

**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
PLAINTIFF'S PROPOSED EXPERT DAN PACHOLKE**

Plaintiffs challenge the legality of the Step-Down Program operated by the Virginia Department of Corrections (“VDOC”). Plaintiffs proffer Dan Pacholke—a purported expert in the field of corrections—to provide testimony about the conditions of confinement within Red Onion State Prison (“Red Onion”) and whether VDOC complied with generally accepted practices, principles, and standards regarding the placement, management, and retention of inmates in restorative housing (also referred to as restrictive housing or segregated housing). The Federal Rules of Evidence permit the introduction of expert testimony, however, only if the expert is qualified to offer the opinion, the opinion is based on reliable methodology, and the opinion is helpful to the trier of fact. Fed. R. Evid. 702.

Because Pacholke’s opinions do not meet these standards, his report (the “Report” or “Pacholke Rep.”), attached as Ex. 1, and related testimony should be stricken. The deficiencies in Pacholke’s opinions fall into three main categories.

First, Pacholke offers opinions that he is not qualified to give. Pacholke is unqualified to give opinions about the effects of long term segregation on mental health, as he is admittedly not

a clinician and has no expertise in that field. Similarly, Pacholke is not qualified to testify about the supposed “incomprehensibility” of the Step-Down Program or the degree to which inmates and staff understand the Program and its underlying principles because he is not an expert in reading comprehension. Opinions on these matters should be excluded.

Second, Pacholke’s opinions rely on assumptions that are not supported by the relevant scientific literature and lack a reliable methodology. Pacholke’s understanding and analysis of restrictive housing and solitary confinement rely on personal, idiosyncratic definitions that are not supported by leading correctional organizations and publications. Accordingly, opinions based on his personal definitions—which underlie his conclusion that VDOC subjects inmates to long-term segregation for excessive periods—should be excluded.

Pacholke’s opinions regarding VDOC’s implementation of Evidence-Based Principles (“EBP”) in the Step-Down Program are equally unreliable. His critique of VDOC’s application of general and specific responsivity tools and strategies is riddled with errors, inconsistencies, and arbitrary criticisms—and none of them addresses a material issue in the case.

Third, Pacholke’s Report should be excluded because it is stuffed with irrelevant opinions, observations, and other filler—pages and pages in which Pacholke merely summarizes the documents or testimony of others without providing any additional analysis or value. Pacholke cannot simply restate the opinions of others, spoon-fed to him in a way favorable to Plaintiffs’ position, and call it expert testimony. These rehashed opinions do nothing to assist the trier of fact and should be stricken.

For these reasons and those set forth in more detail below, Pacholke’s Report and testimony 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. If a proponent establishes the relevance of expert testimony, then 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)) (internal quotations omitted). In assessing reliability, *Daubert* provided 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). Expert 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).

ARGUMENT

I. Pacholke’s “Opinion A”—that the Step-Down Program purportedly subjects inmates to “unnecessary deprivation beyond the length of time necessary”—relies on definitions unsupported in literature and practice, and should be excluded.

Under *Daubert*, district courts consider “whether and to what extent an expert’s theory has been accepted within the relevant scientific or engineering community.” *Nease*, 848 F.3d at 232 (citing *Daubert*, 509 U.S. at 593–94). “Without testing, supporting literature in the pertinent field, peer reviewed publications or some basis to assess the level of reliability, expert opinion testimony can easily, but improperly, devolve into nothing more than proclaiming an opinion is true ‘because I say so.’” *Small v. WellDyne, Inc.*, 927 F.3d 169, 177 (4th Cir. 2019).

Under the banner of his “Opinion A,” Pacholke offers multiple opinions that have not been accepted within the industry and therefore should be excluded.

A. Pacholke’s opinion that restrictive housing must be justified by an “imminent” threat is not accepted in the corrections field.

