No. 20180386-SC

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Plaintiff/Appellee

v.

MICHAEL SCOTT HATFIELD,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT

Appeal from a conviction for four counts of Sexual Exploitation of a Minor, a second degree felony, in violation of Utah Code §76-5b-201 (2017), and three counts of Accessing Pornographic or Indecent Material on School Property, a class A misdemeanor, in violation of Utah Code §76-10-1235 (2017), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable L. Douglas Hogan presiding.

Appellant is incarcerated

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

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INTRODUCTION

Hatfield asks this Court to reverse his convictions for Sexual Exploitation of a Minor and remand with an order to dismiss. His argument is based in statute. The plain language of the Sexual Exploitation Act excludes the scrapbook pages from the definition of child pornography as a matter of law. Alternatively, if the statutory definition can be read broadly to criminalize the scrapbook pages, the Court should interpret the statute narrowly under the canon of constitutional avoidance because a broad interpretation places the constitutionality of the statute in doubt under the First Amendment overbreadth doctrine and the Due Process Clause's vagueness doctrine.

In response, the State proposes a definition of child pornography that is broad enough to encompass not just "true-to-life depictions" but any visual depiction that features an identifiable person under the age of 18 and portrays sexually explicit conduct well enough "that the average viewer would understand what is being depicted."

Resp.Br.18. The State argues this broad definition is supported by the plain language of the statute, and does not place the constitutionality of the statute in doubt.

Below, Hatfield responds to the State's arguments. Hatfield does not concede any matters not addressed in this reply brief but believes those matters are adequately addressed in the opening brief. *See* Utah R.App.P. 24(b).

RESPONSE TO THE STATE'S STATEMENT OF THE CASE

The State's statement of facts draws details from the "Statement of Probable Cause" filed by the State in support of "the issuance of the Information and Arrest Warrant." R.6-7; *see* Resp.Br.3-5. But the statements made in the Probable Cause statement are not proven. The facts before this Court are those admitted for purposes of the no-contest *Sery* plea. R.134. As explained in opening, Hatfield entered a no-contest plea under *State v. Sery*, 758 P.2d 935, 938-40 (Utah Ct.App. 1988), reserving the right to appeal his sufficiency of the evidence and constitutional arguments. *See* Pet.Br.4-8.

ARGUMENT

I. The scrapbook pages did not meet the statutory definition of child pornography as a matter of law.

The State agrees that this Court should look to the plain language of Utah's Sexual Exploitation Act to determine the meaning of child pornography. *See* Resp.Br.8-9. It also acknowledges that the purpose of the Act is "'to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor' in order to 'eliminate the market for those materials and to reduce the harm …

inherent in the perpetuation of' a record of sexual abuse." Resp.Br.9-10. The State disagrees, however, with the plain meaning of the statute.

Hatfield asserts that the statute prohibits a visual depiction of a child engaging in sexually explicit conduct if the depiction looks real or seems to be true. *See* Pet.Br.11-28. In other words, if the average person wouldn't perceive the visual depiction to be of an identifiable child actually engaging in sexually explicit conduct, the visual depiction doesn't meet the definition of child pornography. *See id.*

The plain language of the statute supports this reading. The statute requires the visual depiction to make it "appear that" a minor is engaging in "actual or simulated" "sexually explicit conduct." Utah Code §76-5b-103(1)(c), (10), (11). As explained in opening, these statutory terms (and others discussed below and in opening) support Hatfield's reading of the statute. *See* Pet.Br.11-28; *see also United States v. Williams*, 553 U.S. 285, 297 (2008) ("'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal *must cause a reasonable viewer to believe that the actors actually engaged in that conduct* on camera." (second emphasis added)); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 264-65 (2002) (O'Connor, J., concurring and dissenting) (Justice O'Connor, joined by Justices Rehnquist and Scalia, explaining that the statutory phrase "'appears to be …of'" "comfortably bear[s]" the meaning "'*virtually indistinguishable from*,'" and, "[t]o the extent that the phrase … is

ambiguous, the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring." (emphasis added)); *id.* at 269-71 (Rehnquist, C.J., dissenting) (regarding "the inclusion of 'simulated' conduct, alongside 'actual' conduct," Justice Rehnquist, joined by Justice Scalia, stated: "The reference to 'simulated' conduct simply brings within the statute's reach depictions of hardcore pornography that are '*made to look genuine*,'" such as "computer-generated images *virtually indistinguishable from* real children engaged in sexually explicit conduct." (quoting Webster's Ninth New Collegiate Dictionary 1099 (1983)) (emphases added)).

The State reaches a different conclusion. *See* Resp.Br.8-18. The State asserts that Utah's statute encompasses not only realistic images of children engaging in sexually explicit conduct but any visual depiction from which the average person could discern a rudimentary portrayal of sexually explicit conduct. *See* Resp.Br.12.

The State concedes that all three scrapbook pages at issue here are "not so sophisticated as to appear real." Resp.Br.13. And, regarding the third scrapbook page, the State acknowledges that "*no one* would think that the two girls are masturbating an actual oversized penis." Resp.Br.14 (emphasis added). Regardless, the State concludes that all three scrapbook pages "fit" the statutory definition because "the average person would see" that the collages roughly portray sexually explicit conduct. Resp.Br.12-15.

First, the State argues that gluing a non-pornographic image of a nude child onto the same scrapbook page as a separate image of adult pornography meets the statutory definition of child pornography because "visual depictions of nudity do not have to include sexually explicit acts if the depictions were constructed for the purpose of

causing sexual arousal." Resp.Br.18. Second, the State argues that gluing a non-pornographic image of a clothed child so that the image of the child's hand or arm overlaps a separate image of an erect penis meets the statutory definition because "the statute does not require true-to-life depictions." *Id.* Instead, the State argues, the statute prohibits any visual depiction that presents the subject matter well enough "that the average viewer would understand what is being depicted." *Id.*

The State's proposed interpretation is not supported by the plain language of the statute. First, the plain language is not broad enough to encompass all "visual depictions of nudity … constructed for the purpose of causing sexual arousal." Resp.Br.18. An image of a nude child, without more, is "protected expression" and may not be prohibited. *Osborne v. Ohio*, 495 U.S. 103, 112-13 (1990); *see State v. Morrison*, 2001 UT 73, ¶7, 31 P.3d 547 (same). And an image of a nude child does not become pornography when it is possessed by a person who views it for sexual pleasure. *See Morrison*, 2001 UT 73, ¶¶10-12; *State v. Jordan*, 2018 UT App 187, ¶47, 438 P.3d 862; *see also Jacobson v. United States*, 503 U.S. 540, 551-52 (1992) ("a person's inclinations and 'fantasies … are his own and beyond the reach of government'" (omission in original)); *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987) ("Private fantasies are not within the statute's ambit.").

Under the plain language of the statute, it is not enough that there is "a 'visual depiction of nudity … for the purpose of causing sexual arousal of any person.'" Resp.Br.12-13 (quoting Utah Code §76-5b-103(10)(f)) (omission in original). To be prohibited under Utah's statute, the visual depiction must make it "*appear* that an

identifiable minor *is engaging in*" "the visual depiction of nudity … *for the purpose* of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f). If the act is simulated, it must "duplicate[], within the perception of an average person, the appearance of an *actual* act of sexually explicit conduct." *Id.* §76-5b-103(11).

