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Sandy Davis

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Hey Siri, How Does the Judicial System Treat Searches and Seizures of Electronic Devices? Here's What I Found*

I. INTRODUCTION

In a world where access to an expansive array of information is open and freely available from our back pockets, entrenched legal notions such as privacy and property come to the fore.¹ More to the point, the Fourth Amendment² test for balancing government and possessory interests plays an ever-expanding role in shaping how government agencies search and seize our electronic devices—or more precisely, our “virtual homes.”³

When the government searches and seizes personal property, it must do so within the scope of Fourth Amendment reasonableness. When that personal property is an electronic device, such a search and seizure must be carried out in a fashion that is not only reasonable but comports with notions of investigative diligence and undue delay.

*I would like to thank my Casenote advisor, Anne Johnson, for her dedication to this Article and this subject. It was our conversations about this topic that inspired this Article. A big thank you also to my family who never fails to support me. And finally, muito obrigada (thank you very much) to Rodrigo, who never fails to believe in me and my larger than life ideas.

1. For an approach limiting expansive use of the judicial body in the area of technology and Fourth Amendment doctrine, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 857 (2004).

2. U.S. CONST. amend. IV.

3. *United States v. Mitchell*, 565 F.3d 1348, 1352 (11th Cir. 2009). See Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189 (2018). The author posits a moralistic perspective of the Supreme Court's jurisprudence in this area. More specifically, the Supreme Court has tended to shape its concept of privacy in relation to social and moral attitudes about the particular object or activity being adjudicated, *Id.* at 1234–35.

When the Supreme Court of the United States articulated its test regarding reasonable searches and seizures, it did so during an age when personal property was less intrinsically valuable to owners. Today, courts are confronted with the challenge of incorporating these traditional notions of Fourth-Amendment reasonableness into searches and seizures of personal effects that are intimately connected with personal identity. Fortunately, the judicial system has begun to slowly modify its test in light of modern technological advances in its attempt to keep abreast of a world that is blazing ahead on a path of technological change.

The Georgia Supreme Court recently joined both the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit on this path when they reviewed the search and seizure of electronic devices in *Rosenbaum v. State*.⁴

II. FACTUAL BACKGROUND

Jennifer and Joseph Rosenbaum were the foster parents of two-year-old Laila Daniel who passed away on November 17, 2015. Not even one month later, the couple was arrested in connection to Laila's death and for the abuse of her sister. During their arrest and transportation to jail, police lawfully seized the Rosenbaums' computer, iPad, and cellphones. Officers subsequently logged each of these items into the county property room for safekeeping and attached the property receipts for those devices to the arresting and transporting officers' reports.⁵

Shortly after their arrest, the Rosenbaums requested the return of their electronic devices, but to no avail. The couple further solicited the return of those devices on two other occasions in 2016: once in a motion to recuse, and then again at a bond hearing. On both occasions those requests for return fell on deaf ears.⁶ One year later, during a conversation with the Cobb County District Attorney, the detective assigned to the case could not recall whether any such devices were recovered from the Rosenbaums.⁷

The District Attorney did not become aware of the existence of the electronic devices until nearly a year and a half after their seizure.⁸ Just three days after that revelation, and 539 days after the seizure of the electronic devices, the first of two warrants was issued for those

4. 305 Ga. 442, 826 S.E.2d 18 (2019).

5. *Rosenbaum*, 305 Ga. at 442–43, 826 S.E.2d at 20–21.

6. *Id.* at 444–45, 826 S.E.2d at 22.

7. *Id.* at 444, 826 S.E.2d at 22.

8. *Id.*

devices. A few months later, and a whopping 702 days after the seizure of the electronic devices, the second of two warrants was issued for those devices.⁹ When the lead detective was later questioned as to why he was unaware of the seizure, he admitted that he had not fully read his own officers' reports.¹⁰

Nearly two years after their arrest, the Rosenbaums moved to suppress any evidence retrieved pursuant to the warrants issued in May and November of 2017. The Rosenbaums argued before the court and maintained that, for the last two years, they had sought the return of their electronic devices following three separate occasions: (1) shortly after their arrest from the Henry County District Attorney; (2) in March 2016 at the motion to recuse; and (3) in September 2016 at a bond hearing. What's more, when questioned at the suppression hearing, the Henry County District Attorney could not recall having any prior knowledge of the existence of the electronic devices.¹¹

The Rosenbaums' motion to suppress was granted by the trial court one month later. The trial court granted the motion and ruled that the delay between seizure and the issuance of warrants for the electronic devices was unreasonable under the Fourth Amendment. The state then appealed the trial court's order in March 2018.¹²

On appeal, the Georgia Supreme Court examined the trial court's analysis of the delay and ultimately affirmed.¹³ The Georgia Supreme Court ruled that the search of the electronic devices was unreasonable due to the delay in obtaining the warrants.¹⁴

III. LEGAL BACKGROUND

A. Seizure of Property Under the Fourth Amendment: A Reasonableness Standard

In *United States v. Place*,¹⁵ the Supreme Court of the United States began to develop its reasonableness standard, as it relates to delays in

9. *Id.* at 443, 826 S.E.2d at 21.

