

**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.

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' *DAUBERT* MOTION TO
EXCLUDE THE OPINIONS OF DR. ROBERT MORGAN**

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Specialty Guidelines for Forensic Psychology, American Psychological
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Plaintiffs seek to deprive the factfinder(s) in this case of any expert opinion regarding the scientific literature on “solitary confinement”¹ that differs from that of their experts. In support of that goal, they move to exclude the opinions of Defendants’ expert, Dr. Robert Morgan, on three improper bases: (1) he did not consider information that is irrelevant to his opinions; (2) he does not satisfy arbitrary qualifications that their experts also do not satisfy; and (3) they disagree with his research. And Plaintiffs attempt to support these improper bases by misstating Dr. Morgan’s opinions and misrepresenting the facts. Plaintiffs’ alleged bases for exclusion lack any support in the facts or the law. Accordingly, Defendants Harold Clarke, Randall Mathena, H. Scott Richeson, A. David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Steve Herrick, Tori Raiford, Jeffrey Kiser, and Carl Manis and the Virginia Department of Corrections (“VDOC,” collectively, “Defendants”) oppose Plaintiffs’ Daubert Motion to Exclude the Opinions of Dr. Robert Morgan, which should be denied in its entirety.

I. FACTS

Defendants retained Dr. Morgan “to provide an assessment of the current state of scientific research on the effects of restrictive housing and to offer a rebuttal, as appropriate, to the opinions expressed by experts retained by Plaintiffs on the subject.” Expert Report of Robert D. Morgan, Ph.D. (“Morgan Report”), relevant portions attached as Exhibit 1, at 1. With his expert report, Dr. Morgan did just that – opine on the current state of certain scientific research. *Id.* at 9-40.

Plaintiffs assert that Dr. Morgan’s opinions regarding the scientific research should be excluded because (1) he “has no basis to offer relevant or reliable opinions about the [VDOC]

¹ The literature at issue uses various terms, including solitary confinement, administrative segregation, and restrictive housing. Defendants use the term solitary confinement here because some of the conditions of confinement described in the literature, unlike those in VDOC’s Step-Down Program, meet the definition of that term as it is defined there.

Step-Down Program,” (2) “[h]is exposure to and experience providing mental health services in segregation units is minimal and dated,” and (3) his research on the topic of the effects of solitary confinement purportedly “is viewed as an extreme outlier in the field[.]” Plaintiffs Memorandum of Law in Support of the *Daubert* Motion to Exclude the Opinions of Dr. Robert Morgan (“Pls.’ Br.”) (ECF No. 367) at 2.

For their part, Plaintiffs served on May 26, 2023, reports from Craig Haney, Ph.D. and Michael L. Hendricks Ph.D.² In his report, Dr. Haney opines about, among other topics, “the current state of scientific knowledge about the effects of solitary or isolated confinement on incarcerated persons” Expert Report of Craig Haney, Ph.D., J.D. (“Haney Report”), relevant portions attached as Exhibit 2, at 1. When asked to describe his methodology for forming that opinion, Dr. Haney testified that he reviewed literature on the effects of solitary confinement and focused on his knowledge of that literature. Transcript of Craig W. Haney, Ph.D., J.D., Volume 2, dated August 17, 2023 (“Haney Tr. 2”), relevant portions attached as Exhibit 3, at 127:7-130:13 (testifying that he reviewed the scientific literature in reaching conclusions regarding the “current state of the scientific knowledge”). He did not identify any document or testimony specific to VDOC or the Step-Down Program that he reviewed to opine on “the current state of scientific knowledge.” *Id.*

In addition, while Plaintiffs complain that Dr. Morgan’s “experience providing mental health services in segregation units” is “minimal and dated,” Pls.’ Br. at 2, , they ignore that Dr. Haney’s experience is nonexistent, Transcript of Craig W. Haney, Ph.D., J.D., dated August 17,

² Plaintiffs subsequently recalled the report from Dr. Hendricks, alleging that it contained privileged material, and issued a replacement with the alleged privileged material redacted.

