No. 18-6939

In the Supreme Court of the United States

Jonathan Nelson

vs.

The State of Kansas, Derek Schmidt (Attorney General of Kansas), and
Ray Roberts (Secretary of Corrections)

On Petition for Certiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Questions

1. Concerning a violation of KSA 21-3516a(2), given that the images' nature was reasonably disputed, does the right to a *de novo* review demand the reversal of conviction *once the images disappear from the record post-conviction* if the verbiage in the record is objectively less explicit than that of Osborne v. Ohio?

2. Given that a COA was granted on First Amendment grounds, was the Tenth Circuit correct to disassociate scienter from the First Amendment?

3. Is KSA 21-3516a(2) (now KSA 21-5510a(2)) unconstitutional for lack of a *de facto* scienter requirement, in general or as applied to the petitioner?

List of Parties

Jonathan Nelson, petitioner

The State of Kansas, respondent

Ray Roberts (as Secretary of Corrections), respondent

Derek Schmidt (as Attorney General of Kansas), respondent

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Opinions Below

This case comes to You by the normal procedure, starting as a state conviction. All the opinions are unpublished—my lawyer did trick me into that at the district level, when this began. I was convicted on February 10, 2010 in Johnson County, Kansas.

From there, I appealed to Kansas' Appeals Court. *Kansas v. Nelson*, No. 106,279, 2012 WL 4373003, at *1 (Kan. Ct. App. Sept. 21, 2012) (per curiam) (unpublished)

From there, a Petition for Review was denied.

Afterwards, I filed a federal habeas at US District Court in Topeka, Kansas. 5:15-CV-03083-EFM is the case number.

After the petition and COA were denied at the District Court, I filed an appeal to the Tenth Circuit Court of Appeals. This occurred on Jan 17, 2017. Tenth Circuit 17-3005 is the case number.

After the COA was granted on June 28, 2017, I filed a Reply, following the State's Response. The petition was denied and the COA was characterized as not encompassing the First Amendment Issue in the July 5, 2018 Judgment by the Tenth Circuit. It is that final Judgment, ultimately, that I am contesting before You, as well as the constitutionality of the statute.

Jurisdiction

As a pro se filer, I ask that the "Opinions Below" logic (above) should determine Your jurisdiction. I am under the impression, based on my reading of the nearby statutes that it is: 28 U.S.C. § 1254(1). If I am mistaken, I beg for leniency as a pro se filer. The proper jurisdiction should be apparent based on the "Opinions Below" section above. This is a case typical of those who started in state court and pursued all state remedies, then pursued a federal habeas, seeking a

remedy from injustice. The Tenth's Judgment was made on 5 July 2018. I am mailing this on 2 October 2018.

Constitutional Provisions and Authority

The First Amendment

Congress shall make no law…abridging the freedom of speech, or of the press…

KSA 21-3516a(2) (Now KSA 21-5510a(2))

> 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

[It is my argument that the statute is an authority because it requires "sexually explicit conduct" while the stipulation of facts characterizes the images as "sexually suggestive poses", thereby diminishing the First Amendment.]

Authorities Related to the Destruction of Evidence

I apologize to the Court, but I was unable to properly research this in the time allotted, as I explain in the following petition's main text. The missing pictures were just discovered by me after reading the Tenth Circuit's Judgment. It came as a shock, to be honest. It is my argument that the verbiage in the case weakens the First Amendment (as well as the scienter issue), but the circumstance of the images missing also invokes basic rules of evidence—and decency, frankly. The concern related to the First Amendment scienter issue may be included by the missing pictures.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Statement of the Case

Fantine's Final Plea

> O Voltaire! O humaneness! O nonsense! There is something about "truth," about the *search* for truth; and when a human being is too human about it—"*il ne cherche le vrai que pour faire le bien*"—I bet he finds nothing.
> (Nietzsche, Beyond Good and Evil—Walter Kaufmann translation)

The French translates "...he seeks the true only to do the good..." I love the all-too-misunderstood Nietzsche like no other. I begin with this quote because not a single judge who judged me respects truth like he did, like I do. Every judge was as guilty as Voltaire is to Nietzsche for the exact same reason.

After reading Justice Sotomayor's concurring dissent in Paroline v. United States (Paroline v United States, 572 U.S._2014, 12-8561) my feelings were truly hurt. The harsh reality is that she would make me an indentured servant for life! I've encountered more dishonesty and wrath than a person should encounter in ten lifetimes, let alone one. Indentured servitude is a new concept that dehumanizes me on a level that I have never read in the legal opinions and decisions to which I've been exposed. For what I did? That is vengeance and advocacy. And she called the other dissent perverse! Vengeance under the guise of justice is a great example of perversity. I'm under no illusions now. I always thought that, of the nine, she would be the one most capable of representing justice for me. It is precisely in cases like mine that justice lies. (Double entendre intended.) Ironically, as a liberal, I disdained Justice Scalia, *until I read him*. I now truly, deeply respect him (especially his oeuvre on search warrants) and deeply fear her. Ironic!

