UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF OF THE SEARCH OF TWENTY-SIX (26) DIGITAL DEVICES AND MOBILE DEVICE EXTRACTIONS THAT ARE CURRENTLY IN THE POSSESSION OF LAW ENFORCEMENT IN WASHINGTON D.C.

No. 21-sw-233 (GMH)

MEMORANDUM OPINION AND ORDER

On July 22, 2021, the government presented to the Court an application for a warrant seeking to search 26 cell phones, or digital copies of the information and data extracted by law enforcement from those phones (i.e., "cell phone extractions"), that are currently in the government's possession in the District of Columbia. *See* ECF No. 5. The relevant devices were originally seized by law enforcement in numerous investigations involving the alleged unlawful possession of firearms by different defendants between 2019, and 2021. *Id.* at 33–35. Some of the prosecutions of those defendants whose phones were seized are ongoing, and some have been completed. The government's warrant application does not arise as part of any of these prosecutions but as part of a subsequent investigation into the suspected unlawful manufacturing, trafficking, and distribution into the District of Columbia of

firearms

(i.e., "the subsequent investigation"). The government has determined that each of the cell phones at issue was seized in connection with an alleged crime

. *See id.* at 37–42. The government believes that a search of the data on those cell phones—all of which are smart phones—can lead to evidence linking those guns to a common trafficker or trafficking conspiracy and therefore seeks a warrant approving that search to assist the subsequent

investigation. ECF No. 4 at 3–4; ECF No. 5 at 33–35. The Court appreciates the significance of the government's investigation into the proliferation of such weapons in the District of Columbia. Nevertheless, the warrant application raises important questions about the reasonableness of a search of cell phones seized many months—or in some cases years—ago in connection with prosecutions unrelated to the subsequent investigation. The Court therefore issues this decision explaining its rationale for granting in part and denying in part the warrant application.

I. BACKGROUND

Having reviewed the search warrant application,[1] the Court issued an order on July 26, 2021, directing the government to file a brief that addressed whether the government had unreasonably delayed applying for the search warrant in violation of the Fourth Amendment, pointing specifically to the Second Circuit's analysis of that issue in *United States v. Smith*, 967 F.3d 198 (2d Cir. 2020). ECF No. 1. After the Court granted its request for a one-week extension of time, the government submitted its brief on August 9, 2021 (the "August 9 Brief"). ECF Nos. 2–4.

On August 18, 2021, the Court issued an Order (the "August 18 Order") that (1) stated that there was no impediment to granting the search warrant as to four of the devices—Target Devices[2]

[1] The government first submitted its warrant application for review by the undersigned by email on July 22, 2021. *See* ECF No. 1. Pursuant to the practice of the magistrate judges of this Court, the government waited for instruction from the Court before filing the application on the docket so that it could be sworn. Because the undersigned determined that the warrant application raised questions that would require briefing and perhaps a written decision, on July 26, 2021, the Court ordered the original warrant application to be filed on the docket. *See id.* The government did so on August 16, 2021. ECF No. 5.

[2] The term "Target Devices" as used in this memorandum includes so-called mobile device extractions, in which information and data from a mobile device is copied to a different storage medium. *See, e.g.*, *Sissac v. Montgomery*, No. 16cv2287, 2018 WL 3375110, at *24 (S.D. Cal. July 11, 2018) (describing a cell phone data extraction as "download[ing] the contents of [a] cell phone"). When it is material to the analysis, a distinction will be made between the devices themselves and their extractions.

5, 6, 14, and 15—because each of them had been effectively abandoned prior to their initial seizure by law enforcement; and (2) asked for additional briefing as to the remaining 22 devices. ECF No. 6 (the "August 18 Order"). In particular, the August 18 Order sought information about the circumstances of, and legal basis for, the original seizure of the 22 devices, and the government's justification for its continued retention of those devices thereby leaving them purportedly subject to search in a subsequent investigation. *Id.* at 10–12. After the Court granted two requests for an extension of time, the government filed its second brief on September 15, 2021 (the "September 15 Brief"). ECF Nos. 7–11. In that submission, the government withdrew its request to search 11 of the 22 remaining devices—Target Devices 3, 4, 8, 9, 10, 11, 12, 20, 24, 25, and 26. ECF No. 11 at 19. That submission does not provide an explanation of the government's decision to withdraw its request to search those 11 devices. *Id.* The September 15 Brief does provide additional information about the government's justification for initially seizing and continuing to retain, the remaining 11 devices—Target Devices 1, 2, 7, 13, 16, 17, 18, 19, 21, 22, and 23. The government's request to search those 11 devices is the subject matter of this memorandum opinion.

The Court held a hearing on the government's warrant application on September 27, 2021. At the conclusion of that hearing, the Court granted the government's request for an additional two weeks to brief issues raised at the hearing—specifically, the government's assertion that information and data extracted from a cell phone pursuant to a warrant belonged to the government in perpetuity—or, to put it as the government did at the hearing, the data extractions were "ours as oppose[d] to the defendants['']." Transcript of Sept. 27, 2021 Hearing at 33, 55–58 (on file with the chambers of the undersigned). Approximately two weeks, later, the Court granted the government's request for another week "to consider filing" that brief. Email chain dated Oct. 13, 2021 (on file with the chambers of the undersigned). On October 25, 2021, the government

informed the Court that it would not file "anything additional" in this case, but noted that, as the Court had "requested similar briefing" as to a different search warrant application, Case No. 21-sw-319, the government would "appreciate it" if the Court waited until that briefing had been submitted before ruling in this search warrant application. Email dated Oct. 25, 2021 (on file with the chambers of the undersigned). That brief in the other matter now having been submitted to the Court, the government's warrant application is ripe for adjudication.

For the reasons that follow, the Court will grant the government's application to search Target Devices 1, 2, 7, 13, 21, 22, and 23, but will deny its application to search Target Devices 16, 17, 18, and 19.

II. DISCUSSION

The Supreme Court has recognized that the "preconditions for a warrant" are "probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness." *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978); *see also United States v. U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 318 (1972) ("Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights."); *see also* Order at 13, *In re Search of Information Associated with Cell Towers*, Nos. 21-sc-59, *et al.* (D.D.C. Jan. 17, 2021) (Howell, C.J.) (filed under seal) (noting, in evaluating whether to grant an application for a warrant under the Fourth Amendment, that "[t]he touchstone . . . is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which

it is needed for the promotion of legitimate governmental interests.'" (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001))).

Importantly, "reasonableness" is assessed both before and after a warrant is issued. As the Court previously explained in the August 18 Order, magistrate judges "[have] the authority—and, indeed, a constitutional duty—to evaluate the 'overall reasonableness' of the warrant the government seeks prior to its issuance." ECF No. 6 at 4 (quoting *Zurcher*, 436 U.S. at 565). As Justice Powell articulated in his *Zurcher* concurrence, "the magistrate must judge the *reasonableness* of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant." 436 U.S. at 570 (Powell, J., concurring) (emphasis added)); *see also Blackie's House of Beef, Inc. v. Castillo*, 480 F. Supp. 1078, 1085 (D.D.C. 1979) (noting that "the Constitution imposes upon the magistrate a heavy burden of confining a proposed search within the bounds of reasonableness"), *rev'd on other grounds*, 659 F.2d 1211 (D.C. Cir. 1981). Similarly, in *Michigan v. Tyler*—decided the same day as *Zurcher* on the legality of an administrative search warrant—the Court reemphasized that the magistrate judge's role includes a threshold assessment of the warrant's reasonableness: "The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other." 436 U.S. 499, 507 (1978). The D.C. Circuit has counseled that "[t]his prior consideration must be more than pro forma." *Blackie's House of Beef*, 659 F.2d at 1217. So, "the magistrate must do more than review passively requests for warrants. Rather, he is expected to employ the 'ample tools at his disposal to confine warrants to search within reasonable limits.'" *Blackie's House of Beef*, 480 F. Supp. at 1085 (quoting *Zurcher*, 436 U.S. at 567). Thus, although it is true that courts generally review

challenges to the reasonableness of a search "in two discrete, *post-enforcement* settings: (1) a motion to suppress in a criminal case or (2) a damages claim," the magistrate has an independent duty to make an *ex ante* assessment of a warrant's reasonableness. *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (emphasis in original); *Blackie's House of Beef*, 480 F. Supp. at 1085 ("[T]he Constitution requires that the magistrate determine in advance that the proposed search is reasonable."). The undersigned must therefore evaluate not only probable cause and particularity of the warrant at issue, but the reasonableness of that warrant seeking to search the data on the 11 remaining devices as part of the subsequent investigation.[3]

A. Probable Cause and Particularity

The Court has reviewed the government's warrant application and concludes that it has established probable cause to search each of the target devices at issue. As the warrant application explains, the subsequent investigation is an important one focused on the suspected unlawful trafficking, distribution, and possession of

firearms . ECF No. 5 at 37–39.

[3] Further, as a practical matter, magistrate judges must make an *ex ante* assessment of whether a proposed search or seizure is reasonable for the Fourth Amendment's reasonableness requirement to have real effect. If, for instance, a magistrate judge determined only whether a warrant application met the probable cause and particularity requirements and failed to evaluate reasonableness, and a court later found the search to be unreasonable, the good faith exception to the exclusionary rule would likely leave a criminal defendant without effective recourse. *See United States v. Leon*, 468 U.S. 897, 917, 920–23 (1984) (holding that the exclusion of evidence is generally inappropriate "when an officer acting in good faith has obtained a search warrant from a judge . . . and acted within its scope," because "[p]enalizing the officer [executing the warrant] for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations," nor will it "reduce judicial officer's incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests"). The existence of the *Leon* good faith doctrine thus makes the magistrate judge's role in ensuring adherence to the Fourth Amendment's reasonableness requirement all the more important.

