WIRETAPPING AND EAVESDROPPING IN ARIZONA: A LEGISLATIVE AND CONSTITUTIONAL ANALYSIS*

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INTRODUCTION

The Arizona Legislature recently[1] enacted a statute generally prohibiting wire tapping and eavesdropping[2] except when performed by law enforcement officers pursuant to an "ex parte order" authorized by § 13-1057 of the Act.[3] Section 13-1057 provides:

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[1] The Act was signed by the Governor on March 19, 1968, and has an effective date of June 19, 1968. ARIZ. CONST. art. 4, pt. 1, § 3.

[2] The new Act makes it a felony for a person who is "not a sender or receiver of a telephone or telegraph communication, wilfully and by means of an instrument or device" to overhear or record such a communication, or to aid, authorize, employ, procure or permit another person to overhear or record such a communication "without the consent of either a sender or receiver thereof." It also makes it a felony for a person who is "not present during a conversation or discussion, wilfully and by means of an instrument or device" to overhear or record the conversation or discussion or to aid, authorize, employ, procure or permit another person to overhear or record it, "without the consent of one of the parties to the conversation or discussion." ARIZ. REV. STAT. ANN. § 13-1052(1), (2) (Supp. 1968).

Specifically exempted from the sweep of the Act is the situation in which the eavesdropping is conducted by an undercover agent who is one of the participants in the conversation and who has a recording or transmitting device secreted upon his person or near the telephone into which he is speaking. While an obvious aid to law enforcement, this exemption may in the future be held to conflict with the Court's requirement in *Katz v. United States*, 88 S. Ct. 507 (1967), that a search warrant be obtained in a situation where a conversation was justifiably thought to be private by the participant whose words were the subject of the eavesdrop. In his concurring opinion in *Katz*, Mr. Justice White stated that he did not think *Katz* would apply in the situation like that exempted by § 13-1052(1), (2). The Court of Appeals for the Fifth Circuit in *Long v. United States*, 387 F.2d 337 (1967), *cert. denied*, 88 S. Ct. 1044 (1968) stated in a footnote that *Katz* did not apply to the fact situation in that case, which involved eavesdropping by means of a device secreted upon the person of an undercover agent who was a party to the conversation. But in *White v. United States*, 3 CRIM. L. REP. 2005, 36 U.S.L.W. 2613 (7th Cir. Mar. 18, 1968) the court held that *Katz* applied in such a situation and based its reasoning on the fact that the defendant sought to exclude the "uninvited ear." If the Supreme Court adopts the holding in *White*, and rules, in other words, that *Katz* and *Osborn v. United States*, 385 U.S. 323 (1966) sound the death knell for the earlier decision of *On Lee v. United States*, 343 U.S. 747 (1952), the Arizona legislature will have to make provision for obtaining search warrants in *On Lee*-type situations. See Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968). For additional discussion of these cases and a different opinion see Comment, *Eavesdropping, Wiretapping, and the Law of Search and Seizure — Some Implications of the Katz Decision*, *supra* 9 ARIZ. L. REV. 428, 430 n.17.

[3] ARIZ. REV. STAT. ANN. § 13-1059(1) (Supp. 1968).

> An ex parte order for wire tapping or eavesdropping may be issued by any justice of the supreme court, judge of the court of appeals, or judge of the superior court upon oath or affirmation of a county attorney, the attorney general, an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, or the sheriff of any county, that there is probable cause to believe that a crime has been or is being committed, and that there is probable cause to believe that evidence of such a crime may be obtained,[4] and describing with particularity the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular number or telegraph line involved. In connection with the issuance of such an order, the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of probable cause for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than one month unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that probable cause for such extension or renewal exists. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same. If any wire tapping or eavesdropping takes place pursuant to such order, the applicant shall file immediately with the judge or justice an affidavit upon oath or affirmation setting forth in detail all information obtained by the wire tapping or eavesdropping. This affidavit shall also be retained in his possession by the judge or justice. In the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

