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The Reasonableness and Unreasonableness of Delays in Obtaining Search Warrants

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I. INTRODUCTION

Imagine a couple driving down the road and lawfully being stopped by police. Next, envision that traffic stop turning into an arrest and the couple's phones being seized, their vehicle being impounded, and their computer and tablet within the vehicle taken to the inventory room at the police department.[1] If you are thinking this does not sound like anything out of the ordinary, you would be correct. However, imagine their defense attorney constantly asking for the phone, tablet, and computer to be given back to the couple so that evidence on these devices could be examined for their criminal case.[2] Finally, think about what stress this couple endured with their ongoing criminal proceedings and search warrants for these devices not being obtained until 539 and 702 days later.[3] This is currently a reality in the area of criminal law and many individuals are waiting long periods of time before their personal belongings are returned to them.

This Comment will begin by exploring the Fourth Amendment[4] as it relates to seizures and search warrants.[5] Then, the discussion will continue by exploring Supreme Court cases relating to this issue. Next, the discussion will center on how the courts in certain circuits and states are ruling on this issue and finally attempt to synthesize a benchmark test from these cases.

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1. *State v. Rosenbaum*, 305 Ga. 442, 443–44 (2019).
2. *Id.* at 444–46.
3. *Id.* at 443.
4. U.S. CONST. amend. IV.
5. *Id.*

II. LEGAL BACKGROUND

A. The Fourth Amendment

According to the Fourth Amendment,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

In explaining the purpose of the Fourth Amendment, the Supreme Court of the United States has stated that "this Court has interpreted the Amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests."[7] The Supreme Court, in *United States v. Jacobsen*,[8] stated that "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"[9]

B. Reasonable Delays

In *United States v. Van Leeuwen*,[10] the respondent had two packages containing coins and he mailed one to California, while the other was mailed to Tennessee. He also insured both packages for $10,000.[11] A "postal clerk told a policeman who happened to be present that he was suspicious of the packages" and then "the policeman at once noticed that the return address on the packages was a vacant housing area of a nearby junior college, and that the license plates of respondent's car were British Columbia."[12] After discovering this information, customs officers in Seattle contacted the appropriate authorities in California and informed them that there was an ongoing investigation for trafficking in illegal coins but was unable to inform the authorities in Tennessee of this until the next day.[13] The Seattle customs officer then

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6. *Id.*
7. Illinois v. McArthur, 531 U.S. 326, 330 (2001).
8. 466 U.S. 109 (1984).
9. *Id.* at 124.
10. 397 U.S. 249 (1970).
11. *Id.* at 249–50.
12. *Id.* at 250.
13. *Id.*

retained a "search warrant at 4 p. m., and it was executed in Mt. Vernon at 6.30 p. m., 2 1/2 hours later."[14]

According to the Court, the circumstances surrounding the packages "certainly justified detention, without a warrant, while an investigation was made."[15] The Court emphasized how Seattle customs could not contact the authorities in Tennessee and noted that "29 hours after the mailing, the search warrant reached Mt. Vernon, a speedy transmission considering the rush-hour time of day and the congested highway."[16] The Court concluded that "[n]o interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited."[17] The Court quickly explained that "[t]he rule of our decisions certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection."[18] Finally, the Court clarified its holding by stating that:

> We only hold that on the facts of this case – the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle – a 29-hour delay between the mailings and the service of the warrant cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment.[19]

In a case from the United States Court of Appeals for the Eleventh Circuit, the Federal Bureau of Investigation (FBI) was investigating a username upon suspicion of child pornography and linked it "to a student at the University of Georgia."[20] The FBI then traveled to the student's residence to talk to him and ask "to seize and search [the defendant's] computer."[21] The student told the FBI "that there was child pornography on the computer and on five external hard drives" then signed a form giving the FBI permission to take the electronic devices.[22]

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14. *Id.*
15. *Id.* at 252.
16. *Id.* at 253.
17. *Id.*
18. *Id.*
19. *Id.*
20. United States v. Laist, 702 F.3d 608, 610 (11th Cir. 2012).
21. *Id.*
22. *Id.* at 610–11.

Before seizing the electronics, the FBI permitted the student to "copy some school documents that he needed for his studies."[23]

"On March 4, 2009, when the [FBI] agents took the computer and hard drives" they knew there was child pornography on it because the student told them that there was.[24] In other words, the FBI "took 25 days to prepare its application for a search warrant."[25] However, the search warrant for these electronic devices was not issued until April 13, 2009, and the FBI found "thousands of images and videos depicting child pornography."[26] In an effort to explain the delay in time that it took for the FBI to get the search warrant, the court stated that the FBI investigator "was in a two-person office that covered ten counties" and "that 'there [was] considerable effort that was put into the preparation of [Cearley's] affidavit.'"[27] The court noted that "the affidavit contained 'a lot of valuable information'" and "a 'very substantial amount of information specifically as to the Defendant's conduct.'"[28] Furthermore, the court explained that the judge that was going to grant the search warrant was not "able to review the warrant application until the following week."[29] The student "moved to suppress all evidence obtained from his computer and the five external hard drives" by contending "that he had a substantial possessory interest in the items," and he claimed that the FBI violated his Fourth Amendment rights because the "delay in obtaining a search warrant was unreasonable."[30]

