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"Cell phones are so convenient that they are an inconvenience."[1] Today, ninety-five percent of adults in the United States own a cell phone, and seventy-seven percent of adults in the United States own a smartphone.[2] Smartphones serve as access points for navigating our lives, from paying bills to playing Pokémon, until it is time to recharge.[3] As cellular technology evolves, legal challenges in the context of Fourth Amendment searches and seizures have dramatically increased.[4] Until recently, government agencies were permitted to search a person's cell phone after arrest, review its contents (including internet history, call logs, and text messages), and use this data against the accused in court proceedings.[5] Although the Supreme Court has held that this type of warrantless search of cell phone data incident to an arrest is unlawful, there is still uncertainty as to whether the police may use seized cell phones in other ways without obtaining a warrant.[6] The Georgia Court of Appeals case *State v. Hill*[7] exemplifies the Fourth Amendment dilemmas courts are facing today.

In *Hill*, the defendant, James Hill, was charged with theft of services after he fled from a taxi without paying the fare.[8] As Hill was fleeing, he left his cell phone in the back seat.[9] When police arrived at the scene to investigate, an officer found the phone and turned it on, but could not access the internal data because the phone was password protected.[10] The officer used the emergency feature[11] on Hill's phone

1. Haruki Murakami, Colorless Tsukuru Tazaki and His Years of Pilgrimage 134 (2015).

2. *Mobile Fact Sheet*, Pew Res. Ctr. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/.

3. *See* Steve Lohr, *As More Pay by Smartphone, Banks Scramble to Keep Up*, N.Y. Times (Jan. 18, 2016), https://www.nytimes.com/2016/01/19/technology/upstarts-are-leading-the-fintech-movement-and-banks-take-heed.html; Nick Wingfield & Mike Isaac, *Pokémon Go Brings Augmented Reality to a Mass Audience*, N.Y. Times (July 11, 2016), https://www.nytimes.com/2016/07/12/technology/pokemon-go-brings-augmented-reality-to-a-mass-audience.html.

4. *See* Shannon Jaeckel, *Cell Phone Location Tracking: Reforming the Standard to Reflect Modern Privacy Expectations*, 77 La. L. Rev. 143 (2016) (examining Fourth Amendment interpretation in relation to cell phone location tracking); Parker Jenkins, *OMG—Not Something to LOL About: The Unintended Results of Disallowing Warrantless Searches of Cell Phones Incident to a Lawful Arrest*, 31 BYU J. Pub. L. 437, 475–77 (2017) (considering problems that arise when applying Fourth Amendment principles to emerging technologies); Michael V. Hinckley, *An Unreasonable Expectation? Warrantless Searches of Cell Phones*, BYU L. Rev. 1363, 1364 (2013) (discussing how courts have struggled to balance widespread cell phone use with Fourth Amendment protections).

5. *See* David J. Robinson, *The U.S. Supreme Court Says "No" to Cell-Phone Searches Incident to Arrest*, 102 Ill. B.J. 438, 439 (2014). In general, searches incident to arrest qualify as an exception to the Fourth Amendment. *See infra* note 19 and accompanying text.

6. *See* Riley v. California, 134 S. Ct. 2473, 2485 (2014).

7. 789 S.E.2d 317 (Ga. Ct. App. 2016).

8. *Id.* at 317–18.

9. *Id.* at 318.

10. *Id.*

11. Most cell phone brands and models have an emergency feature that automatically selects the proper local emergency number to call when users call 911. *See* J.D. Biersdorfer, *Calling 911 on a Mobile Phone*, N.Y. Times, Mar. 23, 2017, at B7 ("To help pinpoint calls, almost all carriers use Enhanced 911 services

to dial 911, without first obtaining a warrant.[12] The 911 dispatcher provided the officer with the phone number assigned to the phone as well as Hill's name and date of birth, which ultimately led to his arrest.[13]

Hill filed a motion in state court to suppress the evidence[14] obtained from his cell phone by the officer who placed the 911 call.[15] Hill argued that dialing 911 for the purpose of obtaining his personal information constituted an illegal search[16] in violation of his Fourth Amendment rights[17] because the officer did not have a warrant.[18] To support his argument, Hill relied on *Riley v. California*, in which the Supreme Court eliminated an exception to the Fourth Amendment warrant requirement when, incident to the defendant's arrest,[19] the officers accessed videos, photos, text messages, and call logs on the defendant's cell phone without a warrant.[20]

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to provide dispatchers with more precise information, like the geographical coordinates of the mobile phone . . . ."); Rich Demuro, *You Need to Know About This New iPhone Emergency Feature*, KTLA (Sept. 27, 2017, 4:00 AM), http://ktla.com/2017/09/27/you-need-to-know-about-this-new-iphone-emergency-feature/; Glenn Schweitzer, *Powerful Emergency Features on Your Phone You Didn't Know You Had*, Mind Over Meniere's (June 7, 2017), https://www.mindovermenieres.com/powerful-emergency-features-on-your-phone/ (describing emergency features of the iPhone and Android phones). This feature is generally accessible on a cell phone lock screen, meaning a user is not required to bypass any locks or security measures to use it. *Id.*

12. *Hill*, 789 S.E.2d at 318.

13. *See id.*

14. A motion to suppress is a "request that the court prohibit the introduction of illegally obtained evidence at a criminal trial." *Motion to Suppress*, Black's Law Dictionary (10th ed. 2014).

15. *Hill*, 789 S.E.2d at 318.