I'm under no illusions concerning my chances of being heard by You. I guesstimate that this type of case is batting 0 out of 1,000 (since 1994, the last time a similar case was taken.) My only hope is that You have seen the gross excesses that my case well represents and it has

concerned You. Based on the aforementioned concurring dissent, I cannot see that as a real possibility. But I make this petition nevertheless—what has happened to my life is egregious in the extreme and it will never end, unless You end it. You truly are my last hope. We live in a time where a certain wisdom is lost, even at Your Highest Court, as evidenced by another High Court, the Tenth Circuit.

Ignoring the rule of law, ostracizing people *unfairly*, and ruining a person's faith in government and his fellow man doesn't protect children—it endangers them. That is wisdom. Every society throughout history that has implemented structured ostracism has, *in the long run*, turned from it. The State of Kansas defines what I did as a "violent sexual offense". I literally sat in front of my computer and clicked a mouse button, while rationally (and reasonably) trying to follow the law, perverted as the act was. The record will show that I have, from day one, been very honest about this being a perverted act and wrong. The consequences of a sex crimes conviction are too stark, too fundamental to not be taken with the seriousness You demand (regarding scienter). It is that understanding that leads me to file this petition. It is happening to far too many people and should be addressed, albeit belatedly.

Victor Hugo says it best:

> He admitted all this—in short, that he had done wrong.
> But then he asked questions.
> Was he the only one at fault in this fateful business? ...And, admitting the offence, had not the punishment been ferocious and outrageous? Was not the law more at fault in the penalty it inflicted than he had been in the crime he committed? Had not the scales of justice been over-weighted on the side of expiation? And did not this weighting of the scales, far from effacing the crime, produce a quite different result, namely, a reversal of the situation, substituting for the original crime...making the criminal a victim and the law his debtor, transferring justice to the side of him who had offended against it? Did not the penalty...become in the end a sort of assault by the stronger on the weaker, a crime committed by society against the individual...?

> He asked himself whether human society had the right to impose upon its members, on the one hand its *mindless improvidence* and, on the other hand, its *merciless providence*...
> He asked these questions and, having answered them, passed judgment on society. He condemned it to his hatred. He held it responsible for what he was undergoing and resolved that, if the chance occurred, he would not hesitate to call it to account. He concluded that there was no true balance between the wrong he had done and the wrong that was inflicted upon him, and that although his punishment might not be technically an injustice it was beyond question an iniquity.
> Anger may be ill-considered and absurd; we may be mistakenly angered; but only when there is some deep-seated reason are we outraged. Jean Valjean was outraged.
> (Victor Hugo, Les Misérables, Norman Denny translation, emphasis added)

And wrath begets more wrath and so on. And their wrath will flourish unabated, unless it is curbed by You. From my perspective, such intemperance is very well weaved into the fabric of justice. No-one can end it, not even You, it can only be mitigated. To ignore this type of case is to allow such unmitigated wrath to flourish. You used to understand that truth. I pray You still do. You used to be wary of obscenity law due to its predictable misapplication and excess. It's easy to stand against me and the crime that I was convicted of, but that doesn't address justice—not by far. Like Jean Valjean (before Bishop Bienvenu redeemed him), I am outraged. The chance of a single Justice having Monsieur Madeleine's (Jean Valjean's) *sense of justice* in this environment is scant, let alone four.

I walk into this knowing that it would take the ghost of Justice William O. Douglas Himself to be heard. He said, "To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." (Miller v. California, 413 U.S. 44, dissent) How such a respectable man knew to use the word "monstrous" eludes me. That sentiment is sadly gone, so I hope his ghost lurks behind every corner in Your Hallowed Halls, and—I truly say this with respect and with tears in

my eyes—I hope it haunts all of You should this case be yet another one, in the past twenty-five years, ignored.

The record below shows that no-one seriously disputes that I *reasonably* believed the images to be legal. The consequences are far too severe not to respect scienter. I am not so unique, this is happening far too often. It is in the quantity of this happening in the status quo, and the passage of 25 years, that I hope this issue *has become* an important federal issue that I beg before You. The laws have become more draconian, the people less forgiving. These are the times that this case comes before You. The scienter issue was resolved incorrectly, but after reading Your, "Guide for Counsel" I understand that it is an established law that wouldn't concern You. How the Tenth disposed of the case, even after the images went missing, is just an "improper finding of fact," I believe is how it would be characterized. So be it, but not without explaining *why* it must be a compelling federal concern. And not without calling their decision what it truly is: unjust and dishonest. Again, the misapplication of law and the improper finding of facts are happening far too often. Predictably so!

So this petition will begin with the one issue that I believe may intrigue you: the missing pictures, the latest ploy thrust upon me. (It has literally been one ploy after another for ten years straight.) Whether it be unduly placing me on lifetime parole[1], falsely arresting me for an entire year, whether a misunderstanding or something more nefarious, harassing any employer who hires me, or getting me kicked out of my home three days after moving in, "the treatment"

[1]Luckily, the only fair person I met through all of this, Shawn Minihan of the Johnson County Prosecutors Office, had the judge remove me from it. (She does whatever prosecutors tell her to do.) It couldn't have been good for his career, he did it out of principle. Principle! This is the only chance I will ever have to be heard by this Great Court. I don't know Mr. Minihan or his politics—his reputation is well-known around town as a fair, honest, and principled man. He truly is guided by the law and a sense of justice...of fairness, the only one I met in the decade this has been going on, defense attorneys included. If any good can come of this, I hope his name circulates amongst important people like Yourselves (obviously including your most-bright, most-accomplished Clerks) and he's given a higher position in society, but that probably only happens in Hugo novels. Our country needs people like him. He is rare.

knows no end. I have seen the worst in human nature, I truly have. With social media, it never will end. Justice Douglas is surely rolling in his grave. Put him to rest, address this treatment finally!

