

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

UNITED STATES OF AMERICA )  
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 )  
 v. ) No. 3:05-00185  
 ) Judge Trauger  
TIMOTHY RYAN RICHARDS )  
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GOVERNMENT’S RESPONSE TO DEFENDANT  
RICHARDS’ MOTION TO VACATE CONVICTIONS

Defendant Timothy Ryan Richards has filed a motion to vacate convictions against him on Counts One, Two, Three, Eleven, Sixteen, Nineteen, Twenty, Twenty-One, Twenty-Two, Twenty-Three, and Twenty-Four of the Third Superseding Indictment. Defendant asserts that the recent Sixth Circuit decision in *Connection Distributing Co. v. Keisler* invalidates the convictions on Counts Eleven and Twenty-Two relating to 18 U.S.C. § 2257. \_\_ F.3d \_\_, 2007 WL 3070970 (6th Cir. Oct. 23, 2007). Defendant further demands that this Court vacate the remaining convictions on grounds that there was prejudicial spillover. For the reasons set forth below, the government respectfully requests that this Court put its decision in abeyance until the *Connection* decision is final, and in the alternative, deny the defendant’s Motion to Vacate all convictions against him because the evidence admitted with respect to record-keeping was relevant with respect to defendant's intent and knowledge on other counts within the indictment.

**I. IT IS PREMATURE FOR THE COURT TO VACATE THE CONVICTIONS UNDER 18 U.S.C. § 2257**

As discussed in the government's Motion for Extension of Time to Response to defendant Richards' Motion to Vacate Convictions, it is premature for the Court to make any decision concerning defendant's convictions under 18 U.S.C. § 2257. In *Connection Distributing Co. v. Keisler*, \_\_\_ F.3d \_\_\_, 2007 WL 3070970 (6th Cir. Oct. 23, 2007), the Sixth Circuit held that Section 2257 is unconstitutionally overbroad. However, the government has until December 10, 2007, to seek en banc review of the decision of the Sixth Circuit. As required by 28 C.F.R. § 0.20(b), the Solicitor General is currently assessing the issue. If the Court were to vacate defendant's convictions under 18 U.S.C. § 2257, double jeopardy would prevent the government from retrying the defendant should an *en banc* review ultimately occur and the Sixth Circuit reverse its decision concerning the constitutionality of 18 U.S.C. § 2257. Thus, the government requests this Court put any decision on defendant's motion in abeyance until the legal issue is settled by the Sixth Circuit.

**II. REGARDLESS OF THE SIXTH CIRCUIT OPINION, THE REMAINING COUNTS SHOULD BE UPHELD**

**A. Neither Prejudicial Spillover Nor Retroactive Misjoinder Occurred Among the Convictions on the Two Counts of Violating 18 U.S.C. § 2257 and the Remaining Nine Counts of Conviction.**

Neither the jurisprudence on prejudicial spillover nor the law on the related concept of retroactive misjoinder justifies the defendant's motion to vacate. The test for prejudicial spillover in the context of reversed counts is whether the totality of the circumstances requires reversal of some or all of the remaining counts. 26-630 Moore's Federal Practice—Criminal Procedure § 630.31. The term “retroactive misjoinder” refers to circumstances in which the joinder of multiple counts

was executed properly at trial, but later developments—such as a district court’s dismissal of some counts for lack of evidence or an appellate court’s reversal of less than all convictions—render the initial joinder improper. *United States v. Hamilton*, 334 F.3d 170, 181-82 (2d Cir. 2003). Defendant’s motion to vacate the remaining counts based upon prejudicial spillover can be characterized as a retroactive misjoinder motion. The doctrines of retroactive misjoinder and prejudicial spillover are, by definition, intertwined. *See Hamilton*, 334 F.3d at 181 (stating that “[Defendants] contend. . . they are entitled to new trials on the [ ] grounds that there was ‘retroactive misjoinder’. . . and that they suffered from prejudicial spillover. These contentions [ ] are intertwined . . .”). The Sixth Circuit does recognize the doctrine of retroactive misjoinder and has held that retroactive misjoinders are governed by the same standards as are applied in any case in which prejudicial joinder is alleged; that standard is “compelling prejudice.” *United States v. Warner*, 690 F.2d 545, 553-54 (6th Cir. 1982). Thus, a defendant invoking the doctrine of retroactive misjoinder must demonstrate “compelling prejudice” to obtain reversal on the remaining counts. *Id.* at 554.

