

IN THE
SUPREME COURT OF INDIANA

Cause No. 15A01-1110-CR-00550

DANIEL BREWINGTON,)	
Appellant,)	Appeal from Dearborn County Superior Court II
)	
v.)	Cause No. 15D02-1103-FD-0084
)	
STATE OF INDIANA,)	The Honorable Brian Hill,
)	Special Judge
Appellee.)	

REPLY IN SUPPORT OF PETITION TO TRANSFER
TO THE INDIANA SUPREME COURT

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ARGUMENT

The State asks the Court to do something it cannot do: grant transfer, but affirm on narrower grounds.¹ Indiana Code §§ 35-45-2-1(a)(2) and 35-45-2-1(c)(6)-(7) must be construed narrowly to avoid offending the First Amendment. This Court should grant transfer to clarify these limitations, and reverse Brewington's convictions for intimidation of Judge Humphrey and attempted obstruction of justice.²

I. The Court Cannot Avoid This Constitutional Issue.

The State asks the Court to avoid deciding the constitutionality of the intimidation statute because First Amendment issues are fact-sensitive and should be decided incrementally. Not so.

First Amendment jurisprudence often deals with categorical rules. *See U.S. v. Stevens*, 130 S.Ct. 1577, 1584 (2010). While resolution of any case may depend on its facts, decisions are not based on case-by-case balancing of competing interests. *Id.* at 1585-86. First Amendment cases do not follow the general rule of constitutional avoidance. Courts often look beyond the parties' claims and consider whether a statute prohibits other protected speech, because "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).

The intimidation statute, as applied to Brewington's harsh criticisms of Judge Humphrey and Dr. Connor, infringed on his First Amendment rights. (Petition to Transfer 5-10). Unless the

¹ The State does not challenge the reversal of Brewington's convictions on counts I and III. That ruling should be summarily affirmed.

² The Court should also address the other issues/convictions Brewington raised in his Petition to Transfer that were not challenged in the State's Response.

Court corrects the Court of Appeals's error, others might withhold similar criticism for fear of prosecution, as shown by the various *amicus curiae*.

The Court should construe I.C. § 35-45-2-1 narrowly and consistent with the First Amendment, as shown in Brewington's Petition to Transfer.

II. The Court Cannot Affirm Brewington's Convictions for Intimidation and Attempted Obstruction of Justice.

A. Brewington's Indictments and the General Verdicts Permitted Conviction for Protected Speech.

When the State bases its prosecution on protected and unprotected speech, and the jury returns a general guilty verdict, the conviction must be reversed. *Street v. New York*, 394 U.S. 576, 588 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 569-70 (1970). "A general verdict cannot stand when the case was tried and submitted on two theories, one bona fide and the other not." *Miller v. State*, 417 N.E.2d 339, 343 (Ind. 1981) (citing *Bachellar*, 397 U.S. at 569-71).

The State's argument that Brewington could be convicted of intimidation and attempted obstruction of justice for his harsh criticism was a major part of its case. (See Appellant's Br.14-19; Tr.461-64, 468-73).³ That theory cannot withstand First Amendment scrutiny. (Petition to Transfer 5-10; Brief of *Amicus Curiae* Eagle Forum, *et al.*, 3-11). Because the jury was allowed to convict Brewington for protected speech, and the jury returned general verdicts, Brewington's convictions for intimidation of Judge Humphrey and attempted obstruction of justice cannot stand. The Court cannot grant transfer and affirm on other grounds.

³ Count IV alleged that Brewington attempted obstruction of justice by intimidating/harassing Dr. Connor. (Appellant's Br.17-18). Thus, for these purposes, the intimidation and attempted obstruction charges were indistinguishable. The constitutional infirmities that plague the former infect the latter.

B. Brewington's Convictions Cannot Be Affirmed as "True Threats."

Brewington's convictions for intimidation and attempted obstruction cannot be affirmed as "true threats." This Court must independently review the evidence to determine if Brewington's speech was constitutionally protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). The Court will find that Brewington's statements were not unprotected "true threats," as defined by the Supreme Court. *See Watts v. U.S.*, 394 U.S. 705, 707-08 (1969).

Due to space limitations, Brewington cannot fully address the State's arguments or its numerous inaccurate descriptions of the record, and will rely primarily on his Court of Appeals briefing. However, some points merit mention.

First, this Court has never squarely addressed the "true threats" standard. It should use this opportunity, paying close attention to the Supreme Court's refinement of this doctrine in *Virginia v. Black*, 538 U.S. 343 (2003). *See also U.S. v. Parr*, 545 F.3d 491, 499-501 (7th Cir. 2008).

Second, when considering speech in context, more weight should be placed on facts known to the speaker than on unknown reactions to the speech by third parties. Due process requires that "persons have a right to fair warning of that conduct which will give rise to criminal penalties." *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006). A speaker needs warning of when speech is criminal *before* speaking. Facts and circumstances unknown to Brewington when he spoke, including the alleged victims' subsequent reactions, did not give that fair warning.

Third, the Court must consider context that supports lawful interpretations of Brewington's speech. This includes Brewington's readers' reactions to his request to send letters to Heidi Humphrey. *See Watts*, 394 U.S. at 708. Brewington's readers did what he asked: send letters. (*See Appellant's Br.*10-11). They did nothing violent or illegal, and did not visit the

Humphreys' home. Likewise, context shows that Brewington never threatened to assault Dr. Connor; rather, he made a purely hypothetical statement in a dialog with his readers, using rhetorical flourish. (Ex.198). This was virtually indistinguishable from Mitt Romney's son saying he wanted to "take a swing" at President Obama for calling his father a liar. *See* http://www.huffingtonpost.com/2012/10/17/tagg-romney-obama_n_1976186.html.

Finally, the State's comparisons to cross-burning and anti-abortion activists publicizing addresses of abortion providers are inapt. Those speakers invoked well-known symbols and historical examples of violence/intimidation, intentionally drawing on that significance/history to send a message. There is nothing comparable with Brewington's speech.

When the Court evaluates the entire record under the appropriate constitutional standards, it will find that Brewington's statements were not true threats.

CONCLUSION

For these reasons, and the reasons stated in Brewington's Petition to Transfer and Court of Appeals briefing, the Court should reverse Brewington's convictions and enter verdicts of acquittal or remand for a new trial under the correct constitutional standards.

Respectfully submitted,

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