IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-WDM-MJW

DEBBIE ULIBARRI, *et al*

Plaintiffs,

v.

CITY & COUNTY OF DENVER, *et al.*

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' FED. R. EVID. 702 MOTION TO STRIKE EXPERT WITNESSES

Plaintiffs, by and through their counsel, hereby submit Plaintiffs' Opposition to Defendants' Fed. R. Evid. 702 Motion to Strike Expert Witnesses and state as follows:

I. INTRODUCTION

This is a prison conditions and disability discrimination case involving three deaf pretrial detainees, Shawn Vigil, Roger Krebs, and Sarah Burke; Ms. Burke also has Type 1 diabetes. Shawn Vigil, a 22-year-old profoundly deaf man, was incarcerated in the Denver County Jail ("DCJ") from August 28, 2005 until September 27, 2005, when he committed suicide. While incarcerated, he was placed in administrative segregation solely on the basis of his deafness and was never provided with effective communication. As a result, he was completely isolated. As with Mr. Vigil, Defendants failed to accommodate Mr. Krebs's and Ms. Burke's disabilities resulting in this civil suit alleging violations of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, as well as federal civil rights and state law claims.

In Defendants' Fed. R. Evid. 702 Motion to Strike Expert Witnesses [Docket No. 246] ("Defs.' 702 Motion"), they attempt to completely exclude the testimony of three of Plaintiffs' expert witnesses: Dr. Mark Pogrebin, a national expert on jail and prison conditions; Dr. Jean Andrews, an expert in communications and psycho-social issues relating to people who are deaf; and Linda Edwards, RN, MHS, CDE, an expert in the treatment, education and management of diabetes, and in working with organization systems and diabetics in a prison setting. Defendants' motion demonstrates a fundamental misunderstanding of the law regarding expert witness testimony particularly as applied in this case. At best, Defendants' arguments may be proper cross- examination material at trial, but they are not a basis to exclude expert testimony on an across-the-board basis.

II. ARGUMENT

A. The Applicable Legal Standards.

Expert testimony is admissible if it will assist the trier of fact; and it must be based on sufficient facts or data and be the product of reliable methods applied reliably to the facts. Fed. R. Evid. 702. "Courts should be liberal in admitting expert testimony . . . ." *United States v. Gomez*, 673 F.3d 1515, 1516 (10th Cir. 1995) (describing rule 702 as a "liberal standard").

B. Plaintiffs' Experts are Qualified And Their Opinions Are Admissible.

Defendants challenge Dr. Pogrebin's qualifications to testify on various penological issues and the reliability of his reference to ACA standards. They also argue that he ignores certain facts, and that he offers an opinion on an ultimate issue. Defendants argue that Dr. Andrews is not qualified to opine on medical and mental health issues, and that her opinion is

based on unsubstantiated facts. Finally, Defendants argue that Ms. Edwards's testimony is not based on sufficient facts, and that she offers an opinion on an ultimate issue.

None of these arguments has merit; accordingly, Plaintiffs respectfully request that Defendants' motion be denied.

C. Dr. Pogrebin Is Qualified And His Opinions Are Reliable.

Dr. Pogrebin is a nationally recognized expert in penology and corrections with forty years of experience. He is a longtime Professor and Director of Criminal Justice in the Graduate School of Public Affairs at the University of Colorado at Denver. During his lengthy career, Dr. Pogrebin has conducted numerous field studies, published books and had numerous journal articles with multiple publications reprinted in anthologies regarding penological and corrections issues. *See, e.g.*, Pogrebin, Mark Richard, Ph.D., Vita ("Pogrebin Vita,") at 1. (Decl. of Laura E. Schwartz in Opp'n to Defs.' 702 Motion ("Schwartz Decl."), Ex. 1).

Defs.' 702 Motion makes five arguments concerning Dr. Pogrebin's testimony. First they challenge his qualifications with respect to all of his opinions. Second, they challenge each of Dr. Pogrebin's opinions on the grounds that he relies on the standards promulgated by the American Correctional Association. Third, they contend that his opinions are based on unreliable subjective beliefs. Fourth, Defendants argue that Dr. Pogrebin ignored significant facts. Defendants' final argument is that Dr. Pogrebin wrongly opined on an ultimate issue in the case. As discussed in detail below, each of Defendants' arguments is meritless.

At the hearing in November, Dr. Pogrebin will be prepared to demonstrate how his experience and training led him to the conclusions he reached, why that experience is sufficient to opine on the Defendants' individual and organizational failings in working with deaf and

hearing-impaired prisoners during booking, intake, classification and incarceration. Dr. Pogrebin will further explain why his experience, training and education led him to conclude that Shawn Vigil should not have been confined in administrative segregation without benefit of effective communication, and how his experience is reliably applied to the facts of Mr. Vigil's incarceration and his suicide.[1]

1. Dr. Pogrebin is Well-Qualified under FRE 702 to Give Expert Testimony Regarding Conditions at the Denver County Jail.

The depth and breadth of Dr. Pogrebin's knowledge, experience, training and education render him well qualified under Fed. R. Evid. 702 to give expert testimony about conditions at the Denver County Jail, including Defendants' treatment of deaf prisoners. Rule 702 provides that an expert witness may be qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 ("[T]he relevant reliability concerns may focus upon personal knowledge or experience."). In the words of the 2000 Advisory Committee Note:

> Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

The Tenth Circuit has explained that "[a]n expert witness's testimony can rely solely on experience. When that is the case, however, 'the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.'" *United States v. Nacchio*, 555 F.3d 1234, 1258 (10th

[1] Dr. Pogrebin's written opinions are set forth in his 26(a)(2) reports attached as Exhibits 3 and 4 to Schwartz Decl.

