IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ELVIN CABRERA

on Habeas Corpus.

Case No. S197283

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

ANSWER BRIEF ON THE MERITS

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By appointment of the California
Supreme Court

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ANSWER BRIEF

Elvin Cabrera, petitioner in the court below, files this brief in answer to respondent's opening brief on the merits. The brief is filed in accordance with California Rules of Court, rule 8.520, subdivision (b).

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ISSUE PRESENTED

Among the photocopied exemplars in Cabrera's private collection of Aztec artwork were two that reportedly were signed by validated EME affiliates[1] and two others that contained Aztec symbology the EME had appropriated. These four photocopies comprised the sole basis of Cabrera's validation as an EME associate — that is, one who is "involved periodically or regularly" with EME affiliates. Did that validation meet 1) the regulatory requirements that it be supported by three source items, at least one of which provides a "direct link" to "association," and 2) the constitutional requirement that validation be supported by some evidence of association?

STATEMENT OF THE CASE

"Elvin Cabrera filed a petition for writ of habeas corpus to challenge his validation as an associate of the Mexican Mafia prison gang (EME) and his placement in the security housing unit (SHU) at the California Correctional Institution at Tehachapi (CCI). Cabrera argue[d] that his possession of

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[1] Prison regulations define a member of a gang such as the EME as an inmate "who has been accepted into membership by a gang," and an associate of a gang as an inmate "who is involved periodically or regularly with members or associates of a gang." (Cal. Code Regs., tit. 15, § 3378, subd. (c)(3) & (4).) Cabrera uses the term "affiliate" to refer collectively to both members and associates of a gang. (Accord, Opening Brief, p. 2, fn. 1 ["Respondent will use the term 'affiliate' to refer collectively to prison gang associates and members."].)

photocopies of drawings signed by either a gang member or gang associate was insufficient to establish a 'direct link to a current or former validated member or associate of the gang' as required by California Code of Regulations, title 15, section 3378, subdivision (c)(4)[2]." (*In re Cabrera* (2011) 198 Cal.App.4th 1548, 1552-1556[3].) His petition also raised issues, among others, of 1) adequate notice that possession of the drawings was prohibited or otherwise could serve to validate him; 2) the propriety of dividing the four drawings in his collection of artwork into three "source items" as opposed to one source item of evidence; and 3) whether the four photocopied drawings constituted some evidence that reliably established he associated with the EME. (*Id.* at p. 1571.)

Cabrera was committed to the California Department of Corrections and Rehabilitation (hereafter "CDCR" or "the Department") in April 2003 for 62 years to life following convictions for robbery, burglary, receiving stolen property and

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[2] All further section references are to the California Code of Regulations, title 15. A copy of section 3378 is attached to this brief to make it "readily accessible" to the Court and the parties. (See Cal. Rules of Court, rule 8.504, subd. (e)(1)(C) [permitting attachment of relevant state regulations to a brief].)

[3] The decision of the Court of Appeal under review was formerly published as *In re Cabrera* (2011) 198 Cal.App.4th 1548. Following respondent's convention in the opening brief, Cabrera's pinpoint references to the Court of Appeal decision are to the pages in that opinion as formerly published, rather than the typed opinion. Cabrera's references to "Petn." are to the petition for writ of habeas corpus he filed in the Court of Appeal. His references to lettered exhibits are to those attached to that petition.

drug paraphernalia under California's three strikes law. (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1556.) Now 46 years old, Cabrera is a Cuban-American who had no history or even hint of gang affiliation in or out of prison at the time of his commitment. (Inf. Resp. May 14, 2010, p. 1.[4]) Indeed, putting aside for the moment the four exemplar Aztec drawings he possessed in 2008, every indication from his record is that he has had no involvement with the EME.

"Since 2003, Cabrera has been an inmate at CCI. Since 2005, he has been assigned to yard 4-A." (*In re Cabrera, supra,* 98 Cal.App.4th at p. 1556.) Cabrera was a conforming inmate in the main population of that institution, with only two minor disciplinary rule violations in that time, and among his constructive activities was engagement in the art of drawing. (Petn., pp. 3-4.) To that end, he "had been enrolled in a CCI hobby craft program for nearly three years and had possessed a large quantity of drawings encompassing a variety of art and artists." (*In re Cabrera, supra,* 98 Cal.App.4th at p. 1559 [also referencing a sample of "18 pages of copies of drawings from his collection" attached to his petition as Exh. J]).)

Cabrera's art collection included drawings photocopied from *Lowrider Magazine,* a publication approved by the Department. (*In re Cabrera, supra,* 98 Cal.App.4th at p. 1559;

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[4] As set forth below, Cabrera filed a letter brief on May 14, 2010, that he styled an "Informal Response," but was actually a Reply to the Attorney General's Informal Response. Cabrera refers herein to that pleading as set forth in the text — "Inf. Resp. May 14, 2010.

see also Petn., p. 3; Inf. Resp. May 14, 2010.) Other drawings in Cabrera's collection were photocopies of artwork done by other inmates whom he "never had any contact with," drawn years prior to his prison commitment, and that reportedly were widely distributed and readily available to other inmates. (Petn., p. 3; see also Inf. Resp. May 14, 2010, p. 1 ["mass-produced, widely-available drawings"]; *id.* at p. 4 ["The drawing is a mass-produced internet generated photocopy."].) For example, one of the drawings in question (Exh. A) was drawn in 2000 – well before Cabrera was incarcerated and, indeed, "well before the artist was validated as a gang member ...." (See *In re Cabrera, supra,* 198 Cal.App.4th at p. 1558, fn. 8.) In the course of Cabrera's five years on the mainline, his cell was regularly searched by prison officials who had seen Cabrera's collection of artwork "on numerous occasions," but never identified it as "gang-related material or contraband." (Petn., p. 4; see also *ibid.* ["Petitioner ... had been through countless cell searches and never once told Lowrider magazines, Street Low magazines, etc. were contraband."].)

"Cabrera has no gang tattoos and has never been charged with violating section 3023, which prohibits an inmate from knowingly promoting, furthering, or assisting a prison gang." (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1559.) "Cabrera asserts that he is not a gang member or associate and has never participated in any gang activity." (*Id.* at p. 1559.) Indeed, respondent offers no evidence, not even in the form of hints and

allegations, that Cabrera has ever taken any action on behalf of or in association with the EME.

"On April 3, 2008, some Hispanic inmates in yard 4-A were involved in an assault on prison staff. Cabrera was in his cell at the time of the assault and did not participate.[5] On April 8, 2008, prison officials conducted an operation named 'Swift Response' that targeted all Hispanic inmates in yard 4-A in an effort to identify and neutralize active gang members." (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1557.) Operation Swift Response consisted of the systematic removal of all Hispanic inmates from their cells, photographing their faces and all tattoos, and confiscating property from their cells. (Petn., p. 3.) Cabrera got swept up through Operation Swift Response in a wholesale validation of Hispanics living in that unit as EME affiliates: "During the course of this operation, Institutional Gang Investigator (IGI) E. Sanchez examined Cabrera's personal property and discovered photocopies of drawings. IGI Sanchez believed that four of the drawings were evidence of Cabrera's association with EME. [¶] Three days later, Cabrera and approximately 30 other inmates were removed from the general population and placed in administrative segregation pending validation as members or associates of EME. " (*In re*

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[5] Nor is there any evidence that Cabrera had any connection to the assault in any planning stage or otherwise. Indeed, again putting aside his possession of the four drawings at issue here, *all* the evidence shows that at *all* times in *all* the years of his incarceration Cabrera simply has been doing his time.

Cabrera, supra, 198 Cal.App.4th at p. 1557.) All 30 of them, plus one more that had transferred during the "Swift Response," were so validated. (Petn., p. 7.)

"The process of validating an inmate as a member or associate of a prison gang is governed by section 3378. A validation requires at least three independent source items, one of which must constitute a direct link. (§ 3378, subd. (c)(3) & (4).) Recognized source items include, but are not limited to, an inmate's admission, tattoos, symbols, written materials, the inmate's association with gang affiliates, and communications between inmates. (§ 3378, subd. (c)(8)." (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1553.) As respondent notes: "There are thirteen different categories of source items," or what respondent interchangeably characterized as "pieces of evidence." (Opening Brief, p. 1, citing § 3378, subd. (c)(8).)

On April 9, 2011, IGI Sanchez explained in three CDC form 128B chronos the bases for his opinion that Cabrera was an associate of the EME, concluding that each chrono "should be used as one (1) source towards validating Cabrera as an associate of the prison gang known as the Mexican Mafia." (Exhs. A-C.)

> 1. (Association/Direct link) CDC 128B dated 4-8-2008[6], depicts a drawing discovered in

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[6] A copy of the 128B and the picture referenced therein may be found at Exhibit A. A complete description of the contents of this drawing may be found in *In re Cabrera, supra,* 198 Cal.App.4th at pp. 1557-1558.

the personal property of inmate Cabrera. The drawing depicts the name of the person who is responsible for the drawing. I identified the person responsible for the drawing as inmate Fermin Garcia, D-88896, aka Fox, a validated associate of the prison gang known as the Mexican Mafia (EME), (date of validation 7-15-2003)[7].

2. (Association/Direct link) CDC 128B dated 4-8-2008[8], depicts a drawing discovered in the personal property of inmate Cabrera. The drawing depicts the name of the person who is responsible for the drawing.[9] I identified the person responsible for the drawing as inmate Fernando Bermudez B-53002, aka Agnon Fidel, a validated member of the prison gang known as the Mexican Mafia (EME), (date of validation 8-11-1995).

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[7] "The lower right-hand corner of the drawing contains 'FERMIN 00" printed in block letters. (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1558.) "[T]he double zeros means the drawing was completed in the year 2000, well before the artist was validated as an EME associate in July 2003." (*Id.* at p. 1558, fn. 8.) As Cabrera has described the item: "The photocopied art simply has 'Fermin 00' printed in the lower right corner and an obscure hieroglyphic symbol and displays nothing that is overtly discernible to indicate this is gang related art.... The drawing is a mass-produced internet generated photocopy that does not demonstrate Petitioner is an associate of or loyal to a dangerous prison gang." (Inf. Resp. May 14, 2010, p. 4.)

[8] A copy of the 128B and the drawing referenced therein may be found at Exhibit B. A complete description of the contents of this drawing may be found in *In re Cabrera, supra,* 198 Cal.App.4th at p. 1558.

[9] The name is at the bottom of the drawing is miniscule, if not "barely legible" (Inf. Resp. May 14, 2010, p. 4), and what the Department construed as a "stylized F." initialing the first name looks as much like a "T."

> 3. (Symbols) CDC 128B dated 4-8-08[10], depicts [sic] during a review of the personal property of Inmate Cabrera, Elvin, T-88483, aka Cuba, recognized gang related symbols were discovered within the drawings discovered in Cabrera's personal property. The drawings depict symbols that are indicative of Cabrera's association/loyalty to the prison gang known as the Mexican Mafia (EME).