Regarding the test that the court used, the court stated that "when determining whether a delay renders a seizure unreasonable under the Fourth Amendment, we evaluate the totality of the circumstances presented by each case."[31] The court stated that there were "several factors highly relevant to this inquiry" such as "the significance of the interference with the person's possessory interest" in addition to how long the delay lasted.[32] Furthermore, "whether or not the person consented to the seizure" and "the government's legitimate interest in holding the property as evidence" are also important.[33] The court stated

23. *Id.* at 611.
24. *Id.*
25. *Id.* at 612–13.
26. *Id.* at 612.
27. *Id.* at 611 (insertions in the original).
28. *Id.*
29. *Id.* at 611–12.
30. *Id.* at 612.
31. *Id.* at 613.
32. *Id.*
33. *Id.* at 614.

that they also "consider the nature and complexity of the investigation and whether 'overriding circumstances arose,'" in addition to, "the quality of the warrant application and the amount of time we expect such a warrant would take to prepare," as well as, "any other evidence proving or disproving law enforcement's diligence in obtaining the warrant."[34] Although the factors the court discussed seem very broad in scope, the court stated that it should not "establish a duration beyond which a seizure is definitely unreasonable or, as discussed below, even presumptively unreasonable."[35] However, the court did offer some guidance by stating that "[a] temporary warrantless seizure supported by probable cause is reasonable as long as 'the police diligently obtained a warrant in a reasonable period of time.'"[36]

The court concluded that the government did not want to delay the search of the electronics and that it "no doubt preferred to commence its search immediately but could do so only with the judicial imprimatur of a search warrant."[37] The Eleventh Circuit acknowledged that the student did have "a significant possessory interest in his computer and his hard drives" but that it was diminished because the FBI allowed him to download things off of the computer, and he both admitted to the child pornography and showed it to the FBI.[38] The court went one step further and stated that the student showing the FBI child pornography "enhance[ed] the government's legitimate interest in maintaining custody of the computer and hard drives."[39] The court held that the government acted diligently in trying to obtain the warrant since the FBI agent immediately started preparing it when the student withdrew his consent to the FBI having the electronics and due to the information within the warrant.[40] Lastly, the court stated that this investigation was very complex and the agents working on the case were busy.[41] The court held that the "25-day seizure based solely on probable cause is far from ideal" but that it was reasonable under the totality of the circumstances.[42]

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34. *Id.* (quoting United States v. Mitchell, 565 F.3d 1347, 1352 (11th Cir. 2009)).
35. *Id.* at 614.
36. *Id.* at 613 (quoting *McArthur*, 531 U.S. at 334).
37. *Id.* at 615.
38. *Id.* at 616.
39. *Id.*
40. *Id.* at 616–17.
41. *Id.* at 617.
42. *Id.*

In *United States v. Martin*,[43] an airplane company, MANE, contacted the police to inform them that some of their airplane parts were stolen. Employees from MANE stated that they believed the defendant's own airplane company (Warplanes), who was located next door, was a suspect. Braddock, who owned another airplane company, found that the parts he purchased from the defendant's company, Warplanes, were listed as stolen. Braddock then mailed back the airplane parts to the defendant and told the police. The police obtained a search warrant to search the Warplanes business, and the defendant admitted that he had stolen plane parts. The police contacted the mail carrier and retrieved one package that was being mailed back to the defendant on December 20, 1991.[44] The police then got a search warrant on December 31, 1991, and "searched the package and found the airplane parts that" had been shipped back to the defendant.[45]

The defendant argued "that the government waited too long both in securing a warrant to search the package and in conducting the search."[46] The United States Court of Appeals for the Second Circuit held "that the delay in securing the December 31, 1991 [search] warrant" for the package "was [not] so 'unreasonable' as to violate the Fourth Amendment."[47] However, the court did note that "[i]n some circumstances eleven days might well constitute an unreasonable delay" but failed to explain what specific circumstances would make the court conclude that the delay was unreasonable.[48]

In explaining its reasoning behind why it ruled that the delay was not constitutionally infirm, the court stated that two weekends and Christmas had passed, which may have made it difficult for the police to get the warrant.[49] Furthermore, the court acknowledged that the defendant "had a Fourth Amendment interest in the package" but that "'he assumed the risk that [Braddock would] reveal the information to the authorities,' weakening his claim to Fourth Amendment privacy."[50] In addition, another factor in the court's analysis was that "seizure is necessarily less intrusive where 'the owner has relinquished control of the property to a third party.'"[51] Lastly, the court noted that "this is not

43. 157 F.3d 46 (2d Cir. 1998).
44. *Id.* at 48–49.
45. *Id.* at 49.
46. *Id.* at 53.
47. *Id.* at 54.
48. *Id.*
49. *Id.*
50. *Id.* at 54 (quoting *Jacobsen*, 466 U.S. at 117).
51. *Id.* (quoting United States v. Place, 462 U.S. 696, 705 (1983)).