Cir. 2009) (quoting 2000 Advisory Committee Note). For example, it is fairly common for police officers to provide expert testimony about the drug trade based solely on their experience, without any specialized training. *See, e.g., United States v. Garza*, 566 F. 3d 1194, 1197-99 (10th Cir. 2009) (upholding admissibility of expert testimony of police officer that, in his experience, a gun found in a home where a certain amount of marijuana was also found was possessed in connection with a drug trafficking crime; "specialized knowledge can be acquired through 'experience' and 'training.'").

Dr. Pogrebin's undergraduate degree is in Political Science and Sociology, his master's degree in criminal justice and his doctoral degree in social sciences. Dr. Pogrebin has been a professor in criminal justice at the University of Colorado at Denver since 1977, and a full professor since 1982. Pogrebin Vita (Schwartz Decl, Ex. 1). As relevant here, Dr. Pogrebin's professional expertise encompasses criminology and penology. *Id*. Dr. Pogrebin's entire professional career has been devoted to the study and improvement of the criminal justice system, including prisons and jails. *Id*, *passim*.

This focus is reflected in Dr. Pogrebin's many books,[2] such as *Managing Scarce Resources for Jails and Qualitative Approaches to Criminal Justice: Perspectives from the Field*. He has also authored independent book chapters in a variety of publications including *Prisons and Jails*: *A Reader*; *Behind Bars: Greetings on Prison Culture*; *The Dilemmas of Corrections*, *The Inmate Prison Experience*, and *The Administration and Management of Criminal Justice Organizations*. In addition to his own writings, Dr. Pogrebin served as Deputy Editor of the *Journal of Criminal Justice Education* from 1999 through 2002, and Associate Editor for a

[2] The complete list of Dr. Pogrebin's publications is found in his *vita*, Ex. 1 to Schwartz Decl.

variety of journals including the *International Journal of Crime, Criminal Justice and Law*. *Id*. at 13. He was also a Manuscript Referee for a variety of publications including *The Prison Journ*al and *The American Journal of Police*. *Id*. at 14.

Dr. Pogrebin also brings a wealth of practical experience to the issues in this case. For example, in 1984 he received a grant to study and formulate policies for mentally ill jail inmates in Denver. *Id*. at 14. Dr. Pogrebin has also received multiple grants from the National Institute of Corrections ("NIC"). *Id*. Dr. Pogrebin also provided training regarding classification for the NIC in the 70s and 80s. Dep. of Mark Richard Pogrebin at 188:23 – 189:22 (Schwartz Decl. Ex. 2). He has also studied women as jail managers. Pogrebin Vita at 3, 5 (Schwartz Decl. Ex. 1). Since 1994 Dr. Pogrebin has provided executive training for upper-level managers, training which is sponsored by the California Department of Corrections. *Id*. at 18. He worked as a parole officer for juveniles from 1967 through 1970 and was a social worker in the New Jersey State Reformatory for Men. *Id*. Dr. Pogrebin belongs to a multitude of professional organizations, including the American Jail Association. *Id*.

Defendants also allege that Dr. Pogrebin is only a generalist in criminology and therefore not qualified to opine on prison conditions. This allegation mischaracterizes Dr. Pogrebin's deposition testimony which spoke only to his description of his University department, not his own qualifications. Dep. of Pogrebin at 17:19-23 (Schwartz Decl. Ex. 2). Dr. Pogrebin has long identified himself as having expertise regarding jails. Dr. Pogrebin's Expert Witness Report at 6, ("Pogrebin's Report") (Schwartz Decl. Ex. 3), *see also* Dr. Pogrebin's Additional Expert Witness Report at 3 ("Pogrebin's Add'l Report") (Schwartz Decl. Ex. 4), *see also* Dep. of Pogrebin at 16:21 – 21:11 (Schwartz Decl. Ex. 2).

Although Defendants disparage Dr. Pogrebin's reliance on the ACA standards, they also assert that that because Dr. Pogrebin has not worked on a jail or prison accreditation team for quite some time,[3] he is somehow incompetent to understand and apply the ACA standards. This is illogical – understanding and applying these national standards does not require that Dr. Pogrebin become part of the ACA's accreditation team.

Any remaining questions about Dr. Pogrebin's qualifications simply go to the weight, not the admissibility of his testimony. *See United States v. Cavely*, 318 F.3d 987, 997-98 (10th Cir. 2003).

2. Dr. Pogrebin's Opinions Are Reliable.

Defendants argue that Dr. Pogrebin's opinions are not reliable because they are based on ACA standards. This argument overlooks the breadth of information, training, experience, and resources on which Dr. Pogrebin's opinions are also based.

As a threshold matter, multiple courts have viewed ACA standards as probative even if they are not dispositive. *See, e.g.*, *Ponte v. Real*, 471 U.S. 491, 520 (1985) ("[T]he American Correctional Association (ACA), after a study funded by the Department of Justice, has adopted the following standard as an "essential" element of disciplinary-hearing procedures . . . .); *Coleman v. City & County of Denver*, 197 Fed. Appx. 764, 767 (10th Cir. 2006) (unpublished) (containing evidence that officials at the Denver County Jail relied upon ACA standards in responding to inmate grievance); *Jesusdaughter v. Scoleri*, 2007 U.S. Dist. LEXIS 51624, **6-7 (D. Colo. 2007) (unpublished) (holding that while the standards promulgated by the ACA are

[3] Additionally, Dr. Pogrebin testified during his deposition that he provided administrative training for an immigration holding facility in Aurora Colorado as part of the facilities plan to become accredited by the ACA. Dr. Pogrebin further testified that that training included information about classifying and reclassifying prisoners. Dep. of Pogrebin at 190:12 – 191:14 (Schwartz Decl. Ex. 2).

not, standing by themselves, sufficient to establish the legal standard for evaluating prison condition claims, they "may be instructive, though not conclusive, in determining whether the defendant's violated the Eighth Amendment."). Further evidence of the value of the ACA standards is found in the United States Department of Justice's ("DOJ") expressed intent to have the ACA assess its prisons. *See Ajaj v. United States*, 293 Fed. Appx. 575, 589 n.2 (10th Cir. 2008).