So, *my petition* will be focused on three things: one, the affirmation of my conviction by the Tenth based on the written record (after the images went mysteriously missing) was specious, to say it kindly (Question 1). Two, I fought for 10 years to be honestly heard and I expected the Tenth would demonstrate integrity and honesty. The way they disposed of my granted COA was wrong—scienter's authority is derived from the First Amendment, in this context (Question 2). Three, while scienter may be a well-established law…the constitutionality of KSA 21-3516a(2) is still an important federal question (Question 3). I read Justice Kennedy's concerns about Kansas's civil commitment issue. He said he would be watching them, to keep them honest. Kansas has a particular dishonesty toward anyone *accused* of a sex crime, more so, I think, than other states generally. They are always pushing matters too far, as here.

The Missing Pictures (Question 1)

To be honest, the missing pictures came at the last hour. If Your rules allowed for a motion for an extension of time, I would make it. But they explicitly do not allow it. The more I research Kansas Rules of Evidence, the more convinced I am that I have a strong argument. But I don't even know if it was they who destroyed the pictures! It could have been thrown in the waste basket of US District Judge Melgren's office, for all I know. It truly was just thrown at me. It's unfair, it's unfair as hell and I object.

I know enough to know that I don't know how to write this petition on those grounds. It took me 10 years to be able to write intelligently about the scienter issue. This is an entirely new case law that needs to be researched and 90 days isn't enough for me. A good lawyer could do it, but I've tried and I was utterly confused by it all. I truly don't want to waste Your time by going down an avenue of the law that is irrelevant. Every time I tried to intelligently research it, I would learn afterwards that I was going down the wrong avenue *because* I do not know in which manner the images were disposed. I am convinced that such avenues would prove fruitful, but I don't have the means to travel them.

I believe this Court (for jurisdiction) requires that the record must allow people, in this case the State of Kansas, a chance to respond to the federal question. The record doesn't do that concerning the missing pictures, so You might say that I do not have jurisdiction. That would be very unfair—it sincerely was thrown at me in the last hour. There is no possible way I could have written a single thing about it until now. The missing pictures are everything, to me. So I base my argument on *the effect* the missing pictures impose upon the First Amendment. That, I contend, is an issue about which I clearly have the right to speak.

The Tenth based Their decision on the written record! That's so incredibly unfair. To illustrate the unfairness, please read what the Kansas Appeals Court said about the pictures back in 2012 (Appendix page a36 (page 9 of original), top of page):

> Although the stipulated facts contained the phrase "sexually suggestive" instead of the phrase "sexually explicit," Nelson's argument that his conviction must be reversed based on the stipulated facts is disingenuous *because* the State also entered five photographs into evidence. Therefore, the trier of fact (in this case the court) *could* determine whether the five photographs were sexually explicit and *did not have to rely* merely on the language in the stipulation of facts. *Consequently*, we will *focus* on the

> pictures themselves *instead of the language contained in the stipulation of facts.* (emphasis added in all six instances)

Well, their analysis (of the pictures), I contend was completely unfair, as well. But at least they put on the pretense of needing them. The Tenth didn't even do that!

The Tenth then relies on statements made by the prosecutor outside the stipulated agreement at trial. It really is amazing to me. I was entitled to a de novo review of the pictures themselves. What if the images were protected speech as a *matter of law?* So the Tenth based their decision on the written record—the same written record the Kansas Appeals Court said was insufficient but for the pictures also being admitted. The Kansas Appeals Court needed the pictures. By all that is holy and good, the Kansas Appeals Court cannot be more honorable than the Tenth Circuit!

The Tenth Circuit determined, *de novo*, that the images were sexually explicit without viewing them, diminishing the First Amendment. I can tell the images in Osborne v Ohio, (Osborne v Ohio 495 U. S. 126 footnote 1) are sexually explicit, despite having never seen them (see Reply in Appendix a20-22). The "missing" images in my case are objectively not explicit and therefore *aren't described* as such. Beyond mere error, the First Amendment Itself is weakened. Clarity is needed. The Tenth is right that I didn't argue against some statements made by the prosecutor *when I was under the impression that the pictures would be seen.* Why would I? They were bullshit statements. Anyone who saw them would know it.

I compound my impudent language with impudent imagery—it has purpose: Ploys are constantly used to subvert the truth in the record. The prosecutor talked (at trial, outside the

stipulated agreement) of legs being spread in the pictures. Their legs were spread the same way Your legs are spread as you read this, even if You're standing. Another ploy: there is nothing inherent in the website name "Little Virgins" that would indicate that a reasonable person should know the images were of sexually explicit images of minors. The following remark makes a serious point: Mother Teresa, in full habit, could easily be called a "Little Virgin".

