X. Evidence

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A. Impeachment

1. Standard for Determining Abuse of Discretion.—Two recent decisions deal with: (1) Factors to be considered in determining whether or not a defendant has been denied his constitutional right of effective cross-examination, and (2) matters which a defendant has the right to bring before the trier of fact for purposes of impeachment. Current Indiana law is to the effect that an accused is denied his right of confrontation on an impeachment issue only if there is a total denial of cross-examination.[1] Any lesser limitation is viewed as a regulation of the scope of cross-examination that is reviewable only for an abuse of discretion.[2] Opinions prior to *Haeger v. State*,[3] however, did not clearly state what factors were to be used in the determination whether there had been an abuse of discretion. *Haeger* casts some light on the factors to be considered in this important determination.

In *Haeger*, the defendant was convicted of driving while under the influence of intoxicating liquor. His conviction was based upon the arresting officer's testimony and the results of a Breathalyzer test administered by the officer.[4] On cross-examination of this critical witness, the defendant sought to show that the officer was under pressure to meet a quota of arrests. An objection as to the relevancy of this line of questioning was sustained by the trial court.[5] The appellate court correctly determined the objection was improperly sustained.[6] A witness' bias, prejudice, or ulterior motives are always relevant matters for inquiry on cross-examination.[7] Such

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[1]Borosh v. State, 166 Ind. App. 378, 336 N.E.2d 409 (1975); *see* Lagenour v. State, 376 N.E.2d 475 (Ind. 1978); Brooks v. State, 259 Ind. 678, 291 N.E.2d 559 (1973).

[2]In Borosh v. State, 166 Ind. App. 378, 383-84, 336 N.E.2d 409, 412-13 (1975), the court held:

> Thus, it is clear that only a total denial of access to such an area of cross-examination [bearing upon credibility of a witness] presents a constitutional issue. Any lesser curtailment of cross-examination by the trial court is viewed as a regulation of the scope of such examination, and such curtailment is reviewable only for an abuse of discretion.

[3]390 N.E.2d 239 (Ind. Ct. App. 1979).

[4]*Id.* at 242.

[5]*Id.* at 240.

[6]*Id.* at 242.

[7]"A witness may also be impeached by showing bias, interest, or hostility, for these qualities have a bearing on the credibility of the witness's testimony." E.

questions may lead the trier of fact to discount or completely disbelieve a witness. As noted by the court, however, the issue on appeal is whether the error was prejudicial.[8]

In *Haeger* the Indiana Court of Appeals adopted the holding from *Springer v. United States*[9] to create a three level standard of review for the determination of prejudice.[10] *Springer*, as adopted in *Haeger*, held:

> Where the record reflects a curtailment of a requested line of bias cross-examination *in limine*, so that the jury is unable properly to perform its fact-finding function in inferring bias from the testimony as a whole, we will assess cross-examination errors by a per se error standard. . . . If, however, the trial court has permitted some cross-examination so that the jury has sufficient information from which to infer bias (should it so choose), this court will evaluate error by application of the harmless constitutional error test . . . . To hold harmless such error in curtailing constitutionally-protected cross-examination, it must be clear beyond a reasonable doubt "(1) that the defendant would have been convicted

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IMWINKELRIED, P. GIANNELLI, F. GILLIGAN, F. LEDERER, CRIMINAL EVIDENCE 54 (1979) [hereinafter cited as IMWINKELRIED & GIANNELLI]. *See also* Acker v. State, 239 Ind. 466, 158 N.E.2d 790 (1959); Bryant v. State, 233 Ind. 274, 118 N.E.2d 854 (1954); C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 40, at 78-81 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; E. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 70 (5th ed. J. Weinstein 1976); M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 43-44 (1977).

[8] IND. R. TR. P. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See also FED. R. EVID. 103(a) which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Where the ruling is one of constitutional error in the admission or exclusion of evidence, it must appear beyond a reasonable doubt that the error had no effect on the outcome. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976). *See generally* Milton v. Wainwright, 407 U.S. 371 (1972) (fifth and sixth amendments); Schneble v. Florida, 405 U.S. 427 (1972) (confrontation); Harrington v. California, 395 U.S. 250 (1969) (right of confrontation); Chapman v. California, 386 U.S. 18 (1967) (comment on failure to stand); Spano v. New York, 360 U.S. 315 (1959) (coerced confession).

[9] 388 A.2d 846 (D.C. 1978).

[10] 390 N.E.2d at 241.

> without the witness' testimony, or (2) that the restricted line of inquiry would not have weakened the impact of the witness' testimony." . . .
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> Where we determine that a degree of cross-examination consistent with the Sixth Amendment has been allowed, our appellate review will focus on the scope of the cross-examination allowed, and the trial court's determination will stand unless an abuse of discretion mandating reversal is shown.[11]

Applying these standards to the denial of cross-examination in *Haeger*, the court determined the appellant was entitled to a new trial.[12] The defendant's conviction rested upon the credibility of the arresting officer's testimony. Although a Breathalyzer test administered by the arresting officer also indicated the appellant's intoxication, the accuracy of the test was dependent upon the officer following the correct procedures. The trial court's ruling that prevented any inquiry into possible pressure put on the officer to make arrests falls within the per se error standard created in *Springer*. The denial of the inquiry prevented the jury from performing its function as the trier of fact in inferring bias from the testimony as a whole. Consequently, the appropriate remedy for this prejudicial error was the granting of a new trial.[13]

