I. INTRODUCTION

A recent issue facing the courts is the immediate search of cell phones and text messages on a cell phone incident to a lawful arrest. With recent advances in “smart phone” technology, the average cell phone is a source of literally millions of pieces of information concerning the owner. In many situations, the phone will become a valuable source of reams of evidence relevant to an investigation. Officers often desire to seize and immediately search for evidence on phones as soon as possible. This issue of the *Legal Eagle* is to provide a comprehensive survey of the present law regarding the immediate search and examinations of cell phones without a warrant.

The present state of the law on this issue is definitely in flux, and no definitive decision has been made by the United States Supreme Court. All warrantless searches and seizures are presumed unconstitutional unless an applicable exception is established. Furthermore, the remedy for an unconstitutional search and seizure is suppression of the evidence. Consequently, it is advisable to obtain a warrant whenever practicable. Law enforcement officers and agencies are advised to contact their legal advisors regarding the advisability of searching a cell phone without a warrant given the particular circumstances encountered during an arrest or investigation. This issue, however, will explore recent court decisions for consideration by law enforcement officers and agencies.

So far, the Fourth, Fifth, Seventh, and Tenth Circuits have directly or indirectly found the search of cell phones incident to arrest either a valid exception to the warrant requirement, reasonable, or both. No federal circuit has directly held to the contrary. Among the states, California’s view agreeing with the federal circuits represents the majority, while Ohio represents the minority opposition. Other exceptions to the normal search warrant requirement have also been found to be applicable, including plain
view, exigent circumstances, the automobile exception, consent, and the good faith exception. Until the Supreme Court clarifies the application of Robinson, Edwards, and Chadwick to the context of cell phones, including the effects of Gant, it appears that cell phones can be searched without a warrant if a valid exception exists.

Police may search a person incident to arrest to remove weapons for the officer’s safety, and to seize evidence to prevent it from being destroyed or concealed. ChimeI v. California, 395 U.S. 752, 763 (1969). Under United States v. Robinson, when a lawful custodial arrest occurs, a full search of the arrestee is both an exception to the warrant requirement and a reasonable search. 414 U.S. 218, 235 (1973). In New York v. Belton, the Supreme Court said the scope of the search incident to arrest includes containers found on the arrestee’s person. 453 U.S. 454, 460-61 (1981). The Court also said that containers within the arrestee’s reach, open or closed, may be searched. Id. However, warrantless searches of seized property at the time of arrest do not fall under the incident to arrest exception if the search is remote in time or place from the arrest, or if no exigency exists. United States v. Chadwick, 433 U.S. 1, 14 (1977), abrogated on other grounds by, California v. Acevedo, 500 U.S. 565 (1991). One recent, potential limitation was announced in Arizona v. Gant, holding that police may search a vehicle incident to arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. 129 S.Ct. 1710, 1719 (2009). There is a division among the circuits over whether Gant applies only to vehicular searches, or generally limits searches incident to arrest. United States v. Curtis, 635 F.3d 704, 713 (5th Cir. 2011).

Courts finding that arrestees’ cell phones may be searched without a warrant have primarily done so based upon the above articulated search incident to arrest exception. Most courts appear to find cell phones analogous to containers, then apply Robinson and find the search was both valid under the exception and reasonable.

