

In the Supreme Court of the State of California

In re
ELVIN CABRERA,
On Habeas Corpus.

Case No. S197283
**SUPREME COURT
FILED**
MAR 14 2012
Frederick K. Ohlrich Clerk
Deputy

Fifth Appellate District, Case No. F059511
Kern County Superior Court, Case No. HC011446A

OPENING BRIEF

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ISSUE PRESENTED

Did the Court of Appeal erroneously expand the obligations on the California Department of Corrections and Rehabilitation (CDCR) under its own regulations when it held that, before the prison may classify an inmate as a gang affiliate, there must be evidence of a “mutual relationship” between a known gang affiliate and the inmate?

STATEMENT OF THE CASE

In 2002, Elvin Cabrera was convicted of robbery, burglary, and receiving stolen property. (*In re Cabrera* (2011) 198 Cal.App.4th 1548, 1556.) He was sentenced to 62 years to life in prison. (*Ibid.*) During the time-frame relevant to this case, Cabrera was housed at the California Correctional Institution, in the custody of respondent, Warden Michael Stainer. (*Ibid.*)

On May 13, 2008, Cabrera was “validated,” or officially identified, as an associate of the Mexican Mafia prison gang. (*Cabrera, supra*, 198 Cal.App.4th at p. 1559.) Under CDCR’s regulations, an inmate may be validated as an associate or member of a prison gang based on pieces of evidence, or “source items,” indicative of prison-gang affiliation. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(3-4).) There are thirteen different categories of source items, such as “symbols,” “written material,” “association,” and “informants.” (*Id.* at § 3378, subd. (c)(8).) These different categories were developed by CDCR based on its experience with prison-gang operations. For example, CDCR has learned that prison gangs develop unique iconographies, adopting symbols for identification and communication. “Symbols” is therefore designated as a source-item category. (*Id.* at § 3378, subd. (c)(8)(B).) Three source items are required for validation. (*Id.* at § 3378, subd. (c)(3-4).) Additionally, one of the three source items must also provide a “direct link” between the inmate being

considered for validation and a currently or formerly validated prison-gang affiliate.¹ (*Id.* at § 3378, subd. (c)(3-4).) Under CDCR’s construction of the regulation, “direct link” means a straight-forward connection between the inmate and the affiliate. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1564-1565.)

Initial research into whether an inmate may be affiliated with a prison gang is conducted at individual prisons by Institution Gang Investigators, CDCR officers who specialize in prison gangs. (Cal. Code Regs., tit. 15, § 3378, subd. (c), (c)(2).) The evidentiary basis of any source item discovered is documented and disclosed to the inmate being considered for validation, unless disclosure would pose a safety or security threat. (*Id.* at § 3378, subd. (c)(6)(C), (c)(8)(A-M).) The inmate is given at least 24 hours to prepare a response, and is interviewed. (*Id.* at § 3378, subd. (c)(6).) The materials prepared by the gang investigators and the inmate’s input may then be submitted to the Office of Correctional Safety for review. (*Id.* at § 3378, subd. (c)(6)(A).) That office renders final decisions either validating or rejecting inmates as prison-gang affiliates. If an inmate disagrees with a validation decision, he may challenge it through CDCR’s three-tiered administrative appeals system. (*Id.* at § 3084.1.)

Cabrera’s validation as a Mexican Mafia associate was based on several photocopied drawings containing symbols distinctive of that prison gang discovered in his cell on April 8, 2008. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1557-1559.) One drawing bore the name of a Mexican Mafia associate. (*Id.* at p. 1558.) Another drawing, featuring meso-American and imprisonment themes, bore the name of a different Mexican Mafia member. (*Ibid.*) Pursuant to CDCR’s validation process, and based

¹ Respondent will use the term “affiliate” to refer collectively to prison gang associates and members.

on their training and experience, the prison's gang investigators recommended that the Office of Correctional Safety validate Cabrera as a Mexican Mafia associate. (*Id.* at pp. 1557-1559.) The Office of Correctional Safety found that the drawings in Cabrera's possession constituted sufficient "symbol" and "association" source items to validate him. (*Id.* at p. 1559.) The direct link for Cabrera's validation was supplied by the drawings bearing the names of Mexican Mafia affiliates. (*Id.* at pp. 1557-1558.) Under CDCR's analysis, the criteria for validation was satisfied; the drawings qualified as source items, and the inclusion of the gang affiliates' names supplied a straight-forward connection between Cabrera and those affiliates.

