EXHIBIT 3:

Order Denying Motion to Suppress (United States District Court)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>CORY KILGORE,<br>Defendant. | Case No. 20-CR-15-GKF |

**ORDER**

Before the court is the Motion to Suppress [Doc. 20] of defendant Cory Kilgore. For the reasons set forth below, the motion is denied.

## I. Background

On January 9, 2020, law enforcement agencies executed a search warrant on the defendant's residence in Rogers County. The search warrant was obtained two days prior, on January 7, 2020. The affidavit in support of the search warrant contains the following facts.

On June 27, 2019, "username fred_to_the_f uploaded a known image of child exploitation to the Kik application from IP address 72.192.86.183. Kik reported the image and information to law enforcement." [Doc. 20-1, p. 1 (internal quotation marks omitted)]. On July 9, 2019, "username roleplay8645 uploaded a known image of child exploitation to the Kik application" from the same IP address. [*Id.* (internal quotation marks omitted)]. Kik again reported the image and information to law enforcement. "Both images were identified by PhotoDNA technology." [*Id.*, p. 2]. "PhotoDNA is a technology that aids in finding and removing known images of child exploitation." [*Id.*].

Further, "Homeland Security Investigations provided [the] affiant with a Subscriber IP Usage report from Cox Communications" which revealed the IP address was assigned to the

defendant at an address in Owasso, Oklahoma. [*Id.*]. Homeland Security Investigations also provided the affiant with a criminal history check of the defendant which showed the defendant is a registered sex offender. [*Id.*]. "Kilgore has previously been convicted of Procuring, Producing, Distributing, or Possessing Child Pornography, Lewd or Lascivious Exhibition Victim Under 16 Years Old and Sending Minor Harmful Info." [*Id.*]. The affiant "requested information about Cory Kilgore from the Oklahoma Sex Offender's Registry." [*Id.*]. "The response reported that Cory Kilgore last registered" at the Owasso address "in July 2019." [*Id.*]. Thereafter, "in September 2019 and January 2020," the defendant registered at a second address in Owasso, Oklahoma. [*Id.*]. This second address was the target of the search warrant.

Defendant moves the court to suppress "all evidence seized by police officers pursuant to the January 9, 2020, service of search warrant on Mr. Kilgore's residence—includ[ing] any statements obtained therefrom." [Doc. 20, p. 1]. The defendant requests an evidentiary hearing to develop the facts. [*Id.*]. However, the defendant does not contend the affidavit included a false statement or lacked a material omission. *Cf. Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) ("[W]here the defendant makes a substantial preliminary showing that a false statement . . . was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."). Instead, defendant argues the affidavit fails to establish probable cause. Therefore, a hearing is unnecessary. *See United States v. Haymond*, 672 F.3d 948, 958-59 (10th Cir. 2012) (The court asks "only whether, under the totality of the circumstances presented *in the affidavit*, the . . . judge had a substantial basis for determining that probable cause existed." (emphasis added)).

## II. Legal Standard

When evidence is obtained in violation of a person's rights under the Fourth or Fifth Amendments, the government is generally prohibited from using that evidence in a criminal prosecution. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006). The Fourth Amendment provides that "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. Accordingly, before a judge issues a search warrant, he or she must be provided information sufficient to determine the existence of probable cause. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause.").

"Probable cause exists where attending circumstances would lead a prudent person to believe there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Perrine*, 518 F.3d 1196, 1205 (10th Cir. 2008) (quoting *United States v. Cantu*, 405 F.3d 1173, 1176 (10th Cir. 2005)). "Probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime. Instead, there must be additional evidence linking the person's home to the suspected criminal activity." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998). However, "direct evidence that contraband is in the place to be searched is not required." *United States v. Potts*, 586 F.3d 823, 831 (10th Cir. 2009) (citing *United States v. Hargus*, 128 F.3d 1358, 1362 (10th Cir. 1997)).

The court assesses "the sufficiency of a supporting affidavit based on the totality of the circumstances." *Perrine*, 518 F.3d at 1205 (quoting *Cantu*, 405 F.3d at 1176). "[A] magistrate's or judge's determination that a warrant is supported by probable cause is entitled to 'great deference.'" *Id.* (quoting *Cantu*, 405 F.3d at 1176). This court's duty is simply to "ensur[e] that

the magistrate had a substantial basis for concluding probable cause existed." *Id.* (quoting *United States v. Tisdale*, 248 F.3d 964, 970 (10th Cir. 2001)) (alteration in original).