I speak of the Supreme Court's spread legs and equate Mother Teresa to a child erotica website. In so doing, I prove my point: it is a dangerous thing to base evidence on one's imagination. There is nothing explicit in the writing for the Tenth to base their de novo review. If the record had said, "legs spread in a gratuitous manner" then they would have, pardon the pun, a leg to stand on. But I would have contested *that* characterization. Again, these are just things the prosecutor threw out there, they are not in the stipulated agreement for a reason.

The case before you pivoted on the *nature* of the images. The stipulation describes the images as "sexually suggestive poses". So they manipulated the truth by elevating the term to mean "sexually explicit conduct". And that's what all this pivots on. The written record, alone, demonstrates insufficiency. This case is uniquely streamlined, due to the stipulated nature of it. In the unlikely chance that You've been thinking about addressing government excess in obscenity law, this is a great one to take. It is a stipulated agreement, so it's clean in that sense—easily definable. It truly comes down to the wording in the record, at this point, since the pictures went missing. You wouldn't needlessly be exposed to viewing the images in Your consideration. Justice Scalia once said that cases like this one are 'hardly edifying' to the Court, so at least that aspect is avoided. Again, my only hope is that the frequency with which this type of thing occurs, in aggregate, amounts to a case worthy of Your consideration. There is already

excess vengeance baked in, no offense to the #MeToo movement—it could hardly be more extreme.

On Scienter and Where It Derives its Power (Question 2)

The COA Granting Order States:

> This court grants a COA under 28 U.S.C. § 2253(c) on the following issues:
> 1. Whether Mr. Nelson exhausted his First Amendment claim in state court.
>
> 2. Whether Mr. Nelson is entitled to relief under § 2254 on his First Amendment Claim.

The Tenth responded by stating:

> "We also deny a COA on Nelson's second claim asserting he lacked the requisite scienter regarding the sexually explicit nature of the images."

My main argument is in U.S. v X-Citement Video:

> Morissette, reinforced by Staples, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct...Age of minority in 2252 indisputably possesses the same status as an elemental fact because non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment... In the light of these decisions, one would reasonably [UNITED STATES v. X-CITEMENT VIDEO, INC., ___ U.S. ___ (1994) , 9] expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults.

As a pro se filer, I can only say that the way I read it (present tense), the source of scienter is derived from the First Amendment. The Tenth is clearly under the impression that it is not. If they are mistaken, they will do the same to other cases, even if they are unpublished cases. (My lawyer tricked me on not objecting to my case being unpublished, but no matter—

just another ploy). The above quote is the best one I have, but there are others, for example (from the same):

> First, 2252 is not a public welfare offense. Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view.

While the statement itself is simple and straightforward, its implications are profound.

And (in footnote 7) the Tenth continues:

> He maintains that scienter is constitutionally required for a criminal conviction, yet the state failed to prove that he was aware of the sexually explicit nature of the photos. The district court denied this claim on the merits, citing *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015), for the proposition that "[a]s long as a person knows what he is doing, he can be held liable for that action whether he knows the conduct is actually illegal or not." R., Vol. I at 155-56. Nelson fails to show that reasonable jurists would find the district court's assessment of this claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Then why was the COA granted? The COA clearly encompassed the scienter concept. The COA granting document said, "...on his First Amendment claim." Anyone who read what I wrote would know that it was always scienter that was my claim. I'd bet dollars to donuts that were Judge Matheson asked, he would say that scienter was included, but no matter[2]. They (the panel) clearly believed it wasn't encompassed. No dissents...everyone's on board with "the treatment". Maybe it's just another improper application of federal law, but it's so incredibly egregious and commonplace that it merits your consideration.

I did show that it was reasonable that I didn't believe the images were sexually explicit. That's what "as long as a person knows what he is doing..." means, clearly. Again, it is just another ploy in a long line of ploys.

Footnote Continued:

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[2]Since this petition is probably symbolic, I would like to thank Judge Matheson for his COA, on the record. I say with tears in my eyes, it meant everything to me—to know that there is a person who could live such an upstanding, accomplished life, yet still care for someone in my position, *when the law demands it*. I will never forget it and I am eternally grateful, truly and thank you.

> The Supreme Court held in an obscenity case: It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is [not] required . . . by the Constitution. *Hamling v. United States*, 418 U.S. 87, 123-24 (1974). As to Nelson's fairness argument, the Court cautioned: Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, . . . and if he does so it is familiar to the criminal law to make him take the risk. *Id.* at 124 (internal quotation marks omitted). We deny a COA on Nelson's scienter claim.

