

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSHUA D. ZOLLICOFFER a/k/a
PASSION STAR,
Plaintiff,

versus

BRAD LIVINGSTON, personally and in his
official capacity as Executive Director of the
Texas Department of Criminal Justice
("TDCJ"); *et al.*,

Defendants.

Case No. 4:14-cv-03037

STATE OF WASHINGTON)
) §§
COUNTY OF THURSTON)

Affidavit of Eldon Vail

I, Eldon Vail, upon my oath, hereby certify as follows:

1. I have personal knowledge of each of the facts sets forth herein, and could and would competently testify thereto, if called upon to do so.

INTRODUCTION

2. I am a former corrections administrator with nearly thirty-five years of experience working in and administering adult and juvenile institutions. Before becoming a corrections administrator, I held various line and supervisory level positions in a number of prisons and juvenile facilities in Washington, in addition to serving as a Juvenile Parole Officer and pre-release supervisor. I have served as the Superintendent (Warden) of three adult institutions, including two facilities with maximum-security inmates. I served for seven years as the Deputy Secretary

for the Washington State Department of Corrections (WDOC), responsible for the operation of prisons and community corrections. I briefly retired, but was asked by the former Governor of Washington, Chris Gregoire, to come out of retirement to serve as the Secretary of the Department of Corrections in the fall of 2007. I served as the Secretary for four years, until I retired in 2011.

3. For more than a decade during the time when I was the Deputy Secretary and then Secretary of the WDOC, I lead a prison system that decreased the level of violence by over thirty percent, reinforcing and establishing best practices that continue to reduce violence in the Washington state prison system to this day. Washington is viewed as a national leader in corrections based on a strong combination of three factors, 1) solid security practices, 2) meaningful and evidenced- programs for the inmate population and, 3) the exercise of legitimate authority through responsive grievance processes.

4. Since my retirement, I have served as an expert witness and correctional consultant over twenty times in thirteen different states. A complete copy of my resume, detailing my work experience, is attached to this report as **Exhibit 1**. I am being compensated at the rate of \$150 an hour for my work on this case.

ASSIGNMENT

5. Plaintiffs' counsel has retained me to offer my opinion regarding the need for protection for Joshua D. Zollicoffer a/k/a Passion Star (Ms. Star). Ms. Star, a transgender person currently serving a prison sentence in the Texas Department of Criminal Justice (TDCJ).

MATERIALS RELIED UPON

6. For this report I have reviewed the Plaintiffs' original and amended complaints, the affidavits of Passion Star including related exhibits, her disciplinary history through 2013 and an email sent to opposing counsel on

February 27, 2015 detailing the immediate threat Ms. Star currently faces. A complete list of the material I have reviewed is attached to this report as **Exhibit 2**.

OPINION

7. It is my strong opinion that Ms. Star is in imminent danger of yet another physical or sexual assault and that the TDCJ is either unwilling or unable to provide for her safe protection from a very serious risk of harm.

TDCJ HAS KNOWLEDGE OF THE RISK AND REFUSES TO ACT

8. It is clearly and widely recognized in the corrections profession that LGBT inmates are at high risk for physical and sexual assault. One of the primary ways that has been communicated to the profession is the Prison Rape Elimination Act (PREA). PREA was passed into federal law in 2003. Standards were later finalized including standards that are relevant to this case. The slow implementation of the PREA standards was discussed extensively throughout the corrections industry.

9. The PREA standard for Housing and Placement requires that within seventy-two hours of arrival inmates who are at risk for victimization or abuse be identified.¹ Those standards go on to say²:

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

¹ PREA Prison and Jail Standards, Screening for risk of victimization and abuse, standard 115.41

² *ibid*, standard 115.42

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

As a correctional professional who has interacted with corrections directors and other leaders from around the country for well over a decade, it is simply not possible that the leadership of TDCJ are unaware of this evidence of the risk to gay and transgender prisoners and the requirement to respond to their unique needs to try and keep them safe while in prison. I can only conclude that their department chooses to ignore this information, placing Ms. Star at continued risk of significant harm.

10. In addition to the widely recognized and publicized safety risk for gay and transgender persons who are incarcerated, the TDCJ has in their own records detailed accounts of the physical and sexual assaults Mr. Star has suffered while in their custody. For example, medical records from the TDCJ show she was raped in 2007 while held in the Allred Unit.³ In 2013, less than two years ago, she was attacked with a razor while at Hughes, requiring thirty-six sutures to repair the wounds.⁴ In both of these cases, Ms. Star had alerted TDCJ authorities that she was in danger and that she needed protection prior to the assaults. Tragically, her requests were ignored.