Lusher v. State[14] involved a denial of cross-examination on matters that may impair a witness' ability to perceive and recall. In *Lusher*, voir dire of the prosecution's key witness outside the presence of the jury showed that during the period in which the alleged offense took place the witness was a heavy user of marijuana, hashish, L.S.D., mescaline and PCP.[15] The witness also admitted that in the year in question he was suffering from recurrences of the hallucinating effect, known as flashbacks, of L.S.D. He testified that "[W]hen you hallucinate, you can hallucinate anything you want to and it just happens like 'bang.'"[16] The witness was unable to recall if he was subject to flashbacks at the time of the alleged offense. Although the trial court did permit limited cross-examination on the question of whether the witness was under the influence of any drug at the time of the acts alleged, the defendant was not permitted to inform the jury of the witness' hallucinations.[17] The trial court's

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[11]388 A.2d at 856 (citations omitted).
[12]390 N.E.2d at 242.
[13]*Id.*
[14]390 N.E.2d 702 (Ind. Ct. App. 1979).
[15]*Id.* at 703.
[16]*Id.*
[17]*Id.* at 704.

denial of the opportunity to cross-examine the witness concerning his susceptibility to hallucinations was an abuse of discretion.[18]

The courts disagree on whether mere drug use is admissible for purposes of impeachment.[19] However, where drug use has substantially impaired a witness' ability to perceive or remember, courts generally agree the information should be considered by the trier of fact.[20] In *Lusher*, the accuracy of this witness' testimony was the key to the prosecution's case. Although the court held that exclusion of this evidence was prejudicial error, the court did not state what standard it used in reaching this determination.[21] A consideration of the factors used in *Haeger* demonstrates that the ruling in *Lusher* was correct.

The ruling of the trial court was one limiting, but not completely foreclosing, cross-examination on the question of the witness' ability to perceive and remember. This falls within the second level of review mandated in *Haeger*.[22] Applying that standard it cannot be said, beyond a reasonable doubt, that the defendant would have been convicted absent the witness' testimony or that the inquiry would not have weakened the impact of his testimony. The ruling was therefore prejudicial error.

2. Unconvicted Acts of Misconduct.—In *Chambers v. State*,[23] the Indiana Supreme Court held that a witness may not be cross-examined, for purposes of impeachment, concerning particular extraneous acts of misconduct which are not reduced to convictions.[24] Analysis of the opinion demonstrates that the rule stated in the opinion is not supported by the authorities cited and is improperly applied. The issue arose in *Chambers* when the defendant sought to

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[18]*Id.*

[19]For opinions favoring the admissibility of drug use for purposes of impeachment, *see* People v. Perez, 239 Cal. App. 2d 1, 48 Cal. Rptr. 596 (1965); People v. Strother, 53 Ill. 2d 95, 290 N.E.2d 201 (1972); People v. Talaga, 37 Mich. App. 100, 194 N.W.2d 462 (1971). For opinions not permitting mere drug use to be used for purposes of impeachment, *see* Doe v. State, 487 P.2d 47 (Alaska 1971); State v. Ballesteros, 100 Ariz. 262, 413 P.2d 739 (1966); People v. Ortega, 2 Cal. App. 3d 884, 83 Cal. Rptr. 260 (1969); State v. Goodin, 8 Or. App. 15, 492 P.2d 287 (1971). Indiana does not permit evidence of drug use or involvement for purposes of impeachment. Boles v. State, 259 Ind. 661, 291 N.E.2d 357 (1973); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980).

[20]*See* Fields v. State, 487 P.2d 831 (Alaska 1971); People v. Smith, 4 Cal. App. 3d 403, 84 Cal. Rptr. 412 (1970); People v. Smith, 38 Ill. 2d 237, 231 N.E.2d 185 (1967); State v. Belote, 213 Kan. 291, 516 P.2d 159 (1973). *Cf.* United States v. Gregorio, 497 F.2d 1253 (4th Cir.), *cert. denied*, 419 U.S. 1024 (1974) (indicated that cautionary instructions on the *reliability* of a heroin addict-informer would be appropriate, but to include the words "inherently a perjurer" would be reversible error).

[21]390 N.E.2d at 704.

[22]*See* text accompanying note 11 *supra*.

[23]392 N.E.2d 1156 (Ind. 1979).

[24]*Id.* at 1160.

cross-examine the prosecution's principal witness concerning a charge pending against the witness in an unrelated case.[25] In upholding the trial court's termination of this line of cross-examination, the supreme court wrote:

> There was no showing that the charges pending against Mosier [the witness] in that case had anything to do with the plea agreement with the State involving his testimony and involvement in this case. The court properly sustained objections to said questions and answers. A witness cannot be impeached by proof of particular extraneous acts of misconduct which are not reduced to convictions. *Swan v. State*, (1978) Ind., 375 N.E.2d 198. *See Niemeyer v. McCarty*, (1943) 221 Ind. 688, 51 N.E.2d 365.[26]

In *Niemeyer v. McCarty*,[27] the court refused to admit into evidence the records of a contempt proceeding in which the plaintiff had been convicted of contempt of court for perjury. The court held proof of the contempt citation was not admissible because contempt of court was not a statutory offense and therefore not a crime.[28] However, the same opinion held that it *was* proper to ask the plaintiff the following question on cross-examination for purposes of impeachment: "You have been found guilty of contempt of court for perjury, have you not?"[29] It can be seen that the *Niemeyer* opinion supports the appellant in *Chambers*: if the act inquired into is pertinent to credibility, it is a proper subject of cross-examination.[30]

The opinion in *Swan v. State*[31] at first appears to be in agree-

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[25]*Id.*

[26]*Id.*

[27]221 Ind. 688, 51 N.E.2d 365 (1943).

