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PHILLIP SPECTOR

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 FOR THE COUNTY OF LOS ANGELES

21 PEOPLE OF THE STATE OF CALIFORNIA, )

22 Plaintiff, )

23 vs. )

24 PHILLIP SPECTOR, )

25 Defendant. )

CASE NO. BA255233

DEFENSE IN LIMINE MOTION TO  
EXCLUDE PROSECUTION  
EVIDENCE OF PHILLIP  
SPECTOR'S ESTIMATED BLOOD  
ALCOHOL LEVEL AT TIME OF  
SHOOTING

DATE: April 10, 2007

TIME: 9:00 a.m.

DEPT: 106

28

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES

3 PEOPLE OF THE STATE OF CALIFORNIA, ) CASE NO. BA255233  
4 Plaintiff, )  
5 vs. ) **DEFENSE IN LIMINE MOTION TO**  
6 PHILLIP SPECTOR, ) **EXCLUDE PROSECUTION**  
7 Defendant. ) **EVIDENCE OF PHILLIP**  
8 ) **SPECTOR'S ESTIMATED BLOOD**  
9 ) **ALCOHOL LEVEL AT TIME OF**  
10 ) **SHOOTING**  
11 )  
12 ) DATE: April 10, 2007  
13 ) TIME: 9:00 a.m.  
14 ) DEPT: 106

11 **IN LIMINE MOTION TO EXCLUDE PROSECUTION EVIDENCE OF PHILLIP**  
12 **SPECTOR'S ESTIMATED BLOOD ALCOHOL LEVEL AT TIME OF SHOOTING**

13 It is anticipated that the prosecution will attempt to introduce speculative evidence of  
14 Phillip Spector's estimated blood alcohol level as of 5:00 am on February 3, 2003, the  
15 approximate time that Ms. Clarkson shot herself. This evidence will not be based on any  
16 extrapolation from a later obtained blood alcohol level back to the time of the shooting. It is  
17 solely based on an estimation that his blood alcohol level could potentially have been as high as  
18 0.19% at the time of the shooting based on drinks he was believed to have had the night before  
19 and in the early morning hours before the shooting.  
20

21 We are requesting that the court hold an evidentiary hearing outside the presence of the  
22 jury pursuant to California Evidence Code section 402 before any such evidence is mentioned by  
23 the prosecution. It is the defense position that there is an inadequate foundation that such an  
24 estimate can be reliably made to a reasonable degree of scientific or medical certainty given the  
25 circumstances of this case.  
26

27 **THE URINE SAMPLE**

28 For some unexplained reason, there was no felony blood sample collected from Mr.

1 Spector following this shooting.

2 The only sample that was collected from Mr. Spector was a urine sample which was not  
3 collected until 6:30 p.m., 13½ hours after the estimated time of the shooting. Further, the urine  
4 sample was not collected properly.

5 The proper method for collecting a urine sample is to first have the subject void his or her  
6 bladder (to remove material that has collected there since the prior void), wait 10 to 20 minutes,  
7 and then have the subject urinate again, with the second sample being analyzed. *People v. Epps*,  
8 182 Cal. App. 3d 1102, 1107.

9 It also cannot be determined from the information we currently have whether the sample  
10 was collected in a proper tube containing the appropriate preservative. Finally it appears that the  
11 sample was allowed to sit, un-refrigerated for 28 hours before it was refrigerated.

12 The urine sample that was ultimately tested showed a urine-alcohol level of “.07 g%” as  
13 of the time of the urine collection.

14 The prosecution has not suggested that they will try to estimate Mr. Spector’s blood  
15 alcohol level using the results of this urine test. In the event that they decide that they do want to  
16 make such an estimate, then we object to that procedure and request a hearing under California  
17 Evidence Code section 402 before such an estimate is mentioned in front of the jury. Our  
18 objection will be that they cannot establish a proper foundation for any such calculation and they  
19 cannot establish that correct scientific procedures were used in collecting the processing the  
20 sample. (see *People v. Venegas*, (1998) 18 Cal.4th 47) Should the prosecution state their  
21 intention to offer an extrapolated blood alcohol level based on this urine test, then we also  
22 request an opportunity to further brief this issue.

