

# Recent Case Report

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## U.S. v. Seiver

(7th Cir. 2012) 692 F.3d 774

### Issue

Does probable cause to search a computer for data or graphics become “stale” if officers waited several months before seeking a warrant?

### Facts

Officers obtained a warrant to search Seiver’s computer for child pornography based on reliable information that he had uploaded such images from his computer to a file-sharing website. The upload occurred seven months before the warrant was issued. In the course of the search, officers recovered criminally graphic files and, as a result, Seiver was charged with distribution and possession of child pornography. When his motion to suppress the files was denied, he pled guilty to possession.

### Discussion

Seiver argued that probable cause for the search warrant did not exist because the seven-month delay between the upload and the issuance of the warrant rendered the probable cause “stale.” Because probable cause to search a place or thing can exist only if there is a fair probability that the sought-after evidence will still be there when the search occurs,<sup>1</sup> the issue in *Seiver* was whether it was reasonable to believe that the data would still be stored on Seiver’s computer throughout the following seven months.

In the first ruling on this subject, the Seventh Circuit concluded that if officers have probable cause to believe that evidence of a crime had been stored on the hard drive of a computer, it is unlikely that a delay of several months in seeking a warrant will render the probable cause “stale.” There are two reasons for this. First, unlike drugs, computer data is “not the type of evidence that rapidly dissipates or degrades.” Second, even though a suspect can easily “delete” data on his computer, he cannot easily destroy it. As the court explained:

When you delete a file, it goes into a “trash” folder, and when you direct the computer to “empty” the trash folder the contents of the folder, including the deleted file, disappear. But the file hasn’t left the computer. . . . The file *seems* to have vanished only because the computer has removed it from the user interface and so the user can’t “see” it any more. But it’s still there, and normally is recoverable by computer experts until it is overwritten because there is no longer unused space in the computer’s hard drive.

The court added that, although people can now purchase software that overwrites the data stored on a hard drive, “the use of such software is surprisingly rare.”

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<sup>1</sup> See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Frank* (1985) 38 Cal.3d 711, 727. **NOTE:** If the warrant was executed within ten days after it was issued, the law presumes that probable cause continued to exist. See Pen. Code § 1534(a); *People v. Cleland* (1990) 225 Cal.App.3d 388, 394; *People v. Hernandez* (1974) 43 Cal.App.3d 581, 589.

Still, at some point probable cause will cease to exist. But the court ruled that that did not happen here because “seven months is too short a period to reduce the possibility that a computer search will be fruitful to a level at which probable cause has evaporated.” Accordingly, the court ruled that Seiver’s motion to suppress was properly denied. POV