

1974 WL 27236 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 26, 1974

***1 Re: Use of tape recorders and recording devices for the purpose of tracing obscene and/or nuisance calls.**

Mr. Rutkowski
Supervisor
Department of Youth Services
Campus Police
1925 Shivers Road
Columbia, South Carolina 29210

Dear Mr. Rutkowski:

You have requested that this Office advise you as to the procedure by which a recording device might be utilized in the criminal investigation of either obscene or threatening telephone calls.

It should be noted that confidential communications are now held to be within the protection of the Fourth Amendment, however this does not place such communications beyond the reach of the police. It appears that reasonably limited search warrants or similar orders can be issued by the appropriate court to allow the use of recording devices on telephones. In the case of [Berger v. New York, 388 U. S. 41, 1966](#), the court invalidated a state statute which purported to authorize wiretapping by ex parte judicial order, but apparently only because of the lack of particularity permitted in the application for the order, and the lengthy period of time (up to two months) for the eavesdropping to continue. In the subsequent case of [Katz v. U. S. 389 U.S. 347 \(1967\)](#) Federal agents 'bugged' the defendant's phone conversations by placing a device on the outside of a public telephone booth from which the defendant regularly used to convey gambling information. The Court held that the Fourth Amendment protected 'people not places,' and therefore, a person is entitled to Fourth Amendment protection, if he justifiably expected that his communication would be private.

As a constitutional rule of exclusion the Katz decision is equally binding on the States. The effect of the Katz decision is that without prior judicial authority, wiretapping or electronic eavesdropping is per se an unreasonably search. This opinion however has been interpreted as giving judicial approval for statutory procedures whereby eavesdropping and wiretapping could be conducted under prescribed circumstances. The Court also apparently approved wiretapping performed pursuant to a judicial search warrant. While there is no statute permitting wiretapping in this State, it does appear that the Katz decision will allow such to be done if a judicial search warrant had previously been issued.

I might bring to your attention the Federal statute [18 USC Section 2510 \(1968\)](#) which regulates and restricts wiretapping and electronic eavesdropping. Generally the Act bars the unauthorized interception by any kind of device of any communication by wire, or any oral conversation uttered in the expectation of privacy. (Section 2511). The violation of the Act is a felony; and civil damages are recovery. (Section 2520). The use of any evidence obtained pursuant to such unlawful interruption is prohibited in any proceeding for any governmental body, federal, state, or local. However, the Federal statute does permit wiretapping under the following circumstances:

***2** (1) by court order, wiretapping is permitted when authorized by a court order or warrant based upon issuing of probable cause as to the commission of the specific crimes. Section 2516.

(2) Interceptions and by specific exceptions provided by in the Statute; principally interceptions by persons engaged in lawful communication activities, switchboard operators, telephone companies employees, etc. It might be noted that under this section interceptions are permitted with the consent of either party to the communication. For example, with the consent of one party to conversation, law enforcement officials would be authorized and within their rights in listening on an extension receiver. Section 2511(2). It is generally held that there is 'no interception' where either party consents, since the party himself could testify to the conversations, and, therefore can consent to another's listening in. See [Rathbun v. U. S.](#) 355 U.S. 107.

It is therefore the apparent law that a wiretap would be authorized pursuant to a judicial search warrant, or with the consent of a party to the conversation.

I trust this has been sufficient in answering the question which you posed. If we can be of any further assistance, please do not hesitate to call or write.

Very truly yours,

Timothy G. Quinn
Senior Assistant Attorney General

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