Id. at 39.

Each of the target devices at issue here was recovered by law enforcement in connection with prior investigations which began between approximately one year ago and two-and-a-half years ago in which a gun was seized because it was found in the defendant's alleged unlawful possession. *Id.* at 43–60.

. *Id.* at 42–43. Because each of the target devices was recovered on or near a person connected with its unlawful possession or use, the government reasons that it is probable that the target devices contain evidence related to the connection between that person and the gun; and related to the gun's sale or acquisition, and receipt. *Id.* at 62. Stated simply, the government believes that evidence identifying the source of the guns coming into the District of Columbia, or the methodologies related to such distribution, may be on the devices. The undersigned finds that these representations, and others included in the application, have established probable cause to believe that information or data on the Target Devices will contain evidence relevant to the subsequent investigation, including evidence of trafficking of firearms without a license. ECF No. 5 at 36–37.

The government has also appropriately particularized its search requests in the warrant. It has specifically identified the devices from which it seeks to extract data (i.e., Target Devices 1, 2, 7, 13, 16, 17, 18, 19, 21, 22, and 23). ECF No. 5 at 4–29. Further, although the government apparently intends to extract, and may cursorily review, all the data from the phones if no

extraction has already been performed, it has limited the information to be seized to "fruits, evidence and instrumentalities" of the crimes under investigation. *Id.* at 30. More importantly, the warrant lists 15 distinct categories of data and information that could be useful to the subsequent investigation that the government has demonstrated probable cause to believe may be located on the phones or information and data extraction therefrom. *See id.* at 30–32. This is more than sufficient to satisfy the Fourth Amendment's particularity requirement. *See, e.g.*, *United States v. Burke*, 633 F.3d 984, 992 (10th Cir. 2011) (finding warrant sufficiently particularized where it authorized law enforcement to search and seize "contraband, evidence, fruits, or instrumentalities of [certain] crime(s)," and then listed three categories of information); *United States v. Jacobson*, 4 F. Supp. 3d 515, 524 (E.D.N.Y. 2014) (finding warrants were sufficiently particularized "[b]ecause the [warrants] referenced particular crimes and used illustrative lists as a means of limiting the items to be seized"); *United States v. Reed*, No. 2:13-CR-29-1, 2013 WL 5503691, *4 (D. Vt. 2013) ("The warrant in this case incorporated a list of evidence to be seized that included a description of the crime . . . [;] the warrant in this case [thus] provided adequate guidance limiting the scope of the search for evidence of a specific crime."); *cf. United States v. Smith*, No. CR 19-324 (BAH), 2021 WL 2982144, at *8 (D.D.C. July 15, 2021) (noting that warrant "could have provided more examples . . . of specific kinds of evidence that might constitute evidence related to the criminal offense").

B. Reasonableness

Nevertheless, the government's showing of probable cause and particularity as to its request to search the target devices does not end the analysis. The constitutional inquiry also requires an assessment of the overall reasonableness of the government's requested search, which, in cases where the warrant arises as part of an investigation different from the investigation in

which the device was seized, extends to questions regarding the reason for any delay in the search request, the sufficiency of the basis for the government's continued retention of the device thereby making it available for search in another investigation, and a consideration of the search's impact on the device owner's possessory interests. *See United States v. Wilkins*, __ F. Supp. 3d __, __, 2021 WL 1894990, at *22 (D.D.C. May 11, 2021) (noting that "[a] seizure can 'bec[o]me unreasonable' when 'its length unduly intrude[s] upon constitutionally protected interests.'" (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 n.25 (1984))). A finding of probable cause does not address those concerns, which ultimately stem from the constitutional requirement that searches and seizures be reasonable. *See United States v. Ganias*, 824 F.3d 199, 240 (2d Cir. 2016) (Chin, J., dissenting) (explaining that the issue of a potentially unreasonable search of property retained from a prior prosecution is present even if probable cause to search the property exists in the subsequent investigation).[4] As to that inquiry, for the reasons stated below, the Court finds that the government has established the reasonableness of the search of seven of the target devices as part of the subsequent investigation, but has failed to do so with respect to four.

As the Supreme Court has instructed, "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.'" *United States v. Jacobson*, 466 U.S. 109, 124 (1984). "The evaluation of 'reasonableness' [under the Fourth Amendment] includes consideration of any delays in retaining . . . an item." *In re Application for Search Warrant*, 527 F. Supp. 3d 179, 181 (D. Conn. 2020) (evaluating the government's delay in applying for a search warrant prior to issuing the warrant); *see also Smith*, 967 F.3d at 205 ("[E]ven a seizure based on probable cause is unconstitutional if police act with

[4] Indeed, if probable cause and particularity were dispositive of these concerns, there would be no unreasonable delay cases arising from warrants to search seized property, as there are always warrants present in those cases.

unreasonable delay in securing a warrant." (quoting *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998))); *United States v. Laist*, 702 F.3d 608, 612–13 (11th Cir. 2012) ("The primary issue in this case is whether the FBI acted unreasonably and hence violated the Fourth Amendment when it took 25 days to prepare its application for a search warrant while holding [the defendant's] computer based on probable cause."); *United States v. Burgard*, 675 F.3d 1029, 1032 (7th Cir. 2012) ("When officers fail to seek a search warrant, at some point the delay becomes unreasonable and is actionable under the Fourth Amendment."). In unreasonable delay cases like *Smith*, *Laist*, and *Burgard*, courts have considered a number of factors when deciding whether a delay had been intolerably prolonged in violation of the Fourth Amendment: the lawfulness of the government's initial seizure of the device, including whether the property was seized based on probable cause, reasonable suspicion, or otherwise; the length of and justification for the government's retention of the seized device, including whether it has evidentiary value independent of its contents; the government's diligence in pursuing its investigation and explanation for any delay; the general utility and importance of the seized property to its owner; and the strength of the owner's possessory interest in the property, including whether that interest has been undermined by the owner's abandonment of the property or consent to its search or seizure. *See, e.g.*, *Smith*, 967 F.3d at 206; *Laist*, 702 F.3d at 613–14; *Burgard*, 675 F.3d at 1033; *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *24; *see also United States v. Wright*, __ F. Supp. 3d __, __, 2021 WL 1521283, at *6–7 (M.D. Pa. 2021) (considering, in determining whether evidence culled from the search of a cell phone should be suppressed, the government's interest in and basis for the initial seizure and

the basis for its retention, among other things); *In re Application for Search Warrant*, 527 F. Supp. 3d at 182–88.

But the government's August 9 Brief addressing unreasonable delay underscores an important distinction between the delays at issue in *Smith*, *Laist*, and *Burgard*, and the delay under consideration here. In *Smith*, *Laist*, and *Burgard*, the initial seizure and subsequent warrant were related to the same criminal investigation and the legal inquiry essentially sought to identify cases of government inertia, i.e., those where the government's neglect or indifference to searching a device recovered in an investigation had resulted in its unreasonably prolonged retention. *Smith*, 967 F.3d at 202–03, 206 ("What, after all, is 'reasonable' about police seizing an individual's property on the ground that it potentially contains relevant evidence and then simply neglecting for months or years to search that property to determine whether it really does hold relevant evidence needed for trial or is totally irrelevant to the investigation and should be returned to the rightful owner?" (quoting *United States v. Christie*, 717 F.3d 1156, 1162 (10th Cir. 2013))); *Laist*, 702 F.3d at 610–12, 614 ("When balancing these interests to determine the reasonableness of the government's actions, we are also obliged to 'take into account whether the police diligently pursue[d] their investigation.'" (alteration in original) (quoting *United States v. Place*, 462 U.S. 696, 709 (1983)); *Burgard*, 675 F.3d at 1030, 1033 ("When 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."). Here, however, the original seizure of the device and pending warrant application concern two different investigations: the initial prosecutions of multiple defendants for, among other things, unlawful possession of a firearm, between 2019 and 2021; and the subsequent investigation regarding the distribution of guns into the District of Columbia, which began in February 2021. ECF No. 5 at 37. As the government points

out, at the time of the seizure of the devices at issue in the underlying investigations (which occurred between April 2019 and September 2020 (*see id.* at 33–35)), the subsequent investigation did not exist. ECF No. 4 at 9. Thus law enforcement had no basis to search any of the Target Devices in connection with that subsequent investigation until it had engaged in the complex analysis outlined in the search warrant application, which involved reviewing records related to the recovery of approximately 500 guns recovered in the District of Columbia between March 2017 and February 2021;

determining that 47 of those guns were seized along with a digital device;

. ECF No. 5 at 40–43. The government is thus correct when it asserts that the situation facing the Court is "different from, for example, an unlawful possession of a firearm case where the sole purpose of the purportedly delayed warrant was to obtain evidence of unlawful possession of firearms against the subject in question." ECF No. 4 at 9.

But that difference does not provide the government with the means to escape from the Fourth Amendment's reasonableness inquiry. Its warrant application raises questions related to the unreasonable delay cases, specifically, whether and when the government may, in connection with a subsequent investigation, search a mobile device—or data extracted from such a device—that the government has retained for months or years after its seizure as part of an earlier investigation and prosecution. Few courts have actually grappled with that question, but a number have acknowledged, if only in dicta, that there must be some reasonable limit on the government's power to do so. *See, e.g.*, *United States v. Ganias*, 755 F.3d 125 (2d Cir. 2014), *rev'd en banc*, 834 F.3d 199 (2d Cir. 2016); *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *26 (in a case

involving warrant to search a seized cell phone as part of a subsequent investigation, observing that "[t]he Court is deeply uncomfortable with the notion . . . that law enforcement has the power to seize and indefinitely hold any property merely on the Government's word that the property owner is a person of interest in some uncharged, unrelated crime at the time of the seizure"); *see also, e.g.*, *United States v. Keleta*, No. 4:16CR388, 2017 WL 11404638, at *13 (E.D. Mo. Aug. 10, 2017) (noting discomfort with "unfettered government access and retention of seized [electronically stored information]"), *report and recommendation adopted*, 2017 WL 11404639 (E.D. Mo. Sept. 18, 2017), *aff'd*, 949 F.3d 1082 (8th Cir. 2020).

