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Recent Developments: Hamilton v. State: Judicial Approval of "Jail House Plants"

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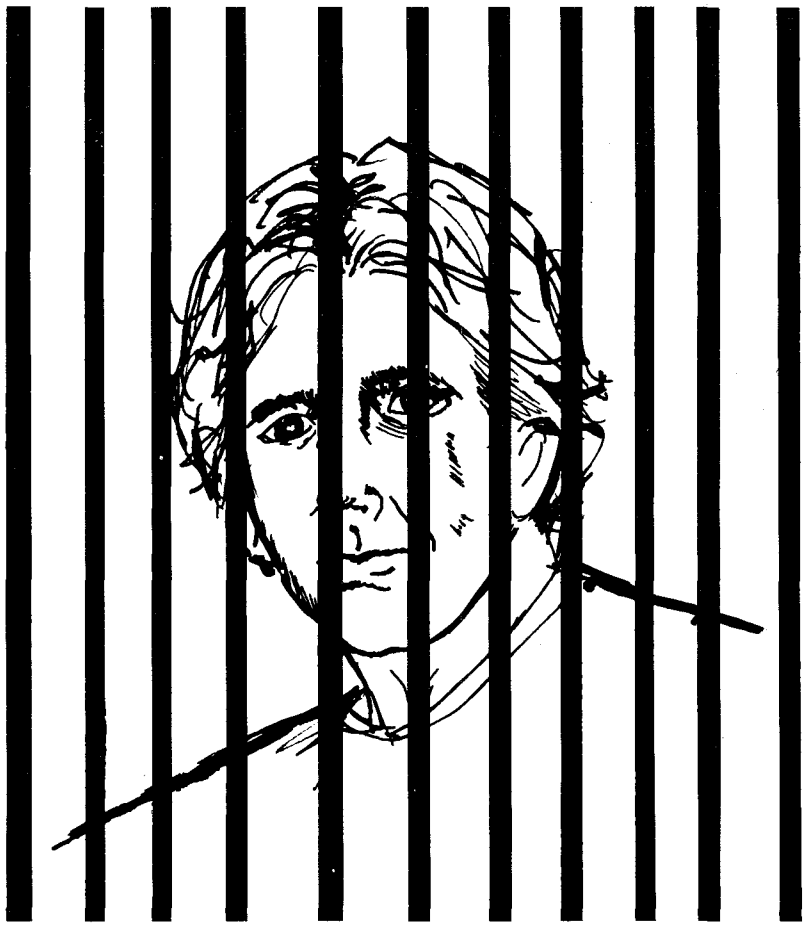
The U.S. Court of Appeals reversed the district court's finding of liability under both the disparate impact and disparate treatment theories. The court stated that Washington's decision to base compensation on the competitive market, rather than on a theory of comparable worth, was not a clearly delineated practice applied at a single point in the job selection process. The court noted that the decision to base compensation on the competitive market involves the assessment of factors too complex and multifaceted for disparate impact analysis. Some of those factors included: surveys, hearings, administrative recommendations, budget proposals, executive actions and legislative enactments. As a result there was no disparate impact found.

The U.S. Court of Appeals overturned the district court's determination of disparate treatment because it found that discriminatory intent had not been proven. Although in appropriate cases discriminatory intent may be inferred from circumstantial or direct evidence, the court held that the findings of "The Willis Study" alone, (that the state sets compensation at the market rate), would not establish the requisite intent without corroborating evidence. The court stated that although the state participates in the market system, it did not create the market disparity and that setting pay rates according to the prevailing market rate does not support the inference of intent to discriminate. The court noted that in some cases an inference of intent may be drawn from statistical evidence, but the weight given to statistical evidence is determined by the existence of independent corroborative evidence of discrimination such as testimony of specific incidents of discrimination.

The court also rejected AFSCME's contention that because the state commissioned "The Willis Study", it was committed to implementing a new system of compensation based on comparable worth as defined in the study. The court was hesitant to adopt a rule that had the effect of penalizing rather than commending employers for their innovation in undertaking such a study. The court was also reluctant to bind the state to base its decision on the results of one study because different studies produce different results which the employer should be permitted to take into account when determining rate of pay. The U.S. Court of Appeals found neither disparate impact nor disparate treatment. They held, therefore, that no Title VII violation had occurred.

