

**APL-2022-00189**

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**COURT OF APPEALS**

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**STATE OF NEW YORK**

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**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent,*

*-against-*

**ANTHONY BLUE,**

*Defendant-Appellant.*

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**BRIEF OF *AMICUS CURIAE*  
THE LEGAL AID SOCIETY  
IN SUPPORT OF DEFENDANT-APPELLANT**

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## **DISCLOSURE STATEMENT**

Pursuant to 22 N.Y.C.R.R. Part 500.1(f), The Legal Aid Society discloses that it is a non-profit organization with no parent, subsidiaries, or affiliates.

## **INTEREST OF AMICUS CURIAE**

*Amicus curiae* The Legal Aid Society is the country's oldest and largest private non-profit legal services agency, dedicated since 1876 to providing quality legal representation to low-income families and individuals in New York City. It has served as the primary public defender in New York City since 1965 and, each year, represents hundreds of thousands of people who are arrested and unable to afford private counsel.

*Amicus* has a strong interest in ensuring that this Court interprets the Criminal Procedure Law's search and seizure protections accurately and in a manner that assures that remedies are available for violations of those protections. *Amicus* regularly represents clients whose property is seized and searched in the same manner as the Appellant Anthony Blue, both at the trial and appellate levels. Legal Aid attorneys spend thousands of hours a year litigating suppression issues, among them issues similar to those presented in this case. To that end, Legal Aid has a vested interest in the development of the law relating to suppression and its application as a remedy for violation of statutory and constitutional rights.

## PRELIMINARY STATEMENT

The Legislature enacted Article 690 of the Criminal Procedure Law to safeguard the rights of New Yorkers from unreasonable searches and seizures. Among the law's many important protections, CPL 690.30 regulates law enforcement's use of a search warrant by providing a ten-day deadline to execute the warrant. When law enforcement fails to execute a search warrant within the statutory deadline, courts suppress the evidence obtained from the unlawful search. In this case, the First Department's ruling rendered the CPL's timeliness protection meaningless for cellphones already in the custody of the police. Under its ruling, when a search warrant for a cellphone is issued, it is simultaneously executed without the need for *any* law enforcement action. Indeed, law enforcement now have a free pass to wait weeks, months, or even years before searching a phone's digital contents. This "cellphone exception" to the CPL's time limit on search warrants removes a key protection against unreasonable searches for everyday New Yorkers.

*Amicus* writes to address how this Court should determine when a search of a cellphone is executed under CPL 690.30 and why suppression is warranted when law enforcement fail to execute a timely search. First, CPL 690.30 is clear and unambiguous, and it makes plain that the search (or execution) is a separate act from the issuance of the warrant. As a result, the First Department's ruling conflicts with the statute's plain text and must be rejected. Second, this Court should hold that,

when a cellphone is already in police custody, the search warrant is “executed” when the actual search of the phone’s data has begun. That reading of the CPL’s plain text both protects the rights of New Yorkers, as the Legislature intended, and accounts for the practical realities of searching a cellphone. Third, this Court should hold that the fruits of an untimely search in violation of CPL 690.30 must be suppressed, consistent with the legislative intent behind the law and the numerous court decisions that have ordered suppression. Respondent’s argument for good-faith and prejudice exceptions to suppression ignore this Court’s precedent rejecting such arguments. This Court must reject these arguments again.

## **ARGUMENT**

### **I. THE PLAIN TEXT OF THE CRIMINAL PROCEDURE LAW PRECLUDES COURTS FROM DEEMING A SEARCH WARRANT EXECUTED AT THE TIME OF THE WARRANT’S ISSUANCE.**

The First Department found that law enforcement’s forensic examination of Anthony Blue’s cellphone did not occur within ten days of the issuance of the warrant. *People v. Blue*, 202 A.D.3d 546, 547 (1st Dep’t 2022). But it nonetheless held that the search did not violate CPL 690.30(1)’s ten-day limit “because the warrant expressly stated that it was ‘deemed executed at the time of issuance,’ and the phone remained in police custody throughout.” *Id.* Contrary to the First

Department's ruling, the warrant and the ensuing search violated the plain, unambiguous text of CPL 690.30.<sup>1</sup>

Courts have no authority under the CPL to deem a warrant executed at the time of issuance. When statutory language is “unambiguous,” it “alone [is] determinative.” *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000) (citing *Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 565 (1984)). Under the CPL, a court “may grant the [search warrant] application and issue a search warrant directing a search” for contraband or evidence of a crime. CPL § 690.40. The CPL clearly mandates that “[a] search warrant must be executed not more than ten days after the date of issuance and it must thereafter be returned to the court[.]” CPL § 690.30(1). The statute makes plain that the search (or execution) is a separate act from the issuance of the warrant. And the statute provides no authority to combine the two acts and make a warrant executed upon its issuance.

