> the property, including storage media or electronically stored information, under reasonable circumstances.

Fed. R. Crim. P. 41, Advisory Committee's Note to 2009 Amendment. Thus, nothing in Rule 41 makes seized information and data—or, in the language of the Advisory Committee, seized "electronically stored information"—the government's property indefinitely. Pursuant to a lawful warrant, such information and data may be seized, it may searched, it may be retained by the government for use at trial, but then it must be returned to its owner, provided it is not contraband or subject to forfeiture. Absent those few exceptions—none of which are applicable here[14]—it does not ever cease to be the owner's property and become the property of the United States Government.

Perhaps the government is advancing the somewhat less aggressive position that until the owner of a seized cell phone has filed a motion for return of property under Rule 41(g), the data and information extracted from the phone remains the government's "property." Not so. Rule 41(g) does not say that. It does not convey to the government a property right in any data and information seized pursuant to a Rule 41 warrant. As the quoted language from the Advisory Committee Note demonstrates, Rule 41(g) *is merely a remedy* for an "aggrieved party" who is harmed by dilatory government review of seized electronically stored information, or "who requires access to . . . electronically stored information earlier than anticipated by law enforcement or ordered by the court." Fed. R. Crim. P. 41, Advisory Committee's Note to 2009 Amendment.

---

[14] Contraband includes "things that are not ordinarily illegal, like guns, automobiles, ships, and currency, that become forfeitable because of their relationship with a criminal act." *United States v. 37.29 Pounds of Semi–Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993), *abrogated on other grounds by United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *see also Vitrano v. United States*, No. 06 Civ. 6518(JCF), 2009 WL 1011582, at *5 (S.D.N.Y. Apr. 14, 2009) ("[D]erivative contraband includes 'items which are not inherently unlawful but which may become unlawful because of the use to which they are put.'" (quoting *United States v. Rodriguez–Aguirre*, 264 F.3d 1195, 1212 n.13 (10th Cir. 2001))). Items subject to forfeiture, on the other hand, include "property constituting, or derived from, proceeds obtained from [illegal activity], or as a substitute asset." *United States v. Alcantara*, No. 06-CR-265 DLI, 2012 WL 2529602, at *2 (E.D.N.Y. June 29, 2012). The government does not contend that the data and information at issue—or even the cell phones from which it was extracted—is contraband or subject to forfeiture.

Provision of that remedy to an aggrieved party, does not convey a property right to the government in the property it seizes prior to a Rule 41(g) motion being filed, nor does the Rule delimit the sum total of the government's obligations vis-à-vis the owners of the property it seizes. *See Santos v. United States*, Nos. 04 Civ. 9716, 99 Cr. 73, 2005 WL 637427, at *1 (S.D.N.Y. Mar. 17, 2005) ("At the conclusion of a criminal proceeding . . . there is a presumption that 'the person from whom the property was allegedly taken has a right to its return.'" (quoting *Mendez v. United States*, Nos. 94 Cr. 466, 99 Civ. 3496, 2003 WL 21673616, at *2 (S.D.N.Y. July 16, 2003))). Rather, precisely because the United States Government does not automatically own the property it seizes, it should take affirmative steps, *sua sponte,* to return non-contraband, non- forfeitable property to its owner when the prosecution associated with its seizure has concluded, as the prosecutors did here in the underlying cases when they completed property release forms for Target Devices 16, 17, 18, and 19 at the conclusion those prosecutions.

In any event, as discussed below, while the absence of a Rule 41(g) motion may, in an appropriate case, undercut the owner's possessory interest in that seized property when it amounts to abandonment, the absence of such a motion does not convey ownership of that property to the government, nor does it alone provide the government with an entitlement to retain possession of those devices thereby rendering them available for search in a subsequent investigation. Stated another way, Rule 41(g) "cannot shift the [g]overnment's burden under the Fourth Amendment onto [ ] defendant[s];" "[p]ointing fingers at defendants does not help the [g]overnment meet its *own* obligation to be reasonable." *Ganias*, 824 F.3d at 236 (Chin, J., dissenting). To find otherwise would allow the absence of a Rule 41(g) motion to drive the entire analysis, when it should only be "helpful, but not essential" to the inquiry. *Wilkins*, __ F. Supp. 3d at __, 2021WL 1894990, at *25 (quoting *Burgard*, 675 F.3d at 1033).