Ganias is, in some sense, the leading case in this area. Calling it that is somewhat odd, however, because, with respect to the issues before the Court, in the end it stands for very little other than judicial acknowledgement of the complexities in balancing the competing interests in this area of the law. In *Ganias*, the defendant challenged his convictions for tax evasion "on the ground that the Government violated his Fourth Amendment rights when, after lawfully copying three of his hard drives for off-site review pursuant to a 2003 search warrant" in an investigation into unrelated criminal activity, the government "retained th[ose] full forensic copies (or 'mirrors'), which included data both responsive and non-responsive to the 2003 warrant . . . and ultimately searched the non-responsive data pursuant to a second warrant in 2006" issued in connection with a separate investigation into tax evasion by Ganias. 824 F.3d at 200–07. In a decision authored by Judge Chin, a panel of the Second Circuit found that the evidence gleaned from the second search should have been suppressed, holding that the Fourth Amendment does not "permit[ ] officials executing a warrant for the seizure of particular data on a computer to seize and indefinitely retain every file on that computer for use in future criminal investigations." *Ganias*, 755 F.3d at 137. The panel noted that the "personal records of Ganias" that were material

to the second investigation were "beyond the scope" of the authorization in the original warrant, and reasoned:

> Nevertheless, the Government continued to retain them for another year-and-a-half until it finally developed probable cause to search and seize them in 2006. Without some independent basis for its retention of those documents in the interim, the Government clearly violated Ganias's Fourth Amendment rights by retaining the files for a prolonged period of time and then using them in a future criminal investigation.

Id. at 137–38. The *en banc* court reversed the panel decision on the basis that law enforcement had relied in good faith on the 2006 warrant, therefore obviating the need to "decide whether retention of the forensic mirrors violated the Fourth Amendment." *Ganias*, 824 F.3d at 200. That is, presented with an opportunity to answer some of the questions raised by a government warrant to search as part of a different investigation data extractions seized in an earlier investigation, the *en banc* Second Circuit passed, but noted the "complex and rapidly evolving technological issues" and "the significant privacy concerns" raised by the case. *Id.* at 220. As the present matter arises in the context of a magistrate judge's consideration of such a warrant in the first instance, those complexities may not be avoided by application of the good faith doctrine as they were in *Ganias*.

With these concerns in mind, the Court turns to the issue at hand: whether the government's request for a warrant to search Target Devices 1, 2, 7, 13, 16, 17, 18, 19, 21, 22, and 23 (or extractions of the information and data they contain) for evidence in the subsequent investigation is reasonable. As discussed below, consideration of all of the factors derived from the cases discussed above weighs in favor of granting the government's application to search Target Devices 1, 2, 7, 13, 21, 22, and 23, and weighs against granting the government's application to search Target Devices 16, 17, 18, and 19.

1. Target Devices 1, 2, 7, 13, 21, 22, and 23

Target Devices 1, 2, 7, 13, 21, 22, and 23 are all associated with open prosecutions in the D.C. Superior Court or this Court. They are grouped together for analysis of the reasonableness of the government's request because the devices were recovered in a similar fashion in each of the underlying prosecutions and the government contends that each device is itself being retained as evidence in those ongoing proceedings, a fact that weighs heavily in the Court's consideration of all of the factors.

a. The Government's Interest in Holding the Property as Evidence in the Case in which it was Seized

As noted, in resolving questions of unreasonable delay, courts have inquired into "the government's *legitimate* interest in holding the property as evidence." *Laist*, 702 F.3d at 614 (emphasis added). The following section discusses whether the government's original seizure of these devices was lawful and whether it had a basis to continue to possess them as evidence in the underlying prosecutions when it applied for the warrant in the subsequent investigation.

i. Initial Seizure of the Property

Courts analyzing the initial seizure of the property at issue in unreasonable delay cases have considered various particulars. First, the lawfulness of the initial seizure is a prime consideration. *See, e.g.*, *United States v. Tisdol*, __ F. Supp. 3d __, __, 2021 WL 2349753, at *1–3 (D. Conn. 2021) (inquiring into the legality of the original seizure of the phone in connection with an argument that law enforcement pursuing federal charges unreasonably delayed applying for a warrant to search a phone seized originally in connection with an investigation into state charges); *United States v. Gabelman*, No. 2:20-cr-00019, 2020 WL 2739616, at *4–*5 (D. Nev. May 5, 2020) (considering the legality of the initial seizure of a cell phone in connection with a claim of unreasonable delay in obtaining a search warrant to search the device), *report and*

recommendation adopted, 2020 WL 2735382 (D. Nev. May 26, 2020). Additionally, courts have noted the "strength" of the government's interest in the seizure, such as whether the property was seized pursuant to probable cause or reasonable suspicion. *See, e.g.*, *Burgard*, 675 F.3d at 1033 ("The state has a stronger interest in seizures made on the basis of probable cause than in those resting only on reasonable suspicion.").

As a preliminary matter, the standard applicable to review of the basis and legitimacy of the government's initial seizure at this stage in the proceedings requires some discussion. Again, it is well-established that a judge faced with a warrant application has an obligation to evaluate its overall reasonableness. *See, e.g.*, *Zurcher*, 436 U.S. at 565; *Tyler*, 436 U.S. at 507; *Blackie's House of Beef*, 659 F.2d at 1217; *Blackie's House of Beef*, 480 F. Supp. at 1085. As explained above, that evaluation necessarily includes some inquiry as to the legality of the original seizures of the devices the government seeks to search in the subsequent investigation.

Nevertheless, this Court's evaluation of the initial seizures of the devices is necessarily limited at this early, *ex parte* stage. It would be unacceptable to repeatedly delay the adjudication of warrant applications in investigations that may be time sensitive in an attempt to recreate the more comprehensive procedures and record available at the motion to suppress stage. And, indeed, the fact that a defendant may be able to take advantage of that more extensive process by later interposing a motion to suppress supports an analysis that is somewhat more cursory than searching. Indeed, in similar circumstances—that is, where the lawfulness of a seizure is considered outside of the context of a motion to suppress—courts have asked only whether "'the alleged unconstitutionality of the search and seizure was absolutely clear on the face of the proceedings' and whether the government had 'obtained a warrant by the usual means based upon at least a colorable allegation of probable cause and the search was otherwise validly executed.'"

In re Search Warrant, No. 03-0008, 2003 WL 22095662, at *5–*6 (D. Del. Sept. 9, 2003) (addressing a motion to return property that was allegedly illegally seized during the preliminary stages of the putative prosecution) (quoting *Donlon v. United States*, 331 F. Supp. 979, 980–81 (D. Del. 1971)); *see also In re Search of Scranton Housing Authority*, 436 F. Supp. 2d 714, 725–26 (M.D. Pa. 2006) ("[T]he court has evaluated the movant's claim that it has been aggrieved by an unlawful search and seizure of property using reasoning similar to that set forth in *Donlon* . . . . Specifically, in light of the movant's arguments, and the pre-indictment stage of the proceedings, the court need only consider whether the alleged unconstitutionality of the search and seizure was 'clear on the face of the proceeding' and 'whether the government had obtained a warrant by the usual means . . . and the search was otherwise validly executed.'"), *vacated on other grounds*, 487 F. Supp. 2d 530 (M.D. Pa. 2007). As discussed further below, the Court has applied a similar standard here to determine that there are no obvious constitutional or other legal infirmities in the original seizure of each device that would undercut the reasonableness of the government's request to search them in the subsequent investigation.

Target Devices 1 and 2 were seized on 2019. ECF No. 11 at 15. That day, U.S. Park Police executed a search warrant at the residence where the defendant lived, recovering 400 grams of marijuana, 20 methamphetamine pills, and numerous guns and rounds of ammunition. Statement of Offense at 2,

They also recovered two of his cell phones. *Id.* The defendant was ultimately charged with unlawful gun possession and intent to distribute controlled substances. *See* Indictment, . Pursuant to a search warrant issued by another federal magistrate judge in March 2020, data was extracted from the two phones. Amended Affidavit in Support of an Application Under Rule 41,

. The defendant challenged the seizure of his cell phones and the extraction in a motion to suppress; however, that motion is now moot because the defendant pled guilty

Target Device 7 was seized on 2020. ECF No. 11 at 8–9. The defendant was drinking with a group in front of a building. *Id.* at 8. When officers approached, someone "voiced 'jump outs,'" and the defendant, who was holding his phone, became wide-eyed and walked away from the group. *Id.* at 8–9. A law enforcement officer who could see a bulge in the defendant's pants that was not consistent with normal male anatomy, asked for consent to conduct a pat-down. *Id.* at 9. The defendant refused. *Id.*

Thereafter, the officer asked the defendant what the bulge in his groin area was; the defendant did not respond. *Id.* Apparently, a pat-down was conducted and a gun seized. The phone was seized incident to the defendant's arrest for unlawful possession of the gun. *Id.* at 8–9.