**B. Defendant Has Failed to Meet the Standards for Prejudicial Joinder as Delineated by Sixth Circuit Case Law.**

The Sixth Circuit further elaborated on this set of issues in *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988). In *Murphy*, the defendant was convicted of eleven counts of mail fraud, one count of obstruction of justice, and one count of perjury. Because the mail fraud counts were later overturned, the defendant tried unsuccessfully to vacate his obstruction and perjury convictions on prejudicial spillover grounds. The Sixth Circuit applied the standard that it had previously set forth in *United States v. Swift*, 809 F.2d 320 (6th Cir. 1987). Echoing the *Swift* Court, the Sixth Circuit articulated the following standard for cases like that of the instant defendant, in which the defense

failed to ask for a severance of counts at trial, but later seeks relief under prejudicial spillover or misjoinder theory:

The defendant moving for a severance must demonstrate an inability of the jury to separate and treat distinctively, evidence relevant to each particular defendant. *Swift*, 809 F. 2d at 322. The same analysis applies where the defendant claims a spillover effect with respect to counts for which a dismissal is ordered as the proof of the dismissed counts might prejudicially spillover onto the remaining convictions.

*Murphy*, 836 F. 2d at 256.

The defendant in the instant case has failed to articulate proof that he suffered “compelling prejudice” due to an inappropriate spillover between Counts Eleven and Twenty-Two, pertaining to the 18 U.S.C. § 2257 offenses, and the remaining counts of conviction. Instead, he simply makes the conclusory statement that the “evidence on the remaining counts was not overwhelming...” Docket Entry 314, p. 10. That statement without demonstration of “compelling prejudice” fails the standard set forth by the Sixth Circuit for situations of this nature.

**C. Sixth Circuit Case Law States That Courts May Presume That Juries Are Capable of Sorting Evidence and Separately Considering Each Count of an Indictment.**

The Court should presume that the jury in the defendant’s trial considered separately each count of the indictment, including the evidence that supported each count of the indictment.. The Sixth Circuit has articulated that courts may presume that juries are capable of sorting evidence and separately considering each count in a multi-count indictment. *See United States v. Medina*, 992 F. 2d. 573, 587 (6th Cir. 1983). In *Medina*, the defendant argued that he suffered prejudice against his right to a fair trial because the government tried him with multiple defendants in a twenty-nine count indictment, in which only three counts pertained to him. *Id.*

Citing the *Medina* case in a subsequent opinion, the Sixth Circuit reviewed a similar claim in *United States v. Welch*, 97 F.3d. 142 (6th Cir. 1996). In *Welch*, one of the defendants appealed his conviction in a multi-defendant, multi-count narcotics trial because his motion to sever had been denied. In rejecting his claim, the Sixth Circuit echoed its earlier language from *Medina*, stating that “[a]s an initial matter juries are presumed capable of sorting evidence and separately considering each count and each defendant.” *Welch*, 97 F. 3d. at 147 (quoting *Medina*, 992 F. 2d. at 587). Noting that the defendant had failed to provide any proof of actual jury confusion, the Sixth Circuit went on to explain that even a bona fide and substantiated risk of jury confusion might not outweigh society’s need for speedy and efficient trials. *Welch*, 97 F. 3d. at 148.

This Court instructed the jury on the issue of “Separate Consideration - Single Defendant Charged with Multiple Crimes.” Docket Entry 202 at 15. The defendant did not demonstrate any jury confusion. Thus, the Court should presume that the jury considered the evidence separately for each count of the indictment.