## III. Analysis

Defendant raises three challenges to the affidavit supporting the search warrant. He argues the facts in the affidavit are stale and that they do not provide a sufficient nexus between the crime and his new residence. Defendant also argues the affidavit fails to indicate the two uploaded images were child pornography. The court considers each argument in turn.

### *A. New Residence*

Defendant argues "the affidavit contains no information or even inference suggesting that contraband or evidence of criminal activity will be found at the Rogers County address." [Doc. 20, p. 7]. The court disagrees.

"[D]irect evidence that contraband is in the place to be searched is not required." *Potts*, 586 F.3d at 831 (citing *Hargus*, 128 F.3d at 1362). "Whether a 'sufficient nexus has been shown between a defendant's suspected criminal activity and his residence . . . necessarily depends on the facts of each case.'" *Id.* (quoting *United States v. Biglow*, 562 F.3d 1272, 1279 (10th Cir. 2009)) (alteration in original). "Among the factors that may be relevant are the type of crime involved; the opportunity for concealment of evidence; the nature of the evidence sought; and the reasonable inference that may be drawn as to where a person would be likely to keep that evidence." *Id.* (citing *Biglow*, 562 F.3d at 1279).

Applying these factors to the circumstances of this case, the affidavit provided a sufficient nexus between the defendant's suspected criminal activity and his new residence. The Tenth Circuit has noted that "images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes." *Haymond*, 672 F.3d at 959 (quoting *Perrine*, 518 F.3d at 1206). For this reason, the Tenth Circuit has upheld warrants authorizing searches of

residences in child pornography cases. *See e.g.*, *Potts*, 586 F.3d at 831 (upholding search of residence for child pornography where the "factors weigh against the possibility that Mr. Potts might have kept the materials at his workplaces"); *Haymond*, 672 F.3d at 959 (upholding search warrant of residence where IP address linked user to child pornography).

In *Potts*, there was no direct evidence the defendant uploaded images of child pornography at his home. 586 F.3d at 831. Rather, the nature of the crime and the evidence sought supported the inference that the defendant would keep evidence of child pornography there. Such is the case here. Had Mr. Kilgore not moved after July 2019, the search warrant likely would have targeted his previous home. There would have been a sufficient nexus between the defendant's suspected possession of child pornography and his residence supporting the warrant. *See Haymond*, 672 F.3d at 959. The fact that Mr. Kilgore moved does not change that analysis. As the Tenth Circuit has explained:

> The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases. Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence. This proposition is not novel in either state or federal court: pedophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time.

*Perrine*, 518 F.3d at 1206 (quoting *United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005)). The issuing judge could reasonably infer that Mr. Kilgore possessed child pornography on his personal computer at his previous residence and maintained that material on his personal computer when he moved. *See Biglow*, 562 F.3d at 1279 ("[A] sufficient nexus is established once an affidavit describes circumstances which would warrant a person of reasonable caution in the belief that the articles sought are at a particular place." (internal citations and quotation marks omitted)).

*B. Staleness*

The court next turns to defendant's argument that the facts in the affidavit are stale. The affiant reported images "of child exploitation" were uploaded on June 27 and July 9, 2019 from an IP address linked to the defendant. [Doc. 20-1, p. 1]. The search warrant was obtained 182 days later. [*Id.*, p. 2].

In *Perrine*, the Tenth Circuit concluded information in the affidavit, describing a chat conversation that happened 111 days prior, was not stale. 518 F.3d at 1205. The Court noted "[w]hether information is stale depends on 'the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Id.* at 1205-06 (quoting *Riccardi*, 405 F.3d at 860). In the context of child pornography cases, the Tenth Circuit has "endorsed the view that possessors of child pornography are likely to hoard their materials and maintain them for significant periods of time." *Potts*, 586 F.3d at 830 (citing *Riccardi*, 405 F.3d at 861). Accordingly, a 111-day delay did not render factual information stale. *Perrine*, 518 F.3d at 1206; *accord Haymond*, 672 F.3d at 959 (107-day-old information was not stale in child pornography case). This is not to say that no amount of time would render information stale in a child pornography case. For example, defendant cites to cases holding three and four-year old evidence of possession of child pornography was stale. [Doc. 20, p. 7]. Here, however, the information was only six months old. Under these circumstances, the court sees no reason to depart from the rationale and result reached by the Tenth Circuit in *Perrine* and *Haymond*. The information was not stale.

