

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40230
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL J. RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-94-CR-117-1

June 3, 2002

Before JOLLY, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Daniel J. Rodriguez ("Rodriguez"), federal inmate federal inmate #23881-149, appeals the district court's denial of his motion to file an out-of-time notice appeal. Rodriguez contends that his attorney was ineffective for failing to file a timely notice of appeal. The Government contends that Rodriguez' constructive 28 U.S.C. § 2255 motion is time-barred.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The district court entered judgment in Rodriguez' criminal conviction on June 27, 1995, and he filed the instant motion on December 27, 1999. Given Rodriguez' claim and the relief he seeks, his motion comes within the scope of 28 U.S.C. § 2255. See United States v. West, 240 F.3d 456, 459 (5th Cir. 2001); see also Mack v. Smith, 659 F.2d 23, 25-26 (5th Cir. 1981). The record does not indicate whether the district court construed the motion a § 2255 motion. Accordingly, we remand for the district court to expressly consider Rodriguez' motion as a § 2255 motion. On remand, the district court should also consider the timeliness of Rodriguez' motion. See Flanagan v. Johnson, 154 F.3d 196, 200-02 (5th Cir. 1998).

VACATED and REMANDED.