

In The Matter Of:

Nelson v.

The State

S21A0773

August 26, 2021

Oral Argument

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IN RE:)
S21A0773 Nelson v. The State.)
_____)

Partial transcription of oral arguments in
S21A0773 Nelson v. State before the Georgia Supreme
Court, held via Zoom videoconference on August 26,
2021, starting, as requested, at 26:47 of the video
and continuing until the end of the arguments.

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1 (Transcription started at 26:50.)
2 **JUSTICE NAHMIA**s: Thank you, Mr. Cunningham.
3 Ms. Dunikoski.
4 **MS. DUNIKOSKI**: Thank you, Justice.
5 We're looking at this all wrong and we're
6 using the wrong words. And the reason we're doing this is
7 because we're using the word "search" over here when what
8 we really mean is analysis and determination of the
9 relevancy of evidence.
10 The Fourth Amendment protects Corey Nelson
11 from unreasonable searches and seizures. So you go get a
12 search warrant, you search his house, and you seize his
13 cellphone.
14 The problem in our case is Detective Stoddard
15 did not say I'm seizing the electronic data and the
16 cellphone, he simply said I'm seizing the cellphone. In
17 other words, he seized the filing cabinet, the Bankers
18 Box. He didn't say I'm seizing the papers inside. He
19 needed to go ahead and get another search warrant.
20 So we're getting really, really overly
21 technical with search because what we've got now is we've
22 got this cellphone in the possession of law enforcement,
23 but law enforcement does not have -- has not legally
24 seized the electronic data. The way to legally seize the
25 electronic data in the phone that they have possession of

1 LIST OF PARTICIPANTS PRESENT VIA ZOOM:
2 The Justices:
3 David E. Nahmias, Chief Justice
4 Michael P. Boggs, Presiding Justice
5 Nels S.D. Peterson, Justice
6 Sarah Hawkins Warren, Justice
7 Charles J. Bethel, Justice
8 John J. Ellington, Justice
9 Carla Wong McMillian, Justice
10 Shawn Ellen LaGrua, Justice
11 Verda M. Colvin, Justice
12
13 Counsel for Appellant:
14 Mitch Durham
15
16 Counsel for Amicus:
17 Professor Clark D. Cunningham
18
19 Counsel for Appellee:
20 Linda J. Dunikoski
21
22
23
24
25

1 is to have a search warrant signed by a neutral magistrate
2 that has been supported by probable cause. So when that
3 happens over here, we get to this point. Search warrant
4 has been signed. This is already in the possession of the
5 police, but it goes from possession into being legally
6 seized. At the point it's legally seized, there is no
7 arbitrary or magical action that needs to be taken place
8 by the place afterwards.
9 **JUSTICE PETERSON**: Is that framing consistent
10 with Riley? And, if so, how?
11 **MS. DUNIKOSKI**: It is consistent with Riley
12 because Riley -- the problem with Riley was that they were
13 doing warrantless searches of a closed container incident
14 to arrest. And the Supreme Court said, listen, you can't
15 just stop people and arrest them and then go, hey, there's
16 closed container on you, let's look through and see what
17 it says. They said you really need to get a search
18 warrant. Why? Because, police officers, you need to be
19 able to articulate why you believe this electronic data is
20 related to the crime you've just arrested the person for.
21 **JUSTICE PETERSON**: But that's a distinction
22 between searching and seizure because when you've arrested
23 someone, you've seized all their -- all their incidental
24 property.
25 **MS. DUNIKOSKI**: Yes.