Because of the similarity between § 13-1057 and § 813-a of the New York Code of Criminal Procedure, which also provides for an ex parte eavesdrop order and which was recently held unconstitutional on its face by the United States Supreme Court in *Berger v. New York*,[5] very serious questions are presented concerning the constitutionality of the new Arizona law and any orders issued under it. The lack of Arizona legislative judgment manifested by borrowing heavily from an enact-

[4] It is to be noted that this provision, presumably following the lead of *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967), allows wire tapping and eavesdropping for "mere evidence" of a crime, and is not limited to searching for words which form a part of the crime (*e.g.*, conspiracy, extortion). Also, this provision is not limited to eavesdropping and wire tapping for evidence of a felony. *Compare* ARIZ. REV. STAT. ANN. § 13-1442 (1956) (general search warrant statute, which still contains a prohibition against searching for "mere evidence" and which permits warrants only in felony cases).

[5] 388 U.S. 41 (1967).

ment known to be invalid has triggered this Comment, which will seek to consider whether section 13-1057 may be implemented and, if not, to consider what avenues are open to the Arizona legislature to effectuate its purpose of authorizing limited wire tap and eavesdrop activity by police officers.

ANALYSIS

Any analysis of the Arizona legislation must, of course, begin with a discussion of *Berger*. In that case, the Supreme Court, in holding the New York statute unconstitutional on its face, found the enactment defective in many particulars: it didn't require a belief that a crime had been or was being committed; it allowed the issuance of the eavesdropping order without requiring that "the property sought, the conversations, be particularly described"; it authorized eavesdropping for a "two-month period"; the order could be extended upon a mere showing that the extension was "in the public interest" without showing a "present" probable cause; no termination of the eavesdrop was required after the conversation sought had been seized; there was no requirement of notice, nor a "showing of special facts" which would overcome the lack of notice; and there was no requirement for a return of the order after the eavesdropping had taken place.[6]

Although § 13-1057 is not a mirror image of the New York statute and has been altered to remedy some of the defects which the New York statute contained,[7] its constitutionality is nevertheless very much in question, for many provisions in the Arizona section pose problems strikingly similar to those that troubled the *Berger* Court: There is no requirement that the conversations sought be particularly described. Eavesdropping is authorized for a period of up to one month. Probable cause is needed for an extension or renewal of the order, but it is not clear whether the probable cause needed is "present" probable cause or whether the probable cause upon which the order was originally issued would suffice. Also, there is no requirement that the officer conducting the eavesdrop terminate it after he has obtained the conversation sought.[8]

Literal Implementation. — It seems clear that if an order for eavesdropping or wire tapping were obtained under section 13-1057 by relying *solely* on the statutory restrictions, a defendant against whom an overheard conversation was sought to be introduced could successfully suppress the evidence. In *Berger*, the Court was concerned about the

[6] *Id.*

[7] The Arizona provision calls for probable cause to believe that a crime has been or is being committed and to believe that evidence of the crime can be obtained by the eavesdrop, and for an immediate return if evidence is obtained by the eavesdrop.

[8] *See* text of § 13-1057 p. 453 *supra.*

extent to which the New York statute constituted a general warrant — leaving to the discretion of the officer executing the order the determination of the conversations to be seized and the termination of the eavesdrop — and was concerned also about the extent to which the statute authorized "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."[9] Consequently, the Court found the statute to be a "blanket grant of permission to eavesdrop . . . without adequate judicial supervision or protective procedures."[10]

That finding in *Berger* would be fully applicable to the situation under discussion. The absence of a requirement that the conversation sought be particularly described unquestionably constitutes a general warrant and leaves too much to the discretion of the executing officer. A one-month authorization of wire tapping and eavesdropping, like the two-month period involved in *Berger*, permits "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."[11] The absence of a requirement that the eavesdropping terminate after the conversation sought has been obtained again smacks of a general warrant and again leaves too much within the discretion of the executing officer. A strict and limited compliance with section 13-1057 would, therefore, result in the invalidity of any order issued under it[12] and the inadmissibility of any resulting evidence[13] and its fruits.[14]

