

20-1319  
No. 21 \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

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VICTOR MANUEL SOLORZANO

PETITIONER

v.

ORIGINAL  
PETITION

UNITED STATES OF AMERICA

Respondent

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On Petition for Writ of Certiorari  
To the United States Court of Appeals  
For the Fifth Circuit

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FILED  
JAN 16 2021  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

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March 15, 2021

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## QUESTIONS PRESENTED

For the first time on appeal, Mr. Solorzano raised a Fourth Amendment claim objecting to a state order to place a tracking device on his vehicle. He contended that the search was a constitutional violation and that it failed to meet the requirements of Fed. R. Crim. P. 41, in that the state order was not based on probable cause and was installed during the night, although, the judge did not expressly authorize installation at night. During this unconstitutional and unreasonable -- night search, Solorzano assaulted law enforcement officers with a firearm -- because he thought they were common trespassers stealing. Mr. Solorzano sought to have the evidence of the assault excluded because: (1) the illegal search provoked the violent confrontation and was a but-for-cause of the discovery of the evidence; (2) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Constitution and Rule 41 had been followed; and (3) there was evidence of intentional and deliberate disregard for the Constitution and Rule 41. In its analysis, the Fifth Circuit Court of Appeals apparently accepted arguendo, "that the state order was not a valid warrant" but denied the claim under the second prong of the "plain error" analysis stating, "(Solorzano) cites no case law for the dubious proposition that a defendant's life-threatening assault on law enforcement officers should be excluded because they installed a warrantless tracking device. See United States v. Trejo, 610 F. 3d 308, 319 (5th Cir. 2010) (a claim that is "novel" and "not entirely clear under the existing case authority "is doom(end)... for plain error"). His claim fails." Notwithstanding, in, United States v. Young, this Court reaffirmed that reviewing courts are the assess plain error claims "imaginatively" and to refrain from "exact(ing) from episodes in isolation abstract questions of evidence and procedure." 470 U.S. 1, 16 (1985) (citing Johnson v. United States, 318 U.S. 189, 202 (1943) (Franfurter, J., concurring)). In addition, this Court stated, Fourth Amendment errors should have been analyzed individually in the context of unreasonable searches and seizures."

(ii)

County of Los Angeles v. Mendez, 518 U.S. \_\_, \_\_ (2017), raising the question: whether the Fifth Circuit Court of Appeals, contrary to established Supreme Court precedent, erred at prong two of its “plain error” analysis in requiring Solorzano to point to case law regarding the “type” of evidence sought to be excluded, rather than, case law regarding the obviousness of whether the search was unreasonable? Specifically, whether misapplying the “plain error” analysis in this case, violates Mr. Solorzano’s constitutional rights to Due Process and Equal Protection under the Fifth Amendment and fails to ensure that practices of this nature will be eradicated in the foreseeable future - -seriously affecting the fairness, integrity and public reputation of judicial proceedings.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Victor Manuel Solorzano respectfully petitions this Court for a writ of certiorari to review the opinion of the Fifth Circuit Court of Appeals denying his claim that the district court clearly erred in failing to exclude the Government's evidence of his assault.

### **OPINION'S BELOW**

The Fifth Circuit's opinion affirming conviction but vacating sentence and remanding for further proceedings in unpublished, but reported at United States v. Solorzano, No. 17-11342, 2020

(5th Cir. 2020) (Appendix A).

### **JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S. C. § 1254 (1). This petition is timely filed. On March 19, 2020, this Court ordered that the deadline to file any petition for a writ of certiorari is extended to 150 days from 90 days. This applies to any petition for certiorari due on or after March 19, 2020. The opinion in this case was issued on October 19, 2020, therefore, the deadline for filing this petition was extended to and including March 18, 2021.

## RELEVANT PROVISIONS

This case involves a federal criminal defendant's constitutional rights under the Fourth and Fifth Amendments, and is governed by Fed. R. Crim. P. 41.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in the pertinent part:

No person shall be \*\*\*deprived of life, liberty, or property, without due process of law; (nor deprived the equal protection of the laws).

## STATEMENT OF THE CASE

Petitioner Victor Manuel Solorzano assualted (w/a firearm) Michael Bali and Joseph Swanson, Joint Task Force Offficers with the Department of Homeland Security, Homeland Security Investigations(HSI), while they attempted to conduct a warrantless—night search. (See D. Ct. Doc. 34, at 1-2) (Detailing Confrontation); D. Ct. Doc. 39, at 4 11 par. 8 (Judicial Notice of Sunrise); D. Ct. Doc. 125-1, at 1-3 (State Order); Appendix A, at 5 (5<sup>th</sup>) (The Fifth Circuit Court of Appeals Apparently Accepting “arguendo that the state order was not a valid warrant”). As a consequence, Mr. Solorzano was sentenced to 567 months imprisonments. (See D. Ct. Doc. 116 (Judgement)).

