

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. VIII]

Order Approving the Revision to the Comment to Rule of Evidence 802; No. 631 Supreme Court Rules Doc.

Order

Per Curiam

And Now, this 19th day of February, 2014, upon the recommendation of the Committee on Rules of Evidence; the proposal having been published for public comment at 43 Pa.B. 210 (January 12, 2013):

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that the Comment to Pennsylvania Rule of Evidence 802 is revised in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective April 1, 2014.

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE VIII. HEARSAY

Rule 802. The Rule Against Hearsay.

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Comment

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On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. No. 4020, or a video deposition of an expert witness may be admitted pursuant to Pa.R.C.P. No. 4017.1(g). In preliminary hearings in criminal cases, the court may consider hearsay evidence pursuant to Pa.R.Crim.P. 542(E) and 1003(E). **In criminal trials, Pa.R.Crim.P. 574 provides a procedure for the admission of forensic laboratory reports supported by a certification.**

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Hearsay Exceptions and the Right of Confrontation of a Defendant in a Criminal Case

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In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution, and (3) admission of the evidence would violate defendant's right "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

Pennsylvania Rule of Criminal Procedure 574 provides a mechanism for the admission of a forensic laboratory report supported by a certification. This Rule provides a defendant an opportunity to exercise the right of confrontation and to object

to the report on hearsay grounds. Following pre-trial notice by the prosecution, and in the absence of a demand by defendant for declarant's live testimony, the Rule permits the admission of a properly certified forensic laboratory report at trial and the accompanying certification at trial. See Pa.R.Crim.P. 574.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

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Final Report explaining the February 19, 2014 revision of the Comment published with the Court's Order at 44 Pa.B. 1309 (March 8, 2014).

FINAL REPORT¹

Revision of the Comment to Rule of Evidence 802

On February 19, 2014, effective April 1, 2014, 2013, upon the joint recommendation of the Criminal Procedural Rules Committee and the Committee on Rules of Evidence, the Court adopted new Pennsylvania Rule of Criminal Procedure 574 and a corollary revision to the Comment to Pennsylvania Rule of Evidence 802

Historically, the Comment to Rule of Evidence 802 was intended to inform that the Rules of Evidence do not attempt to codify requirements under the Confrontation Clause. *See* Pa.R.E. 802, Comment. Moreover, the Rules of Evidence acknowledge that evidentiary rules may exist in other bodies of rules. *Id.*

The new Criminal Rule of Procedure 574 will operate both as a "notice and demand" mechanism to satisfy the requirements of the Confrontation Clause and as a new rule of evidence that will permit the admission of laboratory reports in criminal trials. Accordingly, the Comment to Rule 802 was amended to recognize this new Rule and describe its operation.

[Pa.B. Doc. No. 14-463. Filed for public inspection March 7, 2014, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 5]

Order Adopting New Rule 574 of the Rules of Criminal Procedure; No. 446 Criminal Procedural Rules Doc.

Order

Per Curiam

And Now, this 19th day of February, 2014, upon the recommendation of the Criminal Procedural Rules Com-

¹ The Committee's Final Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Reports.

mittee; the proposal having been published before adoption at 43 Pa.B. 210 (January 12, 2013), and a Final Report to be published with this *Order*:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pennsylvania Rule of Criminal Procedure 574 is adopted in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective April 1, 2014.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

PART G. Procedures Following Filing of Information

Rule 574. Forensic Laboratory Report; Certification in Lieu of Expert Testimony.

(A) In any trial, the attorney for the Commonwealth may seek to offer into evidence a forensic laboratory report supported by a certification, as provided in paragraph (E), in lieu of testimony by the person who performed the analysis or examination that is the subject of the report.

(B) Notice

(1) If the attorney for the Commonwealth intends to offer the forensic laboratory report and accompanying certification as provided in paragraph (A) as evidence at trial, the attorney for the Commonwealth shall file and serve, as provided in Rule 576, upon the defendant's attorney or, if unrepresented, the defendant a written notice of that fact at the time of the disclosure of the report but no later than 20 days prior to the start of trial.

(2) The notice shall include a statement informing the defendant that, as provided in paragraph (C)(3), if no written demand for testimony by the person who performed the analysis or examination that is the subject of the forensic laboratory report is made within 10 days of the service of the notice, the forensic laboratory report and accompanying certification are admissible in evidence without the person who performed the analysis or examination testifying.

(3) Except as provided in paragraph (C), the laboratory report and accompanying certification are admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.

(C) Demand

(1) Within 10 days of service of the notice provided in paragraph (B), the defendant's attorney, or if unrepresented, the defendant may file and serve, as provided in Rule 576, upon the attorney for the Commonwealth a written demand for the person who performed the analysis or examination that is the subject of the forensic laboratory report to testify at trial.

(2) If a written demand is filed and served, the forensic laboratory report and accompanying certification are not admissible under paragraph (B)(3) unless the person who performed the analysis or examination testifies.

(3) If no demand for live testimony regarding the forensic laboratory report and accompanying certification is filed and served within the time allowed by this section, the forensic laboratory report and accompanying certification are admissible in evidence without the person who performed the analysis or examination testifying.

