

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

INVOLABILITY OF COMMUNICATIONS VIA CELL PHONE
(INVOLABILIDAD DE LAS COMUNICACIONES A TRAVÉS DE TELÉFONO CELULAR)

CASE: *Contradicción de Tesis 194/2012*

REPORTING JUSTICE: Guillermo I. Ortiz Mayagoita

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: October 10, 2012

KEY WORDS: Inviolability of communications, inviolability of communications through cell phone or electronic means, article 16 of the Constitution, private communications as evidence.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Contradicción de Tesis 194/2012*, First Chamber, Guillermo I. Ortiz Mayagoita, J., decision of October 10, 2012, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/CT194-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Contradicción de Tesis 194/2012*, Mexico.

SUMMARY OF THE *CONTRADICCION DE TESIS* 194/2012

BACKGROUND: On May 8, 2012, a possible contradiction of decisions between the criterion held by a collegiate court of Cuernavaca and the criterion held by a collegiate court in Chihuahua, both resolving respective *amparos directos*, was reported. These decisions discussed the power of the prosecuting authority or its agents to review, extract, or use as evidence the electronic files stored on the cell phone owned by the detainee in connection with the commission of a crime.

ISSUE PRESENTED TO THE COURT: Whether a prosecuting authority's review, extract, or use as evidence of the electronic files stored in the form of text, audio, image or video of the cell phone owned by the detainee related to the commission of a crime constitutes a violation of the protection from interception of private communications preserved in article 16 of the Constitution.

HOLDING: This Court determined that the collegiate court decisions were contradictory and indicated the correct criterion to apply based on the following reasoning. Under article 16 of the Constitution, the interception of a private communication requires the authorization of the federal judicial authority, at the request of the federal authority that the law authorizes or the head of the Prosecutor's Office of the corresponding state. On this basis, all existing and future forms of communication must be protected by the fundamental right to the inviolability of private communications, as is the case with the information stored on a mobile phone, classified as private by this Court. The constitutional protection refers not only to the communication process, but also to the data that the communication identifies. In this regard, recording the numbers dialed by a user of the telephone network, the identity of the communicators or the duration of the telephone call, without the necessary restrictions that guarantee the fundamental right to the secrecy of communications, can cause a violation. As a result, the evidence obtained, directly or indirectly in violation of fundamental rights, will be invalid. This assertion concerns both evidence obtained by public authorities and evidence obtained by private parties on their own account and at their own risk. In this context, if the investigating authority, when detaining someone, detects that the detainee is carrying a cell phone, the authority may seize the phone

and request the judicial authority to intercept the private communications, in the terms described in the mentioned constitutional provision; therefore if this is done without the judicial authorization, any evidence extracted or derived from it, will be considered unlawful and will have no legal value. Consequently, it was established that the following criterion should prevail as binding precedent: "Right to inviolability of private communications. Its scope of protection extends to data stored on the mobile phone seized from a person arrested and subject to investigation for the possible commission of a crime."

VOTE: The First Chamber decided this matter by a unanimous five votes of Judges Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Guillermo I. Ortiz Mayagoitia y Jorge Mario Pardo Rebolledo (reserved the right to formulate a concurring vote).

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=138865>

EXTRACT OF THE *CONTRADICCION DE TESIS* 194/2012

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 10, 2012, issues the following sentence.

BACKGROUND

p.1 On May 8, 2012, the possible *contradiccion de tesis* between the criterion held by a collegiate court in Cuernavaca and the criterion held by a collegiate court in Chihuahua, both when resolving respective *amparos directos*, was reported.

p.6 The *amparo directo* decided by the collegiate court of Chihuahua gave rise to the isolated decision titled "Interception of private communications. It does not occur when the prosecutor's office investigates the information contained in cell phones related to the commission of a crime."

p.12 For its part, the *amparo directo* decided by the collegiate court of Cuernavaca gave rise to the isolated decision titled "Right to the inviolability of private communications. The fact that the competent judge may, exceptionally, in the pursuit and investigation of crimes, order the intrusion into cell phones, does not imply that the public prosecutor can require investigating agents to reproduce the electronic files contained in the mobile phone of a detainee."

