IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	Civil Case No. 2:20-cv-00007-JPJ-PMS

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OR ARGUMENT THAT INMATES IN THE STEP DOWN PROGRAM ARE SUBJECT TO CAVITY SEARCHES

Defendants' many motions *in limine* largely seek to relitigate issues this Court already considered and decided, raise discovery-related issues that should have been surfaced (if at all) during the lengthy discovery period, or ask this Court to adjudicate substantive disputes under the guise of evidentiary objections. But this particular motion is just plain silly. There are at least three reasons to deny it:

First, Defendants' own authority undermines their position that "cavity search" is an inaccurate or improper characterization of the (largely undisputed) search process individuals in the Step-Down program are forced to undergo when they leave their cells. As Defendants acknowledge, *Amaechi v. West* defines a body-cavity search as a "visual or physical examination into the body's recesses." 237 F.3d 356, 363 (4th Cir. 2001).[1] It is undisputed that the individuals

[1] Defendants suggest that a "body cavity search" requires touching or making "physical contact" (at 2–3) but offer no authority for this proposition. And there is a mountain of case law describing "visual body cavity searches" that involve no physical contact. *See infra* at p. 2–3 & n.3.

in the Step-Down Program are required to squat, spread their buttocks, bend over for a visual inspection of their anus, and cough.[2] Whether that procedure constitutes a "visual . . . examination into the body's recesses" under *Amaechi*—or merely an inspection of the skin's surface under Defendants' preferred definition—is a disputed characterization of the evidence, not a ground for a pretrial, blanket ban on Plaintiffs' terminology.

That conclusion is reinforced by the fact that courts around the country routinely use the phrase "body cavity search" to describe procedures just like the one at issue here. *See, e.g.*, *Murphy v. Hughson*, 82 F.4th 177, 181 n.3 (2d Cir. 2023) ("A 'visual body cavity search' is the inspection of a person's body cavities without contact, such as by having the person manipulate his anatomy, bend over, or squat and cough. It is more intrusive than a 'strip search,' which requires a person to remove his clothes for a more cursory inspection, but less intrusive than a 'manual body cavity search,' which entails physical inspection of body cavities.").[3] In short, Defendants' disagreement

[2] *See, e.g.*, Ex. A at 85:8–86:12 (ROSP unit manager Larry Collins testifying that the "strip search" requires prisoners to "place all his clothing items in the tray slot in the box" and then "ordered to raise his penis, raise his testicles, spread his butt cheeks, squat, and cough. He is ordered to show you the bottom of his feet. He is ordered to open his mouth, raise his tongue, run his tongue between his lips and his gums. And if he has hair, he is ordered to run his fingers through the hair."); Ex. B at 234:5–20 (class member Peter Mukuria describing process as "you have to lift your penis up, spread your butt cheeks, lift your feet up, and you're completely naked standing in front of this man just so you can have an opportunity to go outside and get some fresh air. That's all you're asking for. And immediately shut the tray slot, give you your clothes back, shut the tray slot and leave. And then literally, you will see him two cells down doing the same thing to another person. Another person after that. Another person after that.").

[3] *See also, e.g.*, *Sloley v. VanBramer*, 945 F.3d 30, 36 (2d Cir. 2019) ("[A] 'visual body cavity search' is one in which the police observe the suspect's body cavities without touching them (as by having the suspect to bend over, or squat and cough, while naked)"); *United States v. Bunke*, 412 F. App'x 760, 762 (6th Cir. 2011) ("To complete the cavity search, the officers ordered Jones to take off his clothes and to 'squat and cough' while parting his buttocks with his hands"); *Horton v. Gilchrist*, No. CV 1:20-464, 2023 WL 3400585, at *5 (S.D. Ala. Mar. 27, 2023), *report and recommendation adopted*, No. 1:20-CV-464, 2023 WL 3397388 (S.D. Ala. May 10, 2023), *aff'd*, 128 F.4th 1221 (11th Cir. 2025) (characterizing a process where prisoner was required to "remove his clothing, bend at the waist, spread his buttocks, and cough" as a "visual body cavity search"); *Belyew v. Honea*, No. 2:17-CV-0508, 2023 WL 5957119, at *5 (E.D. Cal. Sept. 13, 2023), *report*

with Plaintiffs' terminology presents, at most, a dispute over which characterization best fits the undisputed search procedure. That is a question for the Court to resolve as factfinder, not a basis for barring Plaintiffs' terminology before trial.

