

**THE FOURTH AMENDMENT AND THE ABANDONMENT DOCTRINE:  
ANOTHER REASON TO PANIC WHEN YOU LOSE YOUR CELL PHONE**

**I. INTRODUCTION**

“[M]odern cell phones...are now 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.”<sup>1</sup> In an era where nearly two-thirds of Americans are smartphone owners,<sup>2</sup> the law is pressured to adapt to societal norms while staying true to precedent and original intent.<sup>3</sup> The unique nature of cell phones requires courts to stretch Fourth Amendment jurisprudence to an unnatural extent, leaving gaps in the law that demand attention at the federal level.<sup>4</sup> Recently, the court in *Sparks* took on the issue of whether a cell phone owner abandoned her cell phone and therefore lost the Fourth Amendment rights protecting it from unlawful search and seizure.<sup>5</sup> The drastic differences between the majority opinion and dissent expose the complexity of the issue.<sup>6</sup>

Analyzing the Fourth Amendment and its protections is a multi-faceted process that continues to evolve.<sup>7</sup> In order for the Fourth Amendment to apply, the government must have conducted the search or seizure in question.<sup>8</sup> Generally, a government search requires a search warrant, but over time the court has weakened the principle by providing exceptions.<sup>9</sup> Also, an individual claiming Fourth Amendment protection must have a reasonable expectation of privacy in the object of the search.<sup>10</sup> Certain items enjoy a heightened expectation of privacy that the court will consider in balancing government interests against individual privacy interests.<sup>11</sup> Due to their personal nature and growing usage, the court has begun to grapple with smart phones and the privacy issues they raise through the lens of Fourth Amendment analysis.<sup>12</sup> In any case, all abandoned property—including cell phones—lacks constitutional protection.<sup>13</sup>

This casenote examines the foundations of the Fourth Amendment, tracing its evolution through generations of judicial precedent, and illustrating the challenges that the modern

technological age pose for the court. Part II provides a step-by-step explanation of how the court approaches Fourth Amendment issues. Part III discusses the facts, procedural history, majority opinion, and dissent from *Sparks* in detail. Part IV analyzes *Sparks* through two approaches to abandonment law and sheds light on the judicial and societal consequences of the decision.

## **II. ARE YOU PROTECTED? OBSERVING THE FOURTH AMENDMENT’S EVOLVING SCOPE**

### ***A. Laying the Foundations: The Language and Scope of the Fourth Amendment***

The first question to ask in evaluating the applicability of the Fourth Amendment is whether or not a government search occurred.<sup>14</sup> During the Revolutionary period, “general warrants” plagued the colonies by allowing British officers the unbridled power to rummage through entire homes in search of criminal activity.<sup>15</sup> The founding generation responded with the Fourth Amendment.<sup>16</sup> The Fourth Amendment begins by providing the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>17</sup> However, the Supreme Court has consistently interpreted this clause to proscribe only governmental action, repeatedly holding that the amendment is “wholly inapplicable” to searches or seizures conducted by private individuals.<sup>18</sup>

Accordingly, the private-search doctrine requires that where an individual unaffiliated with the government first conducts a private search, the legality of a subsequent warrantless search by government officials “must be tested by the scope of the antecedent private search.”<sup>19</sup> Exceeding the scope of a precursory private search equates to a Fourth Amendment violation.<sup>20</sup>

### ***B. The Effects of Abandoning “Effects”***

The court in *Jacobsen* notes that the next question in Fourth Amendment analysis is whether the “search” infringed an expectation of privacy that society recognizes as reasonable.<sup>21</sup> This modern approach is derivative of the test Judge Harlan’s established in his concurrence in *Katz*.<sup>22</sup> The test, which now dominates Fourth Amendment jurisprudence, applies constitutional

protection when governmental actions violate an individual's "reasonable expectation of privacy" in the object of a search.<sup>23</sup> As such, the court in *Jacobsen* echoed Judge Harlan's language in deciding the defendant was ineligible for Fourth Amendment protection because any "reasonable expectation of privacy had already been frustrated as the result of private conduct."<sup>24</sup> In contrast, the inherently personal nature of some objects—such as a briefcase,<sup>25</sup> computer hard drive<sup>26</sup>, or cell phone<sup>27</sup>—requires a greater expectation of privacy and generally necessitates the use of constitutional safeguards before a government search.<sup>28</sup>