II SURVEY OF FEDERAL COURT DECISIONS CONSIDERING INCIDENT TO ARREST EXCEPTION

The primary case dealing with searches of cell phones incident to arrest is United States v. Finley. 477 F.3d 250 (5th Cir. 2007) (cert. denied, 549 U.S. 1353, (2007)). Even though Finley had an employer issued cell phone, because he was permitted to use it for personal business, could exclude others from it, and took normal precautions to maintain his privacy in it, he had standing to challenge the search and seizure of the phone. Id. 258-259. The Court held that police officers could search the defendant’s cell phone, including text messages and call records, incident to a lawful arrest. Id. 260. The Court reasoned that in a lawful custodial arrest, the full search of a person is an exception to the warrant requirement, and also a reasonable search. Id. at 259 (quoting Robinson, 414 U.S. at 235). The Court further reasoned that police must not only search for weapons or instrumentalities of escape on the arrestee’s person, but may look for evidence of the arrestee’s crime on his person in order to preserve it for trial. Id. 260 (citing Robinson, 414 U.S. at 223-224). The permissible scope of a search incident to arrest includes open or closed containers on the arrestee’s person, like a cigarette package in Robinson. Id. (citing Belton, 453 U.S. at 460-61; Robinson, 414 U.S. at 223-224). Thus, text messages and call records were lawfully retrieved from the phone.

The search in Finley occurred after police had already transported the defendant to another residence, but the Fifth Circuit focused on the Supreme Court’s ruling in United States v. Edwards, holding
searches and seizures that could be made at the time of the arrest may legally be conducted later when the defendant arrives at the place of detention. Id. at 260 n.7 (quoting United States v. Edwards, 415 U.S. 800, 803 (1974)). In Finley, the Court also noted that generally as long as administrative processes incident to the arrest and custody have not been completed, a search of the effects seized from the arrestee’s person is still incident to the arrest. Id.

In United States v. Curtis, the Fifth Circuit recently upheld its previous decision in Finley. 635 F.3d 704 (5th Cir. 2011). The Court held that an officer could search the defendant’s cell phone, including text messages, incident to a lawful arrest. Id. at 712-713. The defendant’s cell phone was recovered from an area within his reaching distance at the time of his arrest, and the defendant was still being processed when the officer searched the phone. Id.

The Fourth Circuit has also found multiple reasons for the search of a cell phone without a warrant to be permissible. In United States v. Young, the Court held officers permissibly accessed and copied text messages from defendant’s cell phone during a search incident to arrest. 278 Fed. Appx 242, 245-246 (4th Cir. 2008). The holding was based upon officers having no way of knowing whether text messages would automatically delete or be preserved, the Fourth Circuit’s holding in United States v. Hunter, 1998 WL 887289 (4th Cir. 1998), that phone numbers from a pager could be seized incident to arrest, the Fifth Circuit’s holding in Finley, and officers’ need for preservation of evidence. Id.

In a published decision, the Fourth Circuit again addressed the issue in United States v. Murphy. 552 F.3d 405 (4th Cir. 2009), cert. denied, 129 S.Ct. 2016. Murphy was initially arrested for obstruction of justice after giving false names to police during a traffic stop. Based upon Chimel v. California, Murphy’s person and the area within his immediate control were searched. Murphy had a cell phone on his person, which he even showed to the officer and explained how to find numbers on it as he tried to convince the officer that people listed in the phone could verify his identity. Id. at 408. Because he had the phone on his person at the time of his arrest, it was properly seized without a warrant based on the incident to arrest exception. Based upon the need for preservation of evidence and precedent from Young and Hunter, the Court held that the retrieval of text messages and call records was justified. Id. at 411. The Court also relied upon the Fifth and Seventh Circuits’ decisions in Finley and United States v. Ortiz, allowing warrantless search of cell phones and search of pagers, respectively, incident to arrest. Id.

The Fourth Circuit rejected arguments in Murphy that officers would need to ascertain the storage capac-
ity of a cell phone before being able to search it because it would create an unworkable and unreasonable rule. *Id.* The cell phone in *Murphy* was also searched during an inventory search at the Sherriff’s Department. *Id.* at 412. The cell phone was taken into evidence based upon the warrantless search pursuant to a valid inventory search. *Id.* After the phone was taken into evidence, other officers and investigators were able to conduct a further review of its contents without a warrant. *Id.* (citing *Edwards*, 415 U.S. at 803-04).

