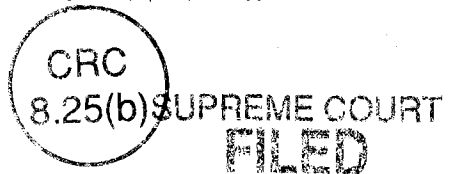


In the Supreme Court of the State of California

In re

ELVIN CABRERA,

On Habeas Corpus.



Case No. S197283 MAY 15 2012

Frederick K. Ohlrich Clerk

Deputy

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

REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JENNIFER A. NEILL
Senior Assistant Attorney General
JESSICA N. BLONIEN
Supervising Deputy Attorney General
AMY DANIEL
Deputy Attorney General
State Bar No. 246884
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-6105
Fax: (916) 322-8288
Email: Amy.Daniel@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

In the petition for review and opening brief, the Warden challenges the Court of Appeal's holding that a decision identifying an inmate as a prison-gang affiliate must include evidence of a mutual relationship between the inmate and a gang affiliate. By misinterpreting a regulation promulgated by CDCR under its quasi-legislative authority, the appellate court engrafted this mutual-relationship requirement onto the gang-validation process — a requirement that the governing regulation does not demand. In doing so, the court failed to defer to CDCR's expertise within its area of rule-making authority and to CDCR's interpretation of its own regulation. In response, Cabrera does not directly address the Warden's claim, but dismisses it as a "red herring." Cabrera instead argues that the individual decision validating him as a Mexican Mafia associate was not supported by "some evidence," and raises additional arguments that are not before this Court on review. Cabrera has not shown that CDCR's construction of its own gang-validation regulation was irrational or otherwise an invalid exercise of its rule-making authority. Therefore, this Court should reverse the appellate court's opinion and uphold CDCR's interpretation of its own regulation.

ARGUMENT

I. CABRERA DOES NOT ESTABLISH THAT THE APPELLATE COURT ACTED PROPERLY WITHIN ITS AUTHORITY IN INDEPENDENTLY INTERPRETING CDCR'S VALIDATION REGULATION.

Cabrera first argues that the Warden's position in the opening brief is off-point because the Court of Appeal did not invalidate CDCR's regulation, but only assessed whether the decision validating Cabrera was

supported by some evidence.¹ (Answer Brief (AB) at p. 30.) Contrary to Cabrera's assertion, the appellate court plainly considered the definitions of the regulatory terms "direct," "link," and "association," and concluded that "combining the definitions" required evidence of a "reciprocal (i.e., mutual or two-way) interaction" between Cabrera and a validated prison-gang affiliate. (*In re Cabrera* (2011) 198 Cal.App.4th 1548, 1564-1567.) The court's construction of the regulation expanded CDCR's obligations in rendering validation decisions, partially rejecting CDCR's interpretation of its own regulation on how prison-gang affiliates should be identified. (Opening Brief (OB) at pp. 10-13.) The court did not limit its opinion to a review of the evidentiary basis of Cabrera's validation, but independently evaluated the framework governing how validation decisions are made.

Cabrera also suggests that the Warden's arguments concerning the deference owed to CDCR in creating rules for prison administration are inapposite because the some-evidence test is itself a deferential standard of review. (AB at p. 35.) Cabrera incorrectly conflates two distinct legal concepts. The some-evidence test applies to individual decisions, and requires courts to uphold prison officials' findings at disciplinary hearings as long as they are not entirely devoid of a factual basis. (*Superintendent v. Hill* (1985) 472 U.S. 445, 455-456.) The some-evidence test does not review anything other than the evidentiary basis of individual decisions. (See *id.* at pp. 453-454.) The Warden's dispute, however, is based on CDCR's delegated authority to craft the general rules under which such individual decisions are made, and the court's misinterpretation of those rules. (OB at pp. 6-7.) That is a broader question governed by a different

¹ This Court has not established whether the some-evidence test applies to decisions identifying inmates as prison-gang affiliates, and that question is not currently before the Court. (Cal. Rules Court, rule 8.516(b).)

legal standard — the rules CDCR adopts under its quasi-legislative authority are valid as long as they are rational, such that there is *any* reasonably conceivable set of facts that may justify the rule. (*In re Jenkins* (2010) 50 Cal.4th 1167, 1181.) Error in an individual case under the some-evidence test would not invalidate a general rule, as one incorrect decision does not establish that the rule lacks any conceivable justification. The some-evidence test thus cannot substitute for the deference due to an agency's judgment within its delegated rule-making authority, nor does it empower a court to bypass the well-established law for reviewing quasi-legislative regulations. The appellate court was not free to alter CDCR's general standards for prison-gang validations under the guise of applying the some-evidence test.

