

# SUPREME COURT COPY

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  
Death Penalty Case

Kings County  
Superior Court  
No. 99CM7335

SUPREME COURT  
FILED

NOV 30 2015

Frank A. McGuire Clerk  
Deputy

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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

HONORABLE PETER M. SCHULTZ

MICHAEL J. HERSEK  
State Public Defender

JOLIE LIPSIG  
Senior Deputy State Public Defender  
Cal. State Bar No. 104644

770 L Street, Suite 1000  
Sacramento, CA 95814-3518  
Telephone: (916) 322-2676

Attorneys for Appellant

DEATH PENALTY

**COPY**

**TABLE OF CONTENTS**

**PAGE**

APPELLANT’S SUPPLEMENTAL REPLY BRIEF ..... 1

I. RESPONDENT’S SUPPLEMENTAL BRIEF DOES NOT  
ADDRESS APPELLANT’S SUPPLEMENTAL ARGUMENT ..... 1

II. APPELLANT’S EIGHTH AMENDMENT CLAIM IS NOT FORFEITED ..... 2

III. RESPONDENT HAS NOT DEMONSTRATED THAT THE DEATH-  
ELIGIBILITY PROVISIONS OF SECTION 4500  
SATISFY THE EIGHTH AMENDMENT ..... 3

CONCLUSION ..... 5

**TABLE OF AUTHORITIES**

**PAGE**

**FEDERAL CASES**

*Furman v. Georgia*  
(1972) 408 U.S. 238 ..... 4

*Godfrey v. Georgia*  
(1980) 446 U.S. 420 ..... 3

*Trop v. Dulles*  
(1958) 356 U.S. 86 ..... 4

*Zant v. Stephens*  
(1983) 462 U.S. 862 ..... 3

**STATE CASES**

*In re Bell*  
(1942) 19 Cal.2d 488 ..... 2

*In re Clark*  
(1993) 5 Cal.4th 750 ..... 2

*People v. Blacksher*  
(2011) 52 Cal.4th 769 ..... 2, 3

*People v. Carpenter*  
(1997) 15 Cal.4th 312 ..... 2

*People v. Finley*  
(1908) 153 Cal. 59 ..... 4

*People v. Vaughn*  
(1969) 71 Cal.2d 406 ..... 4

**TABLE OF AUTHORITIES**

**PAGE**

**STATE STATUTES**

Cal. Evidence Code § 353 ..... 4  
Cal. Penal Code § 4500 ..... *passim*

**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 REPLY BRIEF**

**I.**

**RESPONDENT'S SUPPLEMENTAL BRIEF DOES NOT  
ADDRESS APPELLANT'S SUPPLEMENTAL ARGUMENT**

Appellant's supplemental brief presents one issue, that the death eligibility provision of Penal Code section 4500 violates the Eighth Amendment of the United States Constitution. Respondent, however, has filed a brief solely directed to an issue not raised by appellant: "Delgado's Equal Protection Challenge." (RB, p. 1.) Appellant's brief does not include any equal protection claim, nor does it even cite the 14th Amendment, which contains the Equal Protection Clause. Respondent's brief is thus wholly non-responsive to appellant's supplemental brief. However, to the extent this Court considers any points raised by respondent to be relevant to the claim that was presented in appellant's supplemental brief, appellant submits this reply.

**II.**  
**APPELLANT'S EIGHTH AMENDMENT CLAIM IS NOT FORFEITED**

Respondent first argues that the issue raised in appellant's supplemental brief, which it improperly characterizes as an equal protection claim, is forfeited because it was not raised in the trial court. Appellant's claim, as briefed, is not forfeited. As set forth above, appellant's claim is a challenge to section 4500 under the Eighth Amendment and not the Equal Protection Clause. Thus, respondent's reliance on *People v. Carpenter* (1997) 15 Cal.4th 312, 362, which that held an *equal protection claim* challenging the denial of a severance motion cannot be raised for the first time on appeal, is inapposite.

Respondent also cites Evidence Code section 353, but it is unclear what bearing that section has on an equal protection claim, let alone a claim based on the Eighth Amendment. Section 353 is titled "Erroneous admission of evidence; effect," and states, inter alia, that no verdict or finding may be set aside, nor a judgment reversed "by reason of the erroneous admission of evidence" unless an objection or motion to strike or exclude the evidence was raised below. Appellant's supplemental brief does not raise any challenge to the admission of evidence.

In his supplemental brief, appellant raises a constitutional challenge to the death-eligibility provision of section 4500. As such, it is not subject to a procedural bar for failing to raise the issue in the trial court. (*In re Clark* (1993) 5 Cal.4th 750, 759. The fundamental importance of "securing a correct determination on the question of [a statute's] constitutionality" permits a petitioner to raise such a claim at any time. (*Clark*, 5 Cal.4th at p. 765, fn.4, quoting *In re Bell* (1942) 19 Cal.2d 488, 493; accord *People v.*

*Blacksher* (2011) 52 Cal.4th 769, 847, fn. 40 [noting that a claim attacking the validity of the death penalty statute “may be raised any time”].) For these reasons, appellant has not forfeited his Eighth Amendment claim.

