

## Case Note

### Evidence—ADOPTION OF THE “SILENT WITNESS THEORY”—*Bergner v. State*

#### INTRODUCTION

The fourth district of the Indiana Court of Appeals decided *Bergner v. State*<sup>1</sup> late in 1979.<sup>2</sup> In its opinion the *Bergner* court, with Judge Chipman writing the majority opinion and Judge Young dissenting,<sup>3</sup> adopted the “silent witness” theory.<sup>4</sup> Once the proper foundation for a photograph has been laid, this theory allows the photograph to “speak for itself.”<sup>5</sup> *Bergner* was the first case in Indiana where a photograph was used as substantive rather than demonstrative evidence.<sup>6</sup> The uniqueness of *Bergner*, however, is that the defendant (Bergner) was convicted *solely* upon the basis of two photographs.<sup>7</sup>

The silent witness theory is a valid, and in some jurisdictions accepted, evidentiary methodology.<sup>8</sup> Therefore, the majority’s adoption of the theory would generally be hailed as “the highest form of a progressive judiciary.”<sup>9</sup> The facts in *Bergner*, however, raise serious doubts regarding the adoption of the silent witness theory in this case. In fact, *Bergner* could be used as *the* “hypothetical” which most strongly argues against the silent witness theory and points out its inherent dangers.<sup>10</sup>

In *Bergner*, the court was “singularly concerned with the foundation requirement”<sup>11</sup> for the admission of the photographs into

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<sup>1</sup>397 N.E.2d 1012 (Ind. Ct. App. 1979).

<sup>2</sup>Petition for transfer was denied on July 1, 1980.

<sup>3</sup>397 N.E.2d at 1020.

<sup>4</sup>*Id.* at 1016. This theory is also known as the “pictorial testimony” theory. See 3 J. WIGMORE, LAW OF EVIDENCE § 790 (Chadbourn rev. 1970).

<sup>5</sup>397 N.E.2d at 1015; 2 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1021 (2d ed. Supp. 1978); 3 J. WIGMORE, *supra* note 4, § 790.

<sup>6</sup>397 N.E.2d at 1016. The majority argues, however, that the X-ray in Indiana is used as substantive evidence. See *id.* at 1015; notes 61-80 *infra* and accompanying text.

<sup>7</sup>397 N.E.2d at 1013-14, 1020.

<sup>8</sup>See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); *People v. Doggett*, 83 Cal. App. 2d 405, 188 P.2d 792 (1948); *Oja v. State*, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); *Ferguson v. Commonwealth*, 212 Va. 745, 187 S.E.2d 189, *cert. denied*, 409 U.S. 861 (1972).

<sup>9</sup>397 N.E.2d at 1016 (majority’s assessment of its adoption of the silent witness theory).

<sup>10</sup>See notes 112-39 *infra* and accompanying text.

<sup>11</sup>397 N.E.2d at 1015.

evidence. Since the photograph speaks for itself once admitted, the importance of the foundation requirement for the silent witness theory cannot be overemphasized. When admitted, the state's "key" witness—the photograph—tells its tale worth ten thousand damning words. The defendant, however, cannot cross-examine this "silent" witness as to the accuracy or truthfulness of its representation.<sup>12</sup> The following, therefore, examines only the issue of the foundation for the admittance of photographs into evidence as required by the *Bergner* majority and as criticized in the dissent.<sup>13</sup>

### I. BERGNER—THE FACTS

Bergner was convicted by a jury of sodomizing<sup>14</sup> his four-year-old daughter.<sup>15</sup> The conviction was based solely upon two photographs<sup>16</sup> which portrayed Bergner's daughter committing the act of

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<sup>12</sup>See notes 126-31 *infra* and accompanying text.

<sup>13</sup>Bergner raised three issues upon appeal, the proper foundation for the photographs being the first. 397 N.E.2d at 1014. The second issue raised by Bergner was that his ex-wife's testimony violated the marital privilege. *Id.* at 1019. Bergner argued that his ex-wife's knowledge of his physical appearance and hernia scar was gained during the marital relationship. The majority ruled that, assuming it to be error to allow the ex-wife to testify, it was harmless error in that there was sufficient independent evidence of identification of his body. *Id.* at 1020. The third issue raised upon appeal by Bergner was that there was insufficient evidence to support his conviction. *Id.*

<sup>14</sup>Bergner was convicted under IND. CODE § 35-1-89-1 (1976) (repealed and replaced by IND. CODE § 35-42-4-2 (Supp. 1980)).

<sup>15</sup>397 N.E.2d at 1013. Apparently, the four-year-old daughter was not a witness against Bergner. Under IND. CODE § 34-1-14-5 (1976), "[c]hildren under ten (10) years of age, unless it appears that they understand the nature and obligation of an oath," are not competent witnesses. In *Martin v. State*, 251 Ind. 587, 244 N.E.2d 100 (1969), the defendant was convicted of assault and battery with intent to gratify sexual desires on the four-year-old female victim. The victim was five years old at the time of her testimony at the defendant's trial. The court, upholding the trial court's determination that the victim was a competent witness, stated that "[t]he statutory presumption of incompetence is overcome when the child demonstrates an understanding of 'the nature and obligation of an oath' and there is no further test." *Id.* at 593, 244 N.E.2d at 103. The "nature and obligation of an oath" was interpreted to mean: "(1) [T]he child understood the difference between telling the truth and telling a lie; and, (2) the child had knowledge that she would be punished if she told a lie." *Id.* at 593-94, 244 N.E.2d at 103. See also *Johnson v. State*, 265 Ind. 689, 359 N.E.2d 525 (1977) (seven-year-old child found competent to testify under above test and IND. CODE § 34-1-14-5 (1976)).

<sup>16</sup>This statement is slightly misleading. There was, in fact, "evidence" to establish the foundation for the admission of the photograph including evidence of the identity of the individuals in the photographs. The photographs, however, were the sole evidence of the commission of the alleged crime and of Bergner's alleged criminal agency. These two elements, the *corpus delicti* (crime and agency), are essential to every criminal conviction. See, e.g., *Porter v. State*, 391 N.E.2d 801 (Ind. 1979); *Sneed v. State*, 235 Ind. 198, 130 N.E.2d 32 (1955); *Green v. State*, 159 Ind. App. 68, 304 N.E.2d 845 (1973).

fellatio upon an adult male.<sup>17</sup> As the majority described them, “[t]he photographs show the child lying between the man’s legs with her face, head, and upper body clearly visible. Only the lower body of the male—from the chest to the knee—can be seen, however. The man is partially clothed in a bathrobe.”<sup>18</sup>

Bergner’s son told Bergner’s ex-wife of the existence of the photographs.<sup>19</sup> While Bergner was not at home, his ex-wife searched the darkroom in Bergner’s home, discovered the photographs, and turned them over to the police.<sup>20</sup> The police arrested Bergner and “identified” him as the male in the photographs by a hernia scar clearly visible in the photographs.<sup>21</sup>

At the trial, the state produced two “foundation” witnesses whose testimony was found by the majority to be sufficient for the admission of the photographs into evidence.<sup>22</sup> First, a Federal Bureau of Investigation (F.B.I.) agent, qualified as an expert photograph examiner for the F.B.I., testified to the approximate manufacturing date of the Polaroid black and white film. In addition, the F.B.I. agent testified that the photographs were authentic and not altered or composites.<sup>23</sup>

The second witness, Bergner’s ex-wife,<sup>24</sup> testified to four essential facts: (1) the child in the photographs was her (and Bergner’s) daughter; (2) the man in the photograph was her ex-husband (Bergner) (this testimony was based upon identification of Bergner’s lower body, the above-mentioned hernia scar, and the bathrobe the man was wearing); (3) the room, partially depicted in the photograph, was the living room of the home where Bergner currently lived and where she and Bergner had lived during their marriage; and, (4) the approximate date of the photograph, which was based upon the memorably unprofessional haircut her daughter had received from the daughter’s teenage brother.<sup>25</sup>

Bergner’s sole witness, his present wife, testified that there were discrepancies between the physical appearance of Bergner and the male in the photographs.<sup>26</sup> At this point, the state moved to have Bergner examined by a physician for the purpose of independent

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<sup>17</sup>397 N.E.2d at 1013.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 1014.

<sup>22</sup>*Id.* at 1018.

<sup>23</sup>*Id.* at 1014, 1018.

<sup>24</sup>*Id.* at 1013.

<sup>25</sup>*Id.* at 1013-14.

<sup>26</sup>*Id.* at 1014.

identification.<sup>27</sup> The following procedure was described by the majority.

