

**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.

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

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO EXCLUDE THE
OPINIONS OF DAN PACHOLKE**

I. INTRODUCTION

Dan Pacholke has spent over 40 years working in the field of corrections, 33 of them in various positions at the Washington Department of Corrections (“WDOC”) that culminated in the state’s Governor appointing him to lead the WDOC as its Secretary. Ex. 1, Dan Pacholke CV at 1-3. For the past 8 years, Dr. Pacholke has served as a consultant on corrections issues, working with a number of clients and providing testimony as an expert or consultant in at least 19 cases. *Id.* at 1-5; Ex. 2, Pacholke Rep. at 4-6. As a result of the breadth of Mr. Pacholke’s experience in the corrections field, there can be no serious question that he is eminently qualified to serve as an expert and offer opinions on the development and implementation of corrections policies and practices.

Nevertheless, Defendants seek to exclude *each and every one* of the opinions that Mr. Pacholke has offered in his 117-page report, going so far as to refer to him derisively as “a purported expert in the field of corrections.” ECF No. 370 at 1. According to Defendants, Mr. Pacholke has offered opinions that (a) he is not qualified to provide, (b) rely on assumptions that are unsupported in the relevant scientific literature or lack a reliable methodology, or (c) are irrelevant because they merely restate documents, testimony or opinions of others. *Id.* at 1-2. But a closer review of Defendants’ brief demonstrates that in order to formulate these arguments, Defendants had to *mischaracterize* Mr. Pacholke’s opinions and the bases therefor — and *ignore* that the actual opinions Mr. Pacholke offers in his report are firmly grounded in and supported by the expertise he developed over the course of his 40+-year career in corrections. When Mr. Pacholke’s *undistorted* opinions are examined against his *indisputable* expertise, all of Defendants’ arguments fall away as nothing more than baseless attacks.

Viewed against this backdrop, Defendants’ motion to exclude appears to be little more than a vehicle for them to take issue with opinions and conclusions from Mr. Pacholke with

which they disagree. But the only proper recourse for that is cross-examination — not the wholesale exclusion of Mr. Pacholke’s testimony. The Court should deny Defendants’ motion in its entirety.

II. BACKGROUND

A. Mr. Pacholke’s qualifications and expertise

Mr. Pacholke has devoted the past 41 years to working on and developing expertise in a wide range of corrections issues. Ex. 1, Dan Pacholke CV at 1-5. He has nearly 35 years of experience and training in the adult institutional corrections field, having started his career in 1982 as a Correctional Officer in the Washington Department of Corrections, or WDOC. Ex. 2, Pacholke Rep. at 3; Ex. 1, Dan Pacholke CV at 1-3. From there, Mr. Pacholke worked his way up through a variety of positions with WDOC, including Correctional Sergeant, Correctional Lieutenant, Correctional Captain, Emergency Response Manager, Performance System Administrator, Deputy Superintendent, and Superintendent. Ex. 1, Dan Pacholke CV at 1-3. He then spent 8 years in WDOC’s administration, includes roles as Deputy Director of Prisons, Director of Prisons, and Deputy Secretary of WDOC. *Id.* And in 2015, the Governor of Washington appointed Mr. Pacholke to lead the WDOC as its Secretary. *Id.*

Mr. Pacholke’s WDOC experience provided him with extensive exposure to the issues, policies, and procedures that lie at the heart of the corrections field, and from a number of different vantage points. Most notably, Mr. Pacholke held several positions with WDOC pertaining to the policies, practices and/or administration of segregation units. Specifically, he directly managed segregation units as a Correctional Sergeant and Captain. Ex. 2, Pacholke Rep. at 3. And in his roles as Superintendent and Deputy Director, Mr. Pacholke was responsible for efforts to reform Washington’s systemic use of long-term segregation — leading to a 50 percent

reduction in the population of individuals housed in long-term segregation, while simultaneously lowering system-wide violence for eight consecutive years. *Id.* at 3–4.