### III.

#### **RESPONDENT HAS NOT DEMONSTRATED THAT THE DEATH-ELIGIBILITY PROVISIONS OF SECTION 4500 SATISFY THE EIGHTH AMENDMENT**

Respondent argues only that appellant’s “equal protection challenge” lacks merit, and does not address the claim actually raised in the supplemental brief. It thus argues that appellant has not shown that he was “similarly situated” to prisoners who were not serving a life sentence, a showing that would be required to mount an equal protection challenge. (RB, p. 2.) As respondent explains, to survive the Equal Protection Clause, a statutory classification need only meet the “rational relation” test, i.e., there is no constitutional violation if there is “any conceivable” rational basis for the classification. (*Ibid.*)

To survive constitutional scrutiny under the Eighth Amendment, however, eligibility factors must “adequately differentiate . . . in an objective, evenhanded, and substantially rational way” the 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 the case from others in which death was not imposed].) Even if there is “any conceivable” rational basis for a classification, that basis might not be substantial enough to satisfy the narrowing required for a death penalty statute under the Eighth Amendment. Respondent has not shown that section 4500 adequately

narrows the class of defendants who are subject to the death penalty.

Respondent asserts that this Court has considered and rejected the issue raised in appellant's supplemental brief in *People v. Finley* (1908) 153 Cal. 59. That case, like respondent's brief, however, did not address an Eighth Amendment claim, but only considered whether section 4500 met the rational basis test to survive an equal protection challenge. Further, as explained in appellant's supplemental brief, cases such as *Finley* addressed earlier versions of section 4500 and its predecessor statute, and not the current version. This Court has recognized that, even though section 4500 has withstood constitutional challenges in the past, the earlier "decisions do not necessarily settle the [constitutional] question for all time." (*People v. Vaughn* (1969) 71 Ca1.2d 406, 418.) This is, in part, because of the fluid nature of an Eighth Amendment inquiry, which is based on "the evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

Indeed, the substance of appellant's claim is based on sentencing practices and concerns under California's current Penal Code and death penalty scheme. At the time of *Finley*, there was no narrowing requirement for death penalty statutes, and modern death penalty schemes had not yet been subjected to the constitutional requirements of *Furman v. Georgia*, (1972) 408 U.S. 238. *Finley* thus has virtually no relevance to the issue currently before this Court.

//



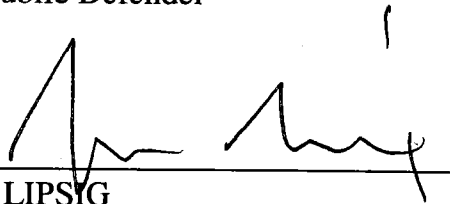
## CONCLUSION

For all the reasons stated in Appellant's Supplemental Brief and above, this Court should declare Penal Code section 4500 invalid as a death-eligibility factor because it violates the Eighth Amendment, and reverse appellant's sentence of death.

Dated: November 25, 2015

Respectfully Submitted,

MICHAEL J. HERSEK  
State Public Defender

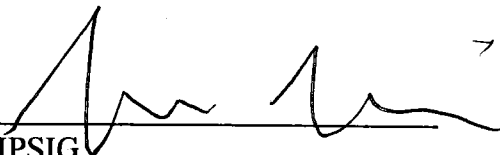
A handwritten signature in black ink, appearing to read "Jolie Lipsig", is written over a horizontal line. The signature is fluid and cursive.

JOLIE LIPSIG  
Senior Deputy State Public Defender  
Attorneys for Appellant

**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 1001 words in length excluding the tables and this certificate.

Dated: November 25, 2015

  
\_\_\_\_\_  
JOLIE LIPSIG  
Attorney for Appellant

**DECLARATION OF SERVICE**

**Re: People v. Anthony Gilbert Delgado  
Kings County Superior Court No. 99CM7335  
California Supreme Court No. S089609**

I, Marsha Gomez, declare that I am over 18 years of age, and not a party to the within cause; my business address is 770 L Street, Suite 1000, Sacramento, CA 95814. A true copy of the attached:

**APPELLANT'S SUPPLEMENTAL REPLY BRIEF**

was served on each of the following, by placing same in envelopes addressed, respectively, as follows:

Anthony Delgado  
P.O. Box D-29974  
San Quentin, CA 94974

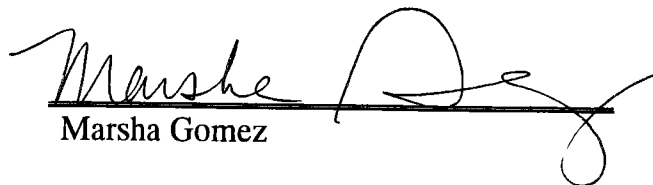
Cliona Plunkett  
Habeas Corpus Resource Center  
303 Second Street, Suite 400  
San Francisco, CA 94107

Office of the Attorney General  
Deputy Attorney General Tia M. Coronado  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2951

Clerk of the Court  
Kings County Superior court  
Main Courthouse  
1426 South Drive  
Hanford, CA 93230-5997

Each said envelope was then, on **November 25, 2015**, sealed with postage fully prepaid and placed for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the United States Postal Service.

I declare under penalty that the foregoing is true and correct and that this declaration was executed on **November 25, 2015**, in Sacramento, California.

  
\_\_\_\_\_  
Marsha Gomez