a case where seizure of property would effectively restrain the liberty interests of the person from whom the property was seized."[52] The court did offer some words of instruction for the government, and perhaps a starting point for a solid rule, by stating that it expects the government to get a search warrant in a period shorter than eleven days.[53]

In *United States v. Mayomi*,[54] the defendant "rented a postal box from Scanner Services" and would frequently call to see if he had mail.[55] A tip was called into an FBI agent stating that mail with "a light brown powder had arrived at Scanner Services."[56] The FBI agent talked to Scanner Services' manager who told him that "he accidentally cut open an envelope addressed to [the defendant] and observed a brown powder fall from the envelope" and stated the defendant received other packages like that before.[57] The manager gave the FBI agent the envelope, and the agent found that there was heroin in it. The FBI agent told the manager to tell him if the defendant received any more packages like this and to keep them instead of putting them in the defendant's mailbox. After the defendant received more envelopes, police had dogs sniff them and found that they contained narcotics.[58] The FBI agent also "performed an external examination of the three envelopes" but did not open them.[59] The search warrants for the envelopes were issued on that day.[60]

Later, after the envelopes were formally tested for narcotics, the FBI placed talc powder in the envelopes and put them back in "the defendant's mailbox for purposes of a controlled delivery."[61] At first, the defendant looked at the envelopes and left Scanner Services to pick up a woman who went back with him to Scanner Services. The woman then went into Scanner Services and picked up the envelopes to take back with her to the car. The defendant dropped the woman off and went to an apartment where he was finally arrested. The defendant continued to receive more packages of heroin in the mail.[62]

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52. *Id.*
53. *Id.*
54. 873 F.2d 1049 (7th Cir. 1989).
55. *Id.* at 1050.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1050–51.
62. *Id.* at 1051.

The defendant stated that "the government illegally detained his mail for an unreasonable period of time before obtaining a search warrant."[63] The United States Court of Appeals for the Seventh Circuit stated that two of the envelopes were detained for two days while one more envelope was detained for less than a full day and was "such a short period of time that the intrusion on the defendant's Fourth Amendment interests was de minimus [*sic*]."[64] The court reasoned that two of the letters were kept through the weekend in order to have them sniffed by the police dogs.[65] The court held that "[t]he detention of the defendant's mail for a period of forty-eight hours in order to confirm [the FBI agent's] suspicion that the three envelopes contained heroin did not invade his rights under the Fourth Amendment."[66]

United States v. Burgard[67] is perhaps the most promising case in terms of developing a rule for when delays in obtaining search warrants will be unreasonable.[68] In that case, police seized a cell phone because they thought that they would find child pornography on it. During the six days that the police did not get the search warrant, several things happened.[69] First, the officer "wrote a report about the seizure and forwarded it to" a detective.[70] Due to the officer and the detective not working the same shifts, "[the detective] did not receive [the officer's] report until the next day."[71] That same night, the detective was finally able to talk to the officer on the phone and the day after the detective called the federal prosecutor. At this point, the detective had to investigate an armed robbery and began working on the search warrant a few days later. The federal prosecutor and the detective also spent some time editing the search warrant before turning it in to the judge.[72]

The Seventh Circuit criticized the behavior of the police by stating that they "lost their sense of urgency: they did nothing with the phone right away and allowed six days to elapse before they applied for a search warrant."[73] Ultimately, the police did find child pornography on the phone. The defendant's main argument on appeal was that the child

63. *Id.* at 1052.
64. *Id.* at 1054.
65. *Id.*
66. *Id.*
67. 675 F.3d 1029 (7th Cir. 2012).
68. *Id.*
69. *Id.* at 1030–31.
70. *Id.* at 1031.
71. *Id.*
72. *Id.*
73. *Id.* at 1030.

pornography on his cell phone should have been excluded due to the police not getting the search warrant for six days.[74] The court concluded "that the officers did not act with perfect diligence," but it nonetheless held that the delay was not "so egregious that it renders the search and seizure unreasonable under the Fourth Amendment."[75]

The court began its analysis by stating that "the Supreme Court has held that after seizing an item, police must obtain a search warrant within a reasonable period of time."[76] Furthermore, the court acknowledged that "at some point the delay becomes unreasonable and is actionable under the Fourth Amendment" but conceded that "[t]here is unfortunately no bright line past which a delay becomes unreasonable."[77] The court then tried to give some guidance by stating that "the Supreme Court has dictated that courts must assess the reasonableness of a seizure by weighing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion.'"[78] In explaining the effects of a delay in getting a search warrant the court noted that "[t]he longer the police take to seek a warrant, the greater the infringement on the person's possessory interest" and that the delay can undermine the criminal justice process because it will "prevent the judiciary from promptly evaluating and correcting improper seizures."[79] Interestingly, the court also said that it is important to consider "whether the person from whom the item was taken ever asserted a possessory claim to it—perhaps by checking on the status of the seizure or looking for assurances that the item would be returned."[80] The Seventh Circuit also noted one way that may make it more likely for a delay to be found reasonable by stating that "the Fourth Amendment will tolerate greater delays after probable-cause seizures."[81] The last factor the court considered in its analysis was "whether the police diligently pursue[d] their investigation."[82]