(AFSCME is currently petitioning the United States Supreme Court to hear this case.)

–Audrey A. Creighton



Hamilton v. State: JUDICIAL APPROVAL OF "JAIL HOUSE PLANTS"

In *Hamilton v. State*, 62 Md. App. 603, 490 A.2d 763 (1985), the Court of Special Appeals of Maryland held that a defendant's statements to an acquaintance while both were incarcerated, did not amount to custodial interrogation requiring *Miranda* warnings even though the acquaintance carried on the conversation at the direction of the police.

In the course of a murder investigation, the Maryland State Police became suspicious of the defendant, Raymond Hamilton, who was incarcerated in the Maryland House of Correction in connection with an unrelated matter. At the behest of the State Police, an acquaintance of Hamilton's, named Fowler, agreed to tape his conversation with the defendant in exchange for the authorities' consideration on pending charges. On two occasions, the acquaintance visited Hamilton and elicited from him incriminating statements regarding the murder. These statements were made without the benefit of *Miranda* warnings. The trial court denied the defendant's motion to suppress his statements, and as a result he was subsequently convicted of murder and various related offenses.

On appeal, the defendant argued that the admission of the statements made to the acquaintance were in violation of his fifth amendment privilege against self-incrimination. The court noted, as a preliminary matter, that the admission of the taped conversations violated neither the Maryland nor federal wiretap statute. MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(2)(1984); 18 U.S.C. § 2511(a)(c) (1982). Additionally, the court held that the admission of the tapes did not violate Hamilton's fourth amendment protection against unreasonable searches and seizures because "[t]he law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent. . . ." *Hamilton*, 62 Md. App. at 608, 590 A.2d at 766 (quoting *United States v. White*, 401 U.S. 745, 752 (1971)).

Turning to the defendant's fifth amendment claim, Judge Alpert, writing for a unanimous court, stated that "*Miranda* warnings must be given when 'an individ-

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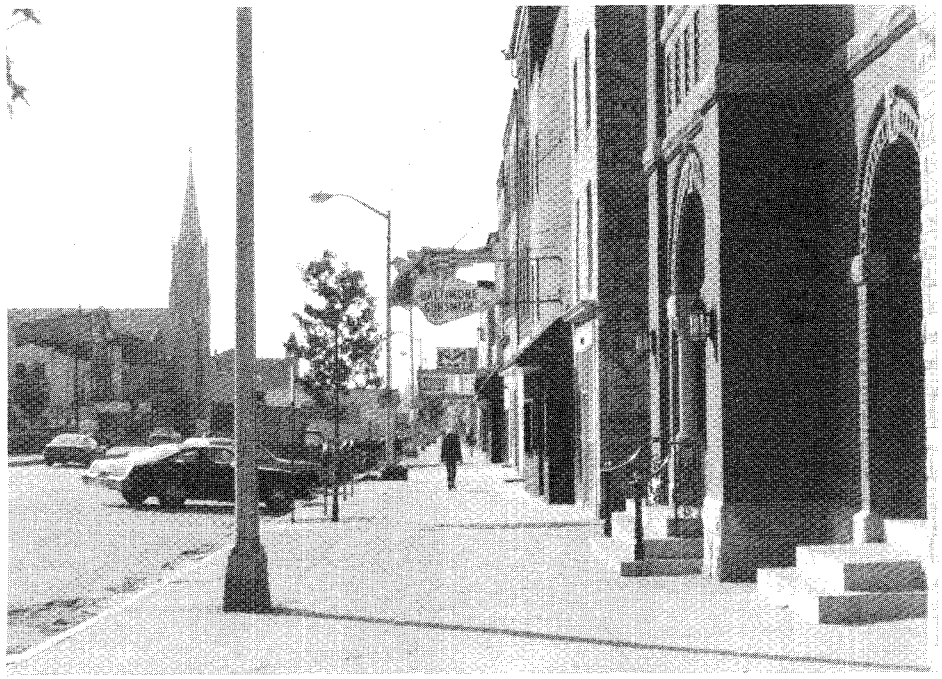
defect in the handgun itself, such as having a safety mechanism that fails under certain circumstances, or having a tendency to misfire, or having a trigger structure that easily catches on foreign objects and thereby causes an accidental discharge. It simply quarrels with the judicial policy-making that will hold it responsible for a third party's deliberate misuse of its product. As an aside, statistics of the Bureau of Alcohol, Tobacco and Firearms seem to suggest that criminals prefer to use high quality .38 and .357 caliber revolvers (the same type of handgun as used by police organizations) over the so-called *Saturday Night Special* in any event. To add another dimension, the underpinning rationale for the *Kelley* decision suggests that there may be room in the cause of action for other types of analogous instrumentalities—e.g., a sawed-off shotgun or the switchblade knife. Only time will tell, however!



