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

BRIEF FOR APPELLANT *EN BANC* REHEARING

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel certifies that the persons having an interest in the outcome of this case are:

1. James Ford Seale, Defendant-Appellant;
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12. Honorable Henry T. Wingate, Chief United States District Judge, Jackson, Mississippi.

This certificate is made so that the judges of this Court may evaluate possible disqualification or recusal.

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I. JURISDICTIONAL STATEMENT

The district court had jurisdiction over the Defendant-Appellant James Ford Seale and the subject matter because Mr. Seale was indicted on January 24, 2007, by a Federal Grand Jury for the Southern District of Mississippi. (Indictment, R. at vol. 1, pp. 25-29; R.E. at tab 3.)[1] He was charged with one count of conspiracy to commit kidnaping in violation of 18 U.S.C. § 1201(c) and two counts of kidnaping in violation of 18 U.S.C. § 1201(a). (*Id.*) The case proceeded to trial from May 30, 2007, through June 14, 2007. (Docket Minute Entry dated May 30, 2007, R. at vol. 1, p. 16 and Docket Minute Entry dated June 14, 2007, *id.* at, p. 18.) The jury returned a verdict of guilty on all counts in the Indictment. (Jury Verdict, R. at vol. 2, pp. 887-88; R.E. at tab 4.) A sentencing hearing occurred on August 24, 2007, at which time the district court sentenced Mr. Seale to life imprisonment on each of the three counts. (Amended Judgment, R. at vol. 2, p. 926; R.E. at tab 5.) Mr. Seale was also required to pay an assessment of $300.00. (*Id.* at p. 927.) A Judgment reflecting this sentence was entered by the district court on September 5,

[1]Abbreviations are used in parenthetical citations to the record from the district court. Documents filed with the district court, which are part of the record before this Court, consist of two volumes. Volume one is page numbers 1 through 299, volume two is page numbers 300 through 936. The parenthetical abbreviation "vol. 1, p. 1" is a reference to page one of volume one of the district court documents. Other abbreviations to documents filed in the district court are consistent with this example. Transcripts of numerous motion hearings, telephone conferences and the trial itself are contained in volumes three through twenty-four. Citations to the transcripts are consistent with the citation format stated above. Note that with regard to the transcripts, the volume numbers assigned by the court reporter *do not* correspond to the volume numbers assigned by this Court. The citations herein are, of course, to the volume numbers assigned by this Court. Citations to documents contained in Appellant's Record Excerpts are abbreviated as "R.E. at tab __."

2007 (R. at vol. 2, pp. 915-18) and an Amended Judgment was entered on September 18, 2007 (*Id.* at pp. 925-28; R.E. at tab 5).[2]

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, because a timely Notice of Appeal was filed on September 14, 2007 (R. at vol. 2, pp. 922-23; R.E. at tab 2), within ten days after entry of the original Judgment in a Criminal Case, as required by Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure. This appeal is from a Final Judgment in a Criminal Case that resolves all issues before the district court.

[2]The only difference in the original Judgment and the Amended Judgment was exclusion of the phrase "[t]he sentence is imposed pursuant to the Sentencing Reform Act of 1984" from the Amended Judgment. (*Compare* R. at vol. 2, p. 915 *with* vol. 2, p. 925.)

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the statute of limitations expired before the Indictment against Mr. Seale was filed.[3]

[3]The three-judge panel limited its analysis to the statute of limitations issue. This was done because all other issues argued in Mr. Seale's initial Brief were rendered moot by the panel's decision that the charges against him were barred by the statute of limitations. However, the panel reserved the right to revisit the remaining issues, depending on the result of the final resolution of the statute of limitations issue. Through a Memorandum to Counsel issued by the Clerk of this Court on November 19, 2008, the parties were directed to limit this *En Banc* Brief to the statute of limitations issue. By including only the statute of limitations issue in this *En Banc* Brief, Mr. Seale is not waiving the remaining issues presented in his initial Appellant's Brief, which have not been addressed by the three-judge panel.

III. STATEMENT OF THE CASE

The Defendant-Appellant James Ford Seale, was indicted by the Grand Jury for the Southern District of Mississippi for violations of 18 U.S.C. §§ 1201(a) and (c), which make it a crime to commit kidnaping and to conspire to commit kidnaping. (Indictment, R. at vol. 1, pp. 25-29; R.E. at tab 3.) The case proceeded to a jury trial beginning May 30, 2007, and continuing through June 14, 2007. After deliberations, the jury returned a verdict of guilty on all three counts alleged in the Indictment. (Jury Verdict, R. at vol. 2, pp. 887-88; R.E. at tab 4.)