**D. The Jury Clearly Demonstrated Through Its Verdict That It Properly Considered the Evidence and Elements for Each Count Charged.**

The jury in the instant case showed that it could and did separately consider each of the counts independently. The fact that the jury acquitted the defendant of 10 counts in and of itself shows that it was carefully evaluating evidence against the particular elements of each crime charged. More importantly, the jury’s verdict on various counts shows that it was careful to differentiate the proof needed to convict on the 18 U.S.C. § 2257 counts and the remaining counts. The 18 U.S.C. § 2257 counts applied to the websites “www.penisclub.com” in Count Eleven and “www.justinsfriends.com”/“www.justinsfriends.net” in Count Twenty-Two. Importantly, the jury acquitted on charges related to the distribution of child pornography on Count Nine, Distribution

of Child Pornography, through the “www.penisclub.com” site. In other words, one can reasonably assume that the jury found that the government had failed to prove that the images on the “www.penisclub.com” depicted child pornography, but that the government had nonetheless proved that the defendant violated the record keeping requirements for that site required by § 2257. This set of facts alone debunks the basis of the defendant’s argument to vacate on grounds of prejudicial spillover.

The jury showed its ability to separately consider each count and render an individualized verdict in several other ways as well. With respect to the second 18 U.S.C. § 2257 conviction pertaining to Count Twenty-Two and “www.JustinFriends.com”/“www.JustinFriends.net,” the jury convicted on other counts related to that site including Count Nineteen, Advertising Child Pornography; Count Twenty, Conspiracy to Distribute Child Pornography; and Count Twenty-One, Distribution of Child Pornography. However, the jury acquitted the defendant of Count Eighteen, another count relating to the same site.

Along similar lines, the jury convicted on Count Sixteen, Distribution of Child Pornography, which involved “www.CaseysCondo.com,” and yet acquitted on Count Twelve, the Conspiracy to Advertise, associated with the same website. Clearly, the jurors were able to separately consider the elements associated with distributing child pornography from the elements of conspiracy and advertising with respect to the same content.

Importantly, the jury also showed that it carefully considered the elements for each count. For instance, the jury acquitted on Counts Six and Seven, which pertained to alleged child pornography depicting victim P.L., even though it convicted on several other counts including Count One, Count Two, Count Sixteen, Count Twenty-Three, and Count Twenty-Four, all of which

involved the same victim. Likewise, the jury acquitted the defendant of charges involving C.B., who was also known as “Tory,” in Counts Four, Five, Fifteen, Twenty-Five, and Twenty-Six, but convicted on Count Three which involved the same alleged victim. Again, this discernment among counts makes clear that the jury was carefully evaluating the evidence and following the Court’s instructions on the elements required for each count. Additionally, the jury deliberated for three days, asking numerous questions throughout that time, which further supports the conclusion that the jury conscientiously and effectively considered the evidence and this Court’s instructions. In short, this is not a case in which the jury blindly followed the prosecution’s arguments, and no prejudicial spillover reasonably can be inferred.

**E. Defendant Fails Even the Second Circuit Legal Test That He Sets Forth as Relevant Authority.**

In his attempt to use the *Connection* decision to vacate all of the counts on which the jury convicted him, the defendant does not address Sixth Circuit case law on retroactive misjoinder; instead he focuses on prejudicial spillover, relying solely upon the Second Circuit case *United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994). In addition to the fact that the *Rooney* decision does not have precedential authority in the Sixth Circuit, the *Rooney* decision does not support effectively the defendant’s argument for vacating his convictions. In fact, the defendant’s argument fails on each of the three factors for analyzing prejudicial spillover that the Second Circuit articulated in *Rooney*. Those factors are as follows: (1) “whether the evidence on the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts, (2) the similarities and differences between the evidence on the reversed count and the remaining counts, and (3) a general assessment of the strength of the

government's case on the remaining counts." *Id.* at 855-56 (2d Cir. 1994). *See also United States v. Wapnick*, 60 F.3d 948, 953-54 (2d Cir. 1995).

1. **The information that defendant alleges to have the effect of prejudicial spill-over is not inflammatory.**

The defendant's claim fails the first prong of the *Rooney* test relating to inflammatory evidence. The defendant broadly and vaguely asserts that the government used evidence related to 18 U.S.C. § 2257 to "incite" the jury into convicting on the remaining counts. Docket Entry 314, pp. 7-8. The evidence related to the arguably invalidated § 2257 counts, however, was not inappropriately inflammatory as to the other counts.