1                                   **PROSPECTIVE ESTIMATE OF BLOOD ALCOHOL LEVEL**

2           The prosecution apparently recognized that there were substantial problems with the  
3 manner in which the urine was collected that would invalidate the results of any extrapolated or  
4 calculated blood alcohol level. Consequently, they attempted to estimate Mr. Spector's blood  
5 alcohol level as of 5:00 a.m. based on a prospective analysis using information concerning the  
6 drinks he may have had the evening before and the morning of the shooting.  
7

8           The results of that estimation are contained in a report dated July 2, 2003, from Senior  
9 Criminalist Catherine Navetta (attached and marked as exhibit "A"). In that report Ms. Navetta  
10 stated that Mr. Spector's blood alcohol level "could potentially reach" 0.19%. She then  
11 qualifies her opinion by saying "It is also possible, based on other physiological factors, not  
12 addressed here, that this person could have a blood alcohol level lower than .19% at 5:00 am."  
13 (emphasis added). She does not provide a lower bound estimate at all, which shows her clear  
14 bias.  
15

16           She qualifies this opinion even further saying "if the information were different, different  
17 estimations could be obtained." She does not explain how different information could affect her  
18 estimates.  
19

20           We do not have any record of receiving Ms. Navetta's work papers or lab notes showing  
21 the method she used to perform her calculations. We have made a discovery request for those  
22 records.  
23

24                                   **EXPERT REPORT OF DR. ROBERT MIDDLEBERG**

25           Criminalist Navetta's report, as well as supporting information concerning that opinion,  
26 was provided to expert forensic toxicologist Dr. Robert Middleberg. Dr. Middleberg is the  
27 laboratory director for the National Medical Services of Willow Grove, Pennsylvania.  
28

          On January 22, 2007, Dr. Middleberg issued his expert report in this case (attached and

1 marked as exhibit "B"). That report discusses both the Los Angeles Coroner's office report of  
2 Mr. Spector's urine-alcohol level as well as criminalist Navetta's report of Mr. Spector's  
3 prospective estimated blood alcohol level as of the time of the shooting in this case.

4 Dr. Middleberg's opinion as stated in his report is as follows:  
5

6 "Based on the above documents and records, in addition to my knowledge,  
7 education, and experience, it is my opinion that no determination can be  
8 made, with a reasonable scientific certainty, as to the blood alcohol  
concentration of Phillip Spector at approximately 5:00 a.m. on 2/3/03."

9 (Middleberg report, exhibit "B," page 2)

10 Dr. Middleberg discusses his reasons for his opinion in his report. These will be  
11 discussed in the next section.

### 12 13 **LAW AND ARGUMENT**

14 With this motion, we do object to any mention of Criminalist Navetta's opinions  
15 concerning her prospective estimate of Mr. Spector's estimated blood alcohol level based on her  
16 cursory analysis of the drinks Mr. Spector may have had the night of and the morning of the  
17 shooting.  
18

19 The admissibility of expert testimony is subject to California Evidence Code section  
20 402(b) which provides "The court may hear and determine the question of the admissibility of  
21 evidence out of the presence or hearing of the jury..."

22 Most jurisdictions, including California, allow what is called extrapolation evidence to  
23 relate backwards from the time a blood sample is collected until the event in question occurred.  
24 This is most commonly seen in drunken driving cases. Extrapolation is the use of scientific  
25 evidence to relate a DUI defendant's blood alcohol level at the time of breath or blood testing  
26 back to the time of operation of the vehicle (See generally *Annot., Admissibility and Sufficiency*  
27 *of Extrapolation Evidence in DUI Prosecutions* (2004) 119 A.L.R.5th 379).  
28

1           The rule in California “is that retrograde extrapolation evidence is admissible, though of  
2 course its weight is subject to challenge, as are the qualifications of the expert witness presenting  
3 the evidence” (see dissenting opinion in *People v. Clark*, (2006) 5 Cal.4<sup>th</sup> 811, 950).

4           However, the Navetta report in this case does not fit the traditional definition of  
5 retrograde extrapolation evidence. The Navetta report makes certain assumption about drinks  
6 that Mr. Spector and his companions ordered at restaurants the night before, plus drinks he  
7 ordered in the early morning hours of the shooting, and uses that information to calculate that his  
8 blood alcohol level at 5:00 a.m. in the morning **could potentially reach** a blood alcohol level as  
9 high as 0.19%. She does not include in her report any details of how she reached that possible  
10 upper bound, except that she does state she is assuming Mr. Spector drank six ounces of alcohol.  
11 She also does not give a **lower bound** to this estimate. She qualifies her estimate further saying  
12 that she might actually be wrong and that Mr. Spector’s blood alcohol could be lower, but she  
13 doesn’t say by how much. She qualifies it even further by saying that if the conditions are  
14 changed, her estimate might also be wrong.  
15  
16

17           Nowhere in her report does she even represent that it is her opinion to a reasonable  
18 degree of scientific or medical certainty that Mr. Spector’s blood alcohol level **would have been**  
19 .019%.