For the first time on appeal, Mr. Solorzano raised a Fourth amendment claim seeking to have evidence of his assualt suppressed. (See Appendix A, at 4 (4<sup>th</sup>), and Appendix B, at 14-17 (34<sup>th</sup> – 37<sup>th</sup>)). Because Solorzano did not preserve this issue, plain error review applied.

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- The object of the search was not “completely accomplished” for this purpose until the tracking device was removed from Mr. Solorzano’s vehicle on November 19, 2015, at approximatelt 6:30pm. (See D. Ct. Doc. 125-1, at 4).

The Fifth Circuit Court of Appeals denied this claim at prong two of the plain error analysis stating, “(Mr. Solorzano) cites no case law for the dubious proposition that a defendant’s life threatening assault on law enforcement officers should be excluded because they installed a warrantless tracking device.” (See Appendix A, at 5<sup>3</sup>).

For this reason, the Fifth Circuit Court of Appeals’ plain error review standard, with respect to Fourth Amendment violations, contravenes this Court’s precedents and effectively denies Solorzano due process and equal protection under the laws. All in violation of the Fourth And Fifth Amendments to the United States Constitution.

## **STATEMENT OF THE FACTS AND PROCEDURAL HISTORY**

In November 2014, agents with the Department of Homeland Security, Homeland Security Investigations(HSI) were investigating a drug smuggling operation. The officers directed their attention towards Solorzano following his encounter with a known suspect. (See PSR par. 9).

In October 2015, officers witnessed Mr. Solorzano meeting with unknown individuals in a parking lots on two separate occasions, prompting them to initiate a traffic stop. They detained Solorzano claiming he had an outstanding warrant—after he provided a valid driver’s license. Upon searching his vehicle, officers discovered mobile devices, a handgun, and some United Staes currency. This traffic stop was prolonged for a K-9 made a positive hit-however- no narcotics were discovered and Solorzano was ultimately released. (See PSR par. 9).

Following the traffic stop, three HSI task force officers- - Shannon McFarland, Michael Bali, and Joseph C. Swanson - were assigned to the case to investigate Mr. Solorzano. Swanson “allegedly” obtained an order from a Texas Judge to place a tracking device on Solorzano’s vehicle base don reasonable suspicion” of criminal activity. \*(See D. Ct. Doc. 125-1, at 1-3). McFarland then dropped Bali off in front of Mr. Solorzano’s residence so that he could install the device on Mr. Solorzano’s vehicle. The attempted installation of this device was at night. (See D. Ct. Doc. 34, at 1-2 (Detailing Confrontation); D. Ct. Doc. 39, at par. 8 (Judicial Notice of Sunrise)).

While Bali was under Solorzano’s vehicle, Mr. Solorzano appeared, assault rifle in hand, along side his cousin, Edgar Solorzano (“Edgar”). After a brief verbal exchange, Solorzano shot at Bali, wounding him and shattering the rear window of Swanson’s vehicle. Solorzano continued to shoot at the two officers as they sped away. (See D. Ct. Doc. 34, at 1-2). The tracking device was removed from Solorzano’s vehicle later that day. (See D. Ct. Doc. 125-1, at 4).

- Mr. Solorzano uses the term “allegedly”, because the state order cannot be authenticated. For example: the state order is devoid (1) a criminal docket number, (2) the date it was filed, and (3) the Texas Judge did not testify to its authorization.

Throughout this encounter, Mc Farland, Bali, and Swanson drove unmarked vehicles, wore plain clothes, and never informed Solorzano that they were law enforcement. Edgar testified at the trial he and Solorzano did not know they were firing at law enforcement officers. Bali himself recognized on cross-examination that Solorzano had no reason to believe they were officers. (See Appendix C, at 8-9 (67<sup>a</sup> -69<sup>a</sup>)).

On August 4, 2016 Solorzano was arraigned on six charges: possession with intent to distribute a controlled substance, aiding and abetting (Count 1), possession of a firearm furtherance of a drug trafficking crime (Count 2), assault on a federal officer, aiding and abetting (Count 3), using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence, aiding and abetting (Count 4), assault on a federal officer, aiding and abetting (Count 5), and using, carrying, brandishing and discharging a firearm during and in relation to a crime of violence, aiding and abetting (Count 6). (See D. Ct. Doc. 3).

Solorzano pleaded not guilty, and trial proceeded before jury April 11, 13, and 14, 2017. The jury found Solorzano guilty on Counts 1, 3, 4, 5, and 6, and that he brandished and discharged the firearm during the offense for Count 4 and 6. (See D. Ct. Doc. 85).