Expansive Implementation. — The constitutional difficulties might perhaps be avoided if law enforcement officials and judicial officers attempt to implement section 13-1057 by complying with *Berger* and the more recent case of *Katz v. United States*.[15] To implement the statute, it is suggested that law enforcement officers, in applying for an "ex parte order" meet the requirements of *Berger* and *Katz* in addition to the statutory requirements. To meet these standards they should: describe with particularity the conversations sought, refrain from asking for or accepting an order which is effective for a period longer than is reasonably necessary to obtain the conversations sought, and request the judge to place a termination order in the warrant. If the officers are seeking an extension or renewal of an order, they should state in the affidavit facts and circumstances sufficient to support a finding of *present* probable cause for the extension or renewal. Judicial officers should refuse to issue "ex parte orders" unless the requirements of *Berger* and *Katz*, as well as the statutory requirements, are complied with.

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[9] 388 U.S. at 59.
[10] *Id.* at 60.
[11] 388 U.S. at 59.
[12] Berger v. New York, 388 U.S. 41 (1967).
[13] Mapp v. Ohio, 367 U.S. 643 (1961).
[14] Nardone v. United States, 308 U.S. 338 (1939).
[15] 88 S. Ct. 507 (1967).

But the above implementation suggestion is not a certain solution. If law enforcement officers and judges cooperated so that an order was issued which complied with the statute and the additional requirements of *Berger* and *Katz*, it might be that a defendant convicted upon evidence obtained under such an order could nonetheless successfully attack the statute, the order, the evidence and the conviction. The Arizona Supreme Court can take one of three approaches in disposing of such a case on appeal. (1) It might affirm the conviction, holding that since the statute was constitutionally applied to him, the defendant was not injured by it and lacks standing to challenge its validity. (2) It might hold the statute unconstitutional on its face and find that any conviction resulting from the statute must be reversed. (3) Finally, it might affirm the conviction and hold that the statute somehow incorporates the *Berger-Katz* standards and is therefore constitutional. Under the second approach the statute and conviction could not be saved even by implementing devices that comport with the fourth amendment. The three possible dispositions will now be discussed *seriatim*.

Disposition 1

The question of the defendant's standing to challenge the statute must be considered under the applicable Arizona and federal decisions. It seems that the Arizona Supreme Court has never been faced squarely with the question whether a defendant against whom a presumably unconstitutional provision was applied constitutionally would have standing to challenge the validity of the provisions. But there is a wealth of language that would lead one, at least on first blush, to believe that such a petitioner would not have standing. In *McKinley v. Reilly*,[16] for example, the court stated that "only those who are injured by the unconstitutional provision of a statute may raise an objection to its constitutionality." And in *State v. Roseberry*,[17] the court recognized that:

> "It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute. This rule applies to all cases both at law and in equity, and is equally applicable in both civil and criminal proceedings. . . . In other words, one attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right. . . ."

Further support for this view is found in *Arizona Power Co. v. State*,[18] where it was held that a corporate defendant lacked standing to challenge the validity of a statute on imprisonment-for-debt grounds be-

[16] 96 Ariz. 176, 183, 393 P.2d 268, 273 (1964); *accord*, South Tucson v. Board of Supervisors, 52 Ariz. 575, 84 P.2d 581 (1938).
[17] 37 Ariz. 78, 87, 289 P. 515, 518, 519 (1930).
[18] 19 Ariz. 114, 166 P. 275 (1917).

cause the imprisonment provision could not conceivably operate against the defendant.

Only in *Elfbrandt v. Russell*,[19] did the Arizona court depart fundamentally from its limited standing concept. In *Elfbrandt*, which involved first amendment rights pitted against a statutory loyalty oath requirement, the court found standing, reasoning:

> [W]e do not entertain attacks on the constitutionality of a statute by those whose rights have not in some way been actually or injuriously affected or directly involved . . . . But in this instance we recognize the problem to appellant is one of potential deterrence of constitutionally protected conduct.

It appears, then, that although the court could find the defendant directly injured on the ground that essential evidence against him was obtained under the statute,[20] the existing Arizona authorities would seem to deny standing on the ground that the defendant's fourth amendment rights were not in fact infringed, unless the defendant could avail himself of the *Elfbrandt* exception.

