In an arson prosecution, the government seeks to rebut the defendant's alibi that he was in a jail in another state at the time of the fire. The government calls a witness to testify that he diligently searched through all the records of the jail and found no record of the defendant having been incarcerated there during the time the fire occurred.

Is the witness's testimony admissible?

A. No, because it is hearsay not within any exception.

B. No, because the records themselves must be produced.

C. Yes, as a summary of voluminous documents.

D. Yes, as evidence of absence of an entry from a public record.

Explanation:

Hearsay exceptions for public records

Existing public records	Records or statements of public office/agency admissible if they set forth:
	activities of office or agency
(FRE 803(8))	matters observed pursuant to legal duty (excluding police observations in criminal cases) OR
	factual findings from legal investigation if offered in civil case or against government in criminal case
Absence of public records	Evidence that diligent search failed to locate public record or statement admissible if:
(FRE 803(10))	introduced through testimony or self-authenticating evidence certified under FRE 902 AND
	in criminal cases, prosecutor gives written notice of intent to offer certification 14 days before trial & defendant does not object in writing within 7 days of receiving notice

FRE = Federal Rule of Evidence.

The **rule against hearsay** bars the admission of out-of-court statements (eg, a writing) offered to prove the truth of the matter asserted therein. One **exception** to this rule applies to the ***absence* of public records**, where evidence that a **diligent search** failed to locate a **public record** is admissible to prove that (1) a record **does not exist** OR (2) a matter regularly kept in public records **did not occur**. This evidence can be introduced through witness testimony or self-authenticating evidence certified under Federal Rule of Evidence (FRE) 902.

Here, the witness seeks to testify that he diligently searched the jail records and found no record of the defendant being incarcerated at the time of the fire. Since incarceration is regularly recorded in public records, this witness testimony falls within the hearsay exception for the absence of public records **(Choice A)**. As a result, it can be used to prove that the defendant's incarceration did not occur.

(Choice B) A party need not produce the records themselves to offer testimony that a search of public records failed to disclose a particular entry therein. Therefore, the failure to produce the records is not a basis to exclude the witness's testimony.

(Choice C) Under FRE 1006, a party may use a summary, chart, or calculation to prove the content of voluminous writings that are otherwise admissible. But this rule does not apply here because the witness is seeking to testify to the *absence* of an entry from the jail records—not to *summarize* those records.

Educational objective:

Under the absence of public records hearsay exception, evidence that a diligent search failed to locate a public record is admissible to prove that (1) a record does not exist or (2) a matter regularly kept in public records did not occur.

References

Fed. R. Evid. 803(10) (hearsay exception for absent public records).

Fed. R. Evid. 902(1) (self-authenticating evidence).