

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 08-6452**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GERALD FELTON,

Defendant - Appellant.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, Senior District Judge. (5:93-cr-00123-F; 5:08-cv-00050-F)

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Submitted: March 27, 2009

Decided: April 14, 2009

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Before MICHAEL, TRAXLER, and DUNCAN, Circuit Judges.

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Vacated and remanded by unpublished per curiam opinion.

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Gerald Felton, Appellant Pro Se. Rudolf A. Renfer, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gerald Felton seeks to appeal the district court's order denying as successive his motion under 28 U.S.C.A. § 2255 (West Supp. 2008). We previously granted a certificate of appealability on the issue of whether the § 2255 motion was properly dismissed as successive. The government concedes that Felton was not provided notice that his prior filing was construed as a § 2255 motion, and further notes that Felton was not informed that his current motion was considered to be successive. See United States v. Blackstock, 513 F.3d 128, 133 (4th Cir. 2008). As such, the government acknowledges, the instant motion under § 2255 should be considered Felton's first such motion.

We have carefully reviewed the record and agree with the government's position. We therefore vacate the district court's order denying the § 2255 motion as successive, and remand for consideration of the motion as Felton's first § 2255 motion. We deny Felton's motion for appointment of counsel and 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.

VACATED AND REMANDED