In any event, the government has provided the Court with no support for its position, and its arguments concerning its "ownership" of data and information extracted from a cell phone are highly dubious. For those reasons, the Court concludes that the government has provided no basis to find that it was entitled to retain possession of Target Devices 16, 17, 18, and 19, or the data and information extracted from them, at the point it sought the warrant in the subsequent investigation, following as it did, the conclusion of the underlying prosecutions where those devices were seized.

b. Duration of the Delay and Diligence of the Government

The analysis of this factor is identical for all 11 devices under consideration. For the same reasons articulated with respect to Devices 1, 2, 7, 13, 21, 22, and 23, the Court finds that there was no lack of diligence by the government in obtaining the warrant seeking to search Devices 16, 17, 18, and 19 as part of the subsequent investigation. *See supra* Section II.B.1.b.

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

As with its consideration of the other devices, the Court assumes that Target Devices 16, 17, 18, and 19, and the information and data they contain, have significant utility and importance to their owners. *See supra* Section II.B.1.c; *see also Wilkins*, __ F. Supp. 3d at __, 2021WL 1894990, at *24. The government continues to retain (1) Target Devices 18 and 19 and the information and data extracted from those two cell phones, and (2) the information and data extracted from Target Devices 16 and 17—the difference being that Target Devices 16 and 17 were retrieved by their owner after the government released his personal property in January 2021 following his sentencing, while Target Devices 18 and 19 have yet to be retrieved by their owner after their release following his sentencing. ECF No. 12 at 1. Thus, common to all four devices is the government's retention of each phones' information and data, extracted during the

underlying prosecutions, that it seeks to search again in the subsequent investigation. That is also the source of the ongoing infringement of the owners' strong possessory interest in the information and data on their phones: the request to search those data extractions as part of the subsequent investigation "prevent[s] [the device owners] from being able to control who else could access [their] information," and therefore "interfere[s] with [their] possessory interest" in that information and data.[15] *Standifer*, 364 F. Supp. 3d at 1298.

The Court finds that the government has not demonstrated that the owners of Target Devices 16, 17, 18, and 19 have significantly undermined their possessory interests in their phones' information and data. *See James*, 353 F.3d at 616; *Cofield*, 272 F.3d at 1306; *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *25. Neither defendant consented to the search of their devices or the government's extraction of information and data from them. ECF No. 11 at 17–19 (explaining that each of the four devices was seized incident to a lawful arrest and originally searched pursuant to a warrant). Indeed, the owner of Target Devices 16 and 17 *affirmatively asserted* his possessory interest by retrieving his devices from the government after his prosecution concluded. ECF No. 11-5 at 2; ECF No. 4 at 21; *see also* ECF No. 12 at 1-2. While there is no evidence that, when he sought the return of his property, he specifically demanded the return of all copies of his phones' information and data in the government's possession—which again the government retained despite him collecting his property—there is no reason to believe that he had any reason to know

[15] Given that it is the owners' "right to exclude" access to their phones' information and data that is being infringed, it is less important to the analysis whether they are incarcerated. *Cf. Sullivan*, 797 F.3d at 633 ("Where individuals are incarcerated and cannot make use of seized property" such as a laptop computer or cell phone, "their possessory interest is reduced."); *United States v. Conley*, 342 F. Supp. 3d 247, 269 (D. Conn. 2018) (stating that the defendant "had a diminished interest in [his] cell phone because [he] was detained at Wyatt Detention Facility following the arrest, and Wyatt does not permit its inmates to possess cell phones"). In any event, the government has not demonstrated that either of the defendants who own Target Devices 16, 17, 18, or 19 were incarcerated at the time that the government submitted its warrant application. Indeed, it has indicated the opposite. *See* ECF No. 4 at 21 (noting that the owner of devices 16 and 17 "retrieved his phones after he served his sentence"); ECF No. 11 at 18 (stating that the owner of Target Devices 18 and 19 was sentenced in October 2020 to "18 months of incarceration, suspended as to all but 6 months").

he should do so. There is nothing in the record demonstrating that the government notified the defendant that it would continue to retain copies of his phones' information and data, thereby making them available for search in another investigation. Certainly, the property release form, which the defendant may have seen when he retrieved his property, made no such disclosure. In it, the United States Attorney's Office informs the MPD:

> This is to advise you that the property described below will not be needed as evidence in the case designated nor in any other case the Police Department has brought to our attention. Therefore, . . .[t]here is no objection on the part of this Office to disposition of the property by the Property Clerk in accordance with the District of Columbia Code. . . .
>
> DESCRIPTION OF PROPERTY
>
> HAND SANITIZER. . . All other personal property . . . including cellular phones . . .