2022 (“Haney Tr. 1”), relevant portions attached as Exhibit 4, at 15:15-17:16. Dr. Haney has never provided mental health services, in any context. *Id.*

As for Dr. Hendricks, he opined about, among other topics, his “Review of Relevant Literature” on the effects of solitary confinement.³ Expert Report of Dr. Michael Hendricks (“Hendricks Report”), relevant portions attached as Exhibit 5, at 11-14. Yet, a review of the “Publications” section of Dr. Hendricks’s Curriculum Vitae (“CV”) reveals that his “scholarship on th[e] topic [of solitary confinement],” Pls.’ Br. at 2, is less than minimal – it is nonexistent. Hendricks Report at 78-79 (pp. 8-9 of CV). And a review of the “Research” section of his CV reveals that his research efforts, the most recent of which is now 15 years old, are similarly devoid of any mention of the topic (or any other topic of relevance to this case). *Id.* at 77-78 (pp. 7-8 of CV). Moreover, Dr. Hendricks’s last “experience providing mental health services in segregation units,” Pls.’ Br. at 2, allegedly involved serving two “lock-down” blocks in the D.C. Jail more than 20 years ago, between 1996-2000. *Id.* at 2-3.

II. LEGAL STANDARD

A defendant acts within its rights in retaining its own expert to rebut the report of the plaintiff’s expert. *Boden v. United States*, No. 7:18CV00256, 2019 WL 6883813, at *5 (W.D. Va. Dec. 17, 2019). Further, Rule 702’s admissibility inquiry “is more limited when evaluating rebuttal expert testimony offered by the defendant” to counter the plaintiff’s expert. *EEOC v. Performance Food Grp.*, No. 13-cv-1712, 2020 WL 1285502, at *7 (D. Md. Mar. 18, 2020) (*quoting Samuel v. Ford Motor Co.*, 112 F. Supp. 2d 460, 469 (D. Md. 2000)).

³ Plaintiffs apparently intend to present the same opinion testimony from two purported experts (Drs. Haney and Hendricks) regarding the literature on the effects of solitary confinement. Defendants will move at the appropriate time to preclude Plaintiffs from presenting cumulative expert testimony.

Rule 702 requires liberal judgment regarding a witness's qualifications to render an expert opinion. *Kopf v. Skyrms*, 993 F.2d 374, 377 (4th Cir. 1993). When an expert's qualifications are challenged,

the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for which the opinion is proffered. One knowledgeable about a particular subject need not be precisely informed about all details of the issues raised in order to offer an opinion.

Id. (quoting *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir.1989), *cert. denied*, 493 U.S. 1073, 110 S. Ct. 1120, 107 L.Ed.2d 1027 (1990)).

Under Rule 702, expert testimony is admissible so long as it is reliable and “helpful to the trier of fact.” *Md. Cas. Co. v. Therm-O-Disc., Inc.*, 137 F.3d 780, 784 & n.22 (4th Cir. 1998) (citing *Daubert v. Merrell-Dow Pharms., Inc.*, 509 U.S. 579, 590, 592-93 (1993)). This inquiry focuses on the witness's “principles and methodology.” *Daubert*, 509 U.S. at 595; *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (quoting *Daubert*, 509 U.S. at 595). “Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay [factfinder].” *Kopf*, 993 F.2d at 377.

The advisory committee's notes directly address differing expert opinions:

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment. “[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.” *Id.* (quoting *United States v. 14.38 Acres*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

III. ARGUMENT

Drs. Haney, Hendricks, and Morgan offer opinions regarding the current state of scientific research on the effects of solitary confinement. In moving to exclude those opinions that do not support their allegations—Dr. Morgan’s—Plaintiffs conveniently ignore the inescapable conclusion that, if their arguments were accepted, their experts’ opinions would have to be excluded for the same reasons.