Defendant cites a Third Circuit case which might seem to dictate a different result. Defendant contends *United States v. Zimmerman*, 277 F.3d 426 (3d Cir. 2002), stands for the proposition that "evidence that informants viewed child pornography at a suspect's house six months earlier [was] too stale to support probable cause." [Doc. 20, p. 7]. However, defendant mischaracterizes that case. In *Zimmerman*, "[t]he affidavit only aver[red] that six and at least ten

months earlier [the defendant] had one piece of *adult* pornography and there [was] no indication whatsoever that he continuously acquired or planned to acquire any other pornography." 277 F.3d at 434 (emphasis added). In its staleness analysis, the Third Circuit distinguished the possession of *adult* pornography from the possession of child pornography. "Presumably individuals will protect and retain child pornography for long periods of time because it is illegal and difficult to obtain." *Id.* In contrast, "the only piece of pornography that [the defendant] allegedly possessed was, in all likelihood, legal and quite easy to obtain." *Id.* at 435. The distinction in *Zimmerman* supports the court's conclusion here.

Defendant also notes that "the prior conviction cited to in the affidavit does not include a date to even judge whether it is stale." [Doc. 20, p. 7]. The government argues that "Kilgore's conviction was directly related to the suspected criminal activity, and was properly considered under the totality of the circumstances. So, the date of conviction was irrelevant to a finding of probable cause." [Doc. 21, p. 12]. The government cites no case law for this proposition.

In *United States v. Roach*, the Tenth Circuit considered whether an April 2007 affidavit failed to establish probable cause because it relied on outdated and stale evidence of the defendant's connection to the Crips gang. 582 F.3d 1192 (10th Cir. 2009). There, the affidavit stated the defendant was arrested in July 2005 for "unspecified crimes," admitted to living a gang "lifestyle" during a November 2005 traffic stop, was arrested for domestic violence in February 2006, and "was seen in the company of another Crip" in June 2006. *Id.* at 1197. "Based solely on these summaries, the affidavit conclude[d] that there was probable cause to believe, in April 2007, that items related to drug trafficking by the Crips would be found at [the defendant's] residence." *Id.* at 1198. The Tenth Circuit noted "whether information is too stale to establish probable cause depends on the nature of the criminal activity, the length of the activity, and the nature of the

property to be seized." *Id.* at 1201 (quoting *United States v. Mathis*, 357 F.3d 1200, 1206-07 (10th Cir. 2004)).

Applying those factors in *Roach*, the Tenth Circuit concluded the affidavit failed to set forth probable cause. "[T]he most recent indication of gang-related criminal activity was some *five years* before the issuance of the warrant." *Id.* (noting the unspecified 2005 arrest and 2006 domestic violence arrest could not be considered evidence of gang-related crimes). The government argued that the defendant's 2005 statement that he lived a gang "lifestyle" effectively corroborated or refreshed the allegedly stale information. *Id.* The Tenth Circuit explained "it would stretch this rule beyond its breaking point to conclude that an isolated statement, occurring one and half years before issuance of the warrant, is evidence that a prior course of criminal conduct is ongoing." *Id.* at 1202. This is particularly so considering that a firearm and drug trafficking are not the sorts of crimes whose evidence is likely to remain stationary for years at a time." *Id.* (comparing *Roach* to *Perrine*, 518 F.3d at 1206, which "explain[ed] that child pornography is particularly likely to remain in the owner's possession for long periods of time).

In this case, the omission the date of Mr. Kilgore's previous child pornography conviction is not fatal to probable cause. The crime at issue here involves child exploitation/pornography. The Tenth Circuit has repeatedly emphasized that child pornography collectors "maintain their materials for significant periods of time." *Perrine*, 518 F.3d at 1206 (quoting *Riccardi*, 405 F.3d at 861). In *Perrine*, the defendant had previously been convicted "in Kansas state court of exploitation of a child." 518 F.3d at 1205. The specific date of that conviction is not listed, but the defendant "was still on probation for that offense" and "involved [the defendant] sending images of child pornography." *Id.* Given the nature of the crime and the evidence sought here, the issuing judge had a substantial basis for determining probable cause existed based on

information that Mr. Kilgore uploaded two known images of child exploitation and his prior, though undated, conviction involving child pornography.

