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## Recent Developments: United States v. Whitehead: Railway Passenger's Fourth Amendment Rights Not Violated by Canine Sniff of Luggage Based on Reasonable Suspicion

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—A.2d— (1988). Section 316(b) cannot be used as a separate basis for imposing tax if there is no federal taxable income to begin with. *Id.* The Circuit Court for Baltimore City affirmed the Tax Court and held that *Ford Motor Land Dev. v. Comptroller*, 68 Md. App. 342, 511 A.2d 578, cert. denied, 307 Md. 596, 516 A.2d 567 (1986) was controlling.

*Ford Motor* involved a Delaware corporation involved in real estate development and related activities in Maryland. Ford sold real property, that it owned in Maryland, in 1978 and realized a net capital gain of close to \$3,000,000 from the sale. However, between 1973 and 1978, Ford suffered overall net operating losses which exceeded, and offset, the 1978 capital gain. Ford realized this after it had already submitted its 1978 taxes and consequently asked for a refund, claiming it had no "net income" to be taxed in Maryland.

The Comptroller, on the other hand, assessed additional taxes on Ford arguing that Ford's capital gain was Maryland net income, and therefore taxable by Maryland under § 316(b) regardless of Ford's net operating losses. The Maryland Tax Court agreed with the Comptroller and affirmed his assessment. The Circuit Court for Baltimore City affirmed the tax court. On appeal, the Court of Special Appeals of Maryland reversed, basing their decision on statutory construction.

The court of special appeals held that a corporation must have a "net income" under § 280A(a) before the capital gains allocation provision of § 316(b) can apply. The court determined that the plain meaning of "net income" for a corporation was its federal taxable income as governed by § 280A. *Comptroller Of The Treasury Income Tax Division v. American Satellite Corporation*, 312 Md. 543-44, 540 A.2d at 1149 (1988) (citing *Ford Motor*, 68 Md. App. at 350-351). Since § 316 provides the means of allocating "net income" between Maryland and other states, the existence of a "net income" is required as a prerequisite to using § 316. *Id.*

In *American Satellite Corporation*, the Court of Appeals of Maryland used a statutory construction analysis, as did the court of special appeals in *Ford Motor*, to determine that the meaning of "net income" was federal taxable income. *American Satellite Corporation*, 312 Md. at 544-45, 540 A.2d at 1150. The court of appeals decided that the appropriate method to reach the definition of "net income" was to ascertain the legislature's intent in enacting the various statutes in question. *Id.* at 544, 540 A.2d at 1150. With this problem solved, the court could then determine whether § 316 modifications could

be made even if a corporation reported no "net income for the year in question." *Id.*

The court of appeals used the legislative committee reports to ascertain the legislative intent of the statutes in question. The committee reports clearly demonstrated that the purpose of the current tax law, which was enacted in 1967, was to significantly restructure the earlier tax law and bring it into conformity with the federal tax scheme. *Id.* at 539, 540, A.2d at 1141. As was said previously, the court of appeals also determined that the legislative intent was for the "net income" of a corporation to be its federal taxable income plus or minus certain modifications. See *American Satellite*, 312 Md. at 545, 540 A.2d at 1150 (citing Technical Supplement to the 1975 Report of the State Tax Reform Study Committee (Legislative Council Of Maryland at 145 (Feb. 1976))). These modifications were to be specific additions and/or subtractions to the federal taxable income. The result of these additions and/or subtractions would be the corporation's "net income." The modifications which were listed in the committee report corresponded exactly to those modifications listed in §§ 280A(b) and (c). See *Id.* There was no indication in the committee report that the Comptroller's position, namely that § 316 modifications should be used when a corporation reported no "net income," was correct. See *American Satellite*, 312 Md. at 545-46, 540 A.2d at 1150.