[28]*Id.* at 692, 51 N.E.2d at 367.

[29]*Id.* at 700, 51 N.E.2d at 370. The court recognized it is proper on cross-examination to inquire into acts not resulting in convictions if they are relevant to credibility. The court wrote, "It is true that a judgment holding a person in contempt of court is not a conviction of a crime, but, where the basis of the judgment of contempt is perjury, it would seem pertinent upon the question of credibility." *Id.*

[30]*Niemeyer* is consistent with FED. R. EVID. 608(b) which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of [a] crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

See IMWINKELREID & GIANNELLI, *supra* note 7, at 60; MCCORMICK, *supra* note 7, § 42, at 82-84; 3A J. WIGMORE, THE LAW OF EVIDENCE §§ 981-984, at 838-54 (Chadbourn rev. 1970).

[31]268 Ind. 317, 375 N.E.2d 198 (1978).

ment with the holding in *Chambers*. In *Swan*, the court stated, "It has long been settled in this state that a witness cannot be impeached by proof of particular extraneous acts of misconduct, which are not reduced to convictions. *Neimeyer v. McCarty*, (1943) 221 Ind. 688, 51 N.E.2d 365; 3A Wigmore Evidence § 977-988 (Chadbourn Revision)."[32] As shown above, the opinion in *Niemeyer* would permit the questioning of a witness on cross-examination concerning acts of misconduct that had not resulted in convictions if the acts had some relation to credibility. Furthermore, reading the sections of *Wigmore* cited in *Swan* indicates another miscitation of authority by the *Swan* court. Sections 977-980a deal with proof of bad acts that have not resulted in convictions. These acts are used for impeachment, by methods other than cross-examination. The general rule is that extraneous acts of misconduct used solely for impeachment cannot be proved unless they have resulted in convictions. It is clear in sections 981-988, however, that *Wigmore* would permit cross-examination of a witness concerning extraneous acts of misconduct that weigh on credibility. Section 981 states: "The reasons already examined (§ 979 *supra*) appear plainly to have no effect in forbidding the extraction of the facts of misconduct from the witness himself upon cross-examination."[33]

Insofar as the opinion in *Chambers* rests upon the authorities cited, it is without foundation. Even if the general rule is accepted that extraneous acts of misconduct may not be used for impeachment,[34] the rule should have no application where the acts show a bias, interest or prejudice on the part of the witness.[35] In *Chambers*, further cross-examination could have demonstrated that the witness believed or hoped his testimony would lead the court or prosecution to be lenient with him on the pending charges. Because Indiana law forbids an offer of proof on cross-examination, it was not possible for the defendant to demonstrate what might have been shown by further examination of the witness.[36] To foreclose a defendant's questioning of a witness concerning matters which may give the witness an interest in testifying for the prosecution violates due process.[37]

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[32]*Id.* at 323, 375 N.E.2d at 202.

[33]3A J. WIGMORE, *supra* note 30, § 982, at 838.

[34]It does appear to be the rule that has been followed in recent Indiana decisions. *See* Swan v. State, 268 Ind. 317, 375 N.E.2d 198 (1978); Otto v. State, 398 N.E.2d 716 (Ind. Ct. App. 1980). This is a position accepted by a minority of courts. *See* MCCORMICK, *supra* note 7, § 42, at 82-84.

[35]*See* note 7 *supra*.

[36]Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970), *overruled in part on other grounds*, Hardin v. State, 265 Ind. 616, 358 N.E.2d 134 (1976) (if an offer of proof is made on cross-examination, it may be ordered stricken); Wood v. State, 92 Ind. 269 (1883).

[37]*See* Davis v. Alaska, 415 U.S. 308 (1974).

3. Photographic Evidence.—The Indiana Court of Appeals in *Bergner v. State*,[38] on an issue of first impression, joined other jurisdictions[39] and the Federal Rules of Evidence[40] by adopting the silent witness theory of photographic evidence. Prior to *Bergner*, photographs were treated as a form of demonstrative evidence by Indiana courts.[41] As in the evidentiary use of models, maps and diagrams, photographs were only evidence to the extent they illustrated the testimony of a witness who had personal knowledge of the scene or matter depicted in the photograph. Instead of verbalizing his knowledge of what the photograph portrayed, the witness could adopt it as a substitute for his description by words. Typically this would be by testimony that the photograph was a true and accurate representation of the things it was intended to depict.[42] The photograph could speak for the witness, but it could not speak for itself.

In *Bergner*, the defendant's conviction for sodomizing his four-year-old daughter rested upon two photographs depicting the alleged act.[43] No eyewitness was available to testify that the photographs

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[38]397 N.E.2d 1012 (Ind. Ct. App. 1979).