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ual is taken into *custody* or *otherwise deprived of his freedom* by the authorities in any significant way and is subjected to *questioning.*'" *Hamilton*, 62 Md. App. at 609, 490 A.2d at 766 (emphasis in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 478 (1966)). Thus, the court reasoned that in order to find a violation of *Miranda*, it must be found "(a) that appellant was interrogated; (b) that the interrogation occurred while he was in custody or otherwise deprived of his freedom; and (c) that appellant was not properly advised of his *Miranda* rights." *Hamilton*, 62 Md. App. at 609, 490 A.2d at 766.

The court quickly found that the acquaintance's conversations with the defendant amounted to an interrogation because he was an agent of the state sent expressly to question the defendant about the murder. Additionally, it is clear that the defendant was not properly advised of his *Miranda* rights. However, the second element, that of custody, was missing.

"Only if the accused is in a situation where there are inherently compelling pressures to respond to interrogation are *Miranda* warnings required." *Hamilton*, 62 Md. App. at 611, 490 A.2d at 767. The court discussed the Supreme Court's decision in *Hoffa v. United States*, 385 U.S. 293 (1966) in reaching its decision. In that case the Court held that the use of testimony of a government informer concerning conversations between the informer and the defendant did not violate the defendant's fifth amendment rights. "[S]ince at least as long as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. . . ." *Id.* at 304 (footnote omitted), quoted in *Hamilton*, 62 Md. App. at 612, 490 A.2d at 767. The conversations in *Hoffa*, however, took place in the defendant's hotel suite and not in a jail cell.

Judge Alpert then turned to the Court's decision in *United States v. Henry*, 447 U.S. 264 (1980).

> [T]he Supreme Court, while holding that statements made to a police informant after indictment of the accused *and while the accused was incarcerated* were inadmissible on Sixth Amendment grounds, addressed Fifth Amendment concerns in *dicta.* Citing *Hoffa* for authority, the Court noted that "the Fifth Amendment has not been held to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential of compulsion."

Hamilton, 62 Md. App. at 613, 490 A.2d at 768 (emphasis in original) (quoting *Henry*, 447 U.S. at 272).

Although the environment involved in *Hamilton*, namely the confines of a prison cell, leads to thoughts of custody, the court concluded that there was nothing coercive in the casual questioning of Hamilton by Fowler. The court noted that Hamilton "spoke with Fowler of his own volition, was not required to stay and continue the conversation and could have left Fowler at any time." *Hamilton*, 62 Md. App. at 615, 490 A.2d at 769. The court cautioned that "[w]e must not forget that '*Miranda* . . . was aimed not at self-crimination generally . . . but at *compelled* self-incrimination—the inherent coercion of the custodial, incommunicado, third-degree questioning process.'" *Hamilton*, 62 Md. App. at 616, 490 A.2d at 769 (quoting *Cummings v. State*, 27 Md. App. 361, 364, 341 A.2d 294, 297, *cert. denied*, 276 Md. 740 (1975)). Thus, the court concluded "that despite appellant's incarceration the interrogation was not custodial." *Hamilton*, at 615, 490 A.2d at 769.