10. *Id.* at 454, 826 S.E.2d at 28.

11. *Id.* at 445–46, 826 S.E.2d at 22–23.

12. *Id.* at 446, 826 S.E.2d at 23.

13. *Id.* at 454–55, 826 S.E.2d 28.

14. *Id.* at 455, 826 S.E.2d 28. The Rosenbaums were ultimately convicted in July 2019 for the death of their foster daughter. Joshua Sharpe, *Ex-Foster Parents Found Guilty, Sentenced in Murder Trial*, ATLANTA J. CONSTITUTION (Aug. 1, 2019), <https://www.ajc.com/news/local/jury-still-deliberating-foster-parents-murder-trial/rKC2uz0irJY3nmytPEnwWO/>.

15. 462 U.S. 696 (1983).

searches and seizures.¹⁶ The foundation of this reasonableness standard arises out of a case involving an interstate traveler and his luggage. After a call from Drug Enforcement Agents (DEA) in Miami, agents at LaGuardia Airport stopped the traveler and subjected his luggage to a “sniff test” by a narcotics dog. The time elapsed during the seizure was about ninety minutes. The agents were able to obtain a warrant on the basis of the sniff test a few days later and found 1,125 grams of cocaine inside the traveler’s luggage. The trial court ultimately denied the traveler’s motion to suppress the evidence of that search.¹⁷

The Supreme Court held that there were two major factors it would consider when determining the reasonableness of searches under the Fourth Amendment: (1) the length of the detention (or the “brevity of the invasion”) and (2) the police’s investigative diligence.¹⁸ Behold, the Fourth Amendment reasonableness standard was born: “[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”¹⁹ Essentially, it was the fact that DEA agents at LaGuardia Airport had sufficient time to prepare arrangements for the traveler, which would have “[M]inimized the intrusion on [his] Fourth Amendment interests” that rendered the seizure unreasonable.²⁰

Just one term later, in *United States v. Jacobsen*,²¹ the Supreme Court took up yet another landmark Fourth Amendment case. In that case, federal agents discovered a bag of suspicious white powder further subsumed within two larger packages. The white powder was tested on-site and confirmed as cocaine. Pursuant to the confirmation, agents obtained a search warrant and arrested Bradley and Donna Jacobsen.²²

In that case, the Supreme Court defined and delineated a search from a seizure under the Fourth Amendment.²³ According to the majority, a search arises when “an expectation of privacy that society is prepared to consider reasonable is infringed,” and a seizure arises when “there is some meaningful interference with an individual’s possessory

16. *Place*, 462 U.S. at 703.

17. *Id.* at 698–700 (holding that seizure was proper as it was based on reasonable suspicion and that Place’s Fourth Amendment rights were not violated).

18. *Id.* at 709.

19. *Id.* at 703.

20. *Id.* at 709–10.

21. 466 U.S. 109 (1984).

22. *Jacobsen*, 466 U.S. at 111–12.

23. *Id.* at 113.

interests in [their] property.”²⁴ Furthermore, the Court articulated that warrantless searches are presumptively unreasonable and cannot be characterized as reasonable simply because law enforcement discover contraband *post hoc*.²⁵ Additionally, the Court held that even seizures lawful in their inception can still violate the provisions of the Fourth Amendment when that seizure unreasonably infringes upon the possessory interests protected by the Fourth Amendment.²⁶ Therefore, the Supreme Court built on its foundation in *United States v. Place* and further defined the nature of Fourth Amendment interests as both privacy and property related.²⁷ However, an important distinction was made by the Court in *United States v. Jacobsen*, when it described Fourth Amendment interests as possessory as in relation to seizures, but as privacy in relation to searches.²⁸

In 2001, the Supreme Court examined a case involving reasonable delay in the search of a dwelling.²⁹ After being informed of the presence of dope in Charles McArthur’s home, an officer went to obtain a warrant for that residence. Even after being warned by a remaining officer that McArthur could not reenter the home without the presence of the officer, McArthur did reenter his residence three separate times. On each occasion the officer stood just inside the doorway. Law enforcement obtained a warrant at around five that evening and searched the residence. Inside, the officers discovered marijuana and drug paraphernalia. Mr. McArthur moved to suppress the evidence as “fruit of the unlawful search,” which the trial court granted.³⁰

The Supreme Court ruled that the search and delay was reasonable and held that it would not adopt a *per se* rule of unreasonableness as it relates to Fourth Amendment requirements.³¹ Rather, the Court again adopted the reasonableness approach under *United States v. Place* by balancing “the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”³² The Court ultimately ruled that the government-related concerns were considerable, and thereby remarked that the officers in this case respected McArthur’s

24. *Id.*

25. *Id.* at 116.

