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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF PETITION TO AMEND RULE 803(10), ARIZONA RULES OF EVIDENCE	R-12-0034 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL'S COMMENTS TO PETITION TO AMEND RULE 803(10), ARIZONA RULES OF EVIDENCE

Pursuant to Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecution Attorneys' Advisory Council ("APAAC") hereby submits its comments in support of the Petition to Amend Rule 803(10), Arizona Rules of Evidence.

I. Preface

APAAC agrees with this Petition that seeks to conform Arizona Rule of Evidence 803(10) with the proposed amendment to the Federal Rules of Evidence. This change would adopt a "Notice and Demand" process for certifications supporting forensics tests, requiring production of the person who prepared the

certificate only if the defendant, after receiving notice from the government, made a timely pretrial demand for production of the witness. This is in response to the holding in the Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527 (2009), that such reports are testimonial within the meaning of the Confrontation Clause as construed in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

II. General Observations Regarding the Proposed Rule

The proposed language appears to meet all the requirements delineated by the United States Supreme Court in *Melendez-Diaz* for "notice and demand" statutes to admit lab results without calling the witnesses. The right to confrontation may be waived by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections. *See* e.g, Ga. Code Ann. §35–3–154.1 (2006); Tex. Code Crim. Proc. Ann., Art. 38.41, §4 (Vernon 2005); Ohio Rev. Code Ann. §2925.51(C) (West 2006). States are free to adopt procedural rules governing objections. *Wainwright v. Sykes*, 433 U. S. 72, 86–87 (1977).

It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses. *See* Fed. Rules Crim. Proc. 12.1(a), (e), 16(b)(1)(C); Comment: "Alibi Notice Rules: The Preclusion Sanction as Procedural Default," 51 U. Chi. L.

Rev. 254, 254–255, 281–285 (1984) (discussing and cataloguing State notice-of-alibi rules); *Taylor v. Illinois*, 484 U. S. 400, 411 (1988); *Williams v. Florida*, 399 U. S. 78, 81–82 (1970). *See also Hinojos-Mendoza v. People*, 169 P. 3d 662, 670 (Colo. 2007) (discussing and approving Colorado's notice-and-demand provision).

The United States Supreme Court has voiced its support for Notice and Demand statutes in *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2718 (2011):

> Furthermore, notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories. Statutes governing these procedures typically "render ... otherwise hearsay forensic reports admissible[,] while specifically preserving a defendant's right to demand that the prosecution call the author/ analyst of [the] report." PDS Brief 9; see *MelendezDiaz*, 557 U.S., at ——, 129 S.Ct., at 2541 (observing that notice-and-demand statutes "permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report").

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III. Conclusion

For these reasons, APAAC supports the Petition to Amend Rule of Evidence 803(10).

Respectfully submitted this 20th day of May, 2013.

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