is nothing in the nature of the right or the language of the fourth amendment which would foreclose its application to non-criminal proceedings.[177] It is therefore a question of policy whether abuse of the statutory authorization for issuing arrest warrants in paternity cases is sufficiently serious to justify excluding admissions resulting from illegal arrest and detention. Although no criminal penalties follow from a determination of paternity, it does impose a substantial and continuing obligation of support, enforceable by imprisonment for contempt. Where an admission of paternity is given, as in this case, under circumstances which at least cast doubt upon its voluntariness,[178] it does seem a slender thread upon which to hang so heavy a liability. Excluding such an admission serves to discourage the careless or unnecessary use of arrest and detention in paternity cases.

IX. Evidence

*William Marple**

A. Opinions

In *Williams v. State*,[1] the Indiana Supreme Court held that "[a]n opinion by an expert witness upon an ultimate fact in issue is not excludable for that reason."[2] The court also held that lay witness opinion testimony concerning an ultimate fact issue is also permissible within the discretion of the trial court.[3] The *Williams* holding appears to conflict with *Strickland v. State*,[4] a later decision by the

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no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[177]The Supreme Court has held that the fourth amendment right (though not the exclusionary rule) is applicable to administrative searches not related to criminal prosecution. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967) (refusal of entry to city housing inspectors checking for violation of building occupancy permit).

[178]The involuntary nature of the confession resulting from illegal arrest is, at least in part, the basis for its exclusion. *See* Brown v. Illinois, 422 U.S. 590, 599 (1975).

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[1]352 N.E.2d 733 (Ind. 1976).

[2]*Id.* at 714.

[3]*Id.* at 742 (citing Rieth-Riley Constr. Co. v. McCarrell, 325 N.E.2d 844 (Ind. Ct. App. 1975), *noted in* Marple, *Evidence, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 239, 245 (1975)).

[4]359 N.E.2d 244 (Ind. 1977).

supreme court. In *Strickland*, the court held that it was proper for the trial court to sustain an objection to a question asked of a lay witness that inquired if the witness knew whether the defendant had "any malice" toward the decedent. The supreme court stated that the "opinion rule excludes an eyewitness' conclusion as to the state of mind of another person."[5] The court noted that this is the province of the jury, which is equally able to infer a person's state of mind from the factual testimony observed and related by the witness.[6]

Strickland is limited to opinions as to the state of mind of another person, but that seems hardly a worthy distinction for resurrecting a per se opinion rule to exclude all opinion testimony on ultimate facts. The seminal case of *Rieth-Riley Construction Co. v. McCarrell*[7] followed rule 704 of the Federal Rules of Evidence, which provides that opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. The court of appeals in *Rieth-Riley*, while abolishing the per se exclusionary rule, left the decision as to admissibility to the discretion of the trial judge. The focus of the trial judge should be to decide whether or not the opinion, by a lay person or an expert, is helpful to the trier of fact.

The testimony objected to in *Williams* was that of the police officer who investigated the scene of an armed robbery and examined a shooting victim. In attempting to administer first aid, he concluded from the blood in the victim's mouth and nose that the victim was suffering from internal hemorrhaging. Specifically, the officer testified: "I would say he was in critical condition."[8] The court noted that the officer had had previous experience on accident scenes and in administering first-aid; the court did not suggest that this experience elevated the stature of the officer's testimony from that of an ordinary lay witness, but rather that it served as a proper factual basis for the opinion.

In *Rieth-Riley*, the foreman of defendant's road construction crew made an out of court statement that he subsequently affirmed in court to the effect that if he had been driving the car in plaintiff's position, he would not have been able to avoid the accident. The factual basis for this opinion was both his personal knowledge of what the construction crew was doing immediately prior to the accident, due to his background in the construction industry, and his own driving experience. The court noted that the foreman was the only

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[5] *Id.* at 248.
[6] *Id.*
[7] 325 N.E.2d 844 (Ind. Ct. App. 1975).
[8] 352 N.E.2d at 739.

eyewitness to the accident. The factors that the court considered on the admissibility of the opinion upon an ultimate issue were: first, the personal knowledge of the witness of the attendant circumstances, and second, the experience of the witness, which in light of the attendant circumstances tends to make the opinion useful to the jury.[9] In *Williams*, the officer had previous experience in first-aid and dealing with accident victims and first-hand knowledge of the blood in the victim's mouth and nose; in *Rieth-Riley*, the foreman was the only witness with first-hand knowledge of the attendant circumstances and experience as an operator of motor vehicles. Thus, while the weight accorded to experience and personal knowledge serving as the factual basis may vary with the case, the rule that such opinion testimony is not objectionable per se, so long as it appears that it will be useful to the jury, is consistent.

The *Strickland* opinion may not be as inconsistent as it first appears, and not simply for the superficial reason that the admissibility of an opinion on an ultimate issue is within the discretion of the trial court. While a witness may have personal knowledge of facts that tend to show the state of mind of another, it does not follow that the witness can have personal knowledge of the state of mind itself. Nor would personal experience be accorded more weight, as once the witness had attested to the facts that tend to show state of mind, the jury should be able to draw an inference as well as the witness as to that state of mind. Hence, the opinion is not helpful to the jury.