ECF No. 11-5 at 2. That language does not reveal that the government would keep copies of the information and data it extracted from the defendant's cell phones, thereby making them available for search in subsequent investigations. Just the opposite: readers of that form—were they to think about extracted phone data at all—would fairly assume that the government would *not* do that because "*all* [their] personal property" was released by the prosecutor, "including [their] cellular phones." *Id.* (emphasis added). More, the prosecutor states in the release that 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." *Id.* (emphasis added). How then was the defendant to know that the government would retain copies of his phones' information and data and could seek to search them again as part of a future investigation? The Court finds that, having requested the return of Target Devices 16 and 17, the owner of those devices maintained a strong possessory interest in the copies of his phones' information and data which the government retained apparently without his knowledge. Indeed, as demonstrated previously,

the government's failure to return all copies of the information and data from his phones (or to destroy them) was contrary to law. *See supra* Section II.B.2.a.ii. Given that, any failure by the defendant when he retrieved his property to insist that the government not keep copies of his personal information and data is meaningless. He should not be faulted for acting consistently with the reasonable assumption that his government would not do such a thing.

The analysis of whether the possessory interest in the data extractions from Target Devices 18 and 19 has been diminished by the owner's actions is somewhat more complicated. Again, following his sentencing in the underlying prosecution, the defendant has not sought the return of those devices (or the data they contain) since the government released them as evidence in January 2021. It is thus temping to conclude—as some courts have and the government contends—that his failure to do so significantly reduces his possessory interest. ECF No. 4 at 21; *see, e.g.*, *Johnson*, 875 F.3d at 1276 (noting, in finding a delay not unreasonable, that the defendant had not "sought return of his phone"); *Smith*, 2021 WL 2982144, at *12 n.9 (finding that a two-month delay in obtaining a search warrant was not unreasonable in part because the defendant "never asked for return of the property"). But, again, whether "an individual has actively asserted their possessory claim to a piece of property through requesting its return is only '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 the owner of Target Devices 18 and 19's failure, as yet, to seek their return is insufficient, standing alone, to extinguish his possessory interest in them or the information and data they contain.[16] *See id.* ("The Court is unconvinced that this single factor, without more, is enough to

[16] Indeed, relying heavily on a failure immediately to retrieve a cell phone following the conclusion of a prosecution to find a significantly diminished possessory interest in that device raises difficult questions about line-drawing. At what point, that is, does a failure to retrieve a cell phone significantly reduce an individual's possessory right in that device? The day after the government releases it? A month after that date? A year? That calculation is made even

compel this outcome."); *see also Fife*, 356 F. Supp. 3d at 803; *Uu*, 293 F. Supp. 3d at 1215. There are a number of factors militating against that result here.

As an initial matter, it must be said that the government seeking to press its advantage based on the defendant's failure to actively assert his possessory claim to Target Devices 18 and 19 is somewhat insincere. Even had the defendant immediately sought return of those devices following his sentencing, the government would have retained copies of the information and data it extracted from them—as it did for Target Devices 16 and 17—and would be seeking to search those data extractions again in the subsequent investigation without the defendant's knowledge, arguing that his possessory interest in them was non-existent. Thus, from the government's perspective, even had the defendant sought the return of his devices, his possessory interest in his phones' data would be no stronger than the purportedly extinguished possessory interest of the owner of Target Devices 16 and 17. That the government's position does not realistically permit the owner of a seized cell phone to take *any action* that would preserve a possessory interest in information and data extracted from the phone, renders suspect its assertion that the defendant's failure as yet to retrieve Target Device 18 and 19 significantly undermines his possessory interest.

Second, unlike other cases where courts have found the owner's failure to seek the return of a cell phone worked to diminish a possessory interest in the device, allowing that failure to drive the analysis with respect to Target Devices 18 and 19 may expose the defendant to criminal liability in a subsequent investigation that did not exist until after his original prosecution finished. It is one thing to conclude that a cell phone owner who sits on his or her rights should not be heard to complain about the government's delayed search of the phone during the same prosecution where the device was seized. *See, e.g., Smith*, 2021 WL 2982144, at *12 n.9 (rejecting the defendant's

---

more difficult where, as appears to be the case here, the government does not provide notice to the owner of the property that it can be retrieved.

