

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re ELVIN CABRERA,

On Habeas Corpus.

F059511

OPINION

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Elvin Cabrera, in pro. per.; and Melanie K. Dorian, under appointment by the Court of Appeal, for Petitioner Elvin Cabrera.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Julie L. Garland, Assistant Attorney General, Jessica N. Blonien and Henry J. Valle, Deputy Attorneys General, for Respondent State of California.

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 argues that his possession of 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).¹

We agree. The required direct link between Cabrera and a gang member or associate was not established by the artist’s name on the photocopied artwork. Consequently, Cabrera’s petition for writ of habeas corpus will be granted.

THRESHOLD ISSUES

There are two threshold issues that will affect our description of the facts in this proceeding. Consequently, we will address those issues before setting forth the facts and procedural history of this case.

Broadly stated, the first issue concerns which facts are material to deciding the merits of this habeas corpus proceeding. The term “material fact” is used here to mean a fact that affects the decisionmaking of this court. In other words, a material fact is a fact of consequence to our reasoning and resolution of this matter. (See generally Cal. Const., art. VI, § 14 [appellate decisions “shall be in writing with reasons stated”].)

The second issue involves identifying which facts have been established for purposes of the habeas corpus proceeding and which facts are in dispute. (See fn. 4, *post.*) The answer to this question is obtained by applying the pleading rules for habeas corpus proceedings set forth by the California Supreme Court in *People v. Duvall* (1995) 9 Cal.4th 464.

I. Facts Material to a Gang Validation Under Section 3378

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).)

¹All further regulatory references are to title 15 of the California Code of Regulations.

When the California Department of Corrections and Rehabilitation (CDCR) relies on these and other types of source items during the validation process, subdivision (c)(8) of section 3378 imposes the following requirement: “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.” (Italics added.) The first question that arises, in reference to this requirement to document and disclose, is whether it precludes CDCR from relying on information not included in the written form to justify its validation decision. Not surprisingly, the parties do not agree on the answer.

Cabrera argues that the use of the word “shall” creates a mandatory duty to disclose all information indicative of gang association and that the consequence for not complying with this duty should be invalidation of the government action and the granting of his petition.

CDCR counters that all of the information relied upon need not be included because concerns for safety and security can justify leaving information out of the forms. With regard to the consequences of failing to include required information in the forms, CDCR argues that if a court overrules the validation, then it may be redone after the inmate is provided with proper disclosure. CDCR has not argued that inadequacies in complying with the document-and-disclose requirement can be cured during the habeas corpus proceeding by supplying additional information to the court.

We conclude that the mandatory language about documentation and disclosure in subdivision (c)(8) of section 3378 means that a reviewing court may consider only two categories of information when deciding whether a gang validation had sufficient evidentiary support. The first category is the information documented and disclosed to the inmate in a written form. The second category is the information withheld from the written disclosure because of safety or security concerns. Information excluded from the forms provided to the inmate for reasons other than safety or security may not be considered by a reviewing court to uphold the validation. Under this interpretation, the document-and-disclose requirement in subdivision (c)(8) of section 3378 effectively

defines which facts are material to a court's review of a gang validation. The information that CDCR may rely upon in court to justify its validation decision is limited to (1) information contained in the forms and (2) information withheld from the forms due to concern for safety and security. We recognize, nonetheless, that situations might arise where CDCR should be allowed to present the reviewing court with background information to help explain the meaning of the information disclosed in the forms, so long as the explanatory background information is not used as *additional grounds* for justifying the validation.

The material facts in this case consist of the contents of the written forms provided to Cabrera during the validation process. Those forms are three general chronos² and the form used to notify Cabrera of the validation decision. The material facts of this case do not include information withheld from the written disclosure for safety or security reasons because CDCR does not contend it withheld information on this ground.

The possibility that this court should consider information from outside the validation forms is raised by CDCR's attachment of a declaration of Everett W. Fischer to its return. We, however, have not relied on that declaration because of our conclusion that the material facts justifying validation must be disclosed in the forms and because the disclosures made in the forms provided to Cabrera are straightforward. Consequently, an expert's insight into the prison environment is not needed to understand the disclosures and, as a result, Fischer's declaration is not needed to provide explanatory background information.³

²The regulatory definition of "General Chrono" is "a CDC Form 128-B (Rev. 4-74) which is used to document information about inmates and inmate behavior. Such information may include ... records of disciplinary or classification matters" (§ 3000.)