[39]*E.g.*, Watkins v. Reinhart, 243 Ala. 243, 9 So. 2d 113 (1942); State v. Kasold, 110 Ariz. 558, 521 P.2d 990 (1974); People v. Bowley, 59 Cal. 2d 855, 382 P.2d 591, 31 Cal. Rptr. 471 (1963); Oja v. State, 292 So. 2d 71 (Fla. Dist. Ct. App. 1974); Franklin v. State, 69 Ga. 36 (1882); Cook v. Clark, 186 N.W.2d 645 (Iowa 1971).

[40]The comments to FED. R. EVID. 1002 state that the best evidence rule applies to photographs when "contents [of the photograph] are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber." [sic]

[41]Williams v. State, 393 N.E.2d 183 (Ind. 1979), a case decided only three months before *Bergner*, illustrates this limited use of photographs. In *Williams*, the court held that a photograph which was admitted into evidence when a witness testified the photograph was that of a Mr. Hodges was prejudicial insofar as it showed Mr. Hodges to be wounded or dead. This was because no testimony at the time the photograph was admitted established that Mr. Hodges was dead or wounded. The photograph itself was not evidence of Mr. Hodges' condition because his condition had not yet been described by the witness. *See* Johnson v. State, 399 N.E.2d 360 (Ind. 1980); Wofford v. State, 394 N.E.2d 100 (Ind. 1979); Wilson v. State, 268 Ind. 112, 374 N.E.2d 45 (1978); Boone v. State, 267 Ind. 493, 371 N.E.2d 708 (1978); Green v. State, 265 Ind. 16, 349 N.E.2d 147 (1976); Murry v. State, 385 N.E.2d 469 (Ind. Ct. App. 1979).

[42]Photographs, like any other evidence, depend for their admissibility into evidence, upon relevance and competence. Usually the relevance of a photographic exhibit is self-portraying. Its competence must depend upon a proper identification as an accurate representation of that which it purports to portray. The verity of the identification depends upon the knowledge of the witness making the identification. If the witness has first hand information of the scene portrayed, it is immaterial that he came by his knowledge at a time differing from that at which it was photographically recorded.

Johnson v. State, 399 N.E.2d 360, 363 (Ind. 1980).

[43]397 N.E.2d at 1013.

were accurate representations of the alleged act.[44] In order to lay a foundation for the photographs' admission, an expert photograph examiner for the F.B.I. testified for the prosecution. He testified that the photographs were taken on Polaroid black and white film and were not composites or altered.[45] The prosecution also called the defendant's ex-wife, who identified the four-year-old daughter and the defendant as the persons shown in the photograph.[46] Her testimony also established, from the haircut of the daughter, that the photographs were probably taken in October, 1976. Testimony by these two witnesses was held to be sufficient to admit the photographs as substantive evidence.[47]

Although the court felt "it would be wrong to lay down extensive, absolute foundation requirements,"[48] it did provide some guidance for future trials. It recognized that photography is not an exact science. Whenever a photograph is used as evidence, there is a danger that 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"[49] may distort the scene depicted. In order to minimize the danger of misrepresentation or manufactured evidence, the court required "proof the photograph [had] not been altered in any significant respect."[50] In addition, non-mandatory guidelines for the admission of photographs under the silent witness doctrine are suggested.

> The date the photograph was taken should be established in certain cases, especially where the statute of limitations or the identity and alibi of the defendant are in question. In cases involving photographs taken by automatic cameras such as Regiscopes or those found in banks, there should be

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[44]*Id.* at 1013-14.

[45]*Id.* at 1014. This method for authentication of a photograph was also used in People v. Doggett, 83 Cal. App. 2d 405, 188 P.2d 792 (1948).

[46]The ex-wife's testimony violated defendant's marital privilege. IND. CODE § 34-1-14-15 (Supp. 1980) provides in part: "The following persons shall not be competent witnesses: . . . Husband and wife, as to communications made to each other." Acts may be considered communications for purposes of this rule. Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926). It has been applied subsequent to a divorce as to matters communicated during the marriage. Kreager v. Kreager, 192 Ind. 242, 135 N.E. 660 (1922). In light of other evidence identifying defendant as the person depicted, however, the error was harmless. As noted by the court, "[A]ny error in X's testimony was rendered harmless by virtue of appellant's display of his abdomen and thighs to the jury." Bergner v. State, 397 N.E.2d at 1020.

[47]397 N.E.2d at 1019.

[48]*Id.* at 1017.

[49]*Id.*

[50]*Id.*

> 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.[51]

Unlike a witness who lays the foundation for the use of a photograph as demonstrative evidence, an expert whose testimony permits use of a photograph as substantive evidence has no personal knowledge of the facts depicted. He cannot be cross-examined concerning the event in question. In its opinion, the court compared this to an exception to the hearsay rule where the declarant is unavailable.[52] Once the proper foundation is laid for the exception, an out-of-court assertion is admissible even though the opponent of the evidence has no opportunity to cross-examine the declarant. The court's analogy is an apt one.

The defendant's conviction was properly sustained by the court. The illogic of limiting the use of photographs to illustrating the testimony of a witness was analyzed in a North Carolina Law Review article published in 1946.

