Thou Shall Not Abandon the Fourth Amendment: *United States v. Sparks* and How the Eleventh Circuit Ruled Cell Phone Abandoned

I. INTRODUCTION

"If the abandonment concept is employed with much more abandon, the [F]ourth [A]mendment itself will be abandoned."[1]

The above statement was made over three decades ago by Fifth Circuit Judge Goldberg. Now, a decision out of the Eleventh Circuit might turn this prescient prediction to reality. In *United States v. Sparks*,[2] the Court ruled that Ms. Sparks and Mr. Johnson abandoned their possessory interests in their cell phone, and thus they lacked standing to assert the government's twenty-three-day delay in obtaining a search warrant violated their Fourth Amendment rights.[3]

The Fourth Amendment of the United States Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[4] Perhaps no other text of the Constitution has been more hotly debated and scrutinized than that of the Fourth Amendment. Much of the debate has focused on searches and seizures of containers,[5] purses,[6] automobiles,[7] and, till recently, cell phones.[8] The debate is focusing yet again on cell phones, but this time in the context of the abandonment doctrine.

Historically, "Fourth Amendment protection of property against search and seizure is lost when that property is abandoned."[9] The crux of the Fourth Amendment's protection encompasses places and property in which an individual has an expectation of privacy that society is prepared to recognize as reasonable.[10] Certainly, "no person can have a reasonable expectation of privacy in an item that he [or she] has abandoned."[11] However, courts should cautiously distinguish between the ordinary use of the term "abandonment" and when it is used in a situation with the potential for loss of Fourth Amendment protections.[12]

The Court's anomalous decision in *Sparks* raises serious questions about the abandonment doctrine and search warrant delays within the ambit of the Fourth Amendment. *Sparks* also shines a spotlight on society's most indispensable and ubiquitous item—the cell phone.[13] Today, almost two-thirds of Americans (64%) own a smartphone[14] and nearly half (46%) say that it is something they "couldn't live without."[15] So, most Americans would gasp if they heard that a court found that two persons had "abandoned their possessory interest in their cell phone after *three* days of looking for it."[16]

This Note discusses the abandonment doctrine as it relates to the Fourth Amendment, and contends that the Eleventh Circuit's recent application of this doctrine to a lost cell phone is flawed. Part II provides a general overview of the abandonment doctrine, search warrant delays, and their relation to the Fourth Amendment. Part III focuses entirely on the relevant facts of *Sparks*, along with the Court's majority and dissenting opinions. Next, Part IV examines how the Court's decision deviates from established precedent, and provides possible solutions to the Court's flawed reasoning. Finally, this Note will conclude by echoing the reasons why the Court's decision ought to be corrected if we are to uphold the foundation that gave rise to the Fourth Amendment.

II. BEFORE SPARKS: AHOY! ALL ABOARD

A. *The Fourth Amendment's Definition of Abandonment*

The Fourth Amendment protects an individual's "houses, papers, and effects."[17] The Supreme Court has held, however, that an individual loses Fourth Amendment protection of property against unreasonable searches and seizures when that property is abandoned.[18] In determining whether an abandonment has occurred, "the critical inquiry is whether the person . . . voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so he could no longer retain a reasonable expectation of privacy with regard to it at the time of the

search."[19] Thus, "[a]bandonment is primarily a question of intent, and may be inferred from words spoken, acts done and objective facts."[20] Indeed, a consideration of case-specific facts is required.[21] Also, courts must "look at the totality of the circumstances, but pay particular attention to explicit denials of ownership and to any physical relinquishment of the property."[22] Finally, the government carries the burden of proving abandonment.[23]

An affirmative action by an individual to abandon something is a crucial fact in the abandonment caselaw.[24] The following cases from the Fifth Circuit are illustrative.[25] In *Edwards*,[26] the defendant was onboard a vessel that was taking on water and sinking.[27] The court found that the defendant "called for aid, accepted aid from the Coast Guard, and voluntarily abandoned" the ship.[28] The court held that the defendant "may not claim that he had an expectation of privacy in the ship," and thus could not challenge the search and seizure.[29]

