

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)
Plaintiff,)

v.)

Case No. 09-M-9317-01-KGG

JAMES A. BAILEY,)
Defendant.)
_____)

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
GRANTING DEFENDANT'S MOTION FOR CAUTIONARY INSTRUCTION**

On June 2, 2011, this matter comes on for hearing upon the Defendant's Motion to Dismiss for Failure to Preserve Evidence or, in the Alternative, Motion for Proposed Cautionary Instruction (Doc. 19). The government is represented by Special Assistant U.S. Attorneys Bryan J. Goldberg and Robin Graham . The Defendant is present and represented by his attorney Syovata K. Edari, Assistant Federal Public Defender.

The Court has heard and considered statements of counsel. Counsel have stipulated that the evidence that is the subject of Defendant's motion, a video recording of Defendant's encounter with law enforcement at the time of the alleged offense, did exist at one time. The parties agree that the evidence was lost or destroyed through accident. The parties agree that although the government had a duty to preserve the evidence, its failure to do so was not intentional or in bad faith. The parties agree that under these facts the defense is not entitled to an order dismissing this case, but that the cautionary instruction proposed by the defense is appropriate.

IT IS THEREFORE ORDERED, that the Defendant's motion to dismiss is denied. The Defendant's alternate motion for a cautionary instruction as proposed in his motion is granted.

S/ KENNETH G. GALE

Kenneth G. Gale

United States Magistrate Judge