Pacholke asserts that inmates should only be subjected to restrictive housing when they pose a “*clear and imminent* threat to the safety of people or the orderly operation of the facility for the shortest amount of time possible to manage the imminent threat.” *See* Pacholke Rep. at 7 ¶ 12 (emphasis added); *see also* Pacholke Dep. (August 11, 2023) at 100:12–17 (attached as Ex. 2).

Pacholke finds this standard applicable not only to the assignment of inmates to restrictive housing, but also to measuring the length of time inmates should remain in restrictive housing. Pacholke Dep. at 102:6–8. Indeed, his assertion that the threat posed by an inmate must be both “clear and imminent” is the central foundation of Pacholke’s opinion that inmates in the Step-Down Program are subjected to restrictive housing for unnecessarily long periods of time.

At deposition, Pacholke claimed that his “clear and imminent threat” requirement is a “standard definition” used in the correctional industry and academic literature. *Id.* at 102:6–8. But he could not point to any piece of literature using this definition. Nor does his Report identify any source for the opinion. Rather, the requirement seems to be one Pacholke created from whole cloth and, thus, is unreliable. *See Nease*, 848 F.3d at 234 (finding testimony “should have been excluded as it was ‘unsupported by any evidence such as test data or relevant literature in the field.’” (quoting *Oglesby*, 190 F.3d at 249)).

When pressed on this point at deposition, Pacholke made only vague references to the work of the Vera Institute of Justice (“Vera”) and studies performed by the Association of State Correctional Administrators (“ASCA”) in conjunction with the Arthur Liman Center at Yale Law School. Pacholke Dep. at 107:2–108:14. Neither supports Pacholke’s conclusion. Vera previously partnered with VDOC to assess the Step-Down Program, publishing a report on its findings and recommendations in 2018. That report recommended that VDOC establish clear guidelines on what constituted a “real threat” or “unacceptable risk” to a facility—but it did not recommend that VDOC limit the use of restrictive housing to “imminent” threats or any other temporal limitation. *See Vera Institute of Justice, The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections* at 20 (2018). Similarly, the ASCA-Liman Center’s 2018 study and survey of restrictive housing did not contain any suggestion that

restrictive housing must be limited to instances of “imminent” threat. *See generally Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* (Oct. 2018).

Other sources of information in the correctional industry also belie Pacholke’s assertion that his “clear and imminent threat” requirement is a “standard definition.” Pacholke Dep. at 102:6–8. The American Correctional Association (“ACA”) Performance-Based Standard and Expected Practices (5th ed.) (the “ACA Standards”) states that the placement of an inmate in restrictive housing should be limited to “those circumstances that pose a direct threat to the safety of persons or a clear threat to the safe and secure operations of the facility.” ACA Standards [PACHOLKE 000909] at 121. The ACA Standards include no requirement that the threat posed be “imminent.”

Not even the Washington Department of Corrections, the agency where Pacholke spent his entire career and which he ultimately led, operates under the “imminent threat” standard that Pacholke now espouses. *See* WDOC OP 320.255, attached as Ex.3, at (POLICY)(I) (“Restrictive Housing is housing for incarcerated individuals whose continued presence in general population would pose a serious threat to employees/contract staff, themselves, other individuals, or to the security of a correctional facility.”) When asked at deposition whether Washington’s policy had an “imminent threat” requirement while he was in charge of the Department of Corrections, Pacholke conceded he did not know. Pacholke Dep. at 106:16–19.

Given the lack of any basis for Pacholke’s self-styled requirement of “imminent threat,” his opinion should be excluded. *See Kumho Tire Co.*, 526 U.S. at 152 (Ultimately, the trial court must ensure that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”).

