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IN THE INDIANA SUPREME COURT  
CAUSE NO.: 49A02-0709-CV-00777

Susana Henri, )  
 )  
Appellant, )  
 )  
v. )  
 )  
Stephen Curto, )  
 )  
Appellee. )

Appeal from the Marion Superior Court  
Case No.: 49D02-0412-CT-002275  
The Honorable Kenneth H. Johnson,  
Judge

---

**BRIEF IN RESPONSE TO PETITION FOR TRANSFER**

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### **Questions Presented for Transfer**

Is a retrial required where the bailiff coerced a verdict by incorrectly implying the jury did not have the option to end in a hung jury?

Does the cumulative effect of the bailiff's statement, considered with a cell phone call pressuring a juror to rush to verdict and the intrusive behavior of the alternate juror, require a retrial?

Should this Court reconsider its prior decision to reconcile the requirement to object to an incorrect instruction against the rule protecting the substantial rights of the parties?

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## **Background and Prior Treatment of Issues**

In 2004, Susana Henri (Susana), a student at Butler University, joined her volleyball teammates at a party. (Tr. 396, 407, Tr. 466-67, Exh. 104.) There she met Stephen Curto (Curto) for the first time. (Tr. 413, 535.) Curto encouraged Susana to play a drinking game. (Tr. 405, 442, 532.) When the beer ran out, Curto retrieved a bottle of rum, which he then shared with Susana and others. (Tr. 472, 530-31, 538-40, 578.) The two eventually became intoxicated. (Tr. 545-46.)

In addition to the alcohol intoxication, Susana blacked out before she left the party, and could not remember much of what happened next. (Tr. 410.) She described symptoms such as confusion, dizziness, disorientation, nausea, headache, stomach ache, diarrhea, and vomiting, symptoms two experts said are consistent with the effects of date-rape drugs. (Tr. 130-33, 289-93, 410, 466-67, Exh. 104, pp. 3-4.)

Susana described how she awoke the next morning:

I had to go to the bathroom and when I got up from under the covers I realized that my hair was poorly tied back, my strapless bra was somewhat off, being lower than it should be and my panties were off. My clothes were all over the floor of my room and a walkie-talkie was next to the storage drawer unit on the floor. In addition a trash can was next to my bed. I put my underwear back on, some shorts and a t-shirt and went to the bathroom. I could only pee a very small and dark amount of urine and it burnt. When I wiped I noticed blood on the toilet paper coming from the back of my vagina. It scared me and confused me. . . . I fell back asleep and at around noon I tried to drink something and eat. It made me very nauseous and I threw up. After that point I threw up every time I ate or drank anything and eventually even if I didn't. I stopped vomiting at approximately 8:30 pm. . . .

(Tr. 466-67, Exh. 104, p. 3.)

Susana was eventually examined by a certified sexual assault nurse examiner. (Tr. 102, 105.) The nurse found "bruising on the right labia majora," (Tr. 115, 120-21,

Exh. 7,) “a small tear in the posterior fourchette,” (Tr. 116, 121, 126, Exh. 8,) and an abrasion on Susana’s cervix. (Tr. 116, 121, 126, Exh. 8.) The nurse testified that “the posterior fourchette tear is the number one injury that occurs in sexual assault.” (Tr. 128.) She concluded that Susana was involved in non-consensual sexual intercourse. (Tr. 130, 145.)

Two licensed social workers testified about the psychological injuries Susana suffered. (Tr. 154-55, 318.) One concluded Susana’s “symptoms are very consistent with other rape victims.” (Tr. 172.) The other testified Susana’s “symptomology and her presentation over what I consider is a significant period of time is very consistent” with that of a person victimized by rape. (Tr. 335.) A psychiatrist diagnosed Susana with post traumatic stress disorder and major depression. (Tr. 262, 267, 295.) All three testified that Susana had no motive to fabricate her claim of rape. (Tr. 185, 313-14, 334-35.)