> If a defective eye with a damaged optic nerve conveys an impression (gained in twilight or under deceptive visual conditions) to a diseased brain, even after the eroding effect of weeks have advanced the process of forgetting, the owner of the eye—though he may be a simple soul of limited intelligence and an even more limited vocabulary—will be permitted to describe in court what he *thinks* that he *remembers* that he *saw*; but, if a camera with cold precision and absolute fidelity records the view permanently and with minute accuracy that view is kept from the jury, perhaps . . . , or its use is sharply circumscribed. Such strange logic has a baffling, Alice-in-Wonderland quality far removed from the realistic directness of the man-of-the-street. Perhaps only the logic of the law, wrought from centuries of philosophic inbreeding and tortured at times by the real and apparent need of stretching or confining the implications of precedent could arrive at such a result.[53]

As recognized by the court in *Bergner*, "although a witness' testimony and a photograph suffer from some of the same maladies, the photograph is far superior in many respects."[54]

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[51]*Id.*

[52]*Id.* at 1018.

[53]Gardner, *The Camera Goes to Court*, 24 N.C.L. Rev. 233, 245 (1946).

[54]397 N.E.2d at 1018.

B. Hearsay

1. Res Gestae.—Indiana's *res gestae*[55] exception to the hearsay rule was the subject of an opinion by the Indiana Supreme Court in *Spears v. State*.[56] At the defendant's trial for assault with intent to kill and murder, four witnesses had been permitted to testify that the defendant's wife "came out of her room hysterically screaming that her husband had beaten Ramenda or that 'Harry did it.'"[57] While noting that a bystander's declaration is not admissible unless it is part of the *res gestae*,[58] the court found the wife sufficiently related to the occurrence to not be a mere bystander.[59] The court, however, was sympathetic to the defendant's objection that the wife had no personal knowledge of her husband's acts because she had not observed the alleged fatal fight.

Prior to the testimony of the four witnesses, the defendant requested an evidentiary hearing to demonstrate that the wife had not observed the alleged acts.[60] The trial court refused to grant this request. In his offer of proof, the defendant stated he would produce a statement that the defendant's wife gave to the police. In this statement she asserted that she did not see her husband beat the deceased.[61] Denial of this request was properly found to be in error.

A rule more ancient than the hearsay rule requires that a witness, or hearsay declarant, have first hand knowledge concerning the matters to which he testifies. With the exception of admissions

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[55]The first Indiana decision to use the term "res gestae" to describe an exception to the hearsay rule was Binns v. State, 57 Ind. 46 (1877). It is a term that has not been popular with commentators on the law of evidence. Professor Morgan, in Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922) wrote: "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'"

[56]401 N.E.2d 331 (Ind. 1980).

[57]*Id.* at 336. This form of *res gestae* would fall within the excited utterance exception to the hearsay rule in federal courts. FED. R. EVID. 803(2). Although not discussed in the opinion, the use of the wife's statements did not violate defendant's marital privilege. This is true even though the wife could not have been called to testify against defendant without violating the privilege. Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926). The declarant of an excited utterance need not be a competent witness in order for the statement to be admissible. *See* Robbins v. State, 73 Tex. Crim. 367, 166 S.W. 528 (1914). *See* MCCORMICK, *supra* note 7, § 297, at 704-09.

[58]Red Cab, Inc. v. White, 213 Ind. 269, 12 N.E.2d 356 (1938). Indiana's *res gestae* rule is different in this respect from FED. R. EVID. 803(2) which permits the use of the excited utterance of a bystander. *See* Annot., 78 A.L.R.2d 300 (1961).

[59]401 N.E.2d at 336.

[60]*Id.* at 337.

[61]*Id.*

and the entry of items in business records, a hearsay declarant must have personal knowledge of the matters contained in his declaration.[62] Professor Cleary writes:

> The common law system of proof is exacting in its insistence upon the most reliable sources of information. This policy is apparent in the opinion rule, the hearsay rule and the documentary originals rule. One of the earliest and most pervasive manifestations of this attitude is the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact. The same requirement, in general, is imposed upon declarations coming in under exceptions to the hearsay rule, that is, the declarant must so far as appears have had an opportunity to observe the fact declared.[63]

As noted by the court, direct proof of the out-of-court declarant's personal observation is not necessary. "[I]t is sufficient if it appears inferentially that the declarant personally observed such matters and that there is nothing to make a contrary inference more probable."[64] However, when the opponent of a hearsay declaration offers to prove a lack of knowledge, it is error to deny the opportunity.

2. Business Records.—The appeal of a convicted bank robber in *Brandon v. State*[65] was denied because the Indiana Supreme Court held that business "records stored on a computer and electronically printed out" are admissible under the business records exception to the hearsay rule.[66] During his trial, the defendant objected to the admission of business office copies of microfiche records from the telephone company which showed all long distance calls that had been charged to a certain number.[67] A foundation for the records had been laid by testimony describing the manner in which telephone calls were automatically recorded on magnetic tape at the time each call was made and the manner in which the computer would later print out microfiche records for filing.[68] It was also shown "that the computer equipment used was a standard type of"

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[62]*See* FED. R. EVID. 602; G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 366-67 (1978); MCCORMICK, *supra* note 7, § 10, at 20-22.

[63]MCCORMICK, *supra* note 7, § 10, at 20.

[64]401 N.E.2d at 336-37 (quoting People v. Poland, 22 Ill. 2d 175, 183, 174 N.E.2d 804, 808 (1961)).

[65]396 N.E.2d 365 (Ind. 1979).

[66]*Id.* at 370.

