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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 129

JOHN F. HAGGERTY, JR.,

Appellant.

20 Eagle Street
Albany, New York 12207
June 3, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 29 (sic),
2 People v. Haggerty.

3 Counsel?

4 MR. SHECHTMAN: Thank you, Judge.

5 CHIEF JUDGE LIPPMAN: Counsel, do you want
6 any rebuttal time?

7 MR. SHECHTMAN: Two minutes, if I could,
8 Your Honor.

9 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
10 ahead.

11 MR. SHECHTMAN: May it please the court,
12 Paul Shechtman, I represent Appellant John Haggerty.

13 This court and others rarely grapple with
14 the best evidence rule. Its terms are well settled.
15 Its exceptions are familiar; compliance with it is
16 usually easy. This is a best evidence case, and it's
17 our position that - - -

18 CHIEF JUDGE LIPPMAN: What's the dispute
19 about the particular document that's alleged to be -
20 - - requiring the application of best evidence rule?

21 MR. SHECHTMAN: Well, the - - -

22 CHIEF JUDGE LIPPMAN: What - - - what did -
23 - -

24 MR. SHECHTMAN: It's - - -

25 CHIEF JUDGE LIPPMAN: - - - did you need to

1 know that was at dispute between the parties?

2 MR. SHECHTMAN: The dispute is simple, Your
3 Honor. It arose on cross-examination of a
4 prosecution witness. He put in an exhibit that said
5 this money came out of the Mayor's personal account.
6 And the question to him was, is it the Mayor's
7 personal account? It says Bloomberg Revocable Trust.
8 Is it a separate entity? And his response was I
9 don't know.

10 And the prosecutor said to the judge, and I
11 quote, I apologize, "What we need to do is bring in a
12 witness to testify to the fact that this account
13 contains the Mayor's money." And that's the rub of
14 it - - - or the nub or it. Does this account contain
15 the Mayor's money?

16 JUDGE SMITH: Can I - - - can I testify
17 that I own my house, without - - - without bringing
18 in the deed?

19 MR. SHECHTMAN: I think the answer is - - -
20 is - - - well, I think you may be able to testify you
21 own your house. If you were to say, do I own my - -
22 - the land that I have in Columbia County in fee
23 simple or in fee tail, right, then it seems to me the
24 answer is I'm testifying to the contents of the
25 document. And once you're testifying to the contents

1 of the document - - - in other words - - -

2 JUDGE SMITH: Well, what's - - - what's - -

3 -

4 MR. SHECHTMAN: - - - this is money that
5 the Mayor controls.

6 JUDGE SMITH: What's the difference? I
7 mean, is - - - is it - - - is it the complexity of
8 the issue or is it the - - -

9 MR. SHECHTMAN: I think that - - - I
10 suppose the difference is you could testify - - - I
11 mean, I'm not sure, Your Honor. You may - - - the
12 answer may be no.

13 JUDGE PIGOTT: Well, let me give you a
14 suggestion. If - - - if the question is - - - the
15 next question was, do you own it as a joint tenancy
16 or tenancy in common with someone, and - - -

17 MR. SHECHTMAN: Well, then I think it's
18 clear - - - I think it's clear - - -

19 JUDGE PIGOTT: - - - and the witness said,
20 I honestly don't know. The judge might say, well,
21 let's get the deed in here and find out what it says.

22 MR. SHECHTMAN: I - - - I - - -

23 JUDGE PIGOTT: And then you would need the
24 deed, right?

25 MR. SHECHTMAN: Judge Pigott, I have to

1 say, I think if the witness said, I do know, and I
2 can tell you what the deed says; I own it as a joint
3 tenancy, I think that runs afoul of the best evidence
4 rule. You are testifying to the con - - -

5 CHIEF JUDGE LIPPMAN: Counsel, why do you
6 think the document wasn't revealed here? What - - -
7 what was being - - -

8 MR. SHECHTMAN: Well, I think it's - - - I
9 think it's - - -

10 CHIEF JUDGE LIPPMAN: - - - hidden or - - -

11 MR. SHECHTMAN: I think it's simple. I
12 think the Mayor said, I'm not turning it over. I
13 don't care how small a portion; I don't care how
14 redacted; I don't care what restrictions. I've never
15 argued in a court - - -

16 CHIEF JUDGE LIPPMAN: Do you - - - do you -
17 - - I'm sorry, counsel. Do you think that the - - -
18 what - - - what wasn't going to be seen, or what they
19 didn't want to be seen, related to this issue of
20 ownership or to other more tangential or the - - -
21 and your answer is we don't know.

