The Uncertainty Surrounding Abandoned Smartphones And Fourth Amendment Standing

I. Introduction

Imagine it's Sunday and you are on a weekly trip to the grocery store. As you exit the store, with bags overflowing in your hands and the sound of kids crying, you're in a hectic search for your car keys. The next thing you know, you are driving away and wondering where you've placed your smartphone, only to realize that you have left it in your shopping cart.[1] It's a stressful situation, but if you ask the majority of the population, it is a situation that undoubtedly is not uncommon.[2] Now ask yourself this: Would you be comfortable with your smartphone landing in the hands of law enforcement only for them to search through all of its contents?[3]

Most Americans likely don't deliberate about the chances of this happening. However, under the current definition of abandonment,[4] the consequences of losing one's phone may be much more severe than the initial stress of having to pay for a replacement. In the event that the smartphone owner in the above scenario felt as though his Fourth Amendment protection against an unreasonable search or seizure of his phone was violated, he is, in theory, legally entitled to contest that violation.[5] However, by simply classifying the phone as "abandoned," the Eleventh Circuit no longer provides the owner an ability to contest the warrantless search of the smartphone's contents.[6] A review of prior cases involving abandoned property and Fourth Amendment standing will confirm, problematically, that there is no clear definition for abandonment.[7]

Throughout history, courts have maintained the same test for classifying property as abandoned: Abandonment is "primarily a question of intent . . . inferred from words spoken, acts done, and other objective facts."[8] But even while applying the exact same test, courts have

continued to come to inconsistent results because "[n]early every case in this area of law has some feature distinguishable from the next."[9] Thus, the question today becomes, at what point does this unclear definition give too much discretion to law enforcement agents?[10] The answer to this question—especially in a day and age where smartphones are capable of encompassing a significant quantity and quality of personal, sometimes incriminating, information,[11]—may cause individuals to wonder if law enforcement is solely "accommodat[ing] the[ir] investigative needs"[12] by stripping away the protections Americans are promised.[13]

Unsurprisingly, this was not an issue when courts were merely deciding cases that involved abandoned automobiles,[14] trailers,[15] vessels,[16] bags,[17] and briefcases.[18] A smartphone, however, presents increased complexity and is quite distinguishable from most of these items. While the Supreme Court has yet to decide a case involving a smartphone, the Eleventh Circuit recently rendered the decision of a case comprising of a smartphone that was accidently left in a Walmart parking lot, and made its way into the hands of an entrusted stranger and, eventually, the police.[19] Like prior abandonment decisions, the Eleventh Circuit's holding was based upon a set of conclusions drawn from minuscule facts.[20] Interestingly, the court drew these conclusions using exclusively the testimony from the fiancé of the woman who found the phone, as he was the only one to testify.[21] Even though the court's approach was consistent with precedent, this case is important because it demonstrates the need for a new, more concrete, test for abandonment as devices capable of possessing intimate details of Americans' lives continue to play an increasing role in today's society.[22]

This note will discuss the Eleventh Circuit's incorrect application of the current test of abandonment to smartphones in *United States v. Sparks*.[23] Part II addresses the history of relevant

case law and explains how other jurisdictions have applied the abandonment test to different types of property. Part III presents the facts of *Sparks* and demonstrate how the majority and dissent worked through the case. Part IV analyzes the *Sparks* decision, its flaws and consequences, and then suggests a possible path that could be taken to ensure the protection of smartphone owners' privacy rights if they ever find themselves in a *Sparks* situation. Finally, Part V takes a forward-looking approach at the future impact that the Eleventh Court's decision will have on the lives of smartphone owners.

