

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.

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*.

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 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

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.

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

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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.