

ORIGINAL

In the

Supreme Court of the United States

MICHAEL LEE SMITH,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

No. 78-5374

Washington, D. C.  
March 28, 1979

Pages 1 thru 34

Duplication or copying of this transcript  
by photographic, electrostatic or other  
facsimile means is prohibited under the  
order form agreement.

*Hoover Reporting Co., Inc.*

*Official Reporters  
Washington, D. C.*

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----  
MICHAEL LEE SMITH,

Petitioner,

v.

No. 78-5374

MARYLAND,

Respondent.  
-----

Washington, D. C.

Wednesday, March 28, 1979

The above-entitled matter came on for argument at  
1:46 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HOWARD L. CARDIN, ESQ., Cardin & Gitomer, 233  
Equitable Building, Baltimore, Maryland 21202;  
on behalf of the Petitioner

STEPHEN H. SACHS, ESQ., Attorney General of Maryland,  
1400 One South Calvert Street, Baltimore, Maryland  
21202; on behalf of the Respondent

- - -

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
HOWARD L. CARDIN, ESQ., on behalf of the Petitioner	3
STEPHEN H. SACHS, ESQ., on behalf of the Respondent	20
HOWARD L. CARDIN, ESQ., on behalf of the Petitioner - Rebuttal	30

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Smith v. Maryland.

Mr. Cardin, you may proceed whenever you are ready.

ORAL ARGUMENT OF HOWARD L. CARDIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CARDIN: Mr. Chief Justice, and may it please the Court:

Modern technology, today's society and improved standard of living and new conveniences also presents a serious challenge to the personal rights of an individual. This was anticipated many years ago by this Court's dissent when in Olmstead it was stated that a form of reaching a means of invading privacy had become available to the government --

QUESTION: Actually, your client would be a lot better off if we still had the system where the operator answered when you pick up the phone and said "number please," wouldn't he?

MR. CARDIN: If we had that system, then I believe that the state's comparison to voluntarily giving over information might well be founded. I don't believe it is founded under the circumstances here, which I do --

QUESTION: So modern technology is actually improving the position of your client.

MR. CARDIN: No, sir, I don't believe so. Modern



technology has now permitted this, the telephone to give a better service. In so doing, it has also permitted the police department to use a sophisticated means of invading privacy, if you will.

QUESTION: Well, isn't one of your arguments that under the modern technology whereby local calls simply are not monitored by the telephone company, that there is an expectation of privacy because nobody except the caller knows and under the old technology, whereby the telephone company operator answered for your number, you knew that you were telling a third party what the number was.

MR. CARDIN: Yes, sir. I'm sorry, I do agree with that, that is correct. As to the --

QUESTION: Mr. Cardin, in agreeing with Mr. Justice Rehnquist, are you saying in effect that you would agree that there would have been no search in the olden days, let's call it, as my kids like to refer to it, when if a police officer had sat next to the operator and just wrote down all the numbers from one particular -- said every time number so-and-so calls, I would like to know who they are calling, and he just say there and wrote down the numbers they were calling, there would be no search there?

MR. CARDIN: I am not agreeing there would be no search. What I am saying is there may not have been an expectation of privacy at that point because one is voluntarily

turning over --

QUESTION: Then if there is no expectation of privacy, at least there is no Fourth Amendment question.

MR. CARDIN: Yes, sir, that is correct.

QUESTION: Okay.

MR. CARDIN: I think there is concern, I just don't think there is the expectation.

QUESTION: You don't know -- at least I don't know, maybe it is well known -- back in the olden days whether the operator knew what the originator of the number was.

MR. CARDIN: I'm sorry, I don't know, Your Honor.

QUESTION: And the answer to his question would depend upon whether or not she did.

MR. CARDIN: It sounds like we are vindicating the fathers of science and purging the government means of espionage. I think we have seen many more advances in our day.

The case of Michael Smith presents an example of modern technology, if you will. Using the telephone in the privacy of his residence, he took an action to exclude what is known now as the curious ear. He certainly did not expect that the telephone company would seize the numbers that he dialed, and so we come to the first important factor that has to be considered with the use of pen register devices and similar types of devices.