The Second Circuit case of *United States v. Jones*, 16 F. 3d. 487, 493 (2d Cir. 1994), provides an elucidating and contrasting example of inflammatory and irrelevant evidence that prejudiced the defendant's interests on remaining counts. In *Jones*, the defendant faced a trial on five criminal counts including Counts One through Three, which consisted of armed bank robbery, bank robbery involving assault, and use of a firearm during a crime of violence. In addition, the defendant faced two additional counts of being a felon-in-possession of a firearm. The jury in the *Jones* case convicted the defendant of the first three counts of the indictment relating to the robbery offenses. However, the defendant successfully severed one of the felon-in-possession counts before trial and ultimately prevailed on an appeal of the other felon-in-possession count. As a result of these peculiar facts, the Second Circuit found that the jury that convicted the defendant for the robbery related offenses had necessarily been exposed to and had likely been influenced by the evidence that *Jones* was a convicted felon. Therefore, the *Jones* case involved a scenario in which the jury had heard inherently prejudicial information that did not have anything to do with the remaining counts. It was this combination of the obviously inflammatory nature of felony

convictions and the inevitable prejudice that felons face that militated the Second Circuit's decision to overturn the remaining counts of conviction.

These kinds of prejudicial circumstances are easily distinguished from those in the instant case. In the matter at hand, the information and evidence presented that Richards did not collect or maintain records or identification for the minors depicted in his pornography is not inherently inflammatory in the way that information about a defendant's felony record might be. In fact, the failure to check records is one of the least inflammatory parts of the whole scheme, which involved sexually abusing minors, videotaping those molestations, and distributing them around the world for profit.

In addition, the evidence that the defendant did not check age identification is independently relevant to the remaining offenses. Rules 402<sup>1</sup> and 404(b)<sup>2</sup> of the Federal Rules of Evidence would have supported the government's authority to introduce the failure to check as a means of impeaching the defendant's assertion that he was ignorant of the victims' minor status. (*See e.g.* TTR at 1033-1038) The instructions for each of the remaining counts each had a scienter requirement about the defendant's knowledge of the victims' minor status. Docket Entry 202 at 18-49. As a result, evidence that Richards did not check identification even though he was dealing with

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<sup>1</sup> Federal Rules of Evidence Rule 402: Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

<sup>2</sup> Federal Rules of Evidence Rule 404 (b) . Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes. (b) Other crimes, wrongs, or acts: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

adolescents would certainly be relevant and admissible, even if the government had never charged the 18 U.S.C. § 2257 counts.

**2. The evidence on the arguably invalidated counts of conviction would be relevant to the remaining counts of conviction.**

In *Rooney*, the Second Circuit elaborated on how courts within its purview should evaluate the second prong of its test that relates to the similarities and differences of the evidence related to reversed and remaining counts. Rooney had been convicted of violating 18 U.S.C. § 666, corruptly soliciting a thing of value intending to be influenced in connection with a federally funded housing project. The Second Circuit reversed the conviction on this count based upon a finding that defendant's conduct was not within the scope of the statute. 37 F.3d at 851, 854. The court also reversed defendant's conviction for two violations of 18 U.S.C. § 1001, making a false statement and concealing a material fact in a submission to the government, based upon the prejudicial spillover doctrine. *Id.* at 851, 857. In its analysis, however, the Second Circuit provided a limiting explanation by stating that prejudicial spillover is *only* relevant in situations in which (1) evidence is introduced on an invalidated count and that evidence would be inadmissible on the remaining counts; *and* (2) 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. The Second Circuit definitively stated that spillover prejudice may not occur in situations in which the evidence related to the invalidated count would *also* be admissible to support the remaining counts, as is the situation in the instant case:

...it is appropriate to look to the similarities and differences between the evidence on the reversed count and the remaining counts. 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 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.

*Id.* at 855-856 (*internal citations omitted*).

Additionally, the Second Circuit in *Rooney* made its decision based upon its finding (1) that the evidence of the invalidated count was inadmissible as evidence of the remaining counts of conviction, and (2) that this inadmissible evidence was introduced pejoratively against the defendant in order to support the remaining conviction. The situation in *Rooney* is different from the instant case in which the evidence of the defendant's knowledge about the age of the victims certainly would have been admissible. The evidence that the defendant did not obtain documentation of his victims' ages is fairly and independently relevant to not only the 18 U.S.C. § 2257 counts, but also to the remaining counts of conviction. Specifically, evidence and argument that the defendant failed to obtain documentation about the age of the performers in his pornography supports the jury's conclusion about the defendant's scienter on the other counts. The jurors appropriately could use their common sense to infer that, even in the absence of a law requiring record keeping, any reasonable person who intended to make pornography with barely-legal teenagers would take steps

to ensure that his estimation of their adult status was indeed correct. The reasonableness of this inference is underscored by the fact that there are dire consequences for producing and trafficking in pornography of minors.