26. *Id.* at 124.

27. *Id.* at 113.

28. *Id.*

29. *Illinois v. McArthur*, 531 U.S. 326 (2001).

30. *McArthur*, 531 U.S. at 329.

31. *Id.* at 331. Presumably because the court has preferred its balancing approach. Requiring a *per se* rule would, necessarily eliminate the need to balance possessory and governmental interests.

32. *Id.*

privacy interests by neither searching his home nor arresting him without a warrant.³³ Ultimately, the Court held that the search was reasonable and demonstrated its continuing adherence to the balancing approach of *United States v. Place* relating to reasonableness in circumstances involving the seizure of both person and property.³⁴ It furthermore reinforced the Court's privacy–property distinction in *United States v. Jacobsen*, as McArthur had only a privacy-related interest in his home, which was searched.³⁵

Finally, turning the clock back to the 1960s, the Supreme Court, in its landmark decision in *Katz v. United States*,³⁶ toyed with the concept of a constitutional right to privacy. In that case, the Federal Bureau of Investigation (FBI) wiretapped a public phone booth and listened to the defendant's calls. The government then sought to use those calls against the defendant at trial, which the trial court allowed.³⁷

In ruling the wiretap unconstitutional by Fourth Amendment standards, the Supreme Court relied partly on the constitutional understanding of privacy under that amendment.³⁸ The Court articulated that the Constitution does not provide for any general right to privacy, but rather, protects individual privacy against specific government intrusion.³⁹ In so holding, the Court articulated that “the Fourth Amendment protects people, not places,” even when those people carry out protected activities in a public space.⁴⁰

The benchmark test for determining what is constitutionally protected as privacy was articulated by Justice Harlan in his concurring opinion.⁴¹ In that opinion, privacy-related interests must meet two

33. *Id.* at 332.

34. *Id.* at 334.

35. *Id.* at 332 (making no argument for or against possessory interest in the seized drugs or drug paraphernalia).

36. 389 U.S. 347 (1967).

37. *Katz*, 389 U.S. at 348.

38. *Id.* at 350.

39. *Id.*; see James K. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L. J. 645 (1985) (explaining that even the Supreme Court in the 1960s attempted to understand the Fourth Amendment in light of a vastly changing modern world instead of construing that amendment's provisions from the perspective of an old wooden bench in the eighteenth century).

40. *Katz*, 389 U.S. at 351 (“But what [the defendant] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”). Interestingly, the balancing approach seeks to protect individuals by looking to the nature and quality of the intrusion. This necessarily requires courts look at possessory interests in light of government action, not possessory interests as they exist in and of themselves.

41. *Id.* at 361 (Harlan, J., concurring).

requirements: (1) the person seeking protection must show a subjective expectation of privacy; and (2) such an expectation must be one in which “society is prepared to recognize as ‘reasonable.’”⁴² In so holding, such privacy interests that society deems reasonable include neither public conversations nor objects that are within a protected space but are nevertheless within “plain view” of the public eye.⁴³

B. Expanding the Reasonableness Inquiry: Delay in Obtaining a Search Warrant

In *United States v. Mitchell*,⁴⁴ the United States Court of Appeals for the Eleventh Circuit later considered the Fourth Amendment reasonableness standard and expanded upon it for the purposes of analyzing undue delay in relation to the search and seizure of electronic devices.⁴⁵ In 2005, Immigration and Customs Enforcement (ICE) agents took up an investigation of internet child pornography. After admitting he might have child pornography on his computer, Mitchell gave ICE agents permission to search his laptop, but denied consent to search his desktop. Agents ultimately removed the desktop’s hard drive to search it. Three days later one ICE Agent left for a two-week training course in Virginia. It was not until twenty-one days after the initial seizure that the ICE Agent submitted a twenty-three-page affidavit in support of a warrant. Of those twenty-three pages, twenty pages contained boilerplate language. After completing the search, ICE Agents discovered images of child pornography on the hard drive. The trial court denied Mitchell’s motion to suppress the evidence obtained from his hard drive.⁴⁶

On appeal, Mitchell challenged the initial seizure of the desktop hard drive on the ground that the twenty-one-day delay in obtaining a warrant was unreasonable.⁴⁷ The Eleventh Circuit held that a warrant that is based on probable cause could nevertheless violate the Fourth Amendment’s reasonableness requirement if law enforcement officers

42. *Id.* (Harlan, J., concurring). Courts have since abandoned analysis under the first prong and relied, almost exclusively, on analysis under the second prong. Tomkovicz, *supra* note 39 at 654.

43. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). What then, are courts to do in cases which involve private social media pages? Such pages exist in a quasi-public sphere, but are nevertheless in a “protected space” by way of passwords and required acceptances of friend requests.

44. 565 F.3d 1348 (11th Cir. 2009).

45. *Id.*

46. *Id.* at 1348–50.

47. *Id.* at 1350.

delay in obtaining a search warrant for seized property.⁴⁸ Further, the Eleventh Circuit noted that when balancing privacy interests against government interests, the court should consider that individuals have a significant possessory and privacy interest in personal computers and electronic data.⁴⁹

The Eleventh Circuit overruled the trial court's denial of Mitchell's motion to suppress and further remarked that Mitchell's possessory interest was not eliminated, even if diminished, by the presence of probable cause.⁵⁰ According to the Eleventh Circuit, there was no compelling justification for delay because ICE Agents had ample time, prior to leaving the state, to submit an affidavit for a warrant. Further, the affidavit submitted to the magistrate judge was lacking in the detail expected from a twenty-one-day delay.⁵¹ Rather, the court's rationale urged that expediency was required in this case because the sooner a warrant is issued, the sooner a property owner's possessory interest in his property can be restored to him.⁵² The Eleventh Circuit noted that this applies with even greater force to personal data which "is the digital equivalent of its owner's home, capable of holding a universe of private information."⁵³ As such, the reasonableness inquiry, as it relates to delay, is evaluated on a case-by-case basis and is highly dependent upon the circumstances surrounding the delay.⁵⁴

In *United States v. Burgard*,⁵⁵ the United States Court of Appeals for the Seventh Circuit also analyzed the Fourth Amendment reasonableness factor in light of undue delay and the seizure of a cell phone.⁵⁶ Unlike the Eleventh Circuit's holding in *United States v. Mitchell*, the Seventh Circuit ultimately held that a six-day delay in

48. *Id.* Presumably, delay implies lack of sufficient governmental interest sufficient to defeat individual interest.

49. *Id.* at 1351 ("Computers are relied upon heavily for personal and business use. Individuals may store personal letters, emails, financial information, passwords, family photos, and countless other items of personal nature in electronic form.").

50. *Id.*

51. *Id.*

52. *Id.* at 1352.

53. *Id.* (quoting *Kansas v. Rupnick*, 280 Kan. 720, 735 (2005)).

54. *Id.* Particularly in light of circumstances which involve the seizure of highly personal data.

55. 675 F.3d 1029 (7th Cir. 2012).

56. *Id.* Courts and parties alike commonly juxtapose *United States v. Mitchell* and this case, depending on whether the outcome of the case is the exclusion or non-exclusion of evidence. See *State v. Stacey*, 171 N.H. 461, 465–67 (2018).

this case was not unreasonable and, therefore, upheld the trial court's decision to deny Burgard's motion to exclude evidence.⁵⁷

In this case, a law enforcement officer obtained information that Burgard's cell phone contained sexually explicit images of young girls. The officer pulled Burgard over while driving, seized his cell phone, and took it to his precinct to log it into evidence. Burgard followed the officer to the precinct to obtain the property receipt for his cell phone. Due to conflicting schedules and a supervening robbery investigation, the officer was unable to submit an affidavit in support of a warrant until six days after obtaining Burgard's phone. Pursuant to that warrant, officers retrieved sexually explicit images of young girls from Burgard's phone.⁵⁸ The trial court denied Mr. Burgard's motion to suppress the evidence obtained from the search of his phone.⁵⁹

The Seventh Circuit applied only a property theory—as opposed to a privacy theory—of seizure as it relates to the individual's possessory interest when it utilized the *United States v. Place* balancing test.⁶⁰ The effect of such a proposition shaped the court's ruling by articulating a set of informal factors which heavily implicate property concerns.⁶¹ One such factor—the brevity of the seizure—implicated a concern for the infringement upon possession of the item.⁶² Additionally, not only is the brevity of the seizure an important property consideration, but so too is the defendant's assertion of some possessory claim to the property seized.⁶³

In analyzing the government's interest in retaining possession of the property, the court heavily relied upon the diligence of officer in obtaining a search warrant.⁶⁴ The diligence of law enforcement

57. *Burgard*, 675 F.3d at 1035.

