IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ANTHONY GILBERT DELGADO, Defendant and Appellant.	Case No. S089609 Kings County Superior Court No. 99CM7335

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Kings

HONORABLE PETER M. SCHULTZ

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TEXT AND OTHER AUTHORITIES

I.
THE DEATH ELIGIBILITY PROVISION OF PENAL CODE SECTION 4500 IS UNCONSTITUTIONAL BECAUSE IT IS ARBITRARY AND IRRATIONAL

Penal Code section 4500 makes an inmate who is serving a life sentence subject to capital punishment (i.e., "eligible" to receive a death sentence) if he commits an assault resulting in death, irrespective of the offense for which the life sentence was imposed. Unlike most other death-eligibility factors in California, which are set forth in Penal Code section 190.2 and referred to as "special circumstances," section 4500 defines a crime that contains it own eligibility provision. The death-eligibility provision of section 4500 is irrational and arbitrary because it excludes inmates serving determinate sentences that are the functional equivalent of life for heinous, violent crimes while including inmates who have committed comparatively minor crimes and are serving less severe indeterminate sentences. Further, it fails to promote the constitutional purposes of the death penalty, including retribution and deterrence. For these reasons, the death eligibility provision of section 4500 violates the Eighth Amendment.

A. An Eligibility Factor Must Differentiate Among Defendants in an Objective, Even-Handed and Substantially Rational Way

There are two distinct phases of the capital sentencing process. In the eligibility phase, "the jury narrows the class of defendants eligible for the death penalty . . . ." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275.) In the selection phase, "the jury determines whether to impose a death sentence on an eligible defendant." (*Ibid.*) The eligibility phase of a capital case has heightened importance:

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> It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition.

(*Buchanan v. Angelone, supra*, 522 U.S. at pp. 276–276.)

To survive constitutional scrutiny, eligibility factors must "adequately differentiate . . . in an objective, evenhanded, and substantially rational way" the murder defendants for whom the jury may consider a death sentence from those for whom it may not. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; see also, *Godfrey v. Georgia* (1980) 446 U.S. 420, 433 [vague eligibility factor did not provide a principled way to distinguish case from others in which death was not imposed].)

In California, eligibility for the ultimate punishment is primarily based on "special circumstances." (See *Brown v. Sanders* (2005) 546 U.S. 212, 214, citing Pen. Code, § 190.2.) However, a conviction pursuant to Penal Code section 4500 also renders a defendant eligible for a death sentence. Section 4500 fails to constitutionally narrow the class of death-eligible defendants because it irrationally premises eligibility on the type of sentence an inmate is serving, rather than the offense underlying that sentence.

B. Penal Code Section 4500

As discussed in Argument II of Appellant's Opening Brief,[1] pursuant to Penal Code section 4500, an inmate serving a life sentence may be sentenced to death if he commits an assault resulting in the victim's death. It provides in relevant part:

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1. Appellant incorporates by reference Argument II of his opening brief at pages 81–87.

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

(Pen. Code, § 4500.)[2]

Between 1908 and 1969, this Court rejected a variety of constitutional challenges to earlier versions of section 4500 and its predecessor statute. (See, e.g., *People v. Finley* (1908) 153 Cal. 59 [mandatory death sentence affirmed for a non-fatal assault on two correctional officers]; *People v. Oppenheimer* (1909) 156 Cal. 733 [mandatory death sentence affirmed for non-fatal stabbing of another inmate]; *People v. Wells* (1949) 33 Ca1.2d 330 [mandatory death sentence affirmed for defendant who was serving a sentence of five years to life for possession of a weapon]; *People v. Smith* (1950) 36 Ca1.2d 444 [mandatory death sentence affirmed for defendant serving sentence of five years to life for burglary who aided and abetted fatal stabbing on an inmate]; *People v. Jefferson* (1956) 47 Ca1.2d 438, 442 [mandatory death sentence affirmed for non-fatal assault]; *People v. Dorado* (1965) 62 Ca1.2d 338 [death sentence affirmed for fatal stabbing by inmate serving five years to life for sale of marijuana]; *People v. Vaughn* (1969) 71 Ca1.2d 406 [death sentence

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2. The history of section 4500 is set forth at pages 84–85 of Appellant's Opening Brief and will not be repeated here.

for a non-fatal assault with a sharpened stick on a correctional officer reversed on other grounds].)

