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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO RECONSIDER PORTIONS OF THE COURT'S SEPTEMBER 8, 2026 TRIAL MANAGEMENT ORDER

I. INTRODUCTION

Plaintiffs respectfully bring three narrow requests to clarify and refine the Court's September 8, 2026 Trial Management Order, ECF No. 575, ("Order") in advance of trial. District courts retain broad discretion to revise interlocutory, non-final pretrial orders at any time before final judgment. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514–15 (4th Cir. 2003); *Saint Annes Dev. Co. v. Trabich*, 443 F. App'x 829, 832 (4th Cir. 2011). Plaintiffs seek reconsideration of the Order to: (i) make a clerical correction to Paragraph 5; (ii) exempt expert witnesses from the blanket witness exclusion order; and (iii) extend the length of the trial day in light of the exclusion of October 13, 2026 from the allocated trial period. Reconsideration is warranted to ensure a fair and efficient trial.

II. ARGUMENT

A. The Court Should Correct the Clerical Error in Paragraph 5.

The Order states at Paragraph 5 that "defendant is permitted as requested to have a total of four state incarcerated witnesses[.]" However, the parties have conferred and agree that, at the August 26 pretrial conference, it was Plaintiffs, not Defendants, who indicated the intent to call incarcerated witnesses to testify live at trial. ECF No. 524 ¶ 3. Plaintiffs respectfully request that the Court amend Paragraph 5 accordingly to specify that it is Plaintiffs who are permitted as requested to have a total of four state incarcerated witnesses, two per day, along with the use of the U.S. Marshal's holding cells in the Courthouse for such witnesses, as arranged by Supervising Deputy U.S. Marshal James Satterwhite.

B. The Court Should Exempt Expert Witnesses from the Blanket Exclusion.

Plaintiffs respectfully request reconsideration of the Order's blanket witness exclusion provision. *See* Order ¶ 9. While exclusion may be appropriate for fact witnesses, a blanket exclusion does not account for the distinct and widely-accepted role of expert witnesses, who are

presumptively exempt from the witness sequestration rule. *See* Fed. R. Evid. 615(a)(3). Excluding Plaintiffs' expert witnesses from witnessing or reviewing courtroom testimony will impede Plaintiffs' ability to try their claims and needlessly inject inefficiency into these proceedings. Without access to fact or expert witness testimony, Plaintiffs' expert witnesses will be unable to account for the evidence actually presented at trial, consistent with the scope of their expert reports, or to advise counsel. For these reasons, Plaintiffs respectfully request that the Court revisit its Order and clarify that expert witnesses are permitted to be present in the courtroom and to review trial transcripts. The parties have conferred, and Defendants oppose this request.

1. Plaintiffs' Expert Witnesses Are Essential to the Presentation of Plaintiffs' Case.

Federal Rule of Evidence 615 governs the exclusion of witnesses from the courtroom. Pursuant to Rule 615(a)(3), "a person whose presence a party shows to be essential to presenting the party's claim or defense" is not authorized to be excluded from hearing other witnesses' testimony. Expert witnesses are presumptively considered "essential to the presentation of a party's claim or defense." Indeed, the Advisory Committee Notes for this rule explicitly state that the category of individuals intended to be covered by Exemption 3 included "an expert needed to advise counsel in the management of the litigation." Fed. R. Evid. 615 advisory committee's note. Given this presumption, courts routinely exempt experts from sequestration. *See United States v. Rhynes*, 218 F.3d 310, 318 n.8 (4th Cir. 2000) ("Parties or their representatives, as well as expert witnesses, are authorized by Rule 615 to remain in the courtroom, hear testimony, and subsequently testify."); *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 629 (4th Cir. 1996) ("[A]n expert who is not expected to testify to facts, but only assumes facts for purposes of rendering opinions, might just as well hear all of the trial testimony so as to be able to base his opinion on more accurate factual assumptions."); *Indem. Ins. Co. of N. Am. v. Electrolux Home Prod., Inc.*, 520 F. App'x 107, 112 (3d Cir. 2013) ("[T]he 'essential' exception [to Fed. R. Evid. 615] applies most often in cases involving expert witnesses. There is little, if any, reason for sequestering a witness who is to testify

as an expert[.]"); *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002) (district court abused its discretion in excluding party's expert witness from the courtroom where expert "needed to hear the testimony of [lay witnesses] in order properly to provide opinion evidence"); *Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd.*, 993 F.2d 1201, 1209 (5th Cir. 1993) ("Expert witnesses clearly fall within Rule 615(3)'s exception."); *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 629 (6th Cir. 1978) ("We perceive little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case.").

Courts evaluate whether a witness's presence is "essential" under Rule 615(a)(3) by considering a well-established set of factors: (1) how critical the testimony is, including whether it involves controverted and material facts; (2) whether the information is "ordinarily subject to tailoring", such that cross-examination or other evidence could expose any deficiencies; (3) the extent to which the witness's testimony is likely to encompass the same issues as other witnesses' testimony; (4) the order in which the witnesses will testify; (5) any potential for bias that might motivate the witness to tailor his or her testimony; and (6) whether the witness's presence is "essential" rather than simply desirable. *See United States v. Jackson*, 60 F.3d 128, 135 (2d Cir. 1995). "[W]here a fair showing has been made that the expert witness is in fact required for the management of the case, . . . the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel." *Morvant*, 570 F.2d at 630.