(D) For cause shown, the judge may extend the time period for filing the notice or the demand for live testimony, or may grant a continuance of the trial.

(E) Certification

The person who performed the analysis or examination that is the subject of the forensic laboratory report shall complete a certification in which the person shall state:

(1) the education, training, and experience that qualify him or her to perform the analysis or examination;

(2) the entity by which he or she is employed and a description of his or her regular duties;

(3) the name and location of the laboratory where the analysis or examination was performed;

(4) any state, national, or international accreditations of the laboratory at which the analysis or examination was performed; and

(5) that the analysis or examination was performed under industry-approved procedures or standards and the report accurately reflects the findings and opinions of the person who performed the analysis or examination regarding the results of the analysis or examination.

Comment

This rule was adopted in 2014 to address the issues raised by the U.S. Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 U.S. 2527 (2009), that held that the 6th Amendment confrontation right precluded presentation of laboratory reports without a live witness testifying in the trial. In *Melendez-Diaz*, the U.S. Supreme Court noted with approval the use of "notice and demand" procedures as a means of permitting routine laboratory reports to be admitted without the expense of supporting the admission by live expert testimony while protecting a defendant's confrontation rights.

This rule provides a "notice and demand" procedure for Pennsylvania. Under the rule, the attorney for the Commonwealth may seek to admit a forensic laboratory report as evidence without the testimony of the analyst who performed the testing that was the subject of the report if notice requirements are met and no demand for the presence of the analyst is made. If the defendant makes such a demand, the analyst would be required to testify before the report could be admitted into evidence.

Nothing in this rule is intended to preclude a stipulation agreed to by the parties for the admission of the laboratory report without the analyst's presence.

Nothing in the rule would prevent further stipulation by the parties in light of the admission of the report and certification.

Nothing in this rule is intended to change the requirement for the provision of discovery under Rule 573.

Under paragraph (D), the trial judge may permit filing of the notice or demand after the time period required in the rule if the party seeking the late filing shows cause for the delay. In the situation where the judge permits the late filing of the notice, the defendant still has 10 days in which to make the demand for the live testimony of the analyst. This may necessitate a continuance of the trial.

The certification in paragraph (E) does not require a description of the actual tests performed for the analysis. This information more properly belongs in the report itself. Since one of the goals of this rule is to permit the defendant to make an informed decision regarding whether to demand the live testimony of the analyst, the

report should provide information sufficient to describe the methodology by which the results were determined.

For purposes of this rule, a laboratory is “accredited” when its management, personnel, quality system, operational and technical procedures, equipment and physical facilities meet standards established by a recognized state, national, or international accrediting organization such as the American Society of Crime Laboratory Directors/Laboratory Accrediting Board (ASCLD/LAB) or Forensic Quality Services—International (FQS-I).

Official Note: New Rule 574 adopted February 19, 2014, effective April 1, 2014.

Committee Explanatory Reports:

Final Report explaining new Rule 574 providing for notice and demand procedures regarding forensic laboratory reports published with the Court’s Order at 44 Pa.B. 1311 (March 8, 2014).

FINAL REPORT¹

Adoption of New Pa.R.Crim. 574

Forensic Laboratory Report; Certification in Lieu of Expert Testimony

On February 19, 2014, effective April 1, 2014, upon the joint recommendation of the Criminal Procedural Rules Committee and the Committee on Rules of Evidence, the Court adopted new Pennsylvania Rule of Criminal Procedure 574 to provide procedures for the admissibility of forensic laboratory reports in lieu of expert testimony and a corollary revision to the Comment to Pennsylvania Rule of Evidence 802 to identify and describe Rule of Criminal Procedure 574.

I. Background

The Criminal Procedural Rules Committee and the Committee on Rules of Evidence were asked by the Pennsylvania District Attorneys Association to consider a “notice and demand” rule of criminal procedure or evidence.

This request arose from the 2009 United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), in which the Court held that the evidentiary use of a report of a forensic test on an alleged controlled substance violated the defendant’s right to confront the witness against him because the preparer of the report did not testify at the defendant’s trial. The Court rejected the prosecution’s argument that the report was admissible as a business record or official record, and the argument that compelling the appearance of the person who performed the test was time consuming and wasteful since, in the overwhelming majority of cases, the defendant would not contest the accuracy of the test.

The Court in *Melendez-Diaz* noted with approval “simple” notice-and-demand procedures that require the prosecution to give notice to the defense of its intent to introduce evidence without calling the necessary witnesses required under the Confrontation Clause. The defense then must give notice to the prosecution that it is demanding that the witness testify and be subject to cross-examination.

After discussing the Association’s letter at our respective meetings, the Committees formed a joint subcommittee to investigate whether and how to proceed. The subcommittee found merit in a “notice and demand” procedure that would provide a mechanism for defendants

to exercise their rights under the Confrontation Clause and to provide for the admissibility of forensic laboratory reports in lieu of expert testimony. The claimed benefit of a “notice and demand” procedure would be a lesser burden on the Commonwealth in scheduling these witnesses, fewer expenses associated with attendance of these witnesses at trial, and increased availability of these analysts and technicians to perform lab/field work rather than appearing in court. Additionally, the procedure would provide a timely and structured mechanism for defendants to raise a Confrontation Clause demand. See *Melendez-Diaz*, 557 U.S. at 327.