Defendants agree that opinions regarding the current state of scientific research on the effects of solitary confinement have no relevance to the “conditions in the Virginia Department of Corrections or the Step-Down Program—the very Program and entity at issue in this case,” Pls.’ Br. at 10, because the conditions of confinement in the Step-Down Program differ markedly from those studied in the research. If the Court agrees with that proposition, it should exclude not only the Morgan Report, but the entirety of the Haney Report and the “Review of Relevant Literature” portion of the Hendricks Report as “hav[ing] no relevance to the facts and issues in this litigation,” *id.*

Of course, Plaintiffs do not advocate for that equitable result, as their objective is not to ensure that only relevant evidence is admitted. It is to ensure that the Court hear only those opinions they favor, *i.e.*, the opinions, and only the opinions, of their own experts. In pursuit of that objective, Plaintiffs create various strawmen of opinions that Dr. Morgan did not offer, and they attempt to conflate Dr. Morgan’s research with the opinions that he did offer to conclude that his opinions are irrelevant and unreliable. As for Plaintiffs’ position regarding Dr. Morgan’s qualifications, they fail to make any cogent argument on the issue, opting instead for conclusory statements and inapt deposition testimony. Required to have only sufficient knowledge, skill, experience, training, *or* education to offer his opinions, Dr. Morgan easily clears the bar on each individual aspect of the inquiry.

A. Plaintiffs Mischaracterize Dr. Morgan’s Opinions, Then Argue That He Should Be Excluded From Offering Those Opinions.

Plaintiffs proceed from a misleading quotation of Dr. Morgan’s opinions to arguments as to why he should be excluded from offering opinions that he did not offer. Specifically, Plaintiffs suggest that Dr. Morgan opines that “the physical and mental effects of solitary confinement” in the Step-Down Program “are comparable to the effects of incarceration as a general matter” and “do not rise to serious mental illness or place inmates at substantial risk of serious physical or mental harm.” Pls.’ Br. at 7 (quoting Morgan Report at 8). While the quoted words do appear in Dr. Morgan’s Report, Plaintiffs omit a key phrase that precedes them: “[t]he scientific literature demonstrates that ...” – with no mention of the Step-Down Program. *Compare* Pls.’ Br. at 7 to Morgan Report at 8. In other words, Dr. Morgan’s opinions focus on what the *scientific literature* demonstrates about solitary confinement, not the physical and mental effects of VDOC’s Step-Down Program. Dr. Morgan did not need to review “documents specific to this case or the [VDOC],” Pls.’ Br. at 5, to reach his conclusions about the state of the scientific literature.

Similarly, contrary to Plaintiffs’ assertion, Dr. Morgan did not offer an opinion regarding “the psychological characteristics of particular individuals.” Pls.’ Br. at 8. Nor should Dr. Haney, who is not qualified to do so. Haney Tr. 2 at 215:9-15 (“I’m not a clinical psychologist”); 281:17-20 (“I’m not a clinical psychologist; I don’t diagnose differentially or otherwise.”). Plaintiffs’ implication that, because Dr. Morgan is a forensic psychologist, § 9.03 of the *Specialty Guidelines for Forensic Psychology* from the American Psychological Association should apply to the opinions that he did offer defies common sense. *See* Pls.’ Br. at 8. As explicitly set forth in that section, it applies when a forensic psychologist is “provid[ing] written or oral evidence about the psychological characteristics of particular individuals[.]” Pls.’ Br. at 8 (quoting *Specialty Guidelines for Forensic Psychology*, American Psychological Association § 9.03). Dr. Morgan

has not provided evidence about any particular individual's psychological characteristics; he has provided opinions about scientific literature.⁴

Dr. Morgan also did not offer an opinion concerning either "a criminal defendant's [or any convicted criminal's] competency" or "the mental health of any named Plaintiff or class member[]." Nor should Dr. Haney, who is not qualified to do so. Haney Tr. 2 at 215:9-15; 281:17-20. Thus, Plaintiffs' immaterial complaints about inmates to whom Dr. Morgan did not speak and medical records he did not review do nothing to advance their position.