Mr. Pacholke has spent the last eight years working as a consultant and expert on corrections issues. Ex. 1, Dan Pacholke CV at 1. For example, he provided training for the National Institute of Corrections, the Defense Technology Corporation, and New York University in a number of areas, including emergency operations, security management, and correctional reform development and implementation. Ex. 2, Pacholke Rep. at 4. He served as co-director of Segregation Solutions at New York University, an initiative to help correctional agencies reduce the use of segregation while simultaneously maintaining or increasing safety. *Id.* And he is currently consulting for the United States Department of Justice Civil Rights Division, in its investigations of two state correctional agencies. *Id.* at 4. Mr. Pacholke has also authored articles, including a policy paper for the U.S. Department of Justice entitled, “More than Emptying Beds: A Systems Approach to Segregation Reform.” *Id.*

B. Mr. Pacholke’s Review and Opinions in This Case

Mr. Pacholke was asked by Plaintiffs to assess the confinement conditions at two VDOC facilities (i.e., Red Onion State Prison and Wallens Ridge State Prison) and to review VDOC policies and discovery materials regarding VDOC’s restrictive housing practices. *Id.* at 1. He was also asked to evaluate whether Defendants “complied with generally accepted practices, principles, and standards” with regard to solitary confinement. *Id.* Mr. Pacholke summarized some of his opinions concerning VDOC’s Step-Down Program as follows:

- Inmates in VDOC’s Step-Down Program are subjected to unnecessary deprivation despite no longer being or in some cases, ever having been a direct threat to the safety of people or the orderly operation of a facility [“Opinion A”];
- VDOC’s Step-Down Program is overcomplicated and incomprehensible to inmates and VDOC staff [“Opinion B”];

- VDOC’s Step-Down Program is not a step-down program in accordance with industry practice or definition regarding the management of restricted housing units. It circumvents the standard limitations on restrictive housing under the guise, and misapplication of, correctional science [“Opinion C”];
- VDOC staff do not understand or use evidence-based principles [“Opinion D”]; and
- VDOC’s Step-Down Program does not adequately address the mental health needs of its population and in practice appears to negatively impact the MH of those subjected to this program [“Opinion F”].

Id. at 2.

Mr. Pacholke also offers the following additional opinions of VDOC’s Step-Down Program: the program fails to provide adequate protections for inmates, *id.* at 39-60 [“Opinion E”]; the inmates and staff are unaware of how to request accommodations for health needs, *id.* at 63-66 [“Opinion G”]; the program creates a convenient cover for staff retaliation and abuse, *id.* at 66-70 [“Opinion H”]; the VDOC fails to protect inmates from harm, *id.* at 70-73 [“Opinion I”]; and that VDOC resists making changes to align its practices with accepted practices and the “evolving standards of decency,” *id.* at 73-82 [“Opinion J”].

In developing his opinions, Mr. Pacholke reviewed VDOC’s past and present policies governing the Step-Down Program. *Id.* at 3. He further evaluated discovery materials from this litigation, including deposition transcripts and produced documents. *Id.* Finally, Mr. Pacholke participated in inmate interviews at Wallens Ridge State Prison, and inmate interviews and a facility tour at Red Onion State Prison. *Id.*

III. LEGAL STANDARD

Rule 702 governs the admissibility of expert testimony. *See* Fed. R. Evid. 702. In applying Rule 702, the district court acts as a gatekeeper “between expert evidence and the trier of fact,” and not as a factfinder. *Traxys N. Amer., LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011) (Jones, J.) (citing *Daubert*, 509 U.S. at 597). Accordingly, a

proponent of expert testimony need not prove that the expert's testimony is correct; rather, it need only establish by a preponderance of the evidence that the testimony is relevant and reliable. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10); *Metamining, Inc. v. Barnette*, 2013 WL 3245355, at *9 (W.D. Va. June 26, 2013) (Jones, J.).

In evaluating reliability, “[t]he inquiry to be undertaken by the district court is ‘a flexible one’ focusing on the ‘principles and methodology’ employed by the expert, not on the conclusions reached.” *United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006) (quoting *Daubert*, 509 U.S. at 594-95). The inquiry has a “liberal thrust” favoring admission. *Daubert*, 509 U.S. at 588; *Md. Cas. Co. v. Therm-O-Disc, Inc.*, 137 F.3d 780, 783 (4th Cir. 1998); *see* Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (noting that post-*Daubert* jurisprudence illustrates that “the rejection of expert testimony is the exception rather than the rule”). Indeed, even for “shaky but admissible evidence,” *Daubert* itself counsels that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof”—rather than outright exclusion—“are the traditional and appropriate means of attacking” such testimony. *Daubert*, 509 U.S. at 596; *Moreland*, 437 F.3d at 431.

