

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-6884

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALTON B. COUTHER, III,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Raymond A. Jackson, District Judge. (2:12-cr-00187-RAJ-TEM-1)

Submitted: August 24, 2021

Decided: August 27, 2021

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Vacated and remanded by unpublished per curiam opinion.

Alton Bernard Couter, III, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alton B. Couter, III, appeals the district court's order construing his pro se petition for a writ of audita querela, pursuant to 28 U.S.C. § 1651(a), as his first 28 U.S.C. § 2255 motion and dismissing it sua sponte as untimely. Because the district court did not provide Couter with an important procedural protection, we vacate the order and remand for further proceedings.

In *Castro v. United States*, 540 U.S. 375 (2003), the Supreme Court held that a court may not recharacterize a pro se motion as the movant's "first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing." *Id.* at 377. The district court did not follow the dictates of *Castro* here: it did not advise Couter of its intent to recharacterize his petition as a § 2255 motion, warn him of the ensuing consequences, or provide him with an opportunity to avoid those consequences.

Due to this substantial notice problem, we vacate the court's order and remand for further proceedings. 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