Susana sued Curto claiming he raped her. (App. 20-24.) In response, Curto filed a Counterclaim alleging intentional interference with a contract. (App. 25-33.) A jury determined Curto was not responsible for raping her. (App. 18, Tr. 654.) The jury found Susana responsible under Curto’s counterclaim and awarded \$45,000 in damages. (App. 19, Tr. 654.)

After the trial, a juror contacted Susana’s attorney, and explained that the jury had asked certain questions of the judge during deliberations. (App. 40-41, 46-48.) Those questions and answers were not discussed with counsel during the trial. (App. 49-50.) The juror also discussed improper participation by the alternate juror. (App. 47.) Susana used this information to support a Motion to Correct Error. (App. 40-51.)

Susana also filed a Motion to Supplement the Record to allow counsel to question the bailiff who handled the jury deliberations. (App. 52-53.) The trial court denied both motions. (App. 5.)

Susana appealed, saying Curto failed to present sufficient evidence to support his counterclaim. She also asserted error in the failure to respond to the jury issues correctly. The Court of Appeals held oral argument (available at [http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/05222008\\_1130am.rm](http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/05222008_1130am.rm)).

The Court of Appeals issued a published opinion. *Henri v. Curto*, 891 N.E.2d 135 (Ind. Ct. App. 2008). That court remanded the case for a new trial based on the error in allowing *ex parte* communications with the jury, one of which was an incorrect statement of the law, and the others which improperly influenced the jury. The court chose not to consider Susana's argument that Curto failed to present sufficient evidence to support his counterclaim, saying, "The parties will be able to address the appropriate elements of Curto's counterclaim" in the new trial. *Id.* at 136, n. 2.

Curto has sought review from this Court. Susana asks this Court to uphold the decision of the Court of Appeals relating to the jury issues, but also asks this Court to review her claim that Curto failed to present sufficient evidence to support his counterclaim.

### **Argument**

#### **1. The Court of Appeals Correctly Ruled the Bailiff's *Ex Parte* Communication Was an Incorrect Statement of the Law.**

Curto argued the bailiff merely told the jury its verdict would have to be

unanimous, and therefore was a correct statement of the law that mirrored the admonition in Final Instruction #15. (Curto's pet. 8-10.) The trial judge stated that he "instructed the bailiff to simply tell the jury to continue their deliberations." (App. 7.) As the Court of Appeals pointed out, however, "what the bailiff conveyed to the jury is the material statement, not what the trial court stated to the bailiff."

Ms. Kirk's affidavit, however, reports that the jury asked "if the decision would have to be unanimous," and when the bailiff returned, "she told us *the jury would have to keep deliberating until we could reach a unanimous verdict.*" (App. 46-47 (emphasis added).)

Curto would have this Court ignore the impact of the bailiff's statement. It did not merely restate correctly the requirement of a unanimous verdict; it informed the jury of the trial court's intention to hold them hostage until unanimity could be achieved. IND. CODE § 34-36-1-7 states, "The jury may be discharged by the court under any of the following circumstances: . . . (4) The jury has been kept together until it satisfactorily appears that there is no probability of the members agreeing upon a verdict." It is clear from this statute that a mistrial is available if the jurors are unable to reach a unanimous verdict.

The words, "the jury would have to" make a difference. They turn a request to keep trying into a mandate to succeed. Under IND. CODE § 34-36-1-7, the jury was not required to succeed.

## **2. Prejudice from the Coercive Instruction Cannot Be Overcome.**

### **a. An Incorrect Statement of the Law Resulted in Prejudice.**

When jurors request additional guidance from the court, "the proper procedure is

for the judge to notify the parties so they may be present in court and informed of the court's proposed response to the jury before the judge ever communicates with the jury. When this procedure is not followed, it is an *ex parte* communication . . .” *Rogers v. R.J. Reynolds Tobacco Co.*, 745 N.E.2d 793, 795 (Ind. 2001). “An inference of prejudice arises from an *ex parte* communication and this inference creates a rebuttable presumption that error has been committed.” *Grey v. State*, 553 N.E.2d 1196, 1198 (Ind. 1990) (citing *Martin v. State*, 535 N.E.2d 493 (Ind. 1989)).