Although the court ruled that the delay was reasonable, it still analyzed what factors were in favor of the defendant and the

74. *Id.* at 1030.
75. *Id.* at 1030–31.
76. *Id.* at 1032.
77. *Id.* at 1032–33.
78. *Id.* at 1033 (quoting *Place*, 462 U.S. at 703).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 1033 (quoting *Place*, 462 U.S. at 709).

government.[83] The court stated "that [the defendant] had a strong interest in possessing his cell phone" because "[h]e even asserted his possessory interests over the phone by voluntarily going to the police station to obtain a property receipt, which would help him obtain the phone's return."[84] However, the court also found that the government had an interest that was just as strong because "police had probable cause to believe that the phone would contain evidence of a crime."[85] Therefore, in this court's analysis, it does not seem as though one party had more of an interest than the other party.[86]

However, the court did seem to find one major fault with the government.[87] Although the court stated that "police imperfection is not enough to warrant reversal," the court argued that the police "should have been able to submit the warrant application" earlier because "an officer with over 14 years of experience" should have been able to "write a two-page affidavit in fewer than six days, especially when the affidavit drew largely on information that was contained in the initial report that he received from Wilson."[88] The court further stated that the warrant contained a lot of boilerplate clauses and that even though "the detective's attention was diverted by a more serious robbery case, this did not take place until Friday, after three days had already passed."[89] It would seem as though this would be enough for the court to rule that this was unreasonable, but the court provides some insight as to why that was not the ruling by stating how thorough the detective was and how the court did "not want to discourage this sort of careful, attentive police work, even if it appears to us that it could or should have moved more quickly."[90]

Lastly, the United States Court of Appeals for the Ninth Circuit, in *United States v. Hillison*,[91] dealt with the issue of a delay in mailed packages and found that this delay "of the package mailed by [the defendant] did not violate the Fourth Amendment."[92] In this case, agents first observed two of the three defendants arrive at an airport carrying bags. The agents then noticed that these two defendants

83. *Id.* at 1034.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. 733 F.2d 692 (9th Cir. 1984).
92. *Id.* at 696.

appeared to be uncomfortable because they were constantly looking around. Agents were ordered to surveil the defendants and eventually watched them drop off a package in the mail, which was detained by the agents. This package was held for nine hours before a search warrant was granted.[93] Later, agents searched the defendants' hotel room and found marijuana seeds and found cocaine in the package that was in the mail. The other defendant was eventually found to possess drugs as well.[94]

C. Unreasonable Delays

In *United States v. Dass*,[95] the Ninth Circuit also analyzed the reasonableness of a search warrant delay in the context of mailed packages.[96] In Hawaii, there were certain packages being mailed that appeared to be suspicious, and agents seized them as a result.[97] These packages were detained "for periods from seven to twenty-three days before [agents] secured search warrants" and marijuana was eventually found inside the packages.[98]

The court began its analysis by declaring that "this circuit [has] found short delays in obtaining a search warrant for mailed packages to be reasonable."[99] One factor that the court emphasized that may have led to their holding was that "the delays could have been much shorter (36 hours) if the police had acted diligently."[100] Ultimately, the court held that the delays were unreasonable and "that these seizures violate[d] the fourth amendment."[101]

In *United States v. Mitchell*,[102] agents were conducting an internet child pornography investigation to find people that were posting this material online or purchasing it. Agents found a child pornography website and were able to identify the people who were using this website through search warrants. Agents identified the defendant as one of the individuals who had a paid subscription to the website and went to his home. The defendant was questioned by the agents and told the agents that he had two subscriptions to child pornography websites.

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93. *Id.* at 694–96.
94. *Id.* at 695.
95. 849 F.2d 414 (9th Cir. 1988).
96. *Id.* at 414–15.
97. *Id.* at 414.
98. *Id.*
99. *Id.* at 415.
100. *Id.*
101. *Id.*
102. 565 F.3d 1347 (11th Cir. 2009).

The defendant had two computers in his home and told the agents that they had child pornography on them. The defendant gave consent to the agents to search his wife's laptop but would not let them search the desktop and explained that it had the child pornography on it. The agents seized the hard drive from the desktop and left the defendant's home.[103]

The agent that had taken the hard drive from the defendant's home left for two weeks to attend training, so the search warrant for the hard drive was not issued until "twenty-one days after the initial seizure."[104] The agent found child pornography on the computer, and the defendant was prosecuted.[105] The defendant appealed, and one of his arguments was "that the twenty-one-day delay in obtaining a search warrant was unreasonable."[106]

The court in *Mitchell* concluded that "'even a seizure based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant.'"[107] The court closely focused on the defendant's possessory interest in its analysis.[108] It held that "[c]omputers are relied upon heavily for personal and business use" and that people have many "items of a personal nature in electronic form on their computer hard drives."[109] Therefore, the court concluded that "the detention of the hard drive for over three weeks before a warrant was sought constitutes a significant interference with Mitchell's possessory interest."[110] Furthermore, the court held that "there was no compelling justification for the delay" in getting the search warrant because the agent could have applied for it before he left for his class or another agent could have applied for it instead.[111]