Mr. Seale filed a timely Notice of Appeal on September 14, 2007 (R. at vol. 2, pp. 922-23; R.E. at tab 2). A three-judge panel of this Court consisting of Judges Davis, Smith and DeMoss heard oral argument on June 2, 2008.[4] (*See* 5th Cir. docket entry dated June 2, 2008.) The Panel Opinion was filed with the Clerk of this Court on September 9, 2008. The three-judge panel found that the charges against Mr. Seale were barred by the statute of limitations. Panel Opinion at 1. The Opinion was authored by Judge DeMoss and joined by Judges Davis and Smith. *Id.*

The Government filed a Petition for Rehearing *En Banc* on September 23, 2008. (*See* 5th Cir. docket entry dated Sept. 23, 2008.) On November 14, 2008, this Court granted the Government's request. (*See* 5th Cir. docket entry dated Nov. 14, 2008.) The case is currently scheduled for *en banc* oral argument during the week of May 18, 2009. (*See* 5th Cir. docket entry dated Nov. 18, 2008.)

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[4]Judges Davis, Smith and DeMoss are referred to in this Brief as "the three-judge panel," or simply "the panel." The subsequent Opinion rendered by the three-judge panel is referenced throughout this Brief as the "Panel Opinion."

Through this appeal, Mr. Seale asks this Honorable Court to reverse the conviction and sentence against him, and enter a Judgment of Acquittal. Specifically, Mr. Seale prays for the *en banc* Court to adopt and affirm the Opinion rendered by the three-judge panel, which found that the charges against Mr. Seale were barred by the statute of limitations.

IV. STATEMENT OF FACTS

Because the only issue on *en banc* review pertains to the statute of limitations, the relevant facts are very limited. This case involves charges for crimes that allegedly occurred on May 2, 1964, almost forty-three years before the Indictment against James Ford Seale was returned on January 24, 2007. (Indictment, R. vol. 1, pp. 25-29; R.E. at tab 3.) Through the three-count Indictment, Mr. Seale was charged with conspiracy to commit kidnaping (count one). (*Id.*) The alleged conspiracy was between Mr. Seale and other unnamed members of the White Knights of the Ku Klux Klan. (*Id.*) The remaining two counts charged the kidnaping of Henry Dee (count two) and the kidnaping of Charles Moore (count three). (*Id.*)

Prior to trial, Mr. Seale moved for dismissal of all charges based on the statute of limitations. (Motion, R. at vol. 1, pp. 43-45.) The district court conducted a hearing on February 22, 2007. (Hearing Transcript, R. at vol. 3, pp. 1-91.) The court heard arguments on several issues, including the statute of limitations. (*Id.*) At the hearing, the Motion to Dismiss was denied. (*Id.* at vol. 3, pp. 56-58; *see also* Docket Minute Entry dated Feb. 22, 2007, R. at vol. 1, pp. 7-8.)

The case proceeded to trial beginning May 30, 2007, and continuing through June 14, 2007. The jury found Mr. Seale guilty, and the district court sentenced him to serve three life sentences. (Jury Verdict, R. at vol. 2, pp. 887-88; R.E. at tab 4; Amended Judgment, R. at vol. 2, p. 926; R.E. at tab 5.) .) This appeal ensued.

V. SUMMARY OF ARGUMENT

Prosecution of the charges against Mr. Seale was barred by the applicable statute of limitations. The two potentially applicable statutes of limitations were 18 U.S.C. §§ 3281 and 3282. Section 3281 called for an unlimited statute of limitations for capital crimes, and § 3282 called for a five-year limitations period for non-capital crimes. The federal kidnaping statute - 18 U.S.C. § 1201 - contained a contained a capital punishment provision from 1964 through 1966, the time frame of the alleged crimes. However, the death penalty provision was judicially excised by the Supreme Court in 1968. Also, in 1972, a congressional amendment to § 1201 excluded the death penalty provision. Removal of the death penalty provision of § 1201 by either or both of these means requires application of the five-year statute of limitations set forth in § 3282. Mr. Seale was not indicted until January 24, 2007, well after expiration of the five-year limitations period. Accordingly, the charges against Mr. Seale were time barred, and this *en banc* Court should enter a Judgment of acquittal.

The three-judge panel filed a well reasoned Opinion in which it found that the charges against Mr. Seale were barred by the applicable five-year statute of limitations. For the reasons stated in the Panel Opinion, this *en banc* court should also find that the charges were barred by the statute of limitations. In summary, the reasons stated in the Panel Opinion are:

- In 1972, the federal kidnaping statue - 18 U.S.C. § 1201 - was amended to remove the death penalty provision. This, in turn, affected which statute of

limitations applied. As described above, the two possible statutes of limitations were the unlimited statute of limitations set forth in § 3281 (for capital crimes) and the five-year limitations period set forth in § 3282 (for non-capital crimes). Because the 1972 amendment to § 1201 rendered the statute non-capital, a five-year statute of limitations applied in this case. The Indictment against Mr. Seale was not filed within five years after the alleged crimes.

