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

DEFENDANTS' REPLY IN SUPPORT OF MOTION *IN LIMINE* TO PROHIBIT PLAINTIFFS' EXPERT WITNESSES FROM TESTIFYING ABOUT INTERVIEWS WITH INMATES AND FROM PRESENTING CUMULATIVE TESTIMONY

PRELIMINARY STATEMENT

Plaintiffs' Opposition answers a motion Defendants did not file. Defendants have not moved to disqualify Dr. Haney or Dr. Hendricks, to strike their opinions, or to exclude their reports as unreliable under *Daubert*. Rather, Defendants moved to exclude particular categories of trial evidence on ordinary evidentiary grounds: the hearsay statements of inmates recounted by both experts, and Dr. Hendricks's duplicative recitation of the same scientific literature Dr. Haney will present. Those are questions of admissibility under the Federal Rules of Evidence, not questions of methodology under Rule 702 and, thus, fairly presented in Defendants' motion *in limine*.

Plaintiffs' Opposition does nothing to undermine the points raised in Defendants' motion. While Plaintiffs spend multiple pages waxing about why their experts may ***rely*** on inmate interviews in forming their opinions, they provide no evidence explaining why their experts should be allowed to ***disclose*** the inadmissible hearsay underlying those opinions to the factfinder. Turning to the issue of Dr. Hendricks' review of the scientific literature, Plaintiffs concede that they "do not intend to present duplicative testimony" from Dr. Hendricks—which is precisely what

Defendants' motion asks the Court to ensure. As such, Defendants' motion *in limine* should be granted.

ARGUMENT

A. Dr. Haney Should be Excluded from Testifying About Statements Made to Him by Inmates at Red Onion State Prison.

Plaintiffs' Opposition begins by arguing that Defendants' motion is merely an untimely *Daubert* challenge "cloaked" as a motion in limine. ECF No. 581, Plaintiffs' Opposition ("Opp.") at 1. That is incorrect. As Defendants stated regarding the content of Dr. Haney's (and Dr. Hendrick's) witness interviews in the very first paragraph of their motion, "[a]ny such testimony would be hearsay without exception." ECF No. 562, Defendants' Motion *in limine* ("Mot.") at 1. That is the issue Plaintiffs ignore: whether those out-of-court statements are hearsay subject to any exception.

Dr. Haney's report includes more than 50 pages detailing the statements made to him by inmates during cell-front and individual follow-up interviews he conducted at Red Onion State Prison. *See* Expert Report of Craig Haney, Ph.D., J.D., at 152-202 (May 26, 2023) ("Haney Report"). These cell-front interviews were outside the scope of Dr. Haney's retention as a non-clinical psychologist, *see* Mot. at 4, were not selected by a truly random sampling process, *id.* at 5, and were initiated in a way likely to garner biased data, *id.* As such, the contents of these interviews—out of court allegations made by declarants who were not under oath, whose demeanor could not be measured by the fact finder, and who were not subject to cross examination when the statements were made—are hearsay and not subject to any exception. The fact that the expert who proffered the statements may be qualified under *Daubert* does not rescue them from inadmissibility.

The *Daubert* standard serves merely as a "gatekeeping" inquiry to test an expert's qualifications and the reliability of his methodology under Rule 702. *See Daubert v. Merrell Dow*

Pharm., Inc., 509 U.S. 579, 595–97 (1993). It is well established, however, that Rule 702 "is not the exclusive rule governing the admissibility of expert testimony" and that evidence that satisfies Rule 702 "may nonetheless be inadmissible under another federal evidentiary rule." *Moreno v. Bosholm*, 151 F.4th 543, 560 (4th Cir. 2025). Indeed, the *Daubert* decision itself noted that courts should be "mindful of other applicable rules" including specifically Rule 703's protections against the disclosure of "otherwise inadmissible hearsay." *Daubert*, 509 U.S. at 595. Rule 703 provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But ***if the facts or data would otherwise be inadmissible***, the proponent of the opinion ***may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.***

Fed. R. Evid. 703 (emphasis added). Put another way, "when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." *Id.*, advisory committee notes, 2000 Amendments. Because Defendants' objection is to the disclosure of the underlying statements, it is governed by Rule 703 and the hearsay rule, which arise independently of Rule 702. Defendants' motion, therefore, is not an untimely *Daubert* challenge, but is a fairly presented evidentiary objection. *See In re Bard IVC Filters Prods. Liab. Litig.*, No. CV-16-00474-PHX-DGC, 2018 WL 11447700, at *9 (D. Ariz. Mar. 1, 2018) (expert's reliance on hearsay that "[was] not challenged by Plaintiffs in any *Daubert* motion" does not entitle the proponent to put that hearsay before the trier of fact).