While it is true that Dr. Pogrebin relied on several ACA standards in formulating his opinions (Pogrebin's Report at 1-4) (Schwartz Decl. Ex. 3), he also relied on a broad range of other relevant materials and information such as published research, books on suicide in jail, and reports from the National Institute of Corrections regarding programs for deaf and hearing-impaired prisoners. *See, e.g.*, Dep. of Pogrebin at 6:20 – 7:25 (Schwartz Decl. Ex. 2). He also based his opinions on, among other things, Dr. Andrews's report, Mr. Vigil's school records, a variety of jail and post orders and other documents issued by Defendants, and depositions taken in the case. *See, e.g.*, attachment to Pogrebin's Report (Schwartz Decl. Ex. 3). Furthermore, in addition to the facts and data arising from the circumstances underlying the litigation, other facts and data are also considered as "sources of information" employed by the expert. *Haager v. Chicago Rail Link, L.L.C.*, 232 F.R.D. 289, 293 (N.D. Ill. 2005). These sources can include court papers, depositions, reports, treatises and handbooks. *Id*.

Defendants also argue, wrongly, that Dr. Pogrebin equates the violation of an ACA standard with a constitutional violation. Defs.' 702 Motion at 6-7. First, there is nothing in his expert reports where he even suggests that this is his opinion. And, in addition to the deposition testimony cited by Defendants, Dr. Pogrebin also stated that he was not intending to opine as to

whether violating an ACA standard is a *per se* constitutional violation. Dep. of Pogrebin at 58:20 – 59:15 (Schwartz Decl. Ex. 2). Consequently, if the Court believes it is necessary, this is an issue that can more properly be considered at the November hearing.

Thus, Dr. Pogrebin's depth of correctional experience, his extensive review of the evidence in this case, coupled with the pertinent ACA standards will serve the trier of fact well in understanding the evidence and in also in determining certain facts in issue.

3. Dr. Pogrebin Properly Considered All Relevant, Documented Facts in Forming His Opinions.

Defendants next argue that Dr. Pogrebin ignored "very significant facts" thereby rendering his opinions unreliable. Defs.' 702 Motion at 10. However, the very "facts" they cite in support of this argument are disputed, hotly disputed. *See Cook v. Rockwell Int'l. Corp*., 580 F. Supp. 2d 1071, 1085 (D. Colo. 2006) ("That the expert relied on disputed facts in reaching his opinion does not render the expert's opinion unreliable . . . ." For example, Defendants assert that there is no evidence Mr. Vigil had a history of mental health difficulties prior to his suicide. To the contrary, Mr. Vigil's school records document just such a history, and Dr. Pogrebin reviewed those documents in reaching his opinions. Dep. of Pogrebin at 75:2-19 (Schwartz Decl. Ex. 2). Defendants also argue that there is no evidence that Mr. Vigil was experiencing any distress while incarcerated. Defs.' 702 Motion at 10. This argument ignores the most basic fact in this case, a fact that should be undisputed—that the Defendants refused to provide Mr. Vigil with any effective means of communicating with them. It is Defendants' "facts" about Mr. Vigil's emotional state that are raw speculation, and they should not be permitted to use Mr. Vigil's enforced silence as a shield in this litigation.

4. Dr. Pogrebin's Opinions Comply With Fed. R. Evid. 704(a).

Fed. R. Evid. 704(a) states in pertinent part that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." But, Rule 704(a) does not require a blanket ban on all testimony about the law as Defendants argue, but is meant, instead, only to prevent a witness from *instructing* the jury on the applicable legal standards.

Moreover, the case heavily replied upon by Defendants in seeking to preclude Dr. Pogrebin[4] from opining that the Defendants were deliberately indifferent to the rights of the Plaintiffs on the ground that it states a legal conclusion, *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), is readily distinguishable. *Specht* involved a lawyer who was called as an expert witness who opined in front of the jury that warrantless searches are unlawful, no one properly consented to the search, and finally, "that the acts of the private individual could be imputed to the accompanying police officer to constitute sufficient 'state action' for a § 1983 claim." *Id.* at 808. In a subsequent case however, the Tenth Circuit significantly narrowed its holding in *Specht*:

> "there is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness." [*Specht*, 853 F.2d] at 808. Here, in contrast, Mr. Fyfe had a doctorate in criminal justice and was an expert in police training, tactics, and the use of deadly force. Courts generally allow experts in this area to state an opinion on whether the conduct at issue fell below accepted standards in the field of law enforcement.
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> *Zuchel v. City and County of Denver*, 997 F.2d 730, 742 (10th Cir. 1993).

[4] Defendants make this identical argument with regard to Plaintiffs' expert on diabetes, Linda Edwards. For much the same reasons, that argument also fails.

Here Dr. Pogrebin will be testifying as an expert in prison conditions, similar to the expert in *Zuchel*. *See also Nieto v. Kapoor,* 1998 U.S. Dist. LEXIS 22490, **26-31 (D. N.M. 1998) (holding in an employment case that plaintiffs' expert witness would be allowed to testify at trial that defendants' conduct "contributed to the creation of a hostile environment and caused the constructive discharge of Plaintiffs, with the caveat that the Court may instruct the jury on the elements of constructive discharge at an appropriate point in Dr. Reeves' testimony.).

There is also an instructive Sixth Circuit case on this same point, Heflin v. Stewart County, 958 F.2d 709, 715-16 (6th Cir. 1992), overruled on other grounds, Monzon v. Parmer County, 2007 U.S. Dist. LEXIS 43798 (6th Cir. 2007). The Heflin court upheld the admission of an expert's testimony regarding the deliberate indifference of jailers in abandoning all approved procedures when a prisoner was found hanging in his cell: "After setting forth in detail the manner in which the defendants failed to follow approved procedures, he stated that in his opinion this conduct demonstrated deliberate indifference to Heflin's need for 'emergency care which could have saved his life.' The testimony merely emphasized the witness's view of the seriousness of the defendants' failures."