The federal prosecutor argued that there was only one agent in the area who knew how to search the computer and that "the delay 'had no practical effect upon Mitchell's rights, for his possessory interest would not have been restored prior to' the issuance of the search warrant," but the court rejected this.[112] The court stated that "'the sooner the warrant issues, the sooner the property owner's possessory rights can be

103. *Id.* at 1348–49.
104. *Id.* at 1349.
105. *Id.* at 1350.
106. *Id.*
107. *Id.* at 1350 (quoting *Martin*, 157 F.3d at 54).
108. *Id.* at 1351.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 1352.

restored if the search reveals nothing incriminating.'"[113] The court also stated that "this consideration applies with even greater force to the hard drive of a computer, which 'is the digital equivalent of its owner's home, capable of holding a universe of private information.'"[114] The court determined "that the delay in obtaining a warrant here was not justified" but pointedly explained that it was "applying a rule of reasonableness that is dependent on all of the circumstances."[115] The court explained that there may have been a different outcome regarding whether or not the delay was reasonable if the agents had tried to find someone else to help them, if the agents needed to work on a different case, or if the agents had been "overwhelmed by the nature of a particular investigation."[116]

In *State v. Rosenbaum*,[117] for the very first time in Georgia, the Georgia Supreme Court dealt with the issue of a delay in obtaining search warrants to search electronics that had been seized.[118] In this case, a young child that was being fostered by the appellees died. The appellees were later arrested and charged for the child's death as well as for abusing the child's sister who they were also fostering.[119] Furthermore, "[a]t the time of appellees' arrest, police seized their iPhones, iPad, and MacBook laptop computer without a warrant."[120] The computer and the iPad were seized from the appellees when police stopped their vehicle and the phones were seized after the appellees were arrested.[121] The police did obtain search warrants for these items, but some of the warrants were issued "539 days after the devices were seized" while the other "warrants were issued on November 6, 2017, 702 days after the seizure."[122] Neither the officer that seized the laptop and tablet nor the detective that seized the phones directly told their supervisor they seized these items but only noted this seizure in their reports.[123]

During the time period after the items had been seized, the appellees' case was transferred to a different district attorney's office.[124] The

113. *Id.*
114. *Id.* at 1352 (quoting Kansas v. Rupnick, 125 P.3d 541, 552 (Kan. 2005)).
115. *Id.* at 1352.
116. *Id.* at 1352–53.
117. 305 Ga. 442 (2019).
118. *Id.* at 442.
119. *Id.* at 443.
120. *Id.*
121. *Id.* at 443–44.
122. *Id.* at 443.
123. *Id.* at 443–44.
124. *Id.* at 443 n.2.

prosecutor for this case stated that he did not know that any electronics had been seized until 536 days after the appellees were arrested.[125] The defense attorney asked the State to return the appellees' electronics many times, but the devices were not returned to them.[126] The trial court looked toward the Eleventh Circuit for how to rule on this issue and ultimately suppressed the evidence due to finding "that the delay in this case was unreasonable and violated appellees' Fourth Amendment rights."[127]

The Georgia Supreme Court held that the Eleventh Circuit had "more opinions on the question of unreasonable delay than any other federal circuit cited by the parties or the trial court."[128] When the trial court decided this case, it "considered the degree of possessory interest in the subject property, the duration of the delay as it affects that interest, and the efforts of defendants to secure the return of the items."[129] In regard to the electronics, the "appellees have a substantial possessory interest in the electronic devices, given the significance of personal computers and similar devices, such as cell phones or tablets."[130] The Georgia Supreme Court held that "the State made no showing of particular complexity, difficulty in drafting the warrant, or competing demands on a limited number of officers" and agreed with the trial court "that 'the State did not diligently pursue its investigation as it relates to the content of these devices.'"[131] The Georgia Supreme Court ultimately held that "the trial court did not err in granting the motion to suppress."[132]

D. Cases with No Decision

In *United States v. Smith*,[133] the United States Court of Appeals for the Second Circuit did not make a ruling as to whether a delayed search warrant was reasonable because it did not have all of the facts that it needed.[134] The court decided to remand the case to the district court in order for them to gather these facts.[135] In this case, "[the defendant

125. *Id.* at 444.
126. *Id.* at 445.
127. *Id.* at 446.
128. *Id.* at 449.
129. *Id.* at 451.
130. *Id.*
131. *Id.* at 454.
132. *Id.* at 442.
133. 759 F. App'x. 62 (2d Cir. 2019).
134. *Id.* at 65.
135. *Id.*

was] passed out in the driver's seat of his car on the side of Route 73" when a police officer found him.[136] The officer proceeded to search the car after the defendant awoke, and he saw child pornography on a tablet in the car. The tablet was then seized, and the police did not apply for a search warrant until a month later. Child pornography was found on the tablet. The defendant then argued to suppress the evidence the police found.[137]