16. A search is "[a]n examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law-enforcement officer for the purpose of finding evidence of a crime." *Search*, Black's Law Dictionary (10th ed. 2014).

17. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

18. *Hill*, 789 S.E.2d at 318. A warrant is a "writ directing or authorizing someone to do an act, esp[ecially] one directing a law enforcer to make an arrest, a search, or a seizure." *Warrant*, Black's Law Dictionary (10th ed. 2014).

19. A search conducted incident to an arrest is an exception to the Fourth Amendment requirement that law enforcement must obtain a warrant prior to conducting a search. 68 Am. Jur. 2d § 117 (2010); *Search Incident to Arrest*, Black's Law Dictionary (10th ed. 2014) ("A warrantless search of a suspect's person and immediate vicinity, no warrant being required because of the need to keep officers safe and to preserve evidence.").

20. *Hill*, 789 S.E.2d at 320 ("Hill cites *Riley v. California* . . . in support of his argument that the officer violated the Fourth Amendment by placing the call from his phone.") (citations omitted). In *Riley*, the defendant was stopped by a police officer and arrested for possession of concealed and loaded firearms. 134 S. Ct. 2473, 2480 (2014). The officer seized the defendant's phone, accessed files on the phone without a warrant, and found evidence of Riley's involvement with a gang. *Id.* at 2480–81. This evidence ultimately

In reply, the State countered that the officer's act of calling 911 did not constitute a Fourth Amendment search,[21] and that Hill had abandoned his phone by leaving it in the taxi.[22] The trial court granted Hill's motion, and the State appealed.[23]

On appeal, the Georgia Court of Appeals held that placing a 911 call to obtain identifying information[24] did not constitute a Fourth Amendment search because Hill had no reasonable expectation of privacy in the information obtained.[25] In its analysis, the court outlined two standards for determining whether a Fourth Amendment search occurred.[26] Under the *Jones* standard,[27] "a search occurs when a government official physically intrudes or trespasses[28] on a person's property" for the purpose of obtaining information.[29] Under the *Katz* standard,[30] a search occurs "when the government

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led to Riley's conviction. *Id.* at 2481. The Supreme Court held that police must obtain a warrant before accessing data on a defendant's cell phone when the phone is seized incident to arrest. *Id.* at 2495; *see also infra* note 38 and accompanying text.

> The Court held that the warrantless search exception following an arrest exists for the purposes of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data. The digital data cannot be used as a weapon to harm an arresting officer, and police officers have the ability to preserve evidence while awaiting a warrant by disconnecting the phone from the network and placing the phone in a "Faraday bag."

Riley v. California, Oyez, https://www.oyez.org/cases/2013/13-132 (last visited Apr. 3, 2018). A Faraday bag can be used to block radio waves from accessing electronics. *See* Eamon P. Doherty, *The Need for a Faraday Bag*, Forensic Mag. (Feb. 21, 2014, 9:44 AM), https://www.forensicmag.com/article/2014/02/need-faraday-bag.

21. *Hill*, 789 S.E.2d at 318.

22. *Id.* The court did not address the State's abandonment argument because it found that no Fourth Amendment search had occurred. *Id.* at 321.

23. *Id.* at 318.

24. The court listed names, addresses, and telephone numbers as examples of identifying information. *Id.* at 319.

25. *Id.*

26. *Id.* at 317.

27. *See* United States v. Jones, 565 U.S. 400 (2012). In *Jones*, government agents installed a GPS tracking device without a warrant on the defendant's car, while it was parked in a public parking lot, to obtain evidence of drug trafficking. *Id.* at 403. The Supreme Court held that installing the tracking device constituted an illegal search because a search occurs when the government physically intrudes on private property for the purpose of obtaining private information. *Id.* at 404.

28. Trespass is an "unlawful act committed against the person or property of another; esp[ecially], wrongful entry on another's real property." *Trespass*, Black's Law Dictionary (10th ed. 2014).

29. *Hill*, 789 S.E.2d at 318 (citing *Jones*, 565 U.S. 400).

30. *See* Katz v. United States, 389 U.S. 347 (1967). In *Katz*, government agents wiretapped a phone booth without a warrant because they suspected that the defendant was transmitting wagering information. *Id.* at 348. The government introduced evidence of the defendant's conversation, and he was convicted for violating a federal statute. *Id.* The Supreme Court reasoned that wiretapping constituted an illegal search because the defendant had a reasonable expectation of privacy when using the phone booth. *See id.* at 353. In his concurrence, Justice John Marshall Harlan II offered a two-part test of when a person has a reasonable expectation of privacy. *See infra* note 46 and accompanying text.

violates a subjective expectation of privacy that society recognizes as reasonable."[31] The *Hill* court emphasized that when it comes to identifying information, an individual does not have a reasonable expectation of privacy when the information is used "to facilitate the routing of communications by methods such as . . . [a] cellular phone."[32] The court also emphasized that the content of personal communications is private, but the transmission of that same information is not,[33] and individuals do not have a reasonable expectation of privacy in information that they voluntarily provide to third parties.[34] Applying the *Katz* standard, the court concluded that Hill did not have a reasonable expectation of privacy[35] in his name, date of birth, or phone number.[36]

The court then rejected Hill's argument relying on *Riley*.[37] It distinguished Hill's case from *Riley*, which did not involve the question of whether an officer's act constituted a Fourth Amendment search.[38] The *Hill* court reasoned that the police officer did not attempt to retrieve any information from within the phone, but simply used it in a manner to gain information about the owner by causing the phone number to be sent to a third party.[39] Overall, the court refused to recognize that Hill had a legitimate expectation of privacy in his identifying information.[40]

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31. *Hill*, 789 S.E.2d at 318 (quoting Kyllo v. United States, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361)).

