NO. 07-60732

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JAMES FORD SEALE
Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
Cause No. 3:07cr9-HTW-JCS

REPLY BRIEF FOR APPELLANT *EN BANC* REHEARING

KATHRYN N. NESTER (MB #9418)
Assistant Federal Public Defender
GEORGE L. LUCAS (MB #1476)
Senior Litigation Counsel
S. DENNIS JOINER (MB #3176)
Federal Public Defender
S. and N. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorneys for Defendant-Appellant

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I. ARGUMENT

A. Introduction.

In a letter to counsel dated February 10, 2009 (hereinafter "February 10 letter"), this Court asked the parties to provide answers to three questions. Because Mr. Seale's *En Banc* Brief was submitted to the Court before February 10, the Court offered him the opportunity to address the three questions in his Reply Brief. At the Court's direction, this Reply Brief is limited to addressing the three following questions:

1) Whether the Supreme Court lacks constitutional authority to transform a capital crime into a non-capital crime for all purposes when Congress has exercised its constitutional prerogative to classify the crime as capital and that classification is consonant with the Eighth Amendment.

2) Whether, consequently, federal kidnaping remained a capital crime for statute-of-limitations purposes after *United States v. Jackson*, 390 U.S. 570 (1968), because the Court held that 18 U.S.C. § 1201's death-penalty provisions violated a defendant's procedural rights under the Fifth and Sixth Amendments but did not hold that the provisions violated the defendant's substantive rights under the Eighth Amendment.

3) Whether the separation of powers issue is properly preserved for *en banc* consideration.

Because the answer to the third question may pretermit the need for the Court to consider the answers to the first two questions, question three is addressed first.

B. Whether the separation of powers issue is properly preserved for *en banc* consideration.

In *United States v. Brace*, 145 F.3d 247 (5th Cir. 1998), this Court faced the question of whether the *en banc* Court could properly consider an issue that was raised neither in district court nor before the three judge panel. The Court held, "[i]t goes without saying that we are a court of review, not of original error. Restated, we review only those issues presented to us; we do not craft new issues or otherwise search for them in the record." *Id.* at 255-56 (citing *United States v. Johnson*, 718 F.2d 1317, 1325 n.23 (5th Cir. 1983)(*en banc*)(holding that this Court cannot not review an improper jury instruction issue if was neither raised in trial court nor on appeal)). As Justice Cardozo eloquently noted, "a judge 'is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness.'" *Brace*, 145 F.3d at 256 (citing Cardozo, The Nature of the Judicial Process 141 (1921)). Based on these principles, the *Brace* Court concluded that "it is not for us to decide which issues should be presented, or to otherwise try the case for the parties." *Id.*

Neither of the two substantive questions posed to the parties in the February 10 letter was raised in either district court or on appeal. Therefore, the questions are not properly preserved for *en banc* consideration. The Government agrees with this position. Appellee's *En Banc* Brief, p. 30 n.14 (stating that "the separation-of-powers issue ... is not preserved for *en banc* consideration....").

Nevertheless, the two remaining questions are addressed below. Because these two questions are intertwined, they are considered in a single analysis.

C. Whether the Supreme Court lacks constitutional authority to transform a capital crime into a non-capital crime for all purposes when Congress has exercised its constitutional prerogative to classify the crime as capital and that classification is consonant with the Eighth Amendment.

AND

Whether, consequently, federal kidnaping remained a capital crime for statute-of-limitations purposes after *United States v. Jackson*, 390 U.S. 570 (1968), because the Court held that 18 U.S.C. § 1201's death-penalty provisions violated a defendant's procedural rights under the Fifth and Sixth Amendments but did not hold that the provisions violated the defendant's substantive rights under the Eighth Amendment.

1. The three-judge panel's decision does not invoke separation of powers concerns.

Under the analysis presented by the three-judge panel, the separation of powers issue need not be reached. This is true because the panel's statute of limitations conclusion was based on *Congress'* enactment of the 1972 amendment to the federal kidnaping statute - 18 U.S.C. § 1201. Panel Opinion at 20 (concluding "that the five-year limitations period *made applicable the federal kidnaping statute by the 1972 amendment* applies to this case...." (emphasis added)). Because the three-judge panel's decision was based on Congress' 1972 amendment to the kidnaping statute, rather than the *Jackson* Court's excision of the death penalty provision of the statute, the separation of powers issue is not invoked under the analysis presented in the Panel Opinion. Accordingly, if this *en banc* Court agrees with the analysis presented in the Panel Opinion, the separation of powers issue need not be addressed at the *en banc* re-hearing.