The court stated that "[i]n determining whether such a delay is unreasonable, '[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.'"[138] The court also described that the factors it explores to find whether the delay was reasonable are "the length of the delay, the importance of the seized property to the defendant, whether the defendant had a reduced property interest in the seized items, and the strength of the state's justification for the delay."[139] The court also noted that when the district court heard the case, the investigator explained that there was such a delay because of the area that he was responsible for covering.[140] However, the Second Circuit noted that "the geographic area the police must cover is certainly relevant to determining the weight of the state's justification for the delay, [but that] it is not necessarily determinative."[141] Although the court did not outline any specific rules or come to a determination for this particular case, the factors that the court looked at are helpful in understanding the court's overall analysis.[142]

III. PRESENTATION OF SOLUTIONS TO THE ISSUE

A A Benchmark Test for Determining the Reasonableness and Unreasonableness of Delays in Obtaining Search Warrants

A benchmark test should be used by the courts in order to help them determine whether or not the delays in obtaining search warrants are reasonable.[143] Currently, courts only have a very subjective and loose

136. *Id.* at 63.

137. *Id.* at 63–64.

138. *Id.* at 64 (quoting *Place*, 462 U.S. at 703).

139. *Id.* at 65.

140. *Id.*

141. *Id.*

142. *Id.*

143. This test was modeled on the test that the Supreme Court of the United States formulated in *County of Riverside v. McLaughlin*. 500 U.S. 44 (1991). In that case, the

framework to follow.[144] This is perhaps to the detriment of defendants because the outcome of their case may be different if courts had more guidance or a benchmark test to follow. If courts wanted to develop a benchmark test, perhaps the prevention of a negative effect on defendants could be a motivating factor. Furthermore, a benchmark test may persuade officers to seek search warrants earlier, if they are faced with the worry that waiting another day to apply for the warrant may make it unreasonable.

The benchmark test for electronic items should be one month or thirty days, and if the delay passes this benchmark, it should be presumed unreasonable.[145] This number of days is only for electronic items, and the time will change based on what item has been seized. This benchmark test would not be strict, in the sense that the delay would certainly be unreasonable, if the circumstances show that someone went past the thirty days. If the circumstances or facts go over the benchmark, there would be a presumption that the delay was unreasonable. However, the court can consider certain facts to help determine whether the delay is still reasonable even though the number of days it took to get the warrant went over the benchmark.[146] For example, if the police have seized a lot of electronic items, belonging to different individuals, over the past few weeks or month and have not yet had time to write search warrant applications for all of these items,

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court ruled that a probable cause hearing will generally be prompt as long as it is held "within 48 hours of arrest." *Id.* at 56. The court specified that holding the hearing within that time period is not the end of the determination but that it could still be unreasonable "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id.*

144. *See Burgard*, 675 F.3d 1029 for an overview of this test.

145. To the contrary, the court in *Laist* is convinced that it would be "unwise to establish a duration beyond which a seizure is definitively unreasonable or, as discussed below, even presumptively unreasonable." 702 F.3d at 614.

146. For example, according to *Laist*, some of the factors courts are considering are "the significance of the interference with the person's possessory interest," and "the duration of the delay," as well as "whether or not the person consented to the seizure," and finally "the government's legitimate interest in holding the property as evidence." 702 F.3d at 613–14. Under the benchmark test that this Comment recommends, courts can still consider all of these factors, but they would be used to go against the presumption that the delay is unreasonable if it went over thirty days. *Id.* A further example can be found in *Rosenbaum* where the court listed some factors such as "particular complexity, difficulty in drafting the warrant, or competing demands on a limited number of officers." 305 Ga. at 454. The court in *Mitchell* also provides a list of factors. 565 F.3d at 1352–53. Finally, the court in *Smith* provided some factors as well. 759 F. App'x. at 65.

a judge could find that the delay is reasonable even if it was over thirty days.[147]

The benchmark or number of days that a delay would be reasonable should be the longest for electronic items such as computers, smart phones, tablets, and other devices. Since these types of electronic devices are so prevalent in our society today, it is likely that police are seizing a great number of these items and may need more time to work on applying for the search warrant. However, when specifying the number of days for the benchmark, the number should not be too large, because as some courts have recognized, electronic devices tend to be very important to individuals and their electronic devices should not be kept from them for too long.[148]

The benchmark in determining whether the delays in obtaining search warrants for mail should be a lesser number of days than that for electronic devices. For mail and other packages, the benchmark should be set at fourteen days or two weeks and if the delay lasts longer, it should be presumed unreasonable by the judge.[149] In regard to mail that has been seized, it may be more pressing to hurry and get the package mailed whereas there may not be as much pressure to do anything with an electronic item sitting in an evidence room. Although there could be issues that cause delays in applying for the search warrants for mail, prior cases have shown that the delay in obtaining search warrants for mail or packages is less than it is for electronic items.[150]

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147. The dissent in *Dass* would likely agree with this because the judge thought that the delay should have been reasonable since the police department had an extremely large number of warrants to complete. 849 F.2d at 418 (Alarcon, J., dissenting).