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1 **JUSTICE PETERSON:** So they've got the phone.
 2 What they haven't done is gone in and get the data that
 3 is, you know, evidence of a crime.
 4 **MS. DUNIKOSKI:** Correct. So -- well, what
 5 they have is they have the box containing the data. They
 6 have seized the box. And that's what we did in this case.
 7 The detective went and seized the box via a search
 8 warrant.
 9 What has to happen down the line -- and I'm
 10 going to -- I'm a down-the-line kind of person. What
 11 protects Corey Nelson is -- at trial is the State wants to
 12 put this electronic evidence in, right? Mr. Durham's
 13 going to object to it by saying you were in possession of
 14 it but you didn't have a legal document signed by a
 15 magistrate judge giving you permission basically to look
 16 at that evidence, so it gets suppressed.
 17 When you have the legal document, the search
 18 warrant, signed by a neutral magistrate, supported by
 19 probable cause, you have now legally seized the ones and
 20 zeros in here and anything you do afterwards to that, just
 21 like anything you do to DNA evidence on that bedsheet you
 22 seized at the house, is what happens down the line.
 23 **JUSTICE PETERSON:** Have you really seized --
 24 I mean, what if the data actually resides on the cloud and
 25 the phone is simply the mechanism for accessing the data?

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1 Have you seized the data on the cloud?
 2 **MS. DUNIKOSKI:** No, you have not.
 3 **JUSTICE PETERSON:** Okay.
 4 **MS. DUNIKOSKI:** Because, remember, this is
 5 actually really a copy. Right now I could drop this in
 6 Lake Lanier and four hours later if I go to a T-Mobile
 7 store, I'm back up and running. My contacts are there, my
 8 calendar is there, my e-mails are there, I can get back on
 9 my banking. So this is --
 10 **JUSTICE PETERSON:** So until you've pulled the
 11 data off the phone, why is it accurate to say that you've
 12 seized the information on the phone?
 13 **MS. DUNIKOSKI:** Because -- you've seized it
 14 because you have a warrant that says you've seized it. It
 15 went from in your possession over here to being legally
 16 seized because you have that search warrant right there.
 17 **JUSTICE WARREN:** But you can seize something
 18 illegally.
 19 **MS. DUNIKOSKI:** Right. What I'm saying is
 20 you can go ahead and seize something illegally. In order
 21 to use it at trial -- the State wants to use this evidence
 22 at trial. In order to use it at trial, I've got to make
 23 sure it's legally seized. How do I make sure this is
 24 legally seized? I make sure a warrant has been signed by
 25 a neutral magistrate supported by probable cause.

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1 **JUSTICE PETERSON:** So what have you seized?
 2 What data have you seized? Let's say that you seize my
 3 phone today at 10:00 o'clock and at 11:00 o'clock I go in
 4 through some other app using my desktop computer and
 5 delete data from the cloud. If you have not yet
 6 downloaded the data from the phone, when did you seize my
 7 data? Did you seize my data at 10:00 o'clock? Does the
 8 data that you've seized change over time as I go in and
 9 delete it even though I don't touch the phone?
 10 **MS. DUNIKOSKI:** No, because what we do with
 11 these phones is one of two things. It goes in a Faraday
 12 bag which keeps anything from the cloud going into it or
 13 we shut it off.
 14 And that's what they did in this case. You
 15 go ahead and you shut this phone down. My phone is shut
 16 down right now. Right now if this is seized, I have a
 17 copy of how my data was at the moment in time that this
 18 was either put in the Faraday bag or was shut down. So
 19 whatever you do in the cloud afterwards --
 20 **JUSTICE WARREN:** Wait. I think I've missed a
 21 step, and it might be technical, you know, lack of
 22 proficiency, but I didn't hear you say anything about
 23 actually imaging or copying or downloading. I heard you
 24 just say I'm shutting it down.
 25 **MS. DUNIKOSKI:** Uh-huh (affirmative). So the