The trial court denied this motion but suggested an even more novel procedure: the court ordered appellant [Bergner] to lower his pants and display his lower abdomen and thighs to the jury. Neither prosecution nor defense objected to this procedure which the trial judge characterized as "a rather unusual thing for the court to do."<sup>28</sup>

Thereafter, the jury found Bergner guilty.<sup>29</sup>

## II. THE REQUISITE FOUNDATION UNDER THE TRADITIONAL RULE

A clear understanding of the foundation traditionally required for the admittance of a photograph into evidence in Indiana will aid in the understanding of the foundation required by the *Bergner* majority for the admittance of a photograph under the silent witness theory. *Hawkins v. State*<sup>30</sup> was the first criminal case in Indiana where the "traditional rule" for the use of photographs as evidence was clearly pronounced.<sup>31</sup> Essentially, the *Hawkins*, or traditional, rule states that a photograph may be used as demonstrative

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<sup>27</sup>*Id.*

<sup>28</sup>*Id.* In *State v. Brown*, 4 Or. App. 219, 475 P.2d 973 (1970), there was a similar "identification" problem. Defendant, charged with assault with intent to kill, was one side of an obtuse love triangle. The victim was the second side and cuckold of this triangle. The wife of the victim completed this ill-fated *ménagé-a-trois*. At the time of his arrest, the defendant had two lewd pictures allegedly of the victim's wife. The identity of the individual in the picture was in issue; apparently, the photo was a *rear-view* shot. Victim identified his wife in the photographs by a distinctive skin pigmentation mark upon her left buttock. The wife testified that the photographs were not of her. The Oregon Appellate Court described the trial court's procedure:

The court had a physician view the disputed area and he testified that such a mark was there. All of this was out of the jury's presence. The harried trial judge then repaired to another room with the physician, a nurse, and the wife and viewed the premises, observing upon his return that when the subject was in the proper position the mark noticeable in the pictures was clearly identifiable on the locus. The court then allowed the prosecution to lay a proper foundation before the jury with the doctor's testimony, and the pictures were received in evidence.

*Id.* at 224, 475 P.2d at 975-76.

<sup>29</sup>397 N.E.2d at 1014.

<sup>30</sup>219 Ind. 116, 37 N.E.2d 79 (1941).

<sup>31</sup>*But see* *Keyes v. State*, 122 Ind. 527, 23 N.E. 1097 (1890) where the court stated that the photographs were properly admitted. "The evidence shows that there was no material change in the place during the interval which elapsed between the day the murder was committed, and the day on which the place was photographed." *Id.* at 530, 23 N.E. at 1097.

evidence if it is relevant and a true representation of the thing it purports to depict.<sup>32</sup>

Since its adoption in *Hawkins*, the courts in Indiana have consistently followed the traditional rule.<sup>33</sup> This rule has two distinct requirements for the admission of a photograph: (1) the photograph must be relevant; and (2) the photograph must be a true representation of the thing it purports to depict. Once these two requirements are met, the photograph may be admitted as demonstrative evidence.<sup>34</sup>

To be admissible, the photograph, like all evidence,<sup>35</sup> must be relevant.<sup>36</sup> Relevancy is defined as the logical tendency to prove or disprove a material fact.<sup>37</sup> When faced with the issue, the courts in Indiana have repeatedly stated that evidence is relevant if it tends to throw any light upon the guilt or innocence of the defendant.<sup>38</sup> When faced with the issue of relevancy of a photograph, the Indiana courts have consistently focused on whether it would be relevant for a witness to testify to that which is depicted in the photograph.<sup>39</sup> If the testimony of the witness would be relevant, then the photograph is held to be relevant.<sup>40</sup>

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<sup>32</sup>219 Ind. at 127, 37 N.E.2d at 83.

<sup>33</sup>See *Williams v. State*, 393 N.E.2d 183 (Ind. 1979); *Green v. State*, 265 Ind. 16, 349 N.E.2d 147 (1976); *McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978).

<sup>34</sup>The majority points out an existing confusion in Indiana courts' analyses of the requisite foundation for the admission of a photograph into evidence. 397 N.E.2d at 1015. Besides requiring that a photograph be relevant and accurate, some cases indicate that a photograph must also aid in the understanding of other evidence. See *McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978). This "third" requirement is clearly within the relevancy requirement. Under the traditional rule, the photograph is admitted as demonstrative evidence. The photographs, therefore, like all demonstrative evidence, are admitted for the purpose of assisting and enlightening the jurors in relation to other evidence. See notes 46-48 *infra* and accompanying text.

<sup>35</sup>See B. JONES, *JONES ON EVIDENCE* § 4:1 (6th ed. 1972); C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 184 (2d ed. 1972) [hereinafter cited as McCORMICK]. In *Hill v. State*, 267 Ind. 480, 488, 371 N.E.2d 1303, 1307 (1978), the court stated that "the test of relevancy is whether the evidence offered renders the desired inference more probable than it would be without the evidence."

<sup>36</sup>*Gee v. State*, 389 N.E.2d 303 (Ind. 1979); *Grooms v. State*, 379 N.E.2d 458 (Ind. 1978), *cert. denied*, 439 U.S. 1131 (1979).

<sup>37</sup>See, e.g., *Minton v. State*, 378 N.E.2d 639 (Ind. 1978); *Bates v. State*, 267 Ind. 8, 366 N.E.2d 659 (1977). "Evidence is relevant when it renders the existence of a fact which bears on an issue more certain or probable." 1 H. UNDERHILL, *UNDERHILL'S CRIMINAL EVIDENCE* § 5, at 7 (6th ed. 1973).

<sup>38</sup>E.g., *Hill v. State*, 267 Ind. 480, 371 N.E.2d 1303 (1978); *Wilson v. State*, 247 Ind. 680, 221 N.E.2d 347 (1966); *Kramer v. State*, 161 Ind. App. 619, 317 N.E.2d 203 (1974).

<sup>39</sup>As recently stated by the Indiana Supreme Court, the relevance of photographs "is determined by inquiry as to whether a witness would be permitted to describe verbally the subject of the photographs." *Propes v. State*, 382 N.E.2d 910, 911 (Ind. 1978).

<sup>40</sup>*Porter v. State*, 391 N.E.2d 801 (Ind. 1979); *Propes v. State*, 382 N.E.2d 910 (Ind. 1978); *Perkins v. State*, 392 N.E.2d 490 (Ind. Ct. App. 1979); *Brown v. State*, 390 N.E.2d

In addition to relevancy, it must be established that the photograph is a true representation of the thing the photograph purports to depict.<sup>41</sup> Implicit in this requirement, and as established by the courts in Indiana, there must be a witness, with knowledge of that which is portrayed, who can verify that the photograph is accurate.<sup>42</sup> It is established in Indiana that the witness need not be the photographer,<sup>43</sup> but the witness must have personal knowledge of the thing photographed.<sup>44</sup>

Once the photograph is established as relevant and accurate, it may be admitted as demonstrative evidence.<sup>45</sup> The photograph, like all demonstrative evidence,<sup>46</sup> may be used either to help a witness explain testimony,<sup>47</sup> or to aid the court and jury to understand a witness' testimony.<sup>48</sup> As recently as September of 1979, the Indiana Supreme Court has affirmed the traditional rule as the proper foundation for the admittance of photographs into evidence. In *Williams v. State*,<sup>49</sup> the court stated that "[o]ne of the necessary steps in qualifying a photograph for introduction is to establish that it is a true and accurate representation of the person, place or thing which it purports to portray."<sup>50</sup> The court went on to state "that a

1058 (Ind. Ct. App. 1979); *Evansville School Corp. v. Price*, 138 Ind. App. 268, 208 N.E.2d 689 (1965).

<sup>41</sup>*Johnson v. State*, 258 Ind. 648, 283 N.E.2d 532 (1972); *Brown v. State*, 390 N.E.2d 1058 (Ind. Ct. App. 1979).

<sup>42</sup>*Carroll v. State*, 263 Ind. 696, 338 N.E.2d 264 (1975); *McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978).

<sup>43</sup>*McDonald v. State*, 233 Ind. 441, 118 N.E.2d 891 (1954); *Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629 (1943); *McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978); *Indiana Union Traction Co. v. Scribner*, 47 Ind. App. 621, 93 N.E. 1014 (1911). See *Boone v. State*, 267 Ind. 493, 371 N.E.2d 708 (1978). This is the generally recognized rule. See, e.g., *McCORMICK*, *supra* note 35, § 214; *Robertson, Photographic Evidence Standard For Admissibility in Texas*, 42 TEX. B.J. 197 (1979); *Note, Photographs as Demonstrative Evidence in the Court Room*, 40 N.D.L. REV. 192 (1964).

<sup>44</sup>*McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978). See also *Jones v. State*, 381 N.E.2d 1064 (Ind. 1978).

<sup>45</sup>See, e.g., *Jones v. State*, 381 N.E.2d 1064 (Ind. 1978); *Jenkins v. State*, 263 Ind. 589, 335 N.E.2d 215 (1975); *Stallings v. State*, 250 Ind. 256, 235 N.E.2d 488 (1968); *McPherson v. State*, 383 N.E.2d 403 (Ind. Ct. App. 1978). For the standard of review for the admission of a photograph by a trial court under the traditional rule, see note 161 *infra* and accompanying text.

<sup>46</sup>1 H. UNDERHILL, *supra* note 37, § 115.

<sup>47</sup>3 B. JONES, *supra* note 35, § 17:49; 2 C. SCOTT, *PHOTOGRAPHIC EVIDENCE* § 1022 (2d ed. 1969).

