No. 07-60732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner

v.

JAMES FORD SEALE,

Defendant-Respondent

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES' PETITION FOR REHEARING EN BANC

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UNITED STATES' PETITION FOR REHEARING EN BANC

Pursuant to Federal Rule of Appellate Procedure 35, the United States respectfully submits this Petition for Rehearing En Banc. The panel, in its decision issued on September 9, 2008, interpreted Congress's 1972 amendment to the federal kidnaping statute, 18 U.S.C. 1201, as a procedural statute that should apply retroactively, rather than a substantive statute that should apply prospectively only.[1] The panel's interpretation of the amendment directly

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[1] The panel's opinion (Slip Op.) is attached hereto.

conflicts with this Court's precedent in *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (1986), on how to apply conflicting canons of statutory interpretation. Accordingly, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

STATEMENT OF THE ISSUE

Whether the panel's interpretation of the 1972 amendment to the federal kidnaping statute, 18 U.S.C. 1201, as a procedural statute that applies retroactively, rather than a substantive statute that applies prospectively only, conflicts with this Court's decision in *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (1986).

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On January 24, 2007, a federal grand jury in the Southern District of Mississippi returned an indictment charging the defendant, James Ford Seale, with two counts of kidnaping, in violation of 18 U.S.C. 1201(a), and one count of conspiracy to kidnap, in violation of 18 U.S.C. 1201(c), for his role in abducting and killing two young, African-American men on May 2, 1964. At the time of the offense, a violation of 18 U.S.C. 1201 was "punishable by death" and thus subject to no limitation on prosecution of capital crimes, pursuant to 18 U.S.C. 3281.

The defendant moved to dismiss the indictment, arguing that the prosecution was barred by the five-year statute of limitations applicable to noncapital crimes, 18 U.S.C. 3282, because: (1) in 1968, the Supreme Court in *United States* v. *Jackson*, 390 U.S. 570, struck down the death penalty provision of 18 U.S.C. 1201; and (2) in 1972, Congress repealed it. The district court denied the motion on both grounds. On June 14, 2007, the jury found the defendant guilty on all three counts of the indictment.

The defendant appealed. He raised numerous issues, including whether the district court erred in denying his motion to dismiss based on the statute of limitations. The panel heard oral argument on June 2, 2008. During argument, the panel asked counsel for the United States to cite a case that holds that the procedural effects of a substantive change to a statute cannot be applied retroactively absent expressed congressional intent. In response, the United States filed a letter, pursuant to Federal Rule of Appellate Procedure 28(j), citing *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (5th Cir. 1986). On September 9, 2008, the panel issued a published decision vacating the defendant's conviction and rendering a judgment of acquittal. See Slip Op. 20. The panel held that the 1972 amendment to the federal kidnaping statute, 18 U.S.C. 1201, retroactively shortened the limitations period applicable to this case.

See *ibid*. The panel did not address *Griffon*.

STATEMENT OF RELEVANT FACTS AND THE PANEL'S OPINION

1. The 1972 Amendment

The 1972 amendment, passed as the Act for the Protection of Foreign Officials and Official Guests of the United States, made several substantive changes to the federal kidnaping statute, 18 U.S.C. 1201. See Pub. L. No. 92-539, Title II, § 201, 86 Stat. 1072. For example, the amendment extended the statute's jurisdictional base to include acts committed within the special maritime, territorial, and aircraft jurisdiction of the United States. See *ibid*. The amendment also expanded the scope of federal kidnaping to include acts committed against foreign officials and official guests. See *ibid*. Finally, the amendment substituted a maximum sentence of death with a term of life imprisonment.[2]

As a result of the amendment's repeal of the death penalty, kidnaping was

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[2] When the bill was first introduced, it restored the death penalty for kidnaping, but with some revisions aimed at achieving compliance with the Supreme Court's holding in *United States* v. *Jackson*, 390 U.S. 570 (1968). See Letter from the Secretary of State and Attorney General, contained in H.R. Rep. No. 1268, 92d Cong., 2d Sess. and S. Rep. No. 1105, 92d Cong., 2d Sess. (1972). Before Congress voted on final passage of the Act, however, the Court decided *Furman* v. *Georgia*, 408 U.S. 238 (1972), which effectively invalidated the federal death penalty as it existed at that time. In response, Congress removed the death penalty from the final version of the bill "to avoid facial invalidity." 118 Cong. Rec. 27116 (Aug. 7, 1972) (statement of Rep. Poff).

reclassified as a noncapital offense, and violations of 18 U.S.C. 1201 became subject to the five-year limitation period under 18 U.S.C. 3282, rather than the no-limitation period under 18 U.S.C. 3281. The language of the amendment, however, did not address the statute of limitations. Nor did the amendment's legislative history refer to or discuss the repeal's indirect effect on the applicable statute of limitations.