22 MR. SHECHTMAN: Well, I don't know in the
23 following sense. I've never had a case where, if the
24 question is, well, were they right that this was the
25 Mayor's money? My answer is, I don't have the

1 foggiest idea, because I can't see the record; it was
2 given back to the Mayor. If any of you were to say,
3 well - - -

4 JUDGE SMITH: Did you - - - did you
5 subpoena the document?

6 MR. SHECHTMAN: I didn't, Your Honor, but I
7 think the case laws are completely clear that as to
8 that, the burden is on the prosecution. It is - - -
9 the evidence rule says that if you're going to
10 introduce evidence about the contents of a document,
11 it is for the proponent to get it. It's his burden.
12 That's what this court's cases say; that's what the
13 federal rules say. So the availability of a subpoena
14 doesn't solve the problem.

15 CHIEF JUDGE LIPPMAN: So - - - so is your
16 view that - - - that the prosecution's basically just
17 deferring to the Mayor? I mean, is that what - - -

18 MR. SHECHTMAN: Well, I - - - I - - -

19 CHIEF JUDGE LIPPMAN: - - - this case is
20 about basically?

21 MR. SHECHTMAN: I think for whatever reason
22 the answer was the Mayor didn't want it, no matter
23 how small a piece; no matter what numbers weren't
24 available. And the answer was, we can't get it, he
25 won't give it to us, we don't want to issue a

1 subpoena, and God-forbid, we don't want it sealed as
2 part of the record so that anybody can look at it.

3 JUDGE PIGOTT: They - - - they make the
4 point - - - the People make the point, I think, that
5 when Attorney Friday testified, that that solved that
6 problem.

7 MR. SHECHTMAN: I - - - I wouldn't think
8 so, Judge. I mean, if I - - - if you go back to your
9 an - - - question, which is, do I own this in fee
10 simple or fee tail or - - - my property law isn't
11 very good, and you had a better example. But I think
12 you would say to yourself, okay, we need the
13 document.

14 If I said, well, I have the drafter, and
15 they can tell me, you would say, well, I don't know a
16 drafter's exception to the best evidence rule. If I
17 said, well, it was drafted twenty years ago, you
18 would say, God, I'm relying on her twenty-year
19 memory. The best evidence rule says I need the
20 document.

21 JUDGE RIVERA: If someone has an
22 independent basis for their statement, do you still
23 need to bring in the document?

24 MR. SHECHTMAN: Absolutely, and here's - -
25 -

1 JUDGE RIVERA: Why so?

2 MR. SHECHTMAN: - - - here's where they're
3 wrong. There are cases; there - - - indeed the cases
4 are legion, that say the following, and I'll give you
5 an example. If someone were to say to you, Judge
6 Rivera, what did Mr. Shechtman say in answer to that
7 question?

8 JUDGE RIVERA: Um-hum.

9 MR. SHECHTMAN: Objection, best evidence.
10 That - - - that - - - there is a transcript, but the
11 best evidence rule says you could say, because the
12 question is, what did you hear? And so there are
13 questions about confessions where someone says, what
14 did he say to you? The fact that there's a tape
15 doesn't require the production of the tape.

16 But here the question isn't what was said.
17 The question is, what does this document say? And -
18 - -

19 JUDGE READ: Mr. Shechtman, why isn't this
20 harmless error?

21 MR. SHECHTMAN: Be - - - the - - - I think
22 there's a variety of answers to that, Judge. One is
23 on this specific question, right, who owns this
24 property, is it the Mayor's or not? The only
25 evidence is this. All right. When we get to

1 summation, the - - -

2 JUDGE SMITH: Didn't the Mayor testify the
3 money was his?

4 MR. SHECHTMAN: No. In fact, what's
5 interesting to me, on the train up, which is always a
6 good thing about arguing in Albany, it says "Indeed
7 the Ma" - - - this is the People's brief at 36.
8 "Indeed, the Mayor himself could just as easily have
9 testified that he owned the corpus of the trust, had
10 anyone bothered to ask him." Well, no one bothered
11 to ask him - - -

12 JUDGE SMITH: He did testify that he gave
13 his money to the Independence Party.

14 MR. SHECHTMAN: No. He test - - - he
15 testified that money went to the Independence Party,
16 but nobody said to him, this came out of a revocable
17 trust, do you own that trust? So I - - -

18 JUDGE SMITH: Okay, but - - - but - - - but
19 didn't he say - - - but that's a different question.
20 Didn't he say it was his money?

21 MR. SHECHTMAN: I'm not aware of that, and
22 there's nothing in the People's brief that says that.
23 Indeed, what I read from that argument is - - -

24 JUDGE RIVERA: He said I gave 1.1 million.

25 MR. SHECHTMAN: Pardon?

1 JUDGE RIVERA: He said I gave 1.1 million.

2 MR. SHECHTMAN: I can - - -

3 JUDGE RIVERA: And he goes on to say, if I
4 had known it wasn't going to be used for that
5 purpose, I could have done other good things with it.

6 MR. SHECHTMAN: Well, look, all I can tell
7 you is this: he never testified that as to this
8 trust, he controlled it, and he could give money
9 towards - - -

10 JUDGE RIVERA: So you're saying he didn't -
11 - - he didn't testify to the source of the money?

12 MR. SHECHTMAN: He didn't testify to the
13 source, or anything about the trust. And it becomes
14 a sufficient issue - - -

15 JUDGE ABDUS-SALAAM: But does that really
16 matter, though, that he didn't say it came from the
17 trust? Is there any real dispute that it was the
18 Mayor's money?