Each of the *Jackson* factors supports exemption here. Plaintiffs intend to call four expert witnesses: psychologist Dr. Craig Haney, psychologist Dr. Michael Hendricks, corrections expert Dan Pacholke, and forensic accountant Russell Molter. Their testimony is critical to the management of Plaintiffs' case—each will address controverted facts at the core of Plaintiffs' challenge to the constitutionality of the Step-Down Program. Drs. Haney and Hendricks will testify about the mental health effects of prolonged solitary confinement on class members and will need access to testimony—including cross-examination of Defendants' fact and expert witnesses— that may reveal details absent from the written record. Mr. Pacholke will testify about the adequacy of the Step-Down Program, including its implementation and recent changes, many

of which diverge materially from VDOC's written policies. Mr. Molter will testify regarding the time class members spent in the Step-Down Program and population trends.

None of Plaintiffs' expert witnesses' testimony is "ordinarily subject to tailoring": each expert disclosed his opinions in advance, those opinions have been subject to *Daubert* scrutiny, and they may be tested again through rigorous cross-examination. *See Jackson*, 60 F.3d at 135. Moreover, because expert witness testimony necessarily evaluates and opines on the same facts and conditions that fact witnesses will describe, or incorporates and responds to opinions offered by other expert witnesses (either Plaintiffs' or Defendants'), hearing that testimony will produce more accurate testimony within the scope of the previously-disclosed opinions. This is particularly important given that Plaintiffs' expert witnesses will need to account for what those witnesses actually said on the stand and to advise counsel on how to proceed on issues where Plaintiffs bear the burden of proof. There is no risk that courtroom or transcript access will motivate tailoring: these are retained professionals offering independent opinions, the scope of which have already been disclosed, not percipient witnesses with a personal stake in the outcome. Finally, and most importantly, the expert witnesses' presence and access to testimony is essential, not merely desirable. Given the complexity of the claims at issue—including years of institutional policy changes and contested mental health histories—excluding Plaintiffs' expert witnesses would deprive counsel and Plaintiffs of their expertise and advice. This concern is heightened here, where absent class members depend on the adequacy of Plaintiffs' trial presentation to vindicate their constitutional rights.[1]

2. Exclusion of Plaintiffs' Expert Witnesses Would Cause Inefficiency and Prejudice at Trial.

The Fourth Circuit has recognized that expert witnesses who give only opinions "might

[1] *Accord Rhynes*, 218 F.3d at 318–19 ("Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses.").

just as well hear all of the trial testimony so as to be able to base [their] opinion on more accurate factual assumptions." *Opus 3*, 91 F.3d at 629. While Plaintiffs' expert witnesses have reviewed the extensive documentary record, documents alone cannot substitute for courtroom testimony. For example, Defendants included on their witness list individuals who were neither adequately disclosed nor deposed during discovery. ECF No. 557 (Plfs. Mtn. to Exclude Testimony), at 1–3. If fully sequestered, Plaintiffs' expert witnesses will never hear or read those witnesses' testimony and will be unable to address it in the context of their opinions without interrupting the proceedings. Or, the parties will need to take additional trial time to recount to the expert what testimony was provided to appropriately contextualize the experts' opinions. In addition, if testimony on which the expert relied is excluded for whatever reason, Plaintiffs' experts will be unable to hear or read how or what has been excluded. Although Plaintiffs do not anticipate that their experts will testify outside the scope of their disclosed opinions, to the extent Defendants believe that an expert has done so, the available remedy is to strike their testimony as going beyond the scope—not to isolate the experts from the foundational facts or preclude the experts from hearing the opinions to which they will be responding.

C. The Court Should Consider Extending Trial Hours to Account for the Loss of October 13.

Plaintiffs respectfully request that the Court consider extending the trial day, currently set from 9:00 a.m. to 4:00 p.m., Order ¶ 11, to compensate for the loss of about five hours of trial time on October 13, 2026, Order ¶ 6. The Court has broad authority to manage trial proceedings in this manner. *See* Fed. R. Civ. P. 16(c)(2)(P) (authorizing the Court to facilitate speedy disposition of an action). Accordingly, Plaintiffs propose that the trial day could begin earlier, e.g. 8:30 a.m., or continue later, e.g. 5:00 p.m., on a provisional basis with the ability to revisit the schedule if trial progresses more quickly than expected. The parties have conferred, and Plaintiffs' understanding

is that Defendants do not assent to this request. Plaintiffs are mindful of the Court's schedule and committed to the efficient presentation of their case. However, the loss of a full trial day is significant in a case of this size and complexity, and Plaintiffs' extensive trial preparations assumed trial would be held on all non-holiday days during the trial period. Losing a full day without adjustment risks compressing the presentation of evidence in this case.

Plaintiffs understand that the Court retains full discretion to adjust the schedule as trial unfolds, and, if trial progresses ahead of schedule, Plaintiffs are pleased to reduce the number of trial hours in the day accordingly.

III. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court reconsider its September 8, 2026 Order, clarify Paragraph 5, amend Paragraph 9 to exempt Plaintiffs' expert witnesses from sequestration, and amend Paragraph 11 to extend the trial day on a provisional basis to account for the loss of October 13, 2026, from the allocated trial period.

Dated: September 10, 2026

Respectfully Submitted,

/s/ *Jared Frisch*

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th 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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