Mercer Law Review

Volume 27
Number 4 *Fifth Circuit Survey Issue*

Article 5

7-1976

Constitutional-Criminal Law

J. Michael Walls

CONSTITUTIONAL—CRIMINAL LAW

By J. MICHAEL WALLS*

The purpose of this article is to provide a discussion of the most interesting and noteworthy cases decided by the Fifth Circuit during 1975 in the area of constitutional criminal law. Although this circuit rendered approximately two hundred criminal opinions involving the constitutional protections guaranteed in the criminal process, relatively few cases dominated this field. Because of the importance of these cases, the author felt compelled to provide a fairly in depth treatment of several more significant decisions. However, in so doing every effort was made to avoid straying from the primary purpose of the article which is to survey the general area of constitutional criminal law.

I. CALLEY V. CALLAWAY

By far the most significant decision handed down during 1975 involving constitutional criminal considerations was the court's en banc decision in the case of *Calley v. Callaway*.[1] That case involved several constitutional issues, three of which will be discussed under separate headings.

A. Review of Court-Martial Proceedings

The case of *Calley v. Callaway* was a review of a petition for habeas corpus relief which alleged violations of constitutional rights in a court-martial proceeding. Therefore, the court was compelled at the outset of its opinion to determine the proper scope of review within the federal court system of contentions which have been previously considered and rejected by military courts. It was concluded that the power of federal courts to review military convictions depends on the nature of the issues raised. Four inquiries were established as necessary in making this determination[2] although it was acknowledged that the courts of appeals are divided as to the proper scope of review.[3]

The four inquiries established in *Calley* are:

> 1. *The asserted error must be of substantial constitutional dimension.* This was stated to mean that the claim of error must be so fundamental as to have resulted in a miscarriage of justice.[4]

---

* Staff Assistant Attorney General, Dept. of Law, State of Georgia. Georgia Southern College (A.B., 1968); Cumberland School of Law, Samford University (J.D., 1973). Member of Ohio and Georgia Bars.

1. 519 F.2d 184 (5th Cir. 1975).
2. *Id.* at 199.
3. *Id.* at 198.
4. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

2. *The issue must be one of law rather than of disputed fact already determined by the military tribunals.*

3. *Military considerations may warrant different treatment of constitutional claims.* This inquiry concerns whether factors peculiar to the military or important military considerations require a different constitutional standard.

4. *The military courts must give adequate consideration to the issues involved and apply proper legal standards.*

These were the principles which guided the court in disposing of the other issues involved in *Calley* and which will serve to guide future reviews of courts-martial in this circuit.

B. Pre-Trial Publicity

An area of constitutional law which has been the subject of a considerable amount of discussion in recent months is the apparent conflict between the first amendment free press guaranties and the right of an accused to receive a fair trial, unprejudiced by excessive pretrial publicity. Two cases of interest in this area were decided by the Fifth Circuit during the period being surveyed—*Calley v. Callaway*,[5] and *United States v. Williams*.[6] Both cases were appealed from United States district courts in Georgia,[7] and both concerned factual situations which were of national interest. In each instance the lower court was reversed, but in so ruling the appellate court reached opposite conclusions on the critical issue of pre-trial publicity.

In *Calley*, the court held that there was no denial of a fair trial even though extensive pre-trial publicity had existed. The court disagreed with the district court's findings that the publicity was improper, largely biased, and undoubtedly prejudicial to the point that "it was not humanly possible for the jurors not to be improperly influenced by prior exposure."[8] The court expressly declined to accept the premise that "prominence brings prejudice" and determined from the facts surrounding Calley's trial that pre-trial publicity had not been sufficiently prejudicial to have violated his sixth amendment rights. The opinion pointed out that newspaper clippings from articles written at the time of Calley's trial described the sentiment at Fort Benning and neighboring Columbus, Georgia, as being generally favorable to Lieutenant Calley. Furthermore, it was noted that surveys conducted by *Time* magazine reached the conclusion that, even when publicity was at its peak, there was considerable sympathy for Calley.[9] Moreover, the court felt that the district court had ignored the rule

5. 519 F.2d 184 (5th Cir. 1975). Calley's petition for certiorari to the United States Supreme Court was denied. *See* 44 U.S.L.W. 3534 (Mar. 23, 1976).

6. 523 F.2d 1203 (5th Cir. 1975).

7. *Calley* was from the Middle District of Georgia at Columbus, and *Williams* from the Northern District of Georgia at Atlanta.

8. 519 F.2d at 205.

9. *Id.* at 206.

that a "prejudicial publicity claim must be viewed differently when the news accounts complained of are 'straight news stories rather than invidious articles which tend to arouse ill will and vindictiveness.' "[10] The recency of publicity was also considered to be a critical factor; and in the case of William Calley, there was a considerable lapse of time between the peak of the publicity and the commencement of the trial. For these reasons the court refused to presume prejudice.