19 MR. SHECHTMAN: Well, I think - - - I think
20 that's entirely the dispute. We know it came from a
21 revocable trust. The question then is - - -

22 JUDGE ABDUS-SALAAM: Then it's - - - it
23 again - - -

24 MR. SHECHTMAN: - - - is it a separate - -
25 -

1 JUDGE ABDUS-SALAAM: - - - the title of
2 that trust is - - -

3 MR. SHECHTMAN: Mayor's Revocable - - -
4 Mayor Bloomberg's or Michael's - - - I guess he did
5 it before he was Mayor or he didn't put the name
6 "Mayor" on it but - - - Michael Bloomberg's Revocable
7 Trust. Here's what the judge says: "we will know" -
8 - -

9 JUDGE ABDUS-SALAAM: And so would it belong
10 to someone other than Michael Bloomberg, is what
11 you're saying?

12 MR. SHECHTMAN: It - - - I think lots of
13 trusts are - - - have an independent life. They are
14 separate entities, such that if you stole from the
15 trust, it would be stealing like from a corporate
16 entity.

17 JUDGE SMITH: Yeah, but - - -

18 JUDGE RIVERA: Well, your - - - your issue
19 is that he may not control the funds - - -

20 MR. SHECHTMAN: My issue - - -

21 JUDGE RIVERA: - - - regardless of who may
22 have actually found them.

23 MR. SHECHTMAN: My issue is if he doesn't
24 control the funds, this is the only evidence that he
25 does, and I don't see how you say it's harmless

1 error.

2 JUDGE RIVERA: So - - - so even if he says,
3 it's my money, I directed my agents to give it to the
4 party for the following purpose, that's still not
5 enough? He has to identify the source?

6 MR. SHECHTMAN: I suppose the answer is - -
7 - if the question is, is it harmless error, the
8 answer is this issue became disputed. It became
9 disputed enough that your trial judge said, "We will
10 eventually know more about the trust whether Mayor
11 Bloomberg could authorize payment from it." And that
12 was an issue that the pros - - - the People have
13 responded to by saying, the trust will make it clear;
14 the witness will make it clear.

15 So I think the People recog - - -

16 JUDGE SMITH: In - - - in a larceny case,
17 isn't - - - isn't the burden - - - the prosecution's
18 - - - the People's burden was just to show that
19 Bloomberg's right to the money was superior to Mr.
20 Haggerty's?

21 MR. SHECHTMAN: That's totally right,
22 Judge.

23 JUDGE SMITH: You don't - - - do you really
24 think the jury could possibly reach any other
25 inference on this record - - -

1 MR. SHECHTMAN: I - - - I-

2 JUDGE SMITH: - - - than that Bloomberg had
3 more right to this money than Haggerty?

4 MR. SHECHTMAN: If he had - - - if he had
5 no right to it, which is to say, if he didn't control
6 it, then he had the same right as Mr. Haggerty.

7 JUDGE SMITH: On what - - - how - - - how
8 could any juror following the evidence get the
9 impression that Bloomberg had no right to this money?

10 MR. SHECHTMAN: Look, I think that this
11 worried the prosecution enough at trial that they
12 rushed out to get this witness. This worried the
13 prosecution enough at trial that when it came to
14 summation that said this was the Mayor's money, we
15 had the person that drew up the trust account. End
16 of story. Well, if that's the - - -

17 JUDGE SMITH: Well, the - - - the - - - the
18 wit - - - the witness didn't - - - wasn't asked to
19 say, what does the document say? He was asked - - -
20 she was asked, what - - - whose money is it? Who's
21 the grantor? Who's the trustee? Why can't - - - why
22 can't someone give - - - why aren't those kind of
23 general characterizations admissible?

24 MR. SHECHTMAN: Look, if - - - if - - - I
25 don't know how one would draw a line. If I say to

1 the witness, don't - - - don't tell me about the
2 contents of the document, but do - - - is there an
3 easement on this property? You would say, objection,
4 best evidence. You're testifying to the contents.

5 JUDGE SMITH: Wouldn't - - - wouldn't - - -
6 I don't know, maybe I wouldn't it if were not - - -
7 if were something that nobody was really - - - if it
8 was not a central issue, and nobody was fighting
9 about it. Why is that different from who owns the
10 house? I understand if there's a real dispute about
11 who owns the house, you got to get the deed.

12 MR. SHECHTMAN: But - - - but this becomes
13 a real issue, right. The prosecution says this
14 doesn't become an issue until this witness's
15 testimony. The witness who's traced all the money
16 says, gees, I don't know whether he controls it. And
17 so at that point, it becomes an issue, and when it
18 becomes an issue, the rules of evidence apply.

