

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 13-7855**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RALPH EDWARD SMITH,

Defendant - Appellant.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:10-cr-00414-BO-1; 5:13-cv-00457-BO)

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Submitted: April 24, 2014

Decided: May 2, 2014

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Before GREGORY and DIAZ, Circuit Judges, and DAVIS, Senior Circuit Judge.

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Vacated and remanded by unpublished per curiam opinion.

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Ralph Edward Smith, Appellant Pro Se. Jennifer P. May-Parker, Assistant United States Attorney, Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ralph Edward Smith appeals the district court's order dismissing his 28 U.S.C. § 2255 (2012) motion. We granted a certificate of appealability on the issue of whether the district court erred in *sua sponte* dismissing Smith's § 2255 motion as untimely filed. The Government has responded, and this appeal is ripe for disposition. We vacate and remand for further proceedings.

The district court, acting *sua sponte*, determined from the face of Smith's motion that his claims were barred by the one-year limitations period set forth in 28 U.S.C. § 2244(d) (2012), and dismissed the action without giving Smith notice or an opportunity to respond.<sup>1</sup> Pursuant to Hill v. Braxton, 277 F.3d 701 (4th Cir. 2002), the district court is required to provide such notice and opportunity to respond "unless it is indisputably clear from the materials presented to the district court that the petition is untimely and cannot be salvaged by equitable tolling principles or any of the circumstances enumerated in § 2244(d)(1)." Id. at 707.

Because it is not "indisputably clear" that Smith cannot salvage his motion, and the Government concedes that

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<sup>1</sup> We note that the Government did not move to dismiss Smith's § 2255 motion on timeliness grounds but rather based on the waiver in Smith's plea agreement.

remand is appropriate, we vacate the district court's order and remand to the district court to provide Smith with the notice and opportunity to respond to which he is entitled pursuant to Hill.<sup>2</sup> We grant Smith's motion to proceed in forma pauperis on appeal. 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 the decisional process.

VACATED AND REMANDED

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<sup>2</sup> We, of course, express no opinion as to the timeliness or merits of Smith's claims.