Having refused to presume prejudice, the *Calley* court went on to determine that the members of the court martial tribunal had in fact been impartial. The majority opinion pointed out that there was a presumption that the court martial members would be impartial, and concluded that the district court had taken too lightly the statements made, after extensive questioning under oath by members of the court-martial board, to the effect that their decision would not be influenced by pre-trial publicity. Finally, the court was unable to find any evidence of actual, isolatable prejudice which could be traced to the pre-trial publicity.

United States v. Williams[11] involved an appeal by the convicted kidnaper of Reg Murphy, the former editor of *The Atlanta Constitution*. Without mentioning *Calley*, which had been decided en banc only a little over three months earlier, the panel before whom *Williams* was argued unanimously reversed the conviction of defendant Williams because of prejudicial pre-trial publicity.

In *Williams*, the court found pervasive community prejudice sufficient to dispense with the requirement that actual prejudice be shown. Specifically, it was found that the

> wide dissemination of Murphy's comments on the [defendant's] personality, . . . the character of those comments, . . . their proximity to the trial, . . . and the familiarity of the panel members with the crime charged, . . . all suggest the probability of a proceeding not limited to the evidence properly introduced before the trier of fact.[12]

How can *Williams* be distinguished from *Calley*? In *Williams*, the court attached particular significance to a televised news special featuring Reg Murphy which was aired in Atlanta shortly before the commencement of Williams' trial. In the news special, Murphy made comments concerning Williams' anti-Semitic views and his insecurity, and portrayed Williams as being given to lying. Perhaps the court considered these comments to be more in the nature of "invidious statements tending to arouse ill will and vindictiveness" than were the news stories concerning Calley which the court considered to be "straight news reporting." The *Williams* panel

10. *Id.* at 206, *quoting from* Beck v. Washington, 369 U.S. 541, 556, 82 S.Ct. 955, 963, 8 L.Ed.2d 98, 111 (1962).

11. 523 F.2d 1203 (5th Cir. 1975).

12. *Id.* at 1209-10.

was also concerned that the news special featuring Reg Murphy occurred close in time to the beginning of Williams' trial. As has been previously shown, the *Calley* court found significance in the fact that the peak of publicity concerning Lieutenant Calley occurred several months before the beginning of his trial. As to the other reason given in *Williams*, that of the familiarity of the jury with the crime charged, it is doubtful that the panel in *Calley* was any less familiar with the particular crime than was the jury in *Williams*.

The possibility that all three members of the panel in *Williams* were not in agreement with the en banc pre-trial publicity ruling in *Calley* is worthy of note. Of the three judges deciding *Williams*, Senior Circuit Judge Tuttle did not sit on the *Calley* appeal, and Circuit Judges Thornberry and Morgan dissented from the majority in *Calley*. Judges Thornberry and Morgan apparently dissented only from that part of the majority opinion relating to the failure of Congress to produce subpoenaed materials. However, the dissenters would have required a retrial, and it was stated in the dissenting opinion that the retrial would pretermit decision as to pre-trial publicity since a retrial atmosphere would be void of the extensive publicity which preceded the original trial.[13] This statement, standing alone, is not considered by this writer to profess disagreement with the majority on the issue of pre-trial publicity. Yet because of this statement, and the fact that the dissenting judges did not specifically state that they were in agreement with the majority on the issue of pre-trial publicity, it cannot be presumed that these judges applied the same standards in making their determination as did the majority in *Calley*.

C. Discovery of Congressional Testimony

A third significant question was considered in *Calley*. This issue involved the discovery of congressional testimony and constituted the only portion of the opinion from which any of the en banc court dissented.[14] Specifically, Calley's lawyers had sought to obtain all the testimony taken before a subcommittee appointed by the House Armed Services Committee to investigate the My Lai incident. The House of Representatives, however, refused to release the requested evidence.

The district court had held that Congress' refusal violated the Jencks Act[15] and that the inability of the defense to obtain the congressional testimony denied Calley due process of law. The court of appeals disagreed, finding that there was no denial of due process and holding that, even if a Jencks Act violation had occurred, such violation did not rise to a level warranting habeas corpus relief.[16]

13. 519 F.2d at 228.

14. Judge Bell filed a dissenting opinion in which he was joined by Judges Gewin, Thornberry, Morgan, and Clark.

15. 18 U.S.C. A. §3500 (Rev. 1969).

16. 519 F.2d at 220.

The court of appeals also refused to find that nondisclosure reached a level of constitutional significance. Whereas, the defense had sought the testimony for use in cross-examination, the court stated that the rule was that the testimony had to have a definite impact on the credibility of an important witness.[17] In holding that the burden of establishing this materiality was to be carried by the defense, the court found that the requisite materiality had not been shown in this case.