Cabrera challenged his validation through CDCR's administrative appeal process. (*Cabrera, supra*, 198 Cal.App.4th at p. 1560.) His appeal was denied. (*Ibid.*) Cabrera then filed a petition for writ of habeas corpus in the Kern County Superior Court. (*Ibid.*) The superior court denied the petition based on its finding that the validation decision was supported by three source items containing two direct links to prison-gang affiliates. (*Ibid.*)

Cabrera then filed an original petition with the California Court of Appeal, Fifth Appellate District. (*Id.* at pp. 1552-1553, 1560.) On September 8, 2011, the appellate court granted Cabrera's petition in a published opinion. (*Id.* at pp. 1553, 1572.) The court overturned Cabrera's validation based on its determination that the record, insofar as it was properly cognizable, did not contain a "direct link" because it did not establish that Cabrera and a Mexican Mafia affiliate had a "mutual relationship." (*Cabrera, supra*, 198 Cal.App.4th at pp. 1552-1553, 1566-1567.) The court accepted CDCR's position that the term "direct link" means a connection without interruption, but rejected CDCR's position that a direct link can be established by an inmate's own actions. (*Id.* at

pp. 1564-1565.) The court held that, where the direct link is drawn from an “association” source item, evidence of “mutual or two-way” interaction is required. (*Id.* at pp. 1566-1567.) It then found that Cabrera’s possession of the drawings containing Mexican Mafia symbols and bearing the names of Mexican Mafia affiliates “does not establish that Cabrera actually had a mutual relationship, even a loose one, with [those affiliates].” (*Id.* at p. 1568.) In reaching that conclusion, the court declined to consider information submitted by a CDCR prison-gang expert explaining that prison-gang affiliates keep copies of artwork by other affiliates to demonstrate their allegiance to the gang and to establish the credibility of their standing in the gang. (*Id.* at pp. 1555 & fn. 3, 1560, 1568.) Rather, the court drew its own conclusions as to the drawings’ significance by comparing them to an inmate’s possession of copied artworks by a non-gang affiliated professional artist or published cartoonist, or Adolph Hitler. (*Id.* at p. 1569.)

The appellate court ordered CDCR to expunge Cabrera’s validation, report the expungement to any law enforcement databases to which it was reported, and cease assigning him to maximum security housing based on the validation. (*Cabrera, supra*, 198 Cal.App.4th at p. 1572.) Initially, the appellate court also ordered CDCR to “remove all documents related to the validation from Cabrera’s prison file.” In a petition for rehearing the Warden argued, among other things, that the court had erroneously added proof of a mutual relationship shown by reciprocal interaction as a prerequisite to the validation process, and that the court-ordered remedy improperly precluded CDCR from considering, in determining how to classify and house Cabrera in the future, the undisputed fact that Cabrera had possessed the drawings containing Mexican Mafia symbols and affiliates’ names. The court modified its opinion to eliminate the order for CDCR to expunge all documentation of the validation. (*In re Cabrera*

(Oct. 6, 2011) No. F059511, 2011 WL 4637502 [mod. order].) The opinion otherwise remained unchanged, and the court denied the Warden's petition for rehearing. (*Ibid.*)

The Warden petitioned this Court for review and requested depublication of the appellate court's opinion. The Court granted review on December 14, 2011.

SUMMARY OF ARGUMENT

In reviewing CDCR's decision to validate Cabrera as a Mexican Mafia associate, the appellate court interpreted CDCR's validation regulation as requiring evidence of a mutual relationship, shown by reciprocal interaction, between Cabrera and a validated Mexican Mafia affiliate. The validity of CDCR's regulation is reviewable under due process principles. That review, however, did not permit the appellate court to expand CDCR's regulation. CDCR's construction of its own regulation is entitled to deference; it is rational and therefore constitutional.

The appellate court did not establish that CDCR's regulation violated Cabrera's due process rights. Rather, it exceeded the bounds of due process and improperly expanded CDCR's obligations in identifying inmates as prison-gang affiliates. The appellate court's opinion must therefore be reversed.

ARGUMENT

I. CDCR'S VALIDATION REGULATION IS A VALID EXERCISE OF ITS AUTHORITY TO CREATE RULES FOR PRISON MANAGEMENT, AND CDCR'S JUDGMENT IN CREATING THAT REGULATION IS ENTITLED TO DEFERENCE.