Nor did Dr. Morgan "conclude that the segregation units that he studied are similar to VDOC's Step-Down Program." Pls.' Br. at 9. That opinion appears nowhere in his Report. Not surprisingly, he did not perform work to develop a basis for conclusions that he did not make and that would have been outside of the scope of the assessment he was retained to provide.

After devoting multiple pages to arguing why Dr. Morgan should not be permitted to offer opinions that he did not offer, Plaintiffs acknowledge their understanding that "he is not offering opinions about conditions in the Virginia Department of Corrections or the Step-Down Program," Pls.' Br. at 10. But, in taking the leap from that acknowledgement to describing Dr. Morgan's opinions as "untethered from the issues in this case," Pls.' Br. at 8, and "hav[ing] no relevance to the facts and issues in this litigation," Pls.' Br. at 10, Plaintiffs demonstrate a complete misunderstanding of the concept of a rebuttal expert. Through Drs. Haney and Hendricks,

⁴ Plaintiffs surprisingly assert that "[i]ndividual evaluation is essential in the field of forensic psychology." Pls.' Br. at 8. Yet, their expert, Dr. Hendricks, offered opinions about "the psychological characteristics" of two named Plaintiffs without individually evaluating them; in fact, he *overruled* the opinions of the clinical psychologists who *did* evaluate them. See, e.g., Defendants' Motion, and Memorandum in Support of Motion, to Exclude the Report and Testimony of Plaintiffs' Proposed Expert Michael L. Hendricks (ECF No. 368) at 3-6. This is yet another demonstration of the level of bias in their favor that Plaintiffs ask the Court to apply in considering the admissibility of expert opinions.

Plaintiffs made the scientific literature an issue in this litigation by having their experts opine about what it shows and alleging that it is applicable to the conditions of confinement in the Step-Down Program. So long as Drs. Haney and Hendricks and, thus, Plaintiffs, assert that the scientific literature regarding solitary confinement is relevant to this litigation, Dr. Morgan's opinions about the same literature also are relevant to the litigation, even if Plaintiffs dislike his opinions. Ex. 2 at 115.

The case cited by Plaintiffs in support of their argument demonstrates why it must fail. In *Kovari v. Brevard Extraditions*, although the Court concluded that an expert's "lack of specific knowledge as to the circumstances of [the plaintiff's] transport" would preclude him from offering an opinion as to whether certain policies caused the plaintiff harm, 461 F.Supp.3d 353, 374 (W.D. Va. May 20, 2020), it denied the defendant's motion to exclude his testimony. *Id.* at 375. As the Court explained, the opinions being offered by the expert did not require the expert "to have any specific factual knowledge" of the plaintiff's transport for the opinions that he intended to offer to be valid and relevant. *Id.* at 375. In fact, as detailed in the Court's opinion, the plaintiff never expected to call the expert to testify as to whether certain policies caused the plaintiff harm. *Id.* at 373.

Plaintiffs' argument here must fail for the same reason. Dr. Morgan is not required to have knowledge of any Plaintiff's specific circumstances to offer valid, relevant opinions in rebuttal to those of Drs. Haney and Hendricks. Neither *Kovari* nor Plaintiffs' string citation to a general proposition from *Sardis v. Overhead Door Corp.*, 10 F.4th 268 (4th Cir. 2021), suggests otherwise.

B. Plaintiffs' Inexplicable Attacks on Dr. Morgan's Qualifications Condemn the Qualifications of Their Own Experts Moreso Than Those of Dr. Morgan.

Despite castigating Dr. Morgan for a purported lack of qualifications, Plaintiffs fail in their brief to identify what they deem "the necessary background and qualifications to offer sound and

helpful opinions concerning the effects of solitary confinement more generally.” Pls.’ Br. at 11. Nor do they offer any legal support for whatever background or qualifications purportedly are required (but which Plaintiffs do not disclose).

But, if their random assertions regarding Dr. Morgan can be used as a guide, Drs. Haney and Hendricks similarly lack the necessary qualifications and similarly would need to be excluded.

