Here's a draft of Smith v. Maryland. It's a short, rather un-scholarly opinion, rather befitting the case, which really requires little more than some common sense and a straightforward application of Katz, Miller, and White. There were five votes at Conference to hold "no search," and that's the way I've written the opinion; this follows your Conference vote and my bench memo.

On pp. 5 & 6, I've included cites to Rakas v. Illinois, which was decided in December of this Term. I've merely put "blank U.S." cites in the text, but I thought that you might like to know the slip opinion references for sake of convenience. Here they are:

Page 5: Majority--slip op. at 15, and note 12.
            LFP concurring--slip op. at 1, 2.
            BRW dissenting--slip op. at 9.

Page 6: Majority--slip op. at 15 note 12.
            LFP concurring--slip op. at 2.

I've included in the pile of materials everything you should need to do the opinion: a Cornell L Rev article; a Drake L Rev article; xeroxes of the Baltimore and DC phone books; and the advance sheets of Maryland Reports containing the opinion below. Everything else that is cited should be in the Justices' Library.

AGL 5/14/79
Consumer Information

For Your Protection

Abusive Calling
Under Federal Law, any person who uses a telephone, or knowingly permits another to use his/her telephone, for making abusive, obscene or harassing calls within the District of Columbia or across state lines commits a crime which is punishable by $500 fine, six months in prison, or both.

C&P is anxious to help stop abusive calls; full cooperation and technical assistance will be given to legal authorities in enforcing the law.

Annoying and Anonymous Calls - What You Can Do About Them
1. Don't talk to persons of whom you are doubtful. Don't give them the audience they want.
2. Hang up at the first obscene word, or if the caller doesn't say anything, or doesn't provide identification to your satisfaction.
3. Call your business office if the annoyance persists. We have employees who are trained to assist and advise you and who can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.

Employee Identification Cards
For your protection, every employee carries an official identification card showing his or her name, photograph and signature.

If you have the slightest doubt about persons who say they are from the Telephone Company, please ask to see their card.

Fraud Penalties
For your protection, new equipment and procedures enable the Telephone Company to detect and investigate fraudulent calls. State law provides that no person shall defect or attempt to defraud the Telephone Company of its lawful charges. Violators, upon conviction, are subject to imprisonment for up to 10 years or a fine of up to $1,000 or both.

Teach Your Children to Dial “911” Or “0” In Emergencies
Show your children how to use the telephone in an emergency by teaching them how to dial “911” or “0” for the police or operator. Also make sure they know their home telephone number and encourage them to always call home if they are going to be late. Give them change to carry for emergencies.

When You Hear a “Beep” Tone
A short “beep” tone heard on your telephone line about every 15 seconds means that the person with whom you are talking is recording your conversation. This signal is provided by the Telephone Company for your protection. Use of a recorder without recorder-connector equipment containing a tone-warning device is contrary to the Company’s tariffs and is not permitted. If you do not want a record made of what you are saying, ask the person with whom you are talking to disconnect the recording machine. When it is disconnected, you will no longer hear the “beep” tone.

3. Follow the installation, operational, routine maintenance and routine repair procedures specified by the manufacturer.

Any items used with the Company’s facilities and equipment in violation of the tariffs may lead to the removal of the equipment, apparatus, device or system, or in the suspension of the customer's telephone service.

A maintenance visit charge applies per visit to a customer's premises where a service difficulty or trouble report is caused by customer provided equipment. You should contact your Service Representative or Account Executive for more information concerning these regulations.

Tariffs
Tariffs which show rates, rules, and regulations for telephone service and facilities within the District of Columbia are approved by the Public Service Commission, 1625 I Street, N.W., Washington, D.C. Tariffs are available in your Business Office for public inspection.

Taxes
A Federal tax will apply on certain items of telephone service, equipment and messages. NO, tax applies on telephone directory advertising or on service connection charges, moves or change charges.

Your Telephone Number Is Important.
When your telephone number is preceded by your area code, it is the only one like it in the United States or Canada. When leaving your telephone number for someone else to call you, be sure to include the area code so that the caller will be calling from a different telephone area than your own.
Consumer Information

For Your Protection

Abusive Calling
It is a criminal offense under Maryland and Federal Laws for any person to make use of telephone facilities and equipment for:
1. Anonymous Calls—If in a manner reasonably expected to annoy, abuse, torment, harass, or embarrass one or more persons; or
2. Repeated Calls—If with intent to annoy, abuse, torment, harass, or embarrass one or more persons; or
3. Any Comment—Request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent.

These offenses are punishable by fine and/or imprisonment. In addition, under Federal Law it is also a criminal offense for anyone who knowingly permits any telephone under their control to be used in Interstate or Foreign communications for any of the purposes noted above.

The Telephone Company will assist its customers in cases of this type. Just call your local Company Business Office.