The only way to harmonize the *Strickland* decision with *Rieth-Riley* and *Williams* is to consider the particular context in which the opinion was offered. In both *Williams* and *Strickland*, the Indiana Supreme Court upheld the decision of the trial judge on the admissibility of the opinion. Thus, implicitly at least, the court applied the rule as stated in *Rieth-Riley*: The trial judge should consider the nature of the issue and the offered opinion in light of all attendant circumstances of the particular case. The discretion of the trial judge will only be reviewed for an abuse thereof.[10]

B. Privilege

An irony in Indiana criminal law is illustrated by a comparison of two cases concerning statements made by juveniles. In *Garrett v.*

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[9]325 N.E.2d at 853.

[10]*Williams* was cited with approval for the proposition that "[t]he admission of opinion testimony on an ultimate fact issue is within the discretion of the trial court," in Bobbitt v. State, 361 N.E.2d 1193, 1197 (Ind. 1977); *accord*, Palmer v. State, 363 N.E.2d 1245, 1248 (Ind. Ct. App. 1977); *contra*, Hunter v. State, 360 N.E.2d 588, 600 (Ind. Ct. App. 1977).

State,[11] the supreme court extended the holding of *Lewis v. State*[12] to require that a juvenile also be given the right to consult a parent or guardian before his confession can be deemed voluntary; furthermore, the consultation must be *meaningful*. In *Garrett*, the juvenile was interrogated prior to the arrival of his mother at the police station. During her initial visit, the interrogation continued. The supreme court, without any apparent showing of such fact in the record, held that the consultation between the juvenile and his mother was not meaningful because it was "too short and perfunctory and too closely supervised to be deemed adequate."[13] It is clear from *Garrett* that the state has the burden of showing every element of voluntariness in introducing a juvenile confession. It also indicates that the supreme court views any juvenile confession with disfavor, and that the state will have a heavy burden to bear if it seeks to use a juvenile's confession.[14]

This holding becomes particularly ironic when it is read in light of *Cissna v. State*,[15] wherein the First District Court of Appeals held that there is no parent-child privilege that would prevent a parent from testifying against a child. The court examined the known privileges in Indiana, all of which exist by virtue of state statutes, and did not find a parent-child privilege. *Garrett* held that a juvenile may not lawfully confess absent a consultation with his parent.[16] *Cissna* held that if the child makes incriminating statements, the parent can be compelled to testify about the statements.[17] Thus, the parent who wants to prevent the child from making incriminating statements that can be used in court would be wise not to talk to the child at all. The juvenile's attorney could conduct the consultation with the attendant attorney-client privilege protecting against the disclosure of any incriminating statements. The attorney could also, of course, advise the juvenile not to waive the right against self-incrimination.

C. Expert Testimony

Walters v. Kellam & Foley[18] is an instructive case on the use of hypothetical questions. The trial court sustained an objection to a lengthy hypothetical question by the plaintiff in a tort case on the

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[11]351 N.E.2d 30 (Ind. 1976).
[12]259 Ind. 431, 288 N.E.2d 138 (1972), *noted in* 6 IND. L. REV. 577 (1973).
[13]351 N.E.2d at 34.
[14]*See* Hall v. State, 346 N.E.2d 584 (Ind. 1976).
[15]352 N.E.2d 793 (Ind. Ct. App. 1976).
[16]351 N.E.2d at 32.
[17]352 N.E.2d at 795.
[18]360 N.E.2d 199 (Ind. Ct. App. 1977).

grounds that the proper foundation for showing the qualifications of the expert had not been shown, and because certain facts had been omitted from the question. The court indicated that the defendants claimed this expert lacked specific qualifications with regard to the particular area of expertise that his education and experience represented.[19] However, the court held that such an objection goes to the weight of the witness' testimony and may be adequately challenged on cross-examination.

The court also held that the expert should have been allowed to state his opinion about how a different design would have prevented plaintiff's injury. "A hypothetical question need not contain all the facts in evidence. It must, however, contain sufficient facts and inferences to present a true and fair relationship to the whole evidence in the case."[20] Thus, the court adopted the more expedient and widely prevailing view that all material facts need not be included in the facts of the question. "The safeguards are that the adversary may on cross-examination supply omitted facts and ask the expert if his opinion would be modified by them . . . ."[21]

Furthermore, the court reminded the bar that "the complications which spurred this appeal are precisely those which give impetus to the pre-trial procedures provided in Indiana Rules of Procedure, Trial Rule 16."[22] A proponent of a hypothetical question should always have the question prepared in writing before trial. The expert can be shown the question and be given time to properly prepare his answer. If the question is properly drafted, the proponent should also provide copies of the question to the trial judge and opposing counsel. This procedure insures that the proper facts are in the record and are presented to the expert. It is also more difficult for opposing counsel to confuse the witness, the proponent, the judge, or the jury because the trial court should require the objecting counsel to state specifically what is omitted or what is included that is omitted. The corrections or deletions can then be written into everyone's copy. The result is that there is much less confusion and rereading and rephrasing of the question. Additionally, the proponent of the question is wise to use a pre-trial conference as suggested by the court of appeals to clarify any objections to the question.