IV. ARGUMENT

A. **Mr. Pacholke’s “Opinion A” that the Step-Down Program subjects inmates to “unnecessary deprivation beyond the length of time necessary” is supported by the literature and Mr. Pacholke’s experience and expertise.**

Defendants first challenge Mr. Pacholke’s “Opinion A,” that VDOC’s Step-Down Program subjects inmates to unnecessary deprivation beyond the length of time necessary,” as being unsupported in the literature and practice. ECF No. 370 at 4. But Defendants’ arguments regarding Opinion A rest on mischaracterizing Mr. Pacholke’s opinions, and ignoring the fact that his actual opinions *are* consistent with and supported by the literature. Moreover,

Defendants disregard the fact that Mr. Pacholke — drawing upon his extensive history in the corrections field — is capable of rendering these opinions *based on his own expertise and experience*. For these reasons, Defendants’ motion to exclude Mr. Pacholke’s Opinion A should be denied.

1. Mr. Pacholke’s opinions on when restrictive housing should be used are consistent with the literature and practices in the corrections field.

Defendants’ first attack on Opinion A centers entirely on *one sentence* found in Mr. Pacholke’s report — i.e., a sentence in which he says, “Inmates should only be subject to these conditions [segregation] when there is 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.” ECF No. 370 at 4-6 (citing Ex. 2, Pacholke Rep. at 6-7). According to Defendants, the phrase “imminent threat” as used in this sentence is not found in certain published sources identified in their brief, and this fact warrants exclusion of Mr. Pacholke’s Opinion A. *Id.*

Reading Defendants’ motion might lead one to believe that the sentence quoted above is Mr. Pacholke’s only articulation of the appropriate standard for segregation, and that the concept of an “imminent threat” lies at the heart of it. But that would be incorrect. Mr. Pacholke’s report — in analyzing whether the Step-Down Program meets the appropriate standard for segregation — repeatedly uses the phrase “*direct threat*” instead of “imminent threat.” For example, the subheading for the very section of the report from which the sentence quoted above comes says, “Inmates in VDOC’s Step-Down Program are subjected to unnecessary deprivation beyond the length of time necessary to address *direct threats to the safety of people or the orderly operation of the facility*.” Ex. 2, Pacholke Rep. at heading II.B (emphases added). Several other sections of Mr. Pacholke’s report likewise apply the concept of “direct threat,” and not “imminent threat.” *See, e.g., id.* at 1 (section 2.a); *id.* at 2 (section 3.a); *id.* at 8 (paragraph 18); *id.* at 22 (paragraph

56); *id.* at 56 (paragraph 159); *id.* at 116 (paragraph 378). In fact, the phrase “direct threat” appears in Mr. Pacholke’s report a total of 11 times.

In contrast, Mr. Pacholke uses the phrase “imminent threat” a grand total of *three* times in his report: twice in the sentence from paragraph 12 to which Defendants object, and once toward the end of the report where he says, “In my opinion, experience, and based on the contemporary standard of decency, people should be released from segregation when they no longer pose an imminent threat to other people or the orderly operation of the institution.” *Id.* at 116 (paragraph 378).

At Mr. Pacholke’s deposition, counsel for Defendants asked him whether he could point to anything in the literature stating that an inmate should stay in segregation only if there is an “imminent threat.” Ex. 3, Pacholke Dep. at 102:13-16. Mr. Pacholke identified some publications, and then went on to testify as follows: “I think it is referenced in all of those *in some way*. I mean, *it might not be exactly — the exact same language, but the intent there is the same.*” *Id.* at 102:18-103:3 (emphasis added). In other words, Mr. Pacholke made clear that — while the specific phrase “imminent threat” may or may not be found in any given publication in the literature — whatever language *is* used in that publication will carry the same concept and intent as the phrase “imminent threat.” This is consistent with the fact that within his report, Mr. Pacholke widely used “direct threat” when evaluating the Step-Down Program, instead of employing “imminent threat.” And notably, at least one of the sources cited in Defendants’ brief — the American Correctional Association (“ACA”) Performance-Based Standard and Expect Practices (5th ed.) (the “ACA Standards”) — also uses the phrase “direct threat.”

