

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Shari Ferreira, et al.,

10 Plaintiffs,

11 v.

12 Joseph M Arpaio, et al.,

13 Defendants.
14

No. CV-15-01845-PHX-JAT

ORDER

15 Pending before the Court is Defendants' Motion to Exclude Plaintiffs' Expert,
16 Pablo Stewart, M.D. (Doc. 213), filed on July 31, 2017. Having considered both parties'
17 briefs, the Court now rules on the motion.

18 **I. BACKGROUND**

19 The Court need not set forth a full recitation of the facts underlying this matter.
20 For purposes of adjudicating Defendants' pending Motion to Exclude Dr. Stewart, a brief
21 recital of the following facts, taken from Plaintiff Shari Ferreira's Third Amended
22 Complaint is sufficient. Plaintiffs brought this civil rights action on behalf of decedent
23 Zachary Daughtry in her capacity as personal representative of the estate. (Doc. 12 at 1).
24 Daughtry was arrested in December of 2013 and booked into the 4th Avenue Jail
25 complex. (*Id.* at 8). On July 9, 2014, Defendant Ryan Bates was placed in a cell with
26 Daughtry. (*Id.* at 9). Officers passed their cell later that evening to find Bates standing
27 over Daughtry, who was unresponsive and laying in a puddle of blood. (*Id.* at 12).
28 Daughtry ultimately passed away from his injuries on July 20, 2014. (*Id.* at 15).

1 On November 21, 2016, Plaintiffs disclosed the report of their psychiatric expert,
2 Dr. Pablo Stewart. On February 10, 2017, Defendants responded by filing a Motion to
3 Strike Expert Report of Pablo Stewart. (Doc. 149). Defendants argued that Dr. Stewart’s
4 findings were conclusory, in addition to being displeased with his incorporation of over
5 360 pages of affidavits from another case by reference. Defendants argued that this
6 disclosure violated Federal Rule of Civil Procedure (“FRCP”) 26(a)(2)(B). A discovery
7 hearing was held on March 22, 2017 in part to discuss Defendants’ Motion to Strike. At
8 the hearing, the Court denied Defendants’ Motion to Strike, but gave Plaintiffs an
9 opportunity to redo Dr. Stewart’s report. Plaintiffs ultimately refiled Dr. Stewart’s revised
10 report on April 7, 2017. Defendants subsequently filed the Motion to Exclude currently at
11 issue on July 31, 2017. (Doc. 213). Plaintiffs filed a Response on September 5, 2017,
12 (Doc. 224), to which Defendants filed a Reply on September 12, 2017. (Doc. 226).

13 **II. LEGAL STANDARDS**

14 Defendants move to exclude Plaintiffs’ psychiatric expert, Dr. Pablo Stewart.
15 Defendants contend that Dr. Stewart must be excluded because his expert report fails to
16 comply with FRCP 26 and that his opinions are inadmissible pursuant to Federal Rule of
17 Evidence (“FRE”) 702. The Court will discuss each of the standards under these rules in
18 turn.

19 **A. Federal Rule of Civil Procedure 26**

20 FRCP 26 requires that if a party desires to have a witness present expert
21 testimony, the party must disclose both the expert and provide a written report outlining
22 information about the expert and her testimony. Fed. R. Civ. Pro. 26(a)(2)(A)–(B). The
23 Rule requires, in relevant part, that the expert report must include:

- 24 (i) a complete statement of all opinions the witness will
25 express and the basis and reasons for them;
26 (ii) the facts or data considered by the witness in forming
27 them