Because the expectation of privacy is based on what society is prepared to recognize as reasonable, it has limits. For instance, the Supreme Court has acknowledged that society does not recognize an expectation of privacy in property that has been voluntarily abandoned as objectively reasonable.<sup>29</sup> Therefore, the Fourth Amendment prohibition against unreasonable searches does not apply to abandoned property.<sup>30</sup>

In determining whether an object or "effect" has been abandoned, the critical inquiry is "whether the person prejudiced by the search...*voluntarily discarded*, left behind, or otherwise *relinquished his interest in the property* so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search."<sup>31</sup> In other words, to establish abandonment, separation with the object in question must be coupled with the requisite intent to sever the ties of ownership.<sup>32</sup> Because voluntariness of abandonment is crucial, its most determinative factor is intent, and relinquishment of possession serves an evidentiary role.<sup>33</sup> Intent may be inferred by acts, words, and "other objective facts."<sup>34</sup> If the government obtains evidence without a search warrant, it carries the burden of proving abandonment<sup>35</sup> by a preponderance of the evidence.<sup>36</sup> A failure to meet this burden or prove an exception to the warrant requirement will result in suppression of the unlawfully obtained evidence.<sup>37</sup>

In the Fourth Amendment context, courts take two alternative approaches to abandonment, focusing on either Fourth Amendment abandonment or property law abandonment.<sup>38</sup> Both approaches involve the “actual intent to abandon” requirement and a manifestation of that intent.<sup>39</sup> The Fourth Amendment approach asks whether an individual’s subjective expectation of privacy is objectively reasonable under the circumstances, and often places a strong emphasis on the location of the item of search.<sup>40</sup> The court in *Williams*, takes the position that the issue of abandonment in a Fourth Amendment case is not “abandonment in the strict property sense.”<sup>41</sup> Instead, the relevant inquiry is if the person prejudiced by a warrantless search had relinquished his interest in the property in question to the extent that he “could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.”<sup>42</sup>

The property law doctrine of abandonment also focuses on intent, but considers the nature of the item, its circumstances, and other relevant factors to inform the analysis.<sup>43</sup> Whether the defendant desires reclamation of the item in question is inconsequential in this objective analysis.<sup>44</sup> Instead, the court looks to “external manifestations” of intent as judged by a reasonable person “possessing the same knowledge available to government agents.”<sup>45</sup> Although the court considers the totality of the circumstances, explicit denials of ownership and actual physical relinquishment are persuasive.<sup>46</sup> Under this analysis, it is clear that lost or mislaid property would meet the intent requirement for abandonment.

The court in *Basinski* took a property-based approach in determining that a locked briefcase—left with a third party under instructions to keep it hidden and later, to destroy it—was not abandoned by its owner and thus required a search warrant or applicable exception before searching it.<sup>47</sup> The opinion also set forth three general types of abandonment cases: 1) where a fleeing defendant relinquishes an object so that he may more easily evade authorities

and/or deny possession at a later time; 2) “garbage cases,” where a defendant disposes of the property in a public location such as a trashcan; and 3) where a defendant is caught red-handed with contraband and denies ownership.<sup>48</sup> The court noted that failure to fit into any of these three categories serves as a strong suggestion that no abandonment occurred.<sup>49</sup>

### ***C. Swallowing the Warrant Requirement***

The next logical step in Fourth Amendment analysis relates to satisfaction of the warrant requirement. Here, the importance of “reasonableness” again echoes throughout related precedent. The text of the Fourth Amendment makes clear that its “ultimate touchstone” is “reasonableness,”<sup>50</sup> where “reasonableness” requires law enforcement to obtain a judicial warrant before effectuating a search.<sup>51</sup> The warrant requirement ensures that a “neutral and detached magistrate” validates a search, rather than the “officer engaged in the often competitive enterprise of ferreting out crime.”<sup>52</sup>

