Written by **Raven Clabough** on May 6, 2015

Court Finds Warrant Not Needed for Cellphone Location Data

On Tuesday, the 11th Circuit Court of Appeals overturned its own opinion given last year by a three-judge panel and decided that individuals do not have a reasonable expectation of privacy in their historical cell phone records and therefore no warrant is needed to obtain those records.

The case involves the 2012 conviction of Quartavious Davis for a series of robberies in Miami. Davis appealed his conviction, asserting that the cellphone towers that were used to place him at the crime scenes were obtained by court order instead of a warrant, in violation of his constitutionally protected rights.

The *Washington Post* reports,

> Federal investigators obtained Davis's records with a court order based on "specific and articulable facts" showing "reasonable grounds" to believe that his cell tower location records were "relevant and material" to the investigation. That is a lesser standard than a warrant based on probable cause that the records sought will yield evidence of the crime.

Last June, a three-judge panel on the 11th Circuit Court of Appeals ruled for the first time that a warrant is required for the government to obtain an individual's stored cellphone records.

"We hold that cell site location information is within the subscriber's reasonable expectation of privacy," the panel wrote in its decision. "The obtaining of that data without a warrant is a Fourth Amendment violation."

The government argued in the case that historical cellphone tower data is less precise and less invasive than data from phones with GPS technology and therefore requires less protection than a warrant, a notion with which the panel disagreed.

"That information obtained by an invasion of privacy may not be entirely precise does not change the calculus as to whether obtaining it was in fact an invasion of privacy," the court wrote.

But on Tuesday, in a 9-2 ruling, the court overturned its 2014 decision.

Writing for the majority, Circuit Judge Frank Hull stated that cellphone users were well aware of how companies collect data about calls and the role that cell towers play in the collection of that data.

"We find no reason to conclude that cellphone users lack facts about the functions of cell towers or about telephone providers' recording cell tower usage," Hull wrote. "This cell tower method of call connecting does not require a different constitutional result just because the telephone company has

decided to automate wirelessly."

"Cell tower location records do not contain private communications of the subscriber," the court wrote. "This type of non-content evidence, lawfully created by a third-party telephone company … does not belong to Davis, even if it concerns him."

"Davis has no subjective or objective reasonable expectation of privacy in [the phone company's] business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies," the ruling continues.

The court states that the call records of Davis had been lawfully acquired because they were obtained pursuant to the Stored Communication Act, or SCA, which allows authorities to request business records from third-parties if specific facts exist to show there are reasonable grounds to believe the data being sought is "relevant and material to an ongoing criminal investigation."

The court added, "While this statutory standard is less than the probable cause standard for a search warrant, the government is still required to obtain a court order and present to a judge specific and articulable facts showing reasonable grounds to believe the records are relevant and material to an ongoing criminal investigation."

The court ultimately upheld the view that an individual does not have a reasonable expectation of privacy with certain types of information that is voluntarily turned over to third parties, such as phone companies and banks. As noted by the *Washington Post*, this "third party" doctrine has been invoked on various occasions to justify obtaining records without a warrant.

The two dissenting judges were troubled by the application of the third party doctrine in this case, however.

"This slippery slope that would result from a wooden application of the third-party doctrine is a perfect example of why the Supreme Court has insisted that technological change sometimes requires us to consider the scope of decades-old Fourth Amendment rules," the opinion reads.

In the dissenting opinion, Judge Beverly Martin opined that under a plain reading of the majority's rule, Americans ultimately surrender "any privacy interest" whatsoever with regard to data given to third parties.

"Nearly every website collects information about what we do when we visit," she wrote. "So now, under the majority's rule, the Fourth Amendment allows the government to know from YouTube.com what we watch, or Facebook.com what we post or whom we 'friend,' or Amazon.com what we buy, or Wikipedia.com what we research, or Match.com whom we date — all without a warrant."

The Associated Press observes that Tuesday's decision is similar to an earlier ruling by the 5th U.S.

Circuit Court of Appeals, while the U.S. Court of Appeals for the 3rd Circuit in Philadelphia determined that the third-party doctrine does not apply to historical cell tower records because individuals are not able to knowingly volunteer their location information to the provider. Federal appeals courts are also currently considering cases from Maryland and Michigan.

David Oscar Markus, the attorney of Davis, was astonished by the court's findings.

"The reach of the majority opinion is breathtaking," he asserted. "It means that the government can get anything stored by a third party — your Facebook posts, your Amazon purchases, your Internet search history, even the documents and pictures you store in the cloud, all without a warrant."

Orin Kerr, a constitutional lawyer and professor at George Washington University, believes the ruling to be “a noteworthy expansion of the exception to the warrant requirement,” and holds that it is “probably inconsistent” with the Supreme Court.

Markus intends to appeal to the Supreme Court, which is expected to take the case, as it so often does when lower courts are in disagreement.