The court's decision that Congress' refusal to release the testimony did not deny Calley due process was based on the facts that Calley was allowed extensive discovery, including prior statements by all witnesses who appeared both before the court-martial and the congressional subcommittee, and that the testimony before the subcommittee was equally nonavailable to the prosecution which was not responsible for its nonproduction. In this last respect, the court pointed out that no case has yet held under *Brady v. Maryland*,[18] the leading case in this area, that the defense has a right to receive information or evidence greater than that possessed by the prosecution. Furthermore, according to the majority, there is no abstract right on the part of a defendant to obtain all evidence which might possibly be helpful to his case. As to possible violations of the Jencks Act, the majority opinion cited the Supreme Court's opinion in *United States v. Augenblick*[19] as standing for the proposition that violations of the Jencks Act do not constitute constitutional error.

In *Calley*, Judge Bell dissented from this part of the majority opinion and filed a separate opinion in which he was joined by Judges Gewin, Thornberry, Morgan, and Clark. These judges were of the opinion that the withholding of evidence by Congress was an error of constitutional magnitude which required either a new trial or further proceedings in the district court. The dissenting judges took issue with two reasons given by the majority in finding that there was no denial of due process. First, they disagreed that the defense should meet the burden of demonstrating that the requested testimony was material. Second, the dissenters interpreted *Brady* to apply equally to all divisions of the federal government, including Congress, and not to the "prosecution" only.

II. Search And Seizure

During the period surveyed, the Fifth Circuit rendered more decisions involving searches and seizures than any other area concerning constitutional aspects of criminal law. However, the decision to give special treatment to cases in this area was not reached solely because of sheer numerosity. Many of these decisions involved cases of first impression in this cir-

17. *See, e.g.*, Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974); United States v. Tashman, 478 F.2d (5th Cir. 1973).

18. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

19. 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969).

cuit, and others were important because they applied new Supreme Court standards concerning border searches.

In a case of first impression in this circuit, the court followed precedent established by the Third Circuit[20] and held that 18 U.S.C.A. §3109 (Rev. 1969), which requires announcement of authority and purpose and refusal prior to forcible entry, has no application to searches of unoccupied dwellings.[21] The court found that the interests protected by requiring announcement and refusal prior to breaking were: (1) the prevention of violence and physical injury to the police and occupants; (2) the unexpected exposure of the private activities of the occupants; and (3) the property damage resulting from forced entry.[22] Judge Ainsworth, writing for the panel, pointed out that only the third and least significant interest in terms of individual privacy can possibly be involved when the occupant is absent from the premises. Therefore, in the court's opinion, it would be futile to require the police to wait for refusal of admittance to a dwelling when no one is home.

A case of first impression for any appellate court concerned the use of a battery-operated "beeper device" which, when attached to an automobile, enables the police to "track" the vehicle. This was held to be a search within the meaning of the fourth amendment.[23] The panel was unable to find a

> rational basis . . . for distinguishing the violation of the expectation of privacy involved in the installation of a "beeper" on a car, in order to trace its movement, from the placing of a tap on the outside of a telephone booth in order to overhear and record conversations.[24]

The case of *United States v. Darensbourg*[25] indicates the degree to which a search warrant description can be erroneous without destroying its validity. The panel reversed an order of suppression which had been based upon a finding that a warrant description was defective because it failed to meet the fourth amendment's particularity requirement. The description read as follows: "Apartment #70, located at 3101 Highland Rd., in the City of Baton Rouge."[26]

The apartment searched was the only apartment in a multi-building complex numbered 70, but was in fact located on July Street across a canal

20. United States v. Gervato, 474 F.2d 40 (3d Cir.), *cert. denied*, 414 U.S. 864, 94 S.Ct. 39, 38 L.Ed.2d 84 (1973).

21. Payne v. United States, 508 F.2d 1391 (5th Cir. 1975).

22. For a discussion of this third interest see Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1494 (1971).

23. United States v. Holmes, 521 F.2d 859 (5th Cir. 1975). The court cited only one other decision addressing this issue. *See* United States v. Martyniuk, 395 F.Supp. 42 (D.Ore. 1975).

24. 521 F.2d at 865. *See* Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

25. 520 F.2d 985 (5th Cir. 1975).

26. *Id.* at 985.

and about 300 yards from 3101 Highland Road. The apartment searched was in the same complex as the Highland Road address. Judge Godbold, in his dissent, argued that the finding of the district court that such a description was constitutionally defective was not clearly erroneous.

