LIU, J.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	
	)	No. S197283
ELVIN CABRERA,	)	
	)	
Petitioner,	)	5 Crim. F059511
	)	
On Habeas Corpus	)	
	)	

ANSWER TO PETITION FOR REVIEW

MELANIE K. DORIAN
California State Bar No. 197955
P. O. Box 5006
Glendale, California 91221-5006
Telephone: (818) 937-0434

Attorney for Petitioner
ELVIN CABRERA

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner below, Elvin Cabrera (hereafter "petitioner"), respectfully submits this answer to the petition for review filed by respondent in the above-entitled matter following the filing of the September 8, 2011 published opinion and the October 6, 2011 modified opinion by the Court of Appeal of the State of California, Fifth Appellate District, granting the petition.

STATEMENT OF CASE AND FACTS

Petitioner incorporates the facts as presented by the Court of Appeal in its original opinion, and has added additional facts as needed in the Argument section. (Slip Opn., pp. 6-10.)

ARGUMENT

I.

REVIEW SHOULD BE DENIED, BECAUSE THE COURT OF APPEAL APPLIED THE CORRECT STANDARD OF REVIEW IN INTERPRETING SECTION 3378, AND DID NOT IMPROPERLY OR ERRONEOUSLY EXPAND THE OBLIGATIONS OF THE PRISON OFFICIALS UNDER THE REGULATIONS

Respondent is seeking review on the sole ground that the court's interpretation of section 3378, as involving some type of a reciprocal and mutual relationship, will essentially hinder the ability of the California Department of Corrections and Rehabilitation ("CDCR") to ensure institutional safety. (PFR, pp. 5-8.) In doing so, respondent mischaracterizes the Court of Appeal's findings, and offers no facts or legal authority to support its argument. For the following reasons, review must be denied.

A. California Regulations

Under California regulations, prison officials may place an inmate in a security housing unit ("SHUT"), whose presence in the general population "presents an immediate threat to the safety of the inmate or

others" or "endangers institution security." (Cal. Code Regs., tit. 15, §3335, subd. (a).) Validated gang members or associates are considered to pose safety concerns and are, therefore, placed in the SHU for an indeterminate term. (Cal. Code Regs., tit. 15, §3341.5, subd. (c)(2)(A).)

Prior to the submission of a validation packet to the Office of Correctional Security ("OCS"), the institutional gang investigator ("IGI") shall interview the inmate and provide him with an opportunity to be heard regarding the information and/or items used for the validation. (Cal. Code. Regs., tit. 15, §3378, subd. (c)(6).) The OCS is to identify "at least three (3) independent source items indicative of actual membership" or "association with validated gang members or associates." (Cal. Code. Regs., tit. 15, §3378, subd. (c)(2)-(4).)

These sources items "must contain factual information," and at least one must constitute "a direct link to a current or former validated member or associate of a gang." (Cal. Code. Regs., tit. 15, §3378, subd. (c)(2)(4).) These include self-admission, tattoos and symbols, written material, photographs, staff information, information from other sources, and association with gang affiliates. (Cal. Code. Regs., tit. 15, §3378, subd. (c)(8)(A)-(H).) Association means "[i]nformation related to the inmate/parolee's association with validated gang affiliates," which may include "addresses, names, identities and reasons why such information is

indicative of association with a prison gang or disruptive group." (Cal. Code. Regs., tit. 15, §3378, subd. (c)(8)(G).)

B. Court of Appeal's Interpretation

The court defined the term "link" to mean a "connection." (Slip Opn., pp. 15-16.) The court rejected petitioner's view that "association" requires involvement that is more than passive, and instead, adopted respondent's position in defining the term as a "loose relationship." (*Id.* at 16-18.) Finally, the court decided that this "direct link" to a current or former validated gang member or associate must necessarily entail some "assent or mutuality from the other party." (*Id.* at pp. 18-19.) It is the latter that is the subject of this petition for review.

Contrary to respondent's contention, the court did not improperly combine the terms "association" and "direct link." (PFR, p. 6.) Nor did it add the mutuality requirement, which respondent describes as "novel and ill-advised." (*Ibid.*) Rather, the court defined and interpreted the terms "direct link" and "association," first, separately, then, in conjunction with each other, in order to explain the kind of showing required under section 3378, subdivision (c). (Slip. Opn., pp. 15-19.) Respondent's disagreement with these interpretations does not invalidate the Court of Appeal's findings.

The Court of Appeal's conclusions were well-reasoned, because as the court explained, absent such reciprocal interaction, "... a validated gang affiliate could create such a relationship with an inmate unilaterally, without any assent or mutuality on the part of the inmate." (Slip Opn., p. 19.) This, of course, would lead to absurd results, where inmates not intending or willing to associate with such validated gang members or affiliates would still be subject to gang validations and indefinite confinement in the SHU.

In addition, as the court clarified, this interpretation did not in any way limit the evidence that could be used to prove a bilateral or reciprocal relationship. (*Ibid.*) As the court observed, "Theoretically, it is possible that the mutual relationship establishing a direct link through association can be inferred from evidence of unilateral action by one of the persons in that relationship. In practice, whether such an inference can be drawn in a particular situation will depend upon the facts and circumstances of that case." (*Ibid.*)

As an example, the court cited *In re Furnace* (2010) 185 Cal.App.4th 649, 654-655, where the petitioner possessed the contact information for a validated gang member in another institution, and whose identity was known to the petitioner based on all the written materials, including newspaper articles, found in his cell. (Slip Opn., pp. 22-23.) The court

noted that, there, the evidence, taken together, provided "some evidence" for the inference of such a mutual relationship between the petitioner and the validated gang member. (*Id.* at 23-24.)

