

No. 18A1055

In the
Supreme Court of the United States

JEFFREY W. DAY,

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**

**MOTION FOR EXTENSION OF TIME TO FILE
PETITION FOR A WRIT OF CERTIORARI**

JEFFREY W. DAY

Pro se

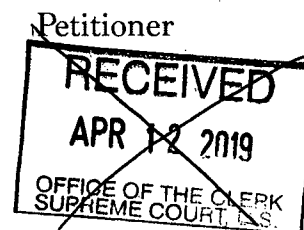
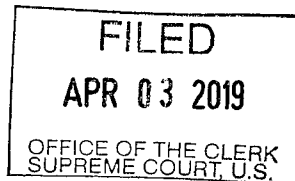
Reg. No. 43458-177

FCI Seagoville

P.O. Box 9000

Seagoville, Texas 75159

No Phone



To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Petitioner Jeffrey W. Day respectfully requests that the time for a petition for writ of certiorari in this matter be extended for 90 days to and including Wednesday, July 17, 2019.

The Court of Appeals issued an order denying Petitioner a certificate of appealability (COA) on November 29, 2018 (*see* App. A, *infra*). Petitioner timely filed a petition for rehearing, which was denied on January 18, 2019 (*see* App. B, *infra*).

Petitioner's petition for relief from this Court therefore would be due on April 18, 2019, absent an extension. Petitioner is filing this application at least ten days before that date.

The Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

Petitioner pled guilty to transporting and shipping child pornography in violation of 18 U.S.C. § 2252(A) in the United States District Court for the Northern District of Texas. On November 15, 2016, Petitioner filed a

motion pursuant to 28 U.S.C. § 2255, seeking a correction in his sentence pursuant to Amendment 801 of the *United States Sentencing Guidelines*, and arguing that U.S.S.G. § 2G2.2(b) is unconstitutionally vague. Petitioner was denied by the District Court, and his application for a COA was denied in a brief standard-form order bereft of any analysis of Petitioner's claim or attempt to apply the relaxed standard for grant described in this Court's correction of the 5th Circuit's COA procedure in *Buck v. Davis*, — U.S. —, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017).

Amendment 801 is a clarifying amendment, adopted because the circuits had reached different conclusions regarding the mental state required for application of the 2-level enhancement for “generic distribution as compared to the 5-level enhancement for distribution not for pecuniary gain.” *U.S. Sentencing Guidelines Manual*, Suppl. to App. C, Amendment 801 (U.S. Sentencing Comm., 2016). Petitioner argues that as a clarifying amendment, Amendment 801 is applicable to sentences that became final prior the effective date of the Amendment. Indeed, due to the confusion among the circuits that attended application of the enhancement prior to the Amendment, the improper application of the enhancement to

increase sentences constitute a “miscarriage of justice if left unaddressed.” *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1994), citing *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994) and *United States v. Faubion*, 19 F.3d 226, 233 (5th Cir. 1994).

Petitioner argues that clarifying amendments occupy a different station in the Guidelines, and do not require listing in U.S.S.C. § 1B1.10(c) to enjoy retroactivity status.

The time to file a petition for a writ of certiorari should be extended for 90 days for the following reasons:

1. Petitioner is an incarcerated *pro se* litigant, and thus requires more time than a trained legal practitioner with freedom to devote full attention to the matter through the application of such resources as he or she desires to bring to the question.

2. The issue of the interplay of Guidelines clarifying amendments and retroactive non-clarifying amendments listed in U.S.S.G. § 1B1.10(c) is one which has potential application to nearly 180,000 persons incarcerated for federal offenses at any one time.

3. By extending the date for the petition in this case, the Court is more likely to have the benefit of the rulings in other cases on Amendment 801 when deciding whether to grant Petitioner's petition. The Court also may have certiorari petitions in those other appeals that it could consider along with Petitioner's petition.

4 An extension will not prejudice Respondents. Petitioner is currently incarcerated and will continue to serve his sentence. Furthermore, the judgment served as the mandate of the Court of Appeals. (See App. A, *infra*).

For the foregoing reasons, the Court should extend the time to file a petition for a writ of certiorari in this appeal 90 days to and including July 17, 2019.



Jeffrey W. Day
Reg. No. 43458-177
FCI Seagoville
P.O. Box 9000
Seagoville, Texas 75159

No. _____

In the
Supreme Court of the United States

JEFFREY W. DAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, JEFFREY W. DAY, DO SWEAR OR DECLARE THAT ON THIS DATE, April 3, 2019, AS REQUIRED BY SUPREME COURT RULE 29, I HAVE SERVED THE ENCLOSED *PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI* ON EACH PARTY TO THE ABOVE PROCEEDING OR THAT PARTY'S COUNSEL, AND ON EVERY OTHER PERSON REQUIRED TO BE SERVED, BY DEPOSITING AN ENVELOPE CONTAINING THE ABOVE DOCUMENTS IN THE UNITED STATES MAIL PROPERLY ADDRESSED TO EACH OF THEM AND WITH FIRST-CLASS POSTAGE PREPAID.

THE NAMES AND ADDRESSES OF THOSE SERVED ARE AS FOLLOWS:

JAMES WESLEY HENDRIX
ASSISTANT U.S. ATTORNEY
U.S. ATTORNEY'S OFFICE
NORTHERN DISTRICT OF TEXAS
SUITE 300
1100 COMMERCE STREET
DALLAS, TX 75242-1699

SOLICITOR GENERAL OF THE
UNITED STATES
ROOM 5614
DEPARTMENT OF JUSTICE,
950 PENNSYLVANIA AVE., N.W.,
WASHINGTON, D. C. 20530-0001

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON April 3, 2019.



JEFFREY W. DAY

Pro se
Reg. No. 43458-177
FCI Seagoville
P.O. Box 9000
Seagoville, Texas 75159

Petitioner

APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 29, 2018

Ms. Karen S. Mitchell
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Earle Cabell Federal Building
Room 1452
Dallas, TX 75242

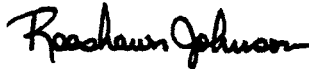
No. 18-10422 USA v. Jeffrey Day
USDC No. 3:16-CV-3243

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

cc:

Mr. Jeffrey Wayne Day
Mr. James Wesley Hendrix

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-10422



A True Copy
Certified order issued Nov 29, 2018

John W. Cuyler
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JEFFREY WAYNE DAY,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Jeffrey Wayne Day, federal prisoner # 43458-177, moves for a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2255 motion claiming that (1) he was entitled to a sentence reduction based upon Amendment 801 to the Sentencing Guidelines, and (2) the version of U.S.S.G. § 2G2.2 under which he was sentenced was void for vagueness under, *inter alia*, *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court dismissed the § 2255 motion, finding the first claim noncognizable and the second claim time barred.

To obtain a COA, Day must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court has denied a request for habeas relief on procedural grounds, the prisoner must show “that jurists of reason

No. 18-10422

would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Day fails to make the necessary showing. Accordingly, his motion for a COA is DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

January 18, 2019

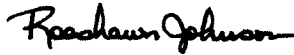
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-10422 USA v. Jeffrey Day
USDC No. 3:16-CV-3243

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

Mr. Jeffrey Wayne Day
Mr. James Wesley Hendrix
Ms. Karen S. Mitchell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10422

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JEFFREY WAYNE DAY,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is DENIED.