

<p>DISTRICT COURT, LA PLATA COUNTY, COLORADO</p> <p>Court Address: 1060 E. 2nd Ave., Durango, CO 81301 Phone Number : (970) 247-2304</p> <p>Plaintiff: PEOPLE OF THE STATE OF COLORADO</p> <p>Defendant: MARK ALLEN REDWINE</p>	<p>DATE FILED: July 16, 2019</p> <p>COURT USE ONLY</p>
	<p>Case Number: 17CR343</p>
<p>ORDER REGARDING THE ADMISSIBILITY OF SCENT AND CADAVER DETECTION DOG EVIDENCE (D-36, D-37, D-38, D-39, D-40, and P-14)</p>	

The defendant is charged with murder in the second degree and child abuse resulting in death in relation to the death of the defendant's thirteen-year-old son, Dylan. During the investigation, law enforcement utilized several different dogs and dog handlers to use the dogs' sense of smell in an attempt to track Dylan, to attempt to corroborate the defendant's statements concerning Dylan's activities the night before he was reported missing,¹ and to determine if any human remains or decaying human tissue² were located at or had been previously located in the defendant's house, pickup truck, and other locations. The Court has previously made a preliminary ruling that the proper way to determine whether to admit such evidence is to conduct

¹ On the night that Dylan was reported missing, the defendant provided scent tracking dog handlers with a pillowcase that the defendant said Dylan had slept upon the night before so that dogs could attempt to track Dylan from the defendant's house. Law enforcement later doubted that Dylan had slept on that pillowcase and had the handler of a certified scent tracking dog conduct an experiment to determine if Dylan had slept on the pillowcase. See below.

² The generic term for dogs with this type of training is "Cadaver Dogs." The Court finds this term to be somewhat confusing as the dogs are trained to detect the odor of decaying human tissue and not to detect all or a significant portion of a deceased human body. The Court will therefore use the term "human remains detection" or the acronym "HRD" in this order.

an analysis pursuant to *Brooks v. People*, 975 P.2d 1105, 1114–15 (Colo. 1999), as modified on denial of reh'g (Apr. 12, 1999).³ See the Court's Order Regarding Dog-Sniff Evidence D-36, D-37, D-38, D-39, D-40, and P-14, issued on February 11, 2019. The Court further ordered that a motion in limine be held prior to the trial to determine if the appropriate foundational requirements of *Brooks*, with appropriate deviations when the evidence being presented is not specific to the trailing of a human being, had been established.⁴

Brooks held that the factors to be used in determining whether to allow the introduction of dog scent trailing evidence are:

1. Is the dog of a breed with acute powers of scent;
2. Has the dog been trained to follow a track by scent;
3. Has the dog shown to be reliable in following a track by scent;
4. Is the dog sniffing in a location that the person being tracked was known to have been;
5. Did the attempt at tracking take place within a reasonable amount of time considering the ability of the dog;
6. Is the dog-sniff evidence corroborated by other evidence; and,

³ The defense argued that the proper foundation to be met was to analyze this type of evidence as novel scientific evidence requiring a hearing pursuant to *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Since issuing the order on February 11, 2019, the Court has become aware of published opinions in four different states that allow the admission of HRD dog evidence in the “. . . context of experience-based specialized knowledge. . .” *Brooks*, p. 1114. These opinions are found in *State v. Brown*, 266 Kan. 563, 574, 973 P.2d 773, 780 (1999); *Clark v. State*, 140 Md. App. 540, 578, 781 A.2d 913, 935 (2001); *People v. Lane*, 308 Mich. App. 38, 53, 862 N.W.2d 446, 457 (2014); and, *Trejos v. State*, 243 S.W.3d 30, 49 (Tex. App. 2007).

⁴ The Court is primarily using the evidence presented at this hearing in issuing this order. However, due to the massive amount of evidence collected in this case, the numerous motions already litigated, and the Court's previous review of the grand jury transcripts in this case, the Court is also taking judicial notice of all the evidence that has previously been presented to the Court.

7. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice to the defendant pursuant to CRE 403.