In short, as explained in opening, to be child pornography, a photograph of a nude child must make it look like the child is participating in the visual depiction of nudity for the purpose of causing sexual arousal. Pet.Br.18-22, 25-27; *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) ("'When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it.'"); *Commonwealth v. Rex*, 11 N.E.3d 1060, 1068 n.13 (Mass. Sup. Jud. Ct. 2014) (*Rex II*) (rejecting argument that images of nude children that did not depict a "lewd exhibition" could be regarded as doing so based on other images defendant kept with them, saying, "The context for the defendant's possession of the seven photocopies is irrelevant to the objective assessment of their lewdness"); *Faloona v. Hustler Magazine, Inc.*, 607 F.Supp. 1341, 1354-55 & n.44 (N.D. Tex. 1985) (nude pictures of children "did not become 'child pornography' when they appeared in *Hustler* [magazine]").

Here, the photographs of nude children glued onto the scrapbook pages do not meet the definition of child pornography. The children don't appear to be "engaging in" nudity "for the purpose of causing sexual arousal of any person." Utah Code §76-5b-103(1)(c), (10)(f). On the contrary, the photographs maintain the appearance of what they are—non-pornographic images of children, posed in the nude for artistic study, cut out

and glued onto scrapbook pages that also contain cutout and glued images of adult pornography. Pet.Br.22, 27-28.

This reading not only follows the plain language of the statute, it also furthers the purpose of the statute—"'to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor'" and "to 'eliminate the market for those materials and to reduce the harm … inherent in the perpetuation of' a record of sexual abuse." Resp.Br.9-10 (quoting Utah Code §76-5b-102(1)(e)). And it is consistent with the *Dost* factors, which ask "'whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity.'" *Morrison*, 2001 UT 73, ¶18.

Second, the plain language of the statute is not broad enough to encompass gluing a non-pornographic photo of a clothed child so that the image of the child's hand or arm overlaps a separate, cutout image of an erect penis. To support such a broad reading, the State looks at dictionary definitions for "duplicate" and "appearance." Resp.Br.11-12. While the dictionary definitions cited by the State are similar to those cited by Hatfield, *compare* Pet.Br.25-26 *with* Resp.Br.11-12, the State draws a broad meaning from them, concluding that the statutory phrase "duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct" encompasses any visual depiction where "the average person would conclude that the depiction portrays a feigned act in a way that reproduces what the real act looks like." Resp.Br.12.

But the words "duplicate" and "appearance" don't support the State's reading. As explained in opening, the words "duplicate" and "appearance" require simulated conduct to copy real conduct exactly enough that the average person would believe it to be real.

See Pet.Br.20-27; *see also Ashcroft*, 535 U.S. at 264-65 (O'Connor, J., concurring and dissenting) (phrase "'appears to be'" means "'virtually indistinguishable from'").

Even if the words "duplicate" and "appearance" could support the State's reading, those are not the only words in the statute to consider. *See State v. Stewart*, 2018 UT 24, ¶12, 438 P.3d 515 ("'we give effect to every word of a statute'").

Material is not child pornography unless the visual depiction makes it "appear that an identifiable minor is engaging in sexually explicit conduct." Utah Code §76-5b-103(1)(c). The State does not defend the trial court's finding that the sexually explicit conduct depicted in the parts of the scrapbook pages featuring clothed children was "'the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person.'" R.130; *see* Resp.Br.13 & n.8. Instead, it asserts that the sexually explicit conduct is "masturbation" or "the fondling or touching of the genitals." Utah Code §76-5b-103(10)(b), (10)(g); *see* Resp.Br.13. Under that theory, the scrapbook pages are child pornography only if they make it "appear" that a child "is engaging in" "actual or simulated" "masturbation" or "fondling or touching of the genitals." Utah Code §76-5b-103(1)(c), (10)(b), (10)(g).

If the act is simulated, it must "*duplicate*[], within the perception of an average person, the *appearance* of an *actual act* of sexually explicit conduct." *Id.* §76-5b-103(11) (emphases added). The definition of "actual" is "1. existing in act or fact; real: *an actual case of heroism; actual expenses*. 2. existing now; present; current: *The ship's actual position is 22 miles due east of Miami.* 3. *Obs*[*olete*]. pertaining to or involving acts or action." Webster's Unabridged Dictionary (Random House, 2d ed. 2001), 21. The

synonyms are "genuine, authentic, veritable," and the antonyms are "unreal, fictional." *Id.* The definition that fits here is the first: "existing in act or fact; real." *Id.* To the extent any definition of "actual" is broad enough to support the State's reading, it would have to be the third: "Pertaining to or involving acts or action." *Id.* But that definition is obsolete. *Id.*; *see State v. Bagnes*, 2014 UT 4, ¶16, 322 P.3d 719 (rejecting more general definition, which supported the State's reading, because that definition was obsolete).

As explained above and in opening, the plain language of the statute, read as a whole, requires simulated conduct to copy the actual conduct exactly enough that an average person would believe it to be real. Pet.Br.20-28; *see Ashcroft*, 535 U.S. at 269 (Rehnquist, C.J., dissenting) ("The reference to 'simulated' conduct simply brings within the statute's reach depictions of hardcore pornography that are '*made to look genuine*,'" such as "computer-generated images *virtually indistinguishable from* real children engaged in sexually explicit conduct." (emphases added)).

Here, cutting and gluing non-pornographic photos of clothed children onto scrapbook pages so that the images of their hand or arm overlapped separate photos of adult pornography did not meet the definition of child pornography. As explained in opening, the average person would not mistake the scrapbook pages for a visual depiction of actual masturbation or actual fondling or touching of the genitals. Utah Code §76-5b-103(10)(b), (10)(g), (11). On the contrary, the average person would perceive the pages to be what they are—separate photographs cut out and glued onto the same page with the non-pornographic images of clothed children glued so that the image of the children's hand or arm overlays the image of a penis. *See* Pet.Br.20-28.

In sum, for the reasons stated here and in opening, this Court should reverse the Sexual Exploitation counts because the three scrapbook pages do not meet the definition of child pornography as a matter of law.

II. If the statutory definition of child pornography can be read broadly to criminalize the scrapbook pages, this Court should interpret it narrowly under the canon of constitutional avoidance.

The plain language of the statute excludes the scrapbook pages from the definition of child pornography as a matter of law. *See* Pet.Br.Part I; *supra* Part I. But, if the statutory definition can be read broadly to encompass the scrapbook pages, this Court should adopt the narrow reading under the canon of constitutional avoidance. *See* Pet.Br.Part II.

In response, the State argues as if Hatfield has raised not the canon of avoidance but a constitutional challenge of the statute. Under this framing, the State argues that the broad reading of the statute it proposes—a reading that would criminalize any visual depiction of an identifiable person under the age of 18 that portrays sexually explicit conduct well enough that "the average viewer would understand what is being depicted"—is not overbroad or vague. Resp.Br.18. The State's claims fail.

A. Hatfield has raised the canon of constitutional avoidance as a tool for interpreting the statute, and the issue should be reviewed through that framing.

The State argues as if Hatfield has raised not the canon of constitutional avoidance but a constitutional challenge of the statute. *See* Resp.Br.18-34. First, the State argues that Hatfield can succeed on appeal only if he "prove[s] unconstitutionality beyond a reasonable doubt." Resp.Br.19-20. Second, the State argues that Hatfield cannot

challenge the statute as "unconstitutionally vague" at all because he has no standing. Resp.Br.29-30. The State is incorrect on both points.

First, to assert the canon of avoidance, Hatfield need not establish facial unconstitutionality. The canon of avoidance "is not a method of adjudicating constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Nor does it require the sort of "extended analysis" required when a court is "'considering the constitutional issue.'" *Id.* "Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." *Id.*

Rather, the canon of avoidance is a tool of statutory interpretation. *Utah Dep't of Transportation v. Carlson*, 2014 UT 24, ¶23, 332 P.3d 900. It "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Martinez*, 543 U.S. at 385; *see Carlson*, 2014 UT 24, ¶24. "It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Martinez*, 543 U.S. at 381; *see United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *State v. Garcia*, 2017 UT 53, ¶59, 424 P.3d 171 ("Constitutional avoidance rests 'on the reasonable presumption' that where there is more than one plausible interpretation of a statute, the legislature 'did not intend the [interpretation] which raises serious constitutional doubts.'"); *Carlson*, 2014 UT 24,

¶23 (canon of avoidance is premised on "a presumption that the legislature 'either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken' by the courts").

