

# Eleventh Circuit Court of Appeals: Warrantless Cell Site Data Constitutional

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The U.S. Court of Appeals for the Eleventh Circuit, sitting as a full panel, has ruled that law enforcement may acquire historical cell site data information (i.e., past location information) from wireless telecommunications providers without first obtaining a warrant. This decision has important implications for wireless telecommunications providers, as it may increase the amount of requests received from law enforcement under the Stored Communications Act.

*United States v. Davis* centered on the question of whether law enforcement officials can request historical cell site data information from wireless telecommunications providers without first obtaining a warrant under the Fourth Amendment. While an earlier three-judge panel found this unconstitutional, the Eleventh Circuit, sitting *en banc*, held the practice constitutional. Historical cell site data information is the information wireless telecommunications providers track regarding the geographic location of a cellular call's origination and termination. Wireless providers maintain this information for a variety of purposes, including to accurately determine if an individual was roaming at the time of the call and to track high-volume areas and make infrastructure improvements accordingly. In law enforcement's hands, this information can be aggregated and used to track an individual's movement.

In *Davis*, the individual was charged and convicted of several crimes and sentenced to over 150 years in prison. The evidence offered against Davis included 67 days of historical cell site data information. Davis was a heavy user of his phone, meaning that there were 5,803 separate call records, or 11,606 cell site location data points provided.

The majority opinion grounded its analysis in the "third-party doctrine," developed out of *Smith v. Maryland* (incoming and outgoing phone numbers recorded by pen register are not private information requiring a warrant) and *United States v. Miller* (no Fourth Amendment right of privacy in bank records). Under the third-party doctrine, an individual has no reasonable expectation of privacy in information provided to third parties, such as banks and telecommunications providers. The rationale is that nothing shared with third parties can be private.

Because the third-party doctrine provides no reasonable expectation of privacy, the Court held that the Stored Communications Act (SCA) provided more protection than the Fourth Amendment. This is because before law enforcement can subpoena information under the SCA, it must first receive a court order. And prior to receiving the court order, law enforcement must offer "specific and articulable facts showing that there are reasonable ground to believe that the contents . . . are relevant and material to an ongoing criminal investigation." Search warrants, by contrast, are issued only if a court finds that a much higher standard is satisfied – "probable cause to believe that a criminal offense has been committed or is

about to take place.” *Davis* suggests that splintered circuit court opinions could result in no nationwide standard to guide law enforcement and service providers.

The law in this area is evolving rapidly. Continued litigation of these issues is anticipated, especially given recent Fourth Amendment-protective opinions by the Supreme Court in *Riley v. California* (warrant generally required to search cell phone, even when seized as a search incident to arrest) and in *United States v. Jones* (warrantless attachment of GPS tracking device to vehicle violated Fourth Amendment). Justice Sotomayor’s concurrence in *Jones* may foreshadow future Supreme Court arguments on the third-party doctrine which, she concludes, is “ill suited to the digital age.” The now-vacated panel opinion in *Davis* relied on this concurrence extensively.

Our telecommunications and white collar and government investigation groups continue to carefully track these issues and provide guidance considering these significant developments. We stand ready to assist and advise our clients as digital privacy issues continue to evolve.

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