Brooks, p. 1114. *Brooks* further held that:

It is important to note that these foundational considerations are best utilized as a mechanism for conducting a proper CRE 702 and CRE 403 analysis, and not as a substitute for the general philosophy embodied in our rules of evidence. As such, the emphasis a court might wish to afford each of these points might vary depending on the facts of a particular case.

Id., pp. 1114-1115.

The prosecution intends to introduce evidence that three different German Shepherds with three different handlers detected the odor of human remains in the defendant's house, inside the defendant's Dodge pickup, as well as in the pickup bed. In addition, the prosecution wishes to present evidence that one of the dogs detected the presence of human remains on the clothing that the defendant is believed to have been wearing the night of Dylan's disappearance, and that the defendant did not cooperate with the initial search for Dylan the day he was reported missing by giving dog handlers a pillowcase that Dylan purportedly slept on the night before his disappearance when, in fact, the pillowcase did not contain Dylan's scent. The Court therefore finds that the modified *Brooks* factors to be considered in regard to the HRD dog evidence are:

1. Is the dog of a breed with acute powers of scent;
2. Has the dog been trained to find the scent of human remains;
3. Has the dog shown to be reliable at finding human remains;
4. Was the dog searching in a location that the dog could reasonably be expected to find the scent of human remains;

5. Did the attempt at finding the scent of human remains occur within a reasonable amount of time considering the ability of the dog;
6. Is the dog-sniff evidence corroborated by other evidence; and,
7. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice to the defendant pursuant to CRE 403.

At the hearing (and for the purpose of determining the admissibility of the proposed expert testimony at trial only) the parties qualified four expert witnesses to support their arguments. The defense presented Dr. Mary Cablk who has scientific expertise in remote sensing by use of the auditory, visual and olfactory senses. Dr. Cablk was qualified as an expert in the science of canine human remains detection. The prosecution presented three witnesses, Carren Corcoran, Katie Steelman, and Rae Randolph, who were not scientifically trained but qualified as experts based on their experiential knowledge as trainers and handlers of HRD dogs.

It is apparent from the testimony of all four experts that different terms are used by various professionals in the field and that there is not consistency across the field as to the appropriate terms to use or whether certain descriptive terms are appropriate to use at all. In this order, the Court will use the word “alert” to mean an observable change in the behavior of a dog that indicates that the dog is smelling the odor of human remains but has not been able to pinpoint the location of highest concentrations of the odor. Various experts in the field use the terms “indicated” or “trained final response” to describe how HRD trained dogs convey that the dog has found the location of the highest concentration of HRD odor. For the purposes of this order, the Court will use the term “trained final response” or the acronym “TFR.”

Using the term “residual odor” is apparently controversial in the field. The term refers to the odors that linger after all of the human remains that create the odors have been removed from the searched location. Some handlers of HRD dogs do not use the term, saying that residual odor is meaningless and that “odor is odor.” According to the evidence at the hearing, there are reports in the HRD field of trained HRD dogs being able to detect the odor of decaying human remains for significant periods of time after human remains have been removed from the location being searched by HRD dogs. Dr. Cablk testified that there are no published studies as to how long the odor of decaying human remains linger after decaying human tissue has been removed from a location, but based upon her experience, it should be detectable by HRD dogs for no more than one week. Dr. Cablk argues that the odors detected by HRD dogs are made up of volatile organic compounds that are released from decaying tissue. Because the compounds are volatile, they degrade and change fairly quickly over time and that once the source of the compounds are removed, the molecules that the HRD dogs are able to detect dissipate. While this scientific explanation is reasonable, it is contradicted by persuasive, although anecdotal, evidence presented at the hearing on this motion that HRD dogs can detect decaying human tissue for significant periods of time after human tissue has been removed from the location the dog is searching.