STUDY OF THE MERITS

p.20-21 To determine whether or not the *contradicción de tesis* reported exists, the following considerations are analyzed: (a) The contending courts, when resolving the disputes presented, exercised judicial discretion through an interpretative exercise to reach a certain resolution; (b) The highlighted aspects of these final decisions show that the opposing interpretations by the collegiate courts addressed the same legal problem, whose characteristics and antecedents are essentially identical. Nevertheless, the conclusion reached by the two courts was not the same.

p.21 The collegiate court of Chihuahua did not admit in the *amparo directo* lawsuit filed, stating that the review of the information contained in cell phones related to the commission of a

crime does not constitute an interception of private communications, the inviolability of which is preserved in article 16 of the Federal Constitution and, therefore, the consent of the defendant is not required for the investigating authority to inquire into the information they contain.

p.22 The collegiate court of Cuernavaca did admit its *amparo directo* lawsuit, considering that the right to privacy or intimacy is protected by article 16, first paragraph, of the Federal Constitution, and therefore electronic files stored on cell phones deserve the protection granted to private communications, since currently, through them, people's private and intimate data can be saved in the form of text, audio, image or video, which, if revealed to third parties, may affect their intimacy and privacy, sometimes even to an extent greater than the interception of a verbal or written communication, or invasion of a private home. Thus, in the case of the prosecution and investigation of crimes, the competent judge may order the intrusion of cell phones, but in no case may the Prosecutor require investigating agents to reproduce the electronic files contained in the cell phone of a detainee.

p.23 From the above it is clear that the courts reached different legal positions even though the relevant facts and legal elements to be evaluated are essentially the same.

Based on the above, the existence of the *contradiccion de tesis* is proven.

I. Constitutional framework and interpretation of the right to the inviolability of private communications

The arguments of the two courts raise a genuine question as to whether a prosecuting authority or its agents may review, extract or use as evidence the electronic files stored in the form of text, audio, image or video, on the cell phone of a detainee related to the commission of a crime without violating due process for interception of private communications, preserved in article 16 of the Federal Constitution.

p.24 Thus, this Court stated that in principle the inviolability of private communications is protected in article 16 of the Constitution.

p.25 It has been argued that the inviolability of private communications is a fundamental right. However, to know the scope of constitutional protection, the material limits and the kind of communications protected by this fundamental right must be determined.

The answer to these questions has been clarified by this Court, in the unanimous decision of the *Amparo Directo en Revision* 1621/2010.

p.26 That decision held that the right to the inviolability of private communications has its own autonomy recognized by the Constitution, despite being just one manifestation among others of those rights that preserve a personal scope of action free from third-party interference –such as the right to privacy, to the inviolability of the home or the protection of personal data. It was stated that the right to the inviolability of communications was a formal right, which means that communications are protected regardless of their content. In this regard, there is no need to analyze the content of the communication, or its circumstances, in order to determine its protection by the fundamental law.

p.27 This Court has held that the twelfth paragraph of article 16 of the Constitution prohibits the interception or unlawful knowledge of a communication belonging to someone else. The violation of this right occurs when an external communication is listened to, recorded, stored, read, or registered – without the consent of the interlocutors – regardless of whether, subsequently, the content of the intercepted conversation is disseminated.

With regard to the latter issue, the reservation of communications is imposed only with regard to third parties, and therefore the lifting of secrecy by one of the participants in the communication is not considered a violation of this fundamental right. This does not, however, prevent a violation of the right to intimacy from occurring depending, as noted above, on the specific content of the conversation disclosed.

p. 28 To guarantee the reservation on which any private communicative process is predicated, the First Chamber of this Court emphasized in the *Amparo Directo en Revision* 1621/2010 that it was essential to also protect the external data of the communication because, although the data do not refer to the content of the communication, they often offer information about the circumstances in which the communication occurred, thus affecting, directly or indirectly, the privacy of the communicators.

p.29 The inviolability of private communications also has a temporal scope that extends after the moment in which the communication takes place. This is of particular importance when the message materializes into an item once the communicative process is finished, since there are many media that, by their nature, preserve the content of the conversations.