QUESTION: Are you suggesting that this couldn't be done without a warrant?

MR. CARDIN: I am suggesting --

QUESTION: It couldn't be done under any circumstances?

MR. CARDIN: I believe with a warrant it can properly be done. I agree with Title III, as cited in our brief, and I think it -- we believe it does require a warrant.

The important factor in these type of cases is that the action of recording these numbers was initiated by the police department, not by the telephone company as part of its housekeeping functions. Several months ago, this Court in the New York Telephone Company case alluded to the fact that the telephone company admits that it uses pen registers to check those -- to detect fraud and prevent violations of the law. In each of these instances, they were housekeeping-type functions. I would ask you to compare the situation --

QUESTION: Well, doesn't the average subscriber know that?

MR. CARDIN: But if these are instances that he is aware of, he makes a long-distance phone call --

QUESTION: He knows it is not private.

MR. CARDIN: He knows it is not private and he makes a long-distance phone call.

QUESTION: No, he knows it is not private locally,

that at times the phone company will cut in.

MR. CARDIN: In those instances where he has made a complaint about it and there are certain issues, that is correct.

QUESTION: There are occasions --

MR. CARDIN: Very, very few in number. There are other occasions. There are other occasions. They are very few in number. The typical piece of apparatus used by the telephone company is not the pen register, it is a tracing device which is placed on someone else's phone or the subscriber's phone and used to find out where a call is coming from. The pen register is used only in a very limited number of cases by the telephone company.

QUESTION: Mr. Cardin, do you think the police need a warrant to use a tracing device?

MR. CARDIN: No, sir. If I as a person --

QUESTION: But you are going to find out where the call came from and invade that person's privacy, aren't you?

MR. CARDIN: I disagree because in the function of the tracing device, the device is placed on the subscriber's phone who has made the complaint. Thereafter the tracing goes through the telephone company itself and does not actually bridge the other end of the line. It stops right before it gets to the other end of the line.

QUESTION: But it obtains information about the other



end of the line, without the knowledge of the person at the other end of the line.

MR. CARDIN: I think it is a matter of semantics. It does not find out information at the other end of the line. That is what we are talking about --

QUESTION: Say, A calls B, you put the device on B's phone, you find out that A made the call and A didn't expect you to find that out. Why isn't that precisely the same invasion of A's privacy if you had put it on A's phone?

MR. CARDIN: The tracing device does not in actuality find that A made the call. That is the reason why in this particular set of facts, if the tracer was used, a pen register was put at the residence of Michael Smith --

QUESTION: But not until after they found out that the call originated from Michael Smith's phone, which they found out by putting a tracing device on B's phone and finding out that a call had originated from A's phone. Isn't that right?

MR. CARDIN: In the instant case, the tracing device was not put at Smith's home, that is the point that I make. It went to a pay phone and from there other --

QUESTION: Well, from my question, if it had gone directly to A's home, and you thereafter put a -- why isn't the tracing device just as much an invasion of A's privacy as the pen register?

MR. CARDIN: There are many persons who would argue that it is. I say it isn't, but there are many cases --

QUESTION: In terms of expectation of privacy, is there a difference?

MR. CARDIN: Yes, I believe so. I believe so, because in this instance the listening ear is not coming from that particular person's phone apparatus, it is coming from some place else and is similar, as I will get to, in the situation of the mail covers and the making of the deposit.

QUESTION: Is this in the record, about all of these different ways?

MR. CARDIN: I'm sorry?

QUESTION: Is there anything in the record about tracing and all of these different things?

MR. CARDIN: Tracing methods?

QUESTION: Yes.

MR. CARDIN: No, there is nothing in the record about that.

QUESTION: Because you are wrong in your facts about how they do it.

MR. CARDIN: I'm sorry, I am wrong in my facts about a tracer?

QUESTION: You trace right up to the phone and then you get back the exact number of the phone that was called, where it is located, who they traced it to, et cetera, et

cetera.