³Fischer's declaration, among other things, challenges Cabrera's credibility. In response, in paragraph No. 13 of his traverse, Cabrera (a) alleges that Fischer's opinion as to his lack of credibility lacks proper foundation and (b) objects to the declaration as improper expert opinion. Also, Cabrera's memorandum of points and authorities attached to his traverse asserts that Fischer's opinion as to Cabrera's state of mind (i.e., his knowledge that the symbols were gang-related) lacked a sufficient basis for this court to consider. Cabrera's objections are not ruled on

II. Material Facts Established by the Pleadings

The next question is whether any material facts are disputed by the parties.⁴ Whether material facts are regarded as admitted or disputed in a habeas corpus proceeding is determined by applying the pleading rules set out in *People v. Duvall*, *supra*, 9 Cal.4th 464. In a habeas corpus proceeding, the pleadings consist of (1) the inmate's petition, (2) CDCR's return, and (3) the inmate's traverse. We will not provide a detailed explanation of the rules applied to these pleadings because this case is relatively simple. As a general principle, a party's failure to dispute factual allegations made by the other party, in the manner described in *People v. Duvall*, is deemed an admission of the truth of those factual allegations.⁵ (*Duvall*, at pp. 478, 480.) For example, a return is required to "*allege facts* that respond to the factual allegations in the habeas corpus petition." (*Id.* at p. 479, italics added.)

in this opinion because we have not relied on the Fischer declaration in deciding this habeas corpus proceeding.

⁴This question is significant because where material facts are in dispute, the reviewing court may appoint a referee and order the referee to hold an evidentiary hearing to resolve the factual disputes. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 478.) In contrast, where the material facts are not disputed, the merits of the habeas corpus petition can be decided without an evidentiary hearing. (*Ibid.*)

⁵Our Supreme Court has set forth a proscription against general denials in a return. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 479-481.) In this case, the last paragraph of the return filed on behalf of CDCR states: "13. Except as expressly admitted above, respondent denies, generally and specifically, each allegation of the petition, and specifically denies that Cabrera's administrative, statutory, or constitutional rights have been violated." Although this paragraph states that it "generally and specifically" denies each allegation of the petition, such a denial in a habeas corpus proceeding is ineffective at disputing the factual allegations made in the petition because it does not fulfill the return's function of narrowing the facts and issues truly in dispute. (*Ibid.*) Instead, it operates as a general denial, which is "an admission of sorts." (*Id.* at p. 479.)

Because the material facts are undisputed, CDCR's use of the foregoing type of a general denial and the return's failure to specifically contest facts has no impact on the outcome in this case. We note the legal effect of CDCR's general denial here because some of the background facts stated in this opinion are taken from allegations made by Cabrera that were not contradicted by CDCR with specific factual allegations of its own.

The pleadings filed here by both parties contain copies of the written forms that were delivered to Cabrera in connection with the gang validation. Those copies do not conflict with one another. Therefore, the parties are in agreement as to the contents of the written forms. Because the contents of those forms constitute the material facts in this case, we conclude the material facts are undisputed and, thus, there is no need for an evidentiary hearing.

FACTS

The context for the material facts—the contents of the written forms—includes the following background information about Cabrera and the investigation into his possible association with EME.

Background⁶

In February 2003, Cabrera was convicted of robbery, burglary, receiving stolen property, and possession of drug paraphernalia. In April 2003, he was sentenced to a prison term of 62 years to life. Since 2003, Cabrera has been an inmate at CCI. Since 2005, he has been assigned to yard 4-A.

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.

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. 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. During the course of this operation, Institutional Gang Investigator (IGI) E. Sanchez examined Cabrera’s personal property and discovered photocopies of

⁶Unless stated otherwise, the facts provided under this heading and those provided subsequently under the heading “Additional Background Facts and Assertions” were not disputed during the pleading stage of this habeas corpus proceeding.

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.

Contents of the Written Forms

IGI Sanchez prepared three general chronos dated April 8, 2008, to document the evidence and the reasons why the evidence indicated Cabrera was associating with members or associates of EME. Two of the general chronos prepared by IGI Sanchez concern drawings that CDCR concluded establish a direct link between Cabrera and affiliates of EME.⁷ Because the existence of a direct link is the primary question in this proceeding, these two general chronos and their subject drawings are central to this case.