*C. "Child Exploitation"*

Finally, defendant argues "[t]he fact that the term 'child pornography' was not used to describe the two images is an indication that the images were not child pornography." [Doc. 20, p. 6]. The affidavit describes the images, not as child pornography, but as being "of child exploitation." [Doc. 20-1, p. 1]. Defendant argues that uploading images of "child exploitation," as opposed to "child pornography," is insufficient to establish probable cause.

In support, the defendant points to *United States v. Edwards*, 813 F.3d 953 (10th Cir. 2015). In *Edwards*, "the magistrate judge issued the warrant based on Mr. Edwards's possession and sharing of child erotica, the law-enforcement officer affiant's opinion that people who possess child pornography are also likely to possess child erotica, and Mr. Edwards's sexually suggestive comments about the child in the photograph." *Id.* at 960. The affidavit supporting the search warrant defined "child erotica" as materials or items that are sexually arousing to persons having a sexual interest in minors but that are not, in and of themselves, obscene or that do not necessarily depict minors in sexually explicit poses or positions." *Id.* at 958. "[T]he search warrant affidavit here provided evidence only that Mr. Edwards possessed legal *child erotica*." *Id.* at 961 (emphasis in original); *see also id.* at 963 ("There was no uncertainty here regarding the content of the images Mr. Edwards had posted, and the Government concedes they constituted legal child erotica."). The Tenth Circuit declined to decide "whether possession of child erotica alone could ever be enough to establish probable cause that an individual possesses child pornography." *Id.* at 963 (citing *United States v. Hansel*, 524 F.3d 841, 846 n. 3 (8th Cir. 2008)). Instead, the Tenth Circuit considered whether, under the totality of the unique circumstances in [that] case, the affidavit

established probable cause to believe child pornography would be found at Mr. Edwards's home." *Id.* at 963-64.

To that end, the Tenth Circuit discussed whether additional facts, combined with the defendant's possession of child erotica, established probable cause. The Court concluded that neither the affiant's opinion that people who possess child pornography are also likely to possess child erotica nor Mr. Edwards's sexually suggestive comments created probable cause. The Court noted that "courts are reluctant to presume that persons are inclined to engage in certain illegal activity based on having engaged in a particular legal activity." *Id.* at 964. (citation omitted). Moreover, "[e]ven when the pedophilic tendencies of the defendant have led to sexual offenses against children, courts have not automatically equated that activity with the possession of child pornography." *Id.* at 968. "It is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely composed of, members of group A." *Id.* (quoting *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (Sotomayor, J.)). The Tenth Circuit held the affidavit failed to provide probable cause that child pornography would be found at Mr. Edwards's home. Nonetheless, the Tenth Circuit affirmed the lower court's denial of the motion to suppress due to the officers' good faith reliance on the warrant. *Id.* at 973.

*Edwards* is distinguishable. First, it is not clear from the affidavit here that the images were legal or that they would not constitute child pornography. Child pornography is a form of child sexual exploitation and the terms "pornography" and "exploitation" are used interchangeably. For example, chapter 110 of title 18 of the United States Code is titled "Sexual *Exploitation* and Other Abuse of Children." The question here is whether, under the totality of the circumstances in this case, the affidavit provided sufficient facts, including the uploading of

"known image[s] of child exploitation," to establish probable cause to believe child pornography would be found at Mr. Kilgore's home.

*Edwards* is also distinguishable because there was no indication Mr. Edwards had previously engaged in illegal conduct related to child pornography. He posted "hundreds of images of child erotica . . . . [a]nd his responses to the comments made by other users about the images suggested he is sexually attracted to children." *Edwards*, 813 F.3d at 964. "Although this behavior is disturbing, the Government admits it does not constitute illegal conduct." *Id.* Here, in contrast, the affidavit informed the issuing judge that the defendant "had previously been convicted of Procuring, Producing, Distributing, or Possessing Child Pornography, Lewd or Lascivious Exhibition Victim Under 16 Years Old and Sending Minor Harmful Info." [Doc. 20-1, p. 2]. Thus, the inferential fallacy in *Edwards* is not present here: the defendant's past *illegal* activity related to *child pornography* could lead the issuing judge to reasonably infer the defendant possessed child pornography.

