

## *Grucci*: Authentication of Tape Recordings and Chain of Custody

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In *Grucci v. Grucci*,<sup>1</sup> the majority and dissent wrangled over whether a chain of custody is a predicate element for authenticating a tape recording. The majority, in dismissing the husband's malicious prosecution action against the wife,<sup>2</sup> Christine, held that it is. The dismissal of Michael's action was anchored exclusively on the jury's determination that Michael had not met the first element of malicious prosecution, that Christine had not initiated the prosecution.

What the majority dismissed as inconsequential to the outcome, to wit, Michael's offer of proof, after Michael's brother, Anthony, had been sworn in, that Anthony, would identify and authenticate the tape as a fair and accurate representation of his conversation with Christine, galvanized the dissent as having "prevented Michael from presenting the most powerful evidence in his case."

### **Chain of Custody**

A leading treatise states that chain of custody for audiotapes means "in addition to evidence detailing the making of the tapes and identifying the speakers, those who have handled the tape from its making to production in court, identify the tape, testify to its custody and unaltered condition".<sup>3</sup> Another leading treatise explains when a chain of custody is necessary:

A chain of custody is important when the probative value of the evidence depends on its unchanged condition (for example between seizure and testing of controlled substances) and the evidence has a uniform appearance or otherwise lacks remarkable qualities and any distinguishing characteristics that would serve to connect it with a relevant person, place, or event.<sup>4</sup>

In *People v. Connelly*,<sup>5</sup> involving a drug bust, the Court of Appeals held:

The fact that [evidence] might have passed through several hands in the interim is of little significance when the object possesses unique characteristics or markings

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<sup>1</sup> 20 N.Y.3d 893 (2012).

<sup>2</sup> Christine charged Michael with having violated an order of protection, of which he was acquitted.

<sup>3</sup> Richardson on Evidence, § 4-213, [Farrell, 11<sup>th</sup> ed.]; *People v. Connelly*, 35 N.Y.2d 171 (1974).

<sup>4</sup> Martin, Capra and Rossi, *New York Evidence Handbook*, § 9.8.1, at 905 [7th ed.].

<sup>5</sup> 35 N.Y.2d 171, 174 (1974).

and is not subject to material alteration which is not readily apparent. In these cases simple identification should suffice...But when the item itself is not patently identifiable or is capable of being replaced or altered, admissibility generally requires that all those who have handled the item 'identify it and testify to its custody and unchanged condition.'

### **Facts**

During the trial, Michael sought, through the testimony of his brother, Anthony, to play for the jury an audiotape of a telephone conversation in which Christine made clear to Anthony, at some point after she went to the police, that she was not afraid of Michael. The offer of proof was: "We would ask [Anthony] if he recognized the voices and whether his prior relationship with [defendant] enabled him to identify her voice and whether or not the tape recording is fair and accurate."

The trial judge denied admission of the tape and the contents of the conversation. The judge charged the jury as to the elements required to establish malicious prosecution: (1) defendant commenced or continued a criminal proceeding against the plaintiff; (2) the prosecution terminated in plaintiff's favor; (3) the absence of probable cause; and (4) actual malice.

The jurors were instructed: "[t]he first question for you to decide is whether [Christine] initiated the criminal prosecution" and "[i]f you find [that Christine was] not responsible for [initiating] the prosecution, *you will find for [her] and you will proceed no further*" (emphasis in majority opinion); additionally, if Christine "directed the District Attorney to prosecute or gave the District Attorney information that [she] knew to be false, [she was] responsible for prosecution." The jury concluded that Christine did not initiate the prosecution, and, as instructed, did not consider the other elements of malicious prosecution. The judge entered judgment dismissing the complaint. The Appellate Division affirmed.

Michael sought a new trial due to evidentiary errors, inter alia: refusing to permit Anthony to authenticate the audiotapes; excluding from evidence, as inadmissible hearsay, Christine's statements to Anthony during the phone conversation.

### **The Majority**

Relying on *People v. Ely*,<sup>6</sup> the majority affirmed, stating that, while a party to a taped conversation can identify the speakers, "identity and authenticity are separate facets of the required foundation, both of which must be established":

The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered (Ely, at 522). There was no attempt to offer proof about who recorded the conversation, how it

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<sup>6</sup> 68 N.Y.2d 520 (1986).

was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years when the conversation was recorded and the trial...The judge did not abuse his discretion by requiring more than Anthony's representation that the tape was "fair and accurate" to establish a sufficient "predicate" before playing the tape for the jury.<sup>7</sup>

The majority commented that, while Christine's statements to Anthony were independently admissible as party admissions, Michael never made this argument,<sup>8</sup> arguing instead that its admission was sought to establish Christine's state of mind (malice) rather than for its truth – that she expressed an alternative motive for going to the police in order to show that she lied to the authorities. The Court gave it short shrift: "For this tactic to work, Michael would have to ask the jury to believe that Christine's alleged statements to Anthony were, in fact, true."<sup>9</sup>

### **Harmless Error?**

Puzzlingly, the majority further concluded that omission of this testimony was not so crucial as to whether Christine initiated the prosecution, the very first element of malicious prosecution and the heart of the verdict.