<sup>48</sup>*Inman v. State*, 383 N.E.2d 820 (Ind. 1978); *Collett v. State*, 167 Ind. App. 185, 338 N.E.2d 286 (1975); *Richmond Gas Corp. v. Reeves*, 158 Ind. App. 338, 302 N.E.2d 795 (1973); *Evansville School Corp. v. Price*, 138 Ind. App. 268, 208 N.E.2d 689 (1965); *Indiana Union Traction Co. v. Scribner*, 47 Ind. App. 621, 93 N.E. 1014 (1911).

<sup>49</sup>393 N.E.2d 183 (Ind. 1979).

<sup>50</sup>*Id.* at 185.

photograph which is a graphic portrayal of relevant testimony is itself relevant."<sup>51</sup>

Justice Musmanno, in *Heimbach v. Peltz*,<sup>52</sup> set out the following description of the traditional rule:

It is common knowledge that a given condition may be so photographed from different angles as to produce conflicting views of the situation under the camera's lens. The formidable Wigmore speaks of photographic testimony with vigor and conviction, as follows:

We are to remember, then, that a document purporting to be a map, picture, or diagram, is, for evidential purposes simply nothing, except so far as it has a human being's credit to support it. It is mere waste paper,—testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon it than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony,—or it is nothing. It may, sometimes, to be sure, not be offered as a source of evidence, but only as a document whose existence and tenor are material in the substantive law applicable to the case,—as where, on a prosecution for stealing a map or in ejectment for land conveyed by deed containing a map, the map is to be used irrespective of the correctness of the drawing; here we do not believe anything because the map represents it. But whenever such a document is offered as proving a thing to be as therein represented, then it is offered testimonially, and it must be associated with a testifier. (III Wigmore on Evidence, Sec. 790, page 174.)<sup>53</sup>

### III. THE REQUISITE FOUNDATION UNDER THE SILENT WITNESS THEORY

Contrary to the use of photographs under the traditional rule, the photograph under the silent witness theory is used as substantive evidence.<sup>54</sup> As stated by the *Bergner* majority:

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<sup>51</sup>*Id.*

<sup>52</sup>384 Pa. 308, 121 A.2d 114 (1956).

<sup>53</sup>*Id.* at 312, 121 A.2d at 117.

<sup>54</sup>2 C. SCOTT, *supra* note 47, § 1021; 3 J. WIGMORE, *supra* note 4, § 790.

The "silent witness theory" for the admission of photographic evidence permits the use of photographs at trial as *substantive* evidence, as opposed to merely demonstrative evidence. Thus, under the silent witness theory there is no need for a witness to testify a photograph accurately represents what he or she observed; the photograph "speaks for itself."<sup>55</sup>

The majority, in support of its position, outlined the use of the silent witness theory in three separate contexts, hereinafter referred to for convenience as: (1) X-ray cases, (2) Regiscope cases, and, (3) bank robbery cases.<sup>56</sup>

Prior to the analysis of these three proffered illustrations, it is well to note, as did Judge Young in his dissent,<sup>57</sup> that there are two major distinctions between each of the contexts examined by the majority and the facts in *Bergner*. First, in each context listed by the majority where the silent witness theory is used, the "processing" of the photograph is given extensive consideration in the laying of the requisite foundation. This "processing" element may include an examination into the camera, its lens, the angle of the shot, the available light, when the film was loaded, when the film was unloaded, whether the camera or film was used during the time in issue, and the chain of custody for development of the film as well as the final photograph.<sup>58</sup> The examination into the "processing" element is to assure the authenticity and trustworthiness of the photograph.<sup>59</sup> Secondly, in each context offered by the majority, there is "other" evidence substantiating that an alleged fact or criminal act has occurred.<sup>60</sup> There was no comparable "processing" element nor any evidence independent from the photographs in *Bergner*.<sup>61</sup>

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<sup>55</sup>397 N.E.2d at 1015 (emphasis in original).

<sup>56</sup>*Id.* at 1015-16.

<sup>57</sup>*Id.* at 1024.

<sup>58</sup>See notes 84-87, 98, 103 & 122 *infra* and accompanying text.

<sup>59</sup>397 N.E.2d at 1016, 1023, 1024.

<sup>60</sup>See notes 80, 91-93 & 132 *infra* and accompanying text.

<sup>61</sup>Without the support of any authority, the majority stated that "every jurisdiction admits X-ray photographs as substantive evidence upon a sufficient showing of authentication." 397 N.E.2d at 1015. This statement is at least debatable. See notes 68-76 *infra* and accompanying text. Support for the majority's statement, however, can be inferred from several authorities. See, e.g., 3 C. SCOTT, *supra* note 47, § 1269; 1 H. UNDERHILL, *supra* note 37, § 153; 3 J. WIGMORE, *supra* note 4, § 795; MacFarlane, *Photographic Evidence: Its Probative Value at Trial and the Judicial Discretion to Exclude*, 16 CRIM. L.Q. 149 (1973).



### A. X-ray Cases

X-rays were the *Bergner* majority's first illustration of the silent witness theory.<sup>62</sup> The majority stated that it was obvious that "no witness can testify that he or she saw what an X-ray depicts, thus rendering the pictorial testimony theory logically inapplicable."<sup>63</sup> The majority then listed four generally required foundation elements for the introduction of an X-ray into evidence.<sup>64</sup> The party offering the X-ray must establish the reliability and trustworthiness of the following: (1) the X-ray machine, (2) the operator or technician, (3) the procedure used in exposing and processing the X-ray plate, and, (4) the record keeping techniques used to match the X-ray to the patient.<sup>65</sup> The majority's reliance upon X-ray cases as support for the adoption of the silent witness theory in the *Bergner* case was erroneous for two reasons. First, X-ray cases are irrelevant to the *Bergner* facts. There was no testimony or any other evidence establishing the reliability or trustworthiness of the camera, photographer, or the procedure and processing of the film.<sup>66</sup> There was evidence, however, establishing that the individual photographed was Bergner.<sup>67</sup> Therefore, only one of the four requisite foundation elements of an X-ray case was met in *Bergner*.

Second, and more importantly, the use of the X-ray as evidence in Indiana is simply not the use of the silent witness theory. As stated by Judge Young in his dissent: "I do not believe that an X-ray is evidence which could 'speak for itself' and it has not been admitted on that rationale."<sup>68</sup> Both the majority<sup>69</sup> and the

<sup>62</sup>397 N.E.2d at 1015.

<sup>63</sup>*Id.* See generally Scott, *X-Ray Pictures as Evidence*, 44 MICH. L. REV. 773 (1946).

<sup>64</sup>These four elements are generally accepted as constituting the proper foundation for the admittance of X-rays. See, e.g., 3 C. SCOTT, *supra* note 47, § 1263; 1 H. UNDERHILL, *supra* note 37, § 153. In *Hashfield v. State*, 247 Ind. 95, 210 N.E.2d 429 (1965), *cert. denied*, 384 U.S. 921 (1966), however, the court cited a two element foundation: "The rule for admission of X-rays in Indiana seems to be twofold. First, the individual X-ray must be properly authenticated. Second, the competency of the X-ray photographer must be shown before the X-ray is admissible." 247 Ind. at 109, 210 N.E.2d at 438. But, as pointed out by Scott:

While the requirements spelled out in Section 1263 are all theoretically necessary to authenticate an X-ray picture, in present day trials X-rays rarely are so completely verified. Generally speaking an X-ray film is sufficiently authenticated for admission in evidence if there is proof showing that it was taken by a properly qualified expert and proof that the film is a fair representation of the subject in question.

3 C. SCOTT, *supra* note 47, § 1265, at 107.

<sup>65</sup>397 N.E.2d at 1015.

<sup>66</sup>See *id.* at 1013-14, 1018.

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 1021.

<sup>69</sup>*Id.* at 1015 n.2.

dissent,<sup>70</sup> citing *Howard v. State*,<sup>71</sup> point out that the X-ray is a form of scientific evidence in Indiana.<sup>72</sup> As stated by one authority, "in every instance of use of an X-ray photograph, there *must be interpretation of it by a witness qualified to interpret* photographs of that class of data."<sup>73</sup> Although the X-ray is admitted into evidence, it is used principally in support of the testimony of a witness.<sup>74</sup> As stated by the court in *Howard*, the X-ray was relevant and admissible in that it "contribute[d] to a determination of the cause of death [and was] . . . relevant also to support the conclusions drawn by the surgeon [expert witness]."<sup>75</sup> Thus, clearly within the traditional purpose of demonstrative evidence, the X-ray illustrates the witness' testimony.<sup>76</sup>

One authority, partially agreeing with the *Bergner* majority's analysis, states that X-rays "do not readily lend themselves" to the requisite foundation under the traditional rule:

X-ray photographs are a common example, and are of course constantly admitted, despite the fact that no witness has actually viewed the objects portrayed. The foundation typically required for X rays [*sic*] is calculated to demonstrate

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<sup>70</sup>*Id.* at 1021.

<sup>71</sup>264 Ind. 275, 342 N.E.2d 604 (1976).

<sup>72</sup>This proposition was never specifically stated by the court in *Howard*, but may be inferred from its examination of the issues raised in relation to the admission of X-rays. *Id.* at 282-84, 342 N.E.2d at 608-09.

<sup>73</sup>3 J. WIGMORE, *supra* note 4, § 795, at 246 (original emphasis).