20  
21           Dr. Middleberg’s report lists the variables, all of which would impact the reliability of  
22 any estimate. They include the rapidity of drinking, time frame for drinking, food consumption  
23 while drinking, whether the drinks were consumed in their totality, the alcohol content of each  
24 alcoholic beverage, and the pathophysiological state of the person doing the drinking. Dr.  
25 Middleberg goes on to conclude that “each of these factors individually, and significantly  
26 together, would adversely affect the ability to perform the calculation as performed and reported.  
27 Thus, it cannot be stated with a reasonable degree of scientific certainty that a BAC 0.19% w/v  
28


1 accurately depicts that of Phillip Spector at and around 5:00 a.m. on 2/3/03.” (Middleberg report,  
2 exhibit “B,” page 4).

3  
4 **CONCLUSION**

5 Based on the above, we request a full evidentiary hearing on this issue. Hopefully by the  
6 time of that hearing, we will have received more discovery concerning the underlying basis for  
7 the Navetta calculations so that she can be properly cross-examined in a 402 hearing prior to the  
8 time any of the evidence discussed above is mentioned to the jury.

9  
10 Dated: April 4, 2007

11 Respectfully submitted,

12  
13   
14 ROBERT D. BLASIER  
15 Attorney for Phillip Spector



COUNTY OF LOS ANGELES - SHERIFF'S DEPARTMENT  
SCIENTIFIC SERVICES BUREAU  
LABORATORY REPORT

BLOOD ALCOHOL TESTING SECTION

7717 Golondrinas Street

Downey, CA 90242

(562) 940-0328

File Number: 003-00017-3199-011

Agency: LASD Homicide

Investigator: Katz (323) 890-5581

Charge: 187 P.C.

Report Date: July 2, 2003

Subject: Spector, Phil

Victim: Clarkson, Lana

This is a supplemental report to that issued by the undersigned on April 3, 2003.

On March 31, 2003, Detective Katz provided a hypothetical drinking pattern including the following information:

One male weighing 135 pounds was drinking alcohol from approximately 10:00 p.m. until approximately 2:30 a.m. The alcohol was consumed in the following manner, with times indicated based on bar bills:

- 10:17 p.m.: (2) daiquiris at "The Grill", each daiquiri containing approximately 1 shot of rum.
- 10:41 p.m. to 12 a.m.: (2) Navy Groggs at "Trader Vics", each containing approximately 3 shots of rum.
- 1:27 a.m.: (2) daiquiris at "Dan Tana's"
- 1:59 a.m. to 2:30 a.m.: (1) shot of 151 at "House of Blues".

The drinks described would contain approximately six ounces of pure alcohol (100% v/v).

I was asked by Detective Katz to estimate what this person's blood alcohol level might be at approximately 5 a.m.

**CONCLUSIONS:**

Based on the hypothetical, the above described male could potentially reach a blood alcohol level of approximately .19% at 5 a.m.

This is just an approximation based on information provided. If the information were different, different estimations could be obtained. It is also possible, based on other physiological factors not addressed, that this person could have a blood alcohol level lower than a .19% at 5 a.m.

Examination by: Catherine L. Navetta,  
Senior Criminalist

64

000325





January 22, 2007

Robert D. Blasier  
Attorney at Law  
3600 Piedra Montana Road  
El Dorado Hills, CA 95762

Re: **People of California v. Phillip Spector**  
**NMS Expert Services Case No. N06071 A**

Dear Mr. Blasier:

You and your firm have retained NMS Labs, represented by Robert A. Middleberg, Ph.D., as consultants in Toxicology in the above captioned case. You have been furnished a copy of my Curriculum Vitae. You have requested that I review pertinent documents and records and form conclusions and opinions regarding Phillip Spector's blood alcohol concentration (BAC) at approximately 5:00 a.m. on 2/3/03. Additionally, you have asked that I comment on the toxicological findings in relation to the production of tremor.

In order to comply with this request, you have supplied me with the following relevant documents and records:

1. Police investigation reports and records regarding Phillip Spector.
2. Police records regarding the collection, storage and transfer of a sexual assault examination kit on Phillip Spector.
3. EMS records regarding Phillip Spector from 2/3/03.
4. Transcript of a tape-recorded interview of Cari Caruso.
5. Los Angeles County Coroner's Toxicology Laboratory's urine toxicology report of Phillip Spector.
6. County of Los Angeles - Sheriff's Department Scientific Services Bureau records, including an alcohol evaluation report by Catherine Navetta regarding Phillip Spector.