19 CHIEF JUDGE LIPPMAN: Counsel, let - - -
20 assuming we agreed with your evi - - - your argument
21 that the best evidence rule applies, what do - - -
22 what do we do then?

23 MR. SHECHTMAN: Send it back for a new
24 trial.

25 CHIEF JUDGE LIPPMAN: Why - - - why

1 wouldn't you dismiss it if you're right?

2 MR. SHECHTMAN: I - - -

3 CHIEF JUDGE LIPPMAN: Why do you want a new
4 - - - why do you ask for a new trial instead of
5 dismissal?

6 MR. SHECHTMAN: If - - - if you'll dismiss
7 it, I won't - - - I won't be upset.

8 CHIEF JUDGE LIPPMAN: I know you won't, but
9 what was your theory as to why a new trial, rather
10 than dismissal?

11 MR. SHECHTMAN: I think my understanding of
12 the double jeopardy clause, and it really would be a
13 double jeopardy question - - -

14 CHIEF JUDGE LIPPMAN: Yeah, this is what
15 I'm driving at, yeah.

16 MR. SHECHTMAN: - - - is under the Supreme
17 Court's precedence, you say to yourself, what - - -
18 was the admitted evidence sufficient? And if the
19 admitted evidence, and that includes the witness's
20 testimony, was sufficient, then the Supreme Court's
21 cases say, it goes back, because the People could
22 substitute something that was admissible, and so they
23 shouldn't be deprived of that opportunity.

24 JUDGE SMITH: So - - - so you - - - so you
25 are not admitting that the evidence was sufficient

1 without - - - you say it was insufficient, but you
2 say that the People are entitled to cure the - - -

3 MR. SHECHTMAN: Well, I'm - - -

4 JUDGE SMITH: - - - the insufficiency?

5 MR. SHECHTMAN: Look, I - - - I hear Judge
6 Rivera saying to me that the Mayor said this was his
7 money. And maybe the answer is, that was admitted,
8 it's legally sufficient. My response is, there was
9 evidence admitted on the point, it was a contested
10 point, and it's not harmless error, because it's too
11 important to be harmless error.

12 And if that's the case, that only
13 underscores the point - - - my client's not going to
14 be happy with me - - - but that only underscores the
15 point that the remedy here is a new trial; it's not a
16 - - - it's not a dismissal.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 You're going to have your rebuttal. Let's hear from
19 your adversary.

20 MR. RIVELLESE: Good afternoon, Vincent
21 Rivellese for the People.

22 CHIEF JUDGE LIPPMAN: Counsel, why don't we
23 have the document in this case? What's so difficult?

24 MR. RIVELLESE: Well, the People - - -

25 CHIEF JUDGE LIPPMAN: What was the problem?

1 MR. RIVELLESE: The People - - - the Mayor
2 had some privacy interests and he did not want to
3 turn the document over voluntarily.

4 CHIEF JUDGE LIPPMAN: Yeah, but everyone
5 who comes to court is entitled to the same
6 consideration.

7 MR. RIVELLESE: Yes.

8 CHIEF JUDGE LIPPMAN: Why - - - why is it
9 that - - - that I don't want to do - - - well, a lot
10 of people who come to court don't want to, you know,
11 give the documents - - -

12 MR. RIVELLESE: And - - -

13 CHIEF JUDGE LIPPMAN: - - - or give out
14 information. Why is this case different?

15 MR. RIVELLESE: It's not, and many
16 witnesses will not give documents without a subpoena
17 or will not come to court without a subpoena. The
18 Mayor did request - - - did not want to turn over the
19 document without a subpoena, but neither party asked
20 for a subpoena.

21 CHIEF JUDGE LIPPMAN: Yeah, yeah, but why
22 didn't you?

23 MR. RIVELLESE: We weren't trying to prove
24 the contents of the document. The only thing the
25 People had to do - - -

1 CHIEF JUDGE LIPPMAN: You rushed around to
2 get this lawyer to come in and testify, didn't you?

3 MR. RIVELLESE: I'm not sure how much of a
4 rush but - - -

5 CHIEF JUDGE LIPPMAN: From Willkie?

6 MR. RIVELLESE: - - - I mean, it was the
7 next morning. But yes, the People called this lawyer
8 - - -

9 CHIEF JUDGE LIPPMAN: It was important to
10 do that, right? Why wasn't it important to just
11 produce the - - - get the document produced?

12 MR. RIVELLESE: I don't think it was that
13 important, but I think in the midst of a trial, when
14 a defense raises an issue that hadn't been raised
15 before, the prosecution is interested in answering
16 the issue for the jury's satisfaction. It's not that
17 it's required; it's not that it's insufficient.

18 CHIEF JUDGE LIPPMAN: How do you get around
19 the best evidence rule, here? Why - - - why
20 shouldn't you have the document, whether it's the
21 Mayor or anybody else?

22 MR. RIVELLESE: We weren't - - -

23 CHIEF JUDGE LIPPMAN: Why isn't this basic?
24 You know, you're - - - you - - - you have to lay a
25 foundation as to why this document is unavailable,

1 and you can't have it, and then you - - - you - - -
2 then you could go with secondary testimony. Why in
3 this case shouldn't we have the document?

4 MR. RIVELLESE: Because we didn't want to
5 prove what was in the document. We had no interest
6 in proving the terms of the trust.

7 CHIEF JUDGE LIPPMAN: But - - - but to
8 prove your charges, you got to prove that he owned
9 the money, right, it's his money?

10 MR. RIVELLESE: We did. Mayor Bloomberg
11 said it was his money. To answer one of the
12 questions that came up - - -

13 JUDGE PIGOTT: But didn't - - - didn't - -
14 - not that - - - I apologize for interrupting you,
15 but didn't all of this start because the judge said,
16 you know, we - - - we need this information?

17 MR. RIVELLESE: Well, the judge said if we
18 got this information, that would put the defense
19 issue to rest. The judge didn't say, if you don't
20 get the information, you lose the case. So it was
21 really just to answer the defense insinuation that
22 the Mayor might not own the money.

23 JUDGE PIGOTT: And the judge. I mean, the
24 judge seemed to indicate that he - - - that he wanted
25 that part - - - as part of the case, did he not?

1 MR. RIVELLESE: Yes, and suggested that it
2 would be easier if the People would just get the
3 evidence, yes. The Mayor did testify - - - I just
4 wanted to answer what had come up before during Mr.
5 Shechtman's argument, page 325 in the record. The
6 question was, "Do you care that your 1.1 million
7 dollars wasn't spent on ballot security?" The answer
8 was, "I do". And then, "It was your personal money,
9 is that correct?" Answer: "It was my personal
10 money."

11 Now, the Mayor didn't necessarily know what
12 the name of the account was that it was withdrawn
13 from, but he said I trust my advisors. The Mayor
14 said that he instructed his advisors to execute the
15 transactions, and Diane Rizzo, at page 533 in the
16 transcript, said that she instructed 600,000 dollars
17 twice be wired from Michael Bloomberg's account.

18 And then the paper document, which was
19 turned over to the defense before trial, says
20 "Michael Bloomberg Revocable Trust".

21 JUDGE PIGOTT: What's your sense of the
22 best evidence rule argument, here, though? I mean, I
23 - - - I understand you're arguing, you know, that
24 there's other evidence, and that the evidence is
25 sufficient, and that - - - it might be harmless, but

1 - - -

2 MR. RIVELLESE: Well - - -

3 JUDGE PIGOTT: - - - but the - - - I'm
4 sorry; go ahead.

5 MR. RIVELLESE: All of the terms of the
6 trust that were elicited during that witness's
7 testimony were elicited on cross by the defense. The
8 only thing that the prosecutor asked was, does
9 Michael Bloomberg own the money? This was the lawyer
10 who drafted the trust document, so she worked for
11 Michael Bloomberg and he came - - -

12 JUDGE SMITH: But don't - - - but don't you
13 - - - I mean, don't you have to read the trust to
14 know whether he owned the money?

15 MR. RIVELLESE: Well, no. The lawyer was
16 his - - - his employee making the trust document for
17 him. He had the money before he started the trust.

18 JUDGE PIGOTT: But Mr. Shechtman makes the
19 point - - -

20 JUDGE RIVERA: So you're saying that would
21 be - - - she would have an independent basis for that
22 - - -

23 MR. RIVELLESE: Yes.

24 JUDGE RIVERA: - - - based on her attorney-
25 client - - -

1 MR. RIVELLESE: Yes.

2 JUDGE RIVERA: - - - relationship?

3 MR. RIVELLESE: Yes, well, absolutely,
4 because the document would certainly also prove that
5 he owned the money, but - - -

6 JUDGE PIGOTT: But that's not the - - - I
7 thought from the reply brief that the point was that
8 all of her testimony was, this is what the document
9 says. This is what the document provides. And if I
10 understand the defense's argument is that's - - -
11 that's not - - - that's not satisfying the best
12 evidence rule because you're not supposed to testify
13 about the document. It has to be independent.

14 MR. RIVELLESE: But then the defense
15 violated the best evidence rule, and we just didn't
16 object, because it was on cross-examination that the
17 defendant elicited those terms of the trust. We
18 didn't ask about the terms of the trust. We just
19 asked if Mayor Bloomberg owned the money. That was
20 the question.

21 JUDGE SMITH: You also - - - you also asked
22 who the trustee was.

23 MR. RIVELLESE: Well, that was on redirect
24 after the defense had gone into - - -

25 JUDGE SMITH: Okay, okay, but you - - -

1 MR. RIVELLESE: - - - all the terms of the
2 trust.

3 JUDGE SMITH: - - - asked. You're saying
4 the door was then opened to - - -

5 MR. RIVELLESE: Certainly, and there was no
6 objection. The objection was to - - - the initial
7 question when we first called the witness, but then
8 the defense elicited - - -

9 JUDGE SMITH: But how - - - how does - - -

10 MR. RIVELLESE: - - - all of the terms - -
11 -

12 JUDGE SMITH: Okay. So how does she know -
13 - - I mean, if you're really strict about this - - -
14 I can understand the argument you weren't that
15 strict, but if you're really strict, the only way - -
16 - only two ways she knows how - - - whose money it
17 is, either she read the document or Bloomberg told
18 her.