<sup>74</sup>No Indiana cases were cited by the majority (and this author could find none) where the jury was allowed to draw its own conclusions from an X-ray without the aid of expert testimony. It would seem that the foundation requirements for an X-ray to be admitted are so intimately connected with the expert's testimony that the two are not distinguishable, or at least not distinguished, by the courts in Indiana. *See, e.g.*, *Howard v. State*, 264 Ind. 275, 342 N.E.2d 604 (1976).

<sup>75</sup>*Id.* at 282, 342 N.E.2d at 608.

<sup>76</sup>This can be clearly demonstrated by admitting the expert's testimony without the X-ray, but not admitting the X-ray's "testimony" without the expert. *See Howard v. State*, 264 Ind. 275, 342 N.E.2d 604 (1976). *Accord*, *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956). As stated by Scott:

The courts take judicial notice of the fact that an X-ray picture of internal conditions of the human body does not necessarily or ordinarily interpret itself to the mere observation of a non-expert. The ordinarily layman is unfamiliar with the structure in detail of the human anatomy, such as the appearance and normal relation to each other of the bones, muscles, etc., and is also unfamiliar with X-ray images thereof and the significance of the same. A jury of laymen possessing no knowledge or experience respecting the bones and injuries thereto might easily be misled by an unexplained X-ray photograph. Indeed, X-ray pictures of some parts of the body, such as the back and pelvic region, unexplained by the evidence of one who qualifies as an expert in the interpretation of such films, may tend to mislead not the layman alone, but even a general practitioner of medicine.

3 C. SCOTT, *supra* note 47, § 1269, at 121 (footnotes omitted).

that a reliable scientific process was correctly utilized to obtain the product offered in evidence. Some few courts have explicitly recognized what the general treatment of X rays [*sic*] would imply, i.e., that the validity of the photographic process, together with adequate proof of its proper utilization, constitutes a valid *alternative* ground for the admission of photographic evidence.<sup>77</sup>

This authority, although proposing an "alternative" foundation requirement, does not propose that the X-ray then speak for itself.

It is not contended that the X-ray is not substantive evidence. As one author commented:

[C]ourts differ as to whether a photograph is illustrative of the witness' testimony or substantive evidence of the facts it portrays. Actually, the distinction is too fine, and the photograph should be considered substantive evidence just as is the testimony which supports it. Perhaps the photograph is really stronger substantive evidence than supporting testimony where it portrays physical facts which conflict with an opponent's testimonial version of the facts. And, the same should be true of X-rays once they have been identified and interpreted by an expert.<sup>78</sup>

The contention is, however, that contrary to the *Bergner* majority position, the X-ray is not authenticated and then merely placed before the jury to be interpreted. The X-ray is always introduced through and in support of expert testimony. *Then* the X-ray acts as substantive evidence. This is clearly not the silent witness theory in application. As stated by the same author: "Ordinary photographs of people and places can be 'read' by lay witnesses and jurors, but X-rays are, in most instances, meaningless to the layman until read and interpreted by an expert. . . ." <sup>79</sup>

In addition, it must be pointed out that whenever an X-ray is admitted into evidence, there will generally be independent corroborating evidence of the X-rayed fact in issue.<sup>80</sup> The facts found in *Bergner*, however, were supported by no such corroborating evidence that a crime in fact occurred.

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<sup>77</sup>MCCORMICK, *supra* note 35, § 214, at 531-32 (emphasis added).

<sup>78</sup>J. RICHARDSON, MODERN SCIENTIFIC EVIDENCE § 16.19, at 504 (2d ed. 1974).

<sup>79</sup>*Id.* at 503.

<sup>80</sup>*See, e.g.*, Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976) (victim's attending physician testified to the degree of injury found which was depicted in the X-ray); Makarski v. State, 439 S.W.2d 340 (Tex. Crim. App. 1969) (same); Meade v. Belcher, 212 Va. 796, 188 S.E.2d 211 (1972) (civil action for loss of leg by plaintiff).

### B. Regiscope Cases

The second context in which the *Bergner* majority illustrated the use of the silent witness theory was in Regiscope cases.<sup>81</sup> The Regiscope is a machine which simultaneously photographs a check and the person cashing the check.<sup>82</sup> The silent witness theory is necessary in the Regiscope cases because the cashier cannot ordinarily recall the incident in issue, the check, or the person cashing the check.<sup>83</sup>

Generally, the foundation necessary to establish the authenticity and trustworthiness of a Regiscope photograph entails three distinct elements:<sup>84</sup> (1) the identification of the defendant in the photograph;<sup>85</sup> (2) the operation of the Regiscope, which generally includes not only how the Regiscope mechanism works, but also the procedure of the picture taking and the matching of the picture with the incident;<sup>86</sup>

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<sup>81</sup>397 N.E.2d at 1015-16.

<sup>82</sup>*Id.* at 1015; 3 C. SCOTT, *supra* note 47, § 1419 (1969 & Supp. 1978).

<sup>83</sup>There is, in effect, no witness due to a combination of the large numbers of checks cashed, the ordinary "in the course of business" routine of cashing checks, the limited period of time the cashier has with the person cashing the check, and the time span between the cashing of the check and the identification of the defendant. The combination of these factors makes it very unlikely that the cashier will be able to identify the defendant. *See, e.g.,* United States v. Gray, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976); Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964) (quoted extensively by J. Young in his dissent, 397 N.E.2d at 1021-23). *But see* Barker v. People, 158 Colo. 381, 407 P.2d 34 (1965).

<sup>84</sup>397 N.E.2d at 1015. *See generally* cases cited in 3 C. SCOTT, *supra* note 47, § 1419 (1969 & Supp. 1978).

<sup>85</sup>The identification of the defendant as a recognized element of the foundation should be distinguished from the "identification" of the defendant as a question of fact for the trier of fact. The issue in *Bergner* is "singularly" concerned with identification as an element of foundation. 397 N.E.2d at 1015. *But cf.* United States v. Gray, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976) (cited by the majority) (the court stated that the foundation elements were the operation of the Regiscope and the processing of the film but that the identification of the defendant in the photograph was a question of fact).

<sup>86</sup>As stated by the Virginia Supreme Court, the test should be "[w]hether the evidence before the trial court was sufficient to authenticate the photograph. . . ." Ferguson v. Commonwealth, 212 Va. 745, 746-47, 187 S.E.2d 189, 191, *cert. denied*, 409 U.S. 861 (1972) (adopting silent witness theory in Regiscope case). This foundational examination generally explores the Regiscope machine, the procedures for taking a photograph, the procedure used to develop the photograph, the procedure for matching the photograph and the forged check, the experience of the operator of the Regiscope, how and where the film is stored before processing, the distance the camera lens is from the objects photographed, and the angle of the camera. Oja v. State, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); Sisk v. State, 236 Md. 589, 204 A.2d 684 (1964).

and, (3) the processing of the Regiscope film, which is analogous to a question of chain of custody of evidence.<sup>87</sup>

In *Bergner*, there was no evidence—nor could there be—of the operation of the camera or of the processing of the film. The one element of foundation required in a Regiscope case which was met in *Bergner* was the identification of Bergner in the photograph.<sup>88</sup> The requisite foundation for a Regiscope photograph is a comprehensive and often expansive examination.<sup>89</sup> As pointed out by Judge Young in his dissent: “In a Regiscope case, the process assures trustworthiness and authentication for the photograph, unlike the situation in this case.”<sup>90</sup>

In addition, it again must be pointed out that there was no corroborating evidence that a crime actually occurred in *Bergner*. In every Regiscope case there is corroborating evidence that the alleged crime actually occurred.<sup>91</sup> This evidence may be a forged or stolen check,<sup>92</sup> or evidence of the otherwise illegal acquisition of funds.<sup>93</sup> In every case, however, there will be evidence independent from the photograph.

### C. Bank Robbery Cases

Finally, the *Bergner* majority examined the silent witness theory in the context of automatic cameras photographing a bank robbery.<sup>94</sup> It must first be noted that the need for the silent witness theory in bank robbery cases will be rare.<sup>95</sup> Generally, there will be an eyewitness available to identify the defendant, contrary to the

<sup>87</sup>*E.g.*, *Sisk v. State*, 236 Md. 589, 204 A.2d 684 (1964); *Robertson*, *supra* note 43, at 199. *See* *United States v. Taylor*, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); *Greer v. State*, 523 S.W.2d 687 (Tex. Crim. App. 1975).

<sup>88</sup>*See* note 67 *supra* and accompanying text.

<sup>89</sup>*See, e.g.*, *Sisk v. State*, 236 Md. 589, 204 A.2d 684 (1964) (quoted extensively in J. Young's dissent, 397 N.E.2d at 1021-23); note 86 *supra*.

<sup>90</sup>397 N.E.2d at 1023.

<sup>91</sup>Each element of the crime must be established in order to prove the commission of the crime. The photograph, however, will not be able to establish all elements of the crime. For example, under IND. CODE § 35-43-4-2 (Supp. 1980), theft requires the element of “unauthorized control” of another's property. This could not be established by a Regiscope photograph. *See* note 135 *infra* and accompanying text.