28 Fed. R. Civ. P. 26(a)(2)(B).

1 “Bald conclusions, brief statements of ultimate conclusions with no explanation of
2 the basis and reasons therefore, or reports omitting a statement of how the facts support
3 the conclusions do not satisfy Rule 26(a)(2)(B).” *Izzo v. Wal-Mart Stores, Inc.*, No. 2:15-
4 CV-01142-JAD-NJK, 2016 WL 593532, at *2 (D. Nev. Feb. 11, 2016) (citations
5 omitted). Exclusion of expert testimony “is an appropriate remedy for failing to fulfill the
6 required disclosure requirements of Rule 26(a).” *Yeti by Molly, Ltd. v. Deckers Outdoor*
7 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). However, questions related to the factual
8 basis of an expert’s testimony go “to the credibility of the testimony, not the
9 admissibility, and it is up to the opposing party to examine the factual basis for the
10 opinion in cross-examination.” *Children’s Broadcasting Corp. v. Walt Disney Co.*, 357
11 F.3d 860, 865 (9th Cir. 2004).

12 **B. Federal Rule of Evidence 702 and *Daubert***

13 In addition to FRCP 26 considerations, when either party attempts to offer expert
14 testimony through an expert witness, the Court “must determine whether the expert
15 witness is qualified and has specialized knowledge that will assist a trier of fact to
16 understand the evidence or to determine a fact in issue.” *McKendall v. Crown Control*
17 *Corp.*, 122 F.3d 803, 805 (9th Cir. 1997) (citing Fed. R. Evid. 702; *Daubert v. Merrell*
18 *Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) (“*Daubert I*”). The Court’s
19 analysis is made by comparing the proposed expert testimony to the requirements of FRE
20 702. FRE 702 provides that:

21 A witness who is qualified by knowledge, skill, experience,
22 training, or education may testify in the form of an opinion or
otherwise if:

- 23 a. the expert’s scientific, technical, or other specialized
24 knowledge will help the trier of fact to understand the
evidence or to determine a fact in issue;
25 b. the testimony is based on sufficient facts or data;
26 c. the testimony is the product of reliable principles and
methods; and
27 d. the expert has reliably applied the principles and methods
to the facts of the case.

28 Fed. R. Evid. 702.

1 The United States Supreme Court and the Ninth Circuit Court of Appeals have
2 issued opinions interpreting FRE 702 that will help guide this Court’s analysis. *See*
3 *Daubert I*; *see also Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir.
4 1995) (“*Daubert II*”). According to *Daubert I*, the Court has broad discretionary powers
5 in determining whether a proposed expert is qualified under Rule 702 by “knowledge,
6 skill, experience, training or education.” *Daubert I* at 591; *see also Daubert II* at 1315.
7 The Court must also decide whether the proposed subject matter of the expert opinion
8 correctly concerns “scientific, technical, or other specialized knowledge” under Rule 702.
9 *McKendall*, 122 F.3d at 806. Finally, the Court must ascertain “whether the testimony is
10 helpful to the trier of fact, i.e., whether it rests on a reliable foundation and is relevant to
11 the facts of the case.” *Id.* (citing *Bogosian v. Mercedes-Benz of North America, Inc.*, 104
12 F.3d 472, 476 (1st Cir. 1997); Fed. R. Evid. 702).

13 The Supreme Court charged district courts with acting as “gatekeepers” to ensure
14 that all scientific testimony and evidence admitted is both relevant and reliable. *Hall v.*
15 *Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1396 (D. Or. 1996). The task before this
16 Court, then, is two-pronged. First, the Court must ensure that the proposed testimony
17 exemplifies “scientific knowledge,” constitutes “good science,” and was “derived by the
18 scientific method.” *Id.* (citing *Daubert II*, 43 F.3d at 1316). Second, the Court must
19 ensure that the testimony is “relevant to the task at hand” in that it “logically advances a
20 material aspect of the proposing party’s case.” *Daubert II*, 43 F.3d at 1315 (quoting
21 *Daubert I*, 509 U.S. at 597).