Focusing on the facts of this case, the Court of Appeal then distinguished *Furnace*, and properly found that, here, the mere possession of the photocopied drawings, without more, did not provide some evidence of "a connection, without interruption or any intervening agency or step in the form of a loose relationship [], between Cabrera and the artist." (*Id.* at 20-24.) Respondent does not offer any facts or legal authority to establish that the court's interpretation of the terms and the application of these definitions in this particular situation were illogical, improper or unlawful.

Respondent claims that the Court of Appeal overstepped its boundaries and has interfered with the deference due the prison officials. (PFR, pp. 6-7.) What respondent ignores is that while great deference is given to administrative agencies' expertise, where the decision is "clearly arbitrary or capricious or has no reasonable basis," courts are free to reject it. (*In re Lusero* (1992) 4 Cal.App.4th 572, 575, quoting *In re Carter* (1988) 199 Cal.App.3d 271, 276-277.)

To that point, respondent cites the "CDCR's expertise," claiming that, in light of this decision, the CDCR "will rarely be able to secure evidence of reciprocal interaction between an inmate being considered for

validation and a prison-gang affiliate," because these gangs "operate in secrecy and are adept at concealing their activities." (PFR, p. 6.) However, respondent does not point to any such expertise offered by any expert on this subject matter, or one that was accepted and/or considered by the court.

Regardless, the Court of Appeal did not create a new requirement in order for an inmate to be properly validated as a gang member, in accordance with due process. The court simply looked at the big picture, examined the regulations in their entirety and extracted something that was evident from the plain language of the law. This is a novel idea.

In interpreting a statute, courts generally look to the actual words, giving them their usual, ordinary and commonsense meaning. (*Governing Bd. of California Teachers Assn. v. Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) In doing so, courts do not examine the language in isolation, "but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Where there is no ambiguity, courts will adopt the clear language of the statute "in favor of an ambiguity that does not exist." (*Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263, 268.) If, however, the language

of the statute is susceptible to more than one reasonable interpretation, courts will look to legislative history to ascertain the legislative intent. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) This is precisely what the Court of Appeal did here, and respondent cannot point to any error.

C. Other Issues

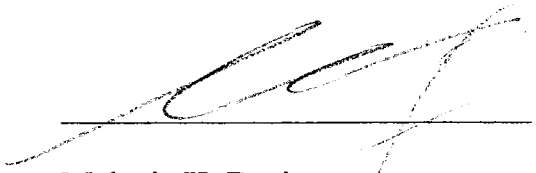
Should this Court grant review, petitioner would request that this Court also consider the issues the Court of Appeal did not decide. (Slip Opn, pp. 3-5, 24-25). These include (1) whether the drawings found in petitioner's possession constituted three independent source items; (2) whether petitioner's gang validation and placement in the SHU violated his First Amendment rights under the federal constitution, as well as his statutory rights under Penal Code sections 2600 and 2601; and (3) whether respondent should be allowed to introduce Fischer's expert declaration, which was not submitted to petitioner prior to his validation, in violation of section 3378, and which included improper opinion regarding petitioner's knowledge and state of mind.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court deny respondent's petition for review. Should this Court grant review, petitioner would request consideration of the additional issues not decided by the Court of Appeal.

Dated: October 28, 2011

Respectfully submitted,



Melanie K. Dorian
Attorney for Petitioner
ELVIN CABRERA

CERTIFICATE OF WORD COUNT

In re Elvin Cabrera
No. S197283
5 Crim. F059511

Pursuant to rule 8.504(d) of the California Rules of Court, I, Melanie K. Dorian, appointed counsel for Elvin Cabrera, hereby certify that I prepared the foregoing Answer to Petition for Review on behalf of my client, and that the word count for this brief is 1,617, excluding tables.

This brief therefore complies with the rule which limits a computer-generated brief to 8,400 words. I certify that I prepared this document in Word, and that this is the word count Word generated for this document.

Melanie K. Dorian
Attorney for Petitioner
ELVIN CABRERA

PROOF OF SERVICE

Re: ***In re Cabrera***
Case No. S197283

I, Melanie K. Dorian, declare that I am over 18 years old; my business address is P.O. Box 5006, Glendale, California 91221-5006.

On October 28, 2011, I served a true copy of the ANSWER TO PETITION FOR REVIEW, by first class mail, on the following parties:

California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, California 93721

Elvin Cabrera T-88483
California Correctional Institution
P.O. Box 1902 (CCI)
Unit 4A-5C-211
Tehachapi, California 93581

Amy Daniel
Attorney General's Office
P.O. Box 944255
Sacramento, California 94244-2550

Deanna Lamb
CCAP
2407 J. Street, Suite 301
Sacramento, California 95816

Kern County Superior Court
1215 Truxtun Avenue
Bakersfield, California 93301
FOR DELIVERY TO:
Hon. Michael E. Dellostritto, Judge

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2011, at Glendale, California.

MELANIE K. DORIAN