Target Device 13 was seized on 2020. *Id.* at 10. Law enforcement observed a group of individuals, including the defendant, *Id.* An officer noticed the defendant clutching at his waistband and "frantically looking around before he fled, clutching the front of his waistband area." *Id.* The defendant was ultimately stopped and officers saw him pull a firearm from his waistband area and toss it on the ground, where they recovered it. *Id.* The defendant was arrested for unlawful possession of the gun, and the phone was seized incident to his arrest from his right front pants pocket. *Id.*

Target Device 21 was seized on 2020. *Id.* at 11. While patrolling in an area where multiple people had recently been shot, officers observed the defendant attempting to conceal something in his waistband. *Id.* When law enforcement asked if the

defendant had any weapons in his possession, the defendant briefly lifted up his shirt but leaned forward in an attempt to conceal an irregularly-shaped object, inconsistent with normal male anatomy, in his waistband. *Id.* Law enforcement patted that area and discovered a gun. *Id.* The defendant was then arrested and charged with unlawful possession of the gun. *Id.* At the time of the arrest, officers recovered the defendant's phone from the ground near where he was stopped. *Id.* at 11–12.

Target Device 22 was seized on 2020. *Id.* at 12–13. Law enforcement observed three males, including the defendant, standing next to a parked vehicle. *Id* at 13. The defendant looked directly at the officers and fled, clutching with his right hand at the front of his waistband. *Id.* The defendant ran into a parking lot, but continued to hold the front of his waistband with his right hand. *Id.* He stumbled once, but regained his footing and continued running, still clutching the waistband of his pants; he stumbled again and fell, and law enforcement were able to apprehend him. *Id.* A pat-down of the waistband area was negative, but law enforcement observed a firearm near where the defendant had fallen. *Id.* Target Device 22 was also recovered from that area. *Id.* The defendant was arrested and charged with unlawful possession of the gun. *Id.* at 12.

Target Device 23 was seized on 2020. *Id.* at 2. Patrolling law enforcement observed three individuals gathered near when those individuals noticed the officers, two of the three began to walk away from the third—the defendant—who was sitting at the table. *Id.* As officers approached, the defendant hunched his torso over his midsection, with a cell phone in his hand. *Id.* He then told the three officers that he had already been approached and checked by a different officer, which the three officers knew to be false. *Id.*

at 2–3. The defendant stayed hunched over and began breathing more deeply and "visibly shaking so much that he could not hold his phone steady." *Id.* at 3. An officer conducted a protective pat down of the defendant's waistband area and felt what he recognized as a firearm. *Id.* The firearm and ammunition were recovered and the defendant was arrested for unlawful possession of the gun. *Id.* Eight days later law enforcement obtained a search warrant to extract data from the phone, which was seized incident to the defendant's arrest. *Id.* That extraction was performed approximately one week later. *Id.*

Based on the government's factual proffer describing the recovery of Target Devices 1, 2, 7, 13, 21, 22, and 23, the Court finds no obvious constitutional or other legal infirmity in their initial seizure. To date, no judge has granted a motion to suppress the seizure of any of the devices.[5] Indeed, Target Devices 1 and 2 were seized pursuant to what appears on its face to be a valid warrant that permitted the seizure of electronic devices. *See* Superior Court of the District of Columbia Search Warrant,

. Further, based on the government's proffer, the stops that led to the seizure of Target Devices 7, 13, 21, 22, and 23 appear to have been supported by reasonable suspicion and the arrests of each defendant by probable cause, thus, "the officers could lawfully search and seize any evidence on [their] person[s], incident to the arrest" of the defendant in those cases. *United States v. Wider*, 951 F.2d 1283, 1286 (D.C. Cir. 1991) (finding that officers who recovered contraband from a sack that had been in the defendant's possession "had an objectively reasonable

[5] Although motions to suppress were filed in the underlying cases in which Target Devices 1, 2 and 21 were seized, it does not appear that any evidence derived from those devices has been suppressed pursuant to those motions. The motion with respect to Target Devices 1 and 2 is moot, as the defendant has pleaded guilty. The motion filed in the case in which Target Device 21 was initially seized does not explicitly seek suppression of the cell phone or any data on it but does challenge the search that resulted in recovery of a firearm that led to the defendant's arrest, at which point the cell phone was recovered from the ground near the defendant. The government has not indicated that motion has been granted. The Court has reviewed each of the motions and has not identified any clear constitutional infirmity in the seizure of the devices at issue.

belief that [he] had committed a crime and therefore probable cause to arrest him"). To be sure, Target Devices 21 and 22 were not retrieved from the person of an individual at his arrest, but from the area near him. But, as the government notes, "cell phones may be lawfully seized pursuant to plain view based on their proximity to an observable criminal offense." ECF No. 4 at 14 (citing *United States v. Thorne*, __ F. Supp. 3d __, __, 2021 WL 2682631, at *46 (D.D.C. 2021) (collecting cases)). Because all of the Target Devices appear to have been lawfully seized pursuant to arrests supported by probable cause, this review—albeit limited—supports the government's request to search Target Devices 1, 2, 7, 13, 21, 22, or 23 as part of the subsequent investigation.

ii. Retention of the Seized Property as Evidence in the Case in which it was Seized

The fact that property appears to have been lawfully seized is only one part of the inquiry into "the government's legitimate interest in holding the property as evidence." *Laist*, 702 F.3d at 614. As important, especially in a case where the government seeks to search a cell phone in a subsequent investigation long after its initial seizure, is the government's justification for the device's continued retention at the point the government seeks to search it anew as part of the subsequent investigation. *See, e.g.*, *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *26 (finding unreasonable a fifteen-month delay between the original seizure of a phone and the government's application for a warrant to search the phone as part of a subsequent, unrelated investigation where the government had retained the phone for that extended period "with no real justification"). As to Target Devices 1, 2, 7, 13, 21, 22, and 23, the government has asserted a straightforward rationale for their continued retention at the point it sought to search them again as part of the subsequent investigation: they are being held as evidence in the underlying

prosecutions, which are still ongoing, thus necessitating their retention by the government and, necessarily, the retention of the information and data on them. ECF No. 11 at 2–14.

Unsurprisingly, courts have recognized the critical government interest in retaining material that has evidentiary value to an ongoing criminal case. Indeed, the Second and Eleventh Circuits have indicated that the "demand [for] expediency in obtaining a search warrant to search seized evidence in order to avoid interfering with a continuing possessory interest for longer than reasonably necessary" is diminished where the seized item "has independent evidentiary value." *Smith*, 967 F.3d at 205 (quoting *United States v. Sparks*, 806 F.3d 1323, 1340 (11th Cir 2015), *overruled on other grounds by United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020) (*en banc*)); *see also id.* at 209 (noting that if the government had shown that a digital device "had independent evidentiary value," that "would have justified the police's retention of [it] without regard to whether they ever sought a warrant to search [its] contents"). That is, the fact that "seized personal property" such as a cell phone has "evidentiary value" in ongoing criminal proceedings "regardless of [its] contents" supports the government's "entitlement to retain possession" of the device "based on the need to preserve evidence for trial." *Wright*, __ F. Supp. 3d at __, 2021 WL 1521283, at *7; *see People v. Bell*, No. G058306, 2021 WL 363233, at *6 (Cal. Ct. App. Feb. 3, 2021) ("[T]he cell phones in this case had evidentiary value independent of the files within them. . . . Therefore, the cell phones themselves would be admissible evidence at defendant's trial . . . . Defendant provides no authority, and we find none, obligating the police to return admissible evidence prior to the disposition of the pending criminal charge for which the evidence was seized."); *see also United States v. Carter*, 139 F.3d 424, 426 (4th Cir. 1998) ("We find no authority . . . that would obligate the officers to return to a criminal defendant charged with the theft, admissible evidence

seized incident to a lawful arrest for the theft, prior to the disposition of the pending criminal charge for which the defendant was arrested.").

Here, the government contends that Target Devices 1, 2, 7, 13, 21, 22, and 23 are themselves, independent of the information and data on them, evidence of the crimes being prosecuted in the underlying cases and that it is therefore entitled to retain those devices for potential use at trial or to oppose a motion to suppress in those ongoing matters. Specifically, with respect to Target Devices 1 and 2, the government asserts those devices were seized from the defendant's home during the execution of a search warrant which also recovered drugs, guns, and ammunition. The defendant was ultimately charged with unlawful gun possession and distribution of controlled substances.

The government contends that the cell phones themselves are evidence in that case because of the well-documented connection between cell phone use and drug trafficking. *See* Transcript of Sept. 27, 2021 Hearing at 42–43. The Court agrees. *See, e.g.*, *Thorne*, __ F. Supp. 3d at __, 2021 WL 2682631, at *47 (noting that cell phones are "essential tools of [the] drug trade" (quoting *United States v. Portilla*, 496 F.3d 23, 27 (1st Cir. 2007))).

Turning to Target Devices 7 and 21, the government states that the phone itself will be relevant to counter any argument that the bulge that officers observed in the defendants' pants and waistband prior to the stop and pat-down was more consistent with an item like a phone than with a gun. ECF No. 11 at 9, 12. Similarly, with respect to Target Device 13, the government contends that the items recovered from the defendant's waistband and pockets may be necessary to explain that the gesture made by the defendant to hold onto his waistband was "consistent with an individual attempting to hold on to contraband (and not to hold onto a phone, which was in his pocket.)" *Id.* at 10–11. Regarding Target Device 22, the government states that the phone itself

"may be important evidence connecting the defendant to the flight and the recovered of the firearm," as well as to counter an argument that the defendant "was grabbing for the phone (and not the firearm)." *Id.* at 14. Last, Target Device 23 was seized from a suspect who had the device in his hand while he allegedly had a gun secreted in the waistband of his pants. The device could therefore serve as evidence that, for example, the item secreted in the defendant's waistband was not the phone but the gun. Transcript of Sept. 27, 2021 Hearing at 46–47.