Therefore, the Comptroller was incorrect in trying to read into the provisions of § 280A(b) a further addition to the taxable base from § 316(b)(3). *Id.* at 546, 540 A.2d at 1150-51. Consequently, § 316(b) cannot be used unless a corporation has a "net income" as defined under the laws of the United States because there must be something to allocate in the first place. *Id.* at 547, 540 A.2d at 1151. Hence, ASC only owed \$14,229 in taxes as required by § 280A(b) for state and local income taxes, and § 288(g) for personal property taxes.

In *American Satellite*, the Court of Appeals of Maryland concluded that the "net income" of a corporation is its federal taxable income as modified by the addition and/or subtraction of those items listed in § 280A(b) and (c). Furthermore, the court determined that if a corporation has no taxable income because its in-state capital gains were offset by out-of-state losses, then § 316 modifications cannot be used to assess further additions. Therefore, § 316 modifications can only be used when a corporation has a "net income."

—Richard M. Goldberg

## *United States v. Whitehead*: RAILWAY PASSENGER'S FOURTH AMENDMENT RIGHTS NOT VIOLATED BY CANINE SNIFF OF LUGGAGE BASED ON REASONABLE SUSPICION

In the consolidated appeal of *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), the United States Court of Appeals for the Fourth Circuit held that the expectation of privacy of one travelling by railroad is substantially less than that of a person occupying a temporary residence, such as a hotel room. In addition, the court held that the brief exposure of the interior of a sleeping compartment on board a train to narcotics detection dogs is constitutionally permissible when based on an articulable, reasonable suspicion that the contraband is contained within the occupant's luggage. In so holding, the court affirmed the district court's ruling.

On November 26, 1986, ten minutes before the departure of the morning train from Miami to New York City, two special narcotics officers assigned to the Miami station observed the defendant, Whitehead, arrive at the station in a taxi. As he emerged from the cab, Whitehead carefully surveyed the station before entering. Then, carrying a sports bag and a suitcase, he entered the station, where he paid \$403 in cash for a one-way, first-class sleeping car ticket to New York.

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As a result of Whitehead's initial scrutiny of the station, the police became suspicious and questioned the taxi driver and ticket sales agent. They discovered that Whitehead had been picked up at the DiLido Hotel, a known meeting place for drug traffickers, and that he purchased the ticket under the name "W. Tucker."

The officers then approached and questioned Whitehead, who identified himself as "W. Tucker." When asked for additional identification, Whitehead began to sweat profusely as he produced a pair of military dog tags. Although Whitehead was dressed in a business suit, he had no other identification. Whitehead told the police he was from New York and had been vacationing in Miami for two days, where he had been staying at the DiLido Hotel. The officers indicated to the defendant that they were in the midst of a narcotics investigation and requested permission to search his luggage. Whitehead refused and boarded the train for New York.

The Miami police relayed the incident to the Washington Amtrak police. A computer search by police revealed that no one named "W. Tucker" had travelled by train from New York to Miami, and that "W. Tucker's" reservation on the Miami-New York train was made only a few hours before its departure.

The next morning, an Amtrak officer boarded Whitehead's train in Washington and learned from the porter that Whitehead became ill shortly after the train's departure from Miami, had not eaten much, and had left his roomette only briefly. The roomette had a sliding inside lock and could not be locked from the outside.

When the train arrived in Baltimore, other police officers and drug trained dogs boarded. An Amtrak officer, posing as a conductor checking tickets, knocked on Whitehead's compartment door. Whitehead opened the door, and the officer identified himself as a policeman and asked permission to enter. Whitehead invited him in, whereupon the officer advised Whitehead of the ensuing drug investigation. Two dogs were brought into the roomette and alerted the police to the luggage. Three kilograms of cocaine were found in the suitcase, and Whitehead was subsequently arrested.

At trial, the defendant's motion to suppress the evidence obtained during the canine sniff search was denied. In so doing, the court relied generally on *California v. Carney*, 471 U.S. 386 (1985), invoking the "vehicle exception" to the warrant requirement. Under this analysis, the trial court ruled that an occupant of a roomette has a diminished expectation of privacy as

compared to a person occupying a temporary home, such as a hotel room. The lower court further determined that because the police had reasonably suspected Whitehead of criminal wrongdoing, their canine investigation of his sleeping compartment did not violate the fourth amendment.