32. *Id.* at 319. In its analysis, the court relied on several decisions. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 744–46 (1979) (finding the government's use of a pen register to record phone numbers did not violate the defendant's reasonable expectation of privacy); United States v. Forrester, 512 F.3d 500, 509–11 (9th Cir. 2008) (finding that the government's use of "mirror port" technology to see the defendant's incoming and outgoing emails did not violate the defendant's reasonable expectation of privacy); Stephenson v. State, 321 S.E.2d 433, 434–35 (Ga. Ct. App. 1984) (reasoning that even if the defendant had a subjective expectation of privacy in his phone number, the expectation would not be recognized as reasonable by society).

33. *See Hill*, 789 S.E.2d at 319. "By using a phone, a person exposes identifying information to third parties, such as telephone companies, and assumes the risk that the telephone company may reveal that information to the government." *Id.* at 319–20.

34. *Id.* at 319–20; *see also Smith*, 442 U.S. at 743–44 ("This court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.").

35. An expectation of privacy is "[a] belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing." *Expectation of Privacy*, Black's Law Dictionary (10th ed. 2014).

36. *See Hill*, S.E.2d at 318–19.

37. *See id.* at 320. In *Riley*, the Supreme Court explained that police officers may "examine the physical aspects of a phone to ensure that it will not be used as a weapon" but must obtain a warrant to search digital information on cell phones seized from defendants. 134 S. Ct. at 2485.

38. *Hill*, 789 S.E.2d at 320. ("Unlike this case, however, *Riley* did not concern whether an officer's acts constituted a search under the Fourth Amendment. It was undisputed in *Riley* that the officers searched the defendants' cellular phones when they accessed files within the phones that included videos, photographs, text messages, and a call log.").

39. *Id.*

40. *Id.* at 321. ("Moreover, we do not construe *Riley* to recognize a legitimate expectation of privacy in identifying noncontent information such as the person's own phone number, address, or birthdate, simply because that information was associated with a cellular phone rather than a landline phone account or a piece of physical mail.")

This Case Comment contends that the court correctly denied Hill's motion to suppress, but did so for the wrong reasons. First, the court incorrectly applied the *Katz* standard to determine whether a search had occurred and should have applied the *Jones* standard because there was a physical intrusion on the defendant's personal property to obtain information.[41] The *Jones* standard should be applied when there is a physical intrusion on a person's effect for the purpose of obtaining information, and *Katz* should only be applied where no physical intrusion on personal property has occurred. Second, as a result of applying the wrong standard, the court concluded that a search had not occurred, without considering the issue of abandonment, as would have been analyzed under the *Jones* standard. Further, the court's decision sets dangerous precedent for cases involving emerging technology, and creates unwarranted confusion and uncertainty for future courts deciding cases involving rights guaranteed to criminal defendants under the Constitution.

First, the court erred by applying *Katz* to determine whether a search occurred. The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[42] Initially, the Fourth Amendment was interpreted under a common law trespass theory: a search occurred if there was an actual physical invasion of a person's house or property for the purpose of making a seizure.[43] Then, in 1967, the Supreme Court's decision in *Katz v. United States* shifted the focus of the doctrine from looking at a person's property rights to analyzing whether there is a reasonable expectation of privacy.[44] The Court in *Katz* derived its holding from the privacy rights guaranteed to individuals under the Fourth Amendment, rather than focusing on a traditional, common law trespass analysis.[45] The concurring opinion of Justice John Marshall Harlan II offered a two-part test providing that a person has a

41. For a discussion on what constitutes "effect" for purposes of this rule, see *infra* notes 71–72 and accompanying text.

42. U.S. Const. amend. IV.

43. Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 Ohio St. J. Crim. L. 33 (2005); *see also Jones*, 565 U.S. at 405 (2012) ("Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." (citations omitted)); Olmstead v. United States, 277 U.S. 438 (1928). In *Olmstead*, federal agents wiretapped the telephone wires outside of the defendant's business office without trespassing on his property. *Id.* at 456–57. Utilizing the evidence gathered, the defendant was convicted for conspiring to violate the National Prohibition Act. *Id.* at 456. The Supreme Court held that there was no Fourth Amendment violation because the government never entered the defendant's property. *Id.* at 464.

44. 389 U.S. 347 (1967). Similar to *Olmstead*, federal agents wiretapped a public phone booth, which Katz used to transmit betting information. *See id.* at 348. The Supreme Court reasoned that the Fourth Amendment "protects people rather than places," *id.* at 351, and its applicability does not depend on "the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

45. *Id.* at 353. The Court held that *Olmstead*'s holding was no longer controlling and deemed the government's activities a search in violation of the Fourth Amendment. *Id.* ("Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested.").

reasonable expectation of privacy when: (1) she has a subjective expectation of privacy, and (2) society is prepared to accept her expectation as reasonable.[46]

However, in 2012, the Supreme Court's decision in *United States v. Jones* reaffirmed the traditional scope of Fourth Amendment protection under the trespass theory.[47] In *Jones*, police officers placed a GPS device on Antoine Jones's car and tracked his movements for twenty-eight days before arresting him.[48] The data gathered by the device helped convict him of drug trafficking.[49] The Supreme Court held that that the government's action of attaching a GPS device to the defendant's car constituted a violation of his Fourth Amendment rights.[50] While the government argued that no search had occurred because Jones had no "reasonable expectation of privacy" in the underbody of his car, the Court declined to address this argument,[51] reasoning that the *Katz* standard was a supplement to the common law trespass test rather than a substitute.[52] Instead, the Court applied the common law trespass test, stating that the Fourth Amendment grants people the right to be secure in their "persons, houses, papers, and effects" and that the defendant's car constituted an effect.[53] The Court stated that the government's trespass "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[54] Since the government intruded on Jones's private property to surveil him, it violated his Fourth Amendment property rights, and thus the evidence against him was inadmissible.[55] Because *Jones* addressed physical intrusion, its standard would better

46. *Id.* at 361 (Harlan, J., concurring).