**Based on the above documents and records, in addition to my knowledge, education and experience, it is my opinion that no determination can be made, with a reasonable degree of scientific certainty, as to the blood alcohol concentration of Phillip Spector at approximately 5:00 a.m. on 2/3/03.**

The following was used to support the above opinion and conclusion:

1. At 6:30 p.m. on 2/3/03, Phillip Spector provided a urine specimen as part of a sexual assault examination kit. There is no record of an initial void prior to collection of the urine specimen and no indication that the urine specimen container had any preservative in it. Additionally, there is no indication of how the specimen was stored from the point of collection until approximately 10:30 p.m. on 2/04/03 (approximately 28 hr) when it was supposedly refrigerated at the Lakewood Sheriff's Station. Further, the sexual assault examination kit was then transferred to Downey Crime Laboratory at some point of time before it was eventually picked up and transferred to the Los Angeles County Sheriff's Department Crime Laboratory at approximately 1:30 p.m. on 2/5/03. Finally, the kit was apparently transferred to the County of Los Angeles, Department of Coroner's Toxicology Laboratory on 2/6/03 at 7:50 a.m.
2. The Los Angeles County Coroner's Toxicology Laboratory performed an analysis for drug substances of toxicological interest on the urine sample from Phillip Spector. The following substances of toxicological interest were reported:

Ethanol	0.07 g%
Fluoxetine	0.46 ug/mL
Norfluoxetine	0.23 ug/mL
Topiramate	37 ug/mL

3. As a general statement, the presence of drug substances, including alcohol, in the urine of an individual merely represents the potential exposure of an individual to those substances at some prior point in time. There is no accepted method, with a reasonable degree of certainty, to relate a particular individual's urine concentration of a drug substance to a corresponding blood concentration. There are many reasons for this toxicologically, including:
  - a. Urine is a "waste" specimen. That is, the body excretes urine after it accumulates it over a period of time. During the time for collection of the water-based urine in the bladder, various endogenous (naturally-occurring) and exogenous (things we take into our bodies) substances also will accumulate in the urine. The substances enter the urine as they are cleared from the blood. The blood concentration of drug substances represents that both in the blood and that cleared from the tissues of the body over time. Based on the chemical and toxicological nature of the substance(s), as well as the physiological and pathological state of the individual, some things may leave the body quickly while others more slowly. Moreover,

this will vary from person to person, and within the same individual throughout the course of a day.

- b. The voiding habits and hydration (fluid intake) of an individual will significantly affect what concentration of a substance over time will be found in that person's urine.
  - c. Some things may form in, or disappear from, urine, especially if the urine is not preserved properly, maintained at an appropriate temperature or contaminated with bacteria or yeast, especially in the presence of glucose or other nutritional substances for these latter microbes.
4. Fluoxetine (Prozac®) is a chemically-atypical antidepressant used to help control major depressive and other mental disorders. Norfluoxetine, the major metabolite of fluoxetine, is also active pharmacologically. Recommended daily doses range between 20 to 80 mg. Topiramate (Topamax®) is an antiepileptic/anticonvulsant drug with a broad spectrum of antiepileptic activity for use in adults and children over 2 years of age. It is marketed in tablets (25, 100 and 200 mg) and Sprinkle capsules (15 and 25 mg). The drug is indicated for use in several types of seizures; daily oral doses for adults range from 400 to 1000 mg per day in divided doses. All three of these compounds have relatively long elimination half-lives, i.e., a measure of how long the substance stays in the body. As such, and in addition to the reasons stated above, the finding of fluoxetine, norfluoxetine and topiramate in the analyzed urine specimen does not allow for a conclusion as to when the substances were administered to Phillip Spector in relation to 5:00 a.m. on 2/3/03.

Both fluoxetine and topiramate are associated with adverse effects when used therapeutically. Such effects can be broken down by physiological function. In respect to the nervous system, both these compounds have been associated with the production of tremor. It would be expected that when taken concomitantly, the likelihood of such an adverse effect would be increased.