Here, it is Dr. Pogrebin's opinion that in isolating Shawn Vigil, who they knew to be profoundly deaf with no lip reading skills, and refusing to provide him with a sign language interpreter, Defendants were deliberately indifferent to Mr. Vigil's need to communicate about his medical and other needs. Because Dr. Pogrebin's opinion does not instruct the jury about the applicable law, he should be permitted to testify about this opinion at trial.

5. Dr. Pogrebin's Testimony Will Assist the Jury in Understanding the Evidence or in Determining a Fact in Issue.

In Defendants' Motion to Strike, they frequent assert that Dr. Pogrebin's testimony will not assist the trier of fact in understanding the evidence or in determining a fact in issue. *See, e.g.,* Defs.' 702 Motion at 6, 8, 9. The contrary is true; because correctional facilities are places well beyond the ken of most persons, Dr. Pogrebin's testimony on these issues will greatly assist the jury.

To be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; *Daubert*, 509 U.S. *at* 591 (the testimony must "aid the jury in resolving a factual dispute"). "[T]he touchstone of the admissibility of expert testimony is its helpfulness to the trier of fact." *United States Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 582 F.3d 1131, 1150 (10th Cir. 2009). Determining helpfulness is a "common-sense inquiry"—"whether a juror would be able to understand the evidence without specialized knowledge concerning the subject." *United States v. McDonald*, 933 F.2d 1519, 1522 (10th Cir. 1991); *see also United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006) (observing that a court may consider whether the testimony is "within the juror's common knowledge and experience").

It is also not unusual for the trier of fact to hear expert testimony in civil rights cases. For example, a Denver jury was allowed to hear expert testimony on the use of deadly force in a police shooting case. *See Zuchel v. City & County of Denver*, 997 F.2d 730 (10th Cir. 1993). There are certainly other cases where district courts have found expert testimony helpful to jurors who are unfamiliar with the criminal justice system. *See, e. g., United States v. Batton*, 602 F.3d 1191, 1201 (10th Cir. 2010) (allowing expert testimony on the grooming of child sexual assault

victims because such "specialized information may very well be beyond the knowledge of many jurors."); *United States v. Garza*, 566 F.3d 1194, 1197-99 (10th Cir. 2009) (upholding the admission of expert testimony about the "tools of the drug trade"); *United States v. Taylor*, 2009 U.S. Dist. LEXIS 100318 at **9-12 (D. N.M. 2009) (allowing expert testimony about some aspects of gangs in prison). In the instant matter, other than those potential jurors who have either worked in the criminal justice system or been incarcerated, the public as a whole lacks even the most basic of information as to how jails and prisons function, particularly as concerns disabled inmates.

With regard to Dr. Pogrebin, Plaintiffs have submitted to this Court – and will submit at the November hearing and at trial – admissible evidence to support each of the allegedly unreliable facts listed by Defendants regarding Dr. Pogrebin. Plaintiffs will also present testimony from Dr. Pogrebin as to the facts and data he relied upon as well as the principles he applied to those facts and data in forming his opinions.

D. Defendants' Objections to the Opinions of Dr. Jean Andrews Are Unfounded.

Dr. Jean Andrews is an expert in communications and psycho-social issues relating to people who are deaf. She will opine, among other things, that (1) speech, lip reading, and writing are not effective communication with Shawn Vigil; (2) that an American Sign Language interpreter was necessary in order to communicate successfully with Mr. Vigil; and (3) that Defendants did not provide Mr. Vigil with effective communication, so he could not communicate his serious medical and psychological needs. Andrews, Jean F., Ph.D., "Report for Shawn Vigil," (Oct. 30, 2008) ("Andrews Report") at 3, 11 (Decl. of Amy F. Robertson in Opp'n to Defs.' 702 Motion ("Robertson Decl."), Ex. 1).

Defendants' Rule 702 Motion makes two arguments concerning Dr. Andrews's testimony. First, they challenge the third opinion set forth above – that Mr. Vigil was unable to communicate his serious medical and psychological needs -- on the grounds that Dr. Andrews "is not sufficiently qualified to render opinions on medical, mental health and jail policy and procedure matters and her opinion is based on unreliable subjective personal belief." Defs.' 702 Motion at 11. To the contrary, Dr. Andrews's extensive experience working with deaf individuals, including research and writing on mental health and criminal justice issues, provides the necessary qualifications; any concerns about her degree of specialization go to the weight, not admissibility, of her testimony.

Second, Defendants object that Dr. Andrews based her opinions on "unproven conclusory allegations in Plaintiffs' Complaint." Defs.' 702 Motion at 12. While that was the only information available to Dr. Andrews when she prepared her report, each of the factual allegations on which she based her opinion is supported by admissible evidence that will be introduced at trial, and will be presented to Dr. Andrews "at or before the hearing." Fed. R. Evid. 703.

1. Dr. Andrews Is Qualified By Her Extensive Experience with Deaf Individuals, including Deaf Prisoners, to Opine On Mr. Vigil's Likely Mental State. Dr. Andrews Has Thirty Years of Experience Working with Deaf People And Has Authored or Co-Authored Publications on Deaf Psychology.

Dr. Andrews received an M.Ed. in Deaf Education in 1977 and a Ph.D. in Speech and Hearing Science in 1983. Vita, Jean Frances Andrews (Defs.' 702 Motion, Ex. G (Doc. No. 246-

7) at 1).[5] She has worked with deaf individuals since 1975, when she began teaching at the Maryland School for the Deaf. *Id.* Since that time, as she anticipates testifying in greater detail at the hearing in November, she has worked with and taught deaf people, and taught courses, conducted research, and written articles on deaf communication, language, literacy, psychology, psycho-social issues and forensics. *See generally id.* In addition, Dr. Andrews has the following credentials, which were omitted from the version of her report attached to Defendants' motion:[6]

- "With graduate students conducted three reading/communication workshops for 40 deaf adult prisoners at the Huntsville State Prison, Estelle Unit, 75% of whom are reading at the K-2nd grade reading level (as assessed by TABE)."
- "Co-authored with two psychologists . . . two major textbooks on Psychology and Deaf People related to psycho-social and linguistic aspects of deafness."

