

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

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

**REPLY TO GOVERNMENT’S RESPONSE TO DEFENDANT 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 files this Reply to the government’s Response (Docket Entry 322) to his Motion to Vacate Convictions Pursuant to Facially Unconstitutional Statute (Docket Entry 313) with supporting Memorandum of Law (Docket Entry 314). For the reasons stated in his Motion and herein, Defendant Richards respectfully suggests that his Motion to Vacate Convictions Pursuant to Facially Unconstitutional Statute should be granted.

Argument

In essence, the government argues two (2) things in its Response. First, the government suggests that it would be premature for this Court to vacate the §2257 convictions (Counts 11 and 22) because double jeopardy would bar a retrial in the event of *En Banc* review and reversal of the published panel decision in *Connection Distribution Co. v. Keisler*, ___ F.3d ___, 2007 WL 3070970 (6th Cir. Oct. 23, 2007). Secondly, the government urges the Court not to vacate the remaining counts of conviction (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24), arguing a lack of prejudicial

spillover effect. Defendant Richards will address each argument in turn.

I. It is Not Premature to Vacate the Convictions under 18 U.S.C. §2257.

The government requests that this Court delay ruling on Defendant Richards' Motion until it can decide whether to file a Petition for Rehearing *En Banc* and, if filed, until after the Sixth Circuit takes action on the Petition. However, the government has not even committed to filing a Petition for Rehearing, and there is no guarantee that the Sixth Circuit would rehear the case *En Banc* or reach a different conclusion if it did. Therefore, the law is settled in the Sixth Circuit through the Panel's published opinion in *Connection Distribution Co.*, and this matter is ripe for this Court's consideration.

Moreover, the government erroneously theorizes that, should there be a subsequent change in the Sixth Circuit law via *En Banc* review of this issue, double jeopardy would bar a retrial. However, this is not a correct statement of the law. When a conviction is vacated after a guilty verdict and on grounds unrelated to sufficiency of the evidence, the vacated conviction can be reinstated without offending the Double Jeopardy Clause. *United States v. Wilson*, 420 U.S. 332, 352, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); *United States v. Recio*, 371 F.3d 1093, 1108 (9th Cir. 2004). Therefore, the government can suffer no prejudice as a result of the Court acting now.

II. The Remaining Counts Are So Irreparably Tainted by the Prejudicial Spillover Effect from the §2257 Counts That They must Be Vacated as Well.

As a threshold matter, the government urges the Court to be guided by severance cases such as *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982) and *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988). Obviously, severance cases are factually distinguishable from the circumstances presented here. It would be more helpful for the Court to examine the law arising from factually

similar circumstances (i.e., where some convictions on jointly tried counts are required to be vacated and the balance of the counts are in question because of taint). The Second Circuit has delineated a three-part test for determining whether there was likely prejudicial spillover from the evidence submitted in support of convictions that were set aside after trial.

(1) whether the evidence introduced in support of 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) whether the dismissed count and the remaining counts were similar; and,

(3) whether the government’s evidence on the remaining counts was weak or strong.

See United States v. Hamilton, 334 F.3d 170, 182 (2nd Cir. 2003); *United States v. Gore*, 154 F.3d 34, 48-49 (2nd Cir.1998); *United States v. Rooney*, 37 F.3d 847, 855-57 (2nd Cir.1994).

Here, the prejudicial spillover effect from the unconstitutional convictions (Counts 11 and 22) is self-evident, and the government occasioned that spillover effect. As set forth in detail in the Motion, in both of its closing arguments, the government vigorously and repeatedly argued for the jury to use the §2257 infractions (Counts 11 and 22) to impute guilt on the remaining counts (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24). The government cannot shrink from its heavy-handed words of incitement to the jury in closing simply because of the present state of the law. The government asked the jury for spillover from the §2257 counts, and now that the jury used the §2257 counts for impute knowledge as requested by the government, those counts are irreparably tainted and cannot be salvaged.

In an effort to dissuade the Court from dismissing the remaining tainted counts, the government points to the mixed verdict and jury instructions as evidence that the jury diligently

compartmentalized the proof on each count and effortlessly moved through the elements. However, the jury's questions belie the government's suggestions. Rather, the jury was confused about how to sort through the proof given the intellectually challenging and complex body of law set forth in the jury instructions. The jury asked numerous questions in the course of deliberations, many of which sought more guidance on the law. The jury expressed frustration with the complexities of deliberating on the advertising counts in particular. (TTR Vol. X, pp. 1648-1660; TTR Vol. XI, pp. 1668-1670; 1673-1677, 1681-1682).

Moreover, contrary to the government's suggestions, the jury's improper consideration of the §2257 evidence cannot be defended under Rules 402 and 404(b) of the Federal Rules of Criminal Procedure. Evidence of Defendant Richards' failure to comply with §2257 would not have been admitted at a separate trial on the remaining counts. Although the government was required to prove Defendant Richards' knowledge and intent for the remaining counts of conviction (Counts 1, 2, 3, 16, 19, 20, 21, 23, and 24), it was not required to prove lack of record keeping or failure to verify age. The government's use of the §2257 proof (failure to verify age and keep records) effectively lowered the government's burden of proof on knowledge and intent as to the other counts. This other act evidence would have been excluded under both Rule 403 and the balancing test of Rule 404(b).

Perhaps most importantly, the proof regarding the failure of record keeping (the §2257 violations) would have been excluded as an improper comment on Defendant Richards' Fifth Amendment privilege. One fundamental problem with the §2257 charges during the trial was the government's inherent tendency to shift the burden to Defendant Richards to prove why he was not in compliance. The government repeatedly struggled with the temptation to shift the burden to

Defendant Richards by means of commenting on his failure to present evidence of his §2257 compliance to dispel the government's proof of *mens rea*. On several occasions, the Court reminded the jury and counsel for the government that the defendant bears no burden of proof. Clearly, at a independent trial on the remaining counts, comment on Defendant Richards lack of record keeping would not have been permitted, and if included, would have been cause for a mistrial.

Finally, the government continues to maintain a slanted view of the proof presented at trial. The government contends that the proof of the remaining counts was overwhelming. While the proof prompted the jury to convict on 11 of 26 total counts, it was hardly overwhelming. The government oversold its proof before trial much as it does in the Response. The weaknesses of the government's case were revealed at trial. The government's only "victim" witness at trial was Patrick Lombardi. He was heavily discredited and shown to be a consensual participant in the production of his own images. The balance of the government's proof came from cold computer forensics and awkward interpretations of emails and chats by Forensic Expert Kristi Whitsman. The government's recollection of the proof in its Response (pp. 12-16) is little more than an attempt to rewrite its closing arguments in a way that does not emphasize the critical importance of the §2257 evidence. The transcript speaks for itself.

Conclusion

Based on the assertions made in his initial Motion and herein, Defendant Richards respectfully suggests that his Motion to Vacate Convictions Pursuant to Facially Unconstitutional Statute should be granted.

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:

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this 26th day of November, 2007.

s/ Kimberly S. Hodde

KIMBERLY S. HODDE