22 **1. Reliability**

23 Both *Daubert I* and *Daubert II* list factors that the courts can use in deciding the
24 first prong, whether the expert testimony is scientifically valid and reliable.
25 *Hall*, 947 F. Supp. at 1396. These factors include:

- 26 1. Whether the theory or technique employed by the expert is
27 generally accepted in the scientific community;
- 28 2. Whether the theory has been subjected to peer review and
 publication;

- 1 3. Whether the theory can be and has been tested;
- 2 4. Whether the known or potential rate of error is acceptable;
- 3 and
- 4 5. Whether the experts are proposing to testify about matters
- 5 growing naturally or directly out of research, or whether
- 6 they have developed their opinions expressly for purposes
- 7 of testifying.

8 *Id.* (citing *Daubert I*, 509 U.S. at 593–94 (first four factors)); *Daubert II*,
9 43 F.3d at 1316–17 (adding fifth factor).

10 The list is illustrative, not exhaustive. *Daubert II*, 43 F.3d at 1317. In *Kumho Tire*
11 *v. Carmichael*, the Supreme Court recognized that all expert theories may not fit neatly
12 into the five factors carved out in *Daubert I* and *Daubert II*, and as such the test for
13 reliability must be “flexible.” 526 U.S. 137, 141 (1999). This is especially the case when
14 the expert is testifying to “technical” or “other specialized knowledge” as opposed to
15 scientific testimony. *Id.* at 148 (citing Fed. R. Evid. 702). As such, the Court may
16 consider the five factors previously mentioned, but ultimately it must determine whether
17 the testimony has “a reliable basis in the knowledge and experience of the relevant
18 discipline.” *Id.* at 149 (citing *Daubert I* at 592).

19 **2. Relevance and Fit**

20 In addition to analyzing the reliability of the expert’s testimony, the Court has a
21 duty to ensure that the testimony is “relevant to the task at hand” in that it “logically
22 advances a material aspect of the proposing party’s case.” *Daubert II*, 43 F.3d at 1315
23 (quoting *Daubert I*, 509 U.S. at 597). Put another way, an expert’s testimony must be
24 “facially helpful and relevant” in assisting the trier of fact evaluate the evidence.
25 *McKendall*, 122 F.3d at 807 (citing *Compton v. Subaru of America, Inc.*, 82 F.3d 1513,
26 1515 (10th Cir. 1996). Once again, the Court must exclude the testimony if it does not
27 “fit” the matters at issue in the case. *Daubert I*, 509 U.S. at 591.

28 **III. ANALYSIS**

As mentioned previously, Defendants move to exclude Plaintiffs’ expert Dr.
Stewart under both FRCP 26, FRE 702 and *Daubert*. The Court will address each

1 argument in turn.

2 **A. Federal Rule of Civil Procedure 26**

3 Defendants' challenge to Dr. Stewart under FRCP 26 is two-fold. First,
4 Defendants challenge whether Dr. Stewart's report complies with FRCP 26(a)(2)(B)(i),
5 which requires his report provide the "basis and reasons" for his opinions. Fed. R. Civ.
6 Pro. 26(a)(2)(B)(i) (requiring that an expert's report must contain "a complete statement
7 of all opinions the witness will express and the basis and reasons for them."). Secondly,
8 Defendants argue that in Dr. Stewart's revised report, he improperly included portions of
9 affidavits from a past case he worked on, the *Graves* case. *See Graves v. Arpaio*, No. CV-
10 77-00479-PHX-NVW, 2014 U.S. Dist. LEXIS 177494 (D. Ariz. Sept. 30, 2014) *vacated*
11 *in part*, No. CV-77-00479-PHX-NVW, 2014 WL 6983316 (D. Ariz. Dec. 10, 2014).
12 Defendants argue that these inclusions are improper incorporations by reference, and that
13 in any event Dr. Stewart has failed to explain how the affidavits relate to this case. (Doc.
14 213 at 2–4).