47. *Jones*, 565 U.S. at 404–05 (2012); *see also* Richard Sobel et al., *The Fourth Amendment Beyond Katz, Kyllo and Jones: Reinstating Justifiable Reliance as a More Secure Constitutional Standard for Privacy*, 22 B.U. Pub. Int. L.J. 1, 17 (2013).

48. *Jones*, 565 U.S. at 403.

49. *Id.* at 403–04.

50. *Id.* at 404–05.

51. *Id.* at 406 ("But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

52. *Id.* at 409 ("But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

53. *Id.* at 404–05. This is a common categorization of the common law trespass test stemming from the text of the Fourth Amendment. *See* U.S. Const. amend. IV; *see also* United States v. Sweeney, 821 F.3d 893, 898 (7th Cir. 2016) ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); United States v. Chadwick, 433 U.S. 1, 12 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").

54. *Jones*, 565 U.S. at 405 (citing Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765)).

55. *Id.* at 404. Courts have often held that this type of surveillance constitutes a search under the Fourth Amendment. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015) (holding that a search occurs when the state "attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."); Hamlett v. State, 753 S.E.2d 118, 125 (Ga. Ct. App. 2013) (holding that the government's installation and monitoring of a GPS device constituted a search that had to be authorized by a warrant); United States v. Lee, 862 F. Supp. 2d 560, 571 (E.D. Ky. 2012), *aff'g* No. 6:11-CR-65-

determine whether a search occurred when the method of gathering information involved a physical intrusion, as it did in *Hill*.[56]

Under the *Jones* standard, a search violates the Fourth Amendment when: (1) the government physically intrudes on a (2) constitutionally protected area (3) for the purpose of obtaining information.[57] In *Jones*, the Court noted that the first element—physical intrusion—stemmed from principles of common law trespass.[58] At common law, the word intrusion was used "to denote the fact that the possessor's interest in the exclusive possession of his land ha[d] been invaded by the presence of a person or thing upon it without the possessor's consent."[59] Although not dispositive, courts have held that the presence or absence of physical intrusion is an important element in determining whether a Fourth Amendment search occurred.[60] To prove physical intrusion, there must be physical penetration or entry into one's premise or property, analogous to trespass.[61] In *Blanton v. State*, the court held that a Fourth Amendment search did not occur since the placement of a microphone against the defendant's

ART-HAI, 2012 WL 1880636 (E.D. Ky. Mar. 22, 2012) (holding that a law enforcement officer violated a defendant's Fourth Amendment rights when he attached a GPS tracker to the defendant's car and then monitored his movements for four days).

56. *See Jones*, 565 U.S at 404 (holding that an illegal search occurs when the government physically intrudes on a constitutionally protected area for the purpose of obtaining information); *Grady*, 135 S. Ct. at 1370 (applying the *Jones* standard to determine whether a search occurred because the method used to gather information involved a physical intrusion).

57. *Jones*, 565 U.S at 404.

58. *Id.* at 404–05; *see also, e.g.*, United States v. Cabrera, 651 Fed. App'x 118, 121 (3d Cir. 2016) (explaining that the reasoning of the *Jones* Court was rooted in principles of private property rights and common law trespass); United States v. Sparks, 711 F.3d 58, 61 (1st Cir. 2013) (stating that the *Jones* Court emphasized that the government committed a common law trespass); El-Nahal v. Yassky, 993 F. Supp. 2d 460, 467 (S.D.N.Y. 2014), *aff'd*, 835 F.3d 248 (2d Cir. 2016) ("The [*Jones*] Court found the surreptitious attachment of the device to be a common law trespass and therefore a search within the meaning of the Fourth Amendment.").

59. Restatement (Second) of Torts § 158 (Am. Law Inst. 1965).

60. *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control."); United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring) ("[W]hen the government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means."); United States v. Karo, 468 U.S. 705, 712–13 (1984) ("The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." (citations omitted)); Blanton v. State, 886 So. 2d 850, 865 (Ala. Crim. App. 2003).

61. *See* Florida v. Jardines, 569 U.S. 1, 11–12 (2013) (holding that the government's use of drug-sniffing dogs to sniff the defendant's home and its immediate surroundings, two constitutionally protected areas, was a search under the Fourth Amendment because the action constituted a physical intrusion); United States v. Tane, No. 61-CR-32, 1962 U.S. Dist. LEXIS 4122, at *10 (E.D.N.Y. 1962) (holding that in the absence of a physical intrusion, an intercepted communication over the phone did not violate the Fourth Amendment); United States v. Alabi, 943 F. Supp. 2d 1201, 1265 (D.N.M. 2013) (holding that scanning the magnetic strip of a defendant's credit card was not a Fourth Amendment search under a trespass-based analysis because accessing the virtual data contained on the strips did not involve a physical intrusion or physical penetration of space); *Blanton*, 886 So. 2d at 865; James W. Wimberly,

kitchen wall did not physically intrude on his property.[62] In *United States v. Ackerman*, the court concluded that an illegal Fourth Amendment search occurred when a government agency opened the defendant's email without a warrant.[63] The *Ackerman* court reasoned that the "common law trespass to chattels" doctrine[64] applied to electronic communications because the framers of the Constitution wanted to protect people from illegal examination of their private correspondence, and preventing intrusion on an individual's email is a modern way of satisfying the framers' intent.[65]