The Court can theorize three reasons that HRD dogs may be able to detect human remains for significant amounts of time after decaying human remains have been removed from a location. The first may be that residual odor does exist and does not dissipate as fast as those in the scientific community believe. The second is that when decaying human tissue is at a location, it releases fluids and/or undetectably small amounts of human tissue that remain and/or are absorbed into the environment that properly trained HRD dogs are able to detect. The third

reason suggested by Dr. Cablk is that dogs are very sensitive to human facial expressions and can read extremely subtle changes in human expressions that handlers do not know they are exhibiting. Dr. Cablk theorizes that such unintentional cueing on the part of the HRD handlers or law enforcement personnel at the scene when the HRD dog is searching for the odor of human remains tips the dog off to the proper location to give a TFR.

The prosecution intends to introduce evidence of three different teams of HRD dogs and their handlers searching the Redwine house, pickup trucks, as well as other locations. Katie Steelman and her dog Darc and Rae Randolph and her dog Selah both searched for the odor of human remains in the defendant's house and trucks on November 29, 2012. Carren Corcoran and her dog Molly searched the Redwine house for the odor of human remains on August 5, 2013. All three dogs were German Shepherds which, according to Corcoran, is a breed with sufficient olfactory abilities to use for scent detection. The Court has reviewed the testimony of all three dog handlers and compared the testimony with prosecution exhibits and prepared the chart below which compares the results of the three teams as to areas all three teams searched for the odor of human remains.

In the chart below, an X indicates either a CBI test indicating the presence of blood⁵ or either an alert or a TFR by the three HRD dogs.

⁵ The CBI results are indicative of blood, not scientific proof of the presence of human blood.

Dog-Sniff Chart
Positive for Blood/Alert or Trained Final Response

	CBI⁶	Corcoran	Randolph	Steelman
Band-Aid in Garage	X			
Couch	X	X	X ⁷	
Loveseat	X	X ⁸		
Floor in front of Loveseat	X			
Coffee Table	X			
Floor under Rug in Living Room close to Coffee Table	X			
Duffel Bag in Bedroom of First Floor		X		
Bathroom Knobs under Sink	X ⁹	X		

⁶ The CBI field tests on the couch, loveseat, coffee table, and two areas of the floor in the living room were also tested with HemaTrace, which indicated presence of higher primate blood, specifically, human, gorilla, orangutan, and a lemur that is native to Madagascar.

⁷ Selah was interested in the couch area, not specifically the couch.

⁸ Corcoran testified Molly detected odor of human remains in the corner of the living room that she could not pinpoint. Based upon Exhibit 8, the odor was in an area where the couch and loveseat were located the night that Dylan was reported missing. In August 2013 when Molly searched the defendant's house, the couch and loveseat had been moved to different locations in the living room. See Defendant's Exhibit 1 and the testimony of Tonya Goldbricht.

⁹ This is a presumptive result for the presence of blood from testing of swabs taken from the knobs that were tested at CBI laboratories and not crime scene analysis at the defendant's house. See People's Exhibit 25, disc, p. 1814.

Dog-Sniff Chart (Continued)
Positive for Blood/Alert or Trained Final Response

	CBI	Corcoran	Randolph	Steelman
Washing Machine		X	X	X
Clothes Hamper			X	X
Front Entrance into Home		X	X (bottom of doorjamb)	
First Floor near Staircase		X		
Where Fireplace Equipment Located		X		
Defendant's Bedroom ¹⁰		X (next to bed)		X (bedroom dresser)
Dodge PU Driver's Side Backseat		X		
Dodge PU Driver's Side Door Seam		X		
Dodge PU Bed		X	X ¹¹	X

¹⁰ The bed and bedroom dresser were located on opposite sides of the bedroom according to People's Exhibit 9.

¹¹ On November 28, 2012, the day before the search warrant for Mr. Redwine's home was executed, Selah was brought to the Redwine home to try to locate Dylan through scent trailing. This effort was not successful. Ms. Randolph then gave Selah the cadaver search command and Selah showed interest in the tailgate of the Dodge truck. Selah was not given access to the bed of the pickup on November 28, 2012. Selah gave a trained final cadaver response on November 29, 2012, in the bed of the Dodge pickup.

