IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONATHAN NELSON,

Petitioner,

vs.

RAY ROBERTS, et al,

Respondents.

Case No. 15-3083-EFM

MEMORANDUM AND ORDER

In 2010, Petitioner Jonathan Nelson was convicted of one count of sexual exploitation of a child in violation of K.S.A. § 21-3516(a)(2) because he possessed sexually explicit images of children. He was sentenced to 32 months' incarceration, and is now subject to post-release supervision. Nelson petitions this Court to issue a writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 1). He argues that K.S.A. § 21-3516(a)(2) is unconstitutional as applied to him because it lacked a scienter requirement. He also argues that the images he possessed are protected by the First Amendment because they are not sexually explicit. In response, the State of Kansas filed a motion to dismiss (Doc. 19). The State argues that Nelson filed a mixed petition that the Court must dismiss. Having carefully reviewed the record, the Court denies the State's motion to dismiss, and after consideration on the merits, the Court also denies Nelson's petition for a writ of habeas corpus.

I. Factual and Procedural Background

In 2006, Nelson was approached by FBI and KBI agents. They questioned him about his subscription to a website called "Little Virgins." Nelson told the agents that if they inspected his computer, they would "find some questionable images." He admitted that he was sexually aroused by children—specifically female girls between 12 and 15 years old. Nelson's computer was investigated and he was charged with sexual exploitation of a child. After multiple attorneys that were appointed to represent him withdrew, Nelson represented himself. He waived his right to a jury trial and proceeded to a bench trial on stipulated facts. It was stipulated that Nelson had a subscription to "Little Virgins," had downloaded images of children between the ages of 5 and 15, and was sexually attracted to females 12 years of age and older. It was also stipulated that at least 48 of the images from his computer were determined to be of children under 18 years old in sexually suggestive poses. Five photographs recovered from Nelson's computer were also entered into evidence in the trial. After reviewing the stipulated facts and the photographs, the Johnson County District Court found Nelson guilty of one count of sexual exploitation of a child and sentenced him to 32 months' imprisonment.

Nelson directly appealed, arguing that (1) his conviction was not supported by sufficient evidence, and (2) he had not knowingly and voluntarily waived his right to a jury trial. The Kansas Court of Appeals affirmed Nelson's conviction,[1] and the Kansas Supreme Court denied review. Nelson then sought federal habeas relief in this district under 28 U.S.C. § 2254.[2] In that petition—before Judge Crow—Nelson challenged his sentence on the grounds that (1) he had no adequate representation, (2) K.S.A. § 21-3516 is unconstitutional because it lacks a scienter

[1] *State v. Nelson*, 2012 WL 4373003, 285 P.3d 1044 (Kan. Ct. App. 2012) (unpublished table opinion).

[2] At the same time, Nelson was also seeking habeas relief in state court on the same grounds.

requirement, (3) the images were protected speech under the First Amendment, and (4) there was no search warrant or *Miranda* warnings in his case.

The Court determined that Nelson's petition was mixed. That is to say, it contained one claim that Nelson had not yet exhausted in state court (that the photographs were protected speech under the First Amendment). Nelson was given the opportunity to dismiss that claim and proceed only on the exhausted claims, or dismiss the entire petition without prejudice in order to exhaust all of his claims in state court. Nelson chose the latter, and Judge Crow dismissed his petition without prejudice. He has since filed the instant petition without taking further action in state court.

II. Legal Standard

The Court's consideration of a state prisoner's collateral attacks on state criminal proceedings is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which "requires federal courts to give significant deference to state court decisions."[3] The Court can only grant relief to a petitioner's claim that has been decided on the merits in state court if the state decision: (1) was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."[4]

A state court decision is contrary to Supreme Court precedent when: (1) "the state court applies a rule that contradicts the governing law set forth in [a United States Supreme Court case]" or (2) "the state court confronts a set of facts that are materially indistinguishable from a

[3] *Lockett v. Trammel*, 711 F.3d 1218, 1230 (10th Cir. 2013).

[4] 28 U.S.C. § 2254(d)(1) & (2); *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

decision of [the United States Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent."[5] A state court's decision is an unreasonable application of Supreme Court precedent if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of a prisoner's case."[6] Thus, this Court may not issue a writ of habeas corpus simply because it "concludes in its independent judgment the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[7]

III. Analysis

Nelson argues that his sentence is unconstitutional for two reasons. First, he argues that K.S.A. § 21-3516(a)(2) is unconstitutional because it lacks a scienter requirement. Second, he contends that the photographs he possessed were protected speech under the First Amendment. In its response, the State contends that Nelson did not exhaust his First Amendment claim in state court, and thus, his petition is mixed and must be dismissed. The Court will consider the exhaustion argument first.