MR. CARDIN: I would only submit to Your Honor that the information I have did come from the investigation department of the telephone company in Baltimore.

The point we make is that this was an action that was precipitated by the police department and not by the telephone company. We compare the situation of a housekeeper coming into a hotel room, in one instance she is coming in and performing her duties and comes across something, that is one situation; on the other hand, if she is contacted by the police department and they say why don't you go into that room for us and see what is there because we suspect something may be going on, then she is operating as the agent of the police department and is not properly on the premises at that time. We believe that analogy is much closer than the analogies that have been submitted or suggested by the state.

The comparison, if you will, to mail covers and deposits are not similar to the pen register situation. It is suggested that with the voluntary turning over of information to third persons when one turns over a letter to a clerk, or when one makes a deposit in a bank, that may be true, but there is not a voluntary turning over of information when one dials his phone.

As you well know, going back to the long-distance call, the person making a long-distance call, who dials or

presses "one," that activates --

QUESTION: That depends on what state you are in, doesn't it? In the State of Virginia, for example, you don't, you have to dial the area code but you don't dial "one."

MR. CARDIN: The point is that you dial -- let me change it, you dial something to activate the pen register type of device, so that when dialing a local call assumes that there is no pen register device working, whereas if one dials a long-distance call knows that he is putting in operation -- it may not be a pen register, he may not know the term, but some kind of device is going to record the number that he is dealing so that he will be charged for it, and number two, he can check the accuracy of the phone company's bill.

There is a substantial difference between that local call and that long-distance call. When one then dials the "one" or the area code, he is then voluntarily turning over the information similar to the deposit or to the mailing of an envelope or the mailing of a letter, or when a person is in the room and is talking supposedly confidentially to a third person. But before he activates that kind of device, he is not voluntarily turning over information.

I would like again to turn to Mr. Justice Rehnquist's question about the operator. If the person were to call the operator for assistance in making that call, then he is



obviously voluntarily turning over that information to the operator and takes the chance that that information may later be conveyed to someone else. But until he does that, it cannot be said in any realistic way that he has voluntarily turned over that information. Thus it might be perceived that in the situation of the mail cover or a deposit that the information could be revealed to law enforcement officers.

It might be foreseeable that one dials a long-distance call by activating the pen register device and takes the chance that that information will be turned over, but not until he activates that device is there any reasonable expectation that that information will be turned over to anyone.

The question as to why --

QUESTION: Unless the callee happens to be a police informant.

MR. CARDIN: Even at that stage, he wouldn't know where the number came from.

QUESTION: I know, but the person who answers the phone knows that the other person called him.

MR. CARDIN: That he dialed the number.

QUESTION: I certainly know that you called me.

MR. CARDIN: Only the fact that I called, but you don't know the number that it emanated from.

QUESTION: No.

MR. CARDIN: Unless you know me or assume where I

came from.

QUESTION: Well, if you say who you are, I know you called me.

MR. CARDIN: I agree with that. I am saying unless there is that type of situation, there is no reason to believe that anyone is recording the number that you dialed or I dialed in a local situation.

Now, the third pertinent part of the factual situation is why should I stand here and ask this Court to require a search warrant or a similar type of court order prior to the installation of such a device.

We start out with the premise that search warrants and court orders are preferred to any situation where there is a search and seizure. As we review --

QUESTION: It is not in the case of an arrest, is there?

MR. CARDIN: We are talking here about --

QUESTION: I thought you said search or seizure.

MR. CARDIN: I'm sorry, a search and seizure not following a valid arrest.

Every case that was submitted to this Court for its consideration -- I take that back -- every federal case that was submitted to this Court for its consideration had in fact a court order involved in it. And I believe I can state fairly to this Court that it is the practice in the federal

system to require a court order or a search and seizure warrant before a pen register is attached. There is in fact a statement by Professor Carr in his book on electronic surveillance that this is the practice in the federal system and that there is certainly a great many of the states that have followed the precedent of the federal system.