Drawing by Associate Garcia—Direct Link

One of the general chronos concerns a drawing allegedly made by Fermin Garcia, a validated associate of EME. The drawing contains a female Mesoamerican warrior holding the shaft of a spear in her left hand. A standard is mounted at the top of the shaft. The standard is circular and slightly larger than the head and headdress of the warrior. "Matlactlomei" symbols appear at the three o'clock and nine o'clock positions on the standard. The Matlactlomei consists of two vertical lines and a vertical column of three dots and is the Mayan symbol for the number 13. Each line has a numerical value of five and each dot has a numerical value of one. Thus, the sum of the two lines and three dots is 13. Matlactlomei is translated to mean 13 within the Nahuatl language. The number 13 is used as a designation for EME because the 13th letter in the alphabet is "M." (See *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1544 [13 used to designate EME].)

⁷For purposes of this opinion, the noun "affiliate" is used to mean a gang member or gang associate.

The lower right hand corner of the drawing contains “FERMIN 00” printed in block letters.⁸ The CDC Form 128-B states that IGI Sanchez “identified the person who drew the picture, as inmate Fermin Garcia, D-88896, aka Fox, a validated associate of [EME], (*date of validation 7-15-2003*).”

Immediately following the first paragraph of the form, near the left-hand margin, is a two-inch by two-and-a-half-inch copy of the drawing. To the right of the drawing are two text boxes. A line extends from the upper box to the Matlactlomei symbol in the drawing. A line extends from the lower box to “FERMIN 00.” The text inside each box reads: “Direct link identified as Fermin Garcia D-88896.”

Below the drawing and the text boxes, a paragraph explains how the Matlactlomei represents 13 and, in turn, how 13 is used to designate EME. The last paragraph of the form states: “This chrono (Direct link) should be used as one (1) source towards validating Cabrera as an associate of the prison gang known as the Mexican Mafia.”

Drawing by Member Bermudez—Direct Link

Another CDC Form 128-B asserts that it identifies a direct link between Cabrera and another validated member of EME. The drawing referenced in that form assembles diverse elements or fragments, including a dragon, a jaguar’s face, the face of a man in which the left half is a skeleton, a woman on a veranda with her head framed by a full moon, a chain, prison bars, and other components. None of the elements of the drawing was identified as being connected with or indicative of EME. At the bottom center of the drawing, the following letters are written: “F.BERMÚDEZ,” with the “F” in a stylized form and “BERMÚDEZ” in block letters. The CDC Form 128-B states that IGI Sanchez “identified the person who drew the picture, as inmate Fernando Bermudez B-53002, aka Angon Fidel, a validated member of [EME], (*date of validation 8-11-1995*).”

⁸Cabrera alleges, and CDCR effectively admits by not specifically disputing, that the double zeros mean the drawing was completed in the year 2000, well before the artist was validated as an EME associate in July 2003.

Symbols

The third CDC Form 128-B used to validate Cabrera as an associate of EME concerns photocopies of two drawings that contain gang-related symbols. 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 Matlactlomei 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 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.”

The CDC Form 128-B asserts that the Matlactlomei and Eternal War Shield are used by members and associates of EME to show their loyalty and that “[b]oth these symbols are recognized by the department as being symbolic to membership/association with the Mexican Mafia.”

The Last Written Form

CDCR’s validation of Cabrera as an associate of EME was made on May 13, 2008, and documented on a CDC Form 128-B-2. CDCR notified Cabrera of its decision using this form. It discloses that the validation was based on the three CDC Form 128-B’s prepared by IGI Sanchez.

Additional Background Facts and Assertions⁹

Cabrera asserts that he is not a gang member or associate and has never participated in any gang activity. He admits possessing the four photocopies of the

⁹The matters set forth in the second paragraph under this heading are not disputed by the parties and, consequently, are deemed admitted for purposes of this habeas corpus proceeding. (See fn. 6, *ante*.)

drawings, but he denies knowing that the artwork contained gang symbols and asserts the “obscure symbols hold no special significance to [me].”

Cabrera 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. To demonstrate this point, Cabrera attached to his writ petition 18 pages of copies of drawings from his collection (exhibit J). 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.

The memorandum of points and authorities, as well as the declaration of Everett W. Fischer attached to CDCR’s return, disputes Cabrera’s assertion that he did not know the significance of the symbols in the drawings.

PROCEDURAL HISTORY

After unsuccessfully pursuing administrative appeals within the CDCR, Cabrera filed a petition for writ of habeas corpus in the Superior Court of Kern County. The superior court denied the petition, concluding there were three valid sources of gang validation with two direct links to gang affiliates.

Thereafter, Cabrera filed a petition for writ of habeas corpus with this court and we issued an order to show cause why the relief requested should not be granted.