Curto correctly points out that the presumed harm can be overcome if the *ex parte* statement is a correct statement of the law, or if it merely repeats statements from other instructions. (Curto pet. 9-10.) Because the bailiff's statement added the coercive component to the jury's understanding, however, the cases cited by Curto support the decision of the Court of Appeals. “Because the statement by the bailiff to the jury was a misstatement of Indiana law, it would be unlikely that the presumed prejudice from that statement could be rebutted.” *Henri*, 891 N.E.2d at 141. Even the lone dissenting judge below appears to agree the bailiff's response was an incorrect statement of the law. *Id.* at 146 (Baker, C.J., dissenting) (“I acknowledge that if, in fact, the bailiff informed the jurors that they had to reach a unanimous verdict, the situation was not ideal . . .”).

**b. Curto Misstates When the Bailiff Spoke to the Jury.**

Curto asserts that the jury had only been deliberating twenty minutes when it received the statement about jury unanimity from the bailiff. (Curto pet. 8.) Curto cites to the Court of Appeals' decision. 891 N.E.2d at 141. The court merely reported how

the trial court responded to Susana's Motion to Correct Error. 891 N.E.2d at 141 (citing Appellant's App. p. 7). This Court should review the trial court's response:

A very short period of time after this panel was charged, the bailiff did convey to me that a juror had a question about the requirement that a verdict had to be unanimous. As they had only been deliberating a short while and that they had been clearly instructed about the need for a unanimous verdict I instructed the bailiff to simply tell the jury to continue their deliberations.

I have no knowledge about this juror requesting to get off the jury, but even if I had, the time they had spent in deliberations was so brief, approximately 20 minutes, that to consider a jury to have been "hopelessly deadlocked" in such a short time would not have been seriously considered and such a request would not have been granted.

(App. 7.)

The trial court reported that the entire deliberation lasted only twenty minutes. This, of course, conflicts with the undersigned's own trial notes, as reported in Susana's brief. (Brief of Appellant, p. 42.) Curto prefers to believe the jury's request occurred twenty minutes into a two and a half hour deliberation. The trial court suggested the request came "a very short period" after beginning a twenty minute deliberation.

Ms. Kirk's affidavit stated, "Before actual deliberations began, the bailiff allowed the jurors to make calls to advise that deliberations were beginning and to make any personal arrangements that were necessary." (App. 47-48.) With this time to make arrangements, and the possibility that the jury was fed during the dinner hour, it is possible the actual deliberation period was much shorter than the two and a half hours recorded by the undersigned, especially considering the trial judge's own statement.

Curto focuses on this time period, because the time between the *ex parte* communication and the jury's verdict has been held to be relevant to the issue of rebutting the presumption of harm. See *Rogers*, 745 N.E.2d at 795; *Smith v.*

*Convenience Store Distributing Co.*, 583 N.E.2d 735, 738 (Ind. 1992); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1288 (Ind. Ct. App. 1996). The record leaves this question open, because it was never established how many minutes into the deliberations the question came, or how soon after that the supposedly unanimous verdict was reached. This information could have been elicited had the trial court granted Susana's Motion to Supplement the Record.

When considering whether the bailiff's statement caused a "sudden turn of events," this Court should consider that in *Rogers*, *Smith*, and *Nesvig*, there was no determination that the *ex parte* statement was an incorrect statement of the law. Because this statement was an incorrect statement of the law, it should not matter when the statement was made, or how soon the jury responded to it.

**c. Reliance on the Juror's Affidavit Is Proper.**

Curto suggests the Court of Appeals has improperly restricted its review only to the affidavit of Ms. Kirk. He asks this Court to consider the statement Ms. Kirk made when the jury was polled. (Curto pet. 6.) He also points out that the trial judge spoke to Ms. Kirk in the hallway, and she had no complaints. (Curto pet. 7.)

