

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) Criminal Number 07-41-P-S
)
 DARIO GIAMBRO)

MOTION IN LIMINE RE: EVIDENCE OF ABSENCE OF REGISTRATION OF
FIREARM IN NATIONAL FIREARM REGISTRATION AND TRANSFER RECORD
(F.R.E. 803(10))

During the trial of this matter, it is anticipated that the government will present evidence, either in the form of a certificate pursuant to F.R.E. 902 or testimony of the person who conducted the search¹, that a search of the National Firearms Registration and Transfer Record was conducted and that there was no record of the subject firearm being registered there.² It is anticipated that the government will offer this evidence pursuant to F.R.E. Rule 803(10). Mr. Giambro submits that this evidence is inadmissible. Because the NFRTR is incomplete and unreliable, and therefore, not trustworthy, Rule 803(10) does not support admission of any evidence that is derived from a search of the NFRTR.

¹ This motion in limine does not address the admissibility of this evidence under *Crawford v. Washington*. The defense reserves the right to address the confrontation clause issue should the government choose not to call the agent who conducted the search and instead rely on the certificate to prove that the firearm was not registered.

² The elements of the crime of Possession of an Unregistered Firearm are (1) that the defendant knowingly possessed the firearm, (2) that the firearm was of a kind that is required to be registered, (3) that the defendant knew that the firearm was of a kind that was required to be registered, and (4) that the firearm was not registered in the National Firearms Registration and Transfer Record. *Staples v. U.S.*, 511 U.S. 600 (1994).

F.R.E. 803(10)

F.R.E. Rule 803(10) allows admission, as an exception to the hearsay rule, of a certificate, pursuant to F.R.E. 902, or testimony, that a diligent search of records regularly made and preserved by a public office or agency was conducted, and that the search failed to disclose the presence of a particular record, to prove the absence of the record.

The Second Circuit Court of Appeals considered the admissibility of Rule 803(10) negative search evidence in the context of unemployment records in *United States v. Robinson*, 544 F.2^d 110 (2nd Cir. 1976). The Department of Labor employee called by the government testified that the records were unreliable and that the absence of a record of an unemployment benefit payment to the defendant did not necessarily mean that the payment was not made. The trial judge admitted the testimony, observing that the reliability problems went to weight and not admissibility. The Court of Appeals found error in the trial judge's admission of the evidence and granted the defendant a new trial. The Court summed up its rationale with the following excerpt:

Evidence that is otherwise admissible under an exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but, if in a particular instance, the circumstances indicate a lack of trustworthiness, the evidence should be excluded. See *United States v. DeGeorgia*, 420 F.2d 889, 895-96 (5th Cir. 1969). The question of trustworthiness is a crucial threshold issue of law going to admissibility, and it must be resolved first by the trial judge before it becomes a question of weight for the jury. *United States v. Robinson*, 544 F.2d 110, 115 (2nd Cir. 1976).

In the context of the NFRTR, the government cannot show that evidence of the results of the NFRTR search is trustworthy because the NFRTR, like the Department of Labor records in *Robinson*, supra, is incomplete and unreliable. Therefore, based upon the evidence discussed below, the negative search evidence is not admissible pursuant to 803(10) or any other evidentiary rule.

In 1997, as a result of concerns about its accuracy and completeness, Congress requested an audit of the NFRTR. An audit report, dated October 26, 1998, was issued by the Treasury Department Inspector General that identified significant reliability problems with the NFRTR, including that National Firearms Act documents had been destroyed by contract employees.³ (See attached defense Exhibit 1). A follow-up report was issued on December 18, 1998, that noted “an increased risk that the registry would not always reflect all NFA weapons and could adversely affect Congress’ intent to control these weapons.” (See attached defense Exhibit 2, Cover Memorandum) In 2005, the Congressional Research Service conducted an investigation into problems with the NFRTR and issued a Memorandum that summarized the findings of the Inspector General audit and noted that the “accuracy and completeness of the NFRTR remains an open question.” (See attached defense Exhibit 3, Page 9). More recently, in 2007, a review of the NFRTR ~~was conducted~~, by the Department of Justice Inspector General determined that the NFRTR is unreliable, noting that “continuing management and technical deficiencies contribute to inaccuracies in the NFRTR database.” (See attached defense Exhibit 4, Page iii). Of note, with regard to technical deficiencies, the 1997 audit

³ The audit report stated that the types and numbers of records destroyed could not be determined. Exhibit 1, page 1.

reported that “Older NFRTR records with empty data fields can improperly exclude the records from search results.”(See Exhibit 4, Page viii)

During the hearing of this motion, the defense will also present the testimony of Eric M. Larson. Mr. Larson is a senior analyst at the U.S. Government Accountability Office.⁴ Mr. Larson has researched the NFRTR and has concluded that the NFRTR is incomplete and unreliable. (See attached defense Exhibit 5).

In support of its opposition to this motion, the government may cite the Tenth Circuit case of *United States v. Rith*, 164 F.3d 1323 (10th Cir. 1999). In *Rith*, a prosecution for Possession of an Unregistered Firearm, the government introduced a certificate, pursuant to F.R.E. 902, evidencing the negative search results of an NFRTR search. The defense objected on the basis, amongst other bases, that the NFRTR was not trustworthy and, therefore, Rule 803(10) should not apply to admit the certificate because to do so would be a violation of the Confrontation Clause. In support of this claim, the defense proffered a statement by Tom Busey, then Chief of the National Firearms Act Branch, that NFRTR searches had been only 50% accurate but that improvements had been made so that the error rate had been reduced to 1.5%. Based upon that proffer, the trial court admitted the evidence and the Court of Appeals affirmed, holding that the NFRTR was sufficiently reliable to satisfy Confrontation Clause concerns.

This case is easily distinguishable from *Rith*. Here, the record is replete with documentary evidence, found in the public record and expert opinion evidence, that the NFRTR is incomplete and unreliable. In *Rith*, the only evidence of record that the

⁴ Mr. Larson’s opinions and conclusions in this case are unrelated to his work at the Government Accountability Office Office. (The name of the General Accounting Office was changed to the Governmental Accountability Office on July 2, 2004 by Sec. 8(a) of the GAO Human Capital Reform Act of 2004, Public Law 108-271.)

NFRTR was unreliable was the proffer of the statement of the Chief of the National Firearms Act Branch.⁵ Also, the Court in *Rith* examined the reliability of the NFRTR in light of a Confrontation Clause challenge and determined, essentially, that cross-examination of the person who conducted the NFRTR search would not be helpful to the defense and, therefore, the Sixth Amendment did not require live testimony. The Court did not examine the question, posed here, of whether negative search results from an incomplete and unreliable data base can qualify for admission under a hearsay exception that, like all hearsay exceptions, has as its underlying premise that the data base is trustworthy. Therefore, the *Rith* case is not helpful to the government's position.

CONCLUSION

For the reasons set forth above, Defendant requests that the Court, grant a hearing on this motion and, after hearing, exclude, as not admissible under F.R.E. 803(10), any evidence derived from a search of the NFRTR.

Dated at Portland, Maine this 19th day of July, 2007.

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⁵ The Court included a footnote comment that the document from which the proffer was made was not offered into evidence.

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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

I hereby certify that on July 19, 2007, I electronically filed Motion in Limine with the Clerk of Court using the DM/ECF system which will send notification of such filing to Assistant United States Attorney Darcie McElwee, and I hereby certify that on July 18, 2007, I mailed by United States Postal Service, the document to the following non-registered participant: Mr. Dario Giambro.

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