2. The decision in *Jackson* did not run afoul of separation of powers principles because the death penalty provision of § 1201 was judicially excised on the basis of substantive unconstitutionality.

The second question presented to the parties in the February 10 letter states in part "the [*Jackson*] Court held that 18 U.S.C. § 1201's death-penalty provisions violated a defendant's *procedural rights* under the Fifth and Sixth Amendments but did not hold that the provisions violated the defendant's *substantive rights* under the Eighth Amendment." (Emphasis added.) Through this statement, it is apparent that this Court is concerned with applying *Jackson* to the subject case because *Jackson* purportedly excised the death penalty provision of § 1201 on "procedural" rather than "substantive" grounds and, as a result, the decision had no effect on categorization of kidnaping as a capital offense. This concern is assuaged by the analysis presented below.

Although the words "procedure" and "procedural" are used on a limited basis in the *Jackson* opinion, the Court never states that its excision of the death penalty provision of the kidnaping statute is based on procedural grounds. As this Court has recognized, in the Sixth Amendment context, substance and procedure are so intertwined that alteration of a procedural right also operates as an alteration of the associated substantive right to a jury trial.[1] *Augustine v. Doe*, 740 F.2d 322, 327 n.7 (5th Cir. 1984)(holding that "[i]n some cases ... a particular procedural safeguard is part of the substantive right, as in the *[S]ixth [A]mendment's right to trial by jury*." (emphasis added)); *see also Karageorgious v. Ashcroft*, 374 F.3d

[1]The Sixth Amendment provision in issue in *Jackson* was the right to trial by jury.

152, 156 (2d Cir. 2004)(categorizing the "right to a jury trial" as a "substantive right[]"). Under the well-reasoned guidance provided by this Court in *Augustine* and by the Second Circuit in *Karageorgious*, the *Jackson* Court's excision of the death penalty provision of § 1201 was based on the statute's violation of a constitutionally guaranteed substantive right - the Sixth Amendment right to a jury trial. This erases any concern that this Court may have that the *Jackson* Court's complete excision of the death penalty provision of § 1201 was based on procedural grounds.

3. The Government's argument regarding the separation of powers issue is without merit.

On page 34, footnote 15 of the Government's *En Banc* Brief, it makes an abbreviated argument that in the post-*Furman v. Georgia* era, "courts have recognized the separation-of-powers issues that would arise if they invalidated all statutes and rules tied to the nature of a capital case, simply because the death penalty could not be constitutionally imposed." Because the factual and legal scenarios in *Furman* and the *Furman* line of cases are distinguishable from *Jackson*, the Government's argument is without merit.

In *Furman v. Georgia*, 408 U.S. 238, 239-40, 92 S.Ct. 2726 (1972), a very divided Supreme Court rendered a *per curiam* opinion containing no majority opinion. Through a series of five separate concurring opinions, all based on different legal rationales, the *Jackson* Court adjudged that the death penalty provisions of two specific Georgia state statutes and one specific Texas state statute were unconstitutional.

Only two of the five Justices who filed concurring opinions intimated that the death penalty is unconstitutional under any circumstance.[2] *Id.* at 305 (Brennan, J., concurring); *id.* at 371 (Marshall, J., concurring). The other three Justices found that the three state capital punishment statutes, which involved purely *procedural* defects, were unconstitutional as applied. *Id.* at 257 (Douglas, J., concurring)(finding the state statutes "unconstitutional in their operation"); *id.* at 309-10 (Stewart, J., concurring)(finding the state death penalty provisions unconstitutional as capriciously and randomly imposed); *id.* at 312-13 (White, J., concurring)(finding the state statutes unconstitutional as they were "administered"). In summary, these three Justices found that the state statutes were procedurally unsound because there was no justifiable reason for when the death penalty was or was not applied under the statutes. This is distinguishable from the ruling in *Jackson* because as discussed above in section I.C.2., the right to a jury trial is a fundamental constitutional right, and the structure of § 1201 denied that right, or at least unconstitutionally quelled the right. *See* 16B Am. Jur. 2d Constitutional Law § 690 (2008)(stating that "[t]he right to a jury trial, where it exists, is a substantive right, not a procedural one"). Thus, the *Jackson* Court struck the death penalty in § 1201 based on a *substantive* defect - the denial of a constitutionally guaranteed right to a jury trial.[3]

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[2]If the Court had found that the death penalty was unconstitutional under any circumstance, then the ruling would have been based on the *substantive* protection against "cruel and unusual punishment," as guaranteed by the Eighth Amendment.

