

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-5644
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK CANALES,

Defendant-Appellant.

S)))))))))Q

Appeal from the United States District Court for the
Western District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 7, 1992, 5th Cir., 1992, _____ F.2d _____)
(July 8, 1992)

Before BROWN, GARWOOD and EMILIO M. GARZA, Circuit Judges.

GARWOOD, Circuit Judge:

We deny the Government's petition for rehearing. Our opinion speaks only to situations in which the prior conviction is attacked on nonforfeited grounds that, if properly established, would render the conviction subject to federal court collateral attack as invalid under the United States Constitution. It is not claimed that the challenge to the 1982 conviction here falls outside of that category. The Government recognizes that the Constitution precludes reliance for sentencing purposes on at least certain

unconstitutionally obtained prior convictions. *United States v. Tucker*, 92 S.Ct. 589 (1972). The Government implies, however, that there may be other prior convictions that, though subject to being set aside on federal court collateral attack because of other federal constitutional infirmities, are nevertheless not so infirm that the Constitution precludes their consideration for sentencing purposes. No authorities are cited that support this assertion, no examples of such convictions are given, and it is not even expressly argued that the 1982 conviction here falls within that category. The Government's argument demonstrates no error in our prior opinion and judgment.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.