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' REPLY BRIEF IN SUPPORT OF THEIR *DAUBERT* MOTION TO EXCLUDE THE OPINIONS OF DR. ROBERT MORGAN

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I. INTRODUCTION

Dr. Robert Morgan has no basis to offer relevant or reliable opinions about the psychological effects of solitary confinement in VDOC prisons. Defendants do not dispute that Dr. Morgan failed to learn anything about the specific facilities or program at issue in this case. In seeking to rehabilitate their expert—and explain this failure—Defendants concede that Dr. Morgan's role in this litigation is limited to offering his view on the state of the scientific literature. He has no opinion on specific conditions in this case, or even on whether the facilities studied in the literature he has looked at are similar to VDOC's Step-Down Program. Indeed, he admitted in his deposition that he could not name the facilities at issue in this case, or even identify how many facilities were at issue.

But even with respect to the very limited purpose for which Defendants offer Dr. Morgan, he lacks the necessary qualifications to testify as an expert and his methodology is unsound. His experiences and publications are, for the most part, far afield from the topic of the psychological effects of solitary confinement, and he primarily bases his opinion of the literature on a single flawed, dated meta-analysis that is an extreme outlier in the large body of literature on solitary confinement. Much of Defendants' strategy in their opposition is to deflect from Dr. Morgan's failings by attacking Plaintiffs' experts. These efforts fail. Dr. Haney is a prolific scholar and researcher of solitary confinement, Dr. Hendricks has extensive clinical experience, and both offer opinions squarely within their expertise, informed by their review of ample case-specific information. Dr. Morgan lacks *any* of those qualifications—clinical experience, scholarship, research, or particularized knowledge about the facilities, programs, or individuals in this case.

His narrow opinion—which is based on unreliable methods, is an extreme outlier in the field, and is wholly untethered from any facts specific to this case—will do nothing to "help the

trier of fact to understand the evidence or" determine a fact in issue, Fed. R. Evid. 702(a), and should therefore be excluded.

Defendants charge Plaintiffs with attempting to deprive the factfinder of any expert opinion that differs from that of their own experts. But Defendants are not entitled to an expert that espouses a particular view, if the only person they can find to offer that view is one whose methods are not sound and qualifications are sub-par. It is simply not the law that a court should admit a defense expert just because he says something contrary to a plaintiff expert.

II. ARGUMENT

A. Dr. Morgan's opinion—which Defendants concede is extremely narrow—offers very limited if any value to the factfinder on the issues in this case and should be excluded.

"Under Rule 702, 'expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful' to the trier of fact." *Kovari v. Brevard Extraditions, LLC*, 461 F. Supp. 3d 353, 369 (W.D. Va. 2020) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993)). Dr. Morgan's opinions in this case are so unmoored to the facts at issue in this litigation that they are of limited relevance and "non-helpful" to the factfinder.

As explained in Plaintiffs' opening brief, Dr. Morgan performed no work to analyze or even become familiar with the facilities, conditions, or policies and practices at issue in this case. ECF No. 367, Memorandum in Support of the *Daubert* Motion to Exclude the Opinions of Dr. Robert Morgan 9–10 ("Mem."); *see also* Ex. 11, Morgan Dep. at 22:15–24:12, 25:20–26:19; 138:6–139:8, 142:10–17. He had no idea, for example, how long the average participant spends in the Step-Down Program. Ex. 11, Morgan Dep. at 26:11–19 ("I don't know the specifics on that . . . as it pertains to VDOC's use of step-down, it would be guessing"). He did not review the symptoms that any class members reported to Dr. Haney during his exhaustive interview process "in enough detail to form an opinion" on them, nor did he "do a deep dive into Dr. Haney's analysis

and conclusions" at all. *Id.* 116:15–117:8. And he expressly conceded that "the specific conditions in the Virginia Department of Corrections and the step-down program are outside the scope of what [he was] retained to opine on in this case." *Id.* at 24:7–12. Lacking any knowledge about VDOC's Step-Down Program, he cannot even opine on whether the conditions in the studies he has reviewed are similar to the conditions at issue in this case.[1] *See, e.g.*, *id.* at 221:12–223:11 ("Q: Do you have an understanding regarding whether segregation in the step-down program is more akin to the punitive segregation in Colorado rather than the administrative segregation in the study? A: The step-down program in VDOC? Q: That's right. A: No."); *id.* 155:10–14 (similar).

