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Recent Developments: United States v. Washington: Testimony Using a Computer Printout of Results of a Blood Sample Does Not Violate the Confrontation Clause Because Such Results Are Not Statements of the Lab Technicians Who Ran the Tests, Are Not Hearsay Statements, and Are Not Testimonial

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RECENT DEVELOPMENT

UNITED STATES V. WASHINGTON: TESTIMONY USING A COMPUTER PRINTOUT OF RESULTS OF A BLOOD SAMPLE DOES NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE SUCH RESULTS ARE NOT STATEMENTS OF THE LAB TECHNICIANS WHO RAN THE TESTS, ARE NOT HEARSAY STATEMENTS, AND ARE NOT TESTIMONIAL.

By: Melyssa Polen

In *United States v. Washington*, the United States Court of Appeals for the Fourth Circuit held that computer printouts of the results of a blood sample are not statements of the lab technicians who ran the tests, are not hearsay statements, and are not testimonial. *United States v. Washington*, 498 F.3d 225, 227 (4th Cir. 2007). Thus, a qualified third party may testify using the computer printout results without violating the Confrontation Clause or the hearsay rule. *Id.* at 227.

Dwonne Washington ("Washington") was pulled over shortly after 3:30 am on January 3, 2004, by a United States Park Police officer, Officer Hatch, who was patrolling the Baltimore-Washington Parkway. Washington was going thirty miles per hour in a fifty-five mile per hour zone when Officer Hatch turned on his siren and lights to pull Washington over. Instead of complying, Washington accelerated and decelerated, pulled off onto the shoulder and then pulled back onto the road, and continued to meander along the parkway with Officer Hatch pursuing his vehicle. Finally, another park police officer maneuvered his car in front of Washington's, forcing him to stop. When Washington did not respond to Officer Hatch's commands to show his hands or open his car door, he was removed from the car, placed in handcuffs, and asked basic questions to which he did not respond. Based on Washington's unresponsive demeanor and an odor of phencyclidine ("PCP"), Officer Hatch took Washington to a hospital where he agreed to give a blood sample for testing. The blood sample was sent to the Armed Forces Institute of Pathology for analysis of ethanol and other drugs.

The blood sample was subjected to "headspace gas chromatography" to check for ethanol and "immunoassay or chromatography" to check for amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine, opiates, and phencyclidine. These tests were conducted by three lab technicians operating under the protocols and supervision of Dr. Barry Levine ("Dr. Levine"), director of the lab and chief toxicologist. Using the raw data and graphs produced by the testing instruments, Dr. Levine issued a report stating that Washington's blood contained ethanol ("alcohol") and PCP. Based on this report, Washington was charged with driving under the influence, unsafe operation of a vehicle, and other Class B misdemeanors.

At trial, Washington objected to Dr. Levine's testimony as an expert witness regarding the results of the blood test. Washington argued that he was entitled to confront the lab technicians who conducted the actual testing, and that Dr. Levine's testimony was inadmissible hearsay. Washington's objections were overruled by a magistrate judge, and Washington was found guilty and sentenced to sixty days in prison. The ruling was affirmed by the United States District Court for the District of Maryland, at Greenbelt, and Washington then appealed to the United States Court of Appeals for the Fourth Circuit.

On appeal, Washington argued that the computer-generated reports were "testimonial statements" of the lab technicians. *Id.* at 229. He objected to their hearsay statements being admitted by way of Dr. Levine's testimony, and argued that Levine's testimony was a violation of his rights under the Confrontation Clause not to have the technicians in court for cross-examination. *Id.* The Fourth Circuit noted that while the Confrontation Clause requires that all criminal defendants be able to confront witnesses against them, a "witness" for purposes of the Confrontation Clause is defined as a declarant who made a "testimonial statement." *Id.* (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). In this case the "statements" were not made by any person, but by the machines which ran the blood tests. *Washington*, 498 F.3d at 230. The only testimony the technicians could have offered was that the test results showed that Washington's blood contained PCP and alcohol. *Id.* at 229-30. Since Dr. Levine was merely offering the same conclusions based on the test results, the Confrontation Clause was not violated. *Id.* at 230.

Further, the Court pointed out that since the lab technicians did not make statements about whether the blood sample was positive for

alcohol or PCP, there would be no value in cross-examining them as they would only be able to refer to the same printouts Dr. Levine referred to in his testimony. *Id.* The Court noted that while Washington did not raise any concerns about the reliability of the machine or the chain of custody, such concerns were valid, but should be addressed through the process of authentication, not by a hearsay or Confrontation Clause analysis. *Id.* at 231.

The Court elaborated on the point that statements made by machines "are not out-of-court statements made by declarants that are subject to the Confrontation Clause." *Id.* at 230. They looked to the definition of "statement" in Federal Rule of Evidence 801(a), and found that the "statement" offered by the machine was made independent of human observation or reporting, and that only the machine, not the technicians, could provide facts about the chemical composition of Washington's blood. *Washington*, 498 F.3d at 230. They further determined that the test results could not be hearsay because hearsay requires an out-of-court declarant, and Federal Rule of Evidence 801(b) defines a declarant as a "person" who makes a statement. *Washington*, 498 F.3d at 231. Thus, because the data from the machines did not constitute testimonial hearsay statements, Dr. Levine's testimony using the data was not in violation of the Confrontation Clause or hearsay rule, and was properly admitted at trial. *Id.* at 232.

The dissent argued that although the test results were computer-generated, a substantial amount of human input is required and the technicians must be highly trained. *Id.* at 232-33 (Michael, J., dissenting). Furthermore, the technicians must follow a specific procedure which is subject to human error, and thus the test results "must be considered statements of the laboratory technicians for both evidentiary and Confrontation Clause purposes." *Id.* at 233-34. Furthermore, courts in other jurisdictions have consistently considered computer printouts to be hearsay statements admissible only under one of the exceptions to the hearsay rule. *Id.* at 234 (citing *United States v. Blackburn*, 992 F.2d 666 (7th Cir. 1993) (computer printouts of lensometer readings); *United States v. McKinney*, 631 F.2d 569 (8th Cir. 1980) (blood test results); *United States v. DeWater*, 846 F.2d 528 (9th Cir. 1988) (breathalyzer test result)). The majority responded to these arguments by noting that the dissent was mixing authentication issues with its argument about "statements" and observed that if the defendant wished to raise questions about how the machines had been set up, he was entitled to subpoena the lab technicians into court and

cross-examine them. *Washington*, 498 F.3d at 231 n.3 (majority opinion). The dissent also suggested that the lab test results were testimonial because their purpose was to establish or prove a past event that was relevant to later criminal prosecution. *Id.* at 234-35 (Michael, J., dissenting). Finally, the dissent felt that the decision to confront the lab technicians should have been one for the defendant, not the court, to make. *Id.* at 235.

The holding in this case will make it easier for litigants to introduce computer-generated results because such results will not be considered hearsay statements. However, as noted in the dissent, this result is at odds with other circuits. Therefore, unless and until the United States Supreme Court addresses this issue, it seems that defendants in Maryland's federal courts will be unable to confront those who directly conduct computer-generated tests. Defendants must raise the issue in terms of the reliability of the test, or handling or chain of custody of the sample. This ruling will also allow for any expert to interpret the results of a test, regardless of whether they actually conducted the test. Further, with the increasing importance of DNA tests and the development of new and novel scientific methods which can be used to evaluate evidence, the use of computer-generated tests at trials is certain to increase. Whether these tests are "testimonial" statements, and whether the machines or their operators may be considered "declarants" are issues which will surely develop, and which should be closely followed by practitioners.