<sup>92</sup>*See, e.g.*, *United States v. Gray*, 531 F.2d 933 (8th Cir.), *cert. denied*, 429 U.S. 841 (1976) (forged check); *Montemayor v. State*, 456 S.W.2d 126 (Tex. Crim. App. 1970) (forged check).

<sup>93</sup>*See, e.g.*, *United States v. Moseley*, 450 F.2d 506 (5th Cir. 1971), *cert. denied*, 405 U.S. 975 (1972) (counterfeit payroll checks).

<sup>94</sup>397 N.E.2d at 1016.

<sup>95</sup>*See, e.g.*, *Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970); *United States v. Hobbs*, 403 F.2d 977 (6th Cir. 1968).

Regiscope cases.<sup>96</sup> The majority, however, does cite two cases where the photographs of a bank robbery were used as independent substantive evidence.<sup>97</sup> In both cases, the requisite foundation for determining the authenticity of the photographs for the purpose of admittance into evidence included an examination into the following elements: (1) installation of film, (2) activation of the camera, (3) removal of the film, (4) development of the film, and (5) the chain of possession of the film.<sup>98</sup>

Both the majority<sup>99</sup> and the dissent<sup>100</sup> cited *Murry v. State*<sup>101</sup> for the proposition that Indiana would allow the photographs of a bank robbery to be used as substantive evidence. In *Murry*, the court determined that the admittance of certain photographs taken by an automatic camera during a robbery was error because the proper foundation had not been laid.<sup>102</sup> The court found error because of the following facts:

In the case at bar, there was testimony as to the manner in which the camera was activated, the direction in which the camera was pointed, the manner in which the film was removed and developed, and the chain of possession of the film after the robbery until the time of trial. There was, however, no testimony indicating when the film was installed, when the pictures were taken, or whether the camera was activated at any other times. Thus, there was insufficient evidence from which an inference could be drawn that the photographs in question were taken during the robbery. . . .<sup>103</sup>

Again, no such "authentication" was or could be established in *Bergner*. Not one of the five bank robbery foundation requirements

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<sup>96</sup>The problems discussed in note 83 *supra* are not relevant in bank robbery cases.

<sup>97</sup>*United States v. Taylor*, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); *State v. Young*, 303 A.2d 113 (Me. 1973).

<sup>98</sup>*United States v. Taylor*, 530 F.2d 639, 641-42 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976); *State v. Young*, 303 A.2d 113, 116 (Me. 1973). It is interesting to note that neither of these bank robbery cases required an "identity" element for the foundation as was required in the X-ray and Regiscope cases. See notes 65 & 85 *supra* and accompanying text. In *Bergner*, the majority found the "identity" element to be part of the evidence supporting a finding that there was sufficient foundation laid for the admission of the photographs. See 397 N.E.2d at 1018; note 112 *infra* and accompanying text.

<sup>99</sup>397 N.E.2d at 1016.

<sup>100</sup>*Id.* at 1023.

<sup>101</sup>385 N.E.2d 469 (Ind. Ct. App. 1979).

<sup>102</sup>The court found error predicated upon improper foundation under the traditional rule and under the silent witness theory. *Id.* at 472.

<sup>103</sup>*Id.*

was satisfied. It again must be pointed out that the bank robbery cases always have independent corroborating evidence, such as the missing money, that the crime occurred. *Bergner* had no such corroborating evidence.

#### D. Foundation—Generally

After discussing the X-ray, Regiscope, and bank robbery cases and formally adopting the silent witness theory,<sup>104</sup> the majority emphasized that the traditional rule with respect to photographs was not disturbed:

We recognize our adoption of the silent witness theory permits the admission of photographs as substantive or demonstrative evidence. We stress we are not changing existing Indiana law; we are adding a second basis for the admissibility of photographic evidence. Thus, our holding in no way affects the use of photographs as demonstrative evidence; the traditional requirements for admissibility as laid down in numerous Indiana cases remain wholly effective.<sup>105</sup>

The majority further emphasized that the requirement of relevancy must still be met, but that “[t]he requirement that a photograph aid the jury in understanding other evidence remains effective, if at all, only when photographs are used for demonstrative purposes.”<sup>106</sup>

The majority asserted a strong reluctance to set out any absolute standards for the admission of photographs under the silent witness theory.<sup>107</sup> The majority did, however, offer guidelines for the formulation of the requisite foundation in individual cases. These guidelines entail a mandatory requirement and two nonmandatory requirements depending upon the facts of the individual case:

[W]e feel compelled to require proof the photograph has not been altered in any significant respect. This is necessary to avoid the dangers of misrepresentation or manufactured evidence which are possible through composite or retouched photographs. Additionally, we suggest a few non-mandatory guidelines for the admission of photographs under the silent witness theory.<sup>108</sup>

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<sup>104</sup>397 N.E.2d at 1016.

<sup>105</sup>*Id.* at 1017.

<sup>106</sup>*Id.* The majority went on to state that “this requirement relates only to demonstrative evidence and has no logical applicability when photographs are used substantively.” *Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

Thus, the majority would require evidence of the photograph's authenticity in *every* case. The two nonmandatory requirements are less definite.

The nonmandatory requirements would change from case to case and depend upon the trial court's determination of whether a sufficient foundation had been laid.<sup>109</sup> The first nonmandatory requirement cited by the majority was the establishment of the date of the photograph. The majority pointed out that "in certain cases, especially where the statute of limitations or the identity and alibi of the defendant are in question,"<sup>110</sup> the date of the photograph should be established. Secondly, the majority cited automatic camera photographs, in the context of Regiscope or bank robbery cases, and stated that "there should be evidence as to how and when the camera was loaded, how frequently the camera was activated, when the photographs were taken, and the processing and chain of custody of the film after its removal from the camera."<sup>111</sup>

#### IV. APPLICATION OF THE SILENT WITNESS THEORY TO THE BERGNER FACTS

The *Bergner* majority, having adopted the silent witness theory, determined that the proper foundation was laid for the admission of the photographs:

There were three main grounds used by the State to establish the foundation. They clearly demonstrate a sufficient degree of authenticity for the admission of the photographs. . . .

First, there was expert testimony to show the photographs had not been altered in any way. . . .

Second, the approximate date the photographs were taken was shown. . . .

Finally, there was strong testimony regarding the identification of the two persons in the photographs.<sup>112</sup>

One fault with the *Bergner* opinion is that the majority examined and explained the uses and problems of the silent witness theory in

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<sup>109</sup>"Whether a sufficiently strong foundation has been laid is left to the sound discretion of the trial court, reviewable only for abuse." *Id.*

<sup>110</sup>*Id.* It is argued by this author that contrary to the majority's position, the "date" element is irrelevant to the facts in *Bergner*. See notes 117-18 *infra* and accompanying text.

<sup>111</sup>397 N.E.2d at 1017, (citing *Murry v. State*, 385 N.E.2d 469 (Ind. Ct. App. 1979) (see notes 101-03 *supra* and accompanying text)).

<sup>112</sup>397 N.E.2d at 1018. See text accompanying notes 14-29 *supra*.



a section separate from its application of the theory.<sup>113</sup> In examining the foundation in *Bergner* for the purpose of applying the theory, the majority merely listed the evidence found in the record and stated that it was sufficient.<sup>114</sup>

The failure by the majority to specifically apply the requisites of the silent witness theory to the *Bergner* facts raises at least two criticisms. First, although the majority's examination into the silent witness theory is comprehensive, its application of the theory upon the unique facts of *Bergner* is of limited practical guidance for future courts and the practicing bar. Secondly, four significant problems with the silent witness theory, in the context of the *Bergner* facts, raise serious questions with the theory and its application. The first two problems—misrepresentation or distortion in the photograph and the limitations upon the defendant's ability to cross-examination of the silent witness theory.<sup>115</sup> The second two problems—no evidence corroborating the photographs and the "relative" requirements of the foundation—were raised, in part, by the dissenting opinion.<sup>116</sup>

Prior to addressing these four problems, however, a "fifth" problem with the majority's opinion should be resolved. The date of the photograph as an element of the foundation should be eliminated from this analysis. The evidence establishing the approximate date of the photograph adds nothing to the determination of the authenticity of the photograph or the thing it purported to depict. As clearly pointed out by the majority opinion, the date is necessary only in certain cases, such as when the defendant raises the issues of statute of limitations or alibi and identity.<sup>117</sup> *Bergner* raised no such issues. The majority offered no explanation why the date was necessary or even supportive of the determination that the foundation was sufficient. The stated purpose of the required foundation is to determine the authenticity of the photograph.<sup>118</sup> In *Bergner*, however, the approximate date of the photograph did not aid in a determination of its authenticity. Therefore, in analyzing the majority's application of the silent witness theory to the facts found in *Bergner*, the date of the photograph as an element of the foundation will not be treated as relevant to the issues.

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<sup>113</sup>Compare 397 N.E.2d at 1015-18 (theory and problems) with *id.* at 1018-19 (practical application).

<sup>114</sup>*Id.* at 1018. See text accompanying note 112 *supra*.

<sup>115</sup>397 N.E.2d at 1017-18. See text accompanying notes 119-31 *infra*.