Government officials must act reasonably and timely in executing searches and seizures without a warrant.<sup>53</sup> Even a reasonable search or seizure based on probable cause is unconstitutional if police unreasonably delay the act of securing a warrant.<sup>54</sup> The reasonableness of the delay is determined on a case-by-case-basis and in light of all relevant facts.<sup>55</sup> Determining reasonableness involves a careful balancing of the “nature and quality of the intrusion” on the individual’s Fourth Amendment rights versus the “importance of the governmental interests alleged to justify the intrusion.”<sup>56</sup> In line with these principles, the court in *Mitchell* reversed a defendant’s conviction of possession of child pornography due to the government’s unreasonable twenty-one day delay in applying for a search warrant.<sup>57</sup>

Without a warrant, a search is only reasonable if it falls within a specific exception to the warrant requirement.<sup>58</sup> As previously mentioned, the Framers drafted the Fourth Amendment in light of government suspicion and distaste for “general warrants.”<sup>59</sup> Although the original intent

of the exception framework aimed to preserve evidence of potential crimes, decades of attenuation have eroded the original meaning by favoring law enforcement intrusion through rampant exceptions that have arguably swallowed the rule.<sup>60</sup> For instance, a series of cases drastically lowered the Fourth Amendment threshold in regard to searches incident to the arrest of a person.<sup>61</sup> First, *Chimel* cited concerns for officer safety and preventing the destruction of evidence—both exigent circumstances—in concluding that police could search a vehicle “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>62</sup> Despite holding that the extensive warrantless search in question was beyond the scope of the exception, the case laid the groundwork for the search incident to arrest doctrine.<sup>63</sup> Just four years later in *Robinson*, the Supreme Court held that probable cause is enough to search a person incident to arrest, even without exigent circumstances.<sup>64</sup> Finally, the Supreme Court halted this precarious path in *Riley*, by declining to extend *Robinson* to searches of cell phone data based on the incomparable nature of digital data search, holding that a warrant is generally required before conducting such a search.<sup>65</sup>

#### ***D. Approaching the Digital Era***

Both *Mitchell*<sup>66</sup> and *Riley* highlight the judicial attempt to apply a document written over two centuries ago to technological issues beyond the Framers’ imaginations.<sup>67</sup> As in *Mitchell*, the court in *Riley* once again used a balancing analysis to measure the public safety interests of the government against the privacy interests of the individual. And as in *Mitchell*,<sup>68</sup> the growing technology-related concerns—for example, immense storage capacity, sensitivity of the contents, and daily need—weigh heavily in favor of the individual in the *Riley* decision.<sup>69</sup> Despite the generational disconnect, the *Riley* court reiterates the same suspicions that prompted the Framers to draft the Fourth Amendment by acknowledging the expansive nature of modern cell phones

and the privacy threats that rummaging through them would entail.<sup>70</sup> The court ultimately sides against the government under the notion that a cell phone search is *more* expansive than an exhaustive search of the home due to the broad array of private information it contains.<sup>71</sup>

Although at first glance *Riley* seems to revive the privacy interests that the Fourth Amendment was intended to protect, its scope is uncertain. The application of *Riley* to searches of cell phones and other technology outside the realm of the “search incident to arrest” doctrine remains unaddressed. As cell phone usage among Americans and the resultant dependency on the devices continues to grow, the gap in relatable precedent grows with it.

### **III. ALL PATHS LEAD HERE: UNITED STATES V. SPARKS**

Forty-six percent of American smartphone owners claim that they “couldn’t live without” their smartphones.<sup>72</sup> Although the remainder of smartphone owners surveyed claim that their phones “are not always needed,” almost all smartphone users describe their phones as “helpful” and “worth the cost.”<sup>73</sup> Therefore, it is easy to imagine the panic that Defendants Jennifer Sparks and Alan Johnson felt upon realizing their shared cell phone was missing.<sup>74</sup> Like any concerned cell phone owner would, Jennifer sent a text message to the phone “urgently requesting” its return.<sup>75</sup> Jennifer also immediately retraced her steps in search of the phone, returning to the Walmart store where she had forgotten it.<sup>76</sup> However, the store had still not located the phone and Jennifer’s search was fruitless.<sup>77</sup> The phone in fact had been mistakenly left at Walmart, and was recovered by a store employee, Linda Vo, a day later.<sup>78</sup> Upon finding the phone, Vo responded to the urgent text with a call.<sup>79</sup> During this call, Jennifer asked if Vo would keep the phone until she arrived to pick it up from the store.<sup>80</sup> Vo complied.<sup>81</sup>