The Seventh Circuit indirectly addressed the issue in *United States v. Pineda-Areola*. 372 Fed. Appx. 661. (7th Cir. 2010). In *Pineda*, officers arrested the defendant for being in the United States illegally and seized a cell phone in his front pocket. *Id.* at 662. An officer then called a number that was used by a suspected alias of the defendant for drug deals and the defendant’s phone rang. *Id.* The Court concluded that even if calling the phone was a search, the officers were entitled to search the defendant and his phone incident to arrest. *Id.* at 663. (citing *Robinson*, 414 U.S. at 235; *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996); *Finley*, 477 F.3d at 258-60).

The Tenth Circuit has also stated that warrantless searches of cell phones incident to arrest are valid. *Silvan W. v. Briggs*, 309 Fed. Appx. 216 (10th Cir. 2009). In *Briggs*, a defendant claimed she and her cell phone were unlawfully searched in a sexual abuse case. However, the Court stated that in a search incident to a lawful arrest, officers may search a person for weapons and evidence. The Court further stated that the permissible scope of the search incident to arrest includes the contents of a cell phone on an arrestee’s person. *Id.* at 225. (citing *Finley*, 477 F.3d at 260; *Ortiz*, 84 F.3d at 983-84; *United States v. Donnes*, 947 F.2d 1430, 1437 (10th Cir.1991) (recognizing that “a search incident to a lawful arrest permits a law enforcement officer to conduct a warrantless search of a container located in the area of the arrestee's immediate control”)). The Court’s reference to *Donnes* implies that the Tenth Circuit views cell phones as containers, which under *Robinson*, may be searched incident to arrest.

The Ninth Circuit had an opportunity to address the issue, but did not, in *United States v. Roberts*. 319 Fed. Appx. 575 (9th Cir. 2009). The defendant claimed that video from a cell phone should have been suppressed because there was no warrant to search the phone and the phone was not searched until over a month from when it was seized from a warrantless search of his vehicle. *Id.* at 578. The Court did not address the issue because it found any error from admitting the video from the cell phone to be harmless. *Id.*

The First Circuit discussed related issues in *United States v. Diaz*, and *United States v. Jadlowe*. 494 F.3d 221 (1st Cir. 2007); 628 F.3d 1 (1st Cir. 2010). In *Diaz*, the Court noted that it was unclear how an officer found the number assigned to defendant’s cell phone and whether it constituted a search, but still held that the district court did not plainly err in finding the seizure of the number of the phone apart from the phone itself because there was probable cause to search for the phone number incident to arrest, and it would have inevitably been discovered either in plain view or by search pursuant to a warrant. *Id.* at 226. The defendant had used the phone earlier in the evening to call someone regarding payment for ecstasy tablets, which the officer was trying to verify. *Id.* at 223. In *Jadlowe*, the defendant was arrested for possession and distribution of narcotics. 628 F.3d at 5. Upon arrest, his cell phone was seized. *Id.* at 7. The Court held that the seizure of a cell phone incident to an arrest was permissible, whether the cell phone was on the arrestee’s person or within an area where he could gain possession of a weapon or destructible evidence. *Id.* at 12-13. The Court did not address any search of the cell phone’s contents.

### III OTHER SIGNIFICANT DECISIONS

The California Supreme Court has held that stored data in the text message folder of a cell phone is the proper subject of a warrantless search incident to arrest. *People v. Diaz*, 244 p.3d 501, 509 (Cal. 2010)
The Court noted that the lawful custodial arrest justified the infringement of any privacy interest the defendant had in property immediately associated with his person at the time of arrest. *Id.* at 508. In *Diaz*, the Court also held that an elapsed 90 minute time period from the defendant’s arrest and the officer’s search of the cell phone did not render the search an invalid search incident to arrest because the phone was personal property immediately associated with the defendant’s person. *Id.* at 505, 506.