2. The Panel's Opinion

The panel focused narrowly on the 1972 amendment's indirect impact on the applicable statute of limitations, concluding that it was a procedural change that should apply retroactively. In so doing, the panel recognized that "[a]bsent a clear statement from Congress that an amendment should apply retroactively, we presume that it applies only prospectively to future conduct, at least to the extent that it affects 'substantive rights, liability, or duties.'" Slip. Op. 5 (citations omitted). The panel also noted that "amendments that change the available punishment only apply prospectively." *Ibid*. (citing, *inter alia*, the general saving clause, 1 U.S.C. 109). Although the 1972 amendment expressly changed the maximum punishment for kidnaping from death to life imprisonment, and although it also made several other substantive changes to the statute, the panel concluded that the amendment was procedural because it "had the effect" of

changing the applicable statute of limitations. *Id.* at 10. The panel acknowledged that there was no legislative history to show that Congress was concerned with changing the statute of limitations for kidnaping, but nonetheless concluded that "[i]n the absence of legislative intent to the contrary, we next apply the presumption that amendments making a new limitations period applicable have retroactive effect." *Ibid*.

Because the panel concluded that the 1972 amendment rendered a procedural rather than substantive change, the panel necessarily rejected the United States' argument that the general saving clause, 1 U.S.C. 109, preserved the pre-1972 "capital" version of the kidnaping statute, subject to no limitation under 18 U.S.C. 3281, for the purpose of prosecuting the defendant. See Slip Op. 11 (explaining that the clause "does not preserve procedural provisions such as a statute of limitations"). In so doing, the panel again acknowledged that the 1972 amendment made no direct change to the limitations period for kidnaping, but held that it must consider the amendment's "practical effect." *Id*. at 12. The panel observed that, because the Supreme Court in *Jackson* invalidated the death penalty for kidnaping in 1968, the 1972 repeal of the death penalty made no substantive change in punishment within the meaning of the saving clause. See *id.* at 13. The panel explained that "[a]lthough it is true that the legislative history contains no

discussion of procedure, it does reveal a congressional assumption that the 1972 amendment removing the death penalty would not affect the substance of § 1201 in the wake of *Jackson*." *Id*. at 14.

Accordingly, the panel held that the 1972 amendment rendered a procedural change that retroactively shortened the limitations period for this case to five years. See Slip Op. 20. Consequently, it concluded that the 2007 prosecution of the defendant for crimes he committed in 1964 was untimely. See *ibid*.

ARGUMENT

THE PANEL'S INTERPRETATION OF THE 1972 KIDNAPING AMENDMENT AS A PROCEDURAL RATHER THAN SUBSTANTIVE STATUTE FOR RETROACTIVITY PURPOSES DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *GRIFFON*

The panel's interpretation of the 1972 amendment to the federal kidnaping statute, 18 U.S.C. 1201, as a procedural statute that applies retroactively, rather than a substantive statute that applies prospectively only, directly conflicts with this Court's precedent for applying conflicting canons of statutory construction in *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146 (1986).

In *Griffon*, the Court considered the Civil Monetary Penalties Law (CMPL), a statute that had both procedural and substantive aspects. See 802 F.2d at 146-

147. Congress enacted the CMPL in 1981 to make it easier for the Secretary of the Department of Health and Human Services (HHS) to combat Medicare and Medicaid fraud. See *id*. at 148-149. Before Congress passed the CMPL, individuals who filed false Medicare and Medicaid claims could be penalized only by the Department of Justice under the False Claims Act (FCA). See *id*. at 149-150. Under the CMPL, however, penalties could be imposed by the Secretary of HHS. See *id*. at 150. The CMPL also changed the forum in and the evidentiary burden by which claims were prosecuted. See *ibid*. Finally, the CMPL created new substantive liability if the individual had "reason to know" that his or her claims were false. See *ibid*.