Thus, as explained in opening and below, this Court should reject the State's broad reading of the statute in favor of the narrow reading outlined in Part I of the opening brief and above because the broad reading raises "grave and doubtful constitutional questions" that the narrow reading avoids. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) (per White, J.); *see Garcia*, 2017 UT 53, ¶59.

Second, to assert the canon of avoidance under the due process doctrine of vagueness, Hatfield need not establish standing to raise a vagueness challenge. In *Martinez*, the Supreme Court expressly rejected the notion that a defendant must establish standing to raise a constitutional challenge before he may assert the canon of avoidance. *Martinez*, 543 U.S. at 381-82. "[W]hen a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others …; he seeks to vindicate his own *statutory* rights." *Id.* at 382.

Besides, even if standing were required, Hatfield has standing. The State acknowledges that a defendant may bring an overbreadth challenge even if the "statutory proscription may be constitutionally applied to him." Resp.Br.21. But the State asserts that a vagueness challenge is not subject to the same standing exception. Resp.Br.29-30. The State reasons that Hatfield has no "standing to challenge the sexual exploitation statute" as vague because the statute "clearly prohibits" visual depictions like the scrapbook pages at issue here. Resp.Br.30. The State is incorrect for two reasons.

First, Hatfield has standing because the statute implicates First Amendment freedoms. The State's stance on standing as to overbreadth is correct. *See, e.g.*, *Osborne*, 495 U.S. at 112 n.8, 116 n.12; *New York v. Ferber*, 458 U.S. 747, 768-69 (1982). But the State is incorrect as to vagueness. The standing requirement for vagueness referenced by the State applies to "statutes which do not involve First Amendment freedoms." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982); *see Hynes v. May & Council of Borough of Oradell*, 425 U.S. 610, 620, 621 n.5 (1976); *Garcia*, 2017 UT 53, ¶56 ("when a vagueness challenge does not involve First Amendment freedoms, [this court] examine[s] the statute only in light of the facts of the case at hand"); *State v. Mattinson*, 2007 UT 7, ¶8, 152 P.3d 300 (same); *State v. Jones*, 2018 UT App 110, ¶¶14-15 & n.4, 427 P.3d 538 (same).

When a vagueness challenge involves First Amendment freedoms, vagueness, like overbreadth, does not require standing. *See, e.g.*, *Williams*, 553 U.S. at 304 ("Although ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech."); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983) ("we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines"); *Martinez*, 543 U.S. at 397-98 (Thomas, J., dissenting) ("our rules governing third-party challenges … are more lenient in vagueness cases"); *Garcia*, 2017 UT 53, ¶56; *Mattinson*, 2007 UT 7, ¶8.

Second, Hatfield has standing because he has "a 'personal stake in the controversy.'" *State v. Ansari*, 2004 UT App 326, ¶35, 100 P.3d 231 (quoting *State v. Mace*, 921 P.2d 1372, 1379 (Utah 1996)). Perhaps if Hatfield had possessed real child pornography, his conduct would be "'clearly proscribed'" because that would be "the quintessence of" sexual exploitation. *Ansari*, 2004 UT App 326, ¶¶44-45. But that is not the case here. Here, as demonstrated above and in opening, the scrapbook pages are not "'clearly proscribed'" by the statute and, to the extent the statute can be read broadly to include the scrapbook pages, Hatfield has asked the Court to interpret the statute narrowly to avoid overbreadth and vagueness concerns associated with criminalizing the scrapbook pages. *See supra*; Pet.Br.11-41. Hatfield provides examples of speech that would be swept up by the statute if the Court adopts the State's reading of the statute. *See* Pet.Br.40. But Hatfield provides the examples not because he is asserting a vagueness challenge on behalf of that conduct but because that conduct is like his and illustrates the broad swath of speech the State's interpretation would criminalize. *See* Pet.Br.28-41.

If the Court adopts the State's interpretation, the Sexual Exploitation Act will criminalize as a second-degree felony private possession of any homemade visual depiction—no matter how unrealistic—that roughly portrays any identifiable person under the age of 18 as engaging in sexually explicit conduct. Resp.Br.33. Such a broad interpretation would raise "grave and doubtful constitutional questions." *Delaware & Hudson Co*, 213 U.S. at 408. Thus, under the canon of avoidance, this Court should adopt the narrow interpretation of the statute. *See* Pet.Br.28-41.

B. A narrow reading of the statutory definition of child pornography is necessary to avoid placing its constitutionality in doubt under the First Amendment overbreadth doctrine.

As explained in opening, neither Utah's appellate courts nor the United States Supreme Court have addressed whether a statute prohibiting morphed images violates the First Amendment. *See* Pet.Br.31-35. The closest the Supreme Court has come to that question is in *Ashcroft*, where the Court said of computer-morphed images:

> [Section (8)(c) of the federal statute] prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber.* Respondents do not challenge this provision, and we do not consider it.

Ashcroft, 535 U.S. at 242.

The State asserts that this paragraph "intimated" that the federal law banning morphed images "would survive constitutional challenge." Resp.Br.23. But it is equally, if not more, likely that this paragraph intimates the opposite: morphed images may be closer to *Ferber* than other virtual child pornography because they implicate the interests of real children, but they are still protected as virtual pornography because they are not "the product of sexual abuse." *See Ashcroft*, 535 U.S. at 251. As explained in *Ashcroft*, *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Id.*

"*Ferber* did not hold that child pornography is by definition without value." *Ashcroft*, 535 U.S. at 251. On the contrary, *Ferber* "recognized some works in this

category might have significant value," but it relied on "virtual images" and permissible simulations as "alternative and permissible means of expression." *Id.* In other words, "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250-51.

In *Ferber* and *Osborne*, the government's "'compelling'" interest in protecting children justified prohibiting real child pornography because images of real children being abused are "intrinsically related" to sexual abuse, as they are "a permanent record" of the abuse "and the harm to the child is exacerbated by their circulation." *Ferber*, 458 U.S. at 759; *see Osborne*, 495 U.S. at 109-11.

By contrast, in *Ashcroft*, the government's interest in protecting children did not justify prohibiting virtual child pornography because "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children." 535 U.S. at 250. In reaching this conclusion, the Supreme Court rejected arguments that prohibiting virtual child pornography was justified because virtual child pornography could lead to actual child abuse, whet a pedophile's appetite for real child pornography, help pedophiles seduce children, promote the market for real child pornography, or make it difficult to prosecute real child pornography. *See id.* at 251-55. The Court concluded that none of these concerns justified banning virtual child pornography. *Id.*

In *United States v. Stevens*, the Supreme Court clarified that, when declaring child pornography "fully outside the protection of the First Amendment," it was not "on the basis of a simple cost-benefit analysis." 559 U.S. 460, 470-72 (2010). "In *Ferber*, for example," the Court "noted that the State … had a compelling interest in protecting

children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*." *Id.* at 471. But the Court "did not rest on this 'balance of competing interests' alone." *Id.* Instead, the Court "made clear that *Ferber* presented a special case: The market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *Id.* In other words, *Ferber* "grounded its analysis in a previously recognized, long-established category of unprotected speech"—"'"speech or writing used as an integral part of conduct in violation of a valid criminal statute."'" *Id.* Likewise, the Supreme Court's "subsequent decisions"—including *Osborne* and *Ashcroft*—"have shared this understanding." *Id.* (citing *Osborne,* 495 U.S. at 110; *Ashcroft,* 535 U.S. at 249–250).

