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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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MEMORANDUM

**TO:** Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

**FROM:** Honorable Sidney A. Fitzwater, Chair, Advisory Committee on Federal Rules of Evidence

**DATE:** April 8, 2011 (Revised June 6, 2011)

**RE:** Report of the Evidence Rules Advisory Committee

**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on April 1, 2011 in Philadelphia at The University of Pennsylvania Law School.

The Committee seeks approval of one proposal for release for public comment: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—that is intended to address a constitutional infirmity in light of the Supreme Court’s decision in *Melendez-Diaz v. Massachusetts*.

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## II. Action Item

### Proposed Amendment to Evidence Rule 803(10)

In June 2009 the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The Court held that certificates reporting the results of forensic tests conducted by analysts are “testimonial” within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*. Consequently, admitting such certificates in lieu of in-court testimony violates the accused’s right of confrontation. The Committee has concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the *absence* of a public record. Like the certificates at issue in *Melendez-Diaz*, certificates proving the *absence* of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of the absence of a public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused’s right of confrontation.

The Committee at its Fall 2010 meeting discussed the possibility of amending Rule 803(10) to correct this constitutional infirmity, and it voted unanimously to consider a proposed amendment at the Spring meeting. The Reporter suggested adding a “notice-and-demand” procedure to the Rule that would require production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. The Committee directed the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that added procedural details such as providing for continuances. After consulting with the DOJ, the Reporter prepared proposed amendments to Rule 803(10).

At its Spring meeting, the Committee voted unanimously to refer a proposed amendment to Rule 803(10), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. The proposed Rule and Committee Note are set out in an appendix to this report.\* As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

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\* The proposed Rule was slightly restyled after the June 2011 Standing Committee meeting to account for suggestions made by the Standing Committee’s style consultant.

**Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved for release for public comment.**

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procedure that was approved by the *Melendez-Diaz* Court. *See* Tex. Code Crim. P. Ann., art. 38.41.