(Exh. D, p. 1; see also Exhs. A-C [the form 128-B chronos referenced in Exh. D].)

IGI Sanchez identified two "symbols" contained in the drawings possessed by Cabrera that he identified as evidence of Cabrera's allegiance to the EME. One drawing, in a kind of "Where's Waldo," contained the "Matlactlomei," while another one contained the Eternal War Shield. (Exhs. C & D.)

Sanchez explained the Matlactlomei symbol as follows:

> The Matlactlomei symbol ... demonstrate[es] his loyalty to the ... EME. The Matlactlomei symbol is the Ancient Meso-American numerical symbol for the number 13. In the symbol a line is equivalent to the numerical value of five and the dot is equivalent to the numerical value of one. The sum of the three dots plus the sum of the two lines is equal to thirteen .... The word Matlactlomei is

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[10] A copy of the 128B and the two drawings referenced therein may be found at Exhibit C. A clearer version of the second drawing that reflects the Eternal War Shield may be found at Exhibit 4, page 3, of the Attorney General's Informal Response filed in the Court of Appeal on April 15, 2010. A complete description of the contents of this drawing may be found in *In re Cabrera, supra,* 198 Cal.App.4th at pp. 1558-1559.

> translated to mean 13 within the Nahuatl language. Since the Ancient Meso-American symbol of three dots and two lines is a symbol for the number 13, the symbol can be referred to as the Matlactlomei symbol. The thirteenth letter in the English alphabet is the letter "M," which EME members/associates recognize interpret as "EME."

(Exh. C; see also *In re Cabrera, supra,* 198 Cal.App.4th at p. 1557 [explaining the Matlactlomei symbol].)

The Court of Appeal described the drawings with the two symbols thusly:

> The first drawing shows a young woman wearing a sombrero and holding a revolver in her right hand. Parts of an eagle and serpent appear from behind the sombrero. Symbols are written on the brim of her sombrero with a Matlacktomei appearing near the center. The symbols appearing on either side of the Matlactlomei are not identified and translated.
>
> The second drawing contains a female Mesoamerican warrior armed with a sword in her right hand, a shield on her left, and a bow and quiver of arrows slung over her back. The CDC Form 128-B states that the "Eternal War Shield is located in the center of the female Aztec warrior chest area."

(*In re Cabrera, supra,* 198 Cal.App.4th at p. 1558.)

IGI Sanchez identified the shield as "The Eternal War Shield," and explained that "The Eternal War Shield is known through gang intelligence, to demonstrate loyalty to the Mexican Mafia as many of the members and associates identify

themselves as being warriors of the EME." (Exh. C, p. 1; see also *In re Cabrera, supra,* 198 Cal.App.4th at p. 1559.) Nowhere, however, has the Department published any symbols that it has identified as signifying the EME. (See, e.g., Inf. Resp. May 14, 2010, p. 4 ["The Petitioner was unaware that these symbols are recognized by the CDCR as demonstrating loyalty to a prison gang because there is no mention anywhere in the California Code of Regulations, title 15 to warn prisoners of the ... symbols the CDCR deems gang related, or capable of being used to validate a prisoner. [¶ ¶]. Nor, does CDCR warn prisoners that certain symbols or images ... can be used to validate prisoners."].)

"Cabrera obtained the copy of the drawing containing the war shield symbol by photocopying it directly from Lowrider Magazine, a publication allowed to be received by any CCI inmate." (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1559.) The only evidence of how Cabrera obtained copies of the other three drawings at issue are his assertions that they were widely disseminated and he obtained them in connection with his art hobby activities. Respondent puts it this way: "Information regarding the manner in which Cabrera obtained the drawings is unavailable." (Inf. Resp., dated Sept. 20, 2010.)

On April 14, 2008, IGI Sigsten[11] conducted an inmate pre-validation interview with Cabrera, who freely admitted possessing the drawings being used to validate him as well as numerous other drawings he maintained in his collection for "artistic purposes." (Petn., p. 3.) Cabrera denied awareness that any of his photocopied drawings "contained hidden gang symbolism" considered by the Department to signify an inmate's allegiance to a prison gang. (Petn., p. 3.) Cabrera stated that he was a 44-year-old Cuban American who had "never been a gang member." (Petn. p. 3.) Nor had he ever had any contact with any of the artists who had made any of the drawings, which in the main had come "from magazines allowed into the institution." (Petn., p. 3; see also *In re Cabrera, supra,* 198 Cal.App.4th at p. 1559 ["He admits possessing the four photocopies of the drawings, but he denies knowing that the artwork contained gang symbols and asserts the 'obscure symbols hold no special significance to me.'"]; Inf. Resp. May 14, 2010, p. 5 ["Petitioner does not deny possessing

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[11] Exh. D, the General Chrono signed by IGI Sanchez and dated 4-09-2008, Gang Information IGI Review, contains an apparent template for reporting the conduct of two interviews – the first providing both oral notice of the validation points being used against the inmate and provision of the written chronos to that effect, and a subsequent "pre-validation interview" that permits the inmate to respond to the notice Sanchez, however, never conducted any interview with Cabrera; rather, Sigsten conducted the pre-validation interview. (See Petition, p. 3.) Cabrera points this Court's attention to the blank spaces in Exh. D where the dates for the alleged "notice" interview and pre-validation follow-up interview should have appeared.

the photocopied art along with at least a hundred other photocopied drawings used solely for artistic purposes, but vehemently contends that he has never engaged in gang activity, associated with a prison gang or committed an act or acts of misconduct on behalf of any gang."].)

On April 16, 2008, Cabrera appeared before an Institutional Classification Committee (ICC) to determine his continued placement in SHU. (Exh. D, p. 2.) Cabrera "expressed to the committee that he was not involved in gangs or gang activity, much less, an associate to a prison gang." (Petn., p. 4.) The ICC noted that Cabrera did "not agree" with its decision to retain him in SHU pending his validation as an associate of the EME. (Exh. D, p. 2.)

By chrono dated May 13, 2008, the Department advised Cabrera that it had validated him as an associate of the Mexican Mafia (EME) prison gang based on three source items:

1) (Association) Direct Link – CDC 128B dated April 8, 2008;

2) (Association) Direct Link – CDC 128B dated April 8, 2008;

3) (Tattoos/Symbols) CDC 128B dated April 8, 2008.

(Exh. E, pp. 1-2.)

The consequences for Cabrera of that validation were severe: "Cabrera's status as a validated associate of the Mexican Mafia (EME) shall prohibit him from programming on a

general population." (Exh. E, p. 1.) That status, rather, requires that he be retained in SHU for the next *six* years as an "active" gang member, unless he "debriefs" to the satisfaction of prison authorities. (See §§ 3341.5, subd. (c)(2)(A)1; 3378, subd. (e); & 3378.1; subd. (d); see also *In re Efstathiou* (2011) 200 Cal.App.4th 725, 731 [validated gang affiliate may "end his active prison gang membership and placement in segregated housing through one of two formal routes: (1) he becomes an 'inactive' gang member after six years of noninvolvement in gang activity or (2) he completes the "debriefing process," demonstrating that he has dropped out of the gang. [Citations].)[12]

As Cabrera has explained the consequences of gang validation:

> Prison gang validation is a "life-long label that entails considerable entanglements through an inmate's incarceration and even upon parole. The consequences of an erroneous gang validation is something that cannot be understated [sic], although the CDCR claims these decisions are administrative in nature, the reality is a prison gang validation is the most severe form of punishment meted out by the CDCR. Nothing else comes close, no murder, assault, possession of a weapon, drug

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[12] "Debriefing is when a validated inmate formally disassociates with his prison gang by meeting with prison officials, renouncing his membership in the gang, and identifying other gang members and associates." (*Lira v. Cate* (N.D. Cal. Sept. 30, 2009), 2009 U.S. Dist. LEXIS 91292 at * 13, fn. 3, aff'd. sub nom. *Lira v. v. Herrera* (9th Cir. 2011) 448 Fed. Appx. 699 [2011 U.S. App. LEXIS 17585].)

> trafficking, escape or arson; each of the acts carries a defined determinate term in a security housing unit (SHU). The stigma attached to a prison gang associate affects *every* decision made by institutional classification committees, shackles an inmate with an indeterminate SHU term, strips him of virtually all privileges, and if the prison gang validation is erroneous and improper, places the inmate in an extremely danger predicament, as Petitioner's validation has done. Petitioner's prison gang validation was completed in less than thirty (30) days by using four (4) unoriginal, photocopies of artwork he did not draw. It was the residual and retaliatory result of a prison staff assault of which Petitioner neither participated in, or had any knowledge of. Petitioner has never posed a threat to institutional security, prison staff or other inmates. Petitioner's validation fails to demonstrate the basic elements of gang activity, association or any illegal act knowingly committed by the Petitioner, not a single shred of gang activity has ever been perpetrated by the petitioner ....

(Supp. Inf. Resp. Dec. 12, 2010, p. 6.)[13]

On June 5, 2008, Cabrera appeared before the ICC for program review. (Petn., p. 4.) Cabrera presented the ICC with an "emergency inmate appeal" in which he complained that no evidence supported the Department's validation of him as an

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[13] Again, Cabrera styled his letter brief, dated Novembr 12, 2010, and filed December 6, 3010, as a Supplemental Informal Response, when it actually was a Response to the Attorney General's Supplemental Informal Response. Cabrera refers to his letter brief as he has in the text here – Supp. Inf. Resp. Dec. 12, 2010.

associate of the EME and that its baseless validation of him had jeopardized his safety, both because rival gangs would now identify him as an enemy and because the EME would enforce its rules on him. (Exh. E, pp. 3-4.) He was now in a no-man's land, and requested housing in protective custody. (Pet., p. 5.) The ICC instead endorsed him for indeterminate housing in SHU, but also referred him to IGI Machado for an interview. (Petn., p. 5; Exh. I.) Cabrera stated to Machado that he was not in any way affiliated with any prison gang and that he would "submit to a polygraph at any time." (Petn., p. 5.) Machado informed Cabrera that the only way for him to reverse his status as a validated gang member would be to "debrief" by writing and submitting an "autobiography" detailing any involvement with the EME and his knowledge of EME activity. (Petn., p. 5; see § 3378, subd. (c)(5).) (Exh. I, p. 2.) Cabrera agreed to write his autobiography, and he was placed on single-cell status. (Exh. I, p. 2.)

On August 14, 2008, Cabrera appeared before the ICC for consideration of his SHU placement and proposed transfer to the SHU at Pelican Bay State Prison, notorious for its oppressive conditions of confinement. (Petn., p. 6.) As one court found about the experiences in SHU at Pelican Bay of a prisoner wrongly validated as an associate of the prison gang known as the Northern Structure:

> In the SHU, inmates are housed in small, barren cells, ... described as "cement tombs." The cells contained a hard cement bed with a

two-inch mattress. There was no other furniture and no windows. Meals were eaten alone inside the cell, served twice a day by guards on trays pushed through a cell-door slot. Inmates were confined to their cells for about 22 1/2 hours every day. They could leave their cells only to shower, go to a medical appointment or administrative hearing, or go to the yard. Ten minute showers were allowed three times a week. The "yard" was a 9' by 48' cement space, with eighteen-foot walls and no windows. The inmates were permitted to exercise, alone, in the yard; plaintiff testified that he "walked in circles" in the yard. Plaintiff also testified that "[t]he only time you could [look] up and see some sky was when you were on the 'yard'; there were no windows in the cell or in the 'pod.'"

.... Inmates were strip-searched and handcuffed every time they left their cells. There were no work, education or drug rehabilitation programs for inmates. Possessions were limited to six cubic feet, and books were allowed but were strictly limited. Inmates could order them through a catalogue but would have to be approved by prison officials and would take several months to arrive. Inmates were not allowed to use the telephone, and visitation privileges were limited. Due to the remote location of Pelican Bay, it was practically impossible for plaintiff's family to visit him.

... Plaintiff was housed near mentally ill patients in the SHU who often screamed or banged repeatedly on things in their cells. Because of this noise, plaintiff had trouble sleeping. For plaintiff, the worst thing about being in the SHU was that he had no

> communication with his family. As years passed, plaintiff became less focused, and he started to worry that experiences would come back to haunt him.
>
> Violence in the SHU was common. Former Pelican Bay Warden Joseph McGrath testified that ... there was "a rash of in-cell homicides" at Pelican Bay SHU....[P]laintiff witnessed through the window in his cell door a deadly gang-directed strangulation assault. Plaintiff testified, "that's something I'm never going to forget ... it's going to stay with me the rest of ... whatever time I have left. ... You wonder, are you next? ... you live on a tightrope, you know, there's always the tension that your door is going to be popped open."
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> Plaintiff's SHU confinement placed him in a concentrated population of prison gang members and associates.... [P]laintiff was the victim of a cellmate assault that had been directed against him by a Northern Structure member because of plaintiff's refusal to associate with the gang. Following that incident, plaintiff was placed on permanent single-cell assignment, and for the last five and a half years of his incarceration at Pelican Bay he served his time in solitary confinement.
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> ... [P]rison officials notified plaintiff that his name appeared on a "bad standing" or "hit list" with the Nuestra Familia and Northern Structure. Individuals appearing on such a list were subject to assault by NF and NS members.

(*Lira v. Cate* (N.D. Cal. Sept. 30, 2009) 2009 U.S. Dist. LEXIS 91292 at *46-50 (record citations and brackets in quote omitted

throughout) , aff'd. sub nom. *Lira v. v. Herrera* (9th Cir. 2011) 448 Fed. Appx. 699 [2011 U.S. App. LEXIS 17585]; see also the description of conditions at Pelican Bay SHU in *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1280 ["Conditions in the SHU may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time."]'; *id.* at p. 1216 ["the conditions in the SHU are sufficiently severe that they lead to serious psychiatric consequences for some inmates"].)

To the ICC proposing to transfer Cabrera to that dungeon, he reiterated that he knew nothing about the EME because he steered clear of it, and again requested that he be given a polygraph examination to prove the truth of his claims. (Petn., p. 6; Exh. F, p. 4.) The ICC denied his request for a polygraph examination, confirmed the endorsement for transfer to Pelican Bay, and elected to retain Cabrera in SHU at C.C.I. pending transfer. (Petn., p. 6.)

On September 1, 2008, Cabrera submitted an administrative appeal of the ICC denial of his request for a polygraph examination in the face of transfer to the SHU at Pelican Bay as a validated EME associate. (Pet, p. 7 & fn. 4.)

On November 3, 2008, IGI Crouch interviewed Cabrera regarding his appeal that challenged the evidence relied upon to validate him as an EME associate. (Petn., p. 7.) Cabrera again stated that he was not a gang associate; that the artwork in his possession was solely for his Hobby Craft Program; and that he

was unaware of the existence of hidden symbols in his photocopied artwork, much less their significance to a prison gang that had apparently adopted these symbols for their own use. (Petn., p. 7.) Cabrera presented the officers with a collection of art (Exh. J) that had been searched but not confiscated to show that it was thematically indistinguishable from the artwork that had been deemed evidence of his association with the EME. (Petn., p. 7; see Exh. J.) Cabrera explained once more that he possessed the art for art's sake, that the drawings had been copied from approved publications or otherwise had been readily accessible to him, and that administration of a polygraph examination of him would verify these claims. (Petn., pp. 7-8.)

Meanwhile, Cabrera had prepared and submitted his autobiography to satisfy IGI Machado's requirement that he "debrief" in order to secure his release from SHU. (Petn., p. 8.) On February 9, 2009, Cabrera was interviewed by Correctional Counselor (CC-I) Cole, who informed him that his autobiography was "insufficient and needed to be resubmitted" before the Department would consider him as having "debriefed." (Exh. I, p. 2.) Cabrera explained to CC-I Cole that he had "only basic, superficial knowledge pertaining to gangs and had no knowledge as to their activities."[14] (Petn., p. 8.)

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[14] As a prisoner wrongly validated as an EME, the prison's offer to release him if he debriefed was a catch-22, as acknowledged by the former warden at Pelican Bay: "McGrath conceded that there is essentially no recourse for an inmate who is mistakenly validated.

On February 10, 2009, Cabrera appeared before an ICC panel for his 180 day inactive/active review. (Exh. I.) Cabrera repeated his claim of innocence and explained that it was "impossible" for him to successfully debrief because he had no information to divulge other than the 15-page autobiography he submitted that outlined his life. (Petn., p. 8.) Cabrera complained that the ICC did not provide him a statement of reasons why his autobiography was deemed insufficient. (Petn., p. 8.) Cabrera further explained that the Department had compromised his safety and well-being because it had had "branded" him as an EME associate, and that he still requested a polygraph examination to prove that he had never been affiliated with any gang and that he had no knowledge of the symbols used by the EME or other prison gangs. (Petn., pp. 8-9.) The ICC panel reaffirmed Cabrera's placement in SHU. (Exh. I, p. 2.)

Having exhausted his administrative remedies within the Department (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1560), Cabrera filed a petition for writ of habeas corpus in Kern County Superior Court on October 1, 2009 (Case No. 11446A), wherein he challenged the action of the Department validating him as an active associate of the Mexican Mafia Prison Gang (EME). (Exh. L.) On December 2, 2009, the superior court denied Cabrera's petition, explaining: "Given the three valid

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The inmate cannot debrief, because in order to debrief you have to be an actual gang member." (*Lira v. Cate, supra,* 2009 U.S. Dist. LEXIS 91292 at 88.)

sources of gang validation with two direct links to gang members, the classification committee is following the validation criteria set down the by the Office of Correctional Safety.... [Cabrera] provided no credible rebuttal." (Exh. L, p. 5-L.)

On February 19, 2010, Cabrera filed in the Court of Appeal, Fifth Appellate District, the petition for writ of habeas corpus that led to the decision here under review.

On March 9, 2010, the Court of Appeal directed the Attorney General to file an informal response addressing "whether the three source items are independent within the meaning of California Code of Regulations section 3378 and Department of Corrections & Rehabilitations Operations Manual section 52070.19.2." The court granted Cabrera leave from the date of the informal response to submit a reply.

On April 15, 2010, the Attorney General's office filed its informal response wherein it argued that the three items were "distinct source items" "not duplicative" of the same "document or occurrence" because they were "on separate sheets of paper" and were from "two validated Mexican Mafia gang members." (Inf. Resp., p. 2.)

On May 14, 2010, Cabrera filed his reply to that informal response (styled "Informal Response") addressing the unreliability of the drawings for validating him as a gang member, whether considered individually or as a group.

On September 2, 2010, the court directed the Attorney General to file a supplemental informal response addressing the following six questions:

1. Upon what basis did the Institutional Gang Investigator E. Sanchez determine that the source items, consisting of drawings that contain the names of known gang associates or members of the Mexican Mafia at the bottom of the drawings, provide a direct link within the meaning of 15 California Code of Regulations section 3378? Is the mere possession of gang symbols, without more, sufficient to demonstrate a direct link within the meaning of section 3378?
2. Did any of the subject drawings reflect an original signature?
3. What information is available concerning the manner in which petitioner came into possession of the subject drawings?
4. Is the means by which petitioner came into possession of the drawings relevant to the determination whether the three items are direct links to a current gang member or associate?
5. Is the means by which petitioner came into possession of the drawings relevant to the determination whether the three items are independent source items?
6. If the manner in which petitioner came into possession of the drawings is relevant, which party to the administrative proceedings bore the burden of proof on that question?

On September 22, 2010, the Attorney General filed its supplemental informal response wherein it answered those questions as follows:

1. "Possession of the drawings containing the signatures of the validated gang members or associates is enough to demonstrate the direct link under section 3378."

2. "The drawings do not reflect the original signature."
3. "Information regarding where the petitioner obtained the drawings is unavailable."
4. The means by which Cabrera obtained the drawings is "irrelevant to whether it is a direct link" because the "drawing in and of itself provides the direct link to the validated prison gang member or associate."
5. The means by which Cabrera obtained the drawings is "irrelevant to whether it is an independent source item" because each drawing "provides independent evidence of association."
6. Cabrera had "the burden to prove where he got [the pictures]" and the Department had only to prove "a link existed between Cabrera and the validated prison gang associate or member without the addition of any intervening agency or step."

On November 16, 2010, the court filed an order to show cause directing respondent to file a written return why the relief prayed for in Cabrera's petition for writ of habeas corpus should not be granted.

By letter-brief to the Court dated November 12, 2010, but not filed until December 6, 2010, Cabrera submitted his reply to the supplemental informal response (styled as a "Supplemental Informal Response"). Cabrera therein alleged, among other things, that the second source item apparently was signed by "T. Bermudez"; IGI Sanchez, however, identified the author as "Fernando Bermudez," a validated gang member.

On November 24, 2010, the court appointed Melanie K. Dorian as counsel for Cabrera.

On January 14, 2011, respondent filed his return.

On April 15, 2011, Cabrera, through counsel, filed his traverse to the return.

On June 2, 2011, the court directed the parties to address in supplemental briefs "the meaning of certain terms and provisions of ... section 3378," as further explained in the order.

On June 20, 2011, the parties' supplemental briefs were filed pursuant to the court's order.

On July 20, 2011, the court heard oral arguments and the case was submitted.