The reason, of course, is that with a warrant we are doing first a general search, there is particularity as to what is seized. There is a --

QUESTION: Mr. Cardin, how can there be particularity, he put the device on and it is on 24 hours a day, isn't it?

MR. CARDIN: Well, we talk about the average situation. There are the abnormal situations also. In other words, if we have an address and this address happens to be a high-rise apartment building and then you may have a pen register device placed on hundreds of phones, hundreds of numbers so that I believe there would be a requirement --

QUESTION: Do you think a judge would grant probable cause based on hundreds of numbers, find probable cause or probably engaged in violation of the law and therefore they are all subject to penalty?

MR. CARDIN: Oh, no, I think it would require the officer at that point or the law enforcement to proceed with an investigation to learn the particular phone which he

believes or has probable cause to believe is the phone number involved.

QUESTION: You are particular in means of limiting it to one phone, not to what can be done with that phone.

MR. CARDIN: I agree that every number would be recorded, particularity as to where we are going, not what is being --

QUESTION: You are not talking about hundreds of phones, are you?

MR. CARDIN: I am talking about one phone.

QUESTION: Well, you were talking about a tall building with hundreds of phones.

MR. CARDIN: The warrant would provide a duration as to how long the pen register device would be permitted on the phone. A return requirement or a warrant causes the officers to use some of that discretion as to how they will later use that information that is obtained, that innocent information, if you will, the requirement that there be a crime that either has been committed or is about to be committed. I think that is very important. In other words, without some kind of a warrant requirement, that device can be placed on a phone for any reason, for intelligence information, whereas, as stated in Burger v. New York, there should be a reason to believe a crime is about to be committed or has been committed. There is no such requirement under



circumstances as they presently exist.

QUESTION: Mr. Cardin, did the Court of Appeals hold that this was a search and seizure but didn't require a warrant or that it was not a search and seizure?

MR. CARDIN: I believe they held that it was not a search and seizure.

QUESTION: So if you are comparing the necessity of a warrant to doing it simply on probable cause without a warrant, I take it that has no applicability here?

MR. CARDIN: Without a warrant or court order, there is no placing or taking of responsibility. Not so long ago, out of the State of Maryland, this Court dealt with the Giordano case and noted that it was important that application be made by certain persons who were designated so that there could be responsibility, there could be supervision as to the actions taken.

QUESTION: Well, they were designated by statute.

MR. CARDIN: I understand that, and I believe that the statute contained that specific point, as this Court stated, in order to assure that they would be responsible for the application --

QUESTION: The state of Maryland provided by similar statute that warrants could only issue under terms of that statute. It hasn't done so here, I take it?

MR. CARDIN: There is no statutory authority for --

QUESTION: So what has Giordano got to do with the statutory requirements with this case?

MR. CARDIN: The fact is that the Court held that that particular provision of the wiretap statute had to be complied with strictly with indications that this was a very important part of that statute and one which could not be accomplished by substantive compliance. What we are saying here is to allow an officer, when he is armed -- we don't even know who the officer might be, whether he has investigative background or if he is high or low within the police department, just to allow anyone to go in and police the pen register would be wrong, that there should be some increment of responsibility and the only way we can do it is to require that there be a court order. As such, there is accountability, there is supervision. Without it, there is complete decentralization and decentralization leads to abuse.

The failure to require that a warrant or court order be obtained prior to the installation of the pen register can also have a far-reaching effect on destroying one's personal rights. As indicated in the brief, as we describe it as a chilling effect, on freedom of speech and association. One cannot necessarily speak for another as to why or why not he does things. But the fact that it would be common knowledge or will be common knowledge to any investigating officer to whom he spoke to, who he knows may well place a chilling

effect one freedom of speech and as an adjunct to that, freedom of association.

There is a strong possibility of abuse by law enforcement officers of this type of device. The fact that the possibility of illegal wiretaps as a simple adjunct to this device has been discussed and is discussed in the brief.

The use of the information by an irresponsible officer can cause the innocent to suffer, it can cause intimidation to persons, it can be used for many, many purposes not consistent with the investigation.

