[DO NOT PUBLISH]

# In the United States Court of Appeals

## For the Eleventh Circuit

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No. 21-13094

Non-Argument Calendar

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DYNZA MACKEY,

Petitioner-Appellant,

*versus*

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:20-cv-61610-BB

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Before JORDAN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

Dynza Cornelius Mackey, a federal prisoner proceeding *pro se*, appeals following, *inter alia*, the district court's: (i) denial of his post-judgment motion to vacate his 2019 federal court conviction based on ineffective assistance of counsel under 28 U.S.C. § 2255; and (ii) dismissal, without prejudice, of certain non-habeas claims concerning his conditions of confinement and compassionate release. The government, in turn, moves for summary affirmance and to stay the briefing schedule.

I.

Court records show that a federal grand jury originally charged Mackey with, in relevant part, one count of identity fraud and one count of identity fraud with intent to commit unlawful activity. He later pled guilty to those offenses. The district court entered a final judgment in his case in 2019. He did not appeal.

In 2020, however, Mackey filed two motions with the district court. First, he moved for home confinement or compassionate release under the First Step Act,[1] which the district court denied.

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[1] Pub. L. No. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018) ("First Step Act").

Second, and in the meantime, Mackey moved the district court to vacate his 2019 convictions under 28 U.S.C. § 2255, arguing that his trial counsel was ineffective and that his conditions of incarceration at the private prison facility where he was incarcerated fell below the standard of care in prisons operated by the government. Several of his conditions of confinement arguments were consistent with his compassionate release motion.

The district court denied Mackey's § 2255 motion, finding that he was not entitled to relief on his ineffective assistance of counsel claims, and that his conditions of confinement claim and compassionate release claim were not cognizable under a 28 U.S.C. § 2255 motion. Mackey ultimately appealed this ruling.

We later denied Mackey a certificate of appealability ("COA") for his ineffective assistance of counsel claims, and we denied a COA as unnecessary for his conditions of confinement and compassionate release claims. We have subsequently dismissed the portion of his appeal regarding his ineffective assistance of counsel claims but have allowed his remaining claims to move forward.

Mackey, who is still *pro se* on appeal, raised several arguments in his initial brief relating to the district court's denial of ineffective assistance of counsel claims, but he did not otherwise offer

arguments relating to his conditions or confinement or compassionate release claims.[2]

Rather than responding, the government moves for summary affirmance and to stay the briefing schedule, arguing that because Mackey does not mention his conditions of confinement and compassionate release claims, they are abandoned, and summary affirmance is warranted. Mackey has not responded to this motion.

II.

Summary disposition is appropriate, in part, where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case . . . ." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). A motion for summary affirmance shall postpone the due date for the filing of any remaining brief until we rule on such motion. 11th Cir. R. 31-1(c).

When appropriate, we will review legal issues in a § 2255 proceeding *de novo* and factual findings under a clear error standard. *United States v. Walker*, 198 F.3d 811, 813 (11th Cir. 1999).

*Pro se* pleadings are liberally construed. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Arguments not

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[2] Mackey does not expressly challenge the district court's denial of a motion for reconsideration he filed before appealing. Accordingly, he has abandoned any argument in that respect. *Sapuppo v. Allstate Floridian Ins., Co.*, 739 F.3d 678, 680 (11th Cir. 2014).

raised in an initial brief are abandoned, however. *Sapuppo v. Allstate Floridian Ins., Co.*, 739 F.3d 678, 680 (11th Cir. 2014). Forfeiture is the failure to make a timely assertion of a right, and the failure to raise an issue in an initial brief on direct appeal is treated as forfeiture of the issue. *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (*en banc*), *cert. denied*, (U.S. Oct. 3, 2022) (No. 21-1468).

Unless a circuit judge or district court judge issues a COA, an appeal may not be taken to the court of appeals from the final order in a proceeding under § 2255. 28 U.S.C. § 2253(c)(1)(B). As a result, until a COA has been issued, federal courts of appeal lack jurisdiction to rule on the merits of appeals filed by habeas petitioners. *United States v. Cody*, 998 F.3d 912, 915 (11th Cir. 2021).

Claims challenging the fact or duration of confinement fall within the core of habeas corpus, while claims challenging the conditions of confinement fall outside that core and may be brought pursuant to 42 U.S.C. § 1983. *Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

A district court has no inherent authority to modify a defendant's sentence and may do so "only when authorized by a statute or rule." *United States v. Puentes*, 803 F.3d 597, 605–06 (11th Cir. 2015). The First Step Act expressly permits district courts to reduce a previously imposed term of imprisonment. *Jones*, 962 F.3d at 1297. That law, in part, amended 18 U.S.C. § 3582(c)(1)(A) to increase the use and transparency of compassionate release of federal prisoners. *See* First Step Act § 603. It provides

that a "court may not modify a term of imprisonment once it has been imposed" except under certain circumstances. 18 U.S.C. § 3582(c).

Here, we grant the government's motion for summary affirmance and deny as moot its motion to stay the briefing schedule. As noted above, we have already dismissed the portion of Mackey's appeal relating to his ineffective assistance of counsel claims, due to the absence of a certificate of appealability, meaning that we cannot consider those claims now. *See* 28 U.S.C. § 2253(c)(1)(B); *Cody*, 998 F.3d at 915. Additionally, he has abandoned his conditions of confinement and his compassionate release arguments, as he does not expressly or implicitly raise them on appeal. *Sapuppo*, 739 F.3d at 680. Although we construe *pro se* filings liberally, there are no arguments related to those issues to construe, so they are forfeited, and we do not have to consider them. *Campbell*, 26 F.4th at 873; *Tannenbaum*, 148 F.3d at 1263.

Regardless, even assuming that Mackey's brief implicitly challenges the dismissal of his conditions of confinement and compassionate release claims, the record shows that the district court properly dismissed them without prejudice. A federal prisoner should bring conditions of confinement challenges in a civil-rights suit filed under *Bivens*, *see Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71–72 (2001), not in a motion filed under § 2255. *Nelson*, 541 U.S. at 643. For his compassionate release arguments, the proper vehicle to bring those claims was in a motion under 18 U.S.C. § 3582(c), not § 2255. 18 U.S.C. § 3582(c). Therefore, the

district court did not err in dismissing those claims, as his motion was not the proper vehicle to bring those claims.

Accordingly, because the government's position is clearly correct as a matter of law, we GRANT the government's motion for summary affirmance and DENY its motion to stay the briefing schedule as moot per 11th Cir. R. 31-1(c). *Groendyke Transp.*, Inc., 406 F.2d at 1162.