B. Pacholke’s definition of solitary confinement is completely personal and unsupported.

Pacholke also fails to establish a reliable basis for his definition of solitary confinement. Notably, he does not define the term in his Report. At deposition, Pacholke defined solitary confinement with a series of descriptors: “living in isolation by yourself with limited ability to interact in a natural way with other people, as an example, that no barrier between you and the person you’re speaking with; have some ability to have, you know, group recreation; the ability to communicate in a natural voice.” Pacholke Dep. at 49:12–18. When asked for some objective criteria by which to define solitary confinement, Pacholke stated that he thinks “it is about social isolation, and it’s the ability to communicate, the ability to develop a relationship or rapport with other people in a natural way.” *Id.* at 50:8–12. But Pacholke could not point to a single publication or piece of literature adopting his definition for solitary confinement. *Id.* at 50:19–52:11.

Like the gloss Pacholke seeks to impose on the standard for restrictive housing, Pacholke’s definition of what constitutes solitary confinement is vague, personal, idiosyncratic, and at odds with leading published literature. For example, the United Nations Standard Minimum Rules for the Treatment of Prisoners, commonly known as the Mandela Rules, define solitary confinement as “the confinement of prisoners for 22 hours or more a day without meaningful human contact.” *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* at 16 (Rule 44), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf. Likewise, the ACLU defines solitary as “the isolation of a person in a cell for approximately 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; restriction or denial of reading material, television, radios or other property; severe constraints on visitation; and the inability to participate in group activities, including eating with others.” ACLU, *Silent Injustice: Solitary Confinement in Virginia*

at 4-5 (2018), https://www.acluva.org/sites/default/files/field_documents/aclu-va_solitary_confinement_report_2018_single-paged_-_final.pdf.

Critically, both the Mandela Rules and the ACLU make clear that there is a temporal element to solitary confinement—22 hours or more per day with little to no human contact. The ACA definition of restrictive housing is also limited to “periods of time 22 hours per day or greater.” ACA Standards [PACHOLKE 000909] at 121. By excluding this temporal element, Pacholke’s definition of solitary confinement is rudderless—malleable to almost any situation and circumstances.

The *ipse dixit* pronouncements that underlie Pacholke’s opinions are a clear violation of the *Daubert* standard’s reliability requirement. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (“As the Supreme Court has repeatedly held, nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”) (citations omitted).

C. Pacholke cannot repudiate the same practices he used and oversaw in WDOC to criticize the practices of VDOC in a litigation opinion.

In his report, Pacholke repeatedly criticizes the criteria VDOC uses to measure inmates’ progress regarding personal responsibility goals through the Step-Down Program—personal hygiene, cell cleanliness, standing for count, and respect—as unrelated to an inmate’s security risk and therefore an inappropriate measurement for an inmate’s continued confinement in restrictive housing. *See Pacholke Rep.* at 10 ¶ 20 (“Some inmates are kept in or sent back to restrictive housing due to failure to meet certain behavioral goals, such as personal hygiene, cell compliance, count, and respect, which are often unrelated to whether or not an inmate is a security threat.”); *id.* at 45 ¶ 125 (“many of the factors used—including hygiene, cell compliance, and standing for the count—are unrelated to risks that caused inmates to be classified as Level S in the first place,

including a risk of violence, escape, and threats to the orderly operation of the facility”). Pacholke doubled down on that position at deposition. Pacholke Dep. at 158:22–159:9 (denying that a policy is “appropriate” if it considers “personal hygiene” or “cell cleanliness” in determining whether an inmate should remain in restrictive housing).

Despite lobbing this criticism at VDOC, Pacholke neglects to mention that, while head of the Washington Department of Corrections, his department used many of the *same* criteria to judge inmates within its maximum custody program. *See* WDOC OP 320.250 at VI(C) (stating that promotions and demotions to different program management levels/steps are based on several factors including cell cleanliness, personal hygiene, “acceptable communications” and interactions with staff, and overall behavior and attitude), attached as Ex. 4.

The Court should not permit Pacholke to ignore or repudiate the real-world practices that he employed as a corrections official now that he’s a purported expert retained to deliver an opinion in support of a party in litigation. As the Supreme Court has explained, ultimately, the trial court must ensure 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.*, 526 U.S. at 152.