In *Williams*,[30] the Fifth Circuit held that a defendant abandoned his trailer when he unhooked it from his tractor at a rest stop area and then drove away.[31] The court explained that because the defendant knew he was being followed by government officers, "[h]is only conceivable purpose in leaving the trailer unguarded and unlocked in the parking area was to rid himself of the vehicle with its incriminating contents."[32] A concurring judge in *Williams* wrote separately to express his disagreement "that the search can be justified under an abandonment theory."[33] Judge Goldberg clarified that "abandonment is a question of *intent*, yet [defendant]'s actions in this case do not reflect a single physic wave of the requisite intent."[34] He further explained that because the defendant returned to pick up the trailer, his "actions evidenced an intent to *retain* control of the trailer rather than to abandon it."[35]

B. *Search Warrant Delays and the Fourth Amendment*

In *Jacobsen*,[36] the Supreme Court concluded that "a seizure lawful at its inception can

nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'"[37] So, once an item has been seized, law enforcement should not unreasonably delay in obtaining a search warrant.[38] Accordingly, "the sooner the warrant issues, the sooner the property owner's possessory rights can be restored if the search reveals nothing incriminating."[39] Lastly, "[t]he reasonableness of the delay is determined in light of all the facts and circumstances," and by "a careful balancing of governmental and private interests."[40]

In *Mitchell*, the Eleventh Circuit found that the initial warrantless seizure of a hard drive from a computer was permissible, but that the twenty-one-day delay in obtaining a search warrant for the seized hard drive was unreasonable.[41] The court explained that Fourth Amendment concerns vis-à-vis the property owner's possessory interests "applies with even greater force to the hard drive of a computer, which is the digital equivalent of its owner's home, capable of holding a universe of private information."[42]

III. UNITED STATES V. SPARKS: GET THOSE LIFE JACKETS READY

A. *Relevant Facts*

The following are the facts which the district court found credible.[43] On June 4, 2012, an employee found a cell phone in a shopping cart at a Wal-Mart store.[44] After finding the phone, the employee contacted a woman who claimed she was the owner of the cell phone, and they made arrangements for the return of the phone.[45] However, the plan never happened because the employee decided to look at the contents of the phone, which were not password protected, and subsequently discovered images of child pornography.[46] This discovery along with the cell phone made its way to a local police department, who then delivered the cell phone to another police

department to investigate.[47] During this time, various law enforcement officials had viewed and confirmed that the images contained in the cell phone were in fact child pornography.[48]

At the same time, Jennifer Sparks continued making various futile attempts to recover the cell phone,[49] which in fact belonged to her boyfriend, Alan Johnson.[50] By the time the cell phone reached the proper police department, three days had passed since the cell phone was found at the store.[51] Finally, a search warrant for the cell phone was issued twenty-three days later on June 27, 2012.[52] After being indicted by a grand jury on various charges, both Johnson and Sparks moved to suppress the evidence.[53] Following an evidentiary hearing, the district court denied the motions to suppress.[54] Then, Johnson and Sparks each plead guilty to one count of production of child pornography under plea agreements that reserved each's right to appeal the denial of their motions to suppress.[55] Johnson was sentenced to 600 months' imprisonment and Sparks was sentenced to 360 months' imprisonment.[56]

B. *The (Frenzied-Fact-Finding) Majority*

Within four paragraphs of the Court's opinion, the "A" word is dropped: "Because Defendants *abandoned* their phone within three days of having lost it, they lack standing to challenge law enforcement's 23-day delay between recovering the phone and obtaining a search warrant to search it."[57] Focusing on abandonment, the Court claims "Johnson and Sparks made a voluntary and calculated decision over a period of three days to cease all efforts to reclaim their phone."[58] Despite the fact that the district court never considered an abandonment theory when analyzing the delay issue,[59] the Court describes "affirmative acts further demonstrating [an] intent to abandon the phone," such as when "Johnson purchased an upgraded phone for himself, filed an insurance claim for the lost phone, and obtained and provided a replacement phone to Sparks."[60]

Most alarming, yet, is the fact that the Court's opinion fails to reach the issue of whether the twenty-three-day period between the seizure of the cell phone and the obtaining of a search warrant for it was unreasonable.[61] In six short paragraphs, the Court dismisses outright the potential Fourth Amendment concerns regarding the search warrant delay by raising, *sua sponte*, the issue of standing.[62] According to the Court, "Johnson and Sparks lost standing to contest the length of the 23-day delay because they abandoned their possessory interests in the phone . . . ."[63] Therefore, without standing to sue, naturally, the Court lacks jurisdiction over the delay issue.[64]