II. The Constitution's Abandonment Issues

A discussion about an individual's standing to challenge an unreasonable search or seizure must begin with a brief look at where this right derives from. Article III, Section 2 of the Constitution gives Americans standing to contest any infringements on their Constitutional rights,[24] and the Fourth Amendment protects Americans from "unreasonable searches and seizures"[25] of their "persons, houses, papers, and effects"[26] by law enforcement officials. However, a defendant has *no standing* to challenge a Fourth Amendment violation when he has abandoned "any reasonable expectation to a continuation of his personal right" to his property.[27]

What may be worrisome for Americans whom find themselves in the above situation is the fact that there are no definite characteristics—such as an item's location, nature, or the length of time it has been out of the hands of the owner,[28]—that an item must possess in order for it to be considered "abandoned."[29] Instead, courts view abandonment as a "question of intent,"[30] inferred from "acts, words, and other objective facts."[31] The following cases will illustrate that throughout history, courts have continued to decide the question of abandonment solely by turning to a case-by-case analysis.

A. You Can Run But You Can't Hide: Abandoning Your Vehicle On A Public Road

Beginning with a discussion on vehicles, which obviously differ significantly from smartphones, in *United States v. Edwards*[32] the court held that the defendant had "voluntarily and purposely"[33] abandoned his car after engaging in a high-speed chase, during which his failure to make a proper turn resulted in his subsequent decision to flee on foot.[34] The Fifth Circuit reasoned that the defendant's decision to leave his car on a public highway with the engine running, the keys in the ignition, and the lights on, signified a voluntary choice to abandon the vehicle.[35] The court noted that whether the facts disclose a "complete abandonment in the strict property-right sense was not the issue,"[36] and instead, the court took a "common sense approach"[37] to decide abandonment. The court concluded that the actions displayed by the defendant indicated that he had "obvious knowledge that it would come into possession of the law enforcement officers,"[38] but nonetheless accepted that risk.

Seven years later the Fifth Circuit continued to avoid the strict property-right approach to the issue of abandonment in its decision in *United States v. Williams*.[39] In *Williams*, DEA agents were informed that Richard Williams was storing and transporting marijuana.[40] The agents subsequently followed Williams as he pulled into a rest-stop, unhooked the trailer from his tractor, and drove away.[41] The court applied the same definition of abandonment used in *Edwards,* and by inferring the defendant's intent through evaluating his overt actions, the court concluded that the defendant knew he was being followed by law enforcement officers, and therefore his only purpose in leaving the unlocked and unguarded trailer behind was to dispose of incriminating evidence.[42] Perhaps influenced by the fact that William's trailer happened to contain drugs, the court reasoned that William's decision to discard his trailer was to protect himself from possessing evidence

during his pursuit by law enforcement agents,[43] while simultaneously protecting his opportunity to return to the rest-stop later on and recover the evidence.[44]

B. My Heart Will Go On: Abandoning Your Ship At Sea

Three years after the Fifth Circuit delivered its opinion in *Williams*, the Fifth Circuit applied the same line of reasoning to a defendant's voluntary exit of a vessel.[45] Again, this is an item considerably different from a smartphone. In *United States v. Edwards*,[46] the defendant called the Coast Guard for assistance because her vessel was taking on water during hazardous weather conditions.[47] Realizing that her life was more important than her vessel that happened to contain 30,000 pounds of marijuana, the defendant exited her vessel and boarded the Coast Guard's ship.[48] The majority of the court again relied on the intent test used in *Williams* and held that, because the defendant called for aid, accepted aid, and left her vessel unattended, she had voluntarily abandoned her vessel.[49] It is unsurprising that the court's decision was consistent with *Edwards* and *Williams*, as they all involved defendants whom decided to exit their modes of transportation.

C. Take It With You When You Go: Abandoning Your Briefcase

Twelve years later, the court was finally confronted with applying the test of abandonment to an item more similar to a smartphone than a vessel or automobile. This time, the court had to rule on abandonment of a briefcase.[50] The Eleventh Circuit followed in the footsteps of the Fifth Circuit and attempted to determine the owner's intent.[51] In *United States v. Ramos,*[52] the defendant failed to move out of his condominium by the check-out time, which enabled the housekeepers to discover two single-dollar bills with a "white powder substance," as well as a briefcase full of cocaine.[53] The court distinguished this case from *United States v. Savage*, where the Fifth Circuit held that the defendant "automatically relinquished possession of the room" he was staying in at

the check-out time, specifically emphasizing the fact that he had turned in his key the night before.[54] Here, however, the defendant had not turned in his key the day before the seizure.[55] Furthermore, the Eleventh Circuit also specifically emphasized that the very nature of a briefcase is an "extension of one's own clothing" where personal items are kept.[56] Therefore, the nature of the item in question became a significant turning point for the court.[57]

