

UNPUBLISHED

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

UNITED STATES OF AMERICA, <i>Plaintiff-Appellee,</i>
v.
SCOTTY ROACH, <i>Defendant-Appellant.</i>

No. 02-6477

Appeal from the United States District Court
for the Middle District of North Carolina, at Winston-Salem.
Frank W. Bullock, Jr., District Judge.
(CR-93-122, CR-93-205)

Submitted: July 29, 2002

Decided: August 13, 2002

Before WILKINS, WILLIAMS, and MICHAEL, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

COUNSEL

Scotty Roach, Appellant Pro Se. John Warren Stone, Jr., Assistant
United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.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

OPINION

PER CURIAM:

Scotty Roach appeals the district court's order that denied his motion for "a new amended judgment order, or a stay of payment of restitution, or remand for resentencing" in which he asserted the district court's restitution order improperly delegated its responsibility for establishing a payment schedule under *United States v. Miller*, 77 F.3d 71 (4th Cir. 1996). Roach's motion only challenges the execution of the restitution portion of his sentence. Because he does not seek to be released from custody, we construe his motion as a petition for habeas corpus relief arising under 28 U.S.C.A. § 2241 (2000). See *Blaik v. United States*, 161 F.3d 1341, 1343 (11th Cir. 1998) ("[Section] 2255 cannot be utilized by a federal prisoner who challenges only the restitution portion of his sentence."); cf. *United States v. Miller*, 871 F.2d 488, 489-90 (4th Cir. 1989) (holding that a claim for jail time credits should be brought under § 2241); *United States v. Glass*, 317 F.2d 200, 203 (4th Cir. 1963) (finding court has discretion to reclassify an improperly labeled pleading); *Roberts v. Pegelow*, 313 F.2d 548, 550 (4th Cir. 1963) (same).

A § 2241 petition must be brought in the district in which the petitioner is incarcerated, see *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000), and Roach is presently incarcerated in Atlanta, Georgia. Accordingly, we vacate the district court's order and remand for the district court to determine whether transferring Roach's § 2241 petition to the proper federal district court would serve the interests of justice, see 28 U.S.C.A. § 1631 (2000), or whether the action is more appropriately dismissed without prejudice to allow Roach to file his action in the appropriate district court. 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.

VACATED AND REMANDED WITH INSTRUCTIONS