

No. _____

**In the
SUPREME COURT OF THE UNITED STATES**

Enrique Fernando Salazar-Valencia,
Petitioner,

v.

Unite States of America,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Hoffman v. United States*, 341 U.S. 479 (1951) this court set the standard for measuring when a witness may properly claim his Fifth Amendment Privilege and refuse to testify. The Court held that a simple blanket declaration by a witness that he cannot testify for fear of self-incrimination will not suffice. *Id.* 486-487. Rather, a court must inquire as to the witnesses' claim before releasing him.

This case poses the following question:

1. Whether the Sixth Amendment Right to Compulsory Process is Exhausted When a Subpoenaed Witness Makes a Blanket Declaration of His Fifth Amendment Right Against Self-Incrimination without Inquiry from the Trial Court?

LIST OF PARTIES

Petitioner in this case is Enrique Salazar Valencia (Defendant-Appellant below). Respondent is the Unites States of America (Plaintiff-Appellee below).

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Enrique Fernando Salazar-Valencia respectfully petitions the Court for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on January 2, 2018.¹

OPINIONS BELOW

The opinion of the United States Court of Appeals affirming Salazar-Valencia's conviction can be found at *United States v. Salazar-Valencia*, 716 Fed. Appx. 288 (5th Cir. 2018) (unpublished). A copy of the Fifth Circuit's opinion issued is attached to this Petition as Appendix A.

A copy of the Fifth Circuit's order denying Petitioner's request for rehearing issued in this case on February 9, 2018, is attached as Appendix B.

JURISDICTION

The judgment of the Fifth Circuit was entered on January 2, 2018. Salazar-Valencia timely petitioned for rehearing, which was denied on February 9, 2018. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

¹ Petitioner's Petition for Rehearing En Banc was denied on February 9, 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Salazar-Valencia was convicted by a jury in Laredo, Texas, of conspiracy to import five or more kilograms of cocaine, in violation of 21 U.S.C. §§ 963, 952(a), 960(a)(1), and 960(b)(1)(B). (App. A).

Salazar-Valencia appealed his conviction and argued, among other claims, that his right to compulsory process under the Sixth Amendment was denied when the trial court allowed a witness to assert a blanket Fifth Amendment privilege. (App.A). The Fifth Circuit considered the issue and affirmed the trial court's decision allowing the blanket assertion. The Fifth Circuit held there was no plain error because "[T]he record reflects Roberto was available as a witness but the court did not permit him to take the witness stand because he planned to invoke the Fifth Amendment privilege.

Because our precedent indicates it is irrelevant whether Robert's invocation of the privilege was valid, the court did not commit a clear or obvious error by refusing to question Roberto as to the basis for his invocation of the privilege. Therefore, Salazar's compulsory process rights were exhausted." (App. A) (*citing United States v. Griffin*, 666 F.3d 68, 70 (5th Cir. 1995)). The Fifth Circuit further stated "[T]o the extent *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975), and *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951), might suggest some ambiguity in our precedent, it is insufficient to establish the requisite clear or obvious error on plain-error review.

In 1951, this Court released *Hoffman v. United States*, 341 U.S. 479 (1951). In *Hoffman*, this court set the standard for measuring when a witness may properly claim his right against self-incrimination and refuse to testify. The Court held that a simple blanket declaration by the witness that he cannot testify for fear of self-incrimination will not suffice. *Id.* 486-487. Rather, a court must inquire as to the witnesses' claim before releasing him from testifying.

The Fifth Circuit recognized the *Hoffman* standard in *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975) wherein the court held "[T]he *Hoffman* Court also indicated, however, that a simple blanket declaration by the witness that he cannot testify for fear of self-incrimination will not suffice to invoke the privilege; the mechanism of the Fifth Amendment is not automatic or self-winding. Accordingly, the custom is for the trial judge to examine the protesting witness out of the presence of the jury in order to determine the validity of his claim. Once the court satisfies

itself that the claim is well-grounded as to the testimony desired, it may, in its discretion, decline to permit either party to place the witness on the stand for the purpose of eliciting a claim of privilege or to comment on this circumstance.” *Gomez-Rojas*, at 1220. But despite this Court’s decision in *Hoffman* and the Fifth Circuit’s decision in *Gomez-Rojas*, the Court found no plain or clear error.