Before *Hamilton*, the "jail plant" situa-

tion arose in *Leuschner v. State*, 41 Md. App. 423, 397 A.2d 622, *cert. denied*, 285 Md. 731, *cert. denied*, 444 U.S. 933 (1979). In that case, an undercover State Police officer had been placed in the defendant's jail cell under false pretenses. Statements made by the accused were held admissible because they were not made in response to interrogation. The *Hamilton* court distinguished its situation from that in *Leuschner*.

The court's decision in *Hamilton* is sure to delight law enforcement personnel. The use of "jail plants," which has long been a favored investigatory tactic, now has the court's official stamp of approval. This tactic, though, is not without its share of criticism. One court has stated that "[t]he frustration of the prosecuting authorities is understandable. There is, however, no excuse for this questionable conduct, which might result in reversal in a closer case." *Flittie v. Solem*, 751 F.2d 967 (8th Cir. 1985). *But see* Kamisar, *Brewer v. Williams, Messiah, and Miranda; What Is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 69 (1978).

–Edward B. Lattner

Bailey v. State: PRE-TRIAL DISCLOSURE EXTENDED TO NON-MARYLAND POLICE OFFICER

In *Bailey v. State*, 303 Md. 650, 496 A.2d 665 (1985) the Court of Appeals of Maryland held that oral statements which the state intended to use at trial and which had been made by the defendant to out-of-state police were statements made by the defendant to a state agent within the meaning of Md. Rule 4-263(b)(2) (formerly Rule 741(b)(2)).

The appellant, Bailey, was charged with having committed a robbery with a deadly weapon on September 29, 1983. Along with other property alleged to have been taken from the victim was a 1967 Ford Mustang. Bailey and a companion were arrested later that day in possession of the Mustang on the New Jersey Turnpike by Officer Jenkins, of the New Jersey State Police.

On February 16, 1984, the state said that Bailey had made no oral or written statements known to them at that time. The defendant then formally requested, pursuant to Md. Rule 4-263(b), that the state submit a copy of the substance of each statement made by the defendant to a "state agent" that the state intended to use at trial. The state did not respond, leaving intact its position that no statement had been made. The state did, however, list Officer Jenkins as a witness it intended to call.

At trial, during the opening statement, the prosecution made reference to and described the prearrest statement made by the defendant to Officer Jenkins. The defense objected based on the state's failure to disclose this statement prior to trial. The trial court ruled there was no discovery violation because Officer Jenkins was not a "state agent" within the meaning of that phrase as used in Maryland Rule 4-263.

The court of appeals granted certiorari to decide whether the statements made by the defendant to non-Maryland police officers which the state intended to use at trial, were discoverable under Md. Rule 4-263.

In support of the trial court's ruling, the state made three arguments. First, the state argued that Md. Rule 4-263 is not applicable to agents of another sovereign. The court rejected this argument noting that the inter-relationship between subsections (a) and (b) of the rule require a different interpretation than that posited by the state in this case. Md. Rule 4-263(a) requires certain disclosures to be made by the state without the defendant's request. Subsection (b) deals with those matters discoverable on request by the accused, including those made to a "state agent." Md. Rule 4-263(b)(2). However, under the 'old rule', subsection (a) contained the following scope provision, conspicuously absent from subsection (b): "the State's Attorney's obligations under *this section* extend to material and information in the possession or control of . . . any others who have participated in the investigation . . . of the case and who . . . with reference to the particular case have reported to his office." Rule 741(a)(3) (emphasis added). If the state's contention was correct, the state would be forced to disclose the statement because subsection (a) would not be limited to "state agents." The defense however, would not be able to acquire the substance of the statement under subsection (b) because it would be limited to "state agent." In addition, most motions to suppress are based on federal constitutional violations in obtaining the evidence. These violations may be made by either state or federal agents. Clearly, the state's interpretation of Md. Rule 4-263 creates anomalous results and frustrates the very purpose of the rule.

The prosecution's second contention was that the Jencks Act, 18 U.S.C. § 3500 (1982), has applicability to the discovery issue here on appeal. The Jencks Act currently requires production of statements "in possession of the United States." The state claimed that the statements here are in possession of state officials, which would not constitute "in the possession of the United States," for purposes of the act.

According to the court, the Jencks Act was inapplicable to the present situation because the scope provisions of 4-263 clearly prove a contrary intent. The court,