

No. _____

In the
Supreme Court of the United States

Brent Anderson,

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. Are questions of fact cognizable on plain error review under Federal Rule of Criminal Procedure 52(b)? **[Petitioner requests GVR in light of *Davis v. United States*, 140 S. Ct. 1060 (2020)]**

PARTIES TO THE PROCEEDING

Petitioner is Brent Anderson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Anderson*, No. 19-10180 (5th Cir. Feb. 24, 2020)
- *United States v. Anderson*, No. 4:18-CR-247-1 (N.D. Tex. Oct. 3, 2018)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brent Anderson 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 reported at *United States v. Anderson*, 795 F. App'x 267 (5th Cir. 2020). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on February 24, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES PROVISIONS

Federal Rule of Criminal Procedure 52(b) provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) (2018) provides: “If the defendant ... used or possessed any firearm or ammunition in connection with another felony offense ... increase [the base offense level] by 4 levels.”

STATEMENT OF THE CASE

Federal Rule of Criminal Procedure 52(b) allows appellate courts to consider “[a] plain error” even if the defendant did not object below. Rule 52(b) makes no distinction between legal and factual errors. Nor do most federal courts of appeals. Only the Fifth Circuit categorically excluded factual errors from plain-error review.

The Fifth Circuit’s idiosyncratic rule was overturned by this Court in *Davis v. United States*, 140 S. Ct. 1060 (2020) after the appeal in this case was decided based on that now-defunct rule. This Court should grant this petition, vacate, and remand for reconsideration in light of *Davis*.

A. Factual Background

On June 4, 2018, a police officer saw Mr. Anderson leaving a motel and recognized him as having an outstanding warrant. When the officer sought to initiate a traffic stop to execute the warrant, Mr. Anderson fled in his vehicle. Shortly into his vehicular flight, Mr. Anderson threw a firearm out of the window of his moving vehicle. Eventually, Mr. Anderson pulled over and surrendered to police.

B. Sentencing Proceedings

The Presentence Investigation Report included a 4-level enhancement to Mr. Anderson’s base offense level because, in the view of U.S. Probation, Mr. Anderson possessed the firearm “in connection with” another felony offense: evading arrest with a motor vehicle. The enhancement increased Mr. Anderson’s advisory sentencing range from 46-57 months to 70-87 months. Ultimately, the district court imposed a within-guidelines sentence of 74 months.

C. Appeal

On appeal, the Fifth Circuit held that Mr. Anderson's challenge to the 4-level "in connection with" enhancement was not cognizable under its idiosyncratic rule in *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Later, this Court abrogated the *Lopez* rule in *Davis v. United States*. Mr. Anderson now asks that this Court grant his Petition, vacate, and remand for further consideration.

REASON FOR GRANTING THIS PETITION

This Court should grant, vacate, and remand because the Court of Appeals relied on the rule overturned in *Davis v. United States*, 140 S. Ct. 1060 (2020).

On appeal, Mr. Anderson challenged a 4-level “in connection with” enhancement on plain error. The Fifth Circuit, however, declined to consider this factual finding on plain error review on account of its idiosyncratic rule in *United States v. Lopez*, 923, F.2d 47, 50 (1991). Petitioner anticipated this result and briefed why the Fifth Circuit’s outlier rule was incorrect. Subsequently, this Court granted certiorari and summarily reversed the Fifth Circuit’s rule in *Davis v. United States*, 140 S. Ct. 1060 (2020).

Mr. Anderson, therefore, is entitled to plain error review of his argument that the “in connection with” enhancement was wrongly applied by the district court. He should receive this consideration, in the first instance, on remand to the Fifth Circuit in light of *Davis*.

CONCLUSION

This Court should grant, vacate, and remand in light of this Court intervening decision in *Davis v. United States*, 140 S. Ct. 1060 (2020).

Respectfully submitted,

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