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# Recent Developments: *Whiting v. State*: Standing for Fourth Amendment Applicability Rests on Both a Subjective Expectation of Privacy and a Reasonably Objective Expectation of Privacy That Society Is Willing to Recognize

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## RECENT DEVELOPMENT

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### **WHITING v. STATE: STANDING FOR FOURTH AMENDMENT APPLICABILITY RESTS ON BOTH A SUBJECTIVE EXPECTATION OF PRIVACY AND A REASONABLY OBJECTIVE EXPECTATION OF PRIVACY THAT SOCIETY IS WILLING TO RECOGNIZE**

**By: Peter McTernan**

The Court of Appeals of Maryland held that in order to possess standing under the Fourth Amendment of the Constitution, a person must have both a subjective expectation of privacy and an objective expectation that society as a whole is willing to recognize. *Whiting v. State*, 389 Md. 334, 885 A.2d 785 (2005). In affirming the intermediate appellate court's decision, the Court held that, while having a subjective expectation of privacy, a squatter living in a publicly owned housing unit did not have a reasonably objective expectation of privacy that society is willing to recognize. *Id.*

When William Moore ("Moore") failed to report to work for two days, Baltimore City Police Officers responded to his home where they discovered that he had been murdered. While investigating the murder, detectives subpoenaed Moore's cellular phone records in order to determine if any calls had been made following his death. After tracing calls, that had in fact been made after Moore's death, police were able to track down a witness who believed that Wesley Whiting ("Whiting") had made calls from Moore's number. In addition, another one of Whiting's acquaintances informed police that Whiting lived at 810 East Preston Street in Baltimore City. While Whiting did in fact reside and keep personal property at the East Preston address, he was merely a "squatter" or trespasser in an abandoned property owned by the City of Baltimore. However, Whiting kept personal possessions and placed a lock on the bedroom door in an attempt to keep others from entering the room where he stayed. On April 27, and May 4, 2001, police executed search warrants where they subsequently discovered evidence of the murder of Moore. Whiting was then arrested and indicted on charges of, *inter alia*, first-degree murder.

At trial, Whiting moved to suppress the evidence obtained through the search warrants, arguing that by living at the residence, he had a legitimate expectation of privacy and therefore had standing to contest the searches. The State countered, arguing that Whiting lacked standing because he was not a tenant or owner of the residence, rather a squatter who was merely trespassing on the property. As such, Whiting could not have a legitimate expectation of privacy. The State produced various pieces of evidence proving that the City of Baltimore owned the home and that Whiting actually had a number of other addresses where he had previously listed his residency. In ruling that Whiting lacked standing, the trial court reasoned that by squatting in a property owned by the city, he was trespassing and thereby committing a crime. The trial court further stated that, though trespassing is a fairly insignificant crime, one cannot expect that society should recognize any expectation of privacy for that trespasser, no matter how subjective, as being legitimate. Thereafter, Whiting was convicted and sentenced to life imprisonment.

After filing an appeal, arguing that the trial court had erred in denying his motion to suppress, the Court of Special Appeals of Maryland affirmed the lower court's decision stating, "because the Housing Authority could enter the premises or could permit anyone else to do so, and because [Whiting] had no right to exclude anyone from the premises... any expectation of privacy [Whiting] had that the police would not enter was unreasonable." *Whiting v. State*, 160 Md. App. 285, 304, 863 A.2d 1017, 1027-28 (2004)). The Court of Appeals of Maryland granted *certiorari* to address the issue of whether Whiting, by squatting in an abandoned, but publicly owned building, possessed a legitimate expectation of privacy, thus giving him standing to challenge the search warrants which produced evidence leading to his conviction for first-degree murder.

The Fourth Amendment guarantees a person the right to be secure in "their persons, houses, papers, and effects, against unreasonable searches and seizures." *Whiting*, 389 Md. at 346, 885 A.2d 792 (citing *United States v. Stevenson*, 396 F.3d 538, 545 (4<sup>th</sup> Cir. 2005)). In order for an individual to invoke protection under the Fourth Amendment, he or she must maintain a "legitimate expectation of privacy" in the house, papers, or effects searched or seized. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)). Furthermore, the legitimacy of a person's expectation of privacy is gauged on societal acceptance and recognition of that expectation. *Id.* at 347, 885 A.2d at 793 (citing *Graham v. State*, 47 Md. App. 287, 294, 421 A.2d 1385,

1389 (1980)). More specifically, the Supreme Court has defined a legitimate expectation of privacy as being, “[m]ore than a subjective expectation of not being discovered.” *Id.* at 348, 885 A.2d at 793 (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

In *Katz*, Justice Harlan created a two-prong test requiring the defendant seeking protection under the Fourth Amendment have both a subjective expectation of privacy in the place being searched and have that expectation be one that society is prepared to recognize, 389 U.S. 347, 353 (J. Harlan, concurring). Twenty-one years later, in *California v. Greenwood*, the Court further expanded this holding by stating that “the person claiming protection under the Fourth Amendment must manifest a subjective expectation of privacy that is ‘objectively reasonable,’” 486 U.S. 35 (1988).

In determining whether an expectation of privacy is objectively reasonable, various factors, including whether the individual owned, leased, lawfully occupied, or rightfully possessed the premises, are considered. *Whiting*, 389 Md. at 351, 885 A.2d at 794-95 (citing *Baum v. State*, 163 Md. 153, 157, 161 A.2d 244, 245 (1932)). Accordingly, given the “squatting” nature of Whiting’s residency, he did not own or lease the premises. *Id.* at 359, 885 A.2d at 800. However, Whiting claimed that because he developed the ability to exclude others by placing a lock on the bedroom door, he had control over the premises, thereby fulfilling the requirements necessary to possess an expectation of privacy. *Id.* at 359-60, 885 A.2d at 800. Conversely, the trial court negated Whiting’s reasoning stating that, sharing an abandoned premises with four or more strangers cannot possibly constitute control over a premises. *Id.* at 360-61, 885 A.2d 800-01. Lastly, Whiting argued that by not acknowledging his expectation of privacy, the State was discriminating against indigents who cannot afford a place of their own. *Id.* at 362, 885 A.2d at 802. However, the Court disregarded Whiting’s arguments, explaining that the financial situation of individuals was not at issue and thus not applicable to the case at hand. *Id.* In conclusion, the Court of Appeals of Maryland affirmed the intermediate court’s decision in holding that although Whiting may have possessed a subjective expectation of privacy, that expectation was not objectively reasonable or one that society was willing or ready to recognize. *Id.*

In evaluating a person’s ability to seek protection under the Fourth Amendment, the Court creates a clear delineation of who may, and who may not assert those rights. The Court draws a fine line distinguishing the difference between the requisite objectively

reasonable expectation of privacy of which society is aware and willing to recognize, and that of a mere subjective expectation that is only cognizant and applicable to the particular individual. By creating this distinction, the Court has followed a historical analysis that gives a surprisingly narrow interpretation of an Amendment that has been traditionally broad and expansive. Nevertheless, by limiting standing to those who possess an objectively reasonable expectation of privacy, the Court has reinforced a premise the Constitution created, in that, while people shall be free from unreasonable searches and seizures, that freedom will not come at the cost of individuals taking advantage of it by seeking protection for illegal acts such as trespassing.