11. Ms. Star has repeatedly alerted TDCJ authorities that she is in danger by utilizing their grievance system. The responses she receives are formulaic and do

³ Exhibit A, Correctional Managed Care, Clinic Notes-Nursing, 3/29/2007

⁴ Exhibit G, Correctional Managed Care, Clinic Notes-Nursing, 11/20/2013

not legitimately respond to the issues she raises. There are many examples in the record. In May of 2013, Ms. Star filed a detailed complaint identifying the prisoners who were threatening her and describing where and when the threat occurred.⁵ The response she received to her grievance was, "...there was no evidence to support your claims".⁶ Undeterred by this feeble response she continued in her good faith efforts to find relief through the TDCJ grievance process. Several grievances later that resulted in more refusals to protect her, on November 19, 2013 she filed an emergency grievance declaring that she was in immediate danger. She also shared this information with the building supervisor on the same day. Tragically, her warnings went unheeded, resulting in the attack with the razor described above. In my experience as a prison administrator and as an expert working on multiple cases in a variety of jurisdictions it is my conclusion that the TDCJ grievance system is ineffective and unresponsive to the very real risks that Ms. Star faces to her personal safety on a daily basis. She cannot hope for relief from the TDCJ by simply continuing to file grievances.

THE CURRENT RISK AND VIABLE ALTERNATIVES

12. Like all prison systems, the TDCJ has alternative housing to protect inmates who are at risk for victimization for someone like Ms. Star. This status in Texas is described in the Amended Complaint as follows, "Safekeeping status is a housing status assigned to individuals in custody who need protection from other inmates in the general population, and whose need for protections could be met by housing them separately. In addition, safekeeping offenders receive their recreation time and meals apart from the general population".⁷ In her grievances

⁵ Ms. Star has repeatedly been willing to give details about the threats to her person, including identifying specific inmates. This courageous act, which should be encouraged by any competent prison administrator seriously interested in stopping violence in their facility has been largely discarded, resulting in her being labeled a "snitch" by other inmates, placing her in further danger.

⁶ Exhibit D, Grievance # 2013143084, 5/12/2013

⁷ Amended Complaint page 5, footnote 2

Ms. Star has repeatedly asked for placement in this program, a placement that in my opinion, based on the records I have reviewed, would be entirely appropriate. TDCJ officials have repeatedly denied these requests.

13. There is clear information in the record that Ms. Star has been denied placement in the safekeeping program because of her disciplinary record, “Your request for safekeeping status was denied due to your history of disciplinaries involving assault and/or aggressive behavior”⁸. I have taken a close look at her disciplinary history through 2013 and I see absolutely no reason why this record would preclude her from being housed safely while she is in prison. Many of her disciplinary write-ups are for small and routine misbehaviors such as having unauthorized property, refusing to work or refusing to follow orders. To the extent that there is violence related behavior such as fighting or possession of a weapon, her record is not extensive and somewhat understandable given the danger she has faced in the TDCJ on a daily basis for several years and the consistent lack of help she has received from department officials. If the staff can’t or won’t defend her, she has been and literally is on her own to protect herself. Even if her behavior were more serious, that would not preclude TDCJ officials from their obligation to act to keep her safe. Fundamental to the obligation of every correctional official is to do all they can to protect inmates when the danger is clearly known, as the record regarding Ms. Star illustrates.

CONCLUSION

14. It is my opinion that the TDCJ continues to put Ms. Star at significant risk of serious harm, bodily injury and perhaps even the risk of death. By their actions for over a decade they have consistently demonstrated that they lack the capacity to appropriately respond to the present and immediate dangers she is facing today housed in general population. I beg the court to intervene and order the TDCJ to

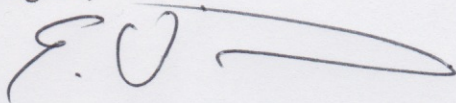
⁸ Exhibit P, Grievance #2014140325

act to keep her safe.

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct to the best of my knowledge.

Executed this 3rd day of March 2015 in Olympia, Washington.

Signed,

A handwritten signature in dark ink, appearing to be 'E. Vail', with a long horizontal stroke extending to the right.

ELDON VAIL