IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. SOCORRO SUSAN CARO, Defendant-Appellant.	Crim. No. S106274 Ventura County Superior Court Case Number: CR 47813

AUTOMATIC APPEAL

APPELLANT'S REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF VENTURA COUNTY

THE HONORABLE DONALD D. COLEMAN, JUDGE PRESIDING

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. SOCORRO SUSAN CARO, Defendant-Appellant.	Crim. No. S106274 Ventura County Superior Court Case Number: CR 47813

APPELLANT'S REPLY BRIEF

INTRODUCTION

Appellant, Socorro Caro, submits the following as her reply brief. Appellant has not responded to those points which were covered adequately in her opening brief. This Court should not construe appellant's election not to respond to a particular argument, sub-argument or allegation made by respondent as a concession or waiver by appellant. (*People v. Hill* (1992) 3 Ca1.4th 959, 995 n.3.)

In writing this reply, appellant assumes that this Court is familiar with the salient facts and arguments raised in the opening brief and only recounts certain facts, law, and argument as needed to put the reply response in context.

ARGUMENT

JURY SELECTION ISSUES

I.

RESPONDENT HAS FAILED TO ADDRESS THE CONFLICTING CASE LAW FROM THE WASHINGTON SUPREME COURT FINDING THAT THE EXCUSAL OF JURORS VIA EMAIL WITHOUT THE KNOWLEDGE OR PRESENCE OF THE DEFENDANT VIOLATES THE DEFENDANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE TRIAL

Appellant argued in her opening brief that her federal and state constitutional rights to be present at trial were violated when the trial court, the prosecution, and defense counsel agreed via email to excuse 62 potential jurors.[1] (AOB 125-133.) Nothing in the record shows that appellant had a role in the decision-making regarding the juror excusals or that she consented to the jurors being excused out of her presence.

In support of her argument, appellant cited and discussed

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[1] Respondent suggests that 8 of the 62 jurors referenced in the email exchanges had been excused previously in open court in appellant's presence. (RB 64.) The trial court's off-the-record maneuvering of the jury selection process makes it difficult to track exactly what the court was doing. Nevertheless, even if the excusals based solely on emails involved 54 jurors rather than 62 jurors, the same argument applies: dozens of jurors were excused for reasons not specified on the record, out of the presence of and without any input from appellant at her trial in which she was facing a death sentence.

the Washington Supreme Court decision in *State v. Irby* (Wash. 2011) 246 P.3d 796, which found that the defendant's absence from seven juror excusals decided via email discussions between the trial court, the prosecution, and defense counsel violated both Washington state law as well as the Fourteenth Amendment right to be present at all critical stages of a trial. (AOB 128-131.) In her discussion, appellant acknowledged that this Court has repeatedly rejected arguments that a defendant's absence from some aspect of jury selection violates federal or state constitutional law or state statute. (AOB 130-131.) Nevertheless, appellant urged this Court to reconsider its position in light of *Irby* and the United States Supreme Court cases upon which *Irby* relied.

Respondent makes several responses to appellant's argument. First, respondent notes that before the jury selection process began, appellant's counsel waived appellant's presence for discussions regarding hardships and stipulations regarding hardships. (RB 59; 6RT 768.) Appellant did not personally waive her presence as required by Penal Code section 977, subdivision (b), nor has respondent cited any case law establishing that counsel can waive a defendant's presence without input from the defendant. In addition, counsel's waiver, even if valid, did not cover discussions outside appellant's presence concerning issues other than excusals for hardship.

Next, respondent cites and discusses California case law discussing when a defendant's presence is deemed necessary and when it can be dispensed with. Respondent makes the very argument that appellant already acknowledged: this Court has found that a defendant's absence from parts of the jury selection process does not implicate state or federal constitutional concerns or run afoul of state statutory law. (RB 63-65.)