On September 8, 2011, in a decision ordered to be published, the court granted relief on Cabrera's petition for writ of habeas corpus and directed the Department to "(1) expunge Cabrera's validation as an associate of the Mexican Mafia prison gang, (2) report the expungement to all gang-related law enforcement databases and clearinghouses to which the original validation was reported previously, (3) remove all documents related to the validation from Cabrera's prison file, and (4) cease housing Cabrera in the SHU based on the gang validation." (*In re Cabrera, supra*, 198 Cal.App.4th at p. 1571.)

The court, citing *In re Jenkins* (2010) 50 Cal.4th 1167, *Superintendent v. Hill* (1985) 472 U.S. 445, and its own decision in *In re Furnace* (2010) 185 Cal.App.4th 649, 659, applied the "some evidence" test to the Department's validation of Cabrera as an EME associate. (*In re Cabrera, supra*, 198 Cal.App.4th at p. 1563.) That validation under the

Department's regulation required that it find that Cabrera was "involved periodically or regularly" with EME affiliates. (*In re Cabrera, supra*, 198 Cal.App.4th at p. 1561.)

The court turned to the plain meaning of the terms "direct," "link," and "association" as used in section 3378, subdivision (c)(8)(G). (*Id.* at p. 1564.) The court adopted the definition of "direct" as determined in *In re Furnace, supra*, 185 Cal.App.4th at p. 661, to mean: "without interruption or diversion" and "without any intervening agency or step." (*Id.* at p. 1564.) The court adopted the overlapping definitions of the term "link" as defined by the parties in their briefing to mean "connection," and noted that this determination was "consistent with the way we analyzed the direct link requirement in *Furnace*." (*Id.* at p. 1565.) The court construed the term "association," based on its "examination of the regulatory context and purpose, as well as various dictionary definitions," to mean "a 'loose relationship as a partner, ... colleague, friend, companion, or ally' with a validated gang affiliate." (*Id.* at p. 1565-1566, quoting Webster's 3d New Internat. Dict. (1986) p. 132.)

Finally, the court "combine[d] the definitions" to determine what "direct link" means when the source item is used to establish the inmate's "association with validated gang affiliates," as the Department here used the source items of the two drawings that bore the signatures of validated gang affiliates. (*In re Cabrera, supra*, 198 Cal.App.4th at pp. 1566-

1567.) The court described the resulting combination as follows:

> At least one source item must provide a connection without interruption or any intervening agency or step in the form of a loose relationship between the inmate and the validated gang affiliate. The relationship, whether characterized as one of partners, colleagues, friends, companions, or allies, must involve reciprocal (i.e., mutual or two-way) interaction between the two individuals forming the relationship. In other words, the requisite relationship cannot be created solely by one party's action; there must be some assent or mutuality from the other party.

(*Ibid.*)

Measuring the evidence relied upon by the Department to establish Cabrera's "direct link" to and his association with the EME against section 3378, subdivision (c)(8)(G) accordingly, the court concluded: "Cabrera's possession of a photocopied drawing containing part of the name of a gang affiliate does not establish that Cabrera actually had a mutual relationship, even a loose one, with the artist. Therefore, CDCR has failed to show an "association" constituting a "direct link" between Cabrera and a validated gang affiliate as required by the provisions of section 3378, subdivision (c)." (*Id.* at p. 1568.) The court, "explicitly identifi[ed] the facts material to [its] conclusion": 1) the documents possessed by Cabrera were photocopies, not originals, of the artists' drawings; 2) the artists' original signatures had not been placed on the photocopies; 3) the name

"FERMIN" appears in one drawing and he made the drawing; 4) Fermin Garcia is a validated associate of EME; 5) the name "F. BERMUDEZ" appears in the other drawing and he made the drawing; and 6) Fernando Bermudez is a validated member of EME. (*Id.* at p. 1569.)

Having so concluded, the court found it unnecessary to resolve either the question whether the Department's treatment of the four drawings that were part of Cabrera's art collection as three independent source items was arbitrary, or the question whether Cabrera's placement in SHU violated his First Amendment rights under the United States Constitution as well as his statutory rights under Penal Code sections 2600 and 2601. (*Id.* at p. 1571.) Implicitly, the court also found it unnecessary to determine either the legitimacy of the third source item, or whether Cabrera had adequate notice that the possession of the artwork in question constituted a prohibited association with EME.

In response to respondent's "petition for rehearing and modification of the court's September 8, 2011 opinion," the court filed an "order modifying opinion and denying rehearing [no change in judgment]." In that order, it deleted the disposition of its September 8, 2011, order and replaced it with direction to the Department to "(1) expunge Cabrera's validation as an associate of the Mexican Mafia prison gang, (2) report the expungement to all gang-related law enforcement databases and clearinghouses to which the original validation

was reported previously, and (3) cease housing Cabrera in the SHU based on the gang validation."

On October 19, 2011, respondent filed in this Court a petition for review of the decision as modified.

On October 31, 2011, Cabrera through counsel filed an answer to the petition.

On December 14, 2011, this Court granted the petition for review.

On January 18, 2012, the undersigned was appointed to represent Cabrera in this Court.

On March 16, 2012, respondent filed its opening brief on the merits.

This brief is filed in answer to that opening brief.

* * * * * *

PREFACE TO ARGUMENT

Respondent's opening brief construes the lower court's grant of relief as invalidating the Department's regulation for controlling the identification or validation and consequent lock-up of gang affiliates (section 3378). (See, e.g., Opening Brief, p. 6 ["The regulation should have been upheld"]; *ibid.* ["even if the appellate court properly determined that the regulation was arbitrary, it should have simply stricken the regulation"].) Thus, respondent expends considerable argument on such matters as distinguishing between "interpretive regulations" and "quasi-legislative regulations" in terms of the level of deference accorded each upon judicial review of a regulation's validity. (See, e.g., Opening Brief, pp. 6-8.) In doing so, respondent misconceives the lower court opinion and misdirects much of its argument, for the court never invalidated the Department's regulation.

To the contrary, the court left the regulation fully intact and operative. The court held only that the Department's validation of Cabrera as an EME associate under that regulation lacked some supporting evidence. Specifically, it concluded that under all the attendant circumstances, Cabrera's possession of photocopied drawings by gang affiliates did not meet the regulatory requisites of a "direct link" to and "association with" those affiliates, so that the Department's finding that it did was arbitrary. (See, e.g., *In re Cabrera*, *supra*, 198 Cal.App.4th at p. 1568 ["We conclude that Cabrera's possession of a photocopied

drawing containing part of the name of a gang affiliate does not ... show an 'association' constituting a 'direct link' between Cabrera and a validated gang affiliate as required by the provisions of section 3378, subdivision (c)."]; *id.* at p. 1571 ["Our opinion in the present case stands for the proposition that 'some evidence' of a 'direct link' is not shown by an inmate's mere possession of two photocopied drawings, with photocopied signatures of the gang-validated artist-authors of the drawings."].)

The lower court's holding was no different in nature than this Court's holding in *In re Lawrence* (2008) 44 Cal.4th 1181 that the Governor's finding that the parole applicant met the regulatory requirement of "unreasonable risk of danger"(section 2281 or 2402) justifying deprivation of parole lacked any supporting evidence and was arbitrary under all the attendant circumstances. This Court there did not invalidate the regulation; rather, it enforced the regulation by measuring the evidence against the regulatory standard. (See, e.g., *In re Lawrence*, *supra*, 44 Cal.4th at p. 1205 ["the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety (§ 3041; Regs., §§ 2281, 2402)"].) The same is true of the court below concerning section 3378: it *enforced* that regulation, it did not invalidate it.

For this reason, respondent's extended argument in support of the constitutionality of the regulation is not on point.

For example, citing *In re Jenkins, supra,* 50 Cal.4th at p. 1176, and other cases that reviewed the lawfulness of administrative regulations, respondent argues that "CDCR's judgment in adopting its validation regulation is ... entitled to deference, and must stand unless it is beyond CDCR's statutory authority, or is arbitrary and capricious." (Opening Brief, p. 7; see also *id.* at pp. 10, 12, and 13 [citing *Jenkins*].) But unlike the case at bar, the petitioner in *Jenkins* challenged the validity of the regulation that authorized the action the Department took against him:

> [T]he issue is squarely presented: Must the inmate actually participate in a work program to receive classification credit for such participation? Or, conversely, is it sufficient if the inmate is willing to work and is unassigned through no fault of the inmate? Section 3375.4, subdivision (a)(3)(B), quoted in the previous paragraph, unambiguously answers the former question in the affirmative and the latter in the negative. Petitioner contends, however, that the regulation is invalid on various grounds.

(*In re Jenkins, supra,* 50 Cal.4th at p. 1174.)

Also unlike the case at bar, the evidentiary support for application of the regulation to the petitioner was not at issue in *Jenkins*, as the following excerpt from that case also makes clear:

> California courts have applied the "some evidence" test to adverse classification actions. [Citations.] Here, however, the relevant facts are undisputed. Section 3375.4, subdivision (a)(3)(B), provides that inmates who are not

> assigned to a program shall be not granted favorable performance points. Petitioner does not deny that he was unassigned for approximately half of the review period. The only dispute is the legal significance of this fact. Accordingly, if section 3375.4, subdivision (a)(3)(B), is valid—a legal issue that is disputed—then clearly some evidence supports the finding that petitioner is not entitled to the favorable score at issue here.

(*In re Jenkins*, 50 Cal.4th at p. 1176.)

In re Andrade (2006) 141 Cal.App.4th 807 aptly illustrates Cabrera's point that the instant case concerns the interpretation of a regulation, not its lawfulness. In *Andrade*, the court rejected the parole board's "determin[ation] that California parole plans were necessary" to establish suitability for a parole applicant subject to deportation. (*Id.* at p. 815.) In finding such plans were necessary, "the Board was implicitly construing section 2402, subdivision (d)(8) of title 15 of the California Code of Regulations, which indicates that the Board should consider whether 'the prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.'" (*Id.* at p. 815, quoting the regulation (brackets in quote deleted).) The court thereupon explained: "The Board's interpretation of its own regulations is accorded great weight. Nonetheless, it remains subject to judicial review to determine if the Board's interpretation is clearly erroneous." (*Ibid.*) Relying on "the plain language of the regulation" (*id.* at p. 817), bolstered by dictionary "definitions ... in accord with the

common usage of the word ['realistic']" (*id.* at p. 816), the court found that "the Board is holding [the parole applicant] to a higher standard than the standard required by California Code of Regulations, title 15, section 2402." (*Id.* at p. 817.) Accordingly, the court concluded that the Board arbitrarily applied its own regulation to find that the parole applicant's failure to develop California parole plans was a circumstance of parole unsuitability, for no evidence supported that finding.