#### ***A. A Series of Searches***

Unfortunately for Jennifer, Vo never showed up to this meeting.<sup>82</sup> Despite her recent agreement, Vo decided to examine the contents of the phone Jennifer had just claimed.<sup>83</sup> Because

she felt some of the phone's stored images were questionable, Vo invited her fiancé, David Widner, to scrutinize the phone's contents as well.<sup>84</sup> Vo scrolled through "thumbnail" images—opening just two images to their full-sizes—on the cell phone's photo-album application while Widner watched.<sup>85</sup> Afterward, Vo transferred the phone to Widner to take it to law enforcement.<sup>86</sup> The majority considered this initial search to be the "private search,"<sup>87</sup> which would determine the permissible scope of a subsequent warrantless search by the government.<sup>88</sup>

Next, Widner arrived at Fort Myers Police Department where he scrolled through the same photo-album thumbnails he had seen with Vo, revealing the content to three government agents.<sup>89</sup> He paused to show one full-size image that he had previously viewed with Vo, along with a video of a young female eating ice cream.<sup>90</sup> Meanwhile, Jennifer—still under the impression that Vo possessed her phone and may continue to respond to text messages—called and sent several messages to the phone requesting its return and attempting to arrange a meeting to facilitate its return.<sup>91</sup> Widner and the government officials ignored the messages.<sup>92</sup>

The government officials then transferred the phone to Detective O'Reilly.<sup>93</sup> O'Reilly scrolled through the photo album with the goal of determining for himself if the allegedly questionable images contained child pornography.<sup>94</sup> O'Reilly viewed the video involving ice cream and an additional video—one that neither Vo, Widner, nor the other government officials had seen—and then concluded that the phone contained pornographic images.<sup>95</sup> At this point, O'Reilly turned off the phone, blocking Jennifer's efforts to regain its rightful possession.<sup>96</sup>

### ***B. A Search Warrant at Last***

After O'Reilly informed the relevant authorities that the police department held a phone containing child pornography, an agent specializing in child pornography was assigned to the case. However, for a number of superfluous reasons, the agent failed to apply for a warrant until

twenty days after her assignment to the case.<sup>97</sup> Jennifer had been deprived of possession of her cell phone for twenty-three days.<sup>98</sup> The search warrant was based on O'Reilly's descriptions of the phone's content and was signed by a state-court judge.<sup>99</sup> A subsequent forensic examination of the phone provided enough information to support a search warrant of Jennifer's home based on the determination that her boyfriend Alan owned the phone.<sup>100</sup> The resultant searches produced evidence of child pornography in the couple's home as well as on the cell phone.<sup>101</sup>

### ***C. The Court Proceedings***

Facing charges for child pornography, Jennifer Sparks and Alan Johnson moved to suppress evidence.<sup>102</sup> A United States magistrate recommended that the district court deny these motions after an evidentiary hearing was held.<sup>103</sup> After a supplemental hearing, the district court denied the motions to suppress.<sup>104</sup> Jennifer Sparks and Alan Johnson then pled guilty to possession and production of child pornography on the condition that they could raise their Fourth Amendment claims in the 11th Circuit.

