

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

WILLIAM THORPE, *et al.*,

Plaintiffs,

V.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Case No. 2:20-cv-00007-JPJ-PMS

**DEFENDANTS' MOTION, AND MEMORANDUM IN SUPPORT OF MOTION,
TO EXCLUDE THE REPORT AND TESTIMONY OF
PLAINTIFFS' PROPOSED EXPERT MICHAEL L. HENDRICKS**

In this case challenging the legality of the Step-Down Program operated by the Virginia Department of Corrections (“VDOC”), Plaintiffs proffer clinical psychologist Michael L. Hendricks to provide expert testimony on a central question: the effect of the Step-Down Program on Plaintiffs’ mental health. The Federal Rules of Evidence permit the introduction of expert testimony only if it is reliable. Fed. R. Evid. 702. Hendricks’s testimony is not and, therefore, it should be excluded.

Both Hendricks’s methods and his conclusions fail to meet established standards for reliability. In multiple instances in his report (the “Report” or “Hendricks Rep.”), Ex. 1, he relied on unsupported inferences to reach highly speculative conclusions about the status of the named Plaintiffs’ mental health. Other times, he admitted to the unreliability of his own testing methods, but made causation determinations anyway. Twice, he reached conclusions without examining the subject Plaintiffs, and instead relied on—and then overruled—the analysis of other examining witnesses whom Plaintiffs elected not to designate as testifying experts. And, in the end, he purported to reach a broad causation conclusion—that, “[a]s a result of protracted isolation, each

Plaintiff (with two exceptions) has developed serious psychological and/or physical distress and impairment in functioning”—without engaging in any sort of differential diagnosis to validate that conclusion.

The flaws in Hendricks’s methodology undermine the conclusions in his report, fail to meet established standards for reliability, and should be excluded.

LEGAL STANDARDS

“The proponent of [an] expert bears the burden of demonstrating the admissibility of the expert’s testimony “by a preponderance of proof.”” *Metamining, Inc. v. Barnette*, No. 2:12CV00024, 2013 WL 3245355, at *9 (W.D. Va. June 26, 2013) (Jones, J.) (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 n.10 (1993)). The Federal Rules of Evidence permit expert testimony only if it meets four conditions:

- a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *Daubert*, 509 U.S. 579. This rule “imposes a special gatekeeping obligation on the trial judge to ensure that an expert’s testimony both rests on a *reliable* foundation and is *relevant* to the task at hand.” *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (internal quotations omitted). The *Daubert* standard applies to any purported experts claiming “technical or other specialized knowledge,” even if the expert testimony is not strictly scientific in nature. *Nease v. Ford Motor Co.*, 848 F.3d 219, 230 (4th Cir. 2017).

As a first step, expert testimony is relevant if it has “a valid scientific connection to the pertinent inquiry.” *Belville v. Ford Motor Co.*, 919 F.3d 224, 232 (4th Cir. 2019). Opinions that

are not relevant to a fact at issue must be excluded. *Sardis*, 10 F.4th at 281. Then, if a proponent establishes the relevance of expert testimony, courts consider the testimony’s reliability. District courts must “ensure that the proffered expert opinion is based on scientific, technical, or other specialized *knowledge* and not on belief or speculation, and inferences must be derived using scientific or other valid methods.” *Nease*, 848 F.3d at 229 (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)).

In assessing reliability, *Daubert* provides several guideposts to consider, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, whether there is a high known error rate, and whether the technique enjoys general acceptance in the relevant scientific community. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). “[E]xpert opinion evidence based on assumptions not supported by the record should be excluded.” *Tyger Constr. Co. Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 143 (4th Cir. 1994). Likewise, an expert opinion that is “no more than a ‘could be’ conclusion . . . is not sufficiently helpful to assist the fact finder so as to be admissible.” *Smithers v. C&G Custom Module Hauling*, 172 F. Supp. 2d 765, 770 (E.D. Va. 2000). That is because opinions about what *may have* happened do not have any “tendency to make the existence of any fact . . . more probable or less probable.” Fed. R. Evid. 401.