QUESTION: Mr. Cardin, what was entered in evidence against your client as a result of the attachment of the pen register?

MR. CARDIN: A photograph.

QUESTION: A what?

MR. CARDIN: A photograph. I'm sorry, let me go back a little bit. After the pen register was affixed and a call to the robbery victim's home was found to be the same time as to the number of the robbery victim's home was punched out on the pen register, the police department or police officer went to the Baltimore Police Department files, obtained a photograph of Smith, took that photograph along with others to the victim who identified that photograph.

QUESTION: And then was the photograph admitted in evidence?

MR. CARDIN: Yes, it was. And there was a stipulation that without the first step, that is the attachment of the pen register and obtaining the information of Michael Lee Smith that way, the photograph would never have been obtained and as such --

QUESTION: He would never have been arrested without that pen register?

MR. CARDIN: Yes, sir.

QUESTION: But even assuming a gross violation in his arrest, can he -- even assuming that you are right and that his arrest was the result of a gross violation or a conceded violation of the Fourteenth Amendment, does it follow that his conviction gets set aside? I think in cases like *Frisbe v. Collins* where the defendant was kidnapped and abducted from one state to another to stand trial, and this Court held non constat, that has nothing to do with it, he got a fair trial and we didn't disturb his conviction, even conceding that this was a gross violation of his Fourteenth Amendment rights.

MR. CARDIN: Justice Stewart, at the trial of the case, it was stipulated, as I say, that he, that is the accused, Michael Lee Smith, would never have been identified unless this device was used, that is that the use of this particular device was to identify my client.

QUESTION: It resulted in his arrest.



MR. CARDIN: It resulted in his being identified, otherwise he would never have been identified, there never had been a warrant for his arrest without that. And I think he would not have been charged with this particular common law robbery.

Failure to require the court order or warrant may lead to instrument use of the pen register. As I indicated, anyone, any law enforcement officer could obtain this device. The state in its brief, on page 14, suggests that a pen register should be allowed in cases where suppression -- I'm sorry, where suspicion exists. What suspicion? Whose suspicion?

A search and seizure based on suspicion is contrary to our Constitution. It is this, that theory which we seek to avoid.

I would ask to reserve the few moments that I have left for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF STEPHEN H. SACHS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SACHS: Mr. Chief Justice, and may it please the Court:

I would like to begin if I may by indicating to the Court what the pen register is not. I think, Mr. Justice

Marshall, we know something about that from this Court's definition in Gioradno and in New York Telephone, we know something about it from the Court's fairly lengthy discussion in the Ninth Circuit in the Hobbs case, we know about it from various Law Review articles that have appeared and cited in the briefs. We know even in this sparse record that the telephone company representative who testified at a hearing in these proceedings referred to the pen register as a normal -- as normal telephone equipment is what he called it.

But the point I would like to make, Your Honors, is that there is no sound, it captures no words uttered into the mouth piece, as this Court raised in Katz, it captures no content, it receives no communication other than the data communication between the phone company and the user. It has been defined by Congress, indeed by its exclusion from the requirements of Title III as not to be a communication. It doesn't disclose that the call is completed, it doesn't review who the caller is, it doesn't say the number was busy, it doesn't say who the parties are and it doesn't tell the duration of the call.

QUESTION: Are you suggesting there is no right of privacy or no expectation of privacy as to what calls are being made, that is to whom they are being made, from your home or your office?

MR. SACHS: That is precisely what we are contending,

Your Honor. There is no reasonable expectation of privacy, and I would go so far as to say that in a great many cases, although it is unprovable, but inherently there is frequently not a subjective expectation of privacy.

The user of the telephone knows, to go back to the days, however long ago they may be, to go back to the days when this was not done mechanically but done by human communication, one says to the operator, "Millie, get me George" or "Get me Sam down at the grocery store." All that is done now, Your Honor, is that we communicate a part of that information, the number we wish to achieve to a phone company who is not statutorily barred from disclosing that information to third parties. Unlike communication between the party calling and the party --

QUESTION: Are you saying that the phone company wouldn't be subject to a suit if they were to disclose it to a third party?