But the Arizona decisions are not the last word on standing. Since a defendant may eventually seek federal review of the Arizona statute's constitutionality, standing, in the long run, becomes essentially a federal question, and pertinent United States Supreme Court decisions will control. That Court's discussion of the standing question in *United States v. Raines*[21] is perhaps the best summary of the law in this area:

> The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. . . . This Court, as is the case in all federal courts, "has no jurisdiction to pronounce any statute,

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[19] 94 Ariz. 1, 7, 381 P.2d 554, 558 (1963), *vacated on other grounds*, 378 U.S. 127 (1964); *accord*, Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann. Cas. 1916D 94 (1915).

[20] The argument of a defendant in such a case would be as follows: Prior to the Court's decision in *Katz* and prior to the passage of the Act, Arizona police officers could eavesdrop or wire tap, and the evidence which was obtained was admissible under *State v. Pacheco*, 98 Ariz. 377, 405 P.2d 809 (1965); no search warrant was needed to validate their activity. In 1967, *Katz* was decided, and under the Supreme Court's constitutional mandate, it became the law of federal and state jurisdictions that a search warrant was required in order to eavesdrop or wire tap where the circumstances were such that the subject could justifiably rely on the privacy of his conversation. The Arizona Act makes eavesdropping and wire tapping *unlawful* except when it is done under an "ex parte order granted pursuant to section 13-1057." ARIZ. REV. STAT. ANN. §§ 13-1052, 1059(1) (Supp. 1968). It was the intent of the legislature to make the section the *exclusive* authority for such activity. The defendant has standing to object to the validity of the statute, since it is the *only* authorization for the officers to eavesdrop or wire tap upon his conversation, and he is, as petitioner in *Berger* was, "indisputably affected by the statute." (388 U.S. at 55).

[21] 362 U.S. 17, 20-22 (1960).

> either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." . . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. . . . In many of their applications, these are not principles ordained by the Constitution, but constitute rather 'rule[s] of practice,' . . . albeit weighty ones; hence some exceptions to them where there are weighty countervailing policies have been and are recognized.[22] . . . This Court has indicated that where the application of these rules would itself have an inhibitory effect on freedom of speech, they may not be applied.

It seems, then, that the standing limitation is a rule of practice which the Court invokes unless there is some countervailing reason for disregarding it. In the fact situation at hand, it can be asserted convincingly that such a countervailing reason exists. At stake is the defendant's right of privacy under the fourth amendment.[23] Admittedly, the Supreme Court has in the past enunicated the principle that the first amendment freedoms are basic to the concept of liberty embodied in the fourteenth amendment,[24] and that was presumably a reason for the *Raines* statement that the standing rules should yield if they would "have an inhibitory effect" upon those rights. But the Court has recently given the protective emphasis, formerly reserved for only first amendment rights, to the right of privacy which the Court in *Griswold v. Connecticut*[25] found within the "penumbra" of the first, third, fourth, fifth and ninth amendments, and which the *Katz* Court found within the fourth amendment. Moreover, it may be argued forcefully that the fourth amendment in a wire tap-eavesdrop setting is inextricably entwined with the first amendment freedoms of speech, association and assembly, since intrusions upon an individual's *conver-*

[22] *See* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Smith v. California, 361 U.S. 147 (1959); Thornhill v. Alabama, 310 U.S. 88 (1940); United States v. Reese, 92 U.S. 214 (1875); Winters v. New York, 333 U.S. 507 (1948); Butts v. Merchants and Miners Transp. Co., 230 U.S. 126 (1913); Dorchy v. Kansas, 264 U.S. 286 (1924); Trade-Mark Cases, 100 U.S. 82 (1879); Employer's Liability Cases, 207 U.S. 463 (1907).

[23] Katz v. United States, 88 S. Ct. 507 (1967).

