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U.S. COURT OF APPEALS

FILED

MAY 18 2009

CHARLES R. FULBRAUGH III
CLERK

May 18, 2009

Ms. Valerie Bellanger
United States Court of Appeals
for the Fifth Circuit
VIA ELECTRONIC MAIL

Re: United States v. James Ford Seale; Case No. 07-60732

Dear Ms. Bellanger:

Pursuant to the letter from the Court you forwarded to me on May 12, 2009, I respectfully enclose for review by the *En Banc* Court the following Letter Reply Brief on behalf of James Ford Seale.

Statement of Issue Presented for Review

The Court seeks Mr. Seale's response to the following argument presented by the Government in their *En Banc* brief:

In addition to changing the penalty for kidnaping, the text of the 1972 amendment to § 1201 included at least three new substantive provisions defining new crimes unrelated to the penalty for kidnaping. These substantive provisions require courts to give prospective application to the entire statute. Griffon v. United States Dep't. Of Health & Human Servs., 802 F.2d 146 (5th Cir. 1986).

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ARGUMENT AND AUTHORITIES

The *Griffon* opinion is not applicable to James Ford Seale's case. In the twenty-two years since *Griffon* was decided, it has been cited by this Court five times. Neither *Griffon* nor the five Fifth Circuit opinions that cite *Griffon* involve retroactive application of a statute of limitations. Even if this Court decides to consider *Griffon*, its holding does NOT conflict with the panel's opinion for the following reasons.

The facts in *Griffon* involve a dispute about how to apply a newly created civil statute that contains within itself both procedural and substantive provisions. Specifically, the Court was asked to decide whether officials could sever the statute and apply the procedural portions retroactively and the substantive portions prospectively. The civil statute at issue in *Griffon* does NOT include a statute of limitations nor does it affect another statute setting forth a statute of limitations, such as in Mr. Seale's case. The issue of whether a statute containing both procedural and substantive provisions can be severed in its application is not at all the issue in Mr. Seale's case. A closer look at the analysis in *Griffon* makes it clear why the opinion has no effect whatsoever on the panel's opinion in Mr. Seale's case.

The statute at issue in the *Griffon* case was the Civil Monetary Penalties Law ("CMPL") which is described as:

a civil statute providing monetary penalties for individuals who file false Medicare or Medicaid claims.

Griffon, 802 F.2d at 148-49.

The CMPL authorizes the Secretary of HHS to impose penalties of up to \$2,000 per claim and double the claim amount on any person who presents or causes to be presented a claim or claims that the person knew or had reason to know was not provided for by statute or regulation.

Id. at 149.

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The issue in *Griffon* was “whether, in the absence of any dispositive congressional intent, the Secretary of the Department of Health and Human Services (HHS) by regulation may sever and apply the procedural elements of the CMPL, thereby inferring and implementing congressional intent to apply the statute retroactively in part.” *Griffon*, 802 F.2d at 146-47. The *Griffon* court ruled:

In sum, the CMPL is, at least for retroactivity purposes, a substantive statute. As such, it falls within the rule of *Union Pacific* to be applied prospectively absent unequivocal Congressional intent. Lacking such 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.

Griffon, 802 F.2d at 155.

The entire legal rationale on which the *Griffon* decision is based hinges on the fact that absent congressional intent, a statute containing mixed procedural and substantive aspects can't be applied partially retroactively, absent congressional intent. As indicated by the following quote, the CMPL contained both a procedural aspect and a substantive aspect.

The major difference of the CMPL from the FCA is that the CMPL provides the Secretary with [a *procedural*] enforcement mechanism independent from prosecution by the Department of Justice in federal court. In addition, the CMPL creates new *substantive* liability if a claim-filer “has reason to know” that her claims are false, and changes the forum in and the evidentiary burdens by which the claims are prosecuted.

Griffon, 802 F.2d at 150 (bracketed text added; emphasis added).