Two years after the CMPL was signed into law, the Secretary adopted a final rule that permitted HHS to impose fines retroactively under the CMPL, but only for conduct that violated the FCA. See *Griffon*, 802 F.2d at 150-151. In so doing, the Secretary recognized "the Due Process problems that might arise from wholesale retroactive application of the CMPL." *Ibid*. In 1985, the Secretary fined George Griffon $44,000 under the CMPL and its implementing regulation for submitting 22 false claims to the Louisiana Medicaid program in 1979. See *id*. at 148-149.

This Court rejected the Secretary's retroactive application of the CMPL's

procedural provisions. See *id.* at 155. The Court observed that the case "wages a conflict of first impression, which simultaneously sounds two canons: first, that in the absence of congressional intent, substantive legislation is to be given prospective application, and; second, that procedural legislation is to be given retroactive application." *Id*. at 147. With respect to the CMPL, the Court further observed that there was "deafening congressional silence regarding [its] retrospective application," but it appeared that "Congress generally intended the CMPL to be a procedural, civil alternative" to the under-enforcement of the FCA. *Id.* at 151. The Court also noted that although "[m]ost of the CMPL provisions [were] procedural," the CMPL also "enlarged the scope of substantive liability, allowing prosecution of those who 'had reason to know' that their claims were not provided for." *Ibid*. The question before this Court, therefore, was "[w]hether this substantive change so colors the nature of the Act as to make the CMPL substantive law for retroactivity purposes." *Ibid*.

This Court answered that question in the affirmative and invalidated the Secretary's regulation permitting retroactive application of the CMPL's procedural aspects. See *Griffon*, 802 F.2d at 147. The Court explained:

> Because Congress has failed to provide adequate indicators of its intent regarding retroactivity, severability, or the nature of the CMPL, regulatory severance of the procedural and substantive

> provisions creates congressional intent out of whole cloth. The Secretary initially purports to infer a general retroactive intent of Congress, by characterizing the statute as procedural. She then attributes congressional cognizance of the inferred Due Process concerns raised by the first and second canons to subsequently infer that Congress would sever the statute, rather than apply it prospectively.
>
> Such bootstrapping by progressively linked inferences is beyond the reach of any reasonable, interpretive powers. Although the power of an administrator to *interpret* the sources of her authority in order to effect congressional purposes is extremely broad, she cannot fictitiously create purposes to achieve specific results. Some degree of interpretive contortion has a therapeutic effect on the law; too much contortion has a crippling effect. The Secretary here cannot simply fabricate a congressional intent to avoid concerns that otherwise would require inferred prospective application of a statute.

Ibid. This Court concluded that "the CMPL is, at least for retroactivity purposes, a substantive statute. * * * Lacking such [retroactive] intent or any intent to sever the statute, the CMPL cannot be applied retroactively in part, and the Secretary cannot characterize the CMPL to do so." *Id*. at 155.

The panel overlooked the approach adopted in *Griffon* in this case when it construed the 1972 kidnaping amendment as a procedural statute that should apply retroactively for limitations purposes. Like the CMPL, the 1972 amendment made both substantive and procedural changes to the way 18 U.S.C. 1201 operates. Substantively, the amendment explicitly extended the statute's jurisdictional base, expanded the scope of federal kidnaping to include acts committed against foreign

officials and official guests, and changed the maximum penalty from death to life imprisonment. Procedurally, the amendment had the indirect effect of changing the applicable statute of limitations. In construing the amendment, however, the panel erred by focusing narrowly on the part of the amendment it considered "relevant" to the case, which was the repeal of the death penalty and the indirect effect it had on the applicable statute of limitations. Slip Op. 4-5.

Although it is true, as the panel recognized, that changes in limitations periods are procedural changes that normally apply retroactively, the panel committed the same error as the Secretary did in *Griffon* when it severed the indirect effect the amendment had on the applicable statute of limitations from the rest of the amendment's provisions. Under *Griffon*, the panel should have presumed that Congress understood that its substantive changes could apply prospectively only. Consequently, it should have also presumed that Congress understood that the indirect procedural effects of its substantive changes also could apply prospectively only. As the panel concedes, and just like the CMPL, there is no indication in the legislative history of the 1972 amendment that Congress intended that the procedural aspects of its legislation apply retroactively. Accordingly, the panel erred under *Griffon* when it concluded that the 1972 amendment applied retroactively for limitations purposes.