Annoying and Anonymous Calls—What You Can Do About Them
1. Don’t talk to persons of whom you are doubtful. Don’t give them the audience they want.
2. Hang up at the first obscene word, or if the caller doesn’t say anything, or doesn’t provide identification to your satisfaction.
3. Call your Business Office if the annoyance persists. We have employees who are trained to assist and advise you and who can frequently help in identifying the authorities the origin of unwelcome and troublesome calls.

False Fire Alarms
It is a criminal offense under Maryland law for any person knowingly to give or cause to be given any false alarm of fire. This offense is punishable by fine and/or imprisonment.

Emergency Calls on Party Lines
It is a criminal offense under Maryland law to refuse to relinquish the use of a party line immediately when informed that it is needed for an emergency call. It is also an offense to state falsely that a party line is needed for an emergency call. The law defines “emergency” as “a situation in which property or human life are in jeopardy and the prompt summoning of aid is essential.” This offense is punishable by fine and/or imprisonment.

Telephone Solicitation
Some Basic Guidelines
1. Find out who is calling. Maryland law requires a sales solicitor to state: name, company’s name, the reason for the call and what is being offered.
2. If you are not sure of your interest and would like additional information, ask the caller to mail you such additional information.
3. If you are not interested, just cut in and politely refuse the offer. If the caller persists, hang up.

Employee Identification Cards
For your protection, every employee carries an official identification card showing his or her name, photograph and signature. If you have the slightest doubt about persons who say they are from the Telephone Company, please ask to see their card.

Fraud Penalties
For your protection, new equipment and procedures enable the Telephone Company to detect and investigate fraudulent calls. State law provides that no person shall defraud or attempt to defraud the Telephone Company of its lawful charges. Violators, upon conviction, may be subject to imprisonment for up to 6 months or a fine of up to $500 or both.

Credit Card Fraud
Any person who publishes or causes to be published, either orally or in writing, the number of an existing, cancelled, revoked, expired, or non-existing telephone credit card, or the numbering or coding system which is employed in the issuance of telephone credit cards, with the intent that it be used or with knowledge that it may be used to fraudulently avoid the payment of any lawful toll charge, is guilty of a misdemeanor. Violators, upon conviction, are subject to imprisonment for up to 12 months or to a fine of up to $500 or both.
HAB--

This looks fine--quite a clean copy. I marked the typos I was able to find.

As to the repetition of phraseology at pp 5-6, I see what you mean. However, I did not intend the two sentences to say the same thing. The sentence on p. 5 says merely that petr is claiming some legitimate expectation of privacy. The question then becomes, "An expectation of privacy as to what?" This in turn depends on the nature of the Govt intrusion, which is described at pp 5-6. Based on the limited capabilities of pen registers--all they do is record the numbers dialed--the draft concludes that petr's claimed expectation of privacy must relate only to the numbers he dialed. Hence the sentence on p 6 that you questioned: "petr's claim necessarily rests upon a claim that he had a legitimate expectation of privacy regarding the numbers he dialed on his phone." This sentence does say something different from the sentence on p 5, although as you rightly point out there is a lot of overlap in the introductory part of the sentence. Can you think of a way to tone down the overlap, while preserving the distinction? One way might be to change "infringed a 'legitimate expectation of privacy' petr held" on p 5 to "infringed some 'legitimate expectation of privacy' petr held."
Re: 78-5374 - Smith v. Maryland

Dear Harry:

The point I intend to make in a short con­
currence may be one that you will be willing to
cover in your opinion, in which event I will
simply join you. It relates to the significance
of the individual's actual or subjective expectation
of privacy. I would like to make sure that an in­
dividual citizen does not lose his Fourth Amendment
rights in either of two hypothetical situations:

1. Assume that a new Adolf Hitler
installs nationwide loudspeakers notifying
the entire populace that henceforth all
homes shall be open to unwarranted and un­
limited search. Such publicity would
eliminate any actual subjective expectation
of continued privacy, but surely would not
destroy the citizen's Fourth Amendment
protection.

2. Assume that a refugee from a
totalitarian country is unaware of our
traditions of freedom and incorrectly
believes that all his telephone conversa­
tions are being monitored by the secret
police. He should nevertheless retain his
Fourth Amendment protections.
I do not believe your opinion is intended to disagree with either of these assumptions. However, unless something similar to these examples is expressly disclaimed, I am afraid that the emphasis on actual expectation of privacy may be subject to misreading. Do you think you could put in an appropriate footnote to make it clear that the emphasis on actual expectation does not include this sort of situation?

Respectfully,

[Signature]

Mr. Justice Blackmun
May 24, 1979

RE: No. 78-5374 - Smith v. Maryland

Dear Harry:

As a post script to my earlier letter, this thought has occurred to me. Perhaps the subjective or actual expectation of privacy is most important when we are evaluating a claim that Fourth Amendment protection should be extended into a new area--wiretap in Katz and pen registers here--but would not be relevant in situations, such as house searches, where Fourth Amendment protection is well recognized in our decided cases. This is just a suggestion.