Andrews Report at 13. The two textbooks are referenced in the footnotes to the Andrews Report, which were also omitted by Defendants:

- Andrews, J., I. Leigh, & M. Weiner. *Deaf People: Evolving Perspectives in Psychology, Education and Sociology*. Boston: Allyn & Bacon, 2004.
- Vernon, M. and J. Andrews. *The Psychology of Deafness: Understanding Deaf and Hard of Hearing People*. New York: Longman, 1990.

[5] An updated copy of Dr. Andrews's Vita (the "Andrews Vita") is attached as Exhibit 2 to the Robertson Declaration. This updated version was served on Defendants on July 29, 2010.

[6] Although Exhibit E to Defendants' 702 Motion (Doc. No. 246-5) purports to include Dr. Andrews's report, it omits the last three pages, which – significantly – include additional credentials and the footnotes to the Andrews Report that document the sources on which Dr. Andrews relied for her opinions. Exhibit 1 to the Robertson Declaration is the complete Andrews Report.

Id. at 14. The tables of contents of these two books are attached as Exhibits 3 and 4 to the Robertson Declaration. The former includes a chapter entitled "Being a Deaf Adult: Viewpoints from Psychology;" the latter, among others, a chapter entitled "Deafness and Mental Illness: Categories of Nonpsychotic and Psychotic Behaviors."

Dr. Andrews also cited to two articles addressing deaf issues in the criminal justice system in her report,[7] and has co-authored a number of other articles and made presentations that address deaf issues in both psychology and criminal justice.[8] At the hearing in November, Dr. Andrews will be prepared to discuss in detail her experience relating to psychological issues of deaf people. This includes the scholarly writing summarized above, as well as such things as her personal experience with the psychological effect on deaf people of lack of communication and isolation in the criminal justice or medical system, and coursework she has taken on psychology during her master's and doctoral studies.

2. Dr. Andrews's Experience Qualifies Her to Testify Concerning Mr. Vigil's Likely Psychological State While Housed in Administrative Segregation With No Effective Communication.

As noted above, *see supra* at Section C.1. *supra*, Rule 702 provides that an expert witness may be qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702; reliability concerns may focus on personal knowledge or experience. *Kumho Tire*, 526 U.S. at

[7] Andrews, J., M. Vernon, & M. LaVigne. "The Bill of Rights, Due Process and the Deaf Suspect/Defendant." *Journal of Interpretation*,. (Summer 2007); Andrews, J., M. Vernon, & M. LaVigne. "The Deaf Suspect/Defendant and the Bill of Rights." *RID VIEWS*(May, 2006): 1, 7-10. *Cited in* Andrews Report at 15.

[8] *See, e.g.*, Andrews, J. "Mistakes Made in the Legal System with Deaf Suspects." Presentation at the Legal Aid Task Force at the Florida Corrections Accreditation Commission, Inc., 3504 Lake Lynda Drive, Suite 380, Orlando, Florida 32817. (August 15, 2008), *cited in* Andrews Vita at 8; Seaborn, B., J. Andrews, & G. Martin. "Deaf Adults and the Comprehension of the Miranda." *Journal of Forensic Psychology and Practice* 10 (2010): 107-132; Andrews, J., P. Shaw, & G. Lomas. (in press). Chapter on Deaf and Hard of Hearing. To appear in Handbook of Special Education, edited by J. Kauffman & D. Hallahan. University of Virginia; Goben, B. , K. Enos, & J. Andrews. (Submitted Jan. 2010). "Comprehending the Inmate Handbook: Solutions for the Deaf Offender." Submitted to JDARA, *all cited in* Andrews Vita at 13.

150; *see also* 2000 Advisory Committee Note ("[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.")

Dr. Andrews's opinion that Mr. Vigil was not able to communicate his serious medical and psychological needs was based on her thirty years of experience and training, outlined above. For example, in her deposition, Dr. Andrews testified that her opinion was based in part on "what [she] know[s] about mental health issues related to deaf individuals, that they're at high risk for anxiety and depression, and that you wouldn't put a deaf person in solitary if they had these kinds of characteristics." Dep. of Jean F. Andrews, 69:9 - 19 (Robertson Decl. Ex. 5). She testified further that the two textbook chapters cited above related to

> the prevalence of mental health issues in the deaf population, and because of deaf people's communication and language delays, such as in the case of Shawn Vigil, that deaf individuals are more prone to anxiety and stress and feelings of powerlessness, especially when they're placed in situations where they don't know what's going on,

Id. 20:24 – 21:11; *see also generally id.* 21:12 – 23:6.

At the hearing in November, Dr. Andrews will be prepared to demonstrate how her experience and training led her to the conclusions she reached, why that experience is sufficient to opine on the psychological state of a deaf person who was arrested, booked and confined in administrative segregation without benefit of effective communication, and how her experience is reliably applied to the facts of Mr. Vigil's etiology, communication ability, educational and reading level, and incarceration at DCJ. *See Nacchio,* 555 F.3d at 1258 (holding that expert relying on experience "must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.").

3. Dr. Andrews Properly Relied on Facts That Plaintiffs Support with Admissible Evidence.

All of the facts on which Dr. Andrews based her opinions are supported by admissible evidence. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert *at or before the hearing*." Fed. R. Evid. 703 (emphasis added). While Dr. Andrews relied on the Complaint in drafting her report, all of the allegations on which she relied are supported by evidence currently before the Court in the Exhibits to Plaintiffs' Combined Opposition to Defendants' Motions for Summary Judgment ("Opp. to MSJ," Doc. No. 228).