In accordance with the order to show cause, CDCR filed a return with supporting memorandum of points and authorities on January 14, 2011. The return also included the declaration of Everett W. Fischer, a long-time employee of CDCR and currently a member of the California Prison Gang Task Force.

In April 2011, counsel appointed to represent Cabrera filed a traverse and memorandum of points and authorities.

DISCUSSION

I. Provisions Concerning an Inmate’s Gang Identification and Validation

The rules of law applied by CDCR personnel to validate Cabrera as a prison gang associate are found in a regulation promulgated by the Secretary of the CDCR—namely,

section 3378. (See generally Pen. Code, §§ 5054, 5058 & 5068 [authority to promulgate regulations and classify inmates].) Section 3378 concerns the documentation of critical information about inmates, which includes an inmate’s relationship with prison gangs or disruptive groups. (§ 3378, subd. (a).) To obtain this critical information, the regulation provides that allegations of gang involvement shall be investigated by a gang coordinator, gang investigator, or a designee. (§ 3378, subd. (c).)

A. Investigations into Gang Involvement

A gang coordinator or investigator looking into an inmate’s possible gang involvement must apply various definitions contained in the regulations. For instance, “member” is defined as an inmate “who has been accepted into membership by a gang.”¹⁰ (§ 3378, subd. (c)(3).) An “associate” is defined as an inmate “who is involved periodically or regularly with members or associates of a gang.” (*Id.*, subd. (c)(4).)

The quantity of evidence that the investigator needs to identify an inmate as a gang member or associate is specified in the regulation. “[A]t least three (3) independent source items of documentation indicative of actual membership” are required to identify an inmate as a gang member. (§ 3378, subd. (c)(3).) “Validation of an inmate/parolee ... 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.” (*Ibid.*) Parallel requirements exist for establishing an inmate is a gang associate. 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. Validation of an inmate/parolee ... as an associate of a prison gang shall require that at least one (1) source item be a direct link to a current or former validated member or associate of the gang.”¹¹ (§ 3378, subd. (c)(4).)

¹⁰The terms “gang” and “prison gang” are not defined here because the parties do not dispute that EME is a prison gang for purposes of the regulation.

¹¹Note that this provision requires the direct link be to a person, not the gang in general.

The meaning of the term “source item” is addressed in section 3378, subdivision (c)(8), which provides:

“... The sources shall be based on the following criteria:

“(A) Self admission....

“(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 is used by and distinctive of gang association or membership....

“(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.... [¶] ... [¶]

“(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.... [¶] ... [¶]

“(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....”

Each of the foregoing criteria includes the following as its last sentence: “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.” (§ 3378, subd. (c)(8).)

The “direct link” term used in section 3378 is not defined by statute or regulation. Also, it does not appear that the term was discussed or defined in the settlement agreement entered in *Castillo v. Alameida* (N.D.Cal. No. C94-2847 MJJ). (See fn. 12, *post.*)

B. Prevalidation Procedures

After an investigation into gang involvement has been completed by the gang coordinator or gang investigator and the identification of the inmate as a gang member or associate has been verified, the verification of the inmate's gang identification "shall be validated or rejected by the chief, office of correctional safety (OCS), or a designee." (§ 3378, subd. (c)(6).) Specific procedures leading up to the validation or rejection decision are set forth in paragraphs (A) through (G) of subdivision (c)(6) of section 3378. These procedures are not the source of the main controversy in this case and will not be described in detail. Briefly summarized, the procedures include a (1) prevalidation interview, (2) 24-hour notice of that interview and the source items used to identify the inmate's gang affiliation, and (3) documentation of the interview and the inmate's response to the source items.¹²

After the prevalidation procedures have been completed, the validation package is submitted to the OCS. (See § 3378, subd. (c)(6)(A) & (D).) The documented interview of the inmate must be submitted to the OCS with the validation package. (§ 3378, subd. (c)(6)(D).)

¹²To provide historical context, we note that these procedures appear to be related to the provisions of the settlement agreement entered in *Castillo v. Alameida* (N.D.Cal. No. C94-2847 MJJ).

A March 20, 2005, draft of that settlement agreement was included as exhibit K to Cabrera's petition. Paragraph No. 9 of the agreement provides: "Due Process in Validations and Inactive Reviews. [CDCR] shall provide notice and opportunity to be heard to each and every prisoner at the pre-validation and inactive review stage. [CDCR] agree[s] to provide 24-hour advance notice to each prisoner of the source items considered prior to the validation packet being sent to Law Enforcement and Investigations Unit ('LEIU') for approval or rejection of an initial validation. [CDCR] also agree[s] to record the prisoner's opinion on each of the source items and to forward in written form such opinions to LEIU. A copy of the written record of the prisoner's opinion shall be given to the prisoner, prior to the time the record is forwarded to LEIU."

