

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

JONATHAN NELSON,

*Petitioner,*

vs.

Case No. 15-3083-EFM

RAY ROBERTS, et al,

*Respondents.*

**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.

denies a certificate, the [petitioner] may . . . seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.”<sup>34</sup>

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.”<sup>35</sup>

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.<sup>36</sup>

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

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<sup>34</sup> Rules Governing Section 2254 Cases, Rule 11(a).

<sup>35</sup> *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

<sup>36</sup> 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 21<sup>st</sup> day of December, 2016.



ERIC F. MELGREN  
UNITED STATES DISTRICT JUDGE