- The well reasoned analysis in *United States v. Provenzano*, 423 F.Supp. 662 (S.D. N.Y. 1976), *aff'd* 556 F.2d 562 (2d Cir. 1977), as well as numerous other cases, support a conclusion that the 1972 amendment to the kidnaping statute applied retroactively. Under the holdings in *Provenzano*, a five-year statute of limitations applied to the charges against Mr. Seale.
- The savings clause did not preserve the unlimited statute of limitations for the crime of kidnaping, because the amendment to § 1201 was procedural rather than substantive.

In addition to the analyses set forth in the Panel Opinion, a five-year statute of limitations applied in this case because in 1968, the Supreme Court judicially excised the death penalty provision of § 1201, retroactively. *United States v. Jackson*, 39 U.S. 570, 88 S.Ct. 1209 (1968). In 1972, Congress re-wrote the statute excluding any reference to the death penalty. Further, in at least two reported decisions, this Court held that § 1201 is "non-capital for all purposes."

United States v. Hoyt, 451 F.2d 570, 571 (5th Cir. 1971); *United States v. Kaiser*, 545 F.2d 467, 469 (5th Cir. 1977).

The district court in this case nevertheless held that the offenses in issue were capital in nature, and applied the unlimited statute of limitations. This was error because: (1) the death penalty provision of § 1201 was judicially excised as unconstitutional in 1968; and (2) this Court has held the statute is "non-capital for all purposes." These two conditions resulted in application of a five-year statute of limitations to the subject crimes nor within five years of the 1972 amendment to the kidnaping statute. Because the Indictment was neither filed within five years after the alleged crimes, this Court should vacate the conviction and sentence imposed on Mr. Seale, and find that the charges levied against him are time barred.

VI. ARGUMENT

The statute of limitations expired before the Indictment against Mr. Seale was filed.

A. Standard of review.

This Court reviews "the district court's fact findings in relation to the statute of limitations for clear error and its legal conclusions *de novo*." *United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007)(citation omitted). The issue on review in this case is legal in nature. Therefore, a *de novo* standard of review applies.[5]

B. Applicable statutes.

The charges levied against Mr. Seale in this case were brought well outside of the five-year statute of limitations called for in 18 U.S.C. § 3282.[6] To prove this point, the language of the statute under which Mr. Seale was charged - 18 U.S.C. § 1201 - must be set forth. Also, two code sections setting forth statutes of limitations must be presented. These code sections are 18 U.S.C. §§ 3281 and 3282.

Mr. Seale was charged with two counts of kidnaping (counts two and three) in violation of 18 U.S.C. § 1201(a) and one count of conspiracy to kidnap (count one) in violation of 18 U.S.C. § 1201(c). (Indictment, R. at 25-29; R.E. at tab 3.) The alleged kidnapings were committed in 1964, and the alleged conspiracy to kidnap occurred from 1964 through 1966. (*Id*.) Therefore, the 1964 through 1966

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[5]The three-judge panel agreed that a *de novo* standard of review applies. Panel Opinion at 2.

[6]On January 26, 2007, Mr. Seale's filed his Motion to Dismiss based on the statute of limitations. (R. at vol. 1, pp. 43-45.)

version of the kidnaping stature is controlling. Following is the language of §§ 1201(a) and (c), as it existed during that time frame.[7]

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, *shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend*, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.
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> * * * * *
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, *each shall be punished as provided in subsection (a)*.

(Emphasis added).

The only two possible statutes of limitations that could apply to § 1201 are 18 U.S.C. §§ 3281, titled "[c]apital offenses," and 3282, titled "[o]ffenses not capital." During the subject time frame, § 3281 stated "[a]n indictment for any offense *punishable by death* may be found at any time without limitation except for offenses barred by the provision of law existing on August 4, 1939."[8] (Emphasis added). Section 3282 stated "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless

[7]A copy of this statute appears in vol. 1, p. 199 of the record before this Court. A copy of the statute also appears at tab 6 of Appellant's Record Excerpts.

[8]In 1994, the phrase "except for offenses barred by the provision of law existing on August 4, 1939" was stricken from the statute. 18 U.S.C. § 3281, Historical and Statutory Notes, 1994 Amendments. Other than that change, the verbiage of § 3281 as it existed during the time of the alleged crime was identical to verbiage as it existed on the date of the subject Indictment.

the indictment is found or the information is instituted within five years next after such offense shall have been committed."[9]

In summary, under § 3281 no limitations period is applicable, so long as the crime is a "capital offense," which is defined as an offense "punishable by death." Under § 3282, all crimes which are not capital offenses carry a five-year statute of limitations.

C. The three-judge panel's analysis and conclusion that the charges against Mr. Seale were barred by the statute of limitations should be adopted by the *en banc* Court.