MR. SACHS: In the Hobbs case in the Ninth Circuit, Your Honor, I think it was held not to be subject to suit. The phone company is at liberty to give that information to a third party, at least a local authority which is all I mean to contend --

QUESTION: Oh.

MR. SACHS: All I need to contend in this case, Your Honor, is that local authority without a warrant but police

officers inquiring are at liberty to achieve from the phone company and the phone company would be, it has been so held --

QUESTION: The phone company -- the police officer can also get unlisted phones, too.

MR. SACHS: That raises perhaps a different question, Your Honor.

QUESTION: I don't see where that makes it legal if the police officer can get those.

MR. SACHS: The question I am addressing myself to, Mr. Justice Marshall, is whether --

QUESTION: I don't see how you need all of this argument.

MR. SACHS: I was trying to respond to the Chief Justice --

QUESTION: I'm sorry, I apologize.

MR. SACHS: My point, sir, is that the user of the telephone has no reasonable expectation that the information he imparts to the company, the number he wishes to achieve, will not be imparted to another person. He knows that every month he gets the long-distance calls he dials, he knows that in many parts of the country telephones are subject to separate constructions, so that for billing purposes the phone company needs to know how many calls for certain purposes are used. He knows that the telephone company is in the business of protecting its own tariffs and its own



customers by investigating complaints of annoying and obscene telephone calls. He knows all of those things.

He is told in his phone book, may it please the Court, in every phone book in this Nation he knows, and I have -- I don't think I stray very far from the record in this case in reading to you what the phone book says, and what it says at least in Washington, D. C., is that we have employees who are trained to assist and advise you, that can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.

So for all of those reasons, we suggest to the Court that the average telephone user probably ought not to have a subjective expectation of privacy as to the number called. But in any case, it is not an expectation that **ought** to be recognized for purposes of the Fourth Amendment.

QUESTION: Mr. Attorney General, suppose you are in a very distinguished position, a lawyer, a public servant, whatever, but he has a fascination with horse races and he is every day calling and placing bets. Perhaps he is an elected officer but doesn't want that **known**. Don't you think he would have some expectation that the fact that he is calling the bookie once or twice a day to place bets that it would be an entirely private matter in a private place?

MR. SACHS: Your Honor, in almost every phase in which evidence that has been obtained surreptitiously, whether

within the warrant requirement or without the warrant requirement, there has been a subjected expectation by the defendant who arrives in the case having had his confidence betrayed. So in that sense, to answer your question, yes, everyone who gets caught took a risk and lost.

QUESTION: That is true of the distinguished physician who commits statutory rape, too, I suppose, wouldn't it, with the implicit assumption that his victim would not inform on him?

MR. SACHS: It was true of Mr. Hoffa, it was true of Mr. Osborn, it was true of Mr. Lewis, it was true of Mr. Lopez, it was true of Von Lusch, it was true of White, it was true of the misplaced confidence cases. It was true of the user of the Bank in Newark, it is true of someone who corresponds through the mails and doesn't expect mail covers to be used. It is true of people who have marihuana in their suitcase but dogs smell it and he is apprehended that way. It is true with people --

QUESTION: Mr. Sachs, you are speaking of a lot of unlawful things. There is nothing unlawful about calling a bookie, at least in Maryland I guess there isn't.

MR. SACHS: Well, I think the answer to that question it is, at least the last time I looked at the law.

QUESTION: Well, let's assume a state -- I thought Maryland, that gambling was legal in Maryland because you have

horse racing and usually horse racing survives by gambling.  
But suppose you have got a state --

MR. SACHS: There is a difference, if I may say so, Mr. Chief Justice, perhaps between the bookie who is not regulated by the state and thus unlawful and the lottery location which is regulated by the state and is lawful. Aside from that, there may not be.