Based upon the recommendations of the joint subcommittee, the Committees approved for publication proposed new Rule of Criminal Procedure 574 and correlative revisions to the Comment to Rule of Evidence 802. Some changes were made to the proposal, particularly with regard to Criminal Rule 574, in light of some of the publication comments.

New Rule of Criminal Procedure 574

The Criminal Rules Committee first discussed the question of whether creation of such procedure was within the Court’s exclusive rule-making authority, particularly in view of the argument that *Melendez-Diaz* defined an aspect of a defendant’s confrontation rights and that such a constitutional right could not be abridged by rule. The Committee disagreed with this argument, concluding that the proposed rule changes do not take away a defendant’s constitutional rights but provided procedures to effectuate those rights in a practical manner.

In developing new Rule of Criminal Procedure 574,² a number of other jurisdictions’ “notice and demand” statutes and rules were considered, including recently adopted Michigan Court Rule 6.202. New Rule 574 is modeled on portions of the Michigan rule and provides for the prosecution’s admission of forensic laboratory reports at a criminal trial in lieu of the live testimony of the person who performed the laboratory analysis or examination. This admission would be predicated on compliance with three elements: 1) notice; 2) demand; and 3) certification.

Unlike the Michigan rule that requires notice to be given in every case, use of this procedure is optional with the prosecution. The Committee concluded that mandatory use of the notice procedure would not be efficient in many cases, especially in larger counties where stipulations of admissibility are common and producing an expert to testify is relatively easy in those cases in which a stipulation cannot be reached. In other words, a live witness would be necessary in order to have forensic reports admitted but the Commonwealth could rely on either traditional stipulations or the new notice procedures to be able to introduce the report without a witness. The new rule is not intended to preclude or discourage the use of stipulations.

As provided in paragraph (B), in order to utilize the procedure, the attorney for the Commonwealth is required to serve the defense written notice of the intention to invoke Rule 574 to admit the report without accompanying live testimony. This notice, together with the forensic laboratory report if not already provided as part of discovery, must be given at least 20 days before the

¹ The Committee’s Final Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee’s Comments or the contents of the Committee’s explanatory Final Reports.

² At the time of this adoption, Rule 574 was not an active rule number, the previous version of that rule having been rescinded in 2004. As part of its adoption, new Rule 574 has been placed in the more general, introductory portion of Part G (Procedures Following Filing of Information) rather than in its former location in Part G(1) (Motions Procedures) since the “notice and demand” procedures are not motions.

start of defendant's trial. The assumption is that the usual practice will be to provide the notice and report during the discovery process, which generally occurs prior to the 20-day notice deadline.

Paragraph (B)(2) requires that the notice contain a warning to the defendant of the consequences of failing to demand the presence of the witness, specifically that the report would be admitted without the technician being present. The Committee concluded that such a warning was important, especially in *pro se* cases, to apprise the defendant of the consequences of failing to make a demand for the witness' appearance at trial.

No later than 10 days after receiving the prosecution's notice, the defendant has the option of serving a written demand on the prosecution that the witness appear and testify at trial. Such a demand would preclude the admission of the forensic laboratory report or certificate absent an analyst's testimony. If no demand is made, then the report and certificate are admissible without witness testimony. However, as noted in paragraph (D), for cause shown, the judge has the discretion to extend the time period of filing a demand for live testimony or grant a continuance of the trial.

The Committee considered whether the notice needed to be filed and formally served, and concluded that adding this requirement would be a means of the reducing disputes over whether and when the notice or demand had been filed. Therefore, the rule requires that the notice and demand be filed and served in accordance with Rule 576.

The new rule also requires, in paragraph (E), that the analyst who performed the analysis or examination to complete a certificate detailing his or her qualifications,

job description, laboratory information, and the procedures and standards in which the analysis or examination were conducted. Based on criticism contained in publication responses, the Committee revised the certification provisions to include additional details of the qualifications of the analyst and any accreditations of the lab at which the test was performed. The Committee also deleted the version of paragraph (D)(2) that was published that provided for presentation of the lab's accreditation in lieu of the technician's certification because the paragraph was likely to cause confusion about the requirements for such a presentation but agreed to retain the definition of "accreditation" in the Comment.

The Committee also discussed whether the certification should include a description of the test performed. However, the Committee ultimately concluded that, rather than in the certification, a description of the test performed would belong more properly in the report itself. The Committee believes, however, that the rule should not detail specific requirements for report contents, since these would vary so widely, but the Comment states the basic principle that the report should contain information regarding methodology sufficient to allow the defendant to make an informed decision on whether to require the analyst's presence.

Rule of Evidence 802

As described in more detail in the companion Final Report from the Committee on the Rules of Evidence, the Comment to Rule of Evidence 802 has been revised to recognize new Rule of Criminal Procedure 574 and describe its operation.

[Pa.B. Doc. No. 14-464. Filed for public inspection March 7, 2014, 9:00 a.m.]