[67]*Id.*

[68]*Id.* at 371.

system that "had been used by the company for several years."[69] Based on this testimony the trial court admitted into evidence the business office copy of the record. The court's opinion on this matter of first impression brings Indiana into conformity with holdings in other jurisdictions[70] and the Federal Rules of Evidence.[71]

As stated in the opinion: "Even though the scrivener's quill pens in original entry books have been replaced by magnetic tapes, microfiche files and computer print-outs, the theory behind the reliability of regularly kept business records remains the same and computer-generated evidence is no less reliable than the original entry books *provided a proper foundation is laid.*"[72] The unusual reliability of business records is created by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon the records, and by the need to make an accurate record as part of a continuing job or occupation.[73] These factors that make business records reliable do not depend on the form in which the records are kept. Considering error that may arise in any activity undertaken by a human being, a computer that automatically records an event may even add a new dimension to the reliability of business records.

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[69]*Id.*

[70]Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968); Grand Liquor Co. v. Department of Revenue, 67 Ill. 2d 195, 367 N.E.2d 1238 (1977); Commonwealth v. Hogan, 387 N.E.2d 158 (Mass. App. Ct. 1979); Ed Guth Realty Co. v. Gingold, 34 N.Y.2d 440, 315 N.E.2d 441, 358 N.Y.S.2d 367 (1974). *See also* Fenwick & McGonigal, *Admissibility of Computerized Business Records*, 15 JURIMETRICS J. 206 (1975); Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. CHI. L. REV. 254 (1974); Tapper, *Evidence from Computers*, 8 GA. L. REV. 562 (1974); *Law and Technology Symposium: Coping with Computer-Generated Evidence in Litigation*, 52 CHI.-KENT L. REV. 545 (1976).

[71]FED. R. EVID. 803(6), which deals with the business records exception to the hearsay rule, refers to "[a] memorandum, report, record, or data compilation, in any form." The advisory committee's note to this section states, "The expression 'data compilation' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage." The term "data compilation" was taken from FED. R. CIV. P. 34(a).

[72]396 N.E.2d at 370 (emphasis added).

[73]Unusual reliability is regarded as furnished by the fact that in practice regular entries have a comparatively high degree of accuracy . . . because such books and records are customarily checked as to correctness by systematic balance-striking, because the very regularity and continuity of the records is calculated to train the recordkeeper in habits of precision, and because in actual experience the entire business of the nation and many other activities constantly function in reliance upon entries of this kind.

McCORMICK, *supra* note 7, § 306, at 720. *See* G. LILLY, *supra* note 62, §§ 68-69, at 235-43 (1978); 5 J. WIGMORE, *supra* note 30, §§ 1517-1561.

In order to ensure the accuracy of computer-generated records, the court in *Brandon* required a three-part foundation for the evidentiary use of computer-generated business records.[74] First, "it must be shown that the electronic computing equipment" used to store the records was standard.[75] It appears the court assumed that a standard computer would be one that had proved its reliability through general acceptance by the business community. Second, the entries must have been "made in the regular course of business at or reasonably near the time of the happening of the event recorded."[76] This is a requirement for any business record that is to be received in evidence, whether stored on a computer or not.[77] The third part of the foundation is a general requirement "that the testimony satisfies the court that the sources of information and method and time of preparation were such as to indicate its authenticity and accuracy and justify its acceptance as trustworthy."[78] The third requirement, like the second, is one that may be applied to any business record, whether kept by hand or by computer.

3. Former Testimony.—In *Spence v. State*,[79] testimony taken in a civil proceeding was determined to be admissible as former testimony at a subsequent criminal trial. The defendant in *Spence* was convicted of assault, battery, cruelty and neglect of children. His conviction rested in part upon the admission, over objection, of a transcript of testimony given by one of his daughters, now deceased, at a prior civil hearing.[80] The testimony had been taken in a proceeding in which the Lake County Department of Public Welfare sought to obtain wardship of the defendant's two daughters. One of the acts

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[74]396 N.E.2d at 370. A more comprehensive foundation suggested by one commentator would require a showing that: 1) The business uses a computer; 2) the computer is reliable; 3) the business has developed a procedure for inserting data into the computer; 4) the procedure has built-in safeguards to ensure accuracy and identify errors; 5) the business keeps the computer in a good state of repair; 6) the business had the computer read out certain data; 7) the witness used the proper procedures to obtain the readout; 8) the computer was in working order at the time the witness obtained the readout; 9) the witness recognizes the exhibit as the readout; 10) the witness explains how he or she recognizes the readout; 11) if the readout contains strange symbols or terms, the witness explains the symbols or terms for the trier of fact. E. IMWINKELREID, EVIDENTIARY FOUNDATIONS 63-64 (1980).

[75]396 N.E.2d at 370.

[76]*Id.*

[77]*See* FED. R. EVID. 803(6); G. LILLY, *supra* note 62, § 68, at 235-36; MCCORMICK, *supra* note 7, §§ 308-309, at 722-24.

[78]396 N.E.2d at 370. The language is similar to the provisions of FED. R. EVID. 803(6) that records of a regularly conducted activity are admissible, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

[79]393 N.E.2d 277 (Ind. Ct. App. 1979).