The First Department found it was appropriate for warrant-issuing courts to deem a warrant executed upon its issuance “in the specific context of phones already

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<sup>1</sup> Respondent's contention that the timeliness of the search cannot be challenged because it was not preserved for review is wrong. *See* Resp. Br. at 26-28. Blue moved to suppress the text messages obtained after the police searched his phone as “wrongfully seized and that the same be excluded as evidence,” RA-78, and he contested the evidence obtained from the search warrant citing “CPL §§ 690.05-690.55.” A-81. As this Court has held, “when the defendant moves to suppress evidence and specifically challenges . . . the subsequent search we believe that the issue has been preserved.” *People v. De Bour*, 40 N.Y.2d 210, 214–15 (1976). That Blue's motion focused on the adequacy of the supporting affidavit for the search warrant is immaterial because “[t]he mere emphasis of one prong of attack over another or a shift in theory on appeal, will not constitute a failure to preserve.” *Id.* at 215 (citations omitted).

in police custody, but not yet analyzed.” *People v. Ruffin*, 178 A.D.3d 455 (1st Dep’t 2019); *Blue*, 202 A.D.3d at 547 (relying on its reasoning in *Ruffin* to reject Blue’s argument that the police violated CPL 690.30(1)). But as this Court has held, “[c]ourts must construe clear and unambiguous statutes as enacted and may not resort to interpretative contrivances to broaden the scope and application of statutes.” *People v. Laing*, 79 N.Y.2d 166, 170-71 (1992).

Interpreting CPL 690.30(1) to mean that the search of a cellphone occurs when the court issues the search warrant “would render the timeliness requirement a nullity, in violation of accepted canons of statutory construction.” *People v. Gallina*, 66 N.Y.2d 52, 56 (1985) (suppressing fruits from an eavesdropping warrant that was not issued “prior to the expiration of [the earlier] . . . eavesdropping warrant” as required under CPL 700.40). When a cellphone or other electronic device is already in the custody of law enforcement, the search warrant authorizes the search for the *digital content* of the device specified in the warrant application, not a search for the device itself. But the First Department’s ruling leads to the “interpretative contrivance” that law enforcement need not take any action within the ten-day limit or any time limit; instead, law enforcement have a free pass to take weeks, months, and even years to search a cellphone.<sup>2</sup>

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<sup>2</sup> The First Department’s ruling also undermines the judicial process. First, when the police take weeks and months to search a cellphone, it delays the criminal court proceeding as the

Creating a “cellphone exception” to the CPL’s ten-day limit on search warrants runs contrary to the U.S. Supreme Court’s admonition that cellphones and the vast, sensitive information they contain are not “any less worthy of [ ] protection.” *Riley v. California*, 573 U.S. 373, 403 (2014) (explaining that the modern cellphone “hold for many Americans ‘the privacies of life.’”). Indeed, “a cell phone search would typically expose the government to far *more* than the most exhaustive search of a house.” *Id.* at 396. In addition to the vast, sensitive data they hold, modern cellphones are ubiquitous. As of 2023, 97% of American adults owned a cellphone and 90% owned a smartphone.<sup>3</sup> Cellphones are an essential resource for Legal Aid’s low-income clients. In New York City, many low-income households rely on cellphones to navigate the internet.<sup>4</sup> In 2020, 45% of low-income New York City households did not have a broadband subscription, and about half of these households relied on a cellular data plan for internet access.<sup>5</sup> Because cellphones contain such vast information, and because most New Yorkers possess them, the

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prosecution’s discovery obligation for the phone’s digital content is not triggered until the police extract them. Second, the ruling strips the suppression courts of their authority to review and determine the lawfulness of law enforcement’s conduct in executing search warrants. If a warrant is deemed executed at the time of its issuance, the search itself is no longer an issue before the suppression court, and the suppression court would have no role in determining whether law enforcement properly conducted its search.