148. *See Rosenbaum*, 305 Ga. at 451; *Laist*, 702 F.3d at 614. For example, the court in *Rosenbaum* referred to "personal computers and similar devices, such as cell phones or tablets, as 'unique possession[s].'" 305 Ga. at 451 (quoting *Laist*, 702 F.3d at 614).

149. Interestingly, in the dissenting opinion of *Dass*, Judge Alarcon states that the majority opinion was wrong because they thought *Hillison* "established a 29-hour bright-line test to determine the reasonableness of government delay in obtaining a warrant to search a package seized from the mails." 849 F.2d at 417 (Alarcon, J., dissenting) (citing *Hillison*, 733 F.2d 692 (1984)). Judge Alarcon argues that the court "did not, however, interpret *Van Leeuwen* as establishing an 'outer boundary' of reasonableness at 29 hours" and that the twenty-nine hour period was only a benchmark instead of a boundary. 849 F.2d at 418 (Alarcon, J., dissenting) (citing *Van Leeuwen*, 397 U.S. 249). Therefore, Judge Alarcon is likely to agree with the Author of this Comment regarding that a benchmark should be set for determining whether or not a delay is reasonable when obtaining a search warrant for mail or packages.

150. *See Van Leeuwen*, 397 U.S. 249; *Martin*, 157 F.3d 46; *Dass*, 849 F.2d 414; *Hillison*, 733 F.2d 696; and *Mayomi*, 873 F.2d 1049. *But see Mitchell*, 565 F.3d 1347; *Laist*, 702 F.3d 608; *Burgard*, 675 F.3d 1029; and *Rosenbaum*, 305 Ga. 442.

B. Police Diligence

Courts need specific guidelines or more of a standard that they can follow when analyzing police diligence in obtaining search warrants. Without guidelines or a test, this analysis becomes very subjective and one court could find that police were diligent while another court could read the same facts and find that they were not. Therefore, when analyzing police diligence, courts need a benchmark test to follow. This benchmark could involve a presumption that the delay was reasonable as long as the police did certain things to obtain the search warrant.[151] According to the court in *Burgard*, "[w]hen police act with diligence, courts can have greater confidence that the police interest is legitimate and that the intrusion is no greater than reasonably necessary."[152] If the courts used a benchmark test, this could help it reach the determination that the police were diligent. Without a benchmark test, courts may be tolerating too much of a lack of diligence. It may also be hard for courts to rule on how much of a delay from the police is too much when they do not have this type of test.

The benchmark test could include a few different factors that would help the court to presume that the police were diligent, or courts could standardize factors and have a specific list. For example, one factor may be that the police started on writing the application for the search warrant the day that they seized the item or the day after even if they did not finish writing the warrant.[153] Additionally, if the court can conclusively find that the police intended to write the application soon after a seizure, intent could be a factor, which could be one factor for finding that the benchmark was met.

Without a benchmark test to help courts determine whether police were diligent in obtaining a warrant, its analysis is very subjective and two courts reading the same facts could come to very different conclusions. This behavior is not very fair for defendants. An illustration of how subjective this analysis is can be viewed in *Burgard*.[154] In that case, the court went as far as to agree with the

151. For example, in *Mitchell*, the court stated that "if the assistance of another law enforcement officer had been sought, we would have been sympathetic to an argument that some delay in obtaining that assistance was reasonable." 565 F.3d at 1352–53. Additionally, the court in *Laist* looked at the quality of the warrant application. 702 F.3d at 614.

152. 675 F.3d at 1033.

153. *Laist*, 702 F.3d at 618. In *Laist*, the court emphasized that after the defendant withdrew the consent that he had given for the officers to search his computer, the officer started "drafting a warrant affidavit . . . on the very day he received Laist's revocation of consent." *Id.*

154. 675 F.3d 1029.

defendant that the warrant could have been applied for earlier because the officer was very experienced, and the warrant was mostly boilerplate.[155] However, the court seemed to completely brush this aside because it found that the delay was reasonable.[156] It is very likely that another court could have ruled that the officers were not diligent because they did not act diligently under these facts.[157]

The court in *Burgard* stated its reason for finding that the police were diligent was partly based on the court "not want[ing] to discourage this sort of careful, attentive police work, even if it appears to us that it could or should have moved more quickly."[158] This seems to give courts a free reign to find that the police were acting diligently as long as it can find that the police were "careful or attentive."[159] Although there is no need for a strict rule for determining whether police were diligent, there should be a standard benchmark in which courts can go through a checklist and find that if the police did certain things, they were diligent. It may be easiest for courts to develop a specific checklist of things that it believes will show that the police were diligent.

Furthermore, the defendant in *Burgard* had a serious concern that may predict the future of what will happen if courts do not develop a benchmark test.[160] Although the court did not think this was concerning, "Burgard argue[d] that this outcome could 'give authorities license to retain seized property for long periods of time merely because they chose not to devote a reasonable amount of resources and sufficient experienced personnel' to the task of obtaining warrants."[161] If courts continue to find that the police were diligent despite various factors indicating that they were not, police departments may begin to be less diligent than they were due to believing that the court will still find them as acting diligently. Courts are likely tolerating too much of a lack of diligence today. If benchmark tests are not developed and put into use in the near future, there will be serious discrepancies in the determinations of whether or not delays in obtaining search warrants are reasonable.