QUESTION: The governor of the state, let's say, of Utah, he is placing a telephone call to a bookie and he certainly hopes that is not going to be made known within the population, the Mormon population of the State of Utah, doesn't he?

MR. SACHS: I am sure that is true, Your Honor, but one --

QUESTION: There is no reasonable or legitimate expectation of privacy, this is a risky thing.

MR. SACHS: I am saying, Your Honor, that it is a risk that he takes and it is the kind of risk that this Court has sanctioned in a great many cases. This Court sanctioned the risk in all the cases that I already mentioned, that when you confide in a friend, a trusted confident, you run the risk that that person will either later go to the authorities or has been an undercover agent all the time.

Among the balances -- I shouldn't say balances, but among the lists of tests to test the one legal question we are

asking in this case, namely is there a reasonable expectation of privacy in the communication of the numbers dialed. Among them is, as this Court has recognized, the assumption of the risk -- among them is the extent of the intrusion, among them is whether thought, words, communication in the normal sense is captured, and it is the state's position in this case, Mr. Chief Justice and members of the Court, that both factually and legally this case falls well on the safe side of the Fourth Amendment.

I must say to the Court that there is a sense in which this case both doctrine and factually has already been decided by this Court. It is a kind of a backwater factually and legally.

If I may enter what Mr. Justice Rehnquist said a few moments ago, it is really alive that what we are testing here is something as to which over the years there has been increased factual privacy and the average phone user probably does have in fact more privacy than he or she did fifty years ago when the phone was first used. And the spectre of electronic surveillance that was injected into the case by the petitioner seems to me displaced because what we have here is really a phone company mechanism that is very much a part of their normal and routine operations which people understand and know are likely to be at any given moment for lots of different reasons breached by the phone company or the phone

company which may then go to lawful authorities.

It is the state's position, Mr. Chief Justice and members of the Court, that the communication made here to the phone company, the numbers dialed is a business communication to a company which has every reason in the world to record and on occasion reveal that information, and there is no kind of communication nor the kind of circumstances that this Court in any of its prior rulings has said it is against.

QUESTION: General Sachs, what do you do with your claimant's example of a maid in a hotel room? You certainly have an anticipation that a third party would be in the room but you don't expect the police to come in.

MR. SACHS: That is true, Your Honor. The Stoner case, I think this Court distinguishes the hotel situation and I think the answer to that is that in a hotel situation the hiring of the hotel room does not expect that the full search from police officers without a warrant will take place. It is very different, we suggest, that a communication out from that hotel room or from one's home on these lines of a company which is not your own, on equipment which is not your own, of a communication much like calling the plumber and saying I have water in my cellar, please come, that plumber can if he wishes tell the police "Sachs has water in his cellar." The call coming out from the hotel room to the butcher that says I want three pork chops, could be revealed



to the police, "Sachs wants three pork chops."

In the same sense, when I say I want 466-6187 to the phone company, I run the risk and we say a legitimate risk that that information may be communicated to the police.

QUESTION: And they can convict me and put me in jail?

MR. SACHS: Yes.

QUESTION: That is a lot different from a pork chop.

MR. SACHS: To answer that, yes, Your Honor, you are right.

QUESTION: Going back, Mr. Attorney General, to the hotel room, I would assume everyone takes the risk if he leaves a .45 automatic on top of the dresser in the hotel room or a package of marihuana, that the hotel maid is under instructions and is very likely to report that to the housekeeper or the manager who will report it to the police.

MR. SACHS: Yes, Your Honor, I certainly agree with that. There are some cases, to return to Mr. Justice Stevens' inquiry, there are some cases which do recognize a limited kind of privilege here, the taxicab case which I think recognizes that for some time and for some purposes you may relinquish your privacy for some purposes but not for all. And I certainly conceded, I must, that the hotel room may well fall into that category, but it is an intrusion by the police into the room. It has the general aspects of a generalized

search of everything in that room, and I think, as we know from Rakus and as we know from other recent cases of this Court, we have not abandoned property concepts altogether when we analyze the Katz expectation test. So I think that is the distinction, Mr. Justice, that I would draw between that and this.