In an Opinion that cited numerous binding Supreme Court cases and Fifth Circuit cases, as well as well reasoned case law from multiple jurisdictions, the three-judge panel of this Court concluded that

> the five-year limitations period made applicable to the federal kidnaping statute by the 1972 amendment applies to this case, where the alleged offense occurred in 1964 and the indictment was issued in 2007. The more than forty-year delay clearly exceeded the limitations period. The district court erred by failing to recognize the presumption that changes affecting statutes of limitation apply retroactively, even without explicit direction from Congress.

Panel Opinion at 20. For the following reasons, this conclusion should be adopted and affirmed by the *en banc* Court.

[9]In 2003, subsection (b) was added to the statute. 18 U.S.C. § 3282, Historical and Statutory Notes, 2003 Amendments. Section 3282, as it existed at the time of the subject Indictment, was identical to the language quoted above in the body of this Brief.

1. The three-judge panel correctly found that absent congressional intent to the contrary, "procedural" amendments to statutes apply retroactively.

The 1972 passage of the Act for the Protection of Foreign Officials and Official Guests to the United States eliminated the death penalty provision of the kidnaping statute, 18 U.S.C. § 1201. Panel Opinion at 4. The maximum possible punishment after the amendment was life imprisonment. *Id.* at 5. As a result, the panel correctly found that "[t]his amendment plainly changes the punishment available, and by extension, the limitations period to be applied." *Id.* (citing 18 U.S.C. §§ 3281, 3282).

In reaching this conclusion, the panel had to determine whether the 1972 amendment applied retroactively. Citing binding Supreme Court precedent, the panel found that absent congressional intent to the contrary, "procedural" changes to statutes apply retroactively. Panel Opinion at 5-6. Citing numerous cases from both the Fifth Circuit and other jurisdictions, the panel found that statutes of limitations are procedural in nature. *Id.* at 6-9. Finally, because "the legislative history [of § 1201] reveals no discussion of the statute of limitations or § 3282" (*id.* at 10, 14), the panel correctly concluded that "the district court erred in finding that the 1972 amendment's effect on the statute of limitations was not retroactive" (*id.* at 4).

2. *United States v. Provenzano* supports a conclusion that after 1972, the kidnaping statute was non-capital.

United States v. Provenzano, 423 F.Supp. 662 (S.D. N.Y. 1976), *aff'd* 556 F.2d 562 (2d Cir. 1977) is analyzed on pages 24 and 25 of Mr. Seale's initial Brief.

The three-judge panel's analysis focused on this case as well. *See* Panel Opinion at 9-16.

Provenzano involved the exact same statute of limitations issue as the subject case. The alleged kidnaping in *Provenzano* occurred in 1961, before the *Jackson* Court excised the death penalty provision of § 1201 and before Congress removed the death penalty provision from the statute. 423 F.Supp. at 663. The indictment charging a violation of § 1201 was filed in 1976, after both judicial excision of the statute and congressional revision of the statute. *Id.*

At issue was whether the unlimited § 3281 statute of limitations or the five-year § 3282 statute of limitations applied to a kidnaping charge under § 1201. *Provenzano*, 423 F.Supp. at 663-64. The court held "the direct effect of the repeal [of the death penalty provision of § 1201 by Congress] is to terminate the applicability of 18 U.S.C. § 3281, the no limit statute of limitations." *Id.* at 669. The *Provenzano* court concluded by finding "that *the five-year statute of limitations [of] 18 U.S.C. § 3282 does apply and that the instant prosecution is time-barred*." *Id.* (emphasis added).

Relying on the reasoning of the *Provenzano* court, the three-judge panel found "*Provenzano's* reasoning, approved by the Second Circuit, to be persuasive. Under the circumstances of this case, there is no practical difference between an amendment to a limitations period itself and an amendment that makes a different

limitations period applicable by changing the available punishment."[10] Panel Opinion at 9-10. This *en banc* Court should reach the same conclusion.

3. The savings clause did not preserve the unlimited statute of limitations for the crime of kidnaping.

The "savings clause" appears in 1 U.S.C. § 109. In relevant part, this code section states:

> 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.

Id.

Citing the Supreme Court case of *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661-62 (1974), the three-judge panel held "[w]hile the saving clause generally preserves substantive elements of a statute, the saving clause does not preserve procedural provisions such as a statute of limitations." Panel Opinion at 11. The panel went on to state:

> The cases we have previously discussed regarding the retroactivity of amended statutes of limitations involved instances where Congress directly amended the limitations period. In this case, because the limitations period was changed indirectly through amendment of the punishment provision of § 1201, we must consider the practical effect of the 1972 amendment. In doing so, we are unable to say that it made a substantive change in the statute, so as to trigger the saving clause. The Supreme Court's decision in *Marrero* instructs us to consider two questions when facing this situation: (1) did the old

[10]Although not cited by the three-judge panel, the analysis and holdings of the Fourth Circuit in *United States v. Massingale*, 500 F.2d 1224 (4th Cir. 1974), also support the conclusion that after 1972, § 1201 was a non-capital offense. *Massingale* is analyzed below in section VI.D.1.d. of this Brief.