C. *The (Vehement) Dissent*

As the main purpose of her dissent, Judge Martin makes plain the reasons why she believes that the defendants did not abandon their cell phone. To begin with, Judge Martin points out that "[t]he District court made no findings related to abandonment in denying the defendants' motions to suppress. It did not mention the word."[65] She further explains, "[b]ecause the government failed to meet its burden of proof on the abandonment issue, and we have no factual findings about abandonment from the District court, we should not now rely on our own findings on that subject to rule in favor of the government on appeal."[66]

Judge Martin provides a timeline of the actions taken by Sparks to reclaim the lost cell phone.[67] One such act, faintly mentioned by the majority,[68] occurred while the phone was being turned over to the police and Sparks "continued to call and send text messages to the phone in an attempt to reclaim it."[69] Judge Martin, then, accuses the majority of "mak[ing] findings, for the first time on appeal, about what Mr. Johnson and Ms. Sparks knew and what motivated them to take actions they may or may not have taken."[70] Tackling the majority on the abandonment issue, Judge Martin provides six examples on "ways to affirmatively abandon something," and then she writes, perhaps the most powerful sentence in her dissent, "[b]ut a person may not abandon

property for Fourth Amendment purposes by *mere loss, carelessness, or accident, where he has made reasonable efforts to reclaim the property*."[71]

Judge Martin responds to the majority's equating Sparks and Johnson's purchase of a new phone with abandonment of the old[72] by stating, "we must be mindful of the status cell phones now have as property."[73] To support her assertion, Judge Martin quotes a recent Supreme Court case[74] that recognized the importance of cell phones in today's society.[75] Lastly, she takes on the search warrant delay issue that the majority brushed aside. Judge Martin cites to binding precedent[76] and holds that "the government's twenty-three-day delay rendered the seizure of the cell phone, and the resulting search of Mr. Johnson and Ms. Sparks's home, unreasonable under the Fourth Amendment."[77]

IV. S.O.S. ABANDON SPARKS: ICEBERG RIGHT AHEAD!

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'"[78] A cell phone unquestionably qualifies as an "effect" within the meaning of the Fourth Amendment.[79] Thus, courts should afford greater constitutional protection to cell phones, especially when found outside the home, because of the privacy and security interests inherent in their ownership and individual possession.[80] Further, the abandonment doctrine should not be routinely applied to thwart the constitutional protection of cell phones. Sparks and Johnson's Fourth Amendment rights were violated when the government unreasonably delayed in obtaining a search warrant for their cell phone for twenty-three days.[81] Fortunately, the Supreme Court could grant certiorari[82] and remedy the erroneous decision in *Sparks*, while upholding the evolving Fourth Amendment jurisprudence that is giving cell phones their due protection.[83]

A. *Stretching the Definition of Abandonment*

The Court based its decision in *Sparks* on the abandonment doctrine. In doing so, it stretched the definition of abandonment as it pertains to the Fourth Amendment. In finding and selecting facts favorable to reach a desired conclusion, the Court crafted a whole new puzzling view of the abandonment doctrine. Traditionally, a "fact-based intent analysis" is applied in determining whether an abandonment has occurred.[84] Indeed, the Court adhered to the proper abandonment calculus,[85] but it punched the wrong numbers into the formula. For example, the Court found that Sparks' instructing the store employee *not* to leave the phone with customer service "betrays the intent to abandon the phone."[86] However, Sparks' request is more properly viewed as an intent to "retain an enforceable right or ability to exclude others" from her personal property.[87] Thus, Sparks simply communicated her expectations and interests in the cell phone to the employee who found it at the store. As such, Sparks' message is devoid of the requisite intent to abandon the cell phone, rather it is proof of an intent to *retain* its control.[88] Such intent is further supported by the fact that Sparks returned to the store to reclaim the cell phone.[89]

The facts that the Court uses to support its abandonment theory are highly conjectural. For example, the Court claims that Sparks and Johnson "chose not to file a report with the police complaining about [the store employee]'s failure to give them back their phone, though they knew where [she] could be found."[90] Yet, under this notion, courts would find that an abandonment occurred from an individual's inaction, rather than an *affirmative* action as required by precedent.[91] In choosing to base its conclusion on the abandonment doctrine, the Court failed to follow established precedent that found abandonment based on real actions,[92] rather than inferences on what an individual chose *not* to do. Ultimately, the Court's finding of abandonment contradicts the district court's observation that "defendants retained a possessory interest in the cell phone," albeit a "greatly diminished" one.[93]