Notably, Plaintiffs do not deny the hearsay nature of Dr. Haney's witness interviews, and do not offer any exception to this hearsay rule,[1] instead contending only that, "statements made to

[1] With respect to Dr. Hendricks's, Plaintiffs contend that statements inmates made to him were made for the purpose of diagnosis. *See* Opp. at 2. Plaintiffs do not offer that as an exception that

both experts are admissible under Rule 702 because Dr. Haney and Dr. Hendricks used the same reliable methodologies that they have employed for decades." Opp. at 2. Even assuming, *arguendo*, that claim is true, "reliable methodology" is not a recognized hearsay exception. And, again, Rule 702 admissibility does not end the inquiry because Rule 703 "provides a presumption ***against disclosure*** to the [factfinder] of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Fed. R. Evid. 703, advisory committee notes, 2000 Amendments (emphasis added).

The Fourth Circuit interprets that limit as the line between permissible reliance and impermissible transmission. While an expert may form an opinion informed by otherwise-inadmissible material, reliance "becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). The "touchstone" is whether the expert "is applying his training and expertise to the sources before him," producing "an original product that can be tested through cross-examination"—or is instead "merely acting as a transmitter for testimonial hearsay." *United States v. Palacios*, 677 F.3d 234, 243 (4th Cir. 2012).

As hearsay not subject to any exception, such information may be disclosed, admitted in evidence, and considered by the fact finder for its truth ***only after*** the court engages in a balancing test of the information's probative value in understanding Dr. Haney's opinion against its prejudicial effect. Moreover, the court must determine not only that the probative value of the information outweighs its prejudicial effect, but that it does so ***substantially***. Fed. R. Evid. 703.

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overcomes the hearsay exclusion for the statements made to Dr. Haney, however, because he is not a licensed clinician and does not offer diagnoses. *See* Mot. Ex. 2, Dep. of Craig W. Haney, Vol. 1, August 17, 2022, 17:5-17:21.

Plaintiffs have not even attempted to show the statements at issue are probative to ***any*** issue in this case, much less how the substance of the statements themselves are probative in helping evaluate Dr. Haney's opinions. Even if they had, however, the statements still would be inadmissible because Plaintiffs also have made no effort to show how that hypothetical probative value outweighs the prejudicial effect of allowing Plaintiffs to present allegations that Defendants are unable to test through the crucible of cross examination. Having failed to make such a showing at all, they certainly have not—and patently could not—make any showing that the hypothetical probative value outweighs the prejudice to the Defendants ***substantially***. Fed. R. Evid. 703. That failure is fatal. The burden is Plaintiffs', and their silence on the question that actually governs is reason alone to exclude the statements. *See* Fed. R. Evid. 703.That deficiency in probative value is underscored by the fact that the statements are independently inadmissible under Rule 703 because they are "not data upon which an expert in the field of non-clinical social psychology would reasonably rely in forming an opinion." Mot. at 4. Plaintiffs' Opposition argues that Defendants' motion merely quibbles about "methodological details," Opp. at 5, and that Defendants "remain free to cross-examine Dr. Haney on any aspect of his interviews," Opp. at 4. Plaintiffs' argument, however, misses the point in at least two ways. ***First***, Defendants' motion does not merely attack the "reliability" of Dr. Haney's cell-front interviews, but illustrates how those interviews are not an "original product" developed through the application of the expert's "application and training." *See Palacios*, 677 F.3d at 243. As such, those statements are of dubious value even to forming such an opinion. They are of absolutely ***no*** value in understanding that opinion. Thus, whatever value Plaintiffs may claim they have certainly does not substantially outweigh the risk that Defendants would be prejudiced by allowing Plaintiffs to enter unchallengeable factual allegations against them. ***Second***, the ability to cross-examine Dr. Haney

on the interviews does not cure that prejudice. Dr. Haney interviewed 24 inmates, none of whom are the named Plaintiffs and none of whom are on either side's witness list. Thus, Defendants remain unable to cross-examine the inmates who actually made the statements.

Dr. Haney's recitation of the statements made to him by inmates at Red Onion is precisely the type of "parrot[ing]" of out-of-court statements under "the guise of expert opinion," that the Fourth Circuit has prohibited. *Johnson*, 587 F.3d at 635 (quoting *United States v. Lombardozzi,* 491 F.3d 61, 72 (2d Cir. 2007)). As such, they should be excluded.