Two cases of first impression in the Fifth Circuit involving wiretaps are worthy of comment. *United States v. Worobyzt*[27] involved an appeal from a finding of contempt based upon a grand jury witness' refusal to answer questions concerning information which he claimed was derived from an illegal wiretap. The court of appeals affirmed. The district court had held the witness in contempt when he continued to refuse to answer questions after the district judge had inspected the wiretap orders, affidavits, and applications in camera and had determined that the wiretap was valid. In affirming the district court, the Fifth Circuit reached a decision in accord with the Second, Third, and Ninth Circuits[28] and in conflict with the First Circuit,[29] and held that the defendant did not have the right to demand the opportunity to inspect the records.

The court sat en banc to rehear the case of *United States v. Doolittle*,[30] and, in a per curiam decision, a majority of the en banc court agreed with the panel majority in affirming the district court.[31] However, a total of six judges dissented. Judges Brown, Wisdom, Thornberry, Goldberg, and Simpson dissented from the affirmance and would have reversed for the reasons stated in Judge Thornberry's dissent to the panel decision. Judge Godbold wrote a separate dissenting opinion. The court reconsidered the panel decision en banc in order to have a full court determination of the issue on which the panel divided, *i.e.*, whether the failure to name certain defendants in the wiretap interception order required suppression of intercepted conversations to which the defendants were parties.

The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Certain defendants, however, contended that since the Government had reasonable cause to believe that their conversations would be intercepted, they were not "unknown," and therefore should have been named in the authorization. Accordingly, since they were not named, those defendants contended that the wiretap order was illegal as to their conversations. This argument was rejected by the majority, principally because these defendants were unable to demonstrate any prejudice by not having been named in the authorization.

During the survey period, the court was called upon to decide a substan-

27. 522 F.2d 196 (5th Cir. 1975).

28. *See* Droback v. United States, 509 F.2d 625 (9th Cir. 1974), *cert. denied*, ___ U.S. ___, 95 S.Ct. 1952, 44 L.Ed.2d 450 (1975); *In re* Persico, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924, 95 S.Ct. 199, 42 L.Ed.2d 158 (1974); United States v. D'Andrea, 495 F.2d 1170 (3d Cir.) (per curiam), *cert. denied*, 419 U.S. 855, 95 S.Ct. 101, 42 L.Ed.2d 88 (1974).

29. *In re* Lochiatto, 497 F.2d 803 (1st Cir. 1974).

30. 518 F.2d 500 (5th Cir. 1975).

31. The panel decision is reported at 507 F.2d 1368 (5th Cir. 1975).

tial number of cases involving border searches. This area continued to be in a state of flux and uncertainty because of recent Supreme Court decisions.[32]

Even though standards for conducting border searches were handed down in 1973 by the United States Supreme Court in *Almeida-Sanchez v. United States*,[33] the Fifth Circuit continued to apply pre-*Almeida-Sanchez* standards in some cases due to its decision that the new standards were not retroactive.[34]

In *United States v. Hart*,[35] a case illustrative of the rapid changes being made in the law concerning border searches, it was held that *Almeida-Sanchez* did not prevent border patrol agents from searching the trunk of an automobile for illegal aliens at a permanent border traffic checkpoint where the agent had less than probable cause. However, the Supreme Court reached a contrary decision later in the year in the case of *Bowen v. United States*[36] and *Hart* can no longer be relied upon for precedent.

Several of the cases concerning border searches involved construction of the recent Supreme Court decision in *United States v. Brignoni-Ponce*,[37] wherein the Court held that border patrol agents on "roving patrols" could constitutionally stop vehicles to question the occupants where there existed "reasonable suspicion" that the vehicle contained aliens illegally in the country. The case of *United States v. Walker*[38] is indicative of the standards for determining "reasonable suspicion." In a per curiam opinion, the *Walker* court held that the fact that border patrol agents observed vehicles traveling together at a high rate of speed on a highway which originated at a border town approximately fifty-two miles away supported a reasonable belief that the vehicles concealed illegal aliens. Accordingly, a stop to determine the citizenship of the passengers was permissible, and the odor of marijuana emanating from inside the car gave probable cause to search the vehicle.

In light of *Brignoni-Ponce*, the court in *United States v. Byrd*,[39] another

32. United States v. Brignoni-Ponce, ___ U.S. ___, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); United States v. Ortiz, ___ U.S. ___, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); Bowen v. United States, ___ U.S. ___, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); United States v. Peltier, ___ U.S. ___, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975).

33. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

34. United States v. Miller, 492 F.2d 37 (5th Cir. 1974); *See* Quarles, *Constitutional Aspects of Criminal Law, Fifth Circuit Survey*, 26 MER. L. REV. 1181 (1975). *See also* United States v. Peltier, ___ U.S. ___, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975).

35. United States v. Hart, 506 F.2d 887 (5th Cir. 1975). *See also* United States v. Janney, 506 F.2d 897 (5th Cir. 1975).

36. ___ U.S. ___, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975).