On appeal, Whitehead conceded that the exposure of this luggage in a public place to a trained dog was not a search for fourth amendment purposes *United States v. Whitehead* at 853 (citing *United States v. Place*, 462 U.S. 696 (1983)). Whitehead contended, however, that his luggage was not in a public place, but rather in a train compartment that was the "functional equivalent" of a temporary home, such as a hotel room. *Id.* at 853 (citing *Stoner v. California*, 376 U.S. 483, 490 (1964)). Based upon this reasoning, Whitehead argued that the officers could not bring trained canines into his roomette without a warrant, or at the least, probable cause. *Id.* at 853.

The United States Court of Appeals for the Fourth Circuit rejected Whitehead's contentions. The court found that an occupant of a train roomette has a lesser expectation of privacy than individuals in their homes or hotel rooms.

The court of appeals relied on several Supreme Court cases in support of its reasoning. *Carroll v. United States*, 267 U.S. 132, 153 (1925) recognized a necessary difference between a search of a home or other dwelling where a warrant must first be obtained, and a search of an automobile for contraband. *Id.* at 854. The court stated that "[i]n the sixty years since the *Carroll* decision, the Supreme Court has consistently reaffirmed that the privacy interests of individuals engaged in transit on public thoroughfares are substantially less than those attached to fixed dwellings." *Id.* at 854 (citing *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) and *Chambers v. Maroney*, 392 U.S. 42 (1970)).

Ready mobility and its potential for immediate flight, as well as the governmental regulations surrounding most forms of public transportation has lent credence to the diminished privacy aspects of public transportation. *Id.* at 854 (citing *California v. Carney*, 471 U.S. 386 (1985)). In *Carney*, the search of a parked motor home in a public place was found to be constitutionally permissible. The Supreme Court held that the motor home was within the "automobile" or "vehicle" exception and that a warrant was not required prior to the search. *Carney*, 471 U.S. 390-93. Because the motor home in *Carney* was both readily mobile and subject to governmental regulations not

applicable to fixed dwellings, the court reasoned that "overriding societal interests of effective law enforcement justified an immediate search before the vehicle and its occupants became unavailable." *Id.* at 393.

The court of appeals in *Whitehead* reasoned that the fourth amendment principles cited in *Carney* clarified Whitehead's privacy interests. Based upon this, the court found that unlike the parked motor home in *Carney*, Whitehead's sleeping compartment was part of a train moving in interstate transit. The court opined that Whitehead was a passenger, not a resident; and while he could not control the train's direction, its movement interfered with the officers' ability to conduct a full fledged investigation within their jurisdictions. Moreover, Whitehead had the ability to leave the train at any stop, and unlike a hotel room, he could not remain on board once the train arrived at its destination. *Whitehead*, 849 F.2d at 854 (4th Cir. 1988).

The court of appeals noted further that railroad travel is highly regulated, and that passengers in sleeping cars are frequently subject to ticket checks and other inquiries by railroad personnel. The court concluded that these types of intrusions, which necessarily reduce a passenger's privacy interests, were sufficient to show that train sleeping compartments are not "homes on rails," and that an onboard passenger's privacy expectation is not akin to a person in his home. *Id.* at 855.

Whitehead next contended that even if his privacy expectation was no greater than that of an automobile occupant, probable cause must have supported the canine sniff search of his compartment under the fourth amendment principles. Once again the court disagreed, stating that given the defendant's reduced expectation of privacy, the importance of societal interest in effective law enforcement, and the minimal intrusiveness of the dog sniff, probable cause was not a prerequisite. *Id.* at 855.