[3]Substantive right" is further defined as "[a] right that can be protected or enforced by law, a right of substance rather than form." *Black's Law Dictionary* 1324 (7th ed. 1999). As discussed

The difference in striking a statute on substantive grounds and striking it on procedural grounds is important to resolving the subject issue. A "law that impinges upon a substantive right or liberty created or conferred by the Constitution is ... presumptively invalid...." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61, 93 S.Ct. 1278 (1973). Such a facial challenge attacks a statute's consistency with existing laws or the Constitution. *See Parkdale Int'l, Ltd. v. United States*, 508 F.Supp.2d 1338, 1347 n.5 (Ct. Int'l Trade 2007). "A facially invalid ... law therefore cannot be justified under any potential application, and is *void*." *Id.* (emphasis added).

The death penalty provision of § 1201 was stricken down by the *Jackson* Court on substantive grounds, because it was facially invalid. Based on the divided nature of the *Furman* opinion, it is difficult to pinpoint a generally applicable holding with which to provide guidance in other cases. However, as recognized in *United States v. Watson*, 496 F.2d 1125, 1127 (4th Cir. 1973), *Furman* neither invalidated any federal statute calling for the death penalty, nor constitutionally foreclosed imposition of the death penalty in the federal criminal justice system. In contrast, the *Jackson* Court judicially excised the death penalty provision of § 1201, and the result was that the crime was no longer a capital crime. This, in turn, triggered application of the five-year statute of limitations set forth in § 3282. Finally, four years later in 1972, Congress completely clarified its

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above, the right to a jury trial is a fundamental right that is protected and enforced by the foundation of all laws of our country - the United States Constitution.

intent to render § 1201 non-capital by re-writing the statute without a death penalty provision.[4]

In conclusion, the Government's separation of powers argument is without merit. The *Jackson* Court was within its constitutional power to judicially excise the death penalty provision of § 1201 as facially invalid, rendering it null and void. As this Court properly recognized in *United States v. Hoyt*, 451 F.2d 570 (5th Cir. 1971) and *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977), this rendered the statute non-capital for all purposes. The effect was to shift the applicable statute of limitations from § 3281 (unlimited) to § 3282 (five-years). Congress could have immediately amended § 1201 to clarify that it remained a capital offense, or it could have re-written the statutes pertaining to the statute of limitations. It did neither. Rather, four years later Congress amended the statute to exclude the death penalty. This series of events was not only constitutionally proper, but also it evinces the intent of both the Supreme Court and Congress to render § 1201 a non-capital offense during the applicable time frame.

[4]In *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973) and *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995), two cases that form the foundation of the Government's argument in this case, the statutes in issue still contained capital punishment provisions. Therefore, the *Watson* and *Manning* courts were able to justifiably conclude that the crimes remained "capital offenses." The subject case is distinguishable because the capital punishment provision of § 1201 was judicially excised, and later written out of the statute by Congress.

II. CONCLUSION

Based on the arguments presented above, the *Jackson* Court's excision of the death penalty provision of § 1201, and the resulting re-classification of the crime as non-capital, did not violate the separation of powers provisions of the Constitution.

JAMES FORD SEALE, DEFENDANT-APPELLANT

BY:_____

KATHRYN N. NESTER (MB #9418)
Assistant Federal Public Defender
GEORGE L. LUCAS (MB #1476)
Senior Litigation Counsel
S. DENNIS JOINER (MB #3176)
Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I, Kathryn N. Nester, certify that today, April 24, 2009, a copy of the Reply Brief for Appellant *En Banc* Rehearing, together with a diskette in PDF format, were served upon Tovah R. Calderon, Esq., *via* electronic mail and United States Mail, postage prepaid, to the U. S. Department of Justice, Civil Rights Division, Appellate Section, P.O. Box 14403, Washington, D.C. 20044-4403, Stan Harris, Acting United States Attorney, *via* United States Mail, postage prepaid, and a copy was delivered *via* United States Mail, postage prepaid to James Ford Seale, Inmate No. 09193-043-043, c/o FCI Terre Haute, Federal Correctional Institution, P.O. Box 33, Terre Haute, Indiana 47808.

KATHRYN N. NESTER (MB #9418)
Assistant Federal Public Defender
GEORGE L. LUCAS (MB #1476)
Senior Litigation Counsel
S. DENNIS JOINER (MB #3176)
Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorneys for Defendant-Appellant

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KATHRYN N. NESTER (MB #9418)
Assistant Federal Public Defender
GEORGE L. LUCAS (MB #1476)
Senior Litigation Counsel
S. DENNIS JOINER (MB #3176)
Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorneys for Defendant-Appellant