58. *Id.* at 1031.

59. *Id.* at 1030.

60. *Id.* at 1033 (“On the individual person's side of this balance the critical question relates to any possessory interest in the seized object, not to privacy or liberty interests.”).

61. *Id.*

62. *Id.* As opposed to some analysis of infringement on the individual's privacy.

63. *Id.* This is important because individuals can increase or diminish their possessory interest based, in part, upon any claim they may assert over their seized devices, which arose in this Seventh Circuit case, as well as in *State v. Rosenbaum*, 302 Ga. at 445, 826 S.E.2d at 26. Such an assertion (or reassertion) of possessory interest could have the effect of tipping the balance in favor of the individual over the government's interest.

64. *Burgard*, 675 F.3d at 1034.

necessarily leads to a presumption that the seized property is of particular value to the investigation.⁶⁵

Yet, again in 2012, the Eleventh Circuit revisited its ruling in *United States v. Mitchell* and returned to the reasonableness test as related to the seizure of a hard drive.⁶⁶ In that case, FBI agents initiated a larger investigation into a child pornography distribution ring. That investigation led agents to David Laist. After admitting to possessing child pornography and signing two separate consent to search forms, FBI agents inspected Laist's computer for the incriminating images. After a prompt investigation of the computer,⁶⁷ agents decided it was necessary to seize the laptop. One week after seizing Laist's computer, agents received a revocation of consent letter. At that very moment, the agents began to prepare an affidavit in support of a search warrant.⁶⁸ The affidavit contained, in significant detail, support of the agent's probable cause to search. Agents obtained a search warrant for the computer twenty-five days after initially seizing the property.⁶⁹ Laist, relying on the Eleventh Circuit's holding in *United States v. Mitchell*, moved to suppress the evidence obtained as a result of the warrant.⁷⁰

The Eleventh Circuit, in this case, articulated a formal set of four factors for analyzing the reasonableness of delay: (1) the significance of interference of individual's possessory interest; (2) the duration of delay; (3) whether the individual consented to seizure; and (4) government's interest in retaining the seized property.⁷¹ While the court did not formally include investigative diligence as an enumerated factor, it did articulate the factor as important to the overall analysis.⁷² Moreover, the Eleventh Circuit departed from the property analysis undertaken by the Seventh Circuit in *United States v. Burgard* and, instead, couched its reasonableness analysis under a privacy theory.⁷³

65. *Id.* (stating that the policy undergirding its position was not to encourage slapdash investigative efforts in pursuit of a warrant).

66. *United States v. Laist*, 702 F.3d 608 (11th Cir. 2012).

67. Including an instance where Laist showed the agents a picture of child pornography on the computer.

68. *Laist*, 702 F.3d at 610–11.

69. *Id.* at 610, 611.

70. *Id.* at 612.

71. *Id.* at 613–14 (citing *Mitchell*, 565 F.3d at 1351, *Place* 462 U.S. at 709, *United States v. Stabile*, 633 F.3d 219, 235 (3d Cir. 2011), and *Burgard*, 675 F.3d at 1033).

72. *Id.* at 614 (implicating several other factors important under the diligence inquiry such as, but not limited to: case complexity, overriding circumstances, quality of warrant application, and the amount of time expected to produce that warrant).

73. *Id.* (quoting *McArthur*, 531 U.S. at 331) (“These factors . . . are the most relevant when we seek to ‘balance the privacy-related and law enforcement-related concerns.’”).

When applying privacy theory as they did, and in affirming the trial court's denial of suppression, the Eleventh Circuit ultimately reasoned that much of the behavior exhibited by Laist diminished the overall interest he may have had in his property.⁷⁴ This behavior included: Laist showing agents a photo of child pornography on his computer; Laist allowing agents to search his computer in his apartment; and Laist allowing agents to take his computer.⁷⁵ This behavior ultimately implicated Laist's privacy concerns in his computer, not any property concern he may have had.⁷⁶

In contrast, the government's interest was not only furthered by Laist's actions, but also by the diligence of officers in immediately preparing an affidavit after the revocation of consent.⁷⁷ To that end, the court reasoned that the effort put into the affidavit⁷⁸ and the complexity of the child pornography investigation⁷⁹ further enhanced the government's interest in retaining the property.⁸⁰ The court further pronounced, and renounced any argument to the contrary, proposition that their ruling in *United States v. Mitchell* stood for the creation of a per se rule of unreasonableness.⁸¹ Rather, the most important aspect of the reasonableness of delay evaluation under the Fourth Amendment is that it is a fact-sensitive inquiry requiring a case-by-case analysis of the factors above.⁸²

IV. COURT'S RATIONALE

In *State v. Rosenbaum*, the Georgia Supreme Court reviewed, as a matter of first impression, the Eleventh Circuit's adoption of the reasonableness standard as it applies to delay in obtaining a warrant for seized items—specifically electronic devices.⁸³ In adopting the factors test developed in *United States v. Mitchell* and refined under

74. *Id.* at 616–18 (factually distinguishing its holding in *Mitchell*).