15 Plaintiffs respond by pointing to the various sections of Dr. Stewart's 154-page
16 report. (Doc. 224 at 2–3). Included in Dr. Stewart's report are his credentials, a list of
17 documents that he reviewed in preparation for giving his opinion, a timeline of the
18 notable events of the case, and Dr. Stewart's own opinions related to the case, among
19 other things. (*Id.*) Plaintiffs ultimately argue that Dr. Stewart's credibility and the
20 information he reviewed is beyond reproach and that challenges related to the weight of
21 the evidence are reserved for the jury. (*Id.* at 3).

22 In his report, Dr. Stewart clearly lists over 460 documents that he relied on to form
23 his opinions. (Doc. 213-2 at 11–33). This list provides the basis for the facts that underlie
24 Dr. Stewart's opinions. From these facts, Dr. Stewart relied on his experience in
25 correctional mental health and his review of the record to make conclusions about the
26 case. These conclusions are outlined in the report. (*Id.* at 139–54). Dr. Stewart often
27 spends many paragraphs explaining the facts that he relied on to reach a conclusion. (*Id.*).
28 His analysis is thorough enough to avoid being classified as a "bald conclusion" or "brief

1 statements of ultimate conclusions with no explanation.” *Izzo*, 2016 WL 593532, at *2.
2 This Court is content that, at a minimum, Dr. Stewart’s report includes the basis and
3 reasons for his opinions.

4 As previously mentioned, Dr. Stewart’s opinions are informed by his experience
5 in the field of correctional mental health. Part of his experience was acquired during his
6 work on the *Graves* case, affidavits from which are cited in his report. While Defendant
7 objects to the inclusion of the *Graves* affidavits as irrelevant, Dr. Stewart has included
8 commentary in his report that discusses the links between the two cases. It is undoubtedly
9 true that the case at issue is *Ferreira v. Penzone* and not *Graves v. Penzone*. However,
10 conclusions about certain conditions in the Maricopa County Jail that Dr. Stewart
11 formulated during his work in *Graves* are not out-of-bounds simply because he came
12 upon them in another matter. After reviewing the record of the current case, it appears
13 that Dr. Stewart came to many similar conclusions that he arrived at in *Graves*.
14 Ultimately, it is for the trier of fact to determine the weight (if any) to give Dr. Stewart’s
15 opinion.

16 While the report survives because it complies with Rule 26(a)(2)(B)(i), it is not a
17 model of form. The Rule does not require the report to be well organized, convenient for
18 the Court or opposing counsel, or that it be user friendly. The Court has already warned
19 counsel that time spent locating items in the report will count against counsel’s allotted
20 trial time. That said, the motion to exclude for failure to comply with Rule 26 is denied.

21 **B. Federal Rule of Evidence 702 and *Daubert***

22 Defendants also argue that Dr. Stewart’s opinions are inadmissible under FRE 702
23 because: (1) his opinions are not reliable and (2) his opinions are not relevant or helpful
24 to a jury. (Doc. 213 at 2). The Court will address each argument in turn.

25 **1. Reliability**

26 Defendants first argue that Dr. Stewart’s testimony is unreliable because it is
27 “based on subjective beliefs or unsupported speculation.” (Doc. 213 at 5). Defendants
28 also argue that Dr. Stewart’s testimony is unsupported by scientific methodology or

1 learned treatises necessary for his opinions to be admitted. (*Id.*). Ultimately, Defendants
2 conclude that Dr. Stewart is simply an advocate for Plaintiff, and not a scientific expert
3 whose testimony is admissible. (*Id.*).

4 Plaintiffs reply by emphasizing the flexibility built into the FRE 702 standard,
5 especially when evaluating social science experts. (Doc. 224 at 5). Plaintiffs claim that
6 courts are free to consider an expert’s personal knowledge and experience in a subject
7 area to qualify them as an expert in that area. (*Id.*). Additionally, Plaintiffs explore some
8 of the Advisory Notes behind FRE 702 which suggest that “rejection of expert testimony
9 is the exception rather than the rule.” (*Id.*). Plaintiffs finally claim that Dr. Stewart more
10 than adequately laid out the facts upon which he based his conclusions, and that he
11 properly evaluated these facts using his knowledge, skill and experience. (*Id.* at 6–11).