On the basis of O'Reilly's search, both the majority and dissent easily concluded that the warrantless government search went beyond the scope of the antecedent private search, and therefore violated the Fourth Amendment.<sup>105</sup> Accordingly, the dissenting opinion would suppress the search to the extent it went beyond the private search along with any evidence found at the home based on the unreasonable seizure of the phone.<sup>106</sup> However, despite the blatant police illegality in violating the private-search doctrine, the majority held that the warrants were still based on probable cause.<sup>107</sup>

The source of the major differences between the majority and dissent, however, is their analysis of whether the cell phone was abandoned by the defendants. The consequences of the treatment of this issue are substantial, as the result determines whether or not the defendants have

standing to contest the government's twenty-three day delay in applying for a warrant.<sup>108</sup> The majority reasoned that because the cell phone in question was replaced, and because the defendants "ceased all efforts" at recovering their phone after three days, the phone was abandoned.<sup>109</sup> Therefore, the majority excused the delay after using a balancing approach to assess the reasonableness of the warrant, as precedent requires.<sup>110</sup> Because the majority considered the phone abandoned, the defendants' possessory interests in the phone at the time of the illegal search were "greatly diminished."<sup>111</sup> Under the majority opinion, any unreasonable delay in returning the phone was excusable due to the defendants' lack of possessory interests in the phone.<sup>112</sup> Without a possessory interest in the phone, the defendants were not injured by the delay in its return, and therefore no contestable case-or-controversy existed.<sup>113</sup>

The dissent, on the other hand, noted the defendants' repeated attempts to reclaim possession of their phone throughout the period in which the search occurred.<sup>114</sup> It cited a number of abandonment cases that demonstrated the misfit of the issue at hand inside the abandonment doctrine.<sup>115</sup> In sum, the dissent exposed the government's failure to meet its burden of proof on the abandonment issue.<sup>116</sup> Therefore, it effectively reasoned that the defendants did have standing to contest the government's unreasonable delay in obtaining a search warrant.<sup>117</sup>

#### **IV. ABANDONING PRIVACY INTERESTS IN THE TECHNOLOGICAL AGE**

In combining the issues of technology and abandonment, *Sparks* may be the first of its kind. However, *Sparks* is no anomaly. The heart of the issue in *Sparks* involves the foreseeable new issue of technology and privacy interests, and to no surprise, also involves the government's routine attempts to evade the warrant requirement. As mentioned throughout this casenote, the colonial suspicion of "general warrants" provides a historical backdrop for the Fourth Amendment.<sup>118</sup> Although the days of officers barging into houses unannounced to conduct warrantless searches are long past, these same fears resonate in the twenty-first century

technological era. The storage capacity of smart phones is expanding alongside a rapidly increasing market of users, and contemporary jurisprudence has struggled to keep up with the new privacy concerns.<sup>119</sup> In his *Riley* concurrence, Alito even suggests that the legislature would be the most appropriate branch to assess and respond to new and future technology-induced privacy issues.<sup>120</sup> One common theme in cases involving technology, however, is the tendency to equate digital storage to the home.<sup>121</sup> In this sense, the privacy interests in electronics are the same type of the privacy interests that the Framers strove to protect through the Fourth Amendment.<sup>122</sup> Therefore, the police generally must obtain a warrant before searching such digital storage.<sup>123</sup>

This type of logic is the product of a property-based approach that involves a careful look at the nature of the cell phone as an object of search and the surrounding circumstances.<sup>124</sup> This approach is well-suited for cases involving the abandonment of property in the Fourth Amendment context,<sup>125</sup> and is the tactic appropriately used by Judge Martin in his well-reasoned *Sparks* dissent.<sup>126</sup> Throughout the dissent, Judge Martin focuses on the personal nature of technological storage.<sup>127</sup> While the majority found that replacement of the defendant's missing cell phone provided evidence of their intent to abandon the original, the dissent finds little solace in a replacement phone that merely provides space for accumulation of data.<sup>128</sup> According to the dissent, the defendants "lost troves of information necessary for navigating modern life" when they lost their cell phone.<sup>129</sup> Thus, replacing the phone does not equate to abandoning the "unique information contained in the lost phone."<sup>130</sup>

By failing to approach the *Sparks* case from a property-based vantage point, the majority in *Sparks* also fails to deliver the correct outcome. The majority used a reasonable expectation of privacy analysis common in Fourth Amendment cases, where the critical inquiry in determining

abandonment focuses on whether there is a “reasonable expectation of privacy with regard to the item at the time of the search.”<sup>131</sup> As such, the majority over-emphasizes the fact that the defendants left their phone with a stranger for twenty-three days, without regard to their repeated attempts to shorten that timespan and keep the phone out of the hands of a *public* entity like Walmart customer service.<sup>132</sup> In attempt to show a lowered expectation of privacy, the majority mentions the lack of password protection on the phone as if that somehow invites others to ravage through its contents.<sup>133</sup>

