IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10287-AA

TERRANCE JOHNSON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Terrance Johnson is a federal prisoner serving a 240-month sentence after pleading guilty to drug charges, pursuant to a negotiated plea agreement, in 2010. He seeks a certificate of appealability ("COA") in order to appeal the denial of his *pro se* motion from relief from judgment, Fed. R. Civ. P. 60(b), following the denial of his 28 U.S.C. § 2255 motion to vacate.

As background, in September 2013, Mr. Johnson filed a motion to vacate, arguing that he received ineffective assistance of counsel because, *inter alia*, counsel failed to argue that the district court exceeded its jurisdiction in imposing an enhanced sentence under 21 U.S.C. §§ 841 and 851, based on a prior conviction that was not yet final. This claim was based on Mr. Johnson's assertion that his 1998 conviction was not final at the time of his sentencing in federal court because he had a pending motion to withdraw his guilty plea with respect to that

conviction. The district court denied Mr. Johnson's § 2255 motion on the merits, and this Court subsequently denied him a COA.

In the instant Rule 60(b) motion to reopen that § 2255 proceeding, Mr. Johnson argued that the district court procedurally erred when it failed to liberally construe the allegations in his § 2255 motion regarding the finality of his 1998 conviction as raising due process and jurisdictional claims, as well as an ineffective-assistance claim. Mr. Johnson claimed that, by failing to address these claims, the district court "effectively denied [him] due process and generated the extraordinary circumstance that warrants Rule 60(b)(6) relief."

The district court did not abuse its discretion in denying Mr. Johnson's motion. *See Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996) (the appeal of a Rule 60(b) motion is limited to determining whether the district court abused its discretion in denying the motion). His § 2255 motion listed two grounds for relief, including the following:

> The Petitioner was provided ineffective assistance of counsel, where counsel failed to argue that the district court exceeded its jurisdiction in imposing an enhanced sentence under § 851 based upon a prior conviction that was not yet final.

It appears that Mr. Johnson believes that the district court should have broadly construed this ground as asserting a claim of trial court error, as well as ineffective assistance of counsel. However, even taking Mr. Johnson's status as a *pro se* litigant into consideration, there is no reasonable reading of this ground that includes any claim other than one of ineffective assistance of counsel. Moreover, Mr. Johnson waited over two years after the entry of the district court's denial of his § 2255 motion to file the instant motion under Rule 60(b)(6). *See* Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time . . . .").

Accordingly, Mr. Johnson's motion for a COA is DENIED, as he has failed make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Mr. Johnson also has moved for an extension of time to file a COA. However, he already has filed such a motion, and this Court has considered the arguments articulated in that filing. He therefore is not required to make any additional filings, and his motion for extension of time is DENIED AS MOOT.[1]

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

[1] Mr. Johnson appears to believe that this Court simply construed the notice of appeal as a motion for a COA. His confusion appears to arise from the fact that, after he filed his motion for a COA on July 17, 2017, this Court remanded the case to the district court for a COA ruling. Once the district court entered its order denying a COA, the clerk's office sent Mr. Johnson a letter informing him of the district court's order and stating that "[t]he notice of appeal will be treated as a request for a [COA] unless appellant files such a request within fourteen (14) days from the date of this letter." It is this 14-day period that Mr. Johnson seeks to expand. However, because Mr. Johnson earlier filed a motion for a COA, there was no need for him to file an additional motion and, consequently, no need to extend the time for doing so.