[80]*Id.* at 279.

alleged in the Department's petition was a knife attack by the defendant on one of his daughters.[81] Counsel who represented Mr. Spence at the wardship hearing also represented him at the later criminal trial.[82] In *Spence*, the court of appeals correctly held defendant's objection to the receipt of the transcript was properly overruled.[83]

Former testimony, unlike other hearsay exceptions, does not rely upon circumstances to provide the guarantees of trustworthiness usually furnished by cross-examination and oath; both oath and the opportunity to cross-examine were present when the former testimony was taken. In civil trials, it is only due to the importance of demeanor evidence, available only when the witness is before the trier of fact, that former testimony as an exception to the hearsay rule is limited to situations in which the witness is unavailable.[84] A defendant's sixth amendment right of confrontation also limits reception of former testimony in criminal trials to circumstances where the witness is actually unavailable.[85] The court in *Spence* lists four factors to be used in determining the admissibility of former testimony: 1) Was the witness under oath at the prior proceeding? 2) Was the prior proceeding before a judicial tribunal equipped to provide a judicial record? 3) Was the defendant represented by counsel at the prior proceeding? and 4) Was the defendant offered every opportunity to cross-examine the witness concerning the statement.[86] As noted in the opinion,

> The critical determination to be made is whether there was sufficient identity of parties and issues between the former and present proceedings. . . . Absolute identity is not required, only sufficient identity to insure that cross-examination in the former case was directed to the issues presently relevant and that the former parties were the same in nature and interest.[87]

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[81] *Id.*

[82] *Id.* at 281.

[83] *Id.*

[84] Professor Seidman in his work on Indiana evidence states:

> Technically it is hearsay only because of the lack of the personal presence of the witness at the present trial so that the jurors may observe his demeanor. Since there is a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness . . . .

M. SEIDMAN, *supra* note 7, at 115-16 (footnote omitted).

[85] Mancusi v. Stubbs, 408 U.S. 204 (1972); Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968).

[86] 393 N.E.2d at 280-81.

[87] *Id.* at 281 (citations omitted).

Testimony given by defendant's daughter at the wardship proceeding was subject to cross-examination by the defendant's legal counsel.[88] The critical issues to be determined at the hearing were similar to those before the court at the criminal trial. In each case the defendant had a similar motive to develop the facts and attack the credibility of the witness. Thus, reception of the former testimony violated neither the hearsay rule nor Mr. Spence's right of confrontation.[89]

C. Judicial Notice

The unusual application of the doctrine of judicial notice in *Owen v. State*[90] is in conflict with the generally accepted legal theory underlying the doctrine. In a trial by jury the appellant in *Owen* was convicted of committing a felony while armed. At the request of the prosecution, the court took judicial notice that the defendant, who acted *pro se* in the trial, had signed the defense pleadings and motions;[91] however, no evidence was offered that defendant had in fact done so. Signatures and other handwriting in the defense pleadings were then used by an expert witness and the jury for comparison with a handwritten note left at the scene of the crime.[92] On appeal the supreme court upheld this use of judicial notice, holding,

> It does not seem unreasonable under the circumstances of this case, for the court to take judicial notice of the fact that the defendant is the one who did in fact, sign these pleadings. The trial judge may take judicial notice of such a fact, and a rebuttable presumption arises which requires the defendant to come forward with any evidence to dispute the presumption.[93]

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[88] *Id.*

[89] The testimony would also have been admissible in a federal court. FED. R. EVID. 804(b)(1) provides:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The testimony was also properly admitted under prior Indiana decisions. *See* Kimble v. State, 387 N.E.2d 64 (Ind. 1979); Livi v. State, 182 Ind. 188, 104 N.E. 765 (1914). *See generally* MCCORMICK, *supra* note 7, §§ 254-261, at 614-27.

[90] 396 N.E.2d 376 (Ind. 1979).

[91] *Id.* at 381.

[92] *Id.*

[93] *Id.*

Authority for this holding is found by the court in *Sumpter v. State*.[94] In *Sumpter*, the court held that it will take judicial notice of the defendant's sex when the sex of the accused is an element of an offense.[95] As in *Owen*, the judicial notice in *Sumpter* creates a rebuttable presumption.[96] Although the holding in *Sumpter* sanctions the use of a rebuttable presumption created by judicial notice,[97] a doctrine rejected by the writers of the Federal Rules of Evidence,[98] it does not support the use of judicial notice in *Owen*.

The doctrine of judicial notice is an alternative to the formal presentation of evidence. When judicial notice is taken of a matter, the parties need not present evidence and the trial judge informs the jury of the fact's existence.[99] Modern law, however, as illustrated by Federal Evidence Rule 201(b), recognizes two independent bases for judicial notice.[100] Federal Evidence Rule 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

In *Sumpter*, it was proper to take judicial notice of a defendant's sex. The sex of a person is a matter that is not subject to reasonable dispute, and if dispute does arise, the sex can be easily determined. Unlike the sex of an individual, however, the authorship of the

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[94]264 Ind. 117, 340 N.E.2d 764, *cert. denied*, 425 U.S. 952 (1976).

[95]*Id.* at 123-24, 340 N.E.2d at 768-69.

[96]*Id.* at 123, 340 N.E.2d at 768-69.

[97]Authorities do not agree on whether or not the fact judicially noticed must be accepted by the jury as conclusively established. *See* Keefe, Landis & Shand, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950); McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

[98]FED. R. EVID. 201(b) provides in part: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In commenting on this rule the advisory committee wrote, "[W]ithin its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof." P. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 47 (1980). As enacted, however, due to a belief the judge should not have the power to order the finder of fact to find any fact necessary for conviction, the rule as enacted permits evidence to the contrary to be put before the jury at a criminal trial but not at a civil trial. FED. R. EVID. 201(g); FEDERAL RULES OF EVIDENCE OF UNITED STATES COURTS AND MAGISTRATES 16 (Report of House Committee on the Judiciary) (West 1979).