The primary opposition case comes from the Ohio Supreme Court in *State v. Smith*. 920 N.E.2d 949 (Ohio 2009) (reconsideration denied, 921 N.E.2d 248 and cert. denied, 131 S. Ct. 102, (U.S. 2010)). In a 4-3 decision, the Court held that a warrantless search for information in a cell phone that was seized incident to arrest violated the Fourth Amendment. *Id.* at 954. The Court reasoned that the search was not necessary for officer safety, and there were no exigent circumstances shown, including suspect identification or preservation of evidence, to justify the search. *Id.* A primary determination in this case was that cell phones are not considered closed containers for purposes of the Fourth Amendment. *Id.* The Court reasoned that containers have traditionally been defined as physical objects capable of holding other physical objects, but cell phones are unique tools capable of holding tremendous amounts of electronic data, more like laptops, and thus have a greater expectation of privacy. *Id.* at 955.

The Fifth Circuit has ruled in one case where the warrantless search of a cell phone was invalid. In *United States v. Zavala*, the Court held that even though there was reasonable suspicion to justify a traffic stop, it was not enough to give rise to probable cause which would justify the search of cell phones on the defendants’ persons incident to arrest. 541 F.3d 562, 574 (5th Cir. 2008). Essentially, the search of the phones prior to having probable cause could not then give the probable cause necessary for an arrest, without a warrant. *Id.* at 574-575. Further, consent by defendant to search the car did not extend to his cell phone, which was immediately taken from defendant and placed on the roof of the car. *Id.* at 576. Finally, search of the cell phones for numbers was found to be beyond the protective search allowed by *Terry*. *Id.* It is important to note that this case did not state search of cell phones incident to arrest violated the Fourth Amendment, rather the case stands for the proposition that a valid arrest must be made, or at least there must be a good faith belief that a valid arrest is permissible, before a cell phone may be searched incident to arrest.

**IV ALTERNATIVE POSSIBLE EXCEPTIONS**

**A. Consent**

Not surprisingly, consent is one valuable exception to the usual warrant requirement that may be useful. In *United States v. McGlothlin*, the Seventh Circuit upheld consent to search a cell phone for pictures of a neighbor, which ultimately revealed child pornography involving another child. 391 Fed. Appx. 542 (7th Cir. 2010). In *McGlothlin*, a woman reported her neighbor was taking pictures of her son with his cell phone and masturbating while the boy played on a trampoline. *Id.* at 543. An officer asked the defendant if he could check the cell phone to which he replied, “Sure.” The officer looked through the phone’s pictures. *Id.* at 544 Although he did not find pictures of the boy in question, the officer found other pictures giving probable cause that the defendant possessed child pornography, specifically an erect adolescent penis. *Id.* Based upon this, the officer seized the phone. *Id.* The Court found the consent was valid, even though he was not told he had a right to refuse, because he was not in custody when the officer asked only one time if he could check, and there were no signs that the defendant did not comprehend what was happening. *Id.* at 545.

In *United States v. Stapleton*, the Eighth Circuit held police did not exceed the scope of consent they obtained from an automobile owner to search an automobile for crack cocaine when they searched a cell phone owned by the passenger, because the passenger remained silent when told about the search and the object of the
search. 10 F.3d 582 (8th Cir. 1993). Within the cell phone on the front passenger floorboard was 47.1 grams of crack cocaine in two plastic bags. \textit{Id.} at 583. The passenger did not tell the police that the phone was his, or that they did not have his consent to search it. \textit{Id.} at 584. The Court found that under those circumstances, officers either had all the consent constitutionally required or that they had the passenger’s implied consent. \textit{Id.}

B. Good Faith

The good faith exception was discussed by the Fifth Circuit in \textit{United States v. Curtis}. 635 F.3d 704 (5th Cir. 2011). In \textit{Curtis}, the Court held that even if the intervening case of \textit{Arizona v. Gant}, holding police could not search a vehicle incident to a recent occupant’s arrest if the arrestee was secured and no longer within reaching distance of the passenger compartment, would not have allowed the police to search defendant’s cell phone, the good faith rule would have precluded suppression of text messages found on the cell phone. \textit{Id.} at 713-714. The cell phone was located on the center console in the vehicle. \textit{Id.} At the time of the search, case law had established that police did not need a search warrant for text messages on a cell phone recovered within the arrestee’s reaching distance after effectuating a valid arrest. \textit{Id.} This may prove to be a significant exception while the state of the law regarding searches of cell phones incident to arrest remains unsettled, but suggestive that it is permissible.

