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10/05/2026

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 07-0031

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 07-0031

FILED

OCT 05 2026

Bowen Greenwood
Clerk of Supreme Court
State of Montana

IN RE THE MONTANA RULES OF EVIDENCE

ORDER

The Montana Commission on Rules of Evidence petitioned this Court to consider amendments to Montana Rules of Evidence 612, 803, 901, and 106. The Court issued an order granting a 90-day comment period.

The Court received comments from the Montana Legal Services Association, the Judith Basin County Attorney, and the Montana Attorney General.

The Commission has responded to the Attorney General's comment on M. R. Evid. 803(6), and has asked the Court to publish the response.

After consideration of the petition, the Court has determined that the bench and bar of the State of Montana should be provided an opportunity to comment on the Commission's response to the Attorney General's comment.

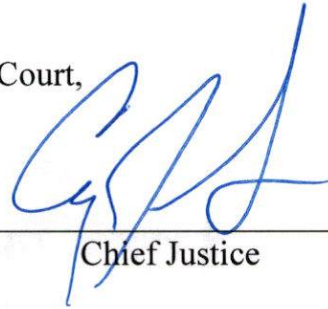
IT IS THEREFORE ORDERED that all members of the bench and bar of Montana and any other interested persons are granted 30 days from the date of this Order in which to file with the Clerk of this Court appropriate comments and/or suggestions to the attached petition.

IT IS FURTHER ORDERED that this Order and attached petition shall be posted on the websites of the Montana State Law Library and the State Bar of Montana.

IT IS FURTHER ORDERED that the Clerk of this Court shall provide copies of the Proposed Revisions to the State Bar of Montana and shall provide to each District Court Judge and each Clerk of the District Court a copy of this Order and attachments with a request that each Clerk of the District Court make the Order and proposed rule revisions available for public review in the Office of the Clerk of the District Court. The additional documents referenced in this Order may be viewed on the Court's electronic public view docket: <https://supremecourtdocket.mt.gov/case-info/active/11483>.

DATED this 5th day of October, 2026.

For the Court,

A handwritten signature in blue ink, appearing to be 'G. J. S.', is written over a horizontal line.

Chief Justice

IN THE SUPREME COURT OF THE STATE OF MONTANA

	)	AF-07-0031
	)	PETITION FOR PUBLICATION
IN RE MONTANA COMMISSION)	)	OF RESPONSE TO ATTORNEY
ON RULES OF EVIDENCE	)	GENERAL'S COMMENT ON
	)	PROPOSED RULE 803(6)
	)	

The Montana Commission on the Rules of Evidence petitioned the Montana Supreme Court to amend several Montana Rules of Evidence, including Rule 803(6) and Rule 901. The Court put the proposed amended rules out for comment. Three comments were received, from the Montana Legal Services Association (MLSA), the Montana Attorney General, and the Judith Basin County Attorney.

MLSA commented on the proposed amendment to Rule 901, supporting the process outlined in the proposed amendment, but suggesting that the language be modified to avoid confusion where a judge, not a jury, is the fact-finder. MLSA proposed the following change:

- (1) If a party challenging the authenticity of an item of evidence demonstrates to the court that a ~~jury~~ reasonably reasonable factfinder could find that the item has been fabricated, in whole or in part, by generative artificial intelligence, the item is admissible only if the

proponent demonstrates to the court that it is more likely than not authentic.

The Commission agrees with this change and recommends that, in the event the Court adopts the proposed amendment, the Court substitute the suggested language for the language originally proposed.

The Judith Basin County Attorney and the Montana Attorney General submitted comments on the proposed amendments to Rule 803(6). The Judith Basin County Attorney noted a practice in which, where, when the State plans to offer crime lab reports, it provides notice to a criminal defendant of its intent to subpoena the persons responsible for the report

The Montana Attorney General, through Senior Assistant Attorney General Ed Hirsch, submitted a comment asking the Court to reject the proposed amended rule, amend the proposed Commission Comment, or issue a clarifying comment. The Commission respectfully requests that the Montana Supreme Court file and publish the attached Response to Attorney General's Comment on Proposed Amendment to Montana Rule of Evidence 803(6).

DATED this 21st day of September, 2026.

