

UNPUBLISHED

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DARRELL ANTHONY RATHBURN,
Defendant-Appellant.

No. 02-6104

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge.
(CR-99-91, CA-01-300)

Submitted: July 31, 2002

Decided: September 3, 2002

Before WILLIAMS and TRAXLER, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

Darrell Anthony Rathburn, Appellant Pro Se. Kenneth Davis Bell,
OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North
Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

OPINION

PER CURIAM:

On May 10, 2000, a jury convicted Darrell Anthony Rathburn of seven counts of wilfully depriving various individuals of their constitutional rights under color of law in his capacity as Chief of Police of Woodfin, North Carolina, in violation of 18 U.S.C.A. § 242 (West 2000). He was sentenced on February 28, 2001, to thirty-seven months active incarceration. On December 11, 2001, Rathburn filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, contending the district court should order a new trial based on "new evidence" of ineffective assistance of counsel.

The district court denied Rathburn's Rule 33 motion as untimely. Furthermore, the district court, without notice to Rathburn, construed his motion as a motion under 28 U.S.C.A. § 2255 (West Supp. 2002), and denied § 2255 relief. Rathburn noted a timely appeal of this order. We affirm in part, vacate in part, and remand.

On appeal, Rathburn contends his Rule 33 motion was timely filed. A Rule 33 motion "predicated on ineffective assistance of counsel must be brought, if at all, within seven days of judgment regardless of when the defendant becomes aware of the facts" on which he relies. *United States v. Smith*, 62 F.3d 641, 648 (4th Cir. 1995). Because Rathburn did not file his Rule 33 motion claiming ineffective assistance of counsel within seven days of judgment, the district court correctly found that such a motion was untimely. Accordingly, as to that portion of the district court's order, we affirm.

Rathburn also claims that the district court erred when it characterized his Rule 33 motion as a § 2255 motion without providing him notice or an opportunity to respond. The district court did not have the benefit of our decision in *United States v. Emmanuel*, 288 F.3d 644 (4th Cir. 2002). In *Emmanuel*, we held a district court must give the

movant notice of its intent to characterize a motion as a § 2255 motion and an opportunity to respond. Because the district court did not provide Rathburn notice and an opportunity to respond, and because Rathburn's ability to file a future § 2255 motion would be foreclosed by the district court's sua sponte construction of his Rule 33 motion as a § 2255 motion, we grant a certificate of appealability on this issue, vacate the district court's order denying Rathburn § 2255 relief, and remand the case for further proceedings consistent with our decision in *Emmanuel*.

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*