

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALLEN RAY JOHNSON,
Defendant-Appellant.

No. 03-7128

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CR-01-167)

Submitted: September 29, 2003

Decided: November 4, 2003

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

Allen Ray Johnson, Appellant Pro Se. Rudolf A. Renfer, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Allen Ray Johnson appeals the district court's order denying relief on his petition filed under 28 U.S.C. § 2241 (2000). We affirm in part, vacate in part, and remand.

Johnson alleged in his § 2241 petition that 21 U.S.C. § 841(a)(1) (2000), the statute under which he was convicted, had been repealed and, therefore, that his conviction was unconstitutional. The district court found that Johnson could not proceed under § 2241 because he failed to show that a motion under 28 U.S.C. § 2255 (2000), was inadequate to test the legality of his detention. We agree and affirm this portion of the district court's order.

To the extent that the district court also construed Johnson's § 2241 petition as an initial § 2255 motion, we note that the court did not give Johnson notice and an opportunity to respond before recharacterizing his petition as a § 2255 motion, as required by our decision in *United States v. Emmanuel*, 288 F.3d 644 (4th Cir. 2002). We therefore vacate this portion of the district court's order and remand for further proceedings in light of *Emmanuel*. On remand, the district court should give Johnson the notice required under *Emmanuel*, consider his claims under § 2255 (barring any objection from Johnson), and provide him a reasonable amount of time to amend the motion to reflect any additional claims for relief. *See id.* at 649.

Finally, we decline to address the issues Johnson raises for the first time on appeal. *See Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED IN PART, VACATED
IN PART, AND REMANDED*