Finally, and entirely apart from whether the specific language Mr. Pacholke used in his report (e.g., “imminent threat”) appears verbatim in literature from the field, Mr. Pacholke’s

opinions are supportable by his own experience and expertise from having spent 40+ years in the corrections field. Rule 702 permits expert testimony where that expert's testimony is based on experience. *See Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 151 (1999). Expert witnesses are granted "testimonial latitude unavailable to other witnesses" because experts root their opinions in "the knowledge and experience of [their] discipline." *Id.* at 148 (internal quotation marks and citations omitted).

It is undisputed that Mr. Pacholke directly managed segregation units in his role as a Correctional Sergeant and Captain, and also led efforts to reform Washington's system-wide use of long-term segregation. Ex. 2, Pacholke Rep. at 4. It is also clear that Mr. Pacholke relied upon this experience and his knowledge of "widely accepted correctional practices" to review the Virginia Department of Correction's policies, procedures, and practices. *Id.* at 3, 6 ("To complete my analysis, I apply widely accepted correctional practices to my review of the prison's policies, procedures, and practices, as well as notes of interviews conducted by Dr. Craig Haney during a visit to Red Onion in April 2023."). Accordingly, Mr. Pacholke is qualified to review the various standards for segregation found in the published literature, and then synthesize that information into an articulation of the "widely accepted correctional practices." Mr. Pacholke is not limited to simply parroting back what others have already said. The Court should reject Defendants' arguments, and deny Defendants' motion to exclude Opinion A.

2. The definition of solitary confinement that Mr. Pacholke gave at his deposition is consistent with the literature.

Defendants next argue that Mr. Pacholke has adopted a "completely personal" and "unsupported" definition of solitary confinement, and that this warrants exclusion of his Opinion A. ECF No. 370 at 7. Here again, Defendants employ the strategy that they used with regard to

“imminent threat” — i.e., mischaracterize Mr. Pacholke’s opinion, argue that the mischaracterized opinion does not match what is found in the literature, and then argue for exclusion on this basis.

Defendants’ argument rests on their claim that the definition of solitary confinement that Mr. Pacholke gave while testifying extemporaneously at his deposition does not contain all of the concepts that are included in certain definitions found in the literature. More specifically, some of the literature mentions minimum duration for isolation to qualify as solitary confinement. Defendants claim that Mr. Pacholke’s failure to include a minimum duration in his testimony warrants exclusion of his Opinion A.

It is true that Mr. Pacholke did not include a temporal minimum when he attempted to describe solitary confinement at his deposition. But this is precisely the type of issue that Defendants’ counsel should address through cross-examination, rather trying to invoke the extreme remedy of excluding the testimony altogether. *See Daubert*, 509 U.S. at 595; *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003) (“In applying *Daubert*, a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses to reach his conclusion; the court does not evaluate the conclusion itself.”).

Moreover, what Defendants ignore is the fact that Mr. Pacholke’s definition of solitary confinement is entirely consistent with the definitions that are recited in Defendants’ brief. As Mr. Pacholke explained during his deposition, there is no single authority that sets forth a universal definition of solitary confinement — so minor variations among those attempting to articulate a definition are not at all surprising. Ex. 3, Pacholke Dep. at 51:8–18. Mr. Pacholke provided his definition based on his years of experience in the corrections field, including his direct work with solitary confinement. The definition offered by Mr. Pacholke and the

definitions from the ACLU and United Nations set out in Defendants' brief all emphasize that solitary confinement involves isolation and limited ability to interact with others, and are entirely consistent.

Defendants' arguments are accordingly without merit, and its motion to exclude Opinion A should be denied. To the extent that Defendants disagree with Mr. Pacholke's definition, they are free to cross-examine him at trial and present competing definitions of their own. *See Daubert*, 509 U.S. at 596.

3. Purported discrepancies between Mr. Pacholke's opinions and Washington Department of Corrections' policies are not grounds for exclusion.