Because the panel misinterpreted the 1972 amendment, it also erred when it concluded that the general saving clause, 1 U.S.C. 109, could not preserve the pre-1972 version of 18 U.S.C. 1201 for the purpose of prosecuting the defendant. See Slip Op. 11-16. Indeed, Congress enacted the saving clause to address precisely this situation. The common law recognized a presumption that repeals and re-enactments of criminal statutes abated all prosecutions that had not reached final disposition. See *United States* v. *Blue Sea Line*, 553 F.2d 445, 447 (5th Cir. 1977). Because the *Ex Post Facto* Clause barred retroactive application of amendments increasing criminal penalties, individuals who violated the law before it was amended could, as a result of abatement and legislative inadvertence, avoid prosecution. See *ibid*. Congress, therefore, enacted the saving clause to eliminate such "pitfalls." *Ibid*. The saving clause provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. 109.

Had the panel properly applied its precedent in *Griffon* to interpret the 1972 amendment as a substantive rather than a procedural statute, it likely would have

reached a different conclusion with respect to the saving clause. Indeed, the panel relied heavily on the Court's previous decision in *Blue Sea Line*. As the panel recognized, however, the sole purpose and effect of the legislation at issue in that case was to render a complete "procedural overhaul" to the way the statute was enforced. See Slip Op. 13 (citing *Blue Sea Line*, 553 F.2d at 450). Thus, *Blue Sea Line* is distinguishable from this case, where there is no evidence of legislative intent to affect procedures.

The panel also erred when it overlooked *Griffon* and relied instead on the Tenth Circuit's decision in *United States* v. *Mechem*, 509 F.2d 1193, 1196 (1975), for the proposition that the saving clause does not bar retroactive application of "legislative amendments * * * [rendering] changes that were both substantive as well as remedial and procedural because procedural changes predominated." Slip Op. 13-14. *Mechem* appears to be in direct conflict with *Griffon*, as does the panel decision in this case.

Consistent with its failure to follow *Griffon*, the panel erroneously rejected the United States' reliance on *United States* v. *Owens*, 965 F. Supp. 158 (D. Mass. 1997). As the panel correctly observed, the court in *Owens* applied "a rule of prospective application to both a change in the available penalty and the resulting procedural change in the [applicable] statute of limitations * * * without

recognizing that procedural changes generally apply retroactively." Slip Op. 16. *Owens* addressed the same legal question presented here, but the panel rejected it as "inconsistent with [the Court's] caselaw." *Ibid*. The panel was incorrect; *Owens* is entirely consistent with *Griffon*.

Finally, although the United States strongly disagrees with the panel's conclusion that the 1972 amendment's repeal of the death penalty did not substantively affect the maximum available punishment for kidnaping within the meaning of the saving clause,[3] see Slip Op. 14, this Court need not address that issue on rehearing. Had the panel properly applied the Court's precedent in *Griffon*, it would have concluded that no part of the 1972 amendment could apply retroactively. The United States thus could have prosecuted the defendant under the pre-1972 version of 18 U.S.C. 1201. See 1 U.S.C. 109. Accordingly, the 2007 prosecution was proper because, as explained in the United States' initial brief, the *Jackson* decision had no impact on the applicable statute of limitations.[4]

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[3] As explained in the Brief for the United States as Appellee (Br.), the 1972 amendment must be compared to the death penalty in effect at the time of the offense, not to its subsequent invalidation under *Jackson*, to determine whether it made a substantive change. See Br. 31-33 (citing *Dobbert* v. *Florida*, 432 U.S. 282, 297 (1977)).

[4] Indeed, every court of appeals to address this issue has held that an offense that is "punishable by death" is still a "capital offense" for statute of

(continued...)

CONCLUSION

For the foregoing reasons, the United States' Petition for Rehearing En Banc should be granted.

Respectfully submitted,

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[4](...continued)
limitations purposes, even where the death penalty is unenforceable or has been waived. See Br. 23-25 (citing *United States* v. *Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995); *United States* v. *Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998), cert. denied, 528 U.S. 825 (1999); *United States* v. *Ealy*, 363 F.3d 292, 295-297 (4th Cir.), cert. denied, 543 U.S. 862 (2004); *Willenbring* v. *Neurauter*, 48 M.J. 152, 179-180 (C.A.A.F. 1998)).

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2008, two copies and one diskette containing an electronic copy of the foregoing United States' Petition for Rehearing En Banc were served by overnight carrier on the following counsel of record:

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