- Plaintiffs assert that Dr. Morgan’s “exposure to and experience providing mental health services in segregation units is minimal and dated,” Pls.’ Br. at 2, with no apparent awareness of the (lack of) experience of their own experts: Dr. Hendricks’s experience was in a single jail, rather than in multiple prisons like Dr. Morgan’s, and is from the same general time period as Dr. Morgan’s; Dr. Haney has ***no such experience*** or any experience providing mental health services of any kind to anyone because, as he concedes, he is not qualified to do so.
- Plaintiffs assert that Dr. Morgan’s “scholarship on this topic is more recent but equally minimal,” Pls.’ Br. at 2, with no apparent awareness that Dr. Hendricks’s CV ***fails to identify a single article***, peer-reviewed or otherwise, that he has published on the topic and fails to identify any research on the topic.⁵

In addition to failing to explain what “evaluation of mental health programs for prisons or jails” has to do with being qualified to opine on the current state of scientific research on the effects of solitary confinement, Plaintiffs blatantly misrepresent Dr. Morgan’s qualifications in that area:

Q Did your forensic psychology practice involve any evaluation of mental health programs for prisons or jails?

A No, that wasn’t part of my practice. ***I did that***, but not part of my private practice, per se.

Transcript of Robert D. Morgan, Ph.D., dated August 10, 2023 (“Morgan Tr.”), relevant portions attached as Exhibit 6, at 40:18-41:1 (emphasis added). In fact, as reflected on his CV, Dr. Morgan co-developed a treatment program for inmates placed in restrictive housing units: *Stepping Up and*

⁵ The suggestion that being denied grant funding for research disqualifies Dr. Morgan as an expert, Pls.’ Br. at 11, lacks any basis in the law. Grant requests are competitive. As an example, data published by the National Institutes of Health indicates between a 19% and 21% success rate for grant proposals from 2019 – 2022. Exhibit 7.

Stepping Out: A Mental Health Treatment Program for Inmates Detained in Restrictive Housing. ECF No. 367-1 at 4. As he explained to Plaintiffs' counsel during deposition, he co-developed the treatment program in conjunction with work he did for the Kansas Department of Corrections related to its step-down program. Morgan Tr. at 80:18-83:3.

Dr. Morgan's knowledge, experience, training, and education, as detailed in his Report, demonstrate his qualifications to offer his opinions. Plaintiffs' arguments to the contrary should be treated, and rejected, for what they are—a transparent scattershot attempt to deprive the factfinder of an assessment of the scientific research that is not skewed in their favor.

C. Plaintiffs Mischaracterize the Bases for Dr. Morgan's Opinions.

Plaintiffs' assertion that "Dr. Morgan's opinions on the effects of solitary confinement primarily rest on his 2016 meta-analysis," Pls.' Br. at 11, is demonstrably false. As support for the assertion, Plaintiffs cite to a single 11-page subsection of Dr. Morgan's 30-page critique. Morgan Report at 9-39. They further ignore the multiple other bases for his opinions that Dr. Morgan explicitly set forth in his Report. *Id.* at 8-9. Those bases include not only his own research and experience and expertise in correctional mental health, but also the reports of Drs. Haney and Hendricks, and his "[r]eview of psychological, psychiatric, and general mental health scientific journals as well as legal journals regarding incarceration, including in restrictive housing, and the effects on inmate mental health functioning." *Id.*

Yet even Plaintiffs' criticism of Dr. Morgan's research relies on mischaracterization and misdirection. Plaintiffs first cite to two sections of Dr. Morgan's deposition testimony. In response to a question about his view as to the gold standard of methodology for studying segregation or solitary confinement, in general, the following exchange occurred:

A: Okay. In general, I would say the true gold standard would be a mixed method design that's longitudinal in nature, that includes control groups, that -- that, as best we can -- we know there's problems with that, but as best we can, keep in

actual control groups. And that mixed method is going to include -- well, mixed methods covers it. You can collect different -- data from multiple different types of sources. That, to me, would be the gold standard.