Here, the officer *did* physically intrude on Hill's private property. By invading Hill's exclusive possessory right to his property without consent, the officer committed an intrusion under the traditional, common law trespass analysis.[66] Unlike in *Blanton*, the officer in *Hill* physically invaded Hill's cell phone by turning it on and dialing 911 to call the dispatcher.[67] Also, the officer's conduct of turning on a cell phone and dialing 911 is analogous to a government agency opening a private email. Finally, as in *Ackerman*, Georgia's statutory definition of trespass states: "Trespass means any misfeasance, transgression, or offense which damages another's health, reputation, or property."[68] Thus, the *Hill* court should have found that the first element of the *Jones* standard—a physical intrusion—had been met.

The second element of the *Jones* standard requires a physical intrusion on a constitutionally protected area.[69] In *Jones*, the Court focused on the four protected areas enumerated in the Constitution—"persons, houses, papers, and effects."[70] Courts have interpreted "effects" to be interchangeable with possessions.[71] In *State v. Davis*, the court clarified that there is no distinction between "possessions" and "effects" because the two words mean the same thing for the purpose of determining

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Jr., Ga. Employment Law § 10:12 (4th ed. 2017) (stating that "[t]he Georgia courts' definition of physical intrusion includes physical trespass, visual surveillance, and aural surveillance").

62. 886 So. 2d at 865.

63. 831 F.3d 1292, 1308 (10th Cir. 2016).

64. Trespass to chattels is "[t]he act of committing, without lawful justification, any act of direct physical interference with a chattel possessed by another." *Trespass to Chattels*, Black's Law Dictionary (10th ed. 2014).

65. *See Ackerman*, 831 F.3d. at 1307–08.

66. *See supra* note 53 and accompanying text.

67. *See* State v. Hill, 789 S.E.2d 317, 318 (Ga. Ct. App. 2016).

68. Ga. Code Ann. § 1-3-3(20) (2017).

69. *See* United States v. Jones, 565 U.S. 400, 406 (2012).

70. *Id.* at 405; *see also* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 91 (2012) (asserting that the *Jones* standard "tracks the common law doctrine most directly suited to each of the four constitutionally protected areas, 'persons, houses, papers and effects'" and that "the standard adopts traditional principles of trespass to land for acts concerning houses, trespass to chattels for acts concerning papers and effects, and trespass to the person for acts concerning persons").

71. *See* State v. Davis, 929 A.2d 278, 295–96 (Conn. 2007) (asserting that there is no distinction between "possessions" as stated in the Connecticut Constitution and "effects" under the Fourth Amendment because the two words mean the same thing for the purpose of determining whether a search occurred);

whether a search has occurred.[72] In *People v. Smith*, the court held that possessions and effects have the same meaning, citing to *Webster's New Collegiate Dictionary* to support its findings.[73] Here, it is undisputed that the cell phone left behind in the taxi belonged to Hill.[74] Under *Davis* and *Smith*, personal possessions constitute effects.[75] The cell phone was Hill's personal possession. Thus, the *Hill* court should have concluded that Hill's cell phone was an effect and therefore constitutionally protected from a warrantless search.

The third element of the *Jones* standard requires that an intrusion must occur "for the purpose of obtaining information."[76] This standard includes any information relevant to a police investigation that is used to incriminate an individual.[77] In *Jones*, the police conducted an illegal search by attaching a device to the defendant's car to track his movements.[78] The Court held that this act constituted a search because "[t]he government physically occupied private property for the purpose of obtaining information" that was then used as evidence to convict the defendant.[79] In *Florida v. Jardines*, police officers used a drug-sniffing dog to explore the front porch of the defendant's home, hoping to discover incriminating evidence.[80] The Court reasoned that because the intrusion on the defendant's property was done for the purpose of obtaining information, the police officer's conduct constituted an illegal search.[81] In *Hill*, the police officer dialed 911 for the purpose of ascertaining the owner of the

People v. Smith, 360 N.W.2d 841, 849 (Mich. 1984) (stating that, for purposes of comparison between the Michigan Constitution and the Fourth Amendment, "[t]he terms 'possessions' and 'effects' are virtually identical in meaning and are often used interchangeably"); Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 Calif. L. Rev. 805, 828 (2016) ("[C]ourts have interpreted Fourth Amendment effects to cover all of an individual's personal property with a general view that 'effects' means goods, moveable objects, or possessions. The Supreme Court has explicitly referenced certain objects as 'effects' throughout its history, including containers, packages held by a person . . . footlockers, [cars], as well as a variety of contraband recovered in criminal cases.").

72. 929 A.2d at 295–96 ("[W]e are not persuaded that the word 'effects,' which is defined as 'movable property' or 'goods' . . . necessarily connotes an ownership interest in that property, or that it otherwise has a materially different meaning than the term 'possessions.'"). In *Davis*, the defendant contended that the state constitution afforded greater protection than the Fourth Amendment because the word "possessions" is broader than "effects." *Id.* at 295.

73. 360 N.W.2d at 849.

74. *See* State v. Hill, 789 S.E.2d 317, 318 (Ga. Ct. App. 2016).

