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FOURTH AMENDMENT—PEN REGISTER SURVEILLANCE

Smith v. Maryland, 99 S. Ct. 2577 (1979).

A perplexing issue recently confronting courts concerns the use of the pen register¹ as a law enforcement tool. Some confusion was diminished by the United States Supreme Court's holding in *United States v. New York Telephone Co.*² that pen registers are not governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968³ because they do not acquire the contents of communications as defined by the Act.⁴ That opinion, however, left unresolved the issue of whether pen register surveillance was subject to the requirements of the fourth amendment.⁵

In the case of *Smith v. Maryland*⁶ the United States Supreme Court resolved the issue by holding that the installation and use of a pen register is not a search within the meaning of the fourth amendment and, therefore, no warrant is required. The Court affirmed the appellate court's decision that the phone company's installation at its central

offices of a pen register to record all numbers dialed from the defendant's phone did not constitute a search and was not, therefore, in violation of the fourth amendment, even though the police, who requested the installation, had not obtained a warrant.

I

Defendant Smith was charged with having robbed Patricia McDonough on March 5, 1976. The victim, who had a full-face view of the robber in the course of the robbery, gave the police a description of the assailant and his automobile.

Shortly after the robbery, McDonough received a series of threatening and obscene telephone calls from an individual who identified himself as the robber. On March 15, McDonough received such a call requesting that she step out on her porch. She did so and observed the car which she had earlier described to the police, driving slowly by her home. On March 16, police discovered the license number of the described vehicle and learned that it was registered to defendant Smith.

On March 17, the telephone company, at the request of the police, installed a pen register at its central offices to record the phone numbers of calls made from the telephone at Smith's residence. Neither a warrant nor a court order authorized the installation of the pen register. On March 17, a call was made from Smith's residence to the victim's home. Thereafter, the police obtained a warrant to search Smith's automobile and residence. The search of the residence revealed that a page in Smith's telephone book containing the name and number of the victim was turned down. On March 19, McDonough viewed a six-man lineup at police headquarters and identified Smith as her assailant.

II

The state trial judge overruled the defendant's pretrial motions to suppress the evidence obtained by the pen register, holding that the warrantless installation of the pen register did not violate the fourth amendment.⁷ The electronically obtained

⁷ *Smith v. State*, 283 Md. 156, 173, 389 A.2d 858, 867 (1978).

¹ "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.

Smith v. Maryland, 99 S. Ct. 2577, 2578 n.1 (1979) (citations omitted).

² 434 U.S. 159 (1977); see Note, *Fourth Amendment—Electronic Surveillance*, 69 J. Crim. L. & C. 493 (1978), discussing that case.

³ 18 U.S.C. §§ 2510-2520 (1976).

⁴ See 434 U.S. at 166-67.

⁵ See *id.* at 165 n.7. Similarly in *United States v. Giordano*, 416 U.S. 505, 554 n.4 (1974) (Powell, J., concurring in part and dissenting in part), the Court did not resolve the question of whether the fourth amendment restrictions on searches applied to the use of pen registers.

The fourth amendment states:

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.

U.S. CONST. amend. IV. It is made applicable to the states through the fourteenth amendment. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶ 99 S. Ct. 2577 (1979).

evidence was admitted; Smith was found guilty of robbery and was sentenced to ten years in prison.⁸

The Court of Appeals of Maryland, the highest court of the state, affirmed the judgment of the trial court and rejected the defendant's contention that pen register surveillance constitutes a search subject to the warrant requirement of the fourth amendment.⁹ Adopting the two-fold test established in Justice Harlan's concurrence in *Katz v. United States*¹⁰ that the fourth amendment is applied where a person has exhibited a subjective expectation of privacy and where society is prepared to recognize the expectation as reasonable, the Court held that there is no constitutionally protected reasonable expectation of privacy in the numbers dialed into a telephone system.¹¹

The conclusion reached by the court of appeals was based heavily on its determination that the expectation of privacy protected by the fourth amendment attaches to the content of a telephone conversation and not to the fact that a conversation took place,¹² and further, that telephone subscribers have no reasonable expectation that records of their calls will not be made.¹³ The court saw little practical difference, insofar as public awareness was concerned, between the maintenance of routine telephone billing records and a pen register record.