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1 process -- the process, Justice Warren, is this. I go --
 2 I'm in Corey Nelson's house, and I go, oh, here's the
 3 phone. I don't want what Justice Peterson is talking
 4 about to have happen. I want it pristine, that copy.
 5 Because, remember, this is a copy. In order to preserve
 6 this copy, I don't want it talking to the web at all, so I
 7 shut it down. The minute I shut it down I'm in possession
 8 of the ones and zeros inside of it. I then need to go get
 9 that search warrant. The minute I've got the search
 10 warrant, it becomes legally seized. I still have the ones
 11 and zeros. It's still that copy of the moment I shut it
 12 down. Me making a photocopy --
 13 **JUSTICE PETERSON:** But when you image -- oh,
 14 go ahead, Chief.
 15 **JUSTICE NAHMIAS:** I mean, you make that
 16 argument, but what you have seized then is all of the data
 17 on the phone frozen at that time, right?
 18 **MS. DUNIKOSKI:** Correct.
 19 **JUSTICE NAHMIAS:** The search warrant does not
 20 allow you to seize all of the data, right? The language
 21 of the search warrant commanded that you search the phone
 22 and seize only evidence of the criminal activity of
 23 certain types.
 24 So it kind of goes to my question of
 25 Professor Cunningham. It's the equivalent of saying,

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1 well, I have a search warrant for the house to seize
 2 evidence of the murder so I can just go take possession of
 3 the house and kind of hold onto the house for the next ten
 4 years and I've executed the warrant.
 5 Don't you have to actually do the search and
 6 the seizure of the particular things in the warrant so
 7 that it's not a general warrant?
 8 **MS. DUNIKOSKI:** Yes. The problem is that
 9 we're unable technologically to do what you just said
 10 because --
 11 **JUSTICE NAHMIAS:** Well, I hear you complain
 12 about technology, but that does not change the Fourth
 13 Amendment so --
 14 **MS. DUNIKOSKI:** No, I agree with you that it
 15 does not change the Fourth Amendment. The State's problem
 16 with being able to actually in a timely ten-day fashion
 17 download thousands of pages off of this, especially if
 18 it's locked and we have to get into it, and then perform
 19 an analysis of thousands of pages to find those pieces of
 20 incriminating evidence that we're going to tender in at
 21 trial. The State's position is that is the same thing as
 22 going I'm looking for DNA evidence at the alleged rapist's
 23 apartment and I get that bedsheet off of it.
 24 **JUSTICE NAHMIAS:** Except what you can do with
 25 a warrant like that is say I am searching for, you know,

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1 evidence that may contain -- that may contain biological
 2 evidence and you may have probable cause to believe that
 3 bedsheets or random firearms. But that's how you would
 4 word the warrant because you don't have to actually have,
 5 you know, provable evidence, you only have to believe you
 6 that something has evidentiary value.
 7 But the warrant here wasn't worded that way.
 8 The warrant here was worded, you know, you are allowed to
 9 seize evidence of the criminal activity, and then it
 10 particularized the things that could be evidence. But you
 11 didn't just seize that. You seized every little bit of
 12 data, right?
 13 **MS. DUNIKOSKI:** Yes, because you can't
 14 separate it when you seize it. There's no way at this
 15 point in time for me to go from here to here and then
 16 magically seize -- or magically separate the data that's
 17 incriminating --
 18 **JUSTICE NAHMIAS:** So if the only data, for
 19 example, on an iPhone that could be relevant to a crime
 20 was photos, that's -- that's the only thing relevant, and
 21 the warrant said you may search this iPhone for photos,
 22 are you saying you can hold onto all of the data because
 23 you still got to get it imaged and that's a hassle and you
 24 got to get through encryption so I can hold onto all the
 25 data and have a general warrant for that data even though

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1 the only thing that's particularized in the warrant is
 2 photos?
 3 **MS. DUNIKOSKI:** The answer is I'm going to
 4 dispute you on the idea that I have a general warrant.
 5 What I have is I have seized all of this data. And the
 6 warrant is specific. Hey, you're looking for photos on
 7 the iPhone. In order for me to do that analysis down the
 8 road, is this the victim's DNA on those bedsheets, are
 9 these photos in this, I can't separate them because I'm
 10 not omniscient.
 11 **JUSTICE NAHMIAS:** I don't know how that's
 12 different than saying like, you know, I have a warrant for
 13 a very large house to search for one thing, you know, the
 14 murder weapon described as this particular gun, and, you
 15 know, it's going to take me a lot of time and it takes a
 16 lot of officers to search a big house and we got to secure
 17 it, and so, you know, it's not a general warrant
 18 because -- I guess because you say you're eventually going
 19 to get around to analyzing what you've seized. I mean,
 20 I'm trying to -- or -- or a room -- a Banker -- a roomful
 21 of documents and you just haven't dedicated the resources
 22 to get the things that the warrant particularizes.
 23 **MS. DUNIKOSKI:** So you go into the house and
 24 you can search it. A regular law enforcement officer can
 25 do that. They can go behind the hot water heater. They