Moreover, the evidence about defendant's failure to keep records is relevant to the other counts of conviction because it showed that defendant failed to abide by requirements of 18 U.S.C. § 2257 even though he knew it was squarely in effect at the time of his conduct. Nothing in the record suggests that he predicted a successful challenge to the § 2257 statute. Indeed the record reflects that the defendant went to great lengths to learn about and abide by the requirements of § 2257 in his adult pornography endeavors. (TTR at 1058). In this way, regardless of the ultimate determination about the constitutionality of § 2257 in the year 2007 and beyond, the defendant's blatant and knowing failure to abide by the law when it was squarely in effect in 2005 amounts to fair and relevant evidence of mens rea for the remaining counts of conviction.

**3. The evidence against the defendant was sufficient and abundant to maintain the convictions.**

The defendant's argument also fails on the third prong of the *Rooney* standard that pertains to the general assessment of the strength of the government's case on the remaining counts. *Rooney*, 37 F.3d at 855-56 (2d Cir. 1994). The government presented abundant evidence of Richards' guilt on the remaining counts, independent of the fact that he failed to abide by the 18 U.S.C. § 2257 regulations. On this point, the defense makes an unsupported conclusory statement that the "evidence on the remaining counts was not overwhelming..." Docket Entry 314, p.10. Additionally, "not overwhelming" is not the legal standard for criminal convictions.

The government offered abundant proof to support the remaining counts of conviction. For Counts One and Sixteen, relating to [www.CaseysCondo.com](http://www.CaseysCondo.com) and "Caseyscondo.com," proof

included evidence in the form of the defendant's own admission, (TRR at 1106), and by corroboration of the victim P.L., (TRR at 279), that the defendant knew the victim's true age reflecting his date of birth in July of 1985. (*See* TRR at 176-177). Moreover, both the defendant ((TRR at 987) and P.L. (TRR at 289) testified that sexual contact had occurred on a repeated basis starting from the time that P.L. was 14 years old. That information about the victim's actual age, coupled with the victim's direct testimony that the pictures associated with this count were taken at a time when he was a minor, together serve as exceptionally strong, direct proof of the defendant's guilt on this count. P.L.'s impressive and credible demeanor during testimony may well have impressed the jurors and convinced them of his accuracy and truthfulness. Moreover, this victim likely gained further credibility from the FBI case agent's testimony that P.L. identified as child pornography only those images that he stated he could be certain were taken before his eighteenth birthday. (TRR at 315). Importantly, the government also was careful to juxtapose the pornographic pictures of P.L. that were taken over a period of years to debunk the defendant's testimony that all of the pictures were taken close in time after the victim's eighteenth birthday. (*See e.g.* TRR at 1102-1103). In other words, the government used the pictures themselves to make obvious that they had been produced over a period time, starting when P.L. looked very young and continuing to a time when his appearance had matured.

Of relevance to some of the pictures associated with Counts One and Sixteen, the "Sydney/XPhotos," the government also introduced evidence of passport records that confirmed that P.L. had traveled to Australia only one time, at a time that he was a minor. (TRR at 317-318). That evidence combined with forensic evidence that the Sydney/XPhotos was distributed on the "www.CaseyandKylesCondo.com" website and the photographic proof that the handstamp on the

victim's hand in a benign picture at the Sydney aquarium that the defendant admitted was taken when P.L. was a minor (TRR at 1098) *also* appeared in the sexually explicit photos labeled "Sydney/Xphotos," provided unequivocal proof that the defendant had distributed child pornography.

The government proved Count Two through similar means. The testimony of P.L. served as direct proof that the pornographic pictures of him in the video "Welcome.wmv" were produced when he was a minor. (TRR at 361-362). The case agent testimony and computer forensic expert testimony proved that the video appeared on the internet (TRR at 190; 224-226; 836) and Richards himself appeared in the video and took credit for the site "www.CaseyandKylescondo.com" that the charged video advertised. ((TRR at 224).