> statute's provisions constitute a form of criminal punishment; and, if so (2) did the amendment extinguish or ameliorate such penalty. Only if we answer both questions affirmatively does § 109 apply to the defendant's criminal prosecution.

Panel Opinion at 12-13.

> Applying the tests set forth in *Marrero*, the three-judge panel held
>
> the death penalty provision of the pre–1972 version of § 1201 did not constitute a criminal punishment in the wake of the Supreme Court's decision in *Jackson* striking the death penalty from § 1201 as facially unconstitutional.[11] Because the Court had severed the death penalty provision from the statute in 1968, Congress's legislative amendment in 1972 had no ameliorative effect upon § 1201's criminal penalties.

Panel Opinion at 13 (footnote added).

Based on the law and analysis presented by the three-judge panel, the *en banc* Court should find that the savings clause did not did not preserve the unlimited statute of limitations for the crime of kidnaping. As such, a five-year statute of limitations applied to the charges asserted against Mr. Seal. The Government filed the subject Indictment well after expiration of the five-year limitations period. Thus the Judgment against Mr. Seale must be vacated.

4. The 1994 revision to the federal kidnaping statute has no effect on the outcome of this case.

In 1994, Congress added a death penalty provision to § 1201. The district court did not consider the effect of the amendment in its ruling on the statute of

[11]In *United States v. Jackson*, 390 U.S. 570, 572 (1968), the Supreme Court held that "the death penalty provision of the Federal Kidnaping Act imposes an impermissible burden upon the exercise of a constitutional right[.]" Accordingly, the Court severed the death penalty provision of § 1201 as unconstitutional, and left the remainder of the statute in full effect. *Id.* at 572, 586. The effect of *Jackson* on the subject issue is further analyzed below in section VI.D.1. of this Brief.

limitations issue. Panel Opinion at 18 n.12. Also, neither of the parties briefed the issue in their initial Briefs. *Id.* On the request of this Court, the parties submitted Supplemental Briefs which analyzed the issue. *Id.*

For different reasons, both the Government and Mr. Seale agreed that the 1994 revision to the federal kidnaping statute has no effect on the outcome of this case. Panel Opinion at 18 n.12. Nevertheless, the three-judge panel analyzed the issue, and found that "[a]pplying the 1994 amendment to the present facts would ... run afoul of the *Ex Post Facto* Clause." *Id.* at 19. However, the panel went on to hold that "[i]t is unnecessary for us to adopt either party's argument because both parties agree that the 1994 amendment does not affect the outcome of this case."

If the *en banc* Court opts to consider the effect of the 1994 amendment to § 1201, Mr. Seale urges the Court to follow the reasoning of the three-judge panel and find that the *Ex Post Facto* Clause bars retroactive application of the amendment.

5. Conclusion - The three-judge panel's analysis and conclusion that the charges against Mr. Seale are barred by the statute of limitations should be adopted by the *en banc* Court.

The preceding subsections of this Brief provide a summary of the analysis conducted by the three-judge panel. Mr. Seale adopts by reference the panel's analysis in its entirety, and re-urges all case law cited by the three-judge panel. For the reasons articulated by the panel, Mr. Seale urges the *en banc* Court to find that the charges against Mr. Seale were brought outside of the five-year statute of limitations. This finding will require the entry of a Judgment of Acquittal.

D. Alternative reasons that the charges against Mr. Seale were barred by the statute of limitations.

The following issues were either not addressed in the three-judge panel's Opinion, or only addressed tangentially. Analyses of these issues provides additional reasons to find that the charges against Mr. Seale were barred by the statute of limitations.

1. The effect of judicial excision of the death penalty provision of the federal kidnaping statute.

Based on the following analysis, the Supreme Court's judicial excision of the death penalty provision of § 1201 rendered the kidnaping statute "non-capital" in 1968. As a non-capital statute, a five-year statute of limitations applied the the charges against Mr. Seale.

a. The Supreme Court judicially excised the death penalty provision of § 1201 in 1968.

As § 1201 existed in 1964, it contained a death penalty provision. Therefore, without further research, one may conclude that no limitations period applied to charges against Mr. Seale. However, in 1968, the death penalty provision of § 1201 was judicially excised by the United States Supreme Court in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209 (1968).