The court consistently refused to conclude that an individual would intentionally abandon a briefcase even six years later in *United States v. Basinski*.[58] Here, the defendant's friend agreed to hide the defendant's suitcase in a barn at his summer home.[59] However, when the defendant learned that he was under investigation by the FBI, he instructed his friend to burn the suitcase.[60] The court relied on the same test used in *Edwards*, but made a point to stress the objectivity of the test: "Because this is not a subjective test, it does not matter whether the defendant harbors a desire to later reclaim an item; we look solely to the external manifestations of his intent . . . ."[61] The court reasoned that the defendant never explicitly disclaimed a privacy interest in the briefcase.[62] Instead, the defendant's conduct proved that he intended to preserve his possessory interests: He entrusted his lifelong friend with hiding the suitcase on private property, in a locked barn, in a remote part of Wisconsin.[63] He additionally instructed his friend to burn the suitcase—trusting that the friend had done so and never being put on notice that he indeed had not.[64] The court further reasoned that the defendant's request to have his friend destroy the briefcase indicated his intentions of keeping the briefcase's contents private.[65]

D. The Trend Leading Up To United States v. Sparks

The above cases reiterate the trend of courts consistently deciding abandonment through a case-by-case analysis of the defendant's intent, with specific overt acts and words solidifying

either the intent to remain in possession or the intent to relinquish possession.[66] However, up until *Sparks* in 2015, the most personal item courts were analyzing was a briefcase. Regardless of the number of documents one can stuff into a briefcase, the maximum amount will never come close to the one-hundred gigabytes of personal information stored within a smartphone. Whether or not those gigabytes contain incriminating information, it seems unlikely that anyone would voluntarily give up their interest in such a personal item. Thus, with the rapid increase in the popularity of smartphones, it became time for a case like *United States v. Sparks*[67] to make its way through the courts. It was also time for the court to clarify the test for abandonment.

III. United States v. Sparks: If At First You Don't Succeed, Courts Won't Care If You Try Again

On June 4, 2012, Alan Robert Johnson and Jennifer A. Sparks thought that they were making a routine trip to Walmart when something went terribly wrong: they left Jennifer Sparks's smartphone in a shopping cart in the parking lot.[68] Upon the realization that she had lost her phone, Sparks urgently returned to Walmart in an unsuccessful attempt to have the store locate her phone.[69] She then sent a text message to her lost phone, identifying herself and urgently requesting the return of her phone.[70] Via Sparks's phone, Linda Vo, the woman who had found her phone, arranged for Sparks to pick up the phone at a future date and time.[71] Sparks trusted Vo to keep her phone in the meantime.[72] Despite these arrangements, and without informing Sparks of her decision to no longer abide by them, Vo decided to have her boyfriend, Widner, turn it over to law enforcement.[73] During Widner's entrance to the police station, Sparks's phone received a text message from the owner, again attempting to retrieve the phone.[74] Subsequently, as a variety of

employees at the police station scrolled through Sparks's phone, Widner informed them that "texts were coming to the phone" that "indicated that the sender wanted the cellphone back."[75]

After the police staff failed to respond to any of the repeatedly sent text messages, a police sergeant turned the phone off and submitted it to evidence.[76] At that point, Sparks had still not received any communication from Vo informing her that Vo was no longer in physical possession of the phone.[77] The phone was delivered one day later to another police department, which further blocked any efforts by Sparks to communicate with anyone about the phone.[78] Sparks's phone was in police possession without a warrant for 23 days.[79] Eventually, a search warrant was obtained and a search of Johnson and Sparks's residence produced additional evidence. The defendants were ultimately indicted by a grand jury for possession of child pornography.[80] Johnson and Sparks both moved to suppress the evidence, but following an evidentiary hearing, the district court denied the motions.[81] Both defendants then appealed.[82]