B. Dr. Hendricks May Not Recount the Out-of-Court Statements of Named Plaintiffs.

Plaintiffs claim that Defendants' attempt "to exclude Dr. Hendricks's expected testimony turns Rule 703 on its head." (Opp. at 5.) Not so. Defendants do not seek to bar Dr. Hendricks from testifying that he interviewed and tested the named Plaintiffs, or from disclosing the results of his psychological tests. Instead, similar to the objection to Dr. Haney's recitation of his cell-front interviews, Defendants seek only to prevent Dr. Hendricks from repeating Plaintiffs' out-of-court statements to the fact finder. *See* Mot. at 7. Plaintiffs' argument that excluding those statements "essentially ask[s] this Court to prohibit a clinical psychologist from explaining his clinical finding," Opp. at 6, is disingenuous. Dr. Hendricks may explain his diagnoses, his testing, and his reasoning; he simply may not put Plaintiffs' own narrative before the factfinder in their place.[2]

Plaintiffs warn that requiring the named Plaintiffs to testify directly "would add substantial trial time." Opp. at 7–8. Assuming that is true for the sake of argument, trial efficiency is not a factor in Rule 703's balancing test, which asks only whether the hearsay's probative value ***substantially***

[2] Plaintiffs' contention that excluding the interview statements would "sever" Dr. Hendricks' opinions from their basis (Opp. at 6) presents a false choice. Dr. Hendricks remains free to explain his methodology, the tests he administered, and the reasoning behind his opinions. He simply may not relay the substance of Plaintiffs' own statements to the factfinder. Rule 703 draws precisely that line, and Plaintiffs' reading of Rule 702 to compel disclosure of hearsay would read Rule 703 out of the Rules entirely.

outweighs its prejudicial effect, not whether admission would be convenient. More fundamentally, efficiency cannot override Defendants' right to confront the evidence presented against them. Permitting Dr. Hendricks to relay the substance of Plaintiffs' statements would place their litigation narrative before the factfinder without subjecting the declarants to cross-examination—denying Defendants any meaningful opportunity to test the accuracy, completeness, or candor of what was said. That is precisely the prejudice Rule 703's balancing test exists to weigh.

Plaintiffs take pains to point out that Dr. Hendricks' interviews of the named Plaintiffs were "not casual conversations," but were instead "structured, multi-hour diagnostic evaluations." *Id.* As explained below, they were not. But, even if they were, a "multi-hour diagnostic" interview is still an interview, and repeating its contents to the fact finder verbatim is still improper transmission. *See United States v. Smith*, 919 F.3d 825, 839 (4th Cir. 2019) (holding that the court should look "for indicia that the expert is giving an independent judgment" and is not "merely acting as a transmitter for testimonial hearsay"). Only Plaintiffs themselves may testify about what they told Dr. Hendricks and be subjected to cross examination. Permitting Dr. Hendricks to testify as to Plaintiffs' underlying statements would only serve to impermissibly bolster Plaintiffs' testimony and waste time.[3]

Plaintiffs' claim that Federal Rule of Evidence 803(4) creates an "express exception for statements made for medical diagnosis," Opp. at 8., is unavailing for at least three reasons. First Dr. Hendricks ***did not*** conduct the interviews to provide a medical diagnosis. In his notes for each of the interviews, Dr. Hendricks recorded that he expressly informed each Plaintiff that the

[3] Plaintiffs' invocation of Dr. Saathoff is beside the point. Opp. at 7. Defendants do not challenge whether ***clinical experts*** may ***rely*** on patient interviews—they may. Defendants challenge ***disclosure*** of those statements to the factfinder, which Rule 703 governs independently of professional reliance norms. *See* Fed. R. Evid. 703, advisory committee notes, 2000 Amendments.

interview was "not being done under a doctor-patient relationship." *See, e.g.,* Excerpt of Interview of Brian Cavitt, attached as Exhibit 1. In other words, Dr. Hendricks himself rejected the idea that he was conducting the interview to provide the Plaintiff with a medical diagnosis.

Second, Rule 803(4)'s "exception to the hearsay rule is premised on the notion that a declarant seeking treatment 'has a selfish motive to be truthful' because 'the effectiveness of medical treatment depends upon the accuracy of the information provided.'" *See Willingham v. Crooke*, 412 F.3d 553, 562 (4th Cir. 2005) (internal citations omitted). Dr. Hendricks, though, was not retained to provide Plaintiffs with medical treatment. *See* Exhibit 1. He was retained by Plaintiffs' counsel for litigation. *See* Mot. at 7. Plaintiffs' "selfish motive," therefore, is not to be "truthful," but to provide statements that benefit their litigation position. *See United States v. Keegan*, 161 F.4th 1334, 1341 (11th Cir. 2025) (statements sought "principally in anticipation of litigation," with a "laser focus on litigation," are not made "for" diagnosis). Indeed, Dr. Hendricks made the litigation purpose explicit to each Plaintiff at the outset of each interview—with Plaintiffs' own counsel present. His notes reflect that each Plaintiff was informed of "the limits of confidentiality (*i.e.*, everything will be shared with his attorneys and may also be included in a report or affidavit)" and that his "report/affidavit will be shared with opposing counsel and ultimately with the Court." *See* Exhibit 1 (HENDRICKS000022). Each Plaintiff proceeded on that understanding.