The law of abandonment’s intent requirement should not be easily satisfied in the case of a cell phone. In order to protect individual privacy interests, abandoning a cell phone should require not only the intent to sever ties with the phone itself, but also with the all the information it stores. Here, the *Sparks* opinion sets a dangerous precedent that invites government intrusion on highly sensitive privacy interests and should be reversed. Although it could be argued that taking a property-based approach and siding with dissent undermines public safety interests by allowing potential criminals to go free, the argument ties back to the balancing test prevalent in Fourth Amendment jurisprudence. In this sense, Alito’s concurrence in *Riley* rings true in providing that a new balancing test—one that takes into account the unique nature of cell phones or other applicable technology—is necessary when approaching digital privacy issues.<sup>134</sup>

## V. CONCLUSION

Since it was drafted, the Fourth Amendment has evolved to provide constitutional protection to drastically changing generations. The analysis above demonstrates how a Fourth Amendment-based decision on the abandonment of cell phones could affect an increasingly technological society. At the highest judicial level, a decision that mirrors that of the 11th Circuit majority in *Sparks* could clear the path for another avalanche of precedent-backed government intrusions that will take a case stronger than *Riley* to stop.

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<sup>1</sup> Riley v. California, 134 S.Ct. 2473, 2484 (2014).

<sup>2</sup> Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER, April 1, 2015, at 2.

<sup>3</sup> 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, 572 (2012).

<sup>4</sup> *Id.* at 576 (highlighting the issue of asymmetric application of the Fourth Amendment with regard to smartphones among district and state courts).

<sup>5</sup> *See generally* United States v. Sparks, 806 F.3d 1323, 1330 (11th Cir. 2015).

<sup>6</sup> *Id.*

<sup>7</sup> *See* Ghoshray, *supra* note 3, at 572.

<sup>8</sup> *See generally* United States v. Jacobsen, 446 U.S. 109 (1984) (holding that federal agents did not violate any privacy interest protected by the Fourth Amendment only because the government search of a damaged package went no further than the private search beforehand).

<sup>9</sup> *See* Ghoshray, *supra* note 3, at 610; *see also* Riley v. California, 134 S.Ct. 2473, 2482 (2014); *see also* United States v. Basinski, 226 F.3d 829, 833 (7th Cir. 2000).

<sup>10</sup> *See Basinski*, 226 F.3d at 836.

<sup>11</sup> *See Riley*, 134 S.Ct. at 2490; *see also* United States v. Mitchell, 565 F.3d 1347, 1352 (11th Cir. 2009); *see also* United States v. Ramos, 12 F.3d 1019, 1021 (11th Cir. 1994).

<sup>12</sup> *See* Ghoshray, *supra* note 3, at 572; *see generally* Riley, 134 S.Ct. 2473.

<sup>13</sup> *See generally* Ramos, 12 F.3d 1019; Mitchell, 565 F.3d 1347; Basinski, 226 F.3d 829.

<sup>14</sup> *See generally* United States v. Jacobsen, 446 U.S. 109 (1984).

<sup>15</sup> *See Riley*, 134 S.Ct. at 2494.

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<sup>16</sup> *Id.*

<sup>17</sup> U.S. CONST. amend. IV.

<sup>18</sup> *Jacobsen*, 446 U.S. at 112.

<sup>19</sup> *Id.* at 115. (citing *Walter v. United States*, 447 U.S. 649, 662 (1980)).

<sup>20</sup> *Id.* at 119. (citing *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *Silverman v. United States*, 365 U.S. 505 (1961)).

<sup>21</sup> *Id.*

<sup>22</sup> Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 *YALE L.J.* 946, 949 (2016) (citing *Katz v. United States*, 389 U.S. 347, 360-362 (Harlan, J., concurring)).