Finally, Defendants claim that Mr. Pacholke's opinions are inconsistent with certain practices of the WDOC during the time of Mr. Pacholke's employment. ECF No. 370 at 8–9. Specifically, Defendants argue that Mr. Pacholke testified that “personal hygiene” and “cell cleanliness” are not factors that should be considered when deciding whether an inmate should remain in segregation — despite the fact that WDOC did just this while Mr. Pacholke worked there. According to Defendants, this too requires exclusion of Mr. Pacholke's Opinion A.

As an initial matter, Mr. Pacholke's testimony is not as simple as Defendants have tried to portray it. In the portion of the deposition transcript where counsel for Defendants asks Mr. Pacholke whether “personal hygiene” and “cell cleanliness” should be considered in segregation decisions, he suggests that they should not — but he also repeatedly ties this answer to his concern that these issues could be signs of mental illness. He also states that “I think there should be some ability to have expectations around hygiene and cell standards. Don't disagree.” So, here again, Defendants have mischaracterized Mr. Pacholke's testimony —this time by removing some of the critical nuance and context.

Even to the extent Mr. Pacholke *is* advocating a different policy today than WDOC once used, he explained during his deposition that he was in charge of the WDOC seven years ago — and that, in the time since he left that role, significant advancements in the relevant literature have occurred. Ex. 3, Pacholke Dep. at 110:7–21. It is unsurprising that an expert’s opinions would continue to evolve as additional literature and studies in the field are published.

Finally, even assuming that Mr. Pacholke’s opinion is at odds with WDOC’s old policy, this is the quintessential type of issue that should be handled by cross-examination. Indeed, any questions about the factual underpinnings of Mr. Pacholke’s testimony go to weight and credibility of the testimony, not its admissibility. *See Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 195 (4th Cir. 2017). That Defendants are even *trying* to exclude Opinion A on this ground demonstrates the complete lack of merit in their motion.

B. Mr. Pacholke is qualified to offer all of his expert opinions.

Defendants challenge several of Mr. Pacholke’s opinions — specifically Opinions B, D and F — on the ground that he is unqualified to offer them. As explained below, however, each of the arguments Defendants advance in support of these challenges is misguided and without merit.

Defendants first argue that Mr. Pacholke is unqualified to offer his Opinion B and D because “he has no expertise in analyzing whether written documents are comprehensible to the average adult,” *id.* at 9–10, and because he is not a “psychologist or sociologist.” *Id.* at 11–12. This is completely baseless. *See McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) (finding that a requiring an expert to be a specialist in a specific field is “an unwarranted expansion of the gatekeeper role announced in *Daubert*”).

As set forth above, Mr. Pacholke is eminently qualified to offer opinions about the field of corrections based on his decades of experience in the field. *See Eskridge v. Pac. Cycle, Inc.*,

556 F. App'x 182, 190–91 (4th Cir. 2014) (expert with substantial professional experience in bicycle accidents possessed a reliable foundation for testimony concerning the same). Mr. Pacholke has overseen the development and implementation of policies, and provided training himself — all of which gives him first-hand knowledge, experience and expertise in being able to tell just how understandable or incomprehensible materials are to corrections staff and inmates. There is no requirement that Mr. Pacholke must be “an expert on reading comprehension or education” in order to offer Opinions B and D, and Defendants’ argument to that effect should be summarily rejected.

Mr. Pacholke’s opinions are focused on how corrections policies are understood and interpreted by those in the field to whom they apply, and he reviewed the deposition testimony of VDOC officials to understand how *they* interpreted and applied the policies. *See, e.g.*, Ex. 2, Pacholke Rep. at 35–36. Mr. Pacholke has a long track record of interacting with inmates and correctional officers, and he is more than qualified to offer opinions about how well those individuals would be able to interpret such policies. *Id.* at 14. Mr. Pacholke explained in his expert report:

I have been reading correctional policies and developing and implementing programs my entire career. The maze of policies and statuses that VDOC has created around its system of restrictive housing is the least comprehensible scheme I have ever encountered and appears to result in inmates being kept in restricted housing for unnecessarily long periods of time and allow for arbitrary and retaliatory staff actions.

Id.