[99]MCCORMICK, *supra* note 7, § 328, at 757-60.

[100]Matters of common knowledge within the territorial jurisdiction of the court and facts capable of certain verification are generally accepted as proper for judicial notice. MCCORMICK, *supra* note 7, §§ 329-330, at 760-66.

pleadings and filings of the defense in *Owen* was not a matter beyond reasonable dispute. Although the facts of the case strongly suggest the defendant's authorship, it cannot be said his authorship was a matter of common knowledge within the territorial jurisdiction of the court. Furthermore, it is doubtful that the prosecution could have proven the defendant's writing of the documents by resorting to sources of undisputable accuracy. The defendant's authorship should have been submitted to the jury as an issue to be resolved based upon evidence that the defendant was acting *pro se*.

D. The Original Document Rule

In order to prove damages arising from alleged medical malpractice, the plaintiff in *Davis v. Schneider*[101] sought to give oral testimony concerning the amount of a bill for services which was submitted by the Chicago Rehabilitation Institute. Prior to testifying, the plaintiff made no effort to account for her copy of the bill or to procure a copy of the original of the bill from the Institute.[102] Upon proper objection, plaintiff's testimony was correctly refused by the court;[103] its reception would have violated the best evidence rule.

The best evidence rule, or more specifically, the original document rule, provides, "[I]n proving the terms of a writing where the terms are material, the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent."[104] A party seeks to prove the terms of a document, within the meaning of the best evidence rule, when he attempts to prove a fact by referring to a document recording that fact. This is true even though the fact could have been proven without reference to the writing.[105] Because the plaintiff in *Davis* sought to show the amount of a "bill" (a writing) as evidence of expenses incurred, the court properly applied the best evidence rule in excluding her testimony. A change in the form of plaintiff's testimony, however, would have made it admissible. The plaintiff should have merely sought to relate expenses or debts incurred as the result of

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[101]395 N.E.2d 283 (Ind. Ct. App. 1979).

[102]*Id.* at 291.

[103]*Id.*

[104]MCCORMICK, *supra* note 7, § 230, at 560; *see* FED. R. EVID. 1002 which provides: "To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by Act of Congress."

[105]The advisory committee's note to FED. R. EVID. 1002 states:

> Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies.

her injuries and made no reference to the "bill." The best evidence rule would not have prevented her testimony because expenses and debts are matters which exist independently of any writing. Proof of facts that exist independently of any writing may be made by testimony of a witness, even though the facts could be proven by use of documents.[106] It is only when a fact is to be proven by reference to a writing, or the contents of the writing are themselves the facts sought to be proven, that the best evidence rule applies.

E. Competency

The Indiana Supreme Court, denying a convicted murderer's appeal in *Pavone v. State*,[107] upheld the use of a witness whose memory had been enhanced by hypnosis.[108] In his offer of proof, the appellant merely stated that he would show the witness had been hypnotized, and that it was not possible to tell how much of his testimony was his own recollection and how much of it was a result of suggestions made to him.[109] This offer of proof was denied. Although from the record it appears that defendant had all the statements, including videotaped statements, taken while the witness was hypnotized, his offer of proof did not establish the manner in which the testimony was influenced. It merely speculated that the testimony was tainted.[110]

The decision of the court is in accord with the law established in other jurisdictions. The general rule is that a combination of an opportunity for cross-examination of the witness and the availability of expert testimony on the contaminating effect of hypnosis on memory, enables the trier of fact to give proper weight to the testimony. *Harding v. State*,[111] a 1968 decision of the Maryland Court of Appeals, was the first reported decision to deal with the use of hypnosis for enhancing a witness' memory. *Harding* set the trend for subsequent rulings in other jurisdictions that hypnotism affects *credibility* but not the *admissibility* of evidence.[112] Two federal court

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[106]McCORMICK, *supra* note 7, § 233, at 563-65.

[107]402 N.E.2d 976 (Ind. 1980).

[108]*Id.* at 980.

[109]*Id.* at 979.

[110]*Id.* at 979-80.

[111]5 Md. App. 230, 246 A.2d 302, *cert. denied*, 395 U.S. 949 (1968).

[112]Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); State v. Brom, 8 Or. App. 598, 494 P.2d 434 (1972). These cases should be distinguished from those in which statements made during a hypnotic trance are offered as evidence of the facts alleged. Courts consistently exclude such evidence. Annot., 92 A.L.R.3d 442, 454 (1979).

of appeals' decisions have, however, indicated that some procedural requirements need to be established in order to prevent the abuse of hypnotic refreshment. In *United States v. Miller*,[113] the United States Court of Appeals for the Second Circuit held that the defense must be notified if a witness has had his memory enhanced by hypnosis.[114] Almost ten years after *Miller*, the United States Court of Appeals for the Ninth Circuit in a footnote wrote:

> We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful.[115]

The defendant in *Pavone* was provided with all the safeguards recommended by the Second and Ninth Circuit Courts of Appeals. Until it is established that hypnosis taints a witness' testimony in a manner that cannot be properly weighed by the trier of fact, its use should not affect the admissibility of testimony.

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[113]411 F.2d 825 (2d Cir. 1969).

[114]*Id.* at 832.

[115]United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).