This case is more similar to *Perrine*, 518 F.3d 1196. There, the affidavit provided the following facts: Username "stevedragonslayer" invited another Yahoo! Messaging Chat user to view his webcam. Through the webcam, "stevedragonslayer" presented images of a young female engaged in oral sex and two young females walking around in a bathroom unclothed. *Id.* at 1203. Information from Yahoo! and Cox identified the defendant as "stevedragonslayer" and further investigation revealed the defendant "had been previously convicted in Kansas state court of exploitation of a child, was still on probation for that offense, and that the prior case involved [the defendant] sending images of child pornography and showing videos containing child pornography via Yahoo! Messenger using a web cam." *Id.* at 1205. The Tenth Circuit concluded "[t]he affidavits gave the issuing judge a substantial basis for concluding that a search would uncover

evidence of wrongdoing." *Id.* at 1206 (quoting *Illinois v. Gates*, 462 U.S. at 236) (alterations omitted). The defendant's prior conviction for child pornography here, coupled with the distinction in the description of the images, separates this case from *Edwards* and establishes a substantial basis for concluding child pornography would be found at the defendant's home. *See United States v. Artez*, 389 F.3d 1106, 1114 (10th Cir. 2004) ("[C]riminal history, combined with other factors, can support a finding of reasonable suspicion or probable cause.").

*D. Good Faith Exception*

Even if the warrant was not supported by probable cause, the good-faith exception to the exclusionary rule would apply. As the Tenth Circuit explained in *Edwards*:

> Under the good-faith exception to the exclusionary rule, if a warrant is not supported by probable cause, the evidence seized pursuant to the warrant need not be suppressed if the executing officer acted with an objective good-faith belief that the warrant was properly issued by a neutral magistrate. When officers rely on a warrant, [courts] presume they acted in objective good faith. This is because '[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.' As the Supreme Court . . . explained in *Leon,* '[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.'
>
> But the presumption of good faith is not absolute. Rather, an officer's reliance on a warrant is not reasonable in four situations: (1) when the issuing magistrate was misled by an affidavit containing false information or information that the affiant would have known was false if not for his reckless disregard of the truth; (2) when the issuing magistrate wholly abandon[s her] judicial role; (3) when the affidavit in support of the warrant is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officer could not reasonably believe it was valid.

813 F.3d at 970 (internal citations omitted). It appears the defendant believes the third situation is applicable here—that the affidavit in support of the warrant is so lacking in indicia of probable cause that it would be entirely unreasonable to rely on it. [*See* Doc. 23, p. 4 ("Because the affidavit does not provide a minimally sufficient nexus between the illegal activity and the place to be searched, the 'good faith exception' does not apply.")]. The question, then, is whether the issuing judge "so obviously erred that any reasonable officer would have recognized the error." *Edwards*, 813 F.3d at 972 (citation omitted).

The issuing judge's determination that a fair probability existed that child pornography would be found in Mr. Kilgore's home was based on two images of "child exploitation" he posted online and that he had previously been convicted of a child pornography crime. The difference in wording between "child exploitation" and "child pornography" does not render reliance on the warrant objectively unreasonable. Indeed, it is reasonable to read the terms as synonymous. *See* 18 U.S.C. § 2251 ("Sexual exploitation of children"). The officers executing the search warrant were entitled to rely on the issuing judge's legal determination that probable cause existed to search Mr. Kilgore's residence for child pornography. The good-faith exception applies.[1]

## IV. Conclusion

WHEREFORE, the defendant's Motion to Suppress [Doc. 20] is DENIED.

IT IS SO ORDERED this 24th day of February, 2020.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

[1] Because the court finds there was probable cause to support the warrant, or, in the alternative, the good-faith exception applies, there is no need for the court to consider the government's argument that defendant "is not entitled to having his statements suppressed" because he "fails to demonstrate a factual nexus between his statements and the search." [Doc. 21, pp. 14-15].