The dissent, written by Judge Eugene Pigott, vigorously referenced governing law that the exclusion of the recording and preclusion of testimony as to its content was reversible error as it was properly authenticated under governing precedent. The dissent underscored that its exclusion "was far from harmless because the evidence was directly relevant to the question whether Christine was responsible for commencing the criminal proceeding against him. The trial court prevented [Michael] from presenting the most powerful evidence in his case – the trial court effectively blocked all methods by which [Michael] could establish his case":<sup>10</sup>

[Anthony] was prepared to prove that defendant was responsible for his prosecution, by lying to the police. The evidence was directly relevant to whether defendant "commenced" the proceeding within the meaning of case law.

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<sup>7</sup> Grucci, at 897.

<sup>8</sup> See: Barker and Alexander, Evidence in New York State and Federal Courts, General vs. Specific Objections, § 1.5; Martin, Capra and Rossi, New York Evidence Handbook, General Objections, § 1.4.1, Incorrect Specific Objections, § 1.4.2; Richardson on Evidence, General Objection, Specific Objection § 1-202, [Farrell, 11<sup>th</sup> ed].

<sup>9</sup> That the "state of mind" exception is a not-so-subtle substitute for the truth of the hearsay is inherently logical because the plain implication is that the declarant would not harbor a particular mind set but for the belief that the underlying statement was true.

<sup>10</sup> Grucci, at 898-899.

Citing the Court's own precedent, *Dennis v. Ryan*,<sup>11</sup> the dissent stated that "if the complainant engages in bad faith conduct that results in a prosecution, she has 'commenced' the prosecution":

When a complainant "has put in motion the officers of the law, ... by his [or her] false and malicious statement it does not, either upon principle or authority, lay with him [or her] to say by way of defence that the injury resulting from the wrong committed by him [or her] would not have been consummated but for the innocent mistake of those imposed upon by him [or her]."

To hold otherwise would abolish the tort of malicious prosecution, it said.

***McGee, Arena, Ely***

The seminal decisions are *People v. McGee*,<sup>12</sup> *People v. Arena* [decided with *McGee*], and *People v. Ely*. Inexplicably, the majority did not reference *McGee*.

***People v. McGee***

*McGee* unequivocally held :

A foundation may be established by a participant to the conversation who testifies that the conversation has been accurately and fairly reproduced. Proof that the evidence has not been altered may be established in a similar fashion. This testimony [] is sufficient to establish that the tape conversation accurately and fairly represents the event to which it refers – [no mention of chain of custody].

In *McGee*, the Court of Appeals laid out the theory behind the foundation necessary to authenticate tape recorded conversations:

The standard to be applied [for recordings] is that applicable to any real evidence sought to be admitted. In determining whether a proper foundation has been laid for the introduction of real evidence, the accuracy of the object itself is the focus of inquiry, which must be demonstrated by clear and convincing evidence. Accuracy or authenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it.<sup>13</sup>

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<sup>11</sup> 65 N.Y. 385, 389 (1875).

<sup>12</sup> 49 N.Y.2d 48 (1979).

<sup>13</sup> "The foundation on which the necessity of authentication rests is an *inherent logical necessity*." "When a claim or offer involves impliedly or expressly any elements of *personal connection with a corporal object*, that connection must be made to appear, like the other elements, else the whole fails in effect." Wigmore on Evidence, § 2129, (emphasis in original).

The foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted. For instance, a chain of custody is employed when “the evidence itself is not patently identifiable or is capable of being replaced or altered” (People v Connelly, 35 NY2d 171, 174 [drugs]). Mere identification by one familiar with the object will be sufficient ‘when the object possesses unique characteristics or markings’ and any material alteration would be readily apparent.

Tape recordings made by a participant to a conversation do not fall within the category reserved for fungible evidence, such as, drugs. The uniformity of these substances, making identification difficult, generally, justifies a requirement of tracing fungible goods through each hand with which it comes in contact. The inherent difficulty with fungible goods simply is not present when evidence of a conversation is sought to be introduced, for the conversation itself is unique and the participants are available to attest to its accuracy. Thus, a chain of custody is not required for the introduction of tape recordings such as those present here.<sup>14</sup>

***People v. Arena***

*People v. Arena*<sup>15</sup> held that, absent any indication that the tape had been altered, the testimony of the victim, who identified the recording as a fair and accurate reproduction of the conversation, constituted a sufficient foundation to support the recording’s admissibility into evidence.

***People v. Ely***

Instead of applying the general rule for authenticating audiotapes where a participant is available, authorized in *McGee* and *Ely*, the majority, in *Grucci*, erroneously rejected that method notwithstanding the participant’s availability to simultaneously identify and authenticate it.