ARGUMENT

I. Hendricks’s opinions regarding Plaintiffs Thorpe and McNabb should be excluded.

In his expert report, Hendricks purported to reach conclusions regarding the mental health of two named Plaintiffs whom he did not personally examine, interview, observe, or even meet: Gerald McNabb and William Thorpe. *See* Hendricks Rep. ¶¶ 12 n.5, 101, 111. Instead, he relied—though only selectively—on the conclusions of other psychologists who did examine McNabb and

Thorpe. Notably, Plaintiffs do not offer the expert testimony of those psychologists, only Hendricks's derivative and often conflicting conclusions.

It is generally accepted practice in the field of psychiatry and clinical psychology that a diagnosis be based on an examination, including a personal interview and observations of the individual being assessed. *Tchatat v. City of New York*, 315 F.R.D. 441, 445 (S.D.N.Y. 2016) (citing cases finding that personal interviews are a keystone element of reliable psychiatric opinion); *United States v. Falcon*, 245 F. Supp. 2d 1239, 1243 (S.D. Fla. 2003) (excluding psychological opinion for failure to conduct personal interview or testing on subject); *see also Foreman v. Am. Rd. Lines, Inc.*, 623 F. Supp. 2d 1327, 1334 (S.D. Ala. 2008) (discussing clinical interviews as core element of clinical psychology and evaluation). It is likewise well-established in the relevant scientific community that personal interactions with subjects are central to accurate diagnoses. *Id.*; *cf. Ashley v. City & Cty. of San Francisco*, No. CV-12-00045-JST KAW, 2013 WL 2386655, at *3 (N.D. Cal. May 30, 2013) (granting psychological evaluation of plaintiff in prisoner-rights case on basis that “five hours of testing, split evenly between the interview and standard psychological testing, is necessary to obtain an accurate diagnosis”). Under *Daubert*, this failure to follow established industry best practices should result in exclusion of Hendricks's opinions about Plaintiffs McNabb and Thorpe. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (excluding physician's testimony where he did not physically examine subject, even though he conceded such examination was standard practice). As the Supreme Court has emphasized, the purpose of Rule 702's gatekeeping function is to “make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *see also Perkins v. United States*, 626 F. Supp. 2d 587, 593 (E.D. Va. 2009) (finding expert testimony

should be excluded when experts fail to be as careful in their paid consulting work as they would be in their other professional work).

Not only did Hendricks fail to examine McNabb and Thorpe himself, but he disagreed with the findings of the psychologists who did examine them—and then replaced those psychologists’ conclusions with his own. For example, it was Dr. Mollimichelle Cabeldue who examined, interviewed and observed Thorpe. Hendricks Rep. ¶ 111. Cabeldue diagnosed Thorpe with Unspecified Trauma and Stressor Disorder, which would not qualify as a serious mental illness under Hendricks’s own criteria. *Id.* ¶¶ 116, 118. Hendricks disagreed. He proceeded to overrule Cabeldue’s evaluation and opine that Thorpe suffered from *both* Post-Traumatic Stress Disorder and Major Depressive Disorder—conditions that, perhaps not coincidentally, qualify under Hendricks’s criteria for a serious mental illness.¹ *Id.* ¶¶ 116, 118; Hendricks Dep. at 185:12–187:20, Ex. 2.

Similarly, it was Dr. Shaina Smith who evaluated McNabb. After examining, interviewing and observing McNabb, Smith concluded that McNabb “did not appear to have acquired additional mental health symptoms while in solitary confinement outside of those which were present prior to solitary confinement.” Shaina Smith, Psychological Evaluation of Gerald McNabb (May 4, 2023) (“McNabb Evaluation”) at 10. Nevertheless, Hendricks opined that “McNabb’s symptoms of PTSD went unaddressed and it is likely that this neglect of his need for treatment very likely

¹ In his deposition, Hendricks claimed that his diagnosis of Thorpe differed from Cabeldue’s because he reviewed Thorpe’s institutional mental health records from Thorpe’s time in VDOC custody and Cabeldue did not. Hendricks Dep. at 185:12–187:20. But Cabeldue testified that she reviewed the same institutional health records as Hendricks. Cabeldue Dep. at 39:6–40:5, Ex. 3.

led to an exacerbation of his trauma-based symptoms.”² Hendricks Rep. ¶ 110; Hendricks Dep. at 231:19–232:20.