C. Validation

After the prevalidation procedures have been completed and the validation package submitted, the OCS's validation or rejection of the evidence relied upon must be documented using CDC Form 128-B2 (Rev. 5/95). (§ 3378, subd. (c)(6)(G).)

In this case, the appropriate form was used to validate Cabrera as an associate of EME. The form stated that a gang validation package was received on April 18, 2008, from IGI J. Gentry at CCI and listed the three CDC Form 128-B's dated April 8, 2008, as the items that met the validation requirements.

II. Judicial Review

In *In re Jenkins* (2010) 50 Cal.4th 1167, the California Supreme Court discussed two different legal tests that might be applied to official action involving inmates. One test inquires into whether the actions by prison officials were arbitrary, capricious, irrational, or an abuse of discretionary authority. (*Id.* at p. 1176.) The California Supreme Court used this test to determine whether a regulation was valid under the due process requirements of the United States and California Constitutions. (*In re Jenkins*, at p. 1176.)

The California Supreme Court also discussed the "some evidence" test adopted by the United States Supreme Court in a case involving the denial of good time credits that could reduce the inmate's time in prison. (*In re Jenkins, supra*, 50 Cal.4th at p. 1176.) In its decision, the United States Supreme Court stated:

"We hold that the requirements of due process are satisfied if *some evidence* supports the decision by the prison disciplinary board This standard is met if 'there was some evidence from which the conclusion of the administrative tribunal could be deduced' [Citation.] Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." (*Superintendent v. Hill* (1985) 472 U.S. 445, 455-456, *italics added.*)

We applied the “some evidence” test in *In re Furnace* (2010) 185 Cal.App.4th 649, 659. 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.

III. The Direct Link Requirement

A. Definition of Terms

CDCR has attempted to establish the requisite direct link through the association criterion in section 3378, subdivision (c)(8)(G).¹³ Consequently, our analysis begins with the meaning of the terms “direct,” “link,” and “association.” We have already determined and adopted a definition of the term “direct” as used in section 3378. (*In re Furnace, supra*, 185 Cal.App.4th at p. 661 [“direct” means “without interruption or diversion” and “without any intervening agency or step”].) Nothing in this opinion is meant to alter that definition. Accordingly, we proceed to the terms “link” and “association.”

1. Association

A letter requesting supplemental briefing on the definition of the regulatory terms asked the parties whether they contended “that the word ‘link’ as used in the phrase

¹³The relevant portions of section 3378 are as follows. “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 ... shall require at least one (1) source item be a direct link to a current or former validated member or associate of the gang” (§ 3378, subd. (c)(4).)

“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: [¶] ... [¶]

“(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.” (§ 3378, subd. (c)(8).)

‘direct link’ in the last sentence of ... section 3378, subdivision (c)(4) should be interpreted to mean ‘connection’? (See American Heritage Dict. (3d college ed. 2000) p. 789 [transitive verb ‘link’ defined as ‘[t]o connect with’].)” Both parties responded “yes.”

Cabrera expanded on his answer by asserting that the term “link” as used in section 3378 simply means a connection that is reciprocal. CDCR took a broader view, asserting that “link” in this context should mean “‘anything serving to connect one part or thing to another; a bond or tie.’ (Random House Webster’s Unabridged Dict. (2d ed. 1998) p. 1119.)”

We also asked the parties whether “link” should be interpreted to mean “relationship.” (See American Heritage Dict., *supra*, p. 789 [“link” defined as “**3.a.** An association; a relationship. **b.** A causal, parallel, or reciprocal relationship; a correlation”].) CDCR answered “no” and Cabrera answered “yes.”

We agree with the parties to the extent that their positions overlap. The term “link” used in subdivision (c)(4) of section 3378 means “connection.” This definition is sufficient for the issues presented by this case. We need not decide the point on which the parties disagree—namely, whether “link” means a reciprocal or two-way connection. The concept of mutuality is addressed subsequently in our definition of “association” and, therefore, it would be redundant to include it in our definition of “link.”

Our determination that “link” means “connection” is consistent with the way we analyzed the direct link requirement in *Furnace*. We did not adopt an explicit definition of “link” in that case, but implicitly treated it as synonymous with “connection.” (*In re Furnace*, *supra*, 185 Cal.App.4th at pp. 660-662.) Whether circumstances will arise where “link” needs a more particular definition than merely “connection” is an issue left for future cases.