The facts in *Ely* are instructive. The defendant-wife was convicted of second-degree murder of her husband. A key issue centered about the admissibility of three tape recordings made by the deceased. The defendant conceded the accuracy of “isolated portions of the conversation” but did not recall having made certain statements, thus not excluding the possibility of alteration and, therefore, not sufficiently establishing authenticity to make the tapes admissible.

The operative portion of *Ely* outlines four methods of laying a foundation, the first of which is directly from the *McGee*-playbook:

- “Testimony of a participant in the conversation that it is a complete and accurate

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<sup>14</sup> McGee, at 59-60.

<sup>15</sup> 48 N.Y.2d 944, 945 (1979).

reproduction of the conversation and has not been altered (McGee, at 60; Arena, at 945);

- A witness to the conversation or to its recording, such as the machine operator, to the same effect (are two well-recognized ways.)
- Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method (federal cites omitted).
- A fourth, chain of custody, though not a requirement as to tape recordings ( McGee, at 60) is an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court ‘identify it and testify to its custody and unchanged condition.’ ”

*Ely* reached its conclusion due to its unique circumstances., the unavailability of the participant to identify and authenticate the tapes and a challenge to their accuracy. As presented by the majority, *Grucci* is capable of misinterpretation that *Ely* modified *McGee* to require a chain of custody even where the participant to the conversation is available to identify and authenticate.

*Ely* also held that an admission by an attorney during summation that a party “admits what was said on those tapes” does not supply the missing foundation or waive that deficiency in the introduction of the tapes.”<sup>16</sup>

### **The Treatises**

The prominent treatises seem to not be fully synchronized on this point. One treatise states that “chain of custody evidence is not required under the first three methods [in *Ely*] because a conversation, like a nonfungible object, usually is a unique event that a participant or witness with personal knowledge can readily identify”, Barker and Alexander, Evidence in New York State and Federal Courts, § 11.11, n., 3, citing *McGee*.<sup>17</sup>

New York Evidence Handbook, Martin, Capra, Rossi, § 4.2.4 [2d ed.] states: “There must be clear and convincing evidence that the recording is genuine and that there has been no tampering with it”, also citing *McGee*.

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<sup>16</sup> At 529.; Cf., *People v. Thompson* 81 A.D.3d 670 (2<sup>nd</sup> Dept.,2011); *Eveready Ins. Co. v. Blackett*, 148 A.D.2d 413 (2<sup>nd</sup> Dept.,1989).

<sup>17</sup> cf., New York Evidence Handbook, Martin, Capra, Rossi, § 4.2.4 [2d ed.]: “There must be clear and convincing evidence that the recording is genuine and that there has been no tampering with it”, citing *McGee*.

And while Richardson on Evidence, §4-213, [Farrell, 11<sup>th</sup> ed.], citing *Ely*, is consonant with Martin that the proponent of the tape must show that the tape has not been tampered with -- the method of proof is unclear. Richardson cites *McGee* for the proposition that “if the accuracy of the tape is otherwise satisfactorily established, a break in the chain of custody affects weight, not admissibility.”

Unlike *Arena*, et al, the majority in *Gurcci*, Martin, and Richardson impose the burden of presenting a chain upon the tape's proponent as part of the direct case rather than during rebuttal in the event of a challenge.

### **The Dissent Harmonized *McGee* and *Ely***

The dissent captured the essence of the majority’s error in four sentences and also showed that, the majority’s reliance on *Ely* notwithstanding, *McGee* and *Ely* are harmonious:

“The holding in [*Ely*] related to the authenticity of the tapes, not, as here, simple admissibility upon being identified by one of the participants. *Ely* specifically states the rule the trial court failed to follow here: “[t]he necessary foundation may be provided in a number of different ways” and that one such “well-recognized” foundation is “[t]estimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered. The majority does not suggest that this is no longer the law. Moreover, we noted that chain of custody is ‘not a requirement as to tape recordings (citing *Ely* and *McGee*).’ ”

The dissent quoted McCormick on Evidence:

If a percipient witness overheard the voices as they were recorded, this witness may provide the required authentication foundation by testifying that the sound recording is an accurate record of what the witness did hear. In such a case, no chain of custody is required, since the purpose of proving the chain is to show that the recording is in the same condition as when first recorded.<sup>18</sup>

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<sup>18</sup> 2 Broun, McCormick on Evidence § 216 [6th ed.]. McCormick further adds:

If no witness testifies that he overheard the crucial information being recorded, then the record must be authenticated by the "silent witness" process; that is, testimony concerning the accuracy of the recording system and the absence of tampering, often through its chain of custody. § 216.

The dissent also referenced Martin, Capra and Rossi, New York Evidence Handbook § 9.8.1 at 907 [2d ed.] ).

**Conclusion**

While *McGee*, *Arena*, and *Ely* still control, it is wise, in light of *Grucci*, to err on the side of caution and include a chain of custody when authenticating tape recordings irrespective of the availability of a participant to the conversation prepared to identify and attest to its fair and accurate representation.