Here, the State concedes that the scrapbook pages "did not involve real abuse, and thus fall outside of *Ferber*'s rationale of protecting child abuse victims." Resp.Br.28. That fact puts the scrapbook pages nearer *Ashcroft* than *Ferber* and warrants invoking the canon of avoidance. As stated in *Ashcroft*, speech that "is neither obscene nor the product of sexual abuse … does not fall outside the protection of the First Amendment." *Ashcroft*, 535 U.S. at 251.

The State argues that the statute is not in danger of being overbroad when read to encompass rudimentary collages constructed by gluing non-pornographic images of identifiable children and legally-possessed images of adult pornography onto the same sheet of paper. *See* Resp.Br.24. For support, the State cites the following cases:

- Federal Circuit Courts:
  - **Second:** *United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2011)
  - **Sixth:** *United States v. Stewart*, 729 F.3d 517 (6th Cir. 2013); *Doe v. Boland*, 698 F.3d 877 (6th Cir. 2012)
  - **Eighth:** *United States v. Bach*, 400 F.3d 622 (8th Cir. 2005)

- State Courts:
  - **Alabama:** *McFadden v. State*, 67 So.3d 169 (Ala. Crim.App. 2010)
  - **Kansas:** *State v. Coburn*, 176 P.3d 203 (Kan. Ct.App. 2008)
  - **New Hampshire:** *State v. Cobb*, 732 A.2d 425 (N.H. 1999) (*Cobb I*), and its federal habeas petition: *Cobb v. Coplan*, 2003 WL 22888857 (D. N.H. Dec. 8, 2003) (*Cobb II*) (attached at Addendum A)

In opening, Hatfield surveyed courts that have addressed morphed images and concluded that courts appear to draw the line for First Amendment protection at realistic images that have been distributed or are intended for distribution. *See* Pet.Br.33-35.

Included in Hatfield's survey were some of the cases the State cites—*Hotaling*, *Boland*, *Bach*, and *Coburn*. *See id.* 34-35. The State asserts that these cases stand for the proposition that all "fabricated images" that use "real children"—no matter how unrealistic—can be criminalized. Resp.Br.25-26. But these cases support drawing the line between protected and unprotected speech as outlined in opening. *See Hotaling*, 634 F.3d at 729-30 & n.3 (rejecting overbreadth argument based on the realistic nature of the computer-morphed images and the fact that the children's real names were attached to the images and the images were marked, indexed, and encoded for internet distribution); *Boland*, 698 F.3d at 880-84 (upholding civil damages because defendant created computer-morphed images that were "indistinguishable from actual child pornography," defendant admitted that the images constituted child pornography, the "lasting" and realistic nature of the images could create "many of the same reputational, emotional and

privacy injuries as actual pornography," and defendant displayed the images in a courtroom); *Bach*, 400 F.3d at 630-32 (noting that "there may well be instances in which the application of [the federal statute] violates the First Amendment," but holding "this is not such a case," where the computer-morphed image "skillfully inserted" the head of one child onto an abusive image of another child, thereby creating a "lasting record" of the child "seemingly engaged in sexually explicit activity," and the image was already in distribution); *Coburn*, 176 P.3d at 210, 223 (rejecting First Amendment argument in case involving images from child pornography websites where all images involved real children and all looked realistic but a doctor testified that one image might have been altered, noting that knowing such images had been distributed "to numerous people" could cause a child "irreparable harm"); *see* Pet.Br.34-35.

The other cases cited by the State are either inapplicable or consistent with Hatfield's conclusion that courts draw the line for protected speech at realistic images that have been distributed or are intended for distribution.

First, *Stewart* is unhelpful because it involved "lascivious exhibition," which is not at issue in this case, and the appellate court declined to address the First Amendment argument as inadequately briefed. *See Stewart*, 729 F.3d at 528.

Second, *McFadden* has limited, if any, instructive value because it involved convictions for possession and production of obscene materials, and Alabama defines obscenity to include "any act of … genital nudity" so long as it "lacks serious literary, artistic, political or scientific value." *McFadden*, 67 So.3d at 174, 176, 79-80. By contrast, Utah's statute requires nudity "for the purpose of causing sexual arousal." Utah

Code §76-5b-103(10)(f). Further, though *McFadden* is nearly ten years old, Westlaw indicates that no courts in Alabama or elsewhere have cited or relied on it.

To the extent *McFadden* is instructive, it is consistent with drawing a line based on realism and distribution. In *McFadden*, the appellate court explained that the collages in that case were not protected by the First Amendment because they "involved genital nudity and pornographic images of real children," they created "a lasting record" of "children showing genital nudity and seemingly engaged in sexual conduct," and the case did not involve "mere possession" but "possession and production of the pictures or photographs incorporated into the collages and montages." 67 So.3d at 178 n.8, 182-84. The court "emphasized that children are harmed not only through the actual production of pornography but also by knowledge of its continued circulation." *Id.* at 184.

Finally, the New Hampshire cases, *Cobb I* and *Cobb II*, are unhelpful. *Cobb I* was issued before *Ashcroft* and did not involve a constitutional challenge. On the contrary, the defendant argued that his conduct did not meet New Hampshire's statutory definition of child pornography. *Cobb I*, 732 A.2d at 642-45. As New Hampshire had "no statutory requirement that the visual representation involve the use of an actual child," the appellate court affirmed. *Id.*

Cobb II is also unhelpful because it is an unpublished district court decision of an untimely federal habeas petition off of *Cobb I*. *See Cobb II*, 2003 WL 22888857, **5-8. Though Cobb raised a First Amendment challenge in his habeas petition and the district court briefly addressed the merits, the court reviewed the claim under the standard for habeas review—whether *Cobb I* "was contrary to, or involved an unreasonable

application of, *clearly established Federal law, as determined by the Supreme Court of the United States*." *Id.* (emphasis added). As noted in opening and above, the Supreme Court has not stated whether morphed images are protected under the First Amendment. *See* Pet.Br.33. Thus, because federal law on the subject is not "clearly established," the district court affirmed. *Cobb II*, 2003 WL 22888857, **5-8.

More helpful is *State v. Zidel*, 940 A.2d 255 (N.H. 2008)—a more recent New Hampshire case cited in the opening brief, where New Hampshire's supreme court held that prohibiting morphed images was overbroad under the First Amendment. There, the state charged defendant with possession of child pornography based on his possession of digital images that depicted "heads and necks of minor females superimposed upon naked adult female bodies, with the naked bodies engaging in various sexual acts." *Id.* at 256.

On appeal, the New Hampshire Supreme Court held that the statute was overbroad under the First Amendment as applied. *Id.* The supreme court's reasoning in *Zidel* supports Hatfield's position. In reaching its decision, the supreme court noted that, as recognized in *Ferber*, states have a "compelling" interest in safeguarding the physical and psychological health of a minor. *Id.* at 263. But, "[u]nlike the images in *Ferber* and *Osborne*, the images in this case do not 'permanently record the [child]'s abuse.'" *Id.* at 263. "When no part of the image is 'the product of sexual abuse,' and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image." *Id.* at 263. "Although the[images] may constitute a 'permanent record' that *if distributed* may be harmful to the depicted child, such harm does not necessarily follow

from the mere possession of these morphed images. Instead, the harm is contingent upon the occurrence of another arguably unlawful act; to wit, distribution." *Id.* at 693.