Third, statements attributing Plaintiffs' harm to their conditions of confinement fall outside the exception's "general cause" limitation. The Fourth Circuit admits statements under Rule 803(4) only to the extent they are pertinent to diagnosis or treatment, and excludes "as a matter of law" portions of a patient's account that are not. *See Willingham*, 412 F.3d at 562. Statements attributing fault or identifying who is responsible for an injury "would seldom, if ever, be sufficiently related"

to diagnosis or treatment. *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980). Accordingly, courts within this Circuit exclude statements that "identify the individual or entity responsible for the injury" or "tend to impermissibly attribute fault." *See Doali-Miller v. SuperValu, Inc*., 855 F. Supp. 2d 510, 515 (D. Md. 2012). To the extent Plaintiffs' statements blame their confinement conditions for their psychological injuries, they attribute fault and are not admissible under Rule 803(4).

Furthermore, Plaintiffs' reliance on *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), is misplaced. *Morgan* held that Rule 803(4) applies to statements made to a psychologist "regardless of why he was consulted." *Id.* at 950. That case, however, dealt with statements of a child-abuse victim that the Fourth Circuit found "reasonably pertinent to treatment." *Id.* at 949. That decision did not address the general-cause/fault limitation that governs here and, contrary to Plaintiffs' assertion, does not authorize the admission of fault-attributing statements untethered to any treatment purpose. At a minimum, the exception must be applied statement-by-statement to admit only what is "genuinely pertinent" to diagnosis, not Plaintiffs' litigation narrative wholesale.

C. Dr. Hendricks Should be Prohibited From Presenting Cumulative Testimony About The Scientific Literature.

Rule 403 authorizes a court to exclude even relevant evidence when its probative value is substantially outweighed by, among other things, "needlessly presenting cumulative evidence." *United States v. Tillmon*, 954 F.3d 628, 643 (4th Cir. 2019). Trial courts are afforded "broad discretion" in making that determination. *Steves & Sons, Inc. v. JELD-WEN, Inc*., 988 F.3d 690, 713 (4th Cir. 2021). That discretion includes a duty—which is especially salient in a case requiring a long and complex trial like the matter at hand—to keep out weak evidence that carries a substantial risk of undue delay or confusion. *Id.* at 716. Indeed, the Fourth Circuit has applied these principles to affirm the exclusion of a party's second expert who "offered only cumulative

evidence" on an issue already covered by the party's first expert. *Manning v. United States*, 726 F. App'x 188, 188-89 (4th Cir. 2018).

The overlap here is direct. While Dr. Haney specifically was retained to survey scientific literature on solitary confinement, Dr. Hendricks also opined about his review of many of the same studies—including articles authored by Dr. Haney ***himself***. *See* Mot. at 3, 8. That the two experts purport to occupy different roles does not license Dr. Hendricks to simply re-present the same body of literature; rather, it confirms that his proper contribution is his Plaintiff-specific clinical opinion, not a cumulative survey of the scientific literature.

Plaintiffs' Opposition claims that they are "mindful of trial efficiency" and "do not intend to present duplicative testimony." Opp. at 10. Defendants merely ask for the Court to provide teeth to those assurances by precluding Dr. Hendricks from offering a cumulative account of the scientific literature.

CONCLUSION

For these reasons, Defendants respectfully request that the Court prohibit Plaintiffs' expert witnesses from testifying about interviews with named Plaintiffs or other inmates and from presenting cumulative testimony.

September 15, 2026

Respectfully submitted,

/s/ *Maya M. Eckstein*

Maya M. Eckstein (VSB #41413)
R. Dennis Fairbanks (VSB #90435)
Kevin S. Elliker (VSB #87498)
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@hunton.com

dfairbanks@hunton.com
kelliker@hunton.com

Lawrence K. DeMeo (*Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
60 State St., Suite 2400
Boston, MA 02109
Ph: (617) 648-2800
Fax: (617) 443-5022
ldemeo@hunton.com

Jay Jones
Attorney General of Virginia

D. Patricia Wallace (VSB #92964)
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
pwallace@oag.state.va.us

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2026, 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