2. Association

CDCR asserts the appropriate definition of the word “association” changes with the context in which it is used and the purpose of the regulation. For example, according

to CDCR, the word “association” is used differently in the first two sentences of subdivision (c)(8)(G) of section 3378. In the first sentence, “association” means to have a “loose relationship as a partner, fellow worker, colleague, friend, companion, or ally” with gang affiliates. (Webster’s 3d New Internat. Dict. (1986) p. 132 [definition of verb “associate”].) The second sentence, however, refers to “association” with “an organization of people with a common purpose and having a formal structure.” (Random House Webster’s Unabridged Dict., *supra*, p. 126.)”

Cabrera argues the term association refers to “periodic or regular” involvement of the inmate with prison gang affiliates. This language stems from section 3378, subdivision (c)(4), which defines “an associate.” (See fn. 13, *ante*.) Citing criminal street gang cases, Cabrera urges the adoption of the following three-prong definition of association: “[A]n inmate, (1) with knowledge of the unlawful activities of a prison gang, (2) ‘individually’ or ‘collectively’ engages in activities relating to the gang, and (3) whose involvement is more than ‘nominal’ or ‘passive.’” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466 [to prove “active participation” in a criminal street gang, for purposes of Pen. Code, § 186.22, subd. (a), it must be shown that defendant’s involvement was more than nominal or passive], citing *People v. Castenada* (2000) 23 Cal.4th 743, 749-750; *People v. Valdez* (1997) 58 Cal.App.4th 494, 505.)

Based on our examination of the regulatory context and purpose, as well as various dictionary definitions, we conclude that, for purposes of the first sentence of subdivision (c)(8)(G) of section 3378, the term “association” means a “loose relationship as a partner, ... colleague, friend, companion, or ally” with a validated gang affiliate. (Webster’s 3d New Internat. Dict., *supra*, p. 132.) Using this definition, the “association” criterion contained in subdivision (c)(8)(G) of section 3378 can be established with information related to the inmate’s loose relationship with a gang affiliate. The loose

relationship between the two individuals can be as partners, colleagues, friends, companions or allies.¹⁴

We reject Cabrera’s argument that “association,” for purposes of subdivision (c)(8)(G) of section 3378, requires the inmate to have *engaged in activities related to the gang* because that argument is not based on the ordinary meaning of the word “association” or “associate.” Instead, it is based on authorities addressing the inapposite question whether “active participation” in a criminal street gang has been shown.

Furthermore, we believe the “association” criterion of section 3378, subdivision (c)(8)(G) that concerns a “source item” is evidentiary in nature, while a finding that an inmate is an “associate”—that is, one “who is involved periodically or regularly with members or associates of a gang” (§ 3378, subd. (c)(4))—is a conclusion based on the proven criteria.

3. Combining the definitions

The last step in our analysis of the meaning of the words in section 3378 is to combine the definitions and reach a conclusion as to 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).)

First, we interpret the requirement that “at least one (1) source item be a direct link to a current or former validated member or associate of the gang” (§ 3378, subd. (c)(4)) to mean that the source item must provide a connection without interruption or any intervening agency or step between the inmate and the validated gang affiliate. Second,

¹⁴We specifically limit our definition of “association” to cases involving the direct link requirement. Therefore we do not decide whether a source item constituting an indirect link could be established by an “association” that meets the following definition: “**5** : to submit to public identification (as with a principle or sentiment) ... <I should wholeheartedly ~ myself with the general libertarian views – Felix Frankfurter>” (Webster’s 3d New Internat. Dict., *supra*, p. 132 [definition of the verb “associate”].) A letter requesting supplemental letter briefs asked the parties whether they thought this definition should be used and they both answered “no.” We asked the question because this is a type of association that involves unilateral action and it appeared that Fischer was using this or a similar definition of “association” in explaining how artwork could be used by an inmate to associate himself with a gang affiliate.

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. 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. Otherwise, a validated gang affiliate could create such a relationship with an inmate unilaterally, without any assent or mutuality on the part of the inmate.