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[19]*Id.* at 219.

[20]*Id.*

[21]*Id.* at 220 (citing McCormick's Handbook of the Law of Evidence § 14, at 33 (2d ed. 1972)).

[22]360 N.E.2d at 220.

D. Impeachment

An unresolved area of evidence is the foundation required of an attorney who seeks to cross-examine a witness concerning matters not in evidence. In *United States v. Harris*,[23] decided by the Seventh Circuit Court of Appeals, the attorneys for two of the criminal defendants in a conspiracy case argued that the United States Attorney had not supplied a factual predicate for questions he asked of the defendants on cross-examination. At trial, the two defendants were asked whether they had received money from various persons. Both defendants denied they had received any payments. The defense attorneys objected that the questions regarding payments were prejudicial because the persons who impliedly made the payments were not available to testify and substantiate the implications.

The court of appeals stated the often repeated rule that it is improper for the prosecution to ask a question that implies a factual predicate that the examiner knows he cannot support by evidence or for which he has no reason to believe there is a foundation of truth.[24] The court cited several cases in which it has been held that it is reversible error if the factual predicate is not proven at trial. Specifically, when an attorney lays a foundation by asking a witness about prior inconsistent statements, it is reversible error to fail to produce the person to whom the statement was made if the witness denies making the statement.[25] It has also been held that counsel may not ask questions implying a valid conviction when he does not have a certified record of a conviction available to rebut a denial.[26] Finally, it is improper to ask inflammatory questions when it is agreed by the government that the matters implied by the questions could not be introduced into evidence.[27] The Seventh Circuit recognized valid instances of questioning without a factual predicate: If counsel has a "reasonable suspicion" that circumstances might be true, he may be allowed to probe an area on cross-examination. The examiner, however, will be bound by the witness' answer.

A safeguard that should be required in such cases is that upon requests of opposing counsel the examiner should be required to

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[23]542 F.2d 1283 (7th Cir. 1976).

[24]*Id.* at 1307 (citing ABA STANDARDS, THE ADMINISTRATION OF CRIMINAL JUSTICE: THE PROSECUTION FUNCTION § 5.7(d) (1974)); 6 J. WIGMORE, EVIDENCE § 1808, at 369 (Chadbourn rev. 1976).

[25]United States v. Bohle, 445 F.2d 54 (1st Cir. 1967).

[26]State v. Williams, 297 Minn. 76, 210 N.W.2d 21 (1973). *See also* Ciravolo v. United States, 384 F.2d 54 (1st Cir. 1967).

[27]Richardson v. United States, 150 F.2d 58, 64 (6th Cir. 1945).

demonstrate to the trial court the actual existence of the specific acts of misconduct in question, and their relevancy, out of the hearing of the jury.[28] This procedure would insulate the jury from unsupported innuendo as a result of questions by the examiner that were asked without basis and in bad faith, yet without creating hardship for the examiner. If the specific act occurred, the foundation could easily be introduced into evidence. On the other hand, if the act did not occur, it would be grossly unfair to allow questions based on nonexistent conduct.

In *Harris*, the Seventh Circuit approved the above safeguard procedures but did not require them. Thus, in the federal courts, the matter rests within the discretion of the trial judge. The court also held that the questions asked in *Harris* did not imply the type of conduct that the courts have held is so prejudicial that the prosecutor must not only have evidence available before asking it but also actually introduce it if the witness denies the conduct. The approach taken by the *Harris* court is that the foundation of the factual basis required for a question is directly suspect due to the inflammatory influence which flows from the question.

In summary, nothing prohibits an attorney from "going fishing" on cross-examination concerning statements, acts, or conduct that he reasonably believes may have occurred but is without evidence to support. The examiner will be bound by the answer of the witness, of course, which leaves only an unsupported inference in the jury's mind and nothing to argue in closing argument. Without any evidence in the record, the proponent of the question may also subject himself to the charge in closing argument that he is trying his case by innuendo. Thus, the ultimate benefit of this type of questioning is not as great as it might appear at first glance.

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[28]The suggested procedure was approved in Michelson v. United States, 335 U.S. 469, 481n.18 (1948), "as calculated in practice to hold the inquiry within decent bounds." *Accord*, United States v. Phillips, 217 F.2d 435, 443-44 (7th Cir. 1954); People v. Dorrikas, 354 Mich. 303, 92 N.W.2d 305 (1958). *See* McCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 192, at 458 (2d ed. 1972), wherein the author would require a "professional statement" from the prosecutor that he has reason to believe and does believe that the acts in question have occurred.