

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA)	
)	
)	
v.)	Criminal No. 3:05-00185
)	Judge Trauger
)	
TIMOTHY RYAN RICHARDS)	

MEMORANDUM and ORDER

The defendant has filed a Motion to Vacate Convictions Pursuant to Facially Unconstitutional Statute (Docket No. 313), to which the government has responded (Docket No. 322), and the defendant has replied (Docket No. 325).

The defendant argues that, because the Sixth Circuit has issued an opinion holding 18 U.S.C. § 2257, under which the defendant was convicted in Counts 11 and 22 of the Third Superseding Indictment, facially unconstitutional, his convictions on these two counts, as well as all other counts, should be vacated. *See Connection Distribution Co. v. Keisler*, 505 F.3d 545 (6th Cir. 2007).

The defendant asserts that, under the Second Circuit test set out in *United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994), there was “prejudicial spillover effect” from the § 2257 counts that tainted the convictions on the remaining counts and that, therefore, the convictions on all counts should be vacated. The government argues that the Second Circuit test is not the appropriate test to apply but, instead, the Sixth Circuit’s “doctrine of retroactive misjoinder,” as discussed in *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982), should govern. Under that standard, the government asserts, vacation of the remaining counts is not justified. Moreover, the government argues that, even under the Second Circuit standard, vacation is not justified.

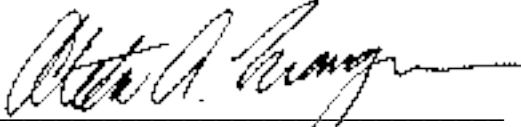
The government requests that the court hold in abeyance the defendant's request to vacate his conviction on Counts 11 and 22, pending a final decision by the Sixth Circuit. The Sixth Circuit docket reflects that an extension has been granted to January 7, 2008 within which to file a petition for rehearing *en banc*.

The court finds that, under either the Second Circuit or Sixth Circuit standard discussed by the parties in their briefs, vacation of the counts other than Counts 11 and 22 is not justified. The court finds no prejudicial spillover effect here, as the jury that sat for this case--which deliberated for three days, asked many questions, and convicted on eleven counts but acquitted on ten counts (Docket No. 203)--carefully followed the extensive instructions given in determining whether the government had proved the necessary elements for each crime charged. As set out in detail in the government's brief, even with regard to specific web sites, the jury convicted as to some counts and acquitted as to others. Moreover, the recordkeeping requirements of § 2257, which have been found facially unconstitutional, are not the sort of inflammatory crimes from which would normally flow a prejudicial effect.

For the reasons expressed herein, it is hereby **ORDERED** that the Motion to Vacate the convictions on Counts 11 and 12 will be **HELD IN ABEYANCE**, pending a final decision by the Sixth Circuit on the unconstitutionality of 18 U.S.C. § 2257. The Motion to Vacate as it relates to the remaining counts on which the defendant was convicted is **DENIED**.

It is so **ORDERED**.

ENTER this 20th day of December 2007.



ALETA A. TRAUGER
U.S. District Judge