On November 2, 2017, the district court sentenced Solorzano to 567 months' imprisonment, followed by three years' supervised release, and special assessment of \$500. (See D. Ct. Doc. 116 (Judgement)). Solorzano timely appealed. (D. Ct. Doc. 119).

## REASONS FOR GRANTING THE WRIT

- I. Certiorari Should Be Granted Because the  
United States Court of Appeals for the Fifth  
Circuit Imposed an Improper and Unduly  
Burdensome “Plain Error” Review Standard  
That Contravened This Court’s Precedents,  
Affects Substantial Rights, and Seriously  
Affects the Fairness, Integrity or Public  
Reputation of Judicial Proceedings

Mr. Solorzano’s case illustrates a deeply troubling example of the Fifth Circuit “Plain Error” review process with regards to Fourth Amendment claims. In this case, the Fifth Circuit Court of Appeals denied Solorzano’s Fourth Amendment claim under the second prong of “plain error” review, not because he failed to show a Fourth Amendment violation – that was “plain”. But- because he did not show any case law where a court had applied the exclusionary rule to the specific evidence sought to be suppressed. The Fifth Circuit Court of Appeals has consistently misapplied the “plain error” standard and its interpretation of the “plain error” standard continues to contravene this Court’s guidance and forecloses the possibility that the court will reach a different conclusion if presented with the “Plain Error” Standard in another case. This Court has previously corrected misapplications of the plain error standard within the Fifth Circuit on a case-by-case basis to maintain uniformity.

See Davis v. United States, No. 19-5421 (S. Ct.) (2020); see also Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018). This court should grant certiorari to address this misapplication of the “plain error” review process.

A. The Empirical Evidence Demonstrates that

the Fifth Circuit’s “Plain Error” Review Process

Contravenes This Court’s Precedents, Affects

Substantial Rights, and Seriously Affects the

Fairness, Integrity or Public Reputation of

Judicial Proceedings.

Mr. Solorzano’s case exemplifies the Fifth Circuit’s misapplication of the “plain error” review standard which contravenes this Court’s precedents, affects substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings.

#### 1. Plain Error Review Standard Contravenes This Court’s Precedents

Because “each case necessarily turns on its own facts,” this Court has made clear that, on plain error review, reviewing courts must consider the “entire record” when determining whether, on a case by case basis, a defendant is entitled to relief. United States v. Young, 470 U.S. 1, 16 & n. 4 (1985). Reviewing courts are to assess plain error claims “imaginatively” and to refrain from “exact(ing) from episodes in isolation abstract questions of evidence and procedure.” Young, 470 U.S. at 16 (citing Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J. concurring)); see also County of Los Angeles v. Mendez, 581 U.S. \_\_, \_\_ (2017) (Fourth Amendment errors should be analyzed individually in the context of unreasonable searches and seizures)

(quoting *Birchfield v. North Dakota*, 579 U.S. \_\_\_, \_\_\_ (2016) (slip op., at 37) (“(R)easonableness is always the touchstone of the Fourth Amendment analysis.”)

In this case, the Fifth Circuit Court of Appeals apparently accepted “arguendo that the state order was not a valid warrant.” (See Appendix A, at 5 (5<sup>a</sup>). By doing so, it conceded at prong one of the plain error analysis, that there was an error. However, the Fifth Circuit Court of Appeals failed at prong two of the plain error analysis in analyzing the Fourth Amendment error in the context of whether the search was reasonable. Instead of asking, whether its obvious that the search was reasonable. The Fifth Circuit Court of Appeals asked, whether its obvious “that a defendant’s life –threatening assault on law enforcement officers should be excluded because they installed a warrantless tracking device”. (Appendix A, at 5 (5<sup>a</sup>). Here, the Fifth Circuit Court of Appeals failed to assess the plain error claim imaginatively and exacted from this episode in isolation an abstract question of evidence and procedure. Moreover, it did so, without considering the entire record on a case-by-case basis, contravening this Court’s precedents.

## 2. Error Affects Substantial Rights

Had the Fifth Circuit properly analyzed the Fourth Amendment claim at prong two- there is a reasonable probability of a different outcome.

The Fourth Amendment protects against “unreasonable searches and seizures.” U.S. CONST. Amend. IV. “(T)he Government’s installation of a GPS device to monitor a vehicle’s movements, constitutes a search. See United States v. Jones, 132 S. Ct. 945, 949 (2012). Under the Fourth Amendment, “(a) warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement.” Flippo v. West Virginia, 528 U.S. 11, 13 (1999). The essence of constitutional provision prohibiting unreasonable searches and seizures is not merely that evidence so acquired shall not be used at all;

while facts thus obtained may be proved like any others if knowledge of them is gained from independent source knowledge gained by government's own wrongs cannot be used by it in criminal prosecution. Wong Sun v. United States, 371 U.S. 471 (1963). In order to effectuate the Fourth Amendment's guaranty of freedom searches and seizures, defendant's in federal prosecutions have the right, upon motion and proof, to have excluded from trial evidence secured by unlawful search and seizure. Simmons v. United States, 390 U.S. 377 (1968).

