



UPDATE JULY 7, 2007 CONTACT: TOLL FREE 888-652-6561

THE PHIL



SPECTOR TRIAL

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Over the years my work with expert witnesses has provided my clients with any number of war stories best told over a drink. After the testimony meltdown of Dr. Vincent Di Maio I would wager that Mr. Spector's defense team has a



better understanding of why trial consultants, like myself, exist. It is a lesson hard learned. Spector's defense team is smart enough to know that the plans they had for their case moving forward must now be altered. This update will identify the impact Dr. Di Maio had on the defense case and what is likely to transpire from here forward. Put your seat belts on because the defense is now seriously debating whether



Phil Spector will now have to testify.



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Within the first ten minutes of Dr. Vincent Di Maio's direct exam I knew the defense team was in for a rough ride. Dr. Di Maio's nonverbal cues screamed disaster for the defense long before he opened his mouth.

It is interesting that Dr. Di Maio shares many character traits with Phil Spector. He enjoys guns just like Phil. He bragged about his familiarity with weapons, e.g., "I fired everything the Army had, and some things they weren't supposed to have." He is a man of another era, just like Phil. Had his patients been alive when he interacted with them, it is clear he would not have welcomed their challenging questions. After all, he is the doctor. Can't you just hear Phil remind the musicians under his care, "I am the producer?" Dr. Di Maio is a man who thinks it's fun, not just interesting, to dissect human bodies. He justified his opinion that Miss Clarkson shot herself, in part, based



upon experiments where living calves were shot in the head. He referred to this study time and again with not so much as one expression of compassion. This "experiment," by the way, showed the calves crying out for their mother and trying to cuddle-up to the person positioning the revolver next to their head for the best camera angle. Is it a surprise that Dr. Di Maio showed no compassion for the fate of Lana Clarkson?

Dr. Di Maio shares with Phil more than one misogynistic attitude. He pontificated about Lana Clarkson's age, looks and movie career. He got so carried away with showing the jury what a "tough guy" he is that he demonstrated how he, like a Ninja, could grab a revolver and then with a marshall arts-like twist of his wrist break the finger off of the would-be shooter. He then added that Lana Clarkson, herself, would have known enough about weapons to know how



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to do this. What movie was Miss Clarkson in where she would have learned that, Doctor? She wielded swords in those Roger Corman films, not snub nose 38's. Given her height advantage, he lectured the jury, she could have easily taken the gun away from Spector were it not for the fact that she wanted to shoot herself. If Mr. Rosen and Mr. Plourd had sunk any deeper into their chairs during Dr. Di Maio's cross exam the Court would have ordered the bailiff to go looking for Spector's lawyers.

When it was Alan Jackson's turn to examine Dr. Di Maio he confronted a witness who thought it was "cute" to engage in facile reparté as well as a witness who would make melodramatic changes to his voice like a bad salesman. At the peak faux-dramatic moment of Dr. Di Maio's performance Jackson would often interrupt the doctor by reasserting a dose of somber reality: "Doctor, that is not what I asked you, please answer the question."

Dr. Di Maio not only shot himself in the foot, he may have shot and killed Phil Spector's chances at an outright acquittal. What Dr. Di Maio's dismal performance did was force the defense team to revisit the issue



of having Phil Spector testify. It has also

forced the defense team to look more kindly upon the Court's obligation to instruct the jury on the lesser included offense. I will cover that issue later in this update. For now, let's examine the Defense's next witness, Dr. Henry Lee, Ph.D.

DR. HENRY LEE AND SARA KAPLAN

Let's just call the "missing evidence" the Sara Kaplan evidence. Whatever you call it, it is the albatross around Dr. Henry Lee's neck. Dr. Lee had been cast as the star witness going into this case, but after the Sara Kaplan incident, Dr. Lee was relegated to "wait and see" and Dr. Vincent Di Maio was tapped to carry the day for the defense. Now what we have is Dr. Lee, albatross and all, in the unenviable position of having to "clean up" the mess left by both Dr. Di Maio and Phil Spector.