The Court of Appeals correctly limited its consideration to the affidavits. IND. TRIAL R. 59(H) requires that "when a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion." An affidavit submitted under T.R. 59 becomes a part of the record. *Allen v. State*, 743 N.E.2d 1222, 1235 (Ind. Ct. App. 2001). "If such an affidavit is uncontradicted, the appellate court must accept its contents as true." *Id.* (citing *Jewell v. State*, 624 N.E.2d

38, 42 (Ind. Ct. App. 1993).

Curto relies on *Hernandez v. State*, 761 N.E.2d 845 (Ind. 2002). *Hernandez*, however, involved a question of whether the jury's question required a hearing to determine whether it was deadlocked. There, the jury sent out a note asking "What if we are a hung jury What will happen to Mr. Hernandez Will he go free or have another trial." *Id.* at 847. There was nothing in the record showing what, if any, was the response to the questions. *Id.* While this Court did say the trial judge "is in the best position to gauge surrounding circumstances of an event and its impact on the jury," *Id.* at 851, the issue of what evidence should be relied on in deciding a motion to correct error was never reached.

Curto asserts that Ms. Kirk's response to the polling question shows she agreed with the verdict. First, Ms. Kirk had just been warned that the law required her verdict to be unanimous, and that the jury would be held indefinitely until unanimous agreement could be reached. Given that understanding, communicated to her on behalf of the trial judge, she could have been in agreement with the verdict *under those circumstances*. Because the understanding she was operating under was not a correct statement of the law, Ms. Kirk's response to polling carries little weight.

Curto asks this Court to hold that "trial judges have the discretion to consider circumstances outside of a juror's affidavit in determining whether the presumption of error is rebutted." (Curto pet. 7.) In *Jewell*, the appellate court ignored a docket entry made by the trial court stating, "During said deliberations and upon request by the jury, Final Instructions, in writing, are delivered to the jury by agreement of the parties." 624 N.E.2d at 43. The Court of Appeals did not consider this docket entry, because the

affidavit of trial counsel, stating there had been no agreement, was uncontroverted.

In Susana's case, Curto presented no affidavits in response to Susana's Motion to Correct Error. This Court should not consider the trial judge's report of his interaction with Ms. Kirk in the hallway.

Curto points to *Myers v. State*, 887 N.E.2d 170 (Ind. Ct. App. 2008), to suggest the Court of Appeals has created a conflict among its decisions. The motion the *Myers* court was considering was a mistrial motion challenging the jury's misconduct, including alcohol use, that occurred during trial, and before deliberations. In addition, the appellant in *Myers* filed a petition for transfer with this Court on September 10, 2008. Because *Myers* considered a different question, and because it is not yet final, there is no conflict with the decision in this case.

**3. The Cumulative Effect of All *Ex Parte* Influences, including a Cell Phone Call to a Juror, and Rude Interruptions from the Alternate Juror, Must Be Considered.**

The Court of Appeals relied on *Jewell* in viewing the bailiff's incorrect statement collectively with the other improper influences on the jury. *Henri*, 891 N.E.2d at 139. Any of the improprieties support a new trial, but in any event, the cumulative effect of the errors mandates a reversal.

Ms. Kirk reported that the alternate juror "continuously used these gestures and nonverbal noises to interrupt during times when statements were made that were supportive of the plaintiff's case." (App. 47.) Those interruptions included tapping on the table, making non-verbal noises, stating that she was "claustrophobic," and pacing

and exercising while others were talking. Ms. Kirk reported that other jurors “would giggle or snicker” during the alternate’s antics. (App. 47.)

The alternate was directed “not [to] participate in any manner” in the deliberations. (App. 39.) It is clear she did participate. “An alternate is not, of course a member of the jury, and he or she qualifies as an outside influence under [IND. EVIDENCE] RULE 606(b).” *Griffin v. State*, 754 N.E.2d 899, 903 (Ind. 2001).