75. *Id.* at 616.

76. *Id.*

77. *Id.* at 616–17.

78. Which contained detailed information beyond mere boilerplate. *Id.*

79. As a whole and not as specifically related to David Laist. *Id.*

80. *Id.*

81. *Id.* at 618. This is because the Supreme Court has articulated the reasonableness test as a balancing test. *Place*, 462 U.S. at 703. See Tomkovicz, *supra* note 39 and accompanying text as explanation for why the judicial system has adopted a balancing test as opposed to a bright-line rule.

82. *Laist*, 702 F.3d at 618. (quoting *Mitchell*, 565 F.3d at 1351).

83. *Rosenbaum*, 305 Ga. 449–50, 826 S.E.2d at 25.

United States v. Laist, an unanimous Georgia Supreme Court ruled in favor of the Rosenbaums.⁸⁴

As a starting point, the supreme court premised their analysis on the foundational principles of Fourth Amendment jurisprudence by articulating that what is at stake in a search and seizure is an individual's possessory interest in his property.⁸⁵ The court elaborated that, under the Eleventh Circuit's framework, this possessory interest is balanced in light of the four factors specifically enumerated in *United States v. Laist*, namely: (a) significance of the interference with the individual's possessory interest; (b) duration of the delay; (c) whether the individual consented to the seizure of his property; and (d) the government's legitimate interest in maintaining the property as evidence.⁸⁶ Ultimately, the court concluded that delay is a highly fact-sensitive inquiry that is to be analyzed on a case-by-case basis, giving weight to all of the relevant circumstances of that case.⁸⁷

The court only addressed the first two factors of the inquiry, as there was clear evidence that the Rosenbaums did not consent to the seizure of the electronic effects and that the government had a strong interest in retaining those effects as evidence.⁸⁸

Moving to each factor in turn, the supreme court looked first at the significance of the Rosenbaums' possessory interest in their electronic devices.⁸⁹ The most important aspect of the analysis was the nature of the property seized from the Rosenbaums: electronic devices.⁹⁰ As both the Supreme Court and Eleventh Circuit have enumerated extensively, individuals have a particularly strong possessory interest in computers and personal electronic devices.⁹¹ Yet further, not only did the

84. *Id.* at 450, 454–55, 826 S.E.2d at 25–26, 28 (per curiam); *Mitchell*, 565 F.3d at 1351; *Laist*, 702 F.3d at 613–14.

85. *Rosenbaum*, 305 Ga. at 450, 826 S.E.2d at 25 (failing to explicitly analyze the search and seizure under a property or privacy theory).

86. *Id.* at 450, 826 S.E.2d at 25–26.

87. *Id.* at 450–51, 826 S.E.2d at 26.

88. *Id.* at 452–54, 826 S.E.2d at 26–28.

89. *Id.* at 451–52, 826 S.E.2d at 26–27.

90. *Id.* at 451, 826 S.E.2d at 26. Interestingly, some commentators have noted that the Supreme Court's analysis of privacy—not explicitly utilized in this case—tends to rest upon moralistic attitudes in relation to the particular object or activity being adjudicated. For example, intimate relationships deemed meaningful have a higher constitutional threshold of privacy than do searches and seizures of something like cocaine. Yet, what about searches and seizures of less objectionable drugs like marijuana? Or less objectionable internet content like excessively violent video games? See Lvovsky, *supra* note 3 and accompanying text.

91. *Rosenbaum*, 305 Ga. at 451, 826 S.E.2d at 26. See *Riley v. California*, 573 U.S. 373 (2014); *Mitchell*, 565 F.3d at 1351; *Burgard*, 675 F.3d at 1033; *Laist*, 702 F.3d at 614.

government seize the Rosenbaums' electronic devices but retained those devices in the face of numerous requests for the return of those items.⁹² Thus, important to this inquiry is not only the nature of the property taken, but also any subsequent reassertion of possessory interest in that property, as was clearly evidenced in this case.⁹³ Finally, the government not only seized personal electronic devices and retained those electronic devices in the face of numerous requests for return, but the government neither objected nor offered opposing evidence to rebut or explain that retention in the face of numerous requests for return.⁹⁴ Consequently, the overwhelming evidence in this case led to the ultimate conclusion that the Rosenbaums neither fatally diminished their possessory interest in their property, but also that law enforcement did not diligently seek to obtain a warrant in compliance with the Fourth Amendment.⁹⁵

