

No. 20-5091

IN THE SUPREME COURT OF THE UNITED STATES

PHILLIP SHAWN HORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 5-7) that the court of appeals erred in refusing to review certain unpreserved sentencing claims. The court of appeals based its rejection of those claims on its view that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Pet. App. A5-A6 (quoting United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (per curiam), cert. denied, 500 U.S. 924 (1991)).

In Davis v. United States, 140 S. Ct. 1060 (2020) (per curiam), this Court determined that "the Fifth Circuit's outlier

practice of refusing to review certain unpreserved factual arguments for plain error" was inconsistent with Federal Rule of Criminal Procedure 52(b). 140 S. Ct. at 1061; see ibid. (citing Lopez, supra). The Court vacated the court of appeals' judgment and remanded for further consideration of Davis's unpreserved claims, which involved a sentencing issue similar to the one presented in this case. Id. at 1062.

As petitioner observes (Pet. 7), the court of appeals issued its decision in this case before this Court decided Davis, which expressly rejected the rationale on which the court of appeals here relied in rejecting the claims at issue. See 140 S. Ct. at 1061-1062. Accordingly, the petition for a writ of certiorari should be granted, the court of appeals' judgment should be vacated, and the case should be remanded for further consideration in light of Davis. See id. at 1062.*

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

AUGUST 2020

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.