The State does not address *Zidel* except to say it is distinguishable because it involved "putting children's heads on adult bodies, … which is not the case here," and it "ignore[d] the real harm done to real children." Resp.Br.27-28. Both points are unavailing. First, where the question on appeal involves the constitutional implications of interpreting Utah's statute to prohibit depictions that use innocent images of "real children to depict sex acts," Resp.Br.3, the distinction drawn by the State does not undermine the usefulness of *Zidel*'s analysis. Second, *Zidel* did not "ignore" whether children were harmed. On the contrary, it addressed the harm to children at length, concluding that, "[w]hen no part of the image is 'the product of sexual abuse,' and a person merely possesses the image, no demonstrable harm results to the child whose face is depicted in the image." *Zidel*, 940 A.2d at 257-65.

The State dismisses other cases cited by Hatfield the same way. *See* Resp.Br.27-28. For the reasons outlined above and in opening, the State's arguments fail. *See People v. Gerber*, 126 Cal.Rptr. 3d 688, 694-201 & n.5 (Cal. Ct.App. 2011); *Parker v. State*, 81 So.3d 451, 452-57 (Fla. Dist.Ct.App. 2011); *Commonwealth v. Rex*, 2012 WL 6178422, **3-6 (Mass. Super. Aug. 8, 2012) (mem. op.) (attached to opening at Addendum E), *aff'd*, *Rex II*, 11 N.E.3d 1060; Pet.Br.33.

In short, as explained here and in opening, interpreting the Sexual Exploitation Act to criminalize possessing for private viewing a rudimentary collage that uses an innocent picture of an identifiable person under the age of 18 to roughly and unrealistically portray

sexually explicit conduct would raise "grave and doubtful constitutional questions." *Delaware & Hudson Co.*, 213 U.S. at 408. Thus, under the canon of avoidance, this Court should adopt the narrow interpretation of the statute. *See* Pet.Br.28-38.

C. A narrow reading of the statutory definition of child pornography is necessary to avoid interpreting the statute in a way that places its constitutionality under the Due Process Clause in doubt.

The State asserts that the statute is not vague for two reasons: (1) "[i]t has a mental state requirement," and (2) "obscenity statutes" and "federal child pornography provisions" have "withstood vagueness challenges." Resp.Br.31. The State's claims fail.

First, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Village of Hoffman Estates*, 455 U.S. at 499. But scienter is not the only factor that determines vagueness. "'To pass constitutional muster,'" a statute "'must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.'" *Mattinson*, 2007 UT 7, ¶9.

"The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates*, 455 U.S. at 498. The Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99. In other words, "where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). And "perhaps the most

important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Village of Hoffman Estates*, 455 U.S. at 499; *see* Pet.Br.39.

Here, the sexual exploitation statute has a scienter requirement, but it is subject to "a more stringent vagueness test" because First Amendment interests are at stake and the penalties for violation are severe—criminal conviction for a second degree felony. *See* Pet.Br.40-41. As stated in *Ferber*, laws purporting to regulate child pornography must "adequately define[]" the prohibited conduct and "suitably limit[] and describe[]" the category of forbidden sexual conduct. *Ferber*, 458 U.S. at 764.

Second, the fact that other statutes have withstood vagueness challenges does not mean that this statute would too. The State argues that Utah Code §76-5b-103(1)(c) is not vague because courts have rejected vagueness challenges to other statutes. *See* Resp.Br.31 (citing *Ward v. Illinois*, 431 U.S. 767 (1977); *Smith v. United States*, 431 U.S. 291 (1977); *Williams*, 553 U.S. 285; *United States v. Lamb*, 945 F.Supp. 441 (N.D.N.Y. 1996)). None of these cases is instructive here, however, because none rejects a vagueness challenge to Utah Code §76-5b-103(1)(c) or, more generally, a statute being used to prosecute a person for privately possessing an unrealistic collage that uses non-pornographic pictures of children to roughly portray sexually explicit conduct. *See Ward*, 431 U.S. at 771-77 (rejecting vagueness challenge to statute prohibiting selling obscene materials); *Smith*, 431 U.S. at 308-09 (rejecting vagueness challenge to statute prohibiting mailing of obscene materials); *Williams*, 553 U.S. at 304-07 (rejecting vagueness

challenge to federal solicitation of child pornography statute where defendant pandered real child pornography); *Lamb*, 945 F.Supp. at 447-51 (rejecting vagueness challenge to statute prohibiting possession of real child pornography, where the court held that the statute was the same as or more clear than statute affirmed in *Ferber*, and where defendant possessed real child pornography transmitted to him over the internet).

As explained in opening, the broad interpretation proposed by the State would make it a second-degree felony to use scissors and glue to construct a rudimentary collage from lawfully possessed, First-Amendment-protected materials, if the collage—no matter how unrealistic—roughly portrays an identifiable person under the age of 18 as engaging in sexually explicit conduct. *See* Pet.Br.38-41.

This reading would criminalize broad categories of speech. *See id.* (providing examples). People possessing such materials "would hardly expect to face criminal charges for child pornography or sexual exploitation. And if they were so charged, they could undoubtedly maintain strong constitutional defenses under the Free Speech and Due Process Clauses." *Bagnes*, 2014 UT 4, ¶37. In contrast, the narrow reading proposed by Hatfield would "'give a person of ordinary intelligence a reasonable opportunity to know what is prohibited,'" *Mattinson*, 2007 UT 7, ¶9, would "'provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement,'" *id.*, and would prevent the criminality of speech from turning on the fact finder's "private sense of the bounds of social propriety." *Bagnes*, 2014 UT 4, ¶17.

In sum, this Court should reject the State's interpretation to avoid placing the constitutionality of the statute under the Due Process doctrine of vagueness in doubt.

Rather, this Court should adopt the interpretation Hatfield outlines above and in opening and hold that the scrapbook pages are not child pornography under Utah Code §76-5b-103(1)(c). *See* Pet.Br.28-41.

CONCLUSION

Hatfield respectfully asks this Court to reverse and remand with an order to dismiss the four counts of Sexual Exploitation of a Minor.

SUBMITTED this 8th day of July 2019.

Lori Seppi

LORI J. SEPPI
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(g)(1), I certify that this brief contains 6,976 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

Lori Seppi

LORI J. SEPPI

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 8th day of July 2019. A searchable pdf will be emailed to the Supreme Court at supremecourt@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

Lori Seppi
LORI J. SEPPI

DELIVERED this _____ day of July 2019.

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ADDENDUM A

2003 WL 22888857
United States District Court, D. New Hampshire.

David COBB, Petitioner
v.
Jane COPLAN, Warden New Hampshire State Prison, Respondent

No. Civ. 03–017–M.
|
Dec. 8, 2003.

Attorneys and Law Firms

Paul J. Haley, Haley Law Office, Hillsboro, NH, for Petitioner.

Stephen D. Fuller, NH Attorney General's Office, Concord, NH, for Respondent.

ORDER

MCAULIFFE, J.

***1** David Cobb, a state prisoner, seeks habeas corpus relief from his multiple state court convictions for attempted felonious sexual assault, exhibiting or displaying child pornography, and possession of child pornography. He complains that he was denied effective assistance of trial counsel and that at least some of his convictions were obtained in violation of First Amendment guarantees. *See generally* 28 U.S.C. § 2254.

Specifically, Cobb says that some of the pornographic depictions of children that led to his convictions were actually "collages that contained components made by juxtaposing adult nude bodies with cut-outs [of children's faces taken] from children's catalogs." Petitioner's memorandum in support of habeas petition (document no. 1) at 1. Thus, says Cobb, "there were no actual children used or exploited in the creation of the collages." *Id.* Consequently, he asserts that, at least as to those particular pornographic depictions of children, his conduct is protected

by the First Amendment and cannot serve as the basis for a criminal prosecution or conviction. Moreover, Cobb says his trial counsel's performance was constitutionally deficient insofar as she failed to raise any defense based upon the First Amendment (at least as to charges based upon collages).