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1 can go in the sock drawer. An expert has to go into this.
 2 So you've got an expert problem --
 3 **JUSTICE NAHMIAS:** So there's an ex -- there's
 4 an expert distinction to the Fourth Amendment?
 5 **MS. DUNIKOSKI:** No, actually there's not.
 6 And so the problem -- the thing, Justice Nahmias, is if we
 7 analogize this to DNA, I think what you're really talking
 8 about is the wording of the warrant. So if we're going to
 9 go ahead and look at the wording of the warrant, then,
 10 yes, okay, there might be a problem because we're looking
 11 for text messages and we're looking for this, we're
 12 looking for that, and how do I parse that out. And I
 13 understand that I can't parse it out. Physically I can't
 14 do it until it's been downloaded --
 15 **JUSTICE PETERSON:** Doesn't the wording of the
 16 warrant require you to parse it out, though? I mean,
 17 maybe you would prefer you got a different warrant from
 18 the warrant you got; and if you did, maybe that would
 19 raise questions as to whether that warrant was overbroad
 20 and therefore invalid. But you got the warrant you got.
 21 **MS. DUNIKOSKI:** Correct.
 22 **JUSTICE PETERSON:** And the fact that the
 23 warrant you got is hard to execute doesn't change what
 24 execution means, does it?
 25 **MS. DUNIKOSKI:** No, because we're doing it

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1 wrong. We're not talking about execution in the right
2 way.
3 If I could go back for a minute, searching is
4 searching. I'm looking. I'm looking everywhere. Okay.
5 I need --
6 **JUSTICE NAHMIAS:** No, search --
7 **MS. DUNIKOSKI:** -- electronic data.
8 **JUSTICE NAHMIAS:** Yeah, search -- I mean,
9 search is pretty clearly described as you search a person
10 or a premises, right?
11 **MS. DUNIKOSKI:** Correct.
12 **JUSTICE NAHMIAS:** The premises here is a
13 phone. It can be a human being or it can be -- or it can
14 a location, right?
15 **MS. DUNIKOSKI:** Uh-huh (affirmative). Yes.
16 **JUSTICE NAHMIAS:** You get to look around that
17 thing. That's the search.
18 And then the seizure is you get to take
19 control of particular things for use down the road, right?
20 And then you return the thing you -- normally you return
21 the thing that you were searching to the owner.
22 **MS. DUNIKOSKI:** Correct, the Bankers Box
23 would go back.
24 **JUSTICE NAHMIAS:** So the issue here is not
25 searching, the issue here is the seizure. What are you --

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1 did you complete -- the command is search this premises,
2 the phone, and seize, the warrant says, evidence of
3 criminal activity, and it lists a whole bunch of specific
4 things. It doesn't just say "which may include data found
5 on the phone." That might be a general warrant, but at
6 least it would authorize you to just seize all the data.
7 **MS. DUNIKOSKI:** But the State's position is
8 is that in this case there was no reason to search Corey
9 Nelson's cellphone because a cellphone has the electronic
10 data on it. So I don't need to look around to determine
11 like Mr. Durham said. We at least got to turn it on and
12 see if there's electronic data. The State's position is
13 you don't have to do that. In order to seize the
14 electronic data and the specific items listed in that
15 search warrant, all that needs to happen is the search
16 warrant is signed based on probable cause. This becomes
17 legally seized. The copying of it is --
18 **JUSTICE WARREN:** What if you got the wrong
19 phone? If you never turn it on, how are you going to
20 know?
21 **MS. DUNIKOSKI:** Right.
22 **JUSTICE BETHEL:** What becomes legally seized?
23 Because you said there's specific things in there but
24 there's also a lot of other information. So is the other
25 information legally seized if it's outside the scope of