[24] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[25] 381 U.S. 479 (1965).

sational privacy can be expected to "have an inhibitory effect" upon the exercise of these rights. Thus, the countervailing reasons exist, and the limiting standing rules should be relaxed under *Raines* or, on a local level, under the similar *Elfbrandt* exception.[26]

Dispositions 2 and 3

Assuming the Arizona Supreme Court would find standing under the *Elfbrandt* or *Raines* exceptions, it by no means follows that it would adopt the second approach, holding the statute unconstitutional on its face and reversing the conviction. Such a holding, in fact, could be reached only by a narrow reading of the statute, and would require overlooking the legislative history and the legislative intent. The court could concededly find sufficient justification for such a ruling in *Berger*, but it is by no means bound by *Berger* to conclude that section 13-1057 is unconstitutional.[27]

Instead, the Arizona Supreme Court might adopt the third approach and uphold the statute as against constitutional attack. In order to reach that result, the court would have to find that (A) the legislature intended to comply with *Berger* and *Katz* and that the statute must be read in conjunction with those cases, or (B) the legislature intended the statute to be read in conjunction with the general search warrant statute and the decided case law of Arizona on searches and seizures, or (C) the language of the statute is itself susceptible of a construction which meets the requirements of *Berger* and *Katz*.

A. *The Legislation Should be Read Together with Berger and Katz.*

Since the Arizona Act is modeled on the New York provision,[28] the Arizona legislature is presumed to have borrowed along with the statute the constructions previously given it by New York's highest tribunal.[29] The New York Court of Appeals in *People v. Kaiser*,[30] which dealt with the New York wire tapping and eavesdropping statute after *Berger* and prior to the adoption of the Arizona Act, held that *Berger* would not be applied retroactively, rehabilitated the statute by reading *Berger* in conjunction with it, and indicated that it would continue that construction in the future.

Although section 13-1057 has been changed somewhat from the New York statute, the change by no means requires rejection of the New York

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[26] Elfbrandt v. Russell, 94 Ariz. 1, 381 P.2d 554 (1963), *vacated on other grounds*, 378 U.S. 127 (1964).

[27] Because § 13-1057 has been changed in several respects from the New York statute in *Berger*, that case is not binding authority for the proposition that § 13-1057 is unconstitutional on its face.

[28] *Compare* N.Y. PENAL LAW §§ 738 to 745 (McKinney 1967) (repealed 1967) *and* N.Y. CODE CRIM. PROC. §§ 813-a, b (McKinney Supp. 1967) *with* ARIZ. REV. STAT. ANN. §§ 13-1051 to -1059 (Supp. 1968).

[29] Hallenbeck v. Yuma County, 61 Ariz. 160, 145 P.2d 837 (1944).

[30] 21 N.Y.2d 86, 233 N.E.2d 818, 286 N.Y.S.2d 801 (1967).

court's construction. In *Copper Queen Consolidated Mining Co. v. Territory*,[31] the Arizona court refused to be bound by a Colorado interpretation of its statute prior to the adoption by Arizona of that statute, but only because the changes in the statute as adopted by Arizona required a change in construction. That result is not required in the case at hand. The Arizona court would not be looking to the New York case for authority to change the meaning of the words in the Arizona statute. Instead, it would be using the case merely as authority for the proposition that *Berger* can be read into the statute.

In addition, the legislative history indicates clearly that the Arizona legislature was cognizant of the Supreme Court's holdings in *Berger* and *Katz* and sought to meet them. House Bill 19 — the Act in its original form — was introduced in the Arizona House of Representatives on January 9, 1968.[32] Its content had been changed substantially from that of its predecessor, House Bill 8, which was introduced in the House a year earlier. House Bill 8 was virtually identical to the New York wire tapping and eavesdropping provisions, but died in committee,[33] presumably because *Berger* was then pending in the Supreme Court.[34] When House Bill 19 was introduced, it was different from House Bill 8 in two respects. Section 13-1057 was amended in an apparent attempt to comply with the Court's requirements in *Berger*, since the changes made were among several of the provisions of the New York statute which the Court in *Berger* considered fatal. Section 13-1058 of House Bill 8 was omitted, presumably because it allowed eavesdropping and wire tapping without obtaining a warrant under certain circumstances, thereby coming in direct conflict with the Court's holding in *Katz*. While in the House Rules Committee, section 13-1057 was amended to reduce the life of a warrant and to assure a prompt return following execution. After the House passed the Act, it was held up for a while in the Senate's majority caucus, mainly because of questions relating to the constitutionality of section 13-1057 in light of *Berger*, but the caucus eventually reached the conclusion that the Act was constitutional.