5. Ethyl alcohol is also known as common drinking alcohol. In respect to assessing potential effects on an individual, blood alcohol concentrations are used to assist in this determination. Urine alcohol concentrations cannot, with a reasonable degree of scientific certainty, be used to correlate to a blood alcohol concentration, especially at some prior point in time from specimen collection. One significant mitigating factor is the known production of ethyl alcohol in biological media, especially in improperly maintained specimens. In the current case, in addition to the reasons stated above, other factors draw into question the provenance for the reported concentration of ethyl alcohol. These factors include the integrity of the urine sample tested, especially in light of potential significant delays in refrigeration during the seemingly large number of transfers of the specimen prior to analysis. Thus, no conclusion can be reached, with a reasonable

degree of scientific certainty, as to the significance of the alcohol finding in the urine of Phillip Spector.

6. Alcohol concentrations at a point in time prior to specimen collection can be approximated prospectively. The prospective calculation effectively uses the known amount, and types of alcohol consumed (e.g., brands), the time frame over which drinking took place, the pace of drinking, the individual's height and weight (and age in the case of males) and several other variables to predict the BAC. The accuracy of this approach is, by definition, only as good as the accuracy and breadth of the information used for the calculations. In the current case, such a determination was made by Catherine Navetta of the County of Los Angeles - Sheriff's Department Scientific Services Bureau. As she correctly points out in her report, her calculation is "just an approximation based on the information provided." And, that if the information provided were different, her calculations would be different and that other factors may have led to an actual BAC lower than that calculated and reported.


In her report, Ms. Navetta calculated a BAC of approximately 0.19% w/v at 5:00 a.m. on 2/3/03. Significant mitigating factors that would impact this calculation include:

- a. Rapidity of drinking.
- b. Time frame for drinking.
- c. Concomitant food consumption while drinking alcohol-containing beverages.
- d. Whether the drinks in their totality were consumed.
- e. The alcohol content of each alcoholic beverage.
- f. Pathophysiological states of the individual.

Each of these factors individually, and significantly together, would adversely affect the ability to perform the calculation as that performed and reported. Thus, it cannot be stated with a reasonable degree of scientific certainty that a BAC of 0.19% w/v accurately depicts that of Phillip Spector at and around 5:00 a.m. on 2/3/03.

I hope the above addresses your concerns in this case. If additional information becomes available that can impact the above conclusions and opinions, please forward such to me for evaluation.

Respectfully,



Robert A. Middleberg, Ph.D., DABFT, DABCC-TC  
Forensic Toxicologist and Laboratory Director

007396

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA )  
3 COUNTY OF LOS ANGELES ) ss

4 I am a resident of the State of California, over the  
5 age of eighteen years, and not a party to the within action. My  
6 business address is 1801 Avenue of the Stars, Suite 900 Los  
7 Angeles, California 90067. On April 5, 2007, I served the  
8 within documents:

7 DEFENSE IN LIMINE MOTION TO EXCLUDE PROSECUTION EVIDENCE OF  
8 PHILLIP SPECTOR'S ESTIMATED BLOOD ALCOHOL LEVEL AT TIME OF  
9 SHOOTING

on each of the interested parties:

9  By Mail: I placed a true copy of the document(s) listed  
10 above in a sealed envelope with postage thereon fully  
11 prepaid, in the United States mail at Los Angeles,  
12 California, addressed as set forth below. BY FEDERAL  
13 EXPRESS

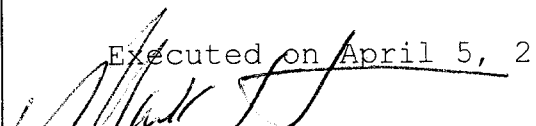
14 X  
15 by personally delivering the document(s) listed above to  
16 the person(s) at the address(es) set forth below.

17 I am readily familiar with the firm's practice of  
18 collection and processing correspondence for mailing.  
19 Under that practice it would be deposited with the U.S.  
20 Postal Service on that same day with postage thereon fully  
21 prepaid in the ordinary course of business. I am aware  
22 that on motion of the party served, service is presumed  
23 invalid if postal cancellation date or postage meter date  
24 is more than one day after the date of deposit for mailing  
25 in affidavit.

26 Steve Cooley, District Attorney  
27 Alan Jackson, Deputy District  
28 Attorney  
Los Angeles County District  
Attorney's Office  
210 West Temple Street  
Los Angeles, CA 90012  
AND BY HAND DELIVERY

29 I declare under penalty of perjury under the laws of the  
30 State of California that the above is true and correct.

31 Executed on April 5, 2007, at Los Angeles, California.

32   
33 \_\_\_\_\_  
34 Roger J. Rosen by Mark Hong