In finding that Sparks and Johnson abandoned their cell phone, the Court pursued an analysis on standing and jurisdiction, *sua sponte*, though neither being issues raised by the parties nor the district court.[94] Without first providing its abandonment analysis, the Court concludes that Sparks and Johnson could show no injury inflicted by the government's delay in obtaining a search warrant because they lacked a possessory interest in (i.e. abandoned) the seized cell phone, thus, any length of the seizure could not possibly inflict injury.[95]

B. *No Search Warrant Delay Here: "No big deal, look into it when you get back"*[96]

The Court's dicey analysis (or lack thereof) on the search warrant delay issue deviates from its own precedent in *Mitchell*. There, a concise and proper analysis was offered to determine whether a Fourth Amendment violation occurred after a delay of twenty-one days in obtaining a search warrant following the seizure of a computer hard drive.[97] More importantly, the appellate court in *Mitchell* found that the government's delay constituted "a significant interference with Mitchell's possessory interest" in the computer hard drive precisely because "[c]omputers are relied upon heavily for personal and business use."[98] Notably, the dissent in *Sparks* speaks the undeniable truth—the same principle applies to modern cell phones.[99] Nevertheless, the *Sparks* Court refused to follow *Mitchell* by carving out an exception through its application of the abandonment doctrine.

Just as troubling, the Court turns a blind eye to the length of the delay—*twenty-three days*—which is wholly unreasonable under the *Mitchell* standard.[100] Too, the Court fails to address the justifications provided by the government for the delay in obtaining a search warrant for the cell phone. Here, the dissent steps up to the plate again and makes clear that the proffered justification for the delay—that the agent in charge of the investigation had been out of town attending three separate trainings and was told that the search warrant was "no big deal, look into

it when you get back"—was exactly the type of justification rejected in *Mitchell*.[101] But, the Court washes its hands of the delay issue by stating that its decision "does nothing to undermine the diligence requirement's incentive for law enforcement to act quickly to secure a warrant."[102] Sadly, the Court's decision to pass on the delay issue greatly undermines established precedent and places significant Fourth Amendment concerns at risk.

C. *Abandoning Rescue Efforts: But, The Fourth Amendment Hearts Cell Phones*

The Supreme Court has noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[103] To date, perhaps no other opinion has more aptly described the significant and ubiquitous role of cell phones than the Supreme Court's opinion in *Riley*. There, a unanimous Court mandated police to "get a warrant" before searching a cell phone seized incident to arrest.[104] The message was very clear—do not mess with cell phones. Nevertheless, the decision in *Sparks* deviates from the Supreme Court's implied guidance in *Riley* on how courts should consider Fourth Amendment claims about cell phones.[105] More to the point, the Court treated the cell phone in *Sparks* like any other object, without recognizing the grave privacy concerns involved "for which the Founders fought."[106] Even worse, the Court perfunctorily applied an abandonment theory to "insulate the government from the consequences of its decision"[107] to delay twenty-three days in obtaining a search warrant for the cell phone. There is simply no way to reconcile the thoughtless and cold view taken by the Court in *Sparks* towards cell phones with that of the Supreme Court in *Riley*. They are each on opposite sides of the Fourth Amendment's protection spectrum.

Fortunately, the dissent was on the right side of the line and called out the Court for equating Sparks and Johnson's purchase of a new phone with abandonment of their lost cell phone.[108] Judge Martin properly cites to *Riley* and reminds us that "we must be mindful of the

status cell phones now have as property."[109] Indeed, without a cell phone 44% of Americans would have trouble doing something they needed to do like getting directions or finding an address.[110] More importantly, half of smartphone owners would not be able to get help in an emergency situation like in a car accident, a possible crime, or a medical emergency.[111] Thus, the fact that Sparks and Johnson purchased a new phone three days after losing their cell phone is irrelevant to the issue in *Sparks* and should not have been used by the Court as a pretext to find an abandonment of the lost phone, especially when Sparks and Johnson "lost troves of information necessary for navigating modern life."[112]