Alan Jackson would do well to forget about the Kaplan evidence and proceed as though it did not exist. Dr. Lee is more vulnerable due to character traits he exhibited during his last appearance before Judge Fidler than he due to the albatross around his neck. Dr. Lee, like Dr. Di Maio, enjoy their time before the jury just a bit too much. It is, after all, a murder trial. One woman is dead and a man's life hangs in the balance. The trial is not a venue designed around the expert witness.

Dr. Lee is vulnerable because he seldom is at a loss for an explanation that inures to the benefit of his client; and he seldom turns down a case if it is a high profile case. That is a bad combination.



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On the other hand, Dr. Herold, forensic scientist employed by the City of Los Angeles, told Jackson that the Kaplan evidence was a “maybe, maybe not,” in terms of whether or not it could have shed light on what happened that night. Absent the persuasive Kaplan appearing in person, the fact that an unseen (to the jury) lawyer said she saw Dr. Lee pick something up is not going to have a profound effect on the jury one way or the other.

From a more global perspective, both Dr. Lee and Dr. Di Maio represent the end of the honeymoon phase these jurors have had with the forensic scientist. Now that we get a closer look at real CSI, we recognize that reasoning can't be supplanted by forensic science. Sherlock Holmes, Dr. Henry Lee's idol, never had to use blood spatter to solve his cases.

THE LESSER INCLUDED OFFENSE

This issue illustrates the overlap between the proper subject matter of a trial analyst, whose expertise is in human behavior in the courtroom, and the letter of the law. As a trial analyst I have heard so many confusing opinions on the subject of the Murder One charge against Phil Spector that I would like to take this opportunity to clear things up. In so doing I can demonstrate how the psychology of criminal trials is interwoven with the letter of the law.

A serious crime not infrequently subsumes other lesser offenses. Assault with a deadly weapon, for example, most often includes the lesser offense of simple assault. In California, the judge is obligated, sua sponte (on his own volition), to instruct the jury on the lesser included offense **if** the evidence warrants such

an instruction. This is true regardless of the trial strategies utilized by the prosecution or the defense.

In *People v. Gutierrez* (2003), Cal.App.4th, Justice Ikola wrote the following:

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*Now here is where the psychology of trials comes into play*) **The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given. Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.**" (People v. Breverman (1998) 19 Cal.4th 142, 154-155.)

From our perspective there either exists now or there is potential evidence waiting to be developed that is consistent with the lesser offense of involuntary manslaughter. California Penal Code § 192 states the following with regard to manslaughter:

192. Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:



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(a) Voluntary--upon a sudden quarrel or heat of passion.

(b) Involuntary--in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. This subdivision shall not apply to acts committed in the driving of a vehicle.; and

(c) Vehicular-- (for a complete recitation of vehicular manslaughter please see the full text of §192 under the California Penal Code).

Under § 192 of the California Penal Code the following important point is made with regard to gross negligence, manslaughter and murder. This section illustrates the impact of human behavior on the law:

"Gross negligence," as used in this section, shall not be construed as prohibiting or precluding a charge of murder under Section 188 upon facts exhibiting wantonness and a conscious disregard for life to support a finding of implied malice, or upon facts showing malice, consistent with the holding of the California Supreme Court in People v. Watson, 30 Cal. 3d 290.

This last section helps to explain the basis for the People's charge of Murder One against Mr. Spector. Under § 188 of the California Penal Code we see an important distinction between implied and express malice. Keep in mind that malice aforethought is the sine qua non of Murder One in California:

§188. "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, (*here is the psychology part*) **or when the circumstances attending the killing**

show an abandoned and malignant heart. When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice."

Let's assume that Mr. Spector behaved similarly to the way he behaved with the four women who have already testified in the prosecution's case in chief. Recall that these women testified about Spector having pulled a gun on them in order to stop them from leaving his home and, in some instances, to force them to disrobe. On that fateful evening just add one more factor to the patterns outlined by the four women -- this time the gun accidentally fired -- for whatever reason. So what would transform the psychological description of the "abandon of a malignant heart", i.e., implied malice, and thus, Murder One, into the lesser offense of involuntary manslaughter? The answer resides in both psychology AND the law.