<sup>3</sup> Mobile Technology Fact Sheet, Pew Research Ctr. (Jan. 2024), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>

<sup>4</sup> Broadband and Equal Access to the Internet in New York City, available at <https://council.nyc.gov/data/internet-access/>

<sup>5</sup> *See id.*

First Department’s cellphone exception to the CPL’s time limit on search warrants would remove a key protection against unreasonable searches for everyday New Yorkers. Losing that protection would be particularly concerning in New York City, where in 2023 the NYPD seized nearly 80,000 cellphones from New Yorkers following arrest.<sup>6</sup> Instead, this Court should confirm that the CPL’s ten-day limit on a search warrant’s execution applies to all property and reverse the First Department’s “cellphone exception.”

**II. THE POLICE EXECUTED APPELLANT’S SEARCH WARRANT AFTER TEN DAYS IN VIOLATION OF CPL 690.30.**

This Court should reject the Respondent’s proposed rule to water down the CPL 690.30’s time limit by interpreting “execution” to mean a preliminary step, which would allow the police to “execute” a search warrant by taking any preparatory step to carry out the search. Resp. Br. at 35-37. Nothing in CPL 690.30 supports this approach. Instead, this Court should hold that a search warrant for a cellphone already in police custody is executed when the police connect the phone to a mobile device forensic tool used to extract and copy the digital contents of phones. As explained below, this simple, commonsense reading of the CPL’s plain text both protects the rights of New Yorkers, as the Legislature intended, and accounts for the practical realities of searching a cellphone.

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<sup>6</sup> Annual NYPD Seized Property Data Report (2023), Attachment C, available at <https://www.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page>.

Respondent argues that the NYPD executed Blue's search warrant within the ten-day time limit because an NYPD detective took the preliminary step of requesting that members of the NYPD's Computer Crime Squad Laboratory examine the phone on September 9, four days after the search warrant was issued. Resp. Br. at 35-37; *see also* NYPD Summary Report (A22). But the detective delivered the cellphone to the NYPD's Computer Crime Squad Laboratory on September 24, 15 days later. *See* NYPD Summary Report (A22). And the NYPD's Computer Crime Squad Laboratory connected the phone to a mobile device forensic tool called CelleBrite Universal Forensic Extraction Device on October 18 and completed the extraction and copying on October 19, over 40 days after the warrant was issued. *See* A-22, A-620, and A-624. Under Respondent's proposed rule, Blue's phone could have sat on the detective's desk for months without being delivered to the lab, and the detective's inaction would be immaterial because he made a timely preliminary request for a forensic examination. It would be more consistent with the CPL to deem the warrant executed when the digital search of Blue's phone began.

Under *amicus'* proposed rule, the search of Blue's phone began when the police connected his phone to the CelleBrite Universal Forensic Extraction Device. Law enforcement agencies like the NYPD use mobile device forensic tools (MDFTs) sold by Cellebrite, Grayshift, MSAB, Magnet Forensics, and AccessData

to search cellphones.<sup>7</sup> The MDFT devices are stored within NYPD facilities, so NYPD officers can search cellphones for digital information in house.<sup>8</sup> With MDFTs, an officer “initiates the extraction process by plugging the phone into the computer or tablet.”<sup>9</sup> “[O]nce the tool recognizes the phone, it will prompt the . . . [officer] to choose the kind of extraction to be performed, and, sometimes, the categories and time range of data to be extracted.”<sup>10</sup> After the phone is plugged in, “MDFTs make it easy for law enforcement to analyze and search data copied from phones. A range of features help law enforcement quickly sift through gigabytes of data . . . This includes mapping where someone has been through GPS data, searching specific keywords, and searching images using image classification tools.”<sup>11</sup>

For a cellphone that is already in police custody, the search warrant is “executed” when the phone is connected to an MDFT and the actual search of the

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<sup>7</sup> See Logan Koepke, et. al., *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* (Oct. 2020), at 6 and 11, <https://www.upturn.org/static/reports/2020/mass-extraction/files/Upturn%20-%20Mass%20Extraction.pdf>; see generally *NYPD Digital Forensic Access Tools: Impact and Use Policy*, April 11, 2021, [https://www.nyc.gov/assets/nypd/downloads/pdf/public\\_information/post-final/digital-forensic-accesst-tools-nypd-impact-and-use-policy\\_4.9.21\\_final.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/public_information/post-final/digital-forensic-accesst-tools-nypd-impact-and-use-policy_4.9.21_final.pdf).