Further, the court analogized the defendant's situation to that of the defendants in *United States v. Miller*¹⁴ and *United States v. White*.¹⁵ In *Miller*, the Court held that a bank depositor has no legitimate expectation of privacy in the contents of checks and deposit slips turned over to the bank; the depositor takes the risk that the information will be conveyed by the bank to the government.¹⁶ In *White*, statements made by the defendant were overheard by government agents by means of a hidden transformer worn by an informer during his meetings with the defendant. The Court found no constitutionally protected expectation of privacy that the informer would not transmit the

⁸ The Supreme Court decision, citing the trial record, noted that the defendant was sentenced to six years. 99 S. Ct. at 2579. The Maryland court's decision, however, stated that Smith was sentenced to 10 years. 283 Md. at 160, 389 A.2d at 860.

⁹ 283 Md. at 174, 389 A.2d at 868.

¹⁰ 389 U.S. 347, 361 (1967).

¹¹ 283 Md. at 173, 389 A.2d at 867.

¹² *Id.* at 167-68, 389 A.2d at 864.

¹³ *Id.* at 168, 389 A.2d at 865.

¹⁴ 425 U.S. 435 (1976).

¹⁵ 401 U.S. 745 (1971).

¹⁶ 425 U.S. at 443.

conversation to the police.¹⁷ The court of appeals concluded that a similar situation existed in the case of telephone calls. While the content of a call is not revealed to the telephone company, the information as to the number dialed is necessarily revealed. Since the caller can have no reasonable expectation that the numbers he dials are confidential, the court held that the information obtained by the telephone company may be used by the prosecution in court.¹⁸

In addition, the court likened the use of a pen register to the use of a mail cover.¹⁹ In each situation, the court reasoned, communications travel through public conveyances; in each, the surveillance reveals only the destination or origin of the communication, not the content of the message itself. Noting that, if anything, the use of a mail cover is more an invasion of privacy than a pen register since it reveals the identities of the parties, the court remarked that, nonetheless, courts have generally held that the use of mail covers does not violate the fourth amendment.²⁰

The court's decision appears to be based in large part upon its belief that pen registers simply do not threaten privacy to the same extent as do actual interceptions of oral communication. Pen registers do not reveal whether a communication even occurred because they do not indicate whether an outgoing call was actually completed. Moreover, such devices are regularly used without a court order for checking billing operations and detecting fraud. According to the court of appeals, the intrusion involved in pen register surveillance is minimal; no violation of the integrity of the communication system is entailed.²¹

¹⁷ *White* was decided on pre-*Katz* law. 401 U.S. at 754. ¹⁸ 283 Md. at 172, 389 A.2d at 866-67.

¹⁹ A 'mail cover' is conducted by furnishing the Government with information appearing on the face of the envelope addressed to the particular address: i.e., addressee, postmark, name and address of sender (if it appears), and class of mail. The actual mail is delivered to the addressee and only the letter-carrier's notation reaches the Government agency which requests the mail cover.

United States v. Balistreri, 403 F.2d 472, 475 n.2 (7th Cir. 1968).

²⁰ That conclusion may be questionable. As the court itself noted, post-*Katz* authority upholding mail covers is limited and such holdings have been narrow in scope. 283 Md. at 173, 389 A.2d at 867. *See United States v. Leonard*, 524 F.2d 1076, 1087 (2d Cir. 1975), *cert. denied*. 425 U.S. 958 (1976); *United States v. Balistreri*, 403 F.2d at 476; *United States v. Isaacs*, 347 F. Supp. 743, 750 (N.D. Ill. 1972).

²¹ 283 Md. at 174, 389 A.2d at 868.

Three judges dissented from the majority view and concluded that Smith had a reasonable expectation of privacy and that a warrant was required. Judge Eldridge in his dissent, in which Judge Digges joined, noted that the defendant by the simple act of dialing local numbers did not reasonably intend to reveal information but merely made use of machinery in particular ways which, without the police intrusion, would have remained fully private. The *Miller* case was distinguishable, according to Eldridge, by the fact that in the normal course of the bank's business it kept copies of the checks and deposit slips which could readily be turned over to the government; whereas, here, without the government's intrusion, the telephone company would not have kept any record of the local calls and could not have revealed any information concerning the calls to anyone.²²

The focus of Judge Cole's dissent was the nature of a search itself. Cole defined a search as a step in a criminal investigation by the government which focuses on the gathering of *any* type of information or clues possibly relevant to prosecution.²³ Concluding that technologically a distinction between verbal and digital transmissions is absurd, Cole noted that there could be no doubt that the fact that the defendant made certain calls from his home telephone was highly relevant information.²⁴

Cole distinguished both the *White* and *Miller* cases because the telephone company in this case was not a "party" to Smith's calls in the same sense as the informant in *White* and the bank in *Miller* were parties to the communications therein involved. At the very least, Cole reasoned, Smith had a reasonable expectation that the telephone company would not, without the safeguards of appropriate legal process, act for the government in collecting information relevant to a criminal prosecution.²⁵

Further, Cole rebuked the majority's analogy to mail covers as unconvincing. Cole noted that while use of the postal service involves essentially public facilities where any writing on the outside of an envelope or on a postcard can be read easily by postal employees, telephones are placed in the home to provide privacy regarding the parties to and content of a conversation.²⁶

Finally, Cole warned of possible abuses of pen registers. Newer models of pen registers, Cole

pointed out, have automatic voice actuated switches which can automatically turn a tape recorder on and off as the telephone is used.²⁷ In Cole's opinion, pen registers should not be installed absent a warrant.