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To cure the problem of prohibited retroactive application of the substantive provision of the statute, the government argued “that *Congress* intended to sever the procedural provisions and to apply only the latter retroactively.” *Griffon*, 802 F.2d at 154 (emphasis in original). In a long and well-reasoned analysis, the *Griffon* court rejected the Government’s argument. The court’s analysis boils down to the content of the following quote: “Were the procedures applied retroactively and the substance applied prospectively, as implied by the Secretary’s argument that the CMPL was designed as a procedural alternative to the FCA, there would be no liability *under the CMPL itself* on which the Secretary could retroactively proceed.” *Griffon*, 802 F.2d 155 (emphasis in original). That is, the procedural and the substantive portions of the statute could not be severed because without the “substance,” there would be nothing for the “procedure” to proceed upon.

The facts and law in *Griffon* are clearly distinguishable from the facts and law in the subject case. In Mr. Seale’s case, there is absolutely no need to consider the effect of a *single* statute with both substantive and procedural aspects, as the court faced in *Griffon*. This is true because the amended statute was the kidnaping statute, and the statute of limitations in issue was a completely separate statute that was not amended at all. Thus, as further described below, there was no severance problem, as in *Griffon*.

In the subject case, the substantive statute was 18 U.S.C. § 1201, which made kidnaping and conspiracy to commit kidnaping a crime. Slip Opinion at 1. “The text of that statute has never included its own limitations period.” *Id.* at 2. The potential statutes of limitations that applied to § 1201 were 18 U.S.C. §§ 3281 and 3282. *Id.* at 3. Section 3281 created an unlimited statute of limitations if the crime in issue was “punishable by death,” and § 3282 created a five year limitations period for applicable crimes for which the death penalty was unavailable. *Id.*

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In 1964, the year that Mr. Seale allegedly committed the kidnappings in issue, § 1201 contained a death penalty provision if “the victim had ‘not been liberated unharmed.’” Slip Opinion at 3. However, in 1968, the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570 (1968) judicially excised and invalidated the death penalty provision of § 1201, finding it unconstitutional. *Id.* at 4. Thereafter, in 1972, Congress legislatively amended § 1201, excluding any reference to the death penalty. *Id.* It is important to note that the statutes of limitations in issue, §§ 3281 and 3282, were not amended or altered, either judicially or legislatively.

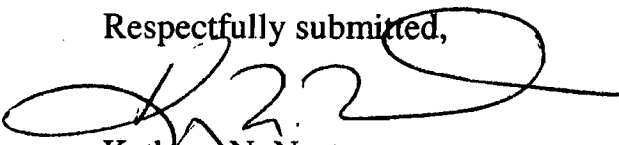
The distinguishing factor in this case, as compared to *Griffon*, is that in the subject case, this Court was never faced with the prospect of having to apply any statute partially retrospectively and partially prospectively, as this Court faced in *Griffon*. In this case, the Court merely had to decide the effect of excising the death penalty provision of the kidnaping statute (§ 1201), a purely substantive statute, on the statutes containing the limitations period (§§ 3281 and 3282), purely procedural statutes. Because the substantive and procedural statutes were totally separate, this process did not require the Court to deem portions of § 1201 procedural and portions substantive, as the Government argues. For this reason, the holdings and analyses in *Griffon* are inapplicable to resolving the issue before the Court.

Finally and most compellingly, in 1990 the Tenth Circuit Court of Appeals was faced with the question of whether or not they could apply an amended statute of limitations retroactively in the EXACT same statute discussed in *Griffon* and the Tenth Circuit held that the statute of limitations amendment SHOULD be applied retroactively and specifically held that *Griffon* was not applicable and was distinguishable because it did not involve a statute of limitations question. *Bernstein v. Sullivan*, 914 F.2d 1395, 1402-3 (10th Cir. 1990). This Court should follow the lead of the Tenth Circuit and reject the Government’s argument that *Griffon* is applicable to Mr. Seale’s analysis. Therefore, there are simply no grounds whatsoever to set aside the comprehensive and well-reasoned opinion of the panel, which relies on the long-standing legal principle that statutes of

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limitations are procedural in nature and should be applied retroactively, barring any *ex post facto* prohibitions, which do not apply in this case.

Respectfully submitted,



Kathryn N. Nester
Attorney for James Ford Seale

cc: Tovah Calderon, Esq. (Via Electronic Mail)
Mr. James Ford Seale (Via Regular Mail)