Mr. Pacholke developed correctional policies throughout his entire career. *Id.* He further reviewed and assessed the policies of correctional systems in his work as a consultant. *See* Ex. 1, Pacholke CV at 4. Understanding how professionals in the field would interpret and understand VDOC’s policies will aid a fact-finder, because interpretations of corrections’ policies is not

within the everyday knowledge of a lay person. *See Kopf v. Skyrn*, 993 F.2d 374, 377–378 (4th Cir. 1993).

Defendants next claim that Mr. Pacholke is not qualified to offer Opinion F — that VDOC does not adequately address or protect the mental health of inmates — because he is not a mental health clinician. ECF No. 370 at 12–14. But Defendants’ argument misconstrues Mr. Pacholke’s opinions.

He is not offering clinical opinions on the individual Plaintiffs’ mental health, but is offering opinions on how VDOC’s policies and practices addressed the mental health of inmates. Mr. Pacholke’s experience at the Washington Department of Corrections involved the development and implementation of policies and trainings to ensure that correctional staff adequately protected the inmates’ mental health. Ex. 2, Pacholke Rep. at 38–39 (“At WADOC, one of our best investments was increasing staff training for those who worked in these units.”). For example, Mr. Pacholke oversaw trainings for staff on identifying and managing mental health issues. *See id.* at 38. Mr. Pacholke also lead reforms of Washington State’s use of long-term separation, policy-reform efforts focused many of the same issues evaluated here. *Id.* at 3–4. Mr. Pacholke relied on his extensive experience when evaluating and offering opinions about VDOC’s policies and practices that should be protecting the mental health of inmates. *See, e.g., id.* at 39 (“In my experience, successful training allows security staff to identify signs of decompensation—such as changes in hygiene and interpersonal engagement—and assist mental health staff to intervene with at-risk inmates to prevent attempts at self-harm.”).

Defendants further claim that even if Mr. Pacholke is qualified, his opinions on VDOC’s failures to protect the mental health of inmates are unreliable because he failed to conduct a differential diagnosis. ECF No. 370 at 13–14. But Defendants’ argument is a straw man. “[A]

differential diagnosis is only one way to determine the reliability of an expert's testimony.”

Kinlaw v. Nwaokocha, 2019 WL 3268833 at *6 (E.D. Va. July 19, 2019). Mr. Pacholke's years of experience in the field of corrections and his work on segregation programs establish his basic qualifications. *See id.* Mr. Pacholke performed extensive reviews of the relevant policies, procedures and testimony related to VDOC's policies and practices concerning inmates' mental health. Ex. 2, Pacholke Rep. at 4–6. Mr. Pacholke's review of VDOC's policies, deposition, and his years of experience constitute a proper methodology. *See Kinlaw*, 2019 WL at *6 (finding the expert's “opinion on causation was based on his review of the medical records, the depositions in the case, and his 30 years of experience as a practicing physician. There is no evidence that this methodology is improper.”).

C. Defendants' disagreements with Mr. Pacholke's opinions are not grounds for exclusion.

Defendants next argue that Mr. Pacholke's opinions are unreliable because they disagree with certain conclusions he offers about VDOC's Step-Down Program. But it is well-established that disagreements with an expert's conclusions is not proper grounds for exclusion under *Daubert*. 509 U.S. at 595 (“The focus, of course, must be solely on principles and methodology, not on the conclusions they generate.”).

1. Mr. Pacholke's opinions on general responsivity are admissible.

Defendants first criticize Mr. Pacholke's opinions about the general responsivity (i.e., the use of social-learning and cognitive behavior approaches to address criminologic needs) by pointing to the workbook element of the Step-Down Program that could be completed in groups. ECF No. 370 at 15–16. Defendants use that point to argue Mr. Pacholke's entire conclusion about general responsivity of the Step-Down Program is wrong and should be excluded. *Id.* at 15 (“That conclusion is wrong.”).