Citing *Daubert*, Defendants argue that Dr. Andrews's opinions are unreliable because the facts on which they are based are "the conclusory, unsubstantiated and speculative allegations in Plaintiffs' Complaint." Defs.' 702 Motion at 13. However, the Tenth Circuit has held that *Daubert* "applies only to the qualifications of an expert and the methodology or reasoning used to render an expert opinion. . . . *Daubert* generally does not, however, regulate the underlying facts or data that an expert relies on when forming her opinion." *United States v. Lauder*, 409 F.3d 1254, 1264 (10th Cir. 2005). Rather, the admissibility of the facts on which an expert relies "is governed by the evidentiary rules regarding foundation and authentication, not *Daubert*." *Id.* That the facts on which an expert relies are disputed is also of no moment. *See Cook v. Rockwell Int'l. Corp.*, 580 F. Supp. 2d 1071, 1085 (D. Colo. 2006) ("That the expert relied on disputed facts in reaching his opinion does not render the expert's opinion unreliable . . .," citing 2000 Advisory Committee Note to Fed. R. Evid. 702); *see also Walker v. Gordon*, 46 Fed. Appx. 691, 695-96 (3d Cir. 2002) ("An expert is . . . permitted to base his opinion on a particular version of disputed facts and the weight to be accorded to that opinion is for the jury.").

Plaintiffs have submitted to this Court – and will submit at the November hearing and at trial – admissible evidence to support each of the allegedly unreliable facts listed by Defendants. Plaintiffs set forth in the table below the statements that Defendants allege Dr. Andrews relied on without sufficient support as well as examples of the evidentiary support they will offer for each proposition.

Factual Assertion Challenged on Defendants' 702 Motion	**Examples of Evidentiary Support**
DCJ did not provide (Vigil) with accommodations to allow him to effectively communicate about his serious medical and mental health needs during incarceration. Therefore, the (DCJ) officials could not provide care and safety and supervision for Mr. Vigil. Defs.' 702 Motion at 12.	Officer Pacheco, one of the officers assigned to the tier where Mr. Vigil was housed, conceded that he "couldn't really assess Mr. Vigil's risk of suicide because of the lack of communication with him." Pacheco Dep. 73:25-74:7, Opp. to MSJ, Ex. 10 (Doc. No. 229-11). He further conceded that, to his knowledge, no interpreter was ever provided to assist Mr. Vigil in communicating with DCJ nurses. *Id.* 74:21-24. Sgt. Romero, who was assigned to the building where Mr. Vigil was housed, admitted that he had no evidence that a sign language interpreter was ever brought in to assist medical staff communicate with inmates at the DCJ, and that there were no written policies requiring interpreters to assist with the intake of deaf inmates. Romero Dep. 63:8-20, Opp. to MSJ, Ex 5 (Doc. No. 229-6).
Vigil was isolated from other inmates because of his disability. Defs.' 702 Motion at 13.	Regarding Mr. Vigil, "[t]he record states 'Is deaf. Does not read lips. Does communicate by writing. Claims negative for all medical problems, in writing. Housed alone for this reason.'" Defs.' Mot. for Summ. J. Fact No. 5 at 5 (Doc. No. 197). The nurse who conducted Mr. Vigil's intake admitted that this meant that he was housed alone because he was deaf. Costin Dep. 123:12-21, Opp. to MSJ, Ex. 3 (Doc. No. 229-4); *see also* Foos Dep. 110:22-111:5, Opp. to MSJ, Ex. 6 (Doc. No. 229-7).

There were inadequate policies, procedures, or equipment in place to accommodate the needs of deaf and hard-of-hearing inmates when Vigil was in custody. Defs.' 702 Motion at 13.	Officer Pablo, another of the officers assigned to the tier where Mr. Vigil was housed, testified that he was not aware of any policies at the DCJ for communicating with deaf inmates. Pablo Dep. 97:23-98:3, Opp. to MSJ, Ex. 8 (Doc. No. 229-9). Officer Pacheco testified that he did not know of any policies for obtaining a sign language interpreter. Pacheco Dep. 56:13-24; *see also* Romero Dep. 26:16-19 (no written policy explaining the availability of interpreters); *id.* 63:8-20 (no evidence that interpreter ever brought in to assist DCJ medical staff).
There were no DCJ policies for deaf or hard of hearing inmates to make telephone calls. Defs.' 702 Motion at 13.	DCJ policies and inmate handbook contain no information concerning accommodations for deaf inmates. *See, e.g.*, Denver Dept of Safety COJL Post Orders Building 6: p.20, Bates No. P000038, SCE: Telephone Calls (Opp. to MSJ Ex. 27 (Doc. No. 229-28)); DCJ Inmate Handbook in effect in August 2005, at 28-29, Bates No. Ulibarri000222. (Opp. to MSJ. Ex. 35 (Doc. No. 229-36)).
The Denver Police Department did not provide Vigil with a sign language interpreter or any effective means of communication. Defs.' 702 Motion at 13.	Officer Pacheco and the City's sign-language coordinator both testified that the City did not provide an interpreter to Mr. Vigil at the DCJ. Pacheco Dep. 74:21-24; Kosinski Dep. 23:18-20 (Opp. to MSJ, Ex. 2 (Doc. No. 229-3)).
DCJ did not provide Vigil with access to programs, benefits and services provided to other inmates. Defs.' 702 Motion at 13.	Mr. Vigil did not have access to a telephone. *See* Defs.' Mot. for Summ. J., Ex. A-12 (Doc No. 197-15 at 8); Pablo Dep. 171:23-172:17. His mental health screening was blank, suggesting he did not receive a mental health screening. Opp. to MSJ, Ex. 44 (Doc. No. 229-46). His health assessment form was blank except for his temperature and blood pressure, suggesting no further health screening was conducted. Opp. to MSJ, Ex. 43 (Doc. No. 229-45).