Appellant, however, disagrees with respondent's contention that the trial court in this case established an agreed-upon parameter for excusing jurors by email. (RB 66.) Although the court and the parties discussed that there might be excusals for cause for which the two sides might stipulate, the court also noted, correctly, that "theoretically you have a chance to rehab some." (9RT 1428.) More importantly, the court set a hearing date to discuss possible stipulations. (9RT 1429.) With the exception of a brief mention of using email to discuss a defense motion to dismiss a Mr. Smith, at no time did the parties contemplate, on the record and in front of appellant, that any discussion of stipulated excusals, whether for cause or otherwise, would take place via email rather than in open court. (9RT 1431.) Thus, this case differs from *People v. Ervin* (2000) 22 Cal.4th 48, 72-73, where the parties agreed to a screening procedure whereby counsel for both sides would jointly review the 600 questionnaires and stipulate to screen out "strong candidates" for excusal: those

who would automatically vote for death or who would never vote for death and those with financial or physical hardship.

As appellant has shown, this Court's interpretation of the federal constitutional right to be personally present during critical trial proceedings directly conflicts with the Washington Supreme Court's views as set forth in *Irby, supra*. Respondent dismisses this argument in one sentence, simply noting that *Irby* conflicts with this Court's case law. (RB at 66.) While the Washington Supreme Court's position is not binding on this Court, the decision in *Irby* provides a significant and legitimate reason why this Court should revisit this issue since there now exists a split in how two states view an important constitutional right.

The United States Supreme Court has established several fundamental points regarding a defendant's right to be present at her trial. Under the Fourteenth Amendment, a criminal defendant has a due process right to be present at any stage of the trial "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" and "to the extent that a fair and just hearing would be thwarted by his absence." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106, 108 [overruled in part on other grounds *Malloy v. Hogan* (1964) 378 U.S. 1, 17].) In addition, "[a] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would

contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745.) Finally, the United States Supreme Court has held that jury selection is a critical stage of trial at which a defendant has a constitutional right to be present. (*Gomez v. United States* (1989) 490 U.S. 858, 873.)

The highest court in Washington has found that a process that involves a juror's fitness to serve in a particular case, as opposed to whether a juror meets general qualifying criteria, is a part of jury selection that is a critical stage of a trial. (*Irby*, 246 P.3d at p. 800.) The *Irby* court specifically contrasted an excusal for cause from an excusal for hardship. (*Id.*) In doing so, the court analogized that the filling out of a jury questionnaire administered to determine the abilities of a potential juror to try that specific case is a form of jury voir dire. Therefore, decision-making on the basis of the jury questionnaire is also a part of voir dire, and voir dire is a critical stage of a trial at which a defendant is entitled to be present. (*Id.* at pp. 800-801.)

Although the denial of the right to be present is subject to harmless error analysis (*Rushen v. Spain* (1983) 464 U.S. 114, 117-119), respondent has not even attempted to show that the 54 jurors who were excused via email could not have sat on appellant's jury (*Irby*, 246 P.3d at p. 802). Indeed, respondent could not make this showing because no one knows why these jurors

were excused because the decision to excuse them was made in cyberspace and not in the courtroom.

Moreover, respondent dismisses out of hand that appellant's presence could possibly have any effect on what took place. (RB 66-67.) For example, respondent cites *People v. Johnson* (1993) 6 Cal.4th 1, 19, for the argument that it was "unduly speculative" that the defendant might have helped his attorney question a juror. (RB 67.) In that case, the issue was the defendant's presence at a hearing to determine whether the court should excuse a juror because the juror had exhibited unusual behavior during the trial, including smiling at the defendant. This Court found the issue speculative especially because both the defense attorney and the prosecutor had opted not to attend the hearing to avoid alienating the juror. (*Johnson*, 6 Cal.4th at pp. 16-19.) Significantly, respondent does not cite any case that says that the value of a defendant's presence during jury selection is too speculative to be prejudicial. Indeed, the United States Supreme Court has observed that the defense benefits from having the defendant present during voir dire because it is within the defendant's power to give counsel advice or suggestions. (*Snyder*, *supra*, 291 U.S. at p. 106.)

As appellant said in her opening brief, "a jury was being selected to sit in judgment of her and potentially determine whether she would live or die. It would be hard to imagine a more

compelling reason for appellant to be present for all decisions related to selecting those jurors who would hold her fate in their hands." (AOB 131.)