Q Taking each of those in order, the mixed method, the sort of standardized and diversified data collection procedures, what is -- is there any study in particular that you think really got that piece right?

A No. No, we don't have that.

ECF No. 367-2 at 181:2-18. In response to a question about whether most of the literature assessing solitary confinement is qualitative rather than quantitative, Dr. Morgan testified as follows:

I would say that the preponderance of the evidence is narrative in nature. Of the literature that is research studies, it's probably a bit more on the qualitative, a bit less on the quantitative, but I'd need to -- I am now interested to do a count on that at some point. It's probably a bit closer now.

Morgan Tr. at 200:3-9. Plaintiffs cite this testimony for a concession and two propositions that no fair reading of it can support: (1) as a concession by Dr. Morgan that “the prison setting rarely lends itself to collection of meaningful quantitative data capable of generating the kinds of effect sizes on which meta-analyses depend;” (2) for the proposition that “there are few quantitative, controlled studies of the effect of segregation on prisoners;” and (3) for the proposition that “much of the research on solitary confinement is qualitative.” Pls.’ Br. at 12. Only the second proposition comes close to finding support in the testimony and then only if the word “much” is replaced by “the preponderance.”

Following those misrepresentations, Plaintiffs take an interlude to provide the Court with a string cite to a series of concurring or other opinions that touched on the issue of solitary confinement. Pls.’ Br. at 12. But the string cite does nothing to establish the propriety of Plaintiffs’ criticism of Dr. Morgan’s scholarship. It seems intended merely to bolster the reputation of Dr. Haney, particularly with the citation to a concurrence in *Grissom v. Roberts*, 902 F. 3d 1162 (10th Cir. 2018). Yet, in *Grissom*, the U.S. Court of Appeals for the Tenth Circuit affirmed the district

court's grant of summary judgment, concluding that the defendant prison officials were entitled to qualified immunity on the plaintiff's claims that his two decades in solitary confinement violated his due process, equal protection, and Eighth Amendment rights. 902 F.3d at 1166-67. Despite the concurring opinion's reference to research by Dr. Haney, it concurred in the judgment finding no constitutional violation. *Id.* at 1175.

Plaintiffs then return from their interlude for a second criticism of Dr. Morgan's research that seems at odd with their first. In their first criticism, Plaintiffs assert that "a meta-analytic approach requires that there be multiple, high-quality controlled studies whose effect sizes can be synthesized." Pls.' Br. at 11-12. In the meta-analysis that they performed for the 2016 study,⁶ Dr. Morgan's team identified certain criteria to ensure that they were using multiple, high-quality controlled studies whose effect sizes could be synthesized; specifically, the studies had to (a) be available in English, (b) evaluate outcomes for inmates placed in segregation in a correctional facility, and (c) "include sufficient data or summary statistics that allowed for the calculation of effect sizes." Pls.' Br., Exhibit 4 (ECF No. 367-4) at 443. Plaintiffs fail to explain how requiring that a study allow for the calculation of effect sizes (so they can be synthesized)—a requirement asserted by Plaintiffs—or that it evaluate outcomes for inmates in segregation in a correctional facility "artificially limited the universe of solitary confinement research." Pls.' Br. at 13. Plaintiffs main complaint seems to be that qualitative studies that they prefer—for example, where inmates engaged in litigation about their conditions of confinement are interviewed by an expert retained by their attorneys, *see, e.g.*, Haney Tr. 2 at 317:13-320:13—do not lend themselves to being "high-quality controlled studies whose effect sizes can then be synthesized." Pls.' Br. at 12.

⁶ The 2016 study on which Dr. Morgan is identified as the lead author, contains two, independent meta-analytic reviews that reached similar results, one conducted by a team led by Dr. Morgan, the second conducted by a team led by Dr. Paul Gendreau. Pls.' Br, Exhibit 4 (ECF No. 367-4) at 439, 441-42.