The Framers would wince if they could time travel and read the *Sparks* opinion today. Although they could not possibly have envisioned the technological advancements we enjoy today,[113] the Framers would have felt just as strong about protecting "a fundamental possessory interest in an individual's own belongings,"[114] including a cell phone. While "the Framers never expected modern courts to impute meaning into the Fourth Amendment that would conflict with essential rights of individuals,"[115] neither would they have approved of a court applying an exception to the protections afforded by the Fourth Amendment.[116] Cast in slightly different terms, the Framers would have frowned upon a denial of Fourth Amendment protection to an individual's property when such property "was accidentally lost and reasonable efforts were made to find it."[117]

D. *Looking Beyond the Horizon: Possible Solutions to the Anomaly of Sparks*

In order to keep with the Framers' original considerations when they penned the Fourth Amendment, we may have to reconsider the privacy interests at stake as they pertain to cell phones and other forms of modern technology that may hold worlds of information on an individual's private life. A legal scholar has suggested "the threshold for warrantless searches of smartphones should be kept significantly high, so that the basic premise of privacy and liberty of the

Constitution remains viable against an onslaught of technological advancement."[118] Another scholar recently proposed a framework for identifying Fourth Amendment interests in the category of "effects" by looking to a property-based approach and utilizing various contextual factors, such as the nature and environment of an item, to help "in evaluating the objectivity of the owner's expectations that property will remain undisturbed and that his or her privacy and security interests will remain unharmed."[119] Lastly, in a separate concurrence in *Riley*, Justice Alito agreed that the Court should not "mechanically apply the rule used in the predigital era to the search of a cell phone," and suggested "a new balancing of law enforcement and privacy interests."[120] Justice Alito called on Congress to "enact legislation that draws reasonable distinctions based on categories of information," concluding that "it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment."[121] Whichever approach we decide to consider, significant changes are needed in the way cell phones are viewed for Fourth Amendment purposes if we are to preserve "the protection for which the Founders fought."[122]

V. CONCLUSION

The Eleventh Circuit departed from its own precedent while turning its back on the Supreme Court's guidance in *Riley*. After *Sparks*, the approach by which district courts are to analyze abandonment under the Fourth Amendment is in a state of flux. The newly established precedent that a twenty-three-day delay is not unreasonable under the facts in *Sparks* has far-reaching implications for the Fourth Amendment's prohibition against "unreasonable seizures." Of far greater concern is how the Court neglected the importance of cell phones under an evolving Fourth Amendment jurisprudence that is giving cell phones their due regard. Only time will tell whether the Supreme Court will grant certiorari to remedy the oddity created by *Sparks*.

[1] United States v. Williams, 569 F.2d 823, 827 (5th Cir. 1978) (Goldberg, J., specially concurring).

[2] 806 F.3d 1323 (11th Cir. 2015).

[3] *Id.* at 1329.

[4] U.S. CONST. amend. IV.

[5] *See* New York v. Belton, 453 U.S. 454 (1981).

[6] *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

[7] *See* California v. Acevedo, 500 U.S. 565 (1991).

[8] *See* Riley v. California, 134 S. Ct. 2473 (2014).

[9] *See* United States v. Edwards, 441 F.2d 749, 752 (5th Cir. 1971).

[10] *See* Katz v. United States, 389 U.S. 347 (1967).

[11] United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000).

[12] United States v. Sparks, 806 F.3d 1323, 1353 (11th Cir. 2015) (Martin, J., dissenting).

[13] *See id.* at 1354; *see also Riley*, 134 S. Ct. at 2484 (describing cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy").

[14] I use "smartphone" and "cell phone" interchangeably throughout this Note.

[15] Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR. (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/.

[16] *Sparks*, 806 F.3d at 1351 (Martin, J., dissenting) (emphasis added).

[17] *See* U.S. CONST. amend. IV.

[18] *See* Hester v. United States, 265 U.S. 57 (1924).

[19] United States v. Ramos, 12 F.3d 1019, 1022 (11th Cir. 1994) (emphasis omitted) (citation omitted) (internal quotation marks omitted).

[20] United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir. 1982) (quoting United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (en banc)).

[21] *Ramos*, 12 F.3d at 1025.

[22] United States v. Basinski, 226 F.3d 829, 837 (7th Cir. 2000) (citations omitted).

[23] *See id.* at 836; *accord Ramos*, 12 F.3d at 1023.

[24] *See* United States v. Sparks, 806 F.3d 1323, 1353 (11th Cir. 2015) (Martin, J., dissenting).

[25] Pursuant to *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), opinions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent in the Eleventh Circuit.