The Court of Appeal interpreted CDCR's regulation as requiring evidence of a mutual relationship to validate an inmate as a prison-gang affiliate. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1566-1568.) The appellate court examined the meanings of three terms from the regulation—

“direct,” “link,” and “association”—and further examined the meaning of those terms when “combined” in the regulation. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1564-1567.) The court accepted CDCR’s plain-meaning definitions of the individual terms, but found that when combined, they require evidence of a “mutual relationship,” shown by “reciprocal (i.e., mutual or two-way) interaction,” between an inmate being considered for validation and a gang affiliate as a prerequisite to validation. (*Ibid.*)

The court erred in several respects in doing so. First, the regulation should have been upheld because CDCR adopted a rational scheme for identifying prison-gang affiliates based on its experience with the realities of prison-gang operations; the appellate court erred in affording no deference to CDCR’s authority or expertise. Second, even if the appellate court properly determined that the regulation was arbitrary, it should have simply stricken the regulation, rather than effectively redrafting the regulation to impose a different evidentiary requirement that is impracticable and ill-advised given the secrecy and complexity of prison-gang operations.

A. CDCR’s Validation Regulation Is a Rational Exercise of Its Authority and Discretion.

Agency regulations come in two classes: interpretative regulations—created to effectuate a statute—and quasi-legislative regulations—adopted under an agency’s rule-making authority delegated by the Legislature. (*Sara M. v. Super. Ct.* (2005) 36 Cal.4th 998, 1012.) The type of regulation determines the applicable level of judicial review. (*Ibid.*) Where regulations implement a statute, the agency’s construction is persuasive, but the ultimate question of interpretation lies with the courts. (*Ibid.*) Where regulations are quasi-legislative, however, the scope of judicial review is “very limited.” (*Ibid.*; *Yamaha Corp. v. St. Bd. of Equalization* (1998) 19 Cal.4th 1, 10-12 [noting that regulations adopted under quasi-legislative

authority command much greater deference than regulations implementing statutes].)

Here, the regulation is quasi-legislative. CDCR implemented the gang-validation regulation pursuant to its broad, delegated authority to create rules and regulations for prison administration. (Pen. Code, § 5058, subd. (a); Cal. Code Regs., tit. 15, § 3378.) The regulation does not interpret or apply a statute; there is no statute governing prison-gang identifications or prison-gang management. CDCR's judgment in adopting its validation regulation is therefore entitled to deference, and must stand unless it is beyond CDCR's statutory authority, or is arbitrary and capricious. (*In re Jenkins* (2010) 50 Cal.4th 1167, 1176; *Yamaha, supra*, 19 Cal.4th at pp. 10-11; *Morris v. Williams* (1967) 67 Cal.2d 733, 748-749.)

Due process demands simply that quasi-legislative regulations, such as CDCR's validation regulation, be rational. (*Jenkins, supra*, 50 Cal.4th at p. 1181.) Due-process review does not inquire as to what a regulatory policy should be—the function of judicial review is “to inquire into the legality of [] regulations, not their wisdom.” (*Morris, supra*, 67 Cal.2d at p. 737; see also *Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1272, 1298-1299.) This limited review appropriately observes “deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.” (*San Francisco Fire Fighters Local 798 v. San Francisco* (2006) 38 Cal.4th 653, 667.)

CDCR's plain purpose in adopting its validation regulation was to identify prison-gang affiliates in the inmate population. (Cal. Code Regs., tit. 15, § 3378, subd. (a), (c).) The regulation is not arbitrary or capricious; it rationally serves this purpose. The regulation specifies thirteen different

types of source items that may indicate prison-gang affiliation. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(8).) CDCR designated these source-item categories based on its practical experience in combating prison gangs. CDCR employs officers and agents who specialize in prison-gang investigations, receive training in prison-gang operations, and participate in state-wide and nation-wide gang task forces. CDCR's knowledge is continually updated as new information is discovered. That information base is developed through such day-to-day work as probing gang-related incidents of violence, interviewing gang affiliates who are quitting their gangs, and routine searches of inmates and cells. Through its efforts CDCR has gained specialized knowledge of prison gangs, which allowed it to craft a regulation designed to effectively identify prison-gang affiliates.

In the case at hand, for example, Cabrera was validated based on his possession of copied drawings containing two symbols, the matlactlomei (three dots and two lines translating to "thirteen" in Nahuatl) and the eternal war shield (an Aztec design), and the names "Fermin" and "F. Bermudez" (both validated Mexican Mafia affiliates). (*Cabrera, supra*, 198 Cal.App.4th at pp. 1557-1559.) From its experience, CDCR has identified the matlactlomei and the eternal war shield as symbols used by the Mexican Mafia to identify itself. (*Ibid.*) CDCR is also aware that gang affiliates use such copied artwork by other gang affiliates to demonstrate gang allegiance and credibility within the gang. (*Id.* at pp. 1555 & fn. 3, 1560, 1568.) CDCR thus has included possession of symbols and gang affiliates' names as types of evidence that constitute source items. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(8)(B, G).) Those source item designations thus are not irrational, but logically based on CDCR's knowledge of prison gangs.

Gang investigators follow the validation regulation in documenting evidence of any source items discovered regarding individual inmates, and based on their training and experience explain why the evidence indicates

gang affiliation. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(8)(A-M).) To validate an inmate, CDCR requires at least three independent source items. (*Id.* at § 3378, subd. (c)(2).) Requiring three items logically increases the accuracy of a validation decision. Additionally, at least one source item must contain a direct link to a currently or formerly validated prison-gang affiliate. (*Id.* at § 3378, subd. (c)(3-4).) The “direct link” language simply requires that the source item show a straight-forward connection between the inmate being considered for validation and a validated affiliate. (*Id.* at § 3378, subd. (c)(3-4); *Cabrera, supra*, 198 Cal.App.4th at pp. 1564-1565.) Using plain language to define a term is not arbitrary. (See *Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021 [interpreting regulation begins with affording usual meaning to language used].) Requiring a simple direct link also logically increases the accuracy of validation decisions, by connecting the inmate to an individual gang affiliate rather than just to the gang as an abstract whole.

Moreover, a validation decision is not based solely on one prison-gang investigator’s viewpoint. The inmate may rebut the source items, adding contrary information for consideration. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(6).) Additionally, a validation decision receives multiple levels of review, as the evidence initially developed by prison-gang investigators is reviewed by the Office of Correctional Safety for a final decision and subject to review through CDCR’s inmate appeals process. (*Ibid.*; Cal. Code Regs., tit. 15, § 3084.1.)

This regulatory scheme is not arbitrary, capricious, or irrational. Rather, it is logically geared toward identifying prison-gang affiliates based on CDCR’s expertise in prison-gang operations, and provides inmates facing validation with a large quantity of procedural protections. It is therefore a valid exercise of CDCR’s quasi-legislative authority and does not violate *Cabrera*’s due process rights.

B. The Responsibility for Determining How Best to Identify Prison-Gang Affiliates Lies with CDCR.

The Court of Appeal did not apply the due process standards cited above to review the validation regulation's validity. (Generally, *Cabrera, supra*, 198 Cal.App.4th at p. 1548.) It simply substituted, in derogation of CDCR's expertise and responsibility, its own judgment of what the validation regulation should require. The court did not make any findings that the regulation failed to reasonably lead to the identification of prison-gang affiliates, or was otherwise irrational. (*Ibid.*) Rather, the court found that the combined terms "direct link" and "association" "must involve reciprocal (i.e., mutual or two-way) interaction" between the inmate being considered for validation and a validated gang affiliate. (*Id.* at pp. 1566-1567.) The court simply reasoned that "[o]therwise, a validated gang affiliate could create [an associational] relationship with an inmate unilaterally, without any assent or mutuality on the part of the inmate." (*Id.* at p. 1567.)

The court cited no evidence that prison-gang affiliates unilaterally create one-sided associations with other inmates. (Generally, *Cabrera, supra*, 198 Cal.App.4th at p. 1567.) More importantly, the potential for some error under a regulation does not render it irrational. As long as there are some conceivable facts reasonably supporting a regulatory rule, it is rational. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 [reciting standard that a rule is rational "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"]; *Dandridge v. Williams* (1970) 397 U.S. 471, 485 ["A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."]; see also *Jenkins, supra*, 50 Cal.4th at p. 1181 [incorporating equal protection rational-basis review standards into due process rationality analysis].) The court's speculation does not

establish that the regulation, as proffered by CDCR, utterly fails to aid in identifying prison-gang affiliates. Indeed, the court acknowledged that the regulation is not inherently irrational absent a reciprocity requirement—it observed that “it is possible that the mutual relationship establishing a direct link through association can be inferred from evidence of unilateral action by one of the persons in that relationship. In practice, whether such an inference can be drawn in a particular situation will depend upon the facts and circumstances of that case.” (*Cabrera, supra*, 198 Cal.App.4th at p. 1567.) If it is possible to establish a direct link without evidence of reciprocal interaction, then CDCR’s regulation is rational and the court’s inquiry should have ended there.