The question presented in this case is whether the Sixth Amendment right to compulsory process is exhausted when a subpoenaed witness simply invokes a blanket declaration of his Fifth Amendment privilege without inquiry from the trial court.

Salazar-Valencia believes that a witness may not simply invoke the Fifth Amendment without inquiry from the trial Court and his reasoning is supported by the Courts decision in *Hoffman v. United States*, 341 U.S. 479 (1951).

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD GRANT THE WRIT TO CLARIFY WHETHER THE SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS IS EXHAUSTED WHEN A SUBPOENAED WITNESS MAKES A BLANKET DECLARATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WITHOUT INQUIRY FROM THE TRIAL COURT.

Despite clear authority from this Court in *Hoffman v. United States*, 341 U.S. 479 (1951), the Fifth Circuit Court of Appeals held Salazar-Valencia’s Sixth Amendment rights to compulsory process were exhausted when a trial witness made a blanket declaration of his Fifth Amendment privilege without further inquiry from the trial court. The Fifth Circuits decision was erroneous. The Court should grant

certiorari because this constitutional issue of a defendant's Sixth Amendment right to compulsory process is of upmost importance to the right to a fair trial.

A. The *Hoffman* Standard is the Correct Standard to Balance a Defendant's Sixth Amendment Right to Compulsory Process and a Witness' Fifth Amendment Right Against Self-Incrimination.

The Constitution establishes the right of a criminal defendant "to have compulsory process for obtaining witness in his favor." U.S. Const. amend. VI. As this Court has elaborated, "[t]he right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). The accused's right to compulsory process, however, does not include the right to compel a witness to waive his Fifth Amendment privilege. *See United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982).

The general standard for a valid assertion of the Fifth Amendment privilege is well established. To assert the privilege, witnesses must show that their testimony would support a conviction under a federal statute or furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The standard for determining whether a claim of privilege is justified is whether the claimant is confronted by substantial and real, and not merely trifling or imaginary, hazard of incrimination. *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980).

When balancing the Sixth Amendment right of the accused and the Fifth Amendment right of the witness, the trial judge must make an appropriate inquiry into the basis of the privilege claimed by the witness and may not permit the witness

to refuse to testify where the witness has no good-faith basis for invoking the privilege or a narrower privilege would adequately protect the witness. *Hoffman*, 341 U.S. at 486 (“The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself - his say-so does not itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.”); see also *United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1982). The Court’s duty to scrutinize a witness’ invocation of the Fifth Amendment is particularly weighty where a witness makes a blanket assertion of the privilege. See *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980). If the District Court’s refusal to allow the defendants to call a material witness to the stand lacked some affirmative justification, it is a violation of the defendant’s constitutional rights. *United States v. Melchor-Moreno*, 536 F.2d 1042, 1045-1046 (5th Cir. 1976), citing *Washington v. Texas*, 388 U.S. 14, 19 (1967).

B. Salazar-Valencia’s Sixth Amendment Right to Compulsory Process was denied when the Trial Court Allowed a Witness to Make a Blanket Assertion of his Fifth Amendment Privilege.

On September 7, 2015, Jose Nelson Romero, an unindicted party, was detained at the port of entry in Laredo, Texas, while driving a commercial passenger bus which contained thirty-five (35) bundles of cocaine in a hidden compartment.

On September 29, 2015, Salazar-Valencia was charged by indictment with one count of conspiracy to import 5 kilograms and more of a mixture and substance containing cocaine. Salazar-Valencia denied involvement and proceeded to trial on February 8, 2016.

During trial, Salazar-Valencia was accused of being a member of a Drug Trafficking Organization (DTO). The Government introduced testimony from Raul Solorio, a co-operating witness who was in custody on a separate indictment and the head of a Texas drug trafficking organization (DTO). Raul Solorio claimed Salazar-Valencia was part of the DTO. Salazar-Valencia denied involvement with the conspiracy but admitted he knew Raul Solorio.