1. Nelson failed to exhaust his First Amendment claim in State Court, but in the interest of comity and federalism, the Court will dispose of it here because it is meritless.

"In order to obtain federal habeas corpus relief, a state prisoner must first exhaust the remedies available in the state courts."[8] This requirement is satisfied if the issues have been

[5] *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also Bell v. Cone*, 535 U.S. 685, 694 (2002).

[6] *Williams*, 529 U.S. at 413.

[7] *Id.* at 411.

[8] *Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999).

presented to the state's highest court, either on direct appeal or collateral attack.[9] The instant petition marks the second time that Nelson has sought federal habeas relief in this district. In 2014, Nelson sought habeas relief on several grounds. One of those grounds was that the images he possessed were protected speech under the First Amendment. The Court found that Nelson had not exhausted that claim in state court, and Judge Crow dismissed the petition without prejudice so that Nelson could pursue the First Amendment claim in state court. Nelson has now filed this petition without taking any further steps in state court. The State argues, once again, that Nelson cannot raise his First Amendment claim here because he failed to exhaust it in state court. But Nelson claims that he raised this argument in his appeal to the Kansas Court of Appeals and later to the Kansas Supreme Court, who denied review.

In the direct appeal of his conviction in state court, Nelson raised two arguments: (1) the evidence produced at trial was insufficient to sustain a conviction of sexual exploitation of a child; and (2) Nelson failed to knowingly or intelligently waive his right to a jury trial. The insufficient evidence portion of the brief comprised three arguments: (1) the evidence failed to prove that the persons in the photographs were younger than 18 years old, (2) the evidence failed to prove that he possessed the photographs with the intent to arouse sexual desires or appeal to his prurient interests, and (3) the evidence failed to prove that the photographs depicted "sexually explicit conduct." Nelson claims that the "sexually explicit conduct" argument implicitly includes the First Amendment argument he raises here. He is wrong.

Nelson is mistaken because he misunderstands the law. In his direct appeal, through counsel, Nelson was arguing that the photographs in question did not meet Kansas' statutory

[9] *Id.* (citing *Denver v. Kan. State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994)).

requirement that they depicted "sexually explicit conduct." In doing so, Nelson cited a United States Supreme Court decision in arguing whether the photographs were in fact sexually explicit. That case addressed whether regular pornography (featuring adults) was protected by the First Amendment.[10] But Nelson never specifically argued that the images were protected by the First Amendment in his direct appeal. He only argued that the images were not sexually explicit as understood in K.S.A § 21-3516(a)(2).

Nelson now contends that a First Amendment claim is implicit in his original argument that the photographs were not sexually explicit because if an image is not explicit, then it is protected by the First Amendment. This argument represents a misunderstanding of the law. True, regular pornography can generally only be banned if it is obscene.[11] However, "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children."[12] In other words, child pornography can be regulated much more strictly than regular pornography. The state can criminalize any works that visually depict sexual conduct by children below a specified age.[13] And for good reason: "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[14]

Therefore, because Nelson had photographs of children, whether or not the photos were sexually explicit is not determinative of whether they are protected by the First Amendment. When dealing with children, "it is not required that sexual conduct portrayed be done so in a

[10] *See Miller v. California*, 413 U.S. 15 (1973)

[11] *Id.*

[12] *New York v. Ferber*, 458 U.S. 747, 756 (1982).

[13] *Id.* at 764.

[14] *Id.* at 757.

patently offensive manner."[15] In his direct appeal in state court, Nelson was not arguing that the images were protected by the First Amendment; he was only arguing that they did not satisfy an element of the applicable Kansas statute. And the Kansas Court of Appeals found that the images were pornographic, and thus, violated Kansas law. But the Kansas Court of Appeals did not consider whether or not that law violated the First Amendment, because Nelson did not raise that argument. Therefore, Nelson has not exhausted his First Amendment claim. Once again, Nelson has filed a mixed petition.

Normally, when a petitioner files a mixed petition, the Court must dismiss the petition and give the petitioner the choice of either returning to state court to exhaust his claims or amending and resubmitting the habeas petition to present only the exhausted claims to the Court.[16] But in the interest of comity and federalism, it is sometimes appropriate for the Court to address the merits of a habeas petition, notwithstanding the failure to exhaust available state remedies.[17] Where the Court is convinced that an argument has no merit, "a belated application of the exhaustion rule might simply require useless litigation in the state courts."[18] Accordingly, the Court will decide the entirety of Nelson's petition here. In the interest of comity and judicial economy, this Court will dispose of the repugnant suggestion that child pornography is protected under the First Amendment without first requiring the Kansas Courts to do the same. Therefore, although the State is correct that Nelson's petition is mixed, the Court denies the State's motion

[15] *Id.* at 764.