C. Abandoned Property

The Sixth Circuit found that abandoning one’s vehicle after police discovered illegal drugs in the trunk extinguished any reasonable expectation of privacy that one might have had over the property in the vehicle. \textit{United States v. Foster}, 65 Fed. Appx. 41, 46 (6th Cir. 2003). When the police discovered the drugs, the defendant fled on foot, leaving his automobile abandoned on the side of the road. \textit{Id.} at 43. Police later seized a cell phone that was plugged into the cigarette lighter, activated the phone, and retrieved the phone numbers stored on the phone. \textit{Id.} at 43. Because there was no reasonable expectation of privacy, there was no Fourth Amendment violation.

D. Exigent Circumstances

Exigent circumstances may be another potential exception, although it is less likely to be relied upon compared to the incident to arrest exception. In a footnote to \textit{Georgia v. Randolf} (not in the context of cell phone searches), the Supreme Court stated, “[A] fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement.” 547 U.S. 103, 116 n. 6 (2006) (citing \textit{Schmerber v. California}, 384 U.S. 757, 770-771 (1966)). In \textit{Schmerber}, the Court basically declared warrantless searches are allowed when delay necessary to obtain a warrant threatens the destruction of evidence. \textit{Schmerber}, 384 U.S. at 770-771. However, the Court has also stated that police “bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches.” \textit{Welsh v. Wisconsin}, 466 U.S. 740, 749-750 (1984).

In \textit{United States v. Ortiz}, police searched contents of a pager in the front of the car that the defendant was in when he was arrested. 84 F.3d 977, 984. The Court suggested that the electronic nature of the information created a need to preserve evidence, akin to an exigent circumstance. Nevertheless, as the Court discussed the finite nature of pagers’ electronic memory and how relatively easy content could be deleted, it stated that it is “imperative that law enforcement officers have the authority to immediately ‘search’ or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.” \textit{Id.} Even when discussing the electronic nature as a potential exigent circumstance, the Court’s analysis appears to conclude that the exigency of the dynamic nature of the electronic content supports search incident to arrest, rather than allowing a warrantless search without a valid arrest.
Lower court decisions demonstrate some possible, common exigency situations. In *United States v. Allen*, the district court found in the context of a narcotics case that an exigency existed that permitted the warrantless search of defendants’ cell phones, which were properly seized, when they continued to ring up to 40 times on one alone. 2005 WL 5574429 1. 6 (S.D. Ohio 2005). The court reasoned that calls were displacing information in the phones’ memories and the government faced imminent destruction of evidence by waiting for a search warrant. *Id*. Similarly, in *United States v. Parada*, a district court found numbers stored in the memory of defendants’ phones that were lawfully seized were subject to loss from incoming calls. 289 F. Supp. 2d 1291 (D. Kan. 2003). Thus, the court found warrantless retrieval of the phone numbers by police was valid. *Id*.

Officer and public safety surrounding a large drug transaction, where officers had reason to believe that the defendant and others, unknown but potentially present, armed, and having just participated in the cocaine deal, justified warrantless search of the call history of a cell phone lawfully seized from defendant. *United States v. Lottie*, 2008 WL 150046 (N.D. Ind. 2008). Also, search of data contained on a narcotics arrestee’s phone was valid under an exigent circumstances exception because the phone came into possession of an agent when data on the phone could have been altered, erased, or deleted remotely. *United States v. Salgado*, 2010 WL 3062440 (N.D. Ga. 2010). This case highlights another significant issue with cell phone data; that of remote destruction or alteration of information through programs such as MobileMe for the iPhone. If courts are willing to find an exigent circumstance where there is potential for imminent destruction of evidence, or a general need for preservation of evidence exists, programs like MobileMe may strongly support the case for warrantless searches.