Respectfully,

[Signature]

Mr. Justice Blackmun
I've seen both of JPS' letters of today, and have drafted a new fn. 5 to address his concerns. I was somewhat hesitant about adopting the suggestion in his second letter--that different inquiries would be proper depending on whether an "old" or "new" mode of police surveillance was being used. My hesitancy, I suppose, can be traced to uncertainty about the ramifications of such a per se rule. I did, however, try to accommodate JPS' second letter somewhat by writing, "alien to well-recognized Fourth Amendment freedoms," in the footnote. JPS' clerk said this might be satisfactory to his boss.

5/24/79 AGL

P.S. If this looks OK, I can run it by JPS and WHR to see if they're agreeable; then it could go to the printer in time for circulation tomorrow. Alternatively, we could just circulate it in typed form.
78-5374—OPINION

SMITH v. MARYLAND

Illinois, — U. S. —, —, and n. 12 (1978); id., at —, — (concurring opinion); id., at —, (dissenting opinion); United States v. Chadwick, 433 U. S. 1, 7 (1977); United States v. Miller, 425 U. S. 455, 442 (1976); United States v. Dionisio, 410 U. S. 1, 14 (1973); Couch v. United States, 409 U. S. 322, 335–336 (1973); United States v. White, 401 U. S. 745, 752 (1971); (plurality opinion); Mancusi v. DeForte, 392 U. S. 364, 368 (1968); Terry v. Ohio, 392 U. S. 1, 9 (1968). This inquiry, as Mr. Justice Harlan aptly noted in his Katz concurrence, embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 U. S., at 361—whether, in the words of the Katz majority, the individual has shown that "he seeks to preserve [something] as private." Id., at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable," id., at 361—whether, in the words of the Katz majority, the individual's expectation, viewed objectively, is "justifiable" under the circumstances. Id., at 353. See Rakas v. Illinois, — U. S., at — n. 12, id., at — (concurring opinion); United States v. White, 401 U. S., at 752 (plurality opinion).

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" petitioner held. Yet a pen register differs significantly from the listening device employed in
Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. Similarly, if a refugee from a totalitarian country, unaware of this Nation's traditions, erroneously assumed that police were continuously monitoring his telephone conversations, a subjective expectation of privacy regarding the contents of his calls might be lacking as well. In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a "legitimate expectation of privacy" existed in such cases, a normative inquiry would be proper.
May 24, 1979

Re: No. 78-5374 - Smith v. Maryland

Dear John:

In response to your letters, I suggest the following:

1. On page 5 of the opinion, 10th line, insert the word "normally" before the word "embraces."

2. Insert a footnote sign "5" after the figures "353" on the third line preceding part B. The enclosure would then be the footnote.

Does this meet your concerns?

Sincerely,

Mr. Justice Stevens
May 24, 1979

Re: 78-5374 - Smith v. Maryland

Dear Harry:

Many thanks. Your changes completely resolve my problem. I definitely will not write separately.

Sincerely,

Mr. Justice Blackmun
MEMORANDUM

TO: HAB
FROM: AGL
RE: Smith v Maryland, No. 78-5374 (TM dissent circulated 6/8/79)
DATE: 6/8/79

I have studied TM's dissent, and don't think it necessitates any response on our part. TM predicates his dissent on his own dissents in Schultz and Miller, and on JMH's dissent in White. TM, in other words, seems to agree that our result is consistent with the Court opinion in Miller, and dissents here only because he dissented there. TM's theory that persons retain an expectation of privacy in information they divulge to third parties for a limited purpose, dissent at 1, 2, 7, was expressly rejected by this Court in Miller, as our quotation from that opinion, draft at 8-9, makes clear. TM's theory is extremely broad—it would give telephone users a legitimate expectation of privacy, not only in local numbers the Tel Co does not record, but also in toll-call numbers the Tel Co does record for billing purposes. TM's theory, in other words, would give telephone users a legitimate expectation of privacy in the Tel Co's business records. Yet Miller held that a depositor has no legitimate expectation of privacy in a bank's business records.

WJB, PS, and TM originally voted to dissent in this case. WJB may be able to join TM's dissent without difficulty. TM's opinion, however, may pose problems for PS. PS joined the Court's opinions in Miller, Couch, and the plurality opinion in White. Since TM's dissent is predicated on a rejection of those opinions, I really don't see how PS can join it.
MEMORANDUM

TO: HAB
FROM: AGL
RE: Smith v Maryland, No 78-5374 (PS dissent circulated 6/13/79)
DATE: 6/13/79

I've read PS' dissent and don't think it calls for any response. PS makes no effort to distinguish this case from Miller and White, both of which he joined. His theory, basically, seems to be the same as TM's, although TM's frankness prevents PS from joining that opinion directly.