75. *See Davis*, A.2d 278 at 296; *Smith*, 360 N.W.2d at 849.

76. *See* United States v. Jones, 565 U.S. 400, 404 (2012).

77. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015) (holding that a search occurred when the State attached a device to the defendant's body without his consent, for the purpose of obtaining information about his movements); Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (holding that a search occurred when police scanned the defendant's home with a thermal imaging device for the purpose of obtaining information about whether he was growing marijuana in his home).

78. *Jones*, 565 U.S. at 403.

79. *Id.* at 403–04.

80. 133 S. Ct. 1409, 1413 (2013).

81. *See id.* at 1416–17.

cell phone.[82] With the assistance of the 911 dispatcher, the officer was able to obtain Hill's identifying information, which ultimately led to Hill's arrest.[83] Therefore, the *Hill* court should have determined that the officer dialed 911 for the purpose of obtaining information to incriminate Hill.

To establish an illegal search in violation of the Fourth Amendment under the *Jones* standard, the government must physically intrude upon a constitutionally protected area for the purpose of obtaining information.[84] Because there was a physical intrusion, the *Hill* court should have applied the *Jones* standard rather than the *Katz* standard. *Katz* should apply only when no physical intrusion has occurred. If the *Hill* court had applied *Jones*, all three elements of the standard would have been met to conclude that the officer conducted a search in violation of the Fourth Amendment.

Second, in applying the *Katz* standard rather than the *Jones* standard, the court erred by failing to consider the State's abandonment argument.[85] A warrantless search of abandoned property does not implicate the Fourth Amendment because an individual forfeits any expectation of privacy inherent in the item searched once he or she abandons it.[86] Abandonment can be shown when either: (1) an individual abandons her interest in property to the point where she no longer has a reasonable expectation of privacy, or (2) the government reasonably believes that the individual abandoned her property.[87] If a search is found to have violated the Fourth Amendment, but abandonment is then established by the State, the search will not be considered a violation of the Fourth Amendment.[88]

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82. *See* State v. Hill, 789 S.E.2d 317, 318 (Ga. Ct. App. 2016).

83. *See id.*; *Jardines*, 133 S. Ct. at 1413.

84. *Jones*, 565 U.S. at 407 ("[W]hen the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.") (citing United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring)).

85. *See Hill*, 789 S.E.2d at 321.

86. United States v. Tugwell, 125 F.3d 600, 602 (8th Cir. 1997) ("A warrantless search of abandoned property does not implicate the Fourth Amendment, for any expectation of privacy in the item searched is forfeited upon its abandonment."); United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000) ("Abandoned property is not subject to Fourth Amendment protection."); Walker v. State, 493 S.E.2d 193, 195 (Ga. Ct. App. 1997) ("The constitutional protection of the Fourth and Fourteenth Amendments does not apply to property which has been abandoned."); Williams v. State, 320 S.E.2d 389, 390–91 (Ga. Ct. App. 1984) (holding that the constitutional protections of the Fourth and Fourteenth Amendments do not apply to abandoned property).

87. *Basinski*, 226 F.3d at 836; State v. Nesbitt, 699 S.E.2d 368, 372 (Ga. App. Ct. 2010); *see also* People v. Juan, 175 Cal. Rptr. 338 (Cal. Dist. Ct. App. 1985).

88. *See Tugwell*, 125 F.3d at 603; United States v. Ruiz, 935 F.2d 982, 984–85 (8th Cir. 1991) (finding no Fourth Amendment violation due to abandonment when the defendant disclaimed ownership of luggage); United States v. Nordling, 804 F.2d 1466, 1470 (9th Cir. 1986) (finding an inference of abandonment and no Fourth Amendment violation when the defendant denied ownership of carry-on baggage and physically relinquished it); United States v. Williams, 569 F.2d 823, 826 (5th Cir. 1978) (finding no Fourth Amendment violation due to abandonment when the defendant left a trailer unlocked and unguarded in a public parking area).

One way to prove abandonment is to establish that a person lost a reasonable expectation of privacy in her property.[89] An individual forfeits her reasonable expectation of privacy by either explicitly denying ownership of the property or by leaving the property in a public place.[90] In *People v. Juan*, the court held that police did not need a warrant to search the defendant's unattended jacket left hanging over a chair at a restaurant table.[91] The court reasoned that because the defendant had placed his jacket in an easily accessible, public area, over which he had no possessory interest, the defendant lost control over his property such that a restaurant employee, an incoming customer, or a police officer had a right to retrieve it.[92] Therefore, since the defendant left his property in a public area, he did not retain any reasonable expectation of privacy in his property, and the search of the jacket was not in violation of the defendant's Fourth Amendment rights.[93]

The *Hill* court should have concluded that Hill lost any reasonable expectation of privacy in his abandoned cell phone. Similar to *Juan*, a taxi is an easily accessible, public area,[94] in which Hill had no possessory interest.[95] By leaving his phone in a public area, Hill lost physical control over his property and did not retain any reasonable expectation of privacy. It is reasonable to assume that the taxi driver, a potential future passenger, or a police officer could have retrieved the phone, thus nullifying Hill's expectation of privacy by abandonment. Therefore, under a loss of reasonable expectation of privacy analysis, Hill's cell phone could have been deemed abandoned.

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89. *See Juan*, 175 Cal. Rptr. at 340–41.