The Court finds colorable the government's explanation as to why each of these devices may have evidentiary value relevant to the underlying prosecution and will not second guess it. *See United States v. Brown*, 185 F. Supp. 3d 79, 82, n.8 (D.D.C. 2016) ("[T]he government's expressed need to retain certain items for evidentiary uses . . . will not be second-guessed."). Provided that the underlying proceedings were ongoing when it applied for the warrant in the subsequent investigation, the Court finds that the government's showing that Target Devices 1, 2, 7, 13, 21, 22, and 23 are themselves evidence in the underlying prosecutions provides a strong justification for their continued retention—or, in the words of *Wright*, "an entitlement [for the government] to retain possession" of the devices—thereby supporting the reasonableness of its request to search them in the subsequent investigation. *Wright*, 16-CR-255, 2021 WL 1521283, at *7; *see also Brown*, 185 F. Supp. 3d at 82 ("[L]awfully seized property 'may be retained pending exhaustion of its utility in criminal prosecutions.'" (quoting *United States v. Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980))); *Ford-Bey v. United States*, Civil Action No. 19-2039, 2020 WL 32991, at *7 (D.D.C. Jan. 2, 2020) ("[C]ourts may rightfully refuse to return claimed property when it falls into one of three categories . . . [including that] the property involved is subject to government retention pending termination of the trial."); *Commonwealth v. Arthur*, 112 N.E.3d 1189, 1194 n.6 (Mass. Ct. App. 2018) (explaining that the government was not obligated to return

the cell phones after searching them where the cell phones had evidentiary value independent of their contents). And, as a practical matter, the fact that the government retains the physical devices as evidence in the underlying prosecutions means that it also has possession of the information and data those devices contain, which the government seeks to search in the subsequent investigation. *Cf. Ganias*, 824 F.3d at 234 (Chin, J. dissenting) (distinguishing a case where the government unlawfully retains nonresponsive electronically stored information extracted from a hard drive from "a case where the physical hard drive itself is of evidentiary value").[6]

The government has also made a satisfactory showing that the underlying prosecutions associated with each of the devices were ongoing when it submitted its warrant application. It has represented that the defendant from whom Target Device 7 was seized has a pending criminal case for unlawful possession of a firearm in

ECF No. 11 at 8. Target Device 13 is being held as evidence in another unlawful firearms possession case in which a status hearing is scheduled for 2022. *Id.* at 10. There are ongoing criminal proceedings in the cases involving Target Devices 21 and 22, as well. ECF No. 4 at 22. The defendant from whom Target Device 23 was seized failed to appear at status hearing in his criminal case in 2020 and

ECF No. 11 at 3.

[6] It bears noting what is *not* at issue in this case or addressed in this opinion: whether and when the government may be permitted to search, as part of a subsequent investigation, either (1) electronically stored information extracted in the initial investigation pursuant to a warrant from a physical storage device (e.g., a cell phone or hard drive) where the device itself is of no evidentiary value in the earlier proceeding; or (2) electronically stored information seized in the initial investigation from an electronic account (e.g., an email, iCloud, Google, or social media account) pursuant to a Stored Communications Act warrant. As noted below, *see infra* note 10, searches of both varieties often raise thorny issues concerning the government's right to retain and later search information from a device that is beyond the bounds of the original warrant—so-called "overseized" information. *See, e.g.*, *Ganias*, 824 F.3d at 232 (Chin, J., dissenting) ("[O]verseizure is exactly what it sounds like. It is a seizure that *exceeds* or *goes beyond* what is otherwise authorized by the Fourth Amendment. It is an overseizure of evidence that may be reasonable, in light of the practical considerations. But once the Government is able to extract the responsive documents, its right to the overseizure of evidence comes to an end.").

Although Target Devices 1 and 2 are connected to a case in which the defendant recently pleaded guilty, sentencing is not set until

. As the Supreme Court has repeatedly stated, "[f]inal judgment in a criminal case means sentence," *Bradley v. United States*, 410 U.S. 605, 609 (1973) (citing cases), and, until sentencing, a guilty plea may be withdrawn "if the defendant can show any fair and just reason for requesting the withdrawal." Fed. R. Crim P. 11(d)(2)(B); *see also United States v. Hanson*, 339 F.3d 983, 987–88 (D.C. Cir. 2003). For those reasons, the Court finds that the underlying prosecution associated with Target Devices 1 and 2 has not yet concluded either.[7]

For these reasons, the government has demonstrated that, as of the date that it submitted the warrant to search Target Devices 1, 2, 7, 13, 21, 22, and 23 in the subsequent investigation, it was still retaining those devices as evidence in the underlying prosecutions where they were first lawfully seized—a retention interest the Court finds strong. *See Hubbard*, 650 F.2d at 303 n.26 (the government may retain lawfully-seized property "pending exhaustion of its utility in criminal prosecutions"); *see also Ford-Bey*, 2020 WL 32991, at *7; *Brown*, 185 F. Supp. 3d at 82; *United States v. Garcia-Geigel*, No. 6:17-cr-160, 2018 WL 309935, at *1 (M.D. Fla. Jan. 5, 2018) (noting the government's "strong interest" in holding property that is evidence in a criminal case); *see also United States v. Hensley*, 469 U.S. 221, 229 (1985) (noting the "strong government interest in solving crimes and bringing offenders to justice"). Stated differently, the fact that Target Devices 1, 2, 7, 13, 21, 22, and 23 are lawfully "seized personal property" that have "evidentiary value" in ongoing criminal proceedings, "regardless of [their] contents," supports the government's "entitlement to retain possession" of those devices "based on the need to preserve evidence for

[7] The government does not contend that any of the underlying prosecutions should be deemed ongoing because of the pendency of a direct appeal, so there is no occasion here to address the impact that issue may have on the analysis.

trial," thereby making them, and the data they necessarily contain, available for search in another investigation pursuant to a warrant. *Wright*, __ F. Supp. 3d at __, 2021 WL 1521283, at *7.

b. Duration of the Delay and Diligence of the Government

The next factors to be assessed are the length of the delay prior to the government seeking the warrant and the government's diligence in pursuing its investigation. *See, e.g.*, *Laist*, 702 F.3d at 613–14; *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *24. As stated previously, application of those factors in this case is somewhat awkward because the government's application seeks a warrant to benefit an investigation that only came into existence fairly recently. When measured from the date of their initial seizure in the underlying prosecutions to the date that the government submitted its warrant application to search them in the subsequent investigation, the owners of Target Devices 1, 2, 7, 13, 21, 22, and 23 had been deprived of their possession for a period of between approximately two years and three months (Target Devices 1 and 2 were seized on 2019 (ECF No. 5 at 33–34) and approximately ten months (Target Device 21 was seized on 2020). *See* ECF No. 1. While those are significant periods of time, the better measure of the delay here is from the inception of the subsequent investigation—February 2021—because, as should be clear from the description of that investigation above, it *could not* have been begun until the number of guns recovered by law enforcement was sufficient to indicate the need for an investigation and also for a pattern to emerge that would provide a basis to seek a warrant to investigate the trafficking of those guns into the District. It would be inappropriate to count against the government a "delay" that is not fairly attributable to it. Thus, the most pertinent measure of delay in this case is the approximately five months between the beginning of the gun investigation in February 2021 and the initial presentation of the search warrant to the Court in July 2021.

Even five months, however, may be found to be unreasonable. In *Smith*, for example, the Second Circuit determined that a delay of 31 days was excessive. 967 F.3d at 206 ("The month-long delay at issue here is nearly three times as long as the delay in [*United States v. Martin*, 157 F.3d 46 (2d Cir 1998)] and is not presumptively reasonable."). But the reasonableness of a delay turns in part on the "diligence with which law enforcement seek a warrant for seized property." *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *26; *see also, e.g.*, *Thomas v. United States*, 775 F. App'x 477, 488 (11th Cir. 2019) ("[I]n determining the reasonableness of the government's actions, courts must take into account whether law enforcement were diligent on pursuing their investigation."); *cf. United States v. Pratt*, 915 F.3d 266, 272 (4th Cir. 2019) (disapproving a 31-day delay because the government provided "no persuasive justification for the delay in obtaining a search warrant for [the defendant's] phone"). In appraising that diligence, courts take into account "(1) the nature and complexity of the investigation, and whether overriding circumstances arose, necessitating a diversion of law enforcement resources; (2) the quality of the warrant application and the amount of time one would expect it would take to prepare; and (3) any other evidence pertaining to law enforcement's diligence." *Thomas*, 775 F. App'x at 488 (citing *Laist*, 702 F.3d at 614)). Here, there is no question that the subsequent investigation was complex prior to the presentation of the warrant, involving, as it did, law enforcement: reviewing information related to approximately 500 guns recovered in the District of Columbia; identifying a subset of

and, finally, determining cases in which a cell phone was recovered with one of those guns that . ECF No. 5 at 40–43. Moreover, preparing the warrant

application would have required a not insubstantial amount of time. It contains a careful explanation of the relevant federal firearms laws and the investigation, including details regarding the original recovery of each of the 26 cell phones the warrant application initially sought to search. *See generally* ECF No. 5. Thus, the Court finds that law enforcement did not lack diligence in seeking the warrant in this case.

c. Interference with the Owner's Possessory Interest in the Seized Property

The significance of the owner's possessory interest in Target Devices 1, 2, 7, 13, 21, 22, and 23, and the data and information contained on those devices, are also important considerations. One can fairly assume that each of the cell phones at issue—like all cell phones—has significant utility and importance to their owners. As the Supreme Court has observed, "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone." *Riley v. California*, 573 U.S. 373, 393 (2014). For that reason, as another judge on this Court has found, "[a]n individual's property interest in their own cell phone can generally be assumed to be significant." *Wilkins*, __ F. Supp. 3d at __, 2021WL 1894990, at *24.

