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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of )  
 ) Arizona Supreme Court No. R-12-\_\_\_\_  
 )  
ARIZONA RULE OF )  
EVIDENCE 803(10) )  
 ) PETITION TO AMEND ARIZONA  
 ) RULE OF EVIDENCE 803(10)  
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**PETITION TO AMEND THE ARIZONA RULES OF EVIDENCE**

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, Mark W. Armstrong and Samuel A. Thumma, petition the Court to amend Arizona Rule of Evidence 803(10), as reflected in the attachment hereto, effective January 1, 2014.

## I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, which had been adopted in 1975. In the more than thirty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence had been amended on several occasions, and not all of these amendments had become part of the Arizona Rules of Evidence.

Arizona Supreme Court Administrative Order No. 2010-42, dated March 24, 2010, established the Ad Hoc Committee on Rules of Evidence to compare the Arizona Rules of Evidence to the restyled Federal Rules of Evidence, identify differences, and provide input to this Court regarding conforming changes not later than December 2010. The Committee timely completed its work and recommended comprehensive changes to the Arizona Rules of Evidence in R-10-0035, which were generally approved by the Court with an effective date of January 1, 2012.

The Ad Hoc Committee's petition in R-10-0035 also recommended that the Court "create a standing committee on the Rules of Evidence to consider future amendment of the rules based on changes to the Federal Rules of Evidence or evolving case law." Following this recommendation, the Court established the Advisory Committee on Rules of Evidence with the following purpose:

The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its first meeting on September 28, 2012, the Advisory Committee recommended that Arizona Rule of Evidence 803(10) be amended to be consistent with a proposed amendment to Federal Rule of Evidence 803(10), which is expected to become effective December 1, 2013, with modifications to account for timing limitations in the Arizona Rules of Criminal Procedure.

## **II. SUMMARY OF THE PROPOSED AMENDMENT TO ARIZONA RULE OF EVIDENCE 803(10)**

The proposed amendment is intended to remedy a potential constitutional infirmity in Rule 803(10), an exception to the hearsay rule concerning the absence of public records. The rule currently provides an exception to the hearsay rule for testimony “*or a certification under Rule 902,*” that a public record or statement does not exist. Ariz. R. Evid. 803(10) (emphasis added).<sup>1</sup> The proposed amendment generally tracks a proposed amendment of Federal Rule of Evidence 803(10), which is currently pending. As set forth in an explanatory note for the proposed federal amendment:

The proposed amendment aligns Rule 803(10) with the Supreme Court’s ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). *Melendez-Diaz* 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*, 541 U.S. 36 (2004), making the admission of such certificates in lieu of in-court testimony a violation of the accused’s right of confrontation. The amendment adopts a “notice-and-demand” procedure that would require production of the person who prepared the certificate stating the absence of a public record only if the defendant, after receiving notice from the government, made a timely pretrial demand for production of the witness.

*Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure, A SUMMARY FOR BENCH AND BAR* (August 2011).

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<sup>1</sup> For example, the misdemeanor offense of “contracting without a license,” usually involves the State’s exhibit from a custodian of records from the office of the Registrar of Contractors that the defendant was not listed as registered.

Public comment on the proposed federal amendment has expired. On June 11, 2012, the Federal Committee on Rules of Practice and Procedure recommended that the Judicial Conference approve the proposed amendment. If the proposed amendment is approved by the Judicial Conference, it will then be considered by the Supreme Court and finally Congress. If the proposed amendment proceeds in due course, it is expected that the amendment to the federal rule would become effective December 1, 2013.

In recommending this rule change to the Arizona Rules of Evidence, the Advisory Committee on Rules of Evidence recognizes that the proposed amendment to Federal Rule of Evidence 803(10) has not been finalized. Thus, the Advisory Committee has conditioned its recommendation on the amendment of Federal Rule of Evidence 803(10) in its current form. The Advisory Committee has also recommended three changes to the federal proposal: (1) the proposed Arizona rule should use 20/10 day time periods (as opposed to the 10/7 day time periods set forth in the federal amendment) consistent with Ariz. R. Crim. P. 16.1(b); (2) the proposed Arizona rule should delete the reference to the Texas statute in its comment; and (3) the following language should be added to the comment to the proposed Arizona rule: “ This rule change is not intended to alter any disclosure requirements in other applicable rules of practice and procedure.” These recommendations have been incorporated in the attached proposed rule.

### **CONCLUSION**

Petitioners respectfully request that the Court consider this petition and proposed rule change at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2013, and that the Court adopt the proposed rule as it currently appears, or as modified in light of comments received from the public, with an effective date of January 1, 2014.

DATED this 20th day of November, 2012.

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Mark W. Armstrong  
Co-Chair, Advisory Committee on Rules of Evidence

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Samuel A. Thumma  
Co-Chair, Advisory Committee on Rules of Evidence

## ATTACHMENT<sup>2</sup>

### ARIZONA RULE OF EVIDENCE 803(10)

#### **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 the testimony or certification is admitted to prove that:~~

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

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

~~(B 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 20 days before trial, and the defendant does not object in writing within 10 days of receiving the notice — unless the court sets a different time for the notice or the objection.

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#### **Comment to 2014 Amendment**

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (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. The amendment is not

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<sup>2</sup> Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

intended to alter any disclosure requirements in other applicable rules of practice and procedure.

**Comment to 2012 Amendment**

[No change in text.]

**Comment to 1994 Amendment**

[No change in text.]