Based upon the chart above, not all three dogs gave an alert or TFR on the same objects or in the same areas as each other or in areas that CBI indicated the presence of blood. Dr. Cablk testified that there are physiological and psychological thresholds for HRD dogs that determine whether they alert or give a TFR to the odor of decaying human remains. The physiological threshold is the amount of odor that a dog can physically detect. The psychological threshold is based upon the dog's training. Different dogs are trained to give a TFR on different quantities of odor detected. The physiological and psychological thresholds will vary between different dogs and may explain why all three dogs did not alert or give a TFR exactly as the other dogs.

Carren Corcoran and Molly

The most qualified HRD dog and handler presented by the prosecution was Carren Corcoran and her dog Molly. Corcoran has been a law enforcement officer for 29 years and began training and using HRD dogs in 1999. Corcoran has attended numerous trainings in HRD, has taught other dog handlers how to train their dogs in HRD, and in 2016 became a national certifying official to certify other dogs and their handlers in HRD. Although Molly, the dog Corcoran used in this case, did not pass her first attempt at certification in HRD when she was 18 months old, she was certified in HRD by the National Narcotic Detection Dog Association five times prior to her work in this case on an approximately yearly basis and two more occasions after working on this case. According to People's Exhibit 4, on the 72 times Molly was either certifying or training on a blind problem where Corcoran did not know the location of the training aid, Molly only gave a TFR one time that was a false identification of the odor of human remains. That false positive was in 2008, the first time Corcoran attempted to certify Molly. If the times Molly failed to give a TFR on a known odor of decaying human remains is included in the reliability calculations, Molly's reliability rate is 91%. According to

Corcoran's testimony, Molly found 14 whole or nearly whole human bodies in the field after she was first certified.

Molly was not initially used in this case until August 4, 2013, slightly more than nine months after Dylan's disappearance. However, on at least three different occasions during Molly's career, she was able to give a TFR to the odor of decaying human remains, what would be described by some in the field as residual odors, after the bodies had been removed from the scene. One of these occasions occurred approximately four years after a body had been removed from an apartment. The locations of these TFRs were confirmed by the confessions of the three defendants in homicide cases. Although it is unclear from the testimony presented at the hearing as to when all three confessions were given, Ms. Corcoran was not aware of the confessions at the time of the searches and at least one of the confessions was given after Molly had conducted her search.

In this case, partial remains of Dylan were recovered off of Bear Creek Loop, a mountain trail near Middle Mountain Road, in late June of 2013. On August 6, 2013, the La Plata County Sheriff's Office brought Corcoran and Molly to the area to see if Molly could locate any additional remains of Dylan. While Molly did not give a TFR at any areas where additional remains could be found, she did give a TFR at the location Dylan's partial remains were found and removed more than a month prior to this search. While it can be argued that the TFR on "residual odors" was the result of cueing on the part of Corcoran or other individuals on the scene, Corcoran testified that she was not aware of the exact locations as to where Molly should be expected to make a TFR in any of these searches. Corcoran testified that it is her practice to keep others present, during her work with HRD dogs, behind her. In at least one of the three cases where the prior location of human remains were identified by confession, they did not

occur until after Molly's search. In Molly's search of Bear Mountain Loop, law enforcement officers were shielded from Molly's view when she gave her TFR at the location where Dylan's remains had previously been found. Based upon these facts, the Court does not find that Molly was cued prior to giving her TFRs during any of her searches in this case.

Based upon the testimony given at the hearing upon these motions, as well as the exhibits admitted at the hearing, the Court finds that as to the modified *Brooks* factors that Molly was a dog with acute powers of scent and had been trained to find and was reliable in finding the scent of decaying human remains.

Substantial circumstantial evidence exists that implicates the defendant in the crimes charged. This evidence includes, *inter alia*, that the last person known to have seen Dylan alive was the defendant. The defendant admitted that Dylan was at his house the night before he was reported missing. Dylan intended to confront the defendant with compromising photographs of the defendant during this last visitation. The defendant reportedly flew into a violent rage at other individuals when they confronted him with the act depicted in at least one of the photographs. If the defendant committed the acts charged, it is likely that the crime occurred in the defendant's house.

