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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RALPH COLEMAN, et al.,

Plaintiffs,

v.

EDMUND G. BROWN, Jr., et al.,

Defendants.

Case No. Civ S 90-0520 LKK-JFM

**EXPERT DECLARATION OF ELDON
VAIL IN SUPPORT OF REPLY BRIEF
IN SUPPORT OF MOTION FOR
ENFORCEMENT OF COURT
ORDERS AND AFFIRMATIVE
RELIEF RELATED TO USE OF
FORCE AND DISCIPLINARY
MEASURES**

1 I, Eldon Vail, declare:

2 1. I have personal knowledge of the matters set forth herein, and if called as a
3 witness, I could competently so testify. I submit this declaration in support of Plaintiffs'
4 Motion for Enforcement of Court Orders and Affirmative Relief Related to Use of Force
5 and Disciplinary Measures ("Motion").

6 2. Defendants and their expert grossly mischaracterize the foundation for my
7 opinions in support of the Motion, claiming it is based only on a review of the seven
8 videos examples detailed in my July 2013 declaration submitted in support of the Motion.
9 However, as outlined in my prior declarations submitted in this case, my opinions are
10 based on: 1) more than 50 videos I observed during my work for the termination
11 proceeding including controlled use of force events and interviews with inmates who
12 alleged excessive use of force or who had been injured during a use of force event.
13 Pursuant to our request, these videos should have included every interview and controlled
14 use of force event that occurred at Corcoran, KVSP, LAC and San Quentin between July 1,
15 2012 and the dates of my inspections in February 2013; 2) hundreds of CDCR internal
16 documents I reviewed, including more than 268 RVR reports and more than 204 use of
17 force incident reports, and which included all of Mr. Martin's file for the termination
18 proceeding plus additional documents produced by CDCR in connection with my own
19 inspections; 3) the four full-day prison inspections I conducted in February 2013 where I
20 visited the living units and yards, and interviewed dozens of mentally ill inmates and staff
21 members; 4) a review of all of the pleadings and supporting documents submitted in the
22 Motion to Terminate, as well as the Court's Order denying the motion, and the subsequent
23 orders of the Three-Judge Court; 5) a review of the relevant reports of the OIG and Special
24 Master; 6) a review of CDCR's use of force and RVR policies and procedures, and all
25 applicable regulations.

26 3. In addition, my opinions are based upon my substantial experience running
27 correctional institutions and presiding over a statewide prison system for more than a
28

1 decade, a system that successfully addressed the challenge created by the rapid influx of
2 the mentally ill into the prison environment. In my 35 years of work in corrections, I have
3 spent considerable time working to provide for the proper custody and care of the mentally
4 ill sentenced to prison. Among other accomplishments with this population, I was the
5 Superintendent (and later the Assistant Director with oversight) of the McNeil Island
6 Corrections Center and charged with program design and operation of an intermediate care
7 treatment unit at that prison. Later in my career as the Secretary and the Deputy Secretary
8 of the Washington State Department of Corrections, I was responsible for all programs for
9 the mentally ill in all Washington state prisons, including the physical plant design of an
10 expansion that doubled the state's beds for the growing population of mentally ill inmates
11 in the system. We developed a design that allowed inmates to move through progressive
12 custody levels from maximum to minimum and to avoid segregation whenever possible.
13 The design has proven effective. For the mentally ill inmates who did end up in
14 segregation we created a specialized high security treatment unit, separate and apart from a
15 regular segregation unit, where the inmates could be safely housed and also receive robust
16 treatment from mental health professionals. The pioneering work of the McNeil program,
17 and Washington's correctional programs overall, have been extensively studied by
18 researchers from the University of Washington, as referenced in my first expert
19 declaration.¹ As I said in my first declaration, "[i]t is difficult work, but it is not
20 impossible work."²

21 4. Since my last declaration, I had an opportunity to re-watch seven of the use
22 of force videos I observed during the termination proceeding.

23 5. Since my last declaration I reviewed the deposition transcripts, declarations,
24 and supporting exhibits of defense expert Steve Martin, CDCR Deputy Director Kathleen
25 _____

26 ¹ Expert Declaration of Eldon Vail, signed March 14, 2013, page 36-38

27 ² Expert Declaration of Eldon Vail, signed March 14, 2013 at 38:7-8.