But Defendants' argument distorts Mr. Pacholke's opinion on general responsivity and misapplies the law. Defendants ignore that Mr. Pacholke expressly acknowledged in his report that some aspects of the program are completed in groups. Ex. 2, Pacholke Rep. at 28. Further, Mr. Pacholke's opinion on general responsivity is not limited to the workbooks. His review of discovery and tours of the VDOC facility showed that "staff are not explaining the curriculum, much less facilitating." *Id.* at 28. Mr. Pacholke contrasts the VDOC's practices with those of other state systems where the staff models the social behavior for prisoners. *Id.* Mr. Pacholke explains that his opinions on general responsivity are based on his experience in Washington, review of discovery materials, and tours of the relevant facilities. *Id.* Mr. Pacholke explained in his report:

In Washington, correctional officers are trained in Core Correctional Practices, which, among other things, teaches officers to model the behavior they wish to see, such as using respectful language and deescalating rather than escalating conflict. I am sure that there are staff who model positive behavior in ROSP and WRSP, but my impression from my tours and interviews is that this is not the norm nor a priority in the VDOC step down program.

Id. at 28.

Defendants' disagreement with Mr. Pacholke's general responsivity conclusions are not grounds for exclusion. *See TFWS*, 325 F.3d at 240 (a party's challenge to the data supporting an expert's conclusion "is a challenge to the proper weight to be given to [the expert's] evidence, not to its admissibility").

2. Mr. Pacholke's opinions on specific responsivity are admissible.

Defendants next disagree with Mr. Pacholke's opinions on specific responsivity,¹ claiming that Mr. Pacholke failed to identify support for his opinions or explain why he came to such conclusions. ECF No. 370 at 16–17. But Defendants' arguments are baseless.

First, Mr. Pacholke's opinions on the Step-Down Program's specific responsivity failures are based on his experience and review of discovery materials in this case. Ex. 2, Pacholke Rep. at 28–29. He repeatedly refers to his experience and review of policies and documents throughout his discussion of specific responsibility. *Id.* at 27–33 (“Washington State has been working with the RNR model since the 1990s. It has been the subject of national correctional trainings and publications for over three decades.... VDOC misrepresents the terms and principles we in the field of corrections have been taught are based in research.”). Mr. Pacholke employed a valid methodology in evaluating the Step-Down Program's responsivity—Defendants simply disagree with his conclusions, which is an inappropriate ground for exclusion. *See Bresler*, 855 F.3d at 195 (“To determine whether an opinion of an expert witness satisfies *Daubert* scrutiny, courts may not evaluate the expert witness' conclusion itself, but only the opinion's underlying methodology.”).

Second, Mr. Pacholke provides specific reasons why he came to his conclusions regarding VDOC's specific responsivity failures. Ex 2, Pacholke Rep. at 28. For example, Mr. Pacholke explains in his report that the Step-Down Program's policies are not responsive to inmates who are illiterate or who suffer from mental or cognitive impairments. *Id.* Defendants

¹ Mr. Pacholke explains that specific responsivity “involves matching the delivery and type of interventions with the specific learning styles, motivations, strengths, personalities, and demographics of offenders. Specific responsivity takes into account gender-responsiveness, ethnic-responsiveness, age-appropriateness, clinical status, and intelligence.” Ex. 2, Pacholke Rep. at 27.

are free to challenge Mr. Pacholke's reasoning and explanations for his conclusions on specific responsivity during cross-examination. *See TFWS, Inc.*, 325 F.3d at 240. But those challenges go to the opinions' weight, not admissibility. *Bresler*, 855 F.3d at 195 (“[Q]uestions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness's assessment, not its admissibility.”).

D. Mr. Pacholke's remaining opinions are not “repackaged” summaries of the evidence.

Defendants save their weakest argument for last. Defendants suggest that Mr. Pacholke's opinions “simply repackage the testimony and opinion of others.” ECF No. 370 at 17. But Defendants again fail to identify a valid basis for excluding Mr. Pacholke's testimony.

Defendants' primary complaint appears to be that Mr. Pacholke identified too much support for his opinions from within the discovery record. *See* ECF No. 370 at 17–18. But identification of support for an expert's opinions within the discovery record is a requirement of Rule 26 expert reports. Fed. R. Civ. Pro. 26(a)(2)(B) (requiring among other things “the basis and reasons for” an expert's opinions and “the facts or data considered by the witness” in forming the opinions). It is certainly not grounds to exclude a witness under *Daubert*.