In this case, HSI task force members, executed a search –at night—without a warrant in violation of the Fourth Amendment and Fed. R. Crim. P. 41. Rule 41 was applicable because HSI task force officers obtained and executed the tracking device order. (See Appendix C, at 3-4 (62<sup>a</sup>- 63<sup>a</sup>), and its requirements were not met.

“Every requirement of Rule 41 is not a sine quanon to federal court use of the fruits of a search predicated on the warrant, even though federal officials participated in its procurement or execution. The products of a search conducted under the authority of a validly issued state warrant are lawfully obtained for federal prosecutorial purposes if the warrant satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of federal courts to govern the conduct of federal officers.

“The proper test to applied is whether a particular Rule 41 standard is one designed to assure reasonableness on the part of federal officers, or whether the provision merely blueprints the procedure for issuance of federal warrants.”

United Staes v. Sellers, 483 F. 2d 37, 43-44 (5th Cir. 1973).

Rule 41(d) was not complied with in that the court order was not base on probable cause. Rule 41

- The government made a judicial admission that HSI task force officers obtained and executed a court order authorizing officers to place a tracking device on Solorzano’s vehicle. A judicial admission is binding upon the party making it and may not be controverted at trial or on appeal. United States v. Chavez-Hernandez, 671 F. 3d 494, 501 (5th Cir. 2012); see Fed. R. Evid. 801(d) (2) (2016). Judicial estoppel prevents a party from asserting a position in a legal proceeding that is inconsistent with a position previously taken. Ergo Science, Inc., v. Martin, 73 F. 3d 595, 598 (5th Cir. 1996).

(e) (C) was not complied with in that the court order did not designate the magistrate to whom it must be returned, did not specify the length of time that the device may be used, not to exceed 45 days from the date the court order was issued, did not require search within 10 days, and did not expressly authorize installation of the tracking device at night. In United States v. Burke, the court held that these provisions violated were “Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers.” 517 F. 2d 377, 385 (2d Cir. 1975) (quoting Sellers). What was done here was an unconstitutional warrantless search.

In general terms, the exclusionary rule prohibits the introduction of evidence at trial that is derivative of an unconstitutional search and seizure. See United States v. Cotton, 722 F. 3d 271, 278 (5th Cir. 2013); Weeks v. United States, 232 U.S. 383 (1914). Under the fruit-of-the poisonous tree doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the Government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the Fourth Amendment violation. United States v. Jones, 234 F. 3d 234, 243-44 (5th Cir. 2000); Abel v. United States, 362 U.S. 217 (1968) (recognizing that in a federal prosecution for crime, articles obtained by an illegal search must be suppressed as the fruits of activity in violation of the Fourth Amendment, whatever the nature of the seized articles, and however proper it would have been to seize them during a valid search).

In this case, the Fourth Amendment and Rule 41 violations were a but-for-cause of the Discovery of the evidence of Solorzano's assault on law enforcement. In this case, the derivative evidence of assault may not be sufficiently attenuated from the Fourth Amendment and Rule 41 violations because the Fourth Amendment and Rule 41 were knowingly and intentionally violated, in that officers acted in reckless disregard or conscious indifference to whether the Fourth Amendment and Rule 41 applied and were complied with.

Had the Fifth Circuit of Appeals properly applied the plain error review standard to the facts of this case, there is a reasonable probability that the outcome would have been different because: (1) there was "prejudice" in the sense that the search might not have been so abusive if the Fourth Amendment and Rule 41 had been followed; and (2) there is evidence of intentional and deliberate disregard of the Fourth Amendment and the provisions of Rule 41.

### 3. Error Seriously Affects the Fairness, Integrity or Public Reputation of Judicial Proceedings

In United States v. Caceres, 440 U.S. 741 (1979), this Court observed that the exclusionary rule "has primarily rested on the judgment that the importance of deterring police conduct that may invade the constitutional rights of individuals throughout the community outweighs the importance of securing the conviction of the specific defendant at trial. The constitutional nexus is likewise reflected in the statement in United States v. Janis 428 U.S. 433,448 n. 35 (1976), that "the primary meaning of judicial integrity in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution."

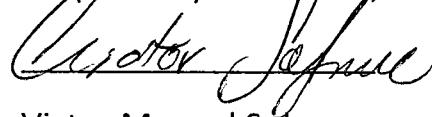
Failure to ensure that practices of this nature will be eradicated seriously affects judicial integrity.

### CONCLUSION

For the foregoing reasons, Mr. Victor Solorzano prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated March 15, 2021

Respectfully submitted,



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