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# SUPREME COURT COPY

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**ANTHONY GILBERT DELGADO,**

**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S089609

SUPREME COURT  
**FILED**

NOV 03 2015

Frank A. McGuire Clerk

Deputy

Kings County Superior Court Case No. 99CM7335  
The Honorable Peter M. Schultz, Judge

## **SUPPLEMENTAL RESPONDENT'S BRIEF**

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DEATH PENALTY

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## INTRODUCTION

On September 30, 2015, appellant Anthony Delgado submitted an application for permission to file a supplemental opening brief, and a supplemental opening brief, with this court. (Docket S089609.) On October 5, 2015, this court granted appellant's request, and directed respondent to file a supplemental respondent's brief no later than November 4, 2015.

## ARGUMENT

### **DELGADO'S EQUAL PROTECTION CHALLENGE IS FORFEITED; DELGADO'S EQUAL PROTECTION RIGHTS WERE NOT INFRINGED AS THE CLASSES ALLEGED ARE NOT SIMILARLY SITUATED**

Delgado argues that his state and federal equal protection rights were violated because the crime of assault by a prisoner serving a life sentence, with malice aforethought and by means of force likely to produce great bodily injury (Pen. Code,<sup>1</sup> § 4500; counts II and III) is applicable to inmates serving a life sentence, but not to inmates serving determinate sentences that, when served consecutively, are the functional equivalent of a life sentence. (Supp. AOB 1-14.) Delgado forfeited the claim by failing to object below, and his equal protection rights were not infringed.

Delgado's failure to object on the basis of equal protection in the trial court forfeits the issue here. (Evid. Code, § 353; *People v. Carpenter* (1997) 15 Cal.4th 312, 362 [a defendant cannot raise an equal protection challenge for the first time on appeal].) In any event, Delgado's equal protection claim lacks merit because the two alleged classes of inmates are not similarly situated.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code unless otherwise indicated.

Delgado asserts that a defendant who is serving a life term and a defendant who is serving a determinate term of years that amounts to the functional equivalent of life in prison are similarly situated. (Supp. AOB 5-10.) Based on this assertion, Delgado contends that section 4500 fails to rationally identify prisoners deserving of the death penalty because the statute is limited to only those prisoners who are serving a life sentence. (*Ibid.*)

To succeed on a claim under the equal protection clause, Delgado must first show the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, overruled on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 836-837.) “Under the equal protection clause, [this court does] not inquire ‘whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.”’ [Citations.]” (*People v. Hofsheier, supra*, at pp. 1199-1200.) In addition, this court upholds a statutory classification against an equal protection challenge under the rational relationship test “ “ “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “[this court’s] inquiry is at an end.” ’ ” ” ” (*Id.* at pp. 1200-1201, italics omitted.) In other words, this court “must accept any gross generalizations and rough accommodations that the Legislature seems to have made. A classification is not arbitrary or irrational simply because there is an ‘imperfect fit between means and ends.’ [Citation.]” (*People v. Turnage* (2012) 55 Cal.4th 62, 77.)

Delgado, who was serving a life term at the time of the alleged crimes, is not similarly situated to a prison inmate serving a term of years that amounts to the functional equivalent of life. Nor does section 4500, as

written, serve no rational purpose. This court considered and rejected this same equal protection claim in *People v. Finley* (1908) 153 Cal 59 (*Finley*), and that decision was affirmed by the United States Supreme Court in *Finley v. People of the State of California* (1911) 222 U.S. 28, 31. In *Finley*, the court considered former section 246, which was repealed and replaced with section 4500 in 1941. (Stats. 1941, ch. 106, § 15, p. 1124.) *Finley* was also faced with the previous versions of the statute that mandated a death sentence.<sup>2</sup> Mandatory death sentences were later found unconstitutional. (See e.g., *Sumner v. Shuman* (1987) 483 U.S. 66, 77-78; *Furman v. Georgia* (1972) 408 U.S. 238.) The statutory language of section 4500 has been amended several times.<sup>3</sup> However, the phrase “undergoing a life sentence” has remained constant. It is this phrase that is pertinent to Delgado’s equal protection claim, and was the same phrase that was at issue in *Finley*.

In *Finley*, the defendant claimed “that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years

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<sup>2</sup> In relevant part, section 246 defined the crime of aggravated assault by a life prisoner as follows: “Every person undergoing a life sentence in a state prison of this state, 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.” (*Finley, supra*, 153 Cal. at pp. 60-61.)

<sup>3</sup> “Section 4500, added by Statutes 1973, chapter 719, section 13, page 1301, amended by Statutes 1977, chapter 316, section 21, page 1264. Former section 4500, added by Statutes 1941, chapter 106, section 15, page 1124, amended by Statutes 1959, chapter 529, section 1, page 2497; Statutes 1965, chapter 1904, section 1, page 4412. Former section 246, added by Statutes 1901, chapter 12, section 1, page 6, repealed by Statutes 1941, chapter 106, section 16, page 1132, reenacted as section 4500 by Statutes 1941, chapter 106, section 15, page 1124.” (*People v. Superior Court (Bell)* (2002) 99 Cal.App.4th 1334, 1340, fn. 4.)

which in all human probability will exceed the term of natural life.”  
(*Finley, supra*, 153 Cal. at p. 62.) Delgado similarly argues that section 4500 is unconstitutional because it excludes from its ambit inmates serving the functional equivalent of a life sentence who may be more deserving of the death penalty. (Supp. AOB 5-10.) *Finley* rejected the defendant’s equal protection claim on the grounds that the two types of prisoners were not similarly situated, and that there was a reasonable distinction between the types of prisoners because it was necessary to have a more severe punishment to deter life prisoners, and because no greater punishment could be imposed except death. As *Finley* explained:

But there are valid reasons which justify the distinction. The ‘life termers,’ as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts, than do the crimes of those undergoing sentence for years. And, finally, if the Legislature sought to make the law applicable to convicts, other than ‘life termers,’ the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable, rational class distinction between the ‘life termers’ and the convict under sentence of years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

(*Finley, supra*, at p. 62.)

For the same reasoning as stated in *Finley*, Delgado’s equal protection challenge to section 4500 should be rejected.



## CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 29, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 1,099 words.

Dated: October 29, 2015

**KAMALA D. HARRIS**  
Attorney General of California

A handwritten signature in cursive script, appearing to read "Tia M. Coronado".

**TIA M. CORONADO**  
Deputy Attorney General  
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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Delgado**

No.: **S089609**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 2, 2015, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 2, 2015, at Sacramento, California.

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Declarant

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Signature