Thus, despite selecting other psychologists to conduct the analysis of Thorpe and McNabb reviewing those psychologists’ reports, in both instances Hendricks had to replace their conclusions with his own to find support for his theory that the named Plaintiffs all suffered psychological harm from their time in the Step-Down Program. Given his inconsistent conclusions and the established case law that generally holds reliable psychological evaluations should include personal interviews with the subject, the Court should exclude Hendricks’s opinions on Thorpe and McNabb—especially because his opinions differ from those of the professionals who actually performed the evaluations.

II. Hendricks’s causation opinions regarding all named Plaintiffs’ mental health conditions should be excluded.

Hendricks proffers an opinion on a central issue in this case: “As a result of protracted isolation, each Plaintiff (with the possible exception of Mr. Snodgrass and Mr. McNabb), has developed serious psychological and/or physical distress and impairment in function.” Hendricks Rep. ¶ 152c. He even goes one step further, claiming “[t]his distress and impairment exceeds any distress and impairment that was evident prior to each man’s placement in the Step-Down Program.” *Id.* Taken together, these findings state two similar but independent conclusions—that the Step-Down Program caused each Plaintiff to “develop” serious psychological or physical impairment, and that the Step-Down Program exacerbated any pre-existing psychological or physical impairments.

² At the same time, Hendricks later contradicted himself, excepting McNabb from his opinion that “protracted isolation” resulted in each Plaintiff’s “develop[ing] serious psychological and/or physical distress and impairment in function.” Hendricks Rep. ¶ 152c.

Hendricks’s opinions regarding the effect of conditions of the Step-Down Program on Plaintiffs’ mental health all suffer from a fundamental flaw—the absence of a demonstrable causal link between Plaintiffs’ injuries and Defendants’ actions. In particular, despite ample evidence of past traumas and mental health conditions experienced by Plaintiffs, Hendricks failed to perform any differential diagnosis to disaggregate what, if any, impact on mental health is attributable to the Step-Down Program. This “failure to adequately address alternative theories undermine[s] the reliability of [his] opinion[s].” *Seamster v. Taylor*, No. 4:21-CV-00021, 2022 WL 2165545, at *8 (W.D. Va. June 15, 2022) (quoting *Cady v. Ride-Away Handicap Equip. Co.*, 702 F. App’x 120, 127 (4th Cir. 2017)).

A. Hendricks’s opinions ignore other possible causes of Plaintiffs’ mental health conditions.

In reaching the broad conclusions he does, Hendricks fails to consider alternative causes for Plaintiffs’ mental health conditions. And there are as many alternative causes as there are Plaintiffs—the record abounds with evidence of the traumas suffered by Plaintiffs before and unrelated to their participation in the Step-Down Program. Consider the following examples:

- Vernon Brooks. Brooks reported diagnoses of emotional disabilities, including depression, ADHD, and intermittent explosive disorder as early as 8th grade and received treatment for mental health issues since childhood. Hendricks Rep. ¶ 32. Yet Hendricks relied on Brooks’ self-report that he “continues to be irritated and depressed,” which could both be attributable to his prior diagnoses, as proof that he deteriorated in the Step-Down Program. *Id.* ¶ 35.
- Brian Cavitt. Cavitt reported that he bounced between foster homes as a child, experienced force-feeding, tried to commit suicide several times before incarceration and received psychiatric hospitalization at least three times. *Id.* ¶ 40. His mother died of AIDS related to intravenous drug use. *Id.* Yet Hendricks discounts these experiences and claims Cavitt broke in the Step-Down Program based, apparently, only on the lack of a prior, documented diagnosis of PTSD. *Id.* ¶ 45.