<sup>116</sup>397 N.E.2d at 1021-24. See text accompanying notes 132-39 *infra*.

<sup>117</sup>397 N.E.2d at 1017. See note 110 *supra* and accompanying text.

<sup>118</sup>397 N.E.2d at 1018, 1023. See text accompanying note 127 *infra*.

### A. The Majority's "Two Problems"

The majority cited "two problems" in relation to the silent witness theory.<sup>119</sup> The first problem is the possibility of distortion or misrepresentation in the photograph:

Photography is not an exact science. The image a camera produces on film can be affected by a variety of things that may lead to distortion and misrepresentation. The quality of the camera and lens, type of film, available light, focal length of the lens, use of lens filters, or even the perspective from which the photograph is taken can play a part in producing a truly representative photograph.<sup>120</sup>

The majority's response to this issue was that the requirement of an adequate foundation overcomes the problems of any distortion or misrepresentation. The majority stated that "assuming any misleading qualities of a photograph are not so egregious as to result in an inadequate foundation, complaints concerning a photograph's distortion go only to the weight to which a photograph is entitled, not admissibility."<sup>121</sup>

This proposition finds support in the cases where an adequate foundation requires an examination into the procedures employed in taking the photograph and in processing the film.<sup>122</sup> In *Bergner*, however, any examination into the procedure and processing is glaringly absent. Thus, the question raised is whether the foundation in *Bergner* was sufficient to overcome any misrepresentation or distortion that might have been present in the photographs.

The foundation in *Bergner* had two relevant elements. First, there was the expert testimony by the F.B.I. agent that the photographs were authentic and not altered or composites.<sup>123</sup> Although

<sup>119</sup>397 N.E.2d at 1017.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* The majority continued their rationale as follows:

In addition, we note the testimony of an eyewitness is subject to many failings. Essentially, a witness' testimony is based upon what he thinks he remembers he saw. Although the human eye is capable of perceiving many things and the human brain has an unmatched capacity for the retention of information, neither is infallible. A witness' perception of an event may be distorted by his other senses, optical illusions, hallucinations or other simple perception errors. He is also likely to have forgotten some of what he saw or may have difficulty communicating his recollection in words.

*Id.* at 1017-18 (citing 1 C. SCOTT, *supra* note 47, §§ 41-54).

<sup>122</sup>See, e.g., *United States v. Taylor*, 530 F.2d 639 (5th Cir.), *cert. denied*, 429 U.S. 845 (1976) (bank robbery case quoted in dissent); *Sisk v. State*, 236 Md. 589, 204 A.2d 684 (1964) (regiscope case quoted extensively in dissent). See text accompanying notes 84-87 & 98 *supra*.

<sup>123</sup>397 N.E.2d at 1014, 1018.

this expert testimony would indicate that the photographs were not misrepresentative or distortive images, its primary impact was to show merely that the photographs were not "manufactured." The second relevant element, the ex-wife's testimony establishing the identity of the individuals in the photographs,<sup>124</sup> is, at least arguably, sufficient to overcome the problems of distortion or misrepresentation when considered in conjunction with the F.B.I. agent's "authenticity" evidence. If the child, the room, the male's body and the robe were clearly depicted, then, arguably, this evidence, in conjunction with the authenticity evidence, will overcome any problems of distortion or misrepresentation.<sup>125</sup>

The second problem raised by the majority is even more troublesome. Cross-examination, "the greatest legal engine ever invented for the discovery of truth,"<sup>126</sup> is virtually denied the defendant. Although the photograph is allowed to "testify," the defendant cannot cross-examine this "key witness" of the state. The *Bergner* majority indicated that the defendant's ability to cross-examine all witnesses establishing the required foundation for the photographs is sufficient to overcome this problem:

In light of the ability to cross-examine those witnesses whose testimony establishes the required foundation, and the authenticity and reliability which attaches to a photograph once a sufficient foundation has been laid, we are unwilling to say the inability to "cross-examine" a photograph is a sufficient basis for the exclusion of photographs as substantive evidence.<sup>127</sup>

In reaching this conclusion, the majority reasoned as follows:

Once a foundation is properly established, the photograph gains a certain degree of authenticity and reliability, and we

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<sup>124</sup>*Id.* at 1013-14, 1018.

<sup>125</sup>Analogously, the majority pointed out that the circumstantial evidence in this case in conjunction with direct evidence of the identity of the male in the photographs supported the sufficiency of the evidence determination.

The location of the sexual act was established to be the living room of appellant's house. Appellant was the only male who lived in or was given access to the home during the time the pictures were taken. The photographs were found in appellant's darkroom. Also, appellant was a professional photographer who possessed the equipment and expertise necessary to produce the photographs. This evidence, though circumstantial, tends to show appellant may have been the male depicted in the photographs.

This tendency is elevated to a near certainty once the personal identification evidence is considered.

*Id.* at 1020.

<sup>126</sup>5 J. WIGMORE, *supra* note 4, § 1367, at 32.

<sup>127</sup>397 N.E.2d at 1018.

perceive no compelling need for further cross-examination. The situation is analogous to the exceptions to the hearsay rule where the declarant is unavailable. Once "circumstantial guarantees of trustworthiness" are demonstrated an out-of-court assertion is admissible notwithstanding the inability of the opponent of the evidence to cross-examine the declarant.<sup>128</sup>

Thus, the essence of the majority's opinion was that the ability to cross-examine the witnesses laying the foundation for the photograph was a legally sufficient substitute for the cross-examination of this "silent" witness. This seems to be a strong proposition where the required foundation involves an elaborate examination and cross-examination into the procedures employed in taking the photograph and in processing the film, as in the Regiscope and the bank robbery cases.<sup>129</sup> However, the failure of the *Bergner* court to specifically address the adequacy of the relatively limited foundation required in *Bergner* leads only to the conclusion that the majority felt that Bergner's ability to cross-examine the F.B.I. agent and his ex-wife was a sufficient substitute for the cross-examination of the state's key witnesses—the two photographs. If this assumption is true, the majority opinion is self-contradictory. At one point in the majority's analysis of the silent witness theory, the following standard is prescribed:

We therefore hold only that a *strong* showing of the photograph's competency and authenticity must be established. . . . [W]e stress our use of the adjective "strong." Photographs tend to have great probative weight and should not be admitted unless the trial court is convinced of their competency and authenticity to a *relative certainty*.<sup>130</sup>

This standard follows the majority's examination of the elaborate foundation requirements of the X-ray, the Regiscope, and the bank robbery cases. In applying the silent witness theory in *Bergner*, however, the majority not only equated the *relatively* limited foundation in *Bergner* with the extensive foundation in other silent witness cases, but implied that such foundation is an adequate legal substitute for cross-examination.

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<sup>128</sup>*Id.* It should be noted, however, that the major objection to hearsay evidence is the inability to cross-examine the declarant:

It would be generally agreed today that the third factor (the inability to cross-examine the out-of-court declarant) is the main justification for the exclusion of hearsay. This is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported by the witness.

MCCORMICK, *supra* note 35, § 245, at 583.

<sup>129</sup>See note 122 *supra*.

<sup>130</sup>397 N.E.2d at 1017 (emphasis in original).

This issue clearly turns upon the dictates of the individual judges' philosophies with regard to the requirements of the criminal justice system. Judge Young, neither accepting nor rejecting the silent witness theory, indicated in his dissent that the *Bergner* foundation was simply not adequate:

[T]he "tendency to accept as true what is mirrored in a photograph" requires very strict rules for admitting a photo as substantive evidence. In this case the photograph is to be used as the only substantive evidence of a crime without even the degree of authentication required in a Regiscope or bank robbery case.<sup>131</sup>

### B. Two More Problems

In addition to the above problems, there are two other problem areas with the silent witness theory as applied to the facts in *Bergner*. First, as pointed out previously, and as stated by Judge Young in his dissent: "It may also be noted that except in sex offenses there is independent competent evidence of the crime. In the Regiscope cases there is evidence that a bad check has been passed when it is returned paid [sic] to the store. This is also true in a bank robbery case."<sup>132</sup> Arguably, the photograph as substantive evidence under the silent witness theory is either "good" evidence or it is not "good" evidence. If it is "good" evidence, then, theoretically, it is possible to base a conviction solely upon the "good" evidence.

However, basing the conviction in *Bergner* solely upon the two photographs necessarily magnifies the already existing problems with the silent witness theory. For example, as pointed out by the majority, any distortion or misrepresentation in a photograph, so long as it is not egregious, should go to the *weight* of the evidence.<sup>133</sup> When, as in Regiscope or bank robbery cases, there is additional evidence to support the photographs, problems with distortion or misrepresentation in the photographs may be outweighed.<sup>134</sup> In *Bergner*, however, not only was Bergner's cross-

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<sup>131</sup>*Id.* at 1024. This "philosophical" difference between the majority and dissent is clearly illustrated by the differing results on the issue of the admissibility of the photographs and the similarity in their stated "tests" for admissibility. Compare "Photographs tend to have great probative weight and should not be admitted unless the trial court is convinced of their competency and authenticity to a *relative certainty*," *id.* at 1017 (majority "test" allowing photographs into evidence) with "the 'tendency to accept as true what is mirrored in a photograph' requires very strict rules for admitting a photo as substantive evidence," *id.* at 1024 (dissent "test" disallowing photographs into evidence).