The State, asserting that Cobb is not entitled to the relief he seeks, moves for summary judgment. Cobb Objects. While Cobb's petition implicates interesting questions concerning the scope of First Amendment protections afforded pornography in general and, in particular, so-called "virtual" child pornography, he has failed to point to any genuine issues of material fact that, if resolved in his favor, might preclude summary judgment in favor of the State.

Background

In May of 1996, Cobb was convicted of one count of attempted felonious sexual assault, fifty-three counts of displaying child pornography, and two hundred and sixty-seven counts of possessing child pornography. He was sentenced to serve eight to fifteen years in the New Hampshire State Prison, where he is presently incarcerated.

Following trial, Cobb appealed his convictions to the New Hampshire Supreme Court, raising twelve distinct issues for the court's review. After addressing and rejecting each of Cobb's assertions of error, the court affirmed his convictions. *State v. Cobb,* 143 N.H. 638, 732 A.2d 425 (1999). The state court's opinion was issued on June 24, 1999. Cobb had 90 days from that date—until September 22, 1999—to file a petition for a writ of certiorari in the United States Supreme Court. He did not. Accordingly, at that point, his convictions became final.

On September 22, 2000, the one-year limitations period established by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241, et seq., during which Cobb could file a federal petition for habeas corpus, lapsed. He did not file a federal petition before the statutorily prescribed window of opportunity closed (nor did he file any state collateral attack on his convictions during that period).

***2** On May 2, 2002, more than two and one-half years after his convictions became final, Cobb filed a "Motion for New Trial and Petition for Habeas Corpus" in the state superior court. In that petition, Cobb raised two issues he did not advance in his direct appeal: that his convictions violate the First Amendment, and a derivative claim that he received ineffective assistance of trial counsel—the claims he now seeks to pursue in this forum. In August of 2002, the state superior court issued a written order denying his habeas petition. *State v. Cobb,* No.

95–S–535–F (N.H.Super.Ct. Aug. 15, 2002) (the "State Habeas Decision"), attached to petitioner's amended petition (document no. 4). Subsequently, on November 18, 2002, the New Hampshire Supreme Court declined to accept Cobb's appeal. Approximately two months later, on January 14, 2003, Cobb filed the presently-pending petition for federal habeas corpus relief under 28 U.S.C. § 2254.

Discussion

I. *Cobb's Habeas Corpus Petition is Untimely.*

In support of its motion for summary judgment, the State says Cobb's petition is untimely, since it was filed after the deadline established by AEDPA. Accordingly, says the State, the petition must be dismissed.

With regard to the pertinent limitations period, the court of appeals for this circuit has observed:

> AEDPA, which became effective on April 24, 1996, fixes a one-year limitations period for federal habeas petitions by state prisoners. Statutory exceptions exist where the state impeded relief, new constitutional rights were created by the Supreme Court, or newly discovered facts underpin the claim, but [petitioner] does not claim to fall within any of these exceptions. *Absent an exception, AEDPA's one-year limit runs from the time that the state court judgment of conviction became final* by the conclusion of direct review or the expiration of the time for seeking it.

David v. Hall, 318 F.3d 343, 344 (1st Cir.) (citations omitted) (emphasis supplied), *cert. denied,* 157 L.Ed.2d 30 (2003). Like the petitioner in *David,* Cobb does not claim that any of the statutory exceptions apply to him. *See* 28 U.S.C. §§ 2244(d)(1)(B) through (D). Consequently, barring any tolling of the statutory limitations period, the time within which Cobb could have filed a federal habeas corpus petition expired on September 22, 2000—that is, one year after he could no longer file a timely petition for a writ of certiorari to the United States Supreme Court.

Importantly, AEDPA does provide that the one-year limitations period applicable to state

inmates is tolled for that period of time during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In this case, however, Cobb did not file a state petition seeking collateral review of his convictions until well *after* AEDPA's limitations period had already expired. As noted above, that period lapsed on September 22, 2000. Cobb did not file his state habeas petition until May 2, 2002—more than one and one-half years later. Consequently, AEDPA's limitation period was not (nor could it have been) tolled by the pendency of Cobb's state habeas petition; that period had already lapsed well before Cobb ever filed his state petition and there was nothing left of it to toll. *See, e.g., Voravongsa v. Wall,* 349 F.3d 1, 2003 WL 22660660 at *6 (1st Cir. Nov.12, 2003) ("With no predicate State post-conviction application having been filed in a timely manner, [petitioner] is not entitled to have the time-limitations period of § 2244(d)(1) tolled by virtue of § 2244(d)(2).").

II. *AEDPA's Limitation Period and Equitable Tolling.*

***3** Although Cobb's argument is unclear, he seems to acknowledge (at least implicitly) that his federal petition for habeas corpus relief is untimely. Nevertheless, he appears to assert that AEDPA's one-year limitations period should be equitably tolled, since he advances a claim that he is "actually innocent" of some of the charges for which he was convicted and sentenced. The court disagrees.

Typically, a federal habeas petitioner raises a claim of "actual innocence" when he or she seeks to advance a claim that was procedurally defaulted in state court and the petitioner cannot otherwise meet the "cause and prejudice" prerequisite to federal review of defaulted claims. "Whether a claim of 'actual innocence' can also serve to avoid AEDPA's statute of limitations is a more cloudy issue that few courts have directly addressed." *McLaughlin v. Moore,* 152 F.Supp.2d 123, 128 (D.N.H.2001).

In this case, Cobb's claim to the benefit of equitable tolling suffers from several shortcomings. The first, and perhaps most substantial, is that neither the Supreme Court nor the court of appeals for this circuit has held that AEDPA's one year limitations period applicable to state prisoners may be equitably tolled. *See, e.g., David,* 318 F.3d at 346 (noting that "section 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort."). *See also Donovan v. State of Maine,* 276 F.3d 87, 92 (1st Cir.2002).

Nothing is changed here by David's claim of actual innocence, a claim itself

> derived from his mistaken-colloquy argument. In general, defendants who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming: pre-trial motions must be filed on time, timely appeals must be lodged, and habeas claims must conform to AEDPA. In particular, the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch.

David, 318 F.3d at 347 (noting that Congress *did* adopt a form of "actual innocence" test with regard to the statutory provisions governing the filing of second or successive petitions).

Second, even assuming that AEDPA's one-year limitations period is subject to equitable tolling, such extraordinary relief is available only in the most compelling of circumstances. As the *David* court observed:

> If equitable tolling is available to extend section 2244(d)'s limitations period, it can only do so for the most exceptional reasons. One of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances. To bypass these restrictions for reasons other than those given in the statute could be defended, if at all, *only for the most exigent reasons.*

***4** *Id.* at 346 (citations omitted) (emphasis supplied). *See also Donovan,* 276 F.3d at 93 ("We have made it pellucid that equitable tolling, if available at all, is the exception rather than the rule; and that resort to its prophylaxis is deemed justified only in extraordinary circumstances.") (citations and internal punctuation omitted); *Delaney v. Matesanz,* 264 F.3d 7, 15 (1st Cir.2001) ("In short, equitable tolling is strong medicine, not profligately to be dispensed."). Cobb's case does not present the sort of compelling or extraordinary circumstances that might justify equitable tolling.