Evidence exists that Mr. Spector and Miss Clarkson had engaged in some form of sexual contact, e.g., Spector's DNA was found on one of her breasts and a blisterpack of Viagra, with two of the three tablets missing, was found in Spector's briefcase. If sexual contact did occur, it wouldn't be the first time that a beautiful actress had sexual relations with a wealthy man who made his money in show business. And what if the weapon was a "prop" in their alleged sex play? Both persons are under the influence of alcohol and, as we all know, accidents occur. Is there enough evidence before the jury in this regard to motivate the Court to instruct on the



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lesser included offense of involuntary manslaughter?

TRIAL STRATEGIES AND THE EGO OF PHIL SPECTOR

Let's look at the sentencing guidelines for involuntary manslaughter:

§193. (a) Voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years. (b) *Involuntary manslaughter is punishable by imprisonment in the state prison for two, three, or four years.*

So with involuntary manslaughter a plausible description of what may have occurred that fateful evening, and the sentencing guidelines extremely attractive, especially when compared to life in prison, why wouldn't Mr. Spector's trial team make involuntary manslaughter the centerpiece of their defense? Once again, the answer to that question is as much related to psychology as it is the letter of the law.

First of all, Spector was charged with Murder One. Secondly, Spector watched both O.J. Simpson and Robert Blake, both charged with Murder One, acquitted by a jury in Los Angeles. Vanity Fair writer Dominick Dunne has noted that he ran into Spector at the O.J. Simpson trial. Everything we know about Phil Spector suggests that from his perspective, if O.J. Simpson and Robert Blake were acquitted, then so should he. From a tactical perspective, the defense had little if nothing to lose by proffering a complete defense to the Murder One charge, *as long as* it made sure that enough non-conflicting evidence was presented as part of that complete defense to warrant the Court's mandated instruction on the lesser offense of involuntary manslaughter.

Let's say, hypothetically, that the prosecution earned the entrenched votes of six jurors in favor of Murder One and the Defendant earned the entrenched votes of 6 jurors in favor of an outright acquittal. In that instance, even when the proportion of votes may be different than the example used, a compromise verdict is not infrequently the end result of deliberations. And what would that compromise verdict be in this case? It may include involuntary manslaughter, *but only if the jury is provided that option.* Therefore, whatever the Defense does, it must make sure that the Court feels obligated to instruct the jury on the lesser offense of involuntary manslaughter.

PHIL SPECTOR TESTIFY?

If Phil Spector thinks that he runs the risk of a conviction on Murder One, then he may insist, over his defense team's objections, that he testify. If Spector's defense team were to conclude that he may be convicted on Murder One AND that they need to put their client on the stand to establish the defense of involuntary manslaughter, then they may swallow hard and advise their client to testify.

Dr. Di Maio made it more likely that the "all or nothing" defense strategy, i.e., Miss Clarkson is a victim of "accidental suicide," would be revisited. If Dr. Lee does not resurrect the prospect of an outright acquittal, involuntary manslaughter becomes very attractive. Does Spector need to testify in order for the jury to find involuntary manslaughter? Here is the bottom line.

There were two people in Spector's home that fateful evening, and one of them is dead. Spector told his driver, Adriano De Souza: "I think I killed somebody." He cleaned up the crime



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scene, had blood back splatter on his jacket and has a history of flashing guns and intimidating women. But he is alive and he can be persuasive if, and it is a big if, he does not perceive himself in a position of power and he is not under the influence of alcohol.

“I may be a jerk, a womanizer, a little man who feels big when he holds a gun, but I’m not a murderer. I cleaned up the blood because I don’t trust the police and I didn’t want to be framed, I figured no one would believe me”; or version two, “I was out of my mind after this happened and I just started cleaning.” “I didn’t call 911 because the poor girl was obviously beyond help. She looked to me like she took her own life, but as I sit here in this courtroom and hear the testimony, maybe the whole thing was one big accident. I have never killed anyone and I didn’t that night.”

While it is clear what Mr. Spector will have to say on direct to increase his chances of an outright acquittal or in the alternative a conviction on the lesser offense of involuntary manslaughter, it is less clear how Mr. Spector will be able to withstand Alan Jackson’s cross examination. Let’s hope, if you’re a member of the defense team, that Mr. Spector is prepared more effectively than was Dr. Vincent Di Maio, or for that matter, Dr. Henry Lee.

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