In support of its reasoning, the court stated that the fourth amendment does not protect people from every governmental intrusion of their privacy, just unreasonable ones. *Id.* at 855 (citing *place*, 462 U.S. at 706-07). In *Place*, the court ruled that avoiding the probable cause requirement for warrants rested "on a balancing of the nature and quality of the individual's fourth amendment interests against the important of the governmental interest alleged to justify the intrusion." *Place*, 462 U.S. at 703. *Place* held that a canine sniff of luggage was unintrusive, and the brief seizure of the bags for that purpose comported with the fourth amendment if there was an articulable, reasonable suspicion

that contraband was contained therein. *Id.* 708-09.

The court of appeals also relied on *Terry v. Ohio*, 392 U.S. 1 (1968), which held that police officers may make limited intrusions on an individual's personal security based on less than probable cause. The *Terry* court based its decision on "the ultimate standard of reasonableness embodied in the fourth amendment," and subsequent decisions that found limited intrusions were not confined to the "stop and frisk" situation presented in *Terry*. *Id.* at 856 (citing *Michigan v. Summers*, 452 U.S. 692, 699-700 (1981)).

By analogizing the decisions of *Place* and *Terry* to the case at bar, the court of appeals found that the authorities conducted the dog sniff search of the defendant's luggage in a manner similar to that in *Place*. The dogs' presence was prearranged, Whitehead's bags were not moved, the train was not delayed, and the defendant remained free to move about in the train while the search was conducted. The court stated in summation that the "brief entry of the dogs into the roomette did not breach the security of Whitehead's effects or entail a significant encroachment of this privacy." *Id.* at 856-857.

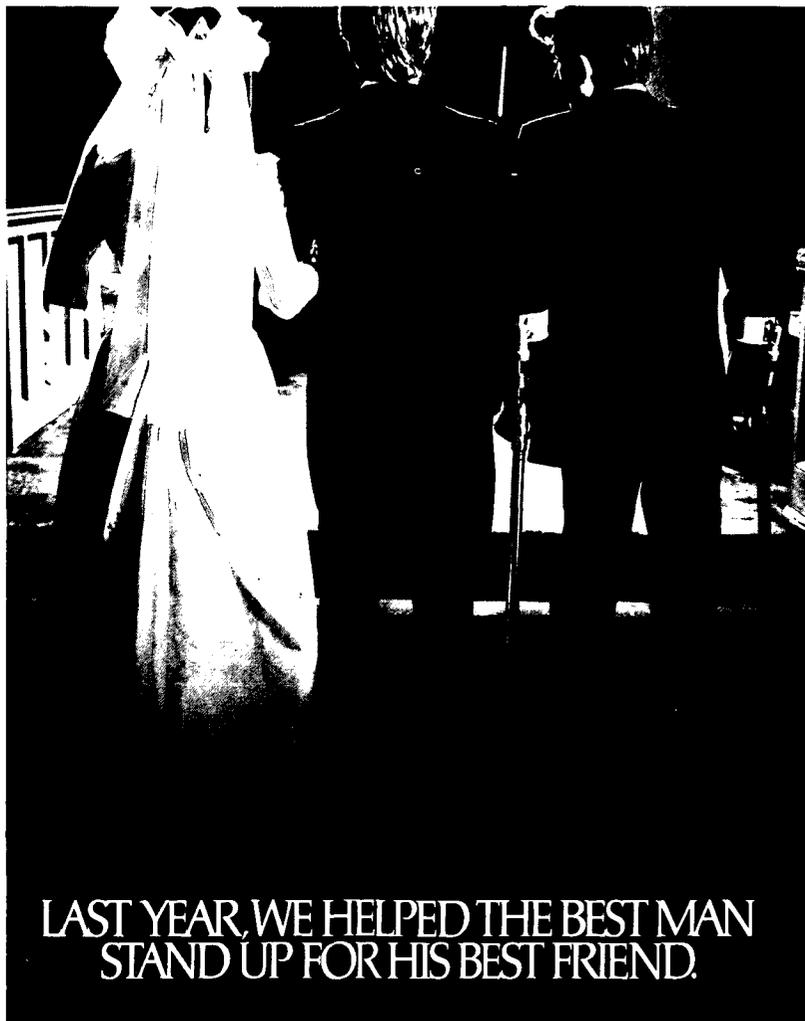
The gravity of the governmental interests, the second prong of the court's analysis, must be shown to be "sufficiently substantial" in order to justify an intrusion on fourth amendment interests in the absence of probable cause. *Id.* The *Whitehead* court again relied on *Place*, which identified "preventing the flow of narcotics into distribution channels" by permitting investigative stops of suspected drug couriers as a strong governmental interest. *Id.* (citing *Place*, 462 U.S. at 704). Based upon the analysis in *Place*, the court of appeals found that the facts of *Whitehead* likewise involved the sufficiently substantial law enforcement interest of intercepting and preventing drug movement from source to distribution. The court concluded that the officers' suspicions of Whitehead, the unintrusive manner of their search to verify these suspicions, and the defendant's limited privacy interests as an occupant of a train sleeping compartment were sufficient to justify the dog sniff without a showing of probable cause. *Id.* at 857.