In seeking to salvage their expert despite his failure to review even basic facts about VDOC's Step-Down Program, Defendants concede that the scope of his opinion is extremely narrow: "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." ECF No. 396, Defendants' Opposition to Plaintiffs' *Daubert* Motion to Exclude the Opinions of Dr. Robert Morgan 6 ("Opp."). Defendants repeatedly disclaim that Dr. Morgan's opinions have any broader relevance to the case than an opinion on the current state of scientific research. ECF No. 396, Opp. 1, 6–7. They further concede that Dr. Morgan cannot even opine on the applicability of the scientific literature to VDOC's Step-Down Program as "he did not perform work to develop a

[1] This distinguishes Dr. Morgan from both Dr. Haney and Dr. Hendricks, despite Defendants' attempt to paint them all in the same light. ECF No. 396, Opp. 2–3, 5, 9. Both Dr. Haney and Dr. Hendricks reviewed and analyzed ample case-specific information. Dr. Haney reviewed VDOC policy documents, institutional files, Step-Down Program materials, and case-related deposition transcripts, as well as toured the facilities and conducted interviews with prisoners. Ex. 12, Haney Report at ¶ 31–32. Dr. Hendricks performed comprehensive mental health evaluations of nine out of eleven of the named plaintiffs in this case, including psychological testing and interviews. ECF No. 400-55, Hendricks Report at ¶ 12–18. Both are therefore also able to say that the conditions in VDOC's program are similar to those in the literature they have reviewed. Ex. 12, Haney Report at ¶ 131–32; ECF No. 400-55, Hendricks Report at ¶ 19–22.

basis for [such] conclusions." ECF No. 396, Opp. 7. For all of these reasons, Dr. Morgan's testimony "does not relate to any issue in the case" and should be excluded. *See Kovari*, 461 F. Supp. 3d at 369.[2]

But even if this court admits Dr. Morgan's testimony for the extremely limited purpose for which Defendants offer it, the conceded narrowness of the opinion means that large swaths of Dr. Haney's expert report are unrebutted in this case. Dr. Haney's conclusions that VDOC's use of solitary confinement causes physical and psychological harm, and that VDOC is and has been aware for many years that mentally ill people should not be housed in solitary confinement, have not been contested by any other expert. *See, e.g.*, Ex. 12, Haney Report at ¶ 23–29. And even with respect to the review of the literature more generally, Dr. Morgan's opinions appear to relate to pre-2016 materials and thus do not expressly rebut Dr. Haney's review of more recent scientific studies and literature. *See, e.g.*, Ex. 12, Haney Report at ¶ 67–68.

B. Even for the very limited purpose for which Defendants offer his opinion, Dr. Morgan is unqualified and his methodology is unsound.

An expert must be qualified by "knowledge, skill, experience, training, or education" to offer opinions on a particular subject. Fed R. Evid. 702. As explained in Plaintiffs' opening brief, Dr. Morgan lacks such qualifications. ECF No. 367, Mem. 11. He has nearly non-existent relevant clinical experience—that is, experience assessing the risks or effects of solitary confinement on prisoners. ECF No. 367, Mem. 3. His scholarship on the topic is minimal: his published and

[2] Defendants' attempt to twist *Kovari* in their favor is unavailing. *See* ECF No. 396, Opp. 8. In that case, this court curtailed the scope of the expert's testimony due to his "lack of specific knowledge as to the circumstances" of the events at issue in the case. *Kovari*, 461 F. Supp. 3d at 374. Even for the limited purpose for which the court admitted the expert's testimony—to opine on the defendant's policies in general—the expert had reviewed the defendant's specific policies and records in formulating his opinions. *See generally* Plaintiff's Opposition to Defendants' Motion to Exclude Trial Testimony of Eric L. Clark, ECF No. 205, *Kovari*, No. 5:18-cv-00070 (W.D. Va.). That is exactly what Dr. Morgan failed to do here.

peer-reviewed articles on solitary confinement consist of a single meta-analysis concerning research conducted by others and a student's research project that Dr. Morgan supervised. ECF No. 367, Mem. 3–4. Only two or three of the 102 studies he has published, in fact, concerned segregation or solitary confinement. Ex. 11, Morgan Dep. at 98:13–100:15.

Because Defendants cannot contradict any of this, they try to level the same criticisms at Plaintiffs' experts. ECF No. 396, Opp. 8–10. But those attempts to discredit Dr. Haney and Dr. Hendricks are both unfounded and irrelevant. Dr. Haney is a Distinguished Professor of psychology with extensive research and publication experience on the psychological risks of solitary confinement whose work has been cited and credited by the Supreme Court of the United States and numerous other courts. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 518, 522 (2011). Attacking his clinical experience does little to undermine his relevant credentials, and Defendants (wisely) have not sought to exclude Dr. Haney. Similarly, Dr. Hendricks is a clinical psychologist with decades of relevant clinical experience whose primary role in this case is to offer opinions about the specific clinical effects of solitary confinement on the named Plaintiffs. Attacking his scholarship is beside the point. Dr. Morgan lacks either qualification. But more importantly, Defendants' criticisms of other experts in this case are irrelevant to the question at hand, which is *Dr. Morgan*'s qualifications.

