

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE THAT HAVE  
BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28  
U.S.C. 2072



MAY 15, 2013.—Referred to the Committee on the Judiciary and ordered  
to be printed

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U.S. GOVERNMENT PRINTING OFFICE



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC, April 16, 2013.*

Hon. JOHN A. BOEHNER,  
*Speaker of the House of Representatives,*  
*Washington, DC.*

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,  
*Chief Justice.*

April 13, 2013

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein an amendment to Evidence Rule 803.

[See *infra*, pp. \_\_\_\_ \_\_\_\_]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2013, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF  
EVIDENCE

**Rule 803. Exceptions to the Rule Against Hearsay —  
Regardless of Whether the Declarant Is  
Available as a Witness**

The following are not excluded by the rule against hearsay,  
regardless of whether the declarant is available as a  
witness:

\* \* \* \* \*

**(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.

\* \* \* \* \*



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

HONORABLE THOMAS F. HOGAN  
*Secretary*

January 22, 2013

MEMORANDUM

To: The Chief Justice of the United States and  
Associate Justices of the Supreme Court

From: Judge Thomas F. Hogan *Thomas F. Hogan*

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF  
EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 803 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2012 session. The Judicial Conference recommends that the amendment be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a redline version of the amendment; (ii) an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the Report of the Advisory Committee on the Federal Rules of Evidence.

Attachments

EXCERPT FROM THE  
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:

\* \* \* \* \*

FEDERAL RULES OF EVIDENCE

*Rule Recommended for Approval and Transmission*

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 803(10), with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was circulated to the bench, bar, and public for comment in August 2011. Scheduled public hearings on the amendment were canceled because no one asked to testify.

The proposed amendment revises the hearsay exception for the absence of a public record or entry to avoid a constitutional infirmity in the current rule in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz*, the certificate would often be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, the admission of certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure.

In *Melendez-Diaz*, the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise



unconstitutional use of testimonial certificates. 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 seven 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 and would not have to produce a witness to so testify. The amended rule would allow the court to set a different time for the notice or the objection. After considering the two public comments it received, the advisory committee recommended approval of the proposed amendment as published.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 803(10), and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

\* \* \* \* \*

Respectfully submitted,



Mark R. Kravitz, Chair

James. M. Cole  
Dean C. Colson  
Roy T. Englert, Jr.  
Gregory G. Garre  
Neil M. Gorsuch  
Marilyn L. Huff  
Wallace B. Jefferson

David F. Levi  
Patrick J. Schiltz  
James A. Teilborg  
Larry D. Thompson  
Richard C. Wesley  
Diane P. Wood

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

MARK R. KRAVITZ  
CHAIR  
  
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SECRETARY

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DAVID G. CAMPBELL  
CIVIL RULES

REENA RAGGI  
CRIMINAL RULES

SIDNEY A. FITZWATER  
EVIDENCE RULES

MEMORANDUM

**TO:** Honorable Mark R. Kravitz, Chair  
Standing Committee on Rules of Practice and Procedure

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

**DATE:** May 3, 2012

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

**I. Introduction**

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

\* \* \* \* \*

Report to Standing Committee  
Evidence Rules Advisory Committee

## II. Action Items

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

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be “testimonial” within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused’s right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a “notice-and-demand” procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant’s failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. 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.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges’ Association favors the proposal. The National Association of Criminal Defense Lawyers (“NACDL”) agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

**Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.**

\* \* \* \* \*

**PROPOSED AMENDMENT TO THE FEDERAL  
RULES OF EVIDENCE\***

1     **Rule 803. Exceptions to the Rule Against Hearsay —**  
2                   **Regardless of Whether the Declarant Is**  
3                   **Available as a Witness**

4     The following are not excluded by the rule against hearsay,  
5     regardless of whether the declarant is available as a witness:

6                                   \* \* \* \* \*

7                   **(10) *Absence of a Public Record.*** Testimony —  
8                                   or a certification under Rule 902 — that a  
9                                   diligent search failed to disclose a public  
10                                  record or statement if ~~the testimony or~~  
11                                  ~~certification is admitted to prove that:~~

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

14                                 **(A)** the record or statement does not

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\* New material is underlined; matter to be omitted is lined through.

15                               exist; or

16                               **(Bii)** a matter did not occur or exist, if a

17                               public office regularly kept a

18                               record or statement for a matter of

19                               that kind; and

20                               **(B)** in a criminal case, a prosecutor who

21                               intends to offer a certification provides

22                               written notice of that intent at least 14

23                               days before trial, and the defendant does

24                               not object in writing within 7 days of

25                               receiving the notice — unless the court

26                               sets a different time for the notice or the

27                               objection.

28                               \* \* \* \* \*

### Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a “notice-and-demand” procedure that was approved by the *Melendez-Diaz* Court. *See* Tex. Code Crim. P. Ann., art. 38.41.

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### Changes Made After Publication and Comment

No changes were made after publication and comment.

