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Moment of Truth

Justices may settle admissibility of lie detector tests once and for all

BY RICHARD C. REUBEN

In an age of technological miracles, a court case involving the validity of lie detector tests seems almost anachronistic.

Refusing to admit lie detector test results into evidence is a time-honored tradition in U.S. courts. In fact, it was just such a disputed test that gave rise to the longstanding rule on admissibility of scientific evidence expressed 74 years ago in *Frye v. United States*, 293 F. 1013.

Under the *Frye* test, which still is widely followed, scientific evidence may be admitted if it is based on principles "sufficiently established to have general acceptance in the field to which it belongs."

While the technical sophistication of today's polygraphs is far beyond the cathode-tube stuff of the 1920s, many lawyers and judges continue to view them as inherently unreliable and overly prejudicial. Their concern is that the procedure does not test whether a subject is telling the truth but measures physiological responses to questions—which may reveal much, but not necessarily the truth.

But this fall, the U.S. Supreme Court will consider, in *United States v. Scheffer*, No. 96-1133, whether to finally lift the barrier to admissibility of polygraph evidence, at least in the federal courts, on grounds that it inhibits the constitutional right of criminal defendants to present their defenses.

The Court might see an easier path toward admissibility in light of its 1993 decision in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 5795. There, the justices rejected *Frye*'s "general acceptance" test for admissibility with a relevancy analysis contained in Rule 702 of the Federal Rules of Evidence. The rule allows "opinion testimony" by a "qualified person" concerning "scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue."

By introducing a new standard for admitting scientific evidence,

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Despite technological advances, courts still cast a suspicious eye on polygraph tests.

Daubert has made a judicial return to the seminal question of lie detectors seem inevitable.

Several federal courts already have taken up the question. Some, such as the 6th U.S. Circuit Court of Appeals based in Cincinnati, have remained generally faithful to *Frye* by continuing to reject polygraph test results. Most of the circuits considering the question have by now allowed the admission of test results under *Daubert*, but some still are operating under *Frye*-based precedents that have yet to be challenged under *Daubert*.

It is this split that the Court is expected to mend when it hears arguments early in the 1997-98 term, which opens Oct. 6.

Testing the Right to a Defense

Scheffer, however, comes not out of any of the circuits but out of the U.S. Court of Military Appeals. The evidence issue is raised under Military Rule of Evidence 707 rather than Federal Rule of Evidence 702. But that is expected to be a distinction without a difference, since the two sets of rules are similar.

Edward G. Scheffer, an enlisted man in the Air Force, was court-martialed for kiting bad checks, using methamphetamines, failing to go to his appointed place of duty and going

absent without leave for 13 days.

In defending the drug charges, Scheffer wanted to introduce favorable results of a polygraph test requested by the Air Force during its investigation.

A military trial judge, applying the *Frye* test, refused Scheffer's request. He appealed, contending that the absolute bar on the admissibility of polygraph evidence contained in Rule 707 of the Military Rules of Evidence violated his constitutional right under the Sixth Amendment to present a defense to his criminal prosecution.

The Court of Military Appeals agreed, removing the bar on per se inadmissibility of polygraph test results. "Foundation evidence for proffered polygraph evidence must establish that the underlying theory that a deceptive answer will produce a measurable physiological response is scientifically valid," the court held.

"This foundation must include evidence that the examiner is qualified, that the equipment worked properly and was properly used, and that the examiner used valid questioning techniques."

As usual, the justices have many options open to them in deciding *Scheffer*. But given *Daubert*, they finally may decide to give lie detectors their day in court. ■