

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 7, 2011

Lyle W. Cayce
Clerk

No. 10-51140

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TERRENCE DOYLE MITCHELL,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:04-CR-203-1

Before BENAVIDES, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:*

Terrence Doyle Mitchell, federal prisoner # 04106-180, appeals from the district court's order denying his motion for specific performance or reinstatement of his direct appeal. In his motion, Mitchell contended that his plea agreement was breached and that counsel was ineffective for failing to prosecute a direct appeal. Mitchell's district court motion was an attempt to collaterally attack his sentence by raising errors that occurred at sentencing or during the period for pursuing a direct appeal. As such, the motion should have

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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been construed by the district court as a 28 U.S.C. § 2255 motion. *See Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000); *see also United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998). Such a recharacterization of Mitchell's motion has important consequences of which Mitchell should be apprised. *See Castro v. United States*, 540 U.S. 375, 383 (2003). Also, because Mitchell's motion was in the nature of a 2255 motion, we lack jurisdiction over his appeal absent ruling on a certificate of appealability in the district court. *See United States v. Youngblood*, 116 F.3d 1113, 1114-15 (5th Cir. 1997).

The judgment of the district court is VACATED and this case is REMANDED for further proceedings.