[16] *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

[17] *Hoxsie v. Kerby*, 108 F.3d 1239, 1242 (10th Cir. 1997).

[18] *Id.* at 1243 (citing *Granberry v. Greer*, 481 U.S. 129, 133 (1987).

to dismiss. The Court will instead construe the State's response as an answer and decide Nelson's petition on the merits.

The law is well settled: child pornography is not protected by the First Amendment.[19] A state may prohibit any material involving a child and depicting sexual conduct.[20] This is because states have a compelling interest in safeguarding the physical and psychological well-being of minors, destroying the market for child pornography, and preventing the re-victimization of abused and exploited children.[21] The materials may be prohibited even if they would not appeal to the prurient interest of the average person or if they are not patently offensive.[22] Therefore, Nelson's argument that the photographs he possessed are not explicit is irrelevant. Both the Johnson County District Court and the Kansas Court of Appeals found that Nelson's photographs were child pornography, and as such, they are not protected by the First Amendment.

Nelson makes dubious comparisons in support of his argument that the photographs he possessed are protected materials. He mentions parents and their children who grow up in nudist colonies and children going through a phase of preferring to be naked. But Nelson's conviction has nothing to do with these hypothetical, innocent situations. Nelson was convicted of sexual exploitation of a child because he downloaded naked pictures of young girls from a website called "Little Virgins." There is nothing innocent about this conduct. There is nothing protected

[19] *Ferber*, 458 U.S. at 764.

[20] *Id.*

[21] *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *Ferber*, 458 U.S. at 756, 760-62.

[22] *Ferber*, 458 U.S. at 764.

about this conduct. And frankly, the Court is disturbed by any of Nelson's arguments to the contrary.[23]

2. The State satisfied its requirement of demonstrating scienter because Nelson knew what he was doing when he downloaded child pornography.

Nelson contends that K.S.A. § 21-3516(a)(2) is unconstitutional as applied because it lacks a scienter requirement. His meandering scienter argument is difficult to follow, but boils down to this: Nelson asserts that he cannot be held criminally liable because he "genuinely did not think the images were illegal because there isn't anything sexual going on in the images." And he claims that the state failed to prove that he had an awareness of the sexually explicit nature of the photographs.

At the outset, the Court would note that Nelson also failed to exhaust this particular claim in state court. While he did assert a scienter argument in the Kansas Court of Appeals, that argument related to scienter regarding the actual age of the girls in the photographs. Here, for the first time, Nelson is actually arguing that his sentence is unconstitutional because he did not think the images were explicit. Once again, the Court could simply dismiss Nelson petition for failure to exhaust his state court remedies. However, this is another odious, meritless claim that the Court will dispose of here to spare additional, useless litigation in state court.

Nelson seems to be relying on *New York v. Ferber*, which states that child pornography laws cannot impose criminal liability "without some element of scienter on the part of the defendant."[24] Scienter is "[a] degree of knowledge that makes a person legally responsible for

[23] Nelson should rid himself of the notion that such photographs are generally—or ever—acceptable. The Supreme Court has made clear that it "consider[s] it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Ferber*, 458 U.S. at 762-63.

[24] *Id.* at 765.

the consequences of his or her act or omission. The fact of an act's having been done knowingly."[25] Thus, Nelson cannot be held criminally liable unless he committed the prohibited act knowingly. Nelson takes this to mean that because he did not think the images he downloaded were sexually explicit, he cannot be held liable for possessing them. Again, he is wrong.

Here, Nelson was convicted under K.S.A. § 21-3516(a)(2),[26] which prohibited an individual from "possessing any visual depiction, including any photograph . . . where such visual depiction of a child under 18 years of age is shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child, or another." The fact that the statute does not specify any required mental state—such as knowingly—does not mean that none exists.[27] Courts will generally interpret "criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[28] This is because it is understood that "wrongdoing must be conscious to be criminal."[29] Thus, even though K.S.A. § 21-3516(a)(2) does not contain an explicit scienter requirement, it is clear from *Ferber* that there must be an element of scienter for Nelson to be held criminally liable.[30]

[25] *Scienter*, Black's Law Dictionary (10th ed. 2014).

[26] Since Nelson's conviction, K.S.A. § 21-3516 has been repealed and replaced by K.S.A. §21-5510.

