# *State of New York Court of Appeals*

**Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.**

To be argued Tuesday, June 3, 2014

**No. 129 People v John F. Haggerty, Jr.**

Political consultant John F. Haggerty, Jr. was accused of stealing campaign funds from Mayor Michael R. Bloomberg during the mayor's 2009 reelection campaign, which was largely self-financed by the mayor. Haggerty persuaded campaign officials to fund, through the Independence Party, an extensive ballot security operation on election day. The Bloomberg Revocable Trust transferred $1.2 million to the Independence Party, with the understanding that the party would use $1.1 million for ballot security and keep the remaining $100,000. The party transferred $750,000 of the money to Haggerty's Special Elections Operations LLC, but trial evidence showed that Haggerty spent only $32,000 on ballot security and used the rest to purchase his childhood home in Queens.

The indictment charged that Haggerty "stole property from Michael R. Bloomberg." At trial, when the defense questioned whether Bloomberg owned and controlled the funds in the Bloomberg Revocable Trust, the prosecution called as a witness the lawyer who drafted the trust agreement to testify that Bloomberg controlled the trust. Supreme Court denied defense counsel's objection that calling the drafting attorney, rather than introducing the trust agreement itself, violated the best evidence rule, which generally prohibits the introduction of secondary evidence unless the original document is lost, destroyed or otherwise unavailable. The prosecution refused to provide a full copy of the trust agreement or enter a redacted copy into the record. Haggerty was convicted of second-degree grand larceny and money laundering. He was sentenced to 1⅓ to 4 years in prison and ordered to pay $750,000 in restitution.

The Appellate Division, First Department affirmed. Rejecting Haggerty's claim that the drafting attorney's testimony about control of the trust violated the best evidence rule, the court cited Schozer v William Penn Life Ins. Co. of N.Y. (84 NY2d 639) without elaboration.

Haggerty argues the drafting attorney's testimony about control of the trust's funds violated the best evidence rule because the trust document "was not lost or missing. It was present in the courtroom, albeit in redacted form. Rather than admit the redacted document, the court excluded it presumably to keep Mayor Bloomberg's financial affairs from public airing." He says the testimony was not justified under Schozer, in which "this Court ruled that secondary evidence -- the testimony of a doctor and his report -- were admissible to prove the contents of an x-ray that had been lost.... Here, by contrast, the trust agreement was not lost. It was in the courtroom, but its owner was unwilling to have the jury see it."

The prosecution argues the best evidence rule was not violated because the drafting attorney "was not called to establish the terms of the Mayor's trust. She was called to testify from her personal knowledge that the Mayor owned the money in the trust account -- a fact she knew independently of the terms of the trust...." Even if the rule was violated, it contends the error was harmless "because the Mayor's ownership of the money was overwhelmingly proved."

For appellant Haggerty: Paul Shechtman, Manhattan (212) 704-9600
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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**No. 130 Matter of Wallach v Town of Dryden**
**No. 131 Cooperstown Holstein Corporation v Town of Middlefield**

The primary issue in these appeals is whether New York's Oil, Gas and Solution Mining Law (OGSML) preempts local government zoning ordinances enacted to prohibit the use of high volume hydraulic fracturing, or "hydrofracking," to recover natural gas from underground shale deposits. The lower courts found there was no express or implied preemption.

The Town of Dryden, in Tompkins County, and the Town of Middlefield, in Otsego County, adopted such land use restrictions in 2011, responding to concerns of residents about the potential health and environmental effects of the hydrofracking process. Dryden amended its zoning ordinance to prohibit all activities related to natural gas and petroleum exploration, production or storage. Middlefield enacted a new zoning law which, among other things, categorized all oil, gas and solution mining and drilling as prohibited land uses in the Town.

Norse Energy Corp., USA, which had acquired through predecessor companies oil and gas leases covering 22,200 acres in Dryden, sued the Town to invalidate the new restrictions. Norse Energy has since filed for bankruptcy and its trustee, Mark S. Wallach, has been substituted as the appellant in the case. Cooperstown Holstein Corporation, which operates a dairy farm in Middlefield and entered into two oil and gas leases with an energy development company in 2007, brought a similar suit against Middlefield. Both plaintiffs argued that the gas drilling bans were preempted by the OGSML and, in particular, by its supersession clause (Environmental Conservation Law 23-0303[2]), which states, "The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."

The Appellate Division, Third Department affirmed Supreme Court decisions dismissing both lawsuits. The "plain language" of the supersession clause "prohibits municipalities from enacting laws or ordinances "*relating to the regulation* of the oil, gas and solution mining industries," and the ordinary meaning of "regulation" is "an authoritative rule dealing with details or procedure," it said in case no. 130. "The zoning ordinance at issue, however, does not seek to regulate the details or procedure of" those industries, but "simply establishes permissible and prohibited uses of land within the Town for the purpose of regulating land generally.... While the Town's exercise of its right to regulate land use through zoning will inevitably have an incidental effect upon" the oil and gas industries, "we conclude that zoning ordinances are not the type of regulatory provision that the Legislature intended to be preempted by the OGSML."

The plaintiffs argue the zoning ordinances are preempted because they ban activities "for which control, oversight and regulation are expressly, exclusively and exhaustively delegated" to the state. Wallach says the "unambiguous" language of ECL 23-0303(2) preempts "all local laws or ordinances that purport to regulate the oil and gas industry" and limits local authority "solely to regulation of local roads and the levying of property taxes. Thus, zoning ordinances that regulate where drilling may occur -- which is a subject matter having nothing to do with roads or taxes -- are preempted."