In *Jackson*, the defendants were charged with kidnaping in violation of § 1201(a). *Jackson*, 390 U.S. at 571. The victim was harmed before release, thus the death penalty provision of § 1201(a)(1) was potentially applicable. *Id.* The issue which began in the district court and concluded in the Supreme Court was whether the death penalty provision in § 1201(a) unconstitutionally quelled a defendant's

right to a jury trial. *Id.* at 571-72. This concern arose because under the language of the statute, only the jury could return a sentence of death. *Id.* This could result in impermissible pressure on a defendant to plead guilty, regardless of guilt or innocence, so as to avoid a potential death sentence from a jury. *See id.* at 571-73, 581. Stated another way, the issue was "whether the Constitution permits the establishment of [] a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury." *Id.* at 581.

The district court dismissed the kidnaping charges in their entirety, finding § 1201 unconstitutional as a violation of the Sixth Amendment right to a jury trial. *Jackson*, 390 U.S. at 571. Upon direct appeal to the Supreme Court, the *Jackson* Court held:

> We agree with the District Court that the death penalty provision of the Federal Kidnaping Act imposes an impermissible burden upon the exercise of a constitutional right, but we think *that provision is severable from the remainder of the statute*. There is no reason to invalidate the law in its entirety simply because its capital punishment clause violates the Constitution. The District Court therefore erred in dismissing the kidnaping count of the indictment.

Id. at 572 (emphasis added); *see also*, *id.* at 586 (holding that "it is clear that the clause authorizing capital punishment is *severable from the remainder of the kidnaping statute* and that the unconstitutionality of that clause does not require the defeat of the law as a whole." (emphasis added)). The Supreme Court found the death penalty provision of § 1201 unconstitutional. *Id.* at 597. The Court excised the death penalty provision and left the remainder of the statute intact and in force. *Id.*

b. Judicial excision - generally.

Judicial excision of a portion of a statute is often referenced as severance of the statute. "Courts that have refused to sever a statute typically have found that 'the balance of the legislation is incapable of functioning independently [because] the valid and invalid provisions are so intertwined.'" *801 Conklin St. LTD. v. Town of Babylon*, 38 F.Supp.2d 228, 245 (E.D. N.Y. 1999)(*citing Nat'l Adver. Co. v. Town of Niagara*, 942 F.2d 145, 148 (2d Cir. 1991)).

> The test is whether the void provision and the valid provision are essentially and inseparably connected and interdependent, one with the other, so that it cannot be presumed that the legislature would have enacted the valid provisions without the void one. Severance is impossible if the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932); *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976).

Hejira Corp. v. MacFarlane, 660 F.2d 1356, 1362 (10th Cir. 1981). Simply stated, "judicial excision is inappropriate where the potentially severed section is a *core part of*, and *interwoven inextricably with*, the entire regulatory scheme." *Brownell v. City of Rochester*, 190 F.Supp.2d 472, 508 (W.D. N.Y. 2001)(emphasis added)(*citing New York State Superfund Coalition, Inc. v. New York State Dep't of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.Y.S.2d 879, 550 N.E.2d 155 (1989)).

Judicial excision of a statute is a somewhat extreme measure because "[c]ourts are very naturally hesitant about drawing solely upon their own authority to repeal *pro tanto* Congressional enactments." *United States v. Watson*, 496 F.2d

1125, 1128 (4th Cir. 1973). Therefore, unless it is conclusively found that a statutory provision is *not* a core part of, and *not* interwoven inextricably with the entire regulatory scheme, then a court should not judicially excise a portion of a statute while leaving the remainder of the statute intact. *See Brownell*, 190 F.Supp.2d at 508.

c. Fifth Circuit case law interpretation of the effect of judicial excision of the death penalty provision of § 1201 by the *Jackson* Court.

In *United States v. Hoyt*, 451 F.2d 570, 571 (5th Cir. 1971), *cert. denied*, 405 U.S. 995 (1972), this Court found that the *Jackson* Court's judicial excision of the death penalty provision of § 1201 rendered § 1201 "non-capital *for all purposes*." (Emphasis added.) *Hoyt* involved whether a defendant charged with kidnaping should be allowed twenty peremptory challenges of jurors under Rule 24(b) of the Federal Rules of Civil Procedure and under 18 U.S.C. § 3432. *Id.* Hoyt was entitled to twenty peremptory challenges only if the kidnaping charge against him under § 1201 was deemed a capital offense. *Id.* If it was deemed non-capital, he was entitled to a lesser number of peremptory challenges. *Id.* Interestingly, it was the *government* in *Hoyt* arguing that under *Jackson*, § 1201 was rendered a non-capital offense.[12] *Id.*

Agreeing with the government's position that *Jackson* rendered § 1201 a non-capital offense, this Court in *Hoyt* held:

[12]Of course, the tables have turned in the subject case. It suits the government's position in this case to argue that *Jackson* did not render § 1201 non-capital, and that inconsistent position is exactly what the government is attempting to convince the Court in this case.