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1 the signed warrant?
2 **MS. DUNIKOSKI:** It is legally seized, but
3 it's unusable.
4 So I'm going to go back to Justice Nahmias'
5 gigantic --
6 **JUSTICE BETHEL:** I'm sorry, I'm sorry. You
7 have data -- you have data that you're saying is not
8 subject to the scope of the warrant in your possession by
9 what authority?
10 **MS. DUNIKOSKI:** By the -- by the authority
11 of -- that is a really good question. At this point you
12 do have data that is outside the scope of the search
13 warrant. It's in your possession. It's also in the
14 possession of the defendant because it's out in the cloud.
15 You do have possession of it. You can't use it at trial.
16 The trial court's never going to let you use any
17 irrelevant evidence that --
18 **JUSTICE PETERSON:** We're not talking about
19 the exclusionary rule. We're talking about the authority
20 of the State to have something.
21 **JUSTICE BETHEL:** You have taken something
22 that belongs to somebody --
23 **MS. DUNIKOSKI:** Uh-huh (affirmative).
24 **JUSTICE BETHEL:** -- by what authority? By
25 what authority? You still have it, and by --

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1 **MS. DUNIKOSKI:** Yes.
2 **JUSTICE BETHEL:** -- what authority does the
3 State still have that which they do not have a warrant
4 authorizing them to have?
5 **MS. DUNIKOSKI:** Well, we don't have legal
6 authority under this particular search warrant because
7 this search warrant was specific to --
8 **JUSTICE PETERSON:** So then you don't have any
9 authority at all, right?
10 **MS. DUNIKOSKI:** For things that are
11 electronic data that is not relevant to the case and not
12 listed in the search warrant, no, we don't have any
13 authority to go ahead and search that --
14 **JUSTICE PETERSON:** You don't have --
15 **MS. DUNIKOSKI:** -- or analyze that.
16 **JUSTICE PETERSON:** -- authority to have it in
17 the first place, right?
18 **JUSTICE BETHEL:** Your argument is that you've
19 overseized and just forgive you for that which you've
20 overseized because --
21 **JUSTICE PETERSON:** At that point it's
22 essentially stolen property under -- under the --
23 according to the common law.
24 **MS. DUNIKOSKI:** Well, if you go back to the
25 fact that we've executed a search warrant and have --

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1 okay. So here's the thing. We've executed a search
 2 warrant. The search warrant -- we have a valid search
 3 warrant which says we have possession of the actual box.
 4 The fact that there's a bunch of stuff in the box --
 5 **JUSTICE WARREN:** Well, you have possession of
 6 the box for certain purposes, right?
 7 **MS. DUNIKOSKI:** For the purpose of
 8 theoretically tendering --
 9 **JUSTICE WARREN:** For the purposes that are
 10 outlined in the warrant, correct?
 11 **MS. DUNIKOSKI:** Well, see, this is where this
 12 case gets really weird. What Detective Stoddard did was
 13 he had a search warrant, a Fulton County search warrant,
 14 to go into Corey Nelson's house and search for cellphones,
 15 not for electronic data but for cellphones. So in this
 16 case we took possession of --
 17 **JUSTICE NAHMIAS:** That warrant's not at issue
 18 at all, right?
 19 **MS. DUNIKOSKI:** Right, that's not at issue.
 20 **JUSTICE NAHMIAS:** Okay.
 21 **MS. DUNIKOSKI:** So then we have a second
 22 warrant that he has to issue because he's got probable
 23 cause now to believe that there's electronic data on this
 24 that would go ahead and tie Corey Nelson to the crime. So
 25 he gets --