unreasonable delay argument where the cell phone at issue was retained by the government for use in the same prosecution for which it was seized).[17] It is quite another to say, as here, that the defendant's failure to retrieve his seized cell phones immediately following the conclusion of his prosecution will substantially undermine his possessory interest vis-à-vis a government application to search those devices in a separate investigation that may expose the defendant to new criminal liability.[18] *Cf. Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *25 (stating, "[t]he Court does not find th[e] non-essential fact [that the defendant failed to request return of his property] particularly revealing" in part because "affirmative outreach" to law enforcement to inquire about

[17] Similarly, in *United States v. Johns* (relied on in *Smith*), the Supreme Court found the fact that the defendant failed to ask for return of his property—there, a vehicle and its contents—seized in connection with a drug smuggling investigation undermined his unreasonable delay argument. *Johns*, 469 U.S. 478, 480, 487 (1985). The circumstances in *Johns* are easily distinguishable from the circumstances in this case. In *Johns*, the Supreme Court found that a delay of three days between the seizure of the vehicle and the search of "packages reeking of marihuana" taken from that vehicle was not unreasonable. *Id.* at 480, 486. Here, not only are the subjects of the search—cell phones capable of holding "[t]he sum of an individual's private life," *Riley*, 573 U.S. at 386, 394—meaningfully distinct from the packages of drugs at issue in *Johns*, but also the searches for which the government now seeks authorization are in service of a different investigation than those in which the devices were seized and the delays at issue are considerably longer than three days. Indeed, as to that last point, the *Johns* Court itself explicitly stated that it was "not suggest[ing] that police officers may indefinitely retain possession" of putative evidence before searching it. 469 U.S. at 487.

It is worth noting, too that, although courts have cited *Johns* for the proposition that "defendants who 'never sought return of [their] property' cannot argue that delay adversely affected Fourth Amendment rights," *United States v. Stabile*, 633 F.3d 219, 235–36 (3d Cir. 2011), the case establishes no such rule. Rather, in *Johns*, the fact that the defendant had not requested return of the vehicle was just one of a number of reasons the Court concluded that the defendant had failed to allege a Fourth Amendment violation arising from the government's three-day delay in conducting the search in that matter. *See* 469 U.S. at 487–88 ("We note that in this case there was probable cause to believe that the trucks contained contraband and there is no plausible argument that the object of the search could not have been concealed in the packages. Respondents do not challenge the legitimacy of the seizure of the trucks or the packages, and they never sought return of the property. Thus, respondents have not even alleged, much less proved, that the delay in the search of packages adversely affected legitimate interests protected by the Fourth Amendment.").

[18] The subsequent investigation is pursuing different charges (i.e., conspiracy and gun trafficking (ECF No. 5 at 36–37)) than the underlying prosecution in which Target Devices 18 and 19 were seized (i.e., unlawful possession of a firearm). The warrant also seeks a broader swath of evidence from the target devices to support those conspiracy and trafficking charges than was sought in the underlying prosecutions. *Compare* ECF No. 5 at 30–32 (listing fifteen types of evidence to be seized for the purposes of the gun investigation), with ECF No. 13-1 at 18–19 (listing eleven more limited categories of evidence to be seized from Target Device 19 in the original unlawful possession of firearms case) *and* ECF No. 13-4 at 18–19 (same as to Target Device 18). It is thus unsurprising that the government does not guarantee that whatever inculpatory evidence is found on the defendant's phones will not be used against him. *See* ECF No. 4 at 10 (asserting that while "the goal" of the un investigation is "to identify trafficker(s) and methodologies upstream from the final possessor" and is "not focused on obtaining evidence against the firearm/target device possessor," discovering evidence on the defendant's phones that may inculpate him in the larger gun investigation "may be an inadvertent result of the warrant").

his property could have "invite[d] a criminal prosecution" (quoting *Walter*, 447 U.S. at 658 n.11)). An individual's strong possessory interest in his or her cell phone, which the Fourth Amendment's prohibition on unreasonable searches and seizures protects, is made of stronger stuff than that.

Third, and closely related, the government has not demonstrated that the defendant was ever notified that failure to retrieve his cell phones immediately following their release as evidence in the underlying prosecution could subject them to search in future investigations and him to additional criminal liability. Had the government presented proof of such notice, its argument concerning the negative implication arising from defendant's inaction to date would be significantly stronger. As it is, it would be unreasonable to find, essentially, that the defendant assumed that risk when he did not immediately retrieve his property following his sentencing. *Cf., e.g.*, *Stancill v. Potomac Elec. Power Co.*, 744 F.2d 861, 865 n.22 (D.C. Cir. 1984) ("In its primary and proper sense, [assumption of the risk] means that the plaintiff has *consented to relieve the defendant* of an obligation of conduct toward him, and to take his chances of injury from a *known risk*."(alteration in original) (emphasis added) (quoting *Bull S.S. Line v. Fisher*, 77 A.2d 142, 145 (Md. 1950))); *Beckford v. United States*, 950 F. Supp. 4, 8 (D.D.C. 1997) (stating that an individual assumes the risk by "*voluntarily* incur[ring] a *known* risk" (emphasis added)).