Given the clarity of the legislative purpose, the Arizona court can be expected to seek a constitutional construction of the statute,[35] perhaps even to the extent of *supplying* the absent *Berger* safeguards.[36]

B. The Arizona Legislature Intended the Statute to be Read in Conjunction with the Conventional Search Warrant Statute and the Decided

[31] 9 Ariz. 383, 84 P. 511 (1906).
[32] H.B. 19, 28th Legis. 2d Reg. Sess. (Ariz. 1968).
[33] Arizona Legislative Review, Mar. 15, 1967, at 3.
[34] Certiorari was granted on Dec. 5, 1966. 385 U.S. 967.
[35] State v. Hooker, 45 Ariz. 202, 41 P.2d 1091 (1935).
[36] Mahoney v. County of Maricopa, 49 Ariz. 479, 68 P.2d 694 (1937).

Case Law of Arizona on Searches and Seizures.

The Act provides for the issuance of an "ex parte order" for wire tapping and eavesdropping, but does not set out a form to be followed in drafting the orders.[37] The conventional search warrant statute does provide such a form:

> B. The warrant shall be in substantially the following form:
> "County of ....., state of Arizona
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> To any sheriff, constable, marshal or policeman in the County of .....
>
> Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken), that (stating the grounds of the application or that there is probable cause for believing), you are therefore commanded in the day time (or in the night time), to make immediate search of the person of C. D. (or in the house, or the place to be searched, describing it with reasonable particularity) for the following property (describing it) and if you find the property or any part thereof, to bring it forthwith before me, at (stating the place).
>
> Date, signature and title of office."[38]

The omission of a form for section 13-1057 raises the question whether the legislature intended that statute to be read together with section 13-1445 B — the conventional search warrant statute. A constructional principle relevant to situations involving statutes of related subject matter hints at an affirmative answer: since there is a presumption that the legislature was cognizant of prior statutes dealing with the same subject matter, it is established that "in the absence of any express repeal or amendment therein, the new provision" is deemed to have been "enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together."[39] It can accordingly be argued persuasively that the legislature intended for section 13-1057 to be read in conjunction with section 13-1445 B, since the latter statute prescribes the form for search warrants, and the "ex parte order" under the former statute is nothing more than a search warrant.[40]

Applying these principles, the defects in § 13-1057 disappear, for that section can then be read to comply fully with *Berger* and *Katz*. Reading section 13-1057 in conjunction with section 13-1445 B, except insofar as the former contains provisions which conflict with the latter, the following result is obtained: The officer executing the order must do it "immediately."[41] The property sought — the conversations of the per-

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[37] *See* Appendix for a suggested Model Form.

[38] ARIZ. REV. STAT. ANN. § 13-1445 B (1956).

[39] Frazier v. Terrill, 65 Ariz. 131, 135, 175 P.2d 438, 441 (1946).

[40] The United States Supreme Court, in *Berger*, seemingly recognized this by treating the terms interchangeably.

[41] ARIZ. REV. STAT. ANN. § 13-1445 B (1956).

son or persons named in the warrant — must be described.[42] The officer is required to bring the property or any part of it which is seized "forthwith" to the magistrate who issued the warrant[43] — a requirement which in effect forces the officer to terminate the search as soon as he finds the property described in the warrant. And, reading the case law of the general provision into the specific provision, it is plain under *State v. Pina*[44] that a new showing of probable cause would be needed to renew a wire tap or eavesdrop warrant. In *Pina,* the court held that once an officer has executed a warrant by making a search under it, the warrant is void and a second search based upon the same warrant is *per se* unreasonable. *Pina,* therefore would satisfy the fourth amendment objections raised by the *Berger* Court to warrants which allow "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."[45]