Cobb has wholly failed to justify (or even explain) why his petition was filed more than a year and one-half after the pertinent limitations period expired. While he relies heavily on the Supreme Court's recent opinion in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), in support of his actual innocence claim, he acknowledges that *Ashcroft* did not recognize a new constitutional right. *See* Petitioner's memorandum in support of habeas petition at 7 (*"Ashcroft* has not established a 'new rule' of constitutional law, but

rather has reaffirmed the First Amendment rights of individuals."). *See generally* 28 U.S.C. § 2244(d)(1)©) (providing that AEDPA's one-year limitation period begins to run on the date "on which the constitutional right asserted was *initially recognized* by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.") (emphasis supplied).

Although Cobb does not specifically invoke the tolling provisions of sections 2254(d)(1) or (2), he seems to suggest that the constitutional protections afforded to "virtual pornography" were only recently recognized, in *Ashcroft.* He is, however, incorrect. The Supreme Court recognized, more than twenty years ago, that some types of so-called "virtual pornography" fall within the protections of the First Amendment:

> We consider 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.... [I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside the prohibition of the statute could provide another alternative.

New York v. Ferber, 458 U.S. 747, 762–63, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (footnote omitted). As the *Ashcroft* court noted, "*Ferber,* then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding." *Ashcroft,* 535 U.S. at 251.

Thus, the claims Cobb seeks to raise in his untimely section 2254 petition—both of which are based on his assertion that "virtual" child pornography of the sort he possessed is protected by the First Amendment—were available to him long before AEDPA's one-year limitations period expired. Cobb tends to acknowledge the point when he asserts that his trial counsel's performance was constitutionally deficient insofar as she failed to raise that First Amendment defense during his trial. Consequently, the court can discern no equitable basis to excuse his failure to raise those available claims in a timely manner. *See, e.g., Donovan,* 276 F.3d at 94. As this court recently observed, even assuming an "actual innocence" claim can, under appropriate circumstances, toll AEDPA's limitations period, it is unlikely that a petitioner can avail himself of such equitable relief if he fails to present *known* claims within AEDPA's one-year limitations period.

> ***5** Further complicating [petitioner's] claim is the fact that the evidence upon which he relies to demonstrate his asserted innocence has been available to

> him for several years ... Accordingly, he easily could have presented that evidence in support of a *timely* section 2254 petition. While it is unclear whether a claim of actual innocence can operate to toll AEDPA's statute of limitations, it is even less clear that such an equitable tolling principle can be invoked by a petitioner who failed to exercise reasonable diligence in pursuing his federal claims.

McLaughlin, 152 F.Supp.2d at 128 (emphasis in original). *See also Delaney v. Matesanz,* 264 F.3d 7, 15 (1st Cir.2001) ("Even where available, equitable tolling is normally appropriate only when circumstances beyond a litigant's control have prevented him from filing on time. In the usual case, a court may deny a request for equitable tolling unless the proponent shows that he was actively misled or prevented in some extraordinary way from asserting his rights.") (citation and internal quotation marks omitted).

In sum, then, even assuming AEDPA's one-year limitations period may, in appropriate cases, be subject to equitable tolling, this is not such a case.

III. *Cobb's Petition Lacks Merit.*

Finally, even if the court were to conclude that Cobb's situation presents sufficiently compelling circumstances to warrant equitable tolling of AEDPA's limitations period, Cobb would not be entitled to the habeas relief he seeks.

A. *AEDPA's Standard of Review.*

Since passage of the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), the power to grant federal habeas relief to a state prisoner with respect to claims adjudicated on the merits in state court has been substantially limited. A federal court may not disturb a state conviction unless the state court's adjudication "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." 28 U.S.C. § 2254(d)(2). Alternatively, habeas relief may be granted if the state court's resolution of the issues before it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *See also Williams v. Taylor,* 529 U.S. 362, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Here, Cobb attacks the underlying state court decision pursuant to section 2254(d)(1). So, to prevail on his petition, he must demonstrate that the state habeas court's rejection of his ineffective assistance claim and/or his First Amendment claim was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.

The United States Supreme Court recently explained the distinction between decisions that are "contrary to" clearly established federal law, and those that involve an "unreasonable application" of that law.

> ***6** Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ 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 the prisoner's case.

Williams, 529 U.S. at 412–13. The Court also noted that an "incorrect" application of federal law is not necessarily an "unreasonable" one.

> [T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.... Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 410–11 (emphasis in original).

B. *Cobb's "Collages" and Supreme Court Precedent.*

Cobb asserts that, in light of the Supreme Court's opinion in *Ashcroft, supra,* the collages that led to at least some of his convictions are protected by the First Amendment. Consequently, he says the state court's rejection of his First Amendment claim was contrary to or involved an unreasonable application of clearly established federal law, as interpreted by the Supreme Court, entitling him to federal habeas relief. Again, however, he is incorrect.

Because the central thesis of Cobb's argument is that the collages leading to some of his convictions constituted "virtual pornography" (which he claims is protected by the First Amendment), it is appropriate to examine the nature of the child pornography at issue in this case. The pornographic material underlying Cobb's convictions fell into two categories: photographs of actual naked children and the so-called collages. At least some of the photographs of actual children were obtained from black market child pornography books and magazines. *See* State Habeas Decision at 9. The collages were described by the state supreme court as follows:

> The items at issue are Polaroid photographs. The photographs generally fall into the following categories: adult nude bodies juxtaposed with fully clothed children; composite images containing the sexually immature bodies or body parts of children either depicted by themselves, with or without a face, or juxtaposed with the faces of adults or other children, some altered by the addition of hand-drawn public hair; and nude bodies that have been altered by the addition of children's heads.

State v. Cobb, 143 N.H. at 642, 732 A.2d 425. Later in its opinion, the court concluded that, "[a] review of all the photos at issue supports the conclusion that *each depicts a child engaged in sexual activity* as defined [by state law]." *Id.* at 645, 732 A.2d 425 (emphasis supplied).

***7** In *Ashcroft,* the Supreme Court considered challenges to various provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251, et seq. (the "CPPA"). In particular, the Court addressed whether 18 U.S.C. §§ 2256(8)(B) and (D) could withstand constitutional scrutiny. The litigants did not challenge, nor did the Court speak to the constitutionality of section 2256(8)(C).

In describing the scope of section 2256(8)(B), the Court observed that it:

> prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called

> "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse."

Ashcroft, 535 U.S. at 241. As to the sort of images embraced by that particular section of the CPPA, the Court noted that they "do not involve, let alone harm, any children in the production process." *Id.* Consequently, unless those images are also obscene, "virtual pornography" of that particular type is protected by the First Amendment. *Id.* at 240 ("As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene.").

Cobb's collages are not the sort of "virtual pornography" described by the Court as falling within the scope of section 2256(8)(B), since those collages *did* involve real children. Images of that sort (or, perhaps more accurately, their computer-age analog) are addressed in section 2256(8)(C), which "prohibits a more common and lower tech means of creating virtual images, known as computer morphing." *Ashcroft,* 535 U.S. at 242. Like Cobb's collages, computer morphing involves altering photographs of actual children to make it appear that those children are engaged in sexually explicit conduct. *See id.* (describing "computer morphing" as follows: "Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity.").

While the Court did not specifically address the constitutionality of section 2254(8)(C)'s ban on that particular type of "virtual pornography," it did note that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber." Id.* Although not part of the Court's holding, that dictum strongly suggests that Cobb's collages are not protected by the First Amendment.[1]

***8** Unlike a Renaissance painting of a fictitious subject or a Hollywood movie that employs adult actors who simply appear to be minors, Cobb's collages involved pornographic images of real children. In that regard, they implicate concerns identified in both *Ferber* and *Ashcroft,* insofar as a lasting record has been created of those children seemingly engaged in sexual activity.