III

Unlike the opinion of the Court of Appeals of Maryland, the opinion of the United States Supreme Court did not focus on the nature of the intrusion by the use of the pen register. In fact, the Court only briefly noted that a pen register does not acquire the contents of the communication, remarking that the defendant's argument must rest upon a claim that he had a legitimate expectation of privacy regarding the numbers he dialed on his phone.²⁸

The defendant's claim was rejected by an application of the two-pronged test formulated by Justice Harlan in his concurrence in *Katz*. As noted before, that test asks first whether the individual has exhibited by his conduct a subjective expectation of privacy, and, second, whether society is prepared to recognize the individual's subjective expectation of privacy as reasonable.²⁹

The Court easily resolved the first part of the inquiry, concluding that people do not entertain any actual expectation of privacy in the numbers they dial.³⁰ The Court accepted the rationale of the lower courts that telephone callers know they must convey phone numbers to the phone company, that they know the phone company has recording facilities for this information, and that they know the phone company makes routine use of pen registers for legitimate business purposes.³¹ Further, the Court concluded that it was immaterial that the telephone was in the defendant's home. According to the Court, the defendant had to convey the number to the telephone company in precisely the same way regardless of his location.³²

The Court then concluded that even if the defendant did harbor some subjective expectation that the phone numbers he dialed would remain private, society was not prepared to recognize this expectation as reasonable.³³ The Court's conclusion was the result of an assumption of risk analysis

²⁷ *Id.* at 186 n.4, 389 A.2d at 874 n.4.

²⁸ 99 S. Ct. at 2581.

²⁹ 389 U.S. at 361.

³⁰ 99 S. Ct. at 2581.

³¹ *Id.*

³² *Id.* at 2582.

³³ *Id.*

²² *Id.* at 177, 389 A.2d at 869 (Eldridge, J., dissenting).

²³ *Id.* at 180, 389 A.2d at 871 (Cole, J., dissenting).

²⁴ *Id.*

²⁵ *Id.* at 185, 389 A.2d at 873.

²⁶ *Id.*

developed in a series of informant cases and most recently applied in *Miller*. In reaffirming its position that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties, the Court analogized the situation of the bank depositor in *Miller* to that of the defendant in this case. In *Miller*, when the depositor turned over checks and deposit slips to the bank, he took the risk that the information would be conveyed by the bank to the government. Here, when the defendant used his phone, he voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In using the phone, then, the defendant assumed the risk that the company would reveal the numbers he dialed to the police.³⁴

The Court also rejected the defendant's argument that since telephone companies do not usually record local calls, he had a legitimate expectation of privacy in making a local call. The Court stated that under the defendant's theory, the existence of fourth amendment protection would depend on the boundaries established by the phone company for its local calling areas, and, therefore, a "crazy quilt" would be made of the fourth amendment.³⁵

The Court concluded that in all probability the defendant entertained no actual expectation of privacy in the phone number he dialed, and that, even if he did, his expectation was not legitimate. Consequently, the installation and use of a pen register was not a search and no warrant was required.³⁶

Justices Stewart and Marshall each filed a dissenting opinion in which Justice Brennan joined.³⁷ Justice Stewart emphasized the vital role of the private telephone, and concluded that numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in *Katz*. According to Stewart, the information captured by pen register surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to fourth and fourteenth amendment protection. Further, Stewart wrote that the information recorded by a pen register "is an integral part of the telephonic

communication that under *Katz* is entitled to constitutional protection, whether or not it is captured by a trespass into such an area."³⁸

Justice Marshall focused his dissent on the risk analysis relied upon by the majority. According to Marshall, the risk analysis has two major flaws: (1) it is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative; (2) to make the risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of the fourth amendment protections.³⁹ In Marshall's view, the legitimacy of privacy expectations within the meaning of *Katz* should depend upon the risks an individual should be forced to assume in a free and open society. According to Marshall, an individual should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes. Accordingly, Marshall would require law enforcement officials to obtain a warrant before they enlist the telephone company to install a pen register.⁴⁰