<sup>23</sup> *Id.*; *see also* *United States v. Basinski*, 226 F.3d 829, 837 (7th Cir. 2000).

<sup>24</sup> *United States v. Jacobsen*, 446 U.S. 109, 127 (1984).

<sup>25</sup> *See* *United States v. Ramos*, 12 F.3d 1019, 1021 (11th Cir. 1994) (declaring that “few places outside one’s home justify a greater expectation of privacy” than a briefcase, which may serve as a large pocket for items such as wallets, credit cards, address books, personal calendars and diaries, correspondence, and reading glasses).

<sup>26</sup> *See* *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) (equating the hard drive of a computer with the home due to its immense storage capabilities and tendency to hold private information).

<sup>27</sup> *See* *Riley v. California*, 134 S.Ct. 2473, 2490 (2014) (noting that allowing authorities to scrutinize digital cell phone records is much different than allowing them to search personal items).

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<sup>28</sup> *Id.* at 2493 (holding that the information on a cell phone is not immune from search, but that a search warrant is generally required for the object, even if the seizure occurred incident to arrest).

<sup>29</sup> *See generally Ramos*, 12 F.3d 1019 (11th Cir. 1994) (holding that the government did not meet its burden in proving abandonment where a defendant left behind a highly personal item in his former apartment).

<sup>30</sup> *Id.* at 1024; *see also Brady*, *supra* note 22, at 1010.

<sup>31</sup> *Id.* at 1022 (emphasis added).

<sup>32</sup> Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010).

<sup>33</sup> *Id.* at 197.

<sup>34</sup> *United States v. Pirolli*, 673 F.2d 1200, 1204 (11th Cir. 1982).

<sup>35</sup> *See United States v. Ramos*, 12 F.3d 1019, 1023 (11th Cir. 1994).

<sup>36</sup> *See United States v. Basinski*, 226 F.3d 829, 833 (7th Cir. 2000).

<sup>37</sup> *Id.*

<sup>38</sup> *Brady*, *supra* note 22, at 1006.

<sup>39</sup> *Id.* at 1007.

<sup>40</sup> *Id.*

<sup>41</sup> *United States v. Williams*, 569 F.2d 823, 826 (5th Cir. 1978) (quoting *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973)).

<sup>42</sup> *Id.*

<sup>43</sup> *Brady*, *supra* note 22, at 1006.

<sup>44</sup> *See United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000).

<sup>45</sup> *Id.*

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<sup>46</sup> *Id.* at 837.

<sup>47</sup> *Id.* at 838 (noting the inherent privacy interest in a briefcase).

<sup>48</sup> *Id.* at 837.

<sup>49</sup> *Id.*

<sup>50</sup> *Riley v. California*, 134 S.Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See United States v. Jacobsen*, 446 U.S. 109, 126 (1984).

<sup>54</sup> *See United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009).

<sup>55</sup> *Id.*

<sup>56</sup> *Jacobsen*, 446 U.S. at 126 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

<sup>57</sup> *See Mitchell*, 565 F.3d at 1352 (noting that an officer’s assertion that he “didn’t see any urgency” in obtaining a warrant before leaving for a two-week training assignment was an unjustifiable excuse for the delay)

<sup>58</sup> *See Riley v. California*, 134 S.Ct. 2473, 2482 (2014).

<sup>59</sup> *Id.* at 2494.

<sup>60</sup> *See Ghoshray*, *supra* note 3, at 610.

<sup>61</sup> *See generally Riley*, 134 S.Ct. 2473.

<sup>62</sup> *Id.* (citing *Chimel v. California*, 556 U.S. 752 (1969) (holding that because authorities rummaged through the defendant’s entire house without a search warrant, they acted outside the scope of the “searches incident to arrest” exception)).

<sup>63</sup> *Id.* at 2483.

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<sup>64</sup> *Id.* (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

<sup>65</sup> *Id.* at 2485 (“There are no comparable risks when the search is of digital data...[A] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.”)

<sup>66</sup> *See United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009).

<sup>67</sup> Ghoshray, *supra* note 3, at 573.

<sup>68</sup> *See Mitchell*, 565 F.3d at 1352.