The above-cited opinions preceded the United States Supreme Court's modern capital jurisprudence, which began with *Furman v. Georgia* (1972) 408 U.S. 238. Thus, to the extent those cases found section 4500 constitutional, they did so without regard to the constitutional principles enunciated in *Furman* and its progeny, cases that established the current constitutional limits and permissible scope of capital sentencing schemes. Further, as this Court recognized in *People v. Vaughn, supra*, 71 Ca1.2d 406, the constitutional validity of section 4500 might change over time. It stated:

> Defendant contends that to subject him to the death penalty for an assault which did not result in the death of the victim is to inflict cruel and unusual punishment upon him. We have long upheld section 4500 against this and related challenges to the penalty which it imposes . . . . These decisions do not necessarily settle the question for all time, however, since in applying the Eighth Amendment's ban on cruel and unusual punishment we must reflect "the evolving standards of decency that mark the progress of a maturing society. (*Trop v. Dulles* (1958) 356 U.S. 86, 101 . . . ."

(*Id.* at p. 418.)

In one post-*Furman* case, *Graham v. Superior Court* (1978) 98 Cal.App.3d 880, the court of appeal found that a mandatory death sentence for a fatal assault was unconstitutional because it was not narrowly drawn.[3] It found that section 4500 encompassed "a wide range of personal culpability," including that akin to both first and second degree murder.

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3. When *Graham* was decided, Penal Code section 4500 had already been amended to eliminate a mandatory sentence. However, the *Graham* court was reviewing a conviction that had been obtained under the old scheme. (98 Cal.App.3d at p. 888.)

(*Id.* at p. 886.) Further, noting that 57 percent of prison inmates were serving life sentences when defendant Graham was convicted, it stated that "[t]he classification of life prisoner covers an even broader range of culpability . . . ." (*Ibid.*) Emphasizing that a life inmate could be serving his sentence for first degree murder or second degree robbery, the reviewing court stated: "Section 4500, therefore, could apply to a person who might hope to be released from prison in months as well as to one who might expect to remain there for many years." (*Ibid.*)

This Court, however, has not yet ruled on a challenge to the constitutionality of the current version of section 4500 in a capital case. For the reasons that follow, it is unconstitutional.

C. Status as a Life Prisoner Fails to Rationally Identify Persons Deserving of the Death Penalty

Section 4500 fails to provide a principled or substantially rational way for determining who should be eligible for a death sentence. Making death eligibility contingent upon the type of sentence an inmate is serving when he commits a fatal assault rather than on the type of crime he has committed is irrational and arbitrary. Further, section 4500 fails to promote the state's interest in retribution or deterrence, recognized as the social goals served by capital punishment.

1. Section 4500 Does Not Single Out the Most Deserving Offenders for Death Eligibility

Conditioning death eligibility solely on the fact that a defendant is serving a life sentence is irrational, and provides no meaningful basis for distinguishing the few who should be subject to death from the many who commit murder. The death penalty is only appropriate for those who can "with reliability be classified among the worst offenders." (*Roper v.*

Simmons (2005) 543 U.S. 551, 569.) It must be limited to those "whose extreme culpability makes them 'the most deserving of execution.'" (*Id.* at p. 568, quoting *Atkins v. Virginia* (2002) 536 U.S. 304, 319.) Under California's sentencing scheme, defendants serving a life sentence are not necessarily more culpable than those serving a determinate sentence and are therefore not necessarily more deserving of execution when they commit fatal assaults while incarcerated. In fact, inmates with a life sentence may be relatively non-violent offenders while other inmates who have committed far more serious and violent offenses may be serving a term of years. Nonetheless, pursuant to section 4500, the commission of a lethal assault renders only the life inmate eligible for the ultimate punishment.