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1 **JUSTICE LaGRUA:** Ms. Dunikoski, let me ask
 2 you a question. Are you disagreeing with the argument
 3 that the seizure actually occurs when the data is
 4 downloaded as Judge Leonard found as to the second warrant
 5 issued in this case?
 6 **MS. DUNIKOSKI:** Yes. The State's position is
 7 that no magical arbitrary other act of copying,
 8 downloading, or analysis needs to take place in order for
 9 the execution of the search warrant to be valid because
 10 the thing protecting Corey Nelson from the State --
 11 **JUSTICE LaGRUA:** So let me ask you a
 12 question. If that's the case, what is the act that occurs
 13 within ten days after getting the warrant for the content
 14 of the -- what happens between a magistrate signing a
 15 warrant and the ten days expiration period for executing
 16 the warrant? As I hear what you're saying, you have to do
 17 nothing but have gotten the warrant. You don't have to do
 18 a thing within that ten days.
 19 **MS. DUNIKOSKI:** Correct, because in this case
 20 this was already legally in the possession of the State
 21 via the Fulton County search warrant. The only thing that
 22 the State needed to do was take it from possession of the
 23 State into legally seizing the data via that search
 24 warrant and no other action -- no other magical action
 25 needed to take place afterwards to execute the search

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1 warrant for that data on the phone.
 2 **JUSTICE PETERSON:** Under that theory, why
 3 aren't you subject to a -- to a suit for violation of the
 4 due process clause for taking property illegally under
 5 1983? And, you know, I think it's clearly established
 6 that the State's not authorized to take -- you know, to
 7 seize items beyond the scope of the search warrant, so
 8 why -- why wouldn't that be -- why wouldn't qualified
 9 immunity be denied because there's no -- you know, the law
 10 has clearly established that you can't do that?
 11 **MS. DUNIKOSKI:** Because this was -- this box
 12 was legally in the possession of the State. The search
 13 warrant was for text messages and photos in the electronic
 14 data here.
 15 **JUSTICE PETERSON:** Right.
 16 **MS. DUNIKOSKI:** Keeping --
 17 **JUSTICE PETERSON:** All the other stuff.
 18 **MS. DUNIKOSKI:** Keeping all the other stuff
 19 is not illegal in the sense that what we're going to do
 20 down the road -- like keeping the bedsheet is not illegal
 21 because we're looking for DNA evidence on it. So keeping
 22 the defendant's clothing is not illegal when we're looking
 23 for the blood on it. Keeping the defendant's carpet rug
 24 when we're looking for trace fibers on it --
 25 **JUSTICE PETERSON:** What about --

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1 **MS. DUNIKOSKI:** -- at the GBI --
 2 **JUSTICE PETERSON:** What about everything in
 3 the defendant's house?
 4 **MS. DUNIKOSKI:** We're not keeping everything
 5 in the defendant's house. This is just --
 6 **JUSTICE WARREN:** But that's an extension of
 7 the analogy here.
 8 **JUSTICE NAHMIAS:** You may have -- you have
 9 executed your warrant properly. The remedy may be a
 10 motion for return of improperly seized items or a tort
 11 action. But that --
 12 **MS. DUNIKOSKI:** Correct.
 13 **JUSTICE NAHMIAS:** -- doesn't necessarily mean
 14 you didn't seize everything you were entitled to seize,
 15 you just seized lots more.
 16 **MS. DUNIKOSKI:** Thank you.
 17 **JUSTICE NAHMIAS:** All right. Thank you,
 18 Ms. Dunikoski.
 19 Ms. Durham, I think you have three and a half
 20 minutes left.
 21 **MR. DURHAM:** All right. Thank you, sir.
 22 A couple quick things, if I may. I want to
 23 make one distinction, I guess, on what the State's talking
 24 about. And I don't believe that the items -- the
 25 information inside the phone has been seized just by them

