

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 15, 2026

Thomas B. Plunkett, III
Clerk

No. 25-50534
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ETHAN STURGIS DAY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CR-1019-2

Before KING, HIGGINSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

The attorney appointed to represent Ethan Sturgis Day has moved for leave to withdraw and has filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *United States v. Flores*, 632 F.3d 229 (5th Cir. 2011). Day has filed a response. The record is not sufficiently developed to enable a fair evaluation of Day's claims contesting the performance of his trial counsel; we therefore decline to consider the claims without prejudice to

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

collateral review. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014). We have reviewed counsel's brief and the relevant portions of the record reflected therein, as well as Day's response. We concur with counsel's assessment that the appeal presents no nonfrivolous issue for appellate review.

Day contends that the record lacks a transcript of the second day of the restitution hearing, August 10, 2023. This transcript is available as Document 1032 on the district court's docket. Day also argues that the government failed to present sufficient evidence to support the loss and restitution figures. But the government and defense agreed on the restitution amount and appropriate loss enhancement. Day's argument rests on the fact that, at resentencing, the government did not seek to prove significant financial hardship for at least 25 victims on under U.S.S.G. § 2B1.1(b)(2)(C), which the district court had originally applied at sentencing. At resentencing, the government instead sought a lower enhancement for substantial financial hardship to five or more victims under U.S.S.G. § 2B1.1(b)(2)(B). Yet substantial financial hardship is a distinct concept from loss under the Guidelines, requiring "'a loss' that 'significantly impacts the victim's resources.'" *See United States v. Day*, 117 F.4th 622, 625–26 (5th Cir. 2024) (quoting *United States v. Aderinoye*, 33 F.4th 751, 757 (5th Cir. 2022)). The government's decision to seek a lower substantial financial hardship enhancement had no bearing on the agreed-upon restitution amount and was not an appealable error.

The Court's review of the record revealed two clerical errors in the judgment on resentencing. A clerical error exists "when the court intended one thing but by merely clerical mistake or oversight did another." *United States v. Vacchino*, 174 F.4th 932, 941 (5th Cir. 2026) (quoting *United States v. Buendia-Rangel*, 553 F.3d 378, 379 (5th Cir. 2008)). First, Day was acquitted on Counts 12 and 13, but a sentence on the first page of the

judgment states that he “was found guilty as to Counts 1, 4-17 and 21-29.” Second, the supervised release conditions in the judgment on remand mistakenly included standard condition number 17, which was not imposed in the original judgment. At resentencing on remand, the district court explained that the judgment would remain undisturbed other than to resentence Day and correct a clerical error. The addition of standard condition number 17 was an oversight.

Counsel’s motion for leave to withdraw is GRANTED, counsel is excused from further responsibilities herein, and the appeal is DISMISSED. *See* 5TH CIR. R. 42.2. Day’s pro se motion for substitute counsel is DENIED. *See United States v. Wagner*, 158 F.3d 901, 902–03 (5th Cir. 1998). His pro se motion for the production of the transcript of the August 10, 2023 restitution hearing also is DENIED. The case is REMANDED to the district court for the limited purpose of correcting the clerical errors in the judgment. *See* FED. R. CRIM. P. 36.