37. ___ U.S. ___, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). *See* United States v. Walker, 522 F.2d 194 (5th Cir. 1975); United States v. Coffey, 520 F.2d 1103 (5th Cir. 1975); United States v. Byrd, 520 F.2d 1101 (5th Cir. 1975). *See also* United States v. Soria, 519 F.2d 1060 (5th Cir. 1975).

38. 522 F.2d 194 (5th Cir. 1975).

39. 520 F.2d 1101 (5th Cir. 1975).

per curiam decision, denied a petition for rehearing en banc. In so doing, the panel held that a stop made by a border patrol agent which did not meet the "reasonable suspicion" of criminal activity criterion, and where the agent testified that he would have stopped any car traveling on that particular road that night, was illegal when tested by *Brignoni-Ponce* standards. Without elaboration it was held that under *Brignoni-Ponce*, a stop which resulted from a signal emanating from a signal device (checker device) embedded in the highway approximately sixty miles from the border, did not occur at a functional equivalent of the border.[40] The court further held the apparent Mexican ancestry of the occupants was insufficient, standing alone, to justify the stopping of the vehicle.

The court also decided several cases involving searches by customs officers which were also controlled by "less than probable cause" requirements. That a customs agent retains the power to search passengers arriving from foreign countries even after they have passed through the routine customs check was illustrated by the case of *United States v. Chiarito*.[41] There, a search by a customs inspector at the Miami International Airport was upheld as reasonable where the inspector observed a man who was wearing a bulky vest and appeared nervous, even though the man had already successfully passed through the customs baggage checkpoint.

In a case of first impression in any appellate court, the Fifth Circuit determined that the lenient standards applicable to customs inspections were available to inspectors in the interior as well as at the border and at ports of entry.[42] In that decision, the court held that 19 U.S.C. A. §482 (Rev. 1965) authorized the search of envelopes at Birmingham, Alabama, without meeting the probable cause requirement. This section empowers customs officers who have "reasonable cause to suspect there is merchandise which was imported contrary to law" to search any trunk or envelope. That 19 U.S.C. A. §482 authorizied the opening on incoming mail had been acknowledged,[43] put prior to *United States v. King*[44] no court had ruled on searches of mail which occurred other than at a port of entry or border area. After dismissing the contention that *Almeida-Sanchez* was applicable, the court held that the search did not violate appellant's fourth amendment rights. Judge Morgan, writing for the panel, pointed out that the sender and addressee could have no reasonable expectation that letters mailed from abroad would remain uninspected. Furthermore, since they would have no idea as to the exact point in the postal process at which the inspection occurred, they were not inconvenienced by an inspection in Birmingham, Alabama, any more than they would have been by an inspec-

40. United States v. Del Bosque, 523 F.2d 1251 (5th Cir. 1975).

41. 507 F.2d 1098 (5th Cir. 1975).

42. United States v. King, 517 F.2d 350 (5th Cir. 1975).

43. United States v. Odland, 502 F.2d 148 (7th Cir., *cert. denied*, 419 U.S. 1088, 95 S.Ct. 679, 42 L.Ed.2d 680 (1974).

44. 517 F.2d 350 (5th Cir. 1975).

tion at the port of entry in California. Finally, the court pointed out that searches of this nature were far less intrusive than searches of individuals or their personal effects. In the court's opinion, Judge Morgan drew an analogy between a letter which had passed through an initial stage in the customs process but was still undelivered, and the situation of the appellant in *Chiarito* who had passed through the initial checkpoint but had not left the customs area. Neither was immune from a further search.

Customs searches have as their purpose the prevention of illegal importation, whereas border searches are for the purpose of preventing illegal immigration. Searches by customs agents and border patrol officers are governed by different requirements of reasonableness. These requirements remain different even though both may be operating at or near the Mexican border. This difference was determinative in *United States v. Soria*,[45] where it was held that *Brignoni-Ponce* and other cases relating to border patrol agents were not applicable to customs agents. The operative facts in this case occurred prior to *Almeida-Sanchez*; however, the pre-*Almeida-Sanchez* unfettered discretion to search vehicles within 100 miles of the border afforded border patrol agents was not available to customs officers. Instead, customs officers were required to have "reasonable cause" to suspect a violation of custom laws prior to conducting a search. In *Soria*, the majority held that to justify a warrantless search of a vehicle by customs agents, there must exist a reasonable nexus between the vehicle and the border. After so holding, it was determined that the essential nexus was not present in the facts before the court, and therefore the search in question was illegal.

While there were numerous other cases involving fourth amendment attacks on searches and seizures, these other opinions did not say anything new and their discussion is not felt to be justified.