The Court finds sufficient reason existed for law enforcement to believe that the odor of decaying human tissue would be present at the time all three HRD searches were conducted at the defendant's house. The search of the truck and house occurred within a reasonable amount of time within which Molly has been shown to be able to detect the odor of decaying human remains. Six out of twelve of Molly's alerts or TFR behaviors in this case are corroborated by

CBI or two other properly trained HRD dogs.¹² The Court finds that the proposed evidence the prosecution intends to present through Ms. Corcoran is very probative in this case and that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. The Court will allow the prosecution to present Ms. Corcoran's observations of Molly's HRD searches in this case at the trial.¹³

Katie Steelman and Darc

Ms. Steelman has been training German Shepherds since 1983 and began training her dogs in search and rescue in 2005. She obtained Darc in 2007 and began training Darc in wilderness air scent and HRD. Darc has not been certified in HRD by any outside agency. According to People's Exhibit 16, Ms. Steelman has attended at least seven seminars to teach her how to train her dogs in HRD between 2009 and October of 2012. In 2010, Ms. Steelman was tasked by La Plata County Search and Rescue to develop training protocols for dogs that were used by search and rescue, and such protocols included the manner in which La Plata County Search and Rescue volunteer dog handlers trained their dogs in HRD. In developing the protocols, Ms. Steelman reviewed the standards and protocols of teams and agencies around the country.

The Court has reviewed Darc's reliability chart, People's Exhibit 18. Ms. Steelman began testing Darc in 2009 in HRD. From August 11, 2009, through the last training prior to the search at the defendant's house in November of 2012, Darc was tested on 276 tasks. During

¹² In this order, the Court is finding that all three dogs that were discussed at the hearing were properly trained HRD dogs. The Court's order below disallowing Ms. Randolph to testify about Selah's HRD work in this case is not a reflection of Ms. Randolph's expertise as a handler or of Selah's abilities in HRD. The Court is denying the introduction of Selah's HRD work in this case based upon a CRE 403 analysis of all of the facts in this case.

¹³ The Court will also allow Ms. Corcoran to testify about Molly's behaviors during the HRD searches of Mr. Redwine's clothing and the Bear Creek Loop trail HRD search. The Court finds that as to these searches, the evidence clearly meets the *Brooks* test as modified by the Court for the purposes of HRD.

those tests, Darc did not give any false positives, i.e., Darc did not give a TFR on any area or item that did not contain decaying human remains. Thirty-one of the tasks listed on Darc's reliability chart from June 30, 2012, until Darc participated in the search of the defendant's house were blind searches. When counting tasks where Darc failed to properly give a TFR on decaying human remains as errors, Darc had a 95.6% success on testing from August 11, 2009, through the time Darc searched the defendant's house. Ms. Steelman is conscious of cuing and took precautions not to cue Darc when training and working with him.

Based upon the testimony given at the hearing upon these motions, as well as the exhibits admitted at the hearing, the Court finds that as to the modified *Brooks* factors that Darc was a dog with acute powers of scent. While Darc was not certified by an outside agency in HRD, the Court finds that Darc had been properly trained to find and was reliable in finding the scent of decaying human remains. As stated above, the Court finds sufficient reason existed for law enforcement to believe that the odor of decaying human tissue would be present at the time all three HRD searches were conducted at the defendant's house. The search of the truck and house occurred within ten days of Dylan being reported as missing which is a reasonable amount of time within which HRD dogs have been shown to be able to detect the odor of decaying human remains and that three out of four of Darc's alerts or TFR behaviors in this case are corroborated by another properly trained HRD dog. The Court finds that the evidence that the prosecution intends to present through Ms. Steelman is very probative in this case and that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. The Court will allow the prosecution to present Ms. Steelman's observations of Molly's HRD searches in this case at the trial.