Under the second factor, the supreme court ruled that the duration of the delay weighed in favor of the Rosenbaums.⁹⁶ Pertinent to this inquiry is not only the length of time between seizure and issuance of the warrant, but also any relevant circumstances contributing to delay.⁹⁷ Such circumstances include: the complexity of the case, overriding circumstances (such as conflicting schedules or another case), and the difficulty in preparing an affidavit in support of the warrant.⁹⁸ The court concluded that no other case presented before it had seen the actual length of delay that was posed before the court in this case: 539 and 702 days respectively.⁹⁹ Furthermore, the government demonstrated no presence of particular case complexity, no drafting difficulty, and no overriding circumstances.¹⁰⁰ Rather, the delay was solely the result of "[M]ultiple errors, failures, and oversights on the part of the State."¹⁰¹

And while law enforcement officers did at least properly log the evidence into its property room and fill out and attach those property

92. *Rosenbaum*, 305 Ga. at 452, 826 S.E.2d at 26–27.

93. *Id.* See *Burgard*, 675 F.3d at 1033 (“[I]t can be revealing to see whether the person from whom the item was taken ever asserted a possessory claim to it.”).

94. *Rosenbaum*, 305 Ga. at 452, 826 S.E.2d at 26–27.

95. *Id.*, 826 S.E.2d at 27.

96. *Id.* at 454, 826 S.E.2d at 28 (“[T]hat ‘the State did not diligently pursue its investigation as it relates to the content of these devices’ is amply supported by the record.”).

97. *Id.* at 453–54, 826 S.E.2d at 27–28.

98. *Id.*

99. *Id.* at 452–53, 826 S.E.2d at 27.

100. *Id.* at 454, 826 S.E.2d at 28.

101. *Id.*

sheets in accordance with department policy, it “inexplicably” could not locate that evidence after subsequent and numerous requests for return.¹⁰² This was so even despite the revelation that the Rosenbaums’ property had not moved from the original property room since the very beginning of the investigation.¹⁰³ Therefore, the court concluded that law enforcement’s utter lack of diligence in this case was overwhelmingly supported by the record.¹⁰⁴

V. IMPLICATIONS

On its face, this case is deceptively straightforward. Underneath its surface, however, lurks a much more complex and convoluted issue regarding how Georgia courts will treat searches and seizures involving electronic data and devices.¹⁰⁵ It is no small matter that the judicial system has, and continues to, review decisions of personal privacy and property in the face of our ever-evolving dependency on electronics.¹⁰⁶ The supreme court’s analysis in *State v. Rosenbaum* demonstrates the court’s willingness to acknowledge and adapt the legal landscape to the growing complexity surrounding the use of personal electronic devices such as cellphones and computers. This ruling further stands to demonstrate the progression that criminal procedure has undertaken as it continues to adapt to modern technology.

This raises other important considerations as the momentum of technological advances propels the legal field forward. These considerations include how the court will handle issues concerning: data storage on a cloud-like databases, developments in artificial intelligence, and data collection policies from social media.¹⁰⁷ There has even been recent concern over DNA collection techniques from popular

102. *Id.*

103. *Id.*

104. *Id.*

105. Some have suggested that legislatures are better equipped to handle drastic and continually evolving issues regarding searches and seizures in relation to technology. More specifically, legislatures contain more institutional advantages whereas rules created within the judicial system lack the kind of flexibility needed in an area that is constantly changing. Kerr, *supra* note 1 at 858–59.

106. See *Mitchell*, 565 F.3d at 1350; *Rosenbaum*, 305 Ga. at 442, 826 S.E.2d at 20; *Henson v. State*, 314 Ga. App. 152, 157, 723 S.E.2d 456, 460 (2012) (ruling that an officer did not exceed the scope of the warrant when he opened a computer file that read “my pictures” and found photographs of child pornography).

107. Take, for example, the legal implications surrounding use of social media in election law and Cambridge Analytica’s extremely controversial use of personal data to influence elections. *THE GREAT HACK* (Netflix 2019).

genealogy databases similar to Ancestry and 23andMe.¹⁰⁸ Given growing concerns regarding technological advancement and the greater need for privacy protection, the judicial system will need to push further down the road of progress and anticipate impending concerns in light of an ever-expanding, and possibly over-sharing, world.