- Derek Malik Cornelison. Cornelison was sexually abused by a sibling at age 6 and spent time in foster care. *Id.* ¶¶ 48, 50. He was incarcerated for 15 years before entering the Step-Down Program. *Id.* ¶ 52. But relying on Cornelison’s statement that the Step-Down Program “really messed him up,” *id.*, Hendricks attributed Cornelison’s PTSD, anxiety, anger and pessimism to the Step-Down Program.
- Frederick Hammer. Hammer has killed at least four people, including a police officer in 1978. *Id.* ¶ 58. At that time, he was diagnosed with paranoid schizophrenia, though the diagnosis may have been incorrect. *Id.* Hammer told Hendricks he had a history of taking medication for depression and anxiety. *Id.* His psychological testing results were inconsistent “at a level . . . that indicated his scores should be interpreted with caution.” *Id.* Hendricks admits that Hammer’s results were “not as clear” and that his “symptoms of depression and anxiety . . . may be extensions of his previously diagnosed depression and anxiety.” *Id.* ¶ 63. Yet Hendricks concludes that it is “*possible* that when [Hammer] was in the Step-Down Program, his symptoms were more severe.” *Id.* (emphasis added); Hendricks Dep. at 244:7–245:20; 252:21–255:14.
- Dmitry Khavkin. Khavkin reported in an affidavit that he was diagnosed with psychosis, PTSD, schizophrenia, paranoia, depression and anxiety as a teenager, before any incarceration. Hendricks Rep. ¶ 67. Yet he denied any such diagnoses in his discussion with Hendricks. *Id.* None of Hendricks’s testing of Khavkin was deemed reliable. *Id.* ¶ 69. Hendricks said he “couldn’t trust what [Khavkin] said.” Hendricks Dep. at 200:8–202:11. Hendricks made no specific finding of causal impact of the Step-Down Program in Khavkin’s plaintiff-specific report, yet included him in his ultimate finding that extended isolation caused him to develop “serious psychological and/or physical distress and impairment in function.” Hendricks Rep. ¶ 152(c). This, despite the fact that Hendricks testified he did not diagnosis Khavkin with a serious mental illness. Hendricks Dep. 179:13–17.
- Peter Mukuria. Mukuria stabbed a corrections officer in the chest while incarcerated before being moved into the Step-Down Program. Mukuria Dep. at 147:5–18, Ex. 4. He suffered a motor vehicle accident in 2006, hit his head, and was unconscious for a long period of time. Hendricks Rep. ¶ 73. Mukuria expressed skepticism that he ever recovered from it, and attributed his subsequent arrest to the accident. *Id.* Yet Hendricks apparently credited Mukuria’s testimony that he “first experienced,” mood changes, quickness to anger and irritability after he moved into the Step-Down Program. *Id.* ¶ 74. Mukuria’s test scores indicated only a single symptom of dissociation “barely above the cut off mark.” *Id.* ¶ 76. Hendricks conceded he had “few symptoms” of PTSD, “his current level of depression is comparatively low,” and admitted in his deposition that Mukuria did not

have a serious mental impairment. *Id.* ¶ 77; Hendricks Dep. 180:22–181:7. Instead, he based his conclusions about Mukuria primarily on his memory scores, without any consideration of whether those arose from the car accident. Hendricks Dep. 180:22–181:7. Nonetheless, Hendricks concluded that Mukuria’s admittedly mild psychological issues were attributable to the Step-Down Program. Hendricks Rep. ¶ 77.

- Gary Wall. Wall has a family history of paranoid schizophrenia and manic depression. *Id.* ¶ 93. He self-reported life-long mental illness. *Id.* ¶ 94. Wall’s medical records indicated pre-incarceration symptoms consistent with PTSD. *Id.* ¶ 97. Hendricks also notes that Wall “had experienced mental health problems before he was placed in the Step-Down [P]rogram.” *Id.* ¶ 100. Hendricks’s testing of Wall indicated symptoms consistent with PTSD but, rather than assess whether they might have pre-dated the Step-Down Program, Hendricks instead attributes them to the Program without critical analysis. *Id.*
- Gerald McNabb. When McNabb was 15, he walked in on his step-father raping his sister. *Id.* ¶ 102. McNabb shot his step-father later that day. In 2008, before moving to the Step-Down Program, McNabb was brutally assaulted by a cellmate and pronounced dead for 30 minutes. *Id.* ¶ 103. As noted above, the psychologist who evaluated McNabb determined no causal link between the Step-Down Program and McNabb’s mental health issues. *See Part I supra* (citing McNabb Evaluation at 10). Nevertheless, Hendricks concluded the Step-Down Program “very likely” led to an exacerbation of symptoms. Hendricks Rep. ¶ 110.