A. The Majority

The majority of the Eleventh Circuit held that it was unnecessary to reach the issue of whether or not there was an unreasonable delay between the seizing of the phone and the obtaining of a search warrant because Sparks had no standing to contest that delay due to her abandonment of the phone.[83] Even though courts have never decided whether an item similar to a smartphone[84] was abandoned, the court still spent the majority of its decision comparing the facts of Sparks's case to precedent, particularly the case of *Edwards.* It reasoned that if exiting a vessel during an emergency is voluntary abandonment, then Sparks's decision to abandon her smartphone, "under far less onerous circumstances" must also be.[85] The court noted both that "loss is not the same thing as abandonment,"[86] and that Sparks's decision to replace her phone would not alone

"demonstrate the intent to abandon."[87] It then spent a considerable amount of time emphasizing that an individual in Sparks's position had a plethora of other options available other than just attempting to retrieve the phone by repeatedly texting it.[88] However, the court's opinion essentially stated that the purchase of the new phone was straw that broke the camel's back.[89]

B. The Dissent

Relying on precedent, the dissent argued that this was not a typical case of abandonment since it is not true that Sparks's only conceivable purpose was to discard her phone with its incriminating contents.[90] The dissent proceeded to point to Sparks's actions to argue that the majority was wrong in its conclusion that Sparks had not gone far enough in her efforts to regain the phone.[91] It compared Sparks's case to precedent like the majority did, but explained that all prior cases involved abandonment by words, deeds, failures to claim possession or to act after promises to reclaim the property, or through gifts; but, there was never abandonment through losses, carelessness, accidents, or situations where reasonable efforts were made to reclaim the property.[92] Finally, the dissent took into account the status that smartphones have in many individuals' lives today to conclude that buying a replacement phone does not necessarily mean the owner is abandoning all hope that the lost phone will be returned.[93]

IV. A Ride On The Abandonment Roller Coaster

"The contours of abandonment . . . . are imprecise . . . . "[94] The Eleventh Circuit's decision is another illustration of the continuation of this trend of courts applying a multitude of factors specific to each case in an attempt to determine if property is abandoned, leaving very little guidance for future courts. In doing so, the majority incorrectly compares and distinguishes the circumstances in *Sparks* with cases that were decided before devices packed with personal

information[95] were possessed by a majority of the population.[96] Consequently, it's the dissent that accurately recognizes the majority's failure to be mindful of today's necessity in quickly replacing a lost smartphone.[97]

A. I'm At A Payphone Trying To Call Home: Comparing The Past To The Present

There is no question as to whether or not the Eleventh Circuit applied the same abandonment test that has been used by the courts in the past.[98] However, the court compared the facts of *Sparks* to precedent in an incorrect manner, proving that what it considers to be its "common sense"[99] approach, which allegedly worked in the past, is no longer appropriate today.[100] For example, in 1960, the Supreme Court held that trash located inside a trash bin was abandoned.[101] Thus, in 2013, under the same common sense approach, it would seem that a lottery ticket that was thrown into a trash bin would be considered abandoned as well.[102] However, a county circuit court was not willing to jump to that seemingly obvious conclusion.[103] With conflicting decisions like this, and with the inevitable fact that smartphones will continue to be misplaced,[104] it's undeniable that courts need more guidance than what the definition of abandonment is currently providing.

