

No.

IN THE SUPREME COURT OF THE UNITED STATES

CORY WAYNE KILGORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

The Petitioner claimed on appeal that his Fourth Amendment rights were violated. The question presented is:

Did the Tenth Circuit, on review of the denial of Petitioner's motion to suppress, err in holding that the search warrant affidavit provided adequate basis for probable cause to believe evidence of child pornography would be found at Petitioner's new address when the affidavit merely described the subject images as "child exploitation," and relied on an undated prior conviction for child pornography, and did not explain the connection between the suspected criminal activity at Mr. Kilgore's old address and his new address?

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ATTACHMENTS:

EXHIBIT 1: *United States v. Kilgore*,
856 F. App'x 783 (10th Cir. 2021) (unpublished)

EXHIBIT 2: Judgment and Commitment (United States District Court)

EXHIBIT 3: Order Denying Motion to Suppress
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PREVIOUS OPINIONS AND ORDERS

In *United States v. Kilgore*, 856 F. App'x 783 (10th Cir. 2021) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment wherein Cory Wayne Kilgore, the Petitioner herein, was the Appellant. *See* Attachment 1. This Petition seeks a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment denied Mr. Kilgore's appeal of a Judgment and Commitment and an Order denying his motion to suppress that were filed in the United States District Court for the Northern District of Oklahoma, in *United States v. Cory Kilgore*, Case No. 20-CR-00015-GKF. *See* Attachments 2 & 3.

JURISDICTION

The Tenth Circuit reviewed the Judgment and Commitment under the authority of 28 U.S.C. § 1291. On May 21, 2021, the Tenth Circuit filed the Order and Judgment now presented for review. *See* Attachment 1. Neither party filed a motion for rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), which permits a writ of certiorari to be “granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.” Mr. Kilgore was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISIONS

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

18 U.S.C. § 2252:

(a) Any person who—

(2) knowingly received or distributed any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

(b) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

STATEMENT OF THE CASE

1. District Court Proceedings

A federal grand jury in the Northern District of Oklahoma charged Mr. Kilgore with one count of knowingly distributing and receiving child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1). Mr. Kilgore moved to suppress evidence obtained during a search of his house, which the district court denied. *Attachment 3*. Mr. Kilgore thereafter entered into a conditional plea agreement to plead guilty to one count of distribution and receipt of a visual depiction of a minor engaged in sexually explicit conduct. The plea agreement permitted Mr. Kilgore to appeal the district court's denial of his motion to suppress. The district court sentenced Mr. Kilgore to fifteen years in custody and a life term of supervised release.

On July 7, 2020, Detective Jessica Dennigs of the Tulsa Police Department filed an affidavit for a search warrant to search Mr. Kilgore's residence for evidence related to the distribution of child pornography. The search warrant affidavit stated that on June 27, 2019, and July 9, 2019, an individual uploaded "a known image of child exploitation to the Kik application from IP address 72.192.86.183." Kik reported the images to law enforcement, which triggered the

investigation. The affidavit further indicated that “PhotoDNA” technology was used to identify the images as images of “child exploitation.”

Law enforcement connected the IP address to Mr. Kilgore at an address located in Owasso, Oklahoma. Mr. Kilgore was a registered sex offender whose undated prior conviction involved child pornography. An examination of the sex offender registry indicated that Mr. Kilgore had last registered himself as residing at the address in question in July 2019. As of September 2019, he registered his residence at a new address in Owasso, Oklahoma. Law enforcement sought a warrant to search this new address for evidence of criminal activity suspected to have occurred at the prior address.