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1 having the physical object.
 2 And the best way I can -- I think I can
 3 explain it is that when they go into Corey Nelson's house
 4 or whoever's house they go into under a search warrant and
 5 they get a phone or they get another phone and they seize
 6 those under the warrant for the residence, they have the
 7 physical phones but they don't have the data inside it,
 8 and I think that's a distinction --
 9 **JUSTICE NAHMIAS:** Why is that? If it is, in
 10 fact, protected from manipulation, the data resides on the
 11 electronic memory inside the device which is in the
 12 State's possession, how is that not controlled completely
 13 by the State which is what a seizure is?
 14 **MR. DURHAM:** Well, again, I think what Riley
 15 is saying is you cannot go into the -- you can have it but
 16 you can't go inside it. You can use the phone or whatever
 17 body of the phone for whatever evidentiary --
 18 **JUSTICE NAHMIAS:** Well, what Riley says is
 19 you need a warrant -- well, you can seize the device but
 20 you can't actually seize what's inside it or do anything
 21 with it without another warrant. But they got another
 22 warrant here.
 23 **MR. DURHAM:** Right.
 24 **JUSTICE NAHMIAS:** And I understand why that
 25 warrant -- you know, their seizure may have been

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1 overbroad.
 2 But if they take your house, if you get a
 3 search warrant for a house to search for one gun and the
 4 police come and they take your house and they just live
 5 there for a while, the gun -- if the gun is inside the
 6 house, has it been seized because they're controlling
 7 everything? They've overbroadly done it but --
 8 **MR. DURHAM:** Well, again, I believe they
 9 have. But I think that there needs to be -- I guess what
 10 I'm trying to get to is there needs to be -- for whatever
 11 electronic devices were taken in the original search,
 12 there needs to be, before the information inside can be
 13 seized or looked at, a separate finding of probable cause
 14 by a magistrate has to be -- has to be done.
 15 **JUSTICE NAHMIAS:** There was. There was a
 16 separate finding of that. I mean, it seems like maybe
 17 we're all -- you know, your remedy is not it wasn't
 18 executed. Your remedy is they seized too much and I can
 19 complain about the search of too much or the seizure of
 20 too much of my property.
 21 **MR. DURHAM:** Until they go in and -- and I
 22 don't believe -- again, I have a separate -- I'm finding a
 23 separate entity in what is inside the phone as opposed to
 24 the physical phone itself, you know --
 25 **JUSTICE LaGRUA:** So, Mr. Durham, once they

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1 get the warrant for the content and they download it, does
 2 that make -- are you conceding that that makes the seizure
 3 complete if they do it within ten days?
 4 **MR. DURHAM:** Once they download it, yes, Your
 5 Honor. I don't disagree with Professor Cunningham in the
 6 ordinary usage of the word where they would have to
 7 analyze it, but I think the question the Court gave us
 8 added it to look under the Fourth Amendment. And when you
 9 do that, I think the courts are trying to show
 10 reasonableness. And given the mass volumes of information
 11 that the phone may have, then the downloading would be the
 12 reasonable answer to the question as opposed to analysis.
 13 **JUSTICE NAHMIAS:** I'm sorry. Just explain
 14 that line that, you know, the act of copying it, which
 15 does nothing to change what you've looked at or what
 16 you've controlled, the act of copying is okay to you
 17 but -- even if it's not reviewed?
 18 **MR. DURHAM:** You haven't invaded the privacy
 19 until -- until you go -- and I think you can separate at
 20 that time during the analysis. But I do think that under
 21 the Fourth Amendment that the downloading would be the
 22 answer as far as the execution of it.
 23 **JUSTICE NAHMIAS:** Okay. Thank you, Counsel,
 24 for very good arguments, and we'll decide the case as soon
 25 as we can, and we are going to ask you to have a good day

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1 while we take a short break before our final case.
 2 (Transcription ended at 51:29.)
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C E R T I F I C A T E

STATE OF GEORGIA:
COUNTY OF GWINNETT:

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This, the 16th day of September, 2021.

DANIEL M. GERSHWIN, CCR-B-1012
Certified Court Reporter

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