Count Three is, on its face, beyond the scope of the defendant's claim. Specifically, Count Three pertains to a conviction for advertising pornography via the "Tory\_DVD.wmv." The jury acquitted on Count Nine, Distribution of Child Pornography via the "www.PenisClub.com" site that specified the "Tory\_DVD.wmv" video. Count Three is beyond reproach because the Tory\_DVD.wmv video advertised more child pornography available on another website. (TRR at 224). In other words, the conviction in Count Three, which related to "Tory\_DVD.wmv," had nothing to do with the conviction on Count Eleven for the § 2257 violation of the site that distributed the Tory\_DVD.wmv video among other pornographic content.

Counts Nineteen, Twenty, and Twenty-two pertain to the website "www.JustinsFriends.com" / "www.JustinsFriends.net." Abundant proof was introduced to support the charges that the defendant knowingly trafficked in child pornography through the latter website. As a predicate matter, the government introduced uncontroverted evidence that two of the people, "Taylor" and

“Colin,” who were depicted in pornography on this site, were minors even at the time of trial. (TRR at 174-176). Additionally, FBI Special Agent Brooke Donahue testified that he had met both Taylor and Colin and that he recognized them as being the same boys that were depicted in some of the child pornography on this site. (TRR at 174-176).

With respect to the defendant’s knowledge that these children were minors at the time of production for Counts Nineteen, Twenty, and Twenty-two, the government introduced evidence of a chat testimony between the defendant and other co-conspirators, in which the defendant claimed ownership of the site and demonstrated his role as the defacto operator of the site. (*See* Government’s Trial Exhibit #95, TRR at 872-873). The government also introduced evidence of communication between the defendant and co-conspirator, Gregory Mitchel, in which the two discussed the fact that this site depicted child pornography of “Taylor” in July of 2005. (*See* Government’s Trial Exhibit #94, TRR at 870). The government then elicited testimony that the child discussed in that chat was depicted on the site as late as September 2005 (TRR at 871). In other words, the government effectively proved that the defendant had continued to traffick in child pornography via this site months after he had, at a minimum, been put on notice that it contained child pornography. Lastly, the government also introduced evidence that the defendant demonstrated his role as the operator of the site by putting a pornographic picture of himself and P.L. on the site. (*See* Government’s Trial Exhibit #22, TRR at 188-189). Copies of the images and other graphic design elements associated with the JustinFriends site were also found on the defendant’s computer; this forensic proof further solidified the proof that the defendant knowingly committed the child pornography offenses charged in Counts Nineteen, Twenty, and Twenty One.

Counts Twenty-Three and Twenty Four pertain to child pornography offenses committed using 8 mm video tape. The child pornography of P.L. depicted in the 8mm video tape labeled "Casey@16" was different and unrelated from the identified images on the sites for which the defendant violated the § 2257 laws, namely "www.PenisClub.com" and "www.JustinsFriends.com"/"JustinsFriends.net." Again, P.L. provided direct testimony that the images on that video were created when he was a minor. (TRR at 328-329). Additionally, P.L. corroborated his own recollection by pointing out that he recognized the home in which the video was shot as being a home in Massachusetts that the defendant lived in at the time that P.L. was approximately 15 years old. (TRR at 328-329). Moreover, the video tape itself supported the guilty verdicts on this count as P.L. appeared to look very young on this video, (*See* Government's Trial Exhibit #31), and the jurors could therefore easily and reasonably conclude that the "Casey@16" 8mm video tape indeed constituted child pornography. This conclusion does not rely, at all, upon the evidence presented regarding the 18 U.S.C. § 2257 convictions in Counts Eleven and Twenty-Two.

### **Conclusion**

Again, the government respectfully requests that this Court hold any decision in this matter in abeyance until the Sixth Circuit opinion at issue is final. In the alternative, the defendant does not have basis on *any* standard to show that there was any prejudicial spillover or that retroactive misjoinder should apply. As a result, the government requests that the Motion to Vacate as applied to the remaining counts of the Indictment must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic case filing to the following:

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on this, the 21<sup>st</sup> day of November, 2007.

/s/ S. Carran Daughtrey  
S. Carran Daughtrey