Mr. Kilgore challenged the sufficiency of the affidavit to provide probable cause of any criminal activity and to establish a nexus between the alleged criminal activity and the place to be searched. The district court denied that motion. It first concluded that there was a sufficient nexus between the suspected criminal activity and Mr. Kilgore’s new residence because child pornographers tend to hoard their collections and are likely to keep them even when moving from one residence to another. This hoarding rationale also led to the district court’s conclusion that Mr. Kilgore’s prior, undated conviction supported a finding of probable cause, as did the events giving rise to the search warrant, the sharing of

two images of “child exploitation.” The district court also rejected Mr. Kilgore’s argument that the search warrant affidavit’s use of the term “child exploitation” did not provide probable cause to believe Mr. Kilgore possessed child pornography. The district court reasoned that when the affidavit referred to images of “child exploitation,” it naturally meant images of child pornography. Moreover, it determined that Mr. Kilgore’s criminal history supported the inference that images of “child exploitation” should be interpreted to mean images of child pornography. Finally, the district court held that the good faith exception to the exclusionary rule would apply even if the use of the term “child exploitation” was improper because an officer could reasonably believe that the issuing judge determined that the term meant child pornography.

2. Tenth Circuit Appeal

Mr. Kilgore filed an appeal in the Tenth Circuit. On May 21, 2021, the court affirmed the district court’s order denying Mr. Kilgore’s motion to suppress evidence in *United States v. Kilgore*, 856 F. App’x 783 (10th Cir. 2021) (unpublished). The deciding panel held that the district court did not clearly err in finding that the term “child exploitation” was synonymous with “child pornography” for the purpose of a search warrant affidavit seeking evidence of child pornography in Mr. Kilgore’s home because doing so would require

interpreting the affidavit is a “hypertechnical, rather than a commonsense, manner.” *Id.* at 785, *quoting United States v. Barajas*, 710 F.3d 1102, 1109 (10th Cir. 2013). It further concluded that Mr. Kilgore’s history as a sex offender who possessed child pornography, combined with the fact that images of child exploitation were connected to his IP address, established the necessary probable cause for a search warrant of his home. *Id.* Mr. Kilgore argued that his undated conviction for child pornography could not support probable cause because the conviction may have been too stale, but the panel rejected that argument with citation to its own precedent. *Id.* at 785 n.4, *citing United States v. Perrine*, 518 F.3d 1196, 1205–06 (10th Cir. 2008). The panel adopted the district court’s reasoning concerning whether there was a sufficient nexus between the suspected criminal activity and Mr. Kilgore’s new residence. *Id.* at 785. It noted that child pornographers tend to hoard their collections “in the privacy of their homes.” *Id.* Thus, because Mr. Kilgore “possessed child pornography on his personal computer at his previous residence,” it was reasonable to conclude that he likely maintained his collection on his personal computer at his new residence. *Id.*

REASON FOR GRANTING A WRIT

Certiorari is appropriate when “a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]” S. Ct. R. 10(c). The decision submitted for review is an important question of federal law that should be settled by this Court, because the Tenth Circuit erred in finding that the search warrant was supported by probable cause. As the Petitioner herein, Mr. Kilgore seeks a ruling that references to images of mere “child exploitation” do not reasonably support a conclusion that images of child pornography are in a person’s possession. Moreover, Mr. Kilgore asks this Court to rule that undated prior convictions for child pornography cannot serve to bolster a finding a probable cause because a neutral magistrate cannot determine if they are too stale. Finally, Mr. Kilgore seeks a ruling that suspected criminal wrongdoing at a prior address does not create an adequate nexus to search a new address.

In the Tenth Circuit appeal, Mr. Kilgore challenged the affidavit’s sufficiency to support a finding of probable cause. Yet the panel rejected those arguments, holding that it was reasonable for the district court to conclude that the terms “child exploitation” and “child pornography” were interchangeable, that an undated prior conviction can be used to support a finding of probable cause,

and that it was reasonable to believe that Mr. Kilgore possessed child pornography at his new address because he distributed images of “child exploitation” at his old address.

An affidavit must provide a substantial basis to conclude that “there is a fair probability that contraband or evidence of a crime will be found at a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983). Further, review of a search warrant for probable cause is limited to the four corners of the affidavit because that is the information made available to the neutral magistrate. *See, e.g., Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964) (“It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate’s attention.”). The affidavit in this case did not meet that standard. The affidavit described images of “child exploitation” having been sent from an IP address associated with Mr. Kilgore’s old address, and it relied on a potentially stale conviction to bolster its position.