Salazar-Valencia testified that in 2014, Raul Solorio approached him about starting a bus line in Texas and provided him with approximately \$100,000 to purchase three (3) commercial buses in his name. Salazar-Valencia registered the buses, purchased insurance, made bus vouchers, and created advertising material for the bus line. However, after some time, Raul Solorio proposed that the buses be used to transport drugs. Salazar-Valencia refused and relinquished possession of the buses, the titles and all associated material to Raul Solorio in August of 2014. Salazar-Valencia also executed and transferred the original titles to Solorio, but Solorio never registered the titles in his name. Instead, Solorio retained the original titles at his home. Raul Solorio picked up two of the buses and stored them in Brookshire, Texas. The third bus, which was the bus that was detained on September 7, 2015, had been previously transported to Guadalajara, Mexico in 2014 and left there.

On July 16, 2015, while in custody, Raul Solorio provided agents with information about the bus that was in Mexico. Sometime after his interview with the agents, Roberto Solorio (the son of Raul Solorio) called Valencia and asked him to

bring the bus from Mexico. Roberto Solorio then called agents to advise them that the bus was going to return to the United States and provided them with copies of the 3 bus titles that were in his father's possession.

On August 20, 2015, Agents placed a "TECS" (Treasury Enforcement Communications System) alert in their database for the bus that was to return to the United States. On September 7, 2015, the bus was detained at the port of entry in Laredo, Texas where agents discovered a hidden compartment loaded with cocaine.

At trial, Salazar-Valencia subpoenaed Roberto Solorio to testify. Roberto Solorio's attorney advised the Court that his client would invoke the Fifth Amendment and that it was up to Salazar-Valencia's counsel to determine if he still wanted to put him on the stand. The Court stated: "I don't think he can. I don't think you can call a witness when you know that they're going to say they invoke their right against self-incrimination." Salazar-Valencia's counsel immediately advised the court that he wanted to call the witness, but that he would not ask him questions that would incriminate him. The Court responded and stated that was not his choice to make.

During their discussions, the Court cited *United States v. Griffin*, 66 F.3d 68 (5th Cir. 1995) in support of its decision to prohibit Salazar-Valencia from calling Roberto Solorio to testify. The Court stated "[C]onstitutional guarantee for compulsory process does not give defendant right to require a witness to take the stand once the witness has appeared in court and refused to testify, even if that refusal is grounded in an invalid assertion of constitutional privilege against self-

incrimination. And compulsory process guarantee also does not entitle defendant to call to jury's attention to such witness's refusal to testify. Salazar-Valencia's counsel responded "[Y]es I know that, Judge."

Salazar-Valencia's counsel then told the court "I found one in 1982 that was a valid case also and basically it wasn't one that was a blanket --that one distinguishes this one, this one didn't come out that it was distinguished. But it does appear in analysis that your Honor would make on the questions that were posed, not in front of everybody, but to you and you (indiscernible). Salazar-Valencia's counsel was asking the Court to make an inquiry outside the presence of the jury to determine the validity of Roberto Solorio's Fifth Amendment privilege. But the court disagreed with Salazar-Valencia's counsel and stated "[T]his case makes it very clear the Fifth Amendment requires that a witness be brought to court, which we're going to do right now, it does not require that he take the stand after refusing to testify. Once a witness appears in court and refuses to testify, a defendant's compulsory process rights are exhausted. It is irrelevant whether the witness's refusal is grounded in a valid Fifth Amendment privilege, an invalid privilege, or something else entirely." *Citing Griffin*, 66 F.3d 70.

As noted previously, Salazar-Valencia insisted on calling Roberto Solorio not for the purposes of asking questions regarding his invocation of the Fifth Amendment, but for putting on a defense. He wanted to refute the allegations made by Raul Solorio about the bus company, he wanted to show that Raul Solorio was still in charge of the 3 buses, and that the storage charges were still being paid by Roberto

Solorio, Raul Solorio's son. Salazar-Valencia also wanted to show that Raul Solorio still had connections with the DTO and that his Son, Raul Solorio was the contact person with the DTO now that Raul Solorio was in custody. "All I'm wanting to do is raise a plausible reasonable doubt. Is there reasonable doubt in what – that's his defense. And he's got a right for a defense." "My theory of defense is that Mr. Solorio, in contact with people and in being a place of trust and the people still protecting Solorio for what he was done for them, would set up and frame Mr. Salazar-Valencia." The Court responded to Salazar-Valencia by stating "[R]ight, you're not going to call the son because case law does not allow you to do that."