In sum, Mr. Chief Justice and members of the Court, I simply want to say that as three circuits have recognized, the Ninth, the Fifth and the First, as the Congress of the United States recognized by not including in Title III the pen register, and as this Court has come very close already by recognizing in New York Telephone that the pen register is a far lesser intrusion than the wiretap.

For those reasons and the sound application of the Fourth Amendment, we respectfully urge the Court to affirm the decision of the Maryland Court of Appeals.

Thank you very much, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney General.

Do you have anything further, Mr. Cardin?

ORAL ARGUMENT OF HOWARD L. CARDIN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CARDIN: I would only point out, going back to our example of the hotel room, that in the instance where the housekeeper turns over information and we accept that as

being proper, we don't have that situation here where the pen register is attached not by the telephone company **for its** housekeeping purposes but by the police department for its investigative purposes.

QUESTION: But it is attached to telephone company property. It isn't attached to the defendant's property.

MR. CARDIN: It is attached to the telephone company's lines, that is correct, Your Honor. The lines are owned by the company. I believe that is suggested, that the portion of lines are in effect leased to the subscriber, that is his use of them is in a sense a lease or a renting of --

QUESTION: In Katz the surveillance was on telephone company property.

MR. CARDIN: Yes.

QUESTION: A pay phone booth.

MR. CARDIN: I would close by stating briefly from Burger, this is no formality that we require today but a fundamental role that has long been recognized as basic to the privacy of every home in America. While requirements of the Fourth Amendment are not inflexible or obtusely unyielding to legitimate needs of law enforcement, it is not asking too much of officers being required to the basic commands of the Fourth Amendment before the privacy of one's home or office are invaded.

QUESTION: What would you say if the telephone

company sent a letter to all of its subscribers that from here on we are publishing the lists **that** are available in our office on demand, on request, a list of all the calls from any telephone in the city.

QUESTION: Under the Freedom of Information Act.

QUESTION: Just anybody who wants them can have them.

MR. CARDIN: If the telephone -- let me respond by saying this, I think the telephone company has in fact done that as far as long-distance calls are concerned. I think we all recognize that.

QUESTION: So you have no complaints about that then?

MR. CARDIN: There is no expectation of the privacy. But now the way they have done, I believe that one expects when he dials that local number --

QUESTION: You are really relying on someone else for confidentiality.

MR. CARDIN: I am suggesting that there is nobody listening to that local line, listening to that number being dialed unless --

QUESTION: You are relying on the telephone company not itself to keep track of the calls that you are making and publishing them?

MR. CARDIN: It certainly doesn't do it in Maryland, at least to my knowledge.

QUESTION: So the answer is yes?

MR. CARDIN: Yes.

QUESTION: Under Mr. Justice White's question, when the telephone company announces, you would be in the same situation on local calls as you would be on long-distance calls, wouldn't you?

MR. CARDIN: I would agree with that.

QUESTION: And there is no intrusion.

MR. CARDIN: No intrusion, physical intrusion?

QUESTION: Or any kind, because what comes out of that is what goes into it.

MR. CARDIN: There is no intrusion as such like if the company announces what it is going to do --

QUESTION: No. When the telephone company puts the pen register on, all it monitors is what comes out.

MR. CARDIN: That is absolutely correct.

QUESTION: And the only thing it monitors is the number and that is all.

MR. CARDIN: And the time, I believe, it punches out the time.

QUESTION: So none of the call is --

MR. CARDIN: None of the call, the number of the call and the time the call was made.

QUESTION: And who pays for this, the government pays for it?



MR. CARDIN: I believe that the -- in the New York Telephone Company case, it was indicated that the government pays for the attaching of the device, yes.

So I would submit to the Court in conclusion that I personally see no reason why this officer in this case could not and should not have applied for a court order, and I believe that precedent has been set in the federal courts of following that precedent and is one that should be adopted here.

Thank you.

MR. CHIEF JUSTICE: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:30 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

1979 APR 6 PM 4 18