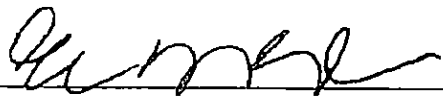


Elizabeth A. Best
District Court Judge
Chair of the Evidence Commission

cc: Hallie Bishop
Caitlin Boland Aarab
Kai Groenke
Brett Irigoin
Paul Kirgis
Claire Lettow
Julie Lichte
Dave McLean
Ann Moderie
Justin Starin
Colin Stephens

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this petition is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and that the word count calculated by Microsoft Word is 304 words, excluding the Certificate of Compliance and the attachments.


Elizabeth A. Best
District Court Judge
Chair of the Evidence Commission

**Response to Attorney General's Comment on Proposed Amendment to
Montana Rule of Evidence 803(6)**

The Montana Commission on the Rules of Evidence petitioned the Montana Supreme Court to amend Rule 803(6), and the Court published the proposed amended rule for comment. The Montana Attorney General, through Senior Assistant Attorney General Ed Hirsch, submitted a comment asking the Court to reject the proposed amended rule, amend the proposed Commission Comment, or issue a clarifying comment. The Attorney General contends that the proposed comment "includes misstatements of law" and would "eliminate all methods by which to enter crime lab reports into evidence." The Commission disagrees with those contentions, but agrees that the original comment could be read too broadly to suggest the amendment would categorically bar state crime lab reports. Accordingly, the Commission offers this response and a revised proposed Commission Comment to Rule 803(6). In addition, the Commission offers a narrower modification of Rule 803(6) should the Court decide to retain a specific hearsay exception for state crime lab reports.

I. Background to the Proposed Amendment

The reason the Commission proposed the amended rule is to raise and address an anomaly in the rules following the 2007 amendment to Rule 803(8). Until 2007, both Rule 803(6) and Rule 803(8) contained the following language:

However, written reports from the Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial.

The above provision expressly contemplates admission of a crime lab report without the testimony of the report's author, so long as the State gives the required notice. The rule puts the burden on the defendant to subpoena the author.

In 1998, the Montana Supreme Court decided *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766, which held that the above provision in Rule 803(8)

violated the defendant's confrontation and due process rights under the Montana Constitution when used to admit a crime lab report against a criminal defendant without the author's testimony, while shifting the burden of producing the report's author to the defendant. Then, in 2004, the United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), that the Sixth Amendment Confrontation Clause bars admission of an unavailable witness's testimonial statements unless the defendant had a prior opportunity to cross-examine the witness.

In 2007, the Evidence Commission petitioned the Court to amend Rule 803(8) to eliminate that provision. The Commission's 2007 petition gave little explanation for the proposed change, stating simply that "The language to be deleted is no longer an accurate reflection of the confrontation issues raised and addressed in both *State v. Clayton* [sic] 1998 MT 221, 290 Mont. 479, 964 P.2d 766 and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004)." See Petition for Amendment of Montana Rules of Evidence, No. AF 07-0031 (Mont. Jan. 16, 2007). In its Order adopting the amendment, the Montana Supreme Court also offered little explanation, noting only that the amendment was "in accordance with our decisions in *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766, ¶ 30, and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004)." See, *In the Matter of the Petition for Amendment of the Montana Rules of Evidence*, No. AF 07-0031 (Mont. June 20, 2007).

The Commission did not, at the time, petition to eliminate the identical language in Rule 803(6). No amended Commission Comment was submitted or adopted explaining the rationale for the amendment, and no explanation was given for the decision to leave Rule 803(6) unchanged. The result was that the evidentiary provision deemed unconstitutional remained in Montana's Rules of Evidence. The proposed amendment would remove that anomaly by striking the same language from Rule 803(6).

In practice, it appears that Montana courts have permitted prosecutors to offer State Crime Lab reports under Rule 803(6) while requiring the State to provide notice of its intent to offer a lab report and then putting the burden on the State to call the analyst responsible for the report if the defendant so demands. The United States Supreme Court held that type of notice-and-demand process met federal

confrontation standards in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326–27 (2009). Thus, the issue the proposed amendment seeks to address is not an unconstitutional practice, but rather a rule that is unconstitutional on its face but is not being followed in practice.