Ultimately, Salazar-Valencia was convicted.

C. The Decision of the Fifth Circuit Court of Appeals Stands in Direct Conflict with This Court's Precedent Which Mandates that the Trial Court's Make Inquiry from Witnesses who Assert a Blanket Fifth Amendment Privilege.

Salazar-Valencia appealed his conviction. On Appeal Salazar-Valencia argued, among other claims, that his rights to compulsory process under the Sixth Amendment was denied when the trial court allowed a witness to assert a blanket Fifth Amendment privilege. (App.A). The Fifth Circuit Court of Appeals disagreed and affirmed the conviction.

In addressing the issue, the Court found no error and stated:

"The record reflects Roberto was available as a witness but the court did not permit him to take the witness stand because he planned to invoke his Fifth Amendment privilege. Because our precedent indicates it is irrelevant whether Roberto's invocation of the privilege was valid, the court did not commit a clear or obvious error by refusing to question Roberto as to the basis for his invocation of the privilege. *United States v. Griffin*, 66 F.3d 68, 70 (5th Cir, 1995). Therefore, Salazar's compulsory

process rights were exhausted. *Id.*”

United States v. Salazar-Valencia, 716 Fed. App. 288, (5th Cir. 2018) (unpublished).

The Fifth Circuit made this ruling despite acknowledging this Court’s ruling in *Hoffman v. United States*, 341 U.S. 479 (1951) and Fifth Circuit precedent, and found it was insufficient to establish clear or obvious error on plain-error review. *See United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975) (requiring court to inquire as to Fifth Amendment privilege) and *United States v. Melchor-Moreno*, 536 F.2d 1042 (5th Cir. 1976) (a blanket refusal to testify is unacceptable. A court must make a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded). The Fifth Circuit was bound by its prior decisions and still found no error. *See United States v. Boche-Perez*, 755 F.3d 327, 334 (5th Cir. 2014) (this circuit abides by the rule of orderliness, under which a panel of the court cannot overturn a prior panel decision “absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court or by our en banc court.”).

Additionally, Salazar-Valencia specifically requested the trial court to make inquiry as to the witness’ blanket Fifth Amendment privilege and therefore, preserved error. Further, because the trial court said it would be “irrelevant whether the witness’ refusal is grounded in a valid Fifth amendment privilege, an invalid privilege, or something else entirely” (citing *United States v. Griffin*, 66 F.3d 68 (5th Cir. 1995)) any further objection would have been futile.

Alternatively, even if Salazar-Valencia failed to preserve error, the trial court's error was plain. To prevail on plain error, Salazar-Valencia was required to show: 1) an error; 2) that the error was plain; and 3) that his substantial rights were affected. *United States v. Martinez-Rodriguez*, 821 F.3d 659 (5th Cir. 2016). If the first three prongs are satisfied, the court has the discretion to remedy the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Martinez-Rodriguez*, 821 F.3d 664 (recognizing the court has been generous with remand under its discretion where sentencing errors lead to increased sentences); *See also Pucket v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

In relation to the first prong, a deviation from legal rule is error. *Olano*, 507 U.S. at 732-733. Under the second prong, an error is plain when it is clear or obvious. An error is clear or obvious when supported by current law. *Olano*, 507 U.S. at 734. In relation to the third prong, an error affects substantial rights when it is prejudicial such to have affected the outcome of the case. *Olano*, 507 U.S. at 735. However, some constitutional errors cannot be found harmless if the error deprives defendant of the "basis protections [without which] a criminal trial cannot be reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Olano*, 507 U.S. at 735 (quoting *Arizona v. Fulminante*, 499 U.S. 279 (1991)).