Second, although Defendants invoke evidentiary rules as the purported basis of their motion, the relief they seek is not exclusion of evidence. Defendants do not identify a single exhibit, transcript excerpt, or piece of testimony they seek to keep from the factfinder. Instead, they ask the Court to police the parties' and witnesses' use of a particular phrase. But Rules 401, 402, and 403 govern admissibility of evidence—not the words used to describe otherwise undisputed facts. Rule 401 defines relevance by reference to whether "evidence" has a tendency to make a fact more or less probable, Fed. R. Evid. 401(a)–(b); Rule 402 governs the admissibility of "relevant evidence," *id.* 402; and Rule 403 permits exclusion of evidence whose probative value is substantially outweighed by enumerated dangers, *id.* 403. None of these rules speaks to the vocabulary or characterization a witness chooses when describing conduct that is otherwise in evidence. If a class member testifies, in his own words, that corrections officers conducted a "cavity search" when he left his cell, and if the underlying facts he describes—being made to expose himself, spread his buttocks, and submit to visual inspection of his anus—are properly in evidence, Defendants identify no rule of evidence that empowers the Court to strike the word he used to describe that experience while leaving the description itself untouched.[4]

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and recommendation adopted, No. 2:17-CV-00508, 2023 WL 8878958 (E.D. Cal. Dec. 22, 2023), *aff'd sub nom. Perez v. Moreland*, No. 24-129, 2025 WL 1483379 (9th Cir. May 23, 2025) (describing "bend and cough" procedure as a visual body cavity search); *Franklin v. Cnty. of Dutchess*, 225 F.R.D. 487, 492 (S.D.N.Y. 2005) (describing a bend and cough process as a "body cavity inspection").

[4] Defendants' sole authority for the proposition that a court can decide *in limine* to prohibit a party from using a particular characterization at trial is *Estate of Fuentes v. Thomas*, No. 98-2408-CM, 2000 WL 1114892 (D. Kan. July 13, 2000). In that case, the court precluded *an expert* from using a clinical/legal term of art ("homicide") in a jury trial under Rules 702/704 on the basis that "an expert may not simply tell the jury what result it should reach." That has nothing to do with the

Defendants' own motion illustrates the point: they do not dispute what actually happens during these searches, *see* ECF No. 566 at 2–3, only the label Plaintiffs and their witnesses may use to describe it. That is a dispute about characterization, not about the admissibility of evidence, and it is not one the Rules of Evidence—or a motion *in limine*—are designed to resolve.

The motion also collapses two distinct requests: restricting witness testimony and restricting counsel's argument. A witness may describe the procedure in the witness's own words, subject to examination about what the witness means. Counsel, meanwhile, may argue reasonable characterizations and inferences from admitted evidence. Defendants identify no evidentiary rule authorizing the Court to prescribe in advance the vocabulary either witnesses or counsel must use when the underlying facts are admissible. The requested ruling is also premature: the propriety of any particular use of the term depends on context. The Court cannot determine in the abstract whether a witness's use of "cavity search" accurately conveys the procedure the witness describes, whether counsel's use is a fair inference from admitted evidence, or whether clarification is necessary. Those questions should be addressed, if they arise, on a developed trial record rather than through a categorical pretrial prohibition.

Third, because this matter is proceeding to a bench trial, Rule 403's core rationale is absent. The Court is sitting as the factfinder and is capable of weighing terminology against the underlying undisputed facts without being misled or inflamed. For this reason, the Fourth Circuit has repeatedly instructed that "in the context of a bench trial, evidence should not be excluded under 403 on the ground that it is unfairly prejudicial." *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) ("For a bench trial, we are confident that the district court can hear relevant evidence, weigh

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situation here, where Defendants are trying to bar class members and witnesses from describing their own physical experiences in ordinary language.

its probative value and reject any improper inferences"); *United States v. Sebolt*, 554 F. App'x 200, 207 (4th Cir. 2014) (similar); *United States v. Howard*, 51 F. App'x 118, 120 (4th Cir. 2002) (similar); *United States v. Musleh*, 106 F. App'x 850, 856 (4th Cir. 2004) (similar).

Defendants try to avoid this dispositive authority by recasting their Rule 403 arguments as a concern about undue delay. This doesn't pass the straight face test. Again, as Defendants concede (at 2–3), the facts concerning how people in the Step-Down program are searched when they leave their cells is largely, if not entirely, undisputed. And any definitional ambiguity could be resolved with a single clarifying question of a witness at trial (*e.g.*, "When you use the term 'cavity search,' what specific search procedure are you describing?"). By contrast, Defendants' proposed blanket prohibition would invite delay and collateral disputes. If a class member or VDOC witness used "cavity search" or similar language to describe the procedure, the Court would have to resolve objections and motions to strike—and, because Defendants never define the prohibition's scope, determine in real time whether terms such as "body cavity" or "intrusive search," or a witness's own description of the search process he underwent, crossed Defendants' unstated line. In other words, Defendants' proposed remedy would generate more midtrial argument and delay than allowing the Court to assess the terminology against the underlying conduct.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court deny Defendants' motion.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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