Plaintiffs end their criticisms of Dr. Morgan's research much as they began them, with misrepresentations. While it is true that Dr. Morgan acknowledged that his study had been criticized for allegedly over-weighting the Colorado Study, Pls.' Br. at 13, Plaintiffs omit that he went on to explain why these criticisms were unfounded. Morgan Tr. at 205:15-209:4. The 27-year-old European journal article that Plaintiffs cite on meta-analysis, Pls.' Br., Exhibit 8 (ECF 367-8), says nothing about criticism, much less erroneous criticism, being "problematic." Pls.' Br. at 13. Similarly, Dr. Morgan says nothing about the supposed "enormous problems with the Colorado study and the data underlying it," much less "readily acknowledges" them, Pls.' Br. at 13, in the deposition testimony cited by Plaintiffs. Morgan Tr. at 206:17-209:4. Later in the transcript, Dr. Morgan acknowledges that Dr. Haney has criticized both the Colorado Study and his research. *Id.* at 209:22-210:15. That fact is not in dispute—Dr. Morgan is well aware of Dr. Haney's criticism, and should have the opportunity to respond to it. Unsurprisingly, the sole cite that Plaintiffs provide for the allegedly "universal[] view" that Dr. Morgan's research is "an extreme outlier and widely criticized in the field," Pls.' Br. at 4, is an article by Dr. Haney. Undoubtedly, Dr. Haney will share his criticisms of any study that disagrees with his views at the appropriate time. Dr. Morgan should be given the opportunity to rebut those criticisms.

Plaintiffs do not and cannot establish that meta-analysis is not an accepted methodology in social science research, including in research on solitary confinement. In fact, Plaintiffs' expert, Dr. Haney, appears to accept research based on meta-analysis without criticism--as long as the researcher reaches conclusions that accord with his views. As noted in Dr. Morgan's Report, Dr. Haney cites to the research of Luigi, et al. (2020), despite that meta-analysis providing similar results to those of Dr. Morgan's and Dr. Gendreau's meta-analyses; the difference: Luigi and his colleagues reported a conclusion more in line with Dr. Haney's views. Morgan Report at 27-28.

In considering whether Dr. Morgan's opinions should be excluded, this Court should focus on those opinions and the methodology used to arrive at them, not Plaintiffs' criticism of his research, which, like Dr. Haney's, is published in a reputable, peer-reviewed journal. At best, Plaintiffs' criticisms about the quality of Dr. Morgan's 2016 meta-analysis would go to the weight to be given Dr. Morgan's opinions, but do not justify excluding them. *See, e.g., Mountain Valley Pipeline, LLC v. 1.85 Acres of Land by Lucki*, No. 7:19-CV-00147, 2020 WL 1067001, at *8 (W.D. Va. Mar. 5, 2020) (the fact that an opposing expert arrives at a different conclusion than a party would like is not a basis for exclusion; perceived weaknesses are matters of weight, not admissibility).

IV. CONCLUSION

Focusing on the relevant factors—the methodology used to arrive at Dr. Morgan's opinions, the relevance of those opinions to the issues in this case, and Dr. Morgan's qualifications to offer those opinions—leads to the inevitable conclusion that his opinions should not be excluded. As Plaintiffs acknowledge, Dr. Morgan has provided expert testimony in state and federal courts in Alabama, California, Kansas, Missouri, Oklahoma, and Texas and in Ontario Province, Canada. Pls.' Br. at 4. Although Plaintiffs identify two Canadian courts that chose not to "give much weight" or not to accept certain opinions offered by Dr. Morgan, Pls.' Br. at 4, fn. 1, they fail to identify a single court that excluded his opinions based on his lack of qualifications; they fail to identify a single court that excluded his opinions because they would not be helpful to the factfinder; and they fail to identify a single court that excluded his opinions because they were not reliable. This Court should not be the first to do so.

For the reasons stated, this Court should deny Plaintiffs' Motion in its entirety.

October 5, 2023

Respectfully submitted,

/s/ Maya M. Eckstein

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

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 October 5, 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