In this case, it was Salazar-Valencia's theory that he was framed by Raul Solorio (Roberto Solorio's father) to obtain possession of the bus seized on September

7, 2015. In fact, as stated previously, Raul Solorio provided information to the Government that the bus would be arriving in the United States while he was in custody and co-operating with the Government. Roberto Solorio, called Salazar-Valencia and requested his assistance with securing the bus from Mexico. Roberto Solorio then provided information to agents regarding the bus and agents were able to seize the bus, which contained cocaine.

Salazar-Valencia subpoenaed Roberto Solorio and wanted to ask him questions about the transaction, but the Court refused to allow questioning based on a blanket assertion of the Fifth Amendment privilege in violation of *Hoffman*. *Hoffman*, 341 U.S. at 487. The error was prejudicial and affected *Salazar-Valencia's* substantial rights because he was prohibited from presenting a complete defense that affected the outcome of the case. *See United States v. Olano*, 507 U.S. 725, 735; *see also Arizona v. Fulminante*, 499 U.S. 279 (1991) (some constitutional errors cannot be found harmless if the error deprives defendant of the “basis protections [without which] a criminal trial cannot be reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair”). It affected the outcome of the case because the cocaine was found in a hidden compartment in a bus that had been transferred to Roberto Solorio’s father prior to the seizure. The bus was not in Salazar-Valencia’s possession and had been in Mexico prior to the seizure. It was Raul Solorio and Roberto Solorio who put the events in question into play and Salazar-Valencia could not present this evidence to the jury. This evidence was also important because co-operating witness, Raul

Solorio testified against Salazar-Valencia and put blame on him. Had the jury been allowed to see the interplay between Raul Solorio and his son, Roberto Solorio, the jury may have acquitted Salazar-Valencia of the charge.

Because Salazar-Valencia required the testimony of Roberto Solorio to present his defense, the court erred in excusing him as a witness. *See United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (finding error and remanding when court failed to conduct proper inquiry from witness when testimony was critical to the defense); *Hoffman*, 341 U.S. at 487 (1951). Considering the error, the Court should grant this petition and remand for correction because the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Pucket v. United States*, 556 U.S. 129, 135 (2009); *United States v. Olano*, 507 U.S. 725, 736 (1993); and *United States v. Martinez-Rodriguez*, 821 F.3d 659 (5th Cir. 2016).

D. The Question of Whether the Sixth Amendment Right to Compulsory Process Permits Excusing a Witness on a Blanket Assertion of the Fifth Amendment Privilege is a Question of Exceptional Importance.

The issue presented in this case is of exceptional importance to Sixth Amendment jurisprudence as it relates to compulsory process and the right to a fair trial. The Fifth Circuit has carved out an exception to the Sixth Amendment that is not supported by this Court’s previous decisions and is in direct conflict with the Court’s ruling in *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

Without correcting the error of the Fifth Circuit, trial court’s in the Fifth Circuit will be permitted to release subpoenaed witnesses on a mere blanket assertion of the Fifth Amendment privilege. The Court should grant certiorari to clarify this

issue and set the proper standards applicable to the Sixth Amendment compulsory rights and the invocation of a Fifth Amendment privilege.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays the Court grant this petition for writ of certiorari.

Respectfully Submitted,

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Date: May 10, 2018

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Enrique Salazar-Valencia

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CERTIFICATE OF SERVICE

I, Oscar A. Vela, Jr., am a member of the Bar appointed under the Criminal Justice Act, do swear and declare that on this 10th day of May, 2018 and pursuant to Rule 29.5, served the preceding *Petition for Writ of Certiorari* and *Motion for Leave to Proceed in Forma Pauperis* on counsel for the Respondent by ECF and/or enclosing a copy of these documents in an envelope for delivery by a private third party commercial carrier for delivery within 3 calendar days and addressed to:

The Honorable Noel Francisco
Office of the Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct

/s/ Oscar A. Vela, Jr.
Oscar A. Vela, Jr.

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APPENDIX

<u>EXHIBIT</u>	<u>DESCRIPTION OF DOCUMENT</u>	<u>PAGE</u>
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