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## Duo brings text message privacy case to Supreme Court

By Pat Murphy | Dec. 29, 2021

Two Boston attorneys have asked the U.S. Supreme Court to review a Massachusetts case in an effort to make clear that the Fourth Amendment protects the privacy rights of a defendant whose sent text messages are stored on someone else's cellphone.

"We live in a transformative age in which the power of technology increasingly threatens our guaranteed privacy rights," Carol A. Starkey says in explaining why she and her Conn Kavanaugh colleague, J.P. Christian Milde, decided to take up the baton in *Delgado-Rivera v. Commonwealth*.

Acting pro bono, Starkey and Milde filed a [petition for a writ of certiorari](#) in *Delgado-Rivera* on Nov. 29. Last June, the [Supreme Judicial Court reversed](#) a Middlesex Superior Court judge's order granting the motion of Jorge Delgado-Rivera to join a motion to suppress evidence of text messages discovered by police in Texas on the cellphone of a co-defendant in an alleged drug trafficking conspiracy.

The SJC ruled Delgado-Rivera could not join the co-defendant's motion to suppress because he lacked a reasonable expectation of privacy in text messages sent by him and stored on the cellphone of another.

"Any purported expectation of privacy in sent text messages of this type is significantly undermined by the ease with which these messages can



be shared with others," Justice Frank M. Gaziano wrote for the SJC.

The petition for cert filed by Starkey and Milde asks the Supreme Court to decide whether the Fourth Amendment prevents the government from using a person's text messages against him when those messages are obtained through an unconstitutional search of the recipient's cellphone.

Starkey says the answer to that question should be clear based on the Supreme Court's 2014 holding in *Riley v. California* that warrantless searches of cellphones are unconstitutional in the absence of an applicable exception to the warrant requirement.

"Despite the U.S. Supreme Court [in *Riley*] unanimously holding that warrantless searches of cellphones are unconstitutional, here [in *Delgado-Rivera*] the Massachusetts Supreme Judicial Court held that a sender of a text message couldn't challenge the unlawful, warrantless search of a recipient's cellphone," Starkey says.

According to Starkey, the SJC's decision in *Delgado-Rivera* sends entirely the wrong message.

U.S. Supreme Court "The SJC really gave police officers carte blanche to unlawfully search private cellphones in the hopes of finding evidence against third parties," Starkey says. "What that means is that, absent a warrant exception, the decision of the SJC really encouraged not just 'bad' police officers who will violate the Fourth Amendment, but



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also well-intended officers to use messages obtained in an unlawful search of someone’s cellphone against any other participant in the conversation.”

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Starkey sees a solid foundation for her client’s case in the text of the Fourth Amendment itself, which provides for the security of the people “in their persons, houses, papers, and effects.” On that front, Starkey takes the position that a digitally transmitted text message falls within the category of an individual’s protected “papers.”

“The text of the Fourth Amendment actually tells us that the protection of papers is not dependent on whether the person still possesses the communication, be-

cause the amendment protects ‘papers’ separately from ‘effects;’” Starkey says. “So the protected papers must include papers that are no longer in one’s possession, such as sent messages.”

She says there’s also support for her arguments in a recent decision from Canada’s highest court.

In the 2017 case *R. v. Marakah*, the Supreme Court of Canada held that a defendant had a reasonable expectation of privacy in his sent text messages and was entitled to challenge their seizure from the recipient’s cellphone.

Starkey says that, at bottom, her client’s case is about the need to preserve and uphold existing constitutional rights by enforcing the warrant requirement to search a cellphone.

“If the American people can’t reasonably rely on a pronouncement of a unanimous Supreme Court decision to tell them where to expect privacy, it’s hard to imagine where they should expect privacy.”