1 Allison, CDCR Deputy Director Michael Stainer, and Office of Internal Affairs Chief of
2 Headquarters Operations John Day, submitted or taken in opposition to the Motion. I have
3 reviewed the declaration of CDCR Adult Institutions Captain Joe Stein, submitted in
4 opposition to the Motion. I reviewed the deposition transcript of Inspector General Robert
5 Barton, taken in connection with the Motion. And I reviewed the latest OIG Semi-Annual
6 Report, which was published after I submitted my July 2013 declaration in support of the
7 Motion.

8 6. I have also reviewed Mr. Martin's file produced in connection with his July
9 2013 deposition. That file included full use of force incident reports and some RVR
10 packets for most of the incidents referenced in my prior declaration. It was the first time
11 complete files were provided to Plaintiffs' counsel in connection with some incidents.

12 7. With one minor exception³, after reviewing this additional information the
13 opinions given in my prior declarations remain unchanged. If anything, having an
14 opportunity to view some of the videos a second time allowed me to document the use of
15 even more OC spray than I had previously noted. Of the 17 use of force videos that CDCR
16 produced, all but one were problematic, and the majority exhibited excessive or
17 unnecessary force. Furthermore, a review of the additional records produced in connection
18 with Mr. Martin's July 2013 deposition only strengthens my prior opinions.

19 8. In paragraph 14 of my July 17, 2013 declaration, I discuss a mentally ill
20 inmate who was in a state of de-compensation and was subjected to excessive OC spray
21 when he was sprayed more than 40 times in a single incident. Having now reviewed the
22 related Internal Executive Review Committee ("IERC") report, I found that the IERC takes
23

24
25 ³ In paragraph 19 of my July 2013 declaration I said that two inmates were, "thrown to the
26 ground and dragged." Upon a second viewing I discovered this was not accurate. The
27 inmates were taken to the ground. My concerns about using OC on someone with asthma,
28 the amount of OC pumped into the cell and use of the spit mask in this incident are
unchanged.

1 issue with some technical details of the event but fails to note that too much spray was
2 used. In fact, the report states: “The amount of force used was in direct relationship to the
3 inmate’s actions,” and “Staff used a reasonable amount of force in order to effect
4 compliance.” This incident clearly exemplifies the inadequacy of the IERC review
5 process, which merely evaluates CDCR’s compliance with its own deficient policies,
6 including its policy allowing for the unlimited use of pepper spray.

7 9. In paragraph 15 in that same declaration, I discuss a mentally ill and suicidal
8 inmate who was place on “management status,” as an example that illustrates my concern
9 about that practice. After reviewing the additional documents, I am even more concerned.
10 The written record clarifies that there was no weapon involved, no immediate threats of
11 harm, and no justification that the inmate, who uses a cane to walk, posed anything more
12 than a routine disruption for staff. His behavior does not meet the threshold of threatening
13 “institutional security,” the justification given by the Incident Commander to twice
14 overrule the medical staff’s recommendation against the use of OC spray due to the
15 inmate’s asthma. The decision by the Lieutenant to place the inmate on “management
16 status” for ten days, in the middle of a use of force event, after the inmate had willingly
17 entered the holding cell, served only to escalate the situation and further disturb an already
18 distraught inmate. It is conceivable that this staff escalation caused this disturbed inmate
19 to resist any further cooperation with the staff. I remain concerned about “management
20 status,” the fact that it is entirely unregulated by CDCR on a system-wide basis, and the
21 potential for it to be an abusive mechanism to circumvent due process, especially for
22 mentally ill inmates. The IERC, however, fails to examine any of these issues and merely
23 notes that the OC spray was used from two or three feet away, instead of the recommended
24 six feet.

25 10. In paragraph 16 of my July 2013 declaration, I discussed the failure of
26 CDCR staff to pay attention to a decompensating inmate’s cues during a use of force
27 event. The inmate asked for the involvement of mental health staff in the process of
28