II. Pacholke’s opinions regarding matters for which he is unqualified should be excluded.

A. Pacholke has no relevant expertise to offer “Opinion B”—that the Step-Down Program purportedly “is overcomplicated and incomprehensible”—and it should be excluded.

Among the many criticisms he levels against VDOC, Pacholke purports to offer expert testimony that the Step-Down Program is “overcomplicated and incomprehensible.” Pacholke Rep. at 14–17. At deposition, Pacholke admitted that he understands the program, but claimed that it is “confusing” for inmates and staff. Pacholke Dep. at 199:6–200:13.

This opinion, which is based on nothing but his personal review of select deposition testimony, should be excluded. Pacholke admitted that he has no expertise in analyzing whether written documents are comprehensible to the average adult, and that he is not an expert on reading comprehension or education. Pacholke Dep. at 201:3–19. Lacking “specialized training or professional experience” in this subject, his opinions should be excluded. *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).

Furthermore, this opinion should be excluded because it is not a proper subject for expert testimony. Expert testimony is only admissible “if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the jury or other trier of fact to understand or resolve a fact at issue.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir. 1999). And such testimony is not “helpful [if] it concerns matters within the everyday knowledge and experience of a lay juror.” *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993). This Court has previously excluded experts in circumstances where “lay jurors are capable of understanding and drawing inferences from the underlying evidence.” *Merritt v. Old Dominion Freight Line, Inc.*, No. 6:07–CV–27, 2011 WL 322885, at *7 (W.D. Va. Feb. 2, 2011) (finding that “the proffered testimony will not assist the jury”). See, e.g., *Cook v. Wal-Mart Stores E., LP*, No. 1:19CV00031, 2020 WL 7481781, at *3–4 (W.D. Va. Dec. 18, 2020) (Jones, J.) (excluding expert testimony on an issue that “[j]urors can use their own experience and judgment to determine”); *Johnson v. Holmes*, No. 3:16-cv-00016, 2018 WL 1404410, at *3 (W.D. Va. Mar. 19, 2018) (agreeing that testimony of proposed expert was not necessary where he had a “bald opinion based on (rather common-sense) intuitions about the statistics”). Here, assuming the topic has any relevancy, the finder of fact can determine

for itself whether the Step-Down Program is “confusing” or “incomprehensible”—it does not need Pacholke’s help in doing so.

B. Pacholke’s “Opinion D”—that VDOC staff purportedly do not understand or use “Evidence-Based Principles”—should be excluded.

Pacholke claims that VDOC staff and leadership do not understand “evidence-based principles.” Pacholke Rep. at 35–39 ¶¶ 95–106. Like his opinion that the Step-Down Program is “overcomplicated,” Pacholke’s opinion that VDOC staff do not understand or use EBP is not a proper expert opinion because it is beyond the scope of his qualifications. Pacholke is not a psychologist or sociologist, and he has no academic training in those fields beyond a few classes at the undergraduate level. Pacholke Dep. at 26:15–22. He is not qualified to assess VDOC officials’ understanding of EBP; thus, his opinion is not proper expert testimony. *Young v. Swiney*, 23 F. Supp. 3d 596, 611 (D. Md. 2014) (“An expert witness may not offer an opinion where the subject matter goes beyond the witness’s [qualifications and] area of expertise.”).

Nor would his opinion on this matter be helpful to the finder of fact. The competency, knowledge, and credibility of VDOC officials is something the finder of fact will readily be able to determine for itself. Pacholke’s personal opinion on the matter should have no bearing on that deliberation. *See, e.g., Broberg v. Carnival Corp.*, No. 17-CV-251537, 2018 WL 4778457 at *2 (S.D. Fla. June 11, 2018) (excluding testimony of purported expert witness as “not ... helpful to the finder of fact” in a bench trial); *Merritt*, 2011 WL 322885, at *7 (finding that “the proffered testimony will not assist the jury”); *Cook*, 2020 WL 7481781, at *3–4 (excluding expert testimony on an issue that “[j]urors can use their own experience and judgment to determine”).