<sup>132</sup>*Id.* at 1024.

<sup>133</sup>*Id.* at 1017. See text accompanying notes 120-21 *supra*.

<sup>134</sup>See note 122 *supra*.

examination into the area virtually denied, but there was no corroborative or supportive evidence to outweigh any distortion or misrepresentation problems that might have existed.

It should be noted that it is only in the unique cases, such as *Bergner*, where every element of the crime can be established in the photograph. For example, in a typical Regiscope case, the photograph will only establish the defendant's identity as the one cashing the check. Other evidence will necessarily be introduced to establish that the check was stolen or forged.<sup>135</sup> This does not answer the above raised problems, but does, however, explain why the Regiscope and bank robbery cases *always* have corroborating evidence.<sup>136</sup>

The final problem with the application of the silent witness theory in *Bergner* is that the majority defined the required foundation as "relative."<sup>137</sup> After examining the application of the silent witness theory by the courts of foreign jurisdictions in the context of X-ray, Regiscope, and bank robbery cases, the majority noted that the foundation required for the admission of a photograph is relative:

[W]e think it important to note how these various courts have stressed the need for authentication or verification of the photographs. We think it equally important to note the courts have recognized that the verification requirement should be understood in a *relative* sense. . . . In other words, these courts have not blindly followed the formal, traditional requirement of admitting photographs solely as demonstrative evidence. Instead, these jurisdictions have analyzed the theory behind the traditional requirements, and have recognized the probative potential of photographic evidence.<sup>138</sup>

Although agreeing with the majority on this "relative sense" of the foundation requirements, Judge Young argued that the silent

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<sup>135</sup>See note 91 *supra*.

<sup>136</sup>That is, it is only in the unique cases, such as *Bergner*, that no corroborating evidence is needed to establish that an individual committed every element of the crime because the photograph depicts the individual committing every element of the crime. For example, under the present offense for which *Bergner* would be prosecuted, IND. CODE § 35-42-4-2 (Supp. 1980) (defining the offense of unlawful deviate conduct), see note 14 *supra*, the elements of the offense, with respect to the *Bergner* facts, are: (1) knowingly or intentionally, (2) causing another to perform deviate sexual conduct, (3) with a person who is too mentally deficient to give a valid consent. Clearly, the photographs in *Bergner* would establish every element of this offense. See 397 N.E.2d at 1013; text accompanying notes 17-18 *supra*.

<sup>137</sup>397 N.E.2d at 1016.

<sup>138</sup>*Id.* (emphasis in original) (citing 9 A.L.R.2d 899 (1950) (discussion of "traditional rule" only)).

witness foundation should be "relatively" higher than under the traditional rule:

I agree that the verification requirement should be understood in a relative sense. . . . The purpose for which a photograph is used determines the relative verification. When a photograph is used as substantive evidence, the need for certainty and accuracy is greater because there is no witness able to explain any distortions, inaccuracy or changes.

The more general use of photographs in court has been hindered by the feeling rather widely held, that so-called trick photography can distort the real facts. The truth is cameras *do* lie. . . . The elimination of the dangers of false or "trick" photographs lies not in rigid rules excluding photographs generally but in the careful qualification of such photographs on their preliminary examination.<sup>139</sup>

Clearly, as Judge Young points out, the foundation required for the silent witness theory photograph is relatively greater than the foundation required for the traditional rule photograph. Just as clearly, the foundation required for the photograph which is the sole evidence upon which a defendant is to be convicted should be relatively higher than the foundation required for the photograph which is supported by corroborative evidence and an expansive examination into the procedure and processing of that photograph.

The foundation required by the majority in *Bergner* for the admission of the photographs was clearly—in a relative sense—less than the foundation required in *Regiscope* and bank robbery cases. The testimony of the F.B.I. agent and of Bergner's ex-wife was in no way comparable to the expansive examination into the procedures for taking the photograph and processing the film, as well as identifying the defendant in the photograph that is the foundation of a *Regiscope* or bank robbery case. The *Bergner* majority's failure to examine and address this apparent discrepancy, as well as the problems discussed above, raises grave doubts as to whether the silent witness theory was properly applied in the *Bergner* case.

## V. SOUND RECORDINGS

Finally, a profitable analogy to the foundation requirements of photographic evidence can be drawn from an examination of the

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<sup>139</sup>397 N.E.2d at 1023 (quoting Gardner, *The Camera Goes to Court*, 24 N.C.L. REV. 233, 235 (1946)).

foundation requirements for the admission of a sound recording into evidence in Indiana. Both the tape recorder and the camera mechanically record emissions from a foreign source: the camera records light waves,<sup>140</sup> and the sound recorder records sound waves.<sup>141</sup> Each is subject to distortion and manipulation.<sup>142</sup> Guidelines for the admission of sound recordings were first established in Indiana in the case of *Lamar v. State*.<sup>143</sup> In *Lamar*, the supreme court, examining the admissibility of a tape recording of an in-custodial interrogation, stated:

The admission of a sound recording should be preceded by a foundation disclosing the following:

- (1) That it is authentic and correct;
- (2) That the testimony elicited was freely and voluntarily made, without any kind of duress;
- (3) That all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given;
- (4) That it does not contain matter otherwise not admissible into evidence; and
- (5) That it is of such clarity as to be intelligible and enlightening to the jury.<sup>144</sup>

Subsequent to *Lamar*, Indiana courts have recognized the limited application of all five foundation elements to recordings involving custodial interrogation.<sup>145</sup> In furtherance of this recognition, and in examining photographic evidence, analysis should be focused upon the first foundation element of the *Lamar* rule, whether the recording is "authentic and correct."

In *Lamar*, the court first addressed the following seven foundation elements required in the Georgia case of *Steve M. Solomon, Jr.*,

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<sup>140</sup>This is an admittedly over-simplified statement. For a more in-depth, yet easily understood, examination of the recording of "light waves," see 1 C. SCOTT, *supra* note 47, §§ 71-73.

<sup>141</sup>Radley, *Recording as Testimony to Truth*, 1954 CRIM. L. REV. 96.

<sup>142</sup>See, e.g., 1 C. SCOTT, *supra* note 47, §§ 156, 202, 244, 290 (for examples of photographic distortion and manipulation); Note, *A Foundational Standard for the Admission of Sound Recordings into Evidence in Criminal Trials*, 52 S. CAL. L. REV. 1273, 1277 nn.23 & 24 (1979) (distortion and manipulation of tape recording).

<sup>143</sup>258 Ind. 504, 282 N.E.2d 795 (1972). In *Sutton v. State*, 237 Ind. 305, 145 N.E.2d 425 (1957), the Indiana Supreme Court first recognized the admissibility of sound recordings.

<sup>144</sup>258 Ind. at 512-13, 282 N.E.2d at 800.

<sup>145</sup>See, e.g., *Duncanson v. State*, 391 N.E.2d 1157 (Ind. Ct. App. 1979); *Jackman v. Montgomery*, 162 Ind. App. 558, 320 N.E.2d 770 (1974).



*Inc. v. Edgar*<sup>146</sup> with respect to the admissibility of a sound recorded confession:

- (1) It must be shown that the mechanical transcription device was capable of taking testimony.
- (2) It must be shown that the operator of the device was competent to operate the device.
- (3) The authenticity and correctness of the recording must be established.
- (4) It must be shown that changes, additions, or deletions have not been made.
- (5) The manner of preservation of the record must be shown.
- (6) Speakers must be identified.
- (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.<sup>147</sup>

The *Lamar* court noted, "it is immediately apparent that numbers 1, 2, 4, 5 and 6 are merely methods of assuring number 3,"<sup>148</sup> authenticity and correctness.<sup>149</sup>

The court, noting the Georgia case was decided in 1955, analogized elements 1 and 2 to the introduction into evidence of photographs, stating:

Without reflecting upon the complexities of tape recording devices or their degree of proficiency at that time, they are

<sup>146</sup>92 Ga. App. 207, 88 S.E.2d 167 (1955). For similar foundational elements, see *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958); *State v. Driver*, 38 N.J. 255, 183 A.2d 655 (1962). The foundation elements for the admission of a video tape, similar to the above, were set out in *State v. Hewett*, 86 Wash. 2d 487, 545 P.2d 1201 (1976). In *Smith v. State*, 397 N.E.2d 959, 962 (Ind. 1979), the Indiana Supreme Court stated: "The test of the admissibility of a sound recording stated in *Lamar* applies with equal logic to the admissibility of a videotape."

<sup>147</sup>92 Ga. App. at 211-12, 88 S.E.2d at 171. This analysis will be limited to elements one through six since element seven concerns the sound recording of confessions which is not here relevant. For a discussion of related issues, see 5 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 901(b)(5)[02] (1978).

<sup>148</sup>258 Ind. at 507, 282 N.E.2d at 797.