It can also be fairly assumed that individuals have a strong possessory interest in the personal data and information on their phones. *See United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032, at *4 (E.D. Mo. Apr. 29, 2008) (finding that the magistrate judge "correctly concluded" that the defendant "had a possessory interest in the cell phone and it is reasonable for a person to expect the information contained in a cell phone—especially information such as that contained in the address book, which is not available even to the service provider—will be 'free from intrusion from both the government and the general public.'" (quoting *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007))), *aff'd in part sub nom. United States v. Dinwiddie*, 618

F.3d 821 (8th Cir. 2010); *see also United States v. Navarro*, No. CR18-02106, 2019 WL 3877699, at *14 (D. Ariz. July 12, 2019) (recommending that data obtained from a cell phone be suppressed due to the government's delay in seeking warrant and recognizing "that the defendant has a strong possessory interest in the cell phone, which in today's world is much more than just a phone—it is akin to a computer that can contain vast amounts of information"), *report and recommendation adopted*, 2019 WL 3858598 (D. Ariz. Aug. 16, 2019). Indeed, as the government contended at the hearing in this matter, oftentimes the "information on [a] cell phone" is more important to the owner than the physical device itself. Transcript of Sept. 27, 2021 Hearing at 19–20. Modern cell phones often contain the owner's photographs, calendars, address books, phone logs, emails, texts, location data, and financial, health and retail purchase information, most of which are often of significant value to the owner. *See Riley*, 573 U.S. at 393 (noting that cell phones "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers"); *Hibbert v. Schmitz*, No. 3:16-CV-3028, 2017 WL 59075, at *5 (C.D. Ill. Jan. 5, 2017) ("Much of [the] information [stored on cell phones] can be extremely personal, including text messages and email conversations with loved ones, geographical location data about the user's movements, purchase history, internet viewing preferences, and the user's photographs. Individuals may also use their smart phones to store important information, including personal passwords, banking and finance information, and medical and health care information. This capacity makes modern cell phones a cornucopia of personal information, and, accordingly, society recognizes the reasonableness of the expectation of privacy in one's cell phone."); *United States v. Park*, No. CR 05-375SI, 2007 WL 1521573, at *1 (N.D. Cal. May 23, 2007) (noting that "cell phones are capable of storing immense amounts of highly personal information"). It is thus unsurprising that the Advisory Committee's

notes to Federal Rule of Criminal Procedure 41(g)—which permits an individual deprived of his or her "property" through seizure by the government to seek its return by motion—recognizes an owner's possessory interest in seized "electronically stored information." *See* Fed. R. Crim. P. 41, Advisory Committee's Note to 2009 amendment ("Current Rule 41(g) already provides a process for the 'person aggrieved' to seek an order for the court for a return of [ ] property, including storage media or electronically stored information, under reasonable circumstances."); *see also* Fed. R. Crim. P. 41(a)(2)(A) (defining "property" to include "documents, book papers, any other tangible objects, *and information*" (emphasis added)).

The fact that owners of mobile devices may have access to backups of the information and data stored on them does not change that calculus. *First*, the mere fact that law enforcement has copied data and information from a mobile device constitutes an interference with the owner's property rights, even where the device owner possesses a backup of that data and information. "After all, when a copy is made, 'the person loses exclusive rights to the data,' and it is at that time that the owner's property interest in the [data] is affected." *See Matter of Search of Info. Associated with [Redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.*, 13 F. Supp. 3d 145, 150 (D.D.C. 2014) (quoting Orin Kerr, *Fourth Amendment Seizures of Computer Data*, 119 Yale L.J. 700, 703 (2010)), *vacated on other grounds*, 13 F. Supp. 3d 157 (D.D.C. 2014).

Second, the Supreme Court has recognized that the "right to exclude" is "attendant" on "lawful possession and control" of property. *Byrd v. United States*, __ U.S. __, __, 138 S. Ct. 1518, 1528 (2018). That is, the right to exclude inheres in a possessory interest. *See United States v. Broy*, 209 F. Supp. 3d 1045, 1053 (C.D. Ill. 2016) (noting that, along with a possessory interest comes "the right to exclude"); *aff'd sub nom. United States v. Kienast*, 907 F.3d 522 (7th Cir.

2018); *Democracy Partners v. Project Veritas Action Fund*, 453 F. Supp. 3d 261, 277 (D.D.C. 2020) ("A 'possessory interest' is defined as '[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.'" (quoting *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014))). This principle holds true for cell phones, and the data and information they contain. *See, e.g.*, *Finley*, 477 F.3d at 259 (affirming district court's finding that "although [defendant's] employer issued him the cell phone, [defendant] nonetheless maintained a property interest in the phone, had a right to exclude others from using the phone, exhibited a subjective expectation of privacy in the phone, and took normal precautions to maintain his privacy in the phone"), *abrogated on other grounds by Riley v. California*, 573 U.S. 373 (2014); *United States v. Alonso-Castaneda*, No. CR-11-4067, 2015 WL 1711989, at *5 (D. Ariz. Apr. 15, 2015) (finding that defendant "legitimately possessed the phone, and as such had a possessory interest in it, and he had the right to exclude others from its use"), *report and recommendation rejected on other grounds*, 2015 WL 10767481 (D. Ariz. July 13, 2015). Here, the government's retention of the data and information on the devices has "prevented [the device owner] from being able to control who else could access [his or her] information," and therefore "seriously interfered with [a] possessory interest" in that information. *Standifer v. Best Buy Stores, L.P.*, 364 F. Supp. 3d 1286, 1298 (N.D. Ala. 2019).

Nor has the government shown that the owners of Target Devices 1, 2, 7, 13, 21, 22, and 23 have done anything to significantly undermine their strong possessory interest. None of them consented to searches of their devices or the data and information they contain. Courts in and out of this Circuit have found this relevant in assessing the strength of the phone owner's possessory interest. *See, e.g.*, *Pratt*, 915 F.3d at 271–72 (finding that defendant's possessory interest in his cell phone was not diminished where he did not "consent to its seizure or voluntarily share

the phone's contents"); *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *25 (concluding that defendant "did not act to seriously diminish this strong possessory interest" in part because "[h]e did not consent to the seizure in any respect"); *Navarro*, 2019 WL 3877699, at *14 ("The defendant's possessory interest in the phone is strengthened by the fact that," among other things, "he did not consent to the search of the phone.").

Further, as in *Wilkins*, there is no indication that any of the device owners have voluntarily abandoned their interests in the phones. *See* __ F. Supp. 3d at __, 2021 WL 1894990, at *25. It is the government's burden to show that a possessory interest in property has been abandoned. *See, e.g.*, *United States v. James*, 353 F.3d 606, 616 (8th Cir. 2003); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir 2001). That question generally turns on "whether the objective facts . . . evidence[ ] (i) the [owner's] denial of ownership, and (ii) that he physically relinquished the property in a way that demonstrated abandonment." *United States v. Fife*, 356 F. Supp. 3d 790, 801 (N.D. Iowa 2019) (quoting *United States v. Voice*, 622 F.3d 870, 877 n.3 (8th Cir. 2010)). There is no such evidence here with respect to Target Devices 1, 2, 7, 13, 21, 22, or 23. *Cf. Sparks*, 806 F.3d at 1344 (finding that defendants abandoned any possessory interest in their phones when they made "a considered and voluntary choice over a three-day period to allow a total stranger to keep a phone containing personal information").

Nevertheless, the government contends that because no one has sought the return of those devices through a Rule 41(g) motion, any possessory interest in them, or of the personal data and information they contain, is significantly diminished. *See, e.g.*, ECF No. 4 at 19–22; ECF No. 11 at 4, 9 n.4, 10 n.5, 12 n.7, 14 n.8. But whether "an individual has actively asserted their possessory claim to a piece of property through requesting its return is 'helpful, though not essential' to the determination of one's possessory interests." *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at

*25 (quoting *Burgard*, 675 F.3d at 1033). Like the *Wilkins* court, the Court finds that failure to move for the devices' return, standing alone, is insufficient to extinguish a mobile device holders' possessory interests. *See id.* at *25 ("The Court is unconvinced that this single factor, without more, is enough to [relinquish possessory interest in the phone]."); *see also Fife*, 356 F. Supp. 3d at 803 ("Although [case law] suggests that whether a defendant requests the return of property is a relevant factor to consider, I do not read it as endorsing a bright-line rule that a defendant must request the return of property to complain of an unreasonable delay."); *United States v. Uu*, 293 F. Supp. 3d 1209, 1215 (D. Haw. 2017) (noting that even where the defendant failed to request return of his property, he retained a property interest in it, and finding that a 20-day delay in seeking a warrant to search it was unreasonable).

In any event, as in *Wilkins*, "this non-essential fact [is not] particularly revealing here" with respect to Target Devices 1, 2, 7, 13, 21, 22, and 23. __ F. Supp. 3d at __, 2021 WL 1894990, at *25. The government contends that Target Devices 1 and 2 are themselves evidence of drug trafficking. Transcript of Sept. 27, 2021 Hearing at 41–43. The Court is unwilling to find that to maintain a property interest in those devices, the owner should have filed a motion under Rule 41(g) which itself may have been inculpatory. *See Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *25. ("[S]uch 'an unwillingness to invite a criminal prosecution' 'cannot [be] equat[ed] . . . [to] a voluntary abandonment of any interest.'" (quoting *Walter v. United States*, 447 U.S. 649, 658 n.11 (1980))). With respect to all the devices, even if requesting their return would not have been incriminating, such a request would almost certainly have been denied because, again, each is being retained by the government as evidence in an ongoing criminal prosecution. *See Ford-Bey*, 2020 WL 32991, at *7 (noting that "courts may rightfully refuse to return claimed property when . . . the property involved is subject to government retention pending termination

of the trial"); *see also In re Search Warrants Executed on Apr. 28, 2021*, No. 21-MC-425, 2021 WL 2188150, at *3 (S.D.N.Y. May 28, 2021) (rejecting Rule 41(g) motion to return property on the basis that "the Government's legitimate interest in the property is established by its ongoing investigation"). The owners' possessory interest in each of the devices at issue is thus not significantly undermined by their failure "to engage in [such a] futile gesture[ ]."[8] *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1278 (11th Cir. 2012) (quoting *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986)).

