

**UNPUBLISHED****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 22-4420**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JIMMY JAY STRAYHORN, JR.,

Defendant - Appellant.

*Appelbit A*

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Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:11-cr-00368-CCE-1)

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Submitted: June 15, 2023

Decided: June 20, 2023

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Before DIAZ, RICHARDSON, and HEYTENS, Circuit Judges.

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Affirmed in part and dismissed in part by unpublished per curiam opinion.

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**ON BRIEF:** William Stimson Trivette, WILLIAM S. TRIVETTE, ATTORNEY AT LAW, PLLC, Greensboro, North Carolina, for Appellant. Frank Joseph Chut, Jr., Assistant United States Attorney, Angela Hewlett Miller, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

matters relating to the propriety of the *relief* granted, he is appealing a new criminal sentence and therefore need not comply with § 2253's [certificate of appealability] requirement." *Id.* Thus, we have jurisdiction over Strayhorn's challenge to the district court's refusal to conduct a resentencing hearing after it vacated Strayhorn's § 924(c) conviction premised on conspiracy to commit Hobbs Act robbery. However, as to any arguments pertaining to the district court's denial of relief on his habeas claims, Strayhorn must establish his entitlement to a certificate of appealability before we may review the merits of the district court's dismissal.

Although Strayhorn contends that the district court erred when it refused to conduct a full resentencing after vacating the § 924(c) conviction, a district court "has broad discretion in crafting relief on a § 2255 claim." *United States v. Chaney*, 911 F.3d 222, 225 (4th Cir. 2018). Accordingly, a district court "is *authorized* to conduct a resentencing in awarding relief under § 2255, [but] not . . . *required*, in resolving every § 2255 motion, to conduct a resentencing." *Hadden*, 475 F.3d at 668.

As this court has expressly observed, a successful § 2255 proceeding must only result in "the vacatur of the prisoner's unlawful sentence . . . and one of the following: (1) the prisoner's release, (2) the grant of a future new trial to the prisoner, (3) or a new sentence, be it imposed by (a) a resentencing or (b) a corrected sentence." *Id.* at 661 (footnote omitted); *see also* 28 U.S.C. § 2255(b) (providing that, after a district court concludes a sentence is unlawful because the underlying conviction was unlawful, "the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate"). Thus, "the

appealability and dismiss the appeal as to the district court's partial denial of his amended § 2255 motion.<sup>2</sup>

In accordance with *Anders*, we have reviewed the entire record and have found no meritorious grounds for appeal. Accordingly, we affirm in part, deny the motion for a certificate of appealability, and dismiss in part. This court requires that counsel inform Strayhorn, in writing, of his right to petition the Supreme Court of the United States for further review. If Strayhorn requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Strayhorn. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

*AFFIRMED IN PART,  
DISMISSED IN PART*

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<sup>2</sup> Although *Anders* counsel requests a certificate of appealability in part due to this court's 23-month delay in docketing the notice of appeal, "nothing in the record suggests that the docketing delay was more than a harmless clerical error." *United States v. Jenkins*, 22 F.4th 162, 168 (4th Cir. 2021). Significantly, Strayhorn has not established—nor does the record show—any prejudicial effect from the delay in docketing. *See id.* at 168 n.6.

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JIMMY JAY STRAYHORN, JR.,	)	
	)	
Petitioner,	)	
	)	1:11-CR-368-1
v.	)	1:16-CV-1267
	)	1:16-CV-1326
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**ORDER AND JUDGMENT**

This matter is pending before the Court on motion and petition to vacate his convictions and sentences and various related motions filed by the petitioner, Jimmy Jay Strayhorn, Jr. .

First, it appears that the initial § 2255 motion and petition, Doc. 230, had defects which prevented its consideration. *See* Doc. 231. The Magistrate Judge recommended dismissal without prejudice and ordered the correct forms to be sent to Mr. Strayhorn. Doc. 231. Mr. Strayhorn did not object and very soon thereafter filed a § 2255 petition on the correct forms. Doc. 233. As to the initial motion and petition, the Court adopts the Magistrate Judge's recommendation and will order that initial motion to be denied and petition to be dismissed, without prejudice to the motion and petition filed on the correct forms.