Rae Randolph and Selah

The prosecution is attempting to qualify Ms. Randolph to testify at the defendant's trial concerning the sniff search of the defendant's house and vehicles, as well as a test she designed to determine if Dylan's scent was detectable on a pillowcase given to search and rescue personnel on November 19, 2012, the night after he disappeared. Ms. Randolph first began training dogs in Minnesota in 1996 and began training Selah, the dog used in this case, in HRD in 2009. According to Ms. Randolph's CV, from 2009 through the fall of 2012, Ms. Randolph and Selah personally attended three separate training sessions that consisted of 120 total hours of HRD training. From April of 2007 through the fall of 2011, Ms. Randolph and Selah personally attended three separate trainings for trailing that consisted of a total of 110 hours of instruction. From August of 2009 through the fall of 2012, Ms. Randolph and Selah personally attended three separate trainings for both cadaver and trailing that consisted of a total of 120 hours of instruction. Selah was certified by Tri-State¹⁴ in trailing in May of 2010. She was certified by Tri-State in cadaver at a level 2 certification, but Selah was not certified in cadaver until September of 2013, ten months after the search at the defendant's house.

The Court considered several factors in making its determination as to whether to allow Ms. Randolph to testify about Selah's HRD work in this case. Several factors that argue against admitting Ms. Randolph's testimony regarding HRD¹⁵ is, first, Selah was not certified in HRD at

¹⁴ Tri-State is a regionally recognized dog training and certification agency.

¹⁵ The Court is not considering in this analysis that Selah had a TFR in the water at Vallacito Lake on two successive days or the fact that Selah showed alert behavior (not a TFR) at a cabin near the defendant's home and no human remains were found at those locations. Dr. Cablk and other witnesses at the hearing testified that HRD dogs in the field are not in a controlled situation. In these situations, it is impossible to know if small amounts of decaying human remains are present or had been present at locations for which HRD dogs give alerts or TFRs, but no human tissue is found. These situations in the field are not considered to be false positive responses by HDR dogs.

the time of this case.¹⁶ Second, the cross-examination and voir dire examination of Ms. Randolph can most charitably be described as difficult for Ms. Randolph. Third, Ms. Randolph admitted that prior to being called out to work on this case that her record keeping was lacking in regard to Selah's training and that many of Selah's training records were missing due to a divorce, two house moves, and two office moves.

The Court has reviewed People's Exhibit 14 which are Selah's training records provided to the Court at the hearing on these motions. The Court notes that many of these records are difficult to decipher and understand, while others are easier to read and more understandable. The notes in Exhibit 14 that specifically relate to this case are typed and easy to understand. In Exhibit 13, Selah's reliability log, there is a ten-month gap of testing from August 25, 2009 through July 8, 2010. Exhibit 14 contains no training records for Selah from August 25, 2009 until June 4, 2010. A second gap exists in both the reliability log and training records from November 27, 2010 until February 14, 2011. A third significant gap in the training records occurs from approximately June 8, 2011 until August 7, 2011. See Exhibit 14, discovery pages 22,006, 24,250-24,258, and 22,007.¹⁷ There are no training records from August 29, 2011, until Ms. Randolph and Selah were called to work on this case on November 24, 2012. It was clearly established at the hearing on these motions that, at a minimum, HRD dogs should be trained at least 16 hours per month and Ms. Randolph cannot substantiate such training for significant periods of time, including 14 months immediately preceding Selah's work on this case.

¹⁶ While using a dog certified by an outside agency in HDR is highly persuasive evidence that the dog is capable of HDR, the Court finds that the lack of certification, by itself, does not make evidence from an HDR dog handler inadmissible.

¹⁷ Exhibit 14 was presented to the Court by date, not by the chronological discovery number.

Factors that support the Court finding that Ms. Randolph should be allowed to testify about Selah's HRD work in this case include the fact that Selah achieved a level 2 certification ten months after Ms. Randolph and Selah were asked to work on this case. Ms. Randolph and Selah spent a significant amount of time in training seminars learning and training to become more proficient at HRD. Of the training records that exist and are understandable, it appears to the Court that Selah was very competent at detecting the odor of decaying human remains. The reliability chart of testing of Selah indicates that from June 26, 2009, through sometime in June of 2011, Selah did not have any false TFRs and when misses are included as errors, Selah had a 97% rate of success at HRD. Finally, the Court notes that during the search of the defendant's house and pickup trucks, the five times Selah gave alerts or TFRs on objects or in locations, those same objects or locations had independently been identified by Molly and/or Darc as smelling of decaying human remains. In addition to confirmation by the other HRD dogs, CBI crime scene testing indicated the presence of blood on the couch that Selah indicated contained decaying human remains.