Finally, Pacholke’s opinion seems to be entirely based on a few select excerpts of deposition testimony and documents whose conclusions Pacholke simply restates. *See* Pacholke Rep. at 35–36 ¶¶ 96–97 (restating the testimony of Randall Mathena and Jeffrey Kiser); *id.* at 36–

37 ¶¶ 99–102 (repeating the conclusions of the VDOC’s Statewide EBP Coordinators Report verbatim). Pacholke cannot simply repackage the testimony and opinion of others and refer to it as an expert opinion. *See Karavitis v. Makita U.S.A. Inc.*, 243 F. Supp. 3d 235, 241 (D. Conn. 2017) (“An expert may not ‘simply rehash otherwise admissible evidence about which he has no personal knowledge While an expert must of course rely on facts or data in formulating an expert opinion, an expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence.’” (internal citation omitted)).

C. Pacholke’s “Opinion F”—that VDOC purportedly does not adequately address or protect the mental health of inmates—should be excluded.

Pacholke is not a mental health clinician, has no significant academic training or background in the fields of mental health or psychology, and is not otherwise qualified to offer opinions about mental health. He freely and repeatedly said so in his deposition. Pacholke Dep. at 29:1–3 (“Q: Do you consider yourself qualified to diagnose mental-health conditions? A: No.”); *id.* at 288:8–9 (“I would not represent an official opinion because I’m not a mental-health clinician.”); *id.* at 289:4–8 (“Q: You agree with me that you don’t have any training that enables you to determine whether a particular individual is decompensating? A: I have no mental-health background or licensure whatsoever.”). Nevertheless, Pacholke devotes an entire section of his Report to arguing that VDOC does not adequately address the mental health needs of inmates—as well as that the Step-Down Program negatively impacts the mental health of inmates. Pacholke Rep. at 60–63 (claiming that VDOC has made “only minor and inadequate accommodations to help those with mental health issues,” and “fails to identify some inmates with mental health issues.”).

Pacholke is not qualified to opine on mental health decompensation or give causation opinions. Thus, any aspects of Pacholke’s Report that purport to state conclusions related to mental

health 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); *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); *Clarendon Regency IV, LLC v. Equinox Clarendon, Inc.*, No. 1:20-cv-01433 (RDA/IDD), 2022 WL 5101691, at *4 (E.D. Va. Oct. 4, 2022) (excluding expert who “admit[ted] that she ha[d] no [relevant] experience”).

Even if Pacholke possessed the qualifications and expertise to give an admissible clinical opinion—he does not—he followed no sound methodological basis in forming the opinions he offers regarding the Step-Down Program's effect on inmates' mental health. Like the other, duplicative expert witnesses Plaintiffs propose on this topic, Pacholke conducted no differential diagnosis, a standard scientific technique for identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. *Westberry*, 178 F.3d at 262. Courts regularly exclude causation testimony that, like Pacholke's, does not account for other potential factors. *See id.* at 265–66 (concluding that 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). 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 477 (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”). Similar cases abound,¹ all of them driving home the inadmissibility of Pacholke’s opinions on this topic.

III. Pacholke’s “Opinion C”—that the Step-Down Program purportedly “circumvents accepted industry practices” and appeals to “misapplied correctional science”—should be excluded.

It is well-established that an expert opinion can be considered reliable only when it is based on sufficient facts or data. Fed. R. Evid. 702; *Daubert*, 509 U.S. 579. And, for obvious reasons, the reliability of an opinion is undermined when the factual underpinnings of the opinion are flawed. *See Sparks v. Gilley Trucking Co., Inc.*, 992 F.2d 50, 54 (4th Cir. 1993) (“[A] court may refuse to allow a generally qualified expert to testify if his factual assumptions are not supported by the evidence.”); *see also Mims v. United States*, 375 F.2d 135, 143 (5th Cir. 1967) (“[E]xpert opinion evidence may be rebutted by showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based.”). District courts may exclude expert testimony that is based on obviously incorrect assumptions. *See Casas Office Mach., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668, 681 (1st Cir. 1994); *see also Berk v. St. Vincent’s Hosp.*, 380 F. Supp. 2d 334, 355 (S.D.N.Y. 2005) (“[A]n expert opinion inadequately informed about the factual grounding of the subject it is called to address bears none of the hallmarks of reliability necessary for the opinion to be admissible under *Daubert*.”).