Cabrera does not establish that CDCR's regulation, as construed by CDCR, is an invalid exercise of its authority. He has not shown that absent a reciprocal-interaction requirement, the regulation lacks a rational relationship to the legitimate correctional goal of identifying prison-gang affiliates. Cabrera reiterates the appellate court's reasoning that an inmate's possession of a photocopied watercolor by Adolph Hitler or a Doonesbury comic strip would not demonstrate that the inmate had a relationship with Hitler or Garry Trudeau, and thus an inmate's possession of a gang affiliate's drawing would not indicate any connection between the inmate and the gang affiliate. (AB at p. 39; *Cabrera, supra*, 198 Cal.App.4th at p. 1569.) This analogy is fundamentally flawed. Commercial artists attempting to make a living through their craft in free society are not comparable to prison inmates attempting to run a covert criminal organization.² The significance of an inmate's possession of a Doonesbury

² The Warden notes that Hitler is used in the appellate court's hypothetical as an example of a famous failed artist, not as the leader of
(continued...)

cartoon has no bearing on the significance of an inmate's possession of a drawing by a prison-gang affiliate. CDCR's validation regulation was created specifically to identify prison-gang affiliates, based on its knowledge of actual prison-gang operations. Whether the regulation would function outside the prison environment to identify persons other than prison-gang affiliates is irrelevant. The regulation applies only within California's prisons, and only for the purpose of identifying prison-gang affiliates. Cabrera does not dispute that inmates utilize copied drawings by prison-gang affiliates to demonstrate gang allegiance and authority within a gang. He protests that the symbols he possessed were "cultural," but does not refute their significance to the Mexican Mafia. (*Id.* at pp. 49-51.) Nor does Cabrera disprove CDCR's rationale for declining to require evidence of reciprocal interaction as a prerequisite for validation — that prison gangs operate with secrecy, and are adept at concealing their interactions from prison officials. (*Ibid.*) Because Cabrera has not shown that there is no conceivable set of facts justifying the regulation, he has failed to show that it is irrational. (*Jenkins, supra*, 50 Cal.4th at pp. 1176, 1181; *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313.)

While there are undoubtedly numerous viable theories for how to address the serious threat posed by prison gangs, the responsibility for selecting and implementing a method lies with CDCR. (*Jenkins, supra*, 50 Cal.4th at p. 1175.) The leeway afforded to CDCR in doing so permits it to adapt its methods according to developing intelligence, changes in the prison environment, and available resources. The question on judicial review is not whether CDCR's validation process could be improved, but

(...continued)

Nazi Germany. (*Cabrera, supra*, 198 Cal.App.4th at p. 1569.)

Additionally, there is no suggestion that Hitler's paintings played any role in running his fascist regime. (*Ibid.*)

simply whether it is rational. The appellate court erred in imposing its independent view of what type of evidence should be required for validation decisions.

II. CABRERA DOES NOT ESTABLISH THAT THE APPELLATE COURT'S REINTERPRETATION OF CDCR'S REGULATION THROUGH A SOME-EVIDENCE REVIEW WAS PROPER.

Cabrera primarily argues that the individual decision identifying him as a Mexican Mafia associate is arbitrary because it is not supported by some evidence. (AB at pp. 38-48.) He proffers reasons why he believes the evidence supporting the validation is insufficient and that his innocent explanations are more persuasive. (*Ibid.*) This is irrelevant to the question on review.

First, the issue presented for review is whether the appellate court could require CDCR to show evidence of a mutual relationship to render a validation decision. (OB at p. 1.) The appellate court rejected Cabrera's validation because it did not find evidence of reciprocal interaction between Cabrera and a validated gang affiliate. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1553, 1566-1567.) Citing this Court's opinion in *In re Lawrence* (2008) 44 Cal.4th 1181, Cabrera incorrectly suggests that the some-evidence test inherently allows a reviewing court to independently decide what evidentiary showing an agency must make to render any type of decision. (AB at p. 31.) In *Lawrence*, this Court addressed parole decisions and answered two questions: what the statutory framework governing parole decisions requires, and how the some-evidence test applies to individual parole decisions. (*Lawrence, supra*, 44 Cal.4th at p. 1191.) This Court did not hold that the some-evidence test is applicable to prison-gang validations or, indeed, to any other prison proceeding. Nor did this Court hold that whenever the some-evidence test is applied, the reviewing court may independently interpret the agency's decision-making

framework. Rather, it is the type of framework involved — whether the agency’s rules are interpretive or quasi-legislative — that determines the level of deference afforded to an agency in determining how decisions should be made. (*Sara M. v. Super. Ct.* (2005) 36 Cal.4th 998, 1012.) Parole decisions are governed by statute. (Pen. Code, § 3041.) The parole board’s judgment regarding how that statute should be interpreted and implemented thus is entitled to consideration, but not to deference. (*Sara M.*, *supra*, 36 Cal.4th at p. 1012; *Yamaha Corp. v. St. Bd. of Equalization* (1998) 19 Cal.4th 1, 10-12.)

