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

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

MOTION TO VACATE CONVICTIONS PURSUANT TO FACIALLY UNCONSTITUTIONAL STATUTE

COMES NOW the Defendant, **Timothy Ryan Richards**, by and through his undersigned counsel, and hereby respectfully moves this Court to vacate his convictions on Counts 11 and 22 of the Third Superseding Indictment based upon the Sixth Circuit's recent decision in *Connection Distribution Co. v. Keisler*, ___ F.3d ___, 2007 WL 3070970 (6th Cir. Oct 23, 2007), declaring 18 U.S.C. §2257 to be facially unconstitutional. Additionally, Defendant Richards moves the Court to vacate his convictions on the remaining counts (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24) because of the prejudicial spillover effect from the inextricably intertwined, tainted convictions (Counts 11 and 22).

The grounds for this Motion are more fully set forth in the accompanying Memorandum of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system, *or*, if not registered, sent via U.S. Mail, postage prepaid, to:

S. Carran Daughtrey
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this 26th day of October, 2007.

/s Kimberly S. Hodde
KIMBERLY S. HODDE

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONVICTIONS PURSUANT TO FACIALLY UNCONSTITUTIONAL STATUTE

Defendant Timothy Ryan Richards, by and through his undersigned counsel, respectfully submits this Memorandum of Law in support of his Motion to Vacate Convictions Pursuant to Facially Unconstitutional Statute.

Background

On October 10, 2006, Defendant Richards began his jury trial on Counts 1 through 26 of the Third Superseding Indictment. (Docket Entry 180). On October 26, 2006, the jury reached a verdict finding Defendant Richards guilty of Counts 1, 2, 3, 11, 16, 19, 20, 21, 22, 23, and 24, and acquitting him of Counts 4, 5, 6, 7, 9, 12, 15, 18, 25, and 26.[1] (Docket Entry 203). Counts 11 and 22 charged Defendant Richards with violations of 18 U.S.C. §2257 (records keeping requirements).

Throughout the course of the trial, the government emphasized the importance of Defendant Richards' records keeping obligations (set forth at 18 U.S.C. §2257) as the operator of a website containing pornography and as a secondary producer. The government and Defendant Richards disagreed as to the elements of 18 U.S.C. §2257. In fact, Defendant Richards submitted special jury

[1] At various stages of the trial and upon motion either by the government or the defendant, the Court dismissed Counts 8, 10, 13, 14, and 17. (Docket Entries 176, 189 & 196).

requests articulating the defense's interpretation of the elements and setting forth a theory of defense instruction spelling out the limited liability of secondary producers such as Defendant Richards. (Docket Entry 187). The Court denied Defendant Richards' secondary producer theory of defense instruction. (Docket Entry 202).

In its closing argument, the government repeatedly highlighted the significance of the 2257 records keeping requirements to establish Defendant Richards' guilt on the balance of the charges in the Third Superseding Indictment. In its closing argument, the government submitted:

> In this case, the defendant is charged with two counts of record requirement violations. One is Count Eleven for Penisclub, and one is Count Twenty-Two for the Justinsfriends web sites. And the defense wants you to think that this is some kind of little rinky-dink charge that's just a technical kind of thing, but it really is actually one of the more important charges in this case. And the reason is because it shows that this defendant knew that he was trafficking in child pornography. Why else would he have 2257 information for the adults and not bother to have it for the kids?

(TTR Vol. IX at 1493-1494). Then, in its rebuttal argument, the government spent 17 pages of transcript discussing and amplifying the significance of the 2257 charges in regard to the actual child pornography offenses:

> Ms. Daughtrey mentioned when she was talking about these record-keeping requirements that they seem like kind of a relatively small part of the proof, almost administrative. But in reality, the 2257 charges end up being incredibly important because they are relatively easy to comply with. If you are the producer, you keep the records -- and the judge will instruct you on the exact terms of the law – but if you produce pornographic content, it doesn't matter if the performer is 17 or 70, the whole point is to make the producer keep records, to check ID and keep records so the FBI can later look at those records and make sure that everybody in every pornographic video is an adult. The law is very simple. Certainly if you go to a course, it's very, very simple. The primary producer has to keep records, and anybody who's redistributing that content has to list the address, the accurate

physical address, where those records are kept. It's not complicated.

. . . . .

Of course. This -- the defense counsel talked a lot about how it was that he had no idea that the performers on the various web sites, including Justinsfriends.net, on Penisclub, on Caseyandkylescondo and Caseyscondo, that they were minors, and that the images depicted children, adolescent boys, under the age of 18 engaged in sexually explicit conduct. You can look at the proof that Ms. Daughtrey showed you related to 2257. You can remember that the defense introduced very elaborate proof of how it was that this defendant was able to comply with 2257. He did it very well when it came to his Collegeboys site. When it came to his 18 year old performers, he showed records saying, okay, here's the physical address, here's an example of an ID. He certainly knows how to do it. And yet -- and he talks about these three file cabinets of records that he keeps. That was in his testimony. He keeps -- he talks about all of that material. And yet, where are the three for Taylor, for [REDACTED], for [REDACTED]s; where are those? Wouldn't you think, as Ms. Daughtrey said, that somebody who goes to the extraordinary length of bringing veterinary records of a dog's birthday --

THE COURT: Ms. Bakshi, I'm going to stop you at this point. The defendant has no burden to bring in any evidence whatsoever before this jury, as you well know.

MS. BAKSHI: Thank you for that correction. I should have said -- I apologize. I should have said, of course, the defendant has no burden. The burden is entirely ours. However, I'll ask you to use your common sense in evaluating whether or not he was -- he didn't know how to comply or he chose not to because doing so would expose him to the truth, that all of these people, Taylor, [REDACTED] and [REDACTED], were minors in the images that are depicted in all of the defendant's web sites. The defense counsel on -- in his closing argument talked a lot about a sincere and honest belief that this defendant was trying very hard to comply. I submit to you there was nothing sincere about this effort to comply. He knew full well how to comply with 2257. He showed you how he knew how to comply with 2257. Yet, when it came to the Penisclub site that depicted child pornography involving [REDACTED], also known as Tory, and [REDACTED], there was no physical address listed. He knows how to do it. He chose not to. And you can use your common sense to infer that that might have been because he knew that if he put the address there, it might bring the FBI knocking.

(TTR Vol. IX at 1549-1552). Throughout the government's rebuttal argument, it repetitively instructed the jury about the great importance of the 2257 charges and how Defendant Richards' failure to comply with 2257 was critical evidence of his knowledge of the minority age of the performers and his intent to commit all of the charged child pornography offenses. In its penultimate words to the jury, the government said:

> There is no indication there was anything honest and sincere about his attempt to comply with 2257. And that's telling of his intent on all of these different crimes against children.

(TTR Vol. IX at 1566). Clearly, the government used the 2257 violations to prove essential elements (specifically, knowledge and intent) for the child pornography charges.

Argument

On October 23, 2007, in *Connection Distribution Co. v. Keisler*, the Sixth Circuit declared 18 U.S.C. §2257 to be facially unconstitutional for overbreadth in violation of the First Amendment.[2] ___ F.3d ___, 2007 WL 3070970 (6th Cir. Oct 23, 2007) [**See Appendix**]. The Court determined that Congress' intent was to define the terms of the statute broadly and to cast a wide net. In considering the facial overbreadth of 18 U.S.C. §2257, the Court exhaustively analyzed the following criteria:

> The first is whether and to what extent the statute reaches protected conduct or speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 486, 494 (1982) ("In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." (footnotes omitted)). The second is determining the "plainly legitimate sweep" of the statute, that is, the sweep that is justified by the government's interest. See

[2] *Connection Distribution Co. v. Keisler*, ___ F.3d ___, 2007 WL 3070970 (6th Cir. Oct 23, 2007) resulted in three (3) separate opinions by the panel.

> *Broadrick*, 413 U .S. at 615; *cf. Taxpayers for Vincent*, 466 U.S. at 810 ("[T]he application of the ordinance in this case responds precisely to the substantive problems which legitimately concerns the City."). The third is determining the likely chilling effects of the statute, stated otherwise as the statute's burden on speech. See *Broadrick*, 413 U.S. at 615; *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (unanimous); *Taxpayers for Vincent*, 466 U.S. at 800 n. 19; *New York v. Ferber*, 458 U.S. 747, 773 (1982). The last step involves weighing these various factors together, paying particular attention to the burden on speech when judging the illegitimate versus legitimate sweep of the statute. *Broadrick*, 413 U.S. at 615 ("[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."); *see Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002) ("We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.").

Connection Distribution Co. v. Keisler, ___ F.3d ___, 2007 WL 3070970 *7 (6th Cir. Oct 23, 2007) (emphasis added).