Nor does the defendant's failure thus far to retrieve Target Devices 18 and 19 demonstrate he has abandoned them such that his possessory interest should be deemed extinguished or significantly diminished. Again, in order to establish legal abandonment, the government must show that "objective facts available to the investigating officers" reflected both "denial of ownership" and a "physical relinquish[ing]" that evidences abandonment. *Fife*, 356 F. Supp. 3d at 801. That has not been demonstrated here. The statute of limitations for a federal post-judgment Rule 41(g) motion for return of property would not run for more than another five years. *See*

Brown, 185 F. Supp. 3d at 82 (holding that a six-year statute of limitations is applicable to post-judgment Rule 41(g) motions for return of property).[19] Further, when the government applied for the warrant, only six months had passed since it had released the defendant's cell phones following his sentencing. Nor is it clear how recently the defendant was released from incarceration on that sentence,[20] his actions thereafter being a better measure of the extent to which he has relinquished his possessory interest in his phones. Finally, the defendant is not an attorney. "The notion that he should have known that he had the legal right to request the return of his phone . . . or that he should bear the cost of obtaining legal representation to take action in this regard is a high burden to place on an ordinary citizen to safeguard one's Fourth Amendment rights." *Wilkins*, 2021 WL 1894990, at *25.

In a different case, the government may be able to demonstrate that an owner's failure to retrieve a cell phone after it has been released as evidence has significantly diminished the owner's possessory interest. It has failed to make that showing here. At best, it has shown only a modest decrease in the defendant's possessory interest in Target Devices 18 and 19, and the information and data they contain.

d. Balancing the Factors

Having articulated the various competing interests with respect to Target Devices 16, 17, 18, and 19, the work of balancing them is straightforward. The Court finds that although the government has established there was no clear constitutional error or other legal infirmity with the seizure of these devices in the underlying prosecutions, and that it has diligently pursued the

[19] It does not appear that District of Columbia courts have set a limitations period for motions to return seized property under Rule 41(g) of the Superior Court Rules of Criminal Procedure, but the D.C. Code prescribes a three-year limitations period for actions, like those under Superior Court Rule 41(g), "for which a limitation is not otherwise specially prescribed." D.C. Code § 12–301(a)(8). That limitations period has not expired either.

[20] Again, the owner of Target Devices 18 and 19 was sentenced in 2020 to " months of incarceration, ECF No. 11 at 18.

warrant at issue in the subsequent investigation—the success of which is no doubt very important—it has failed to establish a sufficient basis entitling it to possession of Target Devices 16, 17, 18 and 19, and the information and data extracted from them, when it sought the warrant to search them again. The underlying prosecutions of both defendants concluded last year, more than seven months prior to the government applying for the warrant. Further, in January 2021, the U.S. Attorney's Office released all four devices because they were no longer "needed as evidence in [the completed prosecutions] nor in any other case the Police Department has brought to our attention." ECF No. 11-5 at 2.

As the D.C. Circuit has instructed, while lawfully seized property "may be retained" by the government "pending exhaustion of its utility in criminal prosecutions," once the government's "need for the property has terminated," the "district court . . . has both the jurisdiction and the duty to return the . . . property . . . regardless and independently of the validity or invalidity of the underlying search and seizure." *Hubbard*, 650 F.2d at 303. "(T)he Government's right to seize and retain certain evidence for use at trial, . . . 'does not in itself entitle the State to its retention' after trial, ..." *Id.* (quoting *United States v. Farrell*, 606 F.2d 1341, 1347 (D.C. Cir. 1979)). Rather, "'it is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner.'" *Id.* (quoting *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C. Cir. 1976)). Even property that was actually used by the government as evidence in the criminal proceeding should generally "be returned to its rightful owner once the criminal proceedings have terminated," unless it is contraband or statutorily forfeit. *Farrell*, 606 F.2d at 1343 (quoting *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977)). Given those principles, the Court finds that, even in light of the undeniable importance of the subsequent investigation, the government lacks an entitlement to

retain possession of the devices and the data extractions in question following completion of the underlying prosecutions and their release by the U.S. Attorney's Office.