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155. *Id.* at 1034.
156. *Id.* at 1034–35.
157. *Id.*
158. *Id.* at 1034.
159. *Id.*
160. *Id.* at 1035.
161. *Id.*

C. The Georgia Supreme Court's Decision in State v. Rosenbaum

The Georgia Supreme Court made the right decision in *Rosenbaum* by holding that "the trial court did not err in granting the motion to suppress."[162] There is not a high likelihood that any court would have found the 539 and 702 day delays reasonable under any circumstances.[163] However, this case presented a perfect opportunity for the court to craft a rule of law for this issue, but the court missed out on this opportunity.[164] By crafting either a solid rule or a benchmark rule for this issue, the Georgia Supreme Court could have set the standard in Georgia and possibly given other states and circuits a model on how to formulate a rule.[165]

In rendering its decision, the court spent a lot of time on the defendants' possessory interest in the electronic devices that were seized from them and noted that the state even agreed that this interest was extremely important to the defendants due to how important computers and other items are to people today.[166] The court's acknowledgement of a person's significant interest in their electronic devices is likely what pushed the court toward its ultimate decision.[167]

However, it is likely that if this case would have been decided during the time that cell phones, computers, and other electronic devices were just beginning to be placed on the market, this would not have been as much of a concern to the court at all.[168] In earlier decades, when people were just starting to purchase and use cell phones and computers, they likely did not have the dependence on these items that individuals do today. Perhaps because electronic devices were not as readily accessible as they are today. In regard to how modern today's society is in terms of technology and individuals' use of it, the court took a step in the right direction by spending considerable time on the defendants' possessory interest.[169] Furthermore, the court emphasized that the attorney for the defendants asked for these electronic devices back for a year and a half.[170] However, if the defendants had never asked for the devices,

162. 305 Ga. at 442.
163. *Id.* at 443.
164. *Id.* at 442.
165. *Id.*
166. *Id.* at 451.
167. *Id.*
168. *Id.*
169. *Id.* at 451–52.
170. *Id.* at 452.

perhaps this would have been a fundamental factor for the court and it may not have spent as much time on this issue.[171]

Another element of the test that the court carefully considered was the police's diligence, which the court did not find much of due to the fact that there was "no showing of particular complexity, difficulty in drafting the warrant, or competing demands on a limited number of officers."[172] Even if the court would have been opposed to making their own test for this issue, police diligence is the one area in which the court should have drafted a rule. It seems that there are endless considerations for the courts when evaluating police diligence. It is not of the Author's opinion that the courts should not consider these factors. However, the Georgia Supreme Court should have developed a benchmark at least for the police diligence element that would help it determine whether or not the delay of the search warrant was reasonable.[173] This benchmark could involve a certain point in which the police's actions would meet the benchmark if they did a number of things that would help them obtain a warrant quickly. However, if the police did nothing to help themselves obtain the warrant, they would not meet this benchmark and it would help the court to find that the delay is certainly unreasonable. It could also be helpful to think of this as a checklist in which the court would check off all the things the police did toward obtaining a warrant, and based on that, the police would meet the benchmark. Ultimately, the Author agrees with the court that the delay was unreasonable, but the court should have developed a test of its own instead of merely following the Eleventh Circuit.[174]

IV. CONCLUSION

The area of the law involving delays in obtaining search warrants should be updated with a rule or test that will offer courts more guidance on deciding whether a delay is reasonable or unreasonable. A test for this issue would not be burdensome to courts but would help them determine the issues that arise. A benchmark test with a presumption that a delay longer than thirty days for electronic items and fourteen days for mail is unreasonable would be best for courts to use. However, even if courts did not want to adopt a benchmark test, a similar test would be sufficient as well. Perhaps the best scenario for development of a rule in this area of law would be if the Supreme Court

171. *Id.* at 451–52.
172. *Id.* at 454.
173. *Id.* at 442.
174. *Id.* at 442, 455.

of the United States decided this issue and both state and federal courts could follow this law. Ultimately, the current method that courts use to determine whether delays in obtaining search warrants are reasonable is too subjective and inefficient.[175]

In addition, police diligence should be considered separately when determining if a delay is reasonable. A court can be very subjective when determining police diligence if they do not have a benchmark to follow. Furthermore, a court may be overlooking or tolerating a complete lack of diligence from the police if it does not have a benchmark or standard to follow.

Georgia's most recent decision on the issue of delays in obtaining search warrants was decided in 2019 in *Rosenbaum*.[176] In this new decision, the Georgia Supreme Court did not attempt to design a benchmark test or any other standard but followed the Eleventh Circuit.[177] Since *Rosenbaum* did not develop a benchmark test for this issue, it is unlikely that Georgia will be the state to finally develop a test and start a change in this area of the law.[178]

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175. *See Burgard*, 675 F.3d 1029 for the process that courts go through to determine whether delays in obtaining search warrants are reasonable or unreasonable.

176. 305 Ga. 442.

177. *Id.* at 449–50.

178. 305 Ga. 442.