IV

In *Smith*, the Supreme Court blended the two-pronged analysis of Justice Harlan's concurrence in *Katz* with the risk analysis of *Miller* and served up an unpalatable result: namely, that numbers dialed from a private home phone are entitled to no constitutional protection.⁴¹ The conclusion of the Court that there is no subjective expectation of privacy in local numbers dialed into the telephone system and that society will not recognize such an expectation even if it does exist can be questioned on two grounds. First, the Court's support for its conclusion that individuals have no subjective expectation of privacy is weak. Second, the Court erroneously applied the reasoning of the *Miller* case

³⁸ 99 S. Ct. at 2584 (Stewart, J., dissenting).

³⁹ *Id.* at 2585 (Marshall, J., dissenting).

⁴⁰ *Id.* at 2586.

⁴¹ The opinion is not only unpalatable but is against the trend established by a number of circuit courts which implied that an installation of a pen register requires compliance with the fourth amendment. See *Application of United States for an Order*, 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1978); *Application of United States in Matter of Order*, 538 F.2d 956, 959 (2d Cir. 1976), *rev'd on other grounds sub nom.* *United States v. New York Tel. Co.*, 434 U.S. 159 (1977); *United States v. Illinois Bell Tel. Co.*, 531 F.2d 809, 811 (7th Cir. 1976); *United States v. John*, 508 F.2d 1134, 1141 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States v. Doolittle*, 507 F.2d 1368, 1371 (5th Cir. 1975); *cert. denied*, 430 U.S. 905 (1977).

³⁴ *Id.*

³⁵ *Id.* at 2583.

³⁶ *Id.*

³⁷ Justice Powell took no part in the consideration or decision of the case.

to the facts of this case to reach its conclusion that society will not recognize any expectation an individual may have that the phone numbers he dials are private. A more reasonable approach to the issue is that found in Justice Marshall's dissent which would require constitutional protection of the defendant's conduct.⁴² The majority, however, rejected Justice Marshall's approach, and by its use of the risk analysis found in *Miller* has opened the door to further intrusions by the government into the private sphere under the guise of law enforcement.

The Supreme Court, in denying that the use of a pen register depends upon compliance with the fourth amendment, first concluded that subscribers have no reasonable expectation that the government will not make records of their local calls.⁴³ However, the Court's argument in favor of this conclusion is unconvincing. The Court's conclusion that people have no expectation of privacy in local phone numbers dialed was based primarily on its belief that people "presumably have some awareness" that pen registers are used to aid in identifying persons making obscene phone calls.⁴⁴ The Court, however, cited no sociological data to prove this belief,⁴⁵ and was only able to note that most phone books tell subscribers that the telephone company can aid in identifying the origin of troublesome calls.⁴⁶ The Court offered no evidence, though, that anyone ever reads the information provided in telephone books.

Even if the Court was correct in its assertion that telephone subscribers know the phone company can monitor local calls, its conclusion that telephone subscribers expect the government to monitor local calls does not follow. The problem is that the Court failed to distinguish the use of pen registers by the telephone company for its internal business purposes from the use of pen registers by the phone company for government investigations. Even if a subscriber does expect the phone com-

pany to monitor his phone, the subscriber probably does not expect the telephone company, without the safeguards of appropriate legal process, to obey a government request to collect information relevant to a criminal prosecution.

By concluding that all subscribers should expect the government to make records of their calls, the Supreme Court unjustifiably has narrowed the subjective expectations of privacy which most individuals hold. Even those with nothing illicit to hide must now expect unregulated governmental monitoring. As Justice Marshall noted, many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts.⁴⁷ Because these people must now expect governmental access to telephone records on less than probable cause, certain forms of political affiliation and journalistic endeavor that are a hallmark of free society are likely to be impeded.⁴⁸

The major flaw of the *Smith* decision rests in its use of the *Miller* case to show that even if telephone subscribers expect the phone numbers they dial to be private, society is not prepared to recognize that expectation as reasonable. As noted above, the Court relied on *Miller* for the proposition that society will not recognize any privacy right when an individual has conveyed information to a third party. By telling another, the individual "assumes the risk" that the information will be disclosed to the government.⁴⁹

The Court's reliance on *Miller* is misplaced for three reasons. First, *Miller* did not say that society refuses to recognize any expectation of privacy once information is turned over to a third party. The defendant in *Miller* was provided the minimal safeguard of appropriate legal process; the bank gave its records to the government pursuant to a subpoena duces tecum.⁵⁰ Therefore, the Court was recognizing an individual's expectation that the government cannot get information from a third party without first going through the appropriate legal process.