III. Judicial Discretion In Accepting Prosecution's Motion To Dismiss

Other than the *Calley* decision, the case of *United States v. Cowan*[46] was probably the most noteworthy case (both in terms of national interest and legal significance) decided in the criminal law area during the survey period. In one of the last opinions he wrote before his death on October 30, 1975, Senior Circuit Judge Murrah of the Tenth Circuit, who was sitting by designation, dealt with yet another constitutional issue raised by the Watergate break-in. This case interpreted for the first time Rule 48(a) of the Federal Rules of Criminal Procedure. That rule authorizes the U.S. Attorney, by leave of court, to file a dismissal of an indictment, information or complaint.

A short statement of the facts involved is necessary before discussing

45. 507 F.2d 1098 (5th Cir. 1975).
46. 524 F.2d 504 (5th Cir. 1975).

Cowan. Briefly stated, the facts were as follows. In February 1974, a federal grand jury in the Northern District of Texas returned a seven count indictment against Jake Jacobsen. Meanwhile, the Watergate Special Prosecution Force and Jacobsen's Washington counsel negotiated an agreement whereby Jacobsen agreed to plead guilty to an unrelated one count charge to be filed in the District of Columbia and to cooperate with the Watergate Special Prosecution Force in its efforts to convict former Secretary of the Treasury, John Connally. It was also a part of the plea agreement that the Government would dismiss the Texas indictment. In accordance with this agreement, the United States Attorney for the Northern District of Texas moved under Rule 48(a) to dismiss the Texas indictment against Jacobson. However, District Judge Hill denied the motion to dismiss and, following the filing of notice of intention not to prosecute by the United States Attorney, appointed private prosecutors.

One can only surmise that Judge Hill suspected that Jacobsen might be taking advantage of the zeal of the special prosecutors in seeking to convict Connally in order to escape being convicted of serious crimes himself in exchange for less than creditable testimony in Connally's prosecution. In this respect, it is interesting to observe that Jacobsen's testimony was largely disbelieved and was not sufficient to convict John Connally.

In an exhaustive opinion, Judge Murrah attempted to preserve what the court considered to be the proper balance of power between the executive and judicial branches of the federal system. However, due principally to the "leave of court" requirement found in Rule 48(a), the court of appeals concluded that in adopting the rule, the Supreme Court intended to "clothe the federal courts with a descretion broad enough to protect the public interest in the fair administration of criminal justice."[47] Although the court was of the opinion that the district judge possessed the discretion to refuse the motion to dismiss, it nevertheless held that where an appellate court has a definite and firm conviction that the trial court had committed a clear error of judgement, the appellate court must reverse. The court held that judicial discretion had been abused under the circumstances involved in this case since nothing in the record overcame the presumption that the prosecutors had acted in good faith in weighing the relative importance of the two prosecutions.[48]

Thus, *Cowan* attaches great weight to the presumption of good faith on the part of government prosecutors, and established the rule that district judges are justified in refusing to accept a motion to dismiss only when the presumption has clearly been rebutted.

47. Id. at 512. *See* United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

48. 524 F.2d at 514.

IV. VOLUNTARINESS OF A PLEA OF GUILTY

Federal Rules of Criminal Procedure, Rule 11 was involved in several cases before the court during 1975. Rule 11 requires that a guilty plea shall not be accepted unless the court first addresses the defendant and determines that the plea is voluntary and that the defendant understands the nature and consequences of a plea of guilty.[49] Under this rule, the court is also required to inquire as to whether the plea is the result of a plea bargain. Subsection (f) of Rule 11 further requires the trial court to be satisfied that there is a factual basis for the plea before accepting a plea of guilty.

Rule 11 is implemented in this circuit by the standards set forth in *Bryan v. United States*.[50] *Bryan* requires (1) that the defendant be placed under oath at the time of taking his plea; (2) that the district court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered; and (3) that specific inquiry be made as to the existence of such an agreement before the plea is accepted.[51]

During the course of 1975, the Fifth Circuit was called upon to apply these standards to several and varied factual situations to determine whether the district courts had properly complied with the requirements of Rule 11 as implemented by *Bryan*. In so doing, the court made plain in *United States v. Maggio*,[52] that *Bryan* standards are applicable to all cases involving plea bargains and not merely to those in which the prosecutor makes a recommendation concerning sentencing. *Herrera v. United States*[53] held that failure to inform the defendant that he would be inelegible for parole before accepting a guilty plea did not violate Rule 11. Furthermore, it was held in another case that Rule 11 did not require that the defendant be told that the sentence will be consecutive to a sentence which is presently being served so long as the district judge advises the defendant of the maximum sentence and carefully questions him as to voluntariness.[54]

The court also ruled that full disclosure does not require that a defendant be told of collateral consequences of a conviction before the acceptance of a guilty plea.[55] The practice of the Alabama Department of Public Safety in suspending the license of drivers who are convicted of driving while intoxicated precipitated an appeal based upon Rule 11. In a decision