19 MR. RIVELLESE: Well, she wrote the
20 document, so he had to have told her it was his money
21 before she made the document in the first place.

22 JUDGE SMITH: Yeah, so she - - - so she's
23 coming in just - - - so you brought her in to repeat
24 hearsay? The Mayor told me it was his money?

25 MR. RIVELLESE: You could put it that way,

1 but the Mayor had already said it was his money that
2 was taken. And we know, in fact, that the money was
3 taken, because the money was paid. So, there's no
4 issue - - - when the Mayor was asked for a million
5 dollars, he gave a million dollars. His agents
6 executed the transactions, and the transactions took
7 place.

8 JUDGE SMITH: I mean, I think I got Mr.
9 Shechtman to maybe admit or half admit a few minutes
10 ago that there is a point at which you don't have to
11 bring in the document. I can say I own my house
12 without the deed. What is the principle? What - - -
13 what lets me say that, but won't let me say let me -
14 - - let me tell you what my diary says, beginning at
15 page 1?

16 MR. RIVELLESE: Well, I mean, the Mayor
17 said that he had - - - he was the one who had the
18 money, so if you're trying to prove what you're
19 allowed to do with the trust, for example, a lot of
20 the argument in the defense brief is whether he was
21 authorized to use the money and whether it complied
22 with the terms of the trust, then you might need the
23 trust. But - - -

24 JUDGE SMITH: Well - - - well, I mean, if -
25 - - if the money is in a trust, don't you have to

1 read the trust to know whether it's really his money?

2 MR. RIVELLESE: Well, it's like if you're
3 wallet is in the car and somebody steals your car, do
4 you have to know - - -

5 JUDGE PIGOTT: No, but with a trust, I
6 mean, there may be purposes in the trust. And this
7 may not be one of the purposes that - - - I'm
8 confusing this even more, but the idea is that - - -
9 that if they ask you how old you are, you don't need
10 your birth certificate. There are certain common law
11 things that are - - - that are conceded.

12 But when you get into these sophisticated
13 documents and - - - and you're talking about whose
14 money and how was it used, et cetera, you can see the
15 argument that maybe the document is the best evidence
16 of what those terms are.

17 MR. RIVELLESE: Well, I think the document
18 is evidence of what the document says, but it's not
19 the only evidence, and of course Ms. - - -

20 JUDGE PIGOTT: We say the best.

21 MR. RIVELLESE: It would be the best if you
22 needed to say what was specific about the document,
23 like fee simple versus fee tail, like Mr. Shechtman
24 said. But we weren't trying to prove whether Michael
25 Bloomberg owned this in fee simple or fee tail. We

1 were just proving that Michael Bloomberg owned the
2 money that was taken. He had a right superior - - -

3 JUDGE SMITH: But isn't that - - - you say
4 - - - to say he owned it, isn't that - - - does it
5 matter whether it was a grantor trust or a rev - - -
6 or an irrevocable trust? If it's irrevocable with a
7 different trustee, maybe he doesn't own it anymore.

8 MR. RIVELLESE: Well, the title was
9 revocable, but if - - -

10 JUDGE SMITH: I understand, but you got to
11 read it to know that.

12 MR. RIVELLESE: Well, I mean, what - - -
13 what about if you just had a bank account of any
14 variety, do you have prove what instrument you use to
15 give somebody money. The Mayor directed money to be
16 given to the defendant and it was at his direction.
17 Does the Mayor - - - and said it was my money - - -
18 does the Mayor have to then provide documentation to
19 prove that the money was his? He gave the money.

20 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
21 without - - - without the lawyer's testimony, do you
22 think that the evidence was sufficient?

23 MR. RIVELLESE: Beyond sufficient. The
24 Mayor himself said it was his money. He gave - - -

25 CHIEF JUDGE LIPPMAN: Without the lawyer's

1 evidence?

2 MR. RIVELLESE: Absolutely, yes. Without,
3 with. It didn't matter. The trust document wasn't
4 necessary at all. The lawyer wasn't necessary.

5 CHIEF JUDGE LIPPMAN: Why'd you bring in
6 the lawyer?

7 MR. RIVELLESE: Because in the pits of the
8 trial - - - and I know some of you have been trial
9 judges and trial practitioners, but in the midst of a
10 trial, when the jury is presented with some sort of
11 insinuation or an issue, the trial lawyer wants to
12 answer it, in case the jury gets hung up on something
13 that you don't even realize they could think is
14 important even if it's not.