The Tenth Circuit handled the scienter issue quite unfairly. The only Supreme Court case cited was a 1974 obscenity case, Hamling v. United States (Hamling v United States, 418 U.S. 87, 123-124 (1974)). Hamling does not appreciate the *evolution* of the scienter argument. Hamling involves officers of a corporation who knowingly made an illustrated production of some kind of official report on obscenity itself. So the official report described what obscenity is and then they turned around and made an "illustrated" production. That would clearly be obscene, now wouldn't it? So the fundamental facts are different. Furthermore, even Hamling expresses the following sentiment:

> Construing 18 U.S.C. § 1461 as being limited to the sort of "patently offensive representations or descriptions of that specific hard core' sexual conduct given as examples in Miller v. California, Miller v. California, 413 U.S. 15 (1973) " the statute is not unconstitutionally vague, it being plain that the brochure is a form of hard-core pornography well within the permissibly proscribed depictions described in Miller.

This just simply is not the case, with the case before This Great Court. I'm sophisticated enough to know that the Tenth Circuit was intellectually rubbing my nose in it—Themselves knowing that You aren't concerned with misapplication of well-established law and/or improper fact finding. This "ploy" is an abuse of power. I'll never listen to another judge claim that they are so bound by the "rule of law" again, unless redeemed by You. It is a myth, at least in obscenity law, but it shouldn't be. So Their argument boiled down to "hey guy, you get too close

to the fire, don't complain when you get burned." They quote Hamling, but Hamling is quoting a 1930 case. Again, scienter evolved to US v. X-Citement Video (US v X-Citement Video, 64 (1994)). But I argue Hamling isn't as much on Their side as They claim. The following sentiment is expressed:

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

In fact, the US v. X-Citement Video quote (the Staples quote above) lists Hamling as a supporting case. The Tenth Circuit separates scienter from the First Amendment. They knew exactly what They were doing—rubbing my nose in it, plain and simple. That's not how justice is supposed to work and I object, even if it's a symbolic objection, at this point.

If You say scienter is derived from the First Amendment, as I believe You do, then I was robbed of my COA. More than just a clearly erroneous interpretation of established law, the Tenth literally changed the meaning of words to uphold a conviction and, in so doing, weakened the First Amendment by disassociating the scienter element embedded in It. That transcends *this case* because evidence is reweighed in a manner that could hurt any person in any case, were the same standard applied.

This case is definitely sufficient to show the excesses You once were wary of in obscenity law. In my case, there was unanimity of opinion—no contradictions below, no conflict with other Circuits. Yet they all, every one of them, erroneously applied Your will concerning scienter. The state essentially granted that scienter wasn't there. The Tenth "cleverly" disposed of the scienter issue by saying it wasn't part of the granted COA. With the

exception of the granted COA, there was Orwellian groupthink. That's a better reason to be heard!

8+(7-*a*) judges [2 district court judges and 6 appellate court judges {8} + ({7} Kansas Supreme Court judges - (minus) the number of Kansas Supreme Court judges {*a*} who *might have* voted to hear me, less than 3—the threshold in Kansas tantamount to Your "rule of four"; given: *a* may be zero), i.e. $0 \leq a < 3$] exemplified *Orwellian groupthink*. Possibly 15-0 judges ignored You, despite the law clearly, *in theory*, protecting me. That is a much better reason to be heard! If there were even a single dissent then that would show that the Rule of Law that You established means *something*. Despite the natural, predictable urge to manipulate the law with *personal morality*, the excess demonstrated by this case is simple human nature, given the subject matter.

They, frankly, don't understand the *reason* scienter *should be* respected toward someone who did what I did. It is this Orwellian groupthink that is precisely why You demanded scienter in the first place: to protect those who *reasonably* tried to follow the law! The consequences are far too severe not to respect scienter *in practice*—at least toward those with similar facts to this case. You knew of this phenomenon when You drafted Your framework. Those who could read between Your lines, could feel the palpability of Your concern. And You were right! You were wise enough to be wary of obscenity law, knowing the fundamental nature of its consequences—truly the wisdom of Our Founding Fathers. It is a lost wisdom, and its loss is hurting our nation while endangering children. If there's unanimity of opinion and they all are wrong, that is exactly the type of case You should take—to mitigate the predictable excesses. In short, Your normal favoring of cases whereby there is conflict below is merited because one is right and

another is wrong so the conflict must be resolved; however, to have no conflict, despite the clear misapplication of Your will, is a far more serious concern!

These laws were all drafted after I was born. Society is becoming smarter, but less wise, more intemperate—that is dangerous. It's human-nature for judges to be predictably unreasonable in this case law concerning scienter. Twenty-five years after U.S. v. X-Citement Video is an excellent time to push back on the excesses. It's, frankly, long overdue and it shows in far more cases than the one before You. Yet such cases are ignored with knee jerk regularity. Do the multitude of people whose lives are ruined while honestly trying to follow the law bother *any* of You still? It should bother *all* of You.

On Scienter and Whether KSA 21-3516a(2) is Constitutional (Question 3)

Kansas does not have a scienter trigger word in their statute. Concerning "properly stated law": A scienter trigger word within a statute is not required. Nevertheless, it *should be* ruled facially unconstitutional if scienter isn't respected *in practice*. It is also missing from Kansas' jury instructions. If scienter is being routinely ignored, then it draws into question their absences—the same question the lovelorn recipient of a Dear John letter asks: is she gone but still honors me or is she gone to my dishonor?