¹ *See 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).

Pacholke's report criticizes VDOC's use of the risks-need-responsivity model to develop the Step-Down Program. Specifically, Pacholke criticizes VDOC's implementation of the "responsivity" component, claiming that the Step-Down Program does not adequately address either general responsivity (the use of social learning and cognitive behavioral approaches to address criminogenic needs) or specific responsivity (the matching of programming with the individual needs, motivations, and personality of an offender). Pacholke Rep. at 27 ¶ 73.

A. Pacholke's claim that the Step-Down Program's evidence-based principles and programming do not address general responsivity is plainly incorrect.

Pacholke first asserts that VDOC does not account for general responsivity because VDOC's implementation of the *Challenge Series*—the cognitive behavioral programming VDOC provides inmates in the Step-Down Program—does not include interaction or facilitation from staff members or group learning for inmates in Level S and only limited interactions at lower levels of the program. *Id.* at 28 ¶ 74. That conclusion is wrong. Of the seven workbooks in the *Challenge Series* that inmates must complete, only the first two must be completed in their cells – a fact Pacholke concedes. Pacholke Dep. at 228:13–15. At deposition, Pacholke admitted that the remaining five workbooks can be completed in group settings, even by inmates at Security Level S. *Id.* at 228:16–22 (“Q: And so the remaining five could be conducted in groups? A: Perhaps. Q: What do you mean perhaps? A: It may be yes, may be no. Q: And that's true even for IM offenders at Level S? A: I believe so. Uh-huh.”). After being further pressed, Pacholke admitted that VDOC's use of the *Challenge Series* complies with general responsivity:

Q: Okay. So when you say VDOC's program does not take into account either type of responsivity, at the beginning of paragraph 74, you would agree with me that VDOC's program at least facially is intended to meet this general-responsivity requirement, right? And your criticism is that it may not be implemented correctly? . . . Is that fair? . . .

A: It could be fair. I mean, I think it probably is fair as it relates to -- just looking at a piece of curriculum alone, that it could meet the need of general responsivity but all the other aspects of it may not.

Id. at 232:14–233:5.

B. Pacholke’s claim that the Step-Down Program does not address specific responsivity is also plainly incorrect.

Turning next to specific responsivity, Pacholke focuses his criticisms on VDOC’s division of the Level S inmate population into the following four sub-groups for purposes of behavior management and programming:

- inmates with the potential for extreme and deadly violence or high escape risk;
- inmates who committed high-profile crimes that received significant media attention;
- inmates with frequently recurring disciplinary violations; and
- inmates who intentionally commit disciplinary violations with the goal of remaining in a restorative housing setting.

Pacholke Rep. at 29 ¶ 78. Pacholke concludes that these subgroups are “placement and classification categories, not categories for interventions to address criminogenic needs.” *Id.* at 30 ¶ 80; Pacholke Dep. at 242:15–22. But Pacholke never adequately explains *why* these sub-groups are not appropriate classifications for addressing specific responsivity.

Neither in his Report nor his deposition could Pacholke point to any literature identifying categories for addressing criminogenic needs or explaining why VDOC’s sub-groups were not appropriate. *See* Pacholke Dep. at 243:1–20. Pacholke also criticizes VDOC’s statement that the four sub-groups were influenced by a study of the Nebraska Department of Corrections’ policy for managing high security offenders. Pacholke Rep. at 29 ¶ 78. Pacholke represented that he is familiar with the Nebraska DOC and is aware of no such policy. *Id.* At deposition, however,

Pacholke admitted that he had not done anything to actually investigate the model Nebraska used, claiming instead that it was “unnecessary.” Pacholke Dep. at 240:4–12.