15 CHIEF JUDGE LIPPMAN: You didn't - - - you
16 didn't bring the lawyer in to show that the Mayor
17 owned the money?

18 MR. RIVELLESE: Well, to answer the
19 insinuation that he didn't. The insinuation was
20 raised during our last witness.

21 JUDGE PIGOTT: You may have been facing a
22 missing document charge if you didn't at least make
23 an attempt, I suspect.

24 MR. RIVELLESE: I'm - - - I'm sorry; I
25 didn't hear the question.

1 JUDGE PIGOTT: Well, you - - - I was kind
2 of agreeing with you. You know, if the judge says,
3 well, let's see what the document says, I think you -
4 - - you know, you're in your - - - you'd be wise to
5 try to find it, because whether he's right or wrong,
6 the judge, you know, may say, because you did not,
7 I'm going to give - - -

8 MR. RIVELLESE: Right.

9 JUDGE PIGOTT: - - - an adverse inference
10 charge to the jury.

11 MR. RIVELLESE: Right. And not everything
12 that you try to do is because it's legally required,
13 or because it's the only way that you can prove the
14 case. It's just in addition. You don't present the
15 minimum evidence possible; you present your best
16 case. So we tried to answer the defense insinuation
17 that it wasn't the Mayor's money.

18 JUDGE RIVERA: So I just want to clarify
19 your argument on this. So is your argument that - -
20 - let's assume for one moment, because the victim of
21 this crime had delegated to agents the control of his
22 funds, and he said, that was my money, I gave it for
23 this purpose, that's not how it was used, it was my
24 money, or it is my money, I let my agents do the
25 following, my agents have this control. And he may

1 not actually know the source. But the agents testify
2 that they then followed through.

3 MR. RIVELLESE: Yes.

4 JUDGE RIVERA: You're saying that's enough?

5 MR. RIVELLESE: Yes, it is.

6 JUDGE ABDUS-SALAAM: Is this any different
7 than if the Mayor were writing a check or having
8 someone else write a check for him? Would he have to
9 bring in his bank statements to show that the money
10 belonged to him?

11 MR. RIVELLESE: Well, I would think not.
12 And it's very much the same, and whether it was a
13 trust account or a checking account or a savings
14 account, or cash from his closet, the money he said
15 was his, and the jury was entitled to believe that,
16 and we didn't need the document for that purpose.
17 And we weren't introducing it. Again, it was the
18 cross-examination that brought out all the terms, and
19 we only asked that simple question of did he own what
20 you asked - - - you were asked to draft.

21 And I'll ask you to affirm the convictions.

22 CHIEF JUDGE LIPPMAN: Okay. Thank you,
23 counsel.

24 Counsel, rebuttal?

25 MR. SHECHTMAN: Yes. Judge Pigott, can I

1 start and address something that you said, which is,
2 how did this become an issue? And your sense is it
3 started with the judge. And it really didn't. It
4 started at the end of that cross-examination of the
5 investigator, right, with the prosecutors turning to
6 the judge asking for a continuance, and saying that
7 we need to bring in a witness to testify to the fact
8 that the accounts contain the per - - - the Mayor's
9 personal money.

10 And that's very different. This wasn't
11 just, well, we're going to satisfy a crazy judge,
12 respectfully. This was, I need this in order to - -
13 - to meet my burden now that this issue has been
14 raised.

15 JUDGE ABDUS-SALAAM: Why - - - why is it -
16 - - is that the only reason that they - - - that the
17 People may have asked to bring this witness in?

18 MR. SHECHTMAN: The only - - -

19 JUDGE ABDUS-SALAAM: Mr. - - - Mr.
20 Rivellese said that - - - well, you've - - - you've
21 tried many cases, Mr. Shechtman. So you know that
22 when something comes up that may not be expected, and
23 you don't want the jury back there speculating what,
24 you know, that was about; you want to cover all your
25 bases. So why isn't that an equally - - -

1 MR. SHECHTMAN: I - - - I think it - - -

2 JUDGE ABDUS-SALAAM: - - - valid reason?

3 MR. SHECHTMAN: I think - - - I think we're
4 both right, Your Honor. I think this was a
5 prosecutor who realized that given that witness's
6 testimony, their chief investigator, that he didn't
7 know whether the Mayor controlled this account,
8 right, that there was a potential for reasonable
9 doubt in this case.

10 And when it comes to summation, when the
11 prosecutor says, how do we know it's the Mayor's
12 money? He doesn't say because the Mayor said it's
13 so. He says because you heard the witness who
14 drafted this trust. And that, it seems to me, is the
15 witness who shouldn't have been able to testify to
16 the contents of the trust, because that's what the
17 best evidence rule says.

18 And Judge Smith, I'd say the following in
19 response, you began with a question that I - - - I
20 fumbled a bit, because it's so very basic. And
21 that's always a problem when you get - - - go to
22 basics. But I assume if you say to the Mayor, do you
23 have a trust, right, that I don't see the best
24 evidence rule applying to that.