To that end, electronic data “[I]s the digital equivalent of its owner’s home, capable of holding a universe of private information.”¹⁰⁹ During the 1980s searches and seizures were questioned under a set of cases that had nothing to do with personal data.¹¹⁰ Rather, those cases fostered greater concern for an individual’s right to their property, as it relates to seizures, and privacy as it relates to searches.¹¹¹ The court has not been any more articulate about whether the search and seizure of personal data implicates privacy or property interests.¹¹² Regardless, the question for the future is not whether the judicial system will adjudicate matters of personal data under a privacy or property theory. Rather, the inquiry is, *should* the judicial system adjudicate matters of electronic data under a privacy or property theory?

Adjudication under a property theory necessarily implies that electronic data will become the virtual equivalent of an owner’s home.¹¹³ Thus, seizing and searching property that the legal system is prepared to view as an owner’s home will carry with it a higher expectation of investigative diligence.

On the flip side, adjudication under a privacy theory implicates a much broader inquiry. Individuals do not have a broad constitutional right to privacy but do have a greater right to privacy in their own

108. In one case, use of a public genealogy database in California led to the infamous “Golden State Killer,” Michael DeAngelo. Tina Hesman Seay, *Crime solvers embraced genetic genealogy*, SCIENCE NEWS (Dec. 18, 2018), <https://www.sciencenews.org/article/genetic-genealogy-forensics-top-science-stories-2018-yir>. For interesting background on that case, including how the public genealogy database came to be used, see *Wondery: Man in the Window*, L.A. TIMES (June–Sept. 2019), <https://wondery.com/shows/man-in-the-window/>. For other controversial uses of genealogy databases, including investigative techniques that reverse-engineer genetic samples to trace family trees (which includes looking at the DNA of family members of suspects), see Jason Tashea, *Genealogy sites give law enforcement a new DNA sleuthing tool, but the battle over privacy looms*, ABA JOURNAL (Nov. 1, 2019), <http://www.abajournal.com/magazine/article/family-tree-genealogy-sites-arm-law-enforcement-with-a-new-branch-of-dna-sleuthing-but-the-battle-over-privacy-looms>.

109. *Mitchell*, 565 F.3d at 1352 (quoting *Rupnick*, 280 Kan. at 735).

110. *Place*, 462 U.S. 696; *Jacobsen*, 466 U.S. 109.

111. See *Jacobsen*, 466 U.S. at 113–14.

112. See *Burgard*, 675 F.3d at 1033; *contra Laist*, 702 F.3d at 614.

113. *Mitchell*, 565 F.3d at 1352.

homes or other protected spaces.¹¹⁴ If electronic data is the virtual equivalent of a home, then owners of electronic devices have a presumptively high privacy right to what is contained therein. Even from his place on the Supreme Court bench in the 1960s, Justice Harlan wrote that “a man’s home is . . . where he expects privacy, but . . . activities[] or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”¹¹⁵ Such a statement eerily resounds when considering the constitutional implications of personal social media use.¹¹⁶ In contrast, Justice Stewart, in his majority opinion, opined that those interests individuals “seek to preserve as private,” even in public spaces, will nevertheless be constitutionally protected as private.¹¹⁷

Courts of the future must decide whether, under a privacy theory, they will harken their analysis to the majority or concurrence in *Katz* or forge their own path for balancing constitutional privacy and property-related interests in light of the use of personal electronic devices. It seems clear from Eleventh Circuit jurisprudence that the individual right to privacy in electronic devices is a legitimate expectation.¹¹⁸ However, whether society—or better yet, the judicial system—is prepared to recognize such a right as reasonable is another matter. What does seem clear is that an important consideration as to what is reasonable—in this murky area of Fourth Amendment jurisprudence—is dependent upon the diligence of officers in obtaining a warrant for sensitive electronic data.¹¹⁹

The diligence requirement has been a consistent theme throughout Fourth Amendment reasonableness jurisprudence. With the emergence of technological advancement, the standard for investigative diligence is now higher than ever. And whether electronic data implicates privacy or property concerns, that standard will remain high in light of any

114. *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

115. *Id.* at 361. (Harlan, J., concurring); Symposium, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L. J. 51 (2002). Some authors have even suggested that this opinion further redefined the scope of Fourth Amendment liberties but that such redefinition holds little weight in the modern, technological era. *Id.* at 56.

116. This is particularly true when data privacy is viewed, at its heart, as informational privacy. Tomkovicz, *supra* note 39, at 666–67 (regarding protection of data as informational, it is “an interest in maintaining confidentiality or secrecy in not having data about one’s life learned by the government.”).

117. *Katz*, 389 U.S. at 351.

118. See *Mitchell*, 565 F.3d at 1351; *Burgard*, 675 F.3d at 1033; *Laist*, 702 F.3d at 614.

119. See *Laist*, 702 F.3d at 614, 616–17.

individual's strong interest in retaining any possessory claim to the virtual equivalent of their home.

Sandy Davis