Second, even if *Miller* is read to hold that the government can obtain any information conveyed to a third party, this does not mean that *Miller* allows the government to obtain all information conveyed to a third party no matter what the form

⁴² 99 S. Ct. at 2584-86 (Marshall, J., dissenting).

⁴³ 99 S. Ct. at 2581.

⁴⁴ The Court conceded that most people may be unaware that pen registers are routinely employed by phone companies to check billing operations, to detect fraud, or to check for a defective dial. *Id.*

⁴⁵ *Id.* The law review articles cited by the Court contain no reference to any sociological studies. See Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108 (1979); Note, *The Legal Constraints upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028 (1975).

⁴⁶ 99 S. Ct. at 2581 (citing BALTIMORE TELEPHONE DIRECTORY 21 (1978); DISTRICT OF COLUMBIA TELEPHONE DIRECTORY 13 (1978)).

⁴⁷ 99 S. Ct. at 2586 (Marshall, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *United States v. Miller*, 425 U.S. at 443.

⁵⁰ *Id.* at 437.

or purpose of the conveyance may have been. Instead, *Miller* can and should be read as allowing third parties to pass information to the government only when the information was given for the third party's own use, not when the information was given to the third party as a medium of conveyance.

In *Miller*, the records of the defendant's accounts pertained to transactions to which the bank was itself a party; checks are not confidential communications but negotiable instruments to be used in commercial transactions. The bank documents obtained contained only information voluntarily conveyed to the bank and exposed to their employees in the ordinary course of business.⁵¹

The defendant in *Smith*, unlike the defendant in *Miller*, did not convey tangible information to the phone company, rather he simply made use of telephone company property. As Justice Stewart remarked in his dissenting opinion, the observation that when a caller dials a number the digits may be recorded by the telephone company does no more than describe the basic nature of telephone calls. A telephone call simply cannot be made without the use of telephone company property and without payment for the service. A telephone conversation itself must be electronically transmitted by telephone company equipment and may be recorded or overheard by use of company equipment. Yet, as Justice Stewart pointed out, *Katz* stands for the proposition that the user of even a public telephone is entitled to assume that his conversation will not be broadcast to the world.⁵² The defendant in *Smith*, like the defendant in *Katz*, was merely sending a message through the medium of a third party; he did not voluntarily turn over information to that third party. The telephone company was not an active participant in the transaction.

Third, even if *Miller* meant that society should not recognize any privacy right when information is conveyed through a third party, this risk analysis has no place in either the subjective or objective test of privacy. The fact that social intercourse imposes certain risks hardly means that the government is constitutionally unconstrained in adding to those risks.⁵³ This would allow the government

to tailor life's fabric with risk-producing conduct. The power to determine the reasonableness of privacy expectations would rest with the intruder.

V

A better approach to the problem of the legitimacy of privacy expectations is by an application of the fourth amendment test proposed by Justice Marshall in his dissent. According to Marshall, the legitimacy of privacy expectations should depend upon the risks one should be forced to assume in a free and open society. An individual should be entitled to assume that both the local and long distance numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes. In Marshall's view, to hold that the use of a pen register is not an extensive intrusion ignores the vital role telephonic communication plays in personal and professional relationships.⁵⁴

Unfortunately, the majority in *Smith* ignored Justice Marshall's warning of possible governmental abuse, and it found the risk analysis to be dispositive in its fourth amendment inquiry. Under *Smith* it appears that the fourth amendment protects neither people nor places but only conduct or communication which does not involve any risk of disclosure to a third party. Under the guise of law enforcement, the government imposes risks on individuals. *Smith* serves as judicial imprimatur of extensive governmental intrusion into the private sphere. Perhaps greater intrusion lies ahead.

Conceivably, the next fourth amendment issue with which the Court will be faced is the mail cover issue discussed by the Court of Appeals of Maryland. Although the circuit courts have upheld mail covers, such holdings have been narrow in scope.⁵⁵ After the *Smith* decision, it would be surprising if the Supreme Court would disallow warrantless use of mail covers. The rationale of *Miller* that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties is more easily applied to the use of mail covers than to the use of pen registers. The *Smith* decision can and may be used to greatly limit the definition of private communication and conduct.

⁵¹ *Id.* at 442.

⁵² 99 S. Ct. at 2583 (Stewart, J., dissenting).

⁵³ See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 365-408 (1974).

⁵⁴ 99 S. Ct. at 2586 (Marshall, J., dissenting).

⁵⁵ See note 20 *supra*.