The prosecutor encouraged the judge at trial to review the statute and the pattern instructions and the case law that it relates to. Everywhere you look in Kansas, you see that scienter is not an element of the crime of sexual exploitation of a minor. The PIK (Pattern Instructions for Kansas) say nothing concerning scienter with relation to mere possessors. Ironically, the following phrase applies to producers/promoters of such visual depictions, "knowing the character and content of the performances…" This applies to 21-3516a(1), not 21-

3516a(2). Despite them retroactively whitewashing my record to a(1), I was never accused of that more serious crime. Now the local journal entry appears as if I were charged with a(1) all along! It's really quite amazing what they get away with. And I victimized a five-year-old! (According to their ploys.) Again, I say exasperatedly, it is simple human nature to behave the way they are, it's a fundamental psychological phenomenon, hence Your original wariness. I've become wary speaking of Your wariness. But I am confident to say: I know You cared once; I hope You still do.

By ignoring this case You are stating that I am of *de minimus* value—not the First Amendment material (which You have said is of *de minimus* value, rightly), but me (as a human-being, Your unspoken words say, wrongly). If I've learned anything from all this, it is that. I get it. Nevertheless, naturally, I disagree.

The Tenth is the Supreme Court in that They are the last to apply established law. I wish that society had built more Supreme Court buildings in 1891 so that the little guy continued to have a *right* to be heard by You. The theory of building the appellate system at that time was supposed to accomplish the same outcome. The Tenth is supposed to correct this misapplication and then the attorneys general are likewise supposed to instruct their respective district attorneys, while the local appellate systems reweigh their responsibility. That's how it's supposed to work. I always believed it would work that way. I always believed in the system—I truly did—all the way until I read Their bogus Judgment on 5 July 2018. And *if* (I accuse no-one) any of the three judges ignored the Rule of Law out of some kind of aspirational calculation to sit amongst Yourselves (the last couple judges came from the Tenth Circuit, after all—perhaps it's in the air), *then* I could think of no better reason to preclude him—or her, as the case may be. It would be a strange thing were a federal appellate judge not content with their already highest of high

position in society, though that, too, is an aspect of human nature—ambition. I personally don't think it's that. I believe the groupthink is derived by a misguided desire to protect children, not understanding that they endanger them. Again, it is the difference between knowledge and wisdom. My point: for whatever reason, the Rule of Law is being routinely ignored, on a fundamental scale.

The effect of all of this is that people who are not intending to break the law are being processed as sex offenders when they had no intention to break the law. They are put on lifetime parole and degraded on an intrinsic level. For me, my registration requirements changed from 10 years to either 25 years or life, depending on the age of the people in the depictions. None of the females depicted were identified so I don't know how that works. I'm quite certain that whatever the absolute most unfair solution that can be conceived will be the course of action taken. Kansas and the Tenth Circuit have ignored Your decisions in US v X-Citement Video and Osborne v Ohio. I ask you to strike down the Kansas statute due to its lack of a scienter requirement with respect to the sexually explicit nature of the depictions in question.

The Kansas Appeals decision focused on "age of minority", but even there, they construed the statute unconstitutionally. They claimed that scienter doesn't apply when the images are "clearly pornographic". (See page a38 in the Appendix, please.) So, using Their logic, some guy who bought a clearly pornographic DVD that he reasonably believed (and the State, I suppose, could stipulate to the fact) were of performers all over the age of 18 could still be prosecuted! Even invoking their ploys, their logic still construes the statute in an unconstitutional manner. Concerning the scienter argument I cared about: it was essentially ignored across the board. Anyone who claims the images were "clearly pornographic" is a liar, plain and simple.

In my experience in prison, I found that the vast majority of people convicted of this specific crime for similar conduct failed to even know what scienter applied to. Most, like the defense attorneys in my case, were under the impression that scienter only applied to the fact that they knowingly possessed the images and did not apply to either the age of minority or the sexually explicit nature of the images themselves. A very small percentage of people in Kansas, therefore, will raise the issue to their lawyers. A very small percentage of lawyers believe it is an element in Kansas so when a defendant does raise the issue to their defense attorney, many will be given the poor legal advice that scienter only applies to knowingly possessing the images, nothing more, as I was several times. Whether they are massaging the law or genuinely believe it is a different question—again, obscenity law predictably creates this phenomenon. A smaller percentage will attempt to raise the issue on appeal. For those who do make it that far, the local appellate courts summarily dismiss the argument based solely on the fact that the images are "clearly pornographic" (even when *objectively* they are not). They, therefore, rule the scienter argument is not valid, invalidating Your Will. For those who go all the way to federal appellate court and get a rare golden ticket, the hard-to-get COA, the case is still treated unfairly? I thought the Tenth had Your kind of institutional wisdom and fairness. I was wrong. Both conservative and liberal were in agreement. It was this aspect of human nature that You were wary of in the 1970s (and beyond…in fact, I have yet to *read* that You are not still wary). Again, I ask, are You still? As it concerns someone reasonably pursuing his rights *vis à vis* the First Amendment, You *should be*—despite the obviously uncouth nature of the subject matter.