First, images of “child exploitation” are not necessarily illegal. For example, the Oxford English Dictionary defines “exploitation” to mean, *inter alia*, “[t]he action or fact of taking advantage of something or someone in an unfair or unethical manner; utilization of something for one’s own ends.” Another dictionary defines “child exploitation” as “using a minor child for profit, power,

status, sexual gratification, or some other purpose.” *See* legaldictionary.net. Under either of these definitions, images of “child exploitation” could refer to images posted by social media “influencers” of their small children to elicit views and obtain sponsorship opportunities, YouTube content creators who feature their children in videos, or even parents posting pictures of their children on Facebook to brag to their friends about a child’s accomplishments. None of which is illegal activity. Moreover, the affiant was a Detective for the Tulsa Police Department’s Cyber Crimes Unit. She was almost certainly trained to investigate child pornography crimes, yet she intentionally chose to use the term “child exploitation” instead of child pornography. It is not reasonable to assume that the affiant intended for the terms to be interchangeable, especially when courts have held that “child erotica” should not be views as synonymous with child pornography. *See United States v. Edwards*, 813 F.3d 953, 963 (10th Cir. 2015). “Courts are reluctant to presume that persons are inclined to engage in illegal activity based on having engaged in a particular legal activity.” *Id.*, *citing Jacobson v. United States*, 503 U.S. 540, 551, 554 (1992). Here, the affidavit described ostensibly legal activities because it did not state the nature of the images with adequate particularity. It was inappropriate for the district court and the Tenth Circuit to read a new meaning into the term used when the affiant could

easily have said the images were of “child pornography” if that is what she meant. These assumptions also deviated from the four corners of the affidavit. The affidavit did not explain that the term “child exploitation” meant child pornography; the district court made that determination on its own, assuming that the images were identified as part of a government database on child pornography. The Tenth Circuit affirming such reasoning was erroneous.

Second, the Tenth Circuit erred in affirming the district court’s determination that an undated sex offense conviction could bolster a finding of probable cause. It is impossible to say, based on the affidavit, whether the conviction was five years old or thirty years old. And it is obvious that an older conviction is less likely to support a finding of probable cause than a recent one. *See United States v. Falso*, 544 F. 3d 110, 122 (2d Cir. 2008) (Sotomayor, J.) (holding that an eighteen year old conviction for sexual contact with a minor was too stale to find probable cause for a search warrant).

Finally, the affidavit did not establish a nexus between the suspected criminal activity and Mr. Kilgore’s new residence. The affidavit made no effort to connect the activity at Mr. Kilgore’s prior residence to his new residence. It did not even use basic boilerplate language claiming that possessors of child pornography are likely to maintain their collection and keep it nearby even when

moving from one residence to another. It provided no facts, specific or otherwise, that indicated evidence of child pornography would be found at Mr. Kilgore's new residence. Indeed, it was the courts who injected this reasoning into the affidavit through their analysis. The affidavit did not even indicate whether Mr. Kilgore had internet access at his new residence or computer equipment that the courts believed would be used to store child pornography. Notably, the Tenth Circuit concluded—with no basis for doing so—that Mr. Kilgore “possessed child pornography on his personal computer at his previous residence.” *Kilgore*, 856 F. App'x at 785. The affidavit provided no such conclusion, and “Kik” is an application typically associated with smartphones. Thus, the Tenth Circuit's analysis not only deviated from the four corners of the affidavit, but it relied on an inaccurate understanding of where the subject images were likely stored. Stated simply, there was no reason to believe that evidence of child pornography would be found at Mr. Kilgore's new address based on purported distribution of images of “child exploitation” at his old address. The Tenth Circuit committed error in affirming the district court's denial of Mr. Kilgore's motion to suppress.

CONCLUSION

Mr. Kilgore requests this Court to grant this petition for certiorari, vacate the Tenth Circuit's Order and Judgment, and remand to the Tenth Circuit with instructions to reconsider the appeal in light of this Court's opinion.

Respectfully submitted,

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