

No. _____

In the
Supreme Court of the United States

Phillip Shawn Horton,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether this Court should grant certiorari, vacate the judgement and remand for reconsideration in light of *Davis v. United States*, 140 S. Ct. 1060 (2020)?

PARTIES TO THE PROCEEDING

Petitioner is Phillip Shawn Horton, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Phillip Shawn Horton. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Reporter at *United States v. Phillip Shawn Horton*, 950 F. 3d 237 (5th Cir. 2020). It is reprinted in Appendix A to this Petition.. The district court's judgment is attached as Appendix B.

JURISDICTION

The published panel opinion and judgment of the Fifth Circuit were entered on February 13, 2020. On March 19, 2020, this Court extended the 90-day deadline to file a petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

Federal Rule of Criminal Procedure 52(b) provides:

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

LIST OF RELATED PROCEEDINGS

1. *United States v. Phillip Shawn Horton*, 6:18-CR-00022-C-BL-2. United States District Court, Northern District of Texas. Judgment entered November 28, 2018.

2. *United States v. Phillip Shawn Horton*, CA No. 18-11577, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered February 13, 2020. Published at *United States v. Horton*, 950 F.3d 237 (5th Cir. 2020)

STATEMENT OF THE CASE

Factual and procedural background

In mid-2016, Mr. Horton became a participant in a conspiracy to obtain and distribute drugs. (ROA.13-15, 52-53,106-13).¹ He acted as a courier and was paid with methamphetamine. (ROA.13-15, 52-53,106-13). That conspiracy continued through the date of the indictment. (ROA.13-15, 52-53,106-13). Prior to this time, Mr. Horton had never been arrested or convicted for any offense. (ROA.115-19. He was 38 years old in 2017 during this conspiracy when he was arrested for his first offense. (ROA.113).

On June 3, 2018, Mr. Horton was charged by indictment with two counts. (ROA.13-15). Count one charged him with being in a conspiracy to distribute and possess with intent to distribute more than 500 grams of methamphetamine. (ROA.13). That conspiracy was alleged to have begun on an unknown date and continued up to the date of the indictment. (ROA.13). Count two alleged that on February 8, 2017, Mr. Horton possessed with intent to distribute more than 500 grams of methamphetamine. (ROA.15). Horton pled guilty to count 2 of the indictment. (ROA.50-56).

Both parties adopted the Presentence Report (PSR), and the district court adopted it as its findings of fact and conclusions of law. (ROA.86,126-27). These findings included the following that, consistent with count one of the indictment, from

¹ For the convenience of the Court and the parties, the Petitioner is citing to the page number of the record on appeal below.

about mid 2016 through at least March 2017, but with no end date other than Mr. Horton's arrest, Mr. Horton acted as a courier for a co-defendant (Martinez) in the case, as was paid for this service in methamphetamine. (ROA.106-13). Martinez was arrested on this case in June of 2018. (Sealed doc. #11). During this period of time, Mr. Horton was arrested and found with methamphetamine three times, twice with firearms: on January 19, 2017, Mr. Horton was in Big Spring, Texas acting as a courier for Mr. Martinez, when he was arrested and found with methamphetamine and firearms, (ROA.108-09,115-16); on February 8, 2017, Mr. Horton was arrested in Colorado City, Texas, with methamphetamine and a firearm, (ROA.108); on April 25, 2017, Mr. Horton was arrested in San Angelo with a gun and methamphetamine (ROA.118); on October 30, 2017, Mr. Horton was arrested in San Angelo with a firearm and a pipe containing methamphetamine residue (ROA.117); and on December 5, 2017, Mr. Horton was arrested in San Angelo with methamphetamine. (ROA.119).

As a result of the arrests Mr. Horton was convicted in state court on May 31, 2017 for possessing the methamphetamine. (ROA.115-16). He received a sentence of probation which was later revoked resulting in a six year sentence. (ROA.115.) On October 30, 2017, Mr. Horton received a fee only for possessing the drug paraphernalia. (ROA.104,117). He was convicted in federal court for possessing with intent to distribute methamphetamine on February 8, 2018. (ROA.104,115). He received 3 criminal history points for the state conviction for possessing methamphetamine, and 1 criminal history point for the state conviction for

paraphernalia. (ROA.104,117). The other charges are pending in Tom Green County (San Angelo, Texas). (ROA.118-19).