With nothing else but prior cases that turned on insignificant details to guide its way, the Eleventh Circuit relied heavily on a comparison of the abandonment of vessels, briefcases, and bags to that of a smartphone.[105] In the court's attempt to pick out specific factors that display the failure of Sparks to put forth less than a minimal effort to retrieve her phone,[106] it concluded that, because the defendant's decision to take a path different from that which the court would have expected a smartphone owner who wished to regain possession to take, Sparks's efforts were not enough.[107] The court strengthened its decision by erroneously using a comparison of *Sparks* to

Edwards[108] to reason that, because the circumstances in *Sparks* were "far less onerous"[109] than those in *Edwards,* then the property of Sparks must be abandoned. Furthermore, the court invalidly distinguished between the circumstances of entrusting a friend to burn a briefcase in *Ramos* from Sparks trusting a stranger who had prepared with her a genuine plan to return the phone.[110] The court reasoned that the cases differ due to the meager detail of *Ramos* involving a friend of thirty years and *Sparks* involving a stranger.[111] The court used its discretion to pick out a single, minor factor to decide the case in a way it deemed appropriate[112]—an extremely problematic approach for the future of individual privacy rights.

The concurrence in *Williams* understood the reality of this trend, which it correlated to the fact that actions that may look like the *intent to abandon* to one court, can look like the *intent to retain control* to another.[113] This generates significant questions for the smartphone owner who loses his phone and wants knowledge of the steps he should take in order to retain a possessory interest. Under the court's decision in *Sparks*, it may seem like the best solution would be for the individual to not replace his lost smartphone.[114] However, there is no promise that another jurisdiction would consider the failure to replace a phone as the intent to retain control rather than an intent to abandon.[115] Thus, the possible future impact of the court's decision is that Americans who lose their smartphone may struggle with the decision to replace a lost phone if it may be seen as an act of surrendering the intimate details on that phone to the law enforcement.[116]

B. A Whole New World: A Potential Solution

By placing the individual who has lost his smartphone in a situation where he is faced with the choice of purchasing a new phone and possibly giving up his privacy or, on the other hand, not purchasing a new phone but living without today's main tool of communication,[117] the

court has failed miserably at molding its "common sense" approach with today's technology.[118] Nonetheless, this is a predictable consequence in light of the long history of courts deciding abandonment based on factors specific to each case, and therefore failing to guide future courts.

Because it's hard to relocate a missing smartphone, and because under the current test the courts attempt to use overt acts to "determine . . . . what is going on inside an owner's head,"[119] a possible solution is to require a court to input the following into its analysis: "Is this something an average American would have left here?"[120] Unlike a vehicle, vessel, or briefcase, a smartphone is not only smaller, which makes it easier to lose, but it also contains a much higher caliber of personal information. Therefore, instead of courts attempting the near-impossible task of determining the owner's intent, a question like this will protect the privacy interests of the individual who innocently leaves his smartphone on a park bench during a causal morning stroll, but who also doesn't know how to make contact with the stranger who has stumbled across it.

V. Conclusion

Following the decision in *Sparks*, courts can continue to use their discretion to the detriment of smartphone owners who value their privacy.[121] The Court needs to come up with a solution on how to define "abandonment" in the context of smartphones in order to effectively draw a definitive line between what is considered abandoned and what is not. Until then, smartphone owners cannot rest assured that the loss of their phone does not mean the loss of their privacy. The main takeaway is that, until the Court gives us a clear answer, Americans need to to be more aware of the consequences of losing their smartphones. If *Sparks* can teach you anything, it's to be careful not lose your smartphone. Or if you do, find a way to wipe it clean. If the police find no criminal evidence, they probably won't try to classify it as abandoned anyway.

[1] *See generally* United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015).

[2] *See* Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR., 27-28 (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/ (discussing respondents who rely on their smartphones for shopping, with four respondents writing about their personal troubles of shopping after forgetting their smartphones at home).

[3] *See generally Sparks*, 806 F.3d at 1331-32.

[4] United States v. Edwards, 441 F.2d 749, 752 (5th Cir. 1971) (The "personal right to Fourth Amendment protection of property against search and seizure is lost when that property is abandoned.").

[5] Riley v. California, 134 S. Ct. 2473, 2482 (2014) ("The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . '").

[6] Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 962 (2016) ("[E]ffects in public spaces . . . . can lose their constitutional protection if deemed 'abandoned.'").

