

Wednesday, August 29, 2007

If humans input data into a machine, the Confrontation Clause is implicated.

Bill of Rights. (From the public domain.) This month, a two-judge majority of the Fourth Circuit decided that an expert witness may testify in criminal court about the machine-generated results of raw data about drugs in a defendant's blood, without necessitating the presence of the technician who operated the machine. The case is *Dwonne A. Washington v. U.S.*, U.S. (August 22, 2007). The majority said that such raw data is generated by a machine rather than by a human, and that information from a machine does not constitute hearsay that would implicate the Sixth Amendment's Confrontation Clause, and, therefore, does not require any Crawford analysis. See *Crawford v. Washington*, 541 U.S. 36 (2004) (which bars testimonial evidence from slipping through the hearsay rule). To the contrary!, says Judge Michael in his wise dissent. Judge Michael cites federal Circuit after federal Circuit standing in stark contrast to the Fourth Circuit majority in *Washington*. Judge Michael explains his dissent, in pertinent part: "In only one circumstance is a computer-generated assertion not considered the statement of a person: when the assertion is produced without any human assistance or input. In *United States v. Hamilton*, 413 F.3d 1138 (10th Cir. 2005), one of two federal cases relied on by the majority, the Tenth Circuit concluded that the computer-generated header information that accompanied a pornographic image on the internet was not a hearsay statement. 'Of primary importance to this ruling,' however, '[wa]s the uncontroverted fact that the header information was automatically generated by the computer . . . without the assistance or input of a person.' *Id.* at 1142 (emphasis added). Similarly, in *United States v. Khorozian*, 333 F.3d 498 (3d Cir. 2003), the other federal case cited by the majority, the Third Circuit determined that the transmission information on a faxed document was not a hearsay statement because it was automatically generated by the fax machine. But see *United States v. Salgado*, 250 F.3d 438 (6th Cir. 2001) (stating that telephone numbers recorded and stored by computer were hearsay statements that were admissible under the business records exception); *United States v. Linn*, 880 F.2d 209 (9th Cir. 1989) (same). "Unlike the header information on a web page or fax, computerized laboratory equipment cannot detect, measure, and record toxin levels in blood samples without the assistance or input of a trained laboratory technician. The toxicology tests on Washington's blood in this case were conducted by technicians at the Armed Forces Institute of Pathology. These technicians undergo extensive training before they are certified to perform the tests. A technician conducting a blood toxicology test must follow a 'step-by-step procedure.' J.A. 48. He must, among other things, calibrate the testing instrument; withdraw the appropriate portion of blood from the larger sample; insert, without contamination, the smaller test sample into the instrument; initiate the test; and monitor the instrument while the test is in progress. Finally, as the record in this case reveals, the technician reviews and annotates the results and signs the report. In light of the significant role that the technician plays in conducting the test and generating accurate results, the results cannot be attributed solely to the machine. As a result, the toxicology test results must be considered statements of the laboratory technicians for both evidentiary and Confrontation Clause purposes.¹ [Footnote] ¹The government does not contend that the test results are not statements. At trial it conceded that the results are hearsay statements, but argued that they are admissible under the business records exception. See Fed. R. Evid. 803(6). "The test results are testimonial statements, notwithstanding the majority's argument to the contrary. The Supreme Court in *Crawford*, rather than specifically defining 'testimonial,' provided examples that constitute the 'core class of "testimonial" statements.' 541 U.S. at 51. Among these are 'pretrial statements that declarants would reasonably expect to be used prosecutorially.' *Id.* The Court further clarified the meaning of 'testimonial' in *Davis v. Washington*, 126 S. Ct. 2266 (2006), stating that courts should also consider the 'primary purpose' of the statement. A statement is not testimonial, for example, if its 'primary purpose . . . is to enable police assistance to meet an ongoing emergency.' *Id.* at 2273. A statement is testimonial, on the other hand, 'when the circumstances objectively indicate . . . that the primary purpose of the [statement] is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 2273-74." I hope the defendant in this *Washington* case will seek and obtain en banc review, and that Judge Michael's reasoning in his dissent will carry the day. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:00