

STATE OF MINNESOTA

SEVENTH JUDICIAL DISTRICT

COUNTY OF CLAY

CRIMINAL DIVISION

State of Minnesota,

Court File No. 14-CR-17-4658

Plaintiff,

vs.

BRIEF IN SUPPORT OF MOTION  
TO DISMISS

Andrew Tyler Seeley,

Defendant.

## STATEMENT OF FACTS

On March 31, 2017 a search warrant was executed at 1002 Belsley Boulevard Apartment 308. A HP computer, two hard drives, a SD card removed from a Sony camera, a Thermaltake desktop computer and a USB drive removed from the desktop computer were found in the residence.

Computer Forensic Services reviewed the files received in this case. An Affidavit, Exhibit 4, was submitted to the court. At the time the first Affidavit was submitted there had been no images found. There had been no forensic review of the computer hard drive previously recovered in the search warrant.

On August 8, 2019 Computer Forensic Services reviewed the forensic image/hard drive discussed in this case. Upon review of the forensic image, any reference to images found were only located in the unallocated space. When recovered from the unallocated space, the information does not have their associated metadata intact. This means that there are no file names, nor dates/timestamps associated with the files (including the date of their deletion), and therefore it is not possible to attribute these files to a specific time or user.

Where there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, the charge should be dismissed. See Minn. R. Crim. P. 11.03. In applying Rule 11.03, "the trial judge must exercise an independent and concerned judgment . . . [to determine if it is] fair and reasonable to require the defendant to stand trial. *State v. Florence*, 306 Minn. at 454, 239 N.W.2d at 900.

Under Minn. Stat. § 617.247, Subd. 4(a), the state must prove that the defendant possessed child pornography "knowing or with reason to know its content and character." *State v. Myrland*, 681 N.W.2d 415, 420 (Minn. Ct. App. 2004). Generally, it must be shown that the user viewed the images – otherwise the "knowing" element of the mens rea is not established.

In *Myrland*, this Court explicitly stated this standard and reversed the defendant's possession conviction.

Most other child pornography cases involving the Internet and a multi-user computer involve an eyewitness account that the defendant was seen viewing illegal material. See, e.g., *State v. Sisler*, 177 N.J. 199, 827 A.2d 274 (2003); *State v. Roberts*, 796 So.2d 779 (La.App. 3 Cir.2001), writ denied, 825 So.2d 1163 (La.2002) (both involving a defendant who used a public library computer to view child pornography). Because appellant here was not seen viewing the images or using the computers to do so, the state was required to prove that he had constructive possession of the computers by showing that he exercised dominion and control over them. See *State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610 (1975) (constructive possession may be shown where a strong inference exists that the defendant once possessed the illegal item and continues to exercise dominion and control over it).

*Myrland*, 681 N.W.2d at 420 (public access to computer negated proof of constructive possession).

It is clear the images charged in this case are from the unallocated space on the forensic image. When images are in unallocated space just like in the *Myrland* case, there is not knowing possession of child pornography. *See Myrland*, 681 N.W.2d at 420 (“there are any number of ways that images or text can be stored to the “unallocated space” of a computer's hard drive. Boyer testified that pop-up advertisements, unsolicited emails, and banner advertisements could contain illegal images or text suggestive of illegal material, and even if the computer user ignored them or deleted them, that text could be stored to the computer's hard drive.”). This has also been articulated in *U.S. v. Flyer*, 633 F.3d 911, 918 (2011) when images are found in unallocated space they cannot be seen or accessed unless the user has forensic software. The court held that it is not possession of child pornography when images are found in the unallocated space. *Id.* at 919. The case law has made it very clear that images in unallocated space do not constitute possession of child pornography. Agent Smith agrees that the images were found in unallocated space and he was only able to find these images through carving with specific computer forensic software.

Knowing these images were in the unallocated space, that the forensic image was previously owned and the clear decisions in case law, Andrew Seeley did not knowingly possess child pornography. All counts of possession of child pornography must be dismissed.

**CONCLUSION**

The State has failed to provide facts to prove the elements of the charge of Possession of Pictorial Representations of Minors in violation of Minn.Stat. 617.247 Subd.4(a) and therefore lacks probable cause. The defendant respectfully requests the Court dismiss the charges against him.

Dated: April 2, 2021



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