In light of the foregoing, Cobb has not sustained his burden of establishing that the state court's decision rejecting his habeas petition was contrary to or involved an unreasonable application of federal law as determined by the Supreme Court. First, as noted above, the Supreme Court has not held that collages of the sort possessed by Cobb are protected by the First Amendment. *See Ashcroft,* 535 U.S. at 242 ("Respondents do not challenge this provision, and we do not consider

it."). In fact, the Court has suggested just the opposite. *See generally Ferber, supra.* Accordingly, Cobb cannot demonstrate that the state court's decision was "contrary to" Supreme Court precedent.

Nor has he demonstrated that the state court's decision involved an "unreasonable application" of Supreme Court precedent, particularly in light of the *Ashcroft* dictum noting that morphed images of real children made to appear as though they are engaged in sexual activity likely fall outside the scope of the First Amendment's protections. Cobb's First Amendment claims regarding his collages were resolved by the state superior court as follows:

> [T]he photographs including so-called "morphed" images [i.e., the "collages"] are not protected by the United States Supreme Court's decision in *Ashcroft.* The *Ashcroft* Court specifically declined to consider the federal statute dealing with "morphing" and noted that "although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber."*
>
> Although the people whose photographs have been "morphed" were not made to engage in the behavior displayed in the photographs, they are nonetheless victimized each time photographs containing their image are displayed or exhibited.
>
> Whereas the United States Supreme Court considered the mere possession of virtual child pornography a "victimless" crime, the same cannot be said of the defendant's possession of the charged photographs in this case. Although in the pictures being contested by the defendant live naked children were not made to engage in the particular activities displayed in the photographs, the images of real children were edited to appear as though the children were engaged in sexual conduct. While the children in the morphed photographs may belong to a different class of victims than children made to actually engage in sexual behavior in the production process of child pornography, the children in the morphed photographs are nonetheless actual identifiable human victims, rather than computer-generated virtual images. In other words, morphed photographs create direct and identifiable child victims of sexual exploitation, whereas purely computer-generated virtual child pornography does not, absent additional criminal conduct, directly victimize any particular children. The underlying concerns which informed the *Ferber* decision, therefore, are implicated by the facts of this case in a manner they were not in *Ashcroft.*

***9** State Habeas Decision at 13–16. In resolving Cobb's First Amendment claim, then, the state habeas court: (1) properly identified the applicable Supreme Court precedent; and (2) applied that precedent in a thorough and thoughtful way that cannot be deemed "unreasonable." Accordingly, Cobb is not entitled to federal relief under section 2254.

C. *Ineffective Assistance and the "Strickland" Standard.*

To prevail on his second claim—that his trial counsel's performance was constitutionally deficient—Cobb must satisfy both elements of a two-part test. First, he must "show, by a preponderance of the evidence, that [his] trial counsel's conduct fell below the standard of reasonably effective assistance." *Gonzalez–Soberal v. United States,* 244 F.3d 273, 277 (1st Cir.2001) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Next, he must demonstrate that counsel's errors actually prejudiced his defense. *Id. See also Cofske v. United States,* 290 F.3d 437 (1st Cir.2002).

With regard to the first prong of the *Strickland* test, the court employs a highly deferential standard of review in assessing the quality of trial counsel's representation, and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland,* 466 U.S. at 689 (citation and internal quotation marks omitted). In other words, to satisfy his burden, Cobb must demonstrate that his trial attorney made errors that were "so serious that [she] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

To satisfy the second prong of the *Strickland* test, a petitioner must show "actual prejudice." That is to say, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.*

Here, Cobb can satisfy neither one of the two essential elements of a *Strickland* claim. First, his defense was not prejudiced by trial counsel's decision not to raise a First Amendment defense to some of the crimes with which Cobb was charged. As noted earlier, that defense lacks merit, since Cobb's collages were made of photographs of real children altered to appear as though the children were engaged in sexual conduct. He does not claim (nor would the record support a finding) that any of his collages involved computer-generated "virtual" subjects or adults who simply appeared to be children.

Even if Cobb's First Amendment defense had some merit, his trial counsel articulated a reasonable and thoughtful basis for her tactical decision not to attack the so-called "morphed" images or "collages" on First Amendment grounds. *See* State Habeas Decision at 4–5 (noting, among other things, that Cobb's trial counsel testified that she "thought about and analyzed whether the collage could be considered art or otherwise protected speech. She explained, however, that a number of the photographs included pictures of live, naked children and, therefore, she and her co-counsel made a tactical decision not to draw focus to the content of particular photographs. Specifically, [counsel] was concerned that arguing that some of the

photographs were not of live, naked children would guarantee conviction on the charges related to photos that were of live, naked children.").[2]

***10** In the context of defending a complex criminal case involving over two hundred pieces of child pornography (some involving pictures of actual children engaged in sexual behavior and others involving the so-called collages), counsel's tactical decision certainly fell well within the range of reasonable trial strategies and, therefore, cannot form the basis of an ineffective assistance claim under *Strickland.*

Finally, Cobb's related claim—that his attorney provided constitutionally deficient representation by failing to call an expert witness to establish that the collages in question were not "obscene"—is entirely without merit. *See* Petitioner's memorandum in support of habeas petition at 5–6. As the Supreme Court has clearly stated, the manufacture, possession, and distribution of depictions of real children engaged in sexual conduct may be proscribed *absent* any additional showing that they are also obscene. *See Ashcroft,* 535 U.S. at 240 ("As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene.") (citation omitted).

Conclusion

AEDPA's one-year limitations period applicable to state inmates seeking federal habeas corpus relief expired more than one and one-half years before Cobb filed his federal habeas petition. Consequently, that petition is untimely.

As for his assertion that AEDPA's limitation period should be tolled, Cobb does not rely upon the discovery of any new (and exculpatory) evidence, nor does he seek the benefit of a new rule of constitutional law, made retroactively applicable to his case by the Supreme Court. Nor does he assert any state-created impediment to the filing of a timely federal petition. Accordingly, he is not entitled to the benefit of any statutorily prescribed tolling. *See generally* 28 U.S.C. § 2244(d).

Although it may be that AEDPA's limitations period is not subject to *equitable* tolling, even assuming equitable relief is available in extraordinary cases, this is not such a case. The record reveals no sound basis upon which to rest any decision excusing Cobb's failure to comply with AEDPA's one-year filing deadline. Cobb offers no plausible excuse (or explanation) for his failure to file a timely petition under section 2254. Instead, he merely seeks equitable relief on the basis of an incorrect assertion that he is "actually innocent" of some of his crimes of

conviction. Under the circumstances presented, he is not entitled to equitable tolling of AEDPA's one-year limitations period, and his petition must be dismissed as untimely. *See* 28 U.S.C. 2244(d).

Finally, even if this court were to conclude that Cobb is entitled to the benefit of equitable tolling, his habeas petition would still fail on the merits. It cannot be said that the state court decision rejecting his First and Sixth Amendment claims yielded a result that was contrary to, or involved an unreasonable application of, clearly established federal law as interpreted by the United States Supreme Court. *See* 28 U.S.C. § 2254(d)(1). Accordingly, respondent's motion for summary judgment (document no. 11) would be granted on the merits.

***11** The petition is dismissed as untimely. The Clerk of Court shall close the case.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 22888857, 2003 DNH 214

Footnotes

1 In *Ferber,* the Court upheld the constitutionality of New York's statutory ban on the distribution of materials that depict a sexual performance by a child. In reaching the conclusion that child pornography is outside the scope of the protections afforded by the First Amendment, the Court noted that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. In support of that conclusion, the Court observed:

> The distribution of photographs and films depicting sexual activity by juveniles is *intrinsically related* to the sexual abuse of children.... *[T]he materials produced are a permanent record of the children's participation* and the harm to the child is exacerbated by their circulation.

Id. at 759 (emphasis supplied).

2 Cobb does not challenge any of these factual findings made by the state habeas court.