Appellant had a right under both the federal and state constitution as well as under state statute to be present for and to know why potential jurors who might sit in judgment of her were excused. The record reveals little about why 54 jurors were excused after they passed an initial hardship screening and filled out a lengthy questionnaire. Under these circumstances, the state cannot prove beyond a reasonable doubt that the removal of 54 potential jurors in appellant's absence did not contribute to the verdict obtained. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, appellant is entitled to a new trial where she can be present for all of jury voir dire.

II.

THIS COURT SHOULD CONDEMN A PRACTICE OF EXCUSING JURORS VIA EMAIL STIPULATION DURING JURY SELECTION IN A CAPITAL CASE BECAUSE IT DEPRIVES A DEFENDANT OF ANY MEANINGFUL APPELLATE REVIEW OF THE BASES FOR THE EXCUSALS

Appellant has argued that the dismissal of 62 jurors (or 54 jurors as respondent maintains) via email without any discussion of the reasons for the dismissals violated Penal Code section 190.9, which requires that all proceedings in a capital case be conducted on the record with a court reporter present, and deprived her of any meaningful appellate review of the bases for the dismissals. (AOB 134-136.) Respondent contends that appellant has forfeited this claim because her attorney agreed to the process. (RB 68.)

Respondent has not pointed to any place in the record where counsel waived Penal Code section 190.9 or where counsel waived appellant's constitutional right to meaningful appellate review. In *People v. Rogers* (2006) 39 Cal.4th 826, 856-857, a case upon which respondent relies, the parties actually discussed Penal Code section 190.9 and how it would apply to an in-chambers discussion about hardship excusals, and they agreed that any informal discussions would be memorialized on the record after

the fact. And, indeed, that was what happened in *Rogers*. In contrast, as discussed in Argument I, above, counsel in this case agreed only to discuss hardship excusals outside of appellant's presence. Counsel did not agree that these discussions would take place off the record. (6RT 768.)

In addition, when the court session ended in this case where there had been a brief discussion about possible stipulations to excusals, the court set a next hearing date to discuss excusals. But, between the end of that session and the start of the scheduled hearing, the email agreements between the defense, the prosecution, and the court took place. (9RT 1429-1433.) Other than the eight hardship dismissals discussed in an earlier court session, the parties did not put on the record the reasons why they stipulated to dismissing the other 54 jurors. Hence, appellant is left with no way to examine whether those excusals were valid or biased or inappropriate. Although constitutional rights can be waived, that waiver must be knowing and intelligent (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 237-238), and a waiver of constitutional rights will not be presumed or lightly inferred. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.)

Respondent argues that even if the claim is not forfeited, it has no merit. (RB 68-69.) First, respondent again submits that the number of jurors dismissed off the record is 54 not 62. (RB 68.) Appellant accepts the number as 54 not 62 because the actual

number is a significant amount of jurors regardless of which number is used.

Second, respondent argues that Penal Code section 190.9 doesn't apply in this situation because that statute relates to oral proceedings and email exchanges are not oral proceedings. Respondent also maintains that, to the extent the two sides discussed the excusal of jurors informally outside of court proceedings, those type of discussions are not "proceedings" within the meaning of 190.9. (RB 68-69.) Appellant disagrees.

Penal Code section 190.9, subdivision (a)(1), states, in relevant part:

> In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.

This Court views section 190.9, subdivision (a), as mandating "that all proceedings in a capital case be conducted on the record and reported." (*People v. Holt* (1997) 15 Cal.4th 619, 708.) "[T]rial courts should take care to avoid off-the-record discussions in capital cases." (*People v. Harris* (2008) 43 Cal.4th 1269, 1283.) The intent behind section 190.9 is "that death penalty cases be treated with greater protections to assure reliability." (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1323.) Thus, section 190.9 requires that a written record

of proceedings in capital cases be maintained.

Jury selection is an immensely important proceeding in a capital case. As technology changes and the use of other modes of communication such as emails and text messaging increases, this Court, and the Legislature, must adapt current procedures to this new technology to ensure that a capital defendant's rights are adequately protected.[2] The need for transparency in capital cases is no less significant when the court and counsel transact relevant trial business through email rather than in the courthouse. Accordingly, in accordance with the meaning and intent of Penal Code section 190.9, trial courts should not allow outside-of-court communication methods to substitute for on the record proceedings conducted in court.

Finally, respondent maintains that the record is adequate to determine the bases for excusing all 62 jurors. (RB 69.) Again, appellant disagrees. The email sent to the court on July 26, 2001, identified 62 jurors whom the two sides agreed should be dismissed for either hardship or cause. (3rd Supp.CT 114-115.) Fourteen of the names are followed by "hardship" in parentheses, leaving 48 jurors presumably excused for cause with no explanation for what constituted cause. (*Id.*) Respondent suggests that because the record includes the juror questionnaires the

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[2] Penal Code section 190.9 was enacted in 1984, long before email became a common mode of communication. (*Holt, supra*, 15 Cal.4th at p. 708 n.30.)

record is adequate for appellate review. (RB 69.) Imbedded within that contention are numerous unsubstantiated assumptions such as, that the basis for the excusal was the questionnaire, that a review of the questionnaire definitively reveals why both parties would want the juror excused, that both sides acted properly and without bias or ulterior motivations, and that all excused jurors actually merited being excused for cause. Because the record does not provide support for these assumptions, it is inadequate for meaningful appellate review.

This Court should not condone the practice of excusing jurors, ostensibly for cause, by email stipulation in a capital case. Given the current state of the record, appellant cannot determine whether any of the 48 unidentified excusals were erroneous dismissals for cause. Because the lack of a record precludes appellant from establishing that any of the jurors were wrongly dismissed because of their views concerning the death penalty, appellant is entitled to a new penalty phase determination.

III.

THE TRIAL COURT ERRED IN DISMISSING TWO JURORS FOR CAUSE OVER DEFENSE OBJECTION WHEN BOTH JURORS SAID THEY COULD IMPOSE DEATH

Appellant has argued that the trial court erred in dismissing two prospective jurors --John Wurdeman and Douglas Spaulding- for cause, over defense objection, when both men said they could be fair and could impose death depending on what they learned at trial and neither one espoused a view of the death penalty that would prevent or substantially impair the performance of his duties as a juror. (AOB 137-151.)

Appellant and respondent agree on the correct standard to be applied: a prospective juror may be excused for cause in a capital case only if his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424, as cited in AOB 145-146 & RB 70.) In accordance with this standard, this Court has said that if a juror is not substantially impaired, removal for cause is impermissible. (*People v. Pearson* (2012) 53 Cal.4th 306, 328.)

Appellant and respondent also substantially agree on their summary of the answers that the two prospective jurors gave on their questionnaire and in voir dire. (*See* AOB 137-145; RB 71-

75.) They disagree, however, on the application of the law to the their responses.

This Court reviews a ruling on a challenge for cause for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 50.) A review of the questionnaire answers and voir dire answers of both Wurdeman and Spaulding leaves no doubt that neither prospective juror met the strict standard for dismissal for cause. (*See* 17JQCT 5050-5071; 10RT 1507-1514, 1532-1533, 1592-1595, 1630-1633 [Wurdeman]; 15JQCT 4476-4497; 10RT 1640-1647, 1690-1695, 1700-1704, 1712-1713 [Spaulding].) This may be because the trial court utilized a different, and improper, standard: "Will a juror's position on the issue of capital punishment affect or substantially impair the juror's ability to be neutral on the question of life in prison without the possibility of parole or death and therefore follow the Court's instructions as to which penalty to impose." (10RT 1631.) *Witt*, however, does not require that a juror be neutral in his feelings about the death penalty; it simply requires that the juror be able to set his feelings aside in order to follow the law, a position both potential jurors embraced. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

A. Wurdeman Presented as a Fair and Thoughtful Juror

Respondent argues that the trial court properly excused Wurdeman because Wurdeman had concerns that sitting as a juror