90. People v. Hoskins, 461 N.E.2d 941, 946 (Ill. 1984) (finding that the defendant gave up any expectation of privacy and therefore abandoned her purse when she threw it on the ground as she fled from police officers); Ramsey v. State, 357 S.E.2d 869, 871 (Ga. Ct. App. 1987) (finding that the defendant forfeited any reasonable expectation of privacy when he disclaimed ownership of a briefcase containing cocaine); Bassett v. State, 353 S.E.2d 48, 50 (Ga. Ct. App. 1987) (holding that the defendant abandoned a tote bag, losing any expectation of privacy, and therefore had no standing to challenge a search on Fourth Amendment grounds); Berger v. State, 257 S.E.2d 8, 9 (Ga. Ct. App. 1979) (finding no expectation of privacy in lost or misplaced property and no Fourth Amendment violation for a police officer opening an unlocked, lost, or misplaced item).

91. *Juan*, 175 Cal. Rptr. at 341–42.

92. *Id.* Items left in public places are frequently deemed abandoned. *See* United States v. Alewelt, 532 F.2d 1165, 1168 (7th Cir. Ill. 1976) (holding that by leaving his jacket on a coat rack in the general working area of an office where he had no possessory interest, the defendant did not retain any reasonable expectation privacy and could not bring a Fourth Amendment challenge to the search of his jacket); *Berger*, 257 S.E.2d at 9 (holding that an off-duty police officer could search an unlocked briefcase found in the lobby of a hotel to determine the owner's identity); Commonwealth v. Johnson, 636 A.2d 656, 659 (Pa. Super. Ct. 1994) (holding that the defendant abandoned a plastic bag when he placed it in a tree in a public park and attempted to dissociate himself from the bag by standing ten to twelve feet away from it).

93. *Juan*, 175 Cal. Rptr. at 341–42.

94. *See id.*

95. *See id.* at 341; State v. Hill, 789 S.E.2d 317 (2016).

Another way of proving abandonment is to show that the government reasonably believed that an individual had abandoned her property.[96] To prove abandonment under this test, "the government must establish by a preponderance of the evidence[97] that the defendant's voluntary words or conduct would lead a reasonable person[98] in the searching officer's position to believe that the defendant relinquished his property interests in the item searched or seized."[99] This analysis is primarily focused on a person's intent, which is inferred from an individual's words and acts and other objective facts.[100] In *United States v. Basinski*, the court explained that property is considered abandoned when a reasonable person in an officer's shoes infers that an individual intended to relinquish interest in that property, therefore losing any reasonable expectation of privacy.[101] For example, in *Johnson v. State*, the court held that by leaving a vehicle's door open and then fleeing from the police, a reasonable person could infer that the defendant intended to abandon his vehicle, therefore justifying a warrantless search.[102]

Even under this second method of analysis—the government reasonably believing that the property was abandoned—the court could have concluded that Hill abandoned his cell phone. A reasonable person in the officer's shoes would have likely concluded that Hill intended to abandon his property by leaving it behind in a taxi. Similar to the conduct in *Johnson*, when Hill fled the taxi without paying the

96. United States v. Basinski, 226 F.3d 829, 836 (7th Cir. 2000) (explaining the test for abandonment as a reasonable belief that a defendant voluntarily relinquished interest in her property); Johnson v. State, 700 S.E.2d 612, 615 (Ga. Ct. App. 2010) (holding that police officers were justified in performing a search when the defendant left his car door open and fled police while the car was illegally parked); Young v. State, 380 S.E.2d 309, 309 (Ga. Ct. App. 1989) (finding that the defendant abandoned his car when, in response to police questioning, he disclaimed any ownership and walked away).

97. Preponderance of the evidence is a "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Preponderance of the Evidence*, Black's Law Dictionary (10th ed. 2014).

98. A reasonable person is "[a] hypothetical person used as a legal standard, esp[ecially] to determine whether someone acted with negligence; specif[ically], a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests." *Reasonable Person*, Black's Law Dictionary (10th ed. 2014).

99. *Basinski*, 226 F.3d at 836 (citing United States v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000)).

100. *See Young*, 380 S.E.2d at 310 (holding that by disclaiming interest in an automobile and walking away from it, the defendant relinquished his interest in the property in question and could no longer retain a reasonable expectation of privacy); Guess v. State, 397 S.E.2d 453 (Ga. Ct. App. 1990) (holding that the defendant's suitcase was considered abandoned, and thus not subject to Fourth and Fourteenth Amendment protections, when he disclaimed ownership of it in response to police officers' questions on a bus); Driggers v. State, 673 S.E.2d 95, 99–100 (Ga. Ct. App. 2009) (holding that the defendant had no reasonable expectation of privacy in the building where he lived, because he was gone for several months, did not try to retrieve his belongings, and had no utilities connected in the house).

101. 226 F.3d at 836 (holding that the defendant did not abandon his property because he entrusted it to his friend and that the government needed a warrant to search it).

102. 700 S.E.2d 612, 615 (Ga. Ct. App. 2010).

fare and left his phone behind, he manifested an intent to abandon his property.[103] Additionally, Hill left his phone in the back seat of a cab—a public area where a reasonable person would not expect to have any privacy. Thus, prior to the officer's arrival, Hill forfeited any reasonable expectation of privacy in his cell phone, and a reasonable person in the officer's shoes could have inferred that Hill intended to abandon his cell phone. Under either analysis, the *Hill* court should have concluded that Hill abandoned his cell phone. Using this exception, the court could have concluded that the officer's search was not a violation of the Fourth Amendment and denied Hill's motion to suppress.