12 When evaluating the reliability of an expert’s testimony, the courts in *Daubert I*
13 and *Daubert II* compiled a list of factors to help guide their analysis. However, Dr.
14 Stewart is not a scientific expert, and as such these factors are of little use here. Instead,
15 the Court must determine whether Dr. Stewart’s testimony has “a reliable basis in the
16 knowledge and experience of [the relevant] discipline.” *Daubert I*, 509 U.S. at 592.

17 As Plaintiffs point out, when evaluating an expert like Dr. Stewart, it is proper for
18 the Court to consider Dr. Stewart’s knowledge, skill and experience as applied to his
19 conclusions. *Hangerter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015–16
20 (9th Cir. 2004). His experience includes serving the mentally ill as a psychiatrist, working
21 with mental health patients in correctional and other institutional contexts, and designing
22 and teaching courses in correctional psychiatry at the University of California, San
23 Francisco. (Doc. 213-2 at 2–3). Dr. Stewart has significantly more than the “minimal
24 foundation of knowledge, skill and experience,” that “suffices” to cross the threshold of
25 expert qualification. *Heston v. City of Salinas*, No. C 05-03658 JW, 2007 WL 4754777,
26 at *2 (N.D. Cal. Mar. 30, 2007) (citing *Hangerter*, 373 F.3d at 1015–16).

27 Dr. Stewart’s experience and training qualifies him as long as the facts he relied
28 on exist. *Guidroz-Brault v. Missouri Pacific Railroad Co.*, 254 F.3d 825 (9th Cir. 2001).

1 Based on a thorough review of the record and Dr. Stewart’s report, the Court finds that
2 Dr. Stewart’s conclusions and report are based on sufficient facts so as to be found
3 reliable, passing the first prong of FRE 702.

4 **2. Relevance and Fit**

5 Defendants argue that Dr. Stewart’s opinions are also inadmissible because they
6 are irrelevant to the case at hand. According to Defendants, the present case is “a failure
7 to protect case based upon the cell assignment of detainees Bates and Daughtry. This is
8 not a case about the adequacy of either inmates’ mental health treatment.” (Doc. 213 at
9 6). Accordingly, Defendants contend, Dr. Stewart’s opinions about Bates’ and
10 Daughtry’s treatment and mental health is irrelevant to the issue at hand.

11 Plaintiffs disagree, arguing that Dr. Stewart’s opinions are relevant because they
12 relate to standard-of-care and causation issues. (Doc. 224 at 13). Plaintiffs argue that Dr.
13 Stewart’s opinions related to both detainees’ mental health and the propriety of placing
14 them together are critically relevant to their case. (*Id.* at 13–15).

15 Although Defendants may disagree with the veracity or weight of Dr. Stewart’s
16 opinions, his opinions are relevant to causation and psychiatric standard-of-care. For
17 example, Dr. Stewart states his opinion that Daughtry should have been in psych housing
18 as opposed to maximum security. (Doc. 213-2 at 142). This opinion alone is relevant to
19 issues of causation, and should not be kept from the jury on grounds of relevance.
20 “Challenges that go to the weight of the evidence are within the providence of a fact
21 finder, not a trial court judge.” *City of Pomona v. SQM North American Corp.*, 750 F.3d
22 1036, 1044 (9th Cir. 2014). Considering Dr. Stewart’s report contains other opinions
23 relevant to causation and standard-of-care, the Court finds the Dr. Stewart passes the
24 second prong of FRE 702.

25 **C. Qualifications**

26 Finally, Defendants question Dr. Stewart’s professional qualifications. Defendants
27 assert that Dr. Stewart is not a correctional expert and that he has no clinical experience
28 in jail or prison. (Doc. 213 at 6). Defendants also claim that Dr. Stewart is not a board-

1 certified forensic psychiatrist, and that he does not have the specialized knowledge
2 required to provide an expert opinion. (*Id.* at 7). As such, even if his testimony is
3 otherwise reliable and relevant, Defendants argue that Dr. Stewart is not qualified to give
4 it.