25 But as you say, when you say who controls

1 this trust? Who's authorized to do this? The only
2 answer to that question is to read the trust. And
3 once you - - -

4 JUDGE SMITH: Does it - - - doesn't it make
5 a difference how - - - I mean, some of the cases talk
6 about collateral issues or undisputed issues - - -

7 MR. SHECHTMAN: Right.

8 JUDGE SMITH: Doesn't it make a difference
9 whether - - - whether you're really fighting about
10 whether he owe - - - whether it's his money or
11 whether it's just - - -

12 MR. SHECHTMAN: But they - - - but they - -
13 -

14 JUDGE SMITH: - - - a complete sideshow?

15 MR. SHECHTMAN: But they were fighting
16 about. They refused to stipulate about it, the
17 defense. And it was an issue, particularly af - - -

18 JUDGE SMITH: And it's - - - anything you
19 refuse to stipulate about, you can make them bring in
20 the underlying documents?

21 MR. SHECHTMAN: No, but if you're
22 testifying - - - if - - - if the question is, is he
23 authorized to - - - to - - - is this trust his? And
24 that was the question. That was the question the
25 judge said, I'm surprised - - - to the prosecutors -

1 - - you haven't run this to the ground.

2 And so once it became clear that there was
3 a serious question here, the answer was the
4 prosecutor said, I need it, and the judge said,
5 you're darn right, and they got it. And the way they
6 got it violated the rules of evidence. And there is
7 no Mayor Bloomberg exception to the rules of
8 evidence, and this isn't collateral.

9 This really isn't a - - - it's not a small
10 piece - - - I mean, if you read those collateral
11 cases, they really have very little to do - - -

12 JUDGE RIVERA: Is it - - -

13 MR. SHECHTMAN: - - - with the elements.

14 JUDGE RIVERA: Is it also your position
15 that they would have had to show that he had enough
16 money to make up 1.1 million?

17 MR. SHECHTMAN: No, because one - - - I - -
18 -

19 JUDGE RIVERA: No, I'm serious - - -

20 MR. SHECHTMAN: That - - - I was going to
21 say that I would - - -

22 JUDGE RIVERA: - - - because all he says is
23 I have the money, right?

24 MR. SHECHTMAN: I was going to say that I
25 would stipulate to. But more seriously, Judge, one

1 of the things we know is, there was 1.2 million
2 dollars there, because it went there to the
3 Independence Party.

4 JUDGE RIVERA: The 100,000, he claims was a
5 - - - was a campaign contribution, not for this.

6 MR. SHECHTMAN: Right, well, and - - - I
7 know. But let me go back and say this. There is a
8 part of this case - - - and I don't mean to be
9 critical of Mayor Bloomberg - - - but there is a part
10 of this case that is playing fast and loose on his
11 part. We know what's happening here, which is money
12 is going up that is unfettered, that is entirely
13 fettered, right? And so it - - -

14 JUDGE RIVERA: All right, but no - - - but
15 in the criminal case, it's whether or not - - -
16 whether or not, Mr. Haggerty, right, stole the money.
17 Let's put that aside.

18 MR. SHECHTMAN: Right.

19 JUDGE RIVERA: So you - - - I just want to
20 clarify. Your position is even when the victim gets
21 up and says, it was my money, but you still need
22 someone else to say - - -

23 MR. SHECHTMAN: No - - -

24 JUDGE RIVERA: - - - that is the actual
25 source of my money?

1 MR. SHECHTMAN: No, but when you look at
2 the paper trail, and see that it is coming out of a
3 trust account, and the government's star witness - -
4 - their summary witness - - - says, gees, I don't
5 know who controls that summary account, that's a good
6 question.

7 JUDGE RIVERA: But Bloomberg does, and he
8 gets up and says, it's my money. Does he have to
9 say, and it came out of this particular trust?

10 MR. SHECHTMAN: No, but when the documents
11 show it, and it becomes an issue, it has to be
12 addressed so that if - - - in answer to the Judge's
13 question of, if it's coming out of my checking
14 account, I think a reasonable juror could say, it's
15 my checking account.

16 I think the jury here could give credit to
17 the Mayor, but the question is - - - was - - - it
18 became a serious issue, when the star agent said, I
19 don't really know. And to fill that gap, to close
20 that gap, the answer was, we'll call the drafter.
21 There has never been a drafter exception.

22 JUDGE RIVERA: Right, so the jury could
23 discount all of that, and say, you know, I heard him
24 say it's his money, that's good enough for me.

25 MR. SHECHTMAN: I - - - I think - - - there

1 was no objection to it, right. It seems to me it's
2 in the record. It's my answer to Chief - - - to the
3 Chief Judge's questions. I don't think it's a legal
4 sufficiency issue, but there was a serious gap here.
5 The People recognized it; the trial judge recognized
6 it. In summation, the way this gap was filled was
7 with this witness's testimony. And this witness,
8 respectfully, should not have been able to testify.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
10 you both, appreciate it.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. John F. Haggerty, Jr., No. 129 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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