49. F.R.CRIM. P. 11.
50. 492 F.2d 775 (5th Cir. 1974).
51. *Id.* at 781.
52. 514 F.2d 80 (5th Cir. 1975).
53. 507 F.2d 143 (5th Cir. 1975). *See also* Trujillo v. United States, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221, (1967).
54. United States v. Saldana, 505 F.2d 628 (5th Cir. 1974).
55. Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975).

written by Judge Morgan, it was held that such pleas were valid even though the defendant was not told that conviction would result in suspension of his driver's license. Since the license is suspended by the Department of Public Safety rather than the court, suspension is collateral to the conviction and the trial court is not required to inform defendants of collateral consequences. This decision carries forward the law which pre-dates current Rule 11. It was based upon decisions which held that a defendant cannot attack a guilty plea as being made without his being fully informed where he is not told that a conviction will result in deportation, a dishonorable discharge, or loss of the voting franchise.[56]

In *Burroughs v. United States*,[57] the court held that the use of a signed standard form guilty plea, a procedure which had previously been approved in *United States v. Sapp*,[58] when amplified by identical dialogue to that used in *Sapp*, was sufficient. However, the court was highly critical of this practice and admonished district judges that the better practice would be to take guilty pleas in a manner that develops a record which tracks the commands of Rule 11.[59]

In *United States v. Vera*[60] the court held that mere assurances by counsel for the defendant that his client understands will not suffice under Rule 11. Similarly, the decision reached in *Torres v. United States*[61] indicates that the appeals court will carefully scrutinize the trial record to determine if the record fully establishes the requirement of Rule 11(f) that a judge satisfy himself that there is a factual basis for a guilty plea. In *Torres*, the court refused to uphold a conviction based upon a guilty plea where the defendant had only a limited knowledge of the English language since the factual basis was read into the record in English. This was held even though the defendant was provided with an interpreter at the time of pleading. The court felt that these circumstances did not adequately indicate that the trial judge was justified in finding a factual basis for the plea.

V. Other Cases Of Interest

The previous sections have discussed areas of criminal law which either have undergone significant changes, have broken new ground during the period surveyed, or have dealt with specific cases of importance in a fairly indepth manner. This section contains brief discussions of several additional cases, most of which are cases of first impression in the Fifth Circuit. One case is important because it reverses the previous law in this circuit.

56. Waddy v. Davis, 445 F.2d 1 (5th Cir. 1975); Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963); United States v. Parrino, 212 F.2d 919 (2d Cir. 1954).

57. 515 F.2d 824 (5th Cir. 1975).

58. 439 F.2d 817 (5th Cir. 1971).

59. 515 F.2d at 827-28.

60. 514 F.2d 102 (5th Cir. 1975).

61. 505 F.2d 957 (5th Cir. 1974).

All of these decisions are noteworthy, but are not as significant as *Calley* or *Cowan*, nor do they fall into areas which were otherwise treated.

In *Van Blaricom v. Forscht*,[62] the court, sitting en banc, reversed its prior panel decision. Earl Van Blaricom's parole had been revoked by a vote of two to one by a three-member panel of the Board of Parole. In a previous panel decision the court had held that since 18 U.S.C. A. §4207 required revocation by "the Board," a quorum consisting of at least a majority of the eight-member board was necessary to revoke parole, and therefore Van Blaricom's revocation was invalid.[63] The en banc court, however, held that this view was too restrictive and adopted the view followed in the Tenth Circuit. Cases from the Tenth Circuit had held that the board policy as to revocation would be controlling and would not be overturned by the court unless its procedures were clearly shown to be discriminatory or so lacking in fundamental fairness as to deprive the parolee or releasee of due process, or because the board's procedures were clearly contrary to the statutes creating and regulating the board.[64]

The right to dispense with counsel is not questioned. However, the right to dispense with effective counsel was a question of first impression in the Fifth Circuit in *United States v. Garcia*.[65] There, a balance between the sixth amendment right to effective counsel and the basic right of a defendant to control his own defense was the goal of the court. *Garcia* involved the waiver of effective counsel by a defendant. In that case, the district judge dismissed the defendant's counsel because he found a conflict of interest in that the attorney represented co-defendants. The defendant, however, informed the court that he wished to retain his counsel even though a conflict existed. In allowing defendant's request, the court recognized that even basic rights may be waived. However, in so doing, the court established standards which guaranteed that the record would indicate the knowing, intelligent and voluntary nature of such a waiver. It was ordered that a Rule 11 type procedure be employed in situations involving waiver of effective counsel so that the defendant's voluntariness and knowledge of the consequences of his action would be manifest on the face of the record. Furthermore, the court determined that such a waiver must not be accepted unless it is in "clear, unequivocal and unambiguous language."[66]

The case of *Maness v. Wainwright*[67] was noteworthy, not because of what it held, but because of what it did not hold. Under Florida's "voucher"

62. 511 F.2d 615 (5th Cir. 1975).