5 Plaintiffs reply by pointing to the many qualifications that Dr. Stewart has listed in
6 his expert report. Plaintiffs refer to Dr. Stewart’s “extensive clinical, research, and
7 academic experience in the diagnosis, treatment, and prevention of mental illnesses in
8 correctional contexts.” (Doc. 224 at 15 (citations omitted)). Plaintiffs give examples of
9 Dr. Stewart’s experience, including his designing and teaching courses on correctional
10 psychiatry and his administrative and clinical experience with jailed and hospitalized
11 inmates in San Francisco. (*Id.* at 8-9). Ultimately, Plaintiffs suggest that “Dr. Stewart is
12 qualified to state the psychiatric correctional related opinions he has stated.” (*Id.* at 16).

13 This Court agrees. Dr. Stewart is a Psychiatrist with a broad background working
14 with mental health patients, especially in correctional and institutional settings. Even
15 more specifically, he has specialized in the “needs of severely mentally ill individuals in
16 sheltered treatment programs in institutional contexts, such as the Mental Health Unit . . .
17 currently operating in the Maricopa County Jail.” (Doc. 213-2 at 3). In addition to his
18 experiential credentials, Dr. Stewart has also written a multitude of papers and essays that
19 have been published in professional and peer-reviewed journals, many on topics directly
20 relevant to this case.¹ Dr. Stewart’s academic qualifications, in addition to his over thirty
21 years of experience working as a psychiatrist in institutional and correctional settings,
22 demonstrates to the Court that Dr. Stewart possesses the requisite credentials to testify as
23 an expert to his psychiatric, correctional-related opinions in this case.²

24
25 ¹ Some particularly relevant examples include: “Mental Health Aspects of
26 Diminished Capacity and Competency” (2007); “Classification of High risk and Special
27 Management Prisoners, A National Assessment of Current Practices” (2004); “The
28 Assessment, Diagnosis, and Treatment of the Patient with Multiple Disorders” (2001);
“Psychiatric Assessment in the Criminal Justice Setting, Learning to Detect Malingering”
(1999); “Mental Illness and Drug Abuse” (1999); and “Assessment and Treatment of the
High Risk Offender” (1999). (Doc. 213-2 at 6-7).

² Defendants’ argument that Dr. Stewart is not qualified to give his opinions

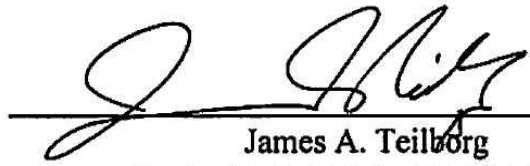
1 **IV. CONCLUSION**

2 Accordingly, the Court finds Dr. Stewart to be qualified to testify to the opinions
3 in his expert report under FRE 702 and *Daubert*. Additionally, his expert report meets the
4 requirements of FRCP 26.

5 Based on the foregoing,

6 **IT IS ORDERED** that the Defendants’ Motion to Exclude Plaintiffs’ Expert
7 Pablo Stewart, M.D. is **DENIED**.

8 Dated this 16th day of November, 2017.

9
10
11
12 
13 James A. Teilborg
14 Senior United States District Judge
15
16
17
18
19
20
21
22
23
24
25

26 because he is not a board-certified forensic psychiatrist is misplaced. That is not the
27 standard here. The “threshold for qualification is low, a minimal foundation of
28 knowledge, skill, and experience suffices.” *Heston*, 2007 WL 4754777, at *2. These
types of challenges are better reserved for cross-examination, as any “lack of
particularized expertise goes to the weight” of the testimony, “not to the admissibility . . .
as an expert.” *United States v. Garcia*, 7 F.3d 885, 890 (9th Cir. 1993).