The Court finds that the owners of Target Devices 1, 2, 7, 13, 21, 22, and 23 each maintain a significant possessory interest in those devices and the information and data they contain, and that they have not acted in a way to substantially diminish that interest.

d. Balancing the Factors

As discussed above, the Court finds no clear legal error in the initial seizures of Target Devices 1, 2, 7, 13, 21, 22, and 23 that would undermine the legitimacy of the government's request to search those devices in the subsequent investigation. Each appears to have been initially seized either pursuant to a valid warrant or during a search incident to an arrest based on probable cause. Further, the government has shown that it is pursuing an important investigation and diligently sought the search warrant at issue as part of that investigation. Most significant for these devices, the government has provided a compelling basis for their continued retention as of the date it sought a warrant related to subsequent investigation, because each of those devices was being held as evidence in the underlying prosecutions. The government having established such

[8] To be sure, the government has asserted that the owner of Target Device 21 is detained and therefore "cannot use the device." ECF No. 4 at 22 & n.8. Courts have recognized that "[w]hen individuals cannot make use of the seized property, 'their possessory interest in that property is reduced.'" *United States v. Harmon*, No. 3:18-cr-221, 2018 WL 5786217, at *3 (D. Ore. Nov. 5, 2018) (quoting *United States v. Sullivan*, 797 F.3d 623, 633 (9th Cir. 2015)). However, even the government does not allege that the interest is therefore non-existent but asserts that it is merely "diminished." ECF No. 4 at 22 n.8.

"an entitlement to retain possession" of those devices "based on the need to preserve evidence for trial" in the underlying prosecutions, the Court finds that the owner's possessory interest in these seven devices, albeit significant, must give way. *Wright*, 2021 WL 1521283, at *7; *see, e.g.*, *Thomas*, 775 F. App'x at 490–92 (finding that the government's diligence and its "compelling interest in retaining the [defendant's] laptop as evidence of a serious federal crime" overbore the defendant's "somewhat diminished" possessory interest); *United States v. Harmon*, No. 3:18-cr-221, 2018 WL 5786217, at *3 (D. Ore. Nov. 5, 2018) (finding that any delay in applying for a warrant to search the defendant's computer was reasonable because the government's interest in retaining it as evidence at trial was "compelling" and outweighed the defendant's possessory interest in the seized property, which was somewhat "reduced" because he was unable to make use of the device). Therefore, the warrant application will be granted as to Target Devices 1, 2, 7, 13, 21, 22, and 23.

2. Target Devices 16, 17, 18, and 19

Target Devices 16, 17, 18, and 19, on the other hand, are not associated with ongoing prosecutions. As explained below, both for that reason and because the owners of the devices have not substantially undermined their possessory interests in them, the Court finds that the balance weighs in favor of the owner's possessory interest and will deny the government's warrant application to search these four devices as part of the subsequent investigation.

a. The Government's Interest in Holding the Property as Evidence in the Case in which it was Seized

i. Initial Seizure of the Property

The government proffers that Target Devices 16, 17, 18, and 19 were seized on 2019. ECF No. 5 at 35. Law enforcement saw an Instagram live stream of three males holding firearms and smoking what appeared to be marijuana. ECF No. 11 at 17. Officers were able to

identify the apartment building where the video was filmed and arrived there within 20 minutes of the live-streamed video. *Id.* They observed several individuals in the building's hallway attempting to leave the area. *Id.*

the officers contacted the leaseholder of the apartment and received consent to "conduct a sweep." *Id.*

A number of firearms were recovered from the closet, each of which matched the appearance of guns seen on the live-streamed video. *Id.* at 17–18. The defendants were each arrested and charged with unlawful possession of firearms in separate cases *Id.* at 17. During a search incident to arrest, officers recovered Target Devices 16 and 17 from one defendant and Target Devices 18 and 19 from the other defendant. *Id* at 18; *see also* ECF No. 5 at 35. Approximately one month later, law enforcement obtained a warrant to search the data on the devices, which the government now seeks with its present warrant application to search again. ECF No. 11 at 18.

Based on these proffered facts, the Court finds no obvious constitutional or other legal error in the initial seizure of Target Devices 16, 17, 18, and 19. It appears that law enforcement received consent to search the apartment where the guns were found, that the defendants' arrests for unlawful possession of firearms were supported by probable cause, and that the devices were recovered during searches incident to the defendants' arrests. Further, there has been no judicial finding since the devices' seizure that would undermine those conclusions.

ii. Retention of the Seized Property as Evidence in the Case in which it was Seized

The government has not argued that it is presently entitled to retain possession of Target Devices 16, 17, 18, and 19 as evidence in the underlying prosecutions of the two defendants. That

is unsurprising, as the prosecution of both defendants has concluded. *See* Transcript of Sept. 27, 2021 Hearing at 32. The defendant who owns Target Devices 16 and 17 entered a guilty plea on 2020, and was sentenced on 2020. ECF No. 11 at 18. Moreover, the government has authorized the return of Target Devices 16 and 17 to their owner, completing a property release form on 2021.[9] ECF No. 4 at 21; ECF No. 11-5 at 2. In that release form, the prosecutor stated the defendant's cell phones "will not be needed as evidence in the [the underlying prosecution] nor in any other case the Police Department has brought to our attention." ECF No. 11-5 at 2.

The prosecution with respect to Target Devices 18 and 19 is similarly complete. The defendant entered a guilty plea on 2020, and he was sentenced on 2020. ECF No. 11 at 18. And, as it did for Target Devices 16 and 17, the government authorized the return of Target Devices 18 and 19 to their owner by completing a property release form—with language identical to that above—in 2021. *Id.* at 18–19; ECF No. 12 at 1.

Because the prosecutions in which Target Devices 16, 17, 18, and 19 were initially seized have concluded, the Court finds that the government's interest in retaining possession of them—thereby subjecting them to search in a subsequent investigation—is significantly diminished, if not extinguished. The defendants in both underlying prosecutions pleaded guilty and were sentenced more than seven months prior to the government applying for the warrant in the subsequent investigation. ECF No. 11 at 18. While the government may be able to offer a persuasive argument in another case that it is entitled to continue to retain possession of a seized cell phone

[9] The government explains that Metropolitan Police Department ("MPD") procedures require a signed release form—known as a PD-81(c)—from the prosecuting attorney before releasing property that has been held as evidence. ECF No. 12 at 1 n.1. In a case that results in a prosecution, the form will be completed by the prosecuting attorney after the case is concluded, when the case file is closed. *Id.* That form is then transmitted to the MPD. *Id.* The government indicated that it was not aware of any formal process for notifying the defendant that the property is available to be picked up. Transcript of Sept. 27, 2021 Hearing at 14–15.

after the investigation or prosecution associated with it is completed—for example, when the device is contraband or subject to forfeiture—it has failed to do so here. *See, e.g.*, *United States v. Wallace*, 213 F. App'x 98, 99 (3d Cir. 2007) (noting that "property seized by the government as part of a criminal investigation generally must be returned once criminal proceedings have concluded"); *see also United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987) (stating that "when 'the property in question is no longer needed for evidentiary purposes, either because the trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation," then "[t]he person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property. In such a case, . . . even if the seizure was lawful the government must justify its continued possession of the property . . . ." (internal citations and footnotes omitted)); *United States v. Willson*, 8 F. App'x 593, 594 (8th Cir. 2001) ("After criminal proceedings have concluded, seized property should be returned to its owner unless it is 'subject to forfeiture.'" (quoting *United States v. Smith*, 659 F.2d 97, 99 (8th Cir. 1981)). Indeed, six months prior to applying for the warrant at issue here, the government completed a property release form in each case indicating that the cell phones no longer needed to be held as evidence in the underlying prosecution, or any other, and could be returned to their owners. Moreover, Target Devices 16 and 17 have actually been retrieved by their owner, while Target Devices 18 and 19 have not. ECF No. 12 at 1. Thus, at best, the government is still holding Target Devices 18 and 19 for retrieval by their owner, a retention interest the Court finds too feeble to justify its request to search those devices again in a subsequent investigation.