Based upon the testimony given at the hearing upon these motions, as well as the exhibits admitted at the hearing, the Court finds that as to the modified *Brooks* factors that Selah is a dog with acute powers of scent, has been trained to find and is reliable in finding the scent of decaying human remains. As stated above, circumstantial evidence existed for law enforcement to believe that the odor of decaying human tissue was present at the time Selah searched the defendant's house. The search of the truck and house occurred within a reasonable amount of time within which a properly trained HRD dog can detect the odor of decaying human remains, and Selah's alert and TFR behavior in this case is corroborated by other evidence. However, because of the gaps in Selah's training records, particularly the lack of records for the 14 months

immediately preceding Selah's HRD searches in this case, her lack of certification in HRD prior to working this case, the Court finds that the presentation of Ms. Randolph's testimony concerning Selah's HRD work in this case is prejudicial to the defendant and will be cumulative. When considering that Corcoran, Steelman, and CBI Agent Clayton will testify to the presence of decaying human remains or blood on the same items or locations as the proposed HRD testimony of Ms. Randolph, the Court does not find Ms. Randolph's HRD testimony to be as probative for the prosecution as it would be if she were the only witness available to testify regarding HRD. The Court finds that pursuant to CRE 403, that the probative value of Ms. Randolph's proposed HRD testimony is substantially outweighed by the danger of unfair prejudice and the needless presentation of cumulative evidence. The Court will not allow Ms. Randolph to testify concerning Selah's HRD work in this case.

The prosecution intends to introduce evidence that when Dylan was first reported as missing on November 19, 2012, by the defendant, law enforcement called out search and rescue tracking dogs to try to use scent tracking to find Dylan. The defendant provided search and rescue dog handlers with a pillowcase that Dylan reportedly slept on the previous night. The scent tracking dogs were unable to obtain a scent to track Dylan away from the defendant's house. Based upon the circumstances of the case, law enforcement became suspicious that the defendant was misleading the search and rescue dog teams about Dylan sleeping on the pillowcase in an attempt to mislead the investigation.

On November 26, 2012, Ms. Randolph set out numerous items, including the pillowcase, in the exhibition hall of the La Plata County fairgrounds. Ms. Randolph then had Selah sniff Dylan's baseball cap that had been provided by Dylan's mother from her home in Colorado Springs. Ms. Randolph then gave Selah the tracking command. Selah did not alert or give a

TFR on the pillowcase or on any item in the exhibition hall. Ms. Randolph then removed Selah from the room, removed the pillowcase and placed another item in the exhibition hall that belonged to Dylan that had been brought to Durango by his mother. Selah was again scented on Dylan's baseball cap and identified the new item that belonged to Dylan by sitting next to it. See Exhibit 14, discovery p. 20,122.

In determining whether to allow Ms. Randolph to testify regarding the pillowcase test, the Court finds it is appropriate to consider the evidence in light of the *Brooks* seven-part test, not the modified test the Court has devised regarding HRD. The test required Selah to use the same training and skills that she uses in scent tracking of human beings. The Court sees no practical difference between the two tasks. Based upon the testimony given at the hearing upon these motions, as well as the exhibits admitted at the hearing, the Court finds that Selah is a dog with acute powers of scent. Selah has been certified by an outside agency that has certified her ability to track humans. Selah was successful at finding a lost prospector in the field in November of 2012, and according to fellow La Plata County Search and Rescue dog handler Roy Vreeland, Selah was very competent at scent tracking.