DCJ discriminated against Vigil by not providing him with a sign language interpreter and assistive devices such as TTY's video phones and closed captioned TV. Defs.' 702 Motion at 13.	*See supra* row 5 (support for the proposition that DCJ did not provide Mr. Vigil with an interpreter). Officer Pablo testified that although there were 12 telephones on the tier where Mr. Vigil was housed, none of them were accessible to him. Pablo Dep. 171:23-172:17. Officer Pacheco testified that he did not know how deaf inmates were informed about the availability of a TTY machine. Pacheco Dep. 51:3-6. DCJ staff stated that the televisions on Mr. Vigil's tier did not have closed-captioning. McCarten Decl. ¶ 5 (Opp. to MSJ, Ex. 9 (Doc. No. 229-10)).

E. Linda Edwards Is Qualified And Her Opinions Are Reliable.

Ms. Edwards is an expert in working with multiple components of the diabetic population, including diagnosis, treatment, and education. Curriculum Vitae of Linda L. Edwards, R.N. M.H.S., CDE[9] (Schwartz Decl. Ex. 5). .Her career in working with the diabetic population spans more than 34 years.[10] Ms. Edwards has already been qualified as an expert in diabetes in a prisoner class action ADA case involving the Colorado Department of Corrections ("CDOC"). *See Montez v. Owens*, United States District Court, District of Colorado Civil Action No. 92-cv-00870-JLK. *See* Schwartz Decl. Ex. 7. Ms. Edwards initially became involved in the Montez litigation in 1999. See Schwartz Decl. Ex. 5 at 3. When the liability claims in Montez were ultimately resolved in 2003, Ms. Edwards worked in cooperation with the CDOC in designing and implementing a plan to train all medical and non-medical staff and inmates regarding diabetes issues. See Schwartz Decl. Ex. 7. Recently, Ms. Edwards testified as an

[9] This is an updated copy of Linda Edwards Curriculum Vita, replacing the CV used in Defs.' 702 Motion, Ex. H (Docket No. 246-8). Plaintiffs have now served opposing counsel with the updated Vita.

[10] *See e.g.* Dep. of Ms. Edward's Depo. at 10:20 – 13:11, 14:16 – 15:10, 17:13-16, 17:23 – 18:12, 19:14 – 20:7, 20:22 – 22:21, 23:15 – 24:7, 11-23, 25:5 – 26:15, 35:1 – 39:24, 40:13 – 41:17, 41:23 – 42:16, 43:7-12, 43:17 – 44:1, 5-17, 44:21 – 45:11, 54:1 – 55:25, and 59:11 – 60:18 (Schwartz Decl. Ex. 6)

expert witness in the Montez compliance hearings held in June-July 2010 "regarding the care and treatment of diabetes, accommodations provided to inmates with diabetes, complications of diabetes and how they are managed by DOC, Quality Management issues and issues identified in the expert report." *See* Schwartz Decl. Ex. 8.

Despite the breadth of Ms. Edwards' work with the diabetic population in a prison setting, [11] Defendants generally contend that Ms. Edwards' opinion testimony about the standard of care regarding its treatment of Plaintiff Sarah Burke should be excluded because it will not assist the trier of fact in understanding the evidence or determining a fact in issue. Defendants make three sub-arguments to support that contention and argue that Ms. Edwards' opinion testimony is based on: speculation, unreliable subjective personal beliefs, and insufficient facts and data. Defs.' 702 Motion at 14-16.

1. Ms. Edwards' Opinion Testimony is Neither Speculative Nor the Result of Unreliable Subjective Personal Beliefs.

Defendants first contend that her testimony is based on speculation and unreliable personal belief because Ms. Edwards: 1) did not review the Denver Health and Hospital policies and procedures for providing medical services at the Denver County Jail, and 2) she opined that when officers make an arrest they perform a "service, program or activity." Defs.' 702 Motion at 15. First, despite questioning Ms. Edwards about these documents, Defendants did not provide a copy of those documents at Ms. Edwards' deposition[12] nor were they attached to Defendants' Motion to Strike. Without knowing what documents Defendants are referring to, it is impossible

[11] Defendants do not appear to be arguing that Ms. Edwards is unqualified to render opinions regarding diabetes in correctional setting. That may be because she has already been accepted as an expert witness in the *Montez* litigation.

[12] The only two exhibits used by the defense at Ms. Edwards' deposition were her curriculum vitae and her expert report. Dep. of Linda Edwards (Schwartz Decl. Ex. 6).

to respond to this argument in any meaningful fashion. In any event, if Defendants believe Ms. Edward's failure to review certain documents undermines her opinion in this case, that is the basis of cross-examination, not a basis to strike her testimony. *Bitler v. A.O. Smith Corp*., 400 F.3d 1227, 1236 n.2 (10th Cir. 2004). By any measure, Ms. Edwards is extremely qualified to opine regarding the proper care and treatment of diabetes, regardless of what standards are provided in the Denver Health and Hospital policies.

Second, as to Defendants' contention that Ms. Edwards is mistaken as to a point of law regarding the ADA—that an arrest is not a "service, program or activity" protected by the ADA. Defs.' 702 Motion at 15. Ms. Edwards, however, offered no opinion as to an officer's legal responsibility under the ADA when arresting a deaf or hearing impaired person. This issue only arose when Ms. Edwards noted that it would be difficult to address a deaf individual's diabetic issues without effective communication. *See e.g*., Edwards, Linda, RN, MHS, CDE, "Expert Witness Report-Diabetes" (Oct. 28, 2008) ("Edwards Report") at 5 ¶ 3, 6 ¶ 8, 6-7 ¶ 9, 7 ¶¶ 10(a), 10(d), 8 ¶ 13, and conclusions at 8 ¶ 1 and 9 ¶¶ 3, 6. *See also* Dep. of Linda Edwards at 89:22 – 91:2, 106:6 – 108:6 (Schwartz Decl. Ex. 6). Moreover, in Plaintiffs' Combined Response to Defendants' Motions for Summary Judgment, Docket No. 228, Plaintiffs contested Defendants' characterization of the law as to this very point. *See, e.g*., Plaintiffs' Combined Response to Defendants Motions for Summary Judgment, Docket #228 at 109-132, and cases cited therein. Moreover, Ms. Burke was in the physical and legal custody of the Denver Police Department and the Denver Sheriff Department well past the immediate circumstances of her arrest in her home. Thus, this argument for striking all of Ms. Edwards' expert testimony as to the standard of care for treating a deaf Type 1 diabetic who needed glucose is entirely unpersuasive.