However, the government also seeks to search copies of all of the information and data it extracted from those four devices pursuant to warrants in the underlying prosecutions.[10] ECF No. 4 at 21; ECF No. 12 at 2. It has retained those data extractions even with respect to Target Devices 16 and 17, two cell phones which, again, have been retrieved by their owner. When they were retrieved, there is no evidence that the government gave notice to their owner that it was retaining a copy of all of the data extracted from those phones or that, in doing so, those data extractions may be subject to search in subsequent investigations. Nevertheless, the government now asks the Court's permission to search the information and data extracted from all four devices again—Target Devices 16 and 17 which have been retrieved by their owner, and Target Devices 18 and 19 which have not, although the government has released all four devices as evidence in the underlying prosecutions—and without notice to their owners.[11] Apparently seeking to justify its

[10] It is not clear from the record whether the extractions at issue are full extractions of all of the information and data on each of the phones. However, Rule 41 of the Federal Rules of Criminal contemplates warrants that allow law enforcement to "seize or copy the entire [electronic] storage medium and review it later to determine what electronically stored information falls within the scope of the warrant." Fed. R. Crim. P. 41(e)(2)(B), Advisory Committee's Note to 2009 amendment. And courts have recognized that, "[b]ecause electronic devices contain vast quantities of intermingled information, . . . 'the reality [is] that over-seizing is an inherent part of the electronic search process.'" *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013) (quoting *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2013) (en banc), *overruled in part on other grounds as recognized in Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2019)); *see also Ganias*, 824 F.3d at 232 (Chin, J., dissenting) ("[F]or [ ] practical considerations, the Government may, consistent with the Fourth Amendment, overseize electronically stored data when executing a warrant."). And, as the Second Circuit recognized in *Ganias*, the concept of "overseizure" complicates the question of what the government should be permitted to search in a subsequent investigation even while the underlying investigation is ongoing. *See generally Ganias*, 824 F.3d at 216–20; *see also id.* at 232–36 (Chin, J., dissenting). Because here, the underlying prosecutions have concluded, leaving the government with an already feeble basis to demand the search of *any* of the extracted information and data again, the fact that its search request might also encompass information and data that was overseized pursuant to the warrant in the underlying prosecution serves to further undermine its interest but is far less important to the analysis here.

[11] This is because Rule 41 of the Federal Rules of Criminal Procedure does not require the government to notify a property owner of the search of his or her property when the property is taken from a premises belonging to someone other than the owner. Rule 41(f)(1)(C) requires the officer executing a search warrant only to "give a copy of the warrant and a receipt for the property taken to the person . . . from whose premises[ ] the property was taken." That is, "Rule 41 allows the copy of the warrant and the receipt to be given to the person from whose premises the property at issue was seized, even if that person is not the owner of that property. There is no separate requirement that the officer provide the warrant, a receipt, or any other form of notice to the owner of the property." *In re Application of the United States for a Search Warrant*, 665 F. Supp. 2d 1210, 1221 (D. Ore. 2009); *see also, e.g., United States v. Zacher*, 465 F.3d 336, 339 (8th Cir. 2006); *United States v. Scully*, 108 F. Supp. 3d 59, 83–84 (E.D.N.Y. 2015). Here, in the government's view, the Target Devices are all in the possession of law enforcement and will be "taken" for

actions and warrant application with respect to those four devices, the government asserted at the hearing that, law enforcement having extracted the data and information from those cell phones pursuant to warrants in the underlying prosecutions, it now "owns" all of those data extractions and it never needs to return them to the phones' owners. Transcript of Sept. 27, 2021 Hearing at 27 ("I don't believe [the cell phone's owner has] a possessory interest in those extractions. Those extractions are from the government's perspective government property. We've been authorized by a judge [pursuant to the warrant in the underlying prosecution] to seize that information and hold on to that information . . . .") As the Assistant United States Attorney asserted repeatedly at the hearing, this is because information and data extracted from a cell phone by law enforcement pursuant to a warrant is "ours as oppose[d] to the defendants['']." *Id.* at 33.

The Court is deeply troubled by the government's position and hopes it merely reflects the aberrant argument of a single prosecutor.[12] The Court knows of no legal authority holding that "ownership" in information and data on a cell phone is conveyed to the United States when it is extracted pursuant to a warrant, thereby making it available for search in subsequent investigations in perpetuity without the cell phone owner's knowledge and without any means of recourse. Certainly that is not how seized physical property is treated under the law, and the government provides no legal basis for providing *less* protection to seized information and data. Transcript of Sept. 27, 2021 Hearing at 35–36. Indeed, one need look no further than the Supreme Court's

search, pursuant to the warrant, from the "premises" of the U.S. Attorney's Office for the District of Columbia, the MPD Evidence Control Branch, or the District of Columbia Department of Forensic Sciences where the property is being held. ECF No. 5 at 4–23. Under that view, while the property is being so held, the officer executing the warrant will provide a copy of the warrant to the government itself, rather than to the owners of the devices.

[12] The Court has concerns in that regard as well. In a recent discussion between the undersigned and a supervisor in the U.S. Attorney's Office pertaining to different warrant application that raises similar issues, the supervisor expressed support for the position that the government "owns" the data it extracts from cell phones pursuant to warrants, and that it can retain that data indefinitely. And, as discussed below, that was the government's original position in *Ganias*.

decision in *Riley* to see the flaws in that proposition. There, relying on the fact that the personal information and data on cell phone can comprise "[t]he sum of an individual's private life," the Supreme Court held that the Fourth Amendment provides *more* protection for the "digital content on [a] cell phone[ ]" than it does for physical objects. 573 U.S. at 386, 394. For those reasons, the government was provided with multiple opportunities following the hearing to identify legal authority supporting its position that it "owns" information and data it extracts from seized cell phones, but it failed to do so.[13] The Court is not surprised.

The government advanced a similar position before the Second Circuit in *Ganias* without success. There, a law enforcement agent asserted at a suppression hearing that data seized pursuant to a warrant—including over-seized data non-responsive to the warrant—was "the government's property, not Mr. Ganias'[s] property," subject to search in a subsequent investigation. *Ganias*, 824 F.3d at 227 (Chin, J. dissenting). Consistent with that position, when arguing before the Second Circuit panel in *Ganias*, the government asserted that it had the right to retain that data "indefinitely." *Id.* at 233 n.7 (Chin, J., dissenting). That position softened by the time the government was before the *en banc* court, where it contended only that its "interests permit it to retain data for the duration of the prosecution." *Id.* at 233 & n.7 (Chin, J., dissenting). The *en banc* court nevertheless addressed the more expansive position. In dissent, Judge Chin found that the government's argument that it could retain indefinitely data seized pursuant to a warrant—

[13] As noted above, at the hearing, the Court granted the government's request for two weeks to provide support for its position. Transcript of Sept. 27, 2021 Hearing at 57–58. At the expiration of that period, the government informally requested an additional week, which the Court also granted. Email chain dated Oct. 13, 2021 (on file with the chambers of the undersigned). On October 25, 2021, the government informed the Court that it would not file "anything additional" in this case, but noted that, as the Court had "requested similar briefing" as to a different search warrant application, the government would "appreciate it" if the Court waited until that briefing had been submitted before ruling in this search warrant application. Email dated Oct. 25, 2021 (on file with the chambers of the undersigned). The Court waited for that brief to be submitted, which occurred on November 5, 2021. Despite the Court's request that the issue of the government's "ownership" of data extracted from a seized cell phone be addressed in that filing, the government's brief included nothing on the subject. *See generally* United States' Memorandum in Support of its Requested Search Warrant, No. 21-sw-319 (on file with the chambers of the undersigned).

even the non-responsive data that was over-seized pursuant to the warrant—would violate the Fourth Amendment, finding the notion that the government could "seize first and investigate later" to be "the equivalent of a general warrant" which "the Fourth Amendment simply does not permit." *Id.* at 235–36. Tellingly, the majority did not disagree with that view. Rather, it sidestepped the question, pointing out that the government provided other rationales for retaining the data at issue "during the pendency of the [the initial] investigation." *Id.* at 204 n.13 (emphasis added).

Other courts have also noted significant discomfort with the notion that the government may retained seized personal information or data indefinitely, thereby making it available for search in subsequent investigations in perpetuity. *See, e.g.*, *United States v. Addaquay*, No. 1:20-cr-00126, 2021 WL 1541051, at *6 (N.D. Ga. Apr. 20, 2021) (noting that, while the government may have a need to retain materials as an investigation unfolds, "[it] cannot indefinitely retain [a defendant's] emails 'for use in future criminal investigation'" (quoting *United States v. Lee*, No. 1:14-cr-227, 2015 WL 5667102, at *4 (N.D. Ga. Sept. 25, 2015))); *United States v. Huntoon*, No. CR-16-00046, 2018 WL 1755788, at *8 n.6 (D. Ariz. Apr. 12, 2018) (noting that it would be "'constitutionally unreasonable' for the [g]overnment to 'seize and indefinitely retain every file on [a] [defendant's] computer for use in future criminal investigations'" (third alteration in original) (quoting *Ganias*, 755 F.3d at 137)), *aff'd*, 796 F. App'x 362 (9th Cir. 2019); *see also Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *26 ("The Court is deeply uncomfortable with the notion . . . that law enforcement has the power to seize and indefinitely hold any property merely on the Government's word that the property owner is a person of interest in some uncharged, unrelated crime at the time of the seizure.").

The government's position is also contrary to Federal Rule of Criminal Procedure 41, which addresses the scope of what may be seized and searched pursuant to a federal warrant. That

rule does not state that data or information seized pursuant to a warrant becomes the government's property and may be retained by it forever. Far from it. Rule 41 defines "property" to include "documents, book papers, any other tangible objects, *and information*." 41 Fed. R. Crim. P. 41(a)(2)(A) (emphasis added). So defined, it is that "property" which the government may search for and seize upon a showing of probable cause under Rule 41(d)(1), and that same "property" that the government must return to a person "aggrieved" by its "deprivation" pursuant to a Rule 41(g) motion. Fed. R. Crim. P. 41(g). Rule 41(g) does not exempt seized data or information from its coverage; rather, when read in conjunction with the definition of "property" in Rule 41(a)(2)(A), all such seized property, including "information," must be returned to the aggrieved person deprived of that property pursuant to a Rule 41(g) motion. Fed. R. Crim. P. 41(g) & 41(a)(2)(A).

If that were not clear enough, the Advisory Committee's Note to the 2009 amendments to Rule 41—quoted at some length here for the government's benefit—removes any doubt:

> Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.
>
> The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended for Rule 41.
>
> . . . .
>
> It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the court for a return of