On top of his lack of qualifications, Dr. Morgan's opinion is unreliable. To be admissible, an expert's opinions must be based on reliable methods and rooted in sufficient facts and data. *Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 195 (4th Cir. 2017); *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021). Dr. Morgan's opinion is primarily based on a 2016 meta-

analysis that is methodologically unsound.[3] The integrity of a meta-analysis depends on the underlying data, *see* Ex. 11, Morgan Dep. at 192:3–193:7, and Dr. Morgan excluded up to 90% of the relevant studies on solitary confinement. ECF No. 400-54, Haney Rebuttal Report App'x A at 399–400. He did so on the basis that they lacked sufficient quantitative rigor—even though *most* research on this topic is qualitative due to inherent limitations on the ability to conduct controlled research in the prison setting. *See* Ex. 11, Morgan Dep. at 181:2–17, 199:13–200:9; ECF No. 367, Mem. 13. Additionally, he only included studies published before 2016. Ex. 11, Morgan Dep. at 209:5–21. This is especially troubling given that the weight of the research continues to grow and has advanced in the last several years. Ex. 12, Haney Report at ¶ 67–92 (reviewing literature post-2018); ECF No. 400-54, Haney Rebuttal Report at ¶ 65. Dr. Morgan's assessment of the state of scientific literature on the topic is thus based on only a tiny percentage of the available literature. ECF No. 400-54, Haney Rebuttal Report at ¶ 52.

After thus constricting the sample size, Dr. Morgan then grossly overweighed a single, flawed study, the Colorado Study. *See* ECF No. 400-54, Haney Rebuttal Report at ¶ 55 (explaining that almost half of the effects measured in the meta-analysis came directly from a single study); *Id.* at ¶ 67–68 (citing Mimosa Luigi, et al., *Shedding Light on "the Hole": A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality in Correctional Settings*, 11 Frontiers in Psychiatry 840, 1–2 (2020)). Even the researchers behind the Colorado Study have

[3] Defendants suggest that Dr. Morgan has a broader basis for his opinions than just the 2016 meta-analysis. ECF No. 396, Opp. 10. There is little support for this. They assert that he reviewed extensive literature, but, out of the 67 articles cited in his report, most of these sources in fact came to the opposite conclusion as him with respect to the effects of solitary confinement, and he cited them in order to dismiss them. ECF No. 400-54, Haney Rebuttal Report at ¶ 17–18. They also assert his "experience and expertise in correctional mental health," ECF No. 396, Opp. 10, but, as Plaintiffs have explained, most of this experience had nothing to do with assessing the risks of solitary confinement. ECF No. 367, Mem. 3.

retreated from the results of their study and now have a different view than Dr. Morgan. ECF No. 400-54, Haney Rebuttal Report at ¶ 28–29.[4]

For both of these reasons, Dr. Morgan has been criticized and courts have rejected his opinions. Contrary to Defendants' suggestion, ECF No. 396, Opp. 13, Dr. Haney is not the only scholar who has criticized Dr. Morgan's research and labeled it an extreme outlier. *See, e.g.*, ECF No. 400-54, Haney Rebuttal Report at ¶ 21 (quoting Ellie Brown, *A Systematic Review of the Effects of Prison Segregation*, 52 Aggression & Violent Behavior 101389, 6 (2020), which describes methodological problems that led Dr. Morgan's meta-analysis to draw incorrect conclusions); *Id.* at ¶ 67 (quoting Mimosa Luigi, et al., *Shedding Light on "the Hole": A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality in Correctional Settings*, 11 Frontiers in Psychiatry 840, 2 (2020), which describes Dr. Morgan's study as "flawed with some methodological issues"). A court in Canada decided to not "give much weight to Dr. Morgan's meta-analysis conclusions" after hearing testimony concerning its serious errors. ECF No. 367, Mem. 4 n.1.

Ultimately, Plaintiffs agree with Defendants that "[i]n considering whether Dr. Morgan's opinions should be excluded, this Court should focus on those opinions and the methodology used to arrive at them." ECF No. 396, Opp. 14. This is not simply a case of two experts coming to different conclusions; Dr. Morgan used faulty methods to reach an extreme outlier opinion. This is precisely what the *Daubert* standard is designed to weed out. *See Mountain Valley Pipeline, LLC v. 0.32 Acres of Land Owned by Terry*, No. 7:21-cv-00099, 2022 WL 4091860, at *5–*7

[4] Contrary to Defendants' arguments, ECF No. 396, Opp. 12–13, Plaintiffs do not take issue with all meta-analyses, just methodologically unsound ones. In fact, Dr. Haney included a meta-analysis in his literature review—one that acknowledged and attempted to address the methodological weaknesses of Dr. Morgan's meta-analysis and, unsurprisingly, reached different conclusions. ECF No. 400-54, Haney Rebuttal Report at ¶ 67–69.

(W.D. Va. Sept. 7, 2022) (excluding expert testimony due to errors and omissions in expert's report).

III. CONCLUSION

For the reasons set forth above, the Court should exclude the opinions of Dr. Robert Morgan.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on the 24th 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.

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