To characterize the 5 images at question as "clearly pornographic" is disingenuous in the extreme and it is essentially a ploy to process people for their thoughts–to ensure that they will be watched over for the rest of their lives for safety purposes, despite the rule of law. The

decision in Stanley v. Georgia (Stanley v Georgia, 394, p565) said that it's none of the government's business what goes on inside a person's mind. I believe in a truly decent society, that is a necessity. Privacy of thought, no matter what the thought, is sacrosanct, as a matter of principle. The conservatives abstained that vote so that it would be a qualified unanimous decision, a rare 5-0 decision. That was a great statement, to me. I know how Stanley has been weakened over the years (I've read the primary *and secondary* cases cited in Osborne that explained the weakening), but that basic element, that spirit, must survive. Unlike Stanley, these images were protected speech.

You demand a de facto scienter requirement. A trigger word, such as "knowingly" in 2252, need not appear in a statute *so long as* it exists in *practice*. Said practice includes the reversal of convictions that must *objectively* be corrected, as in cases like mine, where the State essentially grants that scienter wasn't present and the images are objectively different than Osborne. Despite this, Kansas never felt a compulsion to put on any evidence, other than the pictures themselves, to prove scienter. When the pictures went missing, the Tenth still found a way to ignore the scienter issue. When Kansas was talking about relying on the pictures (in Appeals Court), they were only talking about actual explicitness. That says absolutely nothing about scienter with respect to explicitness. Anyone who saw the pictures would know that a reasonable person could honestly believe them to be legal, *as the written record demonstrates*. The Tenth got away with murder here. Will you let them? It's been 25 years and thousands of lives ruined...must it be 50 years before their excesses are called to account?

This case is philosophically strong because You would not have to prove what "some element of scienter" is, but rather give a clear (based on the stipulation of facts agreement) what "some element of scienter" is not. That has been Your approach in obscenity law since You

started crafting Your framework in the early 1970s. I understand the reasoning and logic for it to be in that direction—in the end, a balance that puts public safety foremost, as it should.

I know it is strong medicine to declare a statute unconstitutional, but the First Amendment requires you to, in this particular case. The record is very clear: I did not believe the images were sexually explicit. Scienter is a constitutionally protected element in the statute, by command of the First Amendment via this Great Court. The images I possessed, all 200 of them, are objectively far away from the "clear child pornography" in Osborne. As such, it is unfair for Kansas to fiat the scienter issue based solely on the pictures, especially in the face of a stipulation of facts that essentially contradicts such an understanding (concerning both my statement that I believed the images to be legal because the previews didn't appear sexually explicit and the characterization of the images being "sexually suggestive" as opposed to "sexually explicit"). (See stipulated agreement in the state direct appeal, page a30) It is unfair for Kansas to do that with the pictures; it is egregious for the Tenth to do it without them. Forgive me for becoming so cynical, but it all feels like a gargantuan sham, at this point. You have a responsibility to restore not only my faith, but the faith of others—faith in the Rule of Law Itself.

So I conclude this section with the response to my Dear John letter: Dear John, it's to your dishonor, now take it! Crybaby scum bag! The difference: the lovelorn John only feels ostracized but for a moment. He will get over it. I truly am forever ostracized. I will never get over it, by necessity. And before you say, "good" I plead with you, as a strict matter of public policy, there are ramifications to such unwise, closed-minded thinking. I would like to say, "but no matter," but it matters. It matters a whole hell of a lot. For heaven's sake, I thought I was

following the law. And reasonably so! The record shows that clearly. You used to be wary of obscenity law. Are *any* of You still?

Reasons Relied on for the Allowance of the Writ

I suppose the thrust of my argument relies on Rule 10(c), though there are elements of jurisdictional oversight that I believe come into play (regarding the admonishment and clarity mentioned in #2 and #3 below).

1a. To push back on the predictable excess that stems from obscenity law. The act, it is true, is perverted, but that does not make every person who commits it a pervert. To define a man by one act may be fair when the images are clearly illegal—such a man seeks to view proof of sexual abuse. The people of whom I speak are those who honestly *and reasonably* tried to follow the law—those who had no intention to encourage the sexual abuse of minors. It is unfair to ruin a person's life when he honestly, reasonably tried to follow the law. It is happening to thousands of people every year. That alone should be reason enough to be heard.

1b. To prove that the sentiment expressed by Justice Douglas in Miller v. California ("To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process") still survives. In short, to show that You, out of principle, still care about such people, whose numbers are not insignificant.

2. To admonish the Tenth Circuit's handling of the COA in question, as one example of the aforementioned "predictable excess". It is so incredibly rare to receive a COA, as You well know. So the incredible unfairness of disassociating scienter from the First Amendment is commensurate to the incredible rarity. If the law means anything, it means that it must rule the day even when in opposition to *personal morality.* Your framework is not immoral, but they do

not appreciate morality in all its consequence, in all its meaning. They, frankly, lack Your institutional wisdom. They, frankly, do not value my life as You do (or did when crafting your framework). The Tenth doesn't appreciate Your sense of justice, Your sense of fairness, in other words. So the reason, I suppose, is to administratively correct (by acting as a jurisdictional court of review) an abuse of power whose effect is a continuation of lives being ruined, of multitudes in the judicial system being given the 'green light' to continue the self-same abuse of power from lowly local prosecutor to the very Supreme Courts of the respective states within the domain of the Tenth Circuit (and, by implication, across the nation). I say again, that transcends *this case* (and this case law) because evidence is reweighed in a manner that could hurt any person in any case, were the same standard applied.