Under California law, a life term may be imposed for a wide variety of offenses. These not only include murder, but also kidnapping for ransom (Pen. Code, § 209, subd. (a)); kidnapping a person for oral copulation (Pen. Code, § 209, subd. (b)(1)); kidnapping in the commission of a carjacking (Pen. Code, § 209.5, subd. (a)); derailing a train without causing personal injury (Pen. Code, § 218); burglary with the intent to commit rape, sodomy, or oral copulation (Pen. Code, § 220, subd. (b)); sexual intercourse with a child under the age of ten (Pen. Code, § 288.7); and using a minor to sell a controlled substance with two prior convictions for the same offense (Pen. Code, § 667.75).

Moreover, under California law an inmate who is not serving a life sentence may be as, or more, culpable than someone who is a life inmate, and thus may be more deserving of the death penalty for killing while incarcerated. A comparison of sentences imposed for multiple violent sex offenses is illustrative. In *People v. Wallace* (1993) 14 Cal.App.4th 651, the defendant was convicted of a series of violent sexual attacks and was

sentenced to a determinate term of more than 280 years. (*Id.* at p. 657.) In holding that the term was not disproportionate to the offenses committed, the appellate court found that the lengthy sentence "had a rational basis — to ensure that Wallace would be imprisoned for life and would never be released on parole." (*Id.* at p. 666; see also, *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 522 [defendant sentenced to 129 years for a variety of sex crimes].) In *People v. Retanan* (2007) 154 Cal.App.4th 1219, the defendant also committed a series of sexual offenses, but was sentenced to an indeterminate term of 135 years to life. (*Id.* at p. 1222.) It is clear from the length of the terms for the defendants in those cases that the sentencing courts found that they deserved to spend the rest of their natural lives incarcerated. Nonetheless, pursuant to section 4500, only Retanan would be death-eligible for committing a fatal assault while in prison. Results such as these show that as an eligibility factor, section 4500 does not rationally distinguish between those for a jury may consider a death sentence, and those for whom it may not, and thus that it violates the Eighth Amendment.

The sentences meted out in gang-related offenses provide another example of the irrationality and arbitrariness of section 4500's death-eligibility factor. In *People v. Johnson* (2001 WL 1635586), the defendant was sentenced to 25 years to life for discharging a firearm into an occupied vehicle for the purpose of promoting a criminal street gang, with an enhancement for personal use of a firearm causing great bodily injury. By contrast, in *People v. Pena* (2006 WL 1102684), the defendants committed numerous more violent offenses, including armed robberies, carjacking, assault with a deadly weapon, and possession of a firearm by a felon, also for the benefit of a street gang. Two of the three *Pena* defendants received determinate sentences of 158 and 118 years, the

functional equivalent of life sentences. Thus, while Johnson, who presumably will be eligible for parole during his lifetime, would be death-eligible under section 4500 if he commits a fatal assault in prison, the defendants in *Pena,* who will never be released from prison, would not.

Perhaps the most glaring disparity in the relative culpability of inmates serving life sentences is found in "Three Strikes" cases. Until very recently, a defendant could receive a 25-years-to-life sentence if he had previously been convicted of two serious or violent felonies and was then prosecuted for a third felony, even if the third strike involved a trivial offense "'such as theft of a bicycle, a slice of pizza, cookies or a bottle of vitamins . . . .'" (*In re Coley* (2012) 55 Ca1.4th 524, 529, quoting Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?* (2004) 37 U.C. Davis L.Rev. 1025, 1026.)[4] Under section 4500, these inmates will be eligible for a death sentence if they kill in prison, along with someone who received a Three Strikes life sentence for the commission of multiple, extremely violent crimes.

Further, section 4500 is irrational and arbitrary because it makes no distinction as to whether an inmate was a juvenile when he committed the offense resulting in a life sentence. The United States Supreme Court and this Court have recognized the diminished culpability of juveniles, yet section 4500 does not. In fact, even if the conviction for which the life sentence was imposed was unconstitutionally obtained, anyone serving such

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4. Pursuant to the Three Strikes Reform Act of 2012, a defendant may now only receive a life sentence if the third strike is another serious or violent felony. (*People v. Yearwood* (2013) 213 Cal.App.4th 151, 167–168.)

a sentence is eligible for death if they commit a fatal assault. (*People v. Superior Court* (*Gaulden*) (1977) 66 Cal.App.3d 773, 778.)

The United States Supreme Court has recognized, in a different context, the constitutional weakness of conditioning death eligibility on an offender's life sentence. (*Sumner v. Shuman* (1987) 483 U.S. 66.) In *Shuman*, the Supreme Court held that a Nevada statute imposing a mandatory death penalty on a prison inmate who was convicted of murder while serving a life sentence without possibility of parole violated the Eighth Amendment. Although the statute at issue in *Shuman* involved a mandatory death sentence, the reasoning behind the court's finding that a prisoner serving a life sentence, even a life sentence without parole, was not sufficient to identify him as a person most deserving of death, applies equally to section 4500.

Importantly, the Court found:

> The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for the purposes of determining whether he should be sentenced to death. It does not specify for what offense the inmate received a life sentence nor does it permit consideration of the circumstances surrounding that offense or the degree of the inmate's participation.

(483 U.S. at p. 80.)

In California, the death penalty is no longer mandatory under section 4500, and a jury must consider any mitigating circumstances in the selection phase when deciding whether to return a death verdict. However, because section 4500 operates as an eligibility factor, rather than a selection or sentencing factor, it must be sufficiently narrow to identify those for whom a death sentence may be sought, and not just those for whom it will actually be imposed. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) That the weight

to be given to an eligibility factor may *later* be mitigated during the selection phase has no bearing on whether it meets the constitutional narrowing requirements as an eligibility factor in the first instance. (Cf. *Lowenfeld v. Phelps* (1988) 484 U.S. 231[finding that a factor used to establish death eligibility serves a different function than the same factor considered as a basis for sentencing an particular individual to death].) Indeed, this Court recently found that a death-eligibility factor has been too broadly defined to satisfy the Constitution because it included in the class of defendants subject to the death penalty those who, based on the circumstances of the offense, did not meet the minimum level of culpability required for imposition of a death sentence. (*People v. Banks* (2015) 61 Cal.4th 788 [eligibility for the death penalty under the felony-murder special circumstance cannot be based on felony-murder simpliciter, i.e., solely on a defendant's participation in a felony during which a killing occurs].) This Court so held even though the defendant in *Banks* also could have presented the facts and circumstances underlying the death-eligibility factor to mitigate its weigh at the sentencing phase. Thus, it is not enough that a jury can theoretically give mitigating effect to the fact that a capital defendant was serving a life term for a non-violent offense, an offense committed while he was a juvenile, or even a de minimus "violent" offense, once it has already determined that the defendant should be considered for a possible death sentence.

Section 4500 is also arbitrary because offenders who may be equally or more deserving of death for an in-prison killing are not eligible under the statute simply because they were sentenced to a term of years rather than to an indeterminate life sentence. The fact that death is not mandatory for life inmates does not save this irrational scheme.

2. Section 4500 Does Not Rationally Promote the Social Purposes of Capital Punishment

The United States Supreme Court has identified retribution and deterrence as the "two distinct social purposes served by the death penalty . . ." (*Roper v. Simmons, supra*, 543 U.S. at p. 571, citing *Atkins v. Virginia, supra*, 536 U.S. at p. 319.) The same purposes motivated the California Legislature to enact section 4500. (See, e.g., *In re Finley* (1905) 1 Cal.App. 198, 202 [because no other punishment can be inflicted, a life inmate would otherwise "stand immune from further human retribution"]; *People v. Gaulden, supra*, 66 Cal.App.3d at p. 778 ["Section 4500 was enacted for the purpose of promoting prison safety by discouraging assaults by prison inmates"].) However, neither deterrence nor retribution is rationally served by premising death eligibility on the label given to an inmate's sentence rather than the reasons for that sentence.

a. Retribution

In *Shuman*, the United States Supreme Court recognized that a state's interest in retribution could be achieved with a sentence less than death, even if the killer was already serving a sentence of life without parole. (*Sumner v. Shuman, supra*, 483 U.S. at p. 83.) The court stated: "[T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization." (*Id.* at p. 84.)

In California there also are ways to punish a life inmate who commits a fatal assault while incarcerated. Most obvious is to take away parole eligibility for those inmates not already sentenced to life without the

possibility of parole (LWOP). Moreover, the label of life inmate is not a rational way to identify those inmates who can be meaningfully punished for committing an in-prison homicide with a sentence less than death from those who cannot. CDC statistics show that at the end of 2012, just over 40,000 offenders housed in California's prisons were sentenced to life terms. Almost 35,000[5] of these inmates had life terms with the possibility of parole. For this group, which includes appellant, taking away parole eligibility, or extending the term of years to be served before parole eligibility, are meaningful options to satisfy the state's interest in retribution.

b. Deterrence

Similarly, the goal of deterrence is not rationally served by the death-eligibility provision in section 4500. In *Shuman*, the Court found, inter alia, that "there is no basis for distinguishing, for purposes of deterrence, between an inmate serving a life sentence without possibility of parole and a person serving several sentences of a number of years, the total of which exceeds his normal life expectancy." (483 U.S. at p. 83.) Based on this finding, the Court held that a mandatory death sentence for life-term inmates "is not necessary as a deterrent." (483 U.S. at p. 82.)

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5. See Prison Census Data, published by the Department of Corrections and Rehabilitation, Offender Information Services Branch, Feb. 2013 (available at vvww.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1212.pdf) The report indicates that as of December 31, 2012, approximately 70 percent of California inmates did not have life sentences (including determinate sentence and second strike cases). The other 30 percent, totaling 40,138 inmates, included 34,803 who had life terms with the possibility of parole and 5,335 with no possibility of parole (4,610 LWOP and 725 death penalty cases).

This is even more true under California's non-mandatory section 4500. Section 4500 applies to all life inmates, whether or not their terms include the possibility of parole. (See, e.g., *People v. Smith, supra*, 36 Ca1.2d at p. 445 [former section 4500 was applicable to inmate serving an indeterminate sentence of 5 years to life for burglary].) As set forth above, the terms of most life inmates in California do include the possibility of parole. Because these inmates have much more to lose than an inmate serving a sentence of LWOP or death, making all life inmates death eligible for an in-prison homicide is not necessary as a deterrent. In fact, the statistical evidence suggests that capital punishment does not actually deter in-prison homicide.

For example, a study of data from 1973 determined that the rate of imprisoned murderers committing murder in death penalty states was statistically equivalent to the rate in states without the death penalty. ("The Deterrent Effect of the Death Penalty Upon Prison Murder," W. Wolfson, in *The Death Penalty in America*, H. Bedau (ed.) 3rd Ed. (1982), at p. 168, table 4-43.) The study's author concluded: "The threat of the death penalty . . . does not even exert an incremental deterrent effect over the threat of a lesser punishment in the abolitionist states." (*Id.* at p. 167.) Other sources confirm that prison staff and inmates are not killed or assaulted more frequently in states without the death penalty as compared to states with it.[6]

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6. See, e.g., *Does Capital Punishment Deter Murder?*, J. Lamperti, Dartmouth College, at p. 5 (available at www.dartmouth.edu/—chance/teaching_aids/books articles/JLpaper.pdf); *The Case Against the Death Penalty*, ACLU (Dec. 2012) at p. 6 (available at wvvw.aclu.org/captial-punishment/case-against-the-death-penalty).

Further evidence of the inefficacy of capital punishment as a deterrent to in-prison homicide is that the number of such crimes has declined precipitously over the years although few states have a death-eligibility statute similar to section 4500.[7] The national rate of in-prison homicide has dropped from 54 per 100,000 inmates in 1980 to 5 per 100,000 in 2010.[8] It is now dramatically lower than the rate of homicide in the general U.S. population, which in 2002 was 35 per 100,000 when standardized to match the country's prison population.[9]

LWOP generally is a sufficient deterrent, as recognized by Justice Breyer when he observed that few offenders sentenced to life without parole instead of death commit further crimes. (*Ring v. Arizona* (2002) 536 U.S. 584, 615 [conc. opn. of Breyer, J.].) More important under the Eighth Amendment, however, is that the life sentence label as a death-eligibility factor irrationally distinguishes among inmates. For the purposes of deterring in-prison crimes, inmates already serving LWOP or death sentences are, as a group, far more similar to inmates like the defendant in *People v. Wallace*, *supra*, 14 Cal.App.4th 651, who, as described above, will never finish his 283-year sentence, than they are to life inmates who will become parole eligible.

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7. See subsection D., post.