E. Inventory Searches

In *United States v. Murphy*, the Fourth Circuit noted that even if the cell phone was not properly seized incident to arrest, it would have also been subject to seizure as a result of the subsequent inventory search. 552 F.3d 405, 411 n. 2 (4th Cir. 2009). The Court went on to explain that the inventory search must be conducted according to standardized criteria. *Id*. at 411. Addressing vehicle search contexts, the Court noted that the search’s purpose must be to secure the vehicle and its contents, not to gather incriminating evidence. *Id*. at 412 (citing *Colorado v. Bertine*, 479 U.S. 367, 374 n. 6 (1987)). At least one court has found the inventory or booking exception to allow for a warrantless search of a cell phone. *Brady v. Gonzalez*, 2009 WL 1952774 (N.D. Ill. 2009) (relying on *Illinois v. Lafayette*, 462 U.S. 640 (1983), to say no search warrant is required to inventory the contents of a person’s pocket at the time of arrest or when taken into custody at the police station).

A handful of other courts have also found inventory and booking searches of cell phones violated the Fourth Amendment. (*United States v. Flores*, 122 F. Supp. 2d 491 (S.D. N.Y. 2000) (holding after purposes of initial inventory search had been met, subsequent, purely investigatory search of cell phone in automobile was improper); *United States v. Park*, 2007 WL 1521573 (N.D. Cal. 2007) (holding warrantless search of lawfully seized cell phones did not meet booking exception because they were surreptitious and investigatory, not pursuant to standard procedures, no reason articulated why searches were necessary to fulfill legitimate government interests in booking searches); *United States v. Wall*, 2008 WL 5381412 (S.D. Fla. 2008) aff’d on other grounds, 343 Fed. Appx. 564 (11th Cir. 2009) (holding search of text messages did not constitute inventory search since there was no need to document phone numbers, photos, text messages or other stored data to properly inventory the defendant’s possessions since the threat of theft was to the phone itself, not information stored upon it). Inventory searches uniformly appear to allow the seizure of cell phones, but are unlikely to justify an actual search of them.
F. Stolen/Wrongful Possession of Device

The Supreme Court of South Dakota held that a defendant did not have a reasonable expectation of privacy in a cell phone where he had not received permission from the owners of the phone to use it, and he left it in his bedroom after the owners of the residence ordered him to leave and was forcibly removed twice by police. *State v. Thunder*, 777 N.W.2d 373 (S.D. 2010). The phone belonged to a family also living at the residence. *Id.* at 376. Thunder started to use it as an alarm, but it also had capacity to hold pictures. *Id.* After Thunder was removed by police, the family found the phone and realized it had pictures and video of Thunder molesting their daughters. *Id.* The Court reasoned that even though Thunder may have had a subjective expectation of privacy in the phone’s contents, his wrongful possession of the phone did not support an expectation of privacy society would recognize as reasonable. *Id.* at 379. This case articulates the likelihood that warrantless searches of stolen cell phones, or where defendants are otherwise in wrongful possession of the devices, will be upheld as valid.

G. Condition of Probation/Parole

The limited expectation of privacy and individual state statutes relating to probation and parole may allow for warrantless searches of cell phones. In *United States v. Diaz*, a district court found a warrantless cell phone search valid because it was authorized under defendant’s probationary search condition, and that it was incident to booking. 2006 WL 3193770 (N.D. Cal. 2006). The court cited the Supreme Court, stating that when an officer has reasonable suspicion of criminal activity by a probationer subject to a search condition, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable. *Id.* at 5 (citing *United States v. Knights*, 534 U.S. 112, 121-122 (2001)).