In his deposition, Hendricks identified portions of his report that he claimed supported his causation conclusions related to the Step-Down Program. *See, e.g.*, Hendricks Dep. at 249:11–259:18. In most cases, Hendricks abandoned any strict causation findings, and instead claimed the Step-Down Program “exacerbated” existing mental health conditions. *Id.* at 249:11–21 (conceding Brooks’s conditions were “not necessarily” caused by the Step-Down Program); 254:5–20 (same regarding Hammer’s symptoms). But he admitted in several instances that he relied on assumptions, or strictly on the statements of the named Plaintiffs, to reach his causation conclusions, despite evidence of pre-existing conditions. For example, for Hammer, Hendricks admitted that his symptoms were “extensions” of pre-Step-Down Program mental health issues, but concluded that they were “probably exacerbated” by the Program. Hendricks Dep. at 254:5–

255:14. Likewise, Hendricks acknowledged that Brooks did not provide any indication of “when [his mental health issues] all began,” so it was “possible that . . . some of this was there before or maybe there with less severity.” *Id.* at 245:21–246:16. Yet, despite these acknowledged unknowns, Hendricks concluded that the conditions of the Step-Down Program “almost certainly would have” exacerbated Brooks’s symptoms. *Id.* at 249:11–21. These speculative conclusions fail to grapple meaningfully with the “not so pleasant histories” of nearly all the plaintiffs. Hendricks Dep. 249:19–21. In the face of such unpleasant personal and medical histories that could significantly affect Plaintiffs’ mental health, Hendricks largely failed to rule out alternative causes of the diagnoses he made, which renders his conclusions unreliable.

B. Hendricks’s failure to conduct a differential diagnosis renders his opinions inadmissible.

Despite pages of detailed record evidence that suggest alternative causes of the mental health conditions suffered by Plaintiffs, Hendricks failed to engage in any sort of differential diagnosis before concluding that the Step-Down Program caused Plaintiffs’ injury. The absence of such analysis renders his conclusions unreliable and inadmissible.

When an expert offers conclusions regarding causation, courts often require that the expert follow a differential diagnosis. Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999). A reliable differential diagnosis typically involves “physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests,” and generally is accomplished by determining the possible causes for the patient’s symptoms and then eliminating each of the potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely. *Id.* On the flipside, “differential diagnosis that

fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation.” *Id.* at 265.

The expectation that an expert conduct such an analysis is central to the requirement that an expert’s testimony be reliable. So “if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert’s testimony.” *See id.* at 265–66 (citations omitted). Courts regularly exclude causation testimony that does not account for other potential factors. For instance, in *Bryte ex rel. Bryte v. Am. Household, Inc.*, 429 F.3d 469 (4th Cir. 2005), the Fourth Circuit affirmed a district court’s exclusion of expert testimony where the expert “did not exclude all or even most of the other possible sources” of injury. *Id.* at 476 (noting that other “possibilities have not been excluded in any methodical or reliable fashion” and “we are not obliged to credit [the expert’s] say-so supporting his own reliability by way of excluding other causes”); *see also Cooper*, 259 F.3d at 203 (expert’s failure to “identify specifically how he ruled out . . . other potential causes” renders his opinions “little more than speculation”); *Ferguson v. Nat’l Freight, Inc.*, No. 7:14-CV-00702, 2016 WL 1192702, at *4 (W.D. Va. Mar. 22, 2016) (citing *Whittaker v. Van Fossan*, 297 F.2d 245, 246 (4th Cir. 1961), for the proposition that even a competent expert’s opinion is “not receivable if he failed to take into account every relevant factor”); *Perkins v. United States*, 626 F. Supp. 2d 587, 594 (E.D. Va. 2009) (excluding expert testimony that failed to consider and rule out pre-existing conditions as causes of plaintiff’s medical issues). Hendricks’s failure to exclude pre-existing conditions, for instance, as potential causes of any of Plaintiffs’ mental health issues warrants exclusion of his causation conclusions.