First, the Court concluded that, because 18 U.S.C. §2257 included a regulation of the visual depiction of adult sexual activity (i.e., legal conduct), it is a regulation of speech. *Id* at * 8-9. Secondly, the Court determined that "this statute covers quite a bit of protected speech." *Id* at * 9. Third, the Court held that 18 U.S.C. §2257 has a chilling effect on speech:

> Indeed, much of the statute's sweep would not be legitimated even if this case does not foreclose the government's ability to regulate so as to prevent defenses and aid prosecution in this manner. This statute covers images of actual sexually explicit conduct regardless of the obvious age of those depicted and regardless of whether or not the photographer actually knows the age of the person being photographed, for instance if the person being photographed is the photographer's significant other. These images are not within the "legitimate sweep" of the statute because it does not vindicate the government's interest to cover them.

Id at * 10. Moreover, the Court determined that the multiple burdens of 2257 lead to "significant chilling effects [on protected speech]."[3] [4] *Id* at * 11-12. After carefully balancing all consideration, the Sixth Circuit held that the records keeping requirements of 18 U.S.C. §2257 were facially

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[3] The Court enumerated the statute's burdens on speech as follows:

1) It bans anonymous images of actual sexually explicit conduct, and if records are not kept (if anonymity is not sacrificed), the person is guilty of a felony punishable by up to five years in prison and fines. 18 U.S.C. § 2257(a), (b), (f).
2) The statute also requires all producers to keep records on each image and affix disclosure statements to the images. Id. § 2257(b), (e). While this burden may not be that large for a commercial entity, it is likely to be more burdensome for those motivated by noncommercial purposes. Indeed, the Supreme Court has recognized that imposing regulations on noncommercial sexually explicit speech is a burden that may be too great and consequently chill speech. See Am. Civil Liberties Union, 521 U.S. at 865.
3) The statute here effectively bans creation of sexually explicit images unless such records are kept.
4) The statute additionally burdens those that wish to publish photographs, as they are disallowed from doing so unless such records are kept, even if they did not take the photograph and have no other way to track the performers down to create the records. Id. § 2257(a), (h)(2)(A).
5) Lastly, the statute burdens speech because it not only requires the person to keep records, it also allows the government to enter the premises where the records are kept at least once every four months, and perhaps more often, to inspect such records. Id. § 2257(c); 28 C.F.R. § 75.5 (2006).

Id at * 11-12.

[4] Likewise, the Court delineated the "significant chilling" effects as follows:

1) The first chilling effect stems from the breadth of the statute; "[t]he ordinance's plain language is admittedly violated scores of times daily, yet only some individuals ... are arrested" and prosecuted. *See Hill*, 482 U.S. at 466-67. There are likely many violations occurring because people without commercial motivations may not realize that the recordkeeping requirements apply to their speech. This leads to chilling because it means that enforcers can seek out and silence particularly disliked people or speech. *See Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *see also Taxpayers for Vincent*, 466 U.S. at 798 & n. 16.
2) Producers are also chilled if they are aware that the statute applies to all photographs of such conduct.
3) Additionally, this statute "unquestionably attaches" criminal penalties to protected speech, including a person's right to speak anonymously and a person's right to take photographs of adult actual sexually explicit conduct are protected.

Id at * 12.

unconstitutional for overbreadth. Finally, the Court determined that the unconstitutional portions of the statute could not be severed and that the only remedy was to declare the statute facially invalid on the whole. *Id* at * 16-17.

The Court must vacate convictions pursuant to a statute which is later declared to be unconstitutional. *See United States v. Pearl*, 324 F.3d 1210, 1213 (10th Cir. 2003)(*citing Griffin v. United States,* 502 U.S. 46, 53, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)("[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground."); *and citing Stromberg v. California,* 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)("[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.")). Consequently, the Court must vacate Defendant Richards' convictions on Counts 11 and 22 pursuant to 18 U.S.C. §2257. These convictions hinge upon what has now been determined to be a facially unconstitutional statute. As such, the convictions cannot stand.

Moreover, the convictions on the remaining counts (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24) must be vacated as well, because they were tainted by the prejudicial spillover effect from the 2257 counts. When some but not all counts of a multi-count conviction must be vacated, the Court must determine if prejudicial spillover from evidence introduced in support of the vacated counts requires the remaining convictions to be upset as well. *United States v. Rooney*, 37 F.3d 847, 855 (2nd Cir.1994). The analysis is one considering the totality of the circumstances. *Id.*

First, the Court must examine "whether the evidence on the reversed count would have tended to incite or arouse the jury into convicting the defendant on the remaining counts." *Rooney*, 37 F.3d at 855 (*citing United States v. Ivic,* 700 F.2d 51, 65 (2nd Cir.1983)(considering whether

evidence had a "decidedly pejorative connotation" that was "of the sort to arouse the jury"); *United States v. Friedman,* 854 F.2d 535, 582 (2nd Cir.1988)(pointing out that evidence on the reversed count was "hardly 'inflammatory'"). Here, the government repetitively and emphatically argued that the evidence of the 2257 violations should cause the jury to convict Defendant Richards of the remaining counts. In closing, the government clearly stated that the 2257 violation "shows that this defendant knew that he was trafficking in child pornography." (TTR Vol. IX at 1493-1494). Then in rebuttal closing, the government spent 17 pages of transcript exploring the great significance of the 2257 violations and their interconnectedness to the remaining charges. Among the government's final words to the jury was a declaration that the 2257 violations were "telling of [Defendant Richards'] intent on all of these different crimes against children." (TTR Vol. IX at 1566). The plain text of the trial transcript undeniably reveals that the government used the 2257 charges to incite the jury into conviction on the remaining child pornography offenses. The first criteria balances in favor of finding that the remaining convictions were tainted by the prejudicial spillover effect from the 2257 counts.

Second, the Court must "look to the similarities and differences between the evidence on the reversed count and the remaining counts." *Rooney*, 37 F.3d at 855.

> Courts have concluded that where the reversed and the remaining counts arise out of similar facts, and the evidence introduced would have been admissible as to both, the defendant has suffered no prejudice. The absence of prejudicial spillover can also be found where the evidence on the reversed and remaining counts are completely dissimilar, thus permitting the inference that the jurors were able to keep the evidence separate in their minds.
>
> While these two lines of cases appear at first blush to be contradictory, they are in fact consistent. When the reversed and remaining counts arise from an identical fact pattern and all evidence introduced on the reversed count would have been admissible

> anyway, a defendant will have a difficult time establishing prejudice. Likewise, when the reversed and remaining counts arise from completely distinct fact patterns and the evidence can be easily compartmentalized, we normally will have undiminished faith that a jury has followed the court's instructions and has evaluated each count on the specific evidence attributed to it. It is only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, *and* this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts, that spillover prejudice is likely to occur.

Rooney, 37 F.3d at 855-856 (citations omitted). In this case, the evidence of the 2257 violations would not have been admissible at a trial on the remaining child pornography charges. Thus, they do not arise from "an identical fact pattern." *Id.* Likewise, the charges were not so "completely distinct" that the jury "easily compartmentalized" the proof in reaching its verdict. *Id.* Rather, this is a case where not only is it likely that the jury used the evidence of the 2257 violation to assist in reaching its verdict on the remaining child pornography offenses, but the government argued that the jury do exactly that in its deliberations. The government expressly told the jury to infer Defendant Richards' <u>knowledge</u> and <u>intent</u> from the lack of record keeping pursuant to 18 U.S.C. §2257. Just like in the *Rooney* decision, the government's explicit invocation of the forbidden evidence (here 2257 evidence) to bolster its case on the remaining counts should undermine the Court's confidence that the jury adequately separated the counts in its deliberations. *Rooney*, 37 F.3d at 857. Obviously, this consideration overwhelmingly weighs in favor finding that the remaining counts were irreconcilably tainted by the 2257 counts.

Finally, the Court should examine the "strength of the government's case on the counts in question." *Rooney*, 37 F.3d at 856 (*citing United States v. Gjurashaj,* 706 F.2d 395, 400 (2nd Cir.1983)(reviewing the strength of the government's evidence on the remaining counts in rejecting

a claim of prejudicial spillover from invalidated count)). Assuming *arguendo* that the Court finds that the independent evidence of the child pornography offenses was sufficient standing alone, Defendant Richards urges the Court to find that the potential for prejudicial spillover is too high to ignore. The evidence on the remaining counts certainly was not overwhelming, and in light of the way the government encouraged the jury to utilize the 2257 evidence in its deliberations on the remaining counts, the Court must find that the remaining counts were tainted by the impermissible, prejudicial spillover from the 2257 evidence. As decided in *Rooney*, Defendant Richards urges the Court to find that the remaining child pornography counts (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24) must also be vacated. *Id.*

Conclusion

Based on the foregoing, Defendant Richards respectfully requests that his convictions on Counts 11 and 22 of the Third Superseding Indictment be vacated as unconstitutional. Furthermore, Defendant Richards respectfully requests that his convictions on the remaining counts (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24) be set aside because of the unfair and prejudicial spillover effect that the inclusion of the unconstitutional counts had on his ability to receive a fair trial.

Respectfully submitted,

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this 26th day of October, 2007.

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