Pacholke also asserts that the sub-groups “don’t tie to a risks-needs tool.” *Id.* at 244:10–12. But Pacholke could not defend that conclusion. When asked if the potential for extreme deadly violence was a risk profile, Pacholke conceded that it “certainly is in the area of aggression.” *Id.* at 245:1. Pacholke further admitted that frequently recurring disciplinary violations are also an appropriate consideration for specific responsivity and that, during his time in the Washington Department of Corrections, an entire program was designed to address this characteristic. *Id.* at 245:7–19.

As with his definitions for restrictive housing and solitary confinement, Pacholke’s criticisms of the VDOC’s implementation of the responsivity principle are more *ipse dixit*, backed only by his own bare conclusions. *See Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 WL 3409724 (D.S.C. Jan. 4, 2019) (concluding that an expert’s “bald assurance of validity is not sufficient as it relates to the measurements and the reliability of his opinions.”). These pronouncements are a clear violation of the *Daubert* standard’s reliability requirement and the Court is under no obligation to accept them. *Joiner*, 522 U.S. at 146; *Cooper*, 259 F.3d at 203 (“As the Supreme Court has repeatedly held, nothing . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”) (citations omitted).

IV. Pacholke’s remaining opinions, which are merely repackaged summaries of prior evidence and testimony, should be excluded.

Pacholke’s remaining opinions include claims that the Step-Down Program’s review process does not provide adequate protections for inmates, *see* Pacholke Rep. at 39–60 (“Opinion E”); that inmates and staff are unaware of how to request accommodations, *id.* at 63–66 (“Opinion G”); that the program creates a “convenient cover for staff retaliation and abuse,” *id.* at 66–70

(“Opinion H”); that VDOC fails to protect inmates from harm, *id.* at 70–73 (“Opinion I”); and that VDOC’s changes to the Step-Down Program are not sufficient to comply with the “evolving standards of decency,” *id.* at 73–82 (“Opinion J”). In addition, he provides extensive recounting of the prior testimony and affidavits of the case’s named Plaintiffs, *id.* at 82–115 (“Opinion K”).

The common thread of these additional “opinions” is that they simply restate factual testimony provided by others and statements made in various documents. For example, Pacholke’s discussion of the External Review Team (ERT) covers more than five pages in which Pacholke summarizes video recordings of ERT proceedings that he reviewed. *Id.* at 53–58. Likewise, for his “Opinion K,” Pacholke devotes more than thirty pages to paraphrasing the affidavits of each named Plaintiff. *Id.* at 82–115.

Pacholke cannot simply repackage the testimony and opinion of others and regurgitate it as an expert opinion. *See Karavitis*, 243 F. Supp. 3d at 241. These summaries, undoubtedly prepared with the extensive influence of Plaintiffs’ counsel, do nothing to assist the trier of fact, are methodologically unreliable, and should be excluded. *Cf. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 929 & n.17 (D.S.C. 2016) (questioning whether “a literature review, without more, is a valid methodology”); *Baker v. Firstcom Music*, No. LA16-cv-08931 VAP(JPRx), 2018 WL 2676636, at *2 (C.D. Cal. May 8, 2018) (finding testimony to be unreliable where expert “failed to verify the underlying data at the core of her expert opinion independently, and instead simply adopted the position of an interested party”); *Geo M. Martin Co. v. All. Mach. Sys. Int’l, LLC*, No. C O7-00692 WHA, 2008 WL 2008638, at *1 (N.D. Cal. May 6, 2008) (“Important factual points should not be proven through experts spoon-fed by wholly biased sources.”).

CONCLUSION

Because Plaintiffs have failed to establish the reliability of Pacholke's opinions, 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