H. Plain View

Practically speaking, this exception is likely limited because most pictures, videos, text messages, and other data are not displayed on the front display, if the cell phone even has one. Some courts have found circumstances where this exception applied. In *State v Carroll*, an officer saw a picture of the defendant smoking marijuana on the display screen of a flip-style cell phone that he was ordered to drop after exiting a vehicle following a high-speed chase. 778 N.W.2d 1 (Wis. 2010). Because the picture was in plain view, the officer was in legal possession of the phone and lawfully in a position to view the screen, there was no initial Fourth Amendment violation, and the officer was able to detain the phone. *Id.* at 9-10. However, further viewing of the image gallery or other data of the phone was found to violate the Fourth Amendment absent showing an exigency, such as imminent destruction of evidence before a warrant could be obtained. *Id.* at 12. The officer was allowed to answer an incoming call since by not doing so, evidence of drug trafficking could not be preserved, and there was a reasonable belief that evidence would be lost. *Id.* This case also illustrates the continual battle between whether evidence stored on cell phones will be preserved in the time it takes to get a warrant, or whether its dynamic nature justifies more immediate intrusion.

I. Emergency

A number of fact patterns could potentially raise this exception. In *State v. Brown*, 2004 WL 424257 1,4 (Conn. Super. 2004), the Court found an emergency exception existed to the usual warrant requirement when a trooper was searching for a missing five-year old boy. Other factors justifying this emergency exception included the boy being with the father the night before, the father not showing up to ongoing divorce proceedings the morning the boy disappeared, a hysterical mother, and a cold Connecticut night. *Id.* at 4-5. Furthermore, when the trooper arrived at the father’s house, the father was highly intoxicated, uncooperative, and leaning in the dark by the bed of his pickup. *Id.* The officer also found a shotgun near the pickup, which had a blood like substance on it. *Id.* The trooper asked the defendant to stop talking on the phone and speak to him,
but had to take the phone away since the defendant didn’t respond. *Id.* After discovering more facts as mentioned, the phone rang and the troopers answered. *Id.* The Court concluded that the emergency circumstances and developments outweighed the defendant’s expectations of privacy, and the objective facts supported a young boy was missing and may be in need of immediate emergency services. *Id.* The Court stated that the search was limited in scope to a prompt search to find victim(s) or killer(s). *Id.*

A Wisconsin court also found an emergency exception when police discovered a crashed and empty vehicle that had a cell phone left in it, and used the phone to locate the driver through his former wife. *State v. Gumphrey*, 722 N.W.2d 401 (Wis. App. 2006). The phone was used in a later prosecution for operating the vehicle under the influence of alcohol. *Id.* Factors justifying the emergency exception included officers knowing or reasonably inferring that a truck had left the highway going fast enough to knock down several mailboxes before hitting a culvert, there was a crack in the windshield about where a driver’s head would hit, a witness saw the driver acting disoriented after the crash, and the driver staggered off leaving personal possessions like two cell phones in the vehicle. *Id.* The court concluded that officers could reasonably believe a person in those circumstances may have a serious head injury and be in need of urgent medical care. *Id.*

**J. Automobile Exception**

The automobile exception may also be useful. Courts that have applied it generally find cell phones in cars to be containers, and thus the container may be searched for evidence relating to the crime of arrest. In *State v. Boyd*, the Court stated police had probable cause to believe defendant was selling drugs, a cell phone was visible on the front seat of his car when the police arrested him, and the police reasonably believed that the cell phone contained evidence of drug activity. 992 A.2d 1071, 1088 (Conn. 2010), cert denied, 131 S.Ct. 1474 (2011) (applying New York law). The same evidence providing probable cause for arrest provided probable cause for search of the vehicle without a warrant, including closed containers that may contain evidence of the crime defendant was arrested for. *Id.* In *United States v. Cole*, the district court also found cell phones to be containers that were subject to warrantless search under the automobile exception. 2010 WL 3210963 (N.D. Ga. 2010). In *Cole*, the court reasoned a cell phone was like a container because it contained information, such as recent calls and contacts’ phone numbers. *Id.* Police observed firearms, a large sum of cash in a shoe box, and suspected marijuana, which combined with cell phones, gave them reason to believe that the phone’s recent calls and contacts may contain additional drug dealing evidence. *Id.*