> The *Jackson* holding invalidated Section 1201(a)'s death penalty feature as violative of the Fifth and Sixth Amendments to the United States Constitution. The Court found nevertheless that the death penalty provision was severable from the definition of kidnaping found in Section 1201(a). Judicial surgery having excised the death penalty from the statute's discussion of the offense of interstate kidnaping, *the lower court's treatment of the case as* ***non-capital for all purposes*** *was correct*.

Hoyt, 451 F.2d at 571 (emphasis added).

In *United States v. Kaiser*, 545 F.2d 467 (5th Cir. 1977), this Court again had the opportunity to determine the effect of judicial excision of the death penalty provision of a statute. The defendant in *Kaiser* was convicted of first degree murder within the jurisdiction of the United States, in violation of 18 U.S.C. § 1111. *Id.* at 469. The appellant claimed error because "of the testimony of a prosecution witness whose name had not been furnished to [the defense] prior to trial as required in capital cases by 18 U.S.C. § 3432." *Id.* at 475.

Relying on *Hoyt*, the *Kaiser* Court held:

> In *United States v. Hoyt*, 451 F.2d 570 (5th Cir. 1971), we confronted a similar § 3432 claim in connection with the federal kidnaping statute. The Supreme Court had held that the capital punishment provision of the statute unconstitutionally burdened the right to a jury trial. *See United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). On that basis this court concluded in *Hoyt* that federal kidnaping was no longer a capital offense triggering § 3432. We have found no compelling distinction between the instant issue and that in *Hoyt*. As in that case, *judicial excision of the death penalty provision renders § 1111 non-capital for all purposes*.

Kaiser, 545 F.2d at 475 (emphasis added). This Court found that because judicial excision of the death penalty provision of § 1111 rendered the statute non-capital for *all purposes*, the government's failure to disclose the witness was not error. *Id.*

The decisions by this Court in *Hoyt* and *Kaiser* set a clear precedent that if the death penalty provision of a statute is judicially excised, then *the statute is non-capital for all purposes*. This Court should therefore find that the district court erred in failing to dismiss the charges Mr. Seale as violative of the five-year statute of limitations set forth in § 3282.

d. Persuasive case law interpretation of the effect of congressional elimination of the death penalty provision of § 1201.

In *United States v. Massingale*, 500 F.2d 1224 (4th Cir. 1974) and *United States v. Provenzano*, 423 F.Supp. 662 (S.D. N.Y. 1976) an additional factor was considered in determining whether § 1201 was a capital or non-capital offense in the post-*Jackson* era. These two courts considered the important fact that *in 1972, Congress amended § 1201 to exclude the possibility of the death penalty for the crime of kidnaping*. *Massingale*, 500 F.2d at 1224 (noting that "the 1972 amendment of Section 1201 by the Congress ... eliminated the death penalty...."); *Provenzano*, 423 F.Supp. at 666 (noting that "[i]n 1972, the death penalty provision of 18 U.S.C. § 1201 was repealed and all violations of the statute were made punishable 'by imprisonment for any term of years or for life.'").

The *Massingale* court went on to hold that the combination of the *Jackson* Court's judicial excision of the death penalty provision from § 1201 and the subsequent repeal of the death penalty provision from § 1201 by Congress "removed kidnaping from the classification of a capital offense...." 500 F.2d at 1224. As such, the activity proscribed by § 1201 was deemed non-capital. *Id.*

Provenzano, which is analyzed above in section VI.B.2. of this Brief, held likewise. As in *Massingale* and *Provenzano*, the district court in this case should have found that the charges against Mr. Seale were time barred under the five-year statute of limitations stated in § 3282. Failure to do so was reversible error.

2. The *Furman v. Georgia* line of cases is inapplicable to the subject issue.

In making its ruling on the statute of limitations issue, the district court erroneously relied in part on the *Furman v. Georgia* line of cases. In Appellee's initial Brief, the Government placed significant reliance on this case as well.

In *Furman v. Georgia*, 408 U.S. 238, 239-40, 92 S.Ct. 2726 (1972), a very divided Supreme Court found that the death penalty provisions of two specific Georgia state statutes and one specific Texas state statute were unconstitutional. It is important to note that *Furman* contains no majority opinion. Justices Douglas, Brennan, Stewart, White and Marshall each filed separate opinions concurring in the decision that the death penalty provisions of the subject state statutes were unconstitutional. *Id.* at 240-57 (Justice Douglas' concurring opinion); *id.* at 257-306 (Justice Brennan's concurring opinion); *id.* at 306-10 (Justice Stewart's concurring opinion); *id.* at 310-14 (Justice White's concurring opinion); *id.* at 314-71 (Justice Marshall's concurring opinion). The Chief Justice and the remaining three Justices each filed separate dissenting opinions.