The Court of Appeals pointed out that the *Griffin* decision ruled that the presumption of harm was deemed rebutted. *Id.* at 903. In *Griffin*, the alternate remained quiet until the other jurors questioned her in an effort to resolve a deadlock. *Id.* at 900, 903. In contrast to the *Griffin* alternate, this alternate engaged in a conscious set of behaviors to ridicule and interrupt any juror with a contrary viewpoint. (App. 47.) This intrusion, especially when coupled with the other improper influences on the jury, is sufficient to order a new trial.

Curto also complains that the decision of the Court of Appeals is in conflict with *Pagan v. State*, 809 N.E.2d 915 (Ind. Ct. App. 2004). (Curto pet. 10-11.) Curto points to the normal process of allowing jurors to make arrangements with their families because of the deliberations. (Curto pet. 11.) This ignores, however, the fact that these jurors had already been allowed to telephone family members to make arrangements before the deliberations began in earnest. (App. 47-48.) Ms. Kirk overheard the juror saying, “she would get to class as soon as she could.” (App. 48.) This interruption occurred in the middle of the deliberations. (App. 47-48.) The effect of the interruption was to allow this juror’s family member to put undue pressure on her to hurry to a verdict.

The Court of Appeals, rather than creating a conflict with *Pagan*, is heeding its warning. See *Pagan v. State*, 809 N.E.2d 915, 922 (Ind. Ct. App. 2004) (“[T]here is the potential for improper outside influence on a juror if . . . the family member . . . then places implied or express pressure on the juror to hastily reach a verdict and return home or to work.”). In this case, the cell phone use extended beyond normal scheduling communication into undue outside pressure to rush to verdict. When viewed collectively with the other improper influences on this jury, a new trial is warranted.

**4. The Trial Court Erred by Failing to Respond to a Statement that the Jury Was “Hopelessly Deadlocked”.**

Ms. Kirk reported to the bailiff that the jury was “hopelessly deadlocked.” (App. 47.) The trial court did nothing in response to the request. The Court of Appeals did not address this issue.

This statement should have been considered under IND. JURY RULE 28. Indiana’s new jury rules empower judges to be creative when faced with juries that are unable to agree to a verdict.

In addition to reporting that the jury was “hopelessly deadlocked,” Ms. Kirk asked if she could be let off the jury. (App. 47.) Both the statement and the request should have triggered the remedies available in IND. CODE § 34-6-1-6, because both showed “the jury desire[d] to be informed as to any point of law arising in the case.” This Court has treated an ineffective notice of impasse as a request for help under IND. CODE § 34-6-1-6. *Ronco v. State*, 862 N.E.2d 257, 260 (Ind. 2007).

Requiring a response to a request such as Ms. Kirk’s would fulfil this Court’s

encouragement to “trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties.” *Tincher v. Davidson*, 762 N.E.2d 1221, 1223 (Ind. 2002).

**5. Curto Failed to Prove His Counterclaim.**

Susana asked the Court of Appeals to find that Curto failed to prove his counterclaim. The counterclaim alleged that Susana gave false statements that caused Butler University to suspend him. (App. 25-33.) On appeal, Curto argued that the case should be reviewed according to the trial court’s instructions rather than the actual law defining the elements of his counterclaim. He argued that Susana waived any error in the instructions, citing T.R. 51(C). This Court should review the issue first using the incorrect instruction. (App. 37.) If that is not persuasive, this Court should consider whether the plain error doctrine requires a reversal.