[26] United States v. Edwards, 644 F.2d 1 (5th Cir. Unit B May 1981).

[27] *Id.* at 1.

[28] *Id.* at 2.

[29] *Id.*

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

[31] *See id.* at 824-26.

[32] *Id.* at 826.

[33] *Id.* at 827 (Goldberg, J., specially concurring).

[34] *Id.* (emphasis in original).

[35] *Id.* (emphasis in original).

[36] United States v. Jacobsen, 466 U.S. 109 (1984).

[37] *Id.* at 124 (footnote omitted).

[38] *See* United States v. Mitchell, 565 F.3d 1347, 1352 (11th Cir. 2009) (per curiam).

[39] *Id.*

[40] *Id.* at 1351. (citations omitted) (internal quotation marks omitted).

[41] *See id.* at 1350-53. *But see* United States v. Laist, 702 F.3d 608, 617 (11th Cir. 2012) (finding a 25-day delay reasonable but cautioning that such a delay was "far from ideal").

[42] *Mitchell*, 565 F.3d at 1352 (citation omitted) (internal quotation marks omitted).

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

[44] *See id.*

[45] *Id.*

[46] *Id.*

[47] *See id.* at *2-6.

[48] *See id.* Law enforcement officials viewed the contents of the cell phone pursuant to the private-search doctrine. *See id.* at *6; *see also* United States v. Sparks, 806 F.3d 1323, 1334 (11th Cir. 2015) (discussing the private-search doctrine in relation to the Fourth Amendment).

[49] *See Sparks*, 806 F.3d at 1351-52 (Martin, J., dissenting).

[50] *See* Initial Brief of Appellant Johnson at 5, United States v. Sparks, 806 F.3d 1323 (11th Cir. 2015) (No. 14-12143-FF).

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

[52] *Id.* at 1333.

[53] *See id.* at 1330.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 1329 (emphasis added).

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

[59] *See* United States v. Johnson, No. 2:12-cr-92-FtM-29DNF, 2013 WL 3992254, at *11-13 (M.D. Fla. Aug. 2, 2013) (finding defendants retained a possessory interest in the cell phone).

[60] *Sparks*, 806 F.3d at 1343. Certainly, a reasonable person who has lost a cell phone would take similar actions, yet the Court misinterprets such actions as proof of abandonment.

[61] *See id.* at 1339.

[62] *Id.* at 1339-41.

[63] *Id.* at 1339.

[64] *Id.* at 1340.

[65] *Id.* at 1351 n.1 (Martin, J., dissenting).

[66] *Id.*

[67] *See id.* at 1351-52.

[68] *See id.* at 1331 (majority opinion).

[69] *Id.* at 1352 (Martin, J., dissenting).

[70] *Id.* n.2.

[71] *Id.* at 1353 (emphasis added).

[72] *See id.* at 1343-44 (majority opinion).

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

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

[75] *See Sparks*, 806 F.3d at 1354; *Riley*, 134 S. Ct. at 2489-91.

[76] United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009) (per curiam); United States v. Laist, 702 F.3d 608 (11th Cir. 2012).

[77] *Sparks*, 806 F.3d at 1356.

[78] *Riley*, 134 S. Ct. at 2494-95 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[79] *But see* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 955-56 (2016) (noting that "recent events indicate that the Supreme Court has not yet given the final word on effects").

[80] *See id.* at 948-56; *see also* 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, 608 (2012) (noting the term "effects" offers "a general recognition of a deeper possessory interest in an individual possession").

[81] *See Sparks*, 806 F.3d at 1354-56; *see also Mitchell*, 565 F.3d at 1353 (finding a 21-day delay in obtaining a search warrant unreasonable).

[82] *See* Petition for Writ of Certiorari, Sparks v. United States, No. 15-7733 (U.S. Jan. 6, 2016).

[83] *See Riley*, 134 S. Ct. at 2489-91.

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

[85] *Compare Sparks*, 806 F.3d at 1342 (applying a "common sense approach" in assessing abandonment), *and id.* at 1344 (viewing all of the facts and considering the totality of the circumstances to ascertain an intent to abandon has occurred), *with* United States v. Edwards, 441 F.2d 749, 753 (5th Cir. 1971) (applying same "common sense approach"), *and* United States v. Basinski, 226 F.3d 829, 837 (7th Cir. 2000) (looking at the totality of the circumstances).