On the other side of the ledger, the D.C. Circuit has also made clear that "the party from whom materials are seized in the course of a criminal investigation retains a protectible property interest in the seized materials." *Hubbard*, 650 F.2d at 303. Here, that possessory interest is particularly strong given that cell phones are "akin to . . . computer[s]" that can contain a "cornucopia of personal information." *Navarro*, 2019 WL 3877699, at *14; *Hibbert*, 2017 WL 59075, at *5. For the reasons stated previously, the Court finds that the owners of Target Devices 16, 17, 18, and 19, have not significantly undermined their possessory interest in those devices, or in the information and data the government extracted from them.

To be clear, what the government did here with respect to Target Devices 16 and 17—seizing those cell phones from the defendant, extracting their information and data, purporting to return "all personal property" to the defendant following his sentencing (apparently without informing him of the copied data and information it retained), and then applying for a warrant seeking to search the extracted data and information anew in a subsequent investigation without the defendant's knowledge, all seemingly because it believes it "owns" those data extractions—the Court finds wholly unreasonable.

The government's request to search the information and data it extracted from Target Devices 18 and 19 also fails. At best, the government is holding Target Devices 18 and 19 for retrieval by their owner, any entitlement it may have had to retain possession of them as evidence having expired in 2021. That is a retention interest the Court finds too feeble to justify its request to search those cell phones again in a subsequent investigation in the face of the defendant's significant, if somewhat diminished, possessory interests in those devices. *Cf. Wilkins*, __ F. Supp.

3d at __, 2021 WL 1894990, at *26 (finding that the defendant's possessory interest in his phone was "significant," even if somewhat diminished, and outweighed the government's interest in searching the phone in a subsequent investigation in light of the government's "utter lack of justification" for seizing and retaining the device); *Ganias*, 824 F.3d at 233 (Chin, J. dissenting) ("Without some independent basis for retaining [the property] in the interim [between the two investigation], . . . the [g]overnment clearly violated Ganias's right under the Fourth Amendment"). Accordingly, the warrant application to search Target Devices 16, 17, 18, and 19, and/or the information and data extracted from them, will be denied.[21]

CONCLUSION

For the foregoing reasons, the Court will grant the government's application to search Target Devices 1, 2, 7, 13, 21, 22, and 23 and will deny the government's application to search Target Devices 16, 17, 18, and 19, and/or the information and data extracted from them. In addition, as noted in a previous Order entered in this case, the government has similarly established

[21] Although it is conceivable that the government could reapply for a search warrant seeking authorization to seize Target Devices 16 and 17 from their owner again, or to re-seize Target Devices 18 and 19 if and when they are retrieved by their owner, this decision nonetheless vindicates the important constitutional rights of the owners of those devices and the data they contain. The owners will have the opportunity to exercise control over their property unless and until the government gains such authorization—and it is not clear that the government would bother to expend the time and resources necessary to do so after the devices have been retrieved by their owners. More, a court may look askance at a maneuver seemingly designed to make an end-run around a decision denying as unreasonable a prior warrant seeking to search the same devices or data. In any case, if law enforcement were to gain such authorization, the devices' owners would be provided a copy of the warrant at the time of the search, thus allowing them to protect their rights—unlike the circumstances here, where the government seeks authorization to search the information and data extracted from the phones without providing notice of the warrant to the phones' owners. In any event, the possibility exists in many of the related unreasonable delay cases that the government, having been found to have unreasonably delayed the search of a seized cell phone, could reapply for a warrant to seize and search the device when it is released back to its owner—a "do-over," if you will. Were that possibility to militate in favor of simply allowing the search in the first instance, that would swallow the rule that "[a] seizure can 'become unreasonable' when 'its length unduly intrude[s] upon constitutionally protected interests.'" *Wilkins*, __ F. Supp. 3d at __, 2021 WL 1894990, at *22 (quoting *Jacobsen*, 466 U.S. at 124 n.25).

that it has probable cause to search Target Devices 5, 6, 14, and 15, which the Court deems abandoned by their owners. ECF No. 6 at 1. Accordingly, it is hereby

ORDERED that the government shall submit an amended warrant application with respect to Target Devices 1, 2, 5, 6, 7, 13, 14, 15, 21, 22, and 23.

SO ORDERED.

Date: November 30, 2021

G. MICHAEL HARVEY
UNITED STATES MAGISTRATE JUDGE