C. The Language in Section 13-1057 Is Itself Susceptible to a Construction which Meets Berger and Katz.

On its face, the section does not require the conversations sought to be particularly described.[46] But that difficulty may be removed by a liberal interpretation of the statute[47] and by a consideration of all its provisions so as to effectuate the main intent and purpose of the legislature.[48] It is necessary for the applicant to state that there is probable cause to believe that a specific crime "has been or is being committed, and that there is probable cause to believe that evidence of such crime may be obtained."[49] It can be argued that in order to establish such probable cause, the applicant would have to describe the subject matter of the conversations sought, thus meeting *Berger* in part. *Berger* also required that the conversation sought be described with "particularity" in the warrant. But a court could easily find a legislative intent that the warrant set out the description with particularity, since without such a requirement the executing officer would not know what he is to search for.

The *Berger* Court's objection to the long period of effectiveness of the New York warrant would seem to render vulnerable the parallel Arizona provision as well. However, by reading the section's provisions together and interpreting the terms broadly, the court could readily find that the phrase "for the time specified therein"[50] means that the

[42] *Id.*
[43] *Id.*
[44] 94 Ariz. 243, 383 P.2d 167 (1963).
[45] 388 U.S. at 59.
[46] *See* text of § 13-1057 *supra* at p. 453.
[47] ARIZ. REV. STAT. ANN. § 1-211 B (1956) (requiring the courts to give all statutes a liberal construction).
[48] Powers v. Isley, 66 Ariz. 94, 183 P.2d 880 (1947).
[49] *See* text of § 13-1057 *supra* p. 453.
[50] *Id.*

"time" must be a period which is reasonably necessary under all the circumstances to obtain the conversation sought. Such an interpretation would satisfy *Berger* for it would result in the order being effective for the time which is reasonably necessary under all the circumstances to obtain the conversation described in the affidavit, but in no event for longer than one month.

The requirement in *Berger* that the eavesdrop be terminated immediately upon obtaining the conversation described in the warrant may also be satisfied by a construction of the Arizona section which takes into consideration all of the section's provisions. The section reads, "If any wire tapping or eavesdropping takes place pursuant to such order, the applicant shall file immediately with the judge or justice an affidavit . . . setting forth in detail all information obtained by the wire tapping or eavesdropping."[51] The word "immediately" was not present in either House Bill 8 or 19 as introduced.[52] The insertion of that word would be a nullity unless it is read as referring to that point in time when the conversation described in the order has been obtained. That is, the officer must immediately terminate the intrusion upon obtaining the described conversation so that he may "immediately" file with the judge who issued the order the affidavit detailing the conversations obtained.

Berger also was critical of the New York statute because it did not require that notice of a prospective search be given. The Arizona provision similarly lacks anything resembling a notice provision. After *Katz*, however, this seems no longer to be a constitutional requirement,[53] for the Court has recognized that wire tapping and eavesdropping by their very nature preclude the giving of notice.

CONCLUSION

It seems, then, that many avenues are open to the Arizona Supreme Court to sustain the statute's constitutionality. Once that court gives its constitutional gloss to the statute, the federal courts will presumably read the statute together with its accompanying case law, and similarly

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[51] *Id.*

[52] *Compare* H.B. 8, 28th Legis., 1st Reg. Sess. (Ariz. 1967) *and* H.B. 19, 28th Legis., 2d Reg. Sess. (Ariz. 1968) *with* ARIZ. REV. STAT. ANN. § 13-1057 (Supp. 1968).

[53] Mr. Justice Stewart, in a footnote to *Katz*, stated in part:

> In omitting any requirement of advance notice, the federal court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. . . . Thus the fact that the petitioner in *Osborn* was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in *Berger* from reaching the conclusion that the use of the recording device sanctioned in *Osborn* was entirely lawful. 88 S. Ct. 507, 513-14 n.16 (1967).