At sentencing, Defense counsel argued for a sentence at the bottom of the guidelines, and that the sentence be run concurrent with the state court sentence for drug possession. (ROA.87). Counsel pointed out:

- Mr. Horton's role in the offense was that of a courier or "mule," and thus should be considered for the low end of the guidelines,
- the Court should consider running the time in this case concurrent to the offense that's referenced in paragraph 72 of the presentence investigation report because that this offense occurred essentially the same time as the violations that led to the revocation of that supervision and the imposition of that sentence.

(ROA.87).

The court immediately, with no input from the government, sentenced Mr. Horton to 262 months, the very top of the guideline maximum, and ordered the parties to step aside. (ROA.89).

On appeal

On direct appeal, Horton raised six issues. The first four issues involved errors that significantly affected Horton's sentence because the PSR writer, the government, defense counsel and the sentencing court all failed to recognize that most, if not all, of Horton's criminal history points came from methamphetamine related, state court convictions that were clearly relevant conduct of the offense of conviction. As a result, 1) the district court plainly erred by assessing criminal history points that should not have counted because they were for state convictions that were relevant conduct; 2)

the district court plainly erred by failing to run the federal sentence concurrent with the state court convictions that were relevant conduct to the offense of conviction; 3) the district court plainly erred by failing to adjust the federal sentence for time served on the state sentence; and 4) the district court plainly erred when it ordered the federal sentence to run consecutively to the state sentences that were based on relevant conduct to the offense of conviction.

Absent these four plain errors, Horton would have received four fewer criminal history points and his imprisonment range would 168 – 210 months, his sentence would have run concurrently with the 6-year state sentence, and he would have received credit for the time he had already served on his state sentence. On appeal, the Court of appeals disposed of the issues regarding relevant conduct, other than his request to run his federal sentence concurrent to his state sentence, as plain error and disposed of the issues by relying on premise that “[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.” *United States v. Horton*, 950 F.3d at 241-242, relying on *United States v. Lopez*, 923 F.2d 47, 50 (1991).

After deciding Horton’s case, this Court decided *Davis v. United States*, 140 S. Ct. 1060 (2020) which abrogated *United States v. Lopez*, 923 F.2d 47, 50 (1991).

REASONS FOR GRANTING THIS PETITION

- I. This Court should grant certiorari, vacate the sentence and remand to the Fifth Circuit for reconsideration in light of, *Davis v. United States*, 140 S. Ct. 1060 (2020).**

On March 23, 2020, this Court abrogated *United States v. Lopez*, 923 F.2d 47, 50 (1991) in *Davis v. United States*, 140 S. Ct. 1060 (2020).

As this Court noted in *Davis*:

Rule 52(b) states in full: “A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.” The text of Rule 52(b) does not immunize factual errors from plain-error review. Our cases likewise do not purport to shield any category of errors from plain-error review. See generally *Rosales–Mireles v. United States*, 585 U.S. —, 138 S.Ct. 1897, 201 L.Ed.2d 376 (2018); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Put simply, there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error.

Davis v. United States, 140 S. Ct. at 1061-1062

An order granting certiorari, vacating the judgment and remanding for consideration in light of this Court’s decision in *Davis*, “both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.” *Stutson v. United States*, 516 U.S. 193, 197 (1996), relying on *Lawrence v. Charter*, 516 U.S. 163 (1996). This is particularly true in light of the fact that the court of appeals did not have the benefit of *Davis* when Mr. Horton’s case was decided.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari*, vacate the judgment and remand to the United States Court of Appeals for the Fifth Circuit in light of *Davis v. United States*, 140 S. Ct. 1060 (2020).

Respectfully submitted this 13th day of July, 2020.

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