CDCR asserts that unilateral action by an inmate, such as possessing the photocopied signature of a gang affiliate, can constitute sufficient proof of association. This assertion appears to be based on an overly broad interpretation of our opinion in *In re Furnace* and, perhaps, on the concern that the legal definition of “association” as a bilateral or reciprocal relationship might be applied to limit the evidence that can be used to prove such a relationship existed. We intend no such evidentiary restriction. 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.¹⁵

¹⁵Our opinion in *In re Furnace*, *supra*, 185 Cal.App.4th 649 neither defined the term “association” nor addressed what the combination of a “direct link” through “association” meant. Neither did we address the question whether mutuality or reciprocity was inherent in the concept of “association.” Nothing in the opinion indicates that the parties ever raised these issues. Because an opinion is not authority for an issue not considered and resolved by the court (*People v. Harris* (1989) 47 Cal.3d 1047, 1071), the *Furnace* decision does not prevent us from interpreting “association” to mean a mutual relationship.

B. Application of the Direct Link Requirement to an Inmate's Associations

With the foregoing definitions of “direct link” and “association” in mind, we must now answer the question whether Cabrera’s possession of either the Bermudez drawing or the Garcia drawing provides some evidence of a connection, without interruption or any intervening agency or step in the form of a loose relationship (i.e., partners, colleagues, friends, companions, or allies), between Cabrera and the artist. We conclude the answer is no.

1. Contentions of CDCR

In *In re Furnace*, *supra*, 185 Cal.App.4th 649, this court adopted the dictionary definition of the word “direct” (“without interruption or diversion” and “without any intervening agency or step”) (*id.* at p. 661) and offered an example of an indirect link:

“To offer an example of what would clearly constitute an indirect link: If inmate A possessed contact information for inmate B who, in turn, possessed contact information for inmate C, a gang member, the link between inmates A and C would not be direct. The significance of the link between inmates A and C would not be evident without the addition of some further step or information.” (*Id.* at p. 661, fn. 3.)

CDCR argues that:

“Based on the Court’s example, the link between Cabrera and the validated associate and member of the EME are direct links. As was the case in *Furnace*, the information contained on the drawings connects Cabrera to the gang member or associate without the addition of some further step or information; the connection is evident from the face of the document. ([*In re Furnace*, *supra*, 185 Cal.App.4th] at p. 662.) This interpretation is consistent with the notion that these drawings are used by inmates to establish credibility and display allegiance with the prison gang. The drawings would lack their force if the connection between the validated gang member or associate and the inmate was indirect or required further information.”

In making this argument, CDCR acknowledges that Cabrera had only photocopies of drawings; the signatures in his possession were not original. CDCR also acknowledges that the forms completed by IGI Sanchez contain no information about how Cabrera came into possession of the photocopied drawings. But, CDCR argues, the

way in which Cabrera came to possess the drawings is irrelevant to the question whether the drawings establish a direct link.

2. *Analysis*

We conclude that 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).

Our conclusion is based on what the general chronos provided to Cabrera contain and do not contain. 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 EME, (5) the name "F. BERMÚDEZ" appears in the other drawing and he made the drawing,¹⁶ and (6) Fernando Bermudez is a validated a member of EME.¹⁷

¹⁶The general chronos included the following statement by IGI Sanchez: "I identified the person who drew the picture, as inmate" Fermin Garcia or Fernando Bermudez. The general chronos do not state how IGI Sanchez was able to identify the artists. For purposes of this opinion, we will assume CDCR correctly found that these inmates were, in fact, the artists who drew the pictures. Consequently, we do not address whether the general chronos disclosed sufficient evidence to support these findings as to the identities of the artists.

¹⁷We note that CDCR's return asserts that both Garcia and Bermudez are housed at Pelican Bay State Prison and cites to the CDC Form 128-B's for support. Those forms do not expressly state where Garcia and Bermudez are housed, but CDCR may have inferred their location from the letter and number assigned to each prisoner. Cabrera's traverse did not dispute this assertion of fact and, consequently, he is deemed to have admitted it. Nonetheless, we did not consider the location of the two artists as a fact that would alter our analysis of the direct link requirement.

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. The failure of the information in the general chronos to establish the requisite relationship between Cabrera and a validated gang affiliate is demonstrated by the following examples. 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 mutual relationship with Hockney, Hitler, or Trudeau. Concluding the inmate actually had a mutual relationship 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].)¹⁸ Thus, as a matter of law, there is not "some evidence" to support the validation. (Cf. *In re David M.* (2005) 134 Cal.App.4th 822, 832 [stale evidence was insubstantial as a matter of law].)