<sup>8</sup> See *NYPD Digital Forensic Access Tools: Impact and Use Policy* at 5.

<sup>9</sup> Logan Koepke, et. al. at 11.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.* at 10.

phone's data has begun.<sup>12</sup> That approach accounts for the practical realities that, in some cases, MDFTs may require anywhere from several hours to several weeks to complete the data extraction from phones with high-tech encryption.<sup>13</sup> Finding a search warrant executed when the digital search of a cellphone is initiated is analogous to finding that a search warrant for a home is executed when the search of the home is initiated, not when officers complete the search and exit the home hours later. *See, e.g., People v. Vara*, 117 A.D.2d 1013, 1013 (4th Dep't 1986) (rejecting defendant's argument that the police failed to execute the search warrant before 9pm as required by CPL 690.30 because the search began at 8:50pm and "a search properly begun before 9:00 P.M., need not be terminated if it extends after that time.").

Expanding on the above analogy, following the logic of Respondent's proposed rule would mean that a search warrant for a home could be deemed executed when a detective fills out paperwork or makes a phone call to prepare to search a home. This Court, and indeed, no New York courts have considered pre-search preparations as sufficient to achieve the "execution" of a search warrant. *See,*

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<sup>12</sup> As this Court held in *People v. DeProspero*, when a search warrant authorizes the *seizure* of digital devices that are not in police custody "to be retained by the police for an unspecified period 'for the purpose of further analysis and examination,'" the warrant is executed when the police seize the digital devices. 20 N.Y.3d 527, 529 (2013) (holding that the search warrant was "executed the following day" when the digital devices were seized from the defendant's home).

<sup>13</sup> As Upturn points out, the default settings on mobile devices would take under a day for advanced tools to decrypt. Logan Koepke, et. al. at 27-28.

*e.g.*, *Ferreira v. City of Binghamton*, 38 N.Y.3d 298, 305 (2022) (noting that after obtaining a search warrant for a residence, police officers first surveilled the residence and *then* the next morning, entered the residence to execute the search warrant); *People v. Arnold*, 98 N.Y.2d 63 (2002) (describing the prior act of requesting assistance from Emergency Services Unit in order to gain entry into the apartment as a separate act than the execution of the search warrant). Courts have widely understood “execution” to mean the actual act of initiating a search; in the case of a premises, it is the entry inside, and in the case of a cellphone, it is the digital entry into the device. CPL 690.30’s timeliness provision applies to the execution of all search warrants, whether a warrant to search a home or to search someone’s cellphone. Thus, this Court should hold that, under the CPL, law enforcement executes a search warrant for a phone already in their custody when they connect the phone to a MDFT to begin the process of extracting and copying the phone’s data.

### **III. NEW YORK LAW REQUIRES THAT THE FRUITS FROM AN UNLAWFUL SEARCH BE SUPPRESSED.**

Respondent argues that this Court should not suppress Blue’s text messages even if it finds that law enforcement violated CPL 690.30 because (i) suppression is not required, (ii) the police acted reasonably by relying in good faith on the warrant, and (iii) there was no prejudice to Blue. But this argument ignores well-established law and must be rejected. When the police fail to execute a warrant within the CPL’s ten-day limit, the fruits of the search must be suppressed.