**a. Curto Failed to Show What False Statement Caused His Suspension.**

Final Instruction 14 stated Curto merely need prove Susana made a false statement that resulted in his suspension from Butler. (App. 37.) To prove his claim, however, he must prove “(i) existence of a valid and enforceable contract; (ii) defendant’s knowledge of the existence of the contract; (iii) defendant’s intentional inducement of breach of the contract; (iv) the absence of justification; and (v) damages resulting from defendant’s wrongful inducement of the breach.” *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994) (citing *Daly v. Nau*, 167 Ind. App. 541, 549 n.6, 339 N.E.2d 71, 76 n.6 (1975)). Even using the faulty instruction, Curto’s claim fails.

Curto confirmed almost all of what Susana reported. He agreed they were

intoxicated. (Tr. 545-46.) He described how she was so intoxicated that she was vomiting, and how he was worried she might die. (Tr. 385, Exh. 12, pp. 5-6.) He admitted having sexual intercourse. (Tr. 552.) He confirmed the physical injuries by saying there was blood on the condom. (Tr. 553.) He confirmed that Susana had no memory of what happened. (Tr. 559.)

Curto was so careful to agree to almost everything that Susana reported that he even changed his story to conform to hers. Curto's main assertion was that Susana consented. (Tr. 419.) To support that idea, he told the police detective on April 20, 2004, that when he was in Susana's room, he went to the bathroom, and when he came out, she had taken her shirt and bra off. (Tr. 385, Exh 12, pp. 2, 5.) Later, after hearing Susana's description of how she woke up, Curto changed his story to say Susana's bra was not off, but lowered below her breasts. (Tr. 507-08, Exh. 17, p. 2.) Even in his trial, Curto could not keep this change consistent. (Tr. 551: "we both removed the rest of our clothing".)

Because Curto agreed with everything Susana reported to Butler, his counterclaim fails even though his ultimate conclusion interpreting the events differs from Butler's. Under the faulty instruction, Curto must point to a false statement that caused the suspension.

**b. Under the Plain Error Doctrine, Curto's Claim Fails.**

This Court has held that where an instruction is not objected to, an appellate court must determine the sufficiency of the evidence based on the instruction, even if it incorrectly states the law. *PSI Energy, Inc. v. Roberts*, 834 N.E.2d 665, 668-69 (Ind. 2005). This ruling should be re-examined, because it does not protect a litigant's right

to challenge errors “inconsistent with substantial justice.” T.R. 61.

FED. R. CIV. P. 51(d)(2) was amended in 2003 to provide, “A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.” This rule is consistent with T.R. 61. The federal courts’ Advisory Committee discussed the change:

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. . . . The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings.

FED. R. CIV. P. 51 advisory committee’s note. This explanation offers a workable solution to balance the need for finality in court decisions against the preservation of the rule of law. This Court should adopt this test for cases such as this, where the substance of the law is egregiously misstated.

This Court should address the conflict between T.R. 51(C) and T.R. 61. T.R. 61, by protecting a litigant’s right to “substantial justice,” stands for the proposition that no man is above the law, either by presenting an incorrect instruction, or by failing to object to an incorrect instruction.

It is clear Curto’s counterclaim fails under the correctly stated elements of his claim. See *Winkler*, 638 N.E.2d at 1235. Curto made no attempt to prove Susana’s statements were made without justification.

### **Conclusion**

Susana Henri respectfully asks this Court to remand the case for a new trial on her claim against Curto. She also asks the Court to order the trial court to enter a

judgment in her favor on Curto's counterclaim.

Respectfully submitted,

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### **Word Count Certificate**

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Gregory Bowes

### **Certificate of Service**

I certify that a copy of the foregoing brief was served upon the following by first class mail, this day, September 25, 2008.

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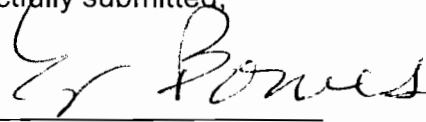
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judgment in her favor on Curto's counterclaim.

Respectfully submitted,



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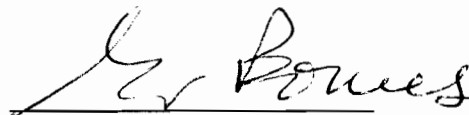
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