No. 130 For appellant Wallach: Thomas S. West, Albany (518) 641-0500
For respondent Dryden: Deborah Goldberg, Manhattan (212) 845-7376
No. 131 For appellant Cooperstown Holstein: Scott R. Kurkoski, Binghamton (607) 763-9200
For respondent Middlefield: John J. Henry, Albany (518) 487-7600

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To be argued Tuesday, June 3, 2014

**No. 132 People v Oliverio Galindo**

Oliverio Galindo was arrested on weapon charges in September 2009 after telling a friend that he accidentally shot his cousin, Augustine Castaneda, in the hip. The men had left the Broome Street Bar in Soho, where they both worked, when the incident occurred. Galindo took his cousin to Bellevue Hospital for treatment. Later that day, he returned to the bar and told his friend, bar manager Luis Flores, that Castaneda had been shot "outside the restaurant." He then admitted that he shot his cousin, saying he was "showing the gun" to Castaneda and it "just went off as an accident." He said he dumped the gun in a container near the hospital.

Galindo was charged with two counts of criminal possession of a weapon in the second degree, one alleging he possessed a firearm with intent to use it unlawfully against another person (Penal Law § 265.03[1][b]) and the other alleging he possessed a firearm outside his home or place of business (Penal Law § 265.03[3]). The charge of possession with intent was based on the statutory presumption of unlawful intent in Penal Law § 265.15(4), which states, "The possession by any person of any ... weapon, ... is presumptive evidence of intent to use the same unlawfully against another." Galindo was convicted of both counts based largely on his statements to Flores about an accidental shooting. He was sentenced to concurrent terms of four years in prison.

The Appellate Division, First Department affirmed. Regarding the charge of possession with intent, it said, "the circumstances of defendant's possession of a loaded firearm, viewed in light of the statutory presumption of unlawful intent (Penal Law § 265.15[4]), provided legally sufficient evidence of defendant's intent to use a weapon unlawfully against another. Evidence that defendant's shooting of his cousin was accidental did not warrant a different conclusion, since the People were not required to prove that defendant specifically intended to use the weapon against any particular person." The court said Galindo failed to preserve his claim that there was insufficient evidence to establish possession outside his home or place of business. Alternatively, it said "the only reasonable interpretation" of his statements to Flores "was that the shooting took place outdoors."

Galindo argues, "[I]t is clear that the prosecution did not meet its burden of proving that Mr. Galindo possessed a firearm with the intent to use it unlawfully against another. The prosecution improperly relied solely upon the presumption to prove Mr. Galindo's unlawful intent. Moreover, the prosecution's own evidence and theory of the case -- that Mr. Galindo accidentally shot Mr. Castaneda -- firmly rebutted the notion that Mr. Galindo possessed any unlawful intent, and the prosecution presented no proof at all, let alone beyond a reasonable doubt, that Mr. Galindo possessed the gun at any other moment in time." He also argues he was deprived of effective assistance of counsel when his trial attorney failed to preserve his claim of insufficient evidence to prove he had possession of a weapon outside his home.

For appellant Galindo: Marisa K. Cabrera, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000

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To be argued Tuesday, June 3, 2014

**No. 133 People v Mark Garrett**

Mark Garrett was charged in Suffolk County with the murder of a 14-year-old girl, whose body was found decomposing in his mother's back yard in 1998. The primary evidence against him was a confession he gave to police. At a pretrial suppression hearing in 1999, he testified that the confession was involuntary and that he signed it only after detectives handcuffed him to a chair and slapped him, hit him, and shocked him twice in the back with a stun gun. A nurse practitioner, who examined him at the jail a week after the interrogation, testified he had two "healing round excoriations" on his back, but she could not tell if they were caused by a stun gun. County Court denied the suppression motion based on testimony of Detective Vincent O'Leary and other investigators that Garrett was not physically abused during the interrogation. In 2000, Garrett was convicted of two counts of second-degree murder and sentenced to 25 years to life.

In 2009, Garrett filed a CPL 440.10 motion to vacate the judgment on the ground that prosecutors violated their obligation under Brady v Maryland (373 US 83) to disclose any material evidence in their possession that would be favorable to the defense. He said prosecutors failed to disclose that a federal civil rights action was brought against Suffolk County and a Detective O'Leary in an unrelated case, which claimed the detective obtained a false confession to arson by striking the handcuffed suspect in the head with a telephone book until he confessed. The federal claim was filed in June 1998, prior to Garrett's arrest, and was settled in March 2001, after he was sentenced. County Court denied Garrett's motion without a hearing.

The Appellate Division, Second Department reversed and remitted for a hearing. "[T]he allegedly suppressed evidence clearly fell within the ambit of the prosecutor's Brady obligation because it constituted impeachment evidence.... Moreover, the People's failure to disclose the existence of the civil action may have denied the defendant the opportunity to conduct an investigation leading to additional exculpatory or impeaching evidence..., for instance, providing a basis for the disclosure of police personnel records otherwise unavailable...." It said a hearing is necessary to determine whether prosecutors had sufficient knowledge of the federal suit to trigger their Brady obligation to disclose it.

The prosecution argues, "The Appellate Division's decision in this case stretched this Court's precedents as to what constitutes Brady beyond any requirement of materiality.... Even if the accusations in the civil complaint bear surface similarity to a defendant's trial claims, this does not convert the naked allegations in the complaint into material for impeachment purposes under the Brady doctrine. Fundamentally, a civil complaint is nothing more than an unsubstantiated allegation, which to be filed does not even require that it is based on good faith. It is hearsay by definition and the mere filing of such accusations does not establish the existence of material evidence" subject to disclosure under Brady.

For appellant: Suffolk County Assistant District Attorney Anne E. Oh (631) 852-2500
For respondent Garrett: Steven A. Feldman, Uniondale (516) 522-2828