However, two other issues are important. First, the private communications must be intentionally intercepted by an unrelated third party. This means that the intervention in the communicative process must be intentional and not a consequence of an error or chance. There would be no legal consequence if the person who intervenes fortuitously in a communication of others does not disseminate its content or affect another right. Secondly, the violation of the fundamental right under consideration requires that the message be transmitted by means other than the word or gesture perceived directly between two individuals, independently – again – of the possible violation of the right to privacy.

p.30 Our Constitution does not limit the means through which the protected communication can be produced –an important aspect for the development of this *contradiccion de tesis* because the norm is intended to protect the inviolability of private communications, which can be violated by any current or future means of communication or device.

p.31 The scope of action of an individual that is protected from interference by third parties is not limited to the inviolability of private communications which is a formal guarantee that protects the communicative process regardless of the content of the messages. The fundamental right to intimacy protects another sphere shielded from the knowledge of third parties.

p.34 For these reasons, any evidence obtained from the violation of fundamental rights cannot be taken into consideration in our legal system. The rejection of the evidence affects not only evidence obtained directly in the act violating a fundamental right, but also the evidence acquired from or as a result of it, even if all constitutional requirements have been met in obtaining it. Both have been obtained thanks to the violation of a fundamental right – one directly and the other indirectly – so logically, according to the exclusion rule, they cannot be used at trial.

II. Inviolability of communications via cell phone

p.41 A "cell phone" is defined as a mobile device, small, with processing capabilities (increasingly similar to a PC), with permanent or intermittent connection to a network (Internet), with limited memory, designed to carry out general functions, such as email, talking on the phone, messages, image management, music, and video.

p.42 Thus, it is emphasized that any person who has a cell phone has the right to keep information in the memory of the device, and therefore, according to the scope that the this Court determined with regard to the reservation of communications protected by Article 16 of the Constitution, that information is classified as private, belonging exclusively to that person's sphere of intimacy. That is why the reservation of communications is imposed only with regard to third parties and the lifting of secrecy by one of the participants in the communication is not considered a violation of this fundamental right.

p.43 This Court is aware of the misuse of cell phones in our country through criminal practices such as extortion, blackmail, kidnappings, etc.

That is why the legislator imposed in article 16 of the Constitution a limit on the inviolability of private communications, which is their interception with the prior authorization of the federal judicial authority, at the request of the federal authority authorized by law or the head of the Prosecutor's Office of the corresponding state.

p.44 In this situation, the authority responsible for investigating a crime where a detainee has a cell phone in his possession that may have been used for antisocial purposes is constitutionally authorized to request the judicial authority to intercept the private communications stored in that device, in the terms described in article 16.

The information extracted, via judicial authorization, from electronic files, whether in the form of text, audio, image, or video, strictly related to the possible commission of a criminal act, may be incorporated into the criminal proceedings and, therefore, will be lawful.

However, if information is searched for and obtained without the corresponding judicial authorization, any evidence extracted, or derived from it, will be considered unlawful, as defined by this Court in the precedent in question, since in that case those actions were

taken outside the permitted constitutional margins, which protect the fundamental right to the inviolability of private communications in all existing and future forms of communication.

p.45 Based on this reasoning, it can be concluded that, in order to intercept a private communication in accordance with article 16 of the Constitution, authorization is required by the federal judicial authority, at the request of the federal authority that the law authorizes or of the head of the Prosecutor's Office of the corresponding state, and therefore all existing and future forms of communication must be protected by the fundamental right to their inviolability. This applies to the mobile phone on which information that this Court has classified as private is stored, hence the scope of protection extends to the data stored on that device, whether in the form of text, audio, image or video.

p.46 There is no basis for restricting this right for persons who have been arrested and are subject to investigation for the possible commission of a crime.

In conclusion, if the authority in charge of the investigation, when making an arrest, detects that the detainee was carrying a cell phone, it is authorized to order the securing of that object and to request the judicial authority to intercept the private communications, in accordance with the terms described in the mentioned constitutional provision; and therefore if that activity is carried out without such judicial authorization, any evidence extracted, or derived from it, will be considered unlawful and will have no legal value.

DECISION

p.46-48 In accordance with the foregoing, the criterion established by this Court in the following terms must prevail as binding precedent: "Right to inviolability of private communications. Its scope of protection extends to data stored on the mobile phone seized from a person arrested and subject to investigation for the possible commission of a crime."