In the case at bar, the lower court similarly concluded that the Department's interpretation of the regulation was unreasonable and clearly erroneous when applied to the evidence at hand, resulting in a determination that lacked any supporting evidence and thus was arbitrary and capricious. Indeed, the court below couched its holding as follows: "Having considered the California Supreme Court's discussion in *In re Jenkins*, we again conclude that the 'some evidence' test applies to our inquiry into the sufficiency of the evidence supporting the findings made by prison officials in applying section 3378, subdivision (c)(4) to an inmate." (*Cabrera* at p. 1563.)[15]

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[15] The lower court had earlier noted that this Court in *Jenkins* had acknowledged that the "some evidence" test applied to judicial review of classification actions, but had not used it there because *Jenkins* concerned a "determine[ation] whether a regulation was valid under the due process requirements of the United States and California Constitutions. (*In re Jenkins*, at p. 1176.)" (*In re Cabrera*, 198 Cal.App.4th at p. 1563.) The lower court further explained that *Jenkins* tested the constitutionality of the regulation by determining whether it was "arbitrary, capricious, irrational, or an abuse of discretionary authority" (*ibid.* at p. 1176). That determination is functionally equivalent to the "some evidence" test.

Respondent's protest that "the appellate court erred in affording no deference to CDCR's authority or expertise" (Opening Brief, p. 6) is empty, for it overlooks the fact that the some-evidence test is a deferential one. As the lower court explain in *In re Furnace, supra,* 185 Cal.App.4th at p. 659, where it first used the some-evidence test to review the lawfulness of validation of an inmate as a gang affiliate: "Judicial review of a Department custody determination is limited to determining whether the classification decision is arbitrary, capricious, irrational, or an abuse of the discretion granted to those given the responsibility for operating prisons." The some-evidence test that the lower court used here thus provided the level of deference that respondent urges was missing in that court's consideration of the case. (See, e.g., *In re Shaputis* (2003) 53 Cal.4th 192, 199 ["The 'some evidence' standard, which we articulated in *In re Rosenkrantz* (2002) 29 Cal.4th 616 and refined in *In re Lawrence* (2008) 44 Cal.4th 1181, is meant to serve the interests of due process by guarding against arbitrary or capricious [agency] decisions without overriding or controlling the exercise of executive discretion."]; see also *Shaputis* at p. 215 ["The 'some evidence' standard is intended to guard against arbitrary [agency] decisions, without encroaching on the broad authority granted to the [agency]."].)

Respondent's argument that the lower court "simply substituted, in derogation of CDCR's expertise and responsibility, its own judgment" (Opening Brief 10) of whether

the evidence met the regulation's requirement reduces itself to the argument that a court must accept that the evidence met the regulatory requirements because the CDCR said it did. However deferential may be the test for some evidence, the lower court here properly recognized that it does not require a court to abjectly bow to the administrative determination. (See *In re Cabrera, supra,* 198 Cal.App.4th at p. 1569, citing *In re Lawrence, supra,* 44 Cal.4th at p. 1213 for the proposition that the "'some evidence' standard requires more than a hunch or intuition.")

Indeed, what this Court said about application of the some-evidence test to parole determinations applies equally to gang validations. There must be an appropriate balance between "deference ... and meaningful review ...." (*In re Lawrence, supra,* 44 Cal.4th at p. 1206.) Moreover, "judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*Id.* at p. 1211.) And the deferential nature of judicial review of the Department's validation of a prisoner as a gang affiliate "does not convert a court reviewing the [validation] into a potted plant." (*Id.* at p. 1212.) Finally, "[t]his standard is unquestionably deferential, but certainly is not toothless." (*Id.* at p. 1210.) At bottom, as reiterated in *Shaputis II, supra,* 53 Cal.4th at p. 221, "the court considers whether there is a rational nexus between the evidence and the ultimate determination" — here, of gang association.

As set forth below, there is no rational nexus from the evidence of Cabrera's private collection of Aztec artwork to the Department's validation of him as a gang associate, which requires a showing that he is "involved periodically or regularly" with gang affiliates. Thus, the Department's validation of him as a gang associate was arbitrary. For this reason and others, as detailed more fully below, the Court should affirm the Court of Appeal's grant of habeas relief to Cabrera.

ARGUMENT

THIS COURT SHOULD AFFIRM THE GRANT OF RELIEF ORDERED BY THE COURT OF APPEAL BECAUSE THAT COURT CORRECTLY HELD THAT THE DEPARTMENT'S VALIDATION OF CABRERA AS AN EME AFFILIATE BASED ON HIS PHOTOCOPIED COLLECTION OF AZTEC ARTWORK LACKED SUPPORTING EVIDENCE AND WAS OTHERWISE ARBITRARY.

Respondent asserts that "Cabrera's validation illustrates the rationality" of the Department's interpretation of section 3378 (Opening Brief, p. 11), but in fact it illustrates the irrationality of it. As explained more fully below, it was irrational for the Department to conclude that Cabrera — a 44-year-old Cuban at the time who had been a fully conforming mainline prisoner for many years, without a hint of gang involvement during his incarceration or in his prior history whether on the street or in prison, and who was in his cell minding his own business when an assault on staff caused the

"swift response" of intensive search of the housing unit for gang members — was "a Mexican Mafia associate ... based on several photocopied drawings containing symbols distinctive of that prison dang discovered in his cell" during that search. (Opening Brief, p. 2.) Rather, his identification as one of thirty identified in that sweep as gang affiliates was an exaggerated response[16] not only to the assault but also to the discovery of those photocopied drawings among his collection of Aztec drawings. Cabrera's private possession of those drawings failed to show that he was "involved periodically or regularly" with EME affiliates – the ultimate finding that the Department needed to make to lock him up indefinitely as a threat to institutional security.

A. The Court Correctly Found that Cabrera's Possession of Two Photocopied Drawings Bearing the Artist's Signature of Validated Gang Affiliates Among His Extensive Collection of Drawings Failed to Establish the "Direct Link" to Those Affiliates Required by the Regulation.

"[T]he 'direct link' term used in section 3378 is not defined by statute or regulation." (*In re Cabrera, supra,* Cal.App.4th at p. 1562.) The parties agreed, as did the court below, that "[t]he term 'link used in subdivision (c)(4) means

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[16] "[J]udgments regarding prison security 'are peculiarly within the province and professional expertise of corrections officials, and, *in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations,* courts should ordinarily defer to their expert judgment in such matters.' [Citation.]" (*Turner v. Safley* (1987) 482 U.S. 78, 86.)

'connection.'" (*Id.* at p. 1565.) The Department stretched that term to the point of distortion to conclude that Cabrera's possession of a copy of a piece of artwork by a gang affiliate provided a "direct link" to the artist, or "a straight-forward connection between the inmate being considered for validation and a validated affiliate." (Opening Brief, p. 9.)

The Court of Appeal properly rejected that interpretation in its narrow holding here, which it explained as follows:

> Our opinion in the present case stands for the proposition that "some evidence" of a "direct link" is not shown by an inmate's mere possession of two photocopied drawings, with photocopied signatures of the gang-validated artist-authors of the drawings. We reject CDCR's position ... that an inmate's mere possession of a gang affiliate's photocopied signature is enough to show a direct link between the inmate and the affiliate.

(*In re Cabrera, supra*, 198 Cal.App.4th at p. 1571.)

The Court of Appeal illustrated the absurdity of the CDCR's position by likening it to a claim that a prisoner's possession of "a photocopy of a painting signed by David Hockney, a drawing or watercolor signed by Adolf Hitler (perhaps the most infamous failed artist of the 20th century), or a Doonesbury cartoon containing Garry Trudeau's signature" would support the inference that the prisoner was directly linked to or had some kind of direct connection to or relationship with one of those artists. (*In re Cabrera, supra*, 198 Cal.App.4th at p. 1569.) Emphasizing that the CDCR had

no information that the artist, an agent of the artist, or for that matter any gang affiliate had given the photocopy of the drawing to Cabrera, the Court of Appeal correctly reasoned that "[c]oncluding the inmate actually had a mutual relationship [or any personal involvement with] these artists would be based merely on speculation or hunch. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1213 ['some evidence' standard requires more than a hunch or intuition].) Thus, as a matter of law, there is not 'some evidence' to support the validation. [Citation.]" (*Id.* at p. 1569 (parallel citations omitted); see also *In re Shaputis, supra,* 53 Cal.4th at p. 211 ("when the evidence ... leads to but one conclusion" a court may "overturn a contrary decision by the" agency].) Here, because the evidence leads to but one conclusion – that there was no direct link or involvement signifying association between Cabrera and the artists – the lower court correctly overturned the Department's determination otherwise.

As respondent argues, "Requiring a simple direct link ... 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." (Opening Brief, p. 9.) Respondent here overlooks the fact that the Department has construed Cabrera's possession of the photocopied drawings by the gang affiliates as providing a direct link not simply of general allegiance to the gang, but of specific association with those gang affiliates. Notably, the lower court here also accepted

the CDCR's definition of association in this context: namely, here "'association' means to have a 'loose relationship as a partner, fellow worker, colleague friend, companion, or ally' ...." (*In re Cabrera, supra,* 198 Cal.App.4th at pp. 1565-1566.) Thus, "when the association criterion in subdivision (c)(8)(G) of section 3378 is used to meet this direct link requirement, the resulting combination can be described as follows: At least one source item must provide a connection without interruption or any intervening agency or step in the form of a loose relationship between the inmate and the validated gang affiliate." (*Id.* at pp. 1566-1567.)

The record here discloses a complete absence of evidence of any kind of relationship, loose or otherwise, between the artists and Cabrera, for there is no evidence that either was even aware of the other, let alone that they had any kind of contact with one another. There simply is no evidence of even the loosest relationship between them. The possession of the photocopied drawings by identified affiliates is no evidence of any association between them and Cabrera, just as Cabrera's possession of the photocopied drawing by Mary Trujillo – used by the Department as a source item of an EME symbol (see Return, Exh. 4, pp. 1 & 3) – provides no evidence of an association or relationship between Cabrera and Trujillo. Thus, the Department's determination that "[t]he direct link for Cabrera's validation was supplied by the drawings bearing the names of Mexican Mafia affiliates" (see Opening Brief, p. 3) is

as faulty as would be a determination that Cabrera's possession of the photocopied drawing by Mary Trujillo constituted "a direct link" between them.

Respondent focuses on the court's elaboration on the meaning of "association" in this context to undermine its holding: "[T]he 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." (Opening Brief, p. 10.) It is unclear what respondent's critique of the Court of Appeal's reasoning here is. Whether one calls the associational relationship reciprocal, mutual, or some other adjective that connotes the participation or assent of both parties, a direct link between a gang affiliate and another can hardly be asserted without evidence of some interaction between them, no matter how attenuated. "Under CDCR's analysis, ... the inclusion of the gang affiliates' names supplied a straight-forward connection between Cabrera and those affiliates." (Opening Brief, p. 3.) The problem with CDCR's analysis is that there was no evidence of any connection between them — straight-forward, loose, or otherwise — that brought them together as partners, friends, colleagues, comrades, associates, or what-have-you.