<sup>149</sup>The following statement, made by the *Lamar* court, seems equally pertinent to the *Bergner* case:

Improved methods of obtaining, preserving and presenting competent evidence, of whatever type, should not only be sanctioned but encouraged as well. In the process, we may not lose sight of fundamental safeguards, but neither should we sacrifice the advantages available to us through scientific and technological progress to the preservation of traditional rules that may have outlived their usefulness. Our mission is to find the truth. Having recognized that sound recordings can assist us in our quest, how do we obtain maximum benefit from them? Our first concern is with authenticity and correctness.

*Id.* at 506-07, 282 N.E.2d at 797.

in common use today, relatively simple of operation and heavily used and relied upon for innumerable purposes. The tape speaks for itself with regard to its audibility. If it is of adequate quality in this regard, it is immaterial how it became so; and there is no more reason for inquiring into the specifications of the device which recorded it and the capabilities of the person who operated it than there would be to make similar inquiries concerning the camera, the film, developing and printing processes and the technician who produced a photograph before admitting it into evidence. All that is required is a showing that the photograph is an adequate representation of that which is intended to be portrayed. We see no reason for requiring more of a sound recording.<sup>150</sup>

The court clearly applied the traditional rule for foundation of the photograph to the sound recording. That is, *Lamar* requires a witness to testify from his personal knowledge that the tape recording is a true and accurate "representation of that which is intended to be portrayed." The court then stated that elements 4 and 5 were essentially one and the same, the purpose "to assure that no changes, additions or deletions have been made."<sup>151</sup> The court stated these elements could be fulfilled by meeting the "chain of custody"<sup>152</sup> rules established in *Graham v. State*.<sup>153</sup> And finally, with respect to element 6, the court stated the speakers should be identified.<sup>154</sup>

The analogy of the *Lamar* foundation with regard to a photographic evidence foundation is clear. The essence of each is to establish the mechanical recordation, whether by camera or sound recorder, as "authentic and correct." It must further be noted that the authenticity and correctness of both types of recordings will be established by a witness testifying to the accuracy of the event

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<sup>150</sup>*Id.* at 507, 282 N.E.2d at 797.

<sup>151</sup>*Id.*

<sup>152</sup>In the recent case, *Chambers v. State*, 392 N.E.2d 1156 (Ind. 1979), the defendant challenged the admission of a tape recording of his confession. In upholding the admissibility of the recording, the Indiana Supreme Court stated, in pertinent part:

In his preliminary testimony, Officer Maxey clearly established the identity of the speakers on the tape. . . . Officer Maxey testified that he kept the recording in his possession, care and custody until the trial, for all but a short period of time in which the prosecutor maintained possession. He obtained it from the prosecutor and presented it in court himself, testified that it was in the same condition at that time as it was when it was made.

*Id.* at 1159. *Accord*, *Gardner v. State*, 263 Ark. 739, 569 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979); *People v. Patton*, 63 Cal. App. 3d 211, 133 Cal. Rptr. 533 (1976).

<sup>153</sup>253 Ind. 525, 255 N.E.2d 652 (1970) (as modified by *Guthrie v. State*, 254 Ind. 356, 260 N.E.2d 579 (1970)).

<sup>154</sup>258 Ind. at 508, 282 N.E.2d at 798.

recorded.<sup>155</sup> *Duncanson v. State*<sup>156</sup> represents the sole appellate review in Indiana of sound recording evidence not authenticated by an eyewitness, or more correctly, *earwitness*, with personal knowledge of the events portrayed by the recording.

In *Duncanson*, Noojin, a police informant, agreed to wear a concealed tape recorder and engage the defendant (Duncanson) in conversation concerning stolen property. The *Duncanson* court found the following evidence in the record to satisfy the first foundation element of *Lamar*:

Thomas Yackish, an associate professor of electrical engineering at Purdue University, testified that he had been asked by the state to analyze the recording after defense counsel, who had originally retained him, decided to forego an analysis. Yackish testified that he was satisfied, after completing several tests on the tape, that the tape had not been altered or tampered with. Noojin identified the voices on the tape as his own and Duncanson's. He testified that the transcript made from the tape was a "verbatim [*sic*] and accurate reflection" of their conversation.<sup>157</sup>

Thus, as in *Bergner*, an "expert" was allowed to establish the authenticity of the mechanical recording and a third party with personal knowledge was allowed to identify the parties participating in the recording.

It is here submitted that all arguments advanced with respect to the silent witness theory are applicable to the sound recording in *Duncanson*. The sound recording, just as the photograph, is free from the test of the adversary's cross-examination.

The essence of the foundation in both *Bergner* and *Duncanson* was the expert's testimony of the authenticity and correctness of the recording. Significantly, in both *Bergner*<sup>158</sup> and *Duncanson*,<sup>159</sup> the issue of whether the recording was authentic and correct was only addressed by a state's witness with, presumably, a preconceived and predisposed view favorable to the state. Arguably, the defendant, whose right of cross-examination is severely handicapped, could (and should) be allowed to bolster his position by expert testimony. The defendant could thus attack the state's witness on one or both of

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<sup>155</sup>For photographic evidence, see note 42 *supra* and accompanying text. For sound recording evidence, see, e.g., *Chambers v. State*, 392 N.E.2d 1156 (Ind. 1979); *Gibbs v. Miller*, 152 Ind. App. 326, 283 N.E.2d 592 (1972); 5 J. WEINSTEIN & M. BERGER, *supra* note 147, ¶ 901(b)(5)[02].

<sup>156</sup>391 N.E.2d 1157 (Ind. Ct. App. 1979).

<sup>157</sup>*Id.* at 1161.

<sup>158</sup>397 N.E.2d at 1014.

<sup>159</sup>391 N.E.2d at 1161.

two issues: first, whether the "state of the art" is such that an expert can *always* establish the recording's authenticity; and, second, whether the recording in issue is actually authentic.<sup>160</sup>

Allowing the criminal defendant to attack the recording by his own expert witness would alleviate the objectionable nature of the *Bergner* and the *Duncanson* foundation requirements in two ways. First, the defendant's expert witness would help "balance out" the inability to cross-examine the recording and reinforce the position of the defendant. Secondly, in making his determination of admissibility, the judge will have the benefit of exposure to more than just the state's evidence of authenticity.

## VI. CONCLUSION — GOOD THEORY, BAD FACTS

The majority clearly set out the standard to be used by a court of review where an appellant challenges the admission of a photograph under the silent witness theory: "Whether a sufficiently strong foundation has been laid is left to the sound discretion of the trial court, reviewable only for abuse."<sup>161</sup> This standard of review is a nearly insurmountable hurdle for an appellant in Indiana.<sup>162</sup> Considering the photograph's "great probative weight"<sup>163</sup> and this limited standard of review, once the photograph is admitted into evidence, chances of reversal of the conviction upon appeal are remote.<sup>164</sup>

This again points out the essential issue of what constitutes the "required foundation" for the silent witness. In the contexts examined by the majority the required foundation for the admission of the photographs into evidence is sufficient to overcome the inherent problems and criticisms of the silent witness theory. The required foundation is sufficient to assure the authenticity and trustwor-

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<sup>160</sup>See, e.g., Radley, *supra* note 141; Note, *supra* note 142.

<sup>161</sup>397 N.E.2d at 1017. This is the same standard of review used under the "traditional rule" for the admission of photographs. *E.g.*, Rogers v. State, 383 N.E.2d 1035 (Ind. 1979); Inman v. State, 383 N.E.2d 820 (Ind. 1978); Clark v. State, 372 N.E.2d 185 (Ind. Ct. App. 1978).

<sup>162</sup>See, e.g., Crane v. State, 380 N.E.2d 89 (Ind. 1978); Blevins v. State, 259 Ind. 618, 291 N.E.2d 84 (1973); Landers v. State, 165 Ind. App. 221, 331 N.E.2d 770 (1975). *But cf.* Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958) (trial court's admission of photographs of autopsy of murder victim with surgeon's hands and instruments in chest cavity held to be an abuse of discretion; note, however, that admission of photos of same victim, after being cut and beat to death with a hammer, was specifically held not to be an abuse of discretion).

<sup>163</sup>397 N.E.2d at 1017. See notes 130-31 *supra* and accompanying text.

<sup>164</sup>Essentially, the trial court's determination with respect to the adequacy of the foundation is, practically speaking, outcome determinative of the trial and appeal. This argument is particularly meaningful where, as in *Bergner*, the photograph is the sole evidence upon which a conviction is based.

thiness of the photographs. In *Bergner*, however, the foundation found sufficient by the majority is less than that assuring authenticity and trustworthiness.

Treating Regiscope and bank robbery cases as exceptions to the traditional rule and indicating a willingness to adopt the silent witness theory in limited circumstances, Judge Young's dissent concluded:

I would limit the use of the "silent witness theory" to cases where it is shown there is no possibility that the traditional foundation could be proved. It should be treated as an exception to the general rule, not as an alternative. The foundation required of other "exceptions" to the traditional rule has not been laid in this case and for that reason I would hold the photographs were improperly admitted.<sup>165</sup>

Whether the "exception" versus the "alternative" formulation is a real or illusory difference, the actual foundation in *Bergner* found sufficient to admit photographs under the silent witness theory clearly raises serious questions about the majority's adoption of the theory in this case.

EDWARD V. OLSON

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<sup>165</sup>397 N.E.2d at 1024.