Unlike parole, there is no statute governing prison-gang validation decisions. CDCR’s validation regulation was created under its quasi-legislative authority to make rules for prison administration. (OB at p. 7.) As such, CDCR’s judgment in creating that regulation is entitled to deference — a quasi-legislative deference that was not at issue in *Lawrence*. Applying the some-evidence test to the individual decision validating Cabrera as a prison-gang associate therefore did not permit the appellate court to independently construe CDCR’s validation regulation. *Lawrence* does not support the appellate court’s failure to defer to CDCR’s expertise in how to identify prison-gang affiliates.

Second, even if Cabrera’s validation were entirely devoid of any factual basis, that circumstance would not render CDCR’s construction of its validation regulation arbitrary. Error in an individual case does not establish that the regulation is incapable of identifying prison-gang affiliates under any circumstances. To be sure, CDCR’s regulation must be rational, but it need not be error-proof. (See *Beach Communications*, *supra*, 508 U.S. at p. 313 [rule rational where supported by “any reasonably conceivable state of facts”].) The solution where an individual decision is arbitrary is to invalidate that decision, not to alter the decision-making framework.

Cabrera generally protests that he is being unfairly punished because he did not commit any prohibited actions on behalf of a prison gang. Cabrera's complaint misconstrues the nature of validation decisions. CDCR does not validate inmates to punish them for past gang-related activity. (Cal. Code Regs., tit. 15, § 3378, subd. (a).) Validation is forward-looking: CDCR validates inmates to identify a potential threat and take action to prevent future gang activity. (*Id.* at § 3341.5, subd. (c)(2)(A)(2); § 3378, subd. (a), (d-f), (h).) To the extent that Cabrera likens the validation process to a disciplinary proceeding, he again conflates two distinct concepts.

III. CABRERA'S REMAINING ARGUMENTS ARE NOT BEFORE THE COURT.

Cabrera claims that it is arbitrary for CDCR to use the Meso-American symbols he possessed as source items indicative of prison-gang affiliation, because they are cultural symbols that were appropriated by the Mexican Mafia. (AB at pp. 49-51.) That question is not before the Court on review, nor was it decided by the appellate court below. (Cal. Rules Court, rule 8.516(b).) Thus, it should not be considered here. In any event, CDCR's use of those symbols as source items is plainly logical, as decades of intelligence gathering have established that the Mexican Mafia identifies itself through those symbols. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1557-1559; Cal. Code Regs., tit. 15, § 3378, subd. (c)(8)(B).)

Cabrera also claims that his validation was not supported by three independent source items as required by California Code of Regulations, title 15, section 3378, subdivision (c)(4). (AB at pp. 51-53.) That question likewise is not before the Court on review, and was not decided by the appellate court below. Moreover, CDCR's regulation requires three independent source items, not three entirely different types of source items. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(4), (c)(8)(H).) Cabrera

possessed four separate drawings indicative of gang affiliation. (*Cabrera, supra*, 198 Cal.App.4th at pp. 1557-1559.) Two drawings contained Mexican Mafia symbols, one bore the name of a Mexican Mafia member, and one contained Mexican Mafia symbols and bore the name of a different Mexican Mafia associate. (*Ibid.*) No single drawing was used to create multiple source items. (*Ibid.*) The four drawing were thus properly regarded as three source items — one for the symbols, and one for each drawing by a Mexican Mafia affiliate. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(8)(B)(G).)

Cabrera lastly claims that he was not given adequate notice that the drawings he possessed contained gang-related materials or gang-affiliate's names. (AB at pp. 53-56.) As with the previous two claims, this question is not before the Court on review, and was not decided by the appellate court below. Additionally, the validation regulation plainly states that possession of gang symbols and affiliates' names may constitute source items toward identification as a prison-gang affiliate. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(8)(B)(G).) Cabrera's alleged unawareness of the nature of the materials he possessed is a rebuttal argument for prison officials to consider during the validation process. (Cal. Code Regs., tit. 15, § 3378, subd. (c)(6).)

CONCLUSION

For the reasons stated herein and in the Warden's opening brief, the Court of Appeal's opinion should be reversed.

Dated: May 14, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JENNIFER A. NEILL
Senior Assistant Attorney General
JESSICA N. BLONIEN
Supervising Deputy Attorney General

A handwritten signature in black ink, appearing to read 'AMY DANIEL', written over a circular stamp or seal.

AMY DANIEL
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 2,154 words.

Dated: May 14, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JENNIFER A. NEILL
Senior Assistant Attorney General
JESSICA N. BLONIEN
Supervising Deputy Attorney General

AMY DANIEL
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cabrera, Elvin In re**
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I declare:

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

On May 14, 2012, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Michael Satris, Esq. (*2 copies*)
Law Office of Michael Satris
P. O. Box 337
Bollinas, CA 94924
Attorney for Petitioner Elvin Cabrera

California Court of Appeal, Fifth District
2424 Ventura Street
Fresno, CA 93721
(Case No. F059511)

Appeals Clerk
Kern County Superior Court
1215 Truxtun Avenue
Bakersfield, CA 93301
(Case No. HC011446A)

Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816-4736

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 14, 2012, at Sacramento, California.

Carrie Haney
Declarant



Signature