sustain it. Nevertheless, in light of the legislature's unwise decision to borrow so heavily from the unconstitutonal New York statute, there is a real possibility that the Arizona Supreme Court will take the view that the statute is unconstitutional. If it does, the Arizona legislature is in effect left in the position it occupied prior to its enactment of House Bill 19 — *i.e.*, faced with drafting a statute which constitutionally authorizes wire tapping and eavesdropping by law enforcement officers. The legislature could have — and should have — avoided all of the problems presented by the section, including the problem of having to repeal it and re-enact a constitutional statute should the section be declared unconstitutional, by meeting *Berger* and *Katz* in explicit language in the first place,[54] or simply by passing House Bill 90, a bill designed to amend the general search warrant statute to permit the seizure of "mere evidence" of a crime, which presumably would have included "conversations" and implicitly would have authorized search warrants for eavesdropping. House Bill 90, although not controversial and not pregnant with constitutional problems, surprisingly died during the Legislative Session. Even in its unamended form, however, the conventional search warrant statute could have authorized warrants for conversations which *actually constituted* a crime (*e.g.*, conspiracy), as opposed to conversations which merely constituted evidence of crime.[55] But the conventional warrant statute can no longer be used for that limited purpose, since section 13-1057 now purports to constitute the *exclusive* authority for wire tapping and eavesdropping. If, therefore, section 13-1057 is declared unconstitutional, the legislature will ironically have performed a *disservice* to law enforcement by taking away its one limited statutory source of wire tapping and eavesdropping authority and replacing it with nothing.

APPENDIX

Model Form for Wire Tapping and Eavesdropping Orders Under Section 13-1057

"County of ....., state of Arizona

To (insert the name or names of the officers who will be conducting the eavesdrop or wire tap)

Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken), that there is probable cause to believe that the crime of ..... has been or is being

[54] For a discussion of the choices the Arizona legislature could have made in borrowing other state's statutes, see Note, *Electronic Surveillance After Berger*, 5 SAN DIEGO L. REV. 107 (1968). For a discussion of the changes made in New York's wire tap-eavesdrop provisions by the New York legislature see Pitler, *Eavesdropping and Wiretapping — The Aftermath of Katz and Kaiser: A Comment*, 34 BROOKLYN L. REV. 223 (1968).

[55] ARIZ. REV. STAT. ANN. § 13-1442 (1956).

committed and there is probable cause to believe that evidence of that crime may be obtained by wire tapping (eavesdropping), you are therefore commanded to proceed to (describing with particularity the place where the eavesdropping or wire tapping is to be conducted and in the case of telegraphic or telephonic communications, identifying the particular number or telegraph line involved) and wire tap (eavesdrop) upon the conversation, communication or discussion (describing the conversation, communication or discussion with particularity)[56] between (describing with particularity the person or persons whose communications, conversations or discussions are to be overheard or recorded), and (describing with particularity the purpose to be served by overhearing or recording the conversation, communication or discussion). You are further commanded, and it shall be your duty, to begin wire tapping (eavesdropping) at (stating the approximate time when the above described conversation, communication or discussion is to begin) and to continue the wire tap (eavesdrop) for such a period of time as is reasonably necessary under all the circumstances to obtain the conversation, communication or discussion in substance as described above, and at the time you have so obtained the conversation, communication or discussion in substance as described above you will terminate the wire tap (eavesdrop) and file immediately with me an affidavit upon oath or affirmation setting forth in detail all information obtained by the wire tap (eavesdrop). However, if it appears after you have been conducting the wire tap (eavesdrop) for a reasonable period of time that the above described conversation, communication or discussion has not taken place and will not take place, within a reasonable time, then you will terminate the wire tap (eavesdrop) and file with me an affidavit setting forth in detail the time you began the wire tap (eavesdrop) and the time you terminated it. This order shall be valid, and you have authority to wire tap (eavesdrop), only for such period of time as is reasonably necessary to obtain the conversation, communication or discussion in substance as described above, but in no event for more than one month. This order and the papers upon which the application for it was based shall be kept in your possession as authority for the wire tap (eavesdrop) authorized herein.

Date, signature and title of office."

[56] For a discussion of the requirement that the conversation be described with particularity and an example of such a description see Note, *Electronic Surveillance after Berger*, 5 SAN DIEGO L. REV. 107, 126 & n.97 (1968).