Defendants next insist that Ms. Edwards' expert testimony cannot assist the trier of fact in understanding the evidence or in determining a fact in issue "because she did not rely upon facts and data that she was knowledgeable about when forming her opinions." Defs.' 702 Motion at 15-16. The only factual basis Defendants provide for this argument is that Ms. Edwards confused some acronyms during her deposition testimony, specifically "ALDF" and "PADF." *Id.*

Nowhere in their arguments do Defendants assert that Ms. Edwards' opinions about Ms. Burke's serious medical needs as a hypoglycemic Type 1 diabetic are unfounded. In forming those opinions, Ms. Edwards relied upon multiple documents, a personal interview with Ms. Burke, the standards of care for diabetes management in correctional facilities, the ACA standards for adult local detention facilities, and the documentation provided by Defendants which was personal to Ms. Burke regarding her arrest and detention. Edwards Report at 1, 3-4 (Schwartz Decl. Ex. 9).

2. Ms. Edwards Expressed No Opinion as to the Legal Standard to be Applied by the Jury.

Defendants object that Ms. Edwards should be prohibited from testifying that Defendants acted with "deliberate indifference" and "willful disregard" regarding Plaintiff Burke's treatment during her arrest and detention . . . . Defs.' 702 Motion at 14, 16. This is the identical argument Defendants made as to Dr. Pogrebin's expert opinions and it fails for the same reasons as set forth above at C.4. *supra*. During Ms. Edwards' deposition, she repeatedly explained that these phrases "deliberate indifference" and "willful disregard" were her terminology, not that of Plaintiffs' counsel, and that she was using that particular language to address a complete systemic failure in addressing Ms. Burke's serious medical needs. In fact, a review of Ms. Edwards' testimony makes it clear that she was not reaching a legal conclusion, but a conclusion

based on her belief there was an extreme failure to provide required medical care. For example, Ms. Edwards testified that when employees at the PADF refused to "provide basic emergency needs" to Ms. Burke, they were deliberately indifferent and willfully disregarded the medical needs she was attempting to communicate. Dep. of Linda Edwards at 91:7-22 (Schwartz Decl. Ex. 6).

Later in the deposition, opposing counsel returned to these identical issues, and Ms. Edwards expanded on her earlier testimony:

> Q. Is the term "Deliberate indifference" your term, or is that something that somebody suggested to you?
>
> A. To me, it's deliberate, and deliberate indifference to the fact that she tried to communicate serious needs regarding her diabetes. She asked for a Sign interpreter, and I'm not a Sign expert, but I am a diabetes expert. She tried to communicate that she needed food, which was essential, and was denied.
>
> Q. What is your definition of "Deliberate indifference"?
>
> A. That, despite the attempts to communicate a need, they were denied.
>
> Dep. of Linda Edwards Depo. at 98:24 – 99:12 (Schwartz Decl. Ex. 6).
>
> * * *
>
> Q. You say, "The officers demonstrated a reckless and willful, deliberate indifference." Is that your own words, again?
>
> A. Again, I've used those terms before. Those are -- no one changed my words, if that's what you're asking. This situation, to me, was, for anyone with Type 1 Diabetes, was extreme. It was extremely distressful for Ms. Burke, and for someone in my field, looking at this report, there were many opportunities for these officers to acknowledge both her deafness and need for a Sign interpreter, and it's documented that she had Type 1 diabetes,

> which has specific needs, none of which appeared to be addressed at all, so I think those are very strong words and I stand by them.
>
> Dep. of Linda Edwards at 108:19– 109:8 (Schwartz Decl. Ex. 6).

Ms. Edwards gave similar testimony throughout her deposition. *See* Dep. of Linda Edwards at 100:2-9 (Schwartz Decl. Ex. 6).

Ms. Edwards never asserted that she was an expert in constitutional law but only that her opinions went to the proper procedures that should be used when a Type 1 diabetic, such as Ms. Burke, presents in distress. *See* discussion of *Heflin v. Stewart County*, 958 F.2d 709, 715-16 (6th Cir. 1992), *overruled on other grounds, Monzon v. Parmer County*, 2007 U.S. Dist. LEXIS 43798 (6th Cir. 2007) at Section C.4. *supra*.

These are the important points regarding Ms. Edwards' expert testimony: she is an extremely experienced and knowledgeable expert in diabetes, including the treatment and management of diabetes in correctional facilities, and she carefully reviewed all of the relevant documents and other evidence in this case before rendering an expert opinion. Defendants have provided no substantive basis for excluding Ms. Edwards' expert testimony, and their motion to strike her expert testimony should be denied in its entirety.

Finally, Plaintiffs have submitted to this Court – and will submit at the November hearing and at trial – admissible evidence to support each of the allegedly unreliable facts listed by Defendants as to Ms. Edwards.

CONCLUSION

For all of the foregoing reasons, Defendants' use of a scattershot Rule 702 motion to strike the complete testimony of three of Plaintiffs' well-qualified experts should fail.

Dated: July 30, 2010.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 30, 2010, I served the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' FED. R. EVID. 702 MOTION TO STRIKE EXPERT WITNESSES** via the CM/ECF system to:

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