[7] *Id.* at 963 ("[T]he Court has not indicated what should factor into a determination that an item is abandoned or not.").

[8] United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978) (citing United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)).

[9] United States v. Ramos, 12 F.3d 1019, 1025 (11th Cir. 1994).

[10] *See generally*, Dr. Saby Ghoshray, *Doctrinal Stress or in Need of a Face Lift: Examining the Difficulty in Warrantless Searches of Smartphones Under the Fourth Amendment's Original Intent*, 33 WHITTIER L. REV. 571 (2012) (discussing an example of overreaching police powers).

[11] *See* Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring) ("Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes . . . . searching their contents implicates very sensitive privacy interests . . . . ").

[12] Ghoshray, *supra* note 10, at 590.

[13] United States v. Johnson, 466 U.S. 109, 113 (1984) (explaining that the Fourth Amendment protects the "right of people to be secure in their . . . . effects, against unreasonable searches an seizures . . . . ").

[14] United States v. Edwards, 441 F.2d 749 (5th Cir. 1971).

[15] United States v. Williams, 569 F.2d 823 (5th Cir. 1978).

[16] United States v. Edwards, 644 F.2d 1 (5th Cir. 1981).

[17] United States v. Pirolli, 673 F.2d 1200 (11th Cir. 1982).

[18] United States v. Ramos, 12 F.3d 1019 (11th Cir. 1994).

[19] United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015).

[20] *Id.*

[21] United States v. Johnson, No. 2:12-cr-92-FtM-29DNF, 2013 WL 3992254, at *1 (M.D. Fla. 2013).

[22] *See generally* Smith, *supra* note 2, at 2.

[23] *Sparks*, 806 F.3d at 1323.

[24] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between a State, or the Citizens thereof . . . . ").

[25] Riley v. California, 134 S. Ct. 2473, 2482 (2014).

[26] *Id.*

[27] United States v. Edwards, 441 F.2d. 749, 753 (5th Cir. 1971) (emphasis added).

[28] *See* Brady, *supra* note 6, at 1011.

[29] *See id.* at 963 ("The Court has not indicated what should factor into a determination that an item is abandoned or not.").

[30] United States v. Ramos, 12 F.3d 1019, 1022-23 (11th Cir. 1994).

[31] *Id.* at 1023.

[32] United States v. Edwards, 441 F.2d 749 (5th Cir. 1971).

[33] *Id.* at 752.

[34] *Id.* at 750.

[35] *Id.* at 753.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 753-54.

[39] United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978).

[40] *Id.* at 824.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] United States v. Edwards, 644 F.2d 1, 1 (5th Cir. 1981).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1-2.

[49] *Id.* at 2.

[50] United States v. Ramos, 12 F.3d 1019 (11th Cir. 1994).

[51] *Id.* at 1022 (citing United States v. Winchester, 916 F.2d 601, 603 (11th Cir. 1990)).

[52] *Id.* at 1019.

[53] *Id.* at 1021.

[54] *Id.* at 1024.

[55] *Id.*

[56] *Id.*

[57] *Id.* ("*Few places outside one's home justify a greater expectation of privacy than does the briefcase*.").

[58] United States v. Basinski, 226 F.3d 829 (7th Cir. 2000).

[59] *Id.* at 832.

[60] *Id.*

[61] *Id.* (citing United States v. Rem, 984, F.2d 806, 810 (7th Cir. 1993)).

[62] *Id.* at 837.

[63] *Id.* at 832-33.

[64] *Id.* at 837.

[65] *Id.*

[66] *Id.*

[67] United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015).

[68] United States v. Johnson, No. 2:12-cr-92-FtM-29DNF, 2013 WL 3992254, at *3 (M.D. Fla. 2013).

[69] *Sparks*, 806 F.3d at 1351 (Martin, C.J., dissenting).

[70] *Id.*

[71] *Id.* at 1351.

[72] *Id.*

[73] *Id.* at 1329 (majority opinion).

[74] United States v. Johnson, No. 2:12-cr-92-FtM-29DNF, 2013 WL 3992254, at *3 (M.D. Fla. 2013).

[75] *Id.* at *5.

[76] *Sparks*, 806 F.3d at 1332.

[77] *Id.*

[78] *Id.* at 1354 (Martin, C.J., dissenting).

[79] *Id.*

[80] *Id.* at 1330 (majority opinion).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1339.

[84] *See* United States v. Ramos, 12 F.3d 1019 (11th Cir. 1994) (involving the court's decision of abandonment of a briefcase, which is the most similar item to a smartphone the court has decided on).

[85] *Sparks,* 806 F.3d at 1342.

[86] *Id.* at 1344.

[87] *Id.*

[88] *Id.* at 1342-44.

[89] *Id.*

[90] *Id.* at 1351 (citing United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978)).

[91] *Id.*

[92] *Id.* at 1353.

[93] *Id.* at 1354.

[94] Brady, *supra* note 6, at 962-63.

[95] Smith, *supra* note 2, at 26.

[96] *Id.* at 2 ("Today nearly two-thirds of Americans own a smartphone . . . . ").

[97] *Sparks*, 806 F.3d at 1354 (Martin, C.J., dissenting).

[98] *See* Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) ("It is obviously difficult to determine with any certainty what is going on inside an owner's head. As a behavioral matter, however, the intention to abandon is typically accompanied by observable acts that evince that underlying desire to sever a claim of ownership.").

[99] *Sparks*, 806 F.3d at 1342.

[100] Ghoshray, *supra* note 12, at 573 ("[J]urisprudence has not kept up with technology.").

[101] Brady, *supra* note 6, at 962.

[102] *See* John Norwood, *The Splendid Mystery of the Lost Lottery Ticket*, 2013 ARK. L. NOTES 1217 (2013).

[103] *Id.* (explaining that the jury ultimately did not have to decide whether a winning lottery ticket, which was thrown into the trash and later discovered by another customer, was sufficiently "abandoned" by the woman who had thrown it into the trash).

[104] *See generally* Smith, *supra* note 2, at 7.

[105] United States v. Sparks, 806 F.3d 1323, 1344-48 (11th Cir. 2015).

[106] *Id.* at 1342-43.

[107] *Id.* at 1343.

[108] United States v. Edwards, 644 F.2d 1 (5th Cir. 1981).

[109] *Sparks*, 806 F.3d at 1342.

[110] *Id.* at 1346.

[111] *Id.*

[112] *See* Brady, *supra* note 6, at 969 (discussing the case of Anderson v. State, where the court held that the defendant's act of leaving an item under a rock on a beach, which was five feet away from him, was abandoned).

[113] United States v. Williams, 569 F.2d 823, 827 (5th Cir. 1978) (Goldberg, C.J., concurring) (emphasis added).

[114] The majority bases its reasoning extensively on the fact that Sparks bought a new phone a few days after Vo failed to return the phone. However, many Americans' lives revolve around their

smartphone so it is not uncommon to get a replacement phone, even if only for temporary use, soon after misplacing a phone.

[115] *Sparks*, 806 F.3d at 1354 (11th Cir. 2015) (Martin, C.J., dissenting) ("But by getting a new phone does not mean they abounded their interest in the unique information contained in the lost phone.").

[116] Smith, *supra* note 2, at 7 (reporting that 46% of smartphone owners say their phone is something they "couldn't live without").

[117] See Ghoshray, *supra* note 12, at 3 ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

[118] *Id.* ("Even the Supreme Court has . . . . recognized the rapid societal chances . . . . ").

[119] Penalver, *supra* note 98, at 196.

[120] Brady, *supra* note 6, at 1012.

[121] Ghoshray, *supra* note 12, at 13 ("[I]t can be argued that the Framers might never have anticipated the present era's intrusive police power.").

I hereby certify that I have completed this submission in accordance with the Competition rules and in accordance with the collaboration and academic integrity requirements of the University of Miami School of Law Honor Code. Signed 508575.