1 “cuffing up” after he observed them nearby. At that moment, custody staff instead
 2 escalated the incident by refusing to bring mental health staff into the event, and simply
 3 ordered the inmate to “get that shit off your head.” The inmate said he was afraid of the
 4 Barricade Removal Device and started talking about his fear of being raped. Staff insisted
 5 that he remove his boxers in order to be stripped searched. While I would not suggest
 6 putting mental health staff in harm’s way, it may well have been useful to bring mental
 7 health staff closer to the cell to talk a decompensating inmate through his fears. He had
 8 expressed a willingness to comply and was looking for a way to maintain some control, but
 9 that need was unheeded by custody staff. That kind of flexibility is not part of CDCR’s
 10 toolbox during use of force events. Again, none of this information was addressed by the
 11 IERC. A review of its report illustrates how CDCR is simply focused on checking the
 12 boxes with a mechanical approach that ignores the needs of mentally ill inmates in a
 13 dynamic situation. Instead IERC simply looked at the narrow issue of whether
 14 department policies were followed, not whether their staff might have missed an
 15 opportunity to deescalate the situation earlier in the event. This incident exemplifies the
 16 fact that the IERC process does not take into account the complexity of using force against
 17 mentally ill inmates. As a result, there is very little feedback that would provide a learning
 18 opportunity for CDCR, or much of a chance that the review will change or improve
 19 CDCR’s use of force practices against class members.

20 11. In paragraph 17 of my July 2013 declaration, I discuss a mentally ill inmate
 21 who was subjected to excessive spray because he would not come out of his cell. Having
 22 now reviewed the IERC report, I note that they share my concern that the inmate’s naked
 23 body was exposed on camera in this incident. However, the IERC report makes no
 24 mention, and once again appears to have no concern, about the amount of OC spray used
 25 against this decompensating inmate.

26 12. These examples illustrate that the IERC is not consistently acting as an
 27 effective review process for use of force against mentally ill inmates. Coupled with
 28

1 Inspector General Barton, Deputy Director Stainer, and Internal Affairs Chief Day's
 2 statements throughout their depositions that neither the OIG nor CDCR, including OIA,
 3 specifically reviews the manner or frequency with which force is used against the mentally
 4 ill or tracks data related thereto, and given Mr. Stainer's statements in his deposition that
 5 such a review is unnecessary⁴, my opinion that a meaningful outside review is critical to
 6 protect the mentally ill inmates in the CDCR is further solidified.

7 13. In Mr. Martin's third declaration he reports that I failed to take into
 8 consideration the level of the inmate's resistance.⁵ He is wrong. The level of an inmate's
 9 resistance is a dynamic measure that can and will change during the course of a use of
 10 force event. In the videos I reviewed (including the videos discussed above) the staff
 11 consistently demonstrate a lack of an agile tactical response to that dynamic measure,
 12 which is one reason why I opine that nearly all of the videos I viewed were examples of
 13 excessive uses of force. In many of the videos the custody staff members escalate the
 14 situation rather than contain it. In nearly every video I reviewed the staff were stuck on
 15 one approach — keep spraying as much OC as possible into the cell of a mentally ill
 16 inmate — whether effective or not. CDCR staff should be better trained and CDCR
 17 administrators should have higher standards for their staff.

18 14. Mr. Martin also says in his declaration that I did not, "provide objective
 19 evidence that officers used force for the very purpose of causing harm to the inmate."⁶ He
 20 is correct, I did not make that assertion in any of my declarations or in my depositions. I
 21 have no way of knowing the intent behind the behavior of CDCR officials in any particular
 22 situation. I can opine, however, that the effect of excessive OC spray is that mentally ill
 23
 24 _____

25 ⁴ Deposition of Michael Stainer, taken August 15, 2013, at 177:23-179:24, 184:12-187:10

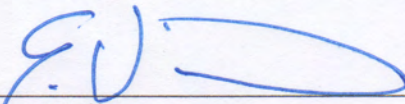
26 ⁵ Martin declaration signed July 17, 2013, paragraph 13, page 3, line 26

27 ⁶ Martin declaration signed July 17, 2013, paragraph 13, page 4, line 5

1 inmates experience a great deal of immediate pain and harm, whatever the intention of the
2 officer inflicting the pain.

3 15. In sum, after reviewing all of the available information since my expert
4 opinions and recommendations were offered in my first two declarations, my opinions and
5 recommendations are unchanged. In fact my prior opinions have been reinforced by the
6 additional information I reviewed. CDCR needs additional oversight to ensure that the
7 rights of mentally ill inmates are protected.

8
9 I declare under penalty of perjury under the laws of the United States that the
10 foregoing is true and correct and that this declaration is executed in Olympia, WA on
11 August 21, 2013.

12
13 
14 Eldon Vail