Defendants further argue that Mr. Pacholke's opinions represent an expert “regurgitating” summaries prepared “with the extensive influence of counsel.” ECF No. 370 at 18. As an initial matter, Defendants' argument that Mr. Pacholke is merely reciting material prepared by counsel is not well-taken. Mr. Pacholke explains in his report that his opinions are based on his extensive experience along with numerous discovery materials, including VDOC policies, his visits to VDOC facilities, deposition testimony, and documents and testimony related to the named Plaintiffs in this case. Ex. 2, Pacholke Rep. at 3–6; Ex. 4, Pacholke Materials

Considered. It is undisputed that these materials, including VDOC's own policies, are not "summaries" prepared by counsel.

Defendants point to district court cases—only one from within the Fourth Circuit—in an effort to argue that Mr. Pacholke's opinions are improper summaries. ECF No. 370 at 18. But these cases provide no support for Defendants' position. In *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Product Liability Litigation*, the expert opinion at issue involved whether an expert had appropriately conducted a literature review because he did not review the "totality of the literature." 174 F. Supp. 3d 911, 929–930 (D.S.C. 2016). No such literature review is at issue here. Defendants' reliance on *Baker v. Firstcom Music* fares no better. No. LA16-cv-08931, 2018 WL 2676636 (C.D. Cal. May 8, 2018). That case involved a handwriting signature expert who relied solely on a party's representations for her opinion on handwriting signatures. *Id.* at 2. Mr. Pacholke's expert report and materials considered make plain that he relied on extensive discovery materials produced in this litigation. *See generally* Ex. 2, Pacholke Rep.; Ex. 4, Pacholke Materials Considered. The final case cited by Defendants, *Geo M. Martin Co. v. Alliance Machine Systems International*, involved a survey expert that failed to conduct a survey. No. C O7-00692 WHA, 2008 WL 2008638, at *1 (N.D. Cal. May 6, 2008). This factual scenario again bears no resemblance to Mr. Pacholke who not only reviewed VDOC's policies and other discovery material but conducted visits to VDOC facilities and conducted inmate interviews. *See* Ex. 2, Pacholke Rep. at 3.

V. CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to exclude Mr. Pacholke's testimony.

Dated: October 5, 2023

Respectfully submitted,

/s/ Megan A. Crowley

Megan A. Crowley (*pro hac vice*)

Jared Frisch (*pro hac vice*)

Paul Wilson (*pro hac vice*)

Covington & Burling LLP

850 Tenth Street, NW

Washington, DC 20001-4956

Telephone: (202) 662-6000

mcrowley@cov.com

jfrisch@cov.com

pwilson@cov.com

William O'Neil (*pro hac vice*)

Matthew Phelps (*pro hac vice*)

Covington & Burling LLP

The New York Times Building

620 Eighth Avenue

New York, NY 10018-1405

Telephone: (212) 841-1000

woneil@cov.com

mphelps@cov.com

Vishal Agraharkar (VSB #93265)

Eden B. Heilman (VSB #93554)

Geri Greenspan (VSB #76786)

Matthew Callahan (*pro hac vice*)

ACLU of Virginia

701 E. Franklin Street, Ste. 1412

Richmond, VA 23219

Telephone: (804) 644-8022

vagraharkar@acluva.com

eheilman@acluva.com

ggreenspan@acluva.com

mcallahan@acluva.com

Kathryn Ali (VSB #97966)

Ali & Lockwood LLP

300 New Jersey Avenue, NW, Ste. 900

Washington, DC 20001

Telephone: (202) 651-2475

katie.ali@alilockwood.com

Maxwell J. Kalmann (*pro hac vice*)

1818 Library Street, 10th Floor

Reston, VA 20190
(650) 586-1043
maxkalmann@meta.com

Counsel for Plaintiffs

Certificate of Service

I hereby certify that on the 5th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

/s/ Megan A. Crowley

Megan A. Crowley (*pro hac vice*)

Jared Frisch (*pro hac vice*)

Paul Wilson (*pro hac vice*)

Covington & Burling LLP

850 Tenth Street, NW

Washington, DC 20001-4956

Telephone: (202) 662-6000

mcrowley@cov.com

jfrisch@cov.com

pwilson@cov.com

William O'Neil (*pro hac vice*)

Matthew Phelps (*pro hac vice*)

Covington & Burling LLP

The New York Times Building

620 Eighth Avenue

New York, NY 10018-1405

Telephone: (212) 841-1000

woneil@cov.com

mphelps@cov.com