In addition, Hendricks’s repeated use of conditional, tentative, and equivocal language highlights the unreliability of testimony that fails to rule out alternative causes. For example,

Hendricks opined that Brooks’s enhanced symptoms “seem[ed] new”—but he did not rule out that they may have been caused by earlier traumas and conditions. Hendricks Rep. ¶ 38. For Cavitt, Hendricks explicitly failed to rule out the influence of childhood trauma on his post-Step-Down Program condition, and instead said his PTSD “seems to have required additional trauma” to produce symptoms. *Id.* ¶ 45. Hendricks found Cornelison “seems not to have” presented Generalized Anxiety Disorder before the Step-Down Program and such diagnosis “reasonably could have been sufficiently caused” by the program. *Id.* ¶ 54. And with respect to Khavkin—who submitted an affidavit dictating multiple psychiatric diagnoses as a teenager—Hendricks concluded that it “seems believable” he did not have certain symptoms prior to being placed in the Step-Down Program, despite also concluding that he could not trust anything Khavkin told him. *Id.* ¶ 70; Hendricks Dep. 200:8–202:11. Hendricks admitted that he used conditional language when he lacked confidence that he had all the relevant information about a particular plaintiff to reach a definitive conclusion. Hendricks Dep. 244:3–248:18 (responding to examples of inconclusive statements in his report and saying “that’s true. And a lot of that has to do with how confident am I that the history that I have is sufficiently complete”).

Hendricks’s brand of opinion—which is “no more than a ‘could be’ conclusion”—“is not sufficiently helpful to assist the fact finder so as to be admissible.” *Smithers*, 172 F. Supp. 2d at 770. Numerous courts have so found. *See, e.g., Oglesby*, 190 F.3d at 251 (upholding exclusion of testimony by expert who “could only speculate as to a possibility which was no more likely than other available possibilities”); *Sharpe v. United States*, 230 F.R.D. 452 (E.D. Va. 2005) (refusing to consider speculative and non-specific expert testimony about what “may have” caused certain results); *Bowers v. Norfolk S. Corp.*, 537 F. Supp. 2d 1343, 1368 (M.D. Ga. 2007) (excluding expert whose “use of the qualifier ‘may’ . . . does not ‘logically advance a material aspect of

[Plaintiff's] case' because '[m]ay' is not synonymous with 'probable'; noting that "equivocal causation testimony does not assist the trier of fact"), *aff'd*, 300 F. App'x 700 (11th Cir. 2008).

III. Hendricks's reliance on inferences and speculation not supported by the factual record fails to comply with *Daubert*.

In addition to not excluding other potential causes of Plaintiffs' mental health issues, Hendricks's opinions suffer from a related methodological defect. In many instances—far too many—the Report relies on assumptions or unsupported inferences about Plaintiffs' medical and mental health history to support his conclusions. An expert's opinion must be based on *knowledge*, however, not on belief or speculation. *Oglesby*, 190 F.3d at 250. "[E]xpert opinion evidence based on assumptions not supported by the record should be excluded." *Tyger Constr. Co. Inc.*, 29 F.3d at 143. And so should Hendricks's opinions be.

The Report is replete with rank speculation about Plaintiffs' previous medical history. The following are just some examples:

- Hendricks declared that Brooks's "trauma-related" symptoms and memory issues "seem[ed] new," Hendricks Rep. ¶ 38, but he cited no facts or evidence to show Brooks did not have memory issues prior to the Step-Down Program. Instead, Hendricks assumed the symptoms were new based on the absence of facts about his pre-program history. Hendricks admitted as much at deposition, when he testified that "there was no clear indication from the record or even in his recall of when all of [his mental health issues] began." Hendricks Dep. at 240:18–241:7.
- Hendricks claimed Cavitt had not been diagnosed with trauma-based symptoms prior to incarceration, but provides no evidence to support that statement. Hendricks Rep. ¶ 45. It also assumes Cavitt received adequate mental health care before prison that could have assessed whether he suffered from such conditions.
- For Cornelison, Hendricks wrote "General Anxiety Disorder *seems not to have been present* prior to Mr. Cornelison's placement in the Step-Down Program and is a diagnosis *that reasonably could have been sufficiently caused by* the stress of being in the program." *Id.* ¶ 54 (emphasis added). This is pure speculation, and Hendricks admitted in his deposition that he

was not confident that he had a complete medical history for Cornelison. Hendricks Dep. 247:9–248:5.