II. Effect of the Proposed Amendment

As the Attorney General’s comment notes, the removal of the special hearsay exception for crime lab reports from Rules 803(8) and, if adopted, 803(6), does not mean that no record produced by the State Crime Lab could ever be admitted. The Court in *Clark* focused on the language permitting admission of crime lab reports upon notice, while placing the burden on the defendant of subpoenaing the State’s witnesses. Removing the provision removes the specific exception for crime lab reports, along with its unconstitutional notice mechanism, but does not foreclose the admission of a crime lab report that satisfies the normal requirements of Rule 803(8), Rule 803(6), or another hearsay exception.

Schwarzmeier does not require retention of the special exception for crime lab reports. In *Schwarzmeier*, the Supreme Court permitted the introduction of a State Crime Lab report under the current version of Rule 803(6) where the report’s author testified. *State v. Schwarzmeier*, 2015 MT 98, ¶ 17, 378 Mont. 456, 459, 346 P.3d 358, 360. The Court did not address, because it did not face, the question of whether the report would have been admissible under Rule 803(6) in the absence of the special admissibility language for crime lab reports. The removal of the express admissibility provision means courts must determine whether a report fits the generally-applicable hearsay exception and then, in a criminal case where the report is offered against the defendant, whether admission would violate the defendant’s confrontation rights.¹

¹ The Commission does not agree that constitutional confrontation applies equally in civil and criminal cases. Both the Sixth Amendment to the U.S. Constitution and Article II, Section 24 of the Montana Constitution apply to criminal prosecutions only. While *Bonamarte* referred to the “principles behind the right to confront witnesses,” it rested on Rule 611(e). See *Bonamarte v. Bonamarte*, 263 Mont. 170, 175, 866 P.2d 1132, 1135 (1994) (“Although *Coy* is a criminal case and applies to a constitutional protection, the principles behind the right to confront witnesses are applicable to civil cases in Montana, as well, and that right is guaranteed in Rule 611 (e), M.R.Evid.”). Rule 611(e) governs the mode of examination of witnesses and expressly gives way to contrary evidentiary rules, including hearsay exceptions; it does not create a constitutional right to confrontation. Mont. R. Evid. 611(e) (“*Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.*”)(emphasis added).

A revised proposed Comment to the proposed amendment to Rule 803(6), making clear that the rule would not categorically exclude State Crime Lab reports, is appended hereto as Exhibit A.

III. A Narrower Alternative

The Commission proposed striking the special exception for lab reports in its entirety in order to retain logical consistency within the rules. The identical provision had been stricken from Rule 803(8), removing both the special exception and the unconstitutional notice-and-subpoena process. The Commission proposed removing both elements from Rule 803(6) to avoid retaining a special business records exception for government documents that no longer have special treatment under the public records exception. But the Commission recognizes that, in light of what has become established practice after *Schwarzmeier*, the Court might choose to retain language in Rule 803(6) permitting State Crime Lab reports to be offered with a notice-and-demand procedure. Accordingly, the Commission also offers a revised proposed amended Rule 803(6), with a new comment, directed at the unconstitutional notice-and-subpoena provision. This alternative rule and comment is appended hereto as Exhibit B.

EXHIBIT A

**Proposed Revised Comment to
Proposed Revised Rule 803(6) as
originally submitted**

Commission Comment to Rule 803(6)

Both Rule 803(6), the business records exception, and Rule 803(8), the public records exception, originally included language providing that written reports from the Montana State Crime Lab fit within those exceptions if the State gave written notice sufficient to allow the defendant to subpoena or depose the persons responsible for the report. In *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766, the Montana Supreme Court held that that provision in Rule 803(8) violated a criminal defendant's rights to face-to-face confrontation under Article II, § 24, and to due process under Article II, § 17, of the Montana Constitution.

Subsequently, in *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that "testimonial" hearsay offered against a criminal defendant violates the United States Constitution unless the defendant has an opportunity to cross-examine the declarant. Relying on those decisions, the Montana Supreme Court in 2007 amended Rule 803(8) to remove the language permitting the introduction of reports from the Montana State Crime Laboratory while placing the burden on the defendant to call the responsible analyst. *See In the Matter of the Petition for Amendment of the Montana Rules of Evidence*, No. AF 07-0031 (Mont. June 20, 2007).

The parallel provision in Rule 803(6) raises the same constitutional concerns, but that provision was not addressed in the 2007 order. As a result, an evidentiary provision determined to be unconstitutional has remained a part of Montana's Rules of Evidence. This amendment addresses that incongruity by removing the special hearsay exception and impermissible notice-and-subpoena mechanism from Rule 803(6).

Elimination of the special admissibility language in Rules 803(6) and 803(8) does not categorically exclude State Crime Lab reports. A proponent may seek to admit a crime lab report under the general language of Rule 803(6), Rule 803(8), or another rule. When testimonial lab reports are offered against a criminal defendant, the prosecution must also establish that admission complies with the confrontation guarantees of the U.S. and Montana constitutions.

EXHIBIT B

Alternative Proposed Revised Rule 803(6), with Proposed Commission Comment

Rule 803 Hearsay Exceptions: Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. ~~However, written reports from the Montana state crime laboratory are within this exception to the hearsay rule when the state has notified the court and opposing parties in writing of its intention to offer such report or reports in evidence at trial in sufficient time for the party not offering the report or reports (1) to obtain the depositions before trial of the person or persons responsible for compiling such reports, or (2) to subpoena the attendance of said persons at trial. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.~~

Written reports from the Montana state crime laboratory may be admitted under this rule if the proponent satisfies all requirements of the preceding paragraph. In a criminal case, if the state intends to offer such a report without the testimony of a person responsible for performing or certifying the analysis or making a conclusion stated in the report, the state must, at least 20 days before trial, file with the court and serve on the defendant a copy of the report and a written notice identifying each such person. The notice must state that, within 10 days after service, the defendant may file and serve a written demand for the appearance at trial of any identified person. Upon a timely demand, the report may not be admitted without the testimony of any demanded person whose testimony is required under the United States or Montana Constitution.

COMMISSION COMMENTS TO 2026 AMENDMENT

Both Rule 803(6), the business records exception, and Rule 803(8), the public records exception, originally included language providing that written reports from the Montana state crime laboratory fit within those exceptions if the state gave written notice sufficient to allow the defendant to subpoena or depose the persons responsible for the report. In *State v. Clark*, 1998 MT 221, 290 Mont. 479, 964 P.2d 766, the Montana Supreme Court held that that provision in Rule 803(8) violated a criminal defendant's rights to face-to-face confrontation under Article II, § 24, and to due process under Article II, § 17, of the Montana Constitution. Subsequently, in *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that "testimonial" hearsay offered against a criminal defendant violates the United States Constitution unless the defendant has an opportunity to cross-examine the declarant.

Relying on those decisions, the Montana Supreme Court in 2007 amended Rule 803(8) to remove the language permitting the introduction of reports from the Montana State Crime Laboratory while placing the burden on the defendant to call the responsible analyst. See *In the Matter of the Petition for Amendment of the Montana Rules of Evidence*, No. AF 07-0031 (Mont. June 20, 2007). The parallel provision in Rule 803(6) raises the same constitutional concerns, but that provision was not addressed in the 2007 order.

In *State v. Schwarzmeier*, the Supreme Court permitted the introduction of a State Crime Lab report under the current version of Rule 803(6) where the report's author testified. *State v. Schwarzmeier*, 2015 MT 98, ¶ 17, 378 Mont. 456, 459, 346 P.3d 358, 360. In the years since, a practice has developed in which courts permit prosecutors to offer State Crime Lab reports under Rule 803(6) while requiring the State to provide notice it plans to offer a lab report and then putting the burden on the State to call the analyst responsible for the report if the defendant so demands. The United States Supreme Court held that type of notice-and-demand process met federal confrontation standards in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326–27 (2009).

The amended Rule 803(6) removes the facially unconstitutional notice-and-subpoena provision, while clarifying that State Crime Lab reports may be admissible

if they meet the requirements of Rule 803(6) and, in criminal cases, requiring the prosecution to provide notice to the defendant that it intends to offer such a report. The notice must provide sufficient information so that the defendant can demand that the prosecution produce any witnesses whose testimony is required by the U.S. and Montana constitutions. The notice must be served 20 days prior to trial and the defendant must make its demand for the production of witnesses within 10 days after service of the notice.