

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Case No. 2:17-cr-24

Plaintiff,

Hon. Robert J. Jonker
Chief U.S. District Judge

vs.

DERRICK GARRELL SAMUELS,
a/k/a “Bam,”

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT’S MOTION TO
ADMIT CERTIFICATION OF LACK OF RECORD

A. Introduction.

The evidence in this case will show that Defendant was in possession of large amounts of U.S. Currency during the time of the conspiracy charged in Count 1 of the superseding indictment. (PageID.66.) The government will also introduce evidence showing that Defendant had limited or no legitimate income during this time. The government will establish this fact, in part, by introduction of a “Certification of Lack of Record” issued by the Commissioner of the Internal Revenue Service (IRS) showing that Defendant did not file IRS Form 1040s (U.S. Individual Tax Returns) for 2014, 2015 and 2016.

Pursuant to Fed. R. Evid. 803(10) and 902(1), the government respectfully moves this Court for an order admitting into evidence government exhibit “Gen-8”, which is a signed and sealed “Certification of Lack of Record”, issued by the IRS,

and showing that Defendant did not file IRS Form 1040s (U.S. Individual Income Tax Returns) for the following time periods: Jan. 1, 2014 – Dec. 31, 2014; Jan. 1, 2015 – Dec. 31, 2015; and Jan. 1, 2016 – Dec. 31, 2016.

The government provided counsel for Defendant notice of its intent to admit this record – a record showing the absence of a public record – on January 17, 2018, and also provided a copy of this Certification of Lack of Record to counsel. The government will bring the original signed and sealed document to any hearing the Court schedules on this matter or to the final pretrial conference.

The government intends to offer government exhibit Gen-8 into evidence during trial in the above-captioned case.

B. Applicable Rules.

Rule 803(10) of the Federal Rules of Evidence provides as follows:

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice-- unless the court sets a different time for the notice or the objection.

Rule 902(1) of the Federal Rules of Evidence provides as follows:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

C. Argument.

Government exhibit Gen-8 is a “Certification of Lack of Record” issued by the IRS. The certification states:

- (1) that the Commissioner of the IRS has custody of Federal tax records,
- (2) that the Commissioner of the IRS would have Defendant’s Form 1040s (U.S. Individual Income Tax Returns) for Jan. 1, 2014 – Dec. 31, 2014; Jan. 1, 2015 – Dec. 31, 2015; and Jan. 1, 2016 – Dec. 31, 2016, and
- (3) that, “having made a diligent search for the described record(s), no such record(s) or entry(ies) pertaining to such record(s) was/were found.”

The “Certification of Lack of Record” is signed by an IRS disclosure specialist and states the following:

Under authority of Commissioner Delegation Order 11-5 (or redelegation thereunder), I certify that the foregoing is true and correct, and I have signed this certification and affixed to it the seal of office of the Internal Revenue Service.

The “Certification of Lack of Record” bears the IRS seal.

Pursuant to Fed. R. Evid. 902(1), this “Certification of Lack of Record” (government exhibit Gen-8) is self-authenticating. Pursuant to Fed. R. Evid. 803(10), this “Certification of Lack of Record” is admissible into evidence to show an absence or non-existence of tax filings by Defendant for tax years 2014, 2015 and 2016. *See United States v. Neff*, 615 F.2d 1235, 1242 (9th Cir. 1980) (holding that the IRS Certificate of Assessment and Payments, which was authenticated under Fed. R. Evid. 902(1) and (4), and which showed the “nonoccurrence” of defendant’s tax returns, was admissible under the Rule 803(10) exception to the hearsay rule).

D. Conclusion.

For the reasons stated above, and pursuant to Fed. R. Evid. 803(10) and 902(1), the government respectfully asks this Court to enter an order admitting into evidence government exhibit Gen-8, which a statement by the IRS regarding the absence of a public record.

Respectfully submitted,

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Date: Jan. 21, 2018

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