempt of intimidation or taunting or what have you but it concerned me enough to really pay a lot of attention." (Trans158,3-9) The post never appeared on a website. The pyromaniac analogy

appeared on Brewington's private Facebook page. [See DECREE and Humphrey testimony.] Connor also testified he did not have a Facebook account. As Brewington spent 2.5 years in prison and has been years removed from his young daughters because he criticized Connor, the Court should not take this lightly as Connor made up a story about seeing the pyromaniac quote and then claimed it caused him to fear for the lives of family and employees, in an effort to have Brewington criminally punished for criticizing him. The Court declined to address the attempted obstruction of justice and relied on the intimidation statute to demonstrate the attempted obstruction of justice as the same evidence was argued for both charges. If the Court were to readdress the attempted obstruction of justice upon rehearing, Brewington hopes the Court would put little weight on any of Connor's statements. The Court made the case that small segments of Brewington's internet writings, which accounted for less than one percent of Brewington's total writings were threatening. The problem which arises is the web posts the Court refers to came *after* the final hearing in Brewington's divorce making it impossible for the writings to be an attempt to prevent Connor from testifying in the divorce. There is no record of any contact between the alleged victims and Dearborn County law enforcement after Kreinhop filed his investigative report on October 28, 2009. Negangard made Brewington a target of a grand jury investigation for intimidation without any record of contact from the alleged victims. Without a finding of fear or direct threat, there is no intimidation. Neither Humphrey nor Connor took any measures to obtain restraining orders against Brewington.

E) By assigning Brewington with the burden of preemptively defending his speech, the State has violated Brewington's First and Fifth Amendment rights.

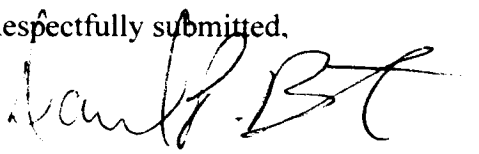
Not only was Brewington put in a position to preemptively defend his speech, the State hit him with the burden of speculating what a panel of judges would deem to be veiled threats

against judges. But where the Court's "true threat" argument *against* Brewington truly fails, is the State argued threatening "hatred and contempt and disgrace and ridicule" "was [Brewington's] whole intent. That's his *only intent*.[emphasis added]" Given Connor's *questionable* [emphasis added] testimony, Kisor's claim that Humphrey isn't as tough as prosecutors, and the fact this case revolves around free speech and the ability to express harsh criticisms of the courts, any reasonable person would conclude that for transparency and the image of the court system, decisions about the ability to criticize judges should be decided by a jury made up of a diverse group of citizens, not a panel of judges.

CONCLUSION

Due to the numerous errors in the trial record, which confused even this Court, reliance on false pretense of fear to define threats; and the structural, fundamental, gross, and/or plain errors that deprived Brewington of nearly every constitutional protection during his criminal case, the Court should grant rehearing and reverse all convictions or remand the matter back for a new trial.

Respectfully submitted,



Daniel P. Brewington
Appellant pro se

WORD COUNT CERTIFICATE

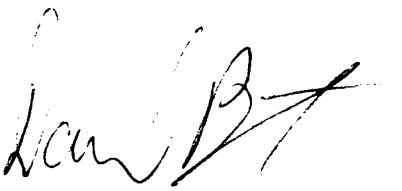
I verify that this Petition for Rehearing contains fewer than 4200.

Daniel P. Brewington
Appellant pro se

CERTIFICATE OF SERVICE

I certify that I served the foregoing on counsel by U.S. Mail at the following addresses on June 3, 2014.

Stephen R. Creason
OFFICE OF THE ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 W. Washington,
Indianapolis, IN 46204



Daniel P. Brewington
Appellant pro se

Daniel P. Brewington
2529 Sheridan Drive
Cincinnati, OH 45212
513-383-3136
dbrewy@gmail.com