First, both the legislative history of CPL 690.30 and the court decisions applying CPL 690.30 establish that suppression is required when a search exceeds the ten-day limit. Suppression for an untimely search is consistent with the aim of the legislators who intended search warrants to be void after ten days. *See* Preiser, CPL 690.30 Practice Commentaries (“Indeed, the Code of Criminal Procedure section from which the present provision [of CPL 690.30] was taken (CPL § 802(1)) specifically provided that after expiration of ten days ‘the warrant, unless executed is void,’ and the CPL Commission’s Staff Comment indicated an intention to continue that provision without change”). Moreover, courts have consistently found that a search warrant executed beyond ten days is unlawful and that the fruits of the warrant must be suppressed. *See People v. Kiah*, 67 N.Y.S.3d 337, 342 (3d Dep’t 2017) (finding that the trial court erred in denying defendant’s suppression motion “because the warrant was not executed within the 10-day limit for execution of a search warrant that is plainly imposed by statute [CPL 690.30(1)].”); *People v. Jacobowitz*, 89 A.D.2d 625, 625 (2d Dep’t 1982) (suppressing fruits of search where “warrant authorizing video surveillance was not executed until 17 days after issuance despite the fact that CPL 690.30 . . . requires execution within 10 days”); *see also People v. Nurse*, 80 Misc.3d 286 (Sup. Ct., Kings Co. 2023) (suppressing evidence where the police brought digital devices, including cellphones, to a digital forensics laboratory within ten days of the issuance of a search warrant, but did not

evaluate or extract information from the digital devices within ten days); *People v. Tonner*, 74 Misc.3d 1218 (Sup. Ct., N.Y. Co. 2022) (suppressing evidence where the police executed a search warrant for defendant’s Google email account 33 days after the warrant was issued).

Second, the CPL does not excuse an untimely search if an officer relies in good faith on the warrant to conduct the late search. *See generally* CPL 690. And this Court has already soundly rejected the good-faith exception to the exclusionary rule’s requirement that evidence from an unlawful search must be suppressed. *See People v. Bigelow*, 66 N.Y.2d 417, 426-27 (1985) (explaining that “if the People are permitted to use the seized evidence, the exclusionary rule’s purpose is completely frustrated, a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future”); *see also, People v. Jennings*, 54 N.Y.2d 518, 523 (1981) (finding that “the good faith of the enforcement authorities cannot validate an arrest based upon a warrant which had been vacated four months before and had been executed nine months before the arrest was made”). Thus, Respondent’s argument for a good-faith exception here must be rejected.

Third, the CPL does not require that defendants show prejudice to suppress the fruits of an unlawful search. *See generally* CPL 690. Courts have routinely held

that suppression is warranted not because of prejudice to the defendants, but to mitigate the potential abuse of statutory and constitutional protections. In *People v. Gallina*, for example, the Second Department found that the requirement to obtain an extension of an eavesdropping warrant “directly implicate[s] an individual's statutory and Fourth Amendment rights as they place limitations upon the intrusion itself.” *People v. Gallina*, 95 A.D.2d 336, 343 (2d Dep’t 1983). As a result, “[s]uppression is required irrespective of lack of prejudice to the defendant or good faith of the investigation.” *Id.* (citations omitted). This Court affirmed the decision and explained that “suppression is warranted here, as in many other cases involving violations of the eavesdropping statutes, because of the potential for abuse.” *People v. Gallina*, 66 N.Y.2d at 59. In *Blue*, the potential that law enforcement will ignore the CPL’s timeliness protection warrants suppression. If suppression were not available as a remedy, Legal Aid’s clients – predominantly low-income New Yorkers of color – and all other New Yorkers will be exposed to such potential abuse.

## CONCLUSION

For the forgoing reasons, this Court should hold (1) that a search warrant cannot be deemed executed at the time of its issuance; (2) that a search warrant for the digital content of a device that is already in law enforcement's custody is executed under CPL 690.30 when the search of the device has begun; and (3) that the fruits of a search obtained in violation of the CPL 690.30's ten-day limit must be suppressed.

Respectfully submitted,



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**COURT OF APPEALS**

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**STATE OF NEW YORK**

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**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent,*

*-against-*

**ANTHONY BLUE,**

*Defendant-Appellant.*

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**CERTIFICATE OF COMPLIANCE**

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Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York, the undersigned attorney for Amicus Curiae hereby certifies that this Brief was prepared on a computer; that Times New Roman, a 14-point proportionally spaced typeface, was used; that the body of the brief is double-spaced, with 12-point singled spaced footnotes; and that, according to the Microsoft Word Processing System used, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, the Table of Authorities, Disclosure Statement, Proof of Service, and Certificate of Compliance is 4,055.

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