In a Texas case, officers were allowed to search passengers’ cell phones like other closed containers in an automobile after police had discovered hidden compartments in the vehicle containing cocaine. *United States v. Garcia-Aleman*, 2010 WL 2635071 (E.D. Tex, 2010), report and recommendation adopted, 2010 WL 2635073 (E.D. Tex. 2010). The court determined probable cause existed to believe evidence of a crime would be found in the cell phone information and photographs, so the automobile exception allowed a warrantless search by the officers. *Id.* A federal court in Kansas also concluded that because officers had probable cause to search a vehicle for illegal drugs or evidence of drug trafficking after a canine alerted to the vehicle, the officers could also search containers in the vehicle for such evidence. *United States v. Fierros-Alvarez*, 547 F. Supp. 2d, 1206, 1211-1212. The defendant also provided probable cause that the phone may have evidence of others involved in drug trafficking after he told police the phone was given to him by the same third party that provided him with the car. *Id.*
V. CONCLUSION: DEALING WITH TECHNOLOGICAL CHANGES AND THE EMERGING STATE OF THE LAW

This area of the law will remain unsettled for some time. However, the Court has been reluctant to address similar issues so far, under the idea that the “judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” City of Ontario v. Quon, 130 S.Ct. 2619, 2625 (2010).

For officers dealing with these issues in the field, they will likely be in the best position if they stick to the foundations behind the exceptions to the Fourth Amendment. The courts appear more likely to find a search reasonable or within an exception when facts can be articulated leading officers to reasonably believe that evidence will be lost or destroyed without immediate action. See infra at section III.

For now, circuit and lower courts generally are finding no reason to make a distinction between cell phones and other closed “containers”, as long as there is a valid arrest first. Many courts are saying neither non-tangible data nor quantity of information is enough to depart from other personal items that fall under the exception. The distinction between cell phones and computers is beginning to blur, but courts have not uniformly determined whether computers and laptops are containers for Fourth Amendment purposes either. The Tenth Circuit has stated with regard to computers, “relying on analogies to closed containers or file cabinets may lead courts to ‘oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage.’” United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999) (quoting Raphael Winick, Searches and Seizures of Computers and Computer Data, 8 HARV. J.L. & TECH, 75, 104 (1994)). The case has been narrowly construed to mean officers conducting searches may not conduct a sweeping, comprehensive search, but that the search must be limited to its original justification. United States v. Grimmett, 439 F.3d 1263, 1268-1269 (10th Cir. 2006). Other courts have analogized computers to containers, noting that the Supreme Court has not drawn lines between containers of information and contraband related to the quality or nature to determine appropriate Fourth Amendment protection. United States v. Arnold, 523 F.3d 941, 947 (9th Cir. 2008).

One potential limit that may be imposed, and is implied in review of some case law, suggests that less intrusive searches will more likely be found reasonable or within an exception. Searches have been less intrusive when they are limited to call logs and contacts since these could be obtained on a piece of paper in a wallet, or by getting phone records from the provider. More intrusive searches, like text messages, start revealing more of the communication itself, and vary a little more in their acceptance. Even greater intrusion has been found when the search requires more levels, such as opening the pictures, then a folder, then a picture, then opening a different folder and viewing those pictures. Thus, officers may be more likely to perform a reasonable search, or fit within an exception to the warrant requirement, such as incident to arrest, when the search requires less ‘levels’ to find and preserve evidence. The underlying offense also may be significant, since probable cause of drug trafficking appears to allow more latitude in searching contacts/call logs, text messages, and answering incoming calls.

Based on wide review of relevant case law, officers are likely justified in searching phones without a warrant when an exception exists, under the same circumstances they would search other containers, like wallets and purses. When preservation of evidence from imminent destruction exists, an ongoing emergency is present, or another exigency exists and the officer can articulate factual reasons why information must be obtained sooner than waiting for a warrant would allow, the search will likely be valid. Because the law is unsettled, officers are unlikely to be subjected to civil rights liability for mistakenly thinking a valid exception existed and searching a phone, assuming there are actual reasons to support the officer’s decision. Like other contexts, mere hunches are still not enough to search a phone, nor should a cell phone be searched without a warrant as a basis for probable cause to support the underlying arrest.