- For Hammer, Hendricks admitted his “clinical presentation is not as clear as it may be for others,” and then wrote “it is also possible that when he was in the Step-Down Program, his symptoms were more severe.” Hendricks Rep. ¶ 63. This, too, is speculation. Hendricks Dep. 244:3–245:20.
- Hendricks relied on his assumption that “it also seems believable” that Khavkin did not have anxiety and depression symptoms before the Step-Down Program to determine that he suffered mental health deterioration in the program and that it was “highly likely that the needs that he did or may have had went unattended.” Hendricks Rep. ¶ 70. At deposition Hendricks testified, “I couldn’t trust what [Khavkin] had said. . . . I just sort of said, well, you know, it seems plausible that he has had some symptoms, but I can’t confidently say this is what his diagnosis is.” Hendricks Dep. at 194:22–196:8.
- For Mukuria, Hendricks concluded he “appear[ed] to have few symptoms of PTSD,” but proceeded to speculate that when he was actually in the Step-Down Program, “his diagnosis at that time likely met criteria for Acute Stress Disorder.” Hendricks Rep. ¶ 77. Of course, Hendricks did not examine Mukuria while he was in the Step-Down Program, and is guessing about what his condition might have been at that time.
- Hendricks concluded that Wall suffered deterioration in the Step-Down Program because “it [was] not clear that [before the Step-Down Program] he was exhibiting any significant mental health problems,” even though Hendricks acknowledged, in the same sentence, that Wall had “experienced mental health problems” before Step-Down. *Id.* ¶ 100. In essence, he relied on the absence of facts about the severity of Wall’s mental health symptoms before the Step-Down Program to conclude Wall must not have had any such symptoms. Hendricks Dep. at 241:20–242:9.

Given that a “reliable expert opinion must not be based on belief or speculation,” *Nease*, 848 F.3d at 231, this Court should exclude Hendricks’s opinions as unreliable.

Hendricks would have had less need to resort to speculation had he followed established best practice in his field. At deposition, he admitted that he lacked a full clinical history for any Plaintiff, even though reviewing such a history is best practice. Hendricks Dep. at 108:5–18; 109:20–110:12. Instead, he based his conclusions on a limited set of information from Plaintiffs’

time of incarceration. *Id.* at 110:20–111:16. Necessarily, then, he relied on assumptions about their prior treatments and diagnoses (or lack thereof) that are not part of the factual record. Nor did Hendricks ask for supporting documents to verify the claims made during his interviews with inmates.³ *Id.* at 114:11–117:1 (admitting that he relied on institutional records, affidavits and conversations with attorneys rather than complete medical records or third-party information); 117:21–119:5 (admitting he did not review all relevant institutional medical records from other states). Accordingly, to the extent the Court admits any part of the Report, it should admit only opinions based on record evidence or established facts. Hendricks’s reliance on assumptions about documents that he did not review cannot support reliable expert conclusions. *See, e.g., Russell v. Wright*, No. 3:11-CV-00075, 2013 WL 596062, at *3 (W.D. Va. Feb. 15, 2013) (limiting expert’s testimony to documents he actually reviewed).

IV. Hendricks’s opinions on medical subjects, which he is not qualified to offer, should be disregarded.

“An expert witness may not offer an opinion where the subject matter goes beyond the witness’s qualifications and area of expertise.” *Young v. Swiney*, 23 F. Supp. 3d 596, 611 (D. Md. 2014); *see also Robinette v. Wal-Mart Stores, Inc. Store #650*, No. 2:15CV00003, 2016 WL 8737153, at *3–5 (W.D. Va. Feb. 5, 2016) (Jones, J.) (excluding expert who had “no specialized training or professional experience” in the relevant subject). Hendricks offers multiple opinions outside his field, and the Court should exclude them all.