The motion filed November 14, 2016, remains pending. Doc. 233. Its primary argument arises as a result of *Johnson v. United States*, 135 S. Ct. 255 (2015), though Mr.

APPENDIX B

Strayhorn makes other arguments. Mr. Strayhorn has also filed a motion to amend his petition to add another claim. Doc. 235.

Proceedings were stayed while various issues wound their way through the appellate courts, and eventually the Court appointed counsel to represent Mr. Strayhorn in connection with issues resulting from *Johnson* and its progeny, including *United States v. Davis*, 139 S. Ct. 2319 (2019). Doc. 249. The Government filed a brief, conceding that Mr. Strayhorn was entitled to relief as to Count 4 as a result of *Johnson*, *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), and *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), and not addressing Mr. Strayhorn's other arguments. Doc. 252. Counsel for Mr. Strayhorn filed a reply. Doc. 255.

It appears that as to the *Johnson* issue, the Government and counsel for Mr. Strayhorn agree that Mr. Strayhorn's conviction and 300-month sentence on Count 4, (brandishing a firearm in connection with conspiracy to commit interference with commerce by robbery of American Coins on October 29, 2010), should be vacated and that Mr. Strayhorn's convictions and sentences on Counts 1, 2, and 3 should remain in place. This would leave a sentence of 209 months, consecutive to any state sentence.

*See* Doc. 167.<sup>1</sup> Neither the Government nor counsel for Mr. Strayhorn requested a resentencing hearing.

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<sup>1</sup> In the operative judgment, Mr. Strayhorn was sentenced to 137 months on Count 1 and on Count 3, to run concurrently with each other, followed by a 72-month sentence on Count 2 to run consecutively to Counts 1 and 3, for a total sentence of 209 months on those three counts. *See* Doc. 167. On Count 4, the Count that the Government agrees should be vacated, Mr. Strayhorn received a 300-month consecutive sentence. *Id.*

A few days after the reply brief was filed, Mr. Strayhorn filed a motion to remove his current attorney. Doc. 256. It appears that Mr. Strayhorn may have received a copy of the reply brief, and he contends that his attorney did not provide him with a copy of the Government's brief. He may also be contending that his attorney did not consult him about the reply brief.

Counsel for Mr. Strayhorn is directed to promptly mail a copy of the Government's response, Doc. 252, and another copy of the reply, Doc 255, to Mr. Strayhorn and to file a certificate of service to that effect. Counsel, whose post-conviction representation was limited to the *Johnson* issues, is allowed to withdraw.

The Court notes that the Government's response brief only responded to the petitioner's *Johnson* claim. (Ground One). Because Mr. Strayhorn's petition raised other issues, the Court will direct the Government to file a response to the remaining claims in the pending motion to vacate, Doc. 233, Grounds Two and Three, and to the motion to amend. Doc. 235. The Court will allow Mr. Strayhorn to file a supplemental reply brief thereafter, if he wishes, addressing all of his pending claims. The Court has read the existing briefing and reviewed the file and does not see any need for substitute counsel on the *Johnson* issue, nor are his other claims of such a nature that appointed counsel is necessary.

**IT IS THEREFORE ORDERED AND ADJUDGED that:**

1. For the reasons stated by the Magistrate Judge, the motion at Doc. 230, is **DENIED without prejudice**, and the related civil case, 16cv1267, is **DISMISSED without prejudice**.

- 2. The § 2255 petition and motion at Doc. 233 remain pending, as does the motion to amend at Doc. 235.
- 3. Eric Placke, post-conviction counsel for Mr. Strayhorn as to *Johnson* issues, shall promptly mail a copy of the Government's response, Doc. 252, and another copy of the reply, Doc 255, to Mr. Strayhorn and file a certificate of service to that effect. Upon compliance, Mr. Placke is allowed to withdraw and Mr. Strayhorn's motion, Doc. 256, is **GRANTED**.
- 4. The Government shall file a response to the remaining issues raised in the motion to vacate, Doc. 233, and the motion to amend, Doc. 235, within sixty days. Mr. Strayhorn may file a reply brief no later than sixty days thereafter.

This the 16th day of March, 2020.



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UNITED STATES DISTRICT JUDGE