[27] *Elonis v. United States*, --- U.S. ---, 135 S. Ct. 2001, 2009 (2015).

[28] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994).

[29] *Morissette v. United States*, 342 U.S. 246, 252 (1952).

[30] *Ferber*, 458 U.S. at 765.

In this regard, Nelson declares that he is innocent. He argues that because he did not consider the materials explicit, it is impossible that he knowingly possessed explicit materials. This argument is misplaced. The statute's definition of "sexually explicit conduct" included exhibition in the nude as well as the lewd exhibition of genitals, female breasts, or the pubic area of any person. The Kansas Court of Appeals has defined "exhibition in the nude" as more than mere nudity, but rather, the act of showing or presenting for public view.[31] In his own petition, Nelson admits that "[t]he images are of girls facing a camera, that is true. They are subjects of an intentional photograph." He goes on to admit in his petition that "there were 200 images downloaded. All of them were of nude, underage girls. The genitalia was present in all photographs." And the stipulated facts at trial stated that Nelson's photographs were of girls in sexually suggestive positions. It is clear that Nelson possessed photographs that depicted exhibitions in the nude featuring young children. An exhibition in the nude is sexually explicit conduct as understood in K.S.A. § 21-3516(a)(2). Thus, by knowingly downloading these pictures, Nelson was knowingly downloading sexually explicit materials as understood under Kansas law. The law, and not Nelson, gets to define what materials are and are not sexually explicit.

Still, Nelson argues that he should not be held accountable because he thought that the pictures were legal due to a legal disclaimer on the website and the fact that certain forms of nudity are legal. But his poor judgment in thinking that a website called "Little Virgins" was legally acceptable is irrelevant. As long as a person knows what he is doing, he can be held

[31] *State v. Liebau*, 31 Kan. App. 2d 501, 505, 67 P.3d 156, 159 (2003).

liable for that action whether he knows the conduct is actually illegal or not.[32] Nelson knew he was downloading staged, nude photos of underage girls—that he did not see what was wrong with this is both irrelevant and deeply troubling.[33]

Finally, the Court feels compelled to address Nelson's assertion that "when a person isn't intending to break the law, it is unfair to ruin his life." But it is much more unfair that every day, young children—like those featured on the site "Little Virgins"—have their lives ruined when they are victimized and used as objects in child pornography. As far as injustices go, the law is far more concerned with the latter.

Nelson knowingly downloaded and possessed pictures that, under Kansas law, constituted sexually explicit images of children. Accordingly, the state sufficiently demonstrated the requisite scienter to sustain a conviction under K.S.A. § 21-3516(a)(2). Despite his pleas to the contrary, what Nelson did was wrong. Although he might not have thought his conduct was illegal, he knew what he was doing. His petition for a writ of habeas corpus is denied.

IV. Certificate of Appealability

Rule 11 of the Rules Governing Section 2254 Cases requires the Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Without such a certificate, a petitioner may not appeal the denial of his or her habeas petition. But, "[i]f the court

[32] *Elonis*, 135 S. Ct. at 2009 (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994)) ("This is not to say that a defendant must know his conduct is illegal before he may be found guilty. The familiar maxim 'ignorance of the law is no excuse' typically holds true. Instead, our cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense.' ").

[33] When asked about his computer, Nelson told officers that they would find "some questionable images." Nelson knew what he was downloading from a website called "Little Virgins." And it is disingenuous for him to argue otherwise.

denies a certificate, the [petitioner] may . . . seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22."[34]

Under 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," and the Court "indicates which specific issue or issues satisfy [that] showing." A petitioner can satisfy this standard by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues presented in the petition are "adequate to deserve encouragement to proceed further."[35]

Here, the Court concludes that it should not issue a certificate of appealability. Nothing suggests that the Court's rulings in this case are debatable or incorrect, and no record authority suggests that the Tenth Circuit would resolve this case differently. The Court thus declines to issue a certificate of appealability. In doing so, the Court notes that petitioner may not appeal its denial of a certificate, but he may seek a certificate of appealability from the Tenth Circuit.[36]

IT IS THEREFORE ORDERED that the State's Motion to Dismiss (Doc. 19) is **DENIED.**

[34] Rules Governing Section 2254 Cases, Rule 11(a).

[35] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[36] *See* Rules Governing Section 2254 Cases, Rule 11(a).

IT IS FURTHER ORDERED that Nelson's Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED.** The Court also denies Nelson a COA.

IT IS SO ORDERED.

Dated this 21st day of December, 2016.

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE