

No. 20-5216

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IN THE SUPREME COURT OF THE UNITED STATES

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BRENT ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 4) that the court of appeals erred in rejecting his unpreserved claim that the district court incorrectly applied Section 2K2.1(b)(6)(B) of the advisory Sentencing Guidelines. The court of appeals based its rejection of that claim on its view that the claim raised "a question of fact that was capable of resolution by the district court and thus cannot constitute plain error." Pet. App. A1-A2 (quoting, inter alia, United States v. Lopez, 923 F.2d 47, 50 (5th Cir.) (per curiam), cert. denied, 500 U.S. 924 (1991)); cf. id. at A2 (separately rejecting under plain-error analysis petitioner's claim that the district court engaged in impermissible "double

counting" by applying both Section 2K2.1(b)(6)(B) and another provision of the Guidelines).

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. Id. at 1062.

As petitioner observes (Pet. 3-4), 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 claim 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

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