The precedent set by *State v. Hill* and the application of the *Katz* standard rather than the *Jones* standard contributes to a significant public policy issue. First, requiring judges to choose between two different standards without clear guidance creates more confusion and ambiguity for future criminal defendants and the courts. When the law is unclear as to which standard to follow, defendants will remain uncertain as to how their case will be decided and what method will likely be employed to make that determination.[104] This could unnecessarily pressure criminal defendants into accepting plea deals rather than going to trial in order to avoid the uncertainty of not knowing what standard a court will apply, and whether the evidence obtained against them will be included or excluded by the court. Criminal defendants may also lose the privilege of exercising their inherent Fourth Amendment rights because they may be reluctant to challenge evidence collected against them for fear of an unpredictable outcome.

Second, because the *Hill* court applied the *Katz* standard, it set dangerous precedent for future cases that will likely involve emerging technology used to acquire information about the owner. When it comes to new technologies such as cell phone pinging or drone surveillance,[105] a person would not ordinarily expect to have a reasonable expectation of privacy under *Katz*, because American society does not yet recognize an expectation of privacy in public areas.[106] For example, there is no

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103. *Compare* State v. Hill, 789 S.E.2d 317, 318 (Ga. Ct. App. 2016) (stating that the defendant fled a taxi cab leaving a cellular phone in the back seat), *with Johnson*, 700 S.E.2d at 615 ("Leaving a vehicle door open and then fleeing police . . . demonstrates an intent to abandon the vehicle.").

104. *See generally* Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. Legal Analysis 257, 281–85 (2010) (discussing the legal consequences of ambiguity in criminal statutes and the effect on criminal cases).

105. Cell phone pinging occurs when "cell phone providers . . . monitor a cell phone's location, and subsequently transmit that information to law enforcement any time a user activates the GPS on [her] phone." Marc McAllister, *GPS and Cell Phone Tracking: A Constitutional and Empirical Analysis*, 82 U. Cin. L. Rev. 207, 224 (2014). "Surveillance drones are equipped with sophisticated imaging technology that provides the ability to obtain detailed photographs of terrain, people, homes, and even small objects." *Domestic Unmanned Aerial Vehicles (UAVs) and Drones*, Electronic Privacy Info. Ctr., http://epic.org/privacy/drones/#tech (last visited Apr. 3, 2018).

106. *See* Adrienne Lafrance, *The Convenience-Surveillance Tradeoff*, Atlantic (Jan. 14, 2016), https://www.theatlantic.com/technology/archive/2016/01/the-convenience-surveillance-tradeoff/423891/ (explaining that Americans view public data collection and surveillance as acceptable while data collection in the home is considered more private).

expectation of privacy when an individual drives on a public highway or parks in a public parking lot.[107] Since most cell phones have a GPS signal, it is easy to track a person's location.[108] Under the current law, this kind of surveillance would likely not be considered a search under *Katz* because an individual would not have a reasonable expectation of privacy in the location data emitted from their phone.[109]

However, if the court were to apply the *Jones* standard, it would expand the intrusion element to reach both physical and virtual intrusions.[110] This expanded version of the *Jones* standard would provide a more concrete framework for cases dealing with emerging technology, making Fourth Amendment cases more predictable. Further, a government's virtual surveillance of a cell phone, or another technological device used to store a defendant's personal information would almost always result in an illegal search, even in a public place, because there would be intrusion on an effect to obtain information, thus satisfying all three elements of the standard. Therefore, the expanded standard would require the government to obtain a warrant before conducting a search and would establish clear rules and guidelines for police officers to follow. This expanded view would also ensure the sufficient protection of constitutional rights and help create certainty and predictability in Fourth Amendment jurisprudence.

The result of the court's decision in *Hill* to apply the *Katz* reasonable expectation standard instead of the *Jones* trespass standard—coupled with not addressing the abandonment exception—is a step back in safeguarding property rights and constitutionally guaranteed protections. By turning on Hill's cell phone and dialing 911 to obtain identifying information, the government committed a physical intrusion and used the information obtained to incriminate him, thus conducting an illegal search in violation of the Fourth Amendment under *Jones*. Although the court ultimately reached the correct result, it used the incorrect legal standard and analysis to do so, focusing on whether there was a reasonable expectation of privacy in the information obtained rather than the physical act of the officer. By applying the *Katz* standard, the court failed to interpret the officer's conduct as an illegal search and, in turn, failed to consider the State's abandonment exception. This holding perpetuates uncertainty as to how each standard should be applied, to the detriment of individuals seeking to protect their constitutionally guaranteed rights.

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107. *See* United States v. Knotts, 460 U.S. 276, 281–82 (1983) (holding that a person has no reasonable expectation of privacy while traveling on a public road); Cardwell v. Lewis, 417 U.S. 583, 591 (1974) (noting that there is no expectation of privacy in a vehicle left in a public parking lot).

108. *See* John Brandon, *Website Can Find Your Exact Location with Your Phone*, Fox News (Feb. 5, 2012), http://www.foxnews.com/tech/2012/02/05/website-can-find-with-your-phone-number.html (discussing ways to track an individual's location by using cellular tower triangulation and the GPS signal on her cell phone).

109. *See* State v. Hill, 789 S.E.2d 317, 319–20 (Ga. Ct. App. 2016).

110. At least one court has already expanded the *Jones* standard in this way. *See* United States v. Ackerman, 831 F.3d 1292, 1307–08 (10th Cir. 2016) (holding that a government entity opening the defendant's email constituted a virtual intrusion or trespass on the defendant's effect, resulting in an illegal search under the Fourth Amendment).