Hendricks is a psychologist, not a medical doctor, as he himself admits. Hendricks Rep. ¶ 54 (“This evaluation did not assess for purely physical symptoms, as that would be within the

³ Notably, Hendricks, as well as Cabeldue and Smith, all admitted they also failed to review clinical records from the Texas or Wyoming prison systems with respect to Thorpe and McNabb, respectively. Hendricks Dep. at 117:21–119:5; Cabeldue Dep. at 40:6–8; Smith Dep. at 38:21–40:1, Ex. 5.

expertise of a medical physician.”). Nevertheless, the Report proceeds to offer causation testimony related to Plaintiffs’ experience of medical conditions, including hypertension, arrhythmia and glaucoma. *Id.* As such, any aspects of Hendricks’s report that purport to state conclusions related to physical medical conditions should be excluded. *See Est. of Harvey ex rel. Dent v. Roanoke City Sheriff’s Off.*, 585 F. Supp. 2d 844, 863 (W.D. Va. 2008) (finding psychologist not qualified to issue expert opinions on proximate cause of death); *cf. Kristensen ex rel. Kristensen v. Spotnitz*, No. 3:09-CV-00084, 2011 WL 4380893, at *20 (W.D. Va. Sept. 21, 2011) (excluding medical doctor’s psychiatric diagnoses).

Hendricks’s lack of expertise to offer medical opinions is exacerbated by his commitment of the same methodological errors that render unreliable his opinions as a psychologist. *See Part II supra.* For instance, despite that millions of Americans suffer from the same, common medical conditions—hypertension, arrhythmia and glaucoma—*outside* the correctional setting,⁴ Hendricks does not even purport to conduct a differential diagnosis to assess contributing causes other than the Step-Down Program. Again, this “failure to adequately address alternative theories undermine[s] the reliability of [his] opinion[s].” *Seamster*, 2022 WL 2165545, at *8 (citations omitted); *see also Perkins*, 626 F. Supp. 2d at 594 (excluding expert testimony that failed to consider and rule out pre-existing conditions as causes of plaintiff’s medical issues). Hendricks’s medical opinions are also impermissibly equivocal by his own admission. Hendricks Dep. at 246:17–247:8 (admitting he was not sure if plaintiff’s heart issues were caused by the Step-Down

⁴ *See, e.g.*, Centers for Disease Control and Prevention, National Center for Health Statistics, Hypertension (stating that 48.1% of adults have hypertension), [FastStats - Hypertension \(cdc.gov\)](https://www.faststats.cdc.gov/Hypertension); Centers for Disease Control and Prevention, Atrial Fibrillation (stating that an estimated 12.1 million people in the United States will have atrial fibrillation, the most common type of arrhythmia, in 2030), [Atrial Fibrillation | cdc.gov](https://www.atrialfibrillation.cdc.gov/); Centers for Disease Control and Prevention, Vision Health Initiative, Current Glaucoma Programs (stating that more than 3 million Americans have glaucoma), [Current Glaucoma Programs | Research | VHI | CDC](https://www.currentglaucomaprograms.com/research/vhi/cdc).

Program). One example suffices: his conclusion that “*it seems entirely plausible* that Mr. Cornelison’s heart problems *may have* been prompted by the stress of being in solitary confinement, *even if it is not clear* that solitary was sufficient to account for these problems.” Hendricks Rep. ¶ 54 (emphasis added).

CONCLUSION

Even qualified experts must follow reliable methods to reach their conclusions. Because Hendricks failed to do so here, the Court should exclude his Report and testimony.

September 8, 2023

Jason S. Miyares
Attorney General of Virginia

Margaret Hoehl O’Shea (VSB #66611)
Assistant Attorney General,
Criminal Justice & Public Safety Division

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
Ph: (804) 786-2206
Fax: (804) 786-4239
moshea@oag.state.va.us

Respectfully submitted,

/s/ **Maya M. Eckstein**

Maya M. Eckstein (VSB #41413)
Thomas R. Waskom (VSB #68761)
Trevor S. Cox (VSB #78396)
R. Dennis Fairbanks (VSB #90435)

HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@HuntonAK.com
twaskom@HuntonAK.com
tcox@HuntonAK.com
dfairbanks@HuntonAK.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

By: /s/ Maya M. Eckstein
Maya M. Eckstein (VSB # 41413)
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
meckstein@HuntonAK.com

Counsel for Defendants