To assist CDCR, practitioners and courts that will apply the principles and definitions established in *In re Furnace*, *supra*, 185 Cal.App.4th 649 and in this opinion to future validation cases, we explicitly identify how this opinion has gone beyond *Furnace* and addressed points not raised there. This opinion explicitly addresses (1) the "document and disclose" requirement in subdivision (c)(8) of section 3378 and its effect on limiting the evidence CDCR may rely upon in court to justify its validation decision, (2) the definition of the term "link," (3) the definition of the term "association," and (4) the meaning of the combination of a "direct link" through "association." Also, we address the question whether a mutual relationship is needed to establish a direct link through association, which we decide in the affirmative here. None of these points was addressed in *Furnace*, and nothing in *Furnace* is inconsistent with our analysis here.

¹⁸Our determination that Cabrera's possession of the drawings did not establish he had a direct link with the artists does not undermine the "some evidence" test used to determine the sufficiency of the evidence in gang validation proceedings.

A critical distinction between the two cases is found in the nature of the information asserted by CDCR to supply the necessary direct link. Cabrera possessed drawings that contained photocopied names of validated gang affiliates, while the inmate in *Furnace* possessed a piece of paper with the name, CDCR number, and institutional housing of a validated member of the Black Guerrilla Family (BGF) prison gang housed at Pelican Bay State Prison. (*In re Furnace, supra*, 185 Cal.App.4th at p. 654.) This information about the BGF member was characterized by the IGI in *Furnace* as contact information. (*Ibid.*) The inmate in *Furnace* also had (1) a book written by George L. Jackson, the person who provided the example and teachings used as the basis for the BGF ideology, (2) an audio compact disc about the life, death, and ideology of George L. Jackson, (3) a photocopied flyer promoting a 2005 Black August event in Oakland, California, and (4) a photocopied newspaper article explaining the meaning of Black August. (*Id.* at pp. 654-655.)

The uncontested facts created an inference that Furnace knew the inmate identified on the piece of paper was a BGF member: the inmate's name was included in the newspaper article explaining Black August, and Furnace stated that he had planned to contact the inmate as research for a children's book he was writing on staying away from gangs and prison. (*In re Furnace, supra*, 185 Cal.App.4th at pp. 655, 661.) There was no question that Furnace was aware the inmate whose contact information he had was a gang member and had a significant role in the BGF. Under all of these circumstances, the name, CDCR number and institutional housing in Furnace's possession was evidence of contact or communication between the two inmates, which in turn supported the inference of involvement between the two. And it was under all these circumstances that we concluded the piece of paper with the gang member's contact information satisfied the requirement of a direct link between the inmate and a validated gang member. (*Id.* at p. 661.)

Our opinion in *Furnace* stands for the proposition that some evidence of a direct link between the inmate and a gang member exists when the inmate possesses a piece of

paper containing an individual's contact information, the inmate knows that the individual is a gang member, and the inmate possesses a variety of materials used by the gang for indoctrinating new members. We recognize that this information does not provide incontrovertible proof that an actual relationship existed between Furnace and the gang member. Conclusive proof of a relationship between the two, however, was not required by the applicable test. Instead, the some evidence test allowed the CDCR to infer the direct link existed based on the information provided in the general chronos. While CDCR could have drawn other inferences from the information provided about Furnace, we concluded that the evidence was sufficient to support an inference that there was involvement between Furnace and the gang member. (*In re Furnace*, *supra*, 185 Cal.App.4th at p. 661.) Thus, we concluded a direct link was demonstrated in that case. (*Ibid.*)

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, stated by the deputy attorney general at oral argument, 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.

C. Other Issues

Based on our resolution of the direct link issue, we need not address whether the four drawings found in Cabrera's possession constituted three independent source items. Also, we do not reach Cabrera's claim that his gang validation and placement in the SHU violated his First Amendment rights under the United States Constitution as well as his statutory rights under Penal Code sections 2600 and 2601.

Lastly, we recognize that our opinion in *Furnace* and this case leave unanswered questions about how the direct link requirement should be applied to situations with different facts. For example, neither case answers whether some evidence of a direct link is established solely by an inmate's possession of (1) a validated gang affiliate's contact

information, or (2) an original drawing made and signed by a validated gang affiliate. Because of the nature of appellate review, those questions must await another day. (See *Fiorentino v. City of Fresno* (2007) 150 Cal.App.4th 596, 605, fn. 2 [readers cautioned that opinion did not contain implied rulings; some of the unresolved issues explicitly identified as issues that must await another day].)

DISPOSITION

Let a writ of habeas corpus issue directing the California Department of Corrections and Rehabilitation 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.

DAWSON, Acting P.J.

WE CONCUR:

KANE, J.

POOCHIGIAN, J.