

442 U.S. 735

Supreme Court of the United States

**Michael Lee SMITH**, Petitioner,

v.

**State of MARYLAND.**

Decided June 20, 1979.

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the question whether the installation and use of a pen register<sup>1</sup> constitutes a “search” within the meaning of the Fourth Amendment,<sup>2</sup> made applicable to the States through the Fourteenth Amendment.

## I

On March 5, 1976, in Baltimore, Md., Patricia McDonough was robbed. She gave the police a description of the robber and of a 1975 Monte Carlo automobile she had observed near the scene of the crime. After the robbery, McDonough began receiving threatening and obscene phone calls from a man identifying himself as the robber. . . . On March 16, police spotted a man who met

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<sup>1</sup> “A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed.” A pen register is “usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line” to which it is attached.

<sup>2</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.”

McDonough’s description driving a 1975 Monte Carlo in her neighborhood. By tracing the license plate number, police learned that the car was registered in the name of petitioner, Michael Lee Smith.

The next day, the telephone company, at police request, installed a pen register at its central offices to record the numbers dialed from the telephone at petitioner’s home. The police did not get a warrant or court order before having the pen register installed. The register revealed that on March 17 a call was placed from petitioner’s home to McDonough’s phone. On the basis of this and other evidence, the police obtained a warrant to search petitioner’s residence. The search revealed that a page in petitioner’s phone book was turned down to the name and number of Patricia McDonough; the phone book was seized. Petitioner was arrested, and a six-man lineup was held on March 19. McDonough identified petitioner as the man who had robbed her.

Petitioner was indicted in the Criminal Court of Baltimore for robbery. By pretrial motion, he sought to suppress “all fruits derived from the pen register” on the ground that the police had failed to secure a warrant prior to its installation. The trial court denied the suppression motion, holding that the warrantless installation of the pen register did not violate the Fourth Amendment. . . . Petitioner was convicted, and was sentenced to six years. . . .

. . . Certiorari was granted in order to resolve indications of conflict in the decided cases as to the restrictions imposed by the Fourth Amendment on the use of pen registers.

## II

### A

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In determining whether a particular form of government-initiated electronic surveillance is a “search” within the meaning of the Fourth Amendment,<sup>4</sup> our lodestar is *Katz v. United States*, 389 U.S. 347, (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a “search” can occur only when there has been a “physical intrusion” into a “constitutionally protected area,” noting that the Fourth Amendment “protects people, not places.” Because the Government’s monitoring of *Katz*’s conversation “violated the privacy upon which he justifiably relied while using the telephone booth,” the Court held that it “constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”

Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a “justifiable,” a “reasonable,” or a “legitimate expectation of privacy” that has been invaded by government action. E. g., [citing cases]. This inquiry, as Mr. Justice Harlan aptly

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<sup>4</sup> In this case, the pen register was installed, and the numbers dialed were recorded, by the telephone company. The telephone company, however, acted at police request. In view of this, respondent appears to concede that the company is to be deemed an “agent” of the police for purposes of this case, so as to render the installation and use of the pen register “state action” under the Fourth and Fourteenth Amendments. We may assume that “state action” was present here.

noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has “exhibited an actual (subjective) expectation of privacy”—whether, in the words of the *Katz* majority, the individual has shown that “he seeks to preserve [something] as private.” The second question is whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable’”—whether, in the words of the *Katz* majority, the individual’s expectation, viewed objectively, is “justifiable” under the circumstances.

### B

In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company’s central offices, petitioner obviously cannot claim that his “property” was invaded or that police intruded into a “constitutionally protected area.” Petitioner’s claim, rather, is that, notwithstanding the absence of a trespass, the State, as did the Government in *Katz*, infringed a “legitimate expectation of privacy” that petitioner held. Yet a pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the contents of communications. This Court recently noted:

“Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the

caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers.”

Given a pen register’s limited capabilities, therefore, petitioner’s argument that its installation and use constituted a “search” necessarily rests upon a claim that he had a “legitimate expectation of privacy” regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must “convey” phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies “for the purposes of checking billing operations, detecting fraud and preventing violations of law.” Electronic equipment is used not only to keep billing records of toll calls, but also “to keep a record of all calls dialed from a telephone which is subject to a special rate structure.” Although most people may be oblivious to a pen register’s esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. Most phone books tell subscribers, on a page entitled “Consumer Information,” that the company “can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.” E.g., [citing telephone directories]. Telephone users, in sum, typically know that they must convey numerical information to the phone

company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

Petitioner argues, however, that, whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he “us[ed] the telephone *in his house* to the exclusion of all others.” Br. for Ptr. But the site of the call is immaterial for purposes of analysis in this case. Although petitioner’s conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed. Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would.

Second, even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not “one that society is prepared to recognize as ‘reasonable.’” This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. E.g., *United States v. Miller*, 425 U.S., at 442-444. In *Miller*, for example, the Court held that a bank depositor has no “legitimate ‘expectation of privacy’ “ in financial information “voluntarily conveyed

to . . . banks and exposed to their employees in the ordinary course of business.” The Court explained:

“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”

Because the depositor “assumed the risk” of disclosure, the Court held that it would be unreasonable for him to expect his financial records to remain private.

This analysis dictates that petitioner can claim no legitimate expectation of privacy here. When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and “exposed” that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate.

[...]

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not “legitimate.” The installation and use of a pen register, consequently, was not a “search,” and no warrant was required. The judgment of the Maryland Court of Appeals is affirmed.

It is so ordered.