In his final argument in support of his motion to suppress, Whitehead contended that the officers did not possess an articulable, reasonable suspicion that his luggage contained contraband. The court agreed that a reasonable suspicion was necessary before the dogs could be released inside Whitehead's roomette. However, it concluded that numerous objective factors

as set forth by the trial court concerning the defendant's appearance and conduct provided the officers with the "requisite quantum of suspicion." *Id.* at 857. These factors included Whitehead's presence in Miami, a major drug source city; his stay at the DiLido Hotel, a known meeting point for drug traffickers; his arrival at the train station just minutes before the train's departure and his scrutiny before entry; his decision, after only a two day vacation, to take a 26 hour train ride at a cost substantially higher than an airline ticket; the fact that he had not taken the train to Miami, at least not under the name of "W. Tucker"; his failure to supply his full name; his making the train reservation just hours before departure; his paying with cash as a means to avoid presenting identification; his lack of identification; his startled, nervous appearance and profuse sweating in an air conditioned station; and the fact that he left his compartment only briefly probably so that he could remain

with the luggage. The court concluded that the officers had a reasonable suspicion that Whitehead was engaged in illegal activity based upon the entire "mosaic" of his actions, and piecemeal refutation of each factor was not what counted.

In dissent, Judge Murnaghan stated that a passenger train sleeping compartment was more analogous to a temporary home for fourth amendment purposes, and Whitehead's reasonable expectation of privacy was violated by the canine sniff search. *Id.* at 860 (citing *United States v. Chadwick*, 438 U.S. 1, 7 (1977) and *Katz v. United States*, 139 U.S. 347, 361 (1967)). In further support of his dissent, Judge Murnaghan found that the numerous factors relating to the defendants appearance and conduct were, even when considered in totality, insufficient to create a reasonable, articulable suspicion of criminal activity by Whitehead. *Id.* at 862 (citing *United States v. Sokolow*, 808 F.2d 1366, 1371 (9th Cir. 1987) and *United States v. Gooding*,



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695 F.2d 78, 83-84 (4th Cir. 1982)).

By its decision in *Whitehead*, the United States Court of Appeals for the Fourth Circuit has held that occupants of overnight train sleeping compartments do not have the same expectation of privacy as individuals in their homes or hotel rooms. Additionally, the court has stated that where such diminished expectation exists, the importance of the law enforcement interests at stake and the "minimal intrusiveness" of the search abrogate the requirement of probable cause under the fourth amendment. As a result of this ruling, the court of appeals has not only redefined the privacy interests of individuals travelling by train, but it appears to justify the abrogation of probable cause as a prerequisite to a canine sniff search for contraband by endorsing the use of police profiles to establish a reasonable, articulable suspicion of criminal activity.

—Virginia Marino Harasti

### *Mills v. Maryland*: SUPREME COURT RULES THAT MARYLAND'S CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONALLY MANDATORY

In *Mills v. Maryland*, \_\_\_U.S.\_\_\_, 108 S. Ct. 1860 (1988), the Supreme Court of the United States, in a 5-4 decision, reversed a Maryland Court of Appeals death sentence affirmation on the ground that the jury verdict form used was unconstitutional.

Ralph Mills, an inmate in the Maryland Correctional Institution, was convicted by a jury of the first degree murder of his cellmate, Paul Brown. At the conclusion of the sentencing hearings, the same jury, using the verdict form provided for in Md. Rule Proc. 772A, found beyond a reasonable doubt that an aggravating circumstance had been proven; namely, that the "defendant committed the murder at a time when he was confined in a correctional institution." *Id.* at 1871. Equally important, the jury found none of the mitigating circumstances provided for in Rule 772A had been proved by a preponderance of the evidence. Consequently, the jury had marked "no" beside each of the eight mitigating circumstances listed on the verdict form. Accordingly, as required by the Maryland Capital Punishment Statute, Md. Ann. Code, art. 27 § 413 (1987 Repl. Vol.), the jury handed down a sentence of death.

On appeal to the Court of Appeals of Maryland, petitioner argued that the statute, in conjunction with the jury instructions and the verdict form, was

unconstitutional in that jury unanimity was required to find the presence or absence of an aggravating circumstance, but not required to find the absence of any mitigating circumstances. Therefore, a sentence of death could result in a situation where the jury unanimously found an aggravating circumstance, but could not agree on the presence of any one specific mitigating circumstance, even if all twelve agreed that some mitigating factors existed. *Id.* at 1865. Conversely, even if eleven of the jurors agreed to the existence of a particular mitigating circumstance, the failure of the remaining juror to agree to the same circumstance may result in the jury marking the verdict form "no" in regard to that particular circumstance.

The court of appeals rejected this argument, and concluded that the requirement of unanimity imposed by the statute applied not only to a finding of the existence of a particular mitigating circumstance, but also to a finding of the absence of any mitigating circumstance. The Court found that the verdict form should be read as requiring unanimity for "no" answers as well as "yes" answers. Furthermore, they found that the trial judge's instructions to the jury stressed the need for unanimity on all of the issues presented. *Id.* at 1864. Therefore, the Court concluded that a finding by any one juror of a mitigating circumstance was sufficient to compel the jury to weigh this factor against any aggravating circumstance.

The Court of Appeals of Maryland recognized, however, that the statute did not provide a procedure to be followed when unanimity could not be reached. Thus, pursuant to its authority to fill gaps in the sentencing process, as provided by § 413(1), they directed that if the jury could not agree unanimously on the acceptance or rejection of any mitigating circumstances, it should leave that answer blank and proceed to the balancing phase. *Id.* at 1864.

The Supreme Court initially noted the importance of mitigating factors in capital cases, stating that "the sentencer may not refuse to consider or be precluded from considering any relevant evidence." *Eddings v. Oklahoma*, 455 U.S. 104 (1982). With this proposition in mind, the Court proceeded to analyze "whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Mills* at 1866.

The strength of Mill's argument rested on the possibility that alternate grounds existed for the sentence of death. If the jury adopted the interpretation favored by the Court of Appeals of Maryland, then it only marked "no" on the verdict form when all twelve of the jurors agreed that the mitigating circumstances were not proved by a preponderance of the evidence. *Id.* Conversely, if the jury adopted the approach advanced by the petitioner, then the marking of "no", only indicated a failure to unanimously agree to the existence of a particular mitigating circumstance. Thus, the jury would be precluded from considering mitigating factors that some jurors found to exist. The Supreme Court said, "[U]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." *Id.* at 1867.

They decided that the two crucial factors to be considered were the judge's instructions to the jury regarding the verdict form stipulated by Md. Rule Proc. 772A, and the verdict form itself. Regarding the jury instructions, the Court found that while the trial judge repeatedly stressed the need for unanimity concerning the finding of both aggravating and mitigating circumstances, he failed to stress that the answer of "no" to either one also required a unanimous finding. Thus, the Court determined that it was possible that the jury made the inference that the "no" answer is merely a failure to unanimously agree on the existence of a particular circumstance, either aggravating or mitigating, not a unanimous finding that

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