63. This matter had been before the Fifth Circuit on two previous occasions. *See Van Blaricom v. Forscht*, 473 F.2d 1323 (5th Cir. 1973); *Van Blaricom v. Forscht*, 489 F.2d 1034 (5th Cir. 1974).

64. Earnest v. Moseley, 426 F.2d 466 (10th Cir. 1970).

65. 517 F.2d 272 (5th Cir. 1975).

66. *Id.* at 278.

67. 512 F.2d 88 (5th Cir. 1975).

rule, a party calling a witness "vouches" for that witness's credibility and therefore may not attack it. It was held under the factual situation in *Maness*, that such a rule was not per se a denial of due process. Maness argued that under *Chambers v. Mississippi*[68] the voucher rule cannot be applied in a state criminal proceeding if it operates to hamper the defendant's development or presentation of a defense theory. The majority, however, disagreed, being of the opinion that *Chambers* could not be so broadly construed. The majority took notice of the fact that voucher provisions had been the subject of considerable criticism[69] and would soon be removed from Federal practice.[70] In addition, it was conceded by the majority that the operation of the voucher rule worked to the detriment of Maness in excluding evidence which suggested his innocence. Nevertheless, it was held that the facts involved in *Maness* were distinguishable from the facts in *Chambers* which had prompted the United States Supreme Court to hold that the defendant was denied due process because of the operation of Mississippi's voucher rule and the hearsay rule.[71] The court also interpreted *Chambers* as standing for the proposition that state courts were to retain wide latitude in fashioning their own rules of evidence and procedure, and that due process did not require that state evidentiary rules be mirror images of the evidentiary rules applied in federal courts.

While it is true that *Chambers* did not expressly strike down state voucher rules, it appears to this writer that that decision does require appellate courts to view these provisions with a critical eye toward assuring that such rules do not operate to exclude evidence which might suggest the innocence of the defendant. This appeared to be the underlying rationale employed by Judge Clark in his dissenting opinion.[72] He was of the opinion that *Chambers* announced a due process principle which commanded that every material source of evidence should be laid before the trier of fact. Judge Clark, therefore, would have remanded for further proceedings to assure that all facts relevant to testing for the truth were admitted.

The case of *Malinauskas v. United States*[73] presented to the court another question of first impression in this circuit. In that case, the court was required to determine the requisite mental competency necessary for a defendant to plead guilty. The appellant relied upon language in several cases which indicated that a higher degree of mental competency was

68. 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

69. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); United States v. Prince, 491 F.2d 655 (5th Cir. 1974); United States v. Torres, 477 F.2d 922 (9th Cir. 1973); United States v. Freeman, 302 F.2d 347 (2d Cir. 1962).

70. FED. R. EVID. 607, effective July 1, 1975 provides: "The credibility of a witness may be attacked by any party, including the party calling him."

71. The hearsay rule was also involved in *Maness* and operated to keep out certain evidence which was sought to be introduced for impeachment purposes.

72. 512 F.2d at 93 (dissent).

73. 505 F.2d 649 (5th Cir. 1974).

required to plead guilty than to stand trial.[74] This contention, however, was rejected, and the court followed the Tenth Circuit[75] in holding that the requisite mental competency necessary for entering a guilty plea is the same as that required to stand trial.

The case of *McMillon v. Estelle*[76] involved a factual situation which is not likely to occur again. In that decision the court affirmed a denial of habeas corpus relief to a prisoner who was convicted by a jury whose foreman was an attorney who had visited the defendant in jail to discuss the defendant's case. The attorney was not retained and never actually represented the defendant. In affirming a finding of lack of prejudice, it was pointed out that the foreman-lawyer testified that she did not remember ever meeting the defendant. The court also emphasized that the attorney was originally the only juror to vote for acquittal and the first juror to recommend probation.

VI. CONCLUSION

As the cases discussed herein indicate, the year 1975 was not a year marked by tremendous changes in the general area of constitutional criminal law in the Fifth Circuit. It was, however, a year in which several very interesting and noteworthy cases were decided in this area of law by that court. These cases, some of which received national attention, may well prove to be landmark decisions which will be discussed, cited, and relied upon for many years to come.

---

74. *See* White v. United States, 470 F.2d 727 (5th Cir. 1972); Johnson v. United States, 344 F.2d 401 (5th Cir. 1965).

75. *See* Wolf v. United States, 430 F.2d 443 (10th Cir. 1970); Crail v. United States, 430 F.2d 459 (10th Cir. 1970); Wolcott v. United States, 407 F.2d 1149 (10th Cir. 1969). *See also* Dusky v. United States, 362 U.S. 402 80 S.Ct. 788, 41 L. Ed. 2d 824 (1960).

76. 523 F.2d 1249 (5th Cir. 1975).