3. Regarding the missing pictures—to provide clarity to courts below concerning what is and what is not "some level of scienter" with regard to images such as these. The images disappeared from the record very late in the game. I was entitled to a de novo review of the images. Yet the Tenth wasn't abated whatsoever, despite the written record clearly being insufficient. This case is uniquely streamlined due to the stipulated nature of the trial and due to the clearly distinguishable difference between "sexually suggestive poses" and "sexually explicit conduct" in the *written record.* The stipulation grants that I did not believe the images were illegal, not only due to a legal disclaimer on the website, but also because the images were not perceived to be "sexually explicit" by the defendant. That is the very essence of scienter, yet not a single judge even mentioned that stipulated fact—not once in the record, despite the defense bringing it up over and over again throughout the record. The images were such that an honest, reasonable person could honestly, reasonably believe them to be legal. By Your edict, such

people are protected by law. The Tenth ignored Your will in the most intellectually dishonest of manners thereby demonstrating yet another excess. Said excess is an extrajudicial abrogation of their sacred duty of themselves to be ruled by the law—the law Your framework creates. This, again, is predictable in obscenity law, hence Your original wariness. This excess, I assert again, should be corrected. Obscenity law encourages *unfair* groupthink. You are the only ones who have the power to push back. It is Your unique power of influence that should compel You and provides You reason to consider this case.

4. To determine whether the absence of a scienter trigger word in KSA 21-3516a(2) is honored in practice. In other words, to determine whether said statute is constitutional.

Conclusion

The record shows the following: one, I reasonably believed the images to be legal; two, the Kansas Appellate Court granted that the written record alone was insufficient; three, the pictures went missing sometime after the Kansas Appellate Court reviewed them; four, the language in Osborne v. Ohio is less explicit than the language *objectively* used to describe the pictures in this case. Nothing about this case has been fair to me, and I'm sure there have been hundreds or thousands of others like it in the past 25 years.

I am the prostitute Fantine, before Valjean redeemed her: a blathering fool who knows the injustice of it all but doesn't know what to do about it—desperately wishing to deny the innate evilness in human nature, ironic that I, to society, have become the one with the foul human nature—the evil sex offender. The rejection of this petition will be my final lesson that the compassion Valjean demonstrated exists only in novels. There is nothing novel about this case. I always thought that such compassion was baked into 'the system' and that the Tenth would show it. Again, I was wrong.

About 25 years ago, coincidentally, I heard a famous billionaire asked on C-SPAN the question, "If you could trade all your wealth for anything, aside from your health and your family, what would it be?" To which, he responded, "my dignity." I distinctly remember saying aloud, "bullshit, you'd give it up in a second for that kind of money." He had a hard, humble childhood, but I still don't know how he could understand that aspect of human nature. I was wrong, he meant it. And he was right. If you don't have dignity, you have nothing. And when one *unfairly* takes a person's family, wealth, prospects, and dignity from them, a recipe for disaster has been brewed—plain and simply. In boxing, it is commonly said, "beware a wounded animal backed into a corner." I hope Justice Sotomayor sees that I am begging her for justice. I have had tears in my eyes every time I've written her name in this petition. I hope that comes across in my writing, at the risk that I am not perceived as respectful. It truly hurts to know how she must feel about me and, frankly, what *kind of* justice I deserve. I respectfully disagree; I apologize if I don't articulate myself appropriately. I also hope that the degree of vehemence that I disagree with the concurring dissent also comes across, out of principle—as one threatened with lifetime servitude for that which I did—a new level of egregiousness.

Many would say that this case, whether overdue to be heard by You or not, hasn't a chance in the #MeToo era. I do not share such a view. I have been sexually assaulted as part of the "treatment" and made to feel undignified every waking moment of my life. Anyone who has gone to prison under similar circumstances knows the dehumanization of which I speak. I have been structurally ostracized outside of prison and been made to feel worthless by anyone with an internet connection and the will to google me. If there were a single person in this world who felt trauma caused by me, I might deserve such vengeance. There is not. Is this treatment truly an eye for an eye, or something else? What I did was wrong, but what was done to me *in the name of justice* was more so—by far. As it concerns the First Amendment (again, I say exasperatedly, I tried to follow the law), it is egregious, despite the clearly perverse nature of my act. So roll Your collective eyes if You wish, but I'll add the following to this petition: #MeToo. Someone who truly understands that movement would fight *for* me. It's a matter of fairness and dignity, which is

always a matter of balance and a weighting of the scales—a matter of true justice. The scales are overly weighted on the side of vengeance (or expiation, as Hugo says euphemistically). The misapplication of the #MeToo movement will only exacerbate the unfairness, the egregiousness that this case well represents.

My argument: if society is going to be so severe in the treatment of sex offenders then they should damn well be fair about who it brands as one. I should hope that Justice Sotomayor would agree with that statement.