Respondent's attack on the "mutuality" aspect of the regulatory requirement of a direct link when used as a source item of association is a red herring. This can be seen by omitting the concepts of reciprocity, mutuality, unilateral, etc.

from the court's discussion of "what is meant by 'direct link' when the source item used is the inmate's 'association with validated gang affiliates.' (§ 3378, subd. (c)(8)(G).)" (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1566.) Cabrera does so here, to wit:

> [W]hen the association criterion in subdivision (c)(8)(G) of section 3378 is used to meet this direct link requirement, the resulting combination can be described as follows: At least one source item must provide a connection without interruption or any intervening agency or step in the form of a loose relationship between the inmate and the validated gang affiliate. The relationship, whether characterized as one of partners, colleagues, friends, companions, or allies, must involve ... interaction between the two individuals forming the relationship....

(*In re Cabrera, supra,* 198 Cal.App.4th at pp. 1566-1567.) In sum, the court reasonably construed the regulation to require some evidence of interaction between the two when a source item identified as a "direct link" is being used to show their association. Again, "CDCR asserts the appropriate definition of the word 'association' [in this context] ... means to have a 'loose relationship as a partner, fellow worker, colleague, friend, companion, or ally' with gang affiliates." (*Id.* at p. 1565.) Here, because there was no showing of any contact or interaction between Cabrera and the artists in question, the drawings failed to establish any kind of association with or relationship between the two.

Again, there is no evidence that Cabrera knew the authors/artists of the photocopied drawings in his possession signed by Fermin Garcia (Exh. A) or Fernando Bermudez (Exh. B) any more than he knew Mary Trujillo of La Puente, California, the artist who drew the Eternal War Shield published in *Lowrider Magazine* (Inf. Resp. filed 4-15-12, Exh. 4, p. 3), or the anonymous artist who drew the "Matlactlomei" symbol embedded in the sombrero of the young woman in that drawing (Exh. C). Nor was there evidence that Cabrera had any kind of relationship or interaction with the artists of any of the other photocopied drawings in his collection of Aztec artwork. (See Exh. J [18 pages of artwork in Cabrera's possession at time of Operation Swift Response].) As the Court of Appeal explained:

> If a prisoner had a photocopy of a painting signed by David Hockney, a drawing or watercolor signed by Adolf Hitler (perhaps the most infamous failed artist of the 20th century), or a Doonesbury cartoon containing Garry Trudeau's signature, that photocopy would not adequately support the inference that the prisoner had a ... relationship with Hockney, Hitler, or Trudeau. Concluding the inmate actually had a ... relationship with these artists would be based merely on speculation or hunch. (See *In re Lawrence,* [*supra,* 44 Cal.4th at p. 1213] ["some evidence" standard requires more than a hunch or intuition].)

(*In re Cabrera, supra,* 198 Cal.App.4th at p. 1569 [ellipses replacing "mutual" throughout].)

Support for the court's decision that Cabrera's possession of the photocopied artwork in question did not provide any evidence that he had any kind of direct link to or relationship with the affiliated authors of the original artwork that served to validate him as an active gang affiliate is bolstered by consideration of all the facts surrounding his possession of them, including:

- The drawing by Garcia was made in 2000, some three years before his validation and some eight years before it was used for Cabrera's validation.[17]
- Bermudez, to whom the undated drawing was ascribed, has been locked up as an affiliate since

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[17] Notably, if the Department had discovered a photograph dated 2000 of Cabrera and Garcia smiling arm-in arm, it could not have used it as a source item because Garcia at that time and for the six months thereafter had not been validated as an affiliate. (See § 3178, subd. (c)(8) ["Any photograph being utilized as a source item that depicts gang members and/or associates shall require that at least one of the individuals be previously validated by the department, or validated as a member or associate of the gang by the department within six (6) months of the photograph's established or estimated date of origin."].) Indeed, even if that photograph depicted them as also flashing gang signs with "EME Forever" emblazoned in the background, the Department could not use it as a source item due to its staleness. (See *ibid.* ["No photograph shall be considered for validation purposes that is estimated to be older than six (6) years."].) Given these regulatory constraints, it was arbitrary for the Department to use the considerably more indirect and attenuated evidence of the names on the photocopied drawings in question as source items establishing "direct links" to and association with the named affiliates.

1995 – years and years before Cabrera was even committed to prison.

- Cabrera has no history of prison or street gang affiliation.
- Cabrera's conduct has been fully conforming for years in the prison's main population on his current term, without any suggestion of gang affiliation.
- Cabrera was 44 years old at the time he was validated, an age well beyond that of typical gang recruits.
- The drawings in question had been subjected to repeated inspection by prison officials without any suggestion of gang concern on their part or warning to dispose of those pictures.
- Cabrera is not even Mexican, but Cuban.
- There was no overt EME connotation on the face of the drawings recognizable by anyone lacking specialized or esoteric knowledge of the EME.
- Cabrera was a longtime participant in the prison art program, in connection which he had amassed a collection of ancient and modern Aztec drawings that numbered more than a hundred, including the four drawings in question that were thematically consistent with the others in to his collection.

- Not a single report, whether from a confidential informant or otherwise, ever has tied Cabrera to gang association or gang activity.
- The Department refused his many requests for a polygraph examination.
- Cabrera sought to avoid the gang validation by practically the only route available to him – debriefing with an autobiography of his criminal activity.

Respondent argues that "the court's opinion requires evidence equivalent to a handshake between an inmate and a gang affiliate to show a direct link" and that such a requirement does not account for the fact that "[o]bscuring activiies and interactions is a basic goal for any criminally oriented group." (Opening Brief, p. 12.) That argument is greatly overstated.

The court's decision does not require evidence that would "impede CDCR in its critical effort to combat prison-gang activity" (Opening Brief, p. 13), for that decision was expressly limited to the following fact pattern:

> To avoid ambiguity in the precedent established by this opinion, we explicitly identify the facts material to our conclusion.
>
> First, the following material facts were included in the information contained in the general chronos: (1) The documents possessed by Cabrera were photocopies, not originals, of the artists' drawings, (2) the artists' original signatures had not been placed on the

> photocopies, (3) the name "FERMIN" appears in one drawing and he made the drawing, (4) Fermin Garcia is a validated associate of the EME, (5) the name "F. BERMUDEZ" appears in the other drawing and he made the drawing, and (6) Fernando Bermudez is a validated member of EME.
>
> Second, the following omissions of information are material to this case. The general chronos did not document or disclose the basis of a relationship between Cabrera and either artist.

(*In re Cabrera, supra,* 198 Cal.App.4th at p. 1569.)

The court's explicit identification of the facts material to its conclusion gives the Department free reign to exercise its judgment in any other case with different material facts. Indeed, the court noted that judicial review of a gang validation regulation must be based on the "circumstances" of each individual case and asks the question whether those particular facts "supported the inference of [gang] involvement." (*Id.* at p. 1570.) In short, while a court gives deference to the "professional judgment of prison administrators," it does not give controlling deference to their judgment of "how the regulation should function" (Opening Brief, p. 13) when that judgment has caused an arbitrary and capricious deprivation of liberty.

B. The Department Arbitrarily Found That the Aztec Drawings Containing Mesoamerican Symbols Common to that Culture Were an EME Source Item Here Simply Because the EME Had Appropriated Them.

The arbitrariness of the Department's application of section 3378, subdivision (c) to validate Cabrera is also revealed by its finding of the third "source item" in the other two drawings that contained symbols it ascribed to the EME. The third CDC form 128-B used to validate Cabrera (Exh. C) concerned photocopies of two drawings. Each drawing contains one symbol (a Matlactlomei and an Eternal War Shield, respectively) that are known *by the Department* "as being symbolic to membership/association with the Mexican Mafia." (Opening Brief, p. 1; see also *In re Cabrera, supra,* 198 Cal.App.4th at pp. 1558-1559.) "Cabrera obtained the copy of the drawing containing the war shield symbol by photocopying it directly from *Lowrider Magazine*, a publication allowed to be received by any CCI inmate." (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1559.) Like the Eternal War Shield, the Matlactlomei is a common symbol of the ancient Aztec culture.

It was manifestly arbitrary for the Department to allow Cabrera to receive artwork from such sources as *Lowrider Magazine* and then turn around to use copies of that same artwork as evidence he wrongly possessed indicia of the EME. (See § 3134.1 ["All magazines and newspapers shall be inspected prior to issuance to ensure that they comply with sections 3006 [disallowance of "contraband" that tends to incite

any form of violence or physical harm to any group or "contains coded messages"]; 3134 [General Mail Regulations] and 3135 [disallowance of any mail that tends to incite any form of violence or physical harm to any group or "contains coded messages"].) Under section 3378, subdivision (c)(8)(B), such symbols must be "*distinctive* to specific gangs" and "*distinctive* of gang association or membership"].) Because the symbols in the drawing here at issue here were distinctive of the Aztec culture and simply appropriated by the EME, Cabrera's mere possession of them did not reliably show EME association. (See, e.g., *Lira v. Cate, supra*, 2009 U.S. Dist. LEXIS 91292 at 61 [given "the fact that the Huelga bird and the number '14' are symbols associated with Mexican-Americans and not exclusive to the Northern Structure, the drawing was not a reliable validation source"]; see also *ibid.* ["[T]he Court finds that the drawing does not contain a Northern Star, and that the other symbols — the '14' and the Huelga bird — are obscure and of ambiguous meaning. The Court finds that the drawing is not reliable evidence of plaintiff's affiliation with the Northern Structure prison gang."].) Particularly in Cabrera's case, where these drawings were among numerous other drawings in his collection distinctive of the Aztec culture but unrelated to the EME, was the Department's finding that these two drawings comprised a source item of EME association arbitrary.

For these reasons, the symbols in the two drawings comprising source item three fail to reliably indicate Cabrera's

allegiance to or association with the EME. Thus, the drawings fail as a source item – leaving the Department without the requisite three source items necessary under its regulation to validate Cabrera as an EME associate. This failure of evidence is sufficient to sustain the lower court's finding that the Cabrera's validation met neither the regulatory nor the constitutional requirements for validation and thus could not stand. That finding entitled him to the relief granted him under the judgment, even if the other two items are deemed reliable "direct links" associating him with the EME.

C. Validation of Cabrera Based on His Collection of Artwork Did Not Meet the Regulatory Requirement that Validation Must Be Based on Three *Independent* Source Items.

"The quantity of evidence that the investigator needs to identify an inmate as a gang member or associate is specified in the regulation. ... The identification of an inmate as a gang associate 'requires at least three (3) independent source items of documentation indicative of association with validated gang members or associates.... (§ 3378, subd. (c)(4).)" (*In re Cabrera, supra,* 198 Cal.App.4th at p. 1561.) The Court of Appeal found it unnecessary to address the question whether Cabrera's art collection comprised one source item or three source items, since its conclusion of a lack of a "direct link" was dispositive of Cabrera's entitlement to relief; it accordingly found that resolution of that question could "await another day." (*Id.* at p. 1571.) Cabrera submits that day has come in the

event that this Court finds that the artwork included a direct link to an EME affiliate, since the lack of three source items would equally entitle Cabrera to the relief he requested. Accordingly, he addresses that question here.[18]

In fact, there is a single source item here; namely, Cabrera's photocopied collection of Aztec ancient and modern art drawings. It was arbitrary for the Department to artificially divide up that collection into three separate source items to meet its regulatory obligation to "ensure that the identification of an inmate/parolee as a currently active gang member or associate is supported by at least three *independent* source items ...." (§ 3378, subd. (c)(2) (emphasis added).)

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[18] Cabrera raised this issue in his answer to the petition for review, asking that "this Court also consider the issues the Court of Appeal did not decide," including specifically "whether the drawings found in petitioner's possession constituted three independent source items ...." (Answer, p. 8.) (Compare *In re Rosenkrantz* , *supra*, 29 Cal.4th at p. 636 [noting the "petitioner did not timely raise the point in his answer to the Governor's petition for review," citing Cal. Rules of Court, rule 28(e) (now Rule 8.516)].) Even if Cabrera had not raised the issue in his answer brief, "it is appropriate to exercise our discretion to resolve this issue" (*ibid.*) for the same reasons the Court found it appropriate to do so in *Rosenkrantz*. First, it is "a threshold question that logically precedes the question" before the Court, since the absence of three source items would render moot the question whether any of them included a "direct link" of "association." (*Ibid.*) Second, the "question is an important one that affects not only the present case but [potentially] numerous other[s]." (*Id.* at p. 637.) Lastly, "the issue properly may be decided as a matter of law. Under the circumstances, we believe that the administration of justice would not be served by leaving this issue unresolved at this juncture." (*Ibid.*)

To the degree that this one body of evidence could be broken down into separate source items of "tattoos or symbols" (the drawings containing the common ancient Mesopotamia or Aztec symbols appropriated by the EME) and "association" (the drawings containing the names of EME affiliates), there still would be but *two* independent source items. Yet, the Department divided the latter drawings, making two source items out of one, because the drawings contained two different names. That was as artificial a separation as dividing three names on a list into three separate source items.

D. Cabrera Had No Notice That His Possession of These Four Exemplars of Aztec Art Was Prohibited or Otherwise Exposed Him to Validation as an EME Affiliate.

Cabrera had no notice that the four photocopied exemplars of Aztec art at issue here were prohibited gang-related items or otherwise could be used by the Department to validate him as EME affiliate. This provides another basis to affirm the judgment of the Court of Appeal.[19]

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[19] Cabrera complained in his petition and throughout the litigation of the lack of notice in violation of due process that his possession of these four drawings exposed him to validation as an EME affiliate. Having otherwise granted him relief, the Court of Appeal found it unnecessary to address this issue. Because it is another "threshold question," closely connected to if not contained within the issue presented in this case, this Court should address the merits of it as it finds appropriate and necessary to resolution of the cause. (See *In re Rosenkrantz, supra*, 29 Cal.4th at p. 636, as discussed in the preceding footnote; see also Cal. Rules of Court, rule 8.516, subd. (b)(1) ["The Supreme Court may decide any issues that are raised or fairly included in the petition or answer"].)

A bedrock principle of fundamental fairness protected by the Due Process Clause is that the government may not take a person's liberty from him for conduct that it has not clearly proscribed. (See, e.g., *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 ["we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"]; *Colten v. Kentucky* (1972) 407 U.S. 104, 110 ["the root of the vagueness doctrine is a rough idea of fairness"].)

"Though ... due process requirements might be less stringently applied when judging prison regulations, it is obvious that the notice afforded [Cabrera] fell far short of ... [the] continuing requirement that inmates be free to steer away from prohibited conduct, unentangled by the trappings of poorly delineated prison regulations." (*Rios v. Lane* (7th Cir. Ill. 1987) 812 F.2d 1032, 1038-1039.) As stated in *Adams v. Gunnell* (5th Cir. Tex. 1984) 729 F.2d 362, 369-370:

> Balanced against the needs of the institution, ... is the fundamental requirement that persons be able somehow to avoid conduct that will lead to severe sanction. Because "legalistic wrangling" over the meaning of prison rules "may visibly undermine the prison administration's position of total authority," federal courts have deferred to the interpretation of those rules by prison authorities "*unless fair notice was clearly lacking*." [Citation.]

(Emphasis supplied; brackets in quote deleted.) As in that case, here also, "basic due process was violated by the eventual imposition of severe punishment for conduct no inmate could have known was against prison rules." (*Id.* at p. 370.)

Cabrera "was given no prior warning that his conduct might be proscribed" (*Rios v. Lane, supra*, 812 F.2d at p. 1038), whether verbally or by written regulation. Section 3378 hardly gave him such warning, for it lacked notice of who the affiliates of the EME were; that the names on the drawings could be identified as affiliates; and that the particular Mesoamerican symbols embedded in the anonymous drawings had been appropriated by the EME. Given that it took a gang expert to explain the hidden significance of the symbols at issue, which were innocuous to the casual observer and without gang connotation on its face or in the context of the drawing, there was no basis for the Department to assume that Cabrera knew their significance to the EME. The Department's failure to publish the gang significance of these symbols or issue some kind of caveat emptor concerning their possession estops it from holding Cabrera accountable for possession of the drawings containing them.

Curiously, as much as the Department desires that other inmates not associate or have any contact with or connection to gang affiliates, they do not publish the names of validated gang inmates as persona non grata. Such publication would serve to both avoid inadvertent association and deter purposeful

association with validated gang associates. Likewise, as much as the Department wishes to minimize inmate possession of gang symbols that show allegiance to or standing in a gang, the Department has not published any such gang symbols to prohibit their possession or otherwise deter their use for gang purposes. Rather, it is given that no directive banned Cabrera from possession of any of the four drawings at issue, or from a connection to any identified EME affiliate. What is a conforming inmate concerned with staying on the right side of authorities to do under these circumstances? The Department gave Cabrera, by all appearances one such inmate, no clue before his validation and lock-up.

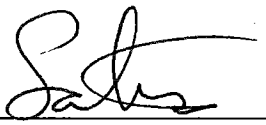
* * * * * *

CONCLUSION

For these reasons, this Court should affirm the judgment of the Court of Appeal.

Dated: April 20, 2012

Respectfully submitted,



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ELVIN CABRERA

California Supreme Court, Case No. S197283
Court of Appeal, Fifth Appellate District, Case No. F059522
Kern County Superior Court No. HC011446A
In re Elvin Cabrera

CERTIFICATE OF APPELLATE COUNSEL

I, Michael Satris, appointed counsel for Elvin Cabrera, hereby certify, pursuant to rule 8.520 (c)(1) of the California Rules of Court, that I prepared the foregoing Answer Brief on the Merits on behalf of my client, and that the word count for this answer, including footnotes, is 13,575 words. This answer to petition for review therefore complies with the rule, which limits a petition for review or answer to petition for review to 14,000 words. I certify that I prepared this document in Microsoft Word 2003, and that this is the word count Microsoft Word generated for this document.

Dated: April 20, 2012

MICHAEL SATRIS

Attorney for Elvin Cabrera

(B) After at least one (1) year at Close A Custody, an inmate verified to be subject to an active law enforcement hold for an offense that could result in sentencing to a Total Term of Life or a determinate term or Total Term of fifteen (15) years or more shall be Close B Custody until the hold is removed.

(6) Disciplinary History. An inmate whose disciplinary history includes any of the criteria described in this subsection shall require Close B Custody:

(A) An inmate found guilty of an in custody serious RVR for the Murder of a Non–Inmate or convicted of Murder of a Non–Inmate shall require Close A Custody during his or her remaining term after release from SHU. The inmate shall be ineligible for Close B Custody or any reduction of custody.

(B) Upon completing at least six (6) years at Close A Custody, an inmate found guilty of an in custody serious RVR for the Murder of an Inmate or convicted of Murder of an Inmate shall serve the subsequent four (4) years at Close B Custody before he or she shall be eligible for consideration of further reduction of custody.

(C) An inmate found guilty of a Division A–1 or Division A–2 serious RVR, as set forth in CCR Section 3323, or who is determined by a classification committee to demonstrate a pattern of, or a continuing propensity for, violence, escape or narcotic distribution, shall serve two (2) years at Close B Custody before he or she shall be eligible for consideration of further reduction of custody.

(D) An inmate designated as a former gang member ("dropout") shall be required to undergo a period of observation and be designated by classification committee action as a Close B Custody inmate for one (1) year before he or she shall be eligible for consideration of further reduction of custody.

(7) Notoriety. After at least five (5) years at Close A Custody, an inmate designated as a Public Interest Case or determined to have High Notoriety shall serve at least five (5) years in Close B Custody before consideration of further reduction of custody.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; *Americans With Disability Act (ADA)*, 42 U.S.C. § 12131, et seq.; and *Pennsylvania Department of Corrections v. Yeskey* (1998) 524 U.S. 206.

HISTORY

1. New section filed 3–27–2000 as an emergency; operative 3–27–2000 (Register 2000, No. 13). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 9–5–2000 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 3–27–2000 order transmitted to OAL 9–5–2000; disapproval and order of repeal and deletion repealing section by operation of Government Code 11346.1(g) filed 10–18–2000 (Register 2000, No. 42).
3. New section filed 10–19–2000 deemed an emergency pursuant to Penal Code section 5058(e); operative 10–19–2000 (Register 2000, No. 42). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 3–27–2001 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 10–19–2000 order, including further amendment of section and NOTE, transmitted to OAL 3–27–2001 and filed 5–3–2001 (Register 2001, No. 18).

§ 3378. Documentation of Critical Case Information.

(a) Any information regarding an inmate/parolee which is or may be critical to the safety of persons inside or outside an institution shall be documented as required below on a CDC Form 812 (Rev. 8/01), Notice of Critical Case Information—Safety of Persons (Nonconfidential Enemies); a CDC Form 812–A (9/92), Notice of Critical Information—Prison Gangs Identification; CDC Form 812–B (9/92), Notice of Critical Information—Disruptive Group Identification; and CDC Form 812–C (Rev. 8/01), Notice of Critical Information—Confidential Enemies. The CDC Forms 812, 812–A, 812–B, and 812–C and all documents referred to on the forms shall be filed in the central file of each identified inmate/parolee. Any confidential material affecting the critical case factors of an inmate/parolee shall conform to the provisions of section 3321. Entries on these forms shall not be a substitute for detailed documentation required elsewhere in the central file.