8. *Suicide and Homicide in State Prisons and Local Jails*, U.S. Dept. of Justice, Office of Justice Programs, Aug. 2005, p. 1; *Mortality in Local Jails and States Prisons, 2000–2010 - Statistical Tables*, U.S. Dept. of Justice, Office of Justice Programs, Dec. 2012 (both available at www.ojp.usjod.gov/bjs).

9. *Suicide and Homicide in State Prisons, supra*, at p. 11.

D. Few States Have Statutes Similar to Penal Code Section 4500

As noted above, the United States Supreme Court looks to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles [supra,* 356 U.S. at pp. 100–101]." (*Roper v. Simmons, supra,* 543 U.S. at p. 561.) Thus, an additional consideration for evaluating whether a statute defining a capital offense passes constitutional scrutiny is an inter-jurisdictional comparison. (See, e.g., *Kennedy v. Louisiana* (2008) 554 U.S. 407; *Roper v. Simmons, supra*, 543 U.S. at p. 563; *Atkins v. Virginia, supr*a, 536 U.S. 304; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.)

Very few states have statutes similar to section 4500, that is, a statute which makes an inmate who commits the equivalent of second degree murder while incarcerated death eligible if he is serving a life sentence. To appellant's knowledge, these states include only Alabama, Mississippi, and New Hampshire.[10] Other states that use inmate status as a death-eligibility factor either require a first degree murder (Arkansas, Kansas, Virginia, Washington) or do not limit eligibility to those serving a life sentence

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10. (Ala. Code, §§ 13A-5-40, subd. (6), 13A-6-2; Miss. Code, § 97-3-19, subds. (1) & (2); N.H. Rev. Stat., § 630:1, subd. I.A(d).) Connecticut has a similar statute. (Conn. Gen. Stat., §§ 53a–54b.) In April 2012, it abolished the death penalty for future cases but not retrospectively, leaving 11 inmates on death row in that state.

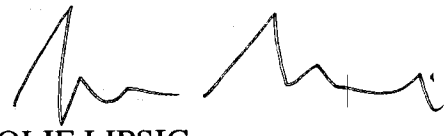
(Texas, Utah, Oregon).[6] The fact that so few states have a statute similar to section 4500 provides further reason to question its constitutionality.

CONCLUSION

For all the reasons stated above, this Court should declare Penal Code section 4500 invalid as a death-eligibility factor because it violates the Eighth Amendment. Although the jury here also found true other special circumstances, to the extent that appellant's eligibility for the death penalty rested in part on his conviction for murder by a life prisoner under section 4500, the process leading to his death sentence was constitutionally flawed and that sentence must be reversed.

Dated: September 28, 2015.

MICHAEL J. HERSEK
State Public Defender



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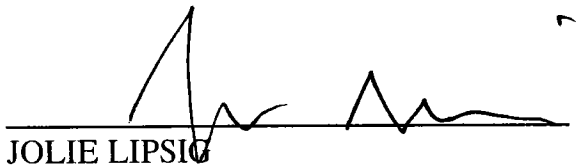
6. (Ark. Stat., § 5-10-101, subd. (a)(6); Kan. Stat., § 21-2439, subd. 3; Va. Code, § 18.2-31, subd. 3; Wash. Rev. Code, § 10.95.020, subd. 2; Tex. Pen. Code, § 19.03, subds. (a)(5)–(6); Utah Code, § 76-5-202, subd. (1)(a); Or. Rev. Stat., § 163.095, subd. (2)(b).) The governor of Oregon recently announced a moratorium on executions in that state, however.

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(2))

I, Jolie Lipsig, am the Senior Deputy State Public Defender assigned to represent appellant, Anthony Gilbert Delgado, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 4,494 words in length excluding the tables and this certificate.

Dated: September 28, 2015.



JOLIE LIPSIG
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: *People vs. Anthony Delgado*
Case Number: **Supreme Court No. S089609**
Kings County Superior Court No. 99CM7335

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 770 L Street, Suite 1000, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing it in envelopes and

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Anthony Delgado
P.O. Box D-29974
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303 Second Street, Suite 400
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Sacramento, CA 94244-2951

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 29, 2015, at Sacramento, California.

Daniel Johnson
Daniel Johnson