Cabrera’s validation illustrates the rationality of the regulation, contrary to the Court of Appeal’s analysis. A CDCR prison-gang expert explained how Cabrera’s possession of drawings by a Mexican Mafia member and associate indicated gang affiliation—gang affiliates possess such artwork for the purpose of demonstrating their status in the gang. (*Id.* at pp. 1555 & fn. 3, 1560, 1568.) That explanation did not depend on Cabrera exchanging drawings with the Mexican Mafia affiliates, or otherwise reciprocally interacting with them. (See *ibid.*) The expert’s information demonstrated that the regulation operated in a rational manner without requiring evidence of a mutual relationship. The appellate court, however, declined to consider the expert’s explanation. (*Id.* at p. 1555 & fn. 3.)

By imposing a “reciprocal interaction” requirement, the appellate court exceeded the applicable due process standards and engaged in a policy analysis—the appellate court imposed its own judgment as to what validation requirements are better. But “in determining whether [an agency] has acted arbitrarily or capriciously, [the] court does not inquire whether, if it had power to draft the regulation, it would have adopted some

method or formula other than that promulgated by the [agency].” (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-835.) And even assuming the regulation as interpreted by CDCR was arbitrary, the appellate court erred by imposing its own, different interpretation. Where a regulation is irrational, the solution is to void the regulation. (See *Jenkins, supra*, 50 Cal.4th at p. 1176.) The courts do not direct an agency’s discretion by creating or rewriting regulations. (See *Copley Press, supra*, 39 Cal.4th at p. 1299.)

The pitfalls of a court substituting its judgment for that of CDCR’s in questions of prison safety and security are apparent in this case. Prison gangs are “[c]landestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals.” (*Wilkinson v. Austin* (2005) 545 U.S. 209, 227.) They “seek nothing less than to control prison life and to extend their power outside prison walls.” (*Ibid.*) Prison gangs are sophisticated criminal organizations. They strive to keep their affiliates’ associations and activities secret from prison officials, and are adept at evading discovery despite the restrictions of the prison environment.

To validate an inmate under the rule announced in the appellate court’s opinion, CDCR must acquire evidence not only connecting the inmate to a particular gang affiliate, but also connecting that same individual affiliate back to the inmate. Cabrera’s possession of drawings by validated Mexican Mafia affiliates would be insufficient to connect Cabrera to those inmates, unless the affiliates also possessed something bearing Cabrera’s name. The court’s opinion requires evidence equivalent to a handshake between an inmate and a gang affiliate to show a direct link—some clear expression that each is accepting interaction from the other. Prison gangs, however, are not so plain-dealing in their interactions. Obscuring activities and interactions is a basic goal for any criminally oriented group. CDCR will rarely be able to discover evidence of direct,

back-and-forth interaction between inmates and validated prison-gang affiliates. Requiring evidence of reciprocal interaction for validations is unrealistic, and will impede CDCR in its critical effort to combat prison-gang activity.

Determining how to best to identify prison-gang affiliates is CDCR's responsibility. (*Jenkins, supra*, 50 Cal.4th at p. 1175, citing *Overton v. Bazzetta* (2003) 539 U.S. 126, 132 ["We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."].) CDCR's judgment in that matter is entitled to deference. (*Ibid.*) The validation regulation must comport with the minimal demands of due process, but within the bounds of that constitutional principle, the fine points of how the regulation functions is within the discretion of CDCR. The appellate court erred in supplanting CDCR's rational exercise of its rule-making authority.

CONCLUSION

The appellate court exceeded the bounds of due process in reviewing CDCR's validation regulation. Rather than constraining its analysis to determining whether the regulation was rational, the court imposed its own judgment as to what the validation process should require. The validation regulation, as construed by CDCR, is a rational, valid exercise of its authority to create rules for prison administration. The regulation therefore did not violate Cabrera's due process rights. The court failed to apply the correct standard of review, and intruded upon CDCR's discretion over prison management.

For these reasons, the Court of Appeal's opinion should be reversed.

Dated: March 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF** uses a 13 point Times New Roman font and contains 3,739 words.

Dated: March 13, 2012

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A handwritten signature in black ink, appearing to read 'AMY DANIEL', is written over the printed name.

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cabrera, Elvin In re**
No.: **S197283**

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.

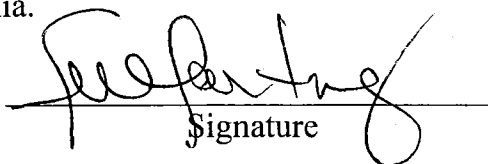
On March 13, 2012, I served the attached **OPENING BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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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 March 13, 2012, at Sacramento, California.

Christine A. McCartney

Declarant



Signature