(b) A CDC Form 812, and when applicable a CDC Form 812–C, shall be completed for each newly committed or returned inmate/parolee.

(1) The CDC Forms 812 and 812–C shall be updated as any critical information becomes known and is documented in the inmate/parolee's central file. The forms shall also be reviewed and updated at the time of any change in the inmate/parolee's status or placement.

(2) Any inmate/parolee who claims enemies shall provide sufficient information to positively identify the claimed enemy. Any inmate/parolee identified as an enemy shall be interviewed unless such interview would jeopardize an investigation or endanger any person. The results of the interview or investigation which supports, verifies or disproves the information shall be documented on a CDC Form 128–B, General Chrono.

(3) Notations on the CDC Forms 812 and 812–C, or absence thereof, shall not be the sole basis for a staff decision or action which may affect the safety of any person.

(c) Gang involvement allegations shall be investigated by a gang coordinator/investigator or their designee.

(1) CDC Form 812–A or B shall be completed if an inmate/parolee has been verified as a currently active member/associate, inactive member/associate or dropout of a gang (prison gang or disruptive group) as defined in section 3000. Current activity is defined as any documented gang activity within the past six (6) years consistent with section 3341.5(c)(5).

(2) Information entered onto the CDC Form 812–A or B shall be reviewed and verified by a gang investigator to ensure that the identification of an inmate/parolee as a currently active gang member or associate is supported by at least three independent source items in the inmate/parolee's central file. The independent source items must contain factual information or, if from a confidential source, meet the test of reliability established in section 3321. The verification of an inmate/parolee identified as a gang dropout shall require a formal debriefing conducted or supervised by a gang investigator.

(3) A member is an inmate/parolee or any person who has been accepted into membership by a gang. This identification requires at least three (3) independent source items of documentation indicative of actual membership. Validation of an inmate/parolee or any person as a member of a prison gang shall require at least one (1) source item be a direct link to a current or former validated member or associate of the gang, or to an inmate/parolee or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered.

(4) An associate is an inmate/parolee or any person who is involved periodically or regularly with members or associates of a gang. This identification requires at least three (3) independent source items of documentation indicative of association with validated gang members or associates. Validation of an inmate/parolee or any person as an associate of a prison gang shall require at least one (1) source item be a direct link to a current or former validated member or associate of the gang, or to an inmate/parolee or any person who is validated by the department within six (6) months of the established or estimated date of activity identified in the evidence considered.

(5) A dropout is an inmate/parolee who was either a gang member or associate and has discontinued gang affiliation. This identification requires the inmate/parolee to successfully complete the debriefing process.

(6) The verification of an inmate/parolee's gang identification shall be validated or rejected by the chief, office of correctional safety (OCS), or a designee.

(A) Prior to submission of a validation package to the OCS, or during the inactive status review process, the subject of the investigation shall be interviewed by the Institution Gang Investigator, or designee, and given an opportunity to be heard in regard to the source items used in the validation or inactive status review.

(B) Inmates shall be given written notice at least 24 hours in advance of the interview. The interview may be held earlier if the inmate waives, in writing, the 24–hour preparation period.

(C) All source items referenced in the validation or inactive status review shall be disclosed to the inmate/parolee at the time of notification. The inmate/parolee shall be given copies of all non–confidential docu-

ments unless otherwise requested in writing by the inmate/parolee. Confidential information used in the validation or inactive status review shall be disclosed to the inmate/parolee via a CDC Form 1030 (Rev. 12/86), Confidential Information Disclosure Form.

(D) The interview shall be documented and include a record of the inmate's/parolee's opinion on each of the source items used in the validation. Staff shall record this information and provide a written record to the inmate/parolee within fourteen (14) calendar days and prior to submission of the validation package to OCS.

(E) The documented interview shall be submitted with the validation package to the OCS for consideration to approve or reject the validation. The documented interview shall be submitted with the inactive status review to the OCS for consideration of the inmate's/parolee's continued current active or inactive status.

(F) The inmate's mental health status and/or need for staff assistance shall be evaluated prior to interview. Staff assistance shall be assigned per guidelines set forth in section 3318.

(G) The validation and/or rejection of evidence relied upon shall be documented on a CDC Form 128–B2 (Rev. 5/95), Gang Validation/Rejection Review, and forwarded to the facility or parole region of origin for placement in the inmate/parolee's central file. Upon receipt of the CDC Form 128–B2, the Classification and Parole Representative or Parole Administrator I, or their designee, shall clearly note in some permanent manner upon the face of every document whether or not the item met validation requirements.

(7) The CDC Forms 812–A and 812–B shall be reviewed by a classification committee at each annual hearing and upon any review for transfer consideration. This shall be documented on a CDC Form 128–G (Rev. 10/89), Classification Chrono. Questionable gang identifications, notations, or new information shall be referred to a gang investigator for investigation.

(8) The determination of a gang identification shall reference each independent source item in the inmate/parolee's central file. The sources shall be based on the following criteria:

(A) Self admission. Staff shall document information about the inmate/parolee's self–admission and specific involvement with the gang. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(B) Tattoos and symbols. Body markings, hand signs, distinctive clothing, graffiti, etc., which have been identified by gang investigators as being used by and distinctive to specific gangs. Staff shall describe the tattoo or symbol and articulate why it is believed that the tattoo or symbol is used by and distinctive of gang association or membership. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(C) Written material. Any material or documents evidencing gang activity such as the membership or enemy lists, constitutions, organizational structures, codes, training material, etc., of specific gangs. Staff shall articulate why, based on either the explicit or coded content, the written material is reliable evidence of association or membership with the gang. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(D) Photographs. Individual or group photographs with gang connotations such as those which include insignia, symbols, or validated gang affiliates. The date of a photograph shall be reasonably ascertained prior to any photo being relied upon for inclusion as a source item. No photograph shall be considered for validation purposes that is estimated to be older than six (6) years. Any photograph being utilized as a source item that depicts gang members and/or associates shall require that at least one of the individuals be previously validated by the department, or validated as a member or associate of the gang by the department within six (6) months of the photograph's established or estimated date or origin. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(E) Staff information. Documentation of staff's visual or audible observations which reasonably indicate gang activity. Staff shall articulate the basis for determining the content or conduct at issue is gang related. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(F) Other agencies. Information evidencing gang affiliation provided by other agencies. Verbal information from another agency shall be documented by the staff person who receives such information, citing the source and validity of the information. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(G) Association. Information related to the inmate/parolee's association with validated gang affiliates. Information including addresses, names, identities and reasons why such information is indicative of association with a prison gang or disruptive group. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(H) Informants. Documentation of information evidencing gang affiliation from an informant shall indicate the date of the information, whether the information is confidential or nonconfidential, and an evaluation of the informant's reliability. Confidential material shall also meet the requirements established in section 3321. Staff shall articulate how the information specifically relates to the inmate's involvement with the gang as a member or associate. The information may be used as a source of validation if the informant provides specific knowledge of how he/she knew the inmate to be involved with the gang as a member or associate. Multiple confidential sources providing information regarding a single gang related incident or behavior shall constitute one (1) source item. Exclusive reliance on hearsay information provided by informants will not be used for validation purposes. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(I) Offenses. Where the circumstances of an offense evidence gang affiliation such as where the offense is between rival gangs, the victim is a verified gang affiliate, or the inmate/parolee's crime partner is a verified gang affiliate. Staff shall articulate why an offense is gang related. Multiple sources of information relative to a single incident or offense will be considered one (1) source of validation. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(J) Legal documents. Probation officer's report or court transcripts evidencing gang activity. Staff shall assure the document containing this information is disclosed to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(K) Visitors. Visits from persons who are documented as gang "runners", or community affiliates, or members of an organization which associates with a gang. Staff shall articulate the basis for determining that the relationship between the visitor and inmate is gang related in nature or that the visitor and inmate engaged in a gang related discussion or gang conduct. Staff shall articulate the basis for identifying the visitor as associated with the gang. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(L) Communications. Documentation of telephone conversations, conversations between inmates, mail, notes, greeting cards, or other communication, including coded messages evidencing gang activity. Staff shall articulate why, based on either the explicit or coded content, the communication is reliable evidence of association or membership with the gang. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(M) Debriefing reports. Documentation resulting from the debriefing required by (c)(2), above. Only information referencing specific gang related acts or conduct shall be considered as a source item. Multiple sources of information relative to a single gang related offense or activity shall be considered a single source of validation. Staff shall document and disclose this information to the inmate/parolee in a written form that would not jeopardize the safety of any person or the security of the institution.

(d) An inmate housed in the general populations as a gang member or associate may be considered for review for inactive status when the inmate has not been identified as having been involved in gang activity for a minimum of two (2) years. Verification of an inmate's inactive status shall be approved or rejected by the OCS, chief or a designee. The approval or rejection shall be forwarded for placement in the inmate's central file. The Institution Classification Committee shall review and consider this determination at the next hearing and upon review for transfer consideration.

(e) An inmate housed in a security housing unit (SHU) as a gang member or associate may be considered for review of inactive status by the Department Review Board when the inmate has not been identified as having been involved in gang activity for a minimum of six (6) years. Verification of an inmate's inactive status shall be approved or rejected by the chief, OCS, or a designee. The approval or rejection shall be forwarded for placement in the inmate's central file.

(f) A gang member or associate, who is categorized as inactive or validated as a dropout of a prison gang and released from a SHU, may be removed from the general population or any other placement based upon one reliable source item identifying the inmate as an active gang member or associate of the prison gang with which the inmate was previously validated. The source item must identify the inmate as a gang member or associate based on information developed after his or her release from SHU. The source item need not be confidential, but must meet the test of reliability established at section 3321.

(g) The procedures relating to the initial validation or rejection of gang members or associates as described in this section shall be followed when reviewing the present status of an inactive gang member or associate. Verification of an inmate's/parolee's active status shall be approved or rejected by the chief, OCS, or a designee. This determination shall be forwarded for placement in the inmate's/parolee's central file.

(h) A classification committee is authorized to return an inmate to a SHU based upon the restoration of the inmate's gang status and a determination that the inmate's present placement endangers institutional security or presents a threat to the safety of others. As provided at section 3341.5, placement in a SHU requires approval by a classification staff representative.

California Supreme Court, Case No. S197283
Court of Appeal, Fifth Appellate District, Case No. F059522
Kern County Superior Court No. HC011446A
In re Elvin Cabrera

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On April 23, 2012, I served the within **ANSWER BRIEF ON THE MERITS** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

Ms. Amy Daniel
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(Counsel for Respondent)

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Clerk, Court of Appeal
Fifth Appellate District
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(Petitioner's Counsel in the Court of Appeal)

CCAP
2407 "J" Street, Suite 301
Sacramento, CA 95816

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on April 23, 2012.

Sabine Jordan