The pillowcase test occurred on November 26, 2012, seven days after the pillowcase had been given to search and rescue dog handlers. If the defendant was not misleading law enforcement about the pillowcase, Dylan's scent should have been detected by a trained scent tracking dog. While there was evidence from Katie Steelman that a dog that is properly trained in wilderness air scent can detect an odor of a human for up to 48 hours, no evidence was presented as to the amount of time human scent will be detectable from items worn by or in this case slept on by a person. The Court believes that this lack of evidence can easily be remedied by the prosecution and will allow the prosecution to present this temporal evidence at trial. The

Court notes that the same lack of training records exist as to scent trailing as are missing with respect to HRD.

The Court finds that although no evidence directly corroborates the belief that the defendant was attempting to mislead the search and rescue dog handlers, substantial circumstantial evidence exists that implicates the defendant in the crimes charged. If the defendant committed the crimes charged, he would have had a motive to mislead law enforcement about whether Dylan slept on the pillowcase. While the Court finds that this *Brooks* factor is the weakest link in the analysis as to whether to admit the pillowcase evidence, *Brooks* allows the Court to vary the importance of each prong of the test depending on the circumstances in the case. *Brooks*, pp. 1114-1115.

The Court notes that all or nearly all of the evidence against the defendant in this case is circumstantial and if the jury believes that the defendant intentionally misled the scent tracking dog handlers, such evidence will be very probative as to whether the defendant committed the crimes charged. Other than the inability of the scent tracking dogs to find a trail of Dylan's scent the night he was reported missing, there is no other evidence of which the Court is aware that is available to the prosecution to support its theory that the defendant intentionally misled the people attempting to find his missing son. Because of the greater probative value that Ms. Randolph can provide the prosecution regarding the pillowcase test than the probative value her HRD testimony would provide the prosecution, the Court finds that the probative value of the pillowcase test evidence is not substantially outweighed by the danger of unfair prejudice to the defendant.¹⁸ The Court therefore will allow the prosecution to present evidence regarding

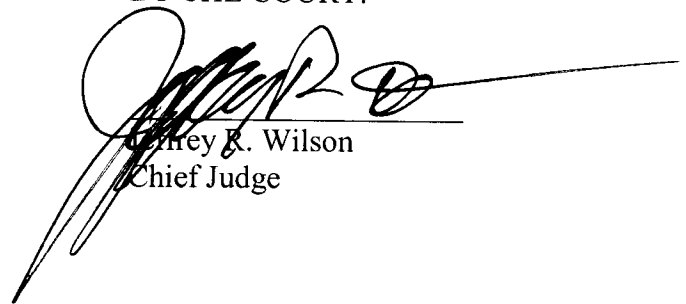
¹⁸ While the defense may cross-examine Ms. Randolph in any appropriate manner at trial, the Court warns the defense that should the cross-examination of Ms. Randolph leave the impression with the jury that the Court, by this order, has found Ms. Randolph is less than credible or that the Court does not find Selah to be reliable in scent

Ms. Randolph and Selah's pillowcase test, as long as sufficient evidence is first provided at trial that it was reasonable to believe that Dylan's scent would have been detectible on the pillowcase, baseball cap, and third undescribed item belonging to Dylan that were used in the test.

For the foregoing reasons, the Court finds that Ms. Corcoran, Ms. Steelman, and Ms. Randolph have substantially more specialized knowledge due to their training and experience than the trier of fact in this case and, pursuant to CRE 702, are qualified as expert dog handlers in the area of HRD. For the same reasons, the Court also finds Ms. Randolph is qualified as a dog handler in the area of scent tracking. Ms. Corcoran and Ms. Steelman will be allowed to testify as to how they and their dogs conducted the HRD searches in this case, their dogs' behaviors during those searches, and their opinions as to the reasons that their dogs behaved as they did during the searches. Ms. Randolph will be allowed to testify as to how she and Selah conducted the pillowcase test in this case, Selah's behavior during that test, and Ms. Randolph's opinion as to the reason that Selah behaved as she did during the pillowcase test.

DONE this ^{16th} day of July, 2019.

BY THE COURT:



Jeffrey R. Wilson
Chief Judge

tracking, the defense may be opening the door for the Court to conduct a new CRE 403 analysis regarding Ms. Randolph's HRD as there may be new considerations regarding the probative value of her testimony.