Also, only two of the five Justices who filed concurring opinions intimated that the death penalty is unconstitutional under any circumstance. *Id.* at 305 (Brennan, J., concurring); *id.* at 371 (Marshall, J., concurring). The other three Justices found that

whether the death penalty was unconstitutional in total was not an issue before the Court, thus no decision should be rendered on the issue. *Id.* at 257 (Douglas, J., concurring); *id.* at 308 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). For reasons further developed below, this unsettled state of the federal death penalty is important in distinguishing the *Furman* line of cases from cases directly applicable to the subject issue.

After *Furman*, federal courts struggled with what constituted a "capital offense" for purposes of determining issues such as whether a defendant was entitled to two counsel at government expense in a *murder* prosecution, rather than one counsel (*United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973)) and determining the applicable statute of limitations in a *murder* prosecution (*United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995)). Of particular importance to the final conclusion in the decisions of both the Fourth and Ninth Circuits was the fact that even though *Furman* and other judicial decisions may have affected the viability of the death penalty provisions of the state murder statutes in issue, Congress had not repealed the death penalty provisions of the federal statutes. (*Watson*, 496 F.2d at 1127 (finding that "[i]n a very literal sense, the offense defined in § 1111 is still a 'capital crime;' the statute still authorizes the imposition of the death penalty and Congress has not repealed it."); *Manning*, 56 F.3d at 1196 (same (*citing Watson*)). Because the statutes still contained capital punishment provisions, these courts found that these *murders* remained "capital offenses."

The subject case is distinguishable from the *Furman* line of cases. First, as the *Watson* court recognized, "[f]rom the plurality of opinions which were filed in *Furman*, we cannot be certain that *Furman* forecloses all statutory schemes for imposition of capital punishment." 496 F.2d at 1127. That is, the *Watson* court properly recognized that *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. Although the Department of Justice may have been deterred from seeking the death penalty in light of the holdings in *Furman*, several federal criminal statutes continued to contain death penalty provision that were never deemed invalid. If the Department of Justice had so chosen, it could have sought the death penalty under those statutory schemes. That is, any "deterrence" to seek the death penalty by the Department of Justice was self imposed; it was not judicially or congressionally imposed.

In contrast, applying *Jackson* to the subject case, it is undisputed that the *Jackson* Court judicially excised the death penalty provision of § 1201 as unconstitutional. In the post-*Jackson* era, the Department of Justice was completely foreclosed from pursuing the death penalty for kidnaping charged under § 1201. Simply stated, availability of the death penalty for § 1201 violations ceased to exist after the Supreme Court rendered its decision in *Jackson*.

Second, unlike the *Furman* line of cases, the death penalty provision of § 1201 was repealed by Congress in 1972. Therefore, as recognized by the principles set forth in *Massingale* and *Provenzano*, *supra*, § 1201 was completely removed from

the ambit of a capital offense. The death penalty provisions in the *Furman* line of cases were not specifically repealed by Congress. Therefore, unlike § 1201 in the subject case, the statutes remained capital in a literal sense. This distinction renders the law set forth in the *Furman* line of cases inapplicable to the subject case.

For all of these reasons, reliance on the *Furman* line of cases in the subject analysis would be misplaced.

VII. CONCLUSION

Based on the arguments presented above, the arguments presented in Appellant's initial Brief, and the analyses of the three-judge panel set forth in the Panel Opinion, this Honorable Court should reverse the conviction and sentence against Mr. Seale, and render a decision that the charges against him must be dismissed. This decision must be reached because the Indictment against Mr. Seale was filed well outside of the applicable five-year statute of limitations.[13]

[13]Mr. Seale included numerous other arguments in his initial Appellant's Brief. However, at the direction of the *en banc* Court, only the statute of limitations issue is addressed herewith. This is because the three-judge panel addressed *only* the statute of limitations issue. In fact, the three-judge panel reserved the right to revisit the remaining issues if this *en banc* Court finds that the subject charges were not barred by the statute of limitations. Panel Opinion at 20. (holding that "[w]e emphasize that our conclusion is based solely on our analysis of the statute of limitations issue which, as a dispositive threshold issue, precludes the need to discuss the other issues raised on appeal challenging the validity of Seale's conviction. Consequently, we pretermit discussion of the other issues, and reserve the right to examine those issues in the future if necessary." If the *en banc* Court finds that the claims against Mr. Seale are not barred by the statute of limitations, then the Judgment against him should nevertheless be vacated on the remaining arguments presented in Appellant's initial Brief, and Mr. Seale reserves his right to present these issues in any future Petition for Rehearing *En Banc*.

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CERTIFICATE OF SERVICE

I, Kathryn N. Nester, certify that today, January 29, 2009, a copy of the *En Banc* Brief for Appellant, together with a diskette in PDF format, were served upon Tovah R. Calderon, Esq., *via* 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, Assistant United States Attorney, *via* United States Mail, postage prepaid, and a copy of the *En Banc* Brief for Appellant 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.

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