<sup>69</sup> *See Riley v. California*, 134 S.Ct. 2473, 2489 (2014).

<sup>70</sup> *Id.* at 2494.

<sup>71</sup> *Id.* at 2491.

<sup>72</sup> Smith, *supra* note 2, at 7.

<sup>73</sup> *Id.*

<sup>74</sup> *See United States v. Sparks*, 806 F.3d 1323, 1330 (11th Cir. 2015).

<sup>75</sup> *Id.*

<sup>76</sup> *See Sparks*, 806 F.3d at 1351 (Martin, J. dissenting).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *See Sparks*, 806 F.3d at 1351 (Martin, J. dissenting).

<sup>83</sup> *See Sparks*, 806 F.3d at 1330.

<sup>84</sup> *Id.* at 1331.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *United States v. Jacobsen*, 446 U.S. 109, 112 (1984).

<sup>89</sup> *See United States v. Sparks*, 806 F.3d 1323, 1331 (11th Cir. 2015).

<sup>90</sup> *Id.*

<sup>91</sup> *See Sparks*, 806 F.3d at 1352 (Martin, J. dissenting).

<sup>92</sup> *Id.*

<sup>93</sup> *See Sparks*, 806 F.3d at 1331.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1332.

<sup>96</sup> *See Sparks*, 806 F.3d at 1352 (Martin, J. dissenting).

<sup>97</sup> *See United States v. Sparks*, 806 F.3d 1323, 1332 (11th Cir. 2015) (explaining that the FBI

Innocent Images Task Force Agent attended two trainings, searched the outer structure of the cell phone, and attempted to contact Detective O'Reilly and a state-court judge, before finally applying for a search warrant for the cell phone).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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<sup>105</sup> *Id.*

<sup>106</sup> *See Sparks*, 806 F.3d at 1351 (Martin, J. dissenting).

<sup>107</sup> *United States v. Sparks*, 806 F.3d 1323, 1332 (11th Cir. 2015).

<sup>108</sup> *Id.* at 1329.

<sup>109</sup> *Id.* at 1343.

<sup>110</sup> *Jacobsen*, 446 U.S. at 126 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

<sup>111</sup> *Sparks*, 806 F.3d at 1339.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See United States v. Sparks*, 806 F.3d 1323, 1331 (11th Cir. 2015) (Martin, J. dissenting)

(noting that the entire time the police searched the phone, the defendants were under the impression they would still be getting the phone back from Vo at Walmart).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Riley v. California*, 134 S.Ct. 2473, 2494 (2014).

<sup>119</sup> *Ghoshray*, *supra* note 3, at 573.

<sup>120</sup> *See Riley*, 134 S.Ct. at 2497 (Alito, J. concurring) (“[I]t 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.”).

<sup>121</sup> *See Riley*, 134 S.Ct. at 2494 (noting that for many Americans, a cell phone holds in digital form “the privacies of life” and “many sensitive records previously found in the home”); *see also*

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United States v. Mitchell, 565 F.3d 1347, 1352 (11th Cir. 2009) (noting the hard drive of a computer is the digital equivalent of its owner's home)

<sup>122</sup> See *Riley*, 134 S.Ct. at 2495 (“The fact that technology now allows an individual to carry [information previously found in the home] in his hand does not make the information any less worthy of the protection for which the Founders fought.”).

<sup>123</sup> *Id.*

<sup>124</sup> Brady, *supra* note 22, at 1006.

<sup>125</sup> *Id.*

<sup>126</sup> See United States v. Sparks, 806 F.3d 1323, 1354 (11th Cir. 2015) (Martin, J. dissenting) (noting the importance of the status cell phones have as property).

<sup>127</sup> *Id.* at 1355.

<sup>128</sup> *Id.* at 1354.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See United States v. Ramos, 12 F.3d 1019, 1022. (11th Cir. 1994).

<sup>132</sup> See United States v. Sparks, 806 F.3d 1323, 1343 (11th Cir. 2015).

<sup>133</sup> *Id.* at 1343.

<sup>134</sup> See *Riley v. California*, 134 S.Ct. 2473, 2497 (2014) (Alito, J. concurring).

*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 990275.*