[86] *Sparks*, 806 F.3d at 1343.

[87] *See* Brady, *supra* note 79, at 1007-08 ("A person communicates expectations about and interests in property to the world through acts that others understand and respect. Contextual signals of possession manifest an individual's expectations with respect to an object, no matter where the object is located. Even when personal property is unattended, a person may retain an enforceable right or ability to exclude others.") (footnotes omitted).

[88] *See* United States v. Williams, 569 F.2d 823, 827 (5th Cir. 1978) (Goldberg, J., specially concurring).

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

[90] *Id.* at 1343 (majority opinion).

[91] *See supra* Part II.A.

[92] *See* United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir. 1982) (finding abandonment where ownership of items was explicitly denied by a defendant); United States v. Edwards, 644 F.2d 1, 2 (5th Cir. Unit B May 1981) (finding abandonment of vessel where a defendant voluntarily abandoned the ship); United States v. Edwards, 441 F.2d 749, 751 (5th Cir. 1978) (finding abandonment of vehicle where a defendant left car and fled on foot after police chase).

[93] United States v. Johnson, No. 2:12-cr-92-FtM-29DNF, 2013 WL 3992254, at *12 (M.D. Fla. Aug. 2, 2013). *But see Sparks*, 806 F.3d at 1347 ("[T]he district court erred in finding that Sparks and Johnson maintained even a minimal possessory interest in the seized phone after they abandoned their efforts to recover the phone . . . and obtained a replacement phone.").

[94] *But see* Bochese v. Town of Ponce Inlet, 405 F.3d 964, 975 (11th Cir. 2005) (declaring that federal courts are "obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking").

[95] *See Sparks*, 806 F.3d at 1339-40.

[96] *See id.* at 1356 (Martin, J., dissenting).

[97] *See* United States v. Mitchell, 565 F.3d 1347, 1350-53 (11th Cir. 2009) (per curiam).

[98] *Id.* at 1351.

[99] *See Sparks*, 806 F.3d at 1355 (Martin, J., dissenting); *see also* Riley v. California, 134 S. Ct. 2473, 2489-91 (2014) (describing cell phones as "minicomputers that also happen to have the capacity to be used as a telephone").

[100] *See Sparks*, 806 F.3d at 1355-56 (Martin, J., dissenting).

[101] *See id.* at 1356; *see also Mitchell*, 565 F.3d at 1352 (noting there was no reason why another agent could not have been assigned to conduct the search of the hard drive when the main agent was away at a training seminar).

[102] *See Sparks*, 806 F.3d at 1348 (stating that had Johnson or Sparks ever returned to the store to try to recover the phone when the employee failed to return it as planned, evidence would exist showing that they had not abandoned their possessory interests, and the search warrant delay could then be balanced "against the importance of the governmental interests alleged to justify the intrusion") (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[103] *Riley*, 134 S. Ct. at 2488-89.

[104] *Id.* at 2495.

[105] Interestingly, the Court acknowledged *Riley* when analyzing a police officer's viewing of a second video on the cell phone which no private party had first watched, and found that approving of such viewing would be inconsistent with the reasoning in *Riley*. *Sparks*, 806 F.3d at 1336.

[106] *Riley*, 134 S. Ct. at 2495.

[107] United States v. Basinski, 226 F.3d 829, 838 (7th Cir. 2000).

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

[109] *Id.*

[110] *See* Smith, *supra* note 15, at 26.

[111] *See id.* at 25.

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

[113] *See* Ghoshray, *supra* note 80, at 573 ("Written over two centuries ago, the Fourth Amendment does not explicitly articulate whether or not warrantless searches are prohibited on smartphones, as the technological boundaries of smartphones were beyond the Framers' imagination.").

[114] *Id.* at 595.

[115] *Id.* at 598.

[116] *See id.* at 606-10 (noting "[t]he recent evolution of carving out countless exceptions to warrantless searches is a modern construction contrary to the [Fourth Amendment's] original intent," aimed at giving "law enforcement a virtual carte blanche" against individual privacy).

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

[118] *See* Ghoshray, *supra* note 80, at 578.

[119] Brady, *supra* note 79, at 1013.

[120] Riley v. California, 134 S. Ct. 2473, 2496-97 (2014) (Alito, J., concurring in part and concurring in the judgment).

[121] *Id.* at 2497.

[122] *Id.* at 2495 (majority opinion).

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 945293.