

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	<b>Case No. 7:01-CR-00020</b>
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	<b><u>and ORDER</u></b>
<b>STEPHEN AUBREY MCININCH,</b>	)	
	)	<b>By: Samuel G. Wilson,</b>
<b>Defendant.</b>	)	<b>Chief United States District Judge</b>

On February 21, 2001, the grand jury indicted the defendant, Stephen Aubrey McIninch (“McIninch”), on three counts of arson stemming from events alleged to have occurred on June 28, 2000, at Pebble Creek Apartments, and September 24-25, 2000, at Ridge Apartments. In Counts I and III, McIninch is accused of setting several welcome mats on fire. Following standard procedure, investigators at the scene of the fires removed a portion of the mats, containing both burned and unburned sections, for testing. The remainder of the welcome mats were left at the scene of the fires and are now unavailable. On July 16, 2001, McIninch filed a motion to dismiss the indictment on the grounds of spoliation of the welcome mats, or, in the alternative, to suppress the government’s evidence regarding the welcome mats. The court allowed the government more time to brief and argue this issue since it was unaware of McIninch’s motion. This issue is now before the court on McIninch’s renewed motion to dismiss, or, in the alternative, to suppress the evidence taken from the welcome mats.

Additionally, McIninch has filed a renewed motion to suppress evidence regarding one of the government’s expert witnesses. The government was directed by the court to turn over summaries of its expert opinions pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E). McIninch objected to the form of some of these summaries, arguing that they did not comply with

Rule 16(a)(1)(E) or the court's order. The court found that several of the summaries did not meet the requirements of Rule 16(a)(1)(E) and allowed the government until August 7, 2001 to correct the deficiencies. The government has since provided McIninch with additional information regarding their expert witnesses. McIninch, however, still objects to one of the government's expert witnesses, Rodney Ferguson. McIninch has filed a renewed motion to suppress the expert report and testimony of Rodney Ferguson.

Finally, McIninch has filed a motion to suppress certain video tapes created by the government as reconstructions of the events surrounding Count I. McIninch claims that these video tape reconstructions are not substantially similar to the actual events. The court will address each of these issues in turn.<sup>1</sup>

## I.

First, the court will address McIninch's motion to dismiss the indictment or suppress evidence relating to the spoilation of the welcome mats. McIninch argues that, because the government failed to preserve all of the mats after taking only a small sample, his defense is prejudiced. McIninch argues that under Arizona v. Youngblood, 488 U.S. 51 (1988), the due process clause of the Constitution requires that the indictment be dismissed or the evidence of the mats suppressed.

The Constitution imposes a duty on law enforcement to preserve evidence when that evidence is expected to play a significant role in the suspect's defense. See California v.

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<sup>1</sup>McIninch also filed a motion to suppress lab results of McIninch's printer and fingerprint and paper analyses of notes seized from McIninch's door. The government, however, indicated in its response to McIninch's motion that it will not introduce any scientific evidence concerning fingerprints or paper analysis.

Trombetta et al., 467 U.S. 479, 488 (1984). To meet the standard of constitutional materiality, however, the “evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” See id. at 489. Furthermore, in Arizona v. Youngblood, the Supreme Court held that when evidence is potentially exculpatory and permanently lost the defendant must show bad faith on the part of the police to establish a violation of due process. 488 U.S. 51, 58 (1988).

Here, McIninch has failed to establish the necessary elements. First of all, McIninch has not demonstrated that the government has destroyed anything. The investigators simply preserved a portion of the mats and left the remaining portion at the crime scene. It is not clear that the government’s failure to preserve the entire mat is the same thing as destroying evidence. Regardless, McIninch has not established that the portion of the mat not preserved by the police possessed any exculpatory value. Additionally, McIninch has not shown that he is unable to obtain comparable evidence by other reasonably available means. McIninch has not demonstrated that he is unable to test the portion of the mat preserved by the police to find comparable evidence. Furthermore, McIninch has not demonstrated any bad faith on the part of the police. The police were following standard procedure when they cut a portion of the mat to be tested and left the rest of the mat at the crime scene. Furthermore, there is no evidence that the police knew or suspected that the remainder of the mat, which they did not preserve, had any exculpatory value. There simply is no evidence of bad faith on the part of the police.

For the reasons stated above, McIninch’s motion to dismiss and motion to suppress evidence of the mat is denied.

## II.

McIninch also filed a renewed motion to suppress the expert report and testimony of Rodney Ferguson because the government did not comply with the requirements of Rule 16(a)(1)(E). This rule requires the government, upon request, to disclose to the defendant a written summary of the testimony of any experts it intends to use, including a description of the bases and reasons for their opinions, and the witnesses' qualifications. The court finds that the summaries provided by the government are sufficient to give McIninch notice of the testimony of Rodney Ferguson, the bases and reasons for his opinion, and his qualifications. Since the government has substantially complied with Rule 16(a)(1)(E) and this court's order, the court denies McIninch's motion to suppress the expert report and testimony of Rodney Ferguson.

## III.

McIninch also moves to suppress the introduction of video tape reconstructions of the events surrounding Count I. Video taped evidence purporting to recreate events at issue must be substantially similar to the actual events to be admissible. Hinkle v. City of Clarksburg, 81 F.3d 416, 425 (4th Cir. 1996). Perfect similarities, however, are not required, and dissimilarities may go to the weight of the evidence instead of admissibility. See Ramseyer v. General Motors Corp., 417 F.2d 859 (8th Cir. 1969).

Here, the government has indicated that the evidence concerning the crime scene and the similarity of the reconstruction to the crime scene will be established prior to the government's expert testifying to his scientific testing conducted in the video tapes. Therefore, the court will take McIninch's motion regarding these video tapes under advisement and will rule on their admissibility as the evidence develops at trial.

**IV.**

For the reasons stated above, it is **ORDERED** and **ADJUDGED** that McIninch's motion to dismiss Counts I and III and his motion to suppress evidence regarding the welcome mats is **DENIED**. Likewise, McIninch's motion to suppress the expert report and testimony of Rodney Ferguson